

INTERSTATE COMMERCE COMMISSION

12/01/95

FD 32760

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UNITED STATES OF AMERICA
INTERSTATE COMMERCE COMMISSION

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DISCOVERY HEARING

FD 32760

12/1/95

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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

Friday, December 1, 1995

Hearing Room 3
Second Floor
888 1st 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

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On Behalf of the National Industrial Transportation League:

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On Behalf of Kennecott Utah Copper Corp. and Kennecott Energy Company:

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On Behalf of United Transportation Union:

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On Behalf of Arizona Electric Power
Cooperative, Central Power and Light Company,
City of Austin, Texas, Commonwealth Edison
Company, and Lower Colorado River Authority:

C. MICHAEL LOFTUS, Esq.
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On Behalf of Sierra Pacific:

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P R O C E E D I N G S

(9:34 a.m.)

ADMINISTRATIVE LAW JUDGE NELSON: Let's begin taking appearances so that we know who is here. Let's start with the company.

I am confused already, because the way we work here, the company is on this side, the opposition is on this side.

MR. ROACH: Well, we are off on the wrong foot.

ADMINISTRATIVE LAW JUDGE NELSON: If we have to do this again please try to remember. I am a creature of habit here.

MR. ROACH: We asked the reporter and she had never been here before either.

ADMINISTRATIVE LAW JUDGE NELSON: Your name is what, sir?

MR. ROACH: My name is Arvid Roach. I am with Covington & Burling, representing the Union Pacific applicants. I am accompanied by my partner Bill Livingston, James Dolan, the vice-president of law of Union Pacific, Sy Harvey, the executive vice president and general counsel of Southern Pacific, Paul Cunningham, of Harkins Cunningham who represent Southern Pacific, and various other folks who I won't

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1 take your time to name.

2 ADMINISTRATIVE LAW JUDGE NELSON: All
3 right. Who is over here? A couple of familiar faces.
4 Yes, sir.

5 MR. WOOD: Good morning, Your Honor. My
6 name is Frederic Wood, with the law firm of Donelan,
7 Cleary, Wood & Maser, 1100 New York Avenue, N.W.,
8 Washington, DC, appearing today on behalf of the
9 National Industrial Transportation League.

10 I have also been asked to note for the
11 record Mr. Thomas W. Wilcox, who is unfortunately ill
12 today, appearing on behalf of Western Resources, Inc.,
13 also a party in this proceeding.

14 MR. LOFTUS: Good morning, Your Honor. My
15 name is Michael Loftus, firm of Slover & Loftus,
16 appearing on behalf of Arizona Electric Power
17 Cooperative, Central Power and Light Company, the
18 City of Austin, Texas, Commonwealth Edison Company,
19 and Lower Colorado River Authority. Thank you.

20 ADMINISTRATIVE LAW JUDGE NELSON: Now, you
21 belong in a FERC case. What are buying, coal here?
22 Is that the issue?

23 MR. LOFTUS: That is correct, Your Honor.

24 ADMINISTRATIVE LAW JUDGE NELSON: All
25 right. Yes, sir.

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1 MR. LeSEUR: Good morning, Your Honor. My
2 name is John LeSeur, also with the Slover & Loftus --

3 ADMINISTRATIVE LAW JUDGE NELSON: I didn't
4 get the name. I am sorry.

5 MR. LeSEUR: John LeSeur, L-e-S-e-u-r.

6 ADMINISTRATIVE LAW JUDGE NELSON: All
7 right.

8 MR. LeSEUR: I am representing the Western
9 Coal Traffic League and City Public Service of San
10 Antonio.

11 MR. GRIFFIN: Your Honor, Donald Griffin
12 of Highsaw, Mahoney and Clarke, here representing the
13 Railway Labor Executives Association and the United
14 Transportation Union.

15 MR. EDELMAN: Your Honor, Richard Edelman,
16 Highsaw, Mahoney and Clarke, also representing the
17 RLEA and the UTU as well as other RLEA affiliated
18 unions which are individually participating as parties
19 in this case in their own name, which for brevity's
20 sake I will just abbreviate them.

21 The ATDE, the BLE, the BMWE, the BRS,
22 hotel employees, the boilermakers and blacksmiths,
23 electrical workers, firemen and oilers, and sheetmetal
24 workers.

25 MR. MASER: Good morning, Your Honor. My

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1 name is John Maser, M-a-s-e-r, Donelan, Cleary, Wood
2 & Maser. I am representing Kennecott Utah Copper
3 Corporation, and Kennecott Energy Company. Thank you.

4 ADMINISTRATIVE LAW JUDGE NELSON: There
5 are other unions, aren't there Mr. Edelman?

6 MR. FINK: Yes, Your Honor.

7 ADMINISTRATIVE LAW JUDGE NELSON: I have
8 seen the papers come in.

9 MR. FINK: Yes, Your Honor. My name is
10 Marc Fink, F-i-n-k, the firm of Sher & Blackwell. I
11 am representing the International Brotherhood of
12 Teamsters.

13 ADMINISTRATIVE LAW JUDGE NELSON: Are
14 there other unions?

15 MR. PRUDEN: Larry Prudent representing
16 Transportation Communications Union.

17 ADMINISTRATIVE LAW JUDGE NELSON: Another
18 familiar face.

19 MR. PRUDEN: Oh my.

20 ADMINISTRATIVE LAW JUDGE NELSON: Yes,
21 indeed. I remember it well. Good to see you again.

22 MS. WILLEN: Your Honor, my name is Debra
23 Willen, with the law firm of Guerrieri, Edmond &
24 Clayman. I am here representing the International
25 Association of Machinists and Aerospace Workers.

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1 ADMINISTRATIVE LAW JUDGE NELSON: Willen,
2 is your name?

3 MS. WILLEN: Yes, sir. W-i-l-l-e-n.

4 ADMINISTRATIVE LAW JUDGE NELSON: Are the
5 unions all in opposition to the transaction? Is that
6 where we are now or is the debate about protective
7 conditions?

8 MR. EDELMAN: The unions we represent are
9 in opposition to the transaction.

10 ADMINISTRATIVE LAW JUDGE NELSON: On its
11 merits?

12 MR. EDELMAN: Yes.

13 MR. FINK: Your Honor, on behalf of the
14 Teamsters, we haven't yet received the application, so
15 we haven't had a chance to study it. It is almost
16 certain that we will be in opposition to the merger.

17 MR. PRUDEN: On behalf of TCU we will
18 probably be opposing, but we too, would like to see
19 what is in the application.

20 ADMINISTRATIVE LAW JUDGE NELSON: Which
21 you have had less than one day to look, I assume?

22 MR. PRUDEN: They have yet to be received,
23 as I understand it. We have not seen them at all.

24 ADMINISTRATIVE LAW JUDGE NELSON: Well, I
25 have got two boxes of it up there. In fact, I want to

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1 talk to the applicants about that. I don't know that
2 I need all of that paper there. All right. Let's
3 continue with the appearances.

4 MR. BERCOVICI: Good morning, Your Honor.
5 Martin Bercovici, B-e-r-c-o-v-i-c-i, law firm of
6 Keller and Heckman, for the Society of the Plastics
7 Industry. With me is Art Harrod.

8 ADMINISTRATIVE LAW JUDGE NELSON: Anyone
9 else?

10 MR. EDWARDS: Good morning, Your Honor.
11 John Edwards with Zuckert, Scoutt & Rasenberger, and
12 we represent Tex-Mex Railway.

13 ADMINISTRATIVE LAW JUDGE NELSON: Where
14 are they in this controversy?

15 MR. EDWARDS: We have yet to take a
16 position, Your Honor.

17 MR. LUBEL: Good morning, Your Honor. I
18 am Alan Lubel with the Troutman Sanders law firm. We
19 represent the Kansas City Southern Railway. Along
20 with me is Mr. William Mullins, Ms. Harilee Molm.

21 ADMINISTRATIVE LAW JUDGE NELSON: Mr.
22 Mullins I know from previous litigation. You are the
23 discovery party in some of the matters we are going to
24 address today?

25 MR. LUBEL: In some, Your Honor. Right.

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1 ADMINISTRATIVE LAW JUDGE NELSON: You are
2 an opponent of the mergers, I gather.

3 MR. LUBEL: We are the railway that is
4 impacted most in terms of losses of traffic by this.

5 ADMINISTRATIVE LAW JUDGE NELSON: Who else
6 do we have here?

7 MS. EDWARDS: Good morning, Your Honor.
8 Krista Edwards on behalf of Canadian Pacific Limited.
9 Canadian Pacific Limited also has not officially taken
10 a position.

11 ADMINISTRATIVE LAW JUDGE NELSON: Anyone
12 else?

13 MR. BILLIEL: Good morning, Your Honor.
14 Michael Billiel from the Department of Justice, and I
15 am accompanied by Joan Huggler, also with the
16 department.

17 ADMINISTRATIVE LAW JUDGE NELSON: And how
18 does the department stand now? When we were on the
19 phone you said you had no position.

20 MR. BILLIEL: That is still the case, Your
21 Honor.

22 ADMINISTRATIVE LAW JUDGE NELSON: Are you
23 going to be involved in discovery aspects of this
24 case?

25 MR. BILLIEL: Yes, sir.

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1 ADMINISTRATIVE LAW JUDGE NELSON: Did you
2 have any problems getting paid for that phone call?

3 MR. BILLIEL: No, Your Honor.

4 ADMINISTRATIVE LAW JUDGE NELSON: Because
5 I would give you a memorandum or anything that would
6 help.

7 MR. BILLIEL: I may need that after the
8 15th.

9 ADMINISTRATIVE LAW JUDGE NELSON: We were
10 all funded at that time. We were duly working under
11 assigned appropriations bills.

12 Anyone else?

13 MR. HUT: Good morning, Your Honor. My
14 name is Stephen Hut; Wilmer, Cutler & Pickering for
15 Consolidated Rail Corporation. With me today is Bill
16 Kolasky to my right, and right behind me, Steven
17 Finizio.

18 ADMINISTRATIVE LAW JUDGE NELSON: What is
19 Conrail doing in this case?

20 MR. HUT: We expect, at this stage, Your
21 Honor, to be involved in discovery matters. We will
22 be reviewing the application as well or expect to
23 begin to do so today.

24 ADMINISTRATIVE LAW JUDGE NELSON: All
25 right. Any other parties?

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1 MS. JONES: Your Honor, I am Erika Jones
2 with the firm of Mayer, Brown & Platt, representing
3 the Burlington Northern Railroad and the Atchison,
4 Topeka & Santa Fe Railway Company. With me today is
5 Rick Weicher, the general counsel, and my partner,
6 Adrian Steel from the firm of Mayer, Brown & Platt.

7 ADMINISTRATIVE LAW JUDGE NELSON: I
8 recognize your name from the papers. You are on the
9 other end of this discovery.

10 MS. JONES: Apparently so.

11 ADMINISTRATIVE LAW JUDGE NELSON: With Mr.
12 Lubel.

13 MS. JONES: That's right.

14 ADMINISTRATIVE LAW JUDGE NELSON: Is that
15 dispute still going on? Are we going to be addressing
16 that this morning?

17 MR. LUBEL: I think we need to, very
18 brief, Your Honor.

19 ADMINISTRATIVE LAW JUDGE NELSON: Very
20 well. Anyone else?

21 MR. ONGMAN: My name is John Ongman, O-n-
22 g-m-a-n, with the firm of Pepper, Hamilton & Scheetz,
23 we represent the Geneva Steel Company.

24 MR. JACKSON: Your Honor, my name is
25 William P. Jackson, Jr. from Jackson & Jessup, P.C.,

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1 P.O. Box 1240, Arlington, Virginia. I represent the
2 Save the Rock Island Committee.

3 ADMINISTRATIVE LAW JUDGE NELSON: Who are
4 they?

5 MR. JACKSON: Some governmental units in
6 Missouri that are interested in the line that runs
7 between St. Louis and Kansas City that was a former
8 Rock Island line, but is currently owned by the St.
9 Louis Southwestern subsidiary.

10 MR. BRUSKIN: Your Honor, my name is
11 Robert Bruskin with Howrey & Simon. My partner,
12 Rosemary McEnery and I represent Coastal Corporation
13 and Shippers, and we hope to see the application today
14 as well, Your Honor.

15 MR. GREENBERG: Your Honor, my name is
16 Edward Greenberg. I am with Galland, Kharasch, Morse
17 & Garfinkle, we represent International Paper.

18 ADMINISTRATIVE LAW JUDGE NELSON: Didn't
19 I also see you in that Florida ICC litigation?

20 MR. GREENBERG: I believe that is so.
21 Pleasure to see you again.

22 ADMINISTRATIVE LAW JUDGE NELSON: All
23 right, sir.

24 MR. WHITE: Good morning, Your Honor. My
25 name is Charles White. I am also with Galland,

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1 Kharasch, but I have a Chinese wall between Greenberg
2 and myself. I represent Utah Railway, and its parent,
3 Mueller Industries.

4 We are negotiating. We don't have a
5 position yet.

6 ADMINISTRATIVE LAW JUDGE NELSON: Mr.
7 White. Yes, sir.

8 MR. SHEYS: I am Kevin Sheys. I represent
9 Illinois Central Railroad Company. Illinois Central
10 Railroad Company is looking forward to reviewing the
11 application today.

12 MS. SABIT: Your Honor, my name is Alicia
13 Sabit, with Hopkins & Setter. I represent the
14 Southern California Regional Rail Authority. We
15 haven't yet seen the application.

16 ADMINISTRATIVE LAW JUDGE NELSON: Another
17 litigator from the Vermont proceedings.

18 ADMINISTRATIVE LAW JUDGE NELSON: Do we
19 have any other appearances? Well, as some of you
20 know, my name is Jerome Nelson, Administrative Law
21 Judge of the Federal Energy Regulatory Commission, and
22 I am here on loan to the Interstate Commerce
23 Commission in arrangements approved by the Office of
24 Personnel Management.

25 My background includes some service in the

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1 office of general counsel Interstate Commerce
2 Commission, where Mr. White and I were colleagues some
3 years ago, and includes some experience in the merger
4 area.

5 I have also been loaned to the ICC a
6 couple of times before in two matters and so I know
7 some of you from that context.

8 As I read these orders, my powers here are
9 over discovery, and discovery only. I think they are
10 rather broad, almost plenary powers over discovery,
11 but I don't think I have any power over anything else.

12 So complaints about the schedule or
13 denials of due process of law or those speeches, I
14 would save the time and client's money.

15 Don't make them to me because there is
16 nothing I can do about them. My role here is strictly
17 discovery, as I read the orders.

18 If there is anybody that sees anything in
19 the orders that is different, then of course I would
20 stand corrected, but at least that is my impression.

21 Mr. Roach, I have got two boxes of
22 material there containing these multivolume
23 applications that arrived yesterday. First of all, I
24 don't know that I need two boxes, one ought to be
25 enough, secondly, the covering letter says that one of

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1 them is highly confidential.

2 We handle confidential material here
3 frequently, but the less I have of it the better. I
4 don't think I need it. Do you? Unless you tell me I
5 should keep it, I will or otherwise I would just as
6 soon give it back to you, then there is absolutely no
7 risk of it falling into the public domain and ruining
8 the country.

9 I also don't know what "highly"
10 confidential means as opposed to just confidential.
11 That is too subtle for me and that is another reason
12 I would like to get rid of it.

13 MR. ROACH: Fair enough. One has to live
14 with the lore of these cases to know these odd
15 distinctions, but we are happy to take that back, Your
16 Honor, and provide it to you whenever you may need it.

17 ADMINISTRATIVE LAW JUDGE NELSON: If you
18 think it comes up in the context of a discovery
19 dispute, then you can bring it in or get it over, but
20 I would just as soon get rid of it, as well as the
21 second set. I don't need that.

22 MR. ROACH: That is fine.

23 ADMINISTRATIVE LAW JUDGE NELSON: There
24 may be some lawyer in the room here today who could
25 use that second set, in which case we can give it to

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1 him or her.

2 So if anyone wants an extra set, contact
3 Mr. Roach and you can cut a deal with him. I just
4 want to get it out of here.

5 Is there any problem if someone from the
6 applicant, after we are finished, comes up to my
7 office and takes that out? Is there any objection to
8 that?

9 don't hear any. So is that going to be
10 you or are you going to arrange for somebody to do
11 that?

12 MR. ROACH: I suspect it will be my
13 colleague, Mike Rosenthal.

14 ADMINISTRATIVE LAW JUDGE NELSON: Mr.
15 Rosenthal. You will find me on the eleventh floor,
16 sir. I will give you back one complete set, plus you
17 will find the highly confidential material and get it
18 out of there. All right.

19 As I see it we have got two areas to work
20 on here this morning. Tell me if there anything more.
21 One is this general matter of generic general
22 procedures or guidelines that people want to adopt.

23 Two are the specifics. Before getting
24 into this I should also give you, if you don't have it
25 already, my secretary's name, Mr. Mullally, M-u-l-l-a-

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1 1-1-y, and she is at 202/219-2552. She generally
2 knows where I am.

3 My law clerk, who could pitch in in an
4 emergency situation, is Adrian DiCianno. Why don't
5 you stand up Ms. DiCianno. She is at 219-2554.

6 Why don't we go off the record for a
7 moment.

8 (Whereupon, the proceedings were taken off
9 the record at 9:48 a.m.)

10 ADMINISTRATIVE LAW JUDGE NELSON: So, I
11 guess that we should take the general before the
12 specific. Are there other things that you want to
13 discuss in addition to those two areas? Mr. Roach?

14 MR. ROACH: Your Honor, I guess what we
15 contemplated doing was giving you a brief report on
16 where we stand on discovery, and then presenting to
17 you the proposed guidelines in addressing the comments
18 that have been received on some of the guidelines.

19 ADMINISTRATIVE LAW JUDGE NELSON: We could
20 begin that way.

21 MR. ROACH: That is all that is on our
22 agenda.

23 ADMINISTRATIVE LAW JUDGE NELSON: No
24 problem with that.

25 MR. ROACH: There are no live disputes

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1 with anyone at this time.

2 ADMINISTRATIVE LAW JUDGE NELSON: That is
3 good news.

4 MR. ROACH: That is good news.

5 ADMINISTRATIVE LAW JUDGE NELSON: All
6 right. Do you have a statement, then, you want to
7 give?

8 MR. ROACH: Yes, a brief statement.

9 ADMINISTRATIVE LAW JUDGE NELSON: You
10 might also, for my edification, help me on this matter
11 of what is happening to the ICC, where it goes, what
12 happens to this case.

13 MR. ROACH: The easy case.

14 ADMINISTRATIVE LAW JUDGE NELSON: I see
15 from the laughter that I have stumbled into humor
16 here, believe it or not, I was actually serious. I am
17 grappling with the question of the extent to which we
18 should devote expansive time and effort if the case
19 either goes away, becomes a private anti-trust action,
20 goes to some other agency, or what happens to it.

21 I am not clear. One answer is the law is
22 what it is, as written today, and we have the case,
23 and we must litigate it, I suppose, but anything you
24 could give that would help on that I would appreciate.

25 MR. ROACH: All right. Well, let me

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1 address that quickly first. As I was saying, there
2 are no certified experts on this subject and others
3 may have information to add, but my knowledge is as
4 follows.

5 First, as you say, the law is what it is
6 and the commission has said in response to comments on
7 the schedule that called attention to this legislative
8 situation that they intend to proceed full speed ahead
9 as if they were charged as they are with deciding the
10 case.

11 ADMINISTRATIVE LAW JUDGE NELSON: I saw
12 that in there.

13 MR. ROACH: Second, the situation in
14 Congress is pretty well clarified at this point. The
15 House has passed an ICC sunset bill that preserves the
16 public interest standard for rail mergers and assigns
17 that responsibility, among others, to a new
18 independent agency within DOT, modeled after FERC.

19 The Senate has done the same thing. The
20 Senate rejected by 62 to 35 an amendment that sought
21 to change the merger standard, and so the merger
22 standard remains intact --

23 ADMINISTRATIVE LAW JUDGE NELSON:
24 Consistent with the public interest.

25 MR. ROACH: Consistent with the public

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1 interest. There is some language in the House bill
2 that amplifies current law and states that mergers can
3 be conditioned, which is already the law in certain
4 respects, but there is no substantive change.

5 ADMINISTRATIVE LAW JUDGE NELSON: You
6 mentioned first the House?

7 MR. ROACH: Yes.

8 ADMINISTRATIVE LAW JUDGE NELSON: Then the
9 Senate?

10 MR. ROACH: Pass both houses and
11 conferences expected very shortly.

12 ADMINISTRATIVE LAW JUDGE NELSON: Do both
13 bills transfer jurisdiction to this tribunal you have
14 described?

15 MR. ROACH: Yes. They give it a different
16 name. That is one thing that has to be resolved in
17 conference, but there is no substantive difference on
18 mergers.

19 ADMINISTRATIVE LAW JUDGE NELSON: So is
20 the expectation that there will be a conference? Yes,
21 there will have to be a conference, I assume, and that
22 there will agreement? Or is this the kind of thing
23 that drives people wild in Washington?

24 MR. ROACH: There it does get harder to be
25 definitive, but my understanding is that there are not

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1 that many differences between the bills, and that it
2 is expected that there will be a conference very soon
3 and that the bill will be signed by the president, but
4 Lord knows, I don't speak for the White House.

5 ADMINISTRATIVE LAW JUDGE NELSON: Of
6 course not. If all of that happens, this case would
7 be transferred to a new entity within the Department
8 of Transportation?

9 MR. ROACH: Yes. There is provision for
10 carry over of the ICC staff and both bills provide
11 that pending proceedings are to continue under the
12 pending procedures and just as if -- a seamless
13 transition as we say in the rail industry.

14 ADMINISTRATIVE LAW JUDGE NELSON: When
15 would all of this happen, on the calendar?

16 MR. ROACH: I think the bills differ on
17 that too. One says January 1, and the other says upon
18 enactment, but that will be sorted out in conference
19 as well.

20 ADMINISTRATIVE LAW JUDGE NELSON: All
21 right. This is what was troubling me a little bit.
22 We could be -- I could be working out discovery
23 procedures, making rulings, and then on January 1, we
24 wake up and the case is somewhere else with somebody
25 else.

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1 MR. ROACH: I don't think with somebody
2 else.

3 ADMINISTRATIVE LAW JUDGE NELSON: Does
4 this make sense?

5 MR. ROACH: The bill also provides that
6 the three current ICC commissioners become the three
7 members of the new agency, and as I say, it provides
8 for continuation of existing pending proceedings under
9 existing procedures.

10 So I don't think what you do will be
11 feudal at all.

12 ADMINISTRATIVE LAW JUDGE NELSON: I don't
13 want to foreclose the new entity from whatever it
14 wants to do.

15 MR. ROACH: I don't see how you would do
16 that. I mean, the ICC tomorrow could decide to change
17 your charge here too, but you act in the meantime,
18 under the charge you have.

19 ADMINISTRATIVE LAW JUDGE NELSON: So your
20 view is to go ahead, I take it, with all of this.

21 MR. ROACH: Absolutely, and the
22 substantive reason for that, if I may say so, is that
23 this merger is urgent, and we have said that to the
24 commission, and shown that to the commission, and they
25 have adopted an expedited schedule.

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1 We have now filed an application that
2 shows 750 million dollars a year in public benefits
3 from this transaction, which is 2 million dollars a
4 day, and every day that goes by it is costing society
5 those benefits.

6 The commission accepted that enough to
7 adopt a expedited schedule here. I think, as Your
8 Honor said, that schedule was set by the commission,
9 and they reserve the right to change it, and to
10 progress under that schedule --

11 ADMINISTRATIVE LAW JUDGE NELSON: What if
12 there is another ALJ assigned to his case on January
13 1? He or she is then stuck with whatever I have done
14 here, I suppose?

15 MR. ROACH: No more than you would be
16 stuck next week if --

17 ADMINISTRATIVE LAW JUDGE NELSON: Or that
18 person could change it.

19 MR. ROACH: Yes. You can change your own
20 rulings too if you wanted.

21 ADMINISTRATIVE LAW JUDGE NELSON: Of
22 course.

23 MR. ROACH: I don't know if that is ever
24 a reason not to act.

25 MR. EDELMAN: If I may, Your Honor?

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1 ADMINISTRATIVE LAW JUDGE NELSON: Yes.

2 Mr. Edelman.

3 MR. EDELMAN: For the RLEA and UTU and
4 other unions, we think we ought to proceed quickly
5 because we are under this expedited schedule.

6 I think it is fair to assume it is
7 probable that the commission will continue along in
8 that regard, and it is in the interest of those who
9 want to pursue discovery to be able to get moving
10 here, and without commenting about the occasional
11 snickers on the 2 million dollar per day number, I
12 will just say that for our reason alone, we would like
13 to proceed.

14 MR. ROACH: It is a very conservative
15 number, Your Honor.

16 ADMINISTRATIVE LAW JUDGE NELSON:
17 Realizing -- well, this is not the tribunal which will
18 litigate the savings claims, I can do nothing about
19 that, but realizing that you would be dealing with me
20 and what procedures we would fashion and what rulings
21 we would make, and all of that could turn out to be
22 somebody else's job on January whatever-it-is, that
23 person would take the case as they found it, I
24 suppose, or the loan may continue.

25 I don't know. It depends upon the new

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1 entity I suppose.

2 MR. ROACH: I would like to say one more
3 word on this. I think a reason to believe that your
4 assignment will continue is that both bills also
5 reduce the commission's budget substantially, which
6 means that they are not suddenly going to be flooded
7 with a lot of new ALJ's that they will be looking for
8 work for.

9 ADMINISTRATIVE LAW JUDGE NELSON:
10 Hopefully they will have the money to pay FERC. This
11 is not a case of two jobs for me. I am paid by the
12 FERC, which is reimbursed under time slips we put in,
13 as much as you keep track of hours, I do that for
14 purposes of this case, and the ICC pays the FERC that
15 reimbursement.

16 All right. So does everyone agree that we
17 should go on? The applicants say so, RLEA says so.
18 Nobody disagrees with that.

19 Yes, sir? On behalf of Kansas City
20 Southern.

21 MR. LUBEL: On behalf of Kansas City
22 Southern we would agree that we would like to go
23 forward with it. We will point out that the public
24 interest standard does include harm to competition.

25 Potential harm that may be cause by the

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1 mergers.

2 MR. WOOD: Your Honor, Mr. Wood for the
3 NIT League. We certainly would like to go forward,
4 with the recognition that much could change before the
5 bill is finally adopted.

6 There has even been some indication that
7 the White House is still opposed to the bills in their
8 present form. What the consequences of that
9 opposition might be are very unclear. It is even
10 possible that they could be vetoed as they threatened
11 before the House considered it, but that remains to be
12 seen.

13 I agree that we should go forward. We
14 only have 120 days from yesterday, the filing date of
15 the application, to prepare under the current
16 schedule, our comments, and this is, as you know, a
17 very large record already with the application, and
18 there are many significant issues that need to be
19 explored, and I think we should proceed.

20 ADMINISTRATIVE LAW JUDGE NELSON: All
21 right. So what is the first item of business, Mr.
22 Roach?

23 MR. ROACH: Well, I thought, Your Honor,
24 I would briefly report on the status of things, and
25 then turn to the guidelines.

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1 Your Honor, we did file yesterday, as you
2 know, and we have service taking place. The
3 application was printed in Pennsylvania, and it is
4 winging its way to the 300 and some party service
5 list.

6 We tried to serve parties who requested it
7 by hand, and everyone should have it today. If they
8 don't they can contact us at Covington & Burling.

9 As Your Honor has heard, the commission
10 has adopted an expedited eight month schedule. I do
11 want to underscore, without going on and on, the great
12 importance of expedition to us, and that is why the
13 general counsel's of both applicants are here today.
14 We are eager to cooperate in discovery. We are eager
15 to move this case forward. We are eager to resolve
16 disputes amicably and to spare Your Honor the burden
17 of struggling with discovery disputes if we possibly
18 can.

19 The status of discovery is as follows: We
20 are in the process of opening the document repository
21 that the commission's order calls for that contains
22 the back up work papers for the application.

23 ADMINISTRATIVE LAW JUDGE NELSON: Where is
24 that located?

25 MR. ROACH: That would be at Covington &

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1 Burling's offices, 1201 Pennsylvania Avenue, 8th
2 Floor, we will send out to all of the parties a paper
3 setting for the procedures for visiting the repository
4 and copying documents, and an index of the contents of
5 the repository.

6 All of the work papers are here. They
7 have been reviewed. They are being stamped. Many of
8 them will be available today, we think all of them on
9 Monday.

10 ADMINISTRATIVE LAW JUDGE NELSON: These
11 are the work papers underlying the application?

12 MR. ROACH: Underlying the 8,100 pages,
13 and application, still more pages. We have received
14 informal discovery requests from four parties, KCS;
15 the Justice Department; ADM Pacific; and Tex-Mex.

16 ADMINISTRATIVE LAW JUDGE NELSON: What do
17 you mean by "informal?"

18 MR. ROACH: Not formal interrogatories or
19 document requests pursuant to the commission's rules,
20 but letters, that sort of thing.

21 In response --

22 ADMINISTRATIVE LAW JUDGE NELSON: I think
23 I have seen some of that.

24 MR. ROACH: Yes.

25 ADMINISTRATIVE LAW JUDGE NELSON: All

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1 right.

2 MR. ROACH: And we have formal requests
3 only from KCS, the request for admission and the
4 document -- or I guess interrogatories.

5 We produced traffic tapes in October, as
6 soon as they became available to the parties that had
7 asked for them.

8 ADMINISTRATIVE LAW JUDGE NELSON: What are
9 traffic tapes? These are new to me since I was in the
10 field. I don't even know if there were computers
11 then.

12 MR. ROACH: They are simply tapes
13 containing data on all of the UP and SP traffic for
14 1994, which is the base year for this proceeding, as
15 well as data from a thing called the waybill sample
16 that the ICC maintains, where they get a sample of 3-
17 1/2 percent of all rail movements every year and
18 assemble it into a data base.

19 We have supplemented the 100 percent not
20 sample, but 100 percent UP and SP traffic with data
21 from the sample for all other railroads.

22 So it is a picture of western rail traffic
23 in 1994, and it is the data we use to prepare the
24 application, to study what the traffic diversion would
25 be of this merger. What the competitive issues -- and

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1 so forth.

2 ADMINISTRATIVE LAW JUDGE NELSON: Do the
3 tapes show every shipment?

4 MR. ROACH: Every shipment on UP and SP,
5 and a sample of --

6 ADMINISTRATIVE LAW JUDGE NELSON: Origin,
7 destination?

8 MR. ROACH: Yes. Rates are there too.

9 ADMINISTRATIVE LAW JUDGE NELSON: Volume?

10 MR. ROACH: Yes. The waybill sample we
11 did not use because it is not valid, but everything
12 else is on there.

13 ADMINISTRATIVE LAW JUDGE NELSON: All
14 right. I interpreted you. So what happened with
15 these tapes? This data?

16 MR. ROACH: We gave them to the parties
17 who asked for them as soon as we had them, which was
18 back in October. We have given them the KCS, the
19 Justice Department CP and Tex-Mex.

20 The other informal request we got was from
21 Tex-Mex for some documents, and we are putting those
22 in the repository today.

23 What that leaves pending is KCS and the
24 Justice Department, and we have been working on their
25 requests. We met with each of them this week to

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1 discuss clarifying and focusing some of the requests
2 and to point to the material in the application and
3 the work papers that is responsive to a lot of the
4 requests.

5 We agreed that we will give them our
6 written objections by next Friday, if Your Honor does
7 commence discovery today, although we have really
8 already commenced it, and full written responses by
9 the 15th of December.

10 You have seen some correspondence about
11 that earlier.

12 ADMINISTRATIVE LAW JUDGE NELSON: Are
13 those dates in dispute?

14 MR. ROACH: No. We do hope to do even
15 better than that, and some of the responsive materials
16 are already being produced.

17 As I said there are no disputes that arise
18 from our standpoint for decision by you today. The
19 apparent dispute would be between Santa Fe and KCS.

20 ADMINISTRATIVE LAW JUDGE NELSON: As to
21 the rapidity of the production --

22 MR. ROACH: As to the Santa Fe tapes, yes.

23 ADMINISTRATIVE LAW JUDGE NELSON: It is
24 not that they are not going to give them.

25 MR. ROACH: Right.

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1 ADMINISTRATIVE LAW JUDGE NELSON: It is
2 that they are not getting there fast enough.

3 MR. ROACH: Right.

4 ADMINISTRATIVE LAW JUDGE NELSON: Is that
5 correct?

6 MR. ROACH: That is right. I am not
7 saying there will be no disputes. Some of these
8 requests are pretty broad, but we are trying to work
9 them out.

10 ADMINISTRATIVE LAW JUDGE NELSON: One of
11 the things we want to do today is to set up machinery
12 to adjudicate those disputes, if there are any, and we
13 have disagreement about that.

14 MR. ROACH: Right.

15 ADMINISTRATIVE LAW JUDGE NELSON: I have
16 Mr. Edelman's submissions on that.

17 MR. ROACH: Right. I am ready to address
18 those next.

19 ADMINISTRATIVE LAW JUDGE NELSON: Is there
20 anything other than those two?

21 MR. ROACH: Not that I am aware of. KCS
22 has concurred, and Mr. Edelman's letter. We have
23 received no other comments --

24 ADMINISTRATIVE LAW JUDGE NELSON: I have
25 the applicant's proposed guidelines. I have what I

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1 have tabbed as the RLEA's response, and then I have
2 RLEA's comments and proposals in a letter dated
3 November 28. Is that all I need? I have read those
4 three things.

5 MR. EDELMAN: To my knowledge.

6 ADMINISTRATIVE LAW JUDGE NELSON: All
7 right.

8 MR. ROACH: Just quickly, with respect to
9 depositions, Your Honor, the commission procedure of
10 order calls for making the witnesses present verified
11 statements available for depositions.

12 We are ready to do that. In our meetings
13 with KCS and Justice, they both indicated that January
14 made sense to them for depositions. RLEA has said
15 that in their letter as well.

16 We are developing availability dates in
17 January for all of our witnesses, and we will send
18 those out to the parties --

19 ADMINISTRATIVE LAW JUDGE NELSON: We don't
20 have to go through any procedure of obtaining ICC
21 permission for each deposition here. Do we?

22 MR. ROACH: No. That is normally the case
23 under the rules, but they have --

24 ADMINISTRATIVE LAW JUDGE NELSON: I know
25 it, and we had that problem in the Vermont proceedings

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1 and I took the bull by the horns, cut through it, and
2 directed the depositions, and I never heard another
3 word about it.

4 So --

5 MR. ROACH: Right, and the commission has
6 done that in the procedural order here.

7 ADMINISTRATIVE LAW JUDGE NELSON: All
8 right. there was an argument about it in that case,
9 and I just asserted a power and directed depositions.
10 So we won't have that trouble here.

11 MR. ROACH: Right.

12 ADMINISTRATIVE LAW JUDGE NELSON: And so
13 far you don't know of any particular problem with
14 depositions? It looks like it is working itself out?

15 MR. ROACH: I hope it will. It is always
16 tricky to orchestrate everybody's schedules, but going
17 into that process we hope to resolve it without your
18 needing to be involved.

19 Finally, as to the guidelines, such
20 guidelines as Your Honor knows were adopted in the BN-
21 Sante Fe case, and that is the precedent that we are
22 following very closely. The commission asked the
23 administrative law judge there to entertain
24 guidelines.

25 The judge concluded that they were

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1 necessary in order to have the case proceed under the
2 expedited schedule. Most of the same parties are
3 represented in this case, and they agreed on virtually
4 all of those guidelines in BN-Santa Fe, in the first
5 decision --

6 ADMINISTRATIVE LAW JUDGE NELSON: How did
7 they come into that case? Judge Leventhal didn't just
8 dream them up. I assume somebody proposed them.

9 MR. ROACH: No. The applicants proposed
10 them. The presiding judge called a hearing, urged the
11 parties to talk beforehand. There were meetings, some
12 adjustments pursuant to meetings among the parties.

13 There was one disputed issue that was put
14 to the Judge, which was the limit on the number of
15 interrogatories and document requests of 50 plus 50 --

16 ADMINISTRATIVE LAW JUDGE NELSON: That
17 limit was in there? Fifty?

18 MR. ROACH: Yes. It was disputed, and the
19 applicants adjusted it to 50 and 50. I think they had
20 a lower number originally.

21 ADMINISTRATIVE LAW JUDGE NELSON: The
22 dispute here is that there shouldn't be any limit.

23 MR. ROACH: Right.

24 ADMINISTRATIVE LAW JUDGE NELSON: Was that
25 the same dispute in the --

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1 MR. ROACH: On the part of some parties.
2 I think in the end there was nobody aggressively
3 arguing that position.

4 ADMINISTRATIVE LAW JUDGE NELSON: Were you
5 in that case, Mr. Edelman?

6 MR. GRIFFIN: Judge Nelson, I was present.
7 This is Mr. Griffin, for RLEA.

8 ADMINISTRATIVE LAW JUDGE NELSON: Were you
9 fighting about the limit at that time?

10 MR. GRIFFIN: Yes. There was a flat limit
11 proposed by the applicants. Ultimately the agreement
12 that was reached had differing amounts.

13 At that point the SP was an active
14 participant in opposition, and they had -- I think it
15 was 125 interrogatories they were allowed.

16 There was also the provision in that that
17 while the limit was imposed, a party could petition
18 Judge Leventhal for leave to file additional
19 interrogatories.

20 ADMINISTRATIVE LAW JUDGE NELSON: That is
21 always true, that goes with any limit.

22 MR. ROACH: Absolutely. We agree that it
23 does.

24 ADMINISTRATIVE LAW JUDGE NELSON: Let's go
25 off the record for a moment and we will evaluate the

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1 temperature here.

2 (Whereupon, the proceedings were taken off
3 the record at 10:08 a.m.)

4 MR. ROACH: It is correct that SP was
5 grandfathered to ask 125 questions in BN-Santa Fe,
6 but that was because they had gotten out of the box
7 before the guidelines were proposed and adopted.

8 We feel very strongly, Your Honor, that
9 the limit of 50 plus 50 in the guidelines serve a
10 salutary purpose. It is not an absolute limit, as you
11 say, they can come to you and show cause, but what it
12 does is it puts people to the task of focusing their
13 requests, focusing on the important issues.

14 When we are going to have 20 or 30 parties
15 here coming at us with 50 a piece to start with, it is
16 going to be a Herculean effort to answer that many.

17 If some choose to ask 300 or 400, which
18 has happened in prior cases, a lot of them quite
19 trivial, but taking a great deal of time to answer --

20 ADMINISTRATIVE LAW JUDGE NELSON: Did
21 there come a time when the ICC in any way approved
22 these limitations?

23 MR. ROACH: I don't believe so.

24 ADMINISTRATIVE LAW JUDGE NELSON: No one
25 appealed there? Nothing happened?

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1 MR. ROACH: No. There was no appeal. The
2 order was issued by the judge. It says, "by the
3 Commission," but then it says, "by Presiding Judge."

4 So it was not appealed. The commission
5 though, has said in its first decision in this case,
6 Your Honor, on September 1, that, and I quote, "We
7 think the BN-Sante Fe discovery guidelines worked
8 exceedingly well."

9 That was when they said they would defer
10 to you the task of deciding whether to --

11 ADMINISTRATIVE LAW JUDGE NELSON: What
12 order is that?

13 MR. ROACH: That is the first order,
14 decision number one, served September 1, at page 5.

15 ADMINISTRATIVE LAW JUDGE NELSON: Well, my
16 file begins with decision number four.

17 MR. ROACH: If I may approach the bench.

18 ADMINISTRATIVE LAW JUDGE NELSON: No
19 wonder I hadn't seen that language. Now that may be
20 that my file begins when the loan occurred.

21 Yes. It is an order that assigns the
22 discovery to me. That is why it is the first order I
23 have. May I take a look? Any objection if I -- I am
24 looking at decision number one, served September 1,
25 1995, and I am on page 5, and this is where you have

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1 a blue line in the margin.

2 MR. ROACH: Yes, Your Honor.

3 ADMINISTRATIVE LAW JUDGE NELSON: Let me
4 look at that for a second.

5 Is there an extra copy of this?

6 MR. ROACH: I have another.

7 ADMINISTRATIVE LAW JUDGE NELSON: May I
8 keep this one then?

9 MR. ROACH: Yes, indeed.

10 ADMINISTRATIVE LAW JUDGE NELSON: All
11 right.

12 MR. ROACH: It says -- just to put it in
13 the record, Your Honor, this is when they had not yet
14 appointed Your Honor -- "The process of assigning an
15 administrative law judge to this proceeding is
16 underway. We think that BN-Santa Fe guidelines worked
17 exceedingly well. We will leave all discovery
18 matters, including the adoption of any guidelines
19 governing discovery, initially to the discretion of
20 the ALJ."

21 We are not trying to say you don't have
22 complete discretion. We are just pointing out that
23 the commission did say that they did work exceedingly
24 well.

25 The commission also, in decision number

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1 six in this case --

2 ADMINISTRATIVE LAW JUDGE NELSON: I hadn't
3 realized that, Mr. Edelman, when I was reading your
4 objections. So be it, but it means they thought
5 something worked exceedingly well.

6 You have got to give me a little more a
7 showing when we get to it, but let's finish with this
8 presentation.

9 MR. ROACH: In decision number six, Your
10 Honor, served on October 19, the commission reinforced
11 the fundamental thrust of the guidelines when it said
12 that in pursuing discovery, parties are to focus
13 strictly on relevant issues.

14 That is really what the guidelines are all
15 about, simply to focus the parties on relevant issues
16 and move the process along.

17 Your Honor, we have received little
18 comment, as we said, on these proposed guidelines.
19 None of the government agencies, Justice,
20 Transportation or any other state or federal body has
21 commented.

22 ACS urged the matter be referred to Your
23 Honor, and comments be heard, but then did not submit
24 its own comments, it concurred in the RLEA comments.

25 I will turn now, if that is all right, to

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1 the issues that are on the table with RLEA.

2 ADMINISTRATIVE LAW JUDGE NELSON: Mr.
3 Mullins?

4 MR. MULLINS: John, before we move onto
5 that I would like to -- I was in the BN-Santa Fe case
6 as well on behalf of Kansas City Southern.

7 When the applicants proposed the discovery
8 guidelines they asked the commission to adopt up front
9 the BN-Santa Fe guidelines.

10 Kansas City Southern came in and opposed
11 that, as well as other parties, and we opposed it and
12 pointed out that we dropped out of the previous case
13 but we found that as we were in that case those
14 guidelines became burdensome and inadequate.

15 So we asked the commission not to adopt
16 the BN-Santa Fe guidelines as requested by the
17 applicants, and the commission agreed with us.

18 The commission said, "We are not going to
19 adopt the BN-Santa Fe guidelines," and they deferred
20 all of that power and authority to you.

21 ADMINISTRATIVE LAW JUDGE NELSON: Well, as
22 you stand here today, do you have problems with those
23 guidelines?

24 MR. MULLINS: We definitely have problems
25 with the guidelines proposed by the applicants.

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1 ADMINISTRATIVE LAW JUDGE NELSON: I didn't
2 see anything from you in this.

3 MR. MULLINS: Have you read our earlier
4 comments on the procedure schedule and their proposed
5 guidelines, which we filed immediately --

6 ADMINISTRATIVE LAW JUDGE NELSON: Fine.
7 Then you will join in today as we get to these
8 particular points, because I certainly want to hear
9 from you on that.

10 MR. MULLINS: The point I wanted to make
11 is that they requested the commission to adopt the BN-
12 Santa Fe guidelines, and the commission, while they
13 might have thought they worked well, they did not want
14 to step on your authority, and they wanted you to have
15 exactly this kind of conference so all of the parties
16 could give their views and you could adopt whatever
17 guidelines you wanted.

18 That is the key.

19 MR. WOOD: Your Honor, I would like to
20 just address a couple of points on this broad issue of
21 the guidelines. First of all, we also participated in
22 the BN-Santa Fe proceeding and, like others at the
23 conference before Judge Leventhal opposed the limit,
24 and would also oppose the same limit on the number
25 here.

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1 I think it is also important to keep in
2 mind that this case has a much different scope than
3 the BN-Sante Fe case, at least at the outset,
4 certainly the size of the territory that is affected
5 by this particular merger is much more extensive, the
6 overlap of lines is much more extensive.

7 In addition we have already an agreement
8 between the applicants and its major competitor in the
9 territory involving thousands of miles of rights to
10 line purposes --

11 ADMINISTRATIVE LAW JUDGE NELSON: That is
12 the BN?

13 MR. WOOD: The BN-Santa Fe, Your Honor,
14 and I think while I have not had an opportunity to see
15 the application, certainly the impact of that
16 agreement, as well as the merger itself, will be a
17 significant issue that we will have to explore.

18 The competitive impact of that transaction
19 itself, as well as the agreement, will need to be
20 explored, and I think that that indicates to us that
21 any limit of the nature proposed by the applicant in
22 terms of the number of discovery requests should not
23 be adopted.

24 ADMINISTRATIVE LAW JUDGE NELSON: Is it
25 the interrogatory limit or discovery request limit

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1 that is the primary issue in the guidelines or are
2 there other problems?

3 I know I have some troubles with it, but
4 if nobody else does, I don't have to live under it.
5 Yes, sir.

6 MR. LUBEL: Alan Lubel on behalf of Kansas
7 City Southern. There are a number of specific points
8 if you want to address them, I will hold those.

9 ADMINISTRATIVE LAW JUDGE NELSON: All
10 right.

11 MR. LUBEL: But since we are talking about
12 the number, we have another problem, not just with the
13 limit on the number, but this concept that it has got
14 to be in two steps.

15 We feel if there is going to be any limit
16 then it should be -- that is your limit for the case,
17 use it up as you will. You are not limited to -- if
18 you don't use all of the 50 the first time, you don't
19 lose them.

20 Of course, we don't think there should be
21 any limit other than reasonableness, which of course,
22 could be brought to Your Honor.

23 MR. BERCOVICI: Your Honor, Martin
24 Bercovici. We too, share Mr. Lubel's concern about
25 the two-step process. We haven't seen the application

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1 yet. We heard this morning that it is 8,100 pages.

2 We have some issues that we would like to
3 address on a preliminary or on an early basis from our
4 client's perspective, and we feel that once we see the
5 application and have a chance to discuss with our
6 consultants we will need to go back and ask for
7 further information, and we think the two-step process
8 itself is burdensome and we should not be subject to
9 that kind of limit. Thank you.

10 MR. EDELMAN: If I may also, Your Honor,
11 we also feel that two steps is unnecessary. We should
12 be able to use our interrogatories and requests for
13 admissions as deemed appropriate.

14 Also, one general comment in this regard -
15 -

16 ADMINISTRATIVE LAW JUDGE NELSON: Do we
17 envision, in your view, wave after wave of discovery?
18 Would there be a schedule for --

19 MR. EDELMAN: I don't know, Your Honor.
20 We sent out discovery as it becomes available. We are
21 sending copies of materials out to our members, asking
22 them to comment, provide us or suggest inquiry --

23 ADMINISTRATIVE LAW JUDGE NELSON: The way
24 we would do it in a FERC case, assuming there were no
25 limits, there would be a schedule.

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1 Mr. Wood, you have been with me in such
2 cases, and there is a schedule and a whole discovery
3 time table, and that is what we follow. Would that
4 work here?

5 MR. EDELMAN: Your Honor, to some degree
6 we all have to get our comments and opposition and
7 inconsistent applications in by --

8 ADMINISTRATIVE LAW JUDGE NELSON: I see
9 that. Is that April 1? F + 120 = April 1?

10 MR. EDELMAN: Yes, effectively, and that
11 gets to my other point, Your Honor, which is, that it
12 is the applicants who have asked for this highly
13 expedited schedule in a very complex case involving a
14 incredibly overlapping merger.

15 Now, if we were under the statutory 2-1/2
16 year schedule, or even under the one year schedule
17 that many of us had proposed during a more leisurely
18 discovery process or one that put more of a burden on
19 the parties --

20 ADMINISTRATIVE LAW JUDGE NELSON: Is it
21 your suggestion that there be no discovery schedule at
22 all?

23 MR. EDELMAN: The discovery schedule, the
24 cut off, effectively, for everybody is going to be
25 April 1.

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1 ADMINISTRATIVE LAW JUDGE NELSON: Other
2 than that compressed in order number six.

3 MR. EDELMAN: Correct. Yes.

4 ADMINISTRATIVE LAW JUDGE NELSON: But what
5 is to prevent your filing ten rounds of
6 interrogatories?

7 MR. EDELMAN: I think we are all subject
8 to reasonableness. If we are unreasonable they may --
9 what they would like us to do is to come to you and
10 say, "We want more." I am saying, why should that be,
11 maybe they should come to you and say, "They are being
12 unreasonable and asking for too much."

13 ADMINISTRATIVE LAW JUDGE NELSON: Well,
14 they would if that happened.

15 MR. EDELMAN: That is correct.

16 ADMINISTRATIVE LAW JUDGE NELSON: So why
17 anticipate trouble? Maybe we don't need to anticipate
18 trouble until it arises. I am not sure about all of
19 this. I am not sure of all of this paper work in
20 there. I didn't like the looks of all of that. One
21 stage of it I didn't even understand.

22 MR. ROACH: Let me come to that, that is
23 the expedited dispute resolution procedure that we are
24 delighted to streamline further, that came from BN-
25 Santa Fe as well, and it streamlined the historic

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1 procedure tremendously.

2 On this subject, Your Honor, I must say to
3 you that we are conflicted on this as well in a sense.
4 We want to be forthcoming in discovery. We want to
5 move this case along.

6 ADMINISTRATIVE LAW JUDGE NELSON: And you
7 are doing that so far.

8 MR. ROACH: Yes. We are putting a
9 tremendous amount of material in the repository. All
10 of the issues that these folks say are so thorny and
11 difficult are addressed very extensively in the
12 application. We went the extra mile on that. We
13 didn't leave things for rebuttal.

14 Any issue that anyone raised with us in
15 discussions, we addressed in the application. The
16 problem though, Your Honor, is, to be frank, a lot of
17 parties in cases like this have a strategy of trying
18 to bog the case down and delay it and bury you in
19 discovery and then say, "Oh, they are unable to cope
20 with all of this. We need an extension of time."

21 We have had ten rounds, ten waves of
22 discovery in prior cases where we have been the
23 applicants, and they go on hundreds and hundreds of
24 requests, page after page of --

25 ADMINISTRATIVE LAW JUDGE NELSON: Mr.

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1 Roach, suppose they successfully bog the case down,
2 don't they then lose?

3 MR. ROACH: No. We lose.

4 ADMINISTRATIVE LAW JUDGE NELSON: They are
5 the ones who have to do things.

6 MR. ROACH: We lose 2 million dollars a
7 day and they get an agency to conclude that this is so
8 tangled up that due process rights are at stake and it
9 needs to be extended.

10 ADMINISTRATIVE LAW JUDGE NELSON: I see,
11 that the agency may, as a result of all of this,
12 extend the deadline.

13 MR. ROACH: Exactly.

14 ADMINISTRATIVE LAW JUDGE NELSON: I see
15 the problem.

16 MR. ROACH: And again, I don't think it is
17 ever going to become an issue, to be honest with you.
18 If they limit it to 50 plus 50, they will figure out
19 a way to state what they want in the 50. We will be
20 responsive, and if they think of something else that
21 they really need, they can come to you, in fact, they
22 won't have to come to you because we will give it to
23 them, but it needs to be there as a limitation.

24 ADMINISTRATIVE LAW JUDGE NELSON: Your
25 proposal is that there be two rounds of -- we are

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1 talking about interrogatories here?

2 MR. ROACH: And document requests.

3 ADMINISTRATIVE LAW JUDGE NELSON: And data
4 requests, and that there be one round of 50 or fewer,
5 and then a second round of 50 or fewer.

6 MR. ROACH: Yes, but the notion in the BN-
7 Santa Fe guidelines --

8 ADMINISTRATIVE LAW JUDGE NELSON: Would
9 there be a schedule for the two rounds?

10 MR. ROACH: The notion was the first 50
11 was for their first round of evidence, which they are
12 going to submit on March 29th, or whatever, and the
13 second round would be for their rebuttal, which they
14 have another evidentiary filing that comes up in May.

15 ADMINISTRATIVE LAW JUDGE NELSON: F + 150?

16 MR. ROACH: F + 165.

17 MR. WOOD: Your Honor, I think we need to
18 have that particular point clarified because the
19 schedule contemplates, as you know, on F + 120, the
20 filing of comments and requests for conditions.

21 It also contemplates filing what are
22 called, "inconsistent applications." Which are filed
23 by other rail carriers seeking alternative
24 dispositions or alternative conditions.

25 ADMINISTRATIVE LAW JUDGE NELSON: Someone

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1 else wants to take over the Southern Pacific?

2 MR. WOOD: Well, or pieces thereof.

3 ADMINISTRATIVE LAW JUDGE NELSON: Is that
4 going to happen?

5 MR. WOOD: I don't know, Your Honor. I
6 should mention that at least one carrier, I believe
7 the Illinois Central, has noted its intent to file an
8 inconsistent application. My point really is, Your
9 Honor, that --

10 ADMINISTRATIVE LAW JUDGE NELSON: Really,
11 your comments protest request for conditions and any
12 other opposition to evidence is the significant thing.

13 MR. WOOD: That is the only round of
14 evidence that we get to file. We do not --

15 ADMINISTRATIVE LAW JUDGE NELSON: When you
16 say, "we," you mean --

17 MR. WOOD: People who are not filing
18 inconsistent applications do not get an opportunity to
19 file rebuttal evidence.

20 ADMINISTRATIVE LAW JUDGE NELSON: I see.
21 Those two later dates, then, are of no avail to the
22 unions unless they are filing applications to take
23 over railroads?

24 MR. WOOD: Correct.

25 ADMINISTRATIVE LAW JUDGE NELSON: Which

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1 they are not.

2 MR. WOOD: Correct.

3 ADMINISTRATIVE LAW JUDGE NELSON: So your
4 big date is F + 120. Where is the Department in all
5 of this? Can you give me some help?

6 MR. BILLIEL: The Department is in the
7 same boat, Your Honor. We are stuck at 120, also.

8 ADMINISTRATIVE LAW JUDGE NELSON: What do
9 you think I ought to do here with this request for
10 guidelines?

11 MR. BILLIEL: Your Honor, as people have
12 said, this is a very big case, we have a problem with
13 the cap. We think -- I fully understand Mr. Roach's
14 concern with the burden of so many parties, but I
15 think the parties are enjoined from duplicating
16 discovery and also if the parties are forced to come
17 to Your Honor and justify, I think that should be
18 sufficient protection.

19 ADMINISTRATIVE LAW JUDGE NELSON: I see
20 USDOT and DOJ comments due. Is DOT represented here?
21 Are they a client agency for you in this matter?

22 MR. BILLIEL: I have no authority to speak
23 for them.

24 ADMINISTRATIVE LAW JUDGE NELSON: You are
25 with the anti-trust division, I assume. So F + 120,

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1 or roughly April 1, is a key filing for the
2 Department?

3 MR. BILLIEL: The filing for the
4 Department.

5 ADMINISTRATIVE LAW JUDGE NELSON: And the
6 unions, and the shippers, and everybody else except
7 those who want to file applications to take over the
8 railroad.

9 MR. ROACH: Or applications for other
10 kinds of conditions, which some shippers have known to
11 do in prior cases, but that is right.

12 ADMINISTRATIVE LAW JUDGE NELSON: Well, it
13 says, "Request for conditions are due on F + 120."

14 MR. ROACH: Right.

15 ADMINISTRATIVE LAW JUDGE NELSON: All
16 right. So that is obviously a critical date, and the
17 discovery up through then seems to me the most
18 important part of the piece, at least right now. KCS?

19 MR. LUBEL: Not to belabor this, Your
20 Honor, Alan Lubel again, but if we as the railroad,
21 just file opposition, and don't file inconsistent
22 application, then we don't get a chance for rebuttal
23 either, and we would be limited to 50 under the
24 limitations that Mr. Roach has suggested.

25 ADMINISTRATIVE LAW JUDGE NELSON: Surely

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1 you don't want to file an application to take over the
2 railroad just so you can get another filing?

3 I can't believe that would happen.

4 MR. MULLINS: Judge Nelson, for your
5 edification, there is a difference between an
6 inconsistent application and a responsive application.
7 An inconsistent application means that a railroad like
8 Kansas City Southern --

9 ADMINISTRATIVE LAW JUDGE NELSON: You are
10 tilling the same row that you did the last time,
11 giving me all of the subtleties on ICC practice. I
12 appreciate that.

13 MR. MULLINS: Okay. An inconsistent
14 application says that we, as a railroad, Kansas City
15 Southern, we want to buy the entire Southern Pacific.

16 A responsive application is where we come
17 in and we say, "We want to buy parts or we want
18 trackage rights over parts of the Southern Pacific."

19 ADMINISTRATIVE LAW JUDGE NELSON: Is that
20 going to happen?

21 MR. MULLINS: That will definitely happen.
22 Yes, Your Honor, from Kansas City Southern's
23 perspective, but the point being that shippers and
24 unions and everybody else, they don't come in with a
25 responsive or an inconsistent application.

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1 Only railroads have that opportunity to do
2 that.

3 MR. LOFTUS: Excuse me, Your Honor, if I
4 may. I would take exception with that.

5 ADMINISTRATIVE LAW JUDGE NELSON: Tell us
6 again, your name.

7 MR. LOFTUS: I am sorry, Your Honor, my
8 name is Michael Loftus.

9 ADMINISTRATIVE LAW JUDGE NELSON: And you
10 are with some shippers, if I recall?

11 MR. LOFTUS: That is correct, Your Honor,
12 and in fact, we have filed responsive applications on
13 behalf of shippers in the past --

14 ADMINISTRATIVE LAW JUDGE NELSON: The
15 shipper wants to take over the railroad?

16 MR. LOFTUS: No, Your Honor, the shipper
17 wants to apply for a condition that would grant
18 trackage rights for its benefit over certain lines.

19 ADMINISTRATIVE LAW JUDGE NELSON: Just as
20 Mr. Mullin just explained?

21 MR. LOFTUS: That's right, Your Honor. I
22 don't think it is a big deal. I just don't want that
23 statement to --

24 MR. ROACH: And I was saying the same
25 thing, that's right. Your Honor, if I could just wrap

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1 this up, and we are happy to live with whatever you
2 decide to do, obviously.

3 The first point I would like to stress is
4 that this is not a qualitatively different case from
5 BN-Santa Fe. The issues are the same kinds of issues.

6 It is a case about competition. BN-Santa
7 Fe was partly parallel, this is too. Some railroads
8 sought conditions, some will here. No one has pointed
9 to any qualitative difference.

10 We have put much more information into
11 this record. We have acted much faster than BN-Santa
12 Fe did to arrive at a settlement that resolves, from
13 our standpoint, as we see it, all of the competitive
14 issues, and at least puts it on the table. Everyone
15 can attack it.

16 Our concern, frankly, is the piling on and
17 the consciously dilatory tactics. We think this is a
18 good device to limit that.

19 We are not worried about the unions. They
20 have never asked 50 requests in the past. We are
21 worried about two or three railroads that could engage
22 in the same tactics that we have seen in many cases in
23 the past, of hundreds and hundreds of discovery
24 requests that just chew up resources, waste time, and
25 create disputes.

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1 ADMINISTRATIVE LAW JUDGE NELSON: Then I
2 suppose you would have to come and see me. I know how
3 to deal with that stuff.

4 MR. ROACH: Sure. It is just a question
5 of whether you are going to have a stop sign in the
6 road in advance which everyone can drive through if
7 there is good enough cause for it or whether you are
8 going to just have an open road, and we have got to
9 come to you and draw the line, when frankly, we don't
10 want to be drawing lines like that.

11 We want to be responsive in discovery, but
12 we want some kind of injunction on the other side to
13 be rational in limiting our discovery.

14 ADMINISTRATIVE LAW JUDGE NELSON: I don't
15 want to do something that hampers -- the big railroads
16 are well financed with big law firms, much like
17 Covington & Burling, and can take care of themselves
18 and can deal with waves of discovery.

19 I am more concerned about the people who
20 are on more limited budgets, maybe some of the
21 shippers, the unions, the anti-trust division.

22 If they don't exceed 50, so be it, but why
23 should they have to spend limited time trying to cut
24 their numerical shape down?

25 Why should they spend five minutes doing

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1 that as opposed to the substantive framing of
2 interrogatories, document requests, and so forth?

3 Isn't there a problem there?

4 MR. ROACH: I don't want to repeat myself.
5 I don't think that there is any legitimate request
6 that can't be limited to 50. If you want to say 75,
7 we are not going to fall on our sword or anything.

8 ADMINISTRATIVE LAW JUDGE NELSON: I was
9 going to ask you, is there a number that might work?

10 MR. ROACH: Seventy-five might work.

11 ADMINISTRATIVE LAW JUDGE NELSON:
12 Somewhere between zero and short of --

13 MR. ROACH: Sure, but --

14 MR. EDELMAN: Your Honor, we have all of
15 a sudden gone down now from 100 to 75.

16 ADMINISTRATIVE LAW JUDGE NELSON: No, 150.

17 MR. ROACH: Okay. The other point I would
18 like to make is that whether or not big law firm are
19 engaged in heroic efforts, and I am not sure that is
20 always true, railroads can't always do that. These
21 people are in business, and their files are being used
22 in business.

23 It is not a simple matter for Southern
24 Pacific to search every shipper file for some needle
25 in a haystack just because it was asked for.

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1 ADMINISTRATIVE LAW JUDGE NELSON: I
2 recognize that. That can happen to you if the
3 interrogatory limit is one.

4 MR. ROACH: Right.

5 ADMINISTRATIVE LAW JUDGE NELSON: That
6 problem doesn't go away whether it is 50 or 75.

7 MR. ROACH: No, but there is --

8 ADMINISTRATIVE LAW JUDGE NELSON: Then you
9 come and tell me, "It is a needle in a haystack. It
10 is a waste of time."

11 MR. ROACH: But I think there is a
12 focusing effect of having a limit. That is all we are
13 saying. We will live with whatever Your Honor orders,
14 obviously.

15 MR. FINK: Your Honor, one point so we
16 don't miss --

17 ADMINISTRATIVE LAW JUDGE NELSON: The
18 federal courts are getting along with what? Twenty-
19 five now?

20 MR. ROACH: Twenty, twenty-five.

21 ADMINISTRATIVE LAW JUDGE NELSON: Under
22 the new rules, but with plenty of discretion of the
23 judge to enlarge them.

24 This is really not like a conventional,
25 U.S. district court litigation which might have two or

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1 three parties.

2 MR. ROACH: We have also got depositions.
3 They can ask all of these witnesses these questions,
4 too.

5 ADMINISTRATIVE LAW JUDGE NELSON: And they
6 will.

7 MR. ROACH: I assume they will too.

8 ADMINISTRATIVE LAW JUDGE NELSON: There is
9 no limit on depositions involved here.

10 MR. ROACH: "Limited to the testifying
11 witnesses and anybody else that is needed to address
12 an issue that is not addressed by the testimony."

13 ADMINISTRATIVE LAW JUDGE NELSON: Which is
14 fairly broad.

15 MR. ROACH: It is pretty broad.

16 ADMINISTRATIVE LAW JUDGE NELSON: Yes,
17 sir.

18 MR. FINK: Your Honor, Marc Fink for the
19 Teamsters. I am tempted to say, since Mr. Roach has
20 indicated the unions are unlikely to violate the
21 number, then there should be no number for us, because
22 we are not the problem, but we are particularly
23 concerned with the way --

24 ADMINISTRATIVE LAW JUDGE NELSON: That is
25 a thought, maybe the limit be applicable to the

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1 parties from whom you fear --

2 MR. ROACH: I would get a little nervous
3 about the due process applications of that one. All
4 I was saying was that these other parties have never
5 done this in the past.

6 MR. FINK: What I am particularly
7 concerned about, and I think it would lead to
8 unnecessary and perhaps confusing procedures, is this
9 wave process.

10 ADMINISTRATIVE LAW JUDGE NELSON: That is
11 a different proposition.

12 MR. FINK: It is. When we see the
13 application --

14 ADMINISTRATIVE LAW JUDGE NELSON: I
15 envision two rounds --

16 MR. FINK: And that is a problem for us.

17 ADMINISTRATIVE LAW JUDGE NELSON: Mr.
18 Edelman would like there to be no limitation on
19 rounds, that he gets the discovery as he wants to file
20 it. Your view?

21 MR. FINK: In effect, there really are
22 limitations, practical limitations, because of the
23 time constraints.

24 What I perceive is this, Your Honor, when
25 we look at the application, we may well have a small

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1 number of questions, that, if we get prompt answers
2 to, might resolve the need for further questions, but
3 if we are limited to one round, then we are, one,
4 probably going to have to file our discovery later
5 rather than earlier, and secondly, we are going to
6 perhaps end up asking more questions than we have to.

7 So effectively, what I am suggesting is
8 that if we don't have these two waves, which for us is
9 only one, then we could end up --

10 ADMINISTRATIVE LAW JUDGE NELSON: Why is
11 it only one for you?

12 MR. FINK: Because we will not have -- the
13 second wave is essentially intended to deal with
14 rebuttal evidence, which we will not be engaging in
15 because we are not going to be filing, at least I
16 don't propose that the union will be filing an
17 inconsistent application.

18 ADMINISTRATIVE LAW JUDGE NELSON: Well, if
19 we were to come up with a schedule which built in two
20 rounds, or we would call them follow-up
21 interrogatories or data requests here, wouldn't that
22 take care of the problem?

23 MR. EDELMAN: Excuse me, Your Honor, is
24 that within the 120 days?

25 ADMINISTRATIVE LAW JUDGE NELSON: Exactly.

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1 MR. EDELMAN: There are two rounds within
2 the 120 days?

3 ADMINISTRATIVE LAW JUDGE NELSON: We build
4 a schedule between now and F + 120 that we can live
5 with, that will give the applicants the time to make
6 the stuff available to get into your hands. You, the
7 time to make your follow up requests, maybe for the
8 sake of argument, that there is no limit on number or
9 that it is a number like 75, and we have our schedule,
10 rather than this open ended --

11 MR. MULLINS: Just to clarify, you made
12 the point about the federal rules and the 25. Those
13 are interrogatories -- would like us to combine
14 interrogatories and document requests. I think we
15 need to just remember that.

16 ADMINISTRATIVE LAW JUDGE NELSON: Is that
17 all the equivalent of what we would call data requests
18 here in this practice, anyone who knows FERC?

19 MR. WOOD: Having appeared in FERC cases
20 before, Your Honor, it is substantially the same. I
21 mean, the document production requests are usually
22 conducted informally in other usual ICC proceedings,
23 but many of the documents are produced as part of the
24 underlying work papers, which does limit the necessity
25 to pursue them.

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1 ADMINISTRATIVE LAW JUDGE NELSON: We have
2 this animal called, "data requests," that covers about
3 everything other than depositions. It can be studies,
4 it can be questions and answers, it can be documents.

5 MR. WOOD: I did want to make one other
6 point, if I could, Your Honor, just in the interest of
7 making sure that you are aware or are fully apprised
8 of the commission's view on the scope of discovery and
9 response to some matters that the Teamsters were
10 pursuing.

11 The commission, in decision number eight,
12 which was served just ten days ago or so, the
13 commission did say, "In our view, concerned parties in
14 this proceeding will be able to obtain ample
15 information through discovery. Parties will not be
16 limited to interrogatories or requests for admission."
17 That suggested to me, particularly the first sentence,
18 that the commission is not necessarily contemplating,
19 as Mr. Roach may have tried to infer from the earlier
20 decision, any limits on discovery.

21 I think he was leaving it entirely in your
22 discretion after hearing the views of the parties on
23 how to conduct it.

24 ADMINISTRATIVE LAW JUDGE NELSON: Would
25 you be willing to pitch in and help come up with a

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1 schedule?

2 MR. WOOD: I think a schedule would be
3 entirely helpful.

4 ADMINISTRATIVE LAW JUDGE NELSON: It would
5 make sense on both sides. A schedule analogous to
6 what we do in the ordinary FERC discovery order,
7 impressed by the time frame of ICC's order number six,
8 of course.

9 We agree in FERC proceedings, where vast
10 sums are at stake, we always agree on these schedules.
11 I don't know why we couldn't do that here.

12 Of course, if you can't, I can simply
13 announce one, but I would like to see if that won't be
14 one thing we will do when we take a break.

15 MR. ROACH: We would be delighted to
16 confer with the other parties on that, Your Honor.

17 ADMINISTRATIVE LAW JUDGE NELSON: Mr.
18 Lubel is up.

19 MR. LUBEL: I don't like to belabor this,
20 Your Honor, but we do have a problem with the wave
21 concept, and as a practical example, we have served
22 some discovery on them, and they are responding to it,
23 but now we have the application. We might realize
24 next week that we need to serve three or four more
25 requests and we don't want to be limited --

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1 ADMINISTRATIVE LAW JUDGE NELSON: Mr.
2 Lubel, if there is a schedule I would ask you to
3 participate in drafting it. Then I would expect that
4 you would be able to live by it.

5 If there is some particular, unique
6 problem that causes departure from the schedule, I can
7 always authorize that, but I would like to try to get
8 a schedule going so we will know what we have to do,
9 when we have to do it, when the response is, when the
10 follow up is.

11 That is certainly one thing to work on,
12 what else? There is the question of the limit, if
13 there is to be any and what it should be, what else?

14 MR. ROACH: Your Honor, the other issues
15 on my check list are: one was the question of what
16 kind of expedited dispute resolution procedure to
17 have, and there is a --

18 ADMINISTRATIVE LAW JUDGE NELSON: Getting
19 back to the limit for a moment.

20 MR. ROACH: Yes.

21 ADMINISTRATIVE LAW JUDGE NELSON: What do
22 other counsel think of the number 75 as a limit?

23 MR. EDELMAN: Seventy-five and seventy-
24 five?

25 ADMINISTRATIVE LAW JUDGE NELSON: Yes.

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1 MR. EDELMAN: Yes.

2 ADMINISTRATIVE LAW JUDGE NELSON: Assuming
3 there were two rounds, on a schedule that would could
4 agree with.

5 MR. EDELMAN: I think we could work with
6 that number.

7 MR. WOOD: In the interest of
8 understanding, Your Honor --

9 ADMINISTRATIVE LAW JUDGE NELSON: Would
10 there be a universe of 150 to be distributed as you
11 wanted it or would it be 75 and 75?

12 MR. EDELMAN: That is what I would prefer.
13 At least certainly if you serve 50 in round one, you
14 can serve 100 in round two.

15 ADMINISTRATIVE LAW JUDGE NELSON: What
16 does Mr. Lubel want?

17 MR. LUBEL: We would prefer what you just
18 stated in terms of it being a universe.

19 ADMINISTRATIVE LAW JUDGE NELSON: Which
20 one?

21 MR. LUBEL: The universe.

22 ADMINISTRATIVE LAW JUDGE NELSON: The
23 universe, 150 to be divided.

24 MR. WOOD: Just so I understand Your
25 Honor's proposal, you would be talking about that --

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1 ADMINISTRATIVE LAW JUDGE NELSON: Not my
2 proposal. I don't have to do it.

3 MR. WOOD: Within that 120 period --

4 ADMINISTRATIVE LAW JUDGE NELSON: Within
5 that 120 day period there would be permission to ask
6 X number of requests, data requests or informational
7 requests, and there would be two rounds scheduled, and
8 you could use them up as you saw in each round.

9 MR. EDELMAN: Your Honor, one issue that -
10 -

11 ADMINISTRATIVE LAW JUDGE NELSON: You can
12 ask one in the first round and 149 in the second if
13 you want. Then the applicants may come in and say,
14 "There is an abuse here, we can't handle 149 in the
15 last two weeks." We would have to cut them down,
16 probably. So that would not be a sensible allocation
17 of the 150 it would seem to me. Yes, sir.

18 MR. EDELMAN: One thing we might want to
19 participate in there are a number of people here who are
20 with law firms representing multiple parties. I
21 assume this is a per party limitation that we are
22 talking about.

23 MR. ROACH: Mr. Edelman represents a dozen
24 unions. I hope it is not going to be per party.

25 MR. EDELMAN: Your Honor, the railroad

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1 consistently opposed the standing of the RLEA as a
2 party, and they have consistently done that. So we
3 are stuck with being multiple parties.

4 ADMINISTRATIVE LAW JUDGE NELSON: So you
5 want 150 interrogatories for every individual union?

6 MR. EDELMAN: I am not saying we will use
7 them, Your Honor.

8 ADMINISTRATIVE LAW JUDGE NELSON: No. I
9 don't like the sound of it.

10 MR. EDELMAN: I am not saying that is what
11 we are going to do, Your Honor.

12 ADMINISTRATIVE LAW JUDGE NELSON: We will
13 have to do some grouping if it comes to that.

14 MR. ROACH: I am not sure what ends up
15 being served by the two waves, if they can be
16 allocated. You are just saying it is 150 for the
17 period.

18 ADMINISTRATIVE LAW JUDGE NELSON: However
19 they want to divide them.

20 MR. ROACH: Right. So I don't get the
21 function of the two waves at that point, because they
22 can ask as many as they --

23 ADMINISTRATIVE LAW JUDGE NELSON: Well,
24 one is a round, and the second is follow up,
25 traditionally. They want to be sure that they have

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1 got the 150 to spend as they want to, I suppose.

2 MR. ROACH: We started at 50 for the first
3 round of evidence, and 50 for the second round of
4 evidence. We would be happy to go to 75 on that or to
5 bifurcate the 75 into two waves.

6 ADMINISTRATIVE LAW JUDGE NELSON: Seventy-
7 five initially, seventy-five follow up?

8 MR. ROACH: Right.

9 ADMINISTRATIVE LAW JUDGE NELSON: We might
10 do that. What do you have to say, Ms. Jones?

11 MS. JONES: The 150 round sounds fine for
12 Burlington Northern Santa Fe, but we need to clarify
13 that -- apparently we are going to be the recipient of
14 some discovery as well, so that these limits will
15 apply to us, as recipients, it needs to be drafted to
16 say, "directed to applicants," because that was all
17 that apparently was contemplated, but apparently we
18 are going to be the recipients, so we also want to be
19 sure that --

20 ADMINISTRATIVE LAW JUDGE NELSON: Yes. We
21 need to change that because discovery is a two way
22 street. Yes, sir.

23 MR. EDWARDS: John Edwards for Tex-Mex.
24 We really support the concept of no waves scheduling
25 of the discovery as necessary before the first cut off

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1 and after the second cut off.

2 ADMINISTRATIVE LAW JUDGE NELSON: That
3 there be no schedule, you say?

4 MR. EDWARDS: Yes, Your Honor, because for
5 the smaller law firms and the smaller parties, it
6 really does bill as discovery goes along, while BN-
7 Santa Fe or Kansas City Southern or whoever is able to
8 put a lot of resources to this, the smaller parties
9 and shippers aren't.

10 ADMINISTRATIVE LAW JUDGE NELSON: Couldn't
11 you just, say there are two dates, and you aren't
12 ready on the first one, you could just use the second
13 one.

14 MR. EDWARDS: The idea, Your Honor, is
15 that the answers for the first develop your second and
16 your third.

17 ADMINISTRATIVE LAW JUDGE NELSON: So what
18 you are saying is that a schedule that may work for
19 everybody else won't work for you?

20 MR. EDWARDS: No. What I am saying, Your
21 Honor, is that you have the first cut off date for
22 discovery, but that you don't have to serve them all
23 at one time.

24 ADMINISTRATIVE LAW JUDGE NELSON: I don't
25 follow you.

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1 MR. EDWARDS: In other words --

2 ADMINISTRATIVE LAW JUDGE NELSON: Let's
3 assume we have a date of January 1 for the serving of
4 the first data requests.

5 MR. EDWARDS: Right. If you serve 5 on
6 December 15, you can serve another 10 December 20, et
7 cetera, on up to January 1 where you cut --

8 ADMINISTRATIVE LAW JUDGE NELSON: So you
9 want the understanding that the deadline is a
10 deadline, but that anyone can act inside that
11 deadline.

12 MR. EDWARDS: Yes, Your Honor. Well, does
13 that cause practical problems for people?

14 MR. PRUDEN: Your Honor, I would like to
15 support the concept of being able to file discovery
16 requests within a period, more than once.

17 For example, you might file certain
18 discovery requests --

19 ADMINISTRATIVE LAW JUDGE NELSON: You mean
20 that there be follow up.

21 MR. PRUDEN: Yes.

22 ADMINISTRATIVE LAW JUDGE NELSON: There is
23 going to be. Save your time. That is a standard
24 practice here, and it works well.

25 MR. ROACH: Your Honor, we don't have any

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1 problem with --

2 ADMINISTRATIVE LAW JUDGE NELSON: What
3 about this suggestion --

4 MR. ROACH: Phasing them during the first
5 period.

6 ADMINISTRATIVE LAW JUDGE NELSON: That the
7 deadline be January 1, but if he wants to file them on
8 December 15, so be it. What do you care? You get
9 them earlier that way.

10 MR. ROACH: Right. What we are most
11 concerned about is holding some kind of limit, and if
12 it is going to be 75 for opening, and 75 for follow
13 up, people can time those any way they like, up to the
14 deadlines for each as far as we are concerned.

15 ADMINISTRATIVE LAW JUDGE NELSON: Which
16 party poses the greatest concern in terms of the
17 number? What are you worried about? KCS?

18 MR. ROACH: I don't know, Your Honor. We
19 have got IC and Conrail talking in public about filing
20 major inconsistent applications.

21 ADMINISTRATIVE LAW JUDGE NELSON: Let's
22 ask them. They all are here. Conrail is here.
23 Illinois Central?

24 MR. HUT: Conrail is here, Your Honor,
25 Stephen Hut for Conrail.

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1 ADMINISTRATIVE LAW JUDGE NELSON: What do
2 you think would be a reasonable limit on data
3 requests?

4 MR. HUT: We would certainly be
5 comfortable, Your Honor, with 150 total. If I could
6 just address the schedule and the allocation of those.
7 I am concerned a little bit about schedules that would
8 unduly box you in.

9 For example, it seems to me that much
10 discovery, much written discovery is responsive to
11 discovery that has gone before, by way of a follow up,
12 either interrogatory answers that have been supplied -
13 -

14 ADMINISTRATIVE LAW JUDGE NELSON: Exactly.
15 I want to build that in.

16 MR. HUT: And so, it may serve the process
17 better if parties are able to sort of pinpoint
18 discovery that say follow up on a line of deposition
19 examination and answers or interrogatory answers,
20 rather than have to be fenced in.

21 ADMINISTRATIVE LAW JUDGE NELSON: I am not
22 sure I know what that means. That there be a follow
23 up that is undefined?

24 MR. MULLINS: Judge Nelson, is there a way
25 that we can do -- if I am understanding what everyone

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1 here is saying, maybe we could have a limit of 150,
2 and by day 120, when everybody has to file their
3 comments, everyone has to serve their 150, but during
4 that 120 days, while we are all preparing, we can
5 serve 10 one week, and 10 the next week, and 10 the
6 next week.

7 ADMINISTRATIVE LAW JUDGE NELSON: If
8 everyone agrees with that, that is fine. Are there
9 problems with that? That there be 150 to be broken up
10 in such increments as you want, filed whenever you
11 want them, up to, there has to be a final deadline.
12 Would that work? How is that from the applicant's
13 point of view?

14 MR. ROACH: Your Honor, I think we have
15 little left in the way of a limit, to be honest with
16 you, 150 is a tremendously high number, and at this
17 point they are able to phase them and --

18 ADMINISTRATIVE LAW JUDGE NELSON: But you
19 said before you could live with it.

20 MR. ROACH: No. I said I could live with
21 75 for the first round of evidence, and 75 for the
22 rebuttal round of evidence, and then that 75 allocated
23 into opening and follow up waves if that was desired
24 by the other parties.

25 As I have said several times, this is not

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1 a life or death issue for the applicants, and we may
2 have to come back to you, as you said, and say we are
3 just getting piled on here.

4 As important as this sentence in paragraph
5 one of the guidelines, it says, "the parties shall
6 avoid any duplicative discovery requests," and I hope
7 you will enter that sentence into the guidelines.

8 ADMINISTRATIVE LAW JUDGE NELSON: How can
9 we bring that about so we can have some coordinate
10 discovery?

11 MR. WOOD: Your Honor, if I may, I am sure
12 that the applicant's contemplated following this
13 practice.

14 ADMINISTRATIVE LAW JUDGE NELSON: It would
15 save money.

16 MR. WOOD: Certainly one of the things
17 that I think is even addressed in Mr. Edelman's
18 letter, but the practice at the BN-Santa Fe proceeding
19 was to, to the extent documents were produced in
20 response to requests, they were also placed in the
21 repository, where any other party who was interested
22 in that information could review it.

23 ADMINISTRATIVE LAW JUDGE NELSON: Would
24 the repository be used for that as well?

25 MR. ROACH: Yes. Absolutely.

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1 MR. WOOD: That would certainly serve to
2 avoid duplicate requests.

3 ADMINISTRATIVE LAW JUDGE NELSON: All
4 counsel or mostly all counsel are in Washington,
5 aren't they?

6 MR. ROACH: Yes, Your Honor.

7 ADMINISTRATIVE LAW JUDGE NELSON: So the
8 repository in Washington would be accessible. Then it
9 seems that if we were to have no numerical limit, but
10 to simply leave that up to claims of abuse, then we
11 are left with the problem of an ultimate deadline for
12 the filing of this stuff.

13 There I would expect you to work something
14 out that you could suggest to me, how much time the
15 discoverers need, how much time the company needs,
16 what the last wave should be.

17 There should be no discovery served after
18 such and such a date. Say we had that system and no
19 numerical limit, and we encourage grouping and
20 efficiency as much as we can, and if there are abuses
21 you come and tell me about it.

22 What will happen is I will crack down on
23 the first abuse, everyone will get the message, and
24 there won't be anymore.

25 MR. ROACH: I think we can live with that,

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1 Your Honor. If the deadline were something like
2 February 20th, or something like that so that we don't
3 get --

4 ADMINISTRATIVE LAW JUDGE NELSON: What is
5 the total length of time we have got until -- we have
6 120 days, roughly four months from the first
7 evidentiary --

8 MR. ROACH: Right. The filing is due
9 March 29. If we get --

10 ADMINISTRATIVE LAW JUDGE NELSON: What is
11 the whole case here? Six months?

12 MR. ROACH: Eight and a half.

13 ADMINISTRATIVE LAW JUDGE NELSON: Eight
14 and a half?

15 MR. ROACH: From filing. Yes. If we get
16 thousands of requests on March 15, then there is going
17 to be a request for an extension of time, and we want
18 to try to avoid that.

19 ADMINISTRATIVE LAW JUDGE NELSON: In
20 Northwest Utilities, that case was discovered, tried,
21 briefed, argued, and decided by me, and that is a full
22 blown trial, which we are not going to have here, an
23 initial decision, a case that was just as complex as
24 this one, in a total of nine months.

25 So this can be done. That was done under

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1 the procedure that I suggested to you in my order
2 where I had a regular discovery day that I was
3 available and so forth.

4 After the first few availabilities they
5 stopped knocking. They would begin to see what would
6 happen and were able to take care of it by themselves.

7 That was under rigorous commission
8 deadlines caused by the situation of the bankruptcy of
9 the Public Service of New Hampshire and the plan of
10 reorganization contemplated rapid regulatory review of
11 the proposal.

12 So I say that by way of my own experience.
13 We are all the prisoners of our own experience. That
14 one worked well, just like you think BN worked well,
15 and I didn't have a lot of fancy stuff in there.

16 Do you all see problems in that procedure
17 fitting this kind of case?

18 MR. ROACH: We have a reservation about
19 it, Your Honor. We are not wedded to the guideline
20 from BN-Santa Fe with the three days and three days.

21 We do think there is some utility in
22 having a writing that you can look at, and that the
23 parties can each see and respond to.

24 ADMINISTRATIVE LAW JUDGE NELSON: Well,
25 the discovery request itself must be in writing, of

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1 course.

2 MR. ROACH: I am saying in terms of
3 defining the issue that is in dispute and bringing to
4 bear the ICC precedent on that issue.

5 There is substantial precedent on a lot of
6 these questions of privilege, burden, relevance, on
7 merger cases, and we have no problems with the times,
8 it can be ne day and one day, it can be a 10 page
9 limit or a 5 page limit, but we think it is helpful to
10 you, and helpful to crystallize the issues and perhaps
11 move the issues, rather than having to run in every
12 week with long lists of potential disputes --

13 ADMINISTRATIVE LAW JUDGE NELSON: It won't
14 work that way.

15 MR. ROACH: Yes. It will.

16 ADMINISTRATIVE LAW JUDGE NELSON: The way
17 it will work is the first week there will be a couple,
18 the next week there will be one, and then there won't
19 be anymore.

20 Do you know what else happens? When it is
21 a motion, and an opposition in a motion to produce, it
22 is easy to give it to an associate and they will file
23 papers, and nobody cares.

24 When you have to come in here and face the
25 music, what is it you want and why won't you give it

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1 them, that is an exercise that in itself deters a lot
2 of disputes in terms of the seriousness, in terms of
3 the relative costs involved.

4 I think I made a requirement in Northeast
5 too, that partners had to be there, or chief counsel,
6 or lead counsel in each case. I had that in there as
7 a deterrent, and I am telling you, it worked
8 beautifully.

9 MR. MULLINS: I hope you wouldn't limit
10 that to partners, Your Honor. I am not there yet.

11 MR. EDELMAN: Your Honor, we like the
12 proposal you have offered. In talking to a number of
13 other parties, there was some concern about the
14 requirement for lead counsel to be there all of the
15 time because there may be multiple people working, but
16 so long as the person who is there would have
17 authority to speak for the party, we think that would
18 be fine.

19 ADMINISTRATIVE LAW JUDGE NELSON: You
20 could live with my procedure?

21 MR. EDELMAN: With that caveat,
22 absolutely, Your Honor.

23 MR. ROACH: We can live with it too. We
24 would suggest an exchange of papers to supplement the
25 appearance before Your Honor can be --

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1 ADMINISTRATIVE LAW JUDGE NELSON: Papers
2 for me?

3 MR. ROACH: Yes.

4 ADMINISTRATIVE LAW JUDGE NELSON: I expect
5 you would be exchanging them between yourselves, of
6 course.

7 MR. ROACH: No. For you, to call
8 precedence to your attention and crystalize the
9 dispute.

10 ADMINISTRATIVE LAW JUDGE NELSON:
11 Precedents don't go a long way in discovery rulings,
12 they are ad hoc and uniquely factual. I don't know
13 that a lot of case laws are that helpful. Mr. Lubel?

14 MR. LUBEL: I just want to say that we can
15 live with your procedure also. As I said in our
16 telephone conference, we would certainly save some
17 trees that way.

18 ADMINISTRATIVE LAW JUDGE NELSON: All
19 right, then. My leaning is to do that. We will do
20 something. I will work it out with you all. We will
21 do something like I did in Northeast Utilities, and
22 certainly we can modify it as counsel may want.

23 We will start out with no interrogatory
24 limits, and if there are abuses I expect that the
25 responding parties will be promptly in here pounding

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1 the table about them.

2 I assure you, I will listen to them and
3 act accordingly. So the best way on the discovering
4 side -- I say this to the railroads as well as to the
5 unions and the shippers -- is to be as reasonable as
6 you can, because you don't want to come in here and
7 have trouble.

8 It can cause you trouble throughout the
9 discovery process if you start out on a bad foot like
10 that. So don't do it. It is bad tactics, bad
11 lawyering.

12 You want me to be with you, not against
13 you, in these discovery issues. You come rolling in
14 there with some mountainous interrogatories, and Mr.
15 Roach tells me he has to go through every file in
16 every station in America that the railroad operates,
17 and you want data back to 1938, I am going to have to
18 ask hard questions about it.

19 So I expect the requests will be
20 reasonably frank. We will have no numerical limit, at
21 least not at first. Now, if we see trouble we can
22 always impose one.

23 It seems to me that what the parties could
24 live best with is a final deadline for the filing of
25 the last round, and whatever happens inside that

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1 deadline is the business of counsel.

2 Have I got that message right?

3 MR. ROACH: From the applicant's you do,
4 and we would propose February 20 as a cut off.

5 ADMINISTRATIVE LAW JUDGE NELSON: My plan
6 is to go back upstairs and let you work something out,
7 and then call me when you have got something.

8 This notion of all responses being placed
9 in the repository, I thought that was appealing. Is
10 there a way to bring that about mechanically so that
11 everyone's discovery can be seen, at least in a place?

12 MR. ROACH: I think it is provided for in
13 the guidelines, and we will certainly stipulate to it.
14 That has been the practice.

15 MR. EDELMAN: Your Honor, we have a
16 concern about that aspect as a limitation in that --

17 ADMINISTRATIVE LAW JUDGE NELSON: Yes, I
18 saw that in your letter. What is that about?

19 MR. EDELMAN: Being proposed in their
20 guidelines is that you have to essentially pop in to
21 have somebody else's responses served on you, which
22 given the number of people, it is a little bit
23 difficult here, and added to that is a related
24 problem, concerning the repository. I don't know what
25 UP and SP were going to set up, but --

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1 ADMINISTRATIVE LAW JUDGE NELSON: There
2 were two questions, one is whether you see everybody
3 else's discovery.

4 MR. EDELMAN: I would like the opportunity
5 t be able to say, "I want to see the responses to
6 everybody else's discovery," or say, "I want to see
7 the responses to interrogatories but not documents,
8 because I don't have that much office space."

9 I won't have the opportunity to say that.
10 One of the reasons we have that concern is because of
11 the adequacy of the repository. In the BN-Santa Fe
12 there were problems about more than one person being
13 in the repository at a time, the amount of physical
14 space within the repository, the need for scheduling,
15 and given the number of people that are here, if the
16 answer is, well it is occasionally seeing discovery in
17 the repository, but only one person is allowed there
18 at a time because there is a limited amount of space,
19 then that is not an answer.

20 ADMINISTRATIVE LAW JUDGE NELSON: Let's
21 ask Mr. Roach what he has in mind. It is in your firm
22 that this would be?

23 MR. ROACH: Yes, Your Honor. I think that
24 there are no disputes here. As to serving responses,
25 written responses, we will serve them on all parties.

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1 The practice has never been to serve the
2 pile of documents you produce on all parties, those
3 will be put into the repository, they will be
4 available to anyone who wants to come inspect them.

5 The repository will be at our firm.

6 ADMINISTRATIVE LAW JUDGE NELSON: What
7 about the mechanics of the repository?

8 MR. ROACH: The mechanics will be that if
9 you want to come you call an hour in advance. It will
10 be open 9:00 to 6:00, we can open it at night and on
11 weekends if people make arrangements for that.

12 You can copy things by giving us the Bates
13 numbers and paying 15 cents a page. The only
14 restriction on people seeing this is that the only
15 individuals who can see highly confidential, which is
16 this term of ours for sensitive information --

17 ADMINISTRATIVE LAW JUDGE NELSON: You have
18 a restricted service list, I presume, or a restricted
19 list for those people?

20 MR. ROACH: Right. It is outside counsel
21 and consultants. That is governed by the commission's
22 protective order.

23 ADMINISTRATIVE LAW JUDGE NELSON: Well,
24 what about these problems that Mr. Edelman ran into in
25 the other case, or that his colleague did?

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1 MR. ROACH: I am not aware.

2 MR. GRIFFIN: Your Honor, this is Mr.
3 Griffin, in the BN-Santa Fe the document repository
4 was small to say the least. There was a limitation to
5 one person.

6 ADMINISTRATIVE LAW JUDGE NELSON: When you
7 say small, was it a room about the size of this
8 hearing room?

9 MR. GRIFFIN: No. It was about the size
10 of walk in closet, Your Honor.

11 ADMINISTRATIVE LAW JUDGE NELSON: A walk
12 in closet?

13 MR. GRIFFIN: Closer to that.

14 ADMINISTRATIVE LAW JUDGE NELSON: Well, we
15 are not going to have that, Mr. Roach, are we?

16 MR. ROACH: No, Your Honor. We will have
17 a room that people can get comfortable in.

18 ADMINISTRATIVE LAW JUDGE NELSON: Can we
19 have a decent size room such as -- I don't know what
20 you have got there, a large conference room or --

21 MR. ROACH: Yes.

22 ADMINISTRATIVE LAW JUDGE NELSON: Would
23 the room be -- how would you compare the room to this
24 hearing room? Would it be as large? Half as large?
25 What are you thinking of?

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1 MR. ROACH: I am not certain what
2 conference room the documents are sitting in right
3 now, but I suspect it is the size of the bench up
4 here, rather than the whole room.

5 ADMINISTRATIVE LAW JUDGE NELSON: You are
6 talking about a third of this room?

7 MR. ROACH: Yes. Something like that.

8 ADMINISTRATIVE LAW JUDGE NELSON: Suppose
9 the repository is roughly a third the size of this
10 hearing room, would that be big enough? Any problems
11 with that?

12 MR. EDELMAN: I guess it depends on how
13 much of the room is taken up by boxes. Is there
14 enough room for multiple people to be there working at
15 the same time. I think that is the issue.

16 MR. ROACH: We will stipulate that this
17 will be worked out without Your Honor having to become
18 involved.

19 ADMINISTRATIVE LAW JUDGE NELSON: I was
20 just going to say to Mr. Edelman that the first
21 discovery conference might be held at the repository.

22 I will tell you what I think of it, and if
23 it doesn't work, then it is going to change. If we
24 want to avoid that, then I would expect the repository
25 would be appropriate for the size, number of people,

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1 complexity of the case, and just as I talked to the
2 other side about bad lawyering, it seems to me it
3 would be equally bad lawyering, Mr. Roach, for you to
4 be nickel and diming the conference room and having
5 them complain to me about it.

6 This transaction is worth how much, in
7 your view?

8 MR. ROACH: The purchase price is over 5
9 billion dollars, and the benefits are 750 million
10 dollars a year.

11 ADMINISTRATIVE LAW JUDGE NELSON: Seven
12 hundred and fifty million dollars a year?

13 MR. ROACH: Right.

14 ADMINISTRATIVE LAW JUDGE NELSON: We can
15 certainly have a decent repository for documents to be
16 seen in, it seems to me.

17 Before I then ask you to start drawing up
18 something, are there any other areas we need to
19 discuss?

20 MR. EDELMAN: Yes. There are a couple of
21 other things in our proposal. One thing we hope no
22 one has a problem with is the requirement that parties
23 number their discovery documents in the same manner as
24 you number things you file at the ICC. It is just
25 easier to read.

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1 ADMINISTRATIVE LAW JUDGE NELSON: I don't
2 know what that meant, nor do I care if everyone agrees
3 to it. Mr. Roach is nodding that he agrees with it.
4 So fine, go on. Whatever it is, it will be in there.

5 MR. EDELMAN: Another concern we had was
6 that where there is a reference to a document in the
7 repository, in other words, the answer to this is
8 that, "It is in the repository."

9 ADMINISTRATIVE LAW JUDGE NELSON: We have
10 a case in which I am the judge, a warehouse full of
11 documents, there was a claim by one of the parties
12 seeking documents that the operator said, "Here, they
13 are in the warehouse."

14 The warehouse was as big as half this
15 building. It turns out that it wasn't that bad, there
16 were numbers and so forth.

17 So there has got to be a system over there
18 whereby a reasonable person can find things within a
19 reasonable time, Mr. Roach.

20 MR. ROACH: Yes. Absolutely. Let me
21 address that. That is in the guidelines. Here is
22 what we are doing, we are preparing and we will
23 circulate an index. Documents are classified by
24 testifying witness, and by other topics, such as the
25 operating plan, the traffic study, et cetera.

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1 We will be happy to guide people to more
2 specific things if they want to tell us they are
3 looking for something.

4 There is a problem, however, with the
5 literal words of what Mr. Edelman put in his letter
6 and some other parties have, from time to time, asked
7 for, and we have litigated this before.

8 It is sometimes ask that people identify,
9 each time they produce a document, and we will be
10 producing thousands of document, if you identify for
11 each one every discovery request that it is responsive
12 to.

13 That is a horrendous burden, because you
14 get these 50 requests -- sets of interrogatories, and
15 the documents are responsive to 40.

16 What we will do is when we produce a new
17 triage of documents in response to Mr. Edelman's
18 request, for example, we will put it in the
19 repository. We will label it as responsive to his
20 request. We will label it as responsive to his
21 specific request in some kind of workable way, but we
22 are not going to certify that this document is also
23 responsive to request number 9 as well as request
24 number 1.

25 ADMINISTRATIVE LAW JUDGE NELSON: That

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1 does seem to me an awfully time consuming thing.

2 MR. ROACH: Right, and the commission has
3 rejected that sort of proposal in the past.

4 ADMINISTRATIVE LAW JUDGE NELSON: See if
5 there isn't a practical --

6 MR. EDELMAN: I am not sure if that is
7 what I -- all I want is that if I get an answer to an
8 interrogatory that says, "There is a document in the
9 repository that is responsive to this request." I
10 would like something that says, "It is document number
11 X," or "You can find it in the documents supporting
12 the statement of Mr. So-and-So."

13 ADMINISTRATIVE LAW JUDGE NELSON: Exactly.
14 You are like these guys that wanted this warehouse in
15 this state that I will not name. It is going to be
16 your burden, Mr. Roach, to build into the machinery
17 here a way in which a reasonable search can be made in
18 a reasonable time to find the documents.

19 MR. ROACH: Right, and we will do our best
20 in that regard.

21 ADMINISTRATIVE LAW JUDGE NELSON: Mr.
22 Lubel has problems?

23 MR. LUBEL: No problems. I just want to
24 echo what Mr. Edelman said, which is a little
25 different than what they are talking about. They are

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1 saying, "When we produce stuff we will label what it
2 is responsive to."

3 ADMINISTRATIVE LAW JUDGE NELSON: He is
4 saying he doesn't want to go through hours and hours
5 of figuring out who is interrogatory 32, this one goes
6 to and the other fella is number 62. That is a time
7 waster, he says.

8 MR. LUBEL: That is fine with us. Our
9 real concern is what Mr. Edelman said. If they
10 respond to an interrogatory saying, "The answer to
11 that is in the warehouse." We think that they should
12 be --

13 ADMINISTRATIVE LAW JUDGE NELSON: Come and
14 see me. We will hold a conference at the warehouse.
15 We will have a look at it.

16 I will say I am the guy who wants to go in
17 there and find it, as a reasonable lawyer, and I will
18 see how long it takes me and if there is somebody
19 there to help, and so forth.

20 In this other case we had also, an
21 employee of the company became available to help with
22 the searches. Can we do something like that? Seven
23 hundred million dollars a year.

24 MR. ROACH: Yes.

25 ADMINISTRATIVE LAW JUDGE NELSON: A

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1 paralegal can help assist --

2 MR. CUNNINGHAM: Your Honor, we don't have
3 that money yet.

4 MR. ROACH: Just as a matter of mechanics,
5 I don't think the company employees are going to be
6 expert at searching the repository because the
7 repository is pulled together by --

8 ADMINISTRATIVE LAW JUDGE NELSON: I mean
9 a Covington & Burling employee, a paralegal.

10 MR. ROACH: As I said, we will assist
11 parties in finding responsive documents.

12 ADMINISTRATIVE LAW JUDGE NELSON: In other
13 words, if the answer is, "It is in box 18M," how do I
14 know where that is?

15 Some paralegal could say, "Box 18M is over
16 there."

17 MR. ROACH: Absolutely. The documents
18 will be Bates numbered, the index will give categories
19 by Bates number. We will do our best to be as
20 specific in responding to each interrogatory as
21 possible. We can't necessarily --

22 ADMINISTRATIVE LAW JUDGE NELSON: Mr.
23 Lubel, I can't anticipate a problem here until it
24 actually exists.

25 We are dealing with the abstract.

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1 MR. LUBEL: All we are suggesting, Your
2 Honor, is that in the guidelines there be some
3 requirement that if they respond to an interrogatory
4 by saying it is in the depository, that in that
5 response they give some indication as to where it is
6 in the depository.

7 ADMINISTRATIVE LAW JUDGE NELSON: Such as
8 box 18B?

9 MR. EDELMAN: Exactly.

10 ADMINISTRATIVE LAW JUDGE NELSON: How
11 about if that requirement were in there?

12 MR. ROACH: Yes. It has to be a rule of
13 reason. If the request is, "What is the labor impact
14 in Denver?" We can be quite specific in pointing to
15 the responsive documents.

16 If the request is, "Produce all documents
17 relating to competition," we are not going to be all
18 that specific. We will say there are such documents
19 throughout the --

20 ADMINISTRATIVE LAW JUDGE NELSON: That
21 sounds fine to me, that the specificity of the
22 reference, the location be in proportion to the
23 specificity of the question.

24 I don't see any trouble with that, Mr.
25 Lubel. Do you?

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1 MR. LUBEL: It is really a burden-shifting
2 thing. They are their documents. They might know
3 where something responsive to an interrogatory is, and
4 what they are trying to do is shift the burden onto
5 us, to start in this short time period that we have,
6 to search --

7 ADMINISTRATIVE LAW JUDGE NELSON: Well, if
8 you ask them for an analysis of competition at every
9 station served by both railroads, and he tells you it
10 is in the depository, for the sake of argument, what
11 more can you expect from him?

12 Do you want him to go through 8,000 boxes
13 and tell what is in each box.

14 MR. EDELMAN: We do have some examples
15 here. We have asked them for presentations to their
16 board where the competitive impact of this merger may
17 have been discussed, and we think that we are entitled
18 to a little more than, "Go find it in the warehouse."
19 We think they should say to us, "The board minutes or
20 presentations are -- "

21 ADMINISTRATIVE LAW JUDGE NELSON: That
22 example is a good one, Mr. Lubel. Mr. Roach, that
23 sounds to me like the kind of request, which, if it
24 were made, you could pinpoint by box number and file
25 number.

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1 MR. ROACH: Absolutely, and it is a good
2 reason why --

3 ADMINISTRATIVE LAW JUDGE NELSON: Records
4 of board meetings.

5 MR. ROACH: Right. It is a good reason
6 why this issue is unlikely to lead to any real
7 disputes. We are going to produce those documents.
8 They will be separately identified.

9 ADMINISTRATIVE LAW JUDGE NELSON: That is
10 the guideline.

11 MR. ROACH: Right.

12 ADMINISTRATIVE LAW JUDGE NELSON: And if
13 you see some abuse there, Mr. Lubel, come in and I
14 will end it and there won't be anymore.

15 MR. ROACH: And my concern from the other
16 side is --

17 ADMINISTRATIVE LAW JUDGE NELSON: Also, it
18 tends to focus the request narrowly because it is
19 going to get you a better answer, Mr. Lubel, including
20 box numbers. How is this done? By boxes?

21 MR. ROACH: It is by Bates number. It will
22 be in file drawers.

23 ADMINISTRATIVE LAW JUDGE NELSON: What do
24 you do with computerized stuff? Is that on tapes?

25 MR. ROACH: They will be on disks, and I

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1 think they will have Bates numbers assigned to them.

2 ADMINISTRATIVE LAW JUDGE NELSON:

3 Photographic, photos that are in a computer?

4 MR. ROACH: I don't believe so. No.

5 ADMINISTRATIVE LAW JUDGE NELSON: Is there
6 a need to translate computer stuff?

7 MR. ROACH: I do not believe so. The data
8 is in formats that are familiar to people who process
9 data.

10 The concern that I have, if I can say just
11 one more word, is that we don't want document requests
12 to turn into disguised requests for admission.

13 In other words, that if we don't point out
14 that a document in some other number range might be
15 regarded as responsive to this, that the party will
16 later argue that we have stipulated that the only
17 universe of responsive documents are the ones with the
18 following Bates numbers.

19 We will do our best to say what we think,
20 rationally interpreting the request, is responsive,
21 but these rules can become very tricky if they turn
22 into estoppel type rules.

23 ADMINISTRATIVE LAW JUDGE NELSON: I don't
24 know how we build that in, and I don't know that that
25 is within my jurisdiction here. That goes more into

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1 the contentions that the parties will make on the
2 merits.

3 If I ask you for documents showing that
4 there will be -- your studies showing that there will
5 be no adverse competitive impacts at point a, and you
6 produce nothing, it is certainly fair game for me to
7 point out to the commission that when I asked for
8 their back up they had nothing.

9 So it was simply an assertion, unsupported
10 by anything. They had a warehouse full of 18 thousand
11 documents and couldn't find one page to support the
12 analysis that there would be no adverse competition.
13 That is fair advocacy.

14 I don't know if I want to cut that off if
15 it happens, but that is up to the commission. Really.
16 I don't think that is within the bounds of discovery.

17 MR. ROACH: We are probably debating
18 things that are hypothetical.

19 ADMINISTRATIVE LAW JUDGE NELSON: It may
20 or may no happen. Well, let's see if we can review
21 where we are. We are going to have no numerical
22 limits.

23 We are going to have an absolute deadline
24 for the serving of the last increment of
25 interrogatories or data requests or whatever they are

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1 called.

2 We are going to have some tailored version
3 of the Northeast Utilities procedure to resolve
4 discovery disputes. We are going to have a repository
5 adequate in size, dimension, and so forth to the
6 complexity of the case.

7 We are going to have a Covington & Burling
8 employee available to assist in the search. We are
9 going to have the applicants describing the location
10 of documents in the warehouse, but their description
11 may be in direct relationship to the specificity of
12 the request.

13 The more specific the request, the more
14 specific the applicants pointing the location must be.

15 What other points? Upon request, everyone
16 gets copies of everyone else's requests and responses,
17 but not of the documents themselves.

18 Is that correct?

19 MR. ROACH: Correct.

20 MR. FINK: Requests or just responses?

21 ADMINISTRATIVE LAW JUDGE NELSON: I
22 thought it was both. You want to see what is being
23 asked and what the response is, but not the actual,
24 physical documents.

25 anything else to include?

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1 MR. ROACH: Your Honor, the statement you
2 made about a Covington & Burling employee being
3 available to help in the --

4 ADMINISTRATIVE LAW JUDGE NELSON: You
5 don't like that?

6 MR. ROACH: We will have paralegals
7 available to point people to the documents, explain
8 where the different number ranges are, hand over the
9 index, as it exists --

10 ADMINISTRATIVE LAW JUDGE NELSON: Fine.
11 Put that in.

12 MR. ROACH: All I am saying is we are not
13 --

14 ADMINISTRATIVE LAW JUDGE NELSON: Do just
15 what you said you will do right now.

16 MR. ROACH: That is fine.

17 ADMINISTRATIVE LAW JUDGE NELSON: That
18 there will be a paralegal available to do these
19 things.

20 MR. ROACH: Fine.

21 MR. WOOD: I would like to address that
22 point. I could perhaps request a rule because the
23 repository requirements, as proposed by the commission
24 and imposed by the commission's order, are applicable
25 to all parties, not just the applicants, and smaller

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1 firms may not have the opportunity to devote a
2 paralegal's full --

3 ADMINISTRATIVE LAW JUDGE NELSON: You mean
4 if you make discovery of something else --

5 MR. WOOD: No. When we file our comments
6 we are required to deposit any supporting materials in
7 the depository, as are all of the other parties, and
8 if any discovery was served on us for document
9 production --

10 ADMINISTRATIVE LAW JUDGE NELSON: Well,
11 let's just make that an applicant's paralegal will
12 assist in finding the applicant's materials. There is
13 not other big authority involved here.

14 Is discovery going to be made of the KCS
15 documents?

16 MR. ROACH: There very well may be, and
17 again, it depends on how substantial these other
18 railroads decide to make their cases.

19 There very well could be discovery of the
20 same scope.

21 ADMINISTRATIVE LAW JUDGE NELSON: Then
22 shall we have counsel for KCS have somebody available
23 on request to assist in finding those documents?

24 MR. LUBEL: Upon request we will be happy
25 to do that, Your Honor. I also would like to point

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1 out that there may be some discovery, as Ms. Jones
2 mentioned, of Burlington Northern, and certainly it is
3 a sizeable entity.

4 ADMINISTRATIVE LAW JUDGE NELSON: And we
5 still have that dispute, don't we? The question of
6 the timeliness of that response.

7 What if we said that we impose the
8 paralegal requirement on the applicant, because it is
9 the primary source of the heaviest volume of documents
10 and it is the one seeking permission to engage in this
11 transaction.

12 So it is singled out. It is different in
13 that sense. That other parties whose stuff is in the
14 repository, will, upon request, assist people in
15 finding things, but they need not always have somebody
16 on the payroll to do that.

17 Will that work? Mr. Pruden.

18 MR. PRUDEN: Your Honor, if I can address
19 something else.

20 ADMINISTRATIVE LAW JUDGE NELSON: Let's
21 get this done.

22 MR. PRUDEN: With respect to limited
23 resources and so forth I was fully prepared to accept
24 Mr. Roach's responses distributed to everyone on the
25 service list, but for someone that is asking

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1 interrogatories to have to distribute their requests
2 to all 330 seems to be a little burdensome.

3 Can we have just his responses, which they
4 will incorporate the question, I assume, in the normal
5 interrogatory format distributed to everyone on the
6 service list?

7 ADMINISTRATIVE LAW JUDGE NELSON: Fine
8 with me. Is that agreeable?

9 MR. FINK: Couldn't we simply have a
10 restricted service list so that we don't have 330, and
11 just have the parties that are active in the
12 proceedings receive those requests? Three hundred and
13 thirty is ridiculous.

14 ADMINISTRATIVE LAW JUDGE NELSON: So you
15 want a limited list of counsel who would be entitled
16 to see everyone's discovery requests?

17 MR. ROACH: The problem we have with this,
18 Judge, is that one of the goals that I think we have
19 all agreed on is to eliminate --

20 ADMINISTRATIVE LAW JUDGE NELSON: That
21 shouldn't be a problem for you.

22 MR. ROACH: Yes, sir.

23 ADMINISTRATIVE LAW JUDGE NELSON: You are
24 the party being discovered.

25 MR. ROACH: Right, but the problem is we

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1 seek to eliminate duplicativeness in these requests,
2 and if the parties don't know what other parties have
3 already asked us because they haven't been served with
4 the requests of the other parties, how can they abide
5 by the injunction in the guidelines to to be
6 duplicative?

7 ADMINISTRATIVE LAW JUDGE NELSON: Well,
8 the limited list would include all of the active
9 players, I would assume.

10 MR. EDELMAN: In other words that everyone
11 who wants to engage in discovery would at some point
12 serve notice on everyone else. So we are all --

13 ADMINISTRATIVE LAW JUDGE NELSON: Maybe we
14 do it here, you get a sense of how many would be on
15 the list, and if it is too many I will cut it down.

16 MR. ROACH: That is fine.

17 ADMINISTRATIVE LAW JUDGE NELSON: That can
18 be part of what we work on after we take a recess.

19 There are two ways to do this. One is to
20 leave you all here. The other is to appoint a
21 committee and discharge everybody else so that the
22 time meters don't keep running, and I am available to
23 do it any way you want to do it.

24 MR. EDELMAN: Before we get into that
25 there is one other area that we had highlighted in our

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1 comments, and that relates to depositions.

2 I know I initially made some statements
3 that I think were generally responsive to my item
4 number six.

5 ADMINISTRATIVE LAW JUDGE NELSON: Like
6 that corporate identification requirement in the
7 federal rules.

8 MR. EDELMAN: That is actually number
9 seven. I think Arvid is being responsive to my number
10 six if they will figure out when people are going to
11 be available who can give verified statements, but as
12 for number seven, we would like to be able to insure
13 that we can say that the person who actually knows
14 about this -- we had situations where somebody was
15 there, we asked questions, then it turned out that
16 that person really didn't have first hand knowledge,
17 and they had based their statement on someone else's
18 work, and then when is that person available, well,
19 that person is not available for another month, and so
20 --

21 ADMINISTRATIVE LAW JUDGE NELSON: Some of
22 that is inevitable. You are never going to get the
23 person who is always the ultimate informed party about
24 everything.

25 MR. EDELMAN: That is true, but they are

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1 proferring everybody who is offering a verified
2 statement, and we may have a very specific area of
3 inquiry. We want the person who knows about X.

4 ADMINISTRATIVE LAW JUDGE NELSON: In the
5 normal case, if that happens, if he gives you X, and
6 it turns out that X doesn't know anything about it.

7 I announce that I will naturally draw the
8 inference that nobody in the company knows anything
9 about it, that they simply made it up on a sheet of
10 paper, and they pay a heavy price for that, but I
11 don't have that authority here. So I see your point.
12 We have got to build something in.

13 Do you have a suggestion?

14 MR. ROACH: What the guidelines say, and
15 what has been the practice in prior cases is that the
16 witnesses submitting the written testimony are deposed
17 unless there is an issue that they do not and cannot
18 address, in which case we must designate someone who
19 can speak to that issue.

20 We are delighted to do that.

21 ADMINISTRATIVE LAW JUDGE NELSON: Let me
22 see that language.

23 MR. ROACH: It is paragraph 6a of the
24 guidelines.

25 ADMINISTRATIVE LAW JUDGE NELSON: Look at

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1 6a Mr. Edelman, and tell me whether you can live with
2 it or if you want some adjustment of it.

3 MR. ROACH: The only reservation we have
4 about Mr. Edelman's language is that we do not think
5 that the commission intends open ended deposition for
6 multiple people on a topic like this.

7 We are required to produce one person if
8 the testifying witnesses can't address it.

9 ADMINISTRATIVE LAW JUDGE NELSON: My
10 experience is that the higher up you go in the
11 company, the more you get the man or woman whose
12 judgment or work depends upon the work of others.

13 MR. ROACH: Right.

14 ADMINISTRATIVE LAW JUDGE NELSON: If you
15 really want the guy who does the numbers, you get a
16 fairly low-level employee, and you could get him.

17 If you get the treasurer, you get the
18 input of the entire treasurer's department, and he or
19 she may say, "I don't know those numbers. They were
20 given to me by Goldberg. I know Goldberg. I know his
21 work. I trust him."

22 I will entertain suggestions from you as
23 to how you want to rewrite that mechanism so that it
24 works better for you, and that perhaps, could go on
25 during the recess.

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1 MR. EDELMAN: It is a presumption against
2 discovery.

3 MR. ROACH: It is not a presumption
4 against discovery. It is simply a presumption that if
5 the testifying witness testifies about a subject, he
6 is the guy to ask about that subject.

7 ADMINISTRATIVE LAW JUDGE NELSON: I see
8 what he means. It starts out that, "Nobody who was
9 not submitted shall be deposed unless -- " then it
10 places some sort of burden on the discoverer. Is that
11 what is troubling you?

12 MR. EDELMAN: Yes, and there is this
13 language at the end that, "On a subject matter
14 relevant to the issues, which has not been
15 specifically addressed by witnesses -- "

16 ADMINISTRATIVE LAW JUDGE NELSON: What
17 sentence are you in here?

18 MR. EDELMAN: Sorry. In 6a.

19 ADMINISTRATIVE LAW JUDGE NELSON: Let's
20 see what that means.

21 MR. EDELMAN: This is a specific labor
22 impact issue that we have, and they say, "Well, you
23 know, Mr. Hartman has done the labor impact
24 statement," so they say "Well, Mr. Hartman did the
25 labor impact statement," but it turns out that Mr.

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1 Hartman doesn't have first hand knowledge about
2 something.

3 Of course, he has specifically addressed
4 the labor impact issue, in which case I would be
5 precluded from asking for somebody else, but in fact,
6 he might not have first hand knowledge.

7 ADMINISTRATIVE LAW JUDGE NELSON: I don't
8 like that result. I am with you on that. I don't
9 like that result. You have got to have people here
10 who, on deposition, are responsible to testify about
11 details. Details are important in this kind of case.

12 MR. ROACH: Absolutely. We did not draft
13 this sentence, it came out of BN-Santa Fe. I think
14 the intent is exactly what we all are saying here.

15 If the testifying witness who purports to
16 specifically address a topic, is, in fact, unable to
17 address that topic, we will provide someone who can.

18 ADMINISTRATIVE LAW JUDGE NELSON: Why
19 don't we have that language in there?

20 MR. ROACH: That is fine.

21 MR. EDELMAN: Okay.

22 MR. ROACH: If they tell us in advance
23 that they want to ask very specific questions about
24 the count of boilermakers in Denver --

25 ADMINISTRATIVE LAW JUDGE NELSON: You

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1 better be on the committee now, Mr. Edelman. If it is
2 going to be committed, you are staying here.

3 MR. ROACH: He is right. These witnesses
4 address a lot of things that they collected from
5 others, just as you say, Your Honor.

6 MR. LUBEL: Your Honor?

7 ADMINISTRATIVE LAW JUDGE NELSON: Sir?

8 MR. LUBEL: A helpful twist to that might
9 be that if you have got good cause you could specify
10 a particular individual that you wanted to approach.

11 You might be in there in the deposition of
12 the person who submitted the testimony --

13 ADMINISTRATIVE LAW JUDGE NELSON: Of
14 course. If you have reason to believe that Goldberg
15 is the person, you ask for the deposition of Goldberg.
16 Of course.

17 MR. LOFTUS: Your Honor, Michael Loftus.
18 Another question with regard to depositions. A
19 critical piece of this application is the settlement
20 agreement between the Union Pacific and the Southern
21 Pacific and the Burlington Northern Santa Fe.

22 ADMINISTRATIVE LAW JUDGE NELSON: Is that
23 public?

24 MR. ROACH: Yes, sir.

25 MR. LOFTUS: And that is a subject upon

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1 which depositions of BN-Santa Fe people may well be
2 desirable.

3 ADMINISTRATIVE LAW JUDGE NELSON: They are
4 a party.

5 MR. LOFTUS: That was one of my questions,
6 whether it was clear that they were, and that they
7 were subject to depositions with regard to that. I
8 just think that needs to be clarified, Your Honor.

9 ADMINISTRATIVE LAW JUDGE NELSON: Is there
10 any doubt about that?

11 MR. ROACH: There is no doubt that a
12 parties' testifying witnesses are subject to
13 deposition. That is provided for in the commission's
14 order.

15 ADMINISTRATIVE LAW JUDGE NELSON: Why do
16 you care? He is talking about the BN's witnesses.

17 MR. ROACH: I care about some of these
18 other principals that have been articulated here.

19 ADMINISTRATIVE LAW JUDGE NELSON: He is
20 saying that there is a deal here between the
21 applicant's and BN, which deal is public, that they
22 want to probe that deal by deposing people who are
23 from the BN company as well as from the applicants.

24 I don't hear anything wrong with that.

25 MR. ROACH: What is potentially wrong with

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1 that is that there is not an as of right deposition
2 practice at the commission.

3 You have to petition for depositions. The
4 commission has overridden that in this case to say
5 that witnesses submitting written verified statements
6 are automatically deposable.

7 He is dragging that requirement through
8 the back door again. Come on, Mr. Roach, let's not do
9 that.

10 Let me make it clear that I regard
11 depositions as an important discovery tool, and that
12 unless there are abuses, which I will of course hear,
13 I intend that they shall go forward.

14 MS. JONES: Your Honor, we certainly agree
15 with that. We don't have any witnesses yet. We
16 didn't file testimony last night with the applicants.

17 We do intend to file some comments,
18 probably before the end of the year, and we will at
19 that time have witnesses, and we will of course, make
20 those witnesses available for board depositions. I
21 don't feel we should be subject to depositions before
22 that point.

23 ADMINISTRATIVE LAW JUDGE NELSON: I am not
24 going to rule on that in the abstract. You come in
25 with a request to depose a particular witness about a

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1 particular subject and you show its relevance and why
2 you need it, and then we will hear Ms. Jones say why
3 that person can't be deposed.

4 MR. ROACH: What I mean to suggest, Your
5 Honor, is that the same rule applies to the
6 applicants, where we have not put witnesses forward,
7 and where a witness isn't needed to cover a specific
8 topic that no witness can answer about, we are not
9 required to produce anybody that anybody asks for
10 without the normal ICC petition.

11 ADMINISTRATIVE LAW JUDGE NELSON: What
12 case is it you are worried about?

13 MR. ROACH: It goes to more than what Mr.
14 Lubel was saying. Can't we just pick and choose seven
15 people we want to depose on a number of topics, then
16 you get into pure federal court deposition practice.

17 ADMINISTRATIVE LAW JUDGE NELSON: That is
18 the kind I know. That is the kind we do here in this
19 agency.

20 MR. ROACH: But I shouldn't have to do it
21 all --

22 ADMINISTRATIVE LAW JUDGE NELSON: Then you
23 come in here and you say, "We have got seven notices
24 of taking. Here are the problems with them."

25 MR. ROACH: It is a little bit different

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1 world at the commission. They have an established
2 practice that cases should go forward with
3 interrogatories and on papers unless a showing of a
4 need for an oral deposition is at stake. That is the
5 only point I am making.

6 ADMINISTRATIVE LAW JUDGE NELSON: I will
7 remember that, but I adhere to my ruling in the
8 Vermont case which is that the language of the orders
9 is sufficiently broad as to give me the power to
10 authorize the taking of depositions without that
11 preliminary showing, and I am going to follow that
12 practice here.

13 Anything else we should discuss before you
14 start? Time is of the essence. We have got to do
15 this today. You can actually draft out an agreement
16 that embodies all of these ideas, another is to
17 outline them and go over them with me and then recite
18 them into the record, that might be faster, but if you
19 want the actual protection of words, now is the time
20 to do it.

21 Let's go off the record to decide how we
22 want to proceed.

23 (Whereupon, the proceedings were taken off
24 the record at 11:33 a.m.)

25 ADMINISTRATIVE LAW JUDGE NELSON: We have

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1 been discussing how to proceed now, and there seems to
2 be a consensus that a representative committee will
3 form itself here to draft up the guidelines.

4 Other lawyers whose interests are
5 effectively represented on the committee can leave and
6 go back to their work.

7 That is fine with me. It seems to me more
8 efficient. My intention is to take a recess, and then
9 have you come and get me when the committee is ready
10 to either recite or draft.

11 I want to have some assurance that lawyers
12 who leave are doing so knowingly and at their own risk
13 and I don't want to hear from them later that they
14 left and then something happened that they didn't
15 like.

16 Is there anyone who objects to this
17 procedure? I don't hear any. I don't see any. So I
18 am not going to take a recess and I will ask Mr. Roach
19 to come to my office with Mr. Rosenthal when the time
20 comes, and then we can also carry the boxes.

21 MR. ROSENTHAL: Mr. Livingston will be
22 representing us.

23 ADMINISTRATIVE LAW JUDGE NELSON: Mr.
24 Livingston, fine. Mr. Lubel, do you have troubles
25 with this?

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1 MR. LUBEL: No. That is fine, Your Honor.

2 We do have this minor issue of the --

3 ADMINISTRATIVE LAW JUDGE NELSON: Let's
4 get to that in a moment. Mr. Livingston, my office is
5 on the 11th floor. I don't recall the room number.
6 It is on the side that overlooks Gonzaga High School.
7 You will find me up there.

8 MR. LIVINGSTON: Are you reachable by the
9 telephone?

10 ADMINISTRATIVE LAW JUDGE NELSON:
11 Absolutely. Is there something else, Mr. Lubel, that
12 you want to resolve now?

13 MR. LUBEL: It is just with BN.

14 ADMINISTRATIVE LAW JUDGE NELSON: I will
15 assume that BN will be here and that you will be here
16 for the drafting of the guidelines, and we can take
17 that up when we are ready with the guidelines.

18 You are certainly a major player here, and
19 I assume BN is.

20 MS. JONES: We were going to appoint Mr.
21 Steel to the committee, sir, but we can certainly
22 wait.

23 ADMINISTRATIVE LAW JUDGE NELSON: And Mr.
24 Steel is?

25 MS. JONES: My partner, right in front of

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1 me.

2 ADMINISTRATIVE LAW JUDGE NELSON: That is
3 fine. As long as the -- he representing BN? It
4 doesn't matter if it is you or Mr. Steel, that is
5 fine. Whoever it is has now got plenty of time to
6 talk with Mr. Lubel and work out a claim for
7 production that he will agree with, and that way you
8 will avoid some ruling, because, as in all phases of
9 litigation, the deal you make, sight unseen, is better
10 than the one I force on you.

11 So if you want to roll dice with me, that
12 is fine. If you want to make a deal you can live
13 with, you work out a schedule with Mr. Lubel for the
14 production of these documents.

15 I don't mind calling these shots. That is
16 what they are paying me to do.

17 Anything else? All right. I am going to
18 take a recess.

19 We will take a recess. I will be hearing
20 next from Mr. Livingston.

21 (Whereupon, a recess was taken at 11:40
22 a.m., to reconvene at 2:04 p.m.)
23
24
25

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AFTERNOON SESSION

(2:04 p.m.)

ADMINISTRATIVE LAW JUDGE NELSON: Well how do we stand now?

MR. LIVINGSTON: Your Honor, we have spent a good deal of effort on this, and we had many disputes, and we resolved all but one of them.

ADMINISTRATIVE LAW JUDGE NELSON: Good.

MR. LIVINGSTON: We have marked up the guidelines, and we have inserts and mark ups. We will have to resolve, at some point today, the mechanics.

ADMINISTRATIVE LAW JUDGE NELSON: I will be willing to take it and simply issue it, assuming we agree, and I can understand it.

MR. LIVINGSTON: It will have to be retyped, obviously.

ADMINISTRATIVE LAW JUDGE NELSON: All right.

MR. LIVINGSTON: If you would like us to do that we can send it over to you. I am hopeful we can get it to you this afternoon.

ADMINISTRATIVE LAW JUDGE NELSON: That will be fine.

MR. LIVINGSTON: And circulate it to the parties. There is one wrinkle in here that I will

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1 bring to your attention that is new.

2 It is important, we think, that the people
3 who are going to be engaged in the discovery process,
4 and not all of the nominal parties in this case will
5 be actively engaged in discovery, but those who are
6 should receive the discovery requests that other
7 parties are making, so that they will not duplicate
8 them, and receive notice of disputes that are coming
9 up before Your Honor, because if it touches on
10 something that is important to them, they may want to
11 come.

12 There was a feeling or belief, and we came
13 to an agreement, that when one of these dispute
14 notices goes out on a Monday afternoon, that notice
15 should not only be given to the party who has objected
16 to the discovery, but also to all parties who are
17 actively participating in discovery.

18 That means we need to create a restricted
19 service list and we have come up with a common sense
20 mechanism. These guidelines would contain an order
21 requiring anybody who wants to participate in
22 discovery to get themselves on that list.

23 That would constitute the official
24 restricted service list.

25 ADMINISTRATIVE LAW JUDGE NELSON: Who has

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1 to create the list and police it and so forth?

2 MR. LIVINGSTON: The names would be coming
3 in to you in response to your order, and I suppose it
4 would be up to Your Honor to then publish the
5 restricted service list of the parties who would
6 receive notice when these disputes were going to be
7 heard.

8 ADMINISTRATIVE LAW JUDGE NELSON: My
9 experience of being the superintendent of lists has
10 not been a very happy one. Someone is always wanting
11 on or off the list.

12 There is a constant stream of
13 administrative requests that I would like to avoid.
14 Can you think of a way to do that?

15 MR. EDELMAN: I think maybe you can't get
16 off of the list, Your Honor.

17 MR. LIVINGSTON: I think once you are on,
18 you are on for the duration.

19 ADMINISTRATIVE LAW JUDGE NELSON: How
20 would the list be created?

21 MR. LIVINGSTON: These guidelines would
22 contain a direction to all of the parties in the case
23 that if they wanted to participate in discovery,
24 engage in discovery themselves or be up to date on
25 what is happening in discovery, they would then send

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1 their name to you and be placed on this list.

2 That would be the list that the rest of us
3 would use when we are serving discovery requests.

4 ADMINISTRATIVE LAW JUDGE NELSON: What if
5 the company assembles the list?

6 MR. LIVINGSTON: We can do that.

7 MR. WOOD: Your Honor, May we go off the
8 record for a moment?

9 ADMINISTRATIVE LAW JUDGE NELSON: Sure.
10 Any objection to going off the record?

11 (Whereupon, the proceedings were taken off
12 the record at 2:08 p.m.)

13 ADMINISTRATIVE LAW JUDGE NELSON: You have
14 agreed on a procedure to handle this matter of the
15 list.

16 MR. LIVINGSTON: Right. On the restricted
17 service list the proposed guidelines will contain a
18 direction to all of the parties in the proceeding that
19 there will be a restricted service list for certain
20 discovery matters, which will be enumerated, and the
21 order will direct that persons who want to be on that
22 list should send their names to Covington & Burling
23 within 10 days, and within 5 days thereafter Covington
24 & Burling will publish the list, providing a copy to
25 all parties in the case.

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1 ADMINISTRATIVE LAW JUDGE NELSON: All
2 right. What else is there?

3 MR. LIVINGSTON: In the proposed
4 guidelines there were some minor matters. I can go
5 through all of the changes, Your Honor, but frankly,
6 some of them we either discussed this morning in
7 general terms or not very --

8 ADMINISTRATIVE LAW JUDGE NELSON: If they
9 are agreed upon and worked out, that is fine. I will,
10 of course, look at this before I adopt it. I want to
11 see exactly what it says.

12 Is it readable in the form you have it
13 there?

14 MR. LIVINGSTON: No. It will have to be
15 retyped. I will suggest that I send a retyped
16 version, with a disk, to Your Honor as soon as I get
17 back to the office.

18 MR. KOLASKY: Your Honor, you might
19 request that Mr. Livingston send you a redlined
20 version as well, that will make it easier to see the
21 changes.

22 ADMINISTRATIVE LAW JUDGE NELSON: I think
23 just a clean copy of the integrated deal as it stands.
24 I don't need to compare.

25 MR. LIVINGSTON: There is one major

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1 dispute, let me see if there is anything else that was
2 flagged before we get to that.

3 ADMINISTRATIVE LAW JUDGE NELSON: Let me
4 look at the draft and see if I have questions, I don't
5 understand something or I don't like something.

6 MR. LIVINGSTON: Let me bring some things
7 to your attention.

8 ADMINISTRATIVE LAW JUDGE NELSON: Can we
9 meet informally on Monday?

10 MR. LIVINGSTON: I don't know if it will
11 be necessary.

12 ADMINISTRATIVE LAW JUDGE NELSON: I have
13 a hearing at 10:00.

14 MR. EDELMAN: I am unavailable on Monday.

15 MR. LIVINGSTON: Your Honor had talked
16 about a deadline for discovery against the applicants.
17 That was one of the issues.

18 ADMINISTRATIVE LAW JUDGE NELSON: That is
19 what I thought people wanted, a one day --

20 MR. LIVINGSTON: As we discussed that the
21 issue became more complicated. We finally ended up
22 with an agreement that there will be a moratorium on
23 the surface of written discovery requests by any party
24 during the period between February 26 and March 29.

25 That was responsive to one of the things

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1 we discussed this morning. Aside from that there is
2 only one major issue in dispute. That is the question
3 of deposition procedure.

4 All are agreed that those individuals,
5 whether or not they work for a party, and some don't,
6 all individuals who have submitted verified statements
7 as part of the case, that those people will be made
8 available for depositions without any showing for need
9 or cause or anything.

10 ADMINISTRATIVE LAW JUDGE NELSON: That is
11 easy.

12 MR. LIVINGSTON: That is easy and that is
13 agreed to. The next part is not the easy part.

14 The non-applicants, the others, my
15 adversaries, want a provision that says, depositions
16 of non-witnesses or of parties on specified subject
17 matter, those depositions may be taken on reasonable
18 written notice, and any party objecting to such a
19 deposition should follow the procedures set forth in
20 the notes.

21 The procedures -- we essentially adopted
22 the ones that you had used in the --

23 ADMINISTRATIVE LAW JUDGE NELSON: Using
24 Monday and Wednesday.

25 MR. LIVINGSTON: Using Monday and

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1 Wednesday, with the only nuance being that there will
2 be written notice to your opponent about the hearings
3 upcoming and also that that notice will then be
4 circulated.

5 ADMINISTRATIVE LAW JUDGE NELSON: Do we
6 say what time on Wednesday?

7 MR. LIVINGSTON: I think we do. Four
8 o'clock.

9 ADMINISTRATIVE LAW JUDGE NELSON: Because,
10 for instance, next week I have hearings. What did I
11 do in Northeast? Did I specify a time that I was
12 available?

13 MR. LIVINGSTON: None shown in this
14 excerpt.

15 ADMINISTRATIVE LAW JUDGE NELSON: FERC
16 hearings never start before 10:00. So why don't I say
17 9:00 a.m. for discovery, and then you get first crack
18 and if it drags on the FERC case will delay itself for
19 half an hour and I will explain it to them.

20 The conferences, if properly invoked,
21 would begin at 9:00 a.m. on the Wednesday of each
22 week.

23 MR. EDELMAN: Would they be here?

24 ADMINISTRATIVE LAW JUDGE NELSON: They
25 would have to be. I am thinking of my own immediate

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1 schedule, but they don't have to be if I don't have
2 commitments that day. They could be at your office,
3 they could be at ICC, wherever.

4 Next week I must be here at 888 1st
5 Street, other weeks I can certainly be at the
6 convenience of counsel, and would be willing to do so.

7 MR. LIVINGSTON: Because of the way this
8 procedure is going to work, for instance, there will
9 be a dispute notice that goes out on a Monday, and it
10 will go to 15 people on the restricted list, I am
11 guessing.

12 You won't know who is coming. You will
13 know who the proponent and the opponent is, but you
14 don't know who else.

15 ADMINISTRATIVE LAW JUDGE NELSON: That
16 notice should also tell the where it should be, too.

17 MR. LIVINGSTON: So maybe we ought to do
18 it at the same place every time.

19 ADMINISTRATIVE LAW JUDGE NELSON: That
20 would be good. Do you want to do it here?

21 MR. EDELMAN: Fine.

22 ADMINISTRATIVE LAW JUDGE NELSON: The
23 intervenor's side says fine. Is that a problem for
24 you?

25 MR. LIVINGSTON: No.

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1 ADMINISTRATIVE LAW JUDGE NELSON: What
2 would your preference be?

3 MR. LIVINGSTON: This is fine.

4 ADMINISTRATIVE LAW JUDGE NELSON: Speak
5 up.

6 MR. LIVINGSTON: No, these are nice
7 hearing rooms. My office is at 12th and Penn, one
8 block from the ICC. I think it makes sense to do it
9 here.

10 ADMINISTRATIVE LAW JUDGE NELSON: Now, we
11 need a reporter, so we will have to figure out how to
12 do that.

13 MR. LIVINGSTON: Maybe the person calling
14 the conference should be responsible for running down
15 the reporter. Would that work?

16 ADMINISTRATIVE LAW JUDGE NELSON: That is
17 a way to do it. I don't know that it will work.

18 MR. MULLINS: The ICC has a contract with
19 a reporting firm.

20 ADMINISTRATIVE LAW JUDGE NELSON: Yes.
21 They do. We will talk to Julia Farr and figure out
22 how to do this.

23 MR. LIVINGSTON: To get back to the
24 dispute, they want depositions to be permitted on
25 reasonable notice, subject to objections.

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1 ADMINISTRATIVE LAW JUDGE NELSON: Anyone
2 they name or on a subject matter?

3 MR. LIVINGSTON: They could say, "We want
4 Mr. Smith," or "We want a witness to deal with such
5 and such a subject." Either way. That is their
6 proposal.

7 Our proposal would be that they can have
8 depositions of that kind, that go beyond the named
9 witnesses, to cover situations where the named witness
10 himself is not knowledgeable about some aspect of
11 something in that witnesses statement.

12 That is not a limitation they want to
13 agree to. That is the dispute between us. We think
14 that given the nature of ICC practice and discovery
15 rules, it is not like an anti-trust case where you can
16 go out and depose the entire sales force, there is a
17 witness who deals with the issues, if he is testifying
18 about something he doesn't know about, all right, you
19 have to bring in a back up guy or a subsidiary guy.
20 That is one thing.

21 That is the nut of the dispute between us.

22 ADMINISTRATIVE LAW JUDGE NELSON: In
23 effect, then, their right to take a deposition of a
24 non-witness, when I say non-witness, I mean a non-
25 submitter of a statement, would be subject to a

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1 condition precedent, namely that they first take a
2 deposition of the next closest submitter and find that
3 he or she is failing in some respect.

4 Then and only then, would the non-
5 submitter's deposition be appropriate.

6 MR. LIVINGSTON: That is correct, although
7 I don't think it would require the deposition of the
8 submitter first, there might be other discovery tools
9 that can be used.

10 ADMINISTRATIVE LAW JUDGE NELSON: Aside
11 from the idea that it harmonizes with commission
12 practice, what else can be said for this requirement?

13 MR. LIVINGSTON: I think it keeps the
14 proceeding, which is on a tight time table, focused on
15 the application, on the verified statements, on the
16 issues in the proceedings.

17 It prevents fishing expeditions and wild
18 goose chases, abusive or harrassing discovery.

19 If someone asks us for a deposition and we
20 say no, they have the right to come to you immediately
21 and say, "We want to take the deposition of Mr. So-
22 and-So, and here is the reason," and you can decide it
23 appropriately. That is more consistent with the
24 purpose of the proceeding.

25 ADMINISTRATIVE LAW JUDGE NELSON: Does

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1 anyone have our rules here? The FERC rules?

2 MR. KOLASKY: When Mr. Livingston talks of
3 ICC precedent, he is talking about decisions made by
4 ICC administrative law judges, Judge Cross and Judge
5 Cleary and other judges.

6 MR. EDELMAN: The rules did have in them
7 some thresholds.

8 MR. KOLASKY: They did, and the whole
9 nature of those rules have been changed by them
10 wanting to change the rules in the first place.

11 ADMINISTRATIVE LAW JUDGE NELSON: I see
12 risk on both sides. Your approach is undoubtedly a
13 little more restrictive to the taking of depositions
14 and in the end, might save some time for that reason.

15 At the same time, your approach may trigger
16 collateral disputes about the extent to which they
17 have or have not crossed this threshold and made the
18 showing they have to make. That is a time killer.

19 MR. LIVINGSTON: I would say two things
20 about the collateral disputes. My guess is that there
21 won't be many of them. My second observation would
22 be that we get a resolution of one or two of those
23 disputes and the matter is taken care of.

24 ADMINISTRATIVE LAW JUDGE NELSON: I think
25 they will fall into place anyway.

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1 MR. LIVINGSTON: I don't think that is a
2 major problem. What we have proposed is not as
3 restrictive as in the BN-Santa Fe case.

4 We are not offering to cut back from what
5 has traditionally been done. We are doing exactly
6 what was proposed in the Santa Fe case. If anything
7 we are being somewhat more open.

8 Your Honor has discretion here. The
9 commission deliberately did not decide these issues.

10 ADMINISTRATIVE LAW JUDGE NELSON: Let me
11 look briefly at our rules for a moment. Mr. Lubel,
12 what is so funny?

13 MR. LUBEL: I am sorry, Your Honor.

14 ADMINISTRATIVE LAW JUDGE NELSON: We are
15 talking about potential discovery abuse and I see you
16 laughing at it over there. You are one of those that
17 is in the category they are worried about.

18 MR. LUBEL: Let me echo Bill here, we will
19 not abuse this process either. I furnished something
20 to my assistant here that resolved our prior dispute
21 with BNSF, which we were able to do without bringing
22 it to your attention, Your Honor.

23 ADMINISTRATIVE LAW JUDGE NELSON: But you
24 were not laughing about discovery abuse?

25 MR. LUBEL: No, Your Honor.

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1 ADMINISTRATIVE LAW JUDGE NELSON: Again,
2 I emphasize, if there is such an abuse, I will deal
3 with it in decisive fashion. If there are penalties
4 to be paid, and I have power to enforce them, I will.

5 ADMINISTRATIVE LAW JUDGE NELSON: My
6 leaning is to not adopt this limitation. I am going
7 to let depositions go forward without the limitation
8 of having to cross some threshold before reaching a
9 non-submitter.

10 It seems to me that in the context of this
11 case, the procedure you contend for, Mr. Livingston,
12 may in itself be a time consumer and a side show, and
13 I am worried about that. I am going to let them go
14 forward.

15 If they start harrassing your people, your
16 people are supposed to be spending their time running
17 a railroad, not sitting in a room answering questions
18 of lawyers.

19 I know that. If that kind of thing is
20 going on I want to hear about it.

21 Has the Department of Justice anything to
22 say on this matter?

23 MR. BILLIEL: We favor that, Your Honor.

24 ADMINISTRATIVE LAW JUDGE NELSON: You are
25 satisfied with that approach?

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1 So I am ruling with the intervenors and
2 the anti-trust division and with the unions and the
3 shippers and so forth on these deposition issues.

4 Are there other things we need to resolve?

5 MR. LIVINGSTON: I think not, Your Honor.
6 The logistics of getting this retyped. I can type it,
7 fax it to everyone on this committee, so they will see
8 what I am sending to Your Honor.

9 ADMINISTRATIVE LAW JUDGE NELSON: That is
10 fine, but you have to work quickly because of our
11 schedule.

12 MR. LIVINGSTON: I can fax it to
13 everybody, and send it to you by 9:00 Monday morning.

14 ADMINISTRATIVE LAW JUDGE NELSON: That is
15 fine, on a disk compatible with our system, but I
16 don't know enough to tell you what that is.

17 MR. EDELMAN: Wordperfect 5.1.

18 MR. LIVINGSTON: I think that does cover
19 it. We will endeavor to do that, taking into account
20 the ruling Your Honor just made and fax it to.

21 ADMINISTRATIVE LAW JUDGE NELSON: Get to
22 to Mrs. Mullally. If she is not here Ms. DiCianno
23 will be here Monday, and God willing, so will I.

24 MS. DICIANNO: 219-2198. I think.

25 ADMINISTRATIVE LAW JUDGE NELSON: I don't

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1 think so.

2 MS. DICIANNO: Call me and I will give it
3 to you.

4 MR. LIVINGSTON: I want to say one last
5 thing in closing. I do want to make it clear on the
6 record that some of the depositions being outlined by
7 Conrail's counsel were over the line.

8 I was not agreeing with his approach.

9 ADMINISTRATIVE LAW JUDGE NELSON: As
10 matters are left, a written version appropriate for
11 issuance by me, reflecting all of these points, my
12 rulings and what has been agreed upon will come about
13 9:00 a.m. Monday, in disk form.

14 I am available now under the discovery
15 procedure that is going to be decreed to sit as early
16 as this Wednesday, should it be necessary.

17 Thank you very much, ladies and gentlemen.

18 (Whereupon, the proceedings were adjourned
19 at 2:49 p.m.)

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This is to certify that the foregoing transcript in

the matter of: Discovery Hearing re:
Finance Docket No. 32760
(Union Pacific Corp., et al.,
-Control and Merger-
Southern Pacific Rail Corp., et al.)

Before: Interstate Commerce Commission

Date: December 1, 1995

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.

Charles P. Ryall