UNITED STATES OF AMERICA

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SURFACE TRANSPORTATION BOARD

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DISCOVERY CONFERENCE

CSX CORPORATION AND CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY -- CONTROL AND OPERATING LEASES/ AGREEMENTS -- CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION -- TRANSFER OF RAILROAD LINE BY NORFOLK SOUTHERN RAILWAY COMPANY TO CSX TRANSPORTATION, INC.	Finance Docket No. 33388

Thursday,
January 8, 1998

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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(9:35 a.m.)

JUDGE LEVENTHAL: The discovery conference will come to order. At this time we'll take appearances. For the movants?

MR. WOOD: Good morning, Your Honor. Frederic L. Wood, the law firm of Donelan, Clearly, Wood and Maser, Washington, D.C., appearing today on behalf of Erie-Niagara Rail Steering Committee.

MR. DOWD: Good morning. Kelvin Dowd, Slover Loftus, representing the State of New York.

MR. BERCOVICI: Your Honor, good morning. Martin Bercovici, law firm of Keller and Heckman, appearing for Eighty-Four Mining Company.

MR. HEALEY: Good morning, Judge. Tom Healey, H-E-A-L-E-Y, on behalf of Elgin, Joliet and Eastern Railway Company; Transtar Inc.; and I&M RailLink. Collectively, we'll refer to them today as the coalition if that's all right with Your Honor.

JUDGE LEVENTHAL: Very well. Further appearances? All right. Respondents?

MR. EDWARDS: Good morning, Your Honor.

John Edwards, Zuckert, Scoutt and Rasenberger, for Norfolk Southern.

MR. FRIEDMAN: Good morning, Your Honor. Michael Friedman, Arnold and Porter, representing CSX.

MR. HARKER: Drew Harker with Arnold and Porter, representing CSX.

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

MR. VON SALZEN: Eric Von Salzen, Hogan and Hartson, representing Canadian Pacific.

JUDGE LEVENTHAL: Further appearances?

MR. OSBORN: Good morning, Your Honor. Jack Osborn of Sonnenschein for Canadian National.

JUDGE LEVENTHAL: All right. We have before us this morning several motions to compel. I just put it in my discovery book haphazardly. The first one I have is the State of New York. All right.

MR. DOWD: Thank you, Your Honor.

JUDGE LEVENTHAL: Mr. Dowd?

MR. DOWD: Your Honor, we are here today really with the second step in the process that began at the hearing two months ago. At that time,

objecting to document production requests from the State of New York, the applicants opposed production of their then recent settlement agreement with Canadian Pacific, claiming that the settlement terms were irrelevant until the applicants, if ever, relied upon that settlement in opposing the state and New York City's responsive application seeking trackage rights over the Hudson line.

We explained at that time that there were really two elements of relevance, one of which existed irregardless of whether the applicants raised the settlement. And that was the issue of operational feasibility.

There was a second issue, the question of whether the settlement in any way obviated the need for the trackage rights really by virtue of granting Canadian Pacific effective access to New York City.

At that time, Your Honor ordered production based upon the first round of relevance and essentially deferred any further argument regarding such matters as the rate in the settlement agreement until such time, if ever, as the applicants chose to

rely upon it.

Immediately then the applicants produced a copy of the CP settlement agreement, redacting the charge that CSX would receive for transit from Albany to New York City and also the charges similarly that CSX would receive for similar service in the Buffalo area, Philadelphia, and elsewhere.

Now, in their December 15th rebuttal filing, the applicants specifically relied upon the CP and CN settlements in posing the state and New York City's requests for trackage rights.

Both at Page 140 of the narrative argument and again in a verified statement of the witness Jenkins, the applicants claim that under the agreement because CP has the right to quote joint rates with CSX for service through Albany to New York City with the CSX portion of the rate being a fixed revenue factor, that that arrangement allowed CP effective access to New York City. And on that basis, among others, the applicants opposed the granting of tracking rights to the state and the city.

Now, it should be clear beyond any real

serious argument that the level of the CSX revenue factor is a critical element in determining whether the applicants' claim that effective access has been granted is true. If that level is set at an unreasonably high rate, then the access is illusory. And on that basis, we sought production of unredacted copies of the CP and CN settlements.

Now, the applicants objected. That's why we're here. And based upon the reply that was filed yesterday, as I see it, they have three arguments. First, they claim that the release of the revenue factors would cause them serious competitive harm. And the essence of their claim is that if motor carriers or other railroads saw all of these revenue factors, it would cause serious harm in their competitive business.

The simple answer to that is that we have a protective order. And that protective order has a highly confidential designation, which would prohibit our disclosure of that number, even to our own clients, much less to outside parties.

So I think the applicants' first stated

concern really is of no concern at all. We've got a protective order. There's no challenge to the legitimacy of the protective order. And thus far it has worked as planned.

It's a protective order that the applicant basically proposed. And in this particular case, it's more than adequate to protect the confidentiality of the revenue factor from non-parties, motor carriers, and whatnot.

The second argument is a claim that we really have no need for the revenue factor. And, as I understand it, the way it goes is roughly as follows. The applicants say that all they argue in their December filing is that CP has the right to quote joint rates. They don't say anything further. And, therefore, the CSX factor of those joint rates is irrelevant.

Now, with all due respect to the applicants, I submit that's disingenuous. If you look at the narrative, if you look at the verified statement of witness Jenkins, the clear and unambiguous import of the argument is that because of

this agreement, because of this right, CP has effective access to New York City.

CP can get there. East of Hudson shippers can use the Canadian Pacific system to compete with CSX. That's the clear import of their argument. And the fact of the matter is that if the level of that CSX revenue factor is too high, then those shippers will have no effective access. The transit will be priced out of any reasonable market.

The third argument is essentially a "Trust us" argument. The applicants claim that the level must be reasonable because otherwise CP wouldn't have signed the agreement. Why would Canadian Pacific enter into a settlement waiving its right to file a responsive application if it was not getting a competitive revenue factor for transit on Hudson line?

The answer to that argument, Your Honor, is that transit on the Hudson line is not the only subject of the settlement agreement. That agreement covers a great many markets, covers a great many movements, great many areas.

It is typical in commercial negotiations

that two parties negotiating at arm's length are going to trade off. It is typical that a party in agreeing to a particular commercial arrangement may accept something far less than what it wanted in one area in order to gain something that it considers more valuable elsewhere.

We have no way of knowing under which shell competing is higher in this agreement. It may be that the revenue factor on the Hudson line is, quote, "reasonable," whatever that might be. It is equally possible that Canadian Pacific elected to accept a fee which is something considerably less than reasonable in order to gain concessions that were more valuable elsewhere. The point is we don't know.

And in our view, the Board cannot make a reasoned judgment on the effectiveness of this arrangement and, thereby, a reasoned judgment on the merits of our responsive application. If the Board and the parties are not permitted to examine the most critical element of the reasonableness of that arrangement; to wit., the revenue factor.

They close their objection with an issue

that the scope of our request exceeds the scope of our interest, the point being that we have asked for access to an unredacted copy of the entire settlement agreement. And our responsive application only relates to east of Hudson.

On that basis, I think I can make that problem go away because we're prepared today to withdraw our request for the revenue factors for Buffalo and Philadelphia, et cetera, insofar as the State of New York and the city are concerned if we are granted access to the revenue factor that applies to the Hudson line, which is the subject of our responsive application.

So, on that basis, Your Honor, I would respectfully submit that the applicants' objections should be overruled and that an order compelling production should be granted.

JUDGE LEVENTHAL: All right. We'll hear from the respondents.

MR. HARKER: Your Honor, I am glad to go in whatever order makes sense to you. Let me offer my thoughts about the order, though, so you have the

benefit of my thinking.

Basically what we have here is today we're going to take up two issues. One is going to be the discovery -- well, I take that back. We're actually going to take up three issues because Mr. Healey is here, but let's deal with New York State. I didn't mean any disrespect. We have New York State's, Erie-Niagara's, and Eighty-Four Mine's motions to compel, which I think are interrelated to some extent.

They raise two issues or the three of them jointly raise or in some combination thereof raise two different issues. One is the discovery of commercially sensitive information when in our view the need for the information has not been shown.

Mr. Dowd has addressed New York State's position on that, but that is also an objection that we make with respect to Erie-Niagara. And so, if you noticed, we wrote our paper basically addressing both of those issues from both the Erie-Niagara and the New York State perspective. And so it from my perspective I think would be more appropriate for me to respond to both, -- otherwise there's going to be a lot of

overlap -- to respond to both Mr. Wood and to Mr. Dowd on that issue.

And then there's a second issue, which cuts across the Erie-Niagara request and the Eighty-Four Mine request, which we, again, addressed jointly in the paper, which is the ability of commenters in the proceeding at this stage of the proceeding to file rebuttal evidence in the matter and obviously the corresponding right to take discovery at this point. And, again, we addressed those two issues together.

I think it makes sense subject to other people's thoughts for Mr. Wood and Mr. Bercovici for us to hear from them. And then I can deal with all three at the same time.

MR. WOOD: Your Honor, I think Mr. Harker has outlined a way we could possibly proceed. He's correct that Mr. Dowd and I have similar but not identical issues that we've raised with respect to the relevancy or the discoverability of the redacted material.

Perhaps you could hear from Erie-Niagara

on that issue because they are similar, although not identical, and rule on that, and after you hear from Mr. Harker and anyone else who wants to speak to that issue.

And then perhaps we could deal with the question of whether or not the procedural issue I guess is perhaps the best way to characterize it, to whether or not, even if the material is discoverable, whether or not we have any right to submit anything to the Board about it. However Your Honor would like to proceed, whichever way is most logical, we'll be glad to do it.

MR. [illegible]OVICI: Your Honor, we concur with Mr. Wood's suggestion to separate the two issues into two separate elements here at this point.

MR. DOWD: Your Honor?

JUDGE LEVENTHAL: Mr. Dowd?

MR. DOWD: I have no objection to any order in which you want to hear argument, but the State of New York would not consent to this being heard as some sort of joint motion.

The State of New York is in a considerably

different posture from Erie-Niagara and Eighty-Four Mining Company. The state and the city are responsive applicants. We have an unchallenged, unqualified right to file evidence on January the 14th.

The material that we are seeking goes directly to one of the principal issues related to that responsive application. And those facts, which are significant, set the state and the city apart from commenting parties.

So while I have no objection to order of argument, I would respectfully ask that for purposes of considering the motions, the status of the state and city be kept separate from other parties.

JUDGE LEVENTHAL: Well, I'll rule on each motion. However, your suggestion, Mr. Harker, is to hear argument based upon issues. The first issue is the commercially sensitive material and the second the right of commenters to seek discovery.

MR. HARKER: Your Honor, that's right. We could do it that way. My only thought was since Mr. Wood's client, Erie-Niagara, raises issues that not only cut across or are related similar to the issues

raised by the State of New York, they're also similar to the issues raised by Eighty-Four Mine. It occurred to me that from my perspective, it would be easier to deal with them all in one sitting or at least all in one argument from my point of view, rather than trying to bifurcate my argument. And, as I said, that's the way we dealt with it in the paper.

But if you want to do it on an issue-by-issue basis, that's fine, too.

JUDGE LEVENTHAL: I don't want to confuse the issue of the right of commenters to seek discovery with the right of the parties filing responsive testimony to seek discovery.

MR. HARKER: And I have no intention of confusing that, frankly, and I wasn't trying to do that.

JUDGE LEVENTHAL: I'm speaking from the viewpoint of the judge. All right. We'll hear the two issues separately.

MR. HARKER: Okay.

JUDGE LEVENTHAL: Let me hear from Mr. Wood and Mr. Bercovici.

MR. BERCOVICI: I think Mr. Wood's suggestion was that you hear from him on the issue of the privilege. And then I would assume that Mr. Harker would respond on privilege. And then after you deal with the privilege issue would come the issue of Mr. Wood and myself as to our opportunity to take discovery on rebuttal. Is that correct?

JUDGE LEVENTHAL: Exactly correct.

MR. BERCOVICI: Okay. Thank you, sir.

JUDGE LEVENTHAL: All right. Mr. Wood?

MR. WOOD: Thank you, Your Honor.

Your Honor, just to provide the brief underpinning of the context of our request for the redacted material contained in the CN and CP agreements for the CSX, let me just indicate to you that the Erie-Niagara Rail Steering Committee is a group of shippers and other governmental organizations and other interests in the Niagara frontier area of western New York who requested certain relief from the STB in this proceeding to meet the public interest standard for approval of this transaction. Some of that relief relates to access through reciprocal

switching and other forms of relief, such as creation of a shared assets area in the Niagara frontier area.

In response to our request for relief, the applicants in their rebuttal filing on December 15th -- and I've attached excerpts from their narrative and from a rebuttal-verified statement of Mr. Jenkins to the letter that I sent to Your Honor last Friday.

And the narrative specifically states that the position of the shippers in the Niagara-Buffalo area will be improved by new agreements negotiated by CSX with both CN and CP. That's at Page 130 of Volume I of the narrative.

And they go on to say that these agreements provide for increased commercial access at mutually agreeable charges. There is a specific reference to the charges and the revenue factors or the switching charges or whatever is contained in the agreements in the narrative and a cite to Jenkins rebuttal-verified statement.

They go on to say that the CSX's agreement with CP specifically will allow CP to receive effective access. And they go on to characterize that

as effective commercial access.

So this is a very important point that the applicants are making that these agreements are going to supposedly provide effective access to customers in the Niagara frontier area.

The narrative does not include a reference to the CN agreement. But Mr. Jenkins' verified statement, which is contained in Volume 2A of the rebuttal filing -- and at Page 225 of that volume, there's a reference of the CN agreement, in which Mr. Jenkins says, "The agreement contains a similar provision to allow CN to convert traffic currently moving by truck to rail movement."

And the agreements themselves contain provisions that set out these opportunities for access by both CN and CP. But the rate terms or the level of the charges, whatever, have been redacted.

There's no way, Your Honor, with the price terms redacted for Erie-Niagara to evaluate the validity or to make an argument to the STB about the validity of the applicants' contention that there will be effective commercial access without access to the

price terms.

It's not a division. It's not a revenue division factor, Your Honor. Specifically, in the CP agreement that's set out on Page 104 of the production, which is cited in the letter, it's referred to as a separately stated switching charge. There's no concern about confidentiality of revenue divisions.

With respect to the CN agreement, it's not clear whether those are separately stated or not, but I submit that in either case, the ability of the CN to compete effectively will depend on how much it has to pay to the CSX after it acquires the Conrail lines in the Niagara frontier area.

And that should be obvious, Your Honor. There had been a history in the Niagara frontier area of very high reciprocal switching charges. Conrail's current charge is $450. And there's a very high charge in effect with respect to CP, formerly the LNH, for reciprocal switching in the Niagara frontier area.

We don't know whether the charges set forth in this agreement are going to be more than,

less than, or the same as those very high charges, which had the effect, as we contended in our submission, of precluding effective economic utilization of supposedly available competitive alternatives to Conrail.

And CSX, in clearly trying to protect the competitive or the lack of competition that Conrail has today, are precluding effective access from other carriers. We don't know if CSX is going to do anything to make that access more available to shippers unless we can evaluate the level of those charges.

I think that Mr. Dowd has already indicated that if there's any concern about the disclosure of this information to anyone outside of the proceedings, we have a protective order that Mr. Dowd indicated has worked very effectively, has a highly confidential classification.

The rest of the agreement has already been classified as highly confidential. We can't even share it or show it to our clients, but we have to use services of outside consultants to evaluate that,

which we have a right to do, to make our presentation to the Board.

I think it's important to realize, Your Honor, that we have been diligent in making our efforts to get access these agreements. The bare outlines of the CN agreement were announced before the October 21st filing. And we made a discovery request.

In spite of periodic inquiries about that, we were informed that the agreement had not been finally settled on. And I think it's clear that it was not signed -- it's dated October 23rd -- until two days after our comments were filed. So we were precluded from any opportunity to comment on the effect of that agreement before we filed our comments on the 21st.

And, similarly, the CP agreement was dated October 20th, but there was an amendment, which is contained in the disclosure in a letter that was dated October 21st.

So we really have had no opportunity to evaluate or comment on this agreement. And the applicants have now relied on it in their December

15th rebuttal filing.

I think that this is, the information about the rates is, eminently relevant to the issues that are presented in this proceeding. And I think on that basis, Your Honor should order its discovery.

I'll now reserve the second part of my presentation on the issue of the procedural issue until we address that.

JUDGE LEVENTHAL: All right. Mr. Bercovici?

MR. BERCOVICI: Thank you, Your Honor.

Upon receipt of the rebuttal filing, we conducted a review of the filing. And following that review, we promptly served a limited number of interrogatories directed to applicants with regard to two witnesses specifying, specifically targeting certain statements in the rebuttal-verified statements and sought certain information to test the veracity and the basis for those statements.

We also at that time asked if one of the witnesses could be made available for deposition. The applicants agreed to produce them for deposition.

They have subsequently filed objections and said they will not respond to the written interrogatories.

They contend in their various pleadings, both their answers and their pleadings that they filed last night, Your Honor, that they don't have any obligation to comply with discovery with regard to their rebuttal-verified statements. What they're really saying, Your Honor, is that they have the right in their rebuttal statement to lie with impunity.

We are not seeking the right to file rebuttal evidence. We're not contemplating sponsoring a witness at any point in time, in our brief or otherwise, and filing rebuttal statements, rebuttal evidence, challenging, contesting, taking issue with their statements. What we do want to do is test the basis for the statements that their witnesses offer in the rebuttal.

They said: Well, we are giving you a deposition. Well, the Commission's rules specifically are incorporated. The Board's rules are incorporated in Discovery Guideline Number 2. It said they will apply except as modified by the Board or by these

discovery guidelines.

The Board's rules make no distinction between the tools of discovery. One tool is deposition. One tool is interrogatories. Another tool is request for production of documents. They want to carve fine distinctions here.

They also say in their filing that they made yesterday that they are giving us by their good grace the right to depose their witness. Well, if that's by their grace, they can at any time during that deposition say, "Witness, go home. Witness, don't answer that. You don't have any right to pursue this line of questioning."

That's not the way that the rules of evidence work. We're not seeking rebuttal evidence. We are seeking impeachment. We're seeking to test the validity of the witness' statement from the standpoint of possible impeachment of whether or not he has a basis for making those statements and those bases are credible.

The Board is -- there has never been a situation that I'm aware of where the right to test a

witness' statement has been so limited or that a distinction has been made between deposition testimony and written discovery.

JUDGE LEVENTHAL: Why wouldn't deposition testimony serve your purpose?

MR. BERCOVICI: Well, Your Honor, we took Mr. Fox's deposition earlier on, back in the first trades of this case, back in August 25. And I asked some questions. Mr. Fox didn't know a lot at the time.

I asked him about the market that we're concerned with, the Pittsburgh 8 seam market, and asked him whether or not that's a shorthand version of describing coal mines with similar characteristics. And it was in our comments.

Well, I don't know. I'm not sure that they do have similar characteristics. I'm sure that there are different methods of mining at different specific locations.

We asked him about whether or not it's his understanding that Pittsburgh 8 seam producers are generally competitive with one another. Answer:

We're trying to understand the market dynamics, but I don't know that much about their individual, you know, efficiency factors, mining costs, load-up capabilities in geographic locations. I really don't know what the relative standing is with respect to mining efficiency.

He's come back and given testimony on rebuttal about all the market opportunities that we will have. We want some very specific information to be able to test his knowledge and his basis for the assertions and the conclusions that he reaches.

And in terms of taking the deposition, having the written information, having the detailed information is a very appropriate and necessary part of preparing for the deposition.

JUDGE LEVENTHAL: All right.

MR. BERCOVICI: Thank you.

JUDGE LEVENTHAL: Mr. Harker?

MR. HARKER: Your Honor, I think from my perspective, I'm not sure we exactly followed the direction that I thought we were going to go with, but I think it probably makes sense to hear from Mr. Wood

now because we've now introduced the issue of commenters taking discovery. Mr. Bercovici is a commenter. I'm not sure --

MR. WOOD: Always happy to respond.

MR. HARKER: But it seems to me that our response to Mr. Bercovici's arguments are inextricably linked with the response to what Mr. Wood is going to say about commenter's rights to discovery and rebuttal. So at this point, I would suggest that it would make sense to hear from Mr. Wood.

JUDGE LEVENTHAL: All right. You want me to hear the entire both issues. The trouble is I think Mr. Dowd's concern is that New York State will be left in the lurch here. I'll keep New York State in mind.

MR. DOWD: I appreciate that, Your Honor.

JUDGE LEVENTHAL: All right, Mr. Wood.

MR. WOOD: Thank you, Your Honor.

As I indicated previously, the applicants did not execute the definitive agreements until on or about the time the comments by Erie-Niagara, among others, were filed. And Your Honor will recall we

made an effort to obtain the text of these documents in the context of a previous discovery conference in late November.

And, of course, we were uncertain whether or not CSX and the applicants -- what use they would make of these agreements. They could have just entered into these agreements with CN and CP and had them quietly disappear from the proceeding, but they didn't do that. They explicitly relied on these documents and these agreements in their rebuttal filing on December 15th as a grounds for urging the Board to deny the relief sought by Erie-Niagara.

Now, the applicants say in the second part of their filing that, even though they now relied on these agreements as a basis for urging the Board to deny the relief, as Mr. Bercovici said, they want to preclude us from testing the validity of that contention, the factual basis for which is contained in the rebuttal-verified statement of Mr. Jenkins.

Now, Mr. Harker and I had a discussion about the possibility of instead of doing this written discovery, we could just call Mr. Jenkins for a

deposition.

But the question I asked Mr. Harker was: If I ask Mr. Jenkins "What is the dollar-per-carload switching charge in the Buffalo-Niagara area on Page 4 of the CP agreement?"; will he answer me? And he wouldn't tell me.

So I don't think it makes any sense for them to come in and say, "Well, the real way to do this is do a deposition" when we couldn't get the answer then either. So we focus some very narrow written document production requests to get the specific information we wanted and to test the validity of their contention.

Now, they say that we customer commenters, and unlike Mr. Dowd, who is a responsive applicant, don't have any right to file any more evidence. That's true. We don't have the right to file a rebuttal statement. But we do have a right under the Administrative Procedures Act to test the validity through discovery of the applicants' contentions and their rebuttal evidence.

In prior proceedings before the STB, as

I've indicated in the letter that we filed on Friday, it has been the practice for depositions to be conducted for discovery after the filing of the applicants' rebuttal evidence and for excerpts from those to be attached to briefs and for arguments to be made in those briefs submitted to the Board.

That's all we want. We want an opportunity to test the validity of the assertions that are made and to take a position, state a position on those in our brief to the Board on February 23rd.

I don't think there's any serious argument from the applicants that we don't have that right. And, in fact, I think they perhaps indicated that we may, in fact, have that opportunity given the fact that they have now relied on this agreement.

And in the footnote on Page 14 of their response, they indicate that there is perhaps an exception when someone -- applicants relied on an agreement, some information that -- Phillips Petroleum Corporation in the UP-SP case, and they were denied an opportunity to respond to it.

I'm not saying the applicants sandbagged

us, which they seem to characterize this as a sandbag exception, but the fact of the matter is that these agreements were not executed until about the time our comments were filed and we could not have any opportunity to see them or evaluate them or address the effect they might have on the position of the Erie-Niagara shippers.

I think that we're entitled to take advantage of the opportunities that the Board has provided in previous proceedings to allow people to submit discovery materials as part of their briefs, even just an opportunity, as I indicated in my letter, that was utilized by both the applicants and the non-applicants in the UP-SP proceeding to make sure that the record is complete, that the Board has a clear understanding of what the factual basis for the contentions of the parties is when it makes a decision on this important case.

And I think the mere fact that we don't have the right to file rebuttal evidence as such on January 14th has not been a basis in previous Board proceedings for parties to conduct discovery after the

rebuttal filing by the applicants in order to test the validity of their assertions. And I think there's no basis for denying us access to the unredacted information on that basis.

Thank you.

JUDGE LEVENTHAL: Mr. Harker, if you submit your witnesses for deposition, will you exercise a claim of privilege to any question?

MR. HARKER: You mean to the question that Mr. Wood poses?

JUDGE LEVENTHAL: Right.

MR. HARKER: I think that barring a decision from you today, we would have the right under Decision 34, as we understand it, to instruct him not to answer.

JUDGE LEVENTHAL: Well, suppose I were to find that this commercially sensitive information should be furnished pursuant to the highly protective provision of our protective order. Would you then assert the same privilege in a deposition proceeding?

MR. HARKER: I do not believe we would have a basis to do that, Your Honor. If what you're

saying is if you order us to -- if you say "This information is not covered by Decision 34. I'm not going to make the applicants produce the agreement because that's written discovery," but if they depose Mr. Jenkins and they ask him "What's in the agreement? What's the number?" and he knows what the number is, and I gather that's where you're going with this, I think, I don't think I'd want to come back to you and try and explain to you why he didn't answer that question. I'm not sure that's where you're going, but I --

JUDGE LEVENTHAL: No. I haven't decided this yet.

MR. HARKER: I understand.

JUDGE LEVENTHAL: I'm just investigating as to whether or not we can have depositions, rather than written discovery, which you're willing to furnish if the issue of confidentiality is resolved this morning.

MR. HARKER: First of all, let me be perfectly clear about something. CSX until yesterday has not been asked or requested to make a witness

available for deposition by any party other than a responsive applicant. Indeed, as we speak, a responsive applicant is taking the deposition of a CSX witness.

It has been NS that has had a number of commenters ask for depositions of rebuttal-verified statement givers. And it's been NS that has made the decision to voluntarily make witnesses available.

I just want to say at this point we have not been asked to make a witness available. And I don't have any instructions from my client as to whether or not a witness would be made available for deposition if it was noticed by a commenter.

JUDGE LEVENTHAL: On Page 18 of your answer, you had in your Argument Number 5, "Applicants voluntarily offer rebuttal witnesses." Do I take it that that applies only to NS and not to CSX?

MR. HARKER: Well, at this point, it's only been NS that has been requested to make people available. And they have taken the position that they will make them voluntarily available.

All I'm saying, Your Honor, is -- and I'm

not trying to play games. All I'm saying is that no witness of CSX has been noticed for deposition by a commenter until late last night.

And I have not yet had -- believe me, I have been talking to the client extensively about discovery during this period of time. And I expected at some point we would face the issue of a commenter and only a commenter noticing one of our witnesses for deposition. And we just haven't come to a resolution on that.

NS has faced that issue. And they have decided that they will make their people available.

JUDGE LEVENTHAL: The big problem here, we don't have much time. This is January 7th, and briefs have to be filed on January 14th.

MR. HARKER: Your Honor, let me correct that. What is due January 14th under the Board's procedural schedule is a rebuttal filing by only about a dozen or so parties.

JUDGE LEVENTHAL: How about briefs? When are briefs due?

MR. HARKER: February 23rd. So we've got

a long way to go. And indeed --

MR. BERCOVICI: Not a long way, Your Honor.

MR. HARKER: In this proceeding, that seems like an eternity.

And, indeed, a few depositions have been noticed for after the January 14th deadline. So don't worry about timing in terms of commenters. And, of course, that's part of the problem. You know, this is going to just go on and on and on and drag out under the commenters' theory. But there's no time problem for the commenters.

JUDGE LEVENTHAL: All right. I'll hear your argument. Are you interested in the concession made by Mr. Dowd that so far as New York State is concerned, they'll limit their request to revenue factors east of the Hudson? Does that help any in resolving this issue with respect to New York State?

MR. HARKER: Insofar as we are concerned, I think that they see the handwriting on the wall in the sense that the rules are clear that even though New York State has the opportunity to file rebuttal,

they're limited in terms of the evidence that they can produce.

And their evidence is limited to basically so-called east of the Hudson issues. There's only one number in the CP agreement that relates to east of the Hudson. That's the number they want. So everything else is really outside the scope of their rebuttal filing anyway.

So I don't think they have a basis for it. So that's not really much of an offer.

MR. WOOD: Your Honor, I should have indicated that, like Mr. Dowd, Erie-Niagara has no real interest in -- kind of the mirror image of Mr. Dowd. We have no real interest in the information about the east of the Hudson issue and indicated in our letter the specific pages of the two agreements which Erie-Niagara has a specific interest in.

We're not seeking -- and I will make that clear if we didn't before. We're not seeking unredaction of information unrelated to the Erie-Niagara situation.

So from our point of view, how we can

handle that, I'm not sure. But our specific interest is with respect to those pages of the two agreements.

JUDGE LEVENTHAL: All right. Let's go off the record for a moment.

(Whereupon, the foregoing matter went off the record at 10:20 a.m. and went back on the record at 10:30 a.m.)

JUDGE LEVENTHAL: In our off-the-record discussion, I attempted to see if we could dispose of this issue with respect to New York State by means of a stipulation. But the results of our discussion show that such a disposition is not feasible at this time.

All right, Mr. Harker. I'll hear from you.

MR. HARKER: Thank you, Your Honor.

There are two issues that have been presented here. The first is the discovery of commercially sensitive information. And I haven't heard anyone dispute our claims about the commercial sensitivity of the information. All I've heard is that the protective order is in place to protect that information. But no one has seriously questioned that

this information is commercially sensitive. I will develop that more later, but I think that's important to point out.

The issue is the discovery of this information. And the need in our view for the information has not been shown. The second issue is the ability of and the authority of commenters to engage in discovery when they have no right to file rebuttal evidence.

First of all, with respect to the commercial sensitivity argument or the issue --

JUDGE LEVENTHAL: I don't think that's in dispute. Is there any dispute as to the nature of the material sought?

MR. DOWD: No, Your Honor. You just heard absolutely right. We don't dispute this commercially sensitive. We just simply point that plenty of commercially sensitive information is discovered all the time. And that's why we have protective orders.

JUDGE LEVENTHAL: All right.

MR. HARKER: And, of course, I don't deny that. But, at the same time, in this case, indeed,

most formally and authoritatively, in Decision Number 34 of the case, the Board has said that, despite the fact that there is a protective order in the proceeding, parties are entitled to redact commercially sensitive information.

You have applied Decision 34, Your Honor, on a number of occasions in the proceeding, but I will just read for you the part of Decision Number 34, Page 2 which says what the test is, "Disclosure of extraordinarily sensitive information should not be required without a careful balancing of the seeking party's need for the information and its ability to generate comparable information from other sources against the likelihood of harm to the disclosing party."

In fact, you will recall that the very last time we got together I think, on December 4th, Mr. Khan on behalf of Martin-Marietta made basically the same argument that Mr. Dowd and Mr. Wood are making now with respect to information of another company.

And you ruled under Decision 34 -- he

argued there's a protective order in place and that is sufficient to protect the information. You ruled, however, that in that particular case, Mr. Khan and Martin-Marietta were not entitled to the information under the Decision Number 34.

JUDGE LEVENTHAL: There's a difference there, though. In Mr. Khan's case, his argument was that everybody else received that information. And, therefore, he felt he was entitled to it. He did not show that there was any need for it. And that's what I based my ruling on there.

MR. HARKER: I understand.

JUDGE LEVENTHAL: Here New York State has shown that, in their opinion, there's a need for it. And Mr. Dowd has expressed that need. In the last instance, that wasn't so. So it is a little bit different.

MR. HARKER: Your Honor, I appreciate that. And, in fact, that really does lead me to the next point because it does seem to me that the issue for you is the -- again, I just wanted to say for the record that the fact that the protective order is in

place doesn't end the inquiry.

And Decision 34 says that. You've said that, most recently on December 4th.

JUDGE LEVENTHAL: All right. I agree with that.

MR. HARKER: So we come to the issue of need. I will tell you that I am still, despite having seen a paper and now hearing their argument, confused about exactly what the need is.

It seems to be that the Canadian Pacific agreed to, Canadian National and Canadian Pacific agreed to, financial terms in the agreement that would not allow them to achieve their commercial goal, which was to gain access to markets to which they had no direct access before.

So it appears that the theory is that Canadian National and Canadian Pacific didn't know what they were doing when they entered into the agreement or that they made some kind of unspecified trade-offs somewhere. So they traded off, you know, made a compromise here to get something there.

But you have the agreement. You have a

copy of the CP agreement. You can see how little we've redacted. It's just essentially numbers. And the question is: What is their theory? Where do the trade-offs occur?

Otherwise what you have is you have two sophisticated commercial parties with adverse interests entering into an arm's length business relationship.

Look what CN and CP gave up. CN and CP gave up the right to file a responsive application. Their description of the responsive application that they filed on August 22nd said that they were going to be seeking access, direct access, to trackage rights and other means to these particular markets to east of the Hudson and into Buffalo.

The question is they entered into an agreement to achieve those goals. And you will hear from counsel for CP that they believe that, in fact, the financial terms met those goals.

So you have two parties who presumably know what they're doing. They know what it takes to move traffic, what economics are necessary to move

traffic, agreeing to a number. And now CP is saying that traffic will move.

You have to rely, ultimately you have to rely, on CP's ability to know better what its own internal costs are in its own market and so it will know what the market will bear in terms of what kind of revenue divisions and what kind of rates it will agree with CSX.

And if you don't accept that, I think you should at least require more of a proffer from the other side as to exactly where they're going with this and what use of the information they're going to make.

It defies logic. It defies logic and common sense that CP and CN would have made an agreement that would not have allowed them to achieve their economic or their commercial goals.

In fact, the Board has had at least one occasion where it has had a similar kind of issue. And that involves Atlantic City, the very first discovery dispute that we got into, where there was a questioning by Atlantic City of a very fundamental premise.

And the Board in that decision affirmed your ruling on appeal as saying -- and basically what they were trying to challenge was that firms don't generally attempt to maximize their profits, going back to the one-lump theory. I won't go into all the detail there because I'm sure you still recall that.

Basically what they said is that: You've got to offer up something to beat something. Nothing is not going to be something. And we have a theory that says firms maximize profits. They're trying to take discovery on some unexplained theory that firms, in fact, don't maximize profits. And the Board said: We're not going to authorize discovery of sensitive commercial information on such a novel theory.

Well, that's what you're basically being asked for here. You've got a novel theory that somehow CN/CP didn't know what economic terms to agree to such that they could achieve their commercial goals. On the basis of that ACE decision, I think you've got plenty of authority to deny their request for discovery here.

Now, we talked a little bit off the record

-- and I'm glad we didn't do this on the record -- about the attempts of New York State and Erie-Niagara to obtain discovery of both agreements. In their total, as we said, New York State focuses on east of the Hudson issues, and Erie-Niagara focuses on Buffalo.

With respect to the CP agreement, we have indicated in our paper on Page 10 the portions of the CP agreement that do not relate to either Buffalo or east of the Hudson issues. However, there was a typographical error in the paper which I want to correct on the record.

The sentence is the second sentence under the Paragraph Number 2 headed, "Both ENRS and NYS/C discovery of commercially sensitive information that is beyond the scope of what is relevant to their filings."

In the second sentence, it says, "Paragraphs 5.A(ii) and (iii) on Page 3 of the CP agreement relating to the minimum revenue factors for shipments between Albany and Montreal and Albany and Philadelphia, respectively, in Exhibit A to the CP

agreement relating to import-export containers in the express rail Montreal-Toronto corridor are unrelated to the claims of either ENRS or NYS and are, therefore, not discoverable by either party."

That, instead of "(ii) and (iii)," it should be "(iii), (iv), and (v)." So, in other words, Paragraphs 5.A(iii), 5.A(iv), and 5.A(v) on Page 3 of the CP agreement do not relate to Buffalo or to New York State.

And, in fact, just to be a little bit more specific, the only provision in the CP agreement that relates to east of the Hudson issues raised by New York State is 5.A(ii) on Page 3 of CSX69HC000103, which I believe you have a copy of, Your Honor. And the only provision in the agreement relating to Buffalo is on Page CSX69HC000104. And that is Paragraph 5.A(vi).

New York State is only entitled to Paragraph (ii). Buffalo is only entitled to Paragraph (vi) from the CP agreement. They had no right to any other information.

During the course of the argument, Mr.

Dowd made a reference to your earlier decision on November 25th, in which I think he said something to the effect that the ruling was that New York State would have the right to come back to you for unredacting the information that we were permitted to redact if we relied on the agreement in our filing on December 15th.

I have read the transcript a couple of times. I read it most recently or looked at it, had my colleague look at it this morning. I didn't see that reference. I don't think that was part of your decision, that your decision was that we could redact, make redactions, but if we relied on the agreement, Mr. Dowd would have a right to come back and seek the information redacted.

I think just to clarify the record as well, -- our paper does, and I thought that would take care of it -- I don't believe that the Canadian National issue was before you on November 25th, Canadian National settlement agreement. I may be wrong about that, but I think it was just Canadian Pacific that was decided by you on November 25th.

The reason why I have a pretty good handle on that is because we did not make the Canadian National agreement available until December 17th. And I can assure you that I comply with your rulings more expeditiously than three weeks later.

And the other thing is they hadn't gotten it before December 17th after your ruling on November -- if you had ruled on it on November 25th, I'm sure we would have all heard about that. So I just wanted to be clear that your earlier ruling only related to Canadian Pacific.

In addition, Mr. Wood said something about the charges for Buffalo not being a revenue division, being just simply a switch rate. That actually is not my understanding. My understanding is, in fact, that the agreements are depending on which provision he's talking about. And I thought the provision he was talking about is, in fact, a revenue division and not a switch rate. I don't know if that's important or not, but I think it's important to understand.

Most of the numbers that we're talking about in here are revenue divisions, not simple switch

rates. There is one. And that's my understanding.

Mr. Wood indicated that they have concern about the so-called switch rate, the Conrail switch rate, in Buffalo, the Buffalo area, being too high to move traffic.

I don't know where you -- we haven't talked about the commenter issue yet, and I do want to do that. But I think that if that is his concern, I think that there are ways that we can address that if you otherwise conclude that he is entitled to this discovery because, in point of fact, CSX happens to believe that the numbers in the agreement compare very favorably to the existing charges that do currently pertain to Buffalo. And so I think we should all file that away and see if after all is said and done, there is not some basis to score that some more.

I think that what probably makes sense for me now is to sit down unless you have any questions. And I believe Mr. Von Salzen on behalf of Canadian Pacific wanted to address this issue of the Erie-Niagara and New York State requests. And then I would then turn to the issue of the commenter matter

if that makes sense to you.

JUDGE LEVENTHAL: All right. However, I do have one question. As I understood Mr. Dowd, his argument, he said that they wanted this information to test the validity of the witnesses' rebuttal testimony. He wasn't disputing any economic theory, as was the case in the Atlantic City decision.

Did I understand you correctly, Mr. Dowd?

MR. DOWD: Yes, Your Honor.

JUDGE LEVENTHAL: So I think you have two different situations here. I think there's a line, a differential, between this situation and the ACE one.

MR. HARKER: I understand your point, Your Honor. All I would say, though, fundamentally the theory, as it's espoused, where they want to get eventually is that and their concern is that somehow CP and CN didn't know what they were doing when they entered into this agreement.

JUDGE LEVENTHAL: I didn't understand his argument to be that. I think he is saying he doesn't know what other considerations were involved in the settlement.

I don't see that that bears on the economic theory of maximizing profits. It might very well be by making some other concession in some other area that that would be maximizing profits but for both railroads.

MR. HARKER: And I think --

JUDGE LEVENTHAL: What he says is he wants to test the witnesses' testimony. It seems to me he has a strong argument there, Mr. Harker.

MR. HARKER: Well, I would be interested in knowing how having this particular number, this particular number, will allow him to do that.

JUDGE LEVENTHAL: All right. Mr. Dowd?

MR. DOWD: Thank you, Your Honor.

Let me answer that question this way. What we have been offered here is an argument that there is no need for the facts because we can rely upon the lawyers' and the witnesses' version of what the meaning of the facts is.

I would submit to you that one of the principal reasons why we have discovery is to test the validity of what the lawyers and the witnesses say.

Mr. Harker, Mr. Von Salzen, honorable, intelligent men. Mr. Jenkins. I don't know him, but I'm sure he's an honorable, intelligent man. But the fact is they are lawyers. He's a witness. They're making statements, conclusory statements, about what certain facts mean. The purpose of discovery is to let parties who oppose those viewpoints find out what the facts are and put those facts before the Board.

If all we had to do was rely upon the representations of counsel and witnesses as to business judgments of railroads, we wouldn't have to have review proceedings.

Just to take one case in point, in the Union Pacific-Southern Pacific merger, the counsel and witnesses assured us that we would have efficient service and multimillion-dollar savings. And now traffic in the West has come to a standstill.

The purpose of discovery is to get the facts to test what the witnesses say. What we intend to do with the revenue factor for CSX east of the Hudson is to test that through a number of different means to determine in our view whether witness Jenkins

and counsel for the applicants are correct in their claim that it provides effective access to New York City and if we believe it does not, to argue, as is our right, to the Board that their claim is without merit. That's our need.

JUDGE LEVENTHAL: All right. Now, the issue with respect to New York State, we now have Mr. Harker's representations on the record. Do I understand that you are now satisfied if you got the information requested with respect to Paragraph 5.A(ii)? If you got that figure, that satisfies your request?

MR. DOWD: Yes, Your Honor, that is correct.

JUDGE LEVENTHAL: Now, with respect to you, Mr. Wood, I take it, then, that your request is limited to Paragraph 5.A(vi). Is that correct?

MR. WOOD: Your Honor, that's not entirely correct. Mr. Harker referred to this Paragraph (vi) that begins at the top of Page 4 of the agreement. If you turn over to the next page, which is identified as CSX69HC000103?

The very first line of that document, which is a letter, actually, that was kind of interpolated into this agreement when it was produced, said, -- and this is a letter from CSX addressed to CP -- "This confirms our conversation this morning that some fine-tuning is required to make Paragraph (vi)," which was the one on the previous page, "--Buffalo accurately reflect the circumstances at Buffalo." And then it goes on to make some fine-tuning, whatever that amounts to, and there are more redactions.

Let me, just for the sake of completeness, also make sure Your Honor understands our requests, which were specified in our letter with respect to the CN agreement. And, without objection, I do have a copy of the CN agreement, which is a redacted version that was produced, as Mr. Harker said, and so the record is complete.

I apologize for the incorrect statement about the production. That was not an issue in November. It was produced on December 17th in our fulfillment of a request that I earlier made on the record that we had made when the agreement was first

announced.

If there is no objection, I would like to furnish the Judge with a copy of that agreement also. And if you could turn to Page 6 of this agreement, Your Honor, which is identified with the Bates number CSX75HC000106? There is a specific reference, "Terminal Opportunities, Buffalo Terminal Area."

And on the next page, Page 7, Paragraph 4.2, refers to Seneca Yard, which is a terminal facility in the Buffalo area, which under this agreement CN is apparently getting some form of access to, different access to. I'm not sure exactly. There's considerably more material redacted from this.

Just as an aside, Your Honor, I would make specific reference to 4.1.2, which refers specifically to a switch rate for CN-Buffalo. And so I'm not sure whether these are going to be switch rates or revenue factors or how they're going to be implemented. That certainly is one of the issues that we need to address.

I'm somewhat surprised that Mr. Harker doesn't understand or requested some form of a

proffer. I thought I provided that, Your Honor, by indicating that our specific concern that we addressed in our comments was with the level of the charges precluding effective ability of shippers to use these services that are supposedly offered in the Buffalo-Niagara area today.

There is a charge that Conrail establishes for reciprocal switching, which is very high. In the judgment of our witnesses, it has precluded the opportunity for shippers to use that.

There has been a charge that has been in effect on an agreement that some litigation and arbitration between Conrail and CP's predecessor, the DNH, going back many years, about which there have been many disputes.

The level of that charge has now been set pursuant to an arbitration award but never published in a tariff. But, nonetheless, it was disclosed as part of the agreements that were produced. And it's been our position that that charge is likewise too high to permit effective use of the services ostensibly offered.

We don't know without seeing these charges in these two agreements whether we're going to be in the same situation we're in today or whether, as Mr. Jenkins said, there is going to be effective commercial access.

That's all we want to test. That's all we're seeking to test. And I think we're entitled to it.

JUDGE LEVENTHAL: Off the record.

(Whereupon, the foregoing matter went off the record briefly at 10:58 a.m.)

MR. HARKER: Your Honor, let me address the very helpful discussion of the various agreements. I defer to Mr. Wood. And I don't disagree with his statement with respect to the letter in the October 21st, 1997 letter in the Canadian Pacific agreement as relating to Buffalo. And I did not include that before. That was just I misspoke. But I agree with him that this letter does relate to Buffalo and, accordingly, is within the scope of the request.

So hopefully to restate this correctly, then, with respect to New York State, it's Paragraph

(ii) on Page 3 of the agreement. And with respect to Buffalo, it's Paragraph (vi) on Page 4 and the October 21, 1997 letter.

Then with respect to the CN agreement, again, my understanding -- I don't dispute Mr. Wood's statements that the redactions in Paragraph 4.1 do apply to Buffalo. And if that's what you're limiting your request to, I'll accept that representation.

And with respect to Paragraph 4.2, Mr. Wood may have missed it, but we did indicate in our paper filed yesterday that CSX was agreeing to unredact that information. In fact, we --

MR. WOOD: I'm sorry? Which paragraph? All of it?

MR. HARKER: That's correct. Paragraph 4.2 of the CN agreement was previously redacted. And, as indicated in our paper yesterday on Page 5, Footnote 3, we indicate that "The provision for accommodating CSX's" -- this is the provision, Mr. Wood, that that refers to. So, in other words, Section 4.2 of the CN agreement we've agreed to unredact.

I think what we're talking about, then, just for purposes of sharpening the discussion are the redactions in the CN agreement on Page 6, Paragraph 4.1, called "Buffalo Terminal Area."

MR. WOOD: Well, I appreciate that clarification. And I probably should have inquired, but, frankly, the footnote was not terribly specific about which language it was referring to. And I appreciate that clarification.

I did neglect to mention one other point. I don't want to make a big issue out of it if it isn't a big issue. The CP agreement has an Exhibit A at the end, CSX69HC000109 and 110. And these are the last two pages of the document as produced. But the exhibit says on it that it's Page 1 of 3 and 2 of 3. And there does not seem to be a 3 of 3.

I'm assuming that there is nothing in there that relates to the State of New York or Buffalo or, in fact, if there even was a Page 3. So I just wanted to make that observation.

MR. HARKER: Your Honor, if I might?

JUDGE LEVENTHAL: Sure.

MR. HARKER: There is a Page 3 of 3. It lists a variety of bcc addressees who got the letter. And it was inadvertently omitted from the production. I can't imagine that it would be of interest to you. It's not of any substance at all, and it certainly doesn't relate to Buffalo.

JUDGE LEVENTHAL: All right. I think you've finished your argument.

MR. HARKER: Yes, Your Honor.

JUDGE LEVENTHAL: All right. Do you wish to be heard?

MR. VON SALZEN: Thank you, Your Honor.

On behalf of Canadian Pacific, we are here to support the position of CSX with respect to the redaction of certain information from the agreement between CSX and CP.

CP takes no position with respect to the CN agreement and no position with respect to the rate of commenters to discovery. We're limiting our remarks to this one issue that is important to CP.

This as confidential information of ours as much as it is confidential information from CSX.

And our economic interests are as much at stake here as the economic interests of CSX.

I think everybody agrees that where commercially sensitive information, confidential information, is sought to be discovered, there's not a black and white rule. There's a balancing test.

Even where there is a protective order and a highly confidential designation, we all recognize that that is an imperfect protection and that, therefore, information that is sensitive ought not to be disclosed, even subject to the protective order, unless there is a good reason to do so. So we're here to argue whether there's a good reason to do so.

We have obviously good reasons for understanding why CSX and Canadian Pacific don't want this information to be disclosed because there's always a risk that disclosed information is going to leak somehow, not suggesting any sort of intention or impropriety on the part of those in counsel or their consultants. It's just that when you disclose information, it always increases the risk that there's going to be a mistake, inadvertent disclosure.

We don't want that to happen. I would suggest that the movants ought not to want that to happen. The movants are the ones who want to have competitive rail service established in these markets.

These mechanisms that CSX and CP have negotiated at arm's length are a way of doing that. They're going to be undermined if commercially sensitive information should somehow leak and get out into the wrong hands, into the hands, for example, of trucking companies, from which we would be trying to get business and from which we would have trouble getting business if our commercially sensitive information were to leak.

So we've got a balancing test here. On the one hand, you've got commercially sensitive information and good business reasons why you don't want that information disclosed. On the other hand, we have a request for discovery. And what is the reason that that information is material?

Now, Mr. Dowd said a moment ago that the issue is whether the movants should simply take the word of CSX or presumably, by implication, CP about

something of word of lawyers, word of consultants, and so forth. That's not the issue at all.

There's been a tremendous amount of information provided. This agreement has been disclosed. There are a few specific detailed numbers that have not been disclosed, but the overall structure of the agreement, the way it works, has been disclosed.

And we all know what it is. It's an arrangement under which CP and CSX are going to be able to cooperate in order to serve this market for certain types of traffic. And we've identified what the traffic is.

If the applicants, the movants want to argue that that's not broad enough, that's fine. They've got that information. The only information they don't have are the specific revenue factors.

The only reason they have given you -- this is true of Buffalo as well as east of the Hudson. The only reason they have given you for saying, "We need that information" is that they wonder whether CP has entered into an agreement that is illusory.

That's their word. But they haven't suggested to you the slightest reason to believe that Canadian Pacific would enter into an illusory agreement.

We have an agreement here that purports to give us an opportunity to compete in these two markets. They say: Well, maybe that's illusory. Okay. Maybe it is. Where is the evidence? Where is the argument? Where is there any basis even for reasonable suspicions that Canadian Pacific has entered into an illusory agreement?

We're not an applicant. We're not in bed with the applicants. We are an independent, unaligned party that has entered into an agreement. There is absolutely no basis that has been suggested in the hour and a half that we have been here for believing that Canadian Pacific has entered into an illusory agreement.

And in the absence of any such indication, I would suggest, Your Honor, that the movants simply have failed to make their case for the disclosure of highly confidential commercially sensitive information.

We, therefore, support the position of CSX that that redacted material should remain redacted.

JUDGE LEVENTHAL: But, as I take your argument, you're saying that New York State doesn't have the right to inquire because they haven't shown any reasonable basis for a suspicion that this agreement is illusory.

MR. VON SALZEN: That's correct.

JUDGE LEVENTHAL: Don't they have a right to test whether or not it's illusory?

MR. VON SALZEN: Well, they have been given a good deal of information. They have been given the basic agreement. They have been given the structure of the agreement, the way it works, what kind of an agreement it is, what traffic it applies to, the routings, and so forth and so on.

The only thing they haven't been given I think in the case of east of the Hudson is one number. Now, they haven't even suggested to you that they have the ability to tell you when they know what that number is whether it's good or bad. I mean, off the record, Your Honor, you suggested that maybe that

would be the way to go.

I think the way this works is, if I understand New York's argument, if the number in that blank is above a certain level, then the agreement is illusory. But they don't even know what that level is that would make it illusory.

I mean, it would be very interesting. We could kind of resolve this by them saying, "Okay. We'll tell you at what level we think it becomes illusory. If CSX and CP would agree, we'll tell you whether it's above or below that line."

I suggest to you that if that were the resolution, then that would be the end of it here and now because they don't have a number. They don't have an area in which they say, "This is going to be illusory if the number is above that particular level" or "below" as far as that goes.

JUDGE LEVENTHAL: All right.

MR. VON SALZEN: Thank you, Your Honor.

MR. DOWD: Your Honor, if I may briefly? Mr. Von Salzen asked: Where is the evidence? That's the whole point. The evidence is in his briefcase.

We cannot properly be held to a standard that requires us to make some sort of an initial showing when the sole fact needed to make the showing is kept from us.

Now, I would venture to speculate that were I to stand here and say that "Any revenue factor above" -- pick a number -- "$150 a carload will not allow effective access to New York City," I am reasonably certain Mr. Harker and Mr. Von Salzen would stand up and say, "Yes, it will."

Where are we? That's why we have the Transportation Board. It is not for the partisans. I mean, would that it were, we would love it if we had the last word on whether that was effective or not, and presumably they would as well. But that is not the way the system is set up.

The Surface Transportation Board ultimately has to decide whether New York State's and New York City's responsive application is well-taken and should be granted. That application fundamentally seeks to bring effective rail competition east of the Hudson River.

The applicants in various forms say: You don't need it because it's already there. One of the ways it's already there is the CP settlement. Our position is we have a right under the procedural rules to test whether we agree with that claim, whether that claim is true, and to present the best evidence we can muster, the best evidence of record in support of our position.

And the charge that CSX will receive as part of these joint line movements is a significant and significantly relevant element of whether the access is effective.

The reason that Mr. Von Salzen and Mr. Harker I believe are wrong in their thesis that we somehow have an obligation to post a level and if we can't post a level, then we can't show a need for the information, the reason is because whatever level we might suggest I suspect they will disagree with. And it will be up to the Transportation Board to decide.

I would also suggest that there is no one level anyway. There are multiple commodities that move to and from east of the Hudson. This agreement

only apparently applies to inbound traffic. There's a variety of commodities that move inbound to points in New York City.

The threshold for what rates may make CP service competitive to CSX service will in all likelihood differ commodity by commodity. So, even if we were to go down that road and try and set a number, there is no one number that could be set.

So we come back fundamentally to our basic position. The standard or that the applicants' own argument is you balance the need against the ability of the discovering party to otherwise attain the information and the harm of disclosure.

We submit that the harm of disclosure is radically minimized, if not effectively eliminated, by the highly confidential designation of the protective order. We submit that there is no way other than discovery for us to learn what the charge is going to be.

So two out of three elements of the test we believe clearly fall on the side of granting our motion. And with respect to need, likewise, we think

we've shown very clearly the relevance of this information. And under the rules, relevance translates into entitlement to discovery.

On that basis, we repeat our request that the objection be overruled and our motion be granted.

MR. OSBORN: Your Honor, I wonder if I could make a statement of Canadian National's position on the matters before you this morning.

Canadian National is sensitive to the position of CSX on these matters. We've settled with them, and we support their application. CN is also sensitive to the position of the New Yorks, to include our customers.

We have no position one way or the other on the merits of the motions before you this morning, but we can say that after considering the matter very carefully, we feel that a highly confidential designation would adequately protect our interests in confidentiality as to our settlement agreement.

So you can act with that as you wish. But from our standpoint, we think the highly confidential process would be satisfactory in this instance. And

we'd be willing to rely on it.

The one qualification I'd like to make is that if you were to rule to award unredacted production on that basis and if you were to make a similar ruling with respect to the CP agreement and if Mr. Von Salzen were to invoke the Martin-Marietta treatment with respect to his agreement vis-à-vis outside counsel for CN, I would ask for reciprocity.

I don't ask for that in the first instance. I'm willing to rely on the highly confidential designation and rely on Mr. Von Salzen to abide by it, but I would want to have equal treatment if we end up in a different posture.

JUDGE LEVENTHAL: All right.

MR. WOOD: Your Honor, if I could just take a minute or two more of your time and summarize, similar to what Mr. Dowd did? Mr. Von Salzen said: What proffer have the movants made with respect to the so-called illusory nature of the agreement?

I don't recall using the word "illusory," but the word the applicants use right in their filing is that the position of the shippers in the

Niagara-Buffalo area will be improved by new agreements negotiated by CSX with both CP and CP and to go on, specifically with respect to the CP agreement, that it will provide customers located in the Buffalo-Niagara area, will receive effective access to and from CP-DH-served markets and so on.

As I said, all we're trying to do is test the validity of that assertion, which depends upon the terms of the very agreement which they now are seeking to preclude us from examining in its entirety or at least those portions that relate to the Buffalo area.

I don't know how we can test the assertions that they made unless we know the economic terms. And there are some ce.t.l economic terms that have been excluded. It's not just the rate level. That's been excluded. But there's also some sort of a minimum volume threshold, which is included in the terms.

If you look at Page 104, Page 4 of the CP agreement, there's a minimum volume requirement, which is fine-tuned, as this letter put it on the very next page. For all we know, there's some minimum volume

requirement that CP may or may not be able to achieve to even get the benefit of what the agreement is.

I think without an opportunity to see what the facts are, we can't make any judgments about whether or not the assertion that the applicants have made that this is going to provide effective access to customers in the Buffalo-Niagara area -- we're at a loss as to how to proceed. And I think on that basis, we should disclose it.

I certainly appreciate CN counsel's representation that CN really has no problem with having this treated under the highly confidential. And it certainly seems to me that's the way to deal with Mr. Von Salzen's concerns about the commercial sensitivity. It certainly has worked in other areas, particularly when Mr. Dowd said balance in favor of disclosure. We have no other way to get this information that's not available anywhere else. The balance certainly tips in our favor.

Thank you, Your Honor.

JUDGE LEVENTHAL: All right. Any further argument?

(No response.)

JUDGE LEVENTHAL: All right. I'm ready to rule. I'm going to require the applicants to unredact the material with respect to New York State as shown in the agreement, Paragraph 5.A(ii) on Page 3 of the agreement.

I'm going to rule with respect to the motion of ENRS and EFM. I'm going to rule with respect to the confidentiality. And my ruling will be the same, that the material that we discussed as limited in the discussion shall be unredacted. The material will be furnished only to the movants and not to any other party.

With respect to Martin-Marietta, although that item wasn't on our agenda, my ruling would be the same if it wasn't before me. So that with respect to Canadian National and CP, I believe it should be reciprocal.

The material will be furnished subject to the highly protected provisions of the protective agreement. I have considered the need for the movants to know as against the need to protect this highly

protected material. And I find that the need to know is paramount. This is the only way that the movants can obtain this information, which I believe is relevant in this proceeding.

I have kept in mind my prior rulings as indicated in our last session, where I found that the need to know of Martin-Marietta was not sufficient to overcome the need for confidentiality.

And in a similar motion earlier in this proceeding, I ordered material provided subject to reasonable redactions. But the movants in this instance have shown that the redactions made to these documents are not reasonable under these circumstances.

We still have to consider the --

MR. HARKER: Your Honor?

JUDGE LEVENTHAL: Yes?

MR. HARKER: May I ask a few points of clarification?

JUDGE LEVENTHAL: Sure.

MR. HARKER: Basically because I suspect that the implementation of your order is going to fall

on my shoulders, and I want to be sure I do it correctly.

As I understand it, we should not place the information, the unredacted, both versions of the -- or the agreements are in the depository in redacted form and in that manner are available to all parties on the highly confidential restricted service list.

As I understand your order, Your Honor, you are not ordering us to place the now modified -- because there will still be some redactions in the depository. In other words, what's in the depository now will stay the way it is.

What we are ordered to do, though, is to give to Mr. Dowd an unredacted version of the CP agreement which only shows that one number --

JUDGE LEVENTHAL: That's correct.

MR. HARKER: -- that we talked about and that we give to Mr. --

MR. DOWD: Excuse me. And the CN agreement. The motion applied to both settlement agreements. Our stipulation, if you will, regarding not having interest in the Buffalo number, et cetera,

related to the CP agreement.

The CN agreement is a little different in structure, and it's not so easy to tell what is and is not --

JUDGE LEVENTHAL: I tried to clarify this in our argument so I would know exactly what I'm being asked to rule on. I thought we had an agreement that the only item you were seeking was the item in 5.A(ii) in the CSX agreement, CSX-CP agreement.

MR. DOWD: CP, but that's the only agreement to which the applicants have lodged a formal objection. In response to the motion, all of the arguments were related solely to that.

JUDGE LEVENTHAL: Well, tell me what it is that you're seeking. I asked for a specific item. You agreed I thought that it was that one. And I thought I asked you that question several times.

MR. DOWD: Yes. And I thought we were talking about the CP agreement. Mr. Osborn indicated no indicated no real objection to the production of the CN agreement if you made a finding of relevance.

JUDGE LEVENTHAL: Do we have any argument

about that?

MR. HARKER: Well, Your Honor, I will tell you that I am as confused as you are because I was on exactly the same page that you were. So I guess I am confused.

MR. DOWD: Can I make a suggestion? I don't want to hang everything up. Maybe the most productive thing to do would be, at least initially, for us to confer with counsel after this hearing is over and see if we can agree that there are limited elements in the CN agreement like the CP agreement, limited elements that relate to New York City, and then simply apply the same terms. We're not interested in the rates in Chicago or elsewhere.

JUDGE LEVENTHAL: All right. Well, you have my ruling on the argument before me this morning.

MR. HARKER: Okay.

JUDGE LEVENTHAL: Now, if there is further request with regard to the CN agreement, why don't the parties see if you can reach an accommodation on that?

MR. HARKER: And it was my understanding that I -- so, anyway, I provide unredacted versions to

some extent to both Mr. Dowd and Mr. Wood. But with respect to CN and CP and what they get, it wasn't entirely clear. I'm not obligated to give CN or CP anything; correct?

JUDGE LEVENTHAL: That's right. Only to the movants.

MR. HARKER: I'm on the same page, then.

JUDGE LEVENTHAL: All right.

MR. EDWARDS: And just a further clarification. With regard to Erie-Niagara, I understand your ruling to be subject to your later argument and discussion with regard to whether they're entitled to anything.

JUDGE LEVENTHAL: We've only ruled on whether or not the redacted material may be kept redacted subject to confidentiality. That's the only thing I've ruled on.

MR. EDWARDS: Thank you, Your Honor.

JUDGE LEVENTHAL: Now, with respect to the Erie and the EFM motion --

MR. DOWD: Excuse me, Your Honor. I'm sorry. That essentially resolves the issues that the

state and the city had, and I'd ask to be excused subject only to just some understanding from counsel as to when we'll get the --

JUDGE LEVENTHAL: Sure. You may be excused. When can you furnish the material?

MR. HARKER: What I have been asked by my client to request is a stay of your ruling until tomorrow afternoon at 5:00 o'clock to give the client an opportunity to decide whether or not to appeal.

Once the bell has rung, you can't unring it. And it's only basically 24 hours, a little bit more than 24 hours, to give us an opportunity to take stock.

JUDGE LEVENTHAL: And if you don't appeal, you'll furnish the material?

MR. HARKER: At 5:00 o'clock tomorrow afternoon.

MR. DOWD: Your Honor, I respectfully -- we have a filing deadline next week. It seems to me that it shouldn't take CSX until 5:00 o'clock tomorrow to decide whether to appeal.

None of your rulings that have been

appealed so far have been overturned.

MR. HARKER: That's incorrect. That is incorrect.

MR. DOWD: On issues such as this.

MR. HARKER: That's incorrect as well. That is incorrect as well.

JUDGE LEVENTHAL: We needn't argue that. The record stands as it stands.

MR. DOWD: That's true. The record stands.

JUDGE LEVENTHAL: What difference does it make? What time do you want him to --

MR. DOWD: Well, I'd like a number by close of business today.

JUDGE LEVENTHAL: You can't get it by close of business. How about tomorrow?

MR. DOWD: Well, I'll take it by close of business tomorrow, but I'd like -- he's asked you to stay your ruling until close of business on Friday so they can decide whether to appeal. I guess I'm opposing that. I'd like a little shorter leash on him making his decision.

JUDGE LEVENTHAL: How about close of business tomorrow? Tomorrow is Friday.

MR. HARKER: Yes. It's Friday. As I said, it's 24 hours.

JUDGE LEVENTHAL: He's asking for 24 hours.

MR. DOWD: He's asking for 24 hours to decide whether to appeal.

MR. HARKER: No, but I understand --

JUDGE LEVENTHAL: They're limited to three days to appeal.

MR. HARKER: But let me explain, Your Honor, what I envision. Again, I am not trying to drag this out. I just want to be sure that the client's interests are protected.

If you recall, the reason why I said that Mr. Dowd was incorrect was, in point of fact, you have only been overruled once. It was with respect to a similar kind of issue.

A stay was sought. You stayed your ruling. But what we did in terms of making the appeal was we made the appeal right away and we requested for

the stay to be extended, your stay to be extended, because it was a very short period of time. The Board extended the stay. And that's what I'm talking about.

So, in other words, if we don't get an extension of the stay, regardless of whether or not we appeal, you'll get the information tomorrow at 5:00 o'clock.

If, on the other hand, we appeal and the Board on its own, which it certainly has the authority to, says, "We'll extend the stay, as we did in the previous case," then that's the situation. You won't get it.

MR. DOWD: Well, Your Honor, we have a filing deadline on January the 14th. So our position would be that if Your Honor is going to stay implementation of your order pending some decision on appeal, that the stay not run beyond the close of business today.

It shouldn't take that long tc make a decision. It's a phone call.

JUDGE LEVENTHAL: No, no. I'll give them a one-day stay.

MR. HARKER: Thank you, Your Honor.

JUDGE LEVENTHAL: All right.

MR. WOOD: Just so there's no uncertainty about the scope of your ruling that you just made with respect to Erie-Niagara, it applies, as I understand it, to both CP and the CN agreements as it relates to Buffalo. Is that your understanding?

MR. HARKER: No. I'm sorry? What was that?

MR. WOOD: The CP and the CN agreements as they relate to Buffalo. I mean, I specifically identified Section 4.1 on Page 6 of the CN agreement that's included within our request. That's what you understood the ruling to be?

MR. HARKER: That is correct. And I will say that the discussion that we had with respect to the stay, as far as I'm concerned, only related to production to New York State. They have a filing next week. You don't.

MR. WOOD: I understand.

MR. HARKER: And there's a different balance I think that needs to be taken into account if

at the end of the day we lose on Erie-Niagara's request with respect to a stay.

So just if we're in the process of clarifying things, the discussion that we just had only relates to our request for a stay as far as the New York State ruling is concerned.

JUDGE LEVENTHAL: All right? All right. Now we --

MR. VON SALZEN: May I also be excused, Your Honor?

JUDGE LEVENTHAL: Yes, surely.

MR. VON SALZEN: Thank you.

JUDGE LEVENTHAL: Now, with respect to the remaining portion of this argument, you indicated that if I ruled on the confidentiality issue, Mr. Harker, you thought you could reach an accommodation with the movants. Is that correct?

MR. HARKER: That is, yes. You mean with respect to the --

JUDGE LEVENTHAL: Whether or not they're entitled to the information.

MR. HARKER: That's possible.

JUDGE LEVENTHAL: Do you parties want to discuss it?

MR. WOOD: Certainly.

JUDGE LEVENTHAL: Why don't we take five minutes? Ten minutes? What do you want?

MR. EDWARDS: Can we have at least ten minutes, Your Honor?

JUDGE LEVENTHAL: At least ten? All right. Why don't we take a ten-minute recess at this time?

(Whereupon, the foregoing matter went off the record at 11:33 a.m. and went back on the record at 12:31 p.m.)

JUDGE LEVENTHAL: All right. Back on the record. Mr. Harker.

MR. HARKER: Thank you, your Honor. Let me report and I do apologize that it took longer than we initially thought, but I guess in this case everything takes longer than people initially thought.

But we did have discussions between CSX and Erie-Niagara in an attempt to resolve the discovery matter before you and we were not able to

resolve the matter. And so what I would propose is that we go on to the second issue as I framed them earlier, which is the right of commentors to have discovery at this stage in the proceeding.

The -- my analysis of the issue begins with Decision No. 6 which was issued in this case on May 22nd, 1997 and it established the procedural schedule in the case. And, Decision No. 6 makes it clear that commentors are not entitled to file rebuttal evidence in the case.

And in particular, on page 11 of my -- of our brief, we quote from Decision No. 6 and I think it's worth stating here. It says "We will not allow parties filing comments, protests and requests for conditions to file rebuttal in support of those pleadings." Parties filing inconsistent and/or responsive applications have a right to file rebuttal evidence. While parties simply commenting, protesting or requesting conditions do not.

So, the statement that the Board made was there was no entitlement to file rebuttal evidence. There wasn't a limitation that there was no right to

file a rebuttal statement, it said rebuttal evidence. And not limited to the form in which this prohibition is not limited to the form in which that evidence would be filed, be it in a brief or be it anywhere else. And there is just a blanket prohibition on filing rebuttal evidence.

Now, in essence what Erie-Niagara and Eight-Four Mine are talking about is they are talking about the need to have discovery to file evidence, to file evidence in the case -- rebuttal evidence in the case. They can say that it is for impeachment, they can say it's for impeachment but that's really not dispositive of the matter because the only way you impeach a party is -- and what they are obviously talking about here is submitting evidence to show that the party, that the witness or whomever didn't know what they were talking about.

You know, in a classic case, the way you impeach a witness is, for instance, and this is a very simplistic example, but it's the way I think, at least. The witness says that a car travelling west bound was -- had the green light and the car

travelling north bound had the red light when the collision occurred. And you ask the witness how good his eyesight is. And as it turns out the witness doesn't have terribly good eyesight. So you impeach him, you submit evidence impeaching his testimony about what color the light was on the basis that the evidence indicates that this person didn't have his glasses on when he observed the accident.

That's impeachment, and that's what they are talking about doing. But you need to put in evidence to do that. And Decision No. 6 prohibits that -- the submission of that evidence. Be it in a brief or anywhere else.

Now, the -- and indeed, given the theory, given the underlying theory of certainly Erie-Niagara that somehow if this number is too high, this number is too high traffic is not going to move, the situation is not going to improve. The nature of that theory necessarily involves the inducement of additional evidence.

In other words, somebody is going to have to say for Erie-Niagara the number -- the CSX CN

number is X. Somebody is going to have to say in some kind of evidentiary submission that that number is too high based on my years of experience or based on my knowledge or based on whatever. That number is too high and therefore traffic is not going to move.

Otherwise, getting the number doesn't help them. This is not, this is not -- not for purposes of impeachment here. They obviously just simply impeachment where you can say the person didn't have his glasses on and he wears glasses. You actually got to go out and get a witness to come in and say, based on my years of experience in the industry the CSX CP or CN number is so high that traffic is not going to move.

You can't deal with that in a brief unless you have evidence. And the only way they are going to have evidence of that is they are going to have to put in a witness, they are going to have to put on a witness, submit a statement to indicate that fact.

And so what the import of that is is that certainly at least in the case of ENRS the inability to file a rebuttal statement directly impacts their

need to take discovery because if they -- if they take the discovery they will obviously have to put on an evidentiary -- have to put in an evidentiary filing. And as I said, the Board says you can't put in an evidentiary filing. No evidentiary statement. So therefore, no discovery.

And that is the way we look at Decision No. 6. I'll come back to that in a few minutes.

Now in addition, another important point is that in one sense this is really not a discovery dispute as it turns out. Because really what we are arguing about is the procedural schedule and what is permitted by the procedural schedule. Because the procedural schedule says only responsive applicants can file rebuttal. And as indicated in Decision No. 6, commentors are not entitled to file rebuttal evidence.

So this is, from my point of view, more is a dispute over procedural schedule rather than a discovery dispute. And in setting the schedule in Decision No. 6, the Board said that the, in giving you your powers to resolve discovery disputes the Board

said that you were not empowered to alter the schedule.

And if you grant the discovery here, implicitly what we are saying -- because as I said there is no way that they can do this discovery without filing an evidentiary statement. This discovery is not going to do them any good whatsoever without a witness being able to say the number is too high. You are in effect altering the schedule because in fact what will happen is you are -- it's essentially implicit acknowledgement that they will be able to put in rebuttal evidence.

I would suggest very respectfully that that is beyond your authority as set out in the procedural schedule.

All of that, by the way, doesn't leave them without a remedy. They have a remedy. And that remedy is as we have seen in other cases, is going to the Board. And as we've seen in other cases the Board has on a number of occasions heard argument on the ability of -- argument from a commentor asking for the right to file rebuttal.

And, this is sort of putting the cart before the horse in a way because the Board hasn't yet given commentors in this case the right to file any rebuttal evidence.

So, at least in the first instance I would suggest that the Movants motion to you is premature and really what they need to do is go to the Board and seek leave of the Board to file rebuttal evidence, in spite of the fact that Decision No. 6 says no.

Now, Board precedent -- in addition to Decision No. 6 which by the way cited to -- the language I read to you before from Decision No. 6 cited to both the UP SP and the BN SF decision. Aside that though there is Board precedent. There have actually been nothing on point here, nothing on point that either one of us can point to and say that this kind of discovery has been permitted by the Board in the past.

But when you look at the way that the Board has decided similar issues, it is Decision No. 6 prohibition on filing rebuttal evidence is readily understandable. It comes basically on the -- you

know, as follow up and as a natural progression to where the Board has come out on this issue in the past.

The Board has said that the applicants have the right to close the record on their application. The applicants have the right to close the record on their application. That's not just primary applicants, by the way. That's also responsive applicants. And to the extent that you permit additional evidence to be filed after we close the record on our case, which was December 15th, you have -- that is inconsistent with the rule as stated in UP CNW Decision No. 17 and in BN SF No. 34 that applicants have the right to close the record on their case.

In addition, the -- in fact there is a quote again in BN SF Decision No. 16 which begins at the bottom of page 13 and goes on to page 16 and there I think the Board's language is instructive. It says traditionally applicants, where they are primary or responsive applicants, have the right to close the evidentiary record on their case.

Well, of course, if they are putting in evidence in their brief, be it impeachment or anything else, we are not closing the record on our case. It is simultaneous briefing. Simultaneous briefing, your Honor, and we are not able to close the record on our case is they are putting evidence in at the same time we are filing our brief.

Then at the end of that it says "Allowing the parties to file rebuttal evidence", and the parties here are talking about commentors, "Allowing the parties to file rebuttal evidence would deprive the primary applicants of their right to close the evidentiary record on their case. We see no necessity for such filings and believe that the current procedural schedule will allow the Commission to fully comprehend and evaluate all issues that the parties seeking conditions will raise in this proceeding."

Again, basically saying that the way that the proceeding should be that we put in our application, commentors have a long period of discovery, open discovery with the normal relevance standards applying. They take all the discovery. In

our case we had nearly 2,000 requests that we responded to. They put their comments in on in this case October 21. And then we have the last word on our case December 15th.

And that structure which is the same basic structure in BN SF was sufficient to allow the Board, as they said, to fully comprehend and evaluate all issues in the case.

Now, the Movants point out a couple of cases in which they think create exceptions to this basic rule that they don't have the right to file any rebuttal evidence. The problem is that they don't even make the claim that their case fits the facts of any of those cases.

In the cases in which they cite, and we've got a decision that we cite in footnote 4 on page 14, in those cases we are talking about a variety of problems or a variety of things that the Board addressed. One was they were, there was discovery abuse and information was withheld apparently. And there was a thought that there was an attempt to sandbag one of the commentors. And the Board said no,

you can't do that.

And in another case there was an offer of deposition transcript. And then in a -- but there was never, as far as I know, any case where evidence was admitted into the record that was adduced through discovery like this.

None of the cases that they have been able to cite fit the situation where they are talking about essentially adducing additional evidence through discovery, written discovery.

Now, in addition, in our paper we talk at length about BN SF Decision No. 34 because in that case there were several motions to, for parties filing comments to submit rebuttal. And Illinois Central and Southern California Regional Rail Authority, for example, argued that they as commentors should have the right to file additional factual information.

And, the ICC said no. "They would not permit the rebuttal filings from parties before the Commission requesting conditions which are not responsive applicants. Responsive applicants have the right to close the record in their cases while parties

requesting conditions do not."

Similarly, Tucson Electric Power sought the -- as a commentor, sought the right to submit rebuttal evidence to clarify some points and the Board said no. When we said no rebuttal filings we really meant it. It wasn't inadvertent. We really meant what we said.

And indeed, what is interesting is in that case some prior schedules had in fact given commentors the right to file rebuttal. And the Board took those out in the final schedule. So, the Board knows how to grant parties the right to file rebuttal when they intend it. They do so explicitly. They do so explicitly. Here there was no such similar explicit authorization.

Now, let's talk about briefs for a minute because I know that there has been some discussion about briefs and Eighty-Four Mine and ENRS talking about they are not going to file a rebuttal statement, your Honor. They are not going to call it what the State of New York is going to call their filing on January 14th or what we called our filing on December

15th. They are not going to say rebuttal in support of comments. They are going to file a brief and the brief is going to include the evidence.

But that's not good either. That's no good. In fact we don't dispute their right to file a brief. But let's talk about what the brief is supposed to say, what it's supposed to include. UP SP this issue came out, Decision No. 31, we talk about it on page 16 and 17 of our paper.

The Board made clear, and again this went to the Board. There is no indication in that particular case that there was an initial question to the ALJ in the case. The question went right to the Board.

In that case the Board said that briefs were to contain no additional evidence. It doesn't say an evidentiary statement or anything like that. It couldn't be any clearer. Quoting from the bottom of page 16, it says

> "Parties may file briefs, but these briefs may not contain new evidence in the

proceeding. The purpose of the briefs is for parties to present legal arguments succinctly and to marshall previously filed evidence favorable to their position. Thus, parties that did not file inconsistent or responsive applications may not file rebuttal evidence concerning responses to their March 29th filings."

And then I've indicated the comparable time period, or the comparable filing for our case is the October 21 filings by the commentors which may be filed on April 29, 1996. And again, that would be comparable to our filing on December 15th where we responded to their comments. The April 29th, 1996 filings, the December 15th, 1997 filings are the so-called close of the record on the applicant's case. And then the Board says "Inappropriate evidentiary material will be stricken."

So the briefs don't get them an end run. And it makes sense. The briefs would not get them an end run around the prohibition on filing rebuttal evidence in the case. The Board has made that clear.

Another point I think that is worth making is that under the Movants' theory here is discovery and rebuttal, it really sort of stands the procedural schedule on its head because the Board has gone to great pains in all the control cases to give responsive applicants special and preferred standing. They are quote unquote applicants. And they are given in the procedural schedules the right to file rebuttal. It is specifically called out in the schedule. And, that right to file rebuttal is subject to a deadline. And in our case the deadline is next week, as Mr. Dowd told us.

Under the comment, the Movant commentors theory, the Board -- they haven't cited to anything in the procedural schedule to indicate that they have the right to file evidence, rebuttal evidence. And essentially what they are saying is that even though we have -- we are not responsive applicants, the

responsive applicants have the right to file rebuttal. We've got the right to file rebuttal too, and guess what, it's not constrained by the January 14th deadline. We can put our -- we can put our rebuttal in after January 14th. We are unconstrained then by the procedural schedule's requirements on responsive applicants. Who, after all, the Board sought to protect by carving them out and giving them the right to file rebuttal evidence.

So, to my way of thinking at least, the requests, the theory of discovery is wholly inconsistent with what the Board said in its procedural schedule and as I said, stands it on its head because it really basically says even though these responsive applicants have the exalted status, they can file rebuttal, we can too and we are not constrained by a January 14th deadline.

Let me talk a little bit about -- actually if you will allow me two seconds to confer.

JUDGE LEVENTHAL: Sure.

MR. HARKER: At this point let me just -- if you would just bear with me, let me check my notes.

Your Honor, I've gotten through basically the argument that I had intended to make.

The only issue really, the only argument that I have not made that is contained in our paper is one which deals with the, with Mr. Bercovici's response on behalf of Eighty-Four Mine where he disputes the distinction that is being made between depositions and written discovery. And this is really an issue at this stage that more directly affects Norfolk Southern, in particular since they have made the offer to Mr. Bercovici.

So with your permission, what I'd like to do is allow Mr. Edwards to finish the Applicant's argument on this. But in the meantime, I would be glad, if you have any questions based on what I've said, I'd be glad to respond to them now or later.

JUDGE LEVENTHAL: Fine, go ahead Mr. Edwards.

MR. EDWARDS: Okay.

JUDGE LEVENTHAL: Let me ask you before you start, Mr. Edwards. You've offered to have your rebuttal witnesses available for cross examination by

deposition. Does that offer still stand?

MR. EDWARDS: Yes it does, your Honor.

JUDGE LEVENTHAL: You have my ruling with regard to the confidentiality, do you agree that you would not interpose such objection to any question put to your witness?

MR. EDWARDS: Your Honor, we would impose any proper objection which would go to privileges that I think have not been discussed today, within the proper scope of the deposition. That is if a rebuttal witness has given written testimony on a subject, that subject is open to question. But topics which they haven't testified to I think is properly in before and after.

I guess what I'm saying is no confidentiality -- no specific confidentiality objections other than just the normal objections would be.

JUDGE LEVENTHAL: All right.

MR. EDWARDS: And that goes for all of them.

JUDGE LEVENTHAL: Mr. Bercovici, your

argument, you felt that the witness would -- might be instructed not to answer on the same basis as objections being made to your request for the written answers. Does that satisfy you? If you depose the witness or get written replies?

MR. BERCOVICI: Well as I said before, your Honor, with regard to deposition we are looking for some very specific information. I'm not sure that the witness himself has that information. He makes some very broad, generalized statements in his rebuttal verified statement that we want to test. The only way to test it is by getting to the root of the information that then can form the basis of analysis and argument as to whether or not that witness is credible.

And the other part of my point that I made before, your Honor --

JUDGE LEVENTHAL: Let me stop this. Mr. Harker made a very strong presentation now. Let's say I grant you -- I compel answers to your discovery. What are you going to do with it?

MR. BERCOVICI: What I'm going to do with

it, your Honor, is if it's -- if we believe the witness --

JUDGE LEVENTHAL: Let's say it contradicts what the witness has testified to.

MR. BERCOVICI: We will do what we have done in prior merger cases. We will do what we have done --

JUDGE LEVENTHAL: Well I'm dealing with this case. Don't tell me --

MR. BERCOVICI: Well, in this case we will do what the Board said in UP SP 35 that they relied upon in their objections. And that is such discovery may take place and information gained at such depositions may be included in the briefs. We will include it as a record appendix to the brief and subject that to counsel argument.

Now Mr. Harker said that there is nothing, they said in their paper on page 12 that there is nothing in Decision 6 -- I want to quote them accurately. They said while the language in Decision 6 did not directly address commentors rights to take discovery in support of surrebuttal evidentiary

submissions.

Your Honor, that is entirely incorrect. Decision 6, Decision 6 was a procedural schedule, the final procedural schedule. At the bottom is a note. It says Note, immediately upon each evidentiary filing -- each evidentiary filing -- the filing party will place all documents relative to the filing in a depository and will make its witnesses available for discovery depositions.

The Board certainly didn't intend that we have the right to take discovery depositions of rebuttal witnesses and then have nothing to do with them in the discovery guidelines, which you promulgated. No. 11, a person who has submitted written testimony in this proceeding shall be made available for deposition upon request.

They have rebuttal witnesses. This is their proposal for what's been adopted, essentially their proposal for discovery guidelines.

They have rebuttal witnesses. It doesn't say only initial witnesses. It says a person who has submitted written testimony.

Paragraph 12, absent agreement among the parties, etc., etc., then it says no witness shall be deposed more than one time as to any written initial statements or more than one time as to any written rebuttal statements submitted by that witness in this proceeding. The discovery guidelines which they proposed and which have been adopted contemplate that there is discovery with regard to the rebuttal verified statements.

I submit, your Honor, it is not up to them to tell me what discovery tools I can use or in what order. The Board's rules that we have cited in our letter to you very specifically say that that is up to the discovering party.

One final point with regard to Decision No. 6 is that in the procedural schedule that is promulgated it says, it gives the schedule of items due, rebuttal filings, briefs due all parties. And then it says oral argument paren close of the record.

So contrary to what Mr. Harker says, the record is not closed. The record closes with oral argument. Is he saying to us today that he is willing

to tell the Board only they can interject evidence into the record at oral argument? We are back to common law pleadings 200 years ago, pleadings by ambush. Whereas I said before and he hasn't tried to answer that the applicants can now lie with impunity in their rebuttal and then say ha, ha, ha you can't test us, you can't do anything about it. You can't find out that we've lied through discovery. And if you do find out, you can't use it.

And that's what they are telling you here today. There is a distinction that all of the cases they have cited deal with people who wanted to make their own affirmative rebuttal cases. And those are every one of those decisions.

There is one other decision I will call to your attention. UP SP 40, if I may I'd like to give you a copy, your Honor.

JUDGE LEVENTHAL: Yes.

MR. BERCOVICI: This was at the -- the date of the decision it was after briefs were filed. Kansas City Southern was seeking documents, documentary report from Burlington Northern who was

not an applicant. They had tried to get the report early on, had been rebuffed. And as the record was closing they tried again.

On June 3 which was the date for briefs, and that cited in page five, under the discussion and conclusions, that's the date for briefs, they were before the Board saying we have a request for documents. We have been rebuffed. We want the Board to order it.

The last paragraph on page five, the Board makes a very interesting distinction. Here KCS seeks further discovery, McKenzie Studies, which are not new studies introduced in the April 29 rebuttal filings.

Now, I will admit that this is -- you know, that the language is not altogether clear. They were told they couldn't have them, that they had tried for this before. There was a question of relevance and materiality. There was a question of timing.

But the Board makes a distinction here. That this is not evidence that was in the rebuttal filing that they are relying upon -- the parties have relied upon that they are now trying to get. This was

something that was out on the table months and months ago. And that's the distinction that we are making. Mr. Harker wants to take, as he has done all morning, take various decisions and apply them far beyond the scope of the facts and the relevance to the parties, and is trying to box us into the situation where we don't have a right to test their rebuttal evidence.

Thank you, your Honor.

JUDGE LEVENTHAL: You don't argue that the applicant's have the right to close, do you?

MR. BERCOVICI: They have closed. They have got the right to close on the record. All I'm saying is that -- I don't dispute that. I mean, the Board has been very clear.

I don't have the right to introduce -- to take my witnesses and to put in new evidence. But I do have the right to argue to the Board on brief that their rebuttal should be disregarded. And the only way that I can do that is to dig beneath the surface of the superficial and generalized comments that they have made to find out if they have any support for it. And through the discovery processes argue to the Board

that they have made these claims, that these claims are not supported, they had no factual basis for these claims.

And the evidence of that is through deposition, it's through written interrogatories and the Commission has allowed that in case after case. It's not -- it doesn't go to the question of the rebuttal that's addressed in terms of a substantive or formative showing.

JUDGE LEVENTHAL: All right. Mr. Edwards, I'll hear your argument.

MR. EDWARDS: Okay, your Honor. I need to address a couple of things here because several things have come up. First off, Mr. Harker discussed the procedural schedule. And really in a way that kind of frames the whole argument. It's a discussion that sets some kind of reasonable limitations on the proceeding before the Board.

It sets forth where the applicants begin the proceedings. There are commentors and responsive applicants and there is rebuttal and then a fine distinction is made by the Board between subsequent

activities of the responsive applicants and commentors.

Mr. Harker said there is nothing on point here. I frankly, if I didn't disagree I would say well there is something pretty close and that is UP CNW Decision No. 17.

UP CNW Decision No. 17 EFM claims contradicts our position that ICC practice limits discovery tools and says that in our filings that say that commentors are not permitted discovery that Decision No. 17 permitted discovery in response to a motion to compel and that applicants in that case provided discovery responses. Quote, accordingly Agency precedent is that discovery in circumstances sought by EFM is available.

UP CNW No. 17 was a motion to compel by the -- let me make sure I've got the party correct. I don't -- yes, it was CCP, but it's the Chicago Central and Pacific Railroad Company and on the first page of that decision the, in that case the Interstate Commerce Commission notes that CCP is a responsive applicant.

So in fact, Decision No. 17 doesn't support EFM's position that prior Board precedent permits commentors to conduct discovery. In fact, if you go into Decision No. 17, which I am very happy to provide, your Honor. I've got a few copies of -- I only have the Lexis copy of the Decision. In that case it's at Star 24. The Interstate Commerce Commission says responsive applicants are entitled to their rebuttal as part of their applications. Parties have the right to submit the final evidence and close the record on the merits of their application.

But there are limits on the type of evidence which are appropriate for rebuttal and thus there are also limits on the latitude for discovery. In UP CNW, the ICC had before it the responsive applicant who is entitled to close the record on its evidence who they said was entitled to in fact discovery to support that rebuttal filing. But the scope of that discovery was founded by what they could properly file in that rebuttal filing.

What EFM is arguing is in fact that they have the right to discover material that would be

beyond that scope. Since they don't have a rebuttal filing, they do not have the right to file written discovery.

Now, Decision No. 35 in UP SP also supports that proposition. In EFM's Motion to Compel they say that Decision No. 35 does not -- this goes to his question with regard to discovery -- written discovery and cross examination. And I would point out, your Honor, that EFM does not have an argument right now as to whether or not they are entitled to depositions to test whether or not, for example, Mr. Fox would have sufficient knowledge to make the statements that he made. Because he has the right to depose Mr. Fox, and in fact that is scheduled.

The question for EFM is whether or not they can have written discovery. And what they are arguing for and which if you gave a ruling on the issue, you would permit.

EFM claims that Decision No. 35 doesn't draw any distinction between written discovery and cross examination depositions. And in fact, EFM states that, and I'm quoting from their motion, that

the Board went on to note that UP SP witnesses would be available for discovery, which they are here, which effectively complied with the case he asked to request to conduct discovery and that discovery information relating to the rebuttal may be filed in briefs. We have in fact offered both the rebuttal witness and offered to permit EFM to cite that in their briefs.

But, in fact, that's not what the Board said. The Board didn't say that that permitted KCS wide ranging discovery. And in fact what happened in Decision No. 35 -- again, I have a copy of the decision, I'd be happy to provide it your Honor -- is they denied KCS the right to written discovery and the subsequent evidentiary pleading and said that they have offered their witness. You can do that and they have offered to let you cite it in the brief. You can do that.

It does not say that -- it says in fact and if you read the decision rather than the EFM interpretation is that we note that applicants have stated that their witnesses who address the CMA settlement agreement in April 29th filings may be

deposed, not the written discovery that KCS was looking for, but they may participate in the depositions. Such discovery, such a discovery tool may take place, information may be included in the briefs.

So in fact, the Decision No. 35 which EFM claims supports their position stands for exactly the opposite position and that is that they were denied the written discovery. They were permitted to engage in the cross examination deposition and that's all EFM is looking for is written discovery here. They have got the right to depose Mr. Fox. They can ask him the questions. If Mr. Fox doesn't know, then they can cite that as a, you know, going to the weight and sufficiency of Mr. Fox's statement.

JUDGE LEVENTHAL: I have a copy of Decision No. 35 in that case. Let me ask you a question. How do you think they could use whatever discovery they can get on brief?

Suppose they depose your witnesses. How can they use whatever information they have on brief?

MR. EDWARDS: In the UP -- in past

practice, when rebuttal witnesses have been available for cross examinations, then a brief which argues the sufficiency of the evidence, the Board has said to attach the cross examination testimony to the brief so that they could read it.

I know of no case in which documentary evidence was ever submitted as an appendix to a brief. It just -- knew that it wasn't already in the record. I may be incorrect on that, but this is exactly the case that the Board was faced with.

In Decision No. 35, the Board said, you know, examine the witness. They've offered him. Attached the -- you can argue the weight and sufficiency. Mr. Bercovici cites Mr. Fox's deposition from earlier in the case and his problem with Mr. Fox's earlier deposition was that he asked questions that Mr. Fox wasn't able to answer.

Well, that's fine. I'm not saying that that necessarily lowers the weight, but he certainly is entitled to argue that Mr. Fox didn't have the sufficient knowledge to make the statement he did. But that does not give him the right to then introduce

contradictory documentary evidence which is what he seems to be seeking at this point.

JUDGE LEVENTHAL: All right.

MR. WOOD: Your Honor, may I be heard?

JUDGE LEVENTHAL: Yes.

MR. WOOD: Thank you. I'd just like to make a few points in response to supplement the points that have been made already.

I think the essence of the issue, Your Honor, as has been framed in this portion of the conference is now that you've ruled that we're entitled to see the agreements in the Erie-Niagara case, what use can we make of them?

I think Mr. Edwards has already very candidly recognized that the practice has been in these very proceedings where we don't have an oral hearing for cross examination after all the evidence is submitted, but we have depositions for both discovery and cross examination after each round of filing, that the only way that evidence can be developed through that discovery mechanism can be provided to the Board is to attach it to your brief,

particularly if it's rebuttal filing.

And as we indicated in our letter, that in fact, was the practice in the UPSP case. For example, I cited to the brief that was filed by Dow Chemical that had discovery transcripts attached to it, including discovery -- these were depositions that were conducted of a witness who had filed a rebuttal statement on behalf of the Applicant.

JUDGE LEVENTHAL: You're talking about depositions and not written --

MR. WOOD: That's correct, Your Honor, but I think --

JUDGE LEVENTHAL: I think there's a difference.

MR. WOOD: Well, except the deposition is for discovery purposes and like Mr. Harker, I take my guidance from decision 6, the note that Mr. Bercovici averred to earlier, specifically says after each evidentiary filing, the filing party will make its witnesses available for discovery depositions. It's a form of discovery that is provided for in the Board's rule just like request for production of

documents. Just like interrogatories. Just like any other means.

And I think decision 6 also says places no limits on the kind of discovery that could be conducted, the Board decision just left it up to Your Honor and the parties to establish any discovery guidelines. And I think we are, once a ruling had been made that the discovery is acceptable and assuming it held an appeal if it is appealed, then the question is what use can we make of it. And I think the practice has been in these proceedings for use to be made by whatever appropriate means to go before the Board. Mr. Harker indicated that we're not without a remedy, that we could seek need to file rebuttal. Well, that's true. But we won't -- we may decide to follow the previous practice and submit it to the Board as part of our briefs and certainly I reiterate the point I made earlier this morning about Mr. Jenkins. There really is no difference if we want to depose and they haven't agreed to we're entitled to a deposition of Mr. Jenkins. I think we are under decision 6. But the question would be even if we did

that, would Mr. Jenkins be able to answer the question clearly if he had information about that, we could submit it as part of our brief. I think it's no different when we ask for a document production request that relate to the very same facts that we have been asking Mr. Jenkins about.

So I think that we're entitled to make use of the document production in submitting it to the Board for its consideration to make whatever contentions and arguments we would want to make about whether or not we can -- the Board can rely on the assertions that the Applicants have made about the CP and the CN agreements, whether they do, in fact, provide effective competitive access for those two carriers in the Niagara frontier region.

Thank you.

MR. BERCOVICI: Your Honor, may I just follow up briefly to my colleague here?

JUDGE LEVENTHAL: Yes.

MR. BERCOVICI: With regard to -- we appreciate Mr. Edwards' candid acknowledgement, but in prior practice you can use the discovery obtained with

regard to the rebuttal witnesses --

JUDGE LEVENTHAL: I understood Mr. Edwards to say -- I understood Mr. Edwards to say that depositions could be used.

MR. BERCOVICI: Depositions.

JUDGE LEVENTHAL: A difference between a deposition where a witness is testifying and a document which somebody has to interpret.

MR. BERCOVICI: Again, Your Honor, I would point you to the discovery guidelines which says the Board's discovery rules will apply except as not applied by the Board by these discovery guidelines and in the Board's discovery guidelines, or discovery rules, rather. They specifically state and we quoted to you, all discovery procedures may be used by parties without filing a petition in obtaining prior Board approval and all discovery procedures and methods of discovery may be used in any sequence and that simply is what we want to do. We want to apply the discovery. We see no difference substantively between the written discovery. We think it helps to narrow and focus the deposition testimony that if the

witness comes up and says gee, somebody told me this. I don't know any of this for a fact. We are now deprived by Mr. Edwards' distinction here, deprived of getting the facts that form the basis for the argument in rebuttal.

And we don't think that this is a game of trying to hide the -- trying to hide the chit somewhere and gamesmanship. We think it's a matter of trying to get the facts on the record so the Board can then make an informed decision.

JUDGE LEVENTHAL: Let's go off the record.

(Off the record.)

JUDGE LEVENTHAL: In our off the record discussion, I indicated that I was about to rule and rather than repeat what I said in our off-the-record discussion, I'll say it on the record now. Of course, whenever I go off the record and whenever I make any comments, parties are free to put into the record anything I said off the record.

Is that understood?

All right, I'll deny the motion of EFM and ENRS to unredact material redacted from the answers to

the previous discovery. However, NS has offered to produce witnesses for deposition and I am ruling that they are now required to do so.

With respect to ERSN, Mr. Woods' motion is likewise denied, subject to a notice on the part of ERSN for CSX to produce its rebuttal witnesses for deposition. As we have previously discussed, I have already ruled upon the highly confidential objection to production of this material and parties cannot use that objection on any deposition, any other objections made on deposition and subject to ruling, if I am requested to make such at the appropriate time.

All right.

MR. WOOD: Thank you, Your Honor.

JUDGE LEVENTHAL: All right. Off the record. We'll stand in recess a half hour for lunch.

(Whereupon, at 1:29 a.m., the hearing was recessed, to reconvene at 2:04 p.m., Thursday, January 8, 1998.)

A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(2:04 p.m.)

JUDGE LEVENTHAL: All right, the conference will come back to order. In the direction of our r[illegible]ess, I'm concerned that perhaps my ruling with respect to the last motion is not specifically clear.

Let the record note that Mr. Dowd and -- I'm sorry, strike that. Mr. Wood and Mr. Bercovici have been excused and are not present in the hearing room at this time.

But for purposes of appeal, if the movants so intend, I would like to clarify the reasons behind my ruling.

Essentially, I have adopted the argument made by both Mr. Harker and Mr. Edwards. I find that our schedule does not permit the commenters to file rebuttal testimony. I find that written replies to discovery cannot have a reasonable use. There's a difference between a document supplied in response to a discovery request and the cross examination of the rebuttal witness by deposition. The cases cited to me

by the movants deal with the ability to attach a deposition to a brief by commenters, but no case has been cited where a document may be attached to a brief by the commenters. In this respect, there is a major difference between a documentary response from the oral cross examination of a witness under deposition.

All right, we're now ready to hear argument on the motion of Transtar, Elgin Joliet and Eastern Railway Company and I & M Railroad link and I guess LLC?

MR. HEALEY: LLC stands for Limited Liability Corporation.

JUDGE LEVENTHAL: All right. Now do I understand your argument, Mr. Healey, dealing only with the verification of the discovery request?

MR. HEALEY: No, I'm sorry, Your Honor. If that was your understanding --

JUDGE LEVENTHAL: That's not my understanding. I'm inquiring --

MR. HEALEY: That's not my position. All four of the interrogatories -- all of the document production requests are at issue.

JUDGE LEVENTHAL: All right, I'm ready to hear argument. Mr. Healey, you may proceed.

MR. HEALEY: As I said earlier this morning, I intend to refer to my clients throughout the argument today as the "Coalition". By that, I mean Transtar, EJ&E and I&M Rail Link.

JUDGE LEVENTHAL: All right, very well. before I hear argument, subject to the other objections that the applicants have made, they also make the statement that applicants have not been able to determine that any such communications have taken place.

MR. HEALEY: Your Honor --

JUDGE LEVENTHAL: You're not satisfied with that answer?

MR. HEALEY: Those answers are there. I have correspondence and I believe it's from Mr. Edwards. When filed, the applicants, due to the holiday rush were not sure that the answers were indeed correct or complete, I suppose, probably -- and that there may in fact be further supplements of those answers.

Given the fact that the answers provided directly conflict with a half dozen things said by the applicants in the filing and I think it's safe to say that the answer is not complete, and I will tell you that I am somewhat mystified as to why the applicants would file responses saying that they're unaware of any meetings when all of the witnesses, both in their verified statements and in their depositions discuss having been present at those meetings and the contents of those meetings and they discuss why those meetings are important for the Board to consider in denying the response of application.

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

(Off the record.)

JUDGE LEVENTHAL: All right, before I hear your further argument, who's going to argue on the applicants?

MR. NORTON: I will, Your Honor.

JUDGE LEVENTHAL: Mr. Norton?

MR. NORTON: They may pitch in after I'm done.

JUDGE LEVENTHAL: You have a tough job before you, Mr. Healey, three against one.

MR. HEALEY: All right, they're not going to say much.

(Laughter.)

JUDGE LEVENTHAL: All right, Mr. Norton. He says that your answers directly are contradictory to other information that he has.

MR. NORTON: I don't think that's an issue as to Conrail. Others can supplement. There's the cover letter that he refers to explaining the responses were put together not in the best of circumstances because of the timing and the holidays. It's very difficult to find anyone outside the lawyers who actually knew real facts so that the response, as indicated, primarily objecting but we did have some -- what was thought to be viable information that would have to be supplemented. It clearly was not complet because we haven't had a chance to talk to various people at our respective -- clients.

I am not sure what the discrepancies that he was alluding to. I don't think any of them related

to Conrail and I don't know what particulars there may be there but it's quite possible that the statement, the general statement made in response which I think was not necessarily attributed to any particular applicant, you haven't identified any and that was just probably some other statement because there had been some discussions that were reflected or alluded to in the rebuttal.

JUDGE LEVENTHAL: Do you intend to give him additional information?

MR. NORTON: Well, I think --

JUDGE LEVENTHAL: Have the parties discussed this?

MR. NORTON: We've had -- Your Honor, we did. We had some discussions earlier in the week about trying to resolve it, but it was not productive ultimately.

On this issue, depending on the ruling, if there is to be further responses, that problem will go away because the answer given will be based on up to date --

JUDGE LEVENTHAL: You're saying that

you've not been able to determine any such communications have taken place. What is left for me to rule on? If there have been no communications --

MR. EDWARDS: It says, Your Honor, it says that applicants have been unable to determine.

JUDGE LEVENTHAL: I'm trying to limit the argument so I can understand it clearly and I can make a ruling accordingly. Are there any communications subject to this --

MR. NORTON: You should assume that there were such -- some communications although it's not a totally abstract or hypothetical.

JUDGE LEVENTHAL: Okay. So we're under the assumption that t[illegible] are communications?

MR. NORTON: Right.

JUDGE LEVENTHAL: All right.

MR. NORTON: Before I get into the specifics of walking through each of the interrogatories, I wanted to make sure, particularly given the discussion we had in the last hour or so, that the record is clear as to the status of the coalition in the case and as to the particular portion

of the case that we're in right now.

As Your Honor is aware, the applicants last year filed what I will refer to as a primary application. That is, the application seeking the control of Conrail.

In response to that primary application, the coalition did not file any opposition to that primary application. We did not come in and say the primary application should not be approved.

Some of our witnesses, in their statements, have briefly stated that there are certain elements of the post-transaction, may in fact be beneficial to competition. So we are not in a position to be objecting to what they have said in their primary application.

What did occur thought was we were able to identify at least one area where we believe competitive harm is going to result as a result of the transaction and that is in Chicago with what is known as the intermediate switch carriers There are three railroads located in the vicinity of Chicago that are the primary function of which is to assist in various

ways with the interchange of freight cars in the City of Chicago. The names of the three carriers are the Belt Railway of Chicago, sometimes known as the Belt or the BRC; the B&OCT which is the Baltimore and Ohio Chicago Terminal which is a wholly owned CSX subsidiary; and the one that is at issue in this suit or in this claim rather, the Indiana Harbor Belt which is sometimes called the Harbor or the IHB. As I say, we did not oppose the transaction, but what we did file is a responsive application. In that responsive application we sought the condition to condition their transaction on the sale of Conrail's ownership interest in the harbor to the coalition. The IHB is currently owned, as we've been in front of Your Honor to discuss previously 51 percent by Conrail, 49 percent by CP Soo. What my clients ask the Board to do is to say in approving the transaction, the transaction is approved contingent upon the requirement that Conrail divest itself of that 51 percent Indiana Harbor Belt stock and sell it over to the coalition.

On December 15th, the applicants filed

their reply to our responsive application and in that reply which I've got in front of me here, they raise a variety of arguments as to why our responsive application should be denied.

Looking through the somewhat voluminous material, we were able to, in about the course of a week, identify certain issues that were raised as to our responsive application on which we wanted discovery, certain discovery that's currently with the Court Reporter now, the four interrogatories and three document requests.

Despite the fact that the responses you'll see do contain some outright denials and complete objections, no five day objections were received by us. In fact, the applicants waited the full allotted 15-day period and after the close of business served responses which are now attached to the transcript here.

They raise a host of objections as to the discovery we served and they provided responses which I don't know any other way to describe them. They are manifestly false and if the applicants read their own

filing, they would find a variety of places where their witnesses and in fact, their attorneys refer particularly to meetings that they had with various people regarding either what they intended to do at the IHB or what we intended to do with the IHB.

The primary objection to our discovery, as I said, there's a host of objections, but the primary objection is that it's not consistent with the limits on discovery by a responsive applicant in rebuttal filing.

I think the issue raised by the objection is whether the information sought in our discovery is reasonably calculated to lead to the discovery of evidence that we can properly submit in rebuttal. Clearly, I think even the applicants would agree that the purpose of rebuttal is to refute evidence raised by an opponent. In fact, the Board's regulation at 49 CFR 1112.6 state rebuttal statements shall be confined to issues raised in reply statements to which they are directed. That is, it's appropriate in rebuttal materials that rebut things raised by your opposition in their reply to your primary application.

Thus, as the applicants can see, if the discovery is designed to elicit evidence "tailored to respond to evidence submitted by applicants in their December 15, 1997 filing" it's proper in its scope and it should be responded to.

The key here really, Judge, is that any issue addressed to my clients, by the applicants, in their December 15th filing, has to, by definition, be a reply to our responsive application and I think it's important that we understand exactly why that is. Since we were not in a position or we did not take the position, rather, of challenging their primary application, there was nothing that they could say on December 15th that would be rebutting what we had said.

So unlike the situation with other people, there was no rebuttal for them to file. We didn't say anything in opposition to their primary application. There's nothing to rebut. Therefore, anything in this filing directed at my clients has to be a reply to what my clients have said in their responsive application.

Now, I'm going to agree with the applicants, that both the Board and the -- prior to what the Commission's decisions and the UP-C&W merger proceedings are probably about the most helpful decisions out there, in terms of defining what the proper scope of rebuttal is, both in terms of what discovery is allowed for preparation of a rebuttal filing and later, in terms of what the proper scope is of materials filed on rebuttal.

I actually have some familiarity with the case. It was my firm who represented the Chicago Central and Pacific, CC&P in that case. In that case, both the CC&P and the Southern Pacific, the SP, had filed both responsive applications just as my client has done here, but in addition, they had filed materials challenging the primary application. Okay. And those materials were filed concurrently. This is a key distinction between those positions and this case. So what you had going on was at that time two simultaneous proceedings and the CC&P came in and filed both opposition to the primary application as well as filing its own responsive application.

Therefore, when the shoe was on the other foot and it was time, in that case, Union Pacific was the primary applicant to file next, what it filed was both rebuttal and support of its primary application and it filed responsive reply material to the responsive application that was filed by CC&P.

Thus, one of the applicants in the Union Pacific CNWS case were making the equivalent of the December 15th filing, they were filing both evidence in support of their primary application on which I think we agree they had the right to close the evidence on, so that rebuttal was allowed and evidence in reply to CC&P and SP's responsive application over which CC&P and SP have the right to close the evidence.

In decision 17 of that case we have to -- I'd like to fill out the quote, the Commission at the time said "parties have the right to submit the final evidence to close the record on the merits of their application, but there are limits on the type of evidence is appropriate for rebuttal and thus there are also limits on the latitude for discovery. In

preparing its rebuttal filing, CC&P may properly present evidence rebutting only the portion of applicants reply filings which was in reply to their responsive application. So then again, we're clear, the filing that the Union Pacific and the position of primary applicants at the time had made was both rebuttal and support of their own primary application, which was closed and that was done and CC&P wasn't allowed to file anything as to the primary application. They were allowed to take discovery and they were allowed to make filings as to things that were said in reply to the responsive application filed by CC&P.

In a footnote to that same decision, they said that in their filing the applicants, and they meant the primary applicants in that case, did not submit a vast amount of evidence or testimony pertaining to or discussing the effects of CC&Ps proposed conditions. The evidence that does do so and in which CC&P may rebut in its scheduled filing appears to be filed in the statements -- and then they went on and listed the various places in the filing

that the primary applicants had made that could properly be rebutted by CC&P.

This again really is the key to what we're talking about here. The coalition doesn't propose the primary application. But anything that is said in this December 15th filing directed towards the coalition, by definition has to be reply material in which we get to close the evidence and in which we get to rebut and which we get to take discovery in order to provide proper rebuttal. It was Mr. Edwards who an hour or so ago said if a witness has given testimony on a subject, and the subject is open to examination and that's all we're looking for here.

The applicants -- and that is the distinction between myself and the parties who are here before you earlier -- I am allowed one additional evidentiary filing. I do have one rebuttal filing. Unfortunately, it's in six days and I should have had the evidence I'm looking for last week. Nonetheless, I am still accorded one more evidentiary filing and I am allowed discovery, including written discovery in order to fill out the information that I need for the

file.

The applicants cited for those UPC&W decisions in their objections, Judge, for the prospect that responsive applicant is limited and that it cannot refer and that it cannot defer to its rebuttal filing, matters that could and should have been explored earlier in discovery presented in its case in chief.

If the applicants by this quote mean that new evidence cannot be submitted in a rebuttal filing, I think they're clearly wrong and I think the simple intuition would tell us that.

What would be the purpose of a rebuttal filing if you weren't allowed to introduce some new evidence. If you were simply presenting the same thing you had presented in support of your responsive application, there's no purpose in having a rebuttal. Clearly, new evidence is allowed in a rebuttal filing and on that point I would cite Your Honor to the decision of the Commission in Bituminous Coal, Hiawatha Utah No. 37038 served December 7, 1988. And I don't have a copy of it here because I just pulled

it off line last night, but I'm only going to read one sentence from it. And in that decision the Commission said "there is no bar to the presentation of new evidence on rebuttal as long as it is responsive to the reply." That's the key to rebuttal discovery, is there's something in the reply that you can point to that this rebuts and if there is, and you're allowed discovery on it and you're allowed to comment on it in rebuttal. If it's new, you're allowed to cover new material in your rebuttal file. And that's what the Board has said.

What the UPC&W decision condemned though is the situation where parties sought to introduce an issue not addressed by either itself in its original application or by its opponent in its opponent's reply. So the situation you're dealing with there is one where new evidence doesn't rebut anything. It's not coming in and saying they're wrong about this for this reason. And the opponent has no opportunity to submit evidence of its own on the issue. In going back again to the UPC&W case, there was an associate with my firm, much younger and more naive who will

remain nameless, who had written a letter in that case to the primary applicant saying that harm to essential services was, in fact, not going to be an element of the CC&P's case. Well, lo and behold along came the rebuttal filing and what was the CC&P's rebuttal filing filled with, evidence regarding harm to essential services. And the Board made short work of that. They said well, wait a minute CC&P. Nowhere in your responsive application did you say anything about harm to essential services. In fact, your young and naive and impressionable associate specifically denied in that letter that there would be any mention of harm to essential services.

The applicants then took their reply filing to your responsive filing. They made no mention in their harm to essential services. You are not allowed to come in now on rebuttal and start talking about harm to essential services. That's the type of new evidence that you're not allowed to bring in, but the reason you're not allowed to bring it in is not because you can't bring new evidence in on rebuttal, it's because you can't bring evidence on

rebuttal that doesn't rebut something said by something in reply.

Another case on this issue demonstrates the point is docket AB167, subnumber 970N Conrail Abandonment in Chicago. Very briefly, Judge, this was a case where Conrail sought to abandon half a mile of track. A party known as H.K.C. came in with an offer of financial assistance in the case. And in discussing the contents of the filings of the parties, the Commission said in that case "in its initial statement H.K.C. specifically noted that it had not reduced its purchase offer to reflect selling expenses." Now on rebuttal it reverses its position, leaving Conrail no opportunity to respond. The rebuttal is for the purpose of responding to Conrail's submission. It is not appropriate to present new arguments and evidence on rebuttal as H.K.C. is attempting to do here. So again, when you're saying you're not allowed to do something new, it's not that you can't devise new rebuttal evidence that you're allowed to put in, you can't put up with a brand new issue. Then you've got to rebut something.

I think you can see the application of these principles with respect to each of our discovery requests. Interrogatory 1, found on page 5 of the response. Very briefly, seeks information in most general form, seeks information, communication between the applicants and other railroads regarding the IHB. I know there are various subparts to the interrogatory, but they are designed to break down the various elements of the communication, who was present, why did it take place, where was it, were certain matters discussed during the communication, etcetera. It was designed to flush out what exactly occurred during the communications.

In replying to our responsive application, which sought purchase of Conrail's IHB stock, the applicants submitted a verified statement by John Oreson. In his statement, section 3 is captioned "the responsive/inconsistent operating plan submitted to the STB are not feasible and/or would negatively CSX operations and undermine the operational benefits of the transaction to the detriment of customers."

Clearly, everything that Mr. Oreson said

in that portion of his statement is directed at replying to the operating plants put in by the various parties who filed responsive applications. Anything that's in here directed towards my client has to be in reply because we didn't oppose the primary application. Nothing in there can be qualified as rebuttal on which the applicants get to close their case.

In discussing Section 3, Mr. Oreson says on page 2 of his rebuttal verified statement "Section 3 analyzes and critiques the specific inconsistent operating plants submitted by various parties in this proceeding with a particular emphasis on the harmful impact those plans would have on CSX proposed operations and consequently on CSX customers."

On page 25 of his rebuttal statement, he begins a section addressed to reply in the operating plant of the coalition, which is my client here. On page 30, Mr. Oreson lets us know that if the coalition's proposed operations incorporate reroute and traffic or constraining CSX's use of the IHB Blue Island Yard, that would create significant

difficulties for CSX.

CSX has discussed its plans with IHB and IHB has agreed to use Blue Island Yard as an east bound and south bond classification facility for a significant amount of CSX interchange traffic that cannot move overhead in their trains from or to western carriers and that is an important feature of CSX's operating plant.

So again in reply to our responsive application, Mr. Oreson has addressed conversations that CSX has had with IHB concerning operations of the IHB. They discuss their plans with the IHB. They cite to their plans with the IHB. Their reply to us and now we simply are looking for discovery on them in order to rebut what he has said about their discussion with the IHB.

I don't know how we can effectively rebut what he's saying if we don't get discovery to find out what it is the witness has talked about. Our discovery is directed toward identifying those three occasions. We don't know if the intended operations conflict with what they plan until we get the details

of what they planned and what they discussed with the IHB.

Later in the statement in replying to the consortium, a slightly different issue here. Replying to the consortium's claim that our responsive application is needed to prevent a loss of neutrality in the Chicago intermediate switching district. Mr. Oreson said, "CSX consulted with IHB and with other carriers, including the western carriers to insure that its plans were consistent with the goals for Chicago." That's something they have said in reply to our responsive application. All I'm seeking is discovery on what he says they've talked to other carriers, including the Western carrier and with IHB, to talk about how their plans are going to be consistent. I'd like to find out some discovery on that, Judge, to use in my rebuttal.

This goes directly to the evidence we need as to the condition. CSX says their responsive application is our responsive application. It's unnecessary because they've worked out all the neutrality issues with the other railroads. That's

the purpose of Mr. Oreson's statement right there. We've talked to the other railroads. There's not going to be a neutrality issue. We'd like some discovery on that issue and we're allowed some discovery on that issue for our rebuttal file.

That's my presentation on first interrogatory.

JUDGE LEVENTHAL: All right, who is going to be responding, Mr. Norton?

MR. NORTON: Well, Your Honor, I wonder whether it makes more sense to go through them all rather than one by one because I think there is some overriding issues. I'm not adverse to that, Judge, if that's how you wish to proceed.

JUDGE LEVENTHAL: Normally, I like to take them one by one, but let me see.

MR. NORTON: I think you'll find, Judge, that interrogatory 2 and 3, I was going to address at the same time because the issues are almost identical. And then when you get to the document requests, document requests 2 and 3 also deal with the same issue.

JUDGE LEVENTHAL: So your suggestion is that you address 2 and 3 separately and 1 separately, is that what you're saying?

MR. NORTON: I'm able to do whatever Your Honor wishes. I don't have a preference one way or the other.

JUDGE LEVENTHAL: Why don't we take 1 and then we'll take 2 and 3 together.

MR. NORTON: Okay.

JUDGE LEVENTHAL: Is your problem with interrogatory 1, Mr. Norton, ambiguity, or are you saying they don't have the right to introduce new evidence to rebut testimony that you've given in your filing?

MR. NORTON: Well, Your Honor, this is one reason I thought it might be better to address everything.

JUDGE LEVENTHAL: If it's appropriate for the two, it will apply.

MR. NORTON: Conrail may be in a somewhat different position on some of these questions than the other applicants and particularly the document

request. They apply only to Conrail and I think the -- what Mr. Healey has gone through, he has not identified any basis for thinking that there is -- there have been communications that Conrail has been involved in of the sort of things he's asking about.

So that is one point I just wanted to mention at the outset.

The -- let me start with the discussion of the standard because that is, obviously, the threshold. Much of what Mr. Healey says we don't take any issue with. It's sort of background. It really doesn't get to the dispositive issue here. We recognize that EJE and others, they are responsive applicants. They do have rights to discovery, a question about the scope is separate, but they do have a right to discovery that a commenter does not. And the standard, I think, as he indicated and is best stated in the UPC&W decision, 17 and 20. But I think he didn't go far enough in taking the lessons that have to be taken away from those decisions and that is you have to look at the stage that we're in and this is also consistent with discovery guidelines and the

very first page of which says that discovery has to be tailored in light of the schedule that has been adopted and what stage of that proceeding are we at. We're at a rebuttal stage which is by definition more limited than the early stage when discovery is pretty wide open.

At this stage, the usual standards for discovery, even allowing some fishing, would apply. It's much more a tailored, focused kind of discovery that has to be justified in order to be allowed. And what the decisions in UPC&W indicate is that rebuttal discovery, discovery by a responsive applicant is allowed if it is shown necessary to respond to evidence submitted in opposition to their responsive application. So that's what has to be the focus and they have to have evidence and they have to -- in the responsive application, if they are entitled to rebut and they need discovery in order to do so.

So that is, I think, a step beyond what Mr. Healey indicated about those decisions and in the UPC&W decision 20, it was made clear that the scope of proper rebuttal was limited to responding to specific

evidence in the reply to the responsive application. It has to be really focused and that's the important starting point here.

The -- interrogatory 1 is quite broad as all three of them are. What they call for is a lot of detail information about communications that may have occurred and they go far beyond the particular kind of discussions that Mr. Healey identified that many have been alluded to by Mr. Oreson because he talks about any communications after January 1, 1997 between any representatives of applicants and representatives of many other common carrier by rail is a pretty broad scope about Conrail's stock interest in IHB or the operation of dispatching of the IHB subsequent to approval.

Well, the particular request -- the particular testimony that is identified might support some discovery relating to the particular elements of the proposal submission that he referred to, but they don't support a broad request of this nature as 2 and 3 elaborate upon it. It is much more than he has identified as a legitimate book for this kind of

discovery.

I think the point is clearer, perhaps, with 2 and 3 than --

JUDGE LEVENTHAL: But why don't we stay with 1? In your opinion, what part of this interrogatory would be pertinent?

What part do you think -- he's entitled to some of it, isn't he?

Mr. Healey has made an argument that he's responding to your rebuttal testimony to their application.

MR. NORTON: I think he's entitled to discovery relating to specific evidence in our rebuttal submission that is within the proper scope of his --

JUDGE LEVENTHAL: Maybe we can narrow this request down. Is there any specific testimony that you're referring to here?

MR. NORTON: He's identified all that he has.

MR. HEALEY: I quoted two of the passages. There actually are a couple of places where the

attorneys reference the same thing in the narrative. I don't have those written down in my argument, but they're much along the same lines. I think it's primarily CSX. They went out and discussed these matters with various railroads to make sure they were comfortable with what's going to happen with the Indiana Harbor Belt. That's what the interrogatory is designed -- to gather the information.

MR. NORTON: If the request were limited to the discussions that he's identified that are referred to in the rebuttal submission of the applicants, they would -- and I think they do all involve CSX, is that right? Well, actually we don't know what else he may have there, but the ones he's mentioned involve CSX.

MR. HEALEY: For the record, as far as I know the only references are in respect to CSX because CSX is going to be taking a leadership position vis-a-vis the IHB as compared to NS. CSX is going to have more of a management role. So it's been CSX discussions and it was a CSX witness who discussed the only evidence I could find of a witness discussing

communication regarding the Harbor was a CSX witness.

JUDGE LEVENTHAL: So interrogatory 1 applies to CSX?

MR. HEALEY: The reason it's drafted for all the parties, Judge, is because I wasn't sure that was where all of the communications came from. They do discuss the fact -- I do want to get the quote right here.

I take back what I just was about to say. Both of the quotes I read talk about CSX having discussions, so all that's talked about is CSX.

MR. NORTON: And Your Honor, I think that just makes the point about the distinction here, that -- and I'll let Mr. Parker address CSX, but he's identified some statements in the rebuttal made by CSX about such conversations. He hasn't identified any related to Conrail or NS and he hasn't identified any relate to a broader universe about related or somewhat related subjects.

JUDGE LEVENTHAL: Well, let's see --

MR. NORTON: If we limit it to the ones that he specifically identifies, we wouldn't have the

problem -- I don't know about CSX, but Mr. Harker can address that.

JUDGE LEVENTHAL: All right. Do I understand that you're limiting this to CSX and if so, the specific references --

MR. NORTON: The particular references that he cited. My only issue that I would raise is I know for a fact I have not put on the record all of the circumstances in the responsive or in the December 15th filing where they mention communications regarding the IHB. I picked the two most egregious ones I could find where clearly --

JUDGE LEVENTHAL: But do they refer only to CSX or to Conrail?

MR. HEALEY: Let me put it this way, Judge, I don't remember any recollection. I don't have any recollection of any CSX or NS conversations.

JUDGE LEVENTHAL: Conrail or NS.

MR. HEALEY: I'm sorry, Conrail or NS conversations regarding IHB. So as far as I know they're limited to CSX.

JUDGE LEVENTHAL: And then any ruling I

would make concerning CSX would satisfy you?

MR. HEALEY: As to interrogatory 1 that's correct.

JUDGE LEVENTHAL: Yes, we're talking about interrogatory 1. All right, Mr. Harker, it seems to be your problem.

(Laughter.)

MR. HARKER: If I could, could you -- you were going a little fast, could you again and I apologize and I know it will be in the record, in the transcript, but could you go back over, Mr. Healey, exactly what meetings are referred to in Mr. Oreson's statement?

MR. HEALEY: Oreson, what is the higher page number, page 30 and the lower page number is Volume 2A-C-501 at the very beginning of the page.

MR. HARKER: Okay, so the -- on page 30 the sentence that says "CSX has discussed its plans with IHB and IHB has agreed to use Blue Island Yard as an east bound and south bound classification facility for a significant amount of CSX interchange traffic, it cannot move over head and through trans from or to

western carriers and that is an important feature of CSX's operating plant."

MR. HEALEY: That was the sentence I was referring to.

MR. HARKER: Okay, and that's the -- is that the only sentence?

MR. HEALEY: No. There was one on page 111 of this statement, at the very bottom. That's also page 2A-C-582. "CSX consulted with IHB and with other carriers including the western carriers to assure that its plans were consistent with their goals for Chicago."

That mentions discussion with a variety of carriers, including western carriers. I assume that to mean UP or BN Santa Fe, but we may find out differently.

MR. HARKER: Okay. Those are the two then we're focused on?

MR. HEALEY: Those are the two. I think every other reference probably is encompassed within those two quotes. Those are the two most direct quotes that I could find.

MR. HARKER: And as I understand where we're heading, the interrogatory 1 would be designed to basically elicit the information in subparagraphs A through J with respect to those discussions and meetings and only those discussions and meetings?

MR. HEALEY: I can't tell you that I can limit it that way because, as I say, there are some other references in both the narrative and in Mr. Oreson to conversations with other railroads. My understanding is that -- you're the parties who have put it in evidence.

My understanding is that those other references would be encompassed within these discussions, so I think these encompass everything, but to the extent that they don't, your witness is the one who discussed them and I don't think I have to go through the entire 4700 pages to identify where he's discussing.

MR. HARKER: But you're the party that has a need to file rebuttal. Do you know what you're trying to rebut? I assume at this point you've got in mind things in the filing that you need to address and

you're telling us that these are the two things that you're currently aware of that you need specifically to address.

MR. HEALEY: And it may be that the other references are encompassed within these two, that's right.

JUDGE LEVENTHAL: Let's see if we can cut this short. You're interested in what -- is it one witness or a number of witnesses?

MR. HEALEY: Both of those references are found in Mr. Oreson's statement.

JUDGE LEVENTHAL: All right, so you're interested in any communication Mr. Oreson, any communications, etcetera, that Mr. Oreson relied upon in making that statement?

MR. HEALEY: Any communication that he knows of in making that statement, yes.

JUDGE LEVENTHAL: Isn't that easy, Mr. Harker? All you have to do is ask your witness.

MR. HARKER: In terms of these two --

JUDGE LEVENTHAL: You have the specific two items that he's mentioned and if Mr. Oreson has

knowledge of or relied on other communications, can't you ask him what they are?

MR. HARKER: Sure. Relied on other communications for purposes of these two statements.

JUDGE LEVENTHAL: For purposes of his testimony in response to -- in rebuttal of the coalition's filings.

MR. HEALEY: Any place where he talks about communications, that he's aware of between the applicants and any other party regarding the IHB.

JUDGE LEVENTHAL: He's not asking do anything else other than what Mr. Oreson was aware of and what he relied on in making his --

MR. HARKER: Yes, I just heard him say the applicants. I heard Mr. Healey throw in "applicants." I am talking about CSX. There's no reference in here --

MR. HEALEY: Oh yes, you're right. I apologize for that. You're right. It is CSX.

MR. HARKER: I guess --

JUDGE LEVENTHAL: Let me go off the record.

(Off the record.)

JUDGE LEVENTHAL: Do you want to memorialize the agreement?

Back on the record. Our off the record discussion I think the party -- I think CSX by Mr. Harker and the coalition by Mr. Healey have reached an agreement on interrogatory 1.

Mr. Healey, do you want to tell us what the agreement is?

MR. HEALEY: Oh yes. Judge, what I offer and apparently Mr. Harker is accepting is I'm withdrawing interrogatory 1 as it's filed on the applicants in exchange for the understanding based upon our discussions off the record that there will be no objections as to the scope of questioning Mr. Oreson as to anything that would be responsive to that interrogatory as to CSX discussions with other railroads. The interrogatories worded a little more broadly, it's worded as to the applicants, but we have conceded that points we could find were relevant to be rebutted or CSX points and therefore we limit the inquiry to CSX competition or at least conversations

of one or more CSX persons were present. There may have been other applicant members present and those would certainly be responsive discussion.

MR. HARKER: Your Honor, is it only the discussions that Oreson testified about, specifically relying on? I thought that was --

JUDGE LEVENTHAL: That was what I understand the interrogatory relates to. Is that correct?

MR. HEALEY: Yes, it does. That's correct.

MR. HARKER: Not any discussion that he wasn't relying on. In other words, not a meeting or a discussion that is not specifically in his head with respect to the two statements --

JUDGE LEVENTHAL: With respect to his testimony he's asking.

MR. HEALEY: For example, he says that they met with a variety of carriers regarding what they intend to do on the IHB. I tomorrow will inquire of Mr. Oreson what carriers did CSX meet with regarding the IHB. Who did you meet with? Where did

you meet? Who was there? What was said? Were any notes taken?

JUDGE LEVENTHAL: All right. Mr. Harker, is that the agreement?

MR. HEALEY: I do have to make one caveat to that and it just occurred to me, Judge. The last part of the interrogatory seeks to identify documents relating to those communications,notes taken during the meetings, agendas, etcetera. As it is not a deposition duces tecum, I haven't asked the witness to bring anything with him. By waiving the interrogatory I would be unable to get those materials, so I would not want to waive the interrogatory as to those written materials requested in interrogatory 1, sub J.

JUDGE LEVENTHAL: Well, Mr. Harker, if there are any documents relating to these communications, will you furnish them?

MR. HARKER: Yes, Your Honor.

MR. HEALEY: I don't expect them to be furnished with the deposition.

JUDGE LEVENTHAL: No, of course.

MR. HEALEY: If you have them, I don't

want -- if you have them sitting in your office, please bring them with you, but otherwise, I don't anticipate that they have been sitting in Mr. Harker's office.

JUDGE LEVENTHAL: All right, very well. All right, interrogatory 2 and 3.

MR. HEALEY: Yes, and actually 2 and 3 are very similar, Judge. Interrogatory 2, you'll notice is somewhat similar to interrogatory 1, again seeking information regarding communications. The difference here is that the subject matter of the interrogatory is a bit different. No. 2 seeks communications with other carriers by rail in which our application is discussed, responsive application. Perhaps the earlier filed description of responsive application or any aspect of the coalition's acquisition of the IHB stock.

I would like to make Your Honor aware of the fact that in conversation earlier in the week, the applicants raised what I call was a very good point. In the interrogatory we also inquire about Wisconsin Central Limited which is WCL and Illinois Central

which is IC. At one time they were a part of the Coalition. They were going to be filing responsive application of seeking Coalition -- because those two parties were able to buy their piece of Norfolk Southern, they agreed to withdraw from the Coalition. The reason I included them in the question was because it was not clear to me specifically when CSX would be aware of the fact that those parties wouldn't be filing what they had described in their description of anticipated responsive application.

What I have agreed to on the phone the other day and what I will continue to agree to is that to the extent any of these discussions concern Wisconsin Central taking over control of the IHB as it's in this interrogatory, Illinois Central taking over the IHB or a combination of two of them, there's nothing in the rebuttal relating to that and I believe to make clear the interrogatory isn't addressed to that.

The situation I wanted to cover was if CSX wasn't aware that Wisconsin Central had withdrawn from the Coalition and was discussing with a party the EJ&E

and Wisconsin Central taking over the Indian Harbor Belt, I think that conversation is relevant because one party of the Coalition is still present in the conversation, EJ&E and that I would want response to. But to the extent the discussion solely concerned Wisconsin Central, alone or in combination with the Illinois Central, those would not be responsive.

JUDGE LEVENTHAL: All right, Mr. Norton?

MR. NORTON: Well, what I didn't hear was any explanation of the hook. What is this --

JUDGE LEVENTHAL: Oh, you want the hook.

MR. HEALEY: I believe, Judge, I did not get to that part of the argument. I apologize. I sat down a bit prematurely, I suppose.

On pages 310 and 311 of their narrative filing. That's volume 1 of 3, the applicants presented argument for about a page about how my two rail clients, INM and EJ&E are lone voices singing out in the wilderness so to speak. Nobody else supports us. No one else is concerned about this IHB issue. Here are these two little railroads wringing their hands about this issue and yet nobody else has come

forward to say yes, you know they're right, there is a problem here.

The discovery is designed to determine whether there were such parties present at one time and through discussions with the IHB or excuse me, through discussions with the applicants they determined for whatever reason their concerns about neutrality of switching or a takeover by CSX that doesn't account for other parties using the IHB, etcetera, whether those issues were discussed with any other parties, such that those parties did not come forward and join us.

What we're suggesting is that in our rebuttal filing, it would be perfectly appropriate to say Judge, or Board, we were able to learn in discovery that, in fact -- and in fact, we have learned that the Union Pacific was quite concerned about the neutrality of dispatching by way of example. However, they had a meeting with CSX. These following issues were discussed, perhaps -- these operating arrangements were agreed to, etcetera. And as a result of that there was no support for the Coalition

from Union Pacific.

That's what question 2 and 3 are designed for. 2 relates to discussions with other railroads. 3 relates to discussions --

JUDGE LEVENTHAL: And did you refer to Mr. Oreson's testimony again, just now?

MR. HEALEY: Did I refer to Mr. Oreson's testimony? No, I referred to the narrative filed by the applicants at pages 310 and 311.

JUDGE LEVENTHAL: All right. Mr. Norton?

MR. NORTON: Your Honor, 2 and 3 present a variation in a different situation because as Mr. Healey just indicated, he's not responding to any specific evidence that was submitted by the applicants. The only thing he's referring to is a discussion and heading, I think, captures the point at page 310 of the narrative of the rebuttal which is not evidentiary. It's just lawyer's document. Which says "no other major carrier has complained about the transaction's disposition of Conrail's IHB shares." That's the specific hook that he's offered here.

Questions 2 and 3 are both far broader

than that narrow book. 3, for example, deals with communications with shippers and has nothing to do with the proposition that is referred to in the narrative on which he's relying. But beyond that, the -- what he's pointing to here, as I said, is not an evidentiary submission. It is a commentary on the state of the record which is to say that no major carrier has filed anything in this proceeding complaining about the proposed disposition of Conrail's IHB shares.

Now that is either accurate or not. It can be determined from the record, from the filings that have been made that we have no reason to think it's not accurate. Mr. Healey has not suggested that it's not accurate. He certainly doesn't need discovery to determine whether that is or is not the case.

What he's coming up with is a different rationale which is not to rebut any evidence that's been submitted and it's not even to rebut the comment in the narrative. It's to address a different point. It's to address a theory that he has that there may be

some -- there may have been some carriers who had some concerns that they may have expressed and then after some communications with one or another of the applicants, they did nothing about it. That is not narrowly focused rebuttal discovery. That is basic fishing, the kind of discovery that is appropriate maybe at the initial stage, but not at this stage. So really here, unlike 1, there's no hook in the testimony or the evidence for grounding any proper rebuttal and the only rationale he's put forward is one that does not require evidence, does not require discovery in order for him to respond and there's nothing that ties it into Conrail. There's nothing that ties it into NS. There's nothing that ties it into CSX in this case. There's no "there" there in order to ground a proper rebuttal discovery.

MR. HEALEY: Judge, the reason why Mr. Norton says what he says is because the evidence that the applicants are referring to is the negative and is the error. There is nothing to point to. He's correct. And that's the very issue that they raise. No one has come forward. It's an argument that they

have made.

How is there any way to rebut that argument, unless we're allowed discovery to find out why that argument is true? I mean in a sense, he's saying well, we've shown that there's a negative. You're not allowed to find out why there may be a negative. We think we are allowed to find out where there may be a negative. And as I say, to the extent that I am told well, this is a fishing expedition, you don't know that there were any conversation. Go back and look at the first Oreson deposition where he specifically says Union Pacific came to us. They had concerns about neutrality of switching. They had a meeting down in Jacksonville, Florida. We discussed this, this, this and this. So there have been these discussions. The discussions are out there and I think we're entitled to discover them. The fact that we can't point to anything in the evidence that they filed, there's nothing in Mr. Oreson's statement talking about it is because it is the negative. There's nothing to be talked about. There's no support. I can't point to it and say that's where

Oreson pointed, that's where Oreson mentioned this, that's what Oreson went on about. And yet, because the applicants are clearly going to make this argument to the Board, then our responsive application should be denied because nobody supports it. I think we're entitled to some reasonable discovery to find out if there's reasons why people haven't come forward to support it.

MR. NORTON: Your Honor, I think he's underscored our position and undermined his own. He's pointed out that this is a subject that could have been gone into when discovery in the first round and indeed was -- there were some questions at the deposition of Mr. Oreson, apparently, that went into discussions that have been held with other carriers about their concerns. That was the time it was appropriate to follow up on it. There's nothing -- and he's not limiting his present request to anything that is tied into the example that he gave or any other particulars that he may be aware of. It's just a complete, open ended inquiry into any kinds of discussions that may have been had on these subjects

and they're stated in a very broad term. I mean it's any discussions of the responsive application and the possibility that there would be a potential acquisition of Conrail's stock interest.

Now I think this is beyond the proper grounds of anyone and the problems that this presents, any of these requests or discussions of other carriers, as to Conrail and IHB, which is another carrier, is they do have a corporate relationship as well as interconnecting rail carriers.

There's a possibility of any number of discussions in some sense that might be caught by this request that would be of no consequence. It might be someone -- did you hear what EJE is proposing to do about Conrail's ownership in IHB? Nothing of any discoverable value, given the breadth of the request. It's something that would have be looked for. I think we go back to the fundamental point, he hasn't got -- here, unlike the first one, he doesn't have an evidentiary book and if he does, the one reference to some deposition testimony, that would be as far as the request ought to go and it ought to be limited

accordingly.

MR. HEALEY: Judge, fortunately, what the applicants are proposing to you is that I should go out and independently be able to find out about each of these incidents and then once I'm about to find out about them, then I'm allowed to ask some discovery about them.

Fortunately in civil discovery, there's not a probable cause standard here. It's not a question can you identify for us all the conversations and then we'll tell you about all the conversations. I've been able to identify one conversation. The fact that this is something that could have been raised before, as we saw in the earlier cases and that's why I quoted the cases, the fact that it could have been raised before is not the issue in determining whether it's proper rebuttal. The question in terms of proper rebuttal is is it something that was said in the reply filing. This is the reply filing. Now the applicants have made an argument that no one has come out and complained about this, other than these two carriers. How am I able to acquire, to rebut that? And I am

able to rebut that. How am I able to rebut that without being able to find out why it is that no one else has complained?

JUDGE LEVENTHAL: If they withdrew that argument, would that satisfy you?

MR. HEALEY: If they withdraw what argument, that nobody has come out and supported?

JUDGE LEVENTHAL: Right.

MR. HEALEY: I will just tell you first of all, I'm not sure that counsel can make that representation today. Maybe they can, but --

JUDGE LEVENTHAL: Mr. Harker?

MR. HEALEY: I would think they would want to discuss it with their clients first.

MR. HARKER: Your Honor, if I understand correctly what you're saying, the point is -- is the observation that is made in the narrative?

JUDGE LEVENTHAL: Yes, it's not evidentiary. It's an argument.

MR. HARKER: But in a way -- at least I was going to talk about decision 20 in UP CNW which is a response to a point that Mr. Healey was making and

it also addresses this point. Because there, the Board indicated that proper rebuttal would be something that seems to controvert any specific evidence opposing the responsive application. That is the hook. It has to be responding to specific evidence and that's why we come back to the need to identify some specific evidence that's been submitted and this is at page 7 of decision 20.

In addition, the Board, the ICC in that case distinguished between commentary that was not of an evidentiary nature and say that didn't present the same kinds of questions. This is an observation that could be made in a brief, just as well as here. It's not a basis for discovery. It's simply a commentary on the state of the record. There are no major carriers who have opposed or raised an issue about this aspect of the --

JUDGE LEVENTHAL: Is that argument important to you?

MR. NORTON: I think it's important to the Board to know that.

JUDGE LEVENTHAL: Can't the Board reach

that conclusion by looking at the evidence that's been supplied and make its own determination whether or not anybody is concerned?

MR. NORTON: Of course, I can do that. It's a lot more convenient to have the fact brought to their attention and it can be reiterated in their brief, I suppose, but I don't think we're in a position to start editing the narrative and that seems to be not a very productive enterprise when all it is is --

JUDGE LEVENTHAL: No, but your trouble is, Mr. Norton, you can make any statement you like in a narrative and the other side can't reply if you can't give them discovery. Instead of putting it in the testimony of your witness, you're making the form of argument and what Mr. Healey is concerned with, he doesn't know how the Board is going to treat that.

MR. NORTON: Your Honor, that raises a good point, but I think it's not the point raised here. If this were an evidentiary statement that said that no major railroad has complained to applicants about the proposed, the way the transaction will

handle Conrail's IHB stock, that would be a very different matter. This does not do that. All this does is say that, as I say, comment on the state of the record that there have been no major railroads who have opposed this aspect of the transaction in this proceeding. It's a fundamentally different proposition.

JUDGE LEVENTHAL: Let's go off the record.

(Off the record.)

JUDGE LEVENTHAL: Back on the record.

In our off the record discussion, I attempted to see if we could reach some accommodation with respect to interrogatory number two and number three, and I did not have much success. However, let's take the interrogatories separately.

With respect to interrogatory number two, the suggestion was made by Mr. Edwards off the record that we limit that to communications between representatives of applicants in one hand and representative of major railroads on the other.

Would that satisfy your inquiry, Mr. -- we're talking about number two.

MR. HEALEY: Yeah, I understand we are, Judge, and I don't think it will. The specific quote we're talking about talks about "yet the silence of other roads reaching Chicago is deafening." The particular point -- and to give you a little background, maybe this will help explain it.

The particular point the Coalition is raising is that -- we are off the record right now or are we on the record?

JUDGE LEVENTHAL: No, we're on the record.

MR. HEALEY: I'll clean up my language then.

Small carriers are the ones who are getting the short end of the stick here -- is one of the themes that we carry throughout our filing. It's the smaller guys who are going to be most at risk because they don't have run through trains stop right through Chicago and they have blocks of ten or 12 cars that need their immediate switching.

Those are the people who aren't going to be focused on by the IHB anymore when it's focus becomes run through trains for class ones. Since what

the applicants talked about here is the silence of any road reaching Chicago, if we were to limit it to any road reaching Chicago, I would be willing to narrow it to that.

MR. NORTON: Your Honor, if I might. This whole section is under a heading No Other Major Carrier Has Complained. And I think the reference to other roads implicitly -- other major railroads is all that's being talked about.

In the next paragraph, it refers to BN SF. And so I think --

JUDGE LEVENTHAL: Are you saying now on the record that that comment is limited to major roads?

MR. NORTON: The silence of other roads coming?

JUDGE LEVENTHAL: Yes.

MR. NORTON: Your Honor, I think it's fair to read it that way, which is not to say that it's not also -- it might also be accurate as to others. But in the context given the heading, we think that would be a fair way to read it.

MR. HEALEY: Judge, I just -- I can't read it that way. It talks about the roads entering Chicago. Now not all railroads enter Chicago, but they talk about the silence of the roads entering Chicago.

JUDGE LEVENTHAL: He just made a -- we'll wait until they're ready.

MR. HARKER: I'm sorry. We're done.

JUDGE LEVENTHAL: All right. I understood Mr. Norton to say that the fair inference from that portion of the narrative that you referred to, that that refers to major roads. Does that satisfy you?

MR. HEALEY: Well, again, Judge, it doesn't because I think more than likely what the applicants are going to be talking about in their brief is the fact that the other smaller roads, the one who we are supposedly --

JUDGE LEVENTHAL: How many small roads are involved here?

MR. HEALEY: Well, I guess I would cite to Iowa Interstate, Wisconsin Southern.

JUDGE LEVENTHAL: Are there any --

MR. HEALEY: They use intermediate switching. I mean, they're small Chicago short lines, but we wouldn't be interested in those. We may be able to sit here and enumerate the railroads that have an agreement on the record as to which railroads they would have talked to.

JUDGE LEVENTHAL: All right. To clarify, I'm going to rule that he's entitled to discovery. I'm willing to narrow it to accommodate the applicants because I think they have a point that the interrogatory is quite broad.

Can the parties agree upon the roads that are involved and a response with respect to those roads which satisfy the interrogatory? And we're talking about number two.

MR. HEALEY: Right. And what I would propose is to limit it to what's normally known as the trunk lines operating in through Chicago. So again, we're not talking about Chicago Rail Link and Chicago Short Line and a couple of those.

Obviously it's UP and BN. I have a feeling I would know if it were Wisconsin Central and

Illinois Central since they're my clients, so we don't have to include them. CP, Soo, Iowa Interstate, Wisconsin Southern -- if I can have a minute to just --

JUDGE LEVENTHAL: Sure.

MR. HEALEY: -- be sure that's all.

Assuming you're counting Southern Pacific, Cotton Belt, etc. as part of the --

MR. EDWARDS: Your Honor, would it be possible for us to have a two minute off the record discussion amongst ourselves?

JUDGE LEVENTHAL: Sure, all right.

We're off the record.

(Whereupon, the foregoing matter went off the record at 3:26 p.m. and went back on the record at 3:31 p.m.)

JUDGE LEVENTHAL: All right, back on the record.

MR. NORTON: What we have, I think, is a proposal which would be that we would respond to two without limitations on the carriers except as to IHB, which I don't think is what Mr. Healey is really

interested in. He's looking at other carriers.

And also excluding kind of day to day conversations as distinct from higher level --

MR. HEALEY: If we can --

MR. NORTON: -- conversations.

MR. HEALEY: -- talk to management employees, that's fine.

MR. NORTON: That are focused on this is the subject rather than a passing comment, that type of thing.

JUDGE LEVENTHAL: All right.

MR. NORTON: And also that three would be withdrawn because it gives us clearly a -- there's something about it here in the statement.

MR. HEALEY: I think I'm agreeable to that. I want to make sure I understand what you're proposing as to two -- that you will respond to two. Which of the railroads are you going to respond as to --

MR. NORTON: All of our --

MR. HEALEY: So you're not going to tell us --

MR. EDWARDS: We will tell you in particular which railroad we talked to, etc. We're just not excluding any railroads other than IHB.

MR. HEALEY: Why would the IHB be excluded?

MR. HARKER: Well, it doesn't make -- it doesn't fit into your theory. IHB is an affiliate of Conrail. IHB was an applicant. IHB is going to come in and -- well, their interest of it is to the Board is that IHB isn't here opposing the transaction.

I mean, whether it's of interest to you is in the -- and the force of this statement is that independent loads have not been in complaining about this particular proceeding. IHB is not an independent road.

MR. NORTON: In addition, you know, it's probably going to be more burdensome in terms of the possibility of -- given the relationship between the companies identified.

MR. HEALEY: I can understand the argument as to the burdensomeness of it because obviously there's a lot of connections between Conrail and IHB.

I guess I don't understand the comments as to why it wouldn't be relevant that there had been discussions with the IHB concerning our responsive application.

MR. HARKER: Mr. Healey, but the hook is, is that the roads have not been in to complain. The silence of the roads on the application has been deafening. And the -- you know, the argument is, is that if there was a problem with the CSX and NS application in Chicago, UPS, UP, BN, SF and so on would have been coming in here to complain.

That doesn't -- that paradigm really doesn't fit IHB because of who IHB is, which is an affiliate of one of the applicants.

MR. HEALEY: But wait. You --

JUDGE LEVENTHAL: Mr. Healey, I think you have a good deal here.

MR. HEALEY: Judge, I do, but I just want to -- I just -- I think we're finally finding the needle in the haystack here, and that's why we've seen so much --

JUDGE LEVENTHAL: No, no.

MR. HEALEY: -- battle going on here.

Certainly if IHB came out of the -- the applicants fought long and hard to convince Your Honor that the IHB is an independent entity. It's not controlled by Conrail. That was Your Honor's ruling and that's what the Board upheld.

So for the applicants now to be saying well it's really an affiliate of Conrail and really isn't that relevant, therefore -- this is a horse of another color. Apparently it changes this --

JUDGE LEVENTHAL: Wait a minute. You have to read your interrogatory number two. I would read it as not pertaining to IHB. You're saying the representative of applicants on the one hand and representatives of any other common carrier by rail.

MR. HEALEY: IHB is a common carrier by rail.

JUDGE LEVENTHAL: No, but any aspect of the potential acquisition of Conrail's 51% interest in IHB.

MR. HEALEY: By EJ&E or IMRL.

To the extent the applicants talked to IHB about us taking over the IHB, I would think that would

clearly be pretty relevant, Judge, to the idea of whether the IHB was going to come out and voice concern or -- and I don't -- are we off the record or on the record?

JUDGE LEVENTHAL: We're on the record.

MR. HEALEY: Okay, then I will keep my comments to myself.

But let me just say that it is certainly possible that a number of people at the IHB were quite interested in our responsive application and may in fact been inclined to come forward in support of us. And that's the reason I voice concern about their conversations with the IHB regarding our assumption of control of the IHB.

Certainly it would be an interesting circumstance if the IHB, as an independent entity, were to come out and support our coalition.

JUDGE LEVENTHAL: Let's go off the record.

(Whereupon, the foregoing matter went off the record at 3:36 p.m. and went back on the record at 3:39 p.m.)

JUDGE LEVENTHAL: On the record.

All right, the parties have reached an accommodation with respect to interrogatory number three and number four.

MR. HEALEY: Two and three.

JUDGE LEVENTHAL: Two and three. So you fellahs can relax in between arguments, but I have to pay attention all the time.

All right, with respect to interrogatory number two and number three.

All right, Mr. Norton, you want to tell us what the agreement is?

MR. NORTON: Yes, that we will respond to number two limited to manage[illegible] level personnel --

MR. HEALEY: And above.

MR. NORTON: -- and above, and excluding casual, day to day kind of communications focusing on communications where this was the subject matter of a meeting or the like. And also that number three will be respond --

JUDGE LEVENTHAL: All right.

MR. HEALEY: That's fine with me. But can we also put on the record that the Wisconsin Central

and the Illinois Central reference in number two has been removed?

JUDGE LEVENTHAL: All right, very well.

All right, then we're up to the document production request.

MR. HEALEY: The interrogatory number four is rather short. It asks the applicants if they have performed any studies or analyses on the impact of divestiture of Conrail's stock again to the coalition.

First of all, again we would remove EJ&E and IC from the question. It's in the third line of interrogatory number four. We will withdraw that part of the question.

The matter it rebuses that it's an atmosphere of some rebuttal statements talking about our proposal and as well the narrative comments of applicants. The applicants talk about the disruption that's going to occur if in fact we take over the operations of the IHB through the divestiture of the 51% stock ownership.

And cite, for example, to page 30 of Mr.

Oreson's verified rebuttal -- verified statement where he said, "If their proposed operations incorporate rerouting traffic or constraining CSX's use of the IHB yard, that would create significant difficulties for CSX."

The applicants have talked about the problems that they will experience if we take over the ownership. We think it certainly is an open issue for rebuttal. And all we've asked them is have you performed any actual studies.

Not what Mr. Oreson said when he said this will be a disaster and a vernal equinox or something else would happen. All the question asks is have you done any actual studies of this to determine what would happen.

MR. NORTON: Your Honor, I think we're in a situation here similar to number one. It does have a hook of sorts. It relates only to CSX. There's nothing relating to NS or Conrail. And Mr. Harker can speak for CSX, but I think that might be the way to go on it, to limit it.

MR. HEALEY: I would agree with Mr.

Norton's comments. I think it's related to CSX only.

JUDGE LEVENTHAL: All right.

Mr. Harker.

MR. HARKER: I -- and Mr. Healey, I apologize; we're eliminating Wisconsin Central and Illinois Central, right --

MR. HEALEY: That's correct.

MR. HARKER: -- from the --

MR. HEALEY: Yes, we are voluntarily withdrawing that from the interrogatory.

MR. HARKER: Let me ask about subpart (e) and (f) as well. It's terribly, terribly broad, particularly the last clause of (e). Regardless -- all documents or other data referenced in performing this study or analysis, regardless of whether the document or other data was actually relied upon in reaching any conclusions.

So they pull down some materials off their desk and look at them and then conclude that this really isn't going to help me do my analysis and put them back on the shelf, that that's something that we need to --

MR. HEALEY: No, no; let me address that I think maybe through a clarification rather than withdrawing anything here.

The circumstance I was trying to gather in subpart (e) was you may in fact have run studies or have other data that would conflict with what you've said, and obviously you don't rely upon that in performing an analysis -- you deep six it.

You don't want anything -- what we could agree to is if the study or analyses determined that the material or data was not relevant at all to the issue, it doesn't have to be produced, and that I clearly agree with.

But to the extent that the material is relevant, whether it was relied upon because it helped support the study or whether it was rejected because it didn't support the study, I think in either case it would be relevant in that case.

And I'd be willing to go with that clarification that, to the extent they concluded it didn't have any relevance, it's not responsive.

MR. HARKER: I'll agree with that. I

appreciate the clarification.

JUDGE LEVENTHAL: All right, then you have no problem with (f) I take it with that clarification?

MR. HARKER: Right, that's correct.

JUDGE LEVENTHAL: All right. And document production request number one?

MR. HEALEY: It kind of falls right out of the interrogatory, so that one I don't have a --

JUDGE LEVENTHAL: No argument on one then?

MR. HEALEY: Two and three, once again, go together, Judge, and I need to give you my last little story of the day, I suppose, in order to understand why it is that they're relevant.

In addition to the control of the intermediate switch carriers in Chicago that we identified as the problem, there was a wholly separate issue that EJ&E in particular identified in its responsive application as a reason why CSX and NS gaining control of the Indiana Harbor Belt was going to cause some anti-competitive problems.

There are roughly two dozen injuries -- injuries; it is late in the day -- industries in the

northwest Indiana area that are served by both EJ&E, my client, and the Indiana Harbor Belt. That is, when these industries want to ship by rail, they can have either EJ&E or IHB to bring the traffic in or move the traffic out.

The problem my client has experienced to date, which is an existing problem and is not a result of the merger, is that Conrail, we feel, because it's a 51% owner of the Indiana Harbor Belt, refuses to work with the EJ&E for the movement of traffic into and out of these facilities.

When Conrail puts in bids to these two dozen roughly industries -- and we have identified the industries in previous discovery. When Conrail puts in a bid to these industries to move traffic, they don't tell us the bid's coming up, they don't ask us what our rate requirement is.

To the extent we find out the bid comes up and we actually tell them what our rate requirement is, they don't include it in the bid. They refuse to work with us. They only work with the Indiana Harbor Belt.

Now, the harm that we see coming from the transaction is that once CSX and NS gain a financial interest in the Indiana Harbor Belt, it is our belief and it is our position in our case that what is going to happen is that the traffic that we were previously foreclosed from, which was only Conrail traffic, is now going to be traffic for virtually the entire eastern part of the United States.

That is because NS has a vested interest in IHB gaining traffic at these industries, they'll only submit bids regarding the IHB. CSX will do the same because they have a vested financial interest.

Now in response to that argument, the applicants came back and said -- made an argument on page 319 of their narrative that -- and I'm quoting here now, "Economics dictate that a trunk line will not accept a lower level of service from a partially owned subsidiary if an independent switch carrier can perform better."

What they mean by that sentence is the rational economic actor that we always used to hypothesize in college in our economics courses, given

the option between these two, will be indifferent to the ownership interest.

That is, they won't care whether they have an ownership interest in IHB. They're going to work with whichever carrier gives them the best service package overall to provide in the shipment. And that's what they say is going to happen after the application, both CSX and NS will be indifferent to the EJ&E and the IHB.

As to the ownership issue, the only thing that they will care about is the overall service package. In order to rebut the argument that that's the way that things actually work and that a railroad actually operates that way, what we have asked for in our discovery -- and we'll talk about the specific request in just a moment.

But what we've asked for in discovery is to identify all of the bids by Conrail into those facilities so that we can demonstrate that in fact Conrail doesn't work with us, okay. Conrail doesn't submit EJ&E as part of the bid.

They don't work with us in order to try to

determine whether it is we can become part of a competitive bidding package with them. They simply go with the IHB.

But that doesn't answer the whole question because that's what discovery question two is, 60 bids. That doesn't answer the whole question, however, because it could be that Conrail, for whatever reason, believes the EJ&E cannot provide competitive service.

Maybe their experience in the past has been we're too slow with our transit times or we lose cars or we damage lading or whatever the issue is; but it makes EJ&E, in Conrail's mind, not a competitive part of the transportation package.

So you need both of these two interrogatories together in order to determine (a) -- excuse me, interrogatory I said -- document request number two, does Conrail currently work with us in the industries, and (b) what are the reasons they don't work with that are valid, legitimate, commercial reasons why they don't work with us.

And I think we're going to find out --

obviously as the attorney, I would argue, I think we're going to find out there aren't valid, legitimate reasons why this is so.

But we need this information in order to rebut what the applicants have said about rational, economic railroads working with whichever is the best overall service package. Clearly with Conrail it doesn't work that way.

Now again, when we were talking -- the four of us were talking on the phone Monday of this week, it was pointed out to me that there were certain parts of these requests, and particularly number two, that might be over broad.

And I was willing to concede the point that they might be over broad. For example, request number two goes all the way back to 1990. The reason it did that, Judge, is I simply have no basis for knowing how many bids Conrail has submitted to these various industries.

If there's only been three or four, that's not going to tell us much of anything in the past year, so we went back a little further. And it's been

represented to me that there's potentially hundreds of bids that Conrail has submitted to these two dozen industries.

And if that's the case, I certainly don't want to make somebody go all the way back to '90 digging up bid information.

More particularly, the applicants have a concern because the bid information discloses competitive information. And actually, I was sitting there last night thinking about this and I certainly agree with them that it requires the disclosure of competitive information.

And I think I can get what I need for discovery request -- document request number two without getting the competitive information. I think if we were able to simply get a head count of the number of bids submitted with IHB and the number of bids submitted with EJ& -- a simply tally, if you will, of those bids -- I think that would give me the information I need.

Because all I'm trying to prove, all I'm trying to rebut is the idea through two that Conrail

is willing to work with EJ&E. Conrail's not willing to work with EJ&E when it has IHB as an option.

But to the extent they can give me a head count of these bids and say 350 were went out involving IHB and six were sent out involving EJ&E, it will be important actually because we raise an issue as to one particular industry if we can break out one industry -- and the name I can't recall right now -- because we have admitted they do work with us in one situation where the IHB physically can't or has said that they will not provide the service.

So they do work with us on one situation, but other than that they don't. So if we limit two -- and I'm willing to talk to them about how we can do that in language that we can agree to -- to a simple head count of bids for a period where we get a reasonable number of bids submitted, I'd be willing to reduce number two along those lines, although I'm not sure there's any way to do that for number three.

Number three is seeking information comparing and contrasting the EJ&E and the IHB and its carriers originating and terminating traffic at these

24 locations -- roughly 24 locations.

JUDGE LEVENTHAL: Mr. Norton.

MR. NORTON: Two and three relate only to Conrail, but Mr. Healey may have --

MR. HEALEY: That's correct, they do.

MR. NORTON: Your Honor, despite the limitations, which we -- it's moving in the right direction -- still I' think there's a fundamental problem here.

The statement that is the hook here is a statement in the narrative that economics dictate that a trunk line will not accept a lower level service from a partially owned subsidiary if an independent switch carrier can perform better.

Well, Mr. Healey's apparent assumption is that his client, EJ&E, performs better so that in cases where it has not been selected, that would negate the general economic proposition that it stated in the narrative.

He hasn't made any proffer whatsoever of the predicate for that critical assumption. Otherwise, all he's -- and the facts that his scenario

suggests is simply that there are two switch carriers.

There's no reason to believe that EJ&E is better than IHB and provides more efficient service or better service or any -- in any way would be logically or rationally or obviously the better choice but it is not being selected.

And in a situation where there -- if there were no difference between the two, say EJ&E and IHB are comparable, there is certainly nothing wrong for Conrail, if it is the case, to favor the company in which it owns a 51% interest.

That's a problem that exists today. If it's a problem, it's not caused by the merger -- the control transaction. And that problem is not going to be worsened. It's going to be improved, if anything, because after the transaction the ownership interest of IHB would effectively be divided between CSX and NS, and they would each have only 25½% and CP would have the largest share.

So that what he's looking as sketching out as the target is not something that is an appropriate subject for rebuttal discovery and his whole premise

just doesn't have a foundation here. He's also excluded, you know, the possibility that the customer may have designated which switching carrier should be used.

What Conrail has done in the past says little or nothing about what CSX or NS are going to do in the future and they are going to be independent actors. And EJ&E is not suggesting that there's anything wrong with what Conrail has done in the past.

In any event, if there were something wrong with -- with what he's identifying as a possible problem, in the future then he could pursue any applicable remedies. So it's hard to see what the connection is here with the proper scope of rebuttal.

Now let me just address the limitations that he's indicated. The limited time period and the limits of the 25 shippers obviously helps compare the original request, but it still is a major burden because those lists of shippers which is submitted in confidential discoveries -- and I'm not going to quibble with names, but I can characterize it -- include many major shippers in petroleum, chemical and

steel companies, for example.

There have been a number of -- there have been a number of bids submitted to these companies over the three year period. This is not limited to bids that were accepted; it's bids of any kind. Tracking down this kind of information is a lot of work.

It's not just punch a number and you've got the answer. And indeed, we've got some initial feedback from the list of names that Mr. Healey gave us, and they don't stand with our own understanding of who the companies are.

So, I mean, there are going to be a lot of practical search problems and practical burdens associated with trying to run this down.

The possibility of coming up with some kind of response to number two which did not require a production of the bids themselves, which of course would present a major problem because of the confidentiality and this looks to a number, is something that I'd actually have to explore with Conrail before accepting or rejecting it because that

is something that we cannot consider on the grounds as a possible alternative to the question that is framed.

And I would like to suggest that maybe it would make sense if I could see if that was something that might lead in a profitable direction. But I still -- even that, I think, Your Honor, is going to produce information that is not of sufficient relevance to -- just to be appropriate for this stage of the proceeding because it's just going to give you numbers and it's not going to tell you whether EJ&E was the better carrier or provide better service in any of those situations.

There's no evidence that would address that. So to try to use the results to impeach the general economic proposition, the information they're going to get won't take them there. It just -- it's not sufficiently probative to provide even the more limited discovery that he's now seeking.

JUDGE LEVENTHAL: Suppose he were to further limit his discovery to something less than three years. How about one year. Would that serve your purpose?

MR. HEALEY: Given the size of some of the shipper that are jointly served, I suspect that one year would probably suffice.

JUDGE LEVENTHAL: Suppose we limit it to one year. Wouldn't that help?

MR. NORTON: Yes, it would, Your Honor. It certainly would. And I can explore that as to whether that's something I can agree to.

JUDGE LEVENTHAL: Let's go off the record.

MR. NORTON: Your Honor, just one further thought.

JUDGE LEVENTHAL: All right, back on the record.

MR. NORTON: He is not lacking the means to provide this information independently of discovery. They know who the shippers are and they know whether they have used or whether they have been in on the bids. It's not a secret who -- whether Conrail is serving that shipper using IHB.

Now this is something they could do on their own. They put in -- already put in some evidence of this nature in support of their responsive

application. They have a verified statement which describes one instance where EJ&E worked with Conrail in serving a shipper.

So this is not a situation where they're disabled from addressing the point if they don't get discovery of this nature from us.

MR. HEALEY: Taking the last point first, that's clearly correct. We are aware of some of the information regarding this. We certainly -- part of the problem when we address it in the verified statement is we are not told by Conrail when bids are going out.

They don't come to us. Yes, we see IHB trains coming in and out of all these plants, but we don't know, you know, how many bids there are, how many movements there were, how long the contracts were. We don't know any of that.

For purposes of what I'm telling you here, you don't need to know that. Again, the idea that the information isn't proper rebuttal, I guess all I need to do is read another couple sentences from the narrative to show exactly what's said after the quote

I read about what the rational, economic railroad will do.

The paragraph carries on to page 320. And it says, "A competitive marketplace and the ever increasing service demands of customers mandate that a railroad act with whichever railroad gives a service package. Conrail's current willingness to favor EJ&E and movements for EJ&E can provide better service offers real world proof of that economically logical principle."

Okay, so what they're saying here is here is this principle and here's some logical proof -- here's some real world proof that shows yes, this is exactly how it happened. I think the real world proof is going to show the exact opposite.

And yes, while the particular head count will not tell us whether EJ&E was viewed as providing a better overall service package than the IHB, that's what the third request is there for. That's what that's going to get.

Tell us if you think -- obviously I'm representing EJ&E here. I'm going to tell you I am

convinced we provide a better service package in every situation. That's what you'd expect me to say. You wouldn't say anything less about your own client.

The issue is not what we think of ourselves; the issue is what does Conrail think of EJ&E because it's Conrail that's submitting these bids to the shippers. That's why we've gone to Conrail for the discovery. They've put into issue. Yes, we did raise it in our original responsive application.

They've applied to it. We're not seeking information in rebuttal.

JUDGE LEVENTHAL: Well, let me make this suggestion to you, and I'll do it on the record rather than going off.

I think that Mr. Healey is entitled to some part of this information that he's seeking. I think the parties would be better off if you can reach an accommodation.

And Mr. Norton, you indicated that you would not be able to do that right now.

I would suggest this. I'm willing to recess this argument until tomorrow morning sometime.

And Mr. Healey, you said you had a deposition. We could --

MR. HEALEY: Beginning at 9:00.

JUDGE LEVENTHAL: Beginning at 9:00?

Would you want to reserve this to come back tomorrow morning, say, at 8:30 if our reporting service can accommodate us? Of course -- well, let's go off the record now.

(Whereupon, the foregoing matter went off the record at 4:06 p.m. and went back on the record at 4:08 p.m.)

JUDGE LEVENTHAL: Back on the record.

And in our off the record discussion, Mr. Norton indicated that he would confer with his client and see if some accommodation could be made with respect to request -- document request number two.

All right, with respect to document request number three?

MR. NORTON: Number three gets us back into the likely need for a file search. It may be one thing to identify situations where there's a bid and whether IHB or EJ&E was included or not. But the

documents reflecting a comparison or contrast of either one of them at traffic at that points, it's a very broad request.

And I'm not sure how, in light of the other limitations, it -- how to read it.

And maybe Mr. Healey, you can offer some --

MR. HEALEY: Well, I guess all I can say at this point is given the fact that it is limited to the ability of the two of them to serve these plants, my experience -- and admittedly, my experience is not with clients the size of Conrail.

But my experience with my clients has been information of the type that you would find in three would be found in the same place as the information you would in the type sought in two. That is, in the marketing files relating to the bids for the various shippers, there would be documents, you know, discussing these types of issues.

Something along those lines.

MR. NORTON: Well, I think that highlights the problem because I don't -- to get this kind of

information is going to require file searches of the sort that would not be required I think to answer the -- two as modified because if you can identify the contracts, you can answer that question but you don't review the whole file.

Whereas this does entail file searches. And even if it were limited to the 24 shippers, that still is going to be a significant undertaking.

MR. HEALEY: Well, I do understand it will be significant. The information I seek in two is not going to be of much worth to me unless I get the information in three.

If I find out, as I think the evidence is clearly going to show, that Conrail works exclusively with the IHB at these points, there's nothing that the IHB -- that the applicants and Conrail in particular couldn't come in later and say well that's because of, you know, a variety of reasons unrelated to the ownership.

And where do I go if I don't have the documents from the files that reflect in fact that EJ&E does provide timelier service and the EJ&E does

provide less damage lading, etc.

MR. NORTON: We don't have a chance to go -- to make a third filing. This is rebuttal and we don't have a chance to respond.

MR. HEALEY: Well, but you're still ready to make arguments, counsel, as to what the evidence shows. We're going to put in the evidence that Conrail doesn't work with us. You're going to argue all kinds of things as to why that may be.

JUDGE LEVENTHAL: He can only make argument on things that are in the record, Mr. Healey.

MR. HEALEY: Well, but what the argument could be is EJ&E has put forward no evidence as to why it may be that Conrail refuses to work with them. It's just as likely that, you know, EJ&E's unable to provide service.

This doesn't demonstrate anything for the Board. This doesn't -- and that's an argument they could make. They couldn't make it if I get the documents sought in three.

JUDGE LEVENTHAL: Let's go off the record.

(Whereupon, the foregoing matter went off

the record at 4:12 p.m. and went back on the record at 4:13 p.m.)

JUDGE LEVENTHAL: All right, we're back on the record.

In our off the record discussion, I indicated that a response to request number three would negate the concession made by Mr. Healey with respect to request number two. Mr. Healey disagrees. He says that number three does not relate to the bids which are involved in request number two.

So what are you looking for in number three?

MR. HEALEY: Again, my experience has been working with railroad marketing personnel that in their files they will have materials relating to the various shippers. Or, just for example, I wouldn't know anything about Conrail's marketing department.

But assuming it's set up like most, somewhere in the Conrail marketing department there is a file for XYZ Steel Company in northwest Indiana. And they will have the bid history in there for the various bids that Conrail has made in the facility.

And they will also have in there notations regarding the ability of the EJ and the IHB to become a part of those bid packages, a notation that says something like J transit times way too slow, got to move this by HB, something along those lines.

And that's the type of information we're looking for, something that -- something we can lay our hands on to say ah ha, you know, okay, you guys are right; you don't work with us, but that's because we've fallen down on the job and we've taken an extra day of turn around time.

Or no, in fact, look at this; every document we have says in fact that EJ&E provides better service into these facilities than the IHB. There isn't a single note of criticism anywhere in here. All that's left to conclude is it's the ownership issue that results in our exclusion.

MR. NORTON: Your Honor, if I -- I think Mr. Healey's response sends the suggestion that there was -- I think implicit in your question to him. It is indeed the case that three negates the concession on two because two would only have required -- I

shouldn't say all of it -- two would require at least going to the -- finding out and identifying and producing the contracts.

Three requires that same process plus reviewing not only the contract file, but possibly other files of the marketing people who are likely to have these kind of documents sitting around. So that the search problem is right back now facing us.

MR. HEALEY: So that I am clear, when you said the concession regarding two, I thought you were referring to the concession that we didn't need the confidential information that the bids would contain. And what I was simply responding to was three does a little bit of confidential bid information. It really involves searching.

Now, to the extent Conrail's bids could -- the answer to number two could be done in Conrail bids and they're all computerized, again that may be what a railroad as large as Conrail are able to put this stuff on a computer in a couple of seconds.

I don't know. None of my clients --

JUDGE LEVENTHAL: Wait a minute. In

number three, you're requesting all documents relating to or reflecting a comparison or contrast of any aspect of EJ&E and IHB (including but not limiting to cost and service issues.)

Isn't that the confidential material you're talking about which you waived with respect to number two?

MR. HEALEY: Can I have a minute just to review three?

And your particular reference would be to the issue of --

JUDGE LEVENTHAL: Yes, you're asking for cost and service issues. What else is there? So you're taking back what you gave them with respect to number two.

MR. HEALEY: Why don't we do this. It won't help to narrow the amount of files that have to be searched, but if they were to exclude the comparison of costs, again then you're open to the argument that our costs are greater.

We do have a confidentiality agreement, as we discussed at length. We could designate this

highly confidential.

JUDGE LEVENTHAL: Not what I'm talking about. I'm talking about the concession you made with respect to number two.

MR. HEALEY: The concession that we don't want the actual contents of the bids; we really want a head count?

JUDGE LEVENTHAL: Right. In number three you're asking for the content of the bids and a comparison between the EJ&E and IHB.

MR. HEALEY: Well, I think we're actually not. We're talking about a much more limited scope of documents. I don't think for every bid there's going to be a document comparing the EJ&E and IHB perfectly. Quite frankly, I think Conrail wrote off working with the EJ&E a long time ago.

There's not going to be many documents comparing them all. To the extent that there is a document comparing them, that clearly would be relevant. But not every time that there is a bid, which is what two encompasses, is there going to be a comparison of the EJ&E.

I don't think there's going to be very many documents, quite frankly, responsive to number three at all.

JUDGE LEVENTHAL: Well, we don't know that, do we?

MR. NORTON: That's right.

MR. EDWARDS: We'd have to look through it.

MR. NORTON: That's right. You can't know the answer to that without making the effort.

But you're exactly right, Your Honor; the confidentiality which of course raises up the level of filling the need that's required is right unavoidable for number three.

MR. HEALEY: Let me do --

MR. NORTON: I think I would have a hard time solving an agreement on two without --

MR. HEALEY: Let me do this then. Given the fact that the quotation we're rebutting on page 320 says, "Conrail currently must work to favor EJ&E and movements where EJ&E can provide better service," and the fact that the quote talks about service, if

number two reduce -- or eliminate cost from their document request number three, it's clearly not going to give me everything that I need, but I think it would give me enough at least to make the argument.

JUDGE LEVENTHAL: Mr. Norton.

MR. NORTON: Uh --

JUDGE LEVENTHAL: Let's go off the record.

(Whereupon, the foregoing matter went off the record at 4:20 p.m. and went back on the record at 4:22 p.m.)

JUDGE LEVENTHAL: Back on the record.

I suggested in our off the record discussion that document request number three be limited to the last six months. Mr. Healey agreed to eliminate the cost information leaving just the service issues.

Mr. Norton, I believe, indicated he was willing to take this up with his clients. Is that correct?

MR. NORTON: Yes.

JUDGE LEVENTHAL: All right, so that leaves how do we get the answer.

MR. NORTON: Well, let me see right now whether I can --

JUDGE LEVENTHAL: All right.

MR. NORTON: -- get through.

JUDGE LEVENTHAL: Sure.

All right, we'll stand in recess.

(Whereupon, the foregoing matter went off the record at 4:23 p.m. and went back on the record at 4:44 p.m.)

JUDGE LEVENTHAL: Back on the record.

MR. NORTON: Your Honor, I was not able -- I was able to talk to someone. I was not able to get an answer because the people I could talk to don't have the information needed to discuss the impact of the proposed limitations and that's going to have to wait until tomorrow.

But there is an issue that I alluded to earlier and I want to come back to because it bears on the acceptability of the limitations. As I mentioned, in running down the names of the 24 shippers provided to us as a representation that they are shippers that Conrail serves or IHB or that can be served by using

either one of them, that those names did not relate to any shipper that Conrail could readily identify.

And we -- I think it's important then to have some kind of a representation or confirmation that those names do involve real shippers who would be -- and those are the right names under which they do business or that, if we have a contract with them, that we would know them by so that we can identify whether they're someone that we serve or not.

And that such -- that there's reason to believe that there may have been bids during the period that the request has alluded to. Otherwise, it's -- it could be a lot of work on what is ultimately a wild goose chase.

MR. HEALEY: Judge, in discussing the names that are on the list, we provided in discovery, pursuant to an applicant discovery request, names of the shippers that we believe could be jointly served by EJ&E and IHB.

I don't think the request was dictated towards and I know the response was not -- does not indicate that in fact those shippers were currently

using both EJ&E and IHB, whether they were shipping by rail at all.

I don't -- I'm just not sure that that was a part of the criteria. I think all we asked our client for is what plants, what facilities are out there that could be served by the EJ&E and could be served by IHB.

So there may be a variety of those out there that Conrail doesn't move any traffic into at all. That's possible. And if it is, then there's no bids to talk about.

MR. NORTON: Well, without an admission those are, we're sending people on a wild goose chase.

JUDGE LEVENTHAL: Didn't he give you the names of the shippers?

MR. NORTON: Yes.

JUDGE LEVENTHAL: And your problem is you don't think the names are the exact names?

MR. NORTON: No, no. We were getting -- we were drawing some blanks. The people who would know said we don't know of anyone that Conrail serves by that name, so we didn't know whether the names they

gave us -- we had assumed from the prior discussion, and maybe this was a misapprehension, that these were all shippers who Conrail served and who also could be served by EJ&E or IHB.

And that may have been a misunderstanding on the information.

JUDGE LEVENTHAL: Well, if you've got names and actually you don't serve them, that's your answer, isn't it?

MR. NORTON: Well, if we have to go running down possible, you know, contracts with companies that would have any reason -- any assurance that Conrail is serving them, it seems at a minimum that there ought to be some threshold representation that they think Conrail serves a shipper.

Otherwise, you know, it would be picking names off of a directory or something.

JUDGE LEVENTHAL: I don't think that's what they did.

MR. HEALEY: No, Judge, I've got the discovery in front of me here. It was in document EJE-15 supplemental responses to CSX and NS's fourth

set of interrogatories. Interrogatory number 4(a) asked us to identify the "certain shipper referred to in the first paragraph on page ten of the responsive application who" -- "losing their existing alternative routings of ISD and EJ&E origination/termination and being reduced to working exclusively with the IHB."

I take from the request that my interpretation of that is name for us all of the shippers that are jointly served by EJ&E and IHB. I think that's what we did.

Now to the extent that some of these shippers may not be served by Conrail, I wouldn't know that. I'm willing to talk to my client and find out because I think my client could probably walk through the list.

JUDGE LEVENTHAL: Why don't we do this in the recess between tonight -- today and tomorrow morning, all right, and you'll have an answer to the other problem with respect to document request two and three tomorrow morning.

MR. NORTON: Well, they've had some -- they're tied together because this is a special aspect

of two.

JUDGE LEVENTHAL: Well, you can --

MR. HEALEY: What I can do -- and I do have the home phone number actually of the gentleman who would know this. I will call him tonight and walk him through the list and identify from him the shippers that he understands within the past year, because that's what our period has been, to have received service through either EJ&E and IHB and Conrail.

And then we can identify for those and give Mr. Norton a list of the ones we believe Conrail operates or serves.

JUDGE LEVENTHAL: All right.

MR. NORTON: That would be helpful.

MR. HEALEY: And I'd be willing to do that tonight.

JUDGE LEVENTHAL: All right.

MR. NORTON: Now as far as the model is concerned -- are we off the record?

JUDGE LEVENTHAL: We're on the record.

Why don't we meet at 8:30.

Reporter, --

MR. NORTON: I don't know -- I won't be able to talk to the people I need to talk to until mid morning, 10:00, 10:30.

MR. HEALEY: I've got this deposition starting at 9:00. If I get into a roll at 9:30 -- last time, as I said, it went quickly. I can do my best to be here by 12:00.

JUDGE LEVENTHAL: All right.

MR. NORTON: I think I can.

MR. HEALEY: In the meantime -- well, understand this is a CSX witness for the second time in a row that will be remaining -- seeming like a buzz saw. So, you know, if I'm going to get back here by 12:00 --

JUDGE LEVENTHAL: Right, we're on the record. We don't need this on the record.

Off the record.

(Whereupon, the foregoing matter went off the record at 4:51 p.m. and went back on the record at 4:52 p.m.)

JUDGE LEVENTHAL: In our off the record

discussion, Mr. Healey undertook to let Mr. Norton know the names of the shippers that are involved with document request number two and three. They also agreed to meet tomorrow morning at 12:00.

All right, now you had a couple more issues?

MR. HEALEY: A couple more issues. One, first of all, I wanted to make sure Mr. Harker was around. I wasn't accusing him of being a liar. That was something we talked about earlier. We did have discovery responses which seemed inconsistent with the applicant's filing.

In light of the resolution of the issues resolved today, the Coalition is going to withdraw its request for verifications of the discovery responses. We would, however, like to get some understanding, at least to the extent counsel's able, when we're going to get this information understanding that, you know, the majority of the objections -- the majority of the requests cited today, we're entitled to at least something.

Had we been given the information, we

would have had it six days ago. And my rebuttal filing is now due next Wednesday. Getting this stuff Wednesday at 5:00 is not going to be of great assistance.

JUDGE LEVENTHAL: All right. I think Mr. Harker is the one that's involved with this.

MR. HARKER: Let me suggest that we will get you the lion's share of the information, both with respect to the interrogatories and the documents, tomorrow.

MR. HEALEY: That's perfectly acceptable.

MR. HARKER: And it may be FedEx'd to your office for Saturday delivery -- I don't necessarily mean here in Washington -- with, as I say, the lion's share. There may be a few other things that will come in which we will get to you at the beginning of the week.

MR. HEALEY: That's perfectly acceptable. I'm not going to be into until Saturday anyway.

JUDGE LEVENTHAL: All right, all right.

MR. NORTON: Your Honor, there is a question about however the document requests get

resolved when we're responding to that because obviously it's a function of the scope of the request. I'm not sure that -- it may be something that the Board needs to think about.

If he needs whatever response he's going to get by Wednesday, then I won't have time for as extensive a search as might be possible if there was more time on this.

MR. HEALEY: Well, the problem with time is not one we've created. I mean, the fact that the schedule went out just a month before rebuttal is that the applicant's urging that they wanted to get this done as quickly as possible.

The fact that I didn't get the information last Friday particularly as to the Conrail question where complete objections were raised and the guidelines instruct that, you know, contact should be made after five days to try to resolve it and no such contact was made.

Ten days were wasted sitting in a complete objection.

JUDGE LEVENTHAL: Why don't we wait and

see what the agreement is tomorrow morning and then we'll treat the question of when you have to produce it. Obviously you have to produce it as fast as you can.

MR. NORTON: Yes, I understand that.

JUDGE LEVENTHAL: And we'll determine that tomorrow morning.

MR. NORTON: Okay.

JUDGE LEVENTHAL: All right, then we stand in recess until 12:00 tomorrow.

(Whereupon, the proceedings were adjourned at 4:56 p.m., to be reconvened at 12:00 p.m., Friday, January 9, 1998.)