

SURFACE TRANSPORTATION BOARD 11/20/97 FD #33388 1-60 1+

UNITED STATES OF AMERICA

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SURFACE TRANSPORTATION BOARD

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HEARING ON MOTIONS TO COMPEL

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,
November 20, 1997

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

(9:30 a.m.)

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

MR. EDWARDS: Good morning, Your Honor, John Edwards, with Zuckert, Scoutt and Rasenberger, for Norfolk Southern.

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

MR. NORTON: Gerald Norton, Harker Cunningham, for Conrail.

MR. MORELL: Good morning, Your Honor. Karl Morell, for Indiana Southern and Indiana and Ohio Railway.

MR. KALISH: Good morning, Your Honor. Steven Kalish, for the Cities of Bay Village, Rocky River, and Lakewood, Ohio.

MR. HEALEY: Good morning, Judge. Tom Healey, on behalf of Wisconsin Central Ltd., Illinois Central Railroad Company, Elgin, Joliet and Eastern Railway Company, and I&M Rail Link.

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1 MR. KOLESAR: Good morning, Andrew
2 Kolesar, Slover and Loftus, here this morning on
3 behalf of Centerior Energy Corporation and Consumers
4 Energy Company.

5 JUDGE LEVENTHAL: We have two motions this
6 morning, one is by the City of Bay Village, City of
7 Rocky River, City of Lakewood, to compel discovery
8 responses by Norfolk Southern Corporation and Norfolk
9 Southern Railway Company. I think we'll take that
10 first because it's a shorter motion. Mr. Kalish.

11 MR. KALISH: Good morning, Your Honor.
12 Thank you. We have agreed with Norfolk Southern that
13 this morning's conference would be limited to our
14 Motion to Compel with regard to Interrogatory Nos. 21
15 through 25. That Motion to Compel commences at page
16 8 of BRL-4.

17 By way of background, Your Honor, what is
18 involved here is the environmental phase of the
19 Board's proceeding concerning this consolidation. My
20 clients have requested substantial information from
21 Norfolk Southern, whose Cleveland-to-Vermillion line
22 passes through our communities. That information is

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1 entirely related to the environmental phase of the
2 proceeding.

3 In Interrogatory Nos. 21 through 25, which
4 certainly also include document requests, we have
5 asked for substantial information concerning such
6 matters as air quality, impact on the local economy,
7 et cetera, et cetera,

8 My own characterization of the Norfolk
9 Southern response to those data requests goes
10 something like this. First, they seem to be taking
11 the position that whatever is of significance towards
12 these matters has been submitted to the Board's SEA,
13 Section of Environmental Analysis, and/or the Board's
14 outside contractor, and that they will give us no
15 information in their possession because the relevant
16 information has been presented to the Board and to the
17 consultant.

18 As to the information that has been
19 presented to the Board and/or the consultant, it
20 appears to be the Norfolk Southern position that that
21 information is protected in some fashion through
22 administrative confidentiality, and they refuse to

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1 give us that information, essentially telling us to
2 wait until the Draft Environmental Impact Statement is
3 issued and then apparently we will learn everything
4 that we are entitled to learn.

5 From the standpoint of my clients, this is
6 entirely without merit. The process that the agency
7 goes through in ruling on the consolidation that is
8 proposed certainly includes under NEPA an
9 environmental analysis just as the economic matters in
10 this proceeding are terribly important to shippers,
11 communities, et cetera, et cetera, it is also true
12 that the environmental matters that are presented to
13 the Board for the Board's consideration are terribly
14 important and do involve large amounts of money as
15 well as potential risk to air quality, public safety,
16 and other matters.

17 When we attempted to find in the Board's
18 regulations anything that would protect this material,
19 we were certainly unable to do so. In point of fact,
20 the Board's discovery regulations, specifically 49 CFR
21 1104.12, specifically required parties submitting
22 documents to the Board to provide copies to parties of

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1 record. We don't even seem to be able to get our
2 hands on the documents that they have submitted to the
3 Board.

4 We simply do not understand how the public
5 is to participate in the process before the Board in
6 the absence of information, nor do we understand any
7 reasonable basis for the Applicants to take the
8 position that the Board and the Board alone should
9 have access to the underlying information that the
10 Applicants are, in fact, asking the Board to rely upon
11 in reaching its environmental decision.

12 We have some experience in this area. By
13 way of example, in the recent Southern Pacific-Union
14 Pacific case, I had the privilege to represent the
15 city of Wichita and, in that proceeding, Your Honor,
16 the Board required specific studies to be done for the
17 environmental impacts in Wichita and also Reno,
18 Nevada, following the Board's issuance of its
19 substantive decision. In that case, we were certainly
20 to work out without any difficulty at all, a procedure
21 with the Applicants in which the Applicants simply
22 provided us copies of all documents that they provided

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1 to the Board's outside consultant. We were able -- we
2 also agreed to provide them copies of all of our
3 documentation.

4 One of the reasons that this is so
5 terribly important is that while we have the highest
6 regards for the consultants -- and for that matter,
7 SEA -- the fact of the matter is that human beings
8 make mistakes. Again, by way of example, to the Union
9 Pacific-Southern Pacific case, the preliminary
10 mitigation report that was recently issued in that
11 case purportedly relied on information provided by the
12 railroads in order to determine the length of trains
13 that would be passing through the city of Wichita.

14 When we looked at the preliminary
15 mitigation report, we realized that the report was
16 premised on the notion that a particular length of
17 train would only be applicable to the additional
18 trains running through the city. We knew because we
19 had the underlying documentation from the railroad
20 that that particular length of train was applicable to
21 each and every train that would run through the city,
22 and we were able to present that information to the

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1 Board by way of our comments on the preliminary
2 mitigation report.

3 This is simply an example and is by no
4 means supposed to be an all-inclusive rationale. The
5 all-inclusive rationale is that this is a terribly
6 important issue. The Applicants have information. We
7 do have a protective order in the event that there is
8 anything here that is confidential, and we simply see
9 no reason that we should be deprived of information,
10 including information that has already been presented
11 to the Board. Thank you, Your Honor.

12 JUDGE LEVENTHAL: An additional objection
13 of NS is that you're asking for documents from January
14 1, 1992. Why do you need them earlier than January 1,
15 1995?

16 MR. KALISH: Your Honor, I believe that we
17 have reached an understanding with Norfolk Southern
18 with regard to the January 1, 1992 versus 1995 date.
19 That understanding, at least my version of it, is that
20 Norfolk Southern will provide us -- and, in fact, has
21 provided us -- safety-oriented information going back
22 to 1992. That happened to be particularly necessary

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1 because the formula, by way of example, of the Federal
2 Railroad Administration, uses to predict level of
3 accidents in the future is based in part on the number
4 of accidents that occurred within the prior five
5 years. We have an understanding with the railroad
6 over that, I don't think that that's an issue.

7 Insofar as these documents are concerned,
8 certainly anything after January 1, 1995 would be more
9 than sufficient.

10 JUDGE LEVENTHAL: All right. Very well.
11 By the way, Mr. Harker has come in. Note your
12 appearance.

13 MR. HARKER: Yes, Your Honor. First of
14 all, let me say I'm sorry for being late. In part, I
15 was delayed by a class of kindergartners down in your
16 lobby. They were going to be taking a tour. I almost
17 joined them, but thought better of it.

18 In any event, I'm Drew Harker,
19 representing CSX, and I'm with Arnold and Porter.

20 JUDGE LEVENTHAL: Very good. We have a
21 very fine day care operation here at the Commission.

22 All right. Who is going to --

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1 MS. BRUCE: I am, Your Honor. First, I'd
2 like to address two issues that Mr. Kalish raised. We
3 do have an understanding, and I have provided
4 documents to him as to the request, the other request
5 for 1992 forward, based on the fact that those were
6 the ones that, as he explained, would be needed for
7 the analysis. We still object to anything prior to
8 1995 as to the request in issue.

9 And at the beginning --

10 JUDGE LEVENTHAL: I'm sorry, I missed
11 that. You still?

12 MS. BRUCE: We still object to anything
13 prior to 1995, as to 21 through 25, but as I
14 understand from Mr. Kalish, what he just said, that is
15 agreeable, that the request is only from 1995 forward?

16 MR. KALISH: Yes, Your Honor, we do have
17 that understanding.

18 JUDGE LEVENTHAL: Very good.

19 MS. BRUCE: And then, secondly, at the
20 beginning of his discussion, Mr. Kalish noted that
21 documents are to be served on all parties, copies to
22 all parties, but I believe he was referring to

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1 Section 1104.2 that addresses service of pleadings and
2 papers, and those are pleadings and papers that are
3 filled with the Commission. These papers have not
4 been filed with the Commission. They have been given
5 over to the SEA on an administratively confidential
6 basis, and that is the basis of Norfolk Southern's
7 suggestion. And I think it's important to point out
8 that there are two processes in this proceeding, one
9 if the approval process of the primary application and
10 the other one is the environmental process which, of
11 course, BRL has every right to participate in both of
12 those processes, and Applicants, as you know,
13 submitted their primary application, made work papers
14 available, and participated in the first days of
15 discovery both written and position.

16 But as Mr. Kalish admits in Interrogatory
17 Nos. 21 through 25, he is seeking entirely
18 environmental information and extremely broad and
19 detailed environmental information. And the
20 information that he is seeking is information that has
21 been given over by Norfolk Southern to the SEA on an
22 administratively confidential basis.

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1 Now, BRL claims that the administratively
2 confidential objection that Norfolk Southern has
3 raised places them in a position of not being able to
4 review information that Norfolk Southern has provided
5 to the SEA and the SEA's outside contractor. Norfolk
6 Southern submits that that kind of review is
7 unnecessary, as BRL has had an environmental process,
8 and will have an opportunity to comment on
9 environmental issues in the proceeding. The
10 environmental process continues, and the Draft EIS is,
11 as I understand it, will be published soon.

12 BRL also claims that the nondisclosure of
13 the requested information is contrary to past
14 practices. That is untrue. In support of Mr. Kalish'
15 claim, he notes that in UP/SP, the city of Wichita and
16 Cedrick County were provided with copies of documents
17 provided to the STB and its outside contractor, but he
18 failed to acknowledge that that was not made during
19 the approval process, the point we're in now. It
20 wasn't made during the discovery process under which
21 he seeks the documents. Instead, it was only after
22 the briefs, the oral argument, the voting conference,

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1 the final decision, and the imposition of the
2 mitigation condition based on the environmental report
3 that the city of Wichita and Cedrick County gave over
4 those -- disclosed those documents. And that was in
5 Decision No. 44. I have a copy of it here, if Your
6 Honor would like to see it.

7 As I mentioned, the documentation that
8 BRL seeks has been given over to the SEA on an
9 administratively confidential basis. And Mr. Kalish
10 and I have had extensive conversations about this
11 issue, and I provide Mr. Kalish yesterday with a
12 redacted copy of a letter written by the SEA to Mary
13 Gates of Arnold and Porter to both the Applicants CSX
14 and NS, and that letter expressly requested that all
15 documentation given over to SEA by Norfolk Southern
16 and CSX for the compilation of the preliminary
17 environmental report and any documents being marked
18 and submitted to the SEA as administratively
19 confidential.

20 Mr. Kalish acknowledged receipt of that
21 letter, but does not agree that that process that was
22 put into place with the PER is a process that

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1 continues to this day. But even before the process
2 of the PER commenced, there were discussions between
3 CSX, NS and the SEA on the environmental issues, on a
4 confidential basis, pursuant to 49 CFR 11.80. Those
5 discussions are not subject to disclosure.

6 And I think that the Decision No. 6 also
7 sheds light on this matter. In that decision, the
8 Board gave or recognized the legitimacy and necessity
9 of the environmental process as a separate process,
10 laid out all the procedures both in the primary
11 application and the environmental application. That
12 decision, which came out at the end of May, instituted
13 a procedural schedule in the main case and a schedule
14 for the environmental issues.

15 The Board paid particular attention in
16 that case to the fact that it was obligated to take a
17 hard look at the environmental issues as required
18 under NEPA and related regulations promulgated by the
19 Council on Environmental Quality.

20 I'd also like to note that it's the Board,
21 not the Applicants, who is required to submit an EIS
22 in order for the Board to comply with the requirements

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1 of NEPA regarding its own governmental action. This
2 is not action on the part of Norfolk Southern. This
3 is not Norfolk Southern's primary application.

4 The reason for the process is to aid the
5 Board and the third-party contractor regarding the
6 information that is submitted. The third-party
7 contractor and the Board are the ones that have the
8 responsibility to verify the information that is
9 submitted by the Applicant. This is a totally
10 separate and distinct process, and I think that's
11 borne out by the language in Decision No. 6.

12 Also, on May 16 CSX and NS filed their
13 preliminary environmental report -- excuse me -- they
14 submitted their preliminary environmental report to
15 the SEA. That was submitted on a confidential basis.
16 It was not disclosed to the public. This is all part
17 of the ongoing process.

18 Under Decision 6, CSX and NS were directed
19 to provide detailed and updated information along with
20 supporting documentation, and to provide a copy of
21 their environmental report to all parties of record.

22 Now, Mr. Kalish' client has access to

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1 those volumes, we have them with us. They are this
2 high (indicating). There is very detailed
3 environmental information. That report came out of
4 analysis back and forth with the SEA, communications
5 back and forth, and this is the document that was the
6 result of that. That, too, is available to him for
7 his analysis and for his comment later on in the
8 process.

9 Also under Decision 6, there was the
10 provision that a Notice of Intent to Prepare an EIS is
11 published. The EIS process was detailed. Public
12 scoping was undertaken. The parties were allowed to
13 comment on that, participate in the scoping process to
14 define what the EIS would encompass. And once the
15 Draft Environmental Impact Statement is published,
16 there will be an opportunity to comment for all
17 interested parties -- by all interested parties --
18 excuse me -- and if BRL disagrees with anything that
19 has been put forth in that DEIS, on any of the data,
20 the facts, the information, or the analysis, it will
21 have an adequate opportunity to comment. In fact, the
22 Board recognized that the whole environmental process

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1 is a way of giving parties due process in the
2 procedure.

3 It's the DEIS, not NS's, input of
4 administrative confidential information to the SEA
5 that should be the subject of BRL's environmental
6 analysis and inquiries. The process of the
7 consultation and exchange of information is not only
8 one for the primary Applicant, I'd also like to point
9 that out.

10 In Decision No. 6, the Board explained
11 that response of Applicant, ecosystem applicants, also
12 had to undertake the same procedure in order to
13 formulate a responsive environmental report. Those
14 were also on a confidential basis. Those are also not
15 disclosed to anyone who wants to see them.

16 And the input of information in this whole
17 process should be upheld because it's necessary and it
18 shouldn't be chilled by disclosure. The whole purpose
19 behind it is for the free flow of information from an
20 applicant to the SEA, so that they can take all the
21 information, all the necessary information, the needed
22 information, and use it and come out with the best

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1 possible end product that is as accurate as possible.
2 Admittedly, mistakes may be made, but that process of
3 communication between the SEA and the Applicant is one
4 of the ways in which those mistakes can be overcome.
5 There are contractors out there looking, there are
6 experts looking at this information. Part of their
7 duty is to give to the public a DEIS that is accurate
8 and accurate as possible. And humans be humans, there
9 is a possibility for human error, but the process in
10 itself is meant to be a way of eliminating those
11 errors.

12 And as I mentioned earlier, the issue of
13 whether the entire exchange of information between
14 Norfolk Southern and SEA has been subject to this
15 administrative confidentiality, has been questioned by
16 BRL.

17 I do have documents, Your Honor, that
18 shows that this has been the way the process has gone
19 from beginning to end. Unfortunately, as I explained
20 to Mr. Kalish yesterday, I was not in a position to
21 disclose them to him because they are marked
22 administratively confidential, and for me to redact

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1 everything out would leave him a blank piece of paper.

2 So, what I would like to request is that
3 you look at them in camera in formulating your
4 decision on whether or not the administrative
5 confidentiality should apply.

6 Secondly, because this is a process that
7 involves information to the SEA, it's Norfolk Southern
8 position that it is not in a position to be able to
9 waive this. This is information that was asked to be
10 given over to the SEA as part of the process, and it
11 would have to be waived by the SEA and not by Norfolk
12 Southern.

13 And so I would like to request that you
14 look at these documents in camera, to verify that they
15 are all marked administratively confidential. They do
16 bear out for each month and each step in the process
17 that this was the way that things were being handled,
18 and they have dates where documents were to be
19 submitted and the manner in which they were to be
20 submitted.

21 JUDGE LEVENTHAL: Are you saying that our
22 protective order in this case doesn't cover it?

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1 MS. BRUCE: I do not believe so, Your
2 Honor. I believe that this is outside the scope of
3 that proceeding -- I mean that order. I do believe
4 that if this was to be given over to BRL, it would
5 have to be with the SEA's approval on it.

6 JUDGE LEVENTHAL: Mr. Kalish.

7 MR. KALISH: Your Honor, very, very
8 briefly, if I may, I believe that my citation to the
9 Board's regulation was accurate, Section 1104.12.
10 Your Honor will note in reviewing that, that section
11 is virtually identical to 18 CFR Rule 1010 applicable
12 to the service in the Federal Energy Regulatory
13 Commission practice.

14 Your Honor may also be aware of the fact
15 that whenever the environmental staff of the Federal
16 Energy Regulatory Commission sends out informational
17 requests to pipelines concerning informational --
18 concerning environmental matters, the environmental
19 folk of the FERC remind the applicants that 18 CFR
20 Section 385.2010 requires you to serve a copy of the
21 response to each person whose name appears on the
22 official service list in this proceeding. Just for

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1 clarification of the record, I'm reading from a recent
2 letter request sent to CNG and Texas Eastern in Docket
3 No. CP97-774.

4 I think the ultimate purport of what
5 Norfolk Southern has told you this morning is that
6 somehow or other it would be messy if the public
7 actually had access to the information upon which the
8 Government was going to rely in reaching a decision in
9 this case. I'm sure arguments along those lines were
10 made in support of the British Star Chamber approach
11 and in certain Latin American countries where
12 defendants don't really seem to have access to the
13 information being used to prosecute them.

14 Notwithstanding the fact that the Draft
15 Environmental Impact Statement will be issued,
16 notwithstanding the fact that we certainly have the
17 right to review that document, we appear to be told by
18 Norfolk Southern that we do not have access to any of
19 the underlying information used to compile that
20 report, and so we simply have to review the four
21 corners of that report and somehow or other magically
22 determine whether, for example, numbers have been

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1 added for equity correct formulae to be used, et
2 cetera, et cetera. We view it as an entirely
3 irrational decision -- or position, rather.

4 I would also note, Your Honor, that
5 consistent with prior practice, Ms. Bruce has advised
6 the entirety of the Western World of this conference
7 this morning. I did not hear any representative of
8 SEA in attendance. I'm not really sure that if they
9 have some sort of legitimate interest here, that that
10 interest requires us to defer consideration of this
11 matter until they choose to appear before Your Honor.

12 The bottom line, from our perspective, is
13 that, (a) we don't believe that there is anything in
14 that documentation that Norfolk Southern is talking
15 about that even would normally be subject to a
16 protective order. We're talking about things that
17 have remarkably little to do with their day-to-day
18 economic concerns. We're talking about air quality.
19 We're talking about public safety. We're talking
20 about noise. We're talking about things that are not
21 particularly confidential. If they are deemed to be
22 confidential by the Railroad, the Railroad is more

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1 than free to designate them as protected under the
2 protective order.

3 If, for some reason, the Railroad believes
4 that the current protective order is inadequate to
5 protect its interests in this matter, then certainly
6 they and we, collectively, are more than capable of
7 revising the protective order in this area.

8 Again, the whole dispute boils down to a
9 relatively unusual objection in late 20th century
10 jurisprudence. They want a decision to be reached
11 based on information that they provide to an agency
12 that they will give to nobody else. We find it
13 totally inimicable to justice. We find it totally
14 contrary to the Board's own regulations. We see
15 nothing in the Board's regulations that even suggest
16 that SEA has the power to say to the applicant's, Thou
17 shalt not give information to anybody else.

18 JUDGE LEVENTHAL: How about Ms. Bruce's
19 point that this is premature, that you have another
20 shot at this after the final order is issued.

21 MR. KALISH: Your Honor, there are two
22 factors here. First of all, we're talking about a

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1 Draft Environmental Impact Statement being reached and
2 being issued and we can review that. Number one, we
3 only have a limited time period to review that
4 document. Reviewing that document will not give us
5 access to the underlying documents. And so that
6 document, standing on its own, isn't particularly
7 helpful.

8 It would be like reviewing an initial
9 decision before this Agency and -- I'm sorry -- before
10 the Federal Energy Regulatory Commission, and being
11 required to submit exceptions on that decision without
12 being able to see the underlying record that led to
13 that decision. It's an impossibility.

14 The second thing that Ms. Bruce alluded to
15 was Decision No. 44 in the Union Pacific/Southern
16 Pacific case. Now, that was an unusual circumstance
17 in which the Agency issued an environmental analysis
18 as opposed to an environmental impact statement. And
19 then because it realized that it was not able to fully
20 deal with the environmental concerns for these two
21 cities, Wichita and Reno, in Decision No. 44, it
22 created a unique procedure for the Agency of, in

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1 effect, dealing with specific environmental problems
2 after issuing the final decision on the merits.

3 Now, I have no way of proving this, but I
4 can assure Your Honor, based on conversations with the
5 SEA, that the SEA viewed that particular procedure as
6 being enormously messy, as being a procedure that they
7 have no interest whatsoever in replicating in this
8 case. It is our understanding that between the Draft
9 Environmental Impact Statement and the Environmental
10 Impact Statement, both of which will be issued before
11 the final decision in this case, that the Board will
12 be doing each and every thing that it expects to do in
13 terms of environmental analysis for this massive
14 proceeding.

15 Now, that may or may not turn out to be
16 the case, but certainly, whether under Decision No. 6
17 or any other decision issued by the Board in this
18 case, Bay Village, Rocky River and Lakewood have been
19 given absolutely no promise, not even a hint, that
20 following the issuance of a decision in chief in this
21 case, that the Board would be cranking out a new
22 proceeding dealing with the specific environmental

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1 concerns of my client.

2 Certainly, if Norfolk Southern is
3 interested in stipulating on the record this morning
4 that such a post-EIS analysis will be done dealing
5 with the specific concerns of my clients, we might
6 want to rethink our position on where we are this
7 morning. But in the absence of such a guarantee from
8 Norfolk Southern, we hold to our position on this
9 motion.

10 JUDGE LEVENTHAL: Before we get to that,
11 is there any question about whether or not these
12 documents are stamped administratively confidential?

13 MR. KALISH: I've never seen them, Your
14 Honor, I can't possibly say how they are stamped.

15 JUDGE LEVENTHAL: Can you give Mr. Kalish
16 the guarantee he wants, Ms. Bruce?

17 MS. BRUCE: Your Honor, I've told him
18 repeatedly that we have documents that have been
19 stamped administratively confidential. I have not
20 given --

21 JUDGE LEVENTHAL: No, no, dealing with a
22 further proceeding --

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1 MS. BRUCE: No, I cannot, Your Honor.

2 JUDGE LEVENTHAL: What is the effect of
3 the documents being marked administratively
4 confidential ?

5 MS. BRUCE: The effect is that that was --

6 JUDGE LEVENTHAL: I'm not familiar with
7 the exception.

8 MS. BRUCE: Well, this is an exception or
9 a procedure that was put into place in this proceeding
10 by the SEA. At their initial direction, they told us
11 to mark documents given to them in the environmental
12 process, beginning with the PER, as administratively
13 confidential.

14 JUDGE LEVENTHAL: Does that prevent its
15 disclosure under a protective order?

16 MS. BRUCE: I believe it would, Your
17 Honor. I believe that it's meant to have the free
18 flow of information and take this information outside
19 of the proceeding and put it into the environmental
20 process. The PER, to start with, was not filed with
21 the Commission. It wasn't part of the proceeding. It
22 wasn't part of the papers that were filed. 1104.12

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1 goes to service of pleadings, service of pleadings and
2 papers filed with the Commission. We were
3 specifically told to submit it to the SEA as
4 administratively confidential. Nothing was filed with
5 the Board. It's been a separate procedure. It's been
6 a procedure outside, from the PER straight up to the
7 DEIS, and that's how everything has been handled.

8 And Mr. Kalish' citation of 18 CFR
9 385.2010 -- it just doesn't apply to this proceeding,
10 neither does 11.0412 provide to this procedure
11 whereby, in essence, CSX has given information over as
12 administratively confidential per the SEA's request.
13 Every document has been given over that way to protect
14 the confidentiality of it.

15 JUDGE LEVENTHAL: You're not really
16 answering my question. Are you claiming that it is
17 similar to the attorney-client privilege? I'm simply
18 not aware of a designation, administratively
19 confidential. It would seem to me that that is a word
20 of advice, to protect any information disclosed in
21 that type of document.

22 I'm going to look at the documents you

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1 wanted me to examine in camera, but --

2 MS. BRUCE: Your Honor, I think it's a
3 practice that's been in place in these proceedings for
4 a long time, and these documents that have either been
5 put in under this proceeding or under BNSF or UP/SP,
6 where admittedly EISes were not formulated by EAs
7 were, this has been the procedure. There hasn't been
8 disclosure of these environmental documents put in the
9 environmental process.

10 JUDGE LEVENTHAL: But what damage would be
11 done if you do release this information that Mr.
12 Kalish is seeking?

13 MS. BRUCE: Well, I think it would subvert
14 the NEPA process. As a matter of fact, I had a
15 conversation with one of the attorneys over at the SEA
16 yesterday, and they thought that this was a subversion
17 of the NEPA process. That is a separate process that
18 the SEA has undertaken the environmental process, that
19 it's not the proper scope of discovery in the main
20 case, that there is a process, there is a process laid
21 out, there is a process laid out in Decision No. 6,
22 there is a process that the Applicants have

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1 participated in since the very beginning when they
2 first complied with 11.80 in which they had
3 discussions, confidential discussions, about the
4 proposed transactions.

5 JUDGE LEVENTHAL: Do you have a copy of
6 Decision No. 6 and 44?

7 MS. BRUCE: Yes, Your Honor. These are
8 clean copies, if counsel would like to look at them.
9 There are no marks on them.

10 JUDGE LEVENTHAL: One of those is supposed
11 to be Decision No. 44?

12 MS. BRUCE: Part of 44, I didn't make the
13 whole thing for environmental reasons. (Handing
14 document.) I think the references in Decision No.
15 44, Your Honor, are page 179 and 298. I just took out
16 excerpts instead of doing the whole case.

17 JUDGE LEVENTHAL: All right. You have
18 given me the cover page and pages 197, 279 and 280.

19 Mr. Kalish, what use would you make of
20 this information in this proceeding, if you were to
21 get it?

22 MR. KALISH: Your Honor, the specific use

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1 that we would be making of it in the proceeding would
2 be to aid us in preparing comments following the
3 issuance of the Draft Environmental Impact Statement,
4 but that would certainly be the initial use.

5 The secondary use obviously would be in
6 later documentation, briefing court appeals, et
7 cetera, et cetera, of this case. As Your Honor is
8 aware, the general standard is that in the NEPA
9 process the Agency is required to "take a hard look"
10 at the problem.

11 If the Agency has access to information
12 and chooses not to use it at all, as is possible under
13 the procedure used by Ms. Bruce, it is certainly
14 possible that a reasonable person could determine that
15 the Agency had not taken a hard look at the problem
16 because it chose to ignore certain information that
17 was presented to it. If we don't have access to all
18 the information presented to it, then we have no way
19 of knowing whether the Agency took a hard look at that
20 problem.

21 I should emphasize for Your Honor that
22 while it is most certainly true that we wish to have

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1 access to all of the information that the Norfolk
2 Southern folk have turned over to SEA and the outside
3 consultant, that that does not constitute 100 percent
4 of our request.

5 We have requested information dealing with
6 specific subjects. We assume that some of that is
7 covered by their environmental submissions to the
8 Agency, but we assume that they also have documents in
9 their possession that they have not to date filed with
10 the Agency and received some sort of administratively
11 confidential stamp. We'll note that we have not been
12 able to locate that phrase in the Board's rules. I
13 took a look at the FOIA rules this morning, and I
14 could not find administratively confidential as a
15 phrase used there either. It appears to be something
16 unique.

17 JUDGE LEVENTHAL: If you were to receive
18 this information, if I were to rule in your favor, to
19 what use would you make that information in this
20 proceeding?

21 MR. KALISH: The first thing, I would make
22 no different use of it than any other document

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1 received in discovery in this case. It would be read
2 as applicable. It might be turned over to outside
3 consultants for review to determine whether the
4 underlying data is accurate to determine whether the
5 formulae used to determine certain things --

6 JUDGE LEVENTHAL: Suppose you find the
7 data is inaccurate, what would you do in this
8 proceeding?

9 MR. KALISH: In this proceeding, we would
10 advise the Surface Transportation Board in our
11 comments on the Draft Environmental Impact Statement,
12 that the data that they were relying on was inaccurate
13 data. It's no different than any other type of
14 submission before the Surface Transportation Board,
15 the FERC, or any other administrative agency. Data is
16 reviewed. Data is analyzed. Data is reflected in --

17 JUDGE LEVENTHAL: Only if it leads to
18 relevant evidence. You can't go on a fishing
19 expedition. You would only be entitled to information
20 that possibly may lead to admissible evidence.

21 MR. KALISH: Absolutely, Your Honor.

22 JUDGE LEVENTHAL: That's what I'm

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1 inquiring, do you think that this would lead to
2 something that you might put in in this case?

3 MR. KALISH: Not only do we believe it,
4 Your Honor, but I do not see word one in the Norfolk
5 Southern objections even suggesting that any of the
6 information we have requested is irrelevant to the
7 NEPA process. In point of fact, Your Honor, the
8 discovery request that we submitted to the Norfolk
9 Southern were premised in large measure on a review of
10 the preliminary mitigation plan issued by the Agency
11 in the Norfolk Southern -- I'm sorry -- in the Union
12 Pacific/Southern Pacific case, and also a review of
13 the scope of the environmental analysis that the
14 Agency issued in this case, and also on the Agency's
15 regulations.

16 We are asking only about things that this
17 Agency considers in its environmental analysis. We're
18 asking about noise. We're asking about air quality.
19 We're asking about safety. We're asking about
20 accidents. We're asking about hazardous materials.
21 These are all more issues for the environmental
22 analysis. We're not fishing at all.

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1 MR. EDWARDS: Your Honor, just a
2 clarification on a couple points that might help you
3 in the resolution of this. Several times the word
4 "file" has come to be stated. In fact, Ms. Monroe has
5 said that every time there's an environmental request
6 sent up by FERC's environmental section, which I'm
7 unfamiliar with, they specifically remind people to
8 file the pleading and to serve it on all parties of
9 record.

10 If you look at the documents which we are
11 willing to provide you in camera, that's not done
12 here. In fact, the section on environmental analysis
13 specifically said this is not a document which is
14 file, it's one that's submitted.

15 JUDGE LEVENTHAL: What's bothering me is
16 I don't know what administratively confidential --

17 MR. EDWARDS: I might be able to help with
18 it. I might be able to help you with that in the next
19 point, and that is that it's not actually filed with
20 the Board. The Board hires a third-party consultant
21 to review the environmental impact in cases like this
22 and in several of these past cases, and these

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1 documents do not go to the Board, they go to the
2 third-party contractor, the consultant to the Board,
3 who is under a mission not to accept these figures,
4 but to verify, to ask, to inquire, and to conduct
5 their own study, which really results in the Draft
6 Environmental Impact Statement which is then
7 published, and it's that document published by the
8 Board based on the study conducted by the third-party
9 consultant to the Board, not the data -- maybe third
10 or fourth generation -- that's provided by the
11 Applicants, but on the study conducted by the third-
12 party consultant.

13 So, if there is an environmental
14 confidentiality there, it is the documents, the
15 information that's provided to not the Board but to
16 their consultant, and under a very long process that
17 has been in the regulations for years, which require
18 the Applicants in any of these cases to begin
19 consultations with the section on environmental
20 assessment up to six months prior to the filing of an
21 application or a Notice of Intent. And the purpose of
22 that informal and administratively confidential

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1 consultation is to protect the information of
2 Applicants and permit the Board to fulfill its NEPA
3 responsibilities. Otherwise -- and this informal
4 consultation, by the way, goes to response of
5 Applicants as well. Otherwise, in fact, if you would
6 rule that this information is open for discovery,
7 we're not sure how far that rule goes, but it's
8 directly against the informal -- it would be directly
9 against the informal consultation requirement that the
10 Board has in its regulations.

11 JUDGE LEVENTHAL: Are you saying, though,
12 that a party can't question the information furnished
13 to the third-party consultant?

14 MR. EDWARDS: Absolutely not. They can
15 get that from the third-party consultant in the Draft
16 Environmental Impact Statement process. They can go
17 to the Board and say -- you know, in their comments,
18 they can say that we don't believe this information.
19 This information is erroneous.

20 You also have to understand the nature of
21 the information that we're talking about here. This
22 is not something that the railroads develop on their

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1 own in the course of business. What happens is -- you
2 know, how many cars cross a particular grade crossing?
3 Well, someone goes out and stands at a grade crossing
4 and goes, one, two, three, four, five, oftentimes.
5 They can develop all this information. In fact, they
6 do lots of times develop this information on the road
7 in the NEPA process, not in this process.

8 JUDGE LEVENTHAL: Can't they use this to
9 request the condition, say, as to length of trains or
10 --

11 MR. EDWARDS: In the NEPA process, in
12 response to the Draft Environmental Impact Statement,
13 and with the several other times that they are
14 permitted to have input into the process.

15 MR. KALISH: Your Honor, I'd just like to
16 provide a citation. I believe that Norfolk Southern's
17 characterization of the outside consultant as somehow
18 or other doing something on its own and then giving it
19 to the Board is entirely incorrect. I'd refer Your
20 Honor to 49 CFR 1105.10(d) which, among other things,
21 says in such a case the consultant acts on behalf of
22 the Commission working under SEA's direction to

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1 collect the needed environmental information and to
2 compile it into a draft EA. These people are not
3 somehow or other third-party wisemen who are being
4 chosen to tell the Agency what to do with regard to
5 environmental matters. They are outside consultants
6 hired simply because SEA, as I understand it, has a
7 grand total of five employees and needs more bodies to
8 deal with these matters.

9 JUDGE LEVENTHAL: He's saying you can
10 attack it after the EPA is issued.

11 MR. KALISH: That's right. He's saying I
12 can attack it after it's issued, and I can attack it
13 with blindfolds on, with my hands tied behind my back,
14 and with shackles on my legs. He will not give me any
15 of the information used to prepare that report.

16 Your Honor, this is a case involving, as
17 you well know, the eastern half of the United States.
18 How much time can the outside consultants possibly
19 have to go out and do their own analysis? Yes, they
20 are going to do their analysis, but yes, they are also
21 going to be relying on information provided by the
22 railroads.

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1 I want all the information that they have
2 access to so that when the day comes that Norfolk
3 Southern will allow me to challenge the DEIS, that I
4 have all the information available to me on which to
5 make that challenge.

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

8 (Discussion off the record.)

9 JUDGE LEVENTHAL: Back on the record. In
10 an off the record discussion, I inquired whether the
11 parties desire to brief the issue. Norfolk Southern
12 indicated that they did. We set a date of December 8,
13 1997 for submission of briefs. The in camera
14 inspection of sample documents that are involved in
15 this argument, for the same date, December 8. The
16 documents you will supply me in a sealed envelope to
17 my office, and I'll return them to you in the same
18 manner.

19 MS. BRUCE: Yes, Your Honor.

20 Off the record.

21 (Discussion off the record.)

22 JUDGE LEVENTHAL: Back on the record.

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1 Now, with respect to Mr. Kalish' suggestion that I
2 rule on specific requests, let's take Interrogatory
3 and Document Request No. 21. Provide all documents
4 dated January 1, 1992 and after, discussing post-
5 acquisition locomotive and motor vehicle exhaust
6 emissions on or near any portion of the line segment.

7 MS. BRUCE: Your Honor, we responded to
8 that. First of all, we raised an objection as to
9 documents after 1995 only.

10 JUDGE LEVENTHAL: Well, we changed that.

11 MS. BRUCE: That's understood. And then
12 we responded by saying that our environmental report
13 which was submitted contains the air quality impact in
14 the county in which the three cities lie.

15 MR. KALISH: Your Honor, here the theory
16 seems to be moving back a step. First, Norfolk
17 Southern is saying we have documents in our
18 possession. We have formulated those in some fashion
19 in a submission to the Agency. We are going to give
20 you access in this particular case to what was
21 submitted in the Agency, but we're not going to give
22 you access to other information relating to that

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1 question that happens to be in our possession.

2 MS. BRUCE: Everything that we have that
3 was in our possession was formulated specifically for
4 submission to the environmental report, in the same
5 process, administratively confidential. All the
6 documentation that we have for all these requests was
7 done specifically for the environmental process and is
8 part of our overall objection. I think that Mr.
9 Kalish thinks that we, through the course of events,
10 keep documents on air quality in Cuyahoga County in
11 Norfolk Southern's normal business practices. That's
12 just not the way it works.

13 What was done is that in each one of these
14 different categories, the documents that are
15 responsive are those documents that were given over to
16 the SEA. There are no others. These are documents
17 developed at the request of the SEA specifically for
18 this proceeding and for compliance with the
19 environmental process.

20 JUDGE LEVENTHAL: Mr. Kalish, is there any
21 particular document that you're saying is outside of
22 the argument that Ms. Bruce has just made? In other

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1 words, she's saying everything here is wrapped up in
2 the decision I'm reserving on your motion to compel.
3 You indicated there were some items that wouldn't be
4 in that category.

5 MR. KALISH: Your Honor, it defies my
6 sense of the way things are done to believe that each
7 -- that the only document relating to this matter that
8 the Norfolk Southern people have is the final product.
9 That final product could only have been compiled --

10 JUDGE LEVENTHAL: No, that's not what Ms.
11 Bruce is saying. She's saying that every document
12 they have fits into the category that we have been
13 discussing this morning that was prepared specifically
14 for the SEA.

15 MR. KALISH: And the distinction that --

16 JUDGE LEVENTHAL: I thought you were
17 saying that there were some documents that were not so
18 prepared. Is that what you're saying?

19 MR. KALISH: Your Honor, that is precisely
20 what I am saying. It defies credibility to say that
21 the only documents that they have with regard to these
22 matters are the final documents that they filed with

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1 the Agency. They had to have done studies in order to
2 compile that information. There has been no
3 suggestion that each and every one of the work papers
4 used to compile this environmental report, 6-B, was
5 turned -- were given to the Agency and also stamped
6 with this magic phrase administratively confidential.

7 MS. BRUCE: For example, Your Honor, if we
8 look at Document Request No. 22, they are asking for
9 operational considerations on the line segment that
10 may affect the post-acquisition -- and then there's a
11 laundry list.

12 Norfolk Southern is acquiring this line.
13 Norfolk Southern is doing an environmental study on
14 its acquisition of the line, and giving that
15 information over to the SEA. This is a line we're
16 going to get. We don't have back data on it. This
17 Cleveland to Vermillion line that he's talking about
18 is -- we're developing the information -- and I might
19 add that there is no one document that's put in. And
20 as you'll see, this is an ongoing back-and-forth --
21 today we need this information, we look at it, then we
22 ask you for more information, we look at it, this

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1 leads to another question. This is an ongoing process
2 that's across-the-board. And there is a group that is
3 working on this that is tasked with environmental
4 issues. They've been working feverishly since the
5 beginning of this proceeding, feeding the information
6 into the SEA almost nonstop. And that's where these
7 documents -- why the documents were compiled and where
8 the documents are submitted to.

9 And any relevant responsive -- responsive,
10 I emphasize that -- document is going to be submitted
11 -- have been submitted -- yes, have been submitted --
12 everything I believe has been submitted to this point
13 to the SEA.

14 JUDGE LEVENTHAL: All right. I think we
15 have the same argument, Mr. Kalish. I'm going to
16 reserve on the motion until after December 8.
17 December 8 we will have the furnishing of briefs, you
18 make whatever argument you like, an in camera
19 inspection of these documents.

20 MR. KALISH: I think that's more than
21 fair, Your Honor. Just by way of clarification, this
22 does not happen to be a line that Norfolk Southern is

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1 acquiring. Norfolk Southern has been operating this
2 line for years.

3 MS. BRUCE: I'm sorry, Your Honor, that
4 was my mistake.

5 JUDGE LEVENTHAL: All right. Decision
6 reserved on the motion.

7 MR. KALISH: May I be excused, Your Honor?

8 JUDGE LEVENTHAL: Before you go, let's go
9 off the record.

10 (Discussion off the record.)

11 JUDGE LEVENTHAL: Back on the record. Mr.
12 Kalish, you may be excused.

13 (Whereupon, Mr. Kalish left the hearing
14 room.)

15 JUDGE LEVENTHAL: All right. The second
16 motion we have before us this morning is CSX's and
17 Norfolk Southern's Motion to Compel discovery from a
18 number of Respondents.

19 What part of this motion is still in
20 contention?

21 MR. HARKER: Your Honor, the parts that
22 are still in contention, although my late arrival

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1 prevented me from talking to counsel -- and perhaps it
2 may make sense -- I'm advised at least in one case it
3 may make sense -- to do that before we get going, but
4 I can report to you --

5 JUDGE LEVENTHAL: Do you want to defer
6 until you speak to counsel? We can recess for
7 whatever period you think --

8 MR. HARKER: We've been going for about an
9 hour and 20 minutes, and I think, setting that aside,
10 I think it probably would make sense to get together
11 and to see what's transpired overnight. I know there
12 have been discussions with all three counsel that are
13 here, but I can report before we break that the issue
14 as to Redland, Ohio has been resolved. The issue as
15 to International Paper has been resolved. And the
16 issue as to A.K. Steel Corporation has been resolved.
17 And I think it's possible perhaps some other issues --
18 we may be capable of resolving some other issues if
19 you give us a few minutes.

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

22 (Discussion off the record.)

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1 JUDGE LEVENTHAL: Back on the record.

2 MR. HEALEY: Thomas Healey, on behalf of
3 Wisconsin Central, Illinois Central, I&M Rail Link,
4 and the Elgin, Joliet and Eastern.

5 Judge, the discovery guidelines in this
6 case require that any conference trying to resolve
7 discovery have been conducted prior to today. The
8 rules require that the Applicants have contacted me in
9 an attempt to discover whether we could resolve any of
10 these issues. The Applicants have ignored that.

11 I received a telephone call on Monday
12 informing me I would be coming to D.C. on Thursday.
13 In light of the Applicants' insistence on holding to
14 the notice requirement that they imposed upon me --
15 and as Your Honor may, in fact, recall, I was in front
16 of you October 9th, and because I called Ms. Bruce one
17 day late to set up that conference, they required me
18 to come back a week later, requiring another trip back
19 from Chicago.

20 I object to the holding of the conference.
21 The Applicants have failed to comply with the
22 regulations applicable to these proceedings, and I

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1 don't think we should have to be here at all. That's
2 my objection.

3 JUDGE LEVENTHAL: Thank you, Mr. Healey.
4 Mr. Harker.

5 MR. HEALEY: I'm sorry, I do have one more
6 thing. The Applicants did not contact me, however, I
7 did, despite the fact that the rules would seemingly
8 place the requirement on the Applicants to contact me,
9 I did, in fact, make an effort to contact the
10 Applicants. I spent over half an hour on the phone
11 with one of their counsel, who is not present today.
12 Throughout the entire course of the discussion, the
13 gentleman I spoke with made absolutely no effort to
14 resolve one single of the interrogatories. He was not
15 willing to narrow the scope of any of them. He was
16 not willing to discuss accepting any of my objections,
17 which are very well based, I think, and he simply
18 said, we insist on the production of all this
19 information. There was no good faith effort to
20 resolve any sort of discovery dispute. The Applicants
21 don't appear to be proceeding in good faith. And I
22 don't understand why it is I should have to travel all

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1 the way from Chicago before I get them to the table to
2 discuss these things, when the rules require them to
3 do that prior to filing a motion.

4 JUDGE LEVENTHAL: Mr. Healey, the instance
5 that you're referring to, they claim that they didn't
6 have time to analyze what your request was.

7 MR. HEALEY: Judge, they had time to draft
8 a motion of some 35-40 pages. They didn't have time
9 to pick up the telephone?

10 JUDGE LEVENTHAL: No, no. You're saying
11 the last time when they made you come back. They said
12 they didn't have enough time to analyze what it was
13 that you -- I don't know what --

14 MR. HEALEY: The issue was the discovery
15 on information regarding the Indiana Harbor Belt. And
16 I would point out to Your Honor that it was at that
17 hearing that Mr. Norton got up and said he was
18 prepared to discuss the merits of the dispute, but he
19 wished to raise the issue in a late notice first, and
20 that was what was ultimately upheld and I was forced
21 to come back a day later, five days before my filing,
22 to try to compel information.

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1 JUDGE LEVENTHAL: You know, Mr. Healey,
2 it's absolutely against my principles of long-standing
3 to stick to technicalities if there is some other way
4 of handling it. If the parties at that time had said
5 that they were prepared to argue, I would have
6 listened to the argument.

7 MR. HEALEY: I do not have the transcript
8 of the October 9th hearing, however, I think if we ask
9 Mr. Norton --

10 JUDGE LEVENTHAL: Mr. Norton, is that what
11 you said, that you were prepared to argue, and I
12 didn't let you do it?

13 (Laughter.)

14 MR. NORTON: No, Your Honor.

15 JUDGE LEVENTHAL: That's contrary to my
16 practices, I can't believe that I did it.

17 MR. NORTON: Your Honor, I'm sure what I
18 indicated was that if we had to, we would do what we
19 had to, but we had not had an adequate opportunity to
20 prepare to address the question.

21 MR. HARKER: And, Your Honor, I
22 specifically recall in that particular instance --

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1 you'll recall that CP was a very interested party in
2 this matter, and that ultimately, as I recall, you
3 relied heavily on their position here, and I do recall
4 Mr. Mayo, on behalf of CP, at that hearing standing up
5 and saying that he had been out of town and just had
6 gotten in the night before, and that was the first
7 time he had notice that the issue had come up. I
8 submit to you that is a very different situation than
9 what we're talking about here today with respect to
10 the four issues that Mr. Healey is about. And if you
11 would like, I can get into that, but I submit to you
12 we are wasting a lot of time to do it.

13 JUDGE LEVENTHAL: Mr. Harker has refreshed
14 my recollection, that was true. If you recall, Mr.
15 Mayo said -- I think he found out about the conference
16 at 11:00 o'clock the preceding night, and that he
17 wasn't prepared to argue, and that he felt that he did
18 have an interest in it.

19 MR. HEALEY: Yes, Your Honor, I think
20 that's correct. I think that is a correct reflection
21 of the record. It still doesn't explain why the
22 regulations in place in this proceeding can be avoided

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1 by the Applicants in the case of this motion.

2 JUDGE LEVENTHAL: I try to treat all
3 people equally on both sides, and I think I do it
4 successfully. I'll tell you again, I've been at this
5 a very long time. I don't ordinarily make people come
6 back from Chicago if it can be avoided. At that time
7 -- Mr. Harker's refreshing my recollection -- it was
8 really Mr. Mayo's position that that really turned the
9 corner on that.

10 MR. HEALEY: So the record is clear, given
11 the fact that it's 28 degrees in Chicago today, I
12 don't mind being here. I have no objection to being
13 here.

14 (Laughter.)

15 JUDGE LEVENTHAL: Why don't we recess for
16 ten minutes. Let's see if you can resolve your
17 differences. If you still maintain your objection
18 after that, I'll entertain it.

19 All right. We stand in recess.

20 (Whereupon, a short recess was taken.)

21 JUDGE LEVENTHAL: Back on the record. Mr.
22 Harker.

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1 MR. HARKER: Thank you, Your Honor. I
2 think, if it's agreeable with counsel for Centerior
3 and Consumers, as well as Mr. Healey, I'd like to
4 report on our discussions with Mr. Morell on behalf of
5 Indiana and Ohio and Indiana Southern because we were
6 partially successful in terms of resolving some of the
7 disputes, but only partially, and I would hope that we
8 could resolve the others fairly expeditiously and let
9 Mr. Morell go. So, without objection.

10 First of all, with respect to Indiana and
11 Ohio Railway Company --

12 JUDGE LEVENTHAL: Which tab are we talking
13 about in your --

14 MR. HARKER: Yes, Your Honor, it is Tab
15 No. 9. Let me indicate with respect to Document
16 Request Nos. 10, 14 and 15, we agreed that we would
17 accept production of documents that would have very
18 limited redactions to them. Essentially, the
19 financial information from the agreements, to they
20 extent there are charges that are specified in the
21 agreements, but that would be the only basis for a
22 redaction. And we would essentially reserve on 10, 14

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1 and 15 until we've had an opportunity to review the
2 documents in their redacted form, to determine whether
3 or not the information that was provided was
4 satisfactory.

5 Assuming that the information provided is
6 satisfactory, we won't bother you again with this, but
7 it's under -- I think we agreed that we expect to get
8 these documents today or tomorrow and if, upon review,
9 it turns out that, in fact, the information that is
10 redacted is important to the primary Applicants in
11 terms of filing rebuttal, that we will revisit the
12 issue next Tuesday at next Tuesday's conference. But
13 at this point, these three have been conditionally
14 resolved.

15 JUDGE LEVENTHAL: All right.

16 MR. HARKER: Now, with respect to Document
17 Request No. 16, produce copies of all agreements
18 between IORY and CRC -- which is a reference to
19 Conrail -- including but not limited to agreements for
20 interchange, switching trackage rights, or haulage.

21 IORY objects to these requests on the
22 grounds that they are overly broad, unduly burdensome,

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1 and seek information which is not relevant to any
2 issue raised in these proceedings. And IORY further
3 objects on the grounds that they seek confidential and
4 sensitive commercial information, including
5 information subject to disclosure restrictions imposed
6 by contractual obligations with third parties.

7 JUDGE LEVENTHAL: Why don't you read into
8 the record the document request.

9 MR. HARKER: Sure, it's Document Request
10 No. 16, which was contained in CSX's First Set of
11 Interrogatories and Document Requests to Indiana &
12 Ohio Railway Company and it says, "Produce copies of
13 all agreements between IORY and CRC, including but not
14 limited to agreements for interchange, switching
15 trackage rights, or haulage".

16 First of all, with respect to the issue as
17 to the relevance of these agreements, quite simply --

18 MR. MORELL: Mr. Harker, could I just --
19 I just want to speed the process along. I know I
20 raised a number of objections, Your Honor. There's
21 only one at issue at this time, and that is if any of
22 these agreements have confidentiality provisions where

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1 we need approval from the third parties, I can't
2 produce them. At this point in time, we're not
3 raising relevance. We're not raising any of the other
4 issues. We're more than happy to give these documents
5 up but, Your Honor, I can't give documents up that
6 have a confidentiality provision without letting the
7 other party -- in this case, Mr. Norton -- know about
8 it.

9 So far, I've been unable to find any
10 confidentiality provisions, but we're still looking
11 through the documents.

12 JUDGE LEVENTHAL: Is there a real
13 argument? Mr. Norton, do you have a position on this?

14 MR. NORTON: Your Honor, I'm not in a
15 position to give consent, or Conrail consent, without
16 knowing which particular agreements are at issue.
17 None has been identified yet where there is a consent
18 requirement. So, it may be premature, but we can't
19 just give a blanket consent without knowing what
20 agreements may be --

21 JUDGE LEVENTHAL: You know, previously
22 I've ordered production of such documents. I've

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1 allowed redactions, reasonable redactions.

2 MR. MORELL: Well, Your Honor, at this
3 point, we really don't -- I don't believe there will
4 be any, we don't know for sure.

5 JUDGE LEVENTHAL: Mr. Harker wants an
6 order scoping no further delay.

7 MR. HARKER: You're reading my mind, Your
8 Honor. Yes.

9 MR. MORELL: I understand that, Your
10 Honor, but I think we can really resolve this. I'd be
11 very surprised if on this issue we need to come back
12 next Tuesday because, if we come back next Tuesday, it
13 will be Mr. Norton coming back next Tuesday, not
14 myself.

15 JUDGE LEVENTHAL: Well, you know my prior
16 ruling, and I would be consistent, and you know --
17 well, I don't remember. I think the Board affirmed my
18 ruling. I think an appeal was taken and I think I was
19 affirmed.

20 MR. HARKER: You were affirmed a number of
21 times on this issue, Your Honor, with respect to the
22 scope of the protective order and the fact that it

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1 protected people who submitted highly confidential
2 documents, even subject to confidentiality
3 restrictions, and I note that Ms. Brown's presence in
4 the hearing room today. She will no doubt remember
5 that she got the better of me in terms of a prior
6 argument on this issue. And we were ordered to
7 produce documents to NISG that were, in fact, subject
8 to the same kinds of confidentiality restrictions that
9 I think we're talking about there.

10 So, I think that the law of the case has
11 been clear and, quite honestly, with all due respect
12 to Conrail as our co-Applicant, I think even if they
13 were to object on some basis to IORY providing
14 documents, we would proceed with our Motion to Compel.

15 JUDGE LEVENTHAL: All right. Do you want
16 to make any further argument?

17 MR. MORELL: I'll make an argument for
18 Conrail, I'm not making it for myself. At most, Your
19 Honor, I think that what Conrail may want to do is
20 redact certain totally irrelevant information, and I
21 believe that's all that Conrail would want to reserve.
22 I can't imagine that they would object.

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1 JUDGE LEVENTHAL: That's what I allowed
2 last time, and my ruling would be the same. I'll
3 grant the motion that the information be furnished
4 under the highly confidential section of the
5 protective order, and that reasonable redactions may
6 be made.

7 MR. HARKER: Well, Your Honor, let me just
8 try and be clear about something in terms of
9 reasonable redactions -- and I'm not trying to pick a
10 fight, please don't think I'm being unreasonably
11 disputatious -- but I think we maybe need a little bit
12 more clarification as to what a reasonable redaction
13 is.

14 JUDGE LEVENTHAL: Well --

15 MR. HARKER: Maybe I can cut through it.
16 Maybe I can cut through it. Is a reasonable redaction
17 -- in the case of NISG, for instance -- let's get back
18 to that. The redaction that you permitted was
19 pursuant to Section 11904 of Title 49, and that, as
20 Your Honor well knows, governs the protection of
21 shipper contracts. And in the case of NISG, NISG was
22 seeking from CSX copies of agreements with third

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1 parties not even in this case -- not even in this case
2 -- utilities located elsewhere. And after a lengthy
3 discussion about the scope of the redactions that we
4 would be permitted, the only redactions that Your
5 Honor permitted pursuant to 11904 was the name of the
6 shipper. That's all. And I made the argument to you
7 that there was other information in the agreements
8 that was like the name in the sense that it's an
9 identifier. It's a brand. Maybe it identified the
10 name of a plant. Maybe it identified the name of a
11 city. And given the fact that we're talking about a
12 utility -- and not many cities have more than one
13 utility -- it's not hard to figure out who the name of
14 the shipper is.

15 So, in point of fact, we didn't get the
16 relief that we requested, but at least in that case
17 you held that under 11904 the protection, the
18 reasonable redaction, was the name of the shipper.

19 Now, here we're not talking about shipper
20 contracts. We're not talking about contracts that are
21 subject to 11904 because these are contracts between
22 Conrail and between another railroad, so they don't

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1 fit 11904. So, I don't even think in terms of your
2 prior practice that there's a basis to even permit
3 reasonable redactions in this case, but I want to be -
4 - and, obviously, at this point we know that the
5 agreement is with Conrail, and so redacting Conrail
6 from that agreement, the name Conrail, really won't
7 make much difference.

8 So, I'd like to try and get that out on
9 the table and see where we're going, because I don't
10 want to have to come back -- I'm sorry, Your Honor --
11 I don't want to have to come back to you next Tuesday
12 -- or, God forbid, it would even be the discovery
13 conference after next Tuesday because the documents
14 were produced to us before then, and then have to get
15 into a debate about redactions.

16 You will recall that when -- and I
17 apologize for going on about this, but I do have some
18 history here -- you will recall that when we were
19 ordered to produce documents to Mr. McBride, or
20 Atlantic City, you ordered us to produce them, without
21 qualification, without condition.

22 When we produced them, we thought that we

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1 were making reasonable redactions. You will recall
2 this. And we redacted highly sensitive information
3 from the cost information and the like. And we were
4 criticized by Mr. McBride for that practice, and he
5 brought us before you and you found that you would
6 order production of the documents, we didn't take
7 exception, and we were ordered to produce the
8 documents on the basis that you basically lost your
9 right. You know, you could have appealed our earlier
10 decision -- my earlier decision -- because you were
11 ordered to produce the documents, and you didn't. And
12 so you have to produce them unredacted.

13 So that was the situation in the first
14 round, and I just want to be sure that we're not going
15 to stray from those ground rules from the first round.
16 And now I will sit down.

17 JUDGE LEVENTHAL: All right. Last time,
18 we had a specific problem before me. Now I don't know
19 what the problem is, and that's why I made a generic
20 ruling, reasonable redactions would be permitted. I
21 don't know what it is that they want to redact, or
22 they may want to redact.

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1 MR. HARKER: I take them at their word.
2 I suspect there won't be any redactions. I really --
3 and I have no basis to believe that there will be any
4 redactions at all. I just worry that -- and I've told
5 you this before, Your Honor, at an earlier conference
6 -- our response has been December 15. And I haven't
7 given you -- at the last hearing, I told you how many
8 business days, how many calendar days -- well, I
9 haven't done the math on it here -- but I just worry
10 that if we get in a situation where we have redactions
11 in the documents that we think are a problem, you
12 know, it's going to delay things such that getting the
13 documents the week before our filing is due is really
14 no good because we have a printer schedule that we've
15 got to deal with. So, we're really up against the
16 gun. And so I guess I worry a little bit about what
17 one man's reasonable redactions area is another man's
18 unreasonable redactions. And so I apologize for
19 pressing Your Honor on that because I understand the
20 spirit in which you're proceeding, but I think it's
21 important to try and clarify that.

22 JUDGE LEVENTHAL: All right. Mr. Norton?

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1 MR. NORTON: I think this is likely not to
2 be a problem. We're dealing with something of a
3 hypothetical situation because we don't know whether
4 there are going to be any documents. And one of the
5 problems is the request calls for agreements relating
6 to interchange, switching trackage rights or haulage
7 that's not relevant. So there is a possibility that
8 there could be some category of agreement that we're
9 not aware of that might present a problem that would
10 cause Conrail not to want to consent, but I don't
11 think that's likely to happen. So, we're really, I
12 think, dealing with something of an abstract problem.

13 JUDGE LEVENTHAL: Why don't we leave it at
14 that, Mr. Harker.

15 MR. NORTON: We don't want to slow
16 anything up.

17 JUDGE LEVENTHAL: No, I understand that.
18 We're going to have this telephone conference next
19 Tuesday. And if there's a problem, you'll bring it up
20 then. A couple of days isn't going to be fatal to
21 you.

22 MR. NORTON: Okay, Your Honor.

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1 JUDGE LEVENTHAL: I understand from the
2 representations made, it appears likely that there
3 won't be a problem. I have to tell you, though, if
4 there is a problem, you have to fax me whatever the
5 redactions are. You have to show me the document,
6 otherwise, I won't be in a position to rule.

7 MR. HARKER: I will be able to send you
8 the redacted version, and either Mr. Morell or Mr.
9 Norton will be able to send you the unredacted
10 version.

11 JUDGE LEVENTHAL: All right.

12 MR. MORELL: I don't think you'll have to
13 worry about it, Your Honor.

14 JUDGE LEVENTHAL: I don't either. Okay.
15 Good.

16 MR. HARKER: And I think that also
17 disposes of Indiana Southern. Let me, just for the
18 record, Indiana Southern is at Tab 10 of your
19 material, Your Honor, and, again, this is -- these are
20 Document Request Nos. 9 and 10 in the First Set of
21 Interrogatories and Request for Production of
22 Documents of CSX and NS.

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1 Document Request No. 9, produce any
2 tariffs, contracts, agreements, or other documents
3 establishing the CRC switch charge referenced on page
4 5 of the responsive application.

5 No. 10, produce all agreements between
6 ISRR and CRC, including but not limited to agreements
7 for interchange, switching trackage rights or haulage.

8 I believe this is an identical objection
9 to IORY, but it's also my understanding that the only
10 current basis for the objection is a concern about any
11 confidentiality obligations flowing to Conrail. I
12 think that the same --

13 JUDGE LEVENTHAL: You want the same
14 ruling.

15 MR. HARKER: Want the same ruling.

16 JUDGE LEVENTHAL: All right, so ordered.

17 MR. MORELL: Thank you, Your Honor. May
18 I be excused, too?

19 JUDGE LEVENTHAL: Yes, you may.

20 (Whereupon, Mr. Morell left the hearing
21 room.)

22 JUDGE LEVENTHAL: All right. Mr. Harker?

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1 MR. HARKER: Thank you, Your Honor.

2 What I would propose to do is to, I guess,
3 proceed, since we sort of finished off the objections
4 at the end of the motion, why don't we go back to the
5 beginning and just basically take them in order, the
6 first one being Centerior Energy Corporation, which is
7 at Tab 1 of your materials.

8 I think that, frankly, Centerior can
9 probably be resolved on the same basis as what you
10 just did. As I understand the situation, that's based
11 on their objection which is at Tab 1 of our motion.
12 They object to Interrogatory Nos. 6, 7, and 13,
13 Document Production Request Nos. 5, 6 and 8. If you'd
14 like, Your Honor, I'd be glad to read those into the
15 record.

16 JUDGE LEVENTHAL: Yes, I think that would
17 be helpful.

18 MR. HARKER: These are a bit longer.
19 Interrogatory No. 6 in CSX's First Set of
20 Interrogatories and Request for Production of
21 Documents to Centerior Energy Corporation, provide
22 separately for each of Centerior's generating

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1 stations, identify each contract currently in effect
2 for the transportation of coal, and for each provide
3 the following information: (a) mode of
4 transportation; (b) name of carrier; (c) expiration
5 date; (d) origin points; (e) whether the
6 transportation involves an interchange with any other
7 carrier or motor transport and, if so, the other
8 carriers and/or modes involved.

9 Interrogatory No. 7 provides, separately,
10 for each of Centerior's generating stations, identify
11 each contract currently in effect for the supply of
12 coal, and for each provide the following information:
13 (a) name of supplier; (b) name and location of mine
14 supplying coal; (c) expiration date; (d) detailed
15 description of any contract terms discussing the
16 transportation of coal to Centerior.

17 Let me interrupt, Your Honor. It occurs
18 to me that we did provide you at Tab 12 of our motion,
19 a copy of the interrogatory requests that we
20 propounded to Centerior, but they were not repeated in
21 their objection so we went ahead and included them,
22 but for the record that's where they are.

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1 JUDGE LEVENTHAL: I have them before me.

2 MR. HARKER: Okay, good. Interrogatory
3 No. 13, describe in detail the "arrangement" between
4 Centerior and Ohio Valley Coal Company, referred to at
5 page 5, Footnote 2, of the verified statement of
6 Michael A. Kovac, and identify all documents
7 constituting, discussing, referring, or relating to
8 such arrangement.

9 Document Production Request No. 5, which
10 is the next objection. Produce all documents
11 identified or which should be identified in response
12 to Interrogatory No. 6. So this is basically the
13 Production Request that corresponds to Interrogatory
14 No. 6.

15 Document Production Request No. 6.
16 Produce all documents identified or which should be
17 identified in response to Interrogatory No. 7. This,
18 similarly, is the companion to the Document Request,
19 companion to Interrogatory No. 7.

20 And then, finally, Document Request No. 8,
21 produce all documents identified or which should be
22 identified in response to Interrogatory No. 13. This,

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1 again, is the Production Request companion to
2 Interrogatory No. 13.

3 So, basically, what Centerior did was
4 object to production of contracts and agreements of
5 various kinds, including production of the actual
6 agreement as well as certain information from the
7 agreement and, as I understand Centerior's position as
8 reflected in the letter dated November 18, 1997, to
9 you, that we received a copy of from Mr. Kolesar,
10 counsel for Centerior Energy Corporation, the basis
11 for the objection to these three interrogatories and
12 three document requests is that some of these
13 agreements may include explicit confidentiality
14 restrictions, and Centerior takes the view that they
15 are not free to produce those absent permission from
16 all parties to the agreements, which is my
17 understanding, and they are seeking such permission,
18 but at least as of the date of this letter had not
19 received it, and it's my understanding, as of
20 yesterday had not received it either, or an order
21 compelling production, and that is why we are here.

22 This, it seems to me, can again be

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1 disposed of the kind of -- a similar order than the
2 one that you just issued and the one that you issued
3 to us on numerous occasions, including involving NISG,
4 where we had two agreements that NISG wanted, both of
5 which had confidentiality restrictions. We're not
6 sure here how many of them do, I guess there are some
7 that do and some that don't, but that's a little bit
8 unclear from their papers. In any event, Your Honor,
9 for the reasons I stated before, ordered production of
10 those agreements to NISG, and I would say here, again,
11 there's no basis to distinguish that situation except
12 for the fact that there you permitted redactions under
13 11904, but here we already know who the shipper is,
14 Centerior, so there's really no point in redacting
15 Centerior's name from any of the agreements.

16 MR. KOLESAR: Your Honor, Andrew Kolesar.
17 Mr. Harker has accurately stated our position as
18 reflected in our papers. The only thing I can add is
19 that subsequent analysis has demonstrated that the
20 agreements do contain the confidentiality restrictions
21 -- we thought that they might -- with one exception.
22 One of our coal transportation agreements does not

1 have such provision in it. That will be produced.
2 And as we've indicated, all that we require is an
3 order from Your Honor.

4 JUDGE LEVENTHAL: All right. Well, I've
5 been consistent in ordering production of such
6 documents. Do you want to produce under the highly
7 confidential provision?

8 MR. KOLESAR: Yes, Your Honor.

9 JUDGE LEVENTHAL: All right. So ordered.

10 MR. HARKER: Your Honor, the next issue
11 raised in our Motion to Compel involved objections
12 filed by Consumers Energy Company to CSX's First Set
13 of Interrogatories and Request for Production of
14 Documents.

15 The first objection was to Interrogatory
16 No. 1, which provides that -- and let me give you a
17 cite in your materials -- Tab 2 is where the objection
18 appears.

19 Interrogatory No. 1 provides that for each
20 of Consumers generating stations, separately for each
21 of the years 1995, '96 and '97, state (a) the
22 location; (b) the fuel or fuels used; (c) the total

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1 generating capacity; (d) the amount of electricity
2 generated; (e) the percentage of capacity utilized;
3 (f) the average cost per kilowatt hour; (g) the amount
4 in tons of coal burned; (h) the amount of electricity
5 generated and sold to other utilities or wholesale
6 customers; (i) the rail carrier or carriers that
7 deliver coal to the rail station; (j) whether coal was
8 delivered to the station by any other mode of
9 transport (e.g., truck, barge, like vessel) specifying
10 the mode or modes used; (k) the station's delivery
11 cost for coal; and (l) the average fuel cost per
12 kilowatt hour.

13 Consumers also objected to Interrogatory
14 No. 8, which provides separately for each of Consumers
15 generating stations, identify each spot purchase of
16 coal made since January 1, 1995, and for each purchase
17 state (a) the supplier and location of the supplying
18 mine; (b) the number of tons supplied; (c) all rail
19 carriers involved in the transportation of the coal.

20 Interrogatory No. 9 provides identify all
21 offers, requests for quotation, or other documents
22 listing bids for transportation of coal to any of

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1 Consumers generating stations. This was also objected
2 to.

3 In addition, Consumers objected to two
4 document requests. The first one, Document Request
5 No. 6, provides produce all documents identified or
6 which should be identified in response to
7 Interrogatory No. 7.

8 And, finally, Document Request No. 7,
9 produce all documents identified or which should be
10 identified in response to Interrogatory No. 9.

11 Let me begin with respect to Interrogatory
12 No. 1, which essentially requests basic information on
13 the operations of and the fuel supply and
14 transportation options for each Consumers plant from
15 1995 to 1997.

16 Now, Consumers objects to this
17 Interrogatory on a couple of different grounds, one,
18 that it is overbroad and unduly burdensome and seeks
19 irrelevant information, also that it seeks information
20 that is publicly available.

21 First of all, with respect to the
22 relevance objection, our understanding of Consumers

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1 filing is that they are concerned that the transaction
2 will reduce Consumers competitive rail transportation
3 options -- that is the basis for their filing.

4 When you look at the filing, on page 6 of
5 their argument -- which you don't have, Your Honor --
6 the heading of that argument is, the transaction is
7 not in the public interest because the disappearance
8 of Conrail will reduce Consumers' competitive options
9 for the rail transportation of coal.

10 So, our understanding of the Consumers
11 filing is that they are concerned about losing
12 competitive options, competitive rail transportation
13 options, that they currently have. Although the
14 letter that they sent to you dated November 18,
15 depending on how you read it, seems to -- well, it's
16 confusing, I guess. I don't know if you have a copy
17 of their letter, but it was -- on the second page, in
18 the second paragraph, in the middle there, in the
19 paragraph that begins, "In their motion", the second
20 sentence reads: Consumers, however, did not allege in
21 its comments that any presently available "competitive
22 options" would be eliminated by the subject

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1 transaction.

2 Well, it certainly seems, based on that
3 argument that I just read to you, that that's exactly
4 what they are saying. And then they go on to say,
5 "Rather, Consumers witness Garrity expressed the
6 concern that prospectively NS would not share
7 Conrail's Great Lakes market focus when it came to the
8 transportation of low sulfur coal".

9 So, even reading that sentence, it would
10 seem to me that there's still concern about somehow
11 losing options for the originating legs of coal
12 shipments. And what this discovery, in general, is
13 aimed at doing -- and I'll get to more of the
14 specifics a little bit later -- is basically to
15 determine what those options are and how they could be
16 affected by the transaction. Clearly, a relevant
17 inquiry.

18 Now, all of these things in Interrogatory
19 No. 1 request very basic kind of information about the
20 operations of the utility and of their plants, and
21 would obviously be basic kind of information necessary
22 to make an assessment as to what Consumers competitive

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1 options are with respect to coal supply and,
2 correspondingly, rail transportation.

3 Indeed, the verified statement of Mr.
4 Garrity indicates that one purpose of his verified
5 statement is to provide the Board with information on
6 Consumers electric generating systems and the coal
7 supply and transportation circumstances relied upon to
8 meet those systems' fuel needs. That's the Garrity
9 verified statement at 1. Interrogatory No. 1
10 essentially requests the same information, basic
11 information about these plants and their various coal
12 supply and rail transportation needs, and it is
13 limited to three years.

14 It's been standard practice in this
15 proceeding, as Your Honor knows, for parties to
16 produce information for a three-year period -- '95,
17 '96 and '97. We were required to produce such
18 information on numerous occasions and including on
19 utilities that weren't even in the case -- you know,
20 as we talked about with Ms. Brown. So, the request is
21 narrowly crafted to get at the information that our
22 experts say that they need.

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1 Now, one of the specific points that's
2 made in the letter is that they don't understand how
3 our request for information about average costs and
4 average fuel costs per kilowatt hour, 1(f) and 1(l),
5 is relevant to anything, but when you look at Mr.
6 Garrity's verified statement at page 3, he talks about
7 how Consumers blends coal to minimize the cost of
8 fuel. Obviously, getting low cost coal is a priority
9 of the utility, and we need to understand what their
10 current cost structure is for us to be able to address
11 this issue that somehow this transaction is going to
12 limit the availability of various coal suppliers to
13 Consumers. So, that's the basis for this information.

14 I don't think we need to go through
15 unless, as the argument proceeds, it makes sense to
16 touch on any of the others.

17 Now, in addition, Consumers argues that
18 much of this information, although perhaps not all of
19 it, is publicly available from FERC forms and EIA
20 forms. That may or may not be so, but the point is,
21 I think, that we were ordered to produce information
22 during the earlier proceeding that the other side had.

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1 We gave Mr. McBride copies of bids and proposals that
2 he already had. We were ordered to do so. I'm not
3 here to take exception to the representation in here
4 that this material is independently available from the
5 FERC, it seems to me that you have to weigh the
6 relative burden in terms of getting the information.

7 Consumers made a report to FERC. They've
8 got it in a file somewhere. It's obviously an
9 important report because it contains very basic
10 information that Consumers is required to supply to
11 the Government. And I think if you weigh the relative
12 burden of requiring us to go hunt in FERC to get this
13 information, or for Consumers to do into a file
14 somewhere and make copies of the documents, it's clear
15 that the relative burden here -- which Your Honor has
16 always obsessed throughout the course of the
17 proceeding when presented to a Motion to Compel --
18 indicates that the relative burden here would suggest
19 that Consumers should provide the information because
20 it is relatively less burdensome than for us to
21 provide --

22 JUDGE LEVENTHAL: Would these reports

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1 satisfy your Interrogatory Document Request?

2 MR. HARKER: We've not seen -- we've not
3 seen the reports and, indeed, I believe that there is
4 some information that was requested in here that is
5 not publicly available on these FERC forms.

6 JUDGE LEVENTHAL: Consumers isn't here --

7 MR. KOLESAR: Yes, sir.

8 JUDGE LEVENTHAL: Oh, you are representing
9 Consumers?

10 MR. KOLESAR: Yes. I'm sorry.

11 MR. HARKER: Yes, they are. This is the
12 problem. We've not been -- we just got this
13 objection, and we've not had an opportunity to review
14 these forms yet to see whether or not it has the
15 information that we need.

16 The thing is that it would be much -- from
17 our point of view in terms of dealing with information
18 that actually came from Consumers in answer to these
19 questions, I think it's much less likely to be
20 challenged than relying on a FERC document. We'd
21 asked them for some fairly basic information. If they
22 say it's just as easy as going to the FERC to get a

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1 report that they filed, they should be able to produce
2 that documentation just as easily, and it came from
3 them, and so it can't be subjected by them to later
4 second-guessing.

5 JUDGE LEVENTHAL: Mr. Kolesar?

6 MR. KOLESAR: Your Honor, CSX's Motion to
7 Compel turns discovery on its head. The obligation
8 should not be ours to produce publicly available
9 information just because CSX would like it. Mr.
10 Harker has suggested that CSX should not be required
11 to come to FERC and hunt for this information.

12 CSX has retained expert counsel in this
13 proceeding. Dr. Robert Sanson, of Energy Ventures
14 Analysis, who has tremendous credentials with respect
15 to the subject matter. Dr. Sanson is well aware of
16 FERC Form 423, he is exceedingly familiar with the
17 FERC Form 1. These materials are on file. Frankly,
18 we are of the view that Dr. Sanson probably already
19 has these materials and that they were instrumental in
20 helping him prepare his verified statement in this
21 proceeding some months ago. We submit that Dr. Sanson
22 probably would not have been doing a very good job had

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1 he not taken a look at these forms.

2 And as to the burden, one trip here to
3 FERC, it seems to us, would have allowed one of these
4 consultants to collect all of these publicly available
5 materials that pertain to each electric utility that
6 is involved in this proceeding.

7 Why, if it's so easy it should be our
8 obligation to do it, as opposed to CSX's, frankly,
9 Consumers does not understand. As to whether it's
10 better to get the information from Consumers as
11 opposed to the version that may be on file with FERC,
12 that material is identically the same.

13 The FERC Form 423s that Consumers may have
14 a copy of in its office are the same FERC Form 423s
15 that are on file here at FERC.

16 JUDGE LEVENTHAL: If you have a copy in
17 your office, what difference does it make whether you
18 xerox it and send it to them or make them come to FERC
19 to look for it?

20 MR. KOLESAR: Well, Your Honor, the burden
21 of discovery should be on the propounding party. Is
22 there any limit to the amount of public material they

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1 should produce? Understandably, if the material were
2 on file with a state utility commission, that might be
3 more burdensome for CSX. There might be some decent
4 argument to make that they shouldn't be required to
5 visit 20 state public utility commissions to examine
6 all the files. But they are here in Washington, as is
7 CSX's counsel and CSX's consultants. This is CSX's
8 proceeding. They are the Applicant. We are an
9 opponent to this proceeding. If they need this data
10 to make their case, frankly, Your Honor, we believe
11 that the onus should be on them.

12 The data called for in Interrogatory No.
13 1 is on public file, as I say, in the FERC Form 423s,
14 which are monthly reports, and they are on file for
15 '95, '96 and '97, through a relatively current period
16 -- I believe that's on the order of one to two months
17 -- it would be the same data that they would get
18 directly from Consumers.

19 There are certain -- FERC Form 1 is filed
20 annually, in '95 and '96. Form 1s are publicly
21 available. The 423 doesn't cover all the elements of
22 Interrogatory No. 1 but, if I may, subparts (a), (b)

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1 and (c) do not change from year to year so,
2 consequently, the 1996 Form 1 should cover that.

3 Subparts (i) and (j), as we indicated in
4 our November 18 letter to you, are duplicative of
5 other portions of CSX's requests and, consequently,
6 should not be at issue. Subparts (g) and (k) are in
7 423, again, which is filed monthly, which leaves us
8 with (d), (e), (f), and (l). They are subpart (d) the
9 amount of electricity generated; subpart (e) the
10 percentage of capacity utilized; (f) the average cost
11 per kilowatt hour; and (l) the average fuel cost per
12 kilowatt hour.

13 Frankly, Your Honor, they have access to
14 that material from 1996, 1995. While they may not be
15 able to get the information for 1997 from public
16 sources, we fall back on our relevance objection. Mr.
17 Harker characterized the contents of our comments of
18 our November 18 reply. I'd like to respond to that,
19 if I may.

20 Frankly, the November 18 reply language
21 should be read in the context of the actual Motion to
22 Compel. Reading from CSX's Motion to Compel briefly,

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1 at page 6 regarding Consumers, Interrogatory No. 1, 8,
2 9, Document Request No. 7, CSX states: "The comments
3 on the primary application that Consumers filed in
4 this proceeding complain of reduced competitive
5 options and being limited to one rail carrier after
6 the transaction".

7 That is not Consumers position. The
8 transaction will not affect the number of carriers
9 serving any one of Consumers plants. Consumers is not
10 a two-to-one shipper at any given destination, as has
11 been the case for some other utilities in other merger
12 proceedings.

13 We are suggesting in this case that the
14 substitute of NS for Conrail as the railroad capable
15 of originating coal from some low sulfur coal origins
16 -- generally in the Pennsylvania area -- for Conrail,
17 will generally hurt Consumers because Norfolk Southern
18 has provided that coal towards its traditional
19 southeast destinations. That is not the same as
20 saying that we have lost some of our competitive
21 service options at destination.

22 We don't believe that this material --

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1 (d), (e), (f) and (l) -- material which we believe is
2 more properly directed to through a market dominance
3 analysis, is appropriate in a merger proceeding.

4 At this point, Your Honor, I can continue
5 to lay out our position with respect to the other
6 interrogatories at issue, or I can --

7 JUDGE LEVENTHAL: Let's take them one at
8 a time.

9 MR. KOLESAR: Yes, Your Honor.

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

11 (Discussion off the record.)

12 JUDGE LEVENTHAL: Back on the record. All
13 right. Do you wish to address Mr. Kolesar's argument
14 with respect to the one?

15 MR. HARKER: Just a few things, Your
16 Honor, and obviously I'd be glad to answer any
17 questions that you have but, first of all, I think Mr.
18 Kolesar has conceded that not all of the information
19 requested in Interrogatory No. 1 is publicly
20 available. I think that's also basically what his
21 letter says.

22 And I think basically what they really

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1 fall back on is that this information is available at
2 FERC and/or somewhere else and we should go get it.
3 But, again, I think this is called discovery, and we
4 are entitled to discover facts from Consumers, and
5 there is just simply an issue about relative burden.

6 JUDGE LEVENTHAL: Well, his argument
7 really also goes to relevance in general. You've made
8 your argument on that.

9 MR. HARKER: Yes. Again, I think, you
10 know, with respect to (d), (e), (f) and (l), the items
11 that he indicates are not publicly available but he
12 again questions their relevance, is that they claim
13 that they are limited at origin, they are going to
14 suffer from this transaction because of a lack of
15 origin competition, and one of the things that they
16 say is that cost of coal is very -- or the cost of
17 generating electricity is very important, and that
18 goes into the kinds of coal that they can use.

19 An so, obviously, their cost structure is
20 relevant to determining exactly what coal sources are
21 available to them and, in turn, how those sources of
22 supply --

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1 JUDGE LEVENTHAL: The specific items. How
2 about the amount of electricity generated, why is that
3 important to you? What would that lead to?

4 MR. HARKER: That would allow us to
5 determine the overall capacity of these facilities,
6 and it made judgments as to how much coal they are
7 consuming, how is it relative to the amount of
8 electricity generated, and so on. This is not rocket
9 science. I mean, there is really no burden here. I
10 mean, this is what this utility does, it generates
11 electricity and, obviously, the extent of electricity
12 that they generate is important in determining what
13 coal sources they have and how much electricity they
14 might generate in the future if they were to get more.
15 It's not -- I think it's just basic information on the
16 plants.

17 JUDGE LEVENTHAL: It may be basic
18 information, but is it relevant? You're asking in
19 (g), you say the amount and times of coal burned. Why
20 do you have to know the amount of electricity
21 generated? You're interested in the coal that's being
22 transported. And that's also to percentage of

1 capacity utilized. What difference does that make to
2 you?

3 MR. HARKER: Well, again, with respect to
4 (e) the percentage of capacity utilized, all of these
5 things basically go to basic kind of information on
6 the utilities' operations. And with respect to
7 capacity, if they are over capacity, under capacity,
8 it goes to how much coal they may need, what kind of
9 a demand for coal they might have with respect to
10 capacity or under capacity -- you know, this is
11 basically basic information that the expert has asked
12 us to request.

13 JUDGE LEVENTHAL: All right. I'm ready to
14 rule. Do you have any further argument?

15 MR. KOLESAR: Two items. Mr. Harker said
16 that it has been Consumers' position that (d), (e),
17 (f) and (1) are not publicly available. I want to
18 clarify that that is only with respect to 1997. That
19 information is available in FERC Form 1, and the
20 reason is the year ending December 31, 1996.

21 Second item, with respect, again, to the
22 issue of whether the documents are publicly available,

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1 I will represent -- and Mr. Harker will correct me if
2 I'm wrong -- but to my best information, CSX has
3 general objections to each and every one of their sets
4 of responses to discovery requests has suggested that
5 they object to producing publicly available
6 information.

7 JUDGE LEVENTHAL: How have I ruled
8 previously on that, Mr. Harker, you have a good
9 memory. Have I required you to furnish publicly
10 available information?

11 MR. HARKER: The issue has never been, to
12 my memory -- and I'll let my colleagues correct me if
13 I'm wrong -- but to my memory, we have never pushed
14 that particular general objection.

15 JUDGE LEVENTHAL: The general --

16 MR. HARKER: And, indeed -- I'm sorry,
17 Your Honor, I was just going to say -- the only
18 analogous case that you have ruled on, and you have
19 ruled on it on numerous occasions, is, we took the
20 position with respect to Atlantic City, Indianapolis
21 Power, Niagara, Mohawk and other utilities that were
22 seeking information on bids and proposals that we

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1 submitted to them, that they had the information --
2 they already had the information, they didn't need to
3 get it from us. And you will recall that you ordered
4 us to produce information on bids and proposals
5 submitted to Mr. McBride's clients, for instance, and
6 that's how you limited Mr. McBride's discovery -- you
7 required us to produce documents -- I'm sorry -- bids
8 and proposals that we submitted to Atlantic City, for
9 instances, despite the fact that obviously they've got
10 these documents.

11 So, that's the only analogous case. And
12 I would say, though, that that is support enough for
13 requiring Consumers, who has these reports, to make
14 photocopies of them and give them to us. It's
15 basically the same principle.

16 JUDGE LEVENTHAL: All right. The general
17 rule in discovery is that you don't have to furnish
18 documents which are publicly available. In this
19 instance, though, I think Mr. Harker makes a good
20 argument. I don't see that there's any burden on
21 Consumers to copy these documents and furnish them,
22 and so I'll so order it.

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1 I take it that your answer is that all the
2 information requested is in these documents that
3 you're referring to except for 1997.

4 MR. KOLESAR: With the exception, Your
5 Honor, of (d), (e), (f) and (l) for '97. All the
6 other elements, all the other subparts are available
7 in 1997.

8 JUDGE LEVENTHAL: These four, do you need
9 1997 for them, Mr. Harker?

10 MR. KOLESAR: As it is is '95 and '96 for
11 (d), (e), (f) and (l). We have Form 1 for year ended
12 December 31, '95 and December 31, '96.

13 MR. HARKER: And you don't have
14 information on '97?

15 MR. KOLESAR: It is not yet publicly
16 available, which I think was His Honor's question.

17 MR. HARKER: So it hasn't been filed with
18 FERC, but you've got it available to you.

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

20 (Discussion off the record.)

21 JUDGE LEVENTHAL: Back on the record. All
22 right. With respect to (d), (e), (f) and (l),

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1 Consumers does not have to furnish the information for
2 1997.

3 All right. The next item is Interrogatory
4 8.

5 MR. HARKER: Yes, Your Honor. Let's see,
6 with respect to Interrogatory No. 8 --

7 MR. KOLESAR: If I could interrupt, I may
8 be able to expedite this. Given Judge Leventhal's
9 ruling on Interrogatory No. 1, with respect to the
10 production of that information, we will see (a) and
11 (b) of No. 8 answered with the production of FERC Form
12 423s as well.

13 MR. HARKER: So (a) and (b) are off the
14 table?

15 MR. KOLESAR: Yes. And (c), which we
16 indicated in our November 18th letter, has been
17 answered by other responses to your Interrogatories.

18 MR. HARKER: Okay. I now am reading from
19 the responses of Consumers Energy Company to CSX's
20 First Set of Interrogatories and Request for
21 Production of Documents, which we received two days
22 ago by fax. Interrogatory No. 8 -- actually, all that

1 is provided there -- it says objection -- this is now
2 in their responses, their 15-day responses.

3 Objection. Consumers objects to this
4 interrogatory on the grounds that its request for
5 details of each spot purchase of coal made over a
6 nearly three-year period is overbroad, unduly
7 burdensome, and seeks information which is not
8 relevant to any issue raised by Consumers in this
9 proceeding which must or properly can be resolved in
10 this proceeding.

11 And your letter, dated November 18,
12 doesn't refer to any other interrogatory response that
13 would give an answer to No. (c). So, can you help me
14 --

15 MR. KOLESAR: I believe I can. Referring
16 to the letter, on page 3 of our November 18 letter, we
17 say in paragraph 2 under Interrogatory No. 8,
18 "Moreover, all of the information sought by CSX
19 Interrogatory No. 8 is available either from public
20 documents or from Consumers responses to other
21 interrogatories and document requests".

22 You are quite right that we don't indicate

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1 which request. I believe, although I cannot confirm
2 this, that it is Interrogatory No. 6 regarding the
3 rail transportation contracts. I believe that we
4 spell that information out in some detail.

5 MR. HARKER: Okay. Now, the response to
6 Interrogatory No. 6 is a long response. Although --
7 and, Your Honor, I don't know how you would want to
8 proceed. I appreciate you don't have this document,
9 but the response does go on for about three and a half
10 pages, and I don't think it would be worth your time
11 for me to read this. But help me, if you could, Mr.
12 Kolesar, Interrogatory 8(c) says "All rail carriers
13 involved in the transportation of the coal" -- meaning
14 the spot purchase of coal -- in terms of your answer
15 to Interrogatory No. 6, how do we tell what is a spot
16 purchase and what isn't?

17 MR. KOLESAR: You will be able to tell
18 about spot purchases from the FERC Form 423. There
19 will be a category there on each monthly report from
20 purchases from each origin, there will be a
21 designation as to whether it is a "C" or an "S",
22 contract or spot. By matching up the 423 with the

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1 information we provided to you there with respect to
2 the rail carriers serving the plants and the other
3 railroads involved in the transportation, I believe
4 that should give you the information.

5 MR. HARKER: So we're supposed to take
6 423, figure out if it's a "C" or an "S" on the form
7 somewhere, and then link it to a destination and/or an
8 origin?

9 MR. KOLESAR: The 423s are broken down by
10 specific generating station and also by origin.

11 MR. HARKER: I hate to be difficult. My
12 only concern is -- and, ultimately, we're going to --
13 so what you're asking us to do is correlate
14 information on the 423 with information that you
15 provided in Interrogatory No. 6, which doesn't refer
16 at all to Form 423, right?

17 MR. KOLESAR: That's correct.

18 MR. HARKER: But maybe we can do that,
19 maybe we can't. I mean, that's not really answering -
20 - that's not really a response to -- I don't think
21 it's really a response to the interrogatory.

22 My only concern is that to the extent that

1 different terminology is used -- I mean, I suspect,
2 for instance, that when you -- I don't know -- but to
3 the extent that there are differences in terminology
4 between Interrogatory No. 6 and FERC Form 423, that's
5 going to introduce confusion. And I've learned enough
6 about this business to know that sometimes different
7 plants go by different names even within the same
8 company. So, to the extent that the terminology is
9 inconsistent between FERC Form 423 and Interrogatory
10 No. 6, which doesn't refer to FERC Form 423 -- and I
11 suspect that FERC Form 423 won't refer to
12 Interrogatory No. 6 -- doing the cross-matching is not
13 going to be easy and could lead to some confusion.
14 And I don't think there is any interest in being
15 confused here.

16 And I think I would just cut through all
17 this and indicate, Your Honor, that if it is that
18 simple to match up these various things, the more
19 straightforward way to do it and the way to avoid any
20 of this possible confusion which I feel certain will
21 exist, is to require Consumers to do that.

22 JUDGE LEVENTHAL: Let's find out one more

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1 thing. On Form 423, when you say each item is
2 designated with a "C" or and "S" and that stands for
3 spot, what does that show?

4 MR. KOLESAR: That shows, for August 1997,
5 for Consumers Campbell plant -- and treat this as a
6 hypothetical, please -- you may see three entries.
7 The first entry will be SPFS, spot coal purchased from
8 blank, and the name of the coal supplier; number of
9 tons, and you'll have that information.

10 JUDGE LEVENTHAL: Does it give you the
11 railroad?

12 MR. KOLESAR: No, it does not give you the
13 railroad, but it will tell you where it's coming from.
14 I understand, and I don't mean to make Mr. Harker read
15 this quickly and know what we're saying in our entire
16 interrogatory answer -- I know he's got a lot to look
17 at.

18 I will represent that I think the
19 consultants for CSX will have no difficulty whatsoever
20 in doing this. I offer that to Your Honor before you
21 make your ruling. Granted the fact that the 423s
22 don't refer to Interrogatory No. 6 and Interrogatory

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1 No. 6's answer doesn't refer to a 423, it should not
2 be that difficult for CSX's consultants to do that.
3 That's the best I can offer at this point on that.

4 MR. HARKER: I'm sorry, Your Honor, I'm
5 obviously at a disadvantage. I just do worry that we
6 are being asked to correlate documents that we didn't
7 prepare and that we had no --

8 JUDGE LEVENTHAL: What does 6 show? I
9 don't have 6. What does that show?

10 MR. HARKER: If I may, I'm giving you a
11 copy of a November 18, 1997 facsimile from Slover and
12 Loftus, Mr. Kelton Dowd, I think a colleague of yours,
13 to Dennis Lyons, a partner of mine, and Sam Sipe, and
14 it is a facsimile copy of Consumers Energy Company's
15 Responses to CSX's First Set of Interrogatories and
16 Request for Production of Documents.

17 The other thing that I don't see on No. 6
18 is -- and it doesn't say anything about contract
19 versus spot. It also doesn't say anything about
20 origin. And to the extent that you need origin
21 information to tie -- it only talks about destination.
22 And it would seem to me that obviously the origin --

1 when you're talking about spot purchase of coal, I
2 mean, the key thing is origin here.

3 So, again, I'm just concerned that when we
4 try and put those forms together, it may not have the
5 information we need or (b) it just -- it might not be
6 able to correlate because of different terminology and
7 the like.

8 JUDGE LEVENTHAL: Interrogatory No. 6
9 deals with contracts, doesn't it?

10 MR. KOLESAR: Rail contracts, Your Honor.
11 And the issue in Interrogatory No. 8 is spot purchases
12 of coal. The spot purchases of coal would be moving
13 by rail transportation contract.

14 JUDGE LEVENTHAL: And some of these
15 contracts are spot contracts?

16 MR. KOLESAR: No. Well, I don't
17 understand Your Honor's terminology. The contracts
18 that we're talking about in response to Interrogatory
19 No. 6 are rail transportation contracts.

20 JUDGE LEVENTHAL: Well, how would they
21 determine whether one of these shipments is a spot
22 shipment or not? Is there a contract when there is a

1 spot shipment?

2 MR. KOLESAR: There is a contract. It's
3 one of those coal transportation contracts.

4 JUDGE LEVENTHAL: Is that included in
5 here?

6 MR. KOLESAR: Yes. Those contracts would
7 be utilized to transport coal, whether that coal be
8 bought as a spot purchase or under a coal supply
9 contract.

10 JUDGE LEVENTHAL: But origin and
11 destination and the carrier, doesn't that give you the
12 information you want?

13 MR. KOLESAR: It doesn't have the origin
14 on there. It doesn't have from where the coal
15 originated. CSX's consultants should know that for
16 each of the origins in a 423, which carriers serve
17 those origins.

18 MR. HARKER: I guess I'm trying to figure
19 out why the issue on No. (c) -- there's not a
20 relevance objection here -- I mean, we're not talking
21 about relevance -- I mean, we're essentially -- I
22 don't know if this is burdened or what have you, but

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1 I think, you know, clearly, being able to tie a
2 particular rail carrier to a particular spot purchase
3 will be part of our case, and I would suggest here
4 again, you know, with respect to relative burden --
5 you know, we are being asked to correlate documents
6 that we didn't create, and I don't know why we're
7 being asked to do that. I would think it would be
8 fairly straightforward for Consumers to provide this
9 information to us.

10 JUDGE LEVENTHAL: Do you have any further
11 argument on it? I don't know, I think we're spending
12 more time on the argument than it's worth. I've
13 looked at 6. It seems to me it should be easy for
14 your client, Mr. Kolesar, to correlate that.

15 MR. KOLESAR: I'm sorry, Your Honor.

16 JUDGE LEVENTHAL: The motion is granted
17 with respect to Interrogatory No. 8.

18 MR. HARKER: The last one, Your Honor, is
19 Interrogatory No. 9 and Document Request No. 7.
20 Identify all offers, requests for quotations or other
21 documents soliciting bids for the transportation of
22 coal to any of Consumers generating stations.

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1 Interrogatory No. 9 and Document Request No. 7 go
2 together.

3 If I could interrupt my train of thought
4 here for a second, I wanted to clarify, where are we
5 on Document Request No. 6? There had been an
6 objection to that in your initial objections, but I
7 notice that it's not picked up in your paper. Is that
8 still an outstanding issue?

9 MR. KOLESAR: Well, based upon the Motion
10 to Compel, we understood that issue to not be noticed
11 for today's hearing. CSX has indicated in its Motion
12 to Compel that assuming compliance with Interrogatory
13 No. 7, CSX is prepared to withdraw No. 6. We Have
14 heard nothing from CSX on the point.

15 MR. HARKER: We will have to talk about
16 that then because we just got your response to that
17 particular interrogatory that we were hoping would
18 take the place of the document request, and we have
19 some issues on that. Thank you. I just wanted to
20 clarify that.

21 Okay. Back to Interrogatory No. 9 and
22 Document Request No. 7, I indicated that Interrogatory

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1 No. 9, identify all offers, requests for quotation or
2 other documents soliciting bids for the transportation
3 of coal to any of Consumers generating stations. And
4 Document Request No. 7 is the companion document
5 request for that one.

6 Well, again, Your Honor, this one is
7 relevant because we are trying to establish and
8 determine exactly what Consumers coal transportation
9 options are. And to the extent that they are claiming
10 that they are losing a transportation option either at
11 origin or destination, I think it's clearly relevant
12 to examine what proposals they solicited or
13 entertained to supply coal to that plant. It's not
14 limited to ultimate delivery, but any participation in
15 interline or intermodal movement is relevant because
16 they seem to be arguing that they are losing an
17 origination option. And we're entitled to discovery
18 as to what bids they've actually received. It's only
19 three years. It's only three years, it's '95 to '97,
20 and this is analogous to Mr. McBride's request -- or
21 actually to your limitation on Mr. McBride's request
22 to require us to produce bids and proposals submitted

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1 to Atlantic City for '95 to '97.

2 JUDGE LEVENTHAL: Your interrogatory
3 doesn't indicate a time period. You're requesting it
4 for '95?

5 MR. HARKER: I'm sorry, Your Honor. There
6 is an instruction in the Interrogatories that
7 indicates the appropriate time limit is '95 to the
8 present unless otherwise specified.

9 MR. KOLESAR: Your Honor, Mr. Harker has
10 identified a theory of relevance that is not in his
11 Motion to Compel. If we look strictly at the Motion
12 to Compel with respect to Interrogatory No. 9, CSX
13 states, "This information is clearly relevant to
14 determining what coal transportation options are
15 available to Consumers in light of its contention that
16 it has none".

17 As we indicated in our November 18th
18 letter, there is only one generating station for which
19 we contend that we have no transportation options.
20 That is clearly reflected in our October 21st
21 comments. That single station is the Campbell
22 station. It is served presently and in the future

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1 will be served solely by CSX.

2 In Mr. Dowd's letter dated November 18, he
3 indicates that in light of the narrowing that we see
4 in the Motion to Compel, if Your Honor believes this
5 to be relevant, we will undertake to conduct a search
6 for solicitations out of our offers for rail coal
7 delivery service to Campbell by carriers other than
8 CSX. On the basis of the fact that Campbell is the
9 only CSX destination and CSX presumably has all that
10 information in its own possession already about the
11 bids it has made to provide transportation service.

12 JUDGE LEVENTHAL: All right. Mr. Harker?

13 MR. HARKER: Well, we are having
14 difficulty in terms of trying to figure out exactly
15 what Consumers position in the case is because when we
16 read their comments, their comments talk generally in
17 terms of a reduction of rail transportation options,
18 and they don't single out the Campbell plant.

19 We have tried to work out a stipulation
20 with Consumers yesterday, to avoid the hearing, where
21 we were focusing in on exactly what the issues were,
22 and we broke down over this issue as to reduction of

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1 rail transportation options, be they at origination or
2 destination, to any of their plants.

3 And it is my understanding, although I was
4 not involved in the negotiations -- it is my
5 understanding that where we ended up was, we couldn't
6 agree on a stipulation because Consumers was unwilling
7 to agree to a stipulation that said that the
8 transaction would not reduce any presently available
9 competitive options for the transportation of coal to
10 Consumers generating stations. They were not willing
11 to agree to that, and we couldn't work out a
12 corresponding stipulation.

13 So, the issue -- let's not get hung up on,
14 well, they're going to have no options, or they're
15 going to have one option, or two options. I mean, I
16 think the critical thing is that they are arguing that
17 the effect of the transaction on them is to reduce
18 competitive options for rail transportation of coal.

19 The purpose of this interrogatory is to
20 test that by asking them for a three-year period what
21 bids and offers have they received for the rail
22 transportation of coal.

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1 Now, if they want to stipulate that as to
2 the other plants they are not arguing that they are
3 losing any rail transportation options, either
4 origination or destination, for any of those three
5 plants, and all we're talking about is Campbell, I
6 think we've got a basis to do a deal, but that is not
7 my understanding of where they are.

8 JUDGE LEVENTHAL: Isn't that what your
9 letter says?

10 MR. KOLESAR: Our letter -- I see that
11 you're pointing to page 4 of our letter. Our letter
12 is in reply to CSX's Motion to Compel where they
13 contend that the relevance of this entire question is
14 based upon the fact that we have contended that we
15 have no coal transportation options.

16 Our comments reflect the fact that
17 presently and in the future we will have no coal
18 transportation options solely at the Campbell station.
19 Campbell is served only by CSX now, will be served
20 only by CSX in the future.

21 JUDGE LEVENTHAL: Well, then, why wouldn't
22 you stipulate in accordance with what Mr. Harker has

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1 just told us? Isn't that the same thing? Am I
2 misunderstanding something here?

3 MR. KOLESAR: Perhaps I haven't explained
4 it fully, Your Honor. We are concerned with regard to
5 all of our generating stations, that the loss of
6 origin competition, competition among originating
7 railroads, will affect out plants. There will be no
8 change in the configuration of rail carriers actually
9 serving the plants, no destination will go from two to
10 one.

11 But the particular that's relevant with
12 respect to this interrogatory is CSX's basis for
13 claiming relevance. It is not what Mr. Harker has
14 said here this morning, it is what they say in their
15 Motion to Compel. The information is clearly relevant
16 to determining what coal transportation options are
17 available to Consumers in light of its contention that
18 it has none. We have only indicated that with respect
19 to Campbell. We've indicated our willingness to
20 produce these documents with respect to Campbell.

21 MR. HARKER: I think this is clear, Your
22 Honor. The issue of the other plants is on the table.

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1 They won't take it off the table. Sure, when we wrote
2 our Motion to Compel, we read their paper to mean that
3 it looked like maybe Campbell was the only issue, but
4 so what? We wrote that paper a few days based on that
5 understanding. We weren't trying to fool anybody.

6 We now have a very clear understanding.
7 Based on negotiations with Consumers about trying to
8 get a stipulation that would reduce the issue to only
9 Campbell. And now, secondly, on the record with Your
10 Honor, they are not willing to take the other stations
11 off of the table. They are concerned about a
12 reduction of rail transportation options for those
13 other facilities.

14 What better evidence on their rail
15 transportation options for those other facilities than
16 to ask them, tell us what bids you've gotten over the
17 course of the last three years to move coal to those
18 facilities.

19 JUDGE LEVENTHAL: Well, it seems fair to
20 me, Mr. Kolesar -- you've just said you are concerned
21 about competition at origin points.

22 MR. KOLESAR: Yes, Your Honor.

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1 JUDGE LEVENTHAL: Isn't that relevant to
2 the question he's asking?

3 MR. KOLESAR: It's not relevant, Your
4 Honor, to the basis for the Motion to Compel, and I
5 think Mr. Harker did just admit that his Motion to
6 Compel is strictly -- that the theory of relevance
7 articulated in the Motion to Compel only applies to
8 Campbell. Whether CSX did not understand our comments
9 up to that time or not is irrelevant, that's what the
10 Motion to Compel says.

11 JUDGE LEVENTHAL: I'll grant the motion.
12 I'll find that it may lead to relevant information.
13 All right.

14 MR. HARKER: Your Honor, one more --

15 JUDGE LEVENTHAL: Just so it's clear, I'm
16 granting the Motion to Compel on Interrogatory No. 9
17 and Document Request No. 7.

18 MR. HARKER: Thank you, Your Honor. And
19 then I think one last issue, and that relates to
20 Document Request No. 6 which, as Mr. Kolesar
21 mentioned, is not addressed in the November 18th
22 letter because they were under the impression that we

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1 had I guess withdrawn the request that we made in the
2 document -- I'm sorry -- in the Motion to Compel.

3 Let me, just for the record, read to you
4 Document Request No. 6. Produce all documents
5 identified or which should be identified in response
6 to Interrogatory No. 7, and Interrogatory No. 7, to
7 which Consumers did not object, stated, separately for
8 each of Consumers generating stations identify each
9 contract currently in effect for the supply of coal
10 and for each provide the following information: (a)
11 name of supplier; (b) name and location of mine
12 supplying coal; (c) expiration date; (d) a detailed
13 description of any contract terms discussing the
14 transportation of coal to Consumers.

15 In the responses to Interrogatory No. 7,
16 the responses that we received two days ago,
17 information responsive to this interrogatory may be
18 obtained from Consumers FERC Form 423 which is
19 publicly available to CSX. For further answer,
20 Consumers has placed documents containing information
21 responsive to this interrogatory in a document
22 depository. So that's the answer we got to

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1 Interrogatory No. 7.

2 What we said in our Motion to Compel at
3 page 8 was that we didn't think that the objection to
4 Document Request No. 6 was well taken, but we noted
5 that Consumers didn't object to Interrogatory No. 7,
6 which requests a limited amount of information as to
7 each current coal supply contract. And then, assuming
8 that Consumers is prepared to provide full and
9 complete responses to Interrogatory No. 7, CSX is
10 prepared to withdraw Document Request No. 6. In the
11 event that Consumers response to No. 7 is not full and
12 complete, CSX asks Your Honor to order production in
13 response to No. 6.

14 First of all, FERC Form 423 you're going
15 to produce anyway in response to the Motion to Compel?

16 MR. KOLESAR: That's correct.

17 MR. HARKER: When we talked yesterday, the
18 documents that I guess are referred to in
19 Interrogatory No. 7 were still not available to us.
20 We haven't had an opportunity to review them, and so,
21 Your Honor, I apologize, but I'm sort of at a loss as
22 to what to do. Perhaps you can shed some light on it

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1 since maybe you've seen the documents.

2 MR. KOLESAR: I think that I may be able
3 to. I can tell you, anyway, that those documents are
4 in production. The due date for our responses was
5 yesterday. As I understand the discovery documents in
6 this case, there is a two-day period with which
7 parties may comply with requests that materials in a
8 depository be actually produced. Mr. Harker, or one
9 of his colleagues -- I'm not sure who the author was -
10 - had requested that all materials in depositories be
11 provided to him. It's not our position that that
12 actually trumps the discovery balance with respect to
13 whether we need to make these materials available on
14 an expedited basis in light of those requests.

15 In any event, those materials, I
16 understand, will be ready today. They will be in the
17 depository effective today, and will be made available
18 to Mr. Harker for his review. Given that fact, I'm
19 not sure where we stand.

20 JUDGE LEVENTHAL: It seems to me, Mr.
21 Harker, you'd have to look at the documents.

22 MR. HARKER: Right. I guess that's

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1 right, although I feel a little bit disadvantaged here
2 in a way, I suppose, in the sense that I have -- in
3 the spirit of compromise, we've tried to move things
4 along. We're not here just to fight about things,
5 although it is nice to be here with you.

6 (Laughter.)

7 MR. HEALEY: Do you want to give him an
8 apple, too?

9 MR. HARKER: And so I feel like I've made
10 -- you know, we made a concession in good faith that
11 is now going to be used against us. I think we do
12 have a right to these contracts. We were willing to
13 accept a little bit less, assuming that we were in a
14 position by today to take the issue off the table but,
15 quite honestly, again, their complaint is that they
16 have -- because of their specifications, there are
17 certain types of coal that they can use and they can't
18 use. That's a bedrock of where they are in this case.
19 And we say, listen, we're opening up new coal fields
20 to you on the basis of single line service, and they
21 say, those are no good for us, we can't use that coal.
22 That's a bedrock for their claim that the transaction

1 doesn't give them public benefit.

2 And so what we need to do to test that is,
3 well, let's see what coal they are buying. Let's see
4 what coal they are actually using, and let's see how
5 similar that is to the coal that we're offering to
6 them single line. So, this is very important stuff,
7 Your Honor, this is very important stuff.

8 And I would submit to you that if I hadn't
9 made that concession in this Motion to Compel to try
10 and move things along, that you would see things my
11 way, and you would give me those contracts based on
12 where we --

13 JUDGE LEVENTHAL: Mr. Harker, you can't
14 make a concession and then withdraw it.

15 MR. HARKER: I can appreciate that.

16 JUDGE LEVENTHAL: Why don't you wait and
17 see what these documents show. We meet every week,
18 and the most you're going to lose is another four or
19 five days provided that you're not satisfied, and
20 provided I then grant your motion. And I think -- I
21 don't think you're going to impede Mr. Harker --

22 MR. KOLESAR: No, Your Honor.

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1 JUDGE LEVENTHAL: You've argued honestly.
2 I've ruled to the best of my judgment. I think you
3 will follow through.

4 MR. HARKER: So, Mr. Kolesar, when do you
5 expect that actually I will get the documents at
6 Arnold and Porter?

7 MR. KOLESAR: There will have to be some
8 discussion as to the means through which those
9 documents are transported to Arnold and Porter, but
10 later today is certainly likely. I don't see any
11 reason why it might not happen, absent your
12 requirement to being here throughout the balance of
13 the afternoon, but I trust that the message can be
14 conveyed to someone else at your firm.

15 MR. HARKER: Yes, it certainly can. Mr.
16 Richard Rosen, who you've talked to, would, in my
17 absence, be the point of contact. And I appreciate
18 Your Honor's statements.

19 Let me just ask one other thing. The
20 documents that you are producing today to us go to the
21 second sentence in Response to Interrogatory No. 7,
22 but the first sentence is FERC Form 423 which you were

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1 just ordered to produce today. Can you give me an
2 idea when I'm going to get that?

3 MR. KOLESAR: I don't have as specific a
4 time in mind for that. We don't have the documents in
5 our office at the present time. Close of business
6 Monday? Noon Monday?

7 MR. HARKER: I'm thinking of the offer and
8 the very reasonable thing you've said about we are
9 going to reconvene next Tuesday, and if -- obviously,
10 I don't want to miss another week, so I want to be
11 sure I've got everything before Tuesday. Monday at
12 noon?

13 MR. KOLESAR: We can do that.

14 JUDGE LEVENTHAL: All right.

15 MR. HARKER: Your Honor, I think that's
16 it.

17 MR. KOLESAR: I believe so.

18 MR. HARKER: I don't think we have
19 anything more on Consumers.

20 JUDGE LEVENTHAL: All right. That
21 disposes of that one. Let's go off the record.

22 (Discussion off the record.)

1 JUDGE LEVENTHAL: Back on the record.
2 We'll take a luncheon recess until 1:30.

3 (Whereupon, at 12:50 p.m., the luncheon
4 recess was taken and the proceedings resumed at 1:30
5 p.m.)

6 JUDGE LEVENTHAL: Back on the record.

7 MR. HARKER: The next subject of the
8 Motion to Compel concerns objections filed by Elgin,
9 Joliet and Eastern Railway and Transtar, Inc., to
10 CSX's and Norfolk Southern's First Set of
11 Interrogatories and Requests for Production of
12 Documents.

13 The subject of the first objection was
14 Interrogatory No. 1(a) and (b), and Interrogatory 1(a)
15 provides, state when discussions and/or negotiations
16 between EJE and I&M Railway, Inc., IMRL, commenced
17 regarding the submission of a joint application to the
18 Board for acquisition of the 51 percent stock
19 ownership of Conrail in the Indiana Harbor Belt
20 Railroad Company, (IHB). And Interrogatory 1(b),
21 state when an agreement was reached with IMRL to
22 submit a joint application to the Board for

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1 acquisition of the 51 percent stock ownership of
2 Conrail in the IHB.

3 The next objection pertained to
4 Interrogatory No. 3 --

5 MR. HEALEY: Are we going to go through
6 them one at a time, or did you want to do all of them
7 --

8 MR. HARKER: Well, my practice has been to
9 read them all at the outset, and then to go through
10 them one at a time.

11 MR. HEALEY: Very good.

12 MR. HARKER: Interrogatory No. 3, with
13 respect to the statement on page 9 of the responsive
14 application, (EJE-10), "Each of the carriers has
15 sufficient resources available for the purchase of a
16 proportionate share of stock" in IHB. What was the
17 approximate purchase price for the totality of the 51
18 percent of the stock of IHB that was assumed in
19 connection with making this statement.

20 And, Your Honor, if you're following along
21 in your materials, I'm reading from the objections
22 that are at Tab 3 of the filing. I apologize for not

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1 making that clear before.

2 JUDGE LEVENTHAL: I'm with you.

3 MR. HARKER: Interrogatory No. 7. With
4 respect to the concerns about neutrality of switching
5 expressed in the verified statement of William H.
6 Brodsky (particularly at pages 3-7) and the concern at
7 page 7 about the possibility that "CSX will play a
8 dominant role" in the management of IHB and other
9 terminal carriers in Chicago, explain why would CSX
10 not want to have an efficient interchange with IMRL,
11 given that the CSX lines and the IMRL lines are
12 entirely end-to-end.

13 Interrogatory 8(a) was also objected to.
14 That provides, state whether EJE's Board of Directors
15 has authorized EJE to make any investments into
16 facilities for IHB, in the event the transactions
17 contemplated by your responsive application are
18 authorized by the STB and are consummated.

19 Interrogatory No. 8(b) was also objected
20 to. It provides, describe such investments including
21 the projects involved, the estimated amounts in
22 dollars, the timing of such investments and projects,

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1 and the proposed sources of funding, including whether
2 commitments for such funding have been obtained.

3 Interrogatory No. 8(c) provides, identify
4 all documents relating to the investments,
5 authorizations, fundings, and commitments referred to
6 in subsections (a) and (b) of this Interrogatory No.
7 8.

8 And then with respect to Request for
9 Production of Documents, Request No. 3 was objected
10 to. It provides, produce all documents relating to
11 the computation of the assumed purchase price referred
12 to in Interrogatory No. 3. And Document Request No.
13 5, produce all documents identified or which should
14 have been identified in response to subsection (c) of
15 Interrogatory No. 8.

16 Going back to Interrogatory No. 1 which,
17 in totality, asked about the process by which EJE and
18 I&M Rail Link, IMRL, came together to file jointly
19 this responsive application, and the background here
20 is that the interest of IMRL in acquiring any part of
21 the Indiana Harbor Belt, which is the basic claim of
22 relief in the responsive application -- that is to

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1 say, CSX and NS, under the transaction agreement, are
2 due to assume the 51 percent interest that Conrail
3 holds in IHB, and EJE and IMRL are basically seeking
4 to take that away from CSX and NS, and they would
5 jointly control IHB.

6 The first time that we had any indication
7 that IMRL was on the scene was on October 21, when
8 IMRL joined with EJE. You will recall that EJE took -
9 - or at least filed discovery against the Applicants
10 with respect to the IHB. During the earlier part of
11 the proceeding, IMRL was not part of it. On August
12 22nd, EJE, under the Board's rules, was required to
13 file their notice of description of responsive
14 application. This was essentially a preview for
15 everyone about what all of the responsive applications
16 that would be filed on October 21 would look like.

17 Interestingly, on August 22nd, EJE
18 indicated their intent to submit a responsive
19 application and said nothing about IMRL. In addition,
20 on October 1, there was a filing relating to the
21 environmental effects of the responsive applications
22 that would be submitted on October 21. Again, no

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1 mention of IMRL. So, IMRL appears on the scene on
2 October 21.

3 And our interrogatories -- there are four
4 in total -- subparts (a), (b), (c) and (d) -- EJE has
5 objected to subparts 1(a) and (b) which ask when
6 discussions or negotiations between EJE and IMRL
7 commenced regarding the submission of the application,
8 and (b) when were the negotiations consummated.

9 EJE's objection to those two
10 interrogatories is that basically it's not relevant.
11 Neither piece of information is relevant.

12 Well, Your Honor, we would submit that
13 understanding when the plan, if you will, of EJE and
14 IMRL came together to acquire and operate IHB is
15 relevant, and certainly is the kind of information
16 that may lead to the discoverability of other relevant
17 information.

18 Basically, the idea would be that to the
19 extent that this plan came together between, say,
20 October 1 and October 21, to file this joint
21 application to operate this carrier which plays an
22 important role in the operations of the Chicago Rail

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1 System is important. To the extent that this plan to
2 acquire the railroad came together at the last minute,
3 that would tend to show perhaps a lack of advance
4 planning, and we are certainly entitled to know that
5 as to when the negotiations began and when they ended.

6 JUDGE LEVENTHAL: Mr. Healey?

7 MR. HEALEY: Judge, if I can, I would like
8 to briefly, I suppose, readdress an issue I raised
9 this morning regarding the Applicant's failure to
10 contact me prior to the hearing. I've made the
11 argument, it's on the record. I would ask that you
12 give me a ruling on that objection.

13 JUDGE LEVENTHAL: Are you prepared to
14 argue on the merits?

15 MR. HEALEY: I am prepared to argue on the
16 merits fully and completely, and vigorously, I might
17 even add.

18 JUDGE LEVENTHAL: Well, I don't encourage
19 the violation of the discovery guidelines, my practice
20 is if there is no harm to the other party, no injury,
21 I grant a waiver of the rules and, in this instance,
22 I will grant a waiver of the rule.

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1 MR. HEALEY: Very good.

2 MR. HARKER: Your Honor, can I -- if we're
3 going to revisit this, I feel compelled, Your Honor,
4 to speak.

5 JUDGE LEVENTHAL: I've ruled in your
6 favor.

7 (Laughter.)

8 MR. HARKER: I know, Your Honor.

9 JUDGE LEVENTHAL: Can I change my mind
10 after you're finished?

11 MR. HARKER: No, I just -- just for the
12 record -- just for the record, we did not violate the
13 discovery guidelines. There is no -- and Mr. Healey
14 has cited no requirement -- that we violated. He
15 talks generally in terms of the discovery guidelines,
16 but there is no paragraph in there that required us to
17 consult with him in advance before filing our Motion
18 to Compel. Indeed, we were criticized by some parties
19 at the earlier part of the proceeding, that we had an
20 obligation to consult with them and negotiate with
21 them before we filed our five-day objections. And
22 people were arguing at that time that that requirement

1 was somewhere in the discovery guidelines, but where
2 nobody could ever tell us.

3 And so I would submit to you that there
4 was no violation of the discovery guidelines here. We
5 have an obligation to give notice to you as well as
6 the other parties by four o'clock on Monday, to the
7 fact that there is a dispute that is -- since I said
8 Mr. Healey didn't give us a citation -- it's in
9 paragraph 18, and that's what we did. And there is no
10 -- we made no violation of the rules and, as a result,
11 there is no need for waiver. If you find there is a
12 need for a waiver, Your Honor, I accept it gratefully.

13 JUDGE LEVENTHAL: In view of the fact that
14 no injury has been asserted and counsel was prepared
15 to argue, I thought I'd save time by granting the
16 waiver.

17 MR. HARKER: And I accept that. I don't
18 know why it was so important for Mr. Healey to get on
19 the record that you were basically ordering him to go
20 forward. I don't know if he's trying to set up an
21 appeal. And to the extent that he is, I just wanted
22 to be sure that the record down below is clear.

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1 JUDGE LEVENTHAL: I think Mr Healey is
2 making his motion or response to the fact that last
3 time he had to come back because of lack of sufficient
4 notice, but why waste time on this.

5 MR. HEALEY: Judge, I just want to make
6 one more point clear on this, and then we can move on
7 to the substance of the motion. The paragraph that
8 Mr. Harker is talking about starts off by saying
9 "Discovery disputes shall be resolved voluntarily
10 among the parties whenever possible. Otherwise,
11 counsel for a party seeking a ruling shall contact",
12 and it goes on from there.

13 That paragraph seems to me to indicate
14 there is supposed to be a prior contact. We could
15 debate the point. It seems to be moot based on your
16 argument, but I think it certainly indicates to me
17 that there is supposed to be an effort to resolve
18 these, just as there is in Federal Courts and in state
19 courts throughout the land. I have said my piece.

20 JUDGE LEVENTHAL: If you want a statement
21 or the record, I think parties should attempt to
22 resolve discovery disputes before making Motions to

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1 Compel. In any event, why don't we go ahead.

2 MR. HEALEY: The whole point, Your Honor,
3 is not forgotten. The immediate issue before you,
4 which is Interrogatories 1(a) and 1(b) They were
5 seeking information regarding the formation of and the
6 finalizing of the agreement on the what we will refer
7 to as the IHB consortium or the IHB coalition.

8 We have raised one objection. It is
9 relevance. We are not claiming here that it would be
10 overly burdensome to provide the information. I
11 think, based upon Mr. Harker's argument, we can see
12 the struggles he had in putting together an argument
13 why it's relevant. If the entire coalition came
14 together on the evening of October 21st and somehow
15 managed to put together the entire documentation
16 relating to it, that's no more relevant than if the
17 plan had been in place four or six months.

18 They claim in their motion that the issue
19 is that they want to determine how well conceived and
20 how well thought out the relief is.

21 Judge, I would respectfully submit to you
22 that that is an issue that can be determined from the

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1 submissions that we have provided. If they don't
2 believe that those submissions are full and complete,
3 I'm certain that's something we're going to hear. The
4 fact that the parties talked a week about it, two
5 weeks about it, whatever it is, it's going to be
6 irrelevant to the issue of how complete our submission
7 is. The issue is going to be whether we've identified
8 a harm from the transaction, and whether the relief we
9 have proposed is related to solving that harm. That's
10 what the Board will be deciding.

11 JUDGE LEVENTHAL: Do you wish to reply,
12 Mr. Harker, how this is relevant?

13 MR. HARKER: No. But I would submit, Your
14 Honor, that, indeed, if this plan came together at
15 midnight on October 20th, before the application was
16 submitted to acquire and operate this important
17 Chicago-based carrier, other comments in this
18 proceeding have indicated -- and we'll talk about them
19 because most of them are essentially made by Mr.
20 Healey's clients -- but that there is a problem with
21 respect to the operations in Chicago. I would submit
22 to you that if something was under consideration for

1 as long as six months, that is a very different kettle
2 of fish than something that just came together
3 overnight. And certainly it looks to us like this
4 plan came together shortly before October 21, given
5 the -- and I haven't heard, frankly, a denial of that,
6 but setting that aside -- it looks to us like this
7 thing came together at the last minute. It's half-
8 baked, maybe even quarter-baked at this point, and it
9 seems to me that in terms of making a determination as
10 to whether or not these responsive applicants are
11 prepared and able and equipped to operate the IHB, the
12 extent to which planning has gone into the process is
13 relevant to that.

14 Certainly, we have been subject to
15 discovery and inquiry about the extent of our plans
16 here, and I think this is relevant along the same
17 lines to exactly where -- you know, how long EJE and
18 IMRL have been talking about this, it's a question of
19 what's the date, no burden, and to whatever extent you
20 might -- there might be a question as to relevance,
21 the fact that there was absolutely no burden with
22 answering the question, and the fact is that there's

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1 a broad standard with respect to admissibility of
2 evidence is -- you know, it's relevant or it could
3 lead to the discoverability of relevant information
4 because the starting point, it seems to me, in terms
5 of trying to figure out how well thought out these
6 plans are is, okay, when did you begin talking, and
7 when did the negotiations end. That kind of inquiry
8 then can go into -- and what did you talk about at
9 that particular meeting, and so on and so on.

10 So, I think that this clearly meets the
11 very broad standard in the STB's rules for relevance.

12 JUDGE LEVENTHAL: I don't think you've met
13 that standard. I'll deny the motion with respect to
14 Interrogatory No. 1(a) and 1(b).

15 MR. HARKER: Interrogatory No. 3.
16 Interrogatory No. 3 asks, with respect to information
17 on page 9 of responsive application that "each of the
18 carriers has sufficient resources available to
19 purchase their proportionate share of stock" in IHB,
20 what was the approximate purchase price for the
21 totality of the 51 percent of the stock of IHB that
22 was assumed in connection with making this statement.

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1 They make a statement in the responsive
2 application that they've got sufficient resources to
3 buy the company. The question is, what was the basis
4 for the statement. It's in the application, it's a
5 representation made to the Board in the application,
6 that they have sufficient resources to acquire the 51
7 percent stock, and we just asked a very reasonable
8 follow-up question, what did you assume. You must
9 have had something in mind when you made that
10 statement, what did you have in mind?

11 MR. HEALEY: Judge, if I can, again, the
12 issue here is not one of burden, it's simply one of
13 relevance. And I think to understand why we are
14 claiming this issue is irrelevant, you have to
15 understand the history of the discussions and
16 discovery between the parties.

17 As Your Honor will well recall, we had
18 come before Your Honor -- we'd been seeking
19 information regarding the IHB and, more particularly,
20 information that would be designed to allow us to
21 place a value on this stock.

22 In I(c)(3), the Illinois Central had asked

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1 for all documents relating to the value of the IHB
2 stock held by Conrail. And in response to that, the
3 Applicants indicated that that request was
4 objectionable and wasn't going to be answered on the
5 grounds of relevancy.

6 Further, Judge, EJE had previously filed
7 discovery responses seeking information, a variety of
8 financial information, that would allow us to value
9 the IHB stock. And in response to that, we were told
10 in CSX/NS-91 at page 5 that the request sought
11 "extensive financial and other information about the
12 IHB that does not appear to have any relevance to any
13 issue that the Board must determine before it decides
14 whether to approve the application. It is premature
15 if sought in connection with an issue the Board would
16 address after approving the application".

17 Finally, Your Honor, when I was in front
18 of you on October 16, the Applicants also argued that
19 that information was premature. The basis of the
20 argument is this, Judge, Applicants have denied us
21 discovery regarding the IHB issues. They have denied
22 it on the basis of the fact that what the Board is

1 going to determine is whether there is a harm we've
2 identified in the transaction, and whether relief we
3 have proposed is appropriate.

4 Now, we had a lengthy discussion when I
5 was in front of you on the 16th regarding counsel's
6 reiteration of past history where the Board has
7 determined, for example, on the Santa Fe-Southern
8 Pacific case, that the merger would not go forward,
9 and that the holding company was required in that case
10 to divest itself of one of the two railroads I think
11 within 90 days, actually. But it was pointed out by
12 the Applicants that there was no ruling in that case
13 as to who the proper party would be in order to get
14 either railroad.

15 The Applicants have told us that we can't
16 get information regarding the valuation of the IHB
17 stock because the Board is not going to determine at
18 this point whether we are the appropriate party.

19 They have said, Judge, that the only thing
20 the Board will determine is whether there is a harm --
21 that is, whether the concentration of control of the
22 Chicago area intermediate switchers -- is unduly

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1 concentrated, and whether that stock should be
2 divested. What they have said is that if they do
3 determine divestiture, there will be subsequent
4 proceedings to determine who would be the appropriate
5 party. That's the time at which this discovery would
6 be relevant as to our ability to purchase the stock.

7 MR. HARKER: Your Honor, they have
8 requested in their responsive application divestiture
9 of the 51 percent stock interest held by Conrail to
10 EJE and IMRL. It was them that put the purchase of
11 IHB at issue in this responsive application. They did
12 it.

13 We have to be in a position to respond on
14 December 15 to the claims that they make in their
15 responsive application. If we don't, we could be
16 basically held to have conceded the point.

17 The fact is that what happened earlier
18 with Mr. Healey is he basically directed the discovery
19 to the wrong party. You and the Board both found that
20 what he should have done was gone to the IHB directly
21 for that information, not come to the Applicants.
22 And, indeed, he pressed the issue on Conrail, which

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1 went all the way to the Board, and the Board upheld
2 your decision that he could not get documents in this
3 matter relating to the IHB through Conrail. That was
4 his problem, not objections that we took or what have
5 you. His problem was, the reason why he didn't get
6 the information is because he didn't direct it to the
7 right party.

8 But in point of fact, in terms of this
9 particular discovery that we are directing, there's no
10 doubt we're directing it to the right party, he's put
11 it at issue. He's opened the door. He's made the
12 claim in his responsive application that they've got
13 the financial resources to acquire the company. And
14 it's certainly our understanding that this is going to
15 be a two-step proceeding, but it's not our decision as
16 to whether or not it's going to be a two-step
17 proceeding, it's going to be up to the STB eventually,
18 but that's our understanding of the situation but, in
19 any event, we need to be in a position to respond on
20 December 15 to everything in the responsive
21 application.

22 You know, it's not like this didn't appear

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1 in a responsive application and we just asked them, do
2 you have the financial resources to acquire this that
3 you're talking about doing. No. The representation
4 is in the document. It's right in here. They've told
5 the Board, we've got the ability to acquire this.
6 We've got the financial resources to do it. So, they
7 must have had some basis for making that statement,
8 and we want to know what the basis was. And I would
9 submit to you that what happened earlier with respect
10 to discovery is irrelevant and, for purposes of this,
11 and as I said, moreover, it sort of misses the point
12 because the problem there was they probably would have
13 gotten the information if they had gone to the right
14 party. They just didn't go to the right party.

15 MR. HEALEY: Judge, it is clear that you
16 ruled and the Board upheld you, that we should have
17 sought the IHB information from the IHB and not from
18 Conrail, and that's the ruling that is out there, and
19 we are prepared to proceed forward. It doesn't change
20 the fact that what the Applicants argued was that in
21 addition to the fact this is the wrong party, there is
22 nothing in this proceeding that you are going to need

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1 this information from. They told you that it was
2 irrelevant. They told you that it was premature.
3 They told you that in every case in the past there has
4 been a two-step proceeding, that the issue of who the
5 appropriate party is and whether they can handle the
6 purchase is something that's going to be determined
7 later.

8 They've pulled one sentence out of a one-
9 inch-thick filing which they have said previously is
10 irrelevant, that it's not something the Board is going
11 to decide, and it may well be that we put in one
12 sentence in there as to something that is not
13 relevant, to something the Board is going to decide at
14 this time.

15 We could think of a variety of things we
16 could have said in there that aren't relevant. That
17 doesn't mean that they become relevant and that they
18 get to do discovery on them. They have denied us
19 discovery on this very self same issue. They said it
20 is not going to be a part of this proceeding. There
21 will be subsequent proceedings before the Board as to
22 who should buy this stock. And on the basis of their

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1 denial of that, they should not be allowed to get the
2 information from us.

3 JUDGE LEVENTHAL: You're not disputing the
4 accuracy of the statement, are you?

5 MR. HEALEY: I don't know the basis upon
6 which the statement was made, so I can't tell you --

7 JUDGE LEVENTHAL: I'm sorry?

8 MR. HEALEY: I don't know the basis upon
9 which the statement was made. I know my clients both
10 read it and felt comfortable with it, but in terms of
11 what the actual number is, I have no idea.

12 JUDGE LEVENTHAL: But you're not disputing
13 that the quotation is correct.

14 MR. HEALEY: I think the quotation is
15 correct. I don't have any dispute with the quotation.

16 JUDGE LEVENTHAL: I'll find that because
17 you place this in issue, that the discovery may lead
18 to admissible evidence. I'll grant the motion with
19 respect to the interrogatory.

20 MR. HARKER: Your Honor, in Interrogatory
21 No. 7, in the responsive application, there is a
22 verified statement of William Brodsky, who is an

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1 official in the IMRL, and there is sort of a theme
2 there about a concern that CSX playing a dominating
3 role in IHB and the other terminal carriers in
4 Chicago. And we've essentially asked EJE why that
5 would be so, why CSX would play a dominant role, given
6 the fact that CSX lines and the IMRL lines are
7 entirely end-to-end.

8 The sole basis for the objection is that
9 it seeks information "not within the possession,
10 custody or control of EJE". Well, I'm not sure what
11 information they are talking about. It asks them with
12 respect to a theme in their responsive application
13 that there was a concern about CSX playing a dominant
14 role, why that would be the case and why this
15 geographical fact of the nature of the connections
16 between CSX and IMRL. It's just not an appropriate
17 objection in this case, given the fact that EJE is a
18 party to the responsive application. They co-
19 sponsored the application and, to the extent that they
20 don't have information sufficient to put them in a
21 position to answer the interrogatory, they should so
22 state.

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1 JUDGE LEVENTHAL: Mr. Brodsky is a witness
2 for IMRL, I take it? He testified on behalf of IMRL?

3 MR. HEALEY: Yes, Judge, I can confirm
4 that Mr. Brodsky is the President, in fact, of IMRL,
5 and did submit a verified statement that was included
6 with the responsive application.

7 The issue to be addressed here, Judge, I
8 think is very straightforward and simple, and is one
9 that the Applicants have again, as we see a recurring
10 theme here, used to their own advantage when discovery
11 was served upon them.

12 Had I gone to Mr. Harker and asked him
13 what did the Conrail witness mean when he said this,
14 Mr. Harker would have said, go ask the Conrail
15 witness. Here is a witness put in by IMRL, who is
16 coming forward and making a statement in his capacity
17 as the IMRL president, and they are asking EJE, what
18 did the IMRL witness mean when he said this.

19 We've seen the same thing again from the
20 Applicants, Judge. I don't understand -- I don't
21 understand why it is that somehow the fact that my two
22 clients have put in a responsive application makes

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1 them anymore joined and responsible for determining
2 information from the others than the Applicants.
3 They've put in one application. Granted, it was 28
4 volumes, or however big it was, but it was one
5 application. There weren't two applications filed by
6 the parties, they filed one joint application. CSX
7 has said in the past they are not responsible for
8 providing information regarding Conrail lines that
9 they are not taking over. They are not responsible
10 for providing information regarding what's in
11 possession, custody or control of NS. This is the
12 exact same situation.

13 I would like to point out that the exact
14 same interrogatory was asked to the IMRL, and as I
15 told the Applicants in my response, IMRL will be
16 providing a substantive response to that
17 interrogatory.

18 So, to the extent the interrogatory is
19 asking what did Mr. Brodsky mean, before midnight
20 tonight which is when our responses are due, the
21 Applicants will have that information. We simply
22 object to the idea that somehow the EJE has to provide

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1 them that information when clearly the standard hasn't
2 applied when they've been asked discovery.

3 JUDGE LEVENTHAL: Pretty strong argument,
4 Mr. Harker.

5 MR. HARKER: Geez, I didn't think so.

6 (Laughter.)

7 MR. HARKER: I don't know. I thought we
8 were here to argue the discovery dispute in front of
9 you. I didn't know we were rearguing all discovery
10 disputes.

11 JUDGE LEVENTHAL: No, no, let's stick with
12 this.

13 MR. HARKER: I appreciate that. I just
14 wanted to be sure that you weren't going to be swayed
15 by that. You know, people had their opportunity to
16 take discovery against us and, as you know, you were
17 very busy during that period of time, that if people
18 didn't like an answer they were in here to complain
19 about it. And I guess I don't remember a complaint
20 over that one.

21 But in any event, back to this, the
22 interrogatory really doesn't ask for what did Brodsky

1 mean at pages 3 through 7. I mean, we will no doubt
2 get into that when we take his deposition, and really
3 we assume that EJE and IMRL, they filed a responsive
4 application, they did it together. EJE agrees with
5 everything in the responsive application. Whether or
6 not they put the witness forward or whether or not
7 IMRL did, and it doesn't ask what he meant by
8 something, it says, okay, he said this, but what if
9 this was the situation. Why does what he say hold
10 true if the situation is this.

11 And it strikes me that that is an
12 appropriate question to ask of EJE. It's not, well,
13 what did Brodsky have on his mind. It's, he said
14 this. This is a concern. By the way, it's echoed in
15 the EJE materials as well. Brodsky is not the only
16 one that made this point, it's also echoed in the EJE
17 materials, and the question is, okay, if that's the
18 situation, if that's the concern, why, EJE, would we
19 not want to have an efficient interchange with IMRL
20 given this geographic fact. So, it doesn't ask what
21 was in Brodsky's mind. It doesn't ask them to tell us
22 what was in Brodsky's mind. It's a very different

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1 inquiry.

2 JUDGE LEVENTHAL: Well, I'll deny the
3 motion with regard to Interrogatory No. 7. I agree
4 with Mr. Healey, the question is asked of the wrong
5 party.

6 MR. HARKER: Your Honor, Interrogatory No.
7 8. There's three parts to this. Basically, what it
8 seeks is information on the extent to which the EJE
9 Board of Directors has authorized EJE to make
10 investments in the facilities of IHB in the event that
11 the transactions contemplated by the responsive
12 Applicants are approved.

13 EJE objects to these requests on grounds
14 of relevance, and that EJE has been denied by the
15 primary Applicants' access to relevant data through
16 discovery.

17 Relevance, I think, is clear. But the
18 extent to which EJE is in a position through the
19 necessary corporate and board approvals to maintain
20 and invest in the IHB is obviously important to the
21 public interest as to whether or not the IHB is going
22 to be properly maintained.

1 If the EJE board hasn't, in fact,
2 authorized investment and the like, that is something
3 that is relevant to determining whether or not EJE is
4 basically in a position to follow through on the
5 requests that it's made to the Board and the extent to
6 which it's going to follow through on the requests to
7 the Board. That deals with the relevance issue.

8 The question about -- you know, we're back
9 to this issue about the deniability -- the fact that
10 we denied them access to relevant data. You've
11 essentially ruled on that, Your Honor. I don't think
12 there's much more that needs to be said about that.

13 They propounded discovery requests to the
14 Applicants, and it asks for very detailed information
15 about the IHB, which you and the Board ruled should
16 have been directed to IHB, that Conrail, which was in
17 possession of the -- the argument that Conrail was
18 somehow in control of the IHB and therefore should
19 have produced the information was unavailing. That
20 was your decision, upheld by the Board. So, that's
21 just a red herring. I don't think that we should deal
22 with that at all and, as I say, with respect to

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1 relevance, the question is, to what extent has EJE
2 gotten the necessary corporate approvals and the like
3 to make investments, follow through on its plan to
4 acquire the IHB. It's obviously a very
5 straightforward question.

6 MR. HEALEY: Well, I don't dispute the
7 fact that it's straightforward. Again, we're not
8 raising the burdensome issue here. The Board has
9 either reviewed the issue, approved it or not, or they
10 haven't reviewed the issue.

11 The question again is one of relevance.
12 What I will agree with Mr. Harker on is that if the
13 EJE Board had looked at this issue and decided that
14 they would not allow the EJE to go forward, I think
15 that would clearly be relevant. And if I were to find
16 out that was the case, I'd be happy to tell Mr. Harker
17 that the Board had looked at it and determined that
18 they could not go forward.

19 On the somewhat safe assumption that that
20 in fact is not the case, I think what we're actually
21 talking about is the fact that is this a case where
22 they've looked at it and approved it, or have they not

1 looked at it at all. I don't see any relevance to it.

2 Again, Your Honor, we were denied
3 information in discovery based upon the idea that
4 there's going to be no determination of we're the
5 appropriate party to take this over. Our ability to
6 buy this stock is not an issue, according to the
7 Applicants in denying us discovery.

8 JUDGE LEVENTHAL: Mr. Harker?

9 MR. HARKER: No, Your Honor.

10 JUDGE LEVENTHAL: I'm about to rule in
11 your favor.

12 MR. HARKER: I thought so, that's why I
13 sat down.

14 JUDGE LEVENTHAL: I find that
15 Interrogatory No. 8 is relevant or may lead to
16 relevant information. Accordingly, I'll grant with
17 respect to Interrogatory 8(a).

18 MR. HARKER: And 8(b) and 8(c) as well,
19 Your Honor?

20 MR. HEALEY: And I think document requests

21 --

22 JUDGE LEVENTHAL: You didn't argue 8(b)

1 and (c). It seems to me that it's the same.

2 MR. HEALEY: Judge, based upon your ruling
3 on 8(a), we understand that that would apply to 8(b),
4 8(c), and I think Document Request No. 5 as well.

5 MR. HARKER: That is correct. And just
6 for the record, there was one more document request,
7 and I'm not sure I mentioned it. It's Document
8 Request No. 3. And that is the companion to
9 Interrogatory No. 3, which was the assumptions about
10 purchase price, and I believe that you granted us the
11 Motion to Compel on Interrogatory No. 3, and I just
12 want to be sure that we're all in agreement that that
13 also includes Document Request No. 3.

14 MR. HEALEY: I am in agreement with that,
15 Judge.

16 JUDGE LEVENTHAL: All right. Very well.

17 MR. HARKER: Your Honor, I think that
18 dispenses with EJE. And what I'd like to do now is
19 move to IMRL, and I think that the rulings that you
20 just made will help speed us through on IMRL.

21 The initial objections of IMRL are at Tab
22 4 in your materials.

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1 MR. HEALEY: As a point of clarification,
2 Judge, I think you're going to find most of the
3 discovery requests were identical, and so we probably
4 don't need to reargue them. Only the identity of the
5 responding party I think is changed. That's not true
6 for all of them, but that is true for some of the ones
7 at issue.

8 JUDGE LEVENTHAL: I see 1(a) and 1(b) are
9 essentially the same.

10 MR. HARKER: That is correct. Would you
11 like me to read them into the record, Your Honor?

12 JUDGE LEVENTHAL: Yes, why don't you read
13 them into the record.

14 MR. HARKER: This is from CSX and Norfolk
15 Southern's First Set of Interrogatories and Request
16 for Production of Documents to I&M Rail Link.

17 Interrogatory No. 1(a), state when
18 discussions and/or negotiations between IMRL and
19 Elgin, Joliet and Eastern Railway Company, Transtar,
20 Inc., EJE, commenced regarding the submission of a
21 joint application to the Board for acquisition of a 51
22 percent stock ownership of Conrail in the Indiana

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1 Harbor Belt Railroad Company, IHB, and then 1(b),
2 state when an agreement was reached with EJE to submit
3 a joint application to the Board for acquisition of
4 the 51 percent stock ownership of Conrail in the IHB.

5 These are basically the same as 1(a) and
6 1(b) in EJE, and unless you think that it makes sense
7 to have argument on this, I assume that your earlier
8 ruling --

9 JUDGE LEVENTHAL: The ruling would be the
10 same.

11 MR. HARKER: All right. So, 1(a) and 1(b)
12 is denied.

13 MR. HARKER: Correct. Interrogatory No.
14 3, with respect to the statement on page 9 of the
15 responsive application that "each of the carriers has
16 sufficient resources available to purchase their
17 proportionate share of stock" in IHB, what was the
18 approximate purchase price for the totality of the 51
19 percent of the stock of IHB that was assumed in
20 connection with making this statement.

21 Again, this is one that you ruled on
22 before, I believe, in connection with EJE --

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1 MR. HEALEY: And you granted.

2 MR. HARKER: -- and you granted it. And
3 that would also encompass Document Request No. 3 in
4 IMRL.

5 MR. HEALEY: I am in agreement with that
6 statement.

7 JUDGE LEVENTHAL: All right. Granted.

8 MR. HARKER: Interrogatory No. 4 and No.
9 6. I would like to group those together. These are
10 new. Interrogatory No. 4(a), identify the "certain
11 shippers" referred to in the first paragraph on page
12 10 of the responsive application, who would, under the
13 transaction proposed in the primary application, be
14 "losing their existing alternative routings of IHB or
15 EJE origination/termination and being reduced to
16 working exclusively for the IHB".

17 Interrogatory No. 6, with reference to the
18 statement on page 6 of the verified statement of James
19 H. Danzel as follows, "Subsequent to the transaction
20 proposed by Applicants, CSX and NS will not be neutral
21 as to which carrier serves these plants. Indeed, it
22 will be in their vested interest to secure all of this

1 traffic for the IHB. Because CSX and NS will each own
2 a portion of the IHB, they will be motivated to
3 eliminate the EJE as an option for these movements".

4 Interrogatory (a) asks, is it not and has
5 it not been in the vested interest of Conrail to
6 secure as much of the traffic as possible for IHB
7 rather than EJE with respect to any traffic over which
8 Conrail has influence, and to seek to eliminate the
9 EJE as an option for movements where either it or IHB
10 would be an option. And Interrogatory 6(b), if not,
11 please explain why not.

12 IMRL objects to these interrogatories,
13 again, on the grounds that they seek information not
14 within the possession, custody or control of IMRL, and
15 IMRL indicates that a substantive response to each
16 will be provided by EJE.

17 First of all, with respect to
18 Interrogatory No. 4, I believe that the reference in
19 the interrogatory is to the -- not to a verified
20 statement here, but to the front part of the
21 application where they provide various information,
22 including what the effect of the proposed transaction

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1 on competition is.

2 There is not a verified statement. What
3 we are trying to follow up on here is a statement
4 sponsored by both, clearly sponsored by both, not in
5 a verified statement, and this asks IMRL for
6 information on what were the shippers that you
7 referred to in your responsive application, who are
8 going to lose their existing alternative routings.

9 It's clearly relevant, and IMRL should
10 give a response to it, or indicate that we don't have
11 information sufficient to give a response.

12 JUDGE LEVENTHAL: Well, they say that
13 their substantive response will be part of the EJE, is
14 that correct?

15 MR. HEALEY: That's correct, Your Honor,
16 in fact, I've personally drafted the response, and
17 there is a list of shippers. The issue here again is
18 the question is asking about shippers who are on the
19 EJE, they are not on the IMRL. So, how it is that the
20 Applicants would presume to come to IMRL and ask the
21 question of who the shippers are on EJE --

22 JUDGE LEVENTHAL: He argues that it's a

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1 joint application, though, and it's in the
2 application, it's not in the statement of a witness.

3 MR. HEALEY: So, if I understand what Your
4 Honor is saying, anything that is not in the statement
5 of a witness can be asked of any party?

6 JUDGE LEVENTHAL: I'm ruling only on this
7 particular issue before me --

8 MR. HEALEY: You're setting a very
9 dangerous precedent.

10 JUDGE LEVENTHAL: -- on the arguments made
11 by counsel.

12 MR. HEALEY: You're setting a very
13 dangerous precedent, though, if each party to the
14 application is responsible for everything that's
15 placed in the application other than what's placed in
16 there as to their witnesses, and that seems to be the
17 argument counsel is making.

18 JUDGE LEVENTHAL: I only rule, and I have
19 been consistent throughout this proceeding and
20 throughout my 26-year career, on not giving advisory
21 opinions. I only rule on things that are before me.

22 MR. HEALEY: Very good, Your Honor.

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1 JUDGE LEVENTHAL: However, what is the
2 argument? If you are going to get the information,
3 Mr. Harker, what difference does it make who gives it
4 to you?

5 MR. HARKER: Well, I think, again, these
6 are joint Applicants. They want to run this railroad.
7 They are claiming harm, they are claiming certain harm
8 --

9 JUDGE LEVENTHAL: No, I agree with you.
10 He says you are going to get the information. EJE is
11 going to give you the information. What difference
12 does it make?

13 MR. HARKER: Well, I think a piece of
14 information would be the fact that the IMRL does not
15 have sufficient information -- they jointly applied to
16 run this railroad, and I think it is relevant and
17 certainly could lead to the admissibility of relevant
18 evidence, that they don't have detailed enough
19 knowledge about this situation to know whether or not
20 -- you know, to know exactly what shippers are going
21 to be affected, and who is going to lose their
22 existing alternative routings.

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1 Again, I believe that this kind of
2 interrogatory request is a perfectly appropriate, and
3 it's not good enough to say, well, get the answer from
4 somebody else. They are here. They sponsored the
5 application.

6 MR. HEALEY: Judge, if I had to recount
7 the number of times Mr. Harker told me to go get the
8 information from somebody else when I was seeking
9 discovery on him, we might be here a while. We will
10 stand on our argument.

11 JUDGE LEVENTHAL: But in any event, you
12 say you have drafted the response, you know that a
13 substantive reply is being made to the questions?

14 MR. HEALEY: Judge, the name of -- my
15 recollection is that 25 to 30 shippers is going to be
16 given to them before midnight tonight.

17 Again, Judge, despite the fact that that
18 information appears in the primary application, it
19 clearly is related information that the EJE is going
20 to have because we're talking about shippers on EJE's
21 system.

22 JUDGE LEVENTHAL: And that applies to both

1 4(a), 4(b) and 6, is that correct?

2 MR. HARKER: We haven't gotten to 6, Your
3 Honor.

4 JUDGE LEVENTHAL: We haven't gotten to 6.
5 4(a) and 4(b)?

6 MR. HEALEY: Correct. And in a
7 substantive response that's in a narrative form and
8 is, in my recollection, nearly a page long is going to
9 be provided by the EJE in response to Interrogatory
10 4(b).

11 JUDGE LEVENTHAL: I'll grant the motion
12 with respect to 4(a) and 4(b), and I suggest to you
13 that that could be your answer. You can say see the
14 substantive filing of EJE.

15 MR. HEALEY: Very good, Judge. Mr. Harker
16 wants to make sure he's getting a response to that.
17 All right. Interrogatory No. 6.

18 MR. HARKER: Yes, Your Honor.
19 Interrogatory No. 6, Mr. Danzel is an official in EJE.

20 MR. HEALEY: He is either a vice president
21 or a director of marketing for EJE.

22 MR. HARKER: That's correct. His verified

1 statement is in the application, and he, just for the
2 record --

3 MR. HEALEY: So that I don't have an angry
4 client, I do think his title is Director of Marketing
5 West.

6 MR. HARKER: Director of Marketing West
7 for Transtar, Inc. So he's in the holding company, I
8 guess.

9 MR. HEALEY: That's correct.

10 MR. HARKER: Okay. And we are -- again,
11 there is concern expressed about CSX now, after the
12 transaction, securing traffic for IHB when Conrail
13 apparently didn't have the same incentive to acquire
14 as much traffic for IHB as possible, and we're just
15 basically asking what -- your concern is that CSX is
16 going to prolong or involve this traffic and divert it
17 to IHB, to the detriment of CSX, and all we are saying
18 is, all we are asking is, you say that, but what is
19 your response to the fact that didn't Conrail have the
20 same incentive. Basically, why is there any incentive
21 -- why does CSX have any different incentive than
22 Conrail would have had.

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1 The objection is that this information --
2 or this request seeks information not within the
3 possession, custody or control of IMRL, and that a
4 substantive response to this interrogatory will be
5 provided by EJE.

6 I think we've talked about these kinds of
7 interrogatories. Again, I think it asks about a
8 statement and says, but what about this. You know,
9 how is this consistent with basically the facts or the
10 presumption that CSX and Conrail would have been
11 equally motivated so there would be no change in the
12 situation after the transaction.

13 MR. HEALEY: Judge, I agree with Mr.
14 Harker on one point, we have talked about this same
15 issue here now several times. Mr. Danzel is a witness
16 sponsored by EJE. He is employed by Transtar, the
17 holding company, and they are asking how does this
18 square with something Mr. Danzel said. IMRL is taking
19 objection to it on the basis that this is not their
20 witness. The facts that he's talking about is not
21 something that the IMRL is going to have knowledge of,
22 this is something that EJE is going to have knowledge

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1 of.

2 Again, Judge, the issue being if you want
3 to know what it is that the EJE witness said, go ask
4 EJE. And, in fact, in this case, they have asked the
5 same question of EJE and, again, EJE is providing an
6 answer. My recollection, again, is it's a narrative
7 close to a page in length -- it might be smaller than
8 that, but I think it's close to a page in length.

9 JUDGE LEVENTHAL: All right. Again, I
10 think this is a moot issue. I'm going to make the
11 same ruling with respect to Interrogatory No. 6 as I
12 did for 4(a) and 4(b). However, I think Mr. Healey is
13 correct, I don't know why you didn't ask this of EJE.
14 All right.

15 MR. HARKER: So, Interrogatory No. 6, the
16 Motion to Compel is granted.

17 JUDGE LEVENTHAL: Correct.

18 MR. HARKER: And then, finally, at least
19 with respect to IMRL, Interrogatory No. 9 asks -- it
20 is essentially the same as Interrogatory No. 8 and
21 Document Request No. 5 directed to EJE, it asks about
22 IMRL's board of directors action. You granted that

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1 with respect to EJE, and I would ask that you do the
2 same thing with respect to IMRL.

3 MR. HEALEY: That's fine, Judge.

4 JUDGE LEVENTHAL: All right.

5 MR. HEALEY: Based upon your prior ruling,
6 that's fine. I'm not indicating agreement with your
7 ruling, merely that it applies to this one as well.

8 JUDGE LEVENTHAL: All right. So ordered.

9 MR. HARKER: And then we're going to move
10 off of IMRL onto the next one, and if Your Honor would
11 give me just a minute to get new papers in front of
12 me.

13 JUDGE LEVENTHAL: Yes.

14 MR. HEALEY: I think -- by the way, Drew,
15 I think we may be able to short-circuit this first one
16 here.

17 MR. HARKER: Anything we can do to shorten
18 the time and move this along, I'm all for.

19 MR. HEALEY: Judge, the interrogatory at
20 issue, the first one, and I'll take it if it's all
21 right with you, is Interrogatory No. 3, looking for
22 all documents relating to litigation --

1 JUDGE LEVENTHAL: Where are we?

2 MR. HEALEY: I'm sorry, this is --

3 MR. HARKER: We are at Tab 7.

4 MR. HEALEY: And it's Interrogatory No. 3.

5 MR. EDWARDS: Wisconsin Central.

6 MR. HEALEY: Yes, Wisconsin Central.

7 MR. HARKER: I'm sorry -- yes.

8 MR. HEALEY: It was looking to identify
9 documents relating to litigation over switching
10 disputes in Chicago between Wisconsin Central and CSX.
11 In the motion, the Applicants indicate that they are -
12 - excuse me, not the Applicants, CSX -- and that's
13 important, I think, in this case -- is indicating that
14 they request Wisconsin Central be ordered to confirm
15 that Mr. Shauer was referring to the dispute in the
16 above-cited cases and, if not, to identify the
17 litigation to which he was making reference.

18 Judge, I think it's pretty clear that CSX
19 is going to know whether it's in litigation with
20 Wisconsin Central or not, but if that is the piece of
21 information that CSX is looking for, Wisconsin Central
22 will in fact confirm and will file a substantive

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1 answer here that confirms that the litigation -- and
2 I have to double-check the cite -- but confirms that -
3 - I think the cite is correct -- confirm that the
4 litigation and arbitration that they talk about in
5 their motion is, in fact, the correct litigation and
6 arbitration that the witness was referring to.

7 JUDGE LEVENTHAL: All right.

8 MR. HEALEY: So that should satisfy on
9 that first one.

10 MR. HARKER: Thank you.

11 MR. HEALEY: Although I guess I will put
12 on the record for what it's worth, I do find it odd
13 that CSX has to ask us what litigation we're involved
14 in over switching disputes in Chicago, but we will
15 answer that, as you've requested.

16 MR. HARKER: Interrogatory Nos. 4(c), (d)
17 and (h), this basically asks for some factual
18 information with respect to interchanges that
19 Wisconsin Central has with a variety of carriers. It
20 probably makes sense for me to read into the record
21 4(c), (d) and (h) and also items (i) through (x), I
22 think, for context in the record.

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1 For each of the carriers listed in items
2 (i) through (x) below, (d) state the number of cars
3 received from the carrier at such direct interchanges
4 in each of the years 1995 and 1996, and for such
5 period in 1997 as you have records for identifying it.
6 I'm sorry. I think I just read (d) and I should have
7 started with (c).

8 Let me read (c), which is also at issue.
9 State the number of cars forwarded to the carrier at
10 such direct interchanges in each of the years 1995,
11 1996, and for such period in 1997 as you have records
12 for (identifying it). And (h) if the response to
13 Interrogatory 1(g) is yes, state which intermediate
14 carriers and state the number of cars interchanged in
15 each such intermediate carrier in each of the years
16 1995 and 1996, and for such period in 1997 as you have
17 record for identifying it.

18 For the purposes of this interrogatory,
19 consider B&OCT as an intermediate carrier regardless
20 of your contention that it is not -- and just for the
21 record, Interrogatory 1(g) which is referred to is --
22 the response to Interrogatory 1(g) is yes. I think

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1 that's a typo and it should have been 4(g), and 4(g)
2 says, state whether WCL uses the services of any
3 intermediate carrier at Chicago to deliver cars to any
4 of the carriers identified in items (i) through (x)
5 below.

6 Now, (i) through (x) below, that says
7 provide responses to Interrogatories 4(a) through (h)
8 for the following carriers: (i) Canadian Pacific Soo,
9 (ii) Elgin, Joliet and Eastern Railway, (iii) Norfolk
10 Southern, (iv) I&M Rail Link, (v) CSX, (vi) Conrail,
11 (vii) Illinois Central Railroad, (viii) Pacific
12 Railroad, (ix) Burlington Northern, (x) Canadian
13 National Railway-GTW.

14 Basically what this is designed -- excuse
15 me -- Wisconsin Central objects on the grounds that
16 the information -- on the ground that these
17 interrogatories are unduly burdensome in that the
18 information sought could be generated, if at all, only
19 through an unduly burdensome special study. They also
20 object on the ground that the information sought is
21 neither relevant nor reasonably calculated to lead to
22 the discovery of admissible evidence.

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1 Basically, the heart of the Wisconsin
2 Central claim is that they have difficulty with
3 interchanges, and that through CSX's domination of the
4 Chicago switching district, and in particular which
5 they claim is going to be exacerbated by this
6 transaction, they have difficulty with, as I said, the
7 interchange situation.

8 And this interrogatory is designed to find
9 out how many cars are basically directly interchanged
10 rather than through an intermediate switching carrier,
11 which is what their problem is. We're asking, well,
12 okay, but how many cars do you directly interchange
13 with such that this may not be -- presumably, this
14 would not be an issue -- that is to say, the
15 intermediate switching problems that you're referring
16 to would not be an issue.

17 So, if you're directly interchanging
18 versus interchanging through an intermediate switch
19 operator, and if most of your business is on direct
20 interchange as opposed to intermediate switch, through
21 intermediate switch carriers, then why -- how much
22 relevance should -- or how much credence should we

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1 give to your claim that 5 percent of the cars that you
2 interchange are through these carriers as opposed to
3 95 percent which you do directly. So, that, I think,
4 goes to the heart of Wisconsin Central's claim for
5 relief, which is essentially divestiture of a part of
6 B&OCT's system into Wisconsin Central.

7 Now, with respect to the issue about a
8 special study, I'm sure one of the first things that
9 Mr. Healey will tell you is that I objected throughout
10 the earlier proceeding to conducting special studies,
11 and on that he would be correct. And there is a basis
12 in the rules to prevent discovery and requirements to
13 do special studies. So, that is not what we are
14 looking for.

15 What we say in the interrogatory is, to
16 the extent you have records for these things, give us
17 the numbers. That's what we're looking for. And it
18 would be our understanding that railroads in the
19 normal course, do maintain these kinds of records, and
20 that's what we're looking for, not a special study.

21 MR. HEALEY: Judge, once again Mr. Harker
22 has reasonably well made my objection as to a special

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1 study. I do think it requires a special study.
2 Moreover, if I understand -- and so that we're clear,
3 the remainder of the interrogatory which seeks the
4 location of interchanges between Wisconsin Central and
5 the various carriers entering Chicago, that
6 information is going to be provided to them. Those
7 responses are due tomorrow before midnight, and they
8 will have that information in their hands before
9 midnight.

10 If I understand the argument Mr. Harker is
11 making regarding the relevance of the information,
12 what they want to determine is as to each of the
13 carriers listed in Interrogatory No. 4, whether we
14 have a gripe about the way that we're treated by the
15 intermediate switch carriers because we could
16 interchange with them directly. And if that's the
17 case, I can assure him that I think there's -- well,
18 I know there's a direct interchange between Wisconsin
19 Central and EJE, and I think that's true as to SOO
20 because they are up in Schiller Park, but I think as
21 to the remainder of the railroads in Chicago, we don't
22 have direct interchanges, and they are going to find

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1 that out tomorrow.

2 So, certainly with respect to the
3 relevance of the number of cars we move as to those
4 railroads, the information is irrelevant. We're
5 telling them we don't have a direct interchange, there
6 is no direct interchange, so his argument as to why
7 the number of cars would be relevant to determine how
8 much we need the intermediate switch carrier to use
9 them for any carrier other than the one we have direct
10 connections with is irrelevant.

11 MR. HARKER: A minute, Your Honor.

12 As I understand it, the -- so we're
13 talking now -- let's just parse this through. With
14 respect to (c) and (d), you are saying that you're
15 going to be telling us that -- I guess in response to
16 other questions, other interrogatories -- that you
17 don't have direct interchanges with these carriers.

18 MR. HEALEY: And, again, I think the
19 responses to question No. 4(a) asks, state whether WCL
20 has direct interchanges with this carrier and state
21 the location of the direct interchange. So you will
22 be getting information tomorrow night regarding

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1 whether there is a direct connection with that carrier
2 or not.

3 MR. HARKER: Okay. So, with respect to
4 (c) and (d) then, unless I'm missing something, it
5 only requests information with respect to number of
6 cars forwarded to the carrier at -- to the extent that
7 you do direct interchanges with them -- obviously, if
8 you don't do direct interchanges with them, then the
9 answer is zero. But with respect to those carriers
10 with whom you do direct interchanges, the
11 Interrogatories (c) and (d) ask for the number of cars
12 forwarded to that carrier or received from that
13 carrier for '95, '96 and '97 -- it's certainly a well
14 accepted period of time in this proceeding -- and as
15 you have records for.

16 So, it doesn't request a special study, it
17 says as you've got records for, give us the number of
18 cars.

19 MR. HEALEY: Judge, I guess at some point
20 we probably should have nailed down Mr. Harker as to
21 what a special study is. I was being told at one
22 point that making several phone calls down to Memphis,

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1 Tennessee on behalf of the Illinois Central was going
2 to require a special study and couldn't be done.

3 This is going to take a significant amount
4 of work to pull this data together, and I don't see
5 the relevance of how many cars -- you haven't
6 explained to me why it is that it's relevant, if we
7 have a direct interchange, how many cars we move to
8 them. It's got nothing to do with the intermediate
9 switch carriers. So, why is it relevant to know if we
10 move 30 cars a year to EJE, or 30,000 cars a year to
11 EJE. It's not related to the intermediate switch
12 carriers.

13 JUDGE LEVENTHAL: Let's dispose of the
14 special study. Are you saying that any request for
15 information requires a special study?

16 MR. HEALEY: No, I'm not.

17 JUDGE LEVENTHAL: Well, he's asking you to
18 give him the information contained in your records.
19 I don't see that that's a special study.

20 MR. HEALEY: Well, then, I'm not sure I
21 understand what a special study is, Your Honor.

22 JUDGE LEVENTHAL: Well, it's not this.

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1 All right.

2 MR. HARKER: You know, as I said, I think
3 in terms of relevance, they make a complaint about
4 interchanges and, in particular, the intermediate
5 switching problem that they allege exists in Chicago
6 as being a problem. And what these interrogatories
7 are designed to determine is, okay, if you move
8 100,000 cars by direct interchange and you move only
9 5,000 cars by intermediate switch, that's a pretty
10 small problem in the overall scheme of things, and
11 should be taken into account when the Board decides
12 whether or not it's going to order, pursuant to
13 Wisconsin Central's request, divestiture sale, a
14 forced sale, of property currently owned by another
15 company which happens to be a subsidiary of CSX.

16 And so I think that the information is
17 important and relevant to assessing the magnitude of
18 harm that Wisconsin Central alleges, and certainly if
19 it's found not to be relevant, I think it clearly
20 meets the test that it could lead to the admissibility
21 of relevant evidence. But I, frankly, think it's
22 relevant because it really goes to the heart of what

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1 the claim for relief is.

2 JUDGE LEVENTHAL: Mr. Healey.

3 MR. HEALEY: The problem that Wisconsin
4 Central has identified is not with interchange in
5 Chicago. The problem Wisconsin Central has identified
6 in this case is problems with use of the intermediate
7 switch carriers in Chicago. Wisconsin Central has a
8 direct connection in a small yard with EJE at a place
9 called Easton, Illinois. We certainly have no
10 problems with the interchange there because there is
11 no intermediate switch carrier there. We haven't
12 raised an issue. We're not seeking relief. We're not
13 claiming that the application, as approved, is going
14 to harm that interchange. There is no issue as to
15 those direct interchanges.

16 The issue comes into play where there is
17 a need for an intermediate switch carrier because we
18 don't have a direct connection with the railroad.

19 JUDGE LEVENTHAL: Mr. Harker, as I
20 understand him to be saying, that he wants to test the
21 -- if you have, say, only 1 percent of your business
22 going through an intermediate carrier, he feels that

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1 that may somehow show that there is no problem or a
2 very small problem.

3 MR. HEALEY: If I can then propose a
4 compromise here, Your Honor, that may satisfy this?
5 If that is his concern -- and, again, I will state
6 that the problem identified relates to the use of
7 intermediate switch carriers -- were we to provide the
8 information sought in (h), I think that will satisfy
9 the question.

10 MR. HARKER: The problem with that is that
11 it doesn't give us a benchmark against which to
12 compare the answer in (h). The thing about (c) and (d)
13 is that it gives us an opportunity to compare the
14 relative numbers. And, you know, if the answer to
15 Interrogatory (h) -- and Your Honor was right on about
16 understanding exactly where I'm coming from, and this
17 makes the point -- if the answer to Interrogatory (h)
18 is 5,000 cars and the answers to Interrogatories (c)
19 and (d) are 100,000 cars or 500,000 cars, that, it
20 seems to me, is an indication that we're talking about
21 a relatively small problem overall to Wisconsin
22 Central's business. And that's why getting answers to

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1 (c), (d) and (h) is important.

2 Getting answers to only (c) and (d) or
3 only (h) is only half the story and, frankly, doesn't
4 really allow us to do what we need to do.

5 JUDGE LEVENTHAL: Are you looking for a
6 total number in (c) and a total number in (d), or do
7 you want it broken down as to --

8 MR. HARKER: Well, it does say, state the
9 number of cars forwarded to the carrier at such direct
10 interchanges, so I think that it would be for each
11 one. But then which would obviously allow us to total
12 it out.

13 JUDGE LEVENTHAL: Well, if he gave you a
14 total, would that satisfy you? Would that make it
15 easier for you, Mr. Healey?

16 MR. HEALEY: Yes, frankly, it would.
17 Again, I think if the issue is what is the magnitude
18 of the problem we're talking about, we've identified
19 a problem with intermediate switch carriers. If the
20 question is, how big a problem is it, the number of
21 cars that we interchange through intermediate switch
22 carriers is going to tell you how big a problem that

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1 is. You won't need the direct numbers.

2 And whether we move 95 percent of our
3 traffic through direct and 5 percent through that, if
4 the 5,000 cars we move through an intermediate carrier
5 is all our traffic in Chicago, or whether it's 1
6 percent of our traffic in Chicago, it's still only
7 5,000 cars, and that's the magnitude of the problem.

8 MR. HARKER: Your Honor, what about the
9 total for the direct and, with respect to the
10 intermediate, the numbers for each intermediate?

11 MR. HEALEY: The total received per year
12 does Wisconsin Central receive direct. For (d),
13 Wisconsin Central forwarded direct, and then for (h)
14 the total received for the Harbor, the total received
15 for the Belt, the total received for B&OCT, and then
16 the same with the received?

17 JUDGE LEVENTHAL: All right. Is that the
18 agreement, Mr. Harker?

19 MR. HARKER: Yes, Your Honor.

20 JUDGE LEVENTHAL: All right. Very well,
21 so ordered.

22 MR. HARKER: Interrogatory No. 5 provides,

1 where the services of an intermediate switching
2 carrier are required in order for one line-haul
3 carrier to deliver traffic to another in Chicago and
4 there are two alternative intermediate switching
5 carriers available, state whether you contend that the
6 receiving line-haul carrier has the legal right to
7 select the intermediate switching carrier.

8 And Wisconsin Central objects on the
9 grounds that it impermissibly seeks a legal
10 conclusion. What it is, it's a classic contention
11 interrogatory, as we indicated in our Motion to
12 Compel, and those go to the issue about intermediate
13 switching carriers and the use of intermediate
14 switching carriers, and we're asking then basically is
15 it more contention about their use and who has the
16 right to use them.

17 It's not asking for a legal opinion, it's
18 asking for whether or not this is their position,
19 perfectly appropriate in discovery. You see
20 contention interrogatories all the time.

21 JUDGE LEVENTHAL: I think Mr. Healey
22 doesn't like the use of the word "legal". If you take

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1 out the word "legal", you're asking whether they think
2 that the line-haul carrier has the right to select the
3 -- I think it's a play on words. Isn't that you
4 position?

5 MR. HEALEY: Not precisely, Judge, because
6 I think that question still asks for the same
7 information, and that is what do you think the law is.
8 I think the case law is clear, a party doesn't have a
9 right to come to the other party and say is this what
10 you think the law is. I've got case law I can cite.

11 I also don't understand them calling this
12 a contention interrogatory. Contention
13 interrogatories generally seek the factual basis for
14 the contentions that a party makes, and not the legal
15 basis for the contentions that a party makes, and I've
16 got case law I could cite to Your Honor on that as
17 well.

18 In point of fact, it's not asking what are
19 the facts, what facts do you base this statement on.
20 It's say, what do you think the law is. We think
21 that's clearly objectionable and we shouldn't have to
22 respond.

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1 JUDGE LEVENTHAL: Mr. Harker, are you
2 seeking to find out what they say the actual practice
3 is?

4 MR. HARKER: Yes.

5 JUDGE LEVENTHAL: And are you asking him,
6 in their opinion, does the line-haul carrier pick the
7 intermediate carrier?

8 MR. HARKER: Yes.

9 JUDGE LEVENTHAL: If he reforms his
10 question --

11 MR. HEALEY: If he reforms his question --
12 now, if I understand what you're saying -- that comes
13 closer to saying as a matter of practical reality, or
14 in the real world, isn't it a fact that the general
15 practice is for the receiving carrier to do this, and
16 if we can reformulate the question somewhere along
17 those lines, we'd be willing to answer that question,
18 Your Honor.

19 JUDGE LEVENTHAL: Do they contend that
20 this is the facts?

21 MR. HEALEY: Isn't that the way parties
22 operate on a daily basis, and we would answer that

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1 question.

2 (Whereupon, Mr. Harker conferred with
3 other counsel.)

4 MR. HEALEY: I'm thrilled at all the
5 consultation required. To think I'm able to do this
6 by myself -- that was off the record.

7 JUDGE LEVENTHAL: Off the record.

8 (Discussion off the record.)

9 JUDGE LEVENTHAL: Back on the record.

10 MR. HARKER: That's acceptable, Your
11 Honor.

12 JUDGE LEVENTHAL: All right. Let's word
13 it correctly.

14 MR. HEALEY: Yes, I need to make sure I
15 understand what the wording is, and if you want to
16 propose something that's fine, or I'll throw something
17 out.

18 MR. HARKER: Do you want me to do it now?

19 MR. HEALEY: I would. I'd be willing to
20 take something from you later today or tomorrow, if
21 you want to think about it more, either way is fine.

22 JUDGE LEVENTHAL: You want an order, so

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1 why don't you do it right now.

2 MR. HEALEY: We can probably keep
3 everything in the sentence up to "carriers available,"
4 --

5 JUDGE LEVENTHAL: Let's go off the record.
6 (Discussion off the record.)

7 JUDGE LEVENTHAL: The parties have agreed
8 upon the question Mr. Harker is about to read into the
9 record.

10 MR. HARKER: Interrogatory No. 5, as
11 revised during the off the record session, states,
12 where the services of an intermediate switching
13 carrier are required in order for one line-haul
14 carrier to deliver traffic to another at Chicago and
15 there are two alternative intermediate switching
16 carriers available, state whether it is the general
17 practice that the receiving line-haul carrier selects
18 the intermediate switching carrier.

19 MR. HEALEY: And we've agreed with that
20 formulation, for the record.

21 JUDGE LEVENTHAL: Very well.

22 MR. HARKER: The next is Interrogatory No.

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1 6(a) provides, with regard to the agreement between NS
2 and WCL referred to on page 2 of the comments of WCL,
3 state what rights -- (a) state what rights are not
4 certain under the agreement.

5 Wisconsin Central objects to this on the
6 ground that it's vague and ambiguous and so therefore
7 they are unable to answer it. They would consider
8 providing a substantive response if we adequately
9 defined what rights we're referring to and why we
10 believe that Wisconsin Central has indicated
11 uncertainty with respect to those rights.

12 And in our Motion to Compel, we do provide
13 some -- we do provide, I think, what Wisconsin Central
14 is looking for. So, I don't know if we have an issue
15 there.

16 MR. HEALEY: The only issue I would raise,
17 Judge, is the uncertainty that they have identified in
18 the agreement. I do appreciate the fact that they
19 have set forth what they understood to be the
20 uncertainty. They seem to be uncertainties that
21 aren't in our possession, custody or control. They
22 seem to be something -- the issue is this, Judge. In

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1 an agreement between Wisconsin Central and Norfolk
2 Southern, Norfolk Southern granted us certain rights
3 to operate over track, and I think it's even a sale
4 agreement of the Panhandle Line, I think that's
5 correct.

6 As a part of that sale, there were also
7 rights granted, operating rights granted to Wisconsin
8 Central on what I understand to be a jointly owned
9 track of the Norfolk Southern and the Grand Trunk
10 Western. I think the issue is that -- the reason it
11 says to the extent that they can, Norfolk Southern
12 shall grant -- it's my understanding that Norfolk
13 Southern is not certain that they can grant us the
14 rights over that track. That I think is probably the
15 substance of their answer to the question. But I'm
16 not sure that my client is in a position to answer
17 what the uncertainty is because, whether they had the
18 ability to grant those rights or not, it's not -- we
19 don't have the joint track agreement. It apparently
20 is a track between Norfolk Southern and Grand Trunk
21 Western. We don't have the agreement, so we can't
22 really speak to the uncertainty as to whether Norfolk

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1 Southern has those rights to us or not. I don't know
2 how we can answer the question, and maybe I just have
3 in providing the explanation that it's undoubtedly as
4 much explanation as Wisconsin Central is going to be
5 able to give.

6 MR. HARKER: Well, you know, I think the
7 agreement was -- the subject agreement is an
8 attachment to their comments, and it seems to us that
9 there obviously was some limitation or question about
10 the granting of the rights, as indicated in the
11 contractual language, and all we're asking for is not
12 what Norfolk Southern necessarily had in their mind
13 but, again, what WCL's understanding is of the
14 situation. And it's these things that we're asking
15 Wisconsin Central to identify.

16 JUDGE LEVENTHAL: I think you can probably
17 do that.

18 MR. HEALEY: I was about to say I think
19 we're in agreement now. If I understand, we read
20 their request to mean, why is it that these rights are
21 not certain. Why is it that Norfolk Southern can't
22 give these rights, or may not give these rights, or

1 may not know whether it has the ability to. All we're
2 trying to indicate is that's something we have no
3 idea, it's not a part -- we're not a part of that
4 agreement.

5 JUDGE LEVENTHAL: I think you can answer
6 that.

7 MR. HEALEY: But what he has just
8 specified here, I think will allow us to answer the
9 question, to the extent we know what the uncertainty
10 is.

11 JUDGE LEVENTHAL: All right. So ordered.

12 MR. HARKER: The next one is Interrogatory
13 No. 7. The responsive application of WCL states on
14 pages 7 and 8, that "WCL intends to invest in the 48th
15 Avenue Yard, upgrading its condition and placing it in
16 expanded service. (a) State the dollar amount that
17 WCL intends to invest in the 48th Avenue Yard. (b)
18 State WCL's proposed schedule for making such
19 investment. (c) State whether WCL's Board of
20 Directors has approved such investment. And (d)
21 identify all documents that in any way relate to the
22 subject matter of Interrogatory 7, subsections (a),

1 (b) and (c).

2 They object on the basis that the
3 information is not relevant or reasonably calculated
4 to meet the discovery of admissible evidence, also
5 that it would require a burdensome special study.

6 First of all, let's deal with the special
7 study issue. I don't understand the objection. It
8 seems to me that we're just asking for information
9 that they've got. There's no need here for a special
10 study, so I would just --

11 MR. HEALEY: If we could shortcut it, I
12 think we're going to withdraw the objection, and we
13 will provide substantive responses on this question,
14 Judge, to all four parts, (a), (b), (c) and (d). On
15 (c), which goes to the Board of Directors issue,
16 again, we don't agree that that's relevant, but given
17 your prior order as to Board of Directors, we will
18 answer it on that basis.

19 MR. HARKER: Interrogatory 8(b) is the
20 next one at issue. State whether WCL can and/or does
21 deliver traffic to the Belt Railway of Chicago BRC,
22 (b) for intermediate handling. The objection there

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1 was that the phrase was vague and that if we provided
2 a more -- a definition, that they would consider
3 providing a substantive response. And in our motion,
4 we have provided such explanation.

5 MR. HEALEY: And on the basis of that
6 clarification, we will be providing an answer to that,
7 Judge.

8 JUDGE LEVENTHAL: All right. Very well.

9 MR. HEALEY: To the extent what they
10 describe intermediate handling to be here, I think we
11 can do that.

12 JUDGE LEVENTHAL: Yes. They've got it in
13 their Motion to Compel.

14 MR. HARKER: Interrogatory No. 12 and
15 Document Request No. 11, these go hand-in-hand.
16 Interrogatory No. 12, state whether since 1987 WCL has
17 expressed any interest, made any inquiry, submitted
18 any proposals, or made any offers regarding WCL's
19 acquisition of some or all of the Altenheim
20 Subdivision.

21 Your Honor, the Altenheim Subdivision is
22 the subdivision of B&OCT that the WCL seeks to require

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1 the forced sale of in this proceeding. (b) State
2 whether such interest, inquiry, proposal or offer was
3 in writing or oral, the individual (and his or her
4 employee and job title) to whom it was made, and the
5 individual (and his or her employer and job title) who
6 it was made by; (c) identify all documents whether
7 created before or after January 1, 1995 which support
8 of in any way relate to the response to or the subject
9 matter of Interrogatory 12, subsections (a) and (b).

10 Document Request No. 11 asks for
11 production of all documents identified or which should
12 have been identified in response to Interrogatory No.
13 12(c).

14 This interrogatory essentially asks for
15 WCL's previous plans to acquire the Altenheim
16 Subdivision. They have submitted a responsive
17 application seeking the Board's authority to acquire
18 this subdivision, and indicate in it that it already
19 experiences difficulty in operating over the Altenheim
20 Subdivision.

21 Basically, the reason for the request is
22 clear, to determine to what extent interest in

1 purchasing the Altenheim Subdivision existed prior to
2 the transaction. The statute is clear. The Board is
3 clear. Their jurisdiction is limited to giving --
4 granting requests for relief of harm caused by the
5 transaction, to the extent that there were plans by
6 B&OCT -- I'm sorry -- plans by Wisconsin Central to
7 acquire the subdivision prior to the transaction.
8 It's clear that the harm complained about here is
9 unrelated to the transaction. If they were talking
10 ten years ago or five years ago about purchasing the
11 subdivision, the Altenheim Subdivision, five years
12 ago, then that was their plan five years ago, even
13 before this transaction was announced. That was the
14 relief that they -- that was a plan that they had at
15 that time.

16 So, how is it that suddenly the
17 transaction caused the harm that they are seeking to
18 ameliorate by essentially seeking the same condition
19 that they've already had plans about. In other words,
20 the classic condition here that a competitor is going
21 to -- a supplier is going to lose a source of rail
22 transportation as a result of the transaction --

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1 directly transaction-related.

2 The Board has the authority under those
3 circumstances, if it deems it appropriate, to grant
4 relief.

5 JUDGE LEVENTHAL: Suppose they had no
6 plans to acquire, how would that affect this
7 proceeding?

8 MR. HARKER: It would be neutral. The key
9 question is to the extent that they had plans to
10 acquire it before, that would suggest that the
11 problems that they're suffering, the alleged problems
12 that they're suffering pre-existed the transaction,
13 and were not caused by the transaction. That's the
14 purpose of what the Board is all about, trying to
15 identify problems that were caused by the transaction.
16 The Board is not empowered and does not grant relief
17 for pre-existing conditions. And to the extent that
18 we can show that their complaints with respect to the
19 Altenheim Subdivision in this situation pre-existed
20 the transaction, as evidenced by the fact that there
21 were plans to acquire the Altenheim Subdivision
22 before, that indicates that this is not -- that's our

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1 theory with respect to this particular matter.

2 It may or may not be persuasive, but that
3 is our theory. And I think it's well grounded in STB
4 precedent, and that's the purpose of this discovery.

5 MR. HEALEY: Judge, just very quickly, I'd
6 reiterate those objections. As to relevance, Mr.
7 Harker is right, our responsibility is to come forward
8 to the Board and identify harms that are going to
9 result from this transaction. The Board is not going
10 to grant us any conditions for a harm that is pre-
11 existing, that much is clear.

12 And in that vein, complaints -- they have
13 asked us about complaints regarding the Altenheim
14 Subdivision, and we're turning over information about
15 our complaints about how we've been treated as a
16 tenant out there.

17 Whether we, in fact, have sought to
18 purchase the piece of track or not in the past isn't
19 related to whether there's been a problem out there.

20 We also object -- and I didn't hear this
21 come up -- we also object aid the time period
22 referenced, why it is that throughout the entire

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1 history of our company, our ten-year-old company, that
2 any effort to buy this would be relevant, I don't
3 understand. They've made no argument as to why the
4 time period that they've so closely clung to in all
5 their discovery responses should suddenly be broadened
6 to extend over the entire scope of our company's
7 existence.

8 Furthermore, Judge, the interrogatory is
9 asking again for information they have in their
10 possession. Tell us about when you've expressed an
11 interest, made an inquiry, submitted a proposal, made
12 an offer. Those are all things we have to do to CSX
13 because they are the party that owns the property. We
14 wouldn't be making offers to buy it from anybody but
15 CSX, they are the ones that are out there.

16 MR. HARKER: Well, not if the interest,
17 inquiry, proposal, or offer was oral. To the extent
18 that WCL has memoranda and the like on oral
19 discussions, that would clearly be something that CSX
20 wouldn't have.

21 With respect to the time period, the time
22 period is essentially based on the verified statement

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1 of Mr. Schauer, who indicates that these problems have
2 existed over the last ten years. We discussed this in
3 the middle of page 27 of our Motion to Compel. This
4 is in his verified statement. And so subtracting 10
5 from 97, we come up with 1987. You know, we have been
6 required to produce information all the way back to
7 1978 in this case, and this is only ten years and, as
8 I said, it's put at issue by Mr. Schauer's statement
9 which says that these problems have existed over the
10 last ten years. To the extent that these problems
11 have existed over the last ten years, maybe they've
12 been thinking about making a purchase or an offer to
13 purchase this particular subdivision.

14 Again, I think it's certainly relevant
15 and, if not directly relevant, it is certainly
16 information which could lead to the discovery of
17 admissible evidence, the standard in the case.

18 JUDGE LEVENTHAL: I don't think you've
19 established that. I'll deny the motion with respect
20 to Interrogatory No. 12(a), (b) and (c).

21 MR. HARKER: And Document Request No. 11.

22 JUDGE LEVENTHAL: Yes.

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1 MR. HARKER: Interrogatory No. 13 and its
2 companion Document Request provides identify any WCL
3 Board of Directors resolution since 1987 that
4 authorized capital expenditures to acquire the
5 Altenheim Subdivision, seek Board authority to acquire
6 the Altenheim Subdivision, improve the physical
7 condition of the Altenheim Subdivision, or invest in
8 the physical connections with other rail lines.

9 And the Document Request No. 12, produce
10 a copy of all Board of Directors resolutions
11 identified or which should be identified in response
12 to Interrogatory 13, subsections (a) through (d).

13 They object to Interrogatory 13 on the
14 basis that it's seeking information that's neither
15 relevant nor reasonably calculated to lead to the
16 discovery of admissible evidence, and object to
17 Document Request No. 12 on the same basis.

18 JUDGE LEVENTHAL: This is basically the
19 same inquiry?

20 MR. HARKER: Differently worded, but that
21 is correct.

22 MR. HEALEY: Judge, I disagree with that.

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1 The issue here that they've put forth in this question
2 regarding what the Board has approved is quite a bit
3 more broad, and I specifically refer Your Honor's
4 attention to subpart (d), Board approvals to invest in
5 physical connections with other rail lines.

6 Judge, this would involve us producing
7 anytime the Board approved a budget for the year, or
8 a piece of interchange track not even in the Chicago
9 switching district -- perhaps up in Canada, perhaps up
10 in the Twin Cities -- was going to have an extra ten
11 spikes driven into it. If that was in the budget,
12 then we'd have to produce that document.

13 It's clearly -- that's not what they're
14 looking for, and I don't think we should have to
15 produce information related to that. If they are
16 looking for the information regarding Board authority
17 to come before the STB and acquire the Altenheim
18 Subdivision, I think that's in line with your prior
19 ruling. And, again, we disagree with the ruling, but
20 we think that your prior ruling has application to
21 13(b), and we will certainly produce the information
22 as it relates to (b).

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1 I think it's more doubtful that your prior
2 ruling relates to (a) and (c). I'd be willing to
3 debate that, but I certainly don't think it relates to
4 (d).

5 MR. HARKER: Well, I think with respect to
6 (d), we would be willing to limit it to the Chicago
7 switching district. I agree -- I mean, to the extent
8 that you considered investments in lines in Canada, or
9 wherever else you might operate outside of Chicago, I
10 would be prepared to limit (d) to essentially the
11 Chicago switching district.

12 MR. HEALEY: You understand that may
13 require redaction of some of these documents, these
14 sensitive Board documents.

15 MR. HARKER: I don't understand any such
16 thing. I mean, I don't know on what basis that would
17 be permitted.

18 MR. HEALEY: Well, you're looking at a
19 Board document that includes a variety of information
20 that we've just agreed is irrelevant.

21 MR. HARKER: Ah.

22 MR. HEALEY: Why it should come forward --

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1 I mean, you will get the information, if that's what
2 ultimately we agree upon, relating to the approval of
3 physical -- investment in the physical connection with
4 other rail lines in the Chicago switching district.

5 MR. HARKER: In other words, what you're
6 saying is, to the extent that the Board had a
7 resolution or there was a memo to the Board about
8 improvements in the rail connection in Canada and that
9 was one paragraph, and then the second paragraph
10 talked about improvements in the rail connections in
11 the Chicago switching district, the first paragraph
12 would be redacted, the second paragraph would be
13 there.

14 MR. HEALEY: That's correct. All those
15 Board resolutions will be provided to you with that
16 understanding, that these --

17 JUDGE LEVENTHAL: What are you agreeing
18 now?

19 MR. HEALEY: I think if I understand, we
20 are agreeing to -- we've certainly agreed your prior
21 ruling applies to (b). We've limited (d) to be
22 investments in the physical connections with other

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1 rail lines in Chicago.

2 MR. HARKER: I think where we are -- at
3 least where I am -- is based on your earlier rulings,
4 I think. The only thing that we have -- the only
5 thing that CSX has agreed to modify in (a), (b), (c)
6 and (d) is limit (d) to the Chicago switching
7 district. Clearly, (a), (b) and (c) are right on
8 point with respect to Altenheim. They don't ask about
9 anything else. (d) we'll limit to the Chicago
10 switching district. And then I think it's right in
11 line with prior rulings by Your Honor that have
12 essentially granted a Motion to Compel when asking
13 about whether or not the necessary corporate approvals
14 have been made for the relief requested.

15 MR. HEALEY: Reluctantly, I agree with
16 that, Your Honor.

17 JUDGE LEVENTHAL: All right. So ordered.

18 MR. HEALEY: Can we take about a five-
19 minute break before we move on to the Illinois
20 Central?

21 JUDGE LEVENTHAL: Yes. All right. Five-
22 minute recess.

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1 (Whereupon, a short recess was taken.)

2 JUDGE LEVENTHAL: Back on the record. Mr.
3 Harker.

4 MR. HARKER: Actually, let me just -- it
5 occurs to me -- Illinois Central Railroad Company is
6 the final subject of the day, the objection to
7 discovery, and I should say for the record that these
8 were discovery requests of both CSX and Norfolk
9 Southern, although Norfolk Southern does not join in
10 this subsection of the Motion to Compel.

11 First of all, with Your Honor's
12 permission, I'll read the various discovery requests
13 into the record. They are at Tab 8 -- or I should say
14 that the objections are at Tab 8 of the motion, and
15 they also include the text of the interrogatories.

16 Interrogatory No. 1, at anytime prior to
17 June 1997 did ICR or, to its knowledge, any prior
18 owner or operator of ICR's line offer or otherwise
19 propose or seek to acquire ownership of trackage or
20 other operating rights over CSX's line of railroad
21 extending from Mile Post 387.9 at Leewood to Mile Post
22 390.0 at Aulon in Memphis, Tennessee. For purposes of

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1 responding to this interrogatory, the time limitation
2 set forth in Instruction 3 does not apply.

3 Interrogatory No. 2, if the answer to
4 Interrogatory No. 1 is anything other than an
5 unqualified no, describe in detail each such other
6 proposal or other request specifying (a) the length
7 and location of the lines involved; (b) the nature of
8 the ownership interest or operating rights proposed or
9 sought; (c) the financial terms upon which such
10 ownership or operating rights were proposed or sought;
11 (d) all other terms including terms governing railroad
12 operations that were offered, proposed, sought or
13 discussed; and (e) why the ownership or operating
14 rights in question were not acquired pursuant to that
15 offer, proposal or request.

16 Interrogatory Nos. 5(a) and 5(c) were both
17 objected to. They provide, identify all instances
18 since 1995 in which ICR has invoked its right under
19 the 1995 agreement with the City of Memphis (IC-5, pg
20 9, Footnote 6), allowing ICR to use the River-front
21 line in emergencies, including but not limited to (a)
22 the circumstances relating to the implication of the

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1 right to use the River Line; and (c) the date of such
2 use.

3 Interrogatory 5(b) is also objected to.
4 It provides, identify all instances since 1995 in
5 which ICR has invoked its right under the 1995
6 agreement with the City of Memphis (IC-5, pg 9,
7 Footnote 6), allowing IC to use the River-front Line
8 in emergencies, including but not limited to the
9 disposition of use of such agreement.

10 Interrogatory No. 6, identify each
11 instance of "significant interference" of ICR trains
12 caused by CSX dispatching from December 1996 until the
13 present, including but not limited to (a) the date of
14 such "interference"; (b) its cause; (c) the total time
15 ICR trains were delayed by it; (d) any communication
16 with CSX concerns; and (e) the CSX response.

17 Interrogatory No. 7, identify all
18 communications with CSX concerning proposals for
19 improvements to the interlocking on the Leewood-Aulon
20 line, including but aid limited to communications
21 concerning cost-sharing for such improvements.

22 Document Requests. Document Request No.

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1 2, produce all documents discussing or relating to any
2 offer, proposal, or request identified in Response to
3 Interrogatory 2. For purposes of this request, the
4 time limitations set forth in Instruction 3 does not
5 apply.

6 Request No. 9, produce all documents
7 related to any instance of "significant interference"
8 with ICR trains or operations in the Memphis area
9 alleged to be caused by CSX dispatching from December
10 1996 until present, including any correspondence with
11 CSX relating thereto.

12 Request No. 10, produce all documents
13 discussing or relating to any communications with CSX
14 concerning any plans, proposals or actions taken since
15 December 1996 with respect to the dispatching of ICR
16 trains in the Memphis area.

17 Request No. 11, produce all documents
18 discussing or relating to improvements or proposed
19 improvements to the interlocking on the Leewood-Aulon
20 line, including but not limited to documents
21 concerning cost-sharing for such improvements.

22 No. 12, produce all documents underlying

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1 ICR's assertion on page 14 of the responsive
2 application that its acquisition of the Leewood-Aulon
3 line would result in reductions and lost equipment
4 utilization, fuel expenses, car hire expenses, crew
5 expenses, crew fatigue and delayed shipments, and
6 increases in on-time performance and operating
7 efficiency.

8 Request 13, produce records for each month
9 of years 1995 and 1996 of ICR's equipment utilization,
10 fuel expenses, car hire expenses, crew expenses, crew
11 fatigue, and delayed shipments and on-time performance
12 in operating efficiency for any ICR district that
13 includes the Leewood-Aulon line.

14 Request Nos. 15(b) and (c), produce a copy
15 of any agreements that the 1907 agreement superseded,
16 including but not limited to the 1905 agreement and
17 any amendments to the 1907 agreement.

18 No. 15(d), produce a copy of all documents
19 (other than routine billing documents) relating to
20 such agreements.

21 Okay. Interrogatory No. 9, which asks
22 whether or not anytime prior to June 1997 did Illinois

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1 Central request --

2 MR. HEALEY: Excuse me, I think it's
3 Interrogatory No. 1.

4 MR. HARKER: What did I say?

5 MR. HEALEY: You said 9.

6 MR. HARKER: I'm sorry. That's correct.

7 JUDGE LEVENTHAL: I was going to ask you
8 why you skipped the first year.

9 MR. HEALEY: Maybe he was just allowing
10 the objections to stand, I thought.

11 (Laughter.)

12 MR. HARKER: It's been a long day, Your
13 Honor. Interrogatory No. 1 asks whether or not at
14 anytime prior to June 1997, whether Illinois Central
15 or any prior owner of Illinois Central proposed or
16 sought to acquire the ownership of trackage that
17 Illinois Central is seeking aid purchase in this
18 particular -- in their responsive application.

19 Basically, what Illinois Central's claim
20 for relief or complaint is that this is going to is
21 the fact that CSX has been significantly interfering
22 with movements along this line for a number of years,

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1 and that they need relief -- that somehow the
2 transaction is going to exacerbate that problem and,
3 therefore, they need relief in the form of a forced
4 sale of this two miles worth of track.

5 And the purpose of Interrogatory No. 1 is
6 according to their responsive application, the purpose
7 of this forced line sale is to mitigate specific
8 adverse impacts on existing competition and the
9 adequacy of transportation service that will result
10 from CSX-Ts acquisition of certain Conrail lines, and
11 the interrogatory asks whether or not any
12 consideration has been given by Illinois Central to
13 purchasing this line prior to June 1997 because,
14 again, to the extent that there was consideration
15 given to purchasing that line prior to June 1997, that
16 indicates that this is a pre-existing condition that
17 existed prior to the transaction and is not caused by
18 the transaction. And, therefore, the condition
19 requested is not designed to remedy relief -- I'm
20 sorry -- remedy a harm created by the transaction, but
21 is rather designed to remedy a pre-existing harm which
22 the Board has said time and time again that it will

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1 not do.

2 JUDGE LEVENTHAL: Is this similar to a
3 Motion to Compel I just recently denied?

4 MR. HARKER: Yes, Your Honor, it is.

5 JUDGE LEVENTHAL: Your argument would be
6 the same?

7 MR. HEALEY: Identical, Your Honor.

8 JUDGE LEVENTHAL: My ruling would be the
9 same. If you want to make additional argument, I'll
10 listen to you, but I think it's exactly the same.

11 MR. HARKER: If I could, Your Honor, what
12 is -- why would we be denied discovery on this? Why
13 isn't the fact that they were interested in purchasing
14 this line prior to the transaction --

15 JUDGE LEVENTHAL: I don't know that that
16 leads to anything that's relevant. There are many
17 reasons they may want to purchase a line. Maybe they
18 want to make an investment, it's a very profitable
19 piece of track.

20 MR. HARKER: And that is true, and it also
21 may be that the reason why they want to purchase the
22 line is because of the fact that this so-called

1 interference has caused them problems in the past, and
2 it's going to -- they allege it's going to continue
3 after the transaction.

4 JUDGE LEVENTHAL: I think you can get that
5 information from a more precisely targeted question.
6 I don't think it leads to relevant information. All
7 right.

8 MR. HARKER: Okay.

9 MR. HEALEY: If I understand Your Honor's
10 ruling, that same ruling would apply to Interrogatory
11 No. 2 and Document Request No. 2. In the Applicant's
12 motion, they indicate that for the same reasons set
13 forth in Interrogatory 1, those are relevant, and
14 therefore those should also be denied.

15 JUDGE LEVENTHAL: Mr. Harker?

16 MR. HARKER: I think as I understand the
17 rationale for your ruling on No. 1, and given the fact
18 that Interrogatory No. 2 asks about the answer to No.
19 1 which they are not going to have to answer, I don't
20 think this is an issue.

21 JUDGE LEVENTHAL: All right, denied.

22 MR. HARKER: Interrogatory Nos. 5(a) and

1 (c), identify all instances since 1995 in which ICR
2 has invoked its right under an agreement with the City
3 of Memphis to use the River-front line -- they object
4 to this on the basis that it seeks information which
5 is neither relevant nor reasonably calculated to the
6 discovery of admissible evidence.

7 The basis for this request, Your Honor, is
8 that the request for relief, according to Illinois
9 Central, will remove the inefficient and any
10 competitive strangle hold that CSX-T now has on IC's
11 operations in the Memphis area. That's responsive
12 application at 8. And their responsive application
13 indicates that the only alternative route to the
14 Leewood-Aulon line, the one that they seek to force
15 the sale of, is the IC's River-front line, and the
16 City of Memphis prohibits further operations on the
17 line except in emergencies.

18 So, basically what they are saying is they
19 have no alternative but to purchase the Leewood-Aulon
20 line. And the purpose of Interrogatory No. 5 is to
21 determine the extent to which they have made use of
22 the River-front because obviously that can be an

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1 alternative, that's alternative routing to Leewood-
2 Aulon. And to the extent that they have alternative
3 routing to Leewood-Aulon, then they don't need to
4 purchase the Leewood-Aulon line. And so these
5 questions are designed to identify the instances since
6 1995, which is the time period that we have used
7 throughout the proceeding, as to whether or not they
8 have invoked the agreement.

9 MR. HEALEY: Judge, very quickly, Mr.
10 Harker is going to be given a copy of the agreement
11 between Illinois Central and I believe it's the City
12 of Memphis' transit agency or subdivision. And in
13 that agreement, it defines the circumstances under
14 which IC can use the line. In light of the fact that
15 that document is going to be produced, I don't see the
16 relevance of making us go and track down each of the
17 individual times when an emergency has arisen such
18 that we've had to operate a train over the alternative
19 routing.

20 JUDGE LEVENTHAL: I think Mr. Harker has
21 made out a case of relevance. I'll grant the motion
22 with respect to Interrogatory 5(a) and (c).

1 MR. HARKER: With respect to Interrogatory
2 5(b), again, this is related to the use of the River-
3 front line. The request asks for the disposition of
4 use of such agreement, and Illinois Central objects to
5 that on the basis that they don't understand what is
6 being asked about. And our Motion to Compel again
7 indicates that basically whether or not -- at the
8 bottom of page 32 of the Motion to Compel, we describe
9 that basically what we're seeking is whether or not
10 they ever invoked the claims of an emergency exception
11 to the '95 agreement under 5(a) and 5(c), and then
12 Interrogatory 5(b) is simply whether or not the
13 invocation was successful or unsuccessful, and did the
14 City of Memphis allow the movement of the freight on
15 the River-front line or not.

16 MR. HEALEY: Judge, we do have a
17 clarification here. I just wanted to say we
18 understand from your clarification what you're asking,
19 and we will be answering the question based on that
20 clarification.

21 MR. HARKER: Okay.

22 MR. HEALEY: It might save us a minute or

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1 two here.

2 MR. HARKER: Moving on to Interrogatory
3 No. 6, again, in their responsive application, they
4 indicate that there has been "significant
5 interference" by CSX with ICR trains caused by CSX
6 dispatching. And this is a claim they make in their
7 responsive application. We ask, tell us about those
8 instances of significant interference -- this is the
9 gravamen of the complaint -- significant interference
10 by CSX in operations by IC, and we're asking them for
11 about a year period, from only December 1996 until the
12 present, tell us about each such significant
13 interference.

14 Now, they object on the basis that it
15 would require Illinois Central to undertake a
16 burdensome and oppressive special study. We've talked
17 before about Mr. Healey's overheated use of this
18 objection. I think this doesn't require a special
19 study. It's basically -- you know, they make the
20 claim in their responsive application, there's been
21 significant interference. We're entitled to find out
22 what's behind it.

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1 And they further object that we already
2 have information in our possession. Of course, that's
3 not correct because there could have been significant
4 interference which we never heard about. So, I don't
5 think that any part of this objection has merit, and
6 I think it's obviously relevant.

7 MR. HEALEY: Judge, I will concede the
8 point that perhaps I've misunderstood the meaning of
9 the phrase "special study". I think, nonetheless, the
10 burden of what they're asking for is rather palpable
11 here. The piece of track we're talking about, Judge,
12 is about a two-mile stretch of track. It is Illinois
13 Central's main line between New Orleans and Chicago.
14 It is a secondary branch line that I understand CSX
15 runs maybe one or two trains a day on, and that's kind
16 of the hub of the problem, is that it doesn't get any
17 attention from the CSX dispatchers because they don't
18 need it for very much.

19 The interference we're talking about --
20 well, it is substantial, virtually all of the trains
21 coming through Memphis, from the little bit I
22 understand of the issue, have a problem getting

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1 through because they can't get a hold of the CSX
2 dispatchers. And sometimes the CSX dispatchers in
3 fact don't even know there's a train out there, when
4 there's a train out there.

5 JUDGE LEVENTHAL: Don't you think they're
6 entitled to this information? You're making an
7 allegation --

8 MR. HEALEY: I don't understand how it is
9 we're going to be able to handle the burden of being
10 able to identify every single train that comes up to
11 this location and has to stop, how it is we're going
12 to be able to determine, for example, what was the
13 cause of the delay. Do we know, for example, from
14 CSX, whether it was -- I didn't know how we're going
15 to know whether it was CSX --

16 JUDGE LEVENTHAL: Whatever your records
17 show. You can't give them something you don't have.
18 What he's asking for is what do your records show as
19 to significant interference. Isn't that your
20 question, Mr. Harker?

21 MR. HARKER: Yes, Your Honor.

22 JUDGE LEVENTHAL: If your records don't

1 show anything, that's your answer.

2 MR. HEALEY: I've made my argument and I'm
3 prepared for your ruling.

4 JUDGE LEVENTHAL: All right. Grant the
5 motion.

6 MR. HARKER: Interrogatory No. 7, this is
7 requesting all communications with CSX concerning
8 proposals for improvements to the interlocking on the
9 Leewood-Aulon line, including but not limited to
10 communications concerning cost-sharing for such
11 improvements. Again, the objection is on the basis of
12 a special study. They also object on the basis of
13 relevance, also object on the basis that CSX already
14 has the information.

15 The interrogatory really goes to the issue
16 of if you assume the problems complained about, if you
17 assume the truth of the problems complained about by
18 Illinois Central, the question is, are there other
19 alternatives less Draconian than a forced line sale.
20 And one such possibility is improvements to the
21 interlocking on the line, and all we're asking for
22 there is has Illinois Central ever suggested

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1 improvements to the interlockers in an attempt to
2 remedy the alleged delays. And to the extent that
3 those accommodations have been discussed, the extent
4 to which Illinois Central was willing to support those
5 accommodations.

6 So, this is really a question about is
7 there a less Draconian alternative to deal with their
8 problem other than requiring us to sell.

9 JUDGE LEVENTHAL: Wouldn't you have that
10 information in your files? It's one thing when you're
11 talking about burden of finding information in public
12 files, but it seems to me this is something you should
13 have in your own files, and it should be very easy for
14 you to find it.

15 MR. HARKER: I should say that there is
16 also a companion Document Request, Request No. 11, to
17 which Illinois Central also objects. Produce all
18 documents discussing or relating to improvements or
19 proposed improvements to the interlocking on the
20 Leewood-Aldon line, including but not limited to
21 documents concerning cost-sharing for such
22 improvements. This is clearly not just communication

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1 between the two, but also documents relating to the
2 issue -- so, in other words, internal documents that
3 we would not have would also be covered by
4 Interrogatory No. 11, and I notice that they object to
5 Interrogatory No. 11 on that basis.

6 The other thing with respect to
7 Interrogatory No. 7 is it says identify all
8 communications with CSX concerning proposals for --
9 again, to the extent that there were oral discussions
10 between the two and Illinois Central has prepared
11 memoranda relating to those communications, CSX would
12 not have that information.

13 JUDGE LEVENTHAL: Would you limit it to
14 memoranda involving oral conversations or oral
15 communications?

16 MR. HARKER: If you're telling me that's
17 the best I'm going to do --

18 JUDGE LEVENTHAL: I'm not telling you
19 you're going to get it.

20 MR. HARKER: And what would be Your
21 Honor's ruling with --

22 JUDGE LEVENTHAL: The same as with respect

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1 to Request No. 11, internal documents --

2 MR. HARKER: That we don't have, documents
3 that were not sent to us. If that is the very best
4 I'm going to do, I would gladly accept that, Your
5 Honor.

6 JUDGE LEVENTHAL: I bet Mr. Healey would
7 go along with that.

8 MR. HEALEY: Judge, you're going to be
9 surprised because I'm not, and I will explain to you
10 why. The issue that's raised in the interrogatory is
11 not one that we have put forth in this case. An
12 interlocking is a device that controls the operation
13 of trains through a crossing at-grade. We have not
14 raised an issue with the interlocking that governs the
15 crossing of trains at-grade between Leewood and Aulon.

16 The issue that we have raised relates to
17 problems we have had in communications. The physical
18 operation of the switches -- that is, how fast that
19 they turn -- that's not something we've raised. And
20 improvement to the interlocking is unrelated to
21 anything we've put at issue in this case.

22 The problem we have had is that the people

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1 who operate the interlocking, we can't get a hold of
2 them. That's the problem. Improvements with the
3 physical plant of the interlocking wouldn't help.
4 Once we get their attention and they decide to move
5 the switches, the switches move and we go.

6 JUDGE LEVENTHAL: Well, Mr. Harker, if
7 that's their complaint --

8 MR. HARKER: Well, this is the first time
9 I've heard this. I mean, our understanding is that
10 there is an issue around interlocking as a cause for
11 the delays.

12 JUDGE LEVENTHAL: Suppose he answers 7 and
13 11 what he just told us. Suppose they say we don't
14 have a complaint with the interlocking, we have a
15 complaint with personnel not being available. Does
16 that satisfy you?

17 MR. HARKER: But to the extent that I --
18 I understand that's what he's saying --

19 JUDGE LEVENTHAL: He's saying that there's
20 no complaint as to the interlocking, that's what he's
21 just said. Now, I would suspect you'd want it in a
22 more formal statement, and if you get that in response

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1 to the interrogatory, that should satisfy you.

2 MR. HEALEY: Maybe I should put one more
3 statement on the record to make sure we're clear. I
4 did not work on the preparation of the Illinois
5 Central case. I have read through it once. My
6 understanding is that the interlocking is not at
7 issue.

8 I would agree with you that if the IC has
9 raised the issue of problems with the physical
10 machinery that allows trains to operate through
11 Leewood to Aulon, that communications regarding
12 improvements to them would be relevant and we would
13 produce the memoranda regarding the communications.
14 But I don't think that's an element to the case and,
15 therefore, I'd object on the relevance and if it's not
16 an element to the case, we would be happy to provide
17 a statement saying we have not placed at issue the
18 physical arrangement of the interlocking, or something
19 along those lines, that should resolve the concern.

20 MR. HARKER: But the part of the problem,
21 as I understand it, is the operation of the
22 interlockers, whether or not you call it a physical

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1 aspect of them or the way they operate because
2 somebody is not available or what have you, and I
3 guess my question -- you know, to the extent -- and I
4 think Mr. Healey's conceded that he understands that
5 there is a problem associated with the interlockers --
6 and I'm not representing that what we're interested in
7 here is solely the physical aspect to it, I don't
8 think -- the only place where we've said is -- or
9 talked about this issue, is down at the bottom of page
10 34, top of page 35, it does so by seeking to discover
11 whether ICR has ever suggested any improvements to the
12 interlockers in an attempt to remedy the alleged
13 delays, again, and to the extent that apparently the
14 interlockers, or the way they operate, have been
15 identified as a source of delay. I think limiting the
16 request to the way the Judge indicated with respect to
17 stuff not that you communicated to us in writing, but
18 things that relate to internal reviews or internal
19 documents relating to the operation of the
20 interlockers, and how those contributed to delays, and
21 what improvements might be made to those interlockers
22 in order to ameliorate the delays, or the operation of

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1 the interlockers in order to ameliorate the delays, I
2 think, is basically what we're looking for. Again,
3 the idea is, is there a less harmful, a less Draconian
4 alternative to a forced line sale, and it strikes us
5 that to the extent that there are internal documents,
6 Illinois Central is saying that if we could only do
7 this, that or the other thing with respect to the
8 operation of the interlockers, this would alleviate
9 some of the delay, and we are prepared to put up some
10 money to improve that situation, I think that's
11 relevant.

12 And I am prepared to live with the
13 compromise that it would only be internal documents
14 generated by Illinois Central, whether related to an
15 oral communication with CSX or just internal
16 communications, and you wouldn't have to produce
17 letters that you provided to CSX.

18 MR. HEALEY: I have to object to that part
19 because the interrogatory says identify all
20 communications with CSX. You are now proposing an
21 expansion of the interrogatory.

22 MR. HARKER: No, no. If you look at

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1 Document Request No. -- we're taking these together --
2 11, and I just thought it made sense to take
3 Interrogatory 7 and 11 together. And so on 7 we're
4 prepared to limit it, and 11 as well, as I've just
5 said.

6 JUDGE LEVENTHAL: The limitation gives you
7 what you want, Mr. Healey.

8 MR. HEALEY: I agree, as long as we are of
9 the understanding that the interlocking is the
10 physical device out there that governs the movement of
11 trains.

12 JUDGE LEVENTHAL: I think that's clarified
13 on the record.

14 MR. HEALEY: Fair enough.

15 JUDGE LEVENTHAL: All right, so ordered.

16 MR. HARKER: Okay, we've already disposed
17 of Document Request No. 2. Document Request No. 9,
18 produce all documents related to any instance of
19 significant interference with Illinois Central trains
20 or operation in Memphis.

21 JUDGE LEVENTHAL: This is Request No. 9.

22 MR. HARKER: I think that's all where we

1 think we are. I'm sorry, page 7. This, I think, is
2 the companion to the prior interrogatory --

3 MR. HEALEY: Interrogatory No. 6, you had
4 granted No. 6 so I think you granted this one as well,
5 Judge.

6 JUDGE LEVENTHAL: Yes.

7 MR. HARKER: Document Request No. 10,
8 produce all documents discussing or related to any
9 communications with CSX concerning any plans,
10 proposals or actions taken since December 1996 with
11 respect to the dispatching of Illinois Central
12 Railroad trains in the Memphis area.

13 MR. HEALEY: Judge, we're going to
14 withdraw this objection.

15 JUDGE LEVENTHAL: All right.

16 MR. HARKER: Request No. 11 we just spoke
17 about. Document Request No. 12, produce all documents
18 underlying Illinois Central's assertion on page 14 of
19 the responsive application for its acquisition of the
20 Leewood-Aulon line that result in reductions and loss
21 of equipment utilization, fuel expenses, car hire
22 expenses, crew expenses, crew fatigue, and delayed

1 shipments and increases in on-time performance and
2 operating efficiency.

3 Your Honor, this essentially picks up
4 right out of page 14 of Illinois Central's responsive
5 application, about their projection of the public
6 interest justifications for this forced line sale.
7 And --

8 MR. HEALEY: Judge, we're going to
9 withdraw this objection as well.

10 JUDGE LEVENTHAL: All right.

11 MR. HARKER: Request No. 13 essentially
12 asks for information necessary to allow us to
13 benchmark and assess the claimed efficiencies if the
14 forced line sale is authorized. In other words, we're
15 asking them, okay, tell us what's the basis for your
16 statement that there are going to be all these
17 efficiencies. They are going to tell us that now.

18 Now we're asking them with respect to
19 Document Request No. 13, this will allow us to
20 essentially benchmark, if you will, the claimed
21 efficiencies, to see if, in fact, these efficiencies
22 are actual or not, by asking for two years worth of

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1 very narrow data that is essentially the mirror image
2 of what we asked for in No. 12.

3 So, again, this allows us to assess the
4 claims in response to Document Request No. 12, that
5 there are going to be these savings.

6 MR. HEALEY: I would disagree with that.
7 The request is clearly overly broad. It doesn't allow
8 them to assess whether there is going to be any
9 savings or not, it merely establishes the benchmark
10 for what those expenses are. I don't see how they are
11 going to take that data and say there won't be savings
12 in car hire because car hire was X. I think it's
13 overly broad and I don't think it's relevant.

14 MR. HARKER: Well, we need some basis to
15 assess the claim of efficiencies. And our best
16 judgment was the best way to do that was to draft a
17 fairly narrow document request for only two years,
18 which requested data with respect to each of the
19 claimed efficiencies by Illinois Central.

20 JUDGE LEVENTHAL: I think they're entitled
21 to some information to test. If you think this is
22 overly broad, tell me how you would narrow it and give

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1 them some of the information that they need. Do you
2 feel that two years is too long?

3 MR. HEALEY: I guess I don't understand
4 why it's needed, and we've said crew expense will go
5 down because crews will be waiting for less time at
6 the interlocking. If we were to buy it and paid more
7 attention to the movement of trains through the
8 interlocking, they move through quicker, crew expense
9 will go down because crews will be waiting there less.
10 Now, why you need to know what we've spent on crews,
11 crew expenses, to determine whether crew expenses are
12 going to go down, I don't understand the connection
13 there, Judge. There doesn't seem to be any
14 relationship between those issues. They both relate
15 to crew expense, but there's no way to measure our
16 claim against what the level of crew expense is.

17 JUDGE LEVENTHAL: Yes, Mr. Harker?

18 MR. HARKER: Well, if they say that our
19 projection for crew expenses for this line after the
20 transaction is X, well, let's see what it was in '95
21 and '96. That's what they would say with respect to
22 Document Request No. 12. We're asking them for the

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1 basis of their assertion that there are going to be
2 these efficiencies, and they're going to tell us,
3 well, because utilization is -- crew utilization is
4 going to be X. Well, the way to measure X is to see
5 whether or not there are, in fact, any efficiencies
6 associated with it, is to see what it was before.

7 JUDGE LEVENTHAL: You need two years of
8 information?

9 MR. HARKER: Well, the problem is that to
10 the extent that there are blips --

11 JUDGE LEVENTHAL: Well, two years wouldn't
12 show you that anyway, would it.

13 MR. HARKER: No, but it's better than one.
14 It's not a special study, and, again, it's to the
15 extent that they've got the records. It's just
16 produce records for each month. Railroads keep this
17 kind of information. So, there's no special study,
18 and I don't think that there's a burden with respect
19 to just producing the records.

20 MR. HEALEY: Judge, if I might, I think
21 you've correctly put your finger on the issue here.
22 If we were to come forward and say we will reduce crew

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1 hire by 32 percent, then I think they've got an
2 argument that at least the documents might -- are
3 reasonably calculated to lead to the discovery of that
4 information.

5 I think they've taken the statement out of
6 context. My recollection of the statement -- and I
7 don't have the application here, perhaps Mr. Harker
8 can refer me to it -- but my recollection is we simply
9 made the statement that crew hire expense will go
10 down. And if they want to know the logic of why we
11 think crew hire expense will go down if we take this
12 over, we'd be happy to answer that as well. But to
13 say that because you think you're going to spend less
14 on car hire, show us all your records for car hire on
15 this piece of track, I don't think there's any
16 relationship there. It certainly doesn't justify the
17 burden of digging up this information.

18 If we were to come forward with specific
19 numbers other than the general statement, then I would
20 agree the data is relevant.

21 JUDGE LEVENTHAL: In No. 12, aren't you
22 going to -- he's saying he needs to check No. 12.

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1 MR. HEALEY: That's right, and what we're
2 going to do on No. 12 -- and if I'm correct, and I
3 think I am, that the reference was simply to the fact
4 that we think those numbers will go down -- I'm not
5 sure we have any documents that reflect that. My
6 understanding was that that was a statement that was
7 made out of the common sense of people who operate a
8 railroad, that if you operate through an interlocking
9 more efficiently, all of these things are going to go
10 down.

11 MR. HARKER: Well, Your Honor, if they say
12 that, if they say we have no backup for this, we've
13 done no study, we have no work papers, they haven't
14 given us any work papers for this, it was just what we
15 thought and we've done no detailed study of it, that's
16 the answer. I mean, the question is produce all
17 documents underlying, and if they say we have no
18 documents underlying, that it seems to me is a
19 complete and responsive answer.

20 JUDGE LEVENTHAL: That's No. 12. How
21 about 13. Suppose they say that with No. 12, suppose
22 they say we have no documents. What would you then

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1 want for No. 13? Would you waive 13?

2 See, I'd be inclined to grant you 13 if
3 they give you figures in No. 12.

4 MR. HARKER: Okay. If that's where you
5 are, I'm prepared to accept that.

6 MR. HEALEY: And I'm prepared to accept
7 that as well, Your Honor.

8 JUDGE LEVENTHAL: Very well, so ordered.

9 MR. HARKER: So to the extent that they
10 respond to Request No. 12 --

11 JUDGE LEVENTHAL: Then they must respond
12 to No. 13.

13 MR. HARKER: Unless they say we have no
14 documents supporting this.

15 Document Request No. 15, produce a copy of
16 any agreements -- actually, let me go back to the
17 actual interrogatories and document requests. 15,
18 produce a copy of (a) which they do not object to, the
19 1907 agreement referred to on page 7 of the verified
20 statement of John D. McPherson; (b) which they do
21 object to, any agreements that the 1907 agreement
22 superseded (including but not limited to the 1905

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1 agreement); (c) which they also object to, any
2 amendments to the 1907 agreement; and (d) which they
3 also object to, all documents other than routine
4 billing documents relating to such agreements.

5 They objected to this on the basis that
6 it's unduly burdensome and that the document requested
7 are currently in Applicants' possession, however, in
8 the spirit of compromise, if we state we don't have a
9 copy of the document, they'll produce it.

10 My understanding is that our copy is not
11 readily available and, on that basis, we've asked for
12 production of the 1905 agreement.

13 JUDGE LEVENTHAL: All right. Mr. Healey?

14 MR. HEALEY: Well, if Mr. Harker will put
15 that writing, that CSX does not have within its files
16 a copy of the 1905 agreement, like it's stated in the
17 response, we will provide him with a copy of the 1905
18 agreement. It simply seems to me that if they have
19 it, that the burden shouldn't be on us to get them an
20 agreement that's between my client and his client.

21 JUDGE LEVENTHAL: He just said they don't
22 have it readily available. What do you mean, you

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1 can't find it, Mr. Harker?

2 MR. HARKER: Not at this point.

3 MR. HEALEY: Mr. Harker is an officer of
4 the court, and as we are on the record here and he has
5 told me they don't have it, to the extent the IC has
6 a copy of the 1905 agreement, it will be produced.

7 JUDGE LEVENTHAL: Very well.

8 MR. HARKER: And there is also an
9 illegible copy. We've asked for a more legible copy.

10 MR. HEALEY: Of?

11 MR. HARKER: The map, the 1907 agreement -
12 - there's a map attached to the 1907 agreement that
13 you did produce, it's just not legible.

14 MR. HEALEY: We'll look and see if we have
15 a more legible copy.

16 MR. HARKER: That's all we can ask.

17 JUDGE LEVENTHAL: All right.

18 MR. HARKER: And then, finally, they
19 object to Request 15(d) on the basis that relating to
20 it's vague. That request asks for all documents
21 relating to such agreements. We've clarified it that
22 we're seeking of copies of documents that interpret

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1 the meaning of any provisions in the 1905, 1907, or
2 other agreements responsive to (a) through (c).

3 MR. HEALEY: And that's satisfactory to
4 us, Judge. That clarification is satisfactory.

5 JUDGE LEVENTHAL: Very well, so ordered.

6 MR. HARKER: I think that concludes it,
7 Your Honor. It's been a long day. I think that
8 concludes our Motion to Compel.

9 JUDGE LEVENTHAL: So far as I can see,
10 you've covered everything. Do you want a few moments
11 to check before we close?

12 MR. HARKER: I don't think so. I think
13 we've been watching that on our side. I think we're
14 all set.

15 JUDGE LEVENTHAL: All right.

16 MR. HEALEY: We're done as well.

17 JUDGE LEVENTHAL: The conference stands
18 adjourned.

19 (Whereupon, at 4:10 p.m., the hearing was
20 concluded.)
21
22