

INTERSTATE COMMERCE COMMISSION 04/18/96

FINANCE DOCKET # 32760 2889-2948 1+

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

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DISCOVERY CONFERENCE

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IN THE MATTER OF: :

UNION PACIFIC CORPORATION, :
UNION PACIFIC RAILROAD COMPANY, :
and MISSOURI PACIFIC RAILROAD : Finance Docket
COMPANY : No. 32760
:

- CONTROL AND MERGER -
:

SOUTHERN PACIFIC RAIL CORPORATION, :
SOUTHERN PACIFIC TRANSPORTATION :
COMPANY, ST. LOUIS, SOUTHWESTERN :
RAILWAY COMPANY, SPCSL CORP., :
AND THE DENVER AND RIO GRANDE :
WESTERN RAILROAD COMPANY. :
-----X

Thursday, April 18, 1996

Federal Energy Regulatory
Commission
Hearing Room 4
Second Floor
888 First Street, N.E.
Washington, D.C.

The above-entitled matter came on for
hearing pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JEROME NELSON
Administrative Law Judge

NEAL R. GROCS

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

(9:35 a.m.)

JUDGE NELSON: All right. Let's make a record of who's here. Mr. Livingston.

MR. LIVINGSTON: For the applicants, Union Pacific, Bill Livingston. Gerald Norton is here for Southern Pacific.

MR. MULLINS: For Kansas City Southern Railway Company, William Mullins.

MR. WOOD: Good morning, Your Honor, Frederick Wood for the National Industrial Transportation Link.

MR. McBRIDE: Good morning, Your Honor. Michael McBride for the Western Shippers Coalition.

MR. STEEL: Good morning, Your Honor. Adrian Steel for Burlington Northern and Santa Fe.

JUDGE NELSON: Very well. I have Mr. Norton's letter of April 16. That's the operative letter. It's my understanding that all that's at issue now are the following things: The materials under the heading failure to respond; the materials under the heading information about railroad offers to

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1 fund other parties; the materials headed
2 confidentiality of KCS letter to NITL; and the matter
3 of the WSC demand for compensation.

4 MR. NORTON: That is -- That was -- We
5 thought that was the case last night. There's an
6 additional wrinkle about the communications with
7 government officials which we have to raise, about the
8 completeness of the proper documents.

9 JUDGE NELSON: I thought we were through
10 with that.

11 MR. NORTON: Well, I thought we were, too,
12 Your Honor. The parties had represented that they had
13 produced all of their presentations and materials
14 provided to Justice, but we have reason to believe
15 that there may have been one that was not produced.

16 JUDGE NELSON: Off the record.

17 (WHEREUPON, the proceeding was off the
18 record briefly.)

19 MR. NORTON: Your Honor, we have some
20 reason to believe that KCS had -- In addition to the
21 documents that they have produced to us now, they had
22 a document that was a study or analysis or report on

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1 collusion in the railroad industry which they made
2 available to the Department of Justice at some point
3 earlier this year in connection with this merger
4 proceeding.

5 That was not -- We've reviewed what has
6 been produced, and that was not produced, and that is
7 an incompleteness that we're trying to confirm, that
8 there is such a document. If it wasn't produced, why
9 not, so we can determine whether it should have been.

10 We just were discussing this with Mr.
11 Mullins this morning, and I think we can maybe take it
12 from there to get some confirmation of whether this is
13 a document that exists and, if it --

14 JUDGE NELSON: Well, why don't we first
15 start with the question of whether KCS is prepared or
16 not. I had a letter here from Mr. Lubel, I believe it
17 is, explaining that you all were spread very thin and
18 setting forth some positions, but asking, in the first
19 instance, for a postponement of matters involving KCS;
20 but here you are. So does that mean that you're now
21 prepared to deal with these or do you still -- are you
22 still seeking a continuance?

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1 MR. MULLINS: Your Honor, in the best of
2 all worlds, we would ask for a continuance. We're
3 prepared to come back tomorrow or Monday morning. We
4 have three depositions going on right now. The
5 applicants are aware of that. It's their depositions,
6 and they've called our witnesses.

7 I have offered to Mr. Norton last night
8 that we'll be here first thing anytime you're
9 available. We'll be here, ready to go, and Mr. Norton
10 said, no, I'm coming up tomorrow. So I didn't want
11 him to be here and not have --

12 JUDGE NELSON: Well, let's see. As far as
13 KCS is concerned, let's see what we have outstanding.
14 We have this matter of the DOJ report.

15 MR. MULLINS: Which I object to him
16 bringing up in today's conference. That's the first
17 time I've ever heard that he had a dispute over the
18 issue was right now, five minutes ago.

19 JUDGE NELSON: Now what else do we have as
20 to KCS? This document that's confidential?

21 MR. MULLINS: That's correct.

22 JUDGE NELSON: That's the one from your

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1 CEO or whoever it is there, your President, to the
2 NITL.

3 MR. MULLINS: That's correct, Your Honor.

4 JUDGE NELSON: And then what else do we
5 have? The matter of your knowledge of finances?

6 MR. MULLINS: Well, it's broader than
7 that. According to their letter, it's our failure to
8 respond and what they -- What they consider failure to
9 respond to interrogatory number 1 in the fifth set.

10 JUDGE NELSON: I didn't see that here.
11 There's a reference to the seventh set.

12 MR. NORTON: I believe it's the fifth set.

13 MR. MULLINS: It's the fifth set, I
14 believe, Your Honor.

15 JUDGE NELSON: Page 2 of Mr. Norton's
16 letter -- See, Mr. Norton, on page 2 just above the
17 heading "Shipper Support Deals," there's a reference
18 to a nonresponse to the seventh set.

19 MR. NORTON: Oh, that -- Yes, that we did
20 receive subsequent.

21 JUDGE NELSON: Oh, that's in now?

22 MR. NORTON: Yes.

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1 JUDGE NELSON: Where's this matter of the
2 other set? I don't see that.

3 MR. NORTON: That's further down on the
4 page with the information about railroad offers to
5 fund other parties.

6 JUDGE NELSON: Yes, I saw that.

7 MR. NORTON: Right.

8 JUDGE NELSON: Is there something --

9 MR. NORTON: That's what he's talking
10 about.

11 JUDGE NELSON: Oh, that is what we're
12 talking about. Oh, I see. Yes, yes, fifth set. I
13 see.

14 There is this matter of your knowledge of
15 any railroad's offer to put up money to help finance
16 opposition to the merger, and your opposition to that
17 production on that.

18 MR. MULLINS: Well, we believe it's also
19 a broader question than that, and as the attachment to
20 Mr. Norton's letter indicates, he's asking -- seems to
21 be asking more than just our knowledge. He seems to
22 be asking for all kinds of documents related to

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1 shipper support statements.

2 JUDGE NELSON: I don't have that
3 attachment.

4 MR. NORTON: Your Honor, that's in the --
5 You should have received this.

6 JUDGE NELSON: Oh, I have this book.

7 MR. NORTON: Tab 4.

8 JUDGE NELSON: So that goes with Tab 4.
9 I see. This is the KCS response. I still don't see
10 where this attachment is.

11 MR. NORTON: Oh, that was attached to the
12 letter.

13 JUDGE NELSON: Yes. I don't have it.

14 MR. MULLINS: Could I approach the bench?

15 JUDGE NELSON: Sure. I just have a letter
16 dated April 16 from Mr. Norton to me which runs five
17 pages. I don't have an attachment.

18 MR. NORTON: That's the same as the letter
19 with the attachments, Your Honor. Oh, I have not
20 looked at these papers. All right. So whatever it
21 is, it's the -- We'll call it the fifth set which
22 involves the question of money and whatever else it

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1 involves, and what else do we have?

2 MR. NORTON: With KCS, that's it.

3 JUDGE NELSON: So it's three issues, the
4 Department of Justice matter, whether the document is
5 confidential or not, and the fifth set.

6 MR. NORTON: And we -- We told Mr. Mullins
7 we'd be prepared to deal with KCS issues first so that
8 he could get back to --

9 JUDGE NELSON: Why can't we put this over
10 to Monday, let's say? Today is Thursday. What's so
11 critical here?

12 MR. NORTON: Your Honor, every --

13 JUDGE NELSON: First of all, with regard
14 to the document, you have it. It's just a question of
15 what label is on it.

16 MR. NORTON: We are in the position, Your
17 Honor --

18 JUDGE NELSON: The memo from Haverty to
19 Emmett, you have.

20 MR. NORTON: But let me take a step back,
21 Your Honor. We're in the context where every day is
22 crucial. We have to get stuff to the printer,

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1 starting next week. Hours are crucial, and putting
2 things off even a day or two days hurts.

3 JUDGE NELSON: What's your next obligation
4 here?

5 MR. NORTON: It's a filing date.

6 JUDGE NELSON: April 29.

7 MR. NORTON: Right, but we have to get
8 stuff to the printer by the end of next week. In
9 addition, this hearing was scheduled at a time when
10 those depositions were also scheduled, plus some
11 additional ones. Now KCS has nine lawyers listed on
12 the cover of their papers. They've got two big firms
13 involved. I don't see a problem.

14 Mr. Mullins, I understand, was at a
15 deposition along with Mr. Lubel. There shouldn't be
16 any problem with them sparing some amount of time to
17 deal with these questions, which were properly noticed
18 at a hearing which was scheduled a week ago.

19 MR. MULLINS: Your Honor, the last time
20 you held a hearing, you said it was going to -- this
21 hearing was for the purpose of the DOJ-DOT
22 presentations --

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1 JUDGE NELSON: I did say that.

2 MR. MULLINS: -- which we have had
3 produced to them.

4 JUDGE NELSON: Well, subject to one
5 dispute.

6 MR. MULLINS: Well, which he brings up
7 this morning five minutes or 10 minutes ago.

8 JUDGE NELSON: So I suppose we could look
9 at that question on the ground that, under any view,
10 that's what we should have been ready to deal with.

11 MR. NORTON: Well, Your Honor, given the
12 history of these proceedings, it was reasonable to
13 anticipate that other disputes we might have with KCS
14 would be put on the agenda today.

15 JUDGE NELSON: If I put this over to
16 Friday or Monday, are you prepared to have whatever
17 responsive documents there may be in this hearing
18 room, ready to go, if necessary, so that I can look at
19 them?

20 MR. MULLINS: If that's what you would
21 request, Your Honor, be prepared.

22 JUDGE NELSON: Yes, so as to take care of

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1 this matter of delay.

2 MR. MULLINS: Sure.

3 JUDGE NELSON: If there's a production,
4 there would be a turnover, and you always have the
5 right to seek an interlocutory appeal, but we're
6 running close on time, and I'd want to feel that if we
7 did it Friday or Monday and I order production, then
8 the documents will go over. Maybe I'd give you an
9 hour to go seek a stay or something.

10 So I would expect that if we postpone
11 these three items, all responsive documents will be in
12 here, available to be looked at by me in camera, if
13 that's necessary, or indeed to be ready to be
14 photocopied and turned over. That is the alleged
15 missing document from Justice, the thing that's called
16 confidential, and whatever you have ready on that
17 fifth set.

18 MR. MULLINS: Well, I don't believe there
19 would be -- I'm unsure as to -- I'm prepared to bring
20 whatever responsive documents which relate to the DOJ
21 or DOT issue

22 JUDGE NELSON: Yes?

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1 MR. MULLINS: I'm prepared to discuss the
2 NIT League letter, because they already have it, and
3 we have it right here. You know, everyone has it
4 right here.

5 JUDGE NELSON: Yes.

6 MR. MULLINS: And I don't believe there
7 would be any documents responsive to interrogatory
8 number 1.

9 JUDGE NELSON: It's not a document
10 request. It's an interrogatory set.

11 MR. LIVINGSTON: I hope we could have the
12 answer to the interrogatory on hand, ready to be
13 produced.

14 JUDGE NELSON: Why don't you do that? Get
15 an answer ready that you don't have to turn over
16 unless I order you to turn it over, in case I want to
17 look at it.

18 MR. LIVINGSTON: If we could come in and
19 do this tomorrow, Your Honor --

20 JUDGE NELSON: Well, I'm available. The
21 only problem I have with tomorrow -- Let's go off the
22 record for a moment.

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1 (WHEREUPON, the proceeding was off the
2 record briefly at 9:48 a.m.)

3 JUDGE NELSON: We discussed our procedures
4 and have agreed that we will attempt to resolve this
5 confidentiality issue today, that is, the
6 confidentiality of the document from Mr. Haverty to
7 Mr. Emmett, and put off the other KCS issues until
8 9:00 a.m. tomorrow in order to enable Mr. Lubel, I
9 guess it is --

10 MR. MULLINS: It will either be Mr. Lubel
11 or myself.

12 JUDGE NELSON: -- to come in here prepared
13 to deal with those questions.

14 MR. MULLINS: That's correct.

15 JUDGE NELSON: All right. We now are back
16 on the record, and we're going to now, I guess, first
17 thing is address this matter of the confidentiality.

18 MR. LIVINGSTON: Right. Your Honor,
19 perhaps the way to approach that, if you have the book
20 of documents --

21 JUDGE NELSON: I have your submission
22 here.

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1 MR. LIVINGSTON: If you turn to Tab 6.

2 JUDGE NELSON: Yes, sir. Tell me, what is
3 the significance of whether something is labeled
4 confidential or whether it isn't. What turns on that?
5 I remember we have Highly Confidential that only
6 counsel can see and consultants, I believe.

7 MR. LIVINGSTON: The main distinction is
8 that -- and there are others, but the main one is that
9 a confidential document can't be quoted in public
10 brief, can't be disclosed in a public filing. So if
11 it's referred to in a filing, the filing would have to
12 be submitted in camera or under seal.

13 JUDGE NELSON: How did the parties -- How
14 did they handle this problem in the recent filings?

15 MR. MULLINS: Your Honor, we had to submit
16 two versions and serve it on 300 people, each version.
17 We had to submit a public version and a Highly
18 Confidential/Confidential version and submit that on
19 300 people. They're going to do the same. They have
20 -- They will be submitting two versions as well.
21 That's the way it works.

22 MR. LIVINGSTON: And that's typical, the

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1 way things are done. This particular document, Your
2 Honor -- Maybe the easiest way to move through this is
3 let me just show you the document.

4 JUDGE NELSON: I'm looking at it. It's
5 dated March 19th of '96?

6 MR. LIVINGSTON: In fact, we got this in
7 discovery from NIT League, and that's why Mr. Wood is
8 here. Technically, it's a discovery dispute not with
9 KCS but with NIT League, because they are the ones
10 that produced the document.

11 JUDGE NELSON: Yes.

12 MR. LIVINGSTON: They are the recipient of
13 the document. There are -- It's a two-page document.
14 Attached to it are two pages as to which there is, I
15 don't think, any dispute that those are public
16 documents. So, really, the only dispute is the two-
17 page Haverty memorandum.

18 JUDGE NELSON: Why don't we have the
19 record show that ConRail's counsel -- Is that Mr.
20 Killory?

21 MR. KILLORY: Yes, Your Honor.

22 JUDGE NELSON: -- is now in the room.

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1 MR. LIVINGSTON: Oh, excuse me. KCS also
2 produced this document. I don't want -- I didn't mean
3 to mislead the court on that.

4 JUDGE NELSON: Well, let me read it for a
5 second.

6 MR. LIVINGSTON: It's just those first two
7 pages where the dispute lies.

8 JUDGE NELSON: So the fight is not over
9 who can see it, but over whether it has to be --
10 whether it can be quoted in a public brief or not?

11 MR. LIVINGSTON: Correct, or referred to
12 publicly.

13 JUDGE NELSON: Yes. Otherwise, they can
14 file a Secret brief?

15 MR. LIVINGSTON: That's right.

16 JUDGE NELSON: Labeled what?

17 MR. MULLINS: No, it's not a Secret brief.
18 Everybody files two versions of their brief. One is
19 a Highly Confidential/Confidential version, and the
20 other is the public version. Everybody does that.
21 They want to be able to put this in the public version
22 and not have to redact it.

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1 MR. LIVINGSTON: That's correct, Your
2 Honor.

3 JUDGE NELSON: Let me read it here.
4 (Perusing the document) Is it so secret that we can't
5 discuss what's in the letter?

6 MR. LIVINGSTON: No. Among counsel,
7 that's fine.

8 MR. MULLINS: Your Honor, we classified it
9 Confidential, not Highly Confidential. Certainly --

10 JUDGE NELSON: So this is Mr. Haverty
11 writing to the NIT League.

12 MR. LIVINGSTON: He's the President of the
13 railroad.

14 JUDGE NELSON: KCS's President. He's
15 attaching a copy of a letter from the Louisiana
16 Governor to the Chairman of the Board. I assume that
17 letter is public.

18 MR. LIVINGSTON: That's a public document.

19 JUDGE NELSON: He can't write her in
20 secret about this case.

21 MR. LIVINGSTON: I don't think so.

22 JUDGE NELSON: Then there's a statement

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1 about some former Governor, and it says that the -- I
2 take it, Governor Foster is opposing the transaction.

3 MR. MULLINS: That's correct.

4 JUDGE NELSON: That's the point of this.

5 MR. MULLINS: That's correct, Your Honor.

6 JUDGE NELSON: And the author says that's
7 significant. So far, is there anything sensitive?

8 MR. MULLINS: No, Your Honor.

9 JUDGE NELSON: Okay. So we can certainly
10 declassify the first paragraph.

11 MR. MULLINS: That's correct.

12 JUDGE NELSON: Second paragraph: A letter
13 he wrote -- Who is Commissioner Charles Matthews?

14 MR. MULLINS: He's with the Texas Railroad
15 Commission.

16 JUDGE NELSON: Okay. So Haverty wrote to
17 Matthews endorsing some proposal of Matthews' that
18 seems to have to do with not this merger, some other
19 thing, or is that merger related?

20 MR. MULLINS: Merger related.

21 JUDGE NELSON: You can't tell from the
22 language.

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1 MR. MULLINS: What was going on is the
2 Texas Railroad Commission was trying to -- was
3 deliberating as to what their position was, and
4 Commissioner Matthews apparently asked Mr. Haverty
5 what he thought of this proposal. This was all done
6 confidentially, not on the public record. This was
7 not -- This was all a deliberative process. The Texas
8 Railroad Commission is a party to this proceeding.

9 JUDGE NELSON: Are they in the case?

10 MR. MULLINS: They are in the case.

11 JUDGE NELSON: And what position have they
12 taken?

13 MR. MULLINS: They've taken on opposition.

14 MR. McBRIDE: Mr. Streeter was here last
15 week.

16 JUDGE NELSON: Yes. I recall Mr.
17 Streeter. Yes. Absolutely. So the point is that
18 some of this opposition may have been aided or
19 corroborated or generated by a letter from Mr. Haverty
20 to Commissioner Matthews?

21 MR. MULLINS: That's correct.

22 JUDGE NELSON: So what?

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1 MR. MULLINS: And they are free to make
2 that point in their filing. The issue is they want to
3 be able to make some press release out of it and say
4 that Mr. Haverty was having secret conversations with
5 Commissioner --

6 JUDGE NELSON: Is that against the rules
7 in Texas?

8 MR. MULLINS: You'll have to ask --

9 JUDGE NELSON: I don't know.

10 MR. MULLINS: I don't know either. I
11 believe, from just conversations I've had with Mr.
12 Streeter, that their deliberative process is -- This
13 was a deliberative process among the Commissioners,
14 and that is not a public process.

15 JUDGE NELSON: All right. How about this
16 third paragraph? Is this confidential, too?

17 MR. MULLINS: Yes, sir, Your Honor.
18 That's referring exactly to the same --

19 JUDGE NELSON: Let me keep reading it.
20 Where is the significance of Matthews? Is he more
21 than simply another Commissioner?

22 MR. MULLINS: There's three Commissioners.

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1 JUDGE NELSON: Three? So he's a third of
2 the vote?

3 MR. MULLINS: That's correct. They could
4 make whatever point they want to make to the STB right
5 now. They've got the document. They can file. They
6 can make whatever point. We don't understand why they
7 -- other than they just probably want to make some
8 press release out of it -- why they want it
9 declassified.

10 MR. WOOD: I'd like to, if I may, Your
11 Honor --

12 JUDGE NELSON: I haven't finished reading
13 yet.

14 MR. WOOD: Certainly.

15 JUDGE NELSON: So he says that he thinks
16 Matthews would like to hear from others that have
17 reservations about it, and he says that Matthews knows
18 that some customers are reluctant to write. He'd like
19 to hear from them, and here's a phone number.

20 So suppose Haverty is drumming up
21 opposition to the merger, and it's partly motivated by
22 Mr. Matthews' own reservations about it. So what's

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1 so important about all this? Why couldn't that be
2 public?

3 One man is the President of the railroad,
4 and the other is a Commissioner of a state.

5 MR. MULLINS: The reason why it shouldn't
6 be public is that this letter was written in
7 confidence between Commissioner Matthews, who phoned -
8 - apparently phoned Mr. Haverty in confidence and
9 said, Mr. Haverty, what do you think of this idea.

10 Commissioner Matthews had an expectation
11 of privacy that this would be done. Now if -- I
12 suggest that if this type of document is public that
13 they should be required to turn over all of their
14 documents, conversations, notes that they had with
15 Commissioner Matthews in --

16 JUDGE NELSON: As far as Commissioner
17 Matthews' assertions of privacy, his counsel isn't
18 here. Does Mr. Streeter know of this issue?

19 MR. MULLINS: I don't believe he does. I
20 don't think they've noticed Mr. Streeter that this is
21 an issue.

22 MR. NORTON: I think he's on the

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1 restricted service list. So he would get notice with
2 everyone else.

3 MR. MULLINS: They made this a dispute
4 between KCS and applicants, not the Texas Railroad
5 Commission.

6 JUDGE NELSON: But what I'm thinking is
7 that I don't see any reason why this has to be
8 resolved today as opposed to tomorrow. If we could
9 get Mr. Streeter in here, I'd like to hear his views
10 and see what we might do.

11 Mr. Wood, what are your problems with
12 this?

13 MR. WOOD: Well, Your Honor --

14 JUDGE NELSON: It's really your record
15 here, isn't it?

16 MR. WOOD: Well, both KCS and the NIT
17 League produced this document in response to discovery
18 requests. We both classified it as Confidential,
19 because it was our understanding --

20 JUDGE NELSON: There's no privilege that
21 would attach to it.

22 MR. WOOD: There's no privilege. We did

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1 review it, and carefully reviewed it, to see if there
2 was any reason to claim privilege under the common
3 interest privilege, and concluded that it was not.
4 Nonetheless, it was apparent that in the context there
5 was an expectation of confidentiality.

6 It was a private communication between Mr.
7 Haverty and Mr. Emmett, and certainly, it --

8 JUDGE NELSON: Does Mr. Emmett care?

9 MR. WOOD: Mr. Emmett is guided by his
10 understanding of the nature of the communication that
11 he received.

12 JUDGE NELSON: Don't know what that means?

13 MR. WOOD: Well, that Mr. Haverty conveyed
14 it to him in private.

15 MR. McPRIDE: Your Honor, may I just point
16 out that I don't see Mr. Streeter's name on the
17 restricted service list.

18 MR. LIVINGSTON: May I be heard on this?

19 JUDGE NELSON: This designation of
20 confidential -- Those labels are the creature of the
21 discovery guidelines or of the original Commission
22 order?

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1 MR. MULLINS: The original protective
2 order issued by the Commission.

3 JUDGE NELSON: Let me see if I have it.

4 MR. MULLINS: There's three standards:
5 Highly Confidential, which is outside counsel --

6 JUDGE NELSON: Let me find it first.
7 Which order is this?

8 MR. MULLINS: This would have been a long
9 time ago. It's probably decision Number 3, I believe.

10 MR. WOOD: I have a copy, Your Honor.
11 It's decision Number 2 which was served December 1.

12 JUDGE NELSON: I know, I always start with
13 Number 4, which is when I'm first named. So I never
14 have anything before then. I ought to cure that
15 defect. May I look at it?

16 MR. WOOD: Certainly, Your Honor. This is
17 decision Number 2.

18 JUDGE NELSON: Maybe in the interest of
19 completeness, when the applicants get a moment, they
20 could get me a copy of decision --

21 MR. WOOD: You may keep that one, Your
22 Honor. That's an extra.

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1 JUDGE NELSON: -- one and three. My
2 records start with 4, and I now have an extra of 2,
3 but I don't have 1 and 3, understandably. They didn't
4 send me orders until I was designated.

5 Now where in here will I find a
6 description of the significance of these labels?

7 MR. WOOD: The first place is at Appendix
8 A, Your Honor, which is the terms of the protective
9 order, paragraph 4, which says: "To the extent the
10 materials reflecting in terms of contracts, shipper
11 specific traffic data, other traffic data..." --

12 JUDGE NELSON: Well, that's not this.

13 MR. WOOD: -- "...or other confidential or
14 proprietary information

15 JUDGE NELSON: So it's not defined, +
16 term confidential.

17 MR. WOOD: That's correct.

18 MR. LIVINGSTON: Well, there's a
19 suggestion in there, Your Honor, that the information
20 is to be of a proprietary kind. What's missing in
21 this memo and what's missing in their argument --
22 there's nothing in here about traffic or contracts or

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1 proprietary information. There's no information in
2 here that anybody could take commercial advantage of.

3 You make this document public. It's not
4 going to result in a commercial disadvantage --

5 JUDGE NELSON: I understand.

6 MR. LIVINGSTON: -- from anyone. The
7 document has been produced. There are no questions
8 here of privilege or relevance. It's been produced.
9 What they want to do, and they say it in their letter,
10 is they think the document embarrasses them, and they
11 want to conceal that embarrassment. That's not a
12 ground for holding it confidential.

13 JUDGE NELSON: Let's say -- I think I
14 would like to hear from Mr. Streeter on this. It's
15 his man, Matthews, that's intimately involved, and
16 hear what these privacy concerns are and so forth.
17 You may also want to double check with Mr. Emmett, his
18 views about this. Does he care if this is released?

19 MR. WOOD; I will check with him, Your
20 Honor.

21 JUDGE NELSON: And what confidentiality
22 considerations does he have here with regard to this

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1 document? So let's put this off until tomorrow and
2 see if we can't reach Mr. Streeter.

3 MR. MULLINS: That's fine, Your Honor.

4 JUDGE NELSON: What if we took a break for
5 a moment and called his office now to be sure he's
6 available tomorrow? Would you be able to do that?

7 MR. MULLINS: That's fine, if somebody has
8 his phone number. I'll call my office.

9 JUDGE NELSON: Let's just take a recess
10 right here in place.

11 (WHEREUPON, the proceeding recessed
12 briefly at 10:03 a.m. and resumed at 10:14 a.m.)

13 JUDGE NELSON: On the record. Mr. McBride
14 was in my office, without objection of the parties, to
15 get a copy, my copy of his filing so that he can be
16 prepared. Now what happened with regard to Mr.
17 Streeter.

18 MR. MULLINS: Mr. Streeter is out of town
19 today. I did speak with his secretary. His secretary
20 explained that Mr. Streeter would be back this
21 evening, and his calendar was available for tomorrow
22 morning, and the secretary assured me that Mr.

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1 Streeter could make it at nine o'clock tomorrow
2 morning.

3 JUDGE NELSON: Well, let's proceed on that
4 assumption. So he has notice now through the
5 secretary. Did you tell her what the issue is and so
6 forth?

7 MR. MULLINS: Yes, I did, and I explained
8 it all and asked Mr. Streeter to call me, and I will
9 explain to Mr. Streeter. I expect a call from him
10 sometime late this afternoon.

11 JUDGE NELSON: Very well. So let's
12 postpone this matter of this confidential -- alleged
13 confidential memorandum until tomorrow. So that, in
14 effect, puts all the KCS matters off until tomorrow.

15 MR. MULLINS: Thank you, Your Honor.

16 JUDGE NELSON: So what's next?

17 MR. LIVINGSTON: Two remaining items: One
18 is Proctor & Gamble, and Mr. Norton will address that.
19 This is on the first page of our letter.

20 JUDGE NELSON: This is this matter,
21 whether they have the status of a party or not?

22 MR. NORTON: Well, that may be giving

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1 their position more credit than it deserves. Proctor
2 & Gamble was one of, I think, about 10 large companies
3 that were served with that same discovery request.
4 They had filed verified statements opposing or seeking
5 divestiture, various positions taken with respect to
6 the merger.

7 They are the only one who has in no way
8 responded. Everyone else has either answered or been
9 in touch with us about working out answers. Asarco,
10 we resolved yesterday their position. Proctor &
11 Gamble has made no communication, filed nothing. We
12 have called a couple of times this week, left
13 messages. No one has called back. So that's where we
14 stand. They have not responded.

15 JUDGE NELSON: What have they done in the
16 case?

17 MR. NORTON: They filed a verified
18 statement saying that they were a big company; they
19 have \$33 billion in sales, that they make a lot of
20 rail shipments. They're going to be affected in
21 several different parts of the country. They have
22 concerns about the Mexican business, and they are

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1 favoring divestiture of part of the SP lines if the
2 merger is approved, and they oppose the merger.

3 So it is not substantial in volume, but it
4 is a significant shipper, and it is taking positions
5 that are very substantial.

6 JUDGE NELSON: Was this one of the April
7 29 -- March 29 filing?

8 MR. NORTON: Yes, it was, although I think
9 it may have been a little earlier, but it was filings
10 in connection with that deadline.

11 JUDGE NELSON: Now what is this matter of
12 some interested party or a party?

13 MR. NORTON: Well, that was --

14 JUDGE NELSON: Where does that come from?

15 MR. NORTON: That was an argument. They
16 didn't make that argument. Another party, Phillips
17 Petroleum, did, and we addressed it, thinking that
18 might be the position that the others are going to
19 take as well.

20 JUDGE NELSON: Where does it come from?

21 MR. NORTON: The Commission's docket is
22 maintained with two groups of people. One is parties

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1 of record, and the other is called interested parties.
2 The parties of record get -- They automatically get
3 copies of various things that are issued by the
4 Commission.

5 JUDGE NELSON: Those are all the people I
6 know in this case, and others.

7 MR. NORTON: Right. The interested party
8 is a different status of party, and they don't get
9 everything automatically. They may get Commission
10 orders, but they're not -- and they don't have to be
11 served. So it's --

12 JUDGE NELSON: Who puts you in one or the
13 other category?

14 MR. NORTON: You put yourself there.

15 JUDGE NELSON: Ah. And do you know what
16 category Proctor & Gamble is in?

17 MR. NORTON: My understanding is that they
18 may or may not have initially categorized themselves,
19 but then they came in and they became a party by
20 filing -- Whatever their status was before, they
21 became a party by filing their verified statement
22 opposing the merger.

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1 So in one sense, the prior categories may
2 have been academic.

3 JUDGE NELSON: Let's give them the benefit
4 of the doubt and say they wanted to be treated as --
5 What's this lesser category, the interested party? So
6 their papers were in that box. What does that have to
7 do with discovery?

8 MR. NORTON: Well, it shouldn't have
9 anything to do with discovery, because they're a party
10 in either category, and certainly --

11 JUDGE NELSON: Is there some notion that
12 an interested party is immune from discovery?

13 MR. NORTON: I think that may be the view
14 that Phillips was going to suggest, if they had
15 followed through on the argument.

16 JUDGE NELSON: Is there Commission
17 precedent or regulation that says that?

18 MR. NORTON: We're not aware of any. The
19 operative word is party.

20 JUDGE NELSON: Does Proctor & Gamble know
21 that you're bringing this issue up today?

22 MR. NORTON: They were notified. Messages

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1 were left with them at least twice this week.

2 JUDGE NELSON: How do you know who to
3 leave them with?

4 MR. NORTON: We left them with a person --
5 Our communication was with the person who filed the
6 verified statements.

7 JUDGE NELSON: Well, that may be just some
8 employee.

9 MR. NORTON: Well, it's someone,
10 presumably, authorized to speak on behalf of Proctor
11 & Gamble.

12 JUDGE NELSON: Have you dealt with counsel
13 for Proctor & Gamble?

14 MR. NORTON: No counsel is identified.

15 JUDGE NELSON: Well, you can always call
16 up the company and ask for the General Counsel's
17 office.

18 MR. NORTON: Well, I suppose we could, but
19 our communication was with the one contact we knew was
20 identified with this proceeding.

21 JUDGE NELSON: Seems to me that a lawyer
22 could straighten this out.

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1 MR. NORTON: Well, that's what happened
2 with other companies where there's been a problem. We
3 call, and lawyers get involved, and it gets resolved.

4 JUDGE NELSON: That's what should happen
5 here. What do you want me to do?

6 MR. NORTON: Well, I think all we can
7 really expect is an order directing that they respond.
8 The deadline for objecting is past. In our view, the
9 time for response has passed, but in any event, they
10 should respond, say, by next Wednesday. Any later
11 than that, and I'm not sure that we can make use, as
12 a practical matter, of what they've got.

13 JUDGE NELSON: Anyone else have any
14 thoughts as to Proctor & Gamble? Are they a member of
15 the NIT League?

16 MR. WOOD: I don't have the membership
17 list here. I believe, subject to check, that they
18 are. I am not acquainted with the particulars of
19 their filing. I know that our office was involved in
20 some discussions of a similar issue with respect to
21 the Phillips Petroleum.

22 JUDGE NELSON: Under ICC practice, if a

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1 company is an interested party but not a -- what's the
2 other? -- party of record, that means that they don't
3 get copies of everything?

4 MR. NORTON: Right.

5 MR. McBRIDE: Yes. The Commission -- or
6 the Board ruled in this case that it didn't have a
7 budget to serve the entire service list. So it wasn't
8 going to serve anybody but the parties of record with
9 its orders.

10 JUDGE NELSON: So the only difference is
11 that they don't get copies of everything?

12 MR. McBRIDE: Well, I don't know that the
13 Board would say that's the only difference. That's
14 all the Board addressed in that order.

15 JUDGE NELSON: Let's say it's now time to
16 decide the case, and I'm the Board. Can I look at the
17 statement of the interested parties? Is it part of
18 the record for decision?

19 MR. McBRIDE: Yes, because if members of
20 Congress, for example, write a letter or Joe Blow
21 writes a letter, it goes on the public docket, and
22 they can take that into account, because everyone is

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1 on notice of what's on the public record,
2 constructively or otherwise.

3 JUDGE NELSON: So those letters are all
4 treated as interested parties then?

5 MR. NORTON: Well, no. They're treated,
6 really, as parties of record in the sense that they
7 are considered -- They've made a submission that is
8 considered by the Board.

9 MR. McBRIDE: Just as, for example, that
10 letter from the Governor of Louisiana you were looking
11 at earlier would be on the public record in this
12 proceeding.

13 JUDGE NELSON: He'd be an interested party
14 but not a party of record?

15 MR. NORTON: Right, but when they take a
16 further step of filing a verified statement with
17 comments, it's a more substantial step. That is
18 indistinguishable from what all these other parties
19 have done.

20 JUDGE NELSON: Suppose I entered this
21 order, and at the same time requested that you be in
22 touch with the Office of General Counsel at this

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1 corporation. They must have headquarters wherever
2 they are and there's probably house counsel that
3 would start leading us down the trail to get a lawyer
4 to be assigned to this matter.

5 MR. NORTON: That would be fine, Your
6 Honor.

7 JUDGE NELSON: Then we'll see where we
8 stand. So we really need to -- If you can deal with
9 this on Wednesday, why do we have to rush in tomorrow
10 with these KCS things?

11 MR. NORTON: Your Honor, Wednesday is the
12 latest that we could possibly get the results and deal
13 with it. We have to give them some time to respond.
14 I would be happy to have it a lot sooner, but --

15 JUDGE NELSON: Well, if they have problems
16 with this -- If counsel shows up and there's then
17 opposition, when are we going to straighten it out?
18 We've got Monday or Tuesday to do that. We'll have to
19 just deal with it if it happens.

20 MR. NORTON: Exactly.

21 JUDGE NELSON: All right. I'm going to
22 order the Proctor & Gamble Company to respond to your

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1 discovery by -- What's the deadline you want?

2 MR. NORTON: I would say Noon Wednesday.

3 JUDGE NELSON: By Noon on Wednesday. If
4 they have problems with it, you're going to contact
5 counsel or attempt to find counsel, and any problem
6 has to be threshed out, I would say, Wednesday
7 afternoon at the latest, given my own schedule here.

8 MR. NORTON: Thank you, Your Honor.

9 JUDGE NELSON: Off the record for a
10 moment.

11 (WHEREUPON, the proceeding was off the
12 record briefly at 10:25 a.m.)

13 MR. WOOD: Your Honor, with your leave, I
14 don't believe there are any other issues involving me.
15 I'd like your leave to be excused.

16 JUDGE NELSON: That's fine, and I hope we
17 can see you tomorrow when we get to this matter of the
18 confidentiality of the memorandum, because your client
19 is the recipient.

20 MR. WOOD: Thank you, Your Honor. I'll be
21 here tomorrow.

22 JUDGE NELSON: The addressee is your

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1 client.

2 MR. WOOD: Well, the recipient, obviously,
3 is governed by the intentions of the sender of the
4 communication, but I'll consult with the recipient.

5 JUDGE NELSON: Well, my experience in the
6 Pentagon and other places with alleged confidentiality
7 is that sometimes the parties, when confronted with
8 it, will say I don't care. I did intend this to be in
9 confidence, but now that I see it and people want it,
10 fine, they can have it. You might get that answer.
11 That resolves the problem.

12 Sometimes we could simply redact the name
13 of the person and release things otherwise, because it
14 may not be important. For example, Commissioner --
15 what's his name?

16 MR. WOOD: Matthews.

17 JUDGE NELSON: Matthews -- Who cares which
18 Commissioner it is, as long as the substance of it
19 gets released. We can do things like that, but we
20 really need to know how people feel about these
21 alleged confidences in order to make a ruling.

22 MR. WOOD: Well, if I may offer one

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1 observation, Your Honor, and I don't want to argue.

2 JUDGE NELSON: If this were an FOI case --

3 MR. WOOD: I understand.

4 JUDGE NELSON: Treat it as a fourth
5 exemption client for this document, which now is a
6 government record, by the way, received by me.

7 MR. WOOD: My discussions with Mr. Norton
8 and --

9 JUDGE NELSON: We'd have to come really to
10 grips with this, and might well have to cut it loose.

11 MR. WOOD: I understand, Your Honor, and
12 I just wanted to offer one observation. Perhaps Mr.
13 Livingston and Mr. Norton can consider this as well.

14 I fail to see, and I haven't heard, how
15 the classification of this document inhibits them from
16 preparing and submitting their case to the Board.

17 JUDGE NELSON: That's another whole story,
18 and I will call on them for that, but I start first of
19 all, with the claim of confidentiality. I start with
20 the presumption of openness. Then we have to go down
21 from there. So let's find out what we can. We'll see
22 you tomorrow then.

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1 MR. WOOD: All right. Thank you, Your
2 Honor.

3 JUDGE NELSON: All right. What's
4 remaining?

5 MR. LIVINGSTON: There's only one issue
6 remaining, and for the benefit of other counsel who
7 may or may not want to stay, and it involves the
8 Western Shippers Coalition, Mr. McBride's client, and
9 it involves strictly a --

10 JUDGE NELSON: This \$12,000 payment.

11 MR. LIVINGSTON: Right. I'd like to
12 address that.

13 JUDGE NELSON: Go right ahead.

14 MR. LIVINGSTON: The witness in question
15 is an outside consultant named Vaneniti who worked for
16 Resources-something-International, a consulting firm.
17 In his expert verified statement he -- which has to do
18 with coal, he refers to some prior studies that he
19 did, which also deal with coal issues.

20 These are studies he did for private
21 clients, and they're not -- can't check them out of
22 the library or pull them up on NEXUS. Because they

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1 are closely related to the subject matter of his
2 verified statement, like any good lawyers, we wanted
3 to look at them to see if they are consistent with his
4 testimony or whether he's saying things in his private
5 studies that are inconsistent with his testimony or
6 which have different emphases or have a different set
7 of data or whether he approaches matters differently.

8 It's a standard approach in examining any
9 expert witness's testimony to look at his prior
10 writings in the same field.

11 JUDGE NELSON: Yes, like prior articles?

12 MR. LIVINGSTON: Prior articles, prior
13 testimony.

14 JUDGE NELSON: Yes.

15 MR. LIVINGSTON: So we want to inspect
16 them.

17 JUDGE NELSON: I thought the other side
18 would say it's not like that, because this is prior
19 secret stuff. The testimony and the articles are
20 public, I suppose. Is that the statement?

21 MR. LIVINGSTON: Whether he has written
22 materials that are secret or public, he has written

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1 prior materials in the area, and that is a fertile of
2 the search for impeachment material, and we want to
3 inspect these documents.

4 We don't want to make commercial advantage
5 of them, and they are covered by the protective order
6 to preclude that. We actually now have the materials,
7 and the \$12,000, in effect, is in escrow pending the
8 resolution of the dispute about the money.

9 We will return the reports in two or three
10 weeks. Three weeks, I think, would probably be a good
11 estimate of when we can return them. We won't keep
12 them. We won't take commercial advantage of them, but
13 we do want to inspect and see how they relate to his
14 testimony and whether they provide impeachment
15 material.

16 JUDGE NELSON: Are they written?

17 MR. LIVINGSTON: Yes. They're documents.

18 JUDGE NELSON: They're not in computers?

19 MR. LIVINGSTON: It's all hard copy.

20 JUDGE NELSON: Hard copy.

21 MR. LIVINGSTON: Hard copy. I'm sure
22 that's right.

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1 MR. MULLINS: That's correct.

2 MR. LIVINGSTON: He says, now, well, first
3 you've got to pay me my going price, which is for
4 three reports \$12,500. This is from a man who, of
5 course, has already been paid for his work in the case
6 by --

7 MR. MULLINS: I object to that. You don't
8 know that.

9 MR. LIVINGSTON: -- by WSC as a retained
10 expert, presumably was paid when he did these reports
11 initially for the companies that he did them for, and
12 now for allowing us to see the materials for
13 impeachment purposes, he says I want -- there's this
14 toll you have to pay, \$12,500.

15 This is, Your Honor, I think, an
16 unprecedented demand, and not one that has any support
17 not only in ICC precedent but in any precedent, and it
18 would -- It's akin, I think, to extortion on the part
19 of this witness.

20 JUDGE NELSON: My first reaction to this
21 when I read this stuff this morning was that that's a
22 small amount in the great scheme of things. Why are

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1 you fighting about it? Is it the principle that's
2 involved here?

3 MR. LIVINGSTON: There is a principle. I
4 doubt seriously that it's a small amount to Mr.
5 Vaneniti.

6 JUDGE NELSON: Well, it's not small to me.

7 MR. LIVINGSTON: He will be greatly
8 enriched if ~~as~~ a price --

9 JUDGE NELSON: To a company that seeks a
10 multi-million dollar savings through this transaction,
11 \$12,000 is not a lot of money.

12 MR. LIVINGSTON: \$12,000 is not a lot of
13 money compared to the efficiencies and benefits that
14 this transaction will bring to the American public.
15 That's true, but nonetheless, it's a lot of money in
16 a discovery dispute. If every time we have to, simply
17 for purposes of inspecting documents to see if they
18 contain impeachment material, we have to pay some
19 Beltway Bandit's price of \$12,500 for three reports
20 for which he's already been paid -- We didn't
21 commission him to do these.

22 If we had hired him to do these reports,

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1 sure, we'd have to pay him, but we want to see whether
2 he's been writing things privately that differ or shed
3 light on his public verified statements.

4 JUDGE NELSON: May I see his submission
5 itself wherein these reports are mentioned?

6 MR. MULLINS: That's where I got it, your
7 office.

8 JUDGE NELSON: Ah. He's not a Beltway
9 Bandit. He operates out of Boulder, Colorado.

10 MR. MULLINS: I resisted objecting to
11 that, too.

12 JUDGE NELSON: This is his verified
13 statement. What is the substance of his position
14 here, Mr. McBride?

15 MR. McBRIDE: The substance of his
16 position, as I've been telling Your Honor for a couple
17 of months in these various arguments that we've had,
18 is that the coal out of Colorado and Utah competes
19 with the coal out of Wyoming and Montana.

20 JUDGE NELSON: Oh, I'm shocked to hear
21 that. So now you've got Mr. Vaneniti to say it.

22 MR. McBRIDE: Exactly. He even put in a

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1 map. As long as I'm on my feet, you'll see on
2 counsel's table there that I gave them not one but two
3 extra copies, since they demanded extra copies --

4 JUDGE NELSON: He is your witness on the
5 competition of the coal?

6 MR. McBRIDE: Okay. So he's an important
7 one.

8 MR. McBRIDE: He is an important one.

9 JUDGE NELSON: Now let's see what he says
10 here. Now I'm looking at WSC-3, page 2.

11 MR. McBRIDE: And he says they wrote these
12 reports, and they are all in the same subject matter
13 area.

14 JUDGE NELSON: It's that last sentence,
15 "In addition, I am the primary author..." --

16 MR. McBRIDE: Yes.

17 JUDGE NELSON: -- "...of Western
18 Bituminous Coal, Analysis of Coal, and Coal
19 Transportation Markets, a client study which was
20 subsequently released to the public.

21 MR. McBRIDE: That is Exhibit --

22 JUDGE NELSON: Yes.

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1 MR. McBRIDE: That one we've given them
2 for nothing.

3 JUDGE NELSON: Well, what's the one that's
4 at issue here?

5 MR. McBRIDE: There are three at issue.
6 If I could approach.

7 JUDGE NELSON: Show me in his testimony,
8 if you would, where he refers to it.

9 MR. McBRIDE: Oh, sorry.

10 JUDGE NELSON: That's what I'm not
11 getting.

12 MR. McBRIDE: It's the three before that.

13 JUDGE NELSON: Oh. He says, "I am the
14 senior author of..."

15 MR. McBRIDE: I apologize. It's a long
16 sentence. I didn't have it in front of me.

17 JUDGE NELSON: You had a yellow tab, and
18 I thought it was this sentence. The sentence says, "I
19 am the senior author of two of RDI's recent syndicated
20 studies." Who is RDI?

21 MR. McBRIDE: That's a firm, Resource Data
22 International, Inc.

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