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DISCOVERY CONFERENCE

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

Finance Docket
No. 33388

Thursday,
October 16, 1997

Washington, D.C.

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

BEFORE: THE HONORABLE JACOB LEVENTHAL
Administrative Law Judge

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WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433

APPEARANCES:On behalf of Conrail:

GERALD P. NORTON, ESQ.
of: Harkins Cunningham
Suite 600
1300 19th Street, N.W.
Washington, D.C. 20036
(202) 973-7605 (GPN)

On behalf of CSX:

DREW A. HARKER, ESQ.
of: Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5022 (DAH)

AND

DAVID H. COBURN, ESQ.
of: Steptoe & Johnson, LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795
(202) 429-8063

On behalf of Norfolk Southern Corporation
and Norfolk Southern Railway Company:

JOHN V. EDWARDS, ESQ.
of: Zuckert, Scoutt & Rasenberger
888 17th Street, N.W.
Washington, D.C. 20006-3939
(202) 298-8660

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APPEARANCES (continued):On Behalf of Canadian Pacific Railway Parties:

GEORGE W. MAYO, JR., ESQ.
of: Hogan & Hartson, L.L.P.
Columbia Square
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5679 (GWM)

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

THOMAS J. HEALY, ESQ.
of: Oppenheimer, Wolff & Donnelly
Two Prudential Plaza, 45th Floor
180 North Stetson Avenue
Chicago, Illinois 60601-6710
(312) 616-5857

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

(9:30 a.m.)

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

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

JUDGE LEVENTHAL: Very well.

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

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

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

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

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

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

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

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

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

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

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

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

22 JUDGE LEVENTHAL: We'll get to that in a

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1 minute.

2 MR. HEALEY: Okay.

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

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

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

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

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

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

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

22 MR. NORTON: That's correct.

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

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

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

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

22 We think just to take the sequence of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 MR. HEALEY: Yes, sir.

11 JUDGE LEVENTHAL: -- on the narrow
12 question.

13 MR. HEALEY: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

17 MR. HEALEY: I appreciate that.

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

20 MR. HEALEY: I understand.

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

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1 MR. HEALEY: I appreciate that, Your
2 Honor.

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

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

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

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

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

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

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

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

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

16 MR. NORTON: Right.

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

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

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

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

8 MR. HEALEY: Okay.

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

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

14 JUDGE LEVENTHAL: How many interrogatories
15 are in --

16 MR. HEALEY: Well --

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

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

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1 summarizes the categories of documents that are
2 requested.

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

5 MR. NORTON: Yes.

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

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

11 JUDGE LEVENTHAL: All right. Off the
12 record.

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

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

1 requests to produce discovery.

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

4 JUDGE LEVENTHAL: Yes. I was about --

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

7 JUDGE LEVENTHAL: I was about to comment
8 on that.

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

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

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

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1 discussion, and analysis.

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

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

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

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

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

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

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

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

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

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1 competitive harms. And the only way to address that
2 is to turn this 51 percent stock ownership to us so
3 that we can look out for the people who aren't Class
4 1's operating through Chicago so that we can maintain
5 a neutral and independent Indiana Harbor Belt in order
6 to accommodate the intermediate switching service that
7 the IHB currently engages.

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

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

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

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

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

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

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

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

13 JUDGE LEVENTHAL: All right. Mr. Norton?

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

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

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1 without having this information.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 would follow if the STB imposes this condition.

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

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

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

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

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

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

7 MR. HEALEY: I have, Judge.

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

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

20 MR. HEALEY: I do, Judge.

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

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1 information that you're seeking?

2 MR. HEALEY: Judge, I think --

3 JUDGE LEVENTHAL: Let me ask a preliminary
4 question.

5 MR. HEALEY: Sure.

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

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

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

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

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

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1 trackage rights issues.

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

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

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

14 JUDGE LEVENTHAL: All right. Any further
15 argument?

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

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

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

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1 JUDGE LEVENTHAL: Sure.

2 MR. HEALEY: Thank you.

3 (Pause.)

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

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

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

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

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1 to divulge information regarding its subsidiary.

2 Here we have a situation where Conrail
3 owns 51 percent of the IHB and the Soo Railroad owns
4 49 percent. And the Soo has expressed its objection
5 to release of this information.

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

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

15 All right. Do you have anything?

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

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

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1 balanced against the confidentiality expressed by the
2 respondents.

3 All right. We have the other
4 interrogatories still meaning.

5 MR. HEALEY: Yes, Judge, we do.

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

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

10 JUDGE LEVENTHAL: All right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 JUDGE LEVENTHAL: And is that information

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1 in the depository?

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

4 JUDGE LEVENTHAL: All right.

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

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

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

22 MR. HEALEY: They were willing to give me

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

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

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

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

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

21 MR. COBURN: But not highly confidential.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 JUDGE LEVENTHAL: Let's go off the record.
2 (Whereupon, the foregoing matter went off
3 the record at 10:24 a.m. and went back on
4 the record at 10:32 a.m.)

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

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

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

18 JUDGE LEVENTHAL: All right. Then suppose
19 you advise my law clerk by, say, 3:00 o'clock today or
20 --

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

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

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

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

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

18 Who will set up the conference call?

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

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

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

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

12 All right. That leaves us now with the
13 generic issue of whether or not Conrail is required to
14 respond to discovery requests of its subsidiary IHB.
15 Mr. Healey, we've heard some argument on the part of
16 --

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

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

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

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

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

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

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

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

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

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

22 And I also present the Court with, which,

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

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

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

15 JUDGE LEVENTHAL: Have you seen this?

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

18 MR. NORTON: Thank you, Your Honor.

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

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

8 JUDGE LEVENTHAL: Mr. Norton?

9 MR. NORTON: Your Honor, taking these
10 piece by piece, the Winston case, we don't know
11 anything about the record that was made in that case.
12 And it related to, as I understood from opinion, a
13 claim in an accident that took place back in the mid
14 1980s.

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

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1 percent interest of Soo.

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

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

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

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

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1 has to address about control.

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

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

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

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

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1 proper way that these matters should be addressed.

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

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

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

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

22 MR. NORTON: Well, they are Conrail

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

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

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

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

19 JUDGE LEVENTHAL: All right. Mr. Mayo?

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

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

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

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

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

22 I think you can see that the independence

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

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

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

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

22 Applicants would put us to a standard of

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

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

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

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

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

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

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

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

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

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

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

13 Let's go off the record.

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

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

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

5 Off the record again.

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

8 JUDGE LEVENTHAL: Back on the record.

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

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

18 MR. NORTON: Right.

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

22 MR. NORTON: I understand.

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

3 All right. Anything else before us this
4 morning?

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

6 JUDGE LEVENTHAL: All right. The
7 conference stands adjourned until tomorrow morning at
8 10:00 a.m.

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

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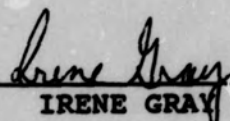
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IRENE GRAY