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12/08/97

STB #41687

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UNITED STATES OF AMERICA

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DISCOVERY CONFERENCE

IN THE MATTER OF:

GRAIN LAND COOP

v.

CANADIAN PACIFIC LIMITED AND SOO
LINE RAILROAD COMPANY, d/b/a
CP RAIL SYSTEMSTB Docket
No. 41687Monday,
December 8, 1997

Washington, D.C.

The above-entitled matter came on for
oral argument in Hearing Room 4 of the Federal
Energy Regulatory Commission, 888 First Street, N.E.
at 9:00 a.m.

BEFORE: THE HONORABLE JACOB LEVENTHAL
Administrative Law Judge

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APPEARANCES:On Behalf of Grain Land Coop:

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

(9:05 a.m.)

JUDGE LEVENTHAL: The conference will come to order. This is a conference in STB Docket No. 41687. All right, further movement?

MR. BARROWS: Good morning, Your Honor. I am Robert Barrows for the Canadian Pacific Railroad and Soo Line.

MS. KUEPPERS: And I am Barbara Kueppers, and I am representing Grain Land Coop.

JUDGE LEVENTHAL: All right, has any part of the dispute that we're to hear this morning been rendered moot by the Commission's order that was served on December 1st?

MR. BARROWS: No portion of the motion made by CP do I understand to be moot. I do understand, however, that to the extent that Grain Land we re-arguing the 11904 issue, that issue has been rendered moot.

The information -- since last we were here, Grain Land and its outside expert did come over and look at the information, and that information is

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1 now being copied under the protective order and will
2 be provided to Grain Land later this week as soon as
3 all the copying gets accomplished.

4 So that portion, I believe, is moot, Your
5 Honor.

6 JUDGE LEVENTHAL: All right, Ms. Kueppers.

7 MS. KUEPPERS: I guess my answer would be
8 very similar. I think our cross motion which, you
9 know, may kind of butt up against your question, you
10 know, really has to do with kind of in what form we're
11 going to receive the answers, whether we'll receive
12 merely thousands of documents or whether the -- we can
13 receive answers in interrogatory form.

14 And so I think, you know, Mr. Earrows is
15 correct: The reason we're here today is not rendered
16 moot.

17 JUDGE LEVENTHAL: All right, very well.

18 All right, this morning's conference was
19 set by the Defendant's motion to compel answers to its
20 second supplementary interrogatory number 21.

21 In reply, the Defendants -- the
22 Complainant filed a cross motion for -- to compel

1 answers to certain interrogatories, and that's what
2 the parties now have advised me becomes moot at this
3 time because of the Commission decision which was
4 served on December 1st, 1997.

5 All right, now with respect to the motion
6 to compel interrogatory number 21, that's the only
7 issue before us this morning, is that --

8 MS. KUEPPERS: No; excuse me, Your Honor,
9 I think you misunderstood what I was saying. I was
10 saying that it was not -- my cross motion was not
11 rendered moot, not that it was.

12 JUDGE LEVENTHAL: Oh, I thought you said
13 you agreed with Mr. Barrows.

14 MS. KUEPPERS: I didn't -- my sense of
15 what you said is you were going to produce documents.
16 But, you know, our interrogatory goes beyond that
17 because what we're saying is --

18 JUDGE LEVENTHAL: You know, if it's not
19 rendered moot, I'll hear your argument.

20 MS. KUEPPERS: Okay.

21 JUDGE LEVENTHAL: All right.

22 MS. KUEPPERS: Okay.

1 JUDGE LEVENTHAL: All right, first we'll
2 take interrogatory number 21. Interrogatory number 21
3 reads as follows:

4 "Identify the dollar amounts of each and
5 every item of damage which Grain Land alleges in the
6 complaint in incurred. And for each dollar amount,
7 (a) describe what the amount compensates for, (b)
8 describes how each amount was calculated, (c) identify
9 each person who participated in performing the
10 calculations, and (d) identify each document which
11 references or evidences the amount."

12 All right, I must say I have the motion by
13 the Complainant -- the motion by Defendant, pardon me,
14 Complainant's cross motion to compel answers to
15 interrogatories and reply to Defendant's motion to
16 compel answer to second supplemental interrogatory
17 number 21, and the Defendant's rely memorandum in
18 opposition to Complainant's cross motion to compel
19 answers to interrogatories.

20 I think that you have made a very complete
21 argument, Mr. Barrows, on behalf of the Canadian
22 Pacific Railroad -- Canadian Pacific Limited. I'll

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1 hear additional argument, if you like, but I think we
2 can go and hear the reply to the arguments as you have
3 advanced.

4 MR. BARROWS: Your Honor, I have only one
5 piece that I'd like to add to it.

6 JUDGE LEVENTHAL: Sure.

7 MR. BARROWS: On October 10, when Grain
8 Land answered the third set of interrogatories and
9 gave us some information about the contract buy backs
10 and discounts, one of the pieces that it had done on
11 the discounts was providing a chart that showed
12 contract numbers, etc., and how the discounts were
13 done.

14 And what I want to do is explain why it is
15 that we specifically asked them in that to give us
16 their document control number. When I couldn't line
17 up their contract numbers, I wrote Ms. Kueppers and
18 she sent me back a letter. And this is one of the
19 documents that she identified, document 5111.

20 And there's a stray, handwritten notation
21 up there that apparently turns out to be a contract
22 number. And she said from this I'm supposed to be

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1 able to figure out their discounts.

2 JUDGE LEVENTHAL: Have you seen this
3 document, Ms. Kueppers?

4 MR. BARROWS: This is the one, Barbara,
5 that you told me contained in the upper right-hand
6 corner the --

7 MS. KUEPPERS: Well, I think -- well, go
8 ahead and finish your argument.

9 MR. BARROWS: At any rate, Your Honor, we
10 had asked Grain Land if it's going to produce
11 documents, which it's entitled to do under 1114.26(b),
12 to do more than simply say we've given you 7,000
13 pieces of paper, we've produced 100,000 documents; the
14 answer's there someplace.

15 And this is an example of why it is that
16 we said if we you want to refer us to documents, at
17 least refer us to the document. Give us your document
18 control number. Give us, you know, what the documents
19 are called, as we had done when we said corridor
20 reports or the Mason City log, a distinct,
21 identifiable document.

22 That was the problem. We have now seen

1 from Grain Land, because of the October 10 responses
2 which came after our motion was made, damages
3 totalling about \$750,000 of claim damages; but we
4 haven't seen any more.

5 We've seen nothing on rate discrimination,
6 nothing on rate reasonableness, nothing on fraud. And
7 that's what brought us here today.

8 JUDGE LEVENTHAL: All right.

9 Ms. Kueppers.

10 MS. KUEPPERS: Your Honor, I think my
11 response is short and fairly clear. I mean, obviously
12 we're the moving party and we have a burden of going
13 forward with our damages.

14 There are -- we have produced a lot of
15 documents, and obviously some of the documents aren't
16 understood. For example, this was a preliminary
17 document that was prepared probably in March of 1996.
18 It was produced -- the document numbers here are 7326,
19 7337, 7338, 7339.

20 This is called performance of CPRS grain
21 car order placement. So there is an interest accruing
22 column here that, you know, runs right down. And you

1 know, the bottom total here is \$563,720.55. Now this
2 was preliminarily prepared, and it was produced.

3 Now, we are working -- for example, one of
4 the categories we're in the process of preparing for
5 production is interest. Now we're at over a million
6 dollars now in terms of the interest.

7 This was just kind of a broad category and
8 taken on a computer, you know, run; but we have since
9 found out after the case was filed that there were
10 different loading programs and so forth.

11 So, you know, I really disagree with Mr.
12 Barrows. He has a number of these documents, and we
13 are working on providing him, in far more detail, you
14 know, exactly what our calculations are -- or what our
15 damages are.

16 I guess I would take a little but of
17 umbrage with what Mr. Barrows said because he also has
18 electronic tapes which have a lot of contract
19 information on them. We responded to CP to inform
20 them in terms of, you know, what the standard was
21 concerning the grain -- what was produced in number
22 two yellow corn so that they could find any documents,

1 the discounts that were taken.

2 So the information was there. The
3 information is very difficult.

4 Now, with that being said, I can honestly
5 tell you here today that we are working on the
6 damages. I think one of the questions that CP raises
7 through Mr. Barrows in its motion is, it's been 18
8 months, you know, where have you been.

9 Well, exactly where we have been is we
10 chose to concentrate on the production of documents to
11 CP while Grain Land's employees -- the people who were
12 most knowledge were there, you know, getting them to
13 produce their files, for example, and so forth, and
14 bringing them up, collecting them from these various
15 line locations.

16 The people who were at Grain Land at the
17 time who were employees are, for the most part, no
18 longer there. So our job, as the attorney and
19 consultants, has become far more complicated. It has
20 become, quite frankly, very time consuming.

21 And in one case recently, I think we
22 honestly reinvented the wheel in providing some very

1 complete information for CP. I think it was on
2 discounts, in fact. And then we discovered a stash of
3 documents where, you know, the stuff was pretty well
4 done.

5 And so, I guess what I'm saying right now,
6 Your Honor, is that we have an obligation to provide
7 responses. We, of course, aren't going to provide,
8 you know, our work product. But to the extent that we
9 will be providing what our damages are, what those
10 categories are, we are diligently working on that.

11 In addition to being -- having the former
12 employees gone who were responsible for that, the --
13 some of these are really quite complicated. For
14 example, these interest calculations that we've been
15 working on and, you know, we're hoping that these can
16 be produced and the interest calculations in the very
17 near future.

18 That will be the largest segment of
19 damages. That will be over a million dollars.

20 JUDGE LEVENTHAL: Let's take the
21 interrogatory part piece by piece.

22 Before we do that, do you people have

1 dates when you're required to file with STB?

2 MS. KUEPPERS: No, no; we are completely
3 off the calendar.

4 JUDGE LEVENTHAL: There's no time
5 constraint?

6 MS. KUEPPERS: Correct.

7 JUDGE LEVENTHAL: All right.

8 All right, let's take interrogatory number
9 21 part (a). Describe the amount -- well, identify
10 the dollar amount of each and every item of damage
11 Grain Land alleges in its complaint it incurred.

12 Is there any argument that you're not
13 going to furnish that figure?

14 MS. KUEPPERS: Oh, no; we'll tell --

15 JUDGE LEVENTHAL: And I think they want a
16 definite figure. They don't want a list of documents.
17 They want a money figure.

18 Is that correct, Mr. Barrows?

19 MR. BARROWS: Your Honor, I'm willing to
20 take the list of documents if the list of documents
21 show what the number is as opposed to here are
22 documents and you need to divine what it is on that

1 piece of paper that constitutes a damage number.

2 JUDGE LEVENTHAL: All right.

3 Well, I understand Ms. Kueppers to say
4 that they have no objection to furnishing you that
5 amount either by dollar amount figure or by list of
6 documents which you say you'll accept.

7 Is that correct?

8 MS. KUEPPERS: Correct, Your Honor.

9 JUDGE LEVENTHAL: All right.

10 Do you have any problem with time, Mr.
11 Barrows? It's their complaint.

12 MR. BARROWS: Your Honor, it is their
13 complaint. And if the answer were that this case is
14 never going to come on for trial, I wouldn't care
15 about time.

16 But, we would like to see this thing move
17 along at some point in time, and I'd like to have some
18 deadline that the STB said that she had 30 days in
19 which to amend the complaint to deal with rate
20 reasonableness, rate discrimination, etc.

21 She said in her original complaint that
22 the damages exceeded a million and a half. Six months

1 later, she said it was two and a half. I think I'm
2 entitled to, at least for now, where she is.

3 JUDGE LEVENTHAL: Well, let's take the
4 decision that we referred to earlier, which was served
5 on December 1st. The order -- the decision requires
6 Grain Land to bow within 30 days of service of this
7 decision, which would be December --

8 MR. BARROWS: Thirty-first.

9 JUDGE LEVENTHAL: -- thirty-first.

10 So that's one time limit that the
11 Complainant has. By that date, she has to file her
12 complaint with regard to that.

13 Isn't that a time limit?

14 MR. BARROWS: Your Honor, I'd be delighted
15 if that were the time limit.

16 JUDGE LEVENTHAL: Well, don't we first
17 have to wait to see what the Complainant does with
18 respect -- those are the two items you told me you
19 were most interested in.

20 MR. BARROWS: No, Your Honor; those are
21 two of the items that we have seen no information on
22 at all.

1 JUDGE LEVENTHAL: All right, well now on
2 December 31st, you're going to get some information,
3 right? You might get all your information.

4 MR. BARROWS: I might get no information.

5 JUDGE LEVENTHAL: Well, that's true. We
6 don't know.

7 MR. BARROWS: Your Honor, it is correct
8 that, by December 31st, if Grain Land is going to
9 pursue a rate reasonableness or a discrimination
10 claim, they need to amend the complaint and they need
11 to put in a lot of information.

12 And I would hope that there would be
13 information there relating to what the damages are
14 that are being claimed for that category, but that's
15 not necessarily one of the things that will be put in
16 there.

17 JUDGE LEVENTHAL: No, but that part I
18 think we have to wait until December 31st.

19 MR. BARROWS: Well, Your Honor, Ms.
20 Kueppers and I have privately talked about what rates
21 are she claiming were unreasonable or discriminatory.

22 And the ones that I have been told about,

1 we have talked about previously before the court which
2 was a moratorium on a \$750 dollar premium and a \$1,250
3 dollar premium for cars that went to Chicago and
4 beyond.

5 It's a proportional rate that went past
6 the gateways of Chicago and Kansas City. Grain Land
7 never sent a shipment under those tariffs, so it
8 couldn't possibly have any damages, any reparation
9 damages.

10 What our motion to the STB to dismiss was,
11 we don't know what rate she is claiming. As soon as
12 she tells us what rate she's claiming, then presumably
13 we'll be able to figure out whether she has -- whether
14 she made any shipments under that.

15 So you're correct that, by that point, we
16 should at least know what the rates are that she has
17 claimed so we can go back and find out whether they
18 shipped anything. We still don't know what rate she
19 thinks it should have been charged.

20 JUDGE LEVENTHAL: Yes, but with respect to
21 those two items, you have to agree that we have to
22 wait until December 31st because the Board has spoken.

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1 You don't want me to overrule the Board, do you?

2 MR. BARROWS: I don't want you to overrule
3 the Board, Judge, and I realize that we have to wait
4 until you say we have to wait.

5 JUDGE LEVENTHAL: All right. I think,
6 with respect to those two items, we have to wait until
7 after the Complainant amends its complaint.

8 So then I take it that there's no dispute
9 that the Complainant is going to furnish the
10 information requested in interrogatory 21 through (a),
11 is that right?

12 MS. KUEPPERS: I'm sorry, that -- to 21 --

13 JUDGE LEVENTHAL: Interrogatory --

14 MS. KUEPPERS: The amount -- that the
15 amount compensates for.

16 JUDGE LEVENTHAL: The dollar amount of
17 each and every item of damage which Grain Land alleges
18 in the complaint it incurred. You have to do that.

19 MS. KUEPPERS: We will provide that, of
20 course.

21 JUDGE LEVENTHAL: All right, now when?

22 MS. KUEPPERS: Well, that's -- I guess

1 that's more of the problem, Your Honor. I do not work
2 on this case full time. I'm a sole practitioner. I
3 can't.

4 JUDGE LEVENTHAL: No, I'm just asking you
5 to pick any date you like and then we can take it from
6 there. How much time?

7 MS. KUEPPERS: Well --

8 JUDGE LEVENTHAL: three months, four
9 months?

10 MS. KUEPPERS: What I --

11 JUDGE LEVENTHAL: You know, your complaint
12 has been pending since -- I think it's April of 1996.

13 MS. KUEPPERS: But, Your Honor --

14 JUDGE LEVENTHAL: I mean, I don't care how
15 long you take, but it's your complaint.

16 MS. KUEPPERS: Well, I understand that.

17 And I have had a -- there have been some
18 human complications there. I did move my office, and
19 my father died on the 25th of November, so I've been
20 gone.

21 What I would like to do, given that we
22 must amend -- first of all, you know, we will be

1 getting apparently some 40,000 documents plus. Our
2 discrimination claim, I mean, really reverts back to
3 what's in these documents.

4 So I think our -- once we get the
5 documents, our time is going to be spent partially
6 looking at these so that we can appropriately amend
7 our complaint. So I don't know that my time will be
8 spent on the damage calculations as -- during the
9 month of December as it will be amending the complaint
10 to allege the factors under the simplified procedures.

11 And therefore, assuming that we get back
12 to damages, you know, I would like to work on damages
13 January, February. And hopefully, I would say by mid
14 or the end of March, we would have a pretty complete
15 picture.

16 This may sound like it's a long time away;
17 but as I indicated to you, I am a sole practitioner,
18 and that my consultants have a small firm. And we
19 cannot work on this case full time. And we will be
20 reviewing the documents that are going to be provided
21 by CP.

22 And apparently, from their correspondence

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1 -- I got a letter dated December 4th where they
2 estimate that one partial production would be 38,000
3 pages. And then on the second page here, they have a
4 miscellaneous documents category which they say are
5 responsive to the interrogatories which is another 15
6 to 20,000 documents.

7 Now, I think -- you know, there's just 24
8 hours in a day, Your Honor, and so we're not on the
9 calendar. We were required to file our appeal within
10 three days, but it took the STB six months. While my
11 clients, as well as CP, I'm sure, would like to move
12 the case forward, we do need some time to digest all
13 of this information.

14 JUDGE LEVENTHAL: All right, so you're
15 saying then you'd like until April 1st?

16 MS. KUEPPERS: Yes.

17 JUDGE LEVENTHAL: Mr. Barrows, do you have
18 a problem with that?

19 MR. BARROWS: Your Honor, if that's when
20 the court is going to permit it, then that's what we
21 will do.

22 JUDGE LEVENTHAL: Ms. Kueppers says that's

1 the best she can do.

2 MR. BARROWS: I would like it earlier so
3 that we can at least know what kind of a case we're
4 dealing with. If she has now identified for us all of
5 the categories of damages adding to what she had
6 previously done simply the interest factor, then at
7 least we know in what ponds we need to go fishing for
8 information.

9 But until she has told us even what the
10 categories of the damages are, Your Honor, that means
11 that basically we shut down our analyses until then.

12 JUDGE LEVENTHAL: But your interrogatory
13 doesn't speak of categories. I assume that once she
14 gives you the dollar amount and every item of damage,
15 you have your categories.

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

17 JUDGE LEVENTHAL: All right.

18 Why don't we set -- with respect to 21(a),
19 why don't we set April 1st as a time for response, all
20 right?

21 Of course, if you can do it earlier,
22 you're going to do it earlier, aren't you, Ms.

1 Kueppers?

2 MS. KUEPPERS: Oh, yes. And in fact,
3 we've already --

4 JUDGE LEVENTHAL: I mean, you're the one
5 that wants money.

6 MS. KUEPPERS: We've already provided, I
7 would say, fairly complete information on a couple of
8 segments of these damages. And as we complete a
9 section, I have no problem sending it on.

10 It's purely a time -- how should we say it
11 -- a time problem trying to -- how should we say it --
12 put ourselves in the shoes of those former employees
13 who are now gone and weave the information to give
14 them.

15 MR. BARROWS: And let me also say, Your
16 Honor, the document that Ms. Kueppers showed to the
17 court and gave some numbers on, I haven't seen it
18 before. I'm not going to tell you that I know each of
19 the 7,500 pages that were reproduced for us.

20 But I can tell you that I've been through
21 all of them and I've never seen anything that looks
22 like that. But I will, when we get out of here, go

1 back and call my paralegal and say I want sitting on
2 my desk when I get back to the office this afternoon
3 those documents, if we have them.

4 MS. KUEPPERS: They were probably reduced
5 in size, I'd think.

6 JUDGE LEVENTHAL: All right. Well, in any
7 event, if you haven't given it to Mr. Barrows, I
8 understand you will give it to him?

9 MS. KUEPPERS: Which?

10 JUDGE LEVENTHAL: That long document that
11 you have.

12 MS. KUEPPERS: Oh, absolutely, absolutely.
13 I thought we had. I mean, if we haven't, I apologize.
14 And it's numbered here. I can't imagine that we would
15 have withheld it from them.

16 JUDGE LEVENTHAL: All right, all right.
17 So that part is disposed of.

18 Now going to (b), describe how each amount
19 was calculated.

20 Do you have any objection to that, Ms.
21 Kueppers?

22 You know, it seems to me that what Mr.

1 Barrows is asking here is what would be required in
2 civil litigation as a bill of particulars. It's your
3 complaint. You have to tell them what your complaint
4 it.

5 MS. KUEPPERS: Well, to the extent -- do
6 you have any -- I mean, you add and you subtract
7 certain numbers and -- I mean, I assume that's -- is
8 that what you're talking about?

9 MR. BARROWS: Well, let me give you an
10 example.

11 To the extent that you're making an
12 interest calculation, it's got to be an interest from
13 a certain date to a certain date based upon certain
14 principal amount, how that principal amount was
15 determined, that that's what you're measuring it on,
16 and where the interest rate came from.

17 That's the kind of information that I'm
18 asking for so that we can at least figure out whether
19 or not the principal amount is correct, the interest
20 rate is correct, etc.

21 JUDGE LEVENTHAL: Just a moment.

22 (Whereupon, the foregoing matter went off

1 the record at 9:30 a.m. and went back on
2 the record at 9:33 a.m.)

3 JUDGE LEVENTHAL: Back on the record.

4 All right --

5 MS. KUEPPERS: No, what he said is
6 reasonable. I mean, we understand -- Your Honor, I
7 think we understand certainly how -- you know, what
8 they want in terms of damages. And I think what they
9 want is what will be presented to the Board. And we
10 have to, of course, tell the Board how we've arrived
11 at our damages and --

12 JUDGE LEVENTHAL: Then is there any -- is
13 there any real objection to interrogatory number 21
14 other than time? I mean, in your answer, you're
15 claiming privilege. I doubt --

16 MS. KUEPPERS: Well, we have some -- for
17 example, you know, we're working with a bank. You
18 know, our interest calculations go directly to the
19 bank and, you know, so we're working with a bank
20 there.

21 JUDGE LEVENTHAL: But you don't have any
22 privilege, do you? I mean, if the bank tells you

1 their interest is nine percent, what's privileged
2 about that?

3 MS. KUEPPERS: Oh, no; we'll disclose nine
4 percent. But if there is some -- how should we call
5 it -- work product, you know, the -- you know, the
6 bank is helping us as our agent --

7 JUDGE LEVENTHAL: And if you are going to
8 claim a work product privilege, it has to be specific.
9 So at this point, you don't have that, do you?

10 MS. KUEPPERS: There may be some
11 communications.

12 JUDGE LEVENTHAL: No, but do you have
13 anything? I can decide this morning.

14 MS. KUEPPERS: No.

15 JUDGE LEVENTHAL: No.

16 So then we have to -- we have to reserve
17 that objection to when and if it arises. There may
18 not be any work product problem.

19 MS. KUEPPERS: Right. I would say that's
20 correct.

21 JUDGE LEVENTHAL: And you don't have any
22 problem then with (d), identify each document which

1 references or evidences the amount? Obviously you
2 don't. You've shown me a list of documents.

3 MS. KUEPPERS: Well, Your Honor, you know,
4 to the extent we can, at some point -- and again, the
5 response they have is what's good for the goose is
6 good for the gander, and I'm a believer of that. But
7 --

8 JUDGE LEVENTHAL: No, but I can't decide
9 motions on that. I decide specific --

10 MS. KUEPPERS: No, I understand.

11 JUDGE LEVENTHAL: -- the specific motions
12 before me.

13 MS. KUEPPERS: To the extent we can -- I
14 mean, we have a range of documents in which a lot of
15 these things are located. I guess we'll try is the
16 best thing I can tell you.

17 JUDGE LEVENTHAL: All right.

18 MS. KUEPPERS: I mean, we have 7,000
19 documents there. I can't tell you, as I sit here,
20 where each and every one of them are. There are
21 certain things that are electronic tape. There are
22 certain things in documents.

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1 And you know, we have essentially -- as I
2 said, to Mr. Barrows, this is kind of the range where
3 these are found. And as we go back and try and
4 calculate these things and can indeed -- you know,
5 working with the certain document -- I mean, it's
6 there and we can provide it.

7 JUDGE LEVENTHAL: All right. Then I don't
8 see that there's a dispute before me this morning with
9 respect to CP's motion, is there, Mr. Barrows?

10 MR. BARROWS: Your Honor --

11 JUDGE LEVENTHAL: I mean, once we've set
12 the date of April 1st and Ms. Kueppers tells us that
13 she doesn't have any specific objection now -- she may
14 have some work product objection later on. And if she
15 does, then it will have to be a specific objection to
16 a specific document, and you'd have to tell us.

17 You'd have to tell me if we have a further
18 conference exactly why it is that the work product
19 privilege applies.

20 It seems to me that, with respect to
21 interrogatory number 21, this really is information
22 you're going to have to prove --

1 MS. KUEPPERS: At some point, right.

2 JUDGE LEVENTHAL: -- before you go -- when
3 you go before the Board. I mean, --

4 MS. KUEPPERS: I agree with you, Your
5 Honor.

6 JUDGE LEVENTHAL: And there's no reason
7 they shouldn't have that, right?

8 MS. KUEPPERS: Right.

9 JUDGE LEVENTHAL: Okay.

10 MR. BARROWS: Your Honor, I think what
11 I've heard is that she is agreeing that my motion
12 should be granted in setting April 1 as a date by when
13 she provides the information.

14 JUDGE LEVENTHAL: Ms. Kueppers?

15 MS. KUEPPERS: I would say, for the most
16 part, that's correct. As I suggest to you, you know,
17 to the extent we have to reference a particular
18 document, I will reluctantly agree to that. But
19 again, I would like to see the -- you know, the same
20 kind of response from CP.

21 JUDGE LEVENTHAL: I'm ruling on CP's
22 motion at this time.

1 MS. KUEPPERS: All right.

2 JUDGE LEVENTHAL: We'll hear your cross
3 motion once we finish with CP's motion.

4 MS. KUEPPERS: Because it just creates
5 additional amounts of work that we --

6 JUDGE LEVENTHAL: But you have -- no, but
7 what are you're asking for you here, Ms. Kueppers, is
8 something you're going to have to prove to the Board.
9 You can't go to the Board and say --

10 MS. KUEPPERS: I understand.

11 JUDGE LEVENTHAL: -- Here's a whole 7,000
12 pages, you figure out what our damages are.

13 MS. KUEPPERS: No, I understand.

14 JUDGE LEVENTHAL: The Board's not going to
15 do it.

16 MS. KUEPPERS: I understand, Your Honor.

17 JUDGE LEVENTHAL: Well, that's all you're
18 required to do with respect to interrogatory number
19 21. You have to give Mr. Barrows the same information
20 that you're going to give the Board eventually when
21 this gets to be tried.

22 MS. KUEPPERS: Right.

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1 JUDGE LEVENTHAL: All right.

2 MS. KUEPPERS: And to that extent, I have
3 no objection.

4 JUDGE LEVENTHAL: All right. Then the
5 motion is granted. The information will be furnished
6 on or before April 1st, 1998.

7 All right, now we have the cross motion of
8 the Complainant. And I have to tell you I don't know
9 exactly what your motion is.

10 You're speaking of what's good for the
11 goose is good for the gander, but with respect to what
12 I've just ruled on for CP, I've only ruled that you
13 have to give them whatever it is you're going to prove
14 to establish your case so they can understand what
15 your complaint is.

16 And actually, maybe after you've given
17 this information, perhaps you can settle. You might
18 not have to go to trial.

19 MS. KUEPPERS: Oh, I understand that, Your
20 Honor.

21 JUDGE LEVENTHAL: Now what is it you're
22 complaining about, about CP's furnishing you with

1 information?

2 MS. KUEPPERS: Well, CP --

3 JUDGE LEVENTHAL: The Board has now ruled
4 that they have to give you the unredacted material,
5 and Mr. Barrows has said he's already done that or is
6 in the process of doing it.

7 MS. KUEPPERS: He's in the process of
8 doing that.

9 JUDGE LEVENTHAL: Okay, so that's disposed
10 of.

11 MR. BARROWS: Your Honor, we've already
12 produced it for her and her expert to come over and
13 look at in our office. Now we're making a copy so
14 that she can look at it more in her office.

15 JUDGE LEVENTHAL: Okay.

16 MS. KUEPPERS: Well, if you'll recall, Mr.
17 Barrows, you ruled out pretty quickly the on hand
18 reports your paralegal did so that, you know, we
19 didn't have access to them. In any event, that's
20 water over the dam at this point.

21 Your Honor, this is what I would like. We
22 have asked for interrogatory responses. The way CP

1 has answered is to say well, you know, we have 32,000
2 pieces of paper here which compromise (sic) our on
3 hand reports. You know, we have another, you know,
4 thousand documents here.

5 He has said we have essentially
6 categories, and you can find the answer in these --
7 you know, it could be up to 100,000 documents for all
8 we know. And what I am asking is that -- we do not
9 run a railroad.

10 CP has said in its responses to us, for
11 example, that it gave IC cars priority over tariff
12 cars. How did it arrive at that answer? I mean, it
13 knows from -- did it recreate an ordering system?

14 We asked specific questions of -- and the
15 answers and supplemental answers just said you can go
16 to these essentially 100,000 documents and find this
17 needle in a haystack for yourself.

18 JUDGE LEVENTHAL: Are you talking about a
19 specific interrogatory?

20 MS. KUEPPERS: Yes, yes.

21 JUDGE LEVENTHAL: All right, which one is
22 that?

1 MS. KUEPPERS: Okay, there are several of
2 them.

3 JUDGE LEVENTHAL: No, let's take the first
4 one.

5 MS. KUEPPERS: The example I give in my
6 cross motion is found at the beginning of -- at the
7 bottom of page two, interrogatory number four.

8 Now what I'm reading from is CP's answers
9 which are contained in a document entitled
10 Respondent's Restated and Supplemental Answers to
11 Complainant's Interrogatory Request, Set 2, which I
12 have attached to an affidavit as Exhibit -- in my
13 affidavit as Exhibit D.

14 And I received this on June 6th, 1997.

15 Grain Land's question at interrogatory
16 number four is for Grain Land unit number 6543 ordered
17 July 31st, 1995 for a want date of October 23rd, 1995
18 with a placement date of April 5th, 1995.

19 Identify by unit number the number of
20 tariff cars you placed on the Corn Lines in Country
21 Grain from October 23rd, 1995 through April 5th, 1996;
22 the dates each unit identified in (a) above was

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1 ordered, wanted in place, or if canceled, date of
2 cancellation;

3 The person ordering the unit, and, if
4 different, the elevator receiving the unit; for
5 private cars, the person ordering; order date, want
6 date, placement date from October 23rd, 1995 through
7 April 5th, 1996; and subpart (e), the number of
8 locomotives originally allocated, made available and
9 utilized from July 31st, 1995 through April 5th, 1996.

10 Now there's an objection that's lodged
11 here based on 11904 which is, of course, moot right
12 now. But the supplemental answer, if you will look
13 towards the bottom of page three, the supplemental
14 answer which was given on May 28th, 1997, states that
15 the information requested is principally contained in
16 the Mason City log book which has been produced, which
17 means it has been made available.

18 Of course, we don't have copies of that.
19 And in the documents that supplement the information
20 contained in the Mason City log book -- we don't know
21 what those are or what those document numbers are --
22 which have also been produced, which means made

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1 available.

2 The answer to this interrogatory may be
3 obtained from these documents and from the following
4 additional business records: corridor reports,
5 analysis of the Corn Lines, Corn Lines car loading
6 reports, and Corn Lines locomotive reports.

7 And of course, he goes on -- CP goes on to
8 say that the burden of deriving the information is as
9 difficult for them essentially or burdensome as it is
10 for us.

11 And I would say that that's not really
12 true, Your Honor, because it's -- these are their
13 documents. They know where to go, what the ordering
14 system was. And in fact, they may have recreated the
15 ordering system when they were -- or in the process of
16 determining whether or claims were correct.

17 And I would ask the Court to have them
18 answer the interrogatory, not merely provide what is
19 going to be the on hand reports themselves, Your
20 Honor, are 32,000 pages. I mean, I read to you before
21 what they intend to produce now which is being
22 withheld.

1 I mean, I'm not a train master. I don't
2 pretend to be one. And there is no way that we are
3 going to be able to determine, you know, what happened
4 to cause these delays. Right now, from what we can
5 tell, you know, the defense so far that has been
6 lodged apparently -- or that my clients are evil
7 people, number one.

8 I mean, I think that that's, you know --
9 JUDGE LEVENTHAL: Wait. Let's stay within
10 the point.

11 MS. KUEPPERS: Well, you know, I mean, in
12 that, that there was a surge in demand. But we know
13 that there were other things going on here. They've
14 admitted of them, that IC cars got priority. And they
15 have documents which must evidence that -- subsets of
16 documents which are within here or document numbers.

17 And so what I am asking, Your Honor, is --
18 you know, we have produced 7,000 documents and have
19 provided in the early stages of the litigation
20 incredibly detailed responses to them by elevator.
21 And all we've gotten back in return is responses like
22 this: You know, here are, you know, 40 or 80,000

1 documents; come to our office and take a look at it;
2 oh, you can't take it with you.

3 Now that's overcome. I would like you to
4 require them to not just produce documents, but in
5 fact to answer the interrogatory. And to then also
6 tell us what -- in what specific documents -- not the
7 range of documents or category of documents, but what
8 specific documents we can ourselves look to to
9 determine -- to verify that information.

10 JUDGE LEVENTHAL: All right, Mr. Barrows.

11 MR. BARROWS: Your Honor, now that the
12 11904 issue is gone, I can tell you approximately what
13 the answer to this is going to look like. I can't
14 tell you specifically because I don't have all of the
15 facts here.

16 The Mason City log is a book that was kept
17 where, on the date a train is ordered, it is assigned
18 a unit number, it is given a want date, the date that
19 the orderer wanted the unit. So each unit number is
20 going to have a unit number, and order date, a want
21 date, the station ordering it.

22 With very few exceptions, Your Honor, the

1 station ordering the unit train got the train because
2 the unit numbers weren't transferable. Grain Land had
3 five stations. And there was a series of 12 or 13
4 orders that simply said Grain Land, and they let us
5 know where they wanted them.

6 In addition, Grain Land shifted trains
7 within its stations, which we permitted it to do
8 because it was Grain Land. But there is no instance
9 other than Grain Land that I'm aware of that a train
10 unit number that was assigned to a particular station
11 ultimately was delivered to a different station.

12 There are some trains that were delivered
13 to the station that ordered it that were then bought
14 on the open market and got billed differently. But if
15 the train was supposed to go to Sanburn, it went to
16 Sanburn. That's the unit number that went to Sanburn.

17 So for (b), all of that information is in
18 the Mason City log, and producing the log gives all of
19 that information.

20 With respect --

21 JUDGE LEVENTHAL: Let's take them one by
22 one.

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1 Do you have a problem with that, Ms.
2 Kueppers?

3 MS. KUEPPERS: How many pages are
4 contained within the Mason City log book and the --
5 these supplements? I don't know what the supplements
6 are.

7 I mean, we've never seen this stuff, Your
8 Honor.

9 MR. BARROWS: Haven't you seen the --

10 MS. KUEPPERS: No, no.

11 MR. BARROWS: Okay.

12 The original Mason City log, Your Honor,
13 is in a log book. Each page probably is this large.
14 And there must be 50, 7,500 pages to it. Each page
15 has about 25 unit numbers on it.

16 MS. KUEPPERS: Seventy-five hundred, did
17 you say?

18 MR. BARROWS: Each page has about 25 unit
19 numbers on it and we go in the -- well, we go in the
20 Mason City log from about April of '95 through October
21 31st of '95 from roughly the number 6,000 to roughly
22 the number 7,000.

1 So you have in there a thousand divided by
2 25, so you have 200 pages for that -- from which you
3 can get all of the unit numbers, all of the order
4 dates, all of the want dates, all of the stations
5 doing the order.

6 They're there in the single document.

7 JUDGE LEVENTHAL: All right, Ms. Kueppers.

8 MS. KUEPPERS: It doesn't sound like it
9 would be much of a burden for them to answer the
10 interrogatory then.

11 JUDGE LEVENTHAL: Well, what would you
12 want them to do other than give you the log?

13 MR. BARROWS: Your Honor, if I can finish
14 what I think I'm doing rather than item by item, --

15 JUDGE LEVENTHAL: All right.

16 MR. BARROWS: -- perhaps you will and she
17 will better understand.

18 So that takes care of (b) with the
19 exception of the placement date. There are placement
20 dates in the Mason City log which aren't always
21 accurate. (c), the person ordering the unit, is also
22 in the Mason City log. That book gives all of that

1 information.

2 For private cars, we don't know who
3 ordered private cars: the order date, want date,
4 placement date, because that is a private function.
5 As the Court knows, private cars, when they come on
6 the line, we're told, you know, go pick it up and go
7 deliver it, but it's not done through us.

8 So we can't tell that. What we are going
9 to provide is an electronic data base that is going to
10 identify the private cars and tell her, for each of
11 those private cars, what its way bill number is, what
12 the way bill date is, what date it was placed at a
13 station, what date it was picked up at a station so
14 that she will have all of the private car information
15 that she wants in an electronic data base.

16 I can't tell her anymore than that because
17 I don't know when Cargill, as an example, ordered a
18 private car because it didn't order it from us.

19 A number of locomotives originally
20 allocated, made available and utilized we've given a
21 study that shows all of the locomotives that were on
22 the Corn Line. That's already been done. Then we get

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1 to the question, Your Honor, by unit number, what cars
2 were placed between a certain date and a certain date.

3 Interrogatory five is a series of dates
4 broader than interrogatory number four. And I've
5 given instructions to give them, by date, what unit
6 numbers were filled on that date -- what the unit
7 number was and what the placement date was.

8 So that now that we've passed the 11904,
9 I think we're at a point where I can give her that
10 information. The other information that she wants,
11 for which we'll identify, if you want something more
12 than this, here are the documents; you've got to
13 figure out what you want.

14 But in terms of what was the sequence of
15 train deliveries and on what dates, we can now give
16 that now that we're past the 11904. So it's -- why
17 don't you wait until you get our answer and then see
18 whether you have a complaint?

19 JUDGE LEVENTHAL: Ms. Kueppers.

20 MS. KUEPPERS: Your Honor, it sounds
21 wonderful; but in reality, I think if it's as simple
22 as Mr. Barrows seems to suggest, then why not answer

1 the interrogatory? I mean, if he has the information,
2 I think he -- you know, he could deduct from the
3 reports that he's talking about.

4 JUDGE LEVENTHAL: Well, what is it --
5 taking the item (a), what answer would you want from
6 him?

7 MS. KUEPPERS: Well, what we're trying to
8 do with this interrogatory -- you know, we placed
9 orders. And about the time we got certain of our
10 cars, I mean, they were -- they were thousands of cars
11 behind, Your Honor.

12 We know --

13 JUDGE LEVENTHAL: Yes, but that's -- but
14 won't you get the information you're requesting in (a)
15 from the logs that he's giving you, the log books?
16 Won't that have all the movements?

17 MS. KUEPPERS: Well, the Mason City log
18 book, as he has suggested, Your Honor, only goes
19 through October -- I think you said October 31st?

20 JUDGE LEVENTHAL: No, he said April 5th.

21 MR. BARROWS: Let me be clear.

22 Prior to April of '95, before the rail car

1 shortage occurred, we have, on separate Mason City
2 logs which will be made available and I don't think
3 she's interested in those, but she's more than welcome
4 to them -- for the period approximately April 1 of '95
5 through October 31 of '95, we were taking orders.

6 As of November 1st, we stopped taking
7 orders because we had 16,000 car orders outstanding on
8 the line that, in a great month, can deliver 3,500 to
9 4,000 cars. So we were so backed up as of November
10 1st, we said we don't know when you're going to get
11 cars, we'll stop taking orders.

12 All of the orders that were placed through
13 October 31st are in the Mason City log. They continue
14 to have information in them subsequent to October 31st
15 going through April and May and June of '96 in terms
16 of placement dates, pull dates, way bill numbers.

17 Although, that information, Your Honor,
18 was not -- let me go back to my law school days.
19 That's not the information that was typically kept
20 within this book in the ordinary course. And so the
21 order date, the want date, the station name, that
22 information is there and that's solid information.

1 There are errors in the placement date and
2 pull date couple days either way simply when the
3 information got to that person who entered it in the
4 log. I know I have found some transposition of
5 numbers in way bill numbers; so that it is reasonably
6 good, although not great for that information.

7 With respect to what was the sequence of
8 delivery of cars, we've already produced something
9 called a daily car situation report. The daily car
10 situation report was, if you will, the maitre d's
11 list. You know, here are the cars that are ordered
12 and the order in which the cars came in.

13 Up through about early October, as I
14 recall, it was listed by want date because cars are
15 delivered in the order they're wanted, not necessarily
16 in the order in which they were ordered. An order
17 might come in on April 1st for a want date four months
18 out. It can come in on April 2nd for two months out.

19 So the two month out is going to get
20 filled before the four month out as long as you're
21 dealing with sort of the normal cycle.

22 When we got backed up and everything is

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1 now late, the daily car situation report was converted
2 to an order date so that it is now listed by order
3 date, and that's the order in which they're done.

4 All of that has been produced to Grain
5 Land to look at. And if they want the hard copies of
6 that now, they will get the hard copies of all of
7 those documents now. And that's, as I say, the maitre
8 d's log. You go to a restaurant and you have to stand
9 in line to be seated.

10 JUDGE LEVENTHAL: Well, what do they have
11 to do to the log in order to get this information, go
12 down it line by line?

13 MR. BARROWS: Line by line, Your honor.

14 There's going to be a number on the left-
15 hand side, 6,000. The next column, I think, is the
16 order date; the next column is the want date; the next
17 column is the station that's placing the order. All
18 of that information is there on the left-hand side.

19 On the right-hand side is additional
20 information between placement dates, pull dates, when
21 it was picked up, way bill number and certain other
22 pieces of information. Some of the other pieces of

1 information include whether it was an IC train.

2 CP Rail made an arrangement with the
3 Illinois Central at one point when there was a
4 shortage to get some IC trains that were on a bid
5 program. And some of those IC trains were used and
6 filled a unit number. Some of them weren't.

7 Private cars -- sometimes they used a unit
8 number rather than having to pay a cancellation fee
9 for that unit number. Some of them weren't. So there
10 is some of that information also in this document.

11 But in terms of what was the order of cars
12 being delivered under (a), we'll -- for her purposes,
13 we'll write that one out for her so that she doesn't
14 need to think about it. But then, if she wants to
15 know for each of those unit numbers, rather than us
16 having to manually type, we're going to say go look at
17 the Mason City log.

18 You can find out for unit number 6,000
19 what data was ordered, what data was wanted, what the
20 station was.

21 JUDGE LEVENTHAL: How do they find that
22 6,000 in the Mason Dixon -- Mason City log?

1 MR. BARROWS: Mason City log?

2 JUDGE LEVENTHAL: Mason City log.

3 MR. BARROWS: It's in the left-hand column
4 under unit number. It says 6,000. It goes 6,000,
5 6,001, 6,002, 6,003, 6,004, 6,005 -- you know, on and
6 on and on, and it's readily determinable. There is --
7 every rule has a glitch, Your Honor.

8 Some stations didn't order unit trains,
9 which is 25 in number. Some of them only wanted five
10 or six or ten. They didn't get a unit number. So
11 there, you're going to get all of the information,
12 except there isn't going to be a unit number.

13 JUDGE LEVENTHAL: Well, Ms. Kueppers, it
14 seems to me that answers your interrogatory. Is there
15 a problem that I don't see?

16 MS. KUEPPERS: Where is the information
17 kept that is similar to the Mason City log book
18 subsequent to October 31st?

19 MR. BARROWS: Well, no orders were taken
20 in --

21 JUDGE LEVENTHAL: All right, let's go off
22 the record.

1 (Whereupon, the foregoing matter went off
2 the record at 10:01 a.m. and went back on
3 the record at 10:12 a.m.)

4 JUDGE LEVENTHAL: All right, back on the
5 record.

6 MR. BARROWS: I don't remember where we
7 were, do you?

8 JUDGE LEVENTHAL: Yes, can you read back
9 the last few statements?

10 (The previous statements were played back.

11 (Whereupon, the foregoing matter went off
12 the record at 10:13 a.m. and went back on
13 the record at 10:15 a.m.)

14 MR. BARROWS: She asked the question about
15 what happened after October 31st, 1995.

16 As of October 31st, 1995, CP stopped
17 taking orders for cars on the Corn Line because we had
18 6,000 cars on order. We delivered 3,035 a month, so
19 we were well behind. However, the Mason City log book
20 was still used thereafter.

21 And all of the trains that were ordered as
22 of October 31st are listed together with the

1 information. No new trains are ordered. There are
2 trains that are placed obviously after October 31st.
3 But, to the extent that it's a unit train, it's a unit
4 train that was ordered before October 31st.

5 So between October 31st and I think the
6 new ordering system came on, maybe June 1st or July
7 1st of '96, there is no new ordering system. You
8 know, there isn't another book because we weren't
9 taking orders.

10 JUDGE LEVENTHAL: Well, does that answer
11 your interrogatory? Isn't that the answer you want,
12 Ms. Kueppers?

13 MS. KUEPPERS: Let me understand what
14 you're saying. What you're saying right now is CP
15 took no order -- additional orders for cars, whether
16 carrot tariff cars or any other kind of equipment,
17 regardless of ownership after -- on and after November
18 1st, 1995, and that a new ordering system, which was
19 put in place then in June or July of 1996, then was
20 implemented, and there would be records concerning
21 that new order system after that?

22 MR. BARROWS: I can agree with some of

1 what you said, and it's the way in which she said it.

2 Tariff car orders were not taken after
3 November 1st, 1995 until the new system was put into
4 place. We cleaned out all of the 16,000 orders, and
5 that takes us into June or early July of 1996. The IC
6 program that we did started in, I believe, October and
7 continued through maybe January.

8 There weren't --

9 JUDGE LEVENTHAL: Which year, 1995?

10 MR. BARROWS: '95-96. October of '95
11 through about January, maybe into February of '96.

12 With respect to the IC program, there were
13 IC cars that were available and they were bid. I
14 don't know whether you can call that an order for
15 cars. Some of those IC cars were used to fill a unit
16 number that was previously ordered; some of them
17 weren't.

18 So yes, there were IC cars that were done
19 outside of, if you will, the traditional tariff
20 ordering system. With respect to private cars, CP
21 didn't control private car orders regardless of
22 ownership. We are simply told there are private cars

1 to either spot or pull from a particular station, so
2 I'm not capable of answering that.

3 We didn't open up tariff car orders again
4 until the summer of '96. And I believe those started
5 with tariff car number 7,000.

6 MS. KUEPPERS: And that's the nugget, Your
7 Honor. You know, presumably, there is some
8 information in this Mason City log book regarding
9 tariff car orders, and my client relied, you know,
10 almost exclusively on this tariff car ordering system.

11 What happened is that CP had a finite
12 number of locomotives. And, as you know, when you
13 have some tariff -- you know, tariff cars here,
14 private cars here, and they're introducing a
15 guaranteed car ordering program, which is what this IC
16 program was -- and we know that there is some case law
17 that says well, you know, CP can't allocate, you know,
18 more than a certain percentage of its cars, for
19 example, to another system.

20 We have a problem that now goes -- shifts
21 a little bit and goes to okay, so who got the
22 locomotives. There are a scarce number of

1 locomotives. And, on the one hand, I have a client
2 being told, you know, you are unit number X and you're
3 going to get your cars, you know, next week.

4 You know, it's actually going to be there.
5 But what we believe happened is the locomotive power
6 was then drained and sent to private cars or sent to
7 the IC program. And I want to know when the users of
8 these other programs placed their orders because it's
9 our belief that they jumped in line.

10 When in fact, what was being said to my
11 client was we're going to follow the ordering system
12 as you ordered. You know, there isn't anybody that's
13 going to jump in line ahead of you.

14 JUDGE LEVENTHAL: Aren't you -- isn't this
15 information you'd be better off getting via
16 deposition? It seems to me that you're raising
17 questions I don't know if you can get from a written
18 answer to an interrogatory.

19 MS. KUEPPERS: Well, that's what I'm here
20 to determine.

21 It seems to me that there are records that
22 exist that shows, you know, when the phone was picked

1 up and a call was placed or that somebody took a --

2 JUDGE LEVENTHAL: Let me interrupt you.
3 Let's go off the record.

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

7 MR. BARROWS: What I'd like to do, Your
8 Honor, is explain a little bit how the Corn Line
9 operated with respect to locomotives because perhaps
10 it will explain part of the problem I'm having with
11 what it is that is being requested.

12 The Corn Line, I previously showed the
13 Court a map of it, and I'm roughly drawing another
14 one. There is a Minnesota leg which is from Jackson,
15 Minnesota to Austin, Minnesota. There is an Iowa leg
16 from Sheldon, Iowa to Mason City, Iowa.

17 There is a north/south component of it
18 that runs from Mason City through Austin. And
19 frankly, after the Twin Cities, the northernmost
20 station of which is called part of the Corn Line is
21 just north of Austin.

22 And then there is the sort of outgoing leg

1 down to the Mississippi River.

2 CP has local trains. A local train, as an
3 example, may be train number 164. 164 typically runs
4 from Mason City through Austin and up to the Twin
5 Cities. Every now and then, it will make a left-hand
6 turn at Austin and it will come out as far as Wells.
7 That's local train 164.

8 There is train 168. 168 is a local train.
9 And I'm not going to get the stations correct, but it
10 runs from Austin out to someplace along the track.
11 And 169 may run from Wells out to Jackson. So we have
12 local trains that are running around the system.

13 We have the same number of locomotives
14 running around the system at all times, both before we
15 had our car crunch and afterwards. Those trains,
16 those locomotives, then pulled the empties and spot
17 them at stations, and pick up the full trains and take
18 them either to Austin or down to Mason City where they
19 are assembled and then sent down to the river.

20 At no time have I found any situation
21 where there were both empty tariff cars ready to spot
22 and IC cars or other private cars ready to spot where

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1 somebody had to make a decision which ones are we
2 going to spot. Are we going to spot the private ones
3 or the IC ones, or are we going to spot the tariff
4 ones?

5 We had problems with empties coming back
6 onto the system. There were so many cars that went
7 what is referred to as off line past Chicago, went off
8 of our system where we lost control of them so that
9 instead of being a four or five or six day cycle time
10 back to the system, it was a 30 day cycle time as they
11 went down to southeast United States.

12 So we had problems getting empties back
13 onto the systems to fill the tariff car orders. When
14 we have private cars in a station ready to pull and we
15 don't have tariff cars, we're going to pull those
16 private cars and we're going to spot them, and that's
17 what we did.

18 When we had tariff cars available to spot,
19 we spotted them. We weren't in the situation where we
20 were long in cars and the cars were simply sitting on
21 a side rail or in a station ready to spot. We didn't
22 have that luxury.

1 So what Ms. Kueppers is looking for,
2 number one, she's not going to find because it didn't
3 happen.

4 But with respect to what documents is she
5 going to want to look to to find how -- you know, what
6 trains are moving around the system, we have something
7 called a train delay report which is what the -- I
8 don't know what his job title is, but his function is
9 to keep track on the train.

10 Here's what time we left this station,
11 here's what we did at that station, here's what time
12 we ended our day -- so that there is a document called
13 a train delay report that explains what the activity
14 of train number 164, as an example, was during a given
15 shift.

16 That's a long explanation to Ms. Kueppers
17 who said we preferred IC or privates over tariff. The
18 answer is we didn't. When cars were available to
19 spot, we spotted them. We had the same number of
20 locomotives running around the Corn Line as we had
21 before the crunch, during the crunch and after the
22 crunch.

1 You can only get so many locomotives on a
2 closed system. This was basically a one track system
3 going east-west, Jackson to Austin; east-west, Mason
4 City to Sheldon.

5 There were a few stations where trains
6 could go by each other on side tracks, but it was
7 basically, you know, one way out, one way back.

8 JUDGE LEVENTHAL: Now with respect to (e),
9 the number of locomotives originally allocated, made
10 available and utilized from July 31, 1995 through
11 April 5, 1996, you said earlier, Mr. Barrows, that you
12 had a study that shows all of the locomotives.

13 MR. BARROWS: Your Honor, there's a sheet
14 showing all of these. And my understanding from our
15 paralegal, who is the one actually delivering the
16 documents for me, is that that's been produced.

17 MS. KUEPPERS: There is one study, Your
18 Honor, if I understand this thing, we -- well, let me
19 back up for a minute. Documents like the train delay
20 report, which apparently will show where the trains
21 were going -- I'm not sure what is actually in these
22 reports.

1 You know, we only heard about it for the
2 first time when you wrote your letter saying that you
3 were going to produce the 11904.

4 MR. BARROWS: And of course, all of that
5 is 11904 information, Your Honor, because it's what we
6 did at each of the stations on each of the days, which
7 is exactly what the 11904 was put there to protect
8 those people.

9 These are single sheets per train per
10 shift. And if she wants them all, she can have them
11 all.

12 MS. KUEPPERS: In your letter -- in his
13 letter, he says this is about 8,000 pages.

14 Is that -- am I reading that letter
15 correctly?

16 MR. BARROWS: Well, we probably have, I
17 know, five or six or seven trains -- train numbers,
18 164, 168, 169, whatever, and I don't remember whether
19 each of them is doing two shifts or three shifts a
20 day.

21 But you multiply it out times the number
22 of days and that's how many pages you have during the

1 '95-96 period of time.

2 MS. KUEPPERS: Your Honor, I just have to
3 say that, you know, we simply disagree with --

4 JUDGE LEVENTHAL: I'm sorry?

5 MS. KUEPPERS: I'm sorry, you know, we
6 simply have to disagree with the way Mr. Barrows has,
7 you know, characterized the operation of the Corn
8 Lines during the period of -- for example, the train
9 -- if he's talking about the one train report we have
10 seen, that appears that CP cut the number of
11 locomotives in half on the Corn Lines.

12 JUDGE LEVENTHAL: But what do you want me
13 to do about it?

14 MS. KUEPPERS: Well, what I -- Your Honor,
15 all I'm asking --

16 JUDGE LEVENTHAL: He's saying he gave you
17 this -- he's saying that this information is available
18 from the documents he gave you, and he's identified
19 the documents.

20 Let's take (e), for instance. Isn't that
21 going to give you the information you're requesting?

22 MS. KUEPPERS: The locomotives for the

1 period of time could likely be derived from that
2 report. I'd have to go back and look at the way that
3 that report is kept. But, Your Honor, my point here
4 is that we had three separate systems operating.

5 We had tariff cars, and my client
6 certainly had thousands of those cars on order and did
7 not receive those cars. We had an IC program, and we
8 had a private car program. Now, you know, equipment
9 was allocated somewhere else, and we're trying to find
10 out when those orders came in, you know, who got that
11 equipment, be it locomotives or whether cars.

12 I have to tell you, Your Honor, that, you
13 know, we're going to be receiving apparently -- it
14 looks like about 80,000 documents which we're told,
15 you know, the information is in there. Because of --
16 you know, what we're going to have to do is bring all
17 of this and weave it all together.

18 So you're asking --

19 JUDGE LEVENTHAL: No, but I don't know
20 exactly what it is that you want me to do.

21 MS. KUEPPERS: Well, all I'm asking --

22 JUDGE LEVENTHAL: Sticking with (e), he

1 said -- Mr. Barrows said they have a study which shows
2 this information. Doesn't that answer your inquiry?

3 MS. KUEPPERS: (e) we may have, Your
4 Honor. But the remainder of this --

5 JUDGE LEVENTHAL: No, we're going to take
6 them one by one.

7 MS. KUEPPERS: Okay.

8 JUDGE LEVENTHAL: The locomotive issue
9 would be resolved by what Mr. Barrows said. You
10 haven't seen this study he's referring to, have you?

11 MS. KUEPPERS: Oh, no, no, no.

12 JUDGE LEVENTHAL: So once you see it, it
13 might answer the question.

14 MS. KUEPPERS: It may, Your Honor. What
15 I'm suggesting is, if he's telling me that I'm going
16 to find the answers to this in 8,000 pages, --

17 JUDGE LEVENTHAL: Well, what kind of an
18 answer would you want? I just don't understand what
19 kind of an answer you're looking for. Do you want him
20 to give you a number, 10,006 locomotives? That's not
21 going to do you any good.

22 MS. KUEPPERS: We may have -- in respect

1 to (e), Your Honor, I'm trying to remember, quite
2 frankly, the specifics of the report that was given to
3 us. I do recall a report that showed that the number
4 of locomotives that were allocated to the Corn Lines
5 was substantially reduced during this period of great
6 delay.

7 So where those locomotives went, of course
8 we have no idea. But that report may be responsive.
9 You know, I would have to go back -- if he said that
10 that's where that information is, I will go back to
11 that report and take a look.

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

13 (Whereupon, the foregoing matter went off
14 the record at 10:33 a.m. and went back on
15 the record at 11:00 a.m.)

16 JUDGE LEVENTHAL: In our off the record
17 discussion, we had a lengthy discussion over the
18 interrogatories and the answers given. I indicated to
19 the parties that I thought the best way to proceed
20 would be to defer ruling on the motion at this time.

21 At my suggestion, the parties are going --
22 well, strike that, "at my suggestion."

1 The procedure we'll follow is that Grain
2 Land will receive the 11904 information that the Board
3 has ordered CP to provide. After receipt of this
4 information, if Grain Land still feels that there is
5 a dispute, Grain Land will renew its motion making
6 specific reference to the interrogatory asked and the
7 information received.

8 And counsel for Grain Land will bring to
9 any future conference regarding such a dispute samples
10 of the responses given to the interrogatory with --
11 and will be prepared to explain why the response is
12 unsatisfactory and what a proper response would be.

13 If further conference is necessary on this
14 dispute, we'll follow the same procedure we have been
15 following throughout. The counsel requesting action
16 will speak to my law clerk and arrange for a mutually
17 convenient date for a conference.

18 Is there anything else we discussed off
19 the record that anybody wants to put on the record?

20 MR. BARROWS: No, Your Honor.

21 JUDGE LEVENTHAL: Ms. Kueppers?

22 MS. KUEPPERS: No, Your Honor.

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1 JUDGE LEVENTHAL: All right, all right;
2 this morning's conference is over.

3 (Whereupon, the proceedings were adjourned
4 at 11:02 a.m.)
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