

INTERSTATE COMMERCE COMMISSION 02/09/96

FINANCE DOCKET # 32760

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UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

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DISCOVERY CONFERENCE

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IN THE MATTER OF: :

UNION PACIFIC CORPORATION, :
UNION PACIFIC RAILROAD COMPANY, :
and MISSOURI PACIFIC RAILROAD : Finance Docket
COMPANY : No. 32760
:
- CONTROL AND MERGER - :
:
SOUTHERN PACIFIC RAIL CORPORATION, :
SOUTHERN PACIFIC TRANSPORTATION :
COMPANY, ST. LOUIS, SOUTHWESTERN :
RAILWAY COMPANY, SPCSL CORP., :
AND THE DENVER AND RIO GRANDE :
WESTERN RAILROAD COMPANY. :
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Friday, February 9, 1996

Federal Energy Regulatory
Commission
Hearing Room 3
Second Floor
888 First Street, N.E.
Washington, D.C.

The above-entitled matter came on for
hearing, pursuant to notice, at 10:00 a.m.

BEFORE:

THE HONORABLE JEROME NELSON
Administrative Law Judge

NEAL R. GROSS

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

(10:03 a.m.)

JUDGE NELSON: Please be seated. Are we ready? Let's get the usual record of who is here. Mr. Roach?

MR. ROACH: Thank you, Your Honor. Arvid Roach, Michael Rosenthal and Paul Cunningham for the Applicants.

JUDGE NELSON: Mr. Loftus?

MR. LOFTUS: Good morning, Your Honor. Michael Loftus on behalf of the Western Coal Traffic League.

JUDGE NELSON: Mr. Edelman?

MR. EDELMAN: Rich Edelman for the RLEA and UPU.

MR. MASER: Good morning, Your Honor, John Maser for Kennecott Utah Copper Corporation, Kennecott Energy Company and U.S. --

JUDGE NELSON: What are you involved in here? I didn't see this name of this client in any of the appeals this morning.

MR. MASER: We're not -- we don't have a dispute this morning, Your Honor. We're here observing.

JUDGE NELSON: Oh, all right.

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1 MR. WOOD: Your Honor, Frederick Wood on
2 behalf of the National Industrial Transportation
3 League and Dow Chemical Company.

4 MR. ONGMAN: Good morning, Your Honor,
5 John Ongman for the Geneva Steel Company and the --
6 Power Company.

7 Mr. Roach has informed me just a few
8 moments ago that he expects to comply with our request
9 by the end of business today, so I think we will also
10 not have something before you.

11 MR. LUBEL: Good morning, Your Honor.
12 Alan Lubel with Troutman Sanders representing the
13 Kansas City Southern Railroad Company.

14 JUDGE NELSON: That's certainly on the
15 agenda today.

16 MR. LUBEL: Yes sir. Some of the -- a
17 couple of the things have been resolved.

18 JUDGE NELSON: That's good. Mr. Billiel?

19 MR. BILLIEL: Good morning, Your Honor.
20 Mike Billiel, Department of Justice.

21 JUDGE NELSON: I hope you're going to be
22 able to work out this business with Southern Pacific
23 so that we don't have to take up a lot of time with it
24 in terms of Mr. Cunningham's request about the
25 documents.

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1 MR. BILLIEL: I don't think it's a dispute
2 between us --

3 JUDGE NELSON: He's concerned about other
4 parties. So I would hope that we could not waste a
5 lot of time with that one. Anybody else?

6 MS. JONES: Erika Jones --

7 JUDGE NELSON: Ms. Jones, yes.

8 MS. JONES: -- for Burlington Northern
9 Railroad Company and Atchison, Topeka & Santa Fe
10 Railway Company. And Adrian Steel of our firm is with
11 us also.

12 JUDGE NELSON: All right, off the record
13 for a moment, please.

14 (Whereupon, the proceedings went off the
15 record at 10:04 a.m. and resumed at 10:08 a.m.)

16 JUDGE NELSON: We have old business and
17 new business. And the way I see the agenda, the old
18 business is Mr. Edelman's dispute regarding the
19 Anschutz materials, and then Mr. Loftus's dispute
20 regarding the alleged settlement privilege.

21 Then we have in the category of new
22 business Mr. Cunningham's letter regarding the
23 housekeeping problems of confidentiality for certain
24 materials that the Department of Justice wants.

25 We have Mr. Lubel with a series of

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1 disputes, some of which he says have now been
2 resolved. And then we have this subpoena request for
3 Grinstein, which came in either yesterday or today.

4 And that's it as far as I know. I got --
5 I've got it here correctly?

6 MR. ROACH: I believe so.

7 JUDGE NELSON: How do you want to begin
8 then between -- between Mr. Loftus and Mr. Edelman?
9 Is there an agreement or a desire or --

10 MR. LOFTUS: Mr. Edelman will be first,
11 Your Honor.

12 JUDGE NELSON: Mr. Edelman?

13 MR. EDELMAN: Fine.

14 JUDGE NELSON: Fine?

15 MR. EDELMAN: Yes.

16 JUDGE NELSON: This is the dispute about
17 Anschutz.

18 MR. EDELMAN: Yes. Our interrogatory
19 number is 33 and number 34. And I have some materials
20 that I'm going to refer to. I have one copy for the
21 Applicants and one for Your Honor.

22 JUDGE NELSON: Thirty-three is with regard
23 to any money invested by Mr. Anschutz or his
24 corporation in the Southern Pacific at the time the
25 Southern Pacific acquired Rio Grande Industries.

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1 MR. EDELMAN: No, that's --

2 JUDGE NELSON: That's not 33?

3 MR. EDELMAN: At the time they required
4 Southern Pacific through Rio Grande Industries in
5 essence.

6 JUDGE NELSON: Well, you'll have to tell
7 me that story. And then number 34 seeks money or
8 capital contributions by Mr. Anschutz or his
9 corporation in Southern Pacific or any SP subsidiary
10 since 1988?

11 What's this all about? Who is Mr.
12 Anschutz?

13 MR. EDELMAN: Sure.

14 JUDGE NELSON: Why do we want this stuff?

15 MR. EDELMAN: Okay, Mr. Anschutz is the --
16 is effectively the party in control of the SP
17 entities. I guess to start with, his -- he and the
18 Anschutz Corp., which is a -- without being -- with
19 apologies to my incorrect characterization of
20 corporate entities, which I'm sure somebody will
21 correct.

22 But as I understand it, he and his
23 corporation control RGI Industries, which was a
24 holding corporation that owned -- controlled the
25 Denver Rio Grande Western Railroad in 1987 or they

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1 acquired control of Southern Pacific through RGI
2 Industries.

3 And our question concerns 33. How much
4 money did Mr. Anschutz put in to --

5 JUDGE NELSON: Let me make notes. Ever
6 since 1958 and '59 in Cambridge, Massachusetts, I
7 learned that I have to diagram these things.
8 Otherwise, I don't understand them.

9 MR. EDELMAN: Go ahead.

10 JUDGE NELSON: So we start with Anschutz
11 --

12 MR. EDELMAN: Okay, Anschutz --

13 JUDGE NELSON: -- and then we have his
14 corporation.

15 MR. EDELMAN: Yes.

16 JUDGE NELSON: And is that a wholly owned
17 --

18 MR. EDELMAN: I believe that --

19 JUDGE NELSON: -- or a family or --

20 MR. EDELMAN: -- the Anschutz Corporation
21 is wholly owned by him or his family and their related
22 interests. Again, I'll --

23 JUDGE NELSON: By whose family?

24 MR. EDELMAN: Mr. Anschutz.

25 JUDGE NELSON: Mr. Anschutz's -- it's a

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1 family corporation?

2 MR. EDELMAN: I believe that's correct.
3 I'll more than -- be more than glad to be corrected on
4 that by --

5 JUDGE NELSON: Is the stock in the
6 Anschutz Corporation traded anywhere?

7 MR. EDELMAN: I don't believe it is.

8 JUDGE NELSON: Listed anywhere?

9 MR. EDELMAN: I don't believe it is.

10 JUDGE NELSON: So there's a family
11 corporation called the Anschutz Corporation?

12 MR. EDELMAN: Correct.

13 JUDGE NELSON: It then acquired RGI?

14 MR. EDELMAN: It had control of RGI. I
15 don't know when he acquired --

16 JUDGE NELSON: RGI is another corporation?

17 MR. EDELMAN: It's a holding corporation.

18 JUDGE NELSON: All of which stock is held
19 by the Anschutz Corporation?

20 MR. EDELMAN: I don't think so. I think
21 they own 31 percent.

22 JUDGE NELSON: Thirty-one percent?

23 MR. EDELMAN: I'm not exactly -- I don't
24 really know the percentages.

25 JUDGE NELSON: Where is the other 69?

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1 MR. EDELMAN: They went -- I know they
2 went public at one point. Morgan Stanley, I think,
3 has 11 percent. I'm sorry, Your Honor, I don't really
4 know the precise --

5 JUDGE NELSON: Apart from the percentages,
6 is it your contention that the Anschutz Corporation
7 controls RGI --

8 MR. EDELMAN: Yes.

9 JUDGE NELSON: -- by virtue of its
10 holdings?

11 MR. EDELMAN: Yes.

12 JUDGE NELSON: The other holdings are so
13 dispersed --

14 MR. EDELMAN: Yes.

15 JUDGE NELSON: -- that whatever Anschutz
16 has --

17 MR. EDELMAN: Absolutely.

18 JUDGE NELSON: -- Anschutz Corporation has

19 --

20 MR. EDELMAN: Absolutely.

21 JUDGE NELSON: -- controls RGI.

22 MR. EDELMAN: There's no dispute about
23 that. That's been fact --

24 JUDGE NELSON: Well, we'll have to see.
25 All right. Now, we have the RGI Corporation.

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1 MR. EDELMAN: Right.

2 JUDGE NELSON: And it acquires a railroad?

3 MR. EDELMAN: It had already owned the
4 Denver Rio Grande Western.

5 JUDGE NELSON: Okay.

6 MR. EDELMAN: And in 1987, I believe, or
7 '88, it, Rio Grande Industries, acquired control of
8 Southern Pacific and its affiliates.

9 JUDGE NELSON: What happened to the other
10 railroad, the Denver Rio Grande?

11 MR. EDELMAN: They retained control of
12 that. And then ultimately, those were all merged
13 together. I don't know if they're formally merged,
14 but they're all under common control.

15 JUDGE NELSON: So they are two separate
16 railroads we think --

17 MR. EDELMAN: But they are --

18 JUDGE NELSON: -- both of which --

19 MR. EDELMAN: -- referred to in these
20 proceedings as Southern Pacific Rail.

21 JUDGE NELSON: And they're controlled by
22 the RGI Corporation?

23 MR. EDELMAN: Correct.

24 JUDGE NELSON: How much -- does the RGI
25 Corporation own 100 percent of the stock of the

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1 Southern Pacific and DRG?

2 MR. EDELMAN: You know, Your Honor, what
3 I -- I can tell you, I -- one of the materials I gave
4 you is a Form 10K from Southern Pacific
5 Transportation.

6 JUDGE NELSON: Maybe Mr. Cunningham can
7 help with the corporate structure here and explain
8 what -- what's not disputed.

9 MR. CUNNINGHAM: I think what's not
10 disputed is that the Anschutz Corporation owns roughly
11 25 percent now of the Southern Pacific Railway, the
12 holding company, which is what I think Mr. Edelman is
13 concerned about.

14 JUDGE NELSON: The Anschutz Corporation
15 owns 25 percent of which company?

16 MR. CUNNINGHAM: Of the holding structure
17 which controls all of the Southern Pacific railroads,
18 including the Denver Rio Grande.

19 JUDGE NELSON: Is that RGI?

20 MR. CUNNINGHAM: No.

21 JUDGE NELSON: What's the name of that
22 company?

23 MR. ROACH: It's been renamed Southern
24 Pacific Rail.

25 MR. CUNNINGHAM: It's been named Southern

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1 Pacific Rail.

2 MR. ROACH: Same corporation.

3 JUDGE NELSON: So Anschutz has 25 percent
4 of the stock, and a company called Southern Pacific
5 Rail --

6 MR. ROACH: Right.

7 MR. EDELMAN: Here, Your Honor, if I may,
8 this is an SEC Form -- Schedule 14D-9 filed here on --
9 I don't see --

10 JUDGE NELSON: Well, I'm getting it now
11 with Mr. Cunningham. Southern Pacific Rail then is a
12 -- is a corporation 25 percent owned by the Anschutz
13 Corporation?

14 MR. CUNNINGHAM: Yes.

15 JUDGE NELSON: And Southern Pacific Rail
16 holds the stock of the Southern Pacific and the Denver
17 Rio Grande or controlling interest of the two
18 railroads?

19 MR. CUNNINGHAM: Yes, yes.

20 MR. ROACH: I think it's 100 percent or
21 virtually 100 percent.

22 JUDGE NELSON: You can't just go on the
23 stock market and buy a share of the Southern Pacific?

24 MR. CUNNINGHAM: No, you can only buy SPR
25 stock.

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1 JUDGE NELSON: Can you buy the Southern
2 Pacific Rail Corporation?

3 MR. CUNNINGHAM: Yes, yes.

4 JUDGE NELSON: That's trading?

5 MR. CUNNINGHAM: That's SPR, yes.

6 MR. ROACH: About 50 percent are publicly
7 traded. There's another 25 percent block that's owned
8 by Union Pacific and is in a voting trust pending --

9 JUDGE NELSON: Pending approval of the
10 merger?

11 MR. ROACH: Correct.

12 JUDGE NELSON: So the working control is
13 in the hands of the trustee and the Anschutz
14 Corporation?

15 MR. ROACH: No, the trustee has to vote
16 with the other shareholders. So he really has no
17 control. It's controlled by Anschutz.

18 JUDGE NELSON: He does what Anschutz
19 Corporation tells him to do?

20 MR. ROACH: Right, except he has to vote
21 for the merger --

22 JUDGE NELSON: All right.

23 MR. CUNNINGHAM: Unless the other --

24 JUDGE NELSON: This is a device to prevent
25 premature acquisition of control?

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1 MR. CUNNINGHAM: Precisely.

2 MR. ROACH: Yes.

3 JUDGE NELSON: It's undisputed then that
4 Anschutz Corporation controls Southern Pacific Rail
5 Corporation, which in turn controls the railroads?

6 MR. CUNNINGHAM: Yes.

7 JUDGE NELSON: Is that correct?

8 MR. CUNNINGHAM: Correct.

9 JUDGE NELSON: Is there any dispute that
10 Mr. Anschutz controls the Anschutz Corporation?

11 MR. CUNNINGHAM: None.

12 JUDGE NELSON: So Mr. Anschutz, as an
13 individual, is in a position to control the two
14 railroads?

15 MR. CUNNINGHAM: Yes.

16 JUDGE NELSON: All right. What is it that
17 we need and why do we need it?

18 MR. EDELMAN: All right. Your Honor, a
19 key element of the SP case here is that SP does not
20 have capital to invest in the railroads, sufficient
21 capital, that it has had difficulty in raising the
22 capital, that it can't get capital that it needs now,
23 and that it's not likely to be able to get the
24 necessary capital in the future.

25 And I've provided you with a number of the

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1 verified statements in this proceeding, including at
2 the top Mr. Anschutz's verified statement.

3 JUDGE NELSON: He is a witness though.

4 MR. EDELMAN: He is a witness.

5 JUDGE NELSON: Yes.

6 MR. EDELMAN: And he provided this
7 statement. And you can see at page 184, I've
8 highlighted for your convenience -- Your Honor and
9 Applicants --

10 JUDGE NELSON: I have it.

11 MR. EDELMAN: -- relevant passages.

12 JUDGE NELSON: So he says, among other
13 things, that the SP needs money?

14 MR. EDELMAN: Right.

15 JUDGE NELSON: And that this merger will
16 give it new sources of capital?

17 MR. EDELMAN: That UP will be able to
18 invest money, get money to invest in the railroad,
19 that SP can't get on its own.

20 JUDGE NELSON: Well, he's happy about that
21 because he's controlling a railroad that needs money.
22 He sees a way for money to come in.

23 MR. EDELMAN: Your Honor, he is going to,
24 by my calculations, walk away with about a billion
25 dollars out of this deal. So he is very happy.

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1 JUDGE NELSON: Does he walk away?

2 MR. EDELMAN: He has -- he will get either
3 -- either shares in UP or, you know, cash. Plus, he
4 will be -- I think he gets to be a member of the Board
5 or Vice Chairman of --

6 JUDGE NELSON: So he's a good, strong
7 supporter of the merger?

8 MR. EDELMAN: He's a very strong supporter
9 of the merger.

10 JUDGE NELSON: But he doesn't want to
11 support the merger on the ground that he's going to
12 make a million dollars. He wants to support the
13 merger as consistent with the public interest.

14 MR. EDELMAN: That's what he says, Your
15 Honor. And what he says is that SP needs cash. Now
16 then beyond that, we have statements from John Gray
17 and --

18 JUDGE NELSON: So the public interest
19 coincides --

20 MR. EDELMAN: With his integrating with --

21 JUDGE NELSON: -- happily with Mr.
22 Anschutz's --

23 MR. EDELMAN: Yes. Exactly.

24 JUDGE NELSON: -- own pocketbook.

25 MR. EDELMAN: So he would say, Your Honor.

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1 JUDGE NELSON: And so the merger is -- and
2 he may well be right. There's not necessarily an
3 inconsistency. If the merger brings new health and
4 infusion of new capital to a company, that's good for
5 the transportation system, good for America, isn't it?

6 Isn't that the theory? And
7 coincidentally, stockholders benefit --

8 MR. EDELMAN: My view of those theories is
9 not necessarily the same as those conventionally held.

10 JUDGE NELSON: But we don't have to
11 adjudicate them.

12 MR. EDELMAN: We don't have to adjudicate
13 that.

14 JUDGE NELSON: That is put forward as a
15 benefit of the merger?

16 MR. EDELMAN: Correct.

17 JUDGE NELSON: All right.

18 MR. EDELMAN: Now so beyond Mr. Anschutz,
19 we then have the statements in more detail by Mr. Gray
20 and Mr. Yarberry, which I've also provided you, all of
21 which assert that a big problem for SP is they need to
22 be able to make capital investments to do
23 improvements, to do various things that they can't do
24 because they can't get capital.

25 JUDGE NELSON: These are SP employees?

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1 MR. EDELMAN: Officers --

2 JUDGE NELSON: Gray and Yarberry?

3 MR. EDELMAN: Yes, Gray and Yarberry.

4 JUDGE NELSON: Yes.

5 MR. EDELMAN: Now -- and they are also
6 witnesses. These are their verified statements.

7 JUDGE NELSON: All right.

8 MR. EDELMAN: Now I would also note,
9 within the last several years, employees of SP and its
10 affiliates gave substantial wage concessions to the
11 railroads through the deferral of pay increases that
12 were give to other class -- employees of class one
13 railroads.

14 And beyond the verified statements, I have
15 provided you with a Form 10K filed by Southern Pacific
16 Transportation at page 458, which refers to those
17 concessions, as well as a sample of one agreement with
18 the Brotherhood of Maintenance and Weigh Employees
19 Union, which refers to the deferral of the wage
20 increases.

21 So during the last several years, the
22 employees have made a substantial investment in the
23 company by deferral of industry standard wage
24 increases.

25 JUDGE NELSON: Where is this stuff about

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1 the --

2 MR. EDELMAN: After the verified
3 statements, you will see a Form 10K.

4 JUDGE NELSON: I have that.

5 MR. EDELMAN: Okay. At page 458 --

6 JUDGE NELSON: Yes.

7 MR. EDELMAN: -- there should be --

8 JUDGE NELSON: You want me to look in the
9 margins?

10 MR. EDELMAN: Yes.

11 JUDGE NELSON: Let me read that paragraph.

12 MR. EDELMAN: Sure.

13 JUDGE NELSON: So sometimes rail labor has
14 some flexibility?

15 MR. EDELMAN: Well, this was imposed by
16 the Congress sometimes based upon the pleas of Mr.
17 Anschutz and his subordinates that they needed it.

18 JUDGE NELSON: I was just remembering
19 other litigation where Labor did not seem to have
20 flexibility. All right. So concessions were made --

21 MR. EDELMAN: Right.

22 JUDGE NELSON: -- in response to the
23 situation the company found itself in.

24 MR. EDELMAN: That's correct.

25 JUDGE NELSON: Now Labor is pretty savvy

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1 about such things. And I would draw from that the
2 inference that the Brotherhoods thought that this was
3 a legitimate claim.

4 They're not giving up money for the fun of
5 it because Anschutz is --

6 MR. EDELMAN: Your Honor, I have to --

7 JUDGE NELSON: -- to make Anschutz a
8 million dollars.

9 MR. EDELMAN: -- tell you that the unions
10 did not want to do this. There was a Presidential
11 Emergency Board that accepted Southern Pacific's
12 recommendation that they be --

13 JUDGE NELSON: I see.

14 MR. EDELMAN: -- as part of a public law

15 --

16 JUDGE NELSON: Labor act forced this then.

17 MR. EDELMAN: That's correct.

18 JUDGE NELSON: I see.

19 MR. EDELMAN: That's correct.

20 JUDGE NELSON: In any event, some tribunal
21 must have found a good faith need for this money.

22 MR. EDELMAN: Yes, apparently they did.

23 JUDGE NELSON: All right, so be it.

24 MR. EDELMAN: Okay.

25 JUDGE NELSON: Now?

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1 MR. EDELMAN: So now, as we have this
2 transaction going forward here, we have Mr. Anschutz
3 stands to walk away with stock or cash on the order of
4 a billion dollars by my calculations, and I'm sure
5 I'll be corrected if I'm off by some -- by very
6 substantially, plus the seat on the Board of UP.

7 By contrast, the employees will end up
8 with reductions in jobs and changes in their
9 collective bargaining agreements that they have not
10 agreed to.

11 We submit our inquiries are relevant here
12 for a couple of reasons: 1) we can test the validity
13 of SP's statement regarding its capital shortfalls and
14 its ability to get capital. One of the key elements,
15 as Mr. Anschutz says, "We can't get capital," and
16 based on his own verified statement.

17 Well, has he contributed any capital to
18 this corporation? Has he been willing to put his
19 assets off as potential collateral?

20 So 1) we have that question about how the
21 validity of the statement that they can't get capital
22 here; 2) we can allow the parties and the Service
23 Transportation Board to inquire into the reasons for
24 this problem.

25 Here we have this billionaire controlling

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1 a railroad who won't invest -- apparently won't invest
2 his own capital, and he cites that capital shortfall
3 as a reason that the STB should approve a merger which
4 is going to give him a billion dollars when he gets
5 done.

6 So there's a question -- and that's been
7 asserted to be in the public interest. And I think
8 it's legitimate for the parties and the Board to
9 inquire into the circumstances around that. Then --

10 JUDGE NELSON: So is it your theory that -
11 - let's assume you could have all of this discovery,
12 and it showed -- what would be our best guess, that
13 Mr. Anschutz has a billion dollars in assets and he's
14 never put a penny of his personal money in the road?

15 MR. EDELMAN: And in fact, he's taken
16 money out.

17 JUDGE NELSON: That would be the best
18 case.

19 MR. EDELMAN: That's right.

20 JUDGE NELSON: What does that get you?

21 MR. EDELMAN: We would ask for conditions
22 on any approval of this merger, which is my -- which
23 is my next point.

24 The employees here gave significant
25 concessions in wages over the last several years, as

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1 I showed. They invested big-time in this outfit.

2 And in Mr. Anschutz hasn't, he stands to
3 walk away with a lot of money and our employees get
4 job reductions and changes in their collective
5 bargaining agreements.

6 We think it's relevant to a condition that
7 we would seek to -- that the employees get reimbursed
8 out of the proceeds of this sale, or out of Mr.
9 Anschutz, or a variety of ways we could fashion some
10 sort of relief here.

11 Because if he's put nothing into this and
12 stands to walk away with a lot, and we made
13 concessions to keep his company going when he didn't,
14 then I think that the unions are entitled, the
15 employees are entitled, to something out of this too.

16 JUDGE NELSON: Review what the conditions
17 would say again?

18 MR. EDELMAN: I mean, I haven't formulated

19 --

20 JUDGE NELSON: No, in rough --

21 MR. EDELMAN: -- it precisely.

22 JUDGE NELSON: -- rough terminology.

23 MR. EDELMAN: That the employees get
24 reimbursed for their wage concessions and their
25 investment in the railroad --

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1 JUDGE NELSON: After --

2 MR. EDELMAN: -- after the sale. Yes.

3 JUDGE NELSON: Yes. So you would seek a
4 condition which would divvy up the proceeds of the
5 sale?

6 MR. EDELMAN: In part to the employees,
7 yes.

8 JUDGE NELSON: In part to the employees.
9 And what's left over would go to the -- what, the
10 stockholders, I guess.

11 MR. EDELMAN: Right.

12 JUDGE NELSON: All right. And why do you
13 need the discovery to press for that condition?

14 MR. EDELMAN: Well, because --

15 JUDGE NELSON: Why can't you --

16 MR. EDELMAN: -- the Commission is going
17 to want to know the facts as to exactly what he put
18 in, what he put in to start with and what he put in
19 afterwards and what he took out.

20 And if he basically put nothing into this
21 railroad, took out of the railroad for eight years,
22 and then is coming to the Commission and says -- and
23 says, "Authorize this transaction, or I will have --
24 after all of that time, I walk away;" and pulls out a
25 billion dollars and a seat on the UP Board and the

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1 employees made concessions, I think the Commission has
2 a right to know that.

3 I think the we have a right to know that.

4 JUDGE NELSON: So you're not -- you are
5 not arguing that the merger should be turned down on
6 the theory that the need for capital is bogus --

7 MR. EDELMAN: Well --

8 JUDGE NELSON: -- and should be met by Mr.
9 Anschutz?

10 MR. EDELMAN: No, we may also argue that
11 if it -- it depends on what we find. Yes, I'm not
12 basing my entire case on the condition.

13 I also think there needs -- maybe the
14 merger should be turned down because they can get
15 capital if he was willing to put some money into it
16 himself. But I don't know what's there.

17 JUDGE NELSON: Here at the place where I
18 work, the rule is, written by me and others and
19 affirmed by the Commission on at least two occasions,
20 that the issue is not whether the benefits of the
21 merger could be sustained or achieved in other ways
22 short of the merger, but whether the benefits of the
23 merger themselves render the transaction consistent
24 with the public interest.

25 So if this were an electric utility case,

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1 there would be an argument that Mr. Anschutz's
2 pocketbook is wholly irrelevant because if there's a
3 need for capital, there's a need for capital. And if
4 the merger would bring in the potential for new
5 capital, an increased cash flow, so be it.

6 It matters not whether the railroad could
7 have gone and found that money some other way.

8 MR. EDELMAN: But Your Honor --

9 JUDGE NELSON: I can see that holding in
10 an electric utility.

11 MR. EDELMAN: But in this case, they've
12 basically said -- the linchpin to their case is "We
13 have no capital. We can't invest. We're behind the
14 other railroads because we haven't made investments
15 because we can't -- we don't have access to capital."

16 In fact, their highly leveraged. Why?
17 Because Mr. Anschutz bought and leveraged buy-out.

18 JUDGE NELSON: Do you know what Mr.
19 Cunningham is going to say as to why they don't want
20 to make some discovery or --

21 MR. EDELMAN: Well as to why they don't
22 want to, I don't know. I know one response I've
23 received.

24 JUDGE NELSON: Well, certainly you've had
25 conversations with them.

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1 MR. EDELMAN: Yes. I mean, they have said
2 that they don't have to do this, and that the
3 Commission had previously held that Mr. Anschutz need
4 not disclose his personal finances in the original RGI
5 acquisition.

6 And the Commission did, in fact, so hold.

7 JUDGE NELSON: Yes, I got that today in
8 the mail room as well.

9 MR. EDELMAN: And I would say that that is
10 not -- that that of reasoning is not applicable here.
11 That concerned the question of was RGI Industries
12 basically fit to acquire SP?

13 Well, one might have, in retrospect -- one
14 has questions. But at that point, the inquiry was did
15 the Commission need to look at Mr. Anschutz's finances
16 --

17 JUDGE NELSON: Was it Labor that was
18 pressing for discovery of his finances at that time?

19 MR. EDELMAN: I think it may have been
20 KCS, but I'm not -- I'm not -- it was not Labor.

21 JUDGE NELSON: Does Mr. Lubel know?

22 MR. LUBEL: I wasn't involved in that
23 proceeding, Your Honor.

24 JUDGE NELSON: All right.

25 MR. EDELMAN: My recollection is that it

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1 was KCS.

2 JUDGE NELSON: Was there an issue, a
3 condition, like that which you've talked about here
4 that --

5 MR. EDELMAN: No.

6 JUDGE NELSON: -- the proceeds should --

7 MR. EDELMAN: No.

8 JUDGE NELSON: -- be earmarked for the
9 benefit of Labor?

10 MR. EDELMAN: No.

11 JUDGE NELSON: So it may be a different
12 situation. And we'll hear from Mr. Cunningham about
13 that or Mr. Roach.

14 MR. EDELMAN: But what that was about was
15 that it was alleged that, in essence, RGI would not be
16 financially capable to support and continue the
17 railroad in good shape and do the things that ended to
18 be done and that their economic predictions were too
19 rosy, and that -- and that there was a need to inquire
20 into Mr. Anschutz's personal finances to -- to - I
21 think they also argued that Mr. Anschutz had bled the
22 -- had bled the DRGW, is the phrase I think KCS used
23 there, and that he would do the same thing to the SP.

24 And the Commission said that what they had
25 to look at was RGI Industries going to be financially

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1 able. And since Anschutz was saying that they weren't
2 predicating the ability of RGI Industries to be
3 financially able on his own finances, that it didn't
4 really matter.

5 And that the Commission accepted RGI's
6 prospective statements as to what its capitalization
7 was, what it was going to be able to do in terms of
8 liquidating real estate, what it was going to be able
9 to take in in terms of income over the time period.

10 And that given that that assessment
11 indicated that RGI Industries was in -- was -- looked
12 like it would be able to sustain the railroad, the
13 approval could go forward based on what RGI Industries
14 had told the Commission.

15 And in that event, Mr. Anschutz's personal
16 finances were not necessary.

17 JUDGE NELSON: Was all of that discussed?

18 MR. EDELMAN: Yes, in the RGI Industries
19 decision.

20 MR. LUBEL: And Your Honor, that does ring
21 a bell. I believe the KCS did predict those dire
22 consequences.

23 MR. EDELMAN: I have a copy of that
24 decision here with me.

25 JUDGE NELSON: So a competing railroad

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1 sought the information in order to defeat the
2 transaction --

3 MR. EDELMAN: Correct.

4 JUDGE NELSON: -- on the ground that
5 Anschutz would be bad news?

6 MR. EDELMAN: Right. That's correct.

7 JUDGE NELSON: He was a wrecking ball, in
8 effect, or out to line his own pockets.

9 MR. EDELMAN: Well --

10 JUDGE NELSON: I'm just trying to
11 understand here.

12 MR. EDELMAN: Well, I have a copy of his
13 decision. I didn't bring a copy for you because
14 that's really their case, but --

15 JUDGE NELSON: And it turned out that they
16 were wrong, I assume?

17 MR. EDELMAN: One might say that.

18 JUDGE NELSON: But the railroad is still
19 in business.

20 MR. EDELMAN: Well, the railroad is
21 considered to be in disastrous, you know, shape such
22 that it has to be -- it has to be bailed out through
23 this merger.

24 JUDGE NELSON: In any event, we don't need
25 to resolve that.

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1 MR. EDELMAN: But it -- but now, the point
2 there is that -- so that's what they had before them.
3 What we've got here is now --

4 JUDGE NELSON: So you would argue that has
5 nothing to do with the interest that Labor is pressing
6 here?

7 MR. EDELMAN: Well no, it doesn't for two
8 reasons. I mean, one is Mr. Anschutz is now here
9 saying the railroad can't raise capital and it hasn't
10 been able to raise capital. And so I/we should get,
11 in essence, bailed out here. We should get -- we
12 should be allowed to merge with this, and I walk away
13 with a billion dollars.

14 JUDGE NELSON: Is there any --

15 MR. EDELMAN: That ICC should approve this
16 in the public interest.

17 JUDGE NELSON: Mr. Edelman?

18 MR. EDELMAN: I'm sorry.

19 JUDGE NELSON: Is there any ICC precedent
20 on this question of the cognizability of claims that
21 a particular benefit could be achieved through means
22 other than the merger? Has that gotten litigated?

23 MR. EDELMAN: I'm not sure I -- you're
24 talking about could SP be saved by way other than the
25 merger?

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1 JUDGE NELSON: No, maybe I'm not making
2 myself clear enough. Suppose it is your claim that
3 there need not be any merger at all.

4 MR. EDELMAN: Yes.

5 JUDGE NELSON: All Mr. Anschutz has to do
6 is open his pocketbook, bail out the SP and continue
7 and continue to compete.

8 And you say that could be one of your
9 claims you argue.

10 MR. EDELMAN: Yes.

11 JUDGE NELSON: Is there precedent at the
12 ICC for the entertaining of such a claim as the -- as
13 bearing on whether a proposed transaction is
14 consistent with the public interest?

15 MR. EDELMAN: I can't think of anything
16 that specific.

17 JUDGE NELSON: We here I think -- I had
18 this in a case, and I know at least one other judge
19 did. I ruled it out in the Northeast Utilities merger
20 proceedings, and was sustained by the Commission, and
21 I believe even the Court of Appeals on that.

22 That's here. That's in the electric
23 utility business and may have nothing to do with
24 railroads. But it happened to be something I came to.

25 Now your condition is different from that.

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1 MR. EDELMAN: Well, it is different. But
2 before I move onto my condition, Your Honor, I would
3 point out that the Commission is supposed to make a
4 public interest determination here based on a whole
5 variety of factors.

6 And part of their asserted public interest
7 here is that SP can't make it in the future the way
8 things are now. That -- and part of the whole
9 argument here is that SP is such a weak competitor,
10 and will continue to be such a weak competitor, that
11 you, the Commission, have to come in and do something,
12 do this transaction, in the public -- that's what's in
13 the public interest.

14 And part of their case is the financial
15 circumstances and the inability to get --

16 JUDGE NELSON: All right. I think I
17 understand the --

18 MR. EDELMAN: Now as to the condition --

19 JUDGE NELSON: Anything else --

20 MR. EDELMAN: -- that's a separate point.

21 JUDGE NELSON: -- before I turn to the
22 Applicants?

23 MR. EDELMAN: Right.

24 JUDGE NELSON: Anything else?

25 MR. EDELMAN: Unless you want to hear more

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1 about our condition.

2 JUDGE NELSON: I think I understand it.

3 MR. EDELMAN: Okay, thank you.

4 JUDGE NELSON: Is it Mr. Cunningham or Mr.
5 Roach? I assume it would be Mr. Cunningham.

6 MR. CUNNINGHAM: Good morning, Your Honor,
7 again.

8 JUDGE NELSON: Yes sir?

9 MR. CUNNINGHAM: I think there are two
10 fundamental problems with the relevance claims that
11 Mr. Edelman has made.

12 The first, and most obvious, is in the
13 context of his own logic. The inquiries are two: 1)
14 how much money was invested was Phillip Anschutz
15 and/or the Anschutz Corporation, and the second is
16 that -- in 1988.

17 And the second is identify all monies
18 invested since 1988. Mr. Edelman's proposition, on
19 its face as I've heard this morning, is that the
20 Commission should examine this transaction and whether
21 it's in the public interest prospectively on the basis
22 of whether or not there is an alternative source of
23 capital --

24 JUDGE NELSON: One of his arguments.

25 MR. CUNNINGHAM: -- for the SP. Well, I

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1 think that is his only argument.

2 MR. EDELMAN: I'm afraid not.

3 JUDGE NELSON: No, he had an alternative,
4 that he would press for imposition of a condition.

5 MR. CUNNINGHAM: Yes, on -- on the --
6 pardon me. I'll --

7 JUDGE NELSON: To make the transaction
8 consistent with --

9 MR. CUNNINGHAM: Well, let's deal with the
10 first one and then we'll come to the second one.

11 JUDGE NELSON: As to the first one, I had
12 some trouble with it in light of precedent here at
13 this agency. So maybe you can help me --

14 MR. CUNNINGHAM: Well, there is some
15 trouble with it on its own logic because the question
16 of whether or not there are monies available in the
17 future to be invested in SPR is totally unrelated to
18 whether or not monies were invested in the past or
19 not.

20 And if the Commission was correct in 1988
21 that Mr. Anschutz was investing no monies at that time
22 and planned to put none in, it would really have no
23 bearing.

24 Or if the Commission was not correct, it
25 would have no bearing on how much money Mr. Anschutz

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1 might have available to invest in the future, and
2 whether or not it would be in the public interest to
3 require him to do so.

4 JUDGE NELSON: Do you have the statute
5 here?

6 MR. CUNNINGHAM: I do not, but I know that

7 --

8 JUDGE NELSON: Does anyone have either a
9 copy of whatever the current version is of Section V
10 or give me a cite to it, and we'll get it out of the
11 library.

12 MR. EDELMAN: It would be 49 U.S.C. 11-
13 344(b) and (c).

14 JUDGE NELSON: B?

15 MR. EDELMAN: B.

16 JUDGE NELSON: B, as in baseball?

17 MR. EDELMAN: Yes.

18 JUDGE NELSON: And C, as in Charlie?

19 MR. EDELMAN: Correct.

20 JUDGE NELSON: Does anyone have the
21 statute here? If not, we'll --

22 MR. EDELMAN: That is the old statute
23 under which we're -- this transaction --

24 JUDGE NELSON: So we would now find it
25 under 49 U.S. Code 1134(b) and (c)?

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1 MR. CUNNINGHAM: 344, two fours at the
2 end.

3 JUDGE NELSON: 1344.

4 MR. CUNNINGHAM: Right.

5 JUDGE NELSON: Five digit --

6 MR. EDELMAN: B and C.

7 JUDGE NELSON: Right. So they are like
8 zip codes.

9 MR. CUNNINGHAM: So if the first
10 proposition is that --

11 JUDGE NELSON: Well, let's go off the
12 record for a moment. I'm going to try to arrange
13 this.

14 (Whereupon, the proceedings went off the
15 record at 10:37 a.m. and resumed at 10:37 a.m.)

16 MR. CUNNINGHAM: Assuming the relevance of
17 this or the notion that the Commission could consider
18 whether or not there were alternative means of
19 supporting -- providing the capital for SP, what Mr.
20 Anschutz's, or companies under his control, provided
21 to SP in the past is completely irrelevant because
22 they tell us nothing about the future of
23 capitalization invested.

24 Just as the investment of Morgan Stanley
25 or the Union Pacific or any other company or any other

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1 holder of the other 50 percent of SPR shares in the
2 past would not tell us what capital was available in
3 the future.

4 A further question arises assuming the
5 lack of --

6 JUDGE NELSON: He needs to prove that not
7 only --

8 MR. CUNNINGHAM: He would need to prove --

9 JUDGE NELSON: -- that Mr. Anschutz
10 contributed nothing --

11 MR. CUNNINGHAM: Whether -- well, assuming

12 --

13 JUDGE NELSON: -- and moreover, that he
14 has vast assets.

15 MR. CUNNINGHAM: He would need to prove --

16 JUDGE NELSON: He would need to prove the
17 net worth of Mr. Anschutz.

18 MR. CUNNINGHAM: And he would need to have
19 a further legal predicate, which I don't believe he
20 can find. And that is, that the question of whether
21 or not the proposed transaction in the public interest
22 is somehow related to the question of whether or not
23 Mr. Edelman and his clients are satisfied with the
24 capital contribution of Mr. Anschutz

25 Because the question before the

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1 Commission, as you noted as it is here before the FERC
2 and utility mergers, is whether the transaction
3 proposed is consistent with the public interest.

4 JUDGE NELSON: Exactly what I remember in
5 my electric utility. Now you're saying that's the
6 same rule with railroad mergers?

7 MR. CUNNINGHAM: It's the same rule with
8 railroad mergers.

9 JUDGE NELSON: Is there precedent to that
10 effect?

11 MR. CUNNINGHAM: There is a great deal of
12 precedent to that effect. And I have not brought it,
13 but we would be glad to gather it for you.

14 So the question of whether this
15 transaction is consistent with the public interest is
16 unrelated to the contributions made by Mr. Anschutz
17 and the companies that he might control or any other
18 shareholder in the past.

19 And it is unrelated to what is available
20 in the future except insofar as the issue posed in
21 this case, as to whether SP can attract capital.

22 And that is a question for which we are
23 posing -- proposing as witnesses Mr. Anschutz himself,
24 who will be deposed on the 16th; Mr. Yarberry, the
25 Chief Financial Officer of SP, who will be deposed on

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1 Monday; and Mr. Gray, the chief marketing witness for
2 SP who will be deposed in approximately two weeks.

3 All of them will be available to testify
4 as to whether or not, to the extent of their
5 knowledge, capital might be raised by SP in a manner
6 more felicitous to the public interest than that
7 proposed in this transaction.

8 And to the extent that there are
9 legitimate inquiries to that, we will permit inquiry
10 because that is an issue on the table: whether or not
11 this is --

12 JUDGE NELSON: The extent to which SP can
13 attract capital short of this merger --

14 MR. CUNNINGHAM: Yes.

15 JUDGE NELSON: -- is an issue?

16 MR. CUNNINGHAM: It is an issue.

17 JUDGE NELSON: And you will allow the
18 witnesses to be --

19 MR. CUNNINGHAM: We will allow --

20 JUDGE NELSON: -- questioned about that?

21 MR. CUNNINGHAM: -- questioned about that.

22 Now, let's go to the question of whether or not Labor,
23 as a condition in this transaction, assuming for the
24 moment -- and there is no precedent --

25 JUDGE NELSON: Before we get to that

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1 condition, let's assume we now have Mr. Anschutz being
2 deposed.

3 MR. CUNNINGHAM: Yes.

4 JUDGE NELSON: And one of the subjects is
5 the ability of the railroad, Southern Pacific, to
6 obtain capital.

7 MR. CUNNINGHAM: Yes.

8 JUDGE NELSON: (A) with the merger; (b)
9 without the merger. Why couldn't Mr. Edelman ask Mr.
10 Anschutz what he, Mr. Anschutz, thinks of the Southern
11 Pacific Railroad's --

12 MR. CUNNINGHAM: He is fully entitled to
13 do that.

14 JUDGE NELSON: -- as an investment?

15 MR. CUNNINGHAM: And Mr. Anschutz has
16 testified on that issue, and he will stand for cross
17 examination in discovery on that issue.

18 JUDGE NELSON: Why couldn't he say, "Mr.
19 Anschutz, do you think enough of the Southern Pacific
20 Railroad to invest money in that?"

21 MR. CUNNINGHAM: He is free to ask that
22 question.

23 JUDGE NELSON: "And how much money?"

24 MR. CUNNINGHAM: And he's entitled to an
25 answer.

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1 JUDGE NELSON: It seems to me he might be
2 able to get at some of this stuff that would be opened
3 in the deposition.

4 MR. CUNNINGHAM: That's right. And we
5 will stipulate that Mr. Anschutz and companies he
6 controls may be presumed to have some capacity to make
7 investments in companies.

8 MR. ROACH: Your Honor, if I could just
9 say one word from the perspective of UP on this, the
10 way we see this issue is really very simple. Any
11 investor's inclination to invest in Southern Pacific
12 is a function of Southern Pacific's business, how
13 viable, how profitable it potentially is.

14 There is ample evidence in this record
15 that SP is in trouble, that it has been chronically in
16 trouble.

17 JUDGE NELSON: We don't need to try that
18 issue.

19 MR. ROACH: No, no. But my point is --

20 JUDGE NELSON: Nor do I see what this has
21 to do with your client.

22 MR. ROACH: Well, that's fair enough. I
23 mean, I'm just really adding a thought.

24 JUDGE NELSON: Which seems to me to
25 involve Mr. Anschutz and the SP's representations here

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1 by Mr. Cunningham.

2 MR. CUNNINGHAM: We are both here actually
3 as counsel for the Applicants.

4 MR. ROACH: No, that's fine. I -- that's
5 fine.

6 MR. CUNNINGHAM: But in any case, Mr.
7 Anschutz would stand for questioning as to the
8 attractiveness of SP as an investment in the future.

9 JUDGE NELSON: Well, it may be then --
10 just tossing this idea that this dispute is premature.
11 And if we need to look at it, we ought to look at it
12 in the context of the Anschutz deposition and what he
13 answers there or refuses to answer there.

14 MR. EDELMAN: Your Honor, I'm sure if I
15 asked these same questions in the deposition, they are
16 going to instruct him not to answer.

17 They're saying I can ask him will he --
18 does he think it's a good idea to invest his money
19 prospectively --

20 JUDGE NELSON: Well, Mr. Anschutz is a man
21 of money, you believe. You could certainly examine
22 him on his perspicacity. He's testifying about
23 invested perception.

24 MR. EDELMAN: My question --

25 JUDGE NELSON: He has to qualify on that.

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1 MR. EDELMAN: I don't want to tromp on
2 poles.

3 JUDGE NELSON: Part of the way you become
4 an expert about invested perception is your own
5 experience. You are entitled to ask him about his
6 perception of the company and has he, in effect, ever
7 put his money where his mouth is.

8 MR. EDELMAN: Well sir, are you saying
9 that we --

10 JUDGE NELSON: Isn't he opening himself to
11 that question anyway?

12 MR. EDELMAN: Well, I think so. And
13 that's why I think they ought to answer the
14 interrogatory.

15 JUDGE NELSON: But maybe we can -- we can
16 see this better in the context of the actual
17 deposition. If there's then a refusal to answer --
18 where is this deposition being conducted, right here?

19 MR. EDELMAN: Yes, next Friday.

20 JUDGE NELSON: We could have it in this
21 building if that would speed things up. Then I would
22 be upstairs. That's one way to go at it, and just
23 see where the questioning goes.

24 MR. EDELMAN: Well, I can represent I'm
25 going to ask those two questions.

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1 JUDGE NELSON: Mr. Cunningham acknowledges
2 that the SP's ability or inability to obtain capital
3 with this merger and without this merger are issues in
4 the case, right?

5 MR. CUNNINGHAM: Yes sir.

6 JUDGE NELSON: And issues about which Mr.
7 Anschutz may be deposed. So my suggestion is -- I
8 welcome your thoughts on this.

9 Let's go forward with the deposition and
10 see where it leads and what their problems are.

11 MR. EDELMAN: Your Honor, it just seems to
12 me we're going to start the deposition --

13 JUDGE NELSON: How would that be with you,
14 Mr. Cunningham?

15 MR. CUNNINGHAM: Entirely satisfactory to
16 us, Your Honor. I don't think it's necessary to
17 relocate. Given the availability of telephones, I
18 don't think it will be necessary to relocate.

19 JUDGE NELSON: I just made a suggestion.
20 I guess -- I assume -- I don't know. I'd have to
21 check our own hearing schedule and in the interest of
22 time, because I see orders from the Commission that
23 have denied requests for time except insofar as the
24 Justice Department and job interrupt.

25 Otherwise, they've denied all requests as

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1 I read those orders. So --

2 MR. EDELMAN: Your Honor, I'm amenable to
3 asking these questions in the deposition. But I will
4 represent to you that I'm going to ask those questions
5 and --

6 JUDGE NELSON: Maybe he'll answer them.

7 MR. EDELMAN: Well it seems to me that's
8 up to -- I mean, are their Counsel going to instruct
9 him not to answer? I -- one of the reasons I wanted
10 to have this up here today was to put off the -- to
11 call Your Honor in the middle of a deposition.

12 JUDGE NELSON: Well, Mr. Cunningham's
13 theory is that what Mr. Anschutz may or may not have
14 done in the past has got nothing to do with the
15 problem. The problem is now.

16 MR. EDELMAN: Well, you see --

17 JUDGE NELSON: And what's going to happen
18 tomorrow if there's no merger or what's going to
19 happen tomorrow if there is a merger.

20 And I think that he may have something
21 there and that that cut between the past and now may
22 be a useful guideline.

23 And insofar as today and tomorrow and next
24 year are concerned, he may well have to answer
25 questions about --

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1 MR. EDELMAN: Well, but I --

2 JUDGE NELSON: -- how he perceives these
3 investments.

4 MR. EDELMAN: But I'm asking retrospective
5 looking questions in part because you can inquire as
6 to what he might actually do. And again, to me, I
7 think a significant issue here is that he is saying,
8 "In the public interest, this transaction should be
9 approved because -- because of this capital shortfall.
10 I stand to make a billion dollars on it without having
11 put anything into it."

12 And that should be known by the
13 Commission. Because if the Commission --

14 JUDGE NELSON: I don't think there's any
15 problems in getting at how much money you claim he's
16 going to make. That's open in a deposition. That's
17 always open to show bias, and he's a witness.

18 And one of the way you show bias is
19 financial interest. There should be no problems with
20 questions along those lines, are there, Mr.
21 Cunningham?

22 MR. CUNNINGHAM: Other than the fact that
23 it could be derived from publicly available documents.

24 JUDGE NELSON: I assume there's a formula
25 and there's a stock split, all of which could be

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1 calculated.

2 MR. CUNNINGHAM: Exactly, all of which --

3 JUDGE NELSON: And he could certainly be
4 asked that.

5 MR. EDELMAN: Sure, but Your Honor, I
6 submit it's relevant --

7 JUDGE NELSON: Suppose for sake of
8 argument he -- we testify that he has never put a
9 penny of his personal money into the Southern Pacific
10 Railroad up to now.,

11 MR. EDELMAN: Yes, Your Honor.

12 JUDGE NELSON: But as of tomorrow, he
13 testifies that this merger will bring substantial
14 transportation benefits as well as help him do better,
15 and that's why he's for it.

16 And he further testifies that if the Board
17 turns it down he will personally put a million
18 dollars of his own money in. What have you then
19 proven? What then is the relevance of yesterday in
20 the history?

21 MR. EDELMAN: Well Your Honor, one thing
22 is it goes to whether or not he would actually be
23 willing to put his own money into it. The other is
24 that it would show the Commission -- basically, the
25 Commission -- or the Board, I'm sorry --

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1 JUDGE NELSON: Suppose you ask him
2 prospectively, "If there is no merger, will you put
3 any money in?" That's certainly open

4 MR. EDELMAN: Well, yes, and I would --

5 JUDGE NELSON: And he says, "Not a
6 nickel."

7 MR. EDELMAN: Right.

8 JUDGE NELSON: Well, does that help you
9 any?

10 MR. EDELMAN: It might, Your Honor,
11 because what may happen is that what he said -- that's
12 what he's saying right now because he's trying to get
13 approval by the Board.

14 But if the answer is that he's got an
15 investment in this corporation and it's got to
16 maintain value and somebody else is not putting the
17 infusion in to support it, then maybe he'll have to do
18 that.

19 Or maybe there will have to be some other
20 arrangement where he doesn't make out quite as well.

21 But the point is, he's asking relief for -
22 - for an approval that basically relieves him. And
23 he's done apparently nothing.

24 JUDGE NELSON: Well, we don't know that.

25 MR. EDELMAN: We suspect that.

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1 MR. CUNNINGHAM: Your Honor, there's a --
2 pardon me, I didn't mean to interrupt.

3 MR. EDELMAN: I'm sorry, I've been
4 interrupting.

5 JUDGE NELSON: He may say that if he's
6 done nothing, that the reason he's done nothing is he
7 doesn't want to throw good money after bad. He can
8 make more money in other fields.

9 Now if you'll give him this merger, then
10 the health of the railroad is boosted, and then you've
11 got something to talk about. If he says that, it
12 seems to me it's not such a great help to you.

13 MR. EDELMAN: Yes, it is because then we
14 can say then "Don't approve this merger in this form
15 because it's an unjust enrichment to this man." Let
16 him structure it some other way.

17 JUDGE NELSON: How far back in history do
18 you need to go to prove your case?

19 MR. EDELMAN: I'll go back to the time
20 when he obtained control of the railroad.

21 JUDGE NELSON: When was it that the
22 Southern Pacific Rail Corporation got control of
23 Southern Pacific and the DRG?

24 MR. EDELMAN: I don't want to play around
25 with all of those corporate gains. Mr. Anschutz

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1 became in control of the railroad in '88.

2 JUDGE NELSON: Which railroad?

3 MR. EDELMAN: The Southern Pacific
4 Railroad.

5 JUDGE NELSON: In 1988?

6 MR. EDELMAN: Yes.

7 JUDGE NELSON: That's a long time back.

8 MR. EDELMAN: I don't think so.

9 JUDGE NELSON: When was this merger first
10 announced, this proposition, this proposed merger?

11 MR. EDELMAN: August of '95, it was
12 formally --

13 JUDGE NELSON: Ninety-five. Where there
14 informal --

15 MR. EDELMAN: It was in negotiations for
16 about a year or so before.

17 MR. ROACH: Not correct.

18 JUDGE NELSON: Were there informal --

19 MR. EDELMAN: I don't want to get into
20 characterizing. There were discussions between the
21 two railroads on an off for sometime prior to August.

22 JUDGE NELSON: If I read the New York
23 Times or the Journal of Commerce or The Wall Street
24 Journal or all three, would I have known prior to
25 August of '94, was it?

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1 MR. ROACH: Five.

2 JUDGE NELSON: Five?

3 MR. CUNNINGHAM: Ninety-five, Your Honor.

4 MR. EDELMAN: You would not --

5 JUDGE NELSON: That there was probably
6 going to be proposed merger?

7 MR. EDELMAN: You would not have known
8 that. If you were knowledgeable in the industry, you
9 might have thought something like that was coming.

10 JUDGE NELSON: But I would not know it
11 from --

12 MR. EDELMAN: Correct.

13 JUDGE NELSON: -- reading such
14 publications?

15 MR. EDELMAN: That's right.

16 JUDGE NELSON: So the first real date we
17 have is August of '95.

18 MR. EDELMAN: I don't see why that would
19 that would be the first real --

20 JUDGE NELSON: The first real date when
21 people would know that there was going to be a merger
22 proposed?

23 MR. EDELMAN: Yes, the outside public.

24 JUDGE NELSON: So why aren't we interested
25 in Mr. Anschutz's reactions as of August whatever it

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1 was, August 1?

2 MR. CUNNINGHAM: August third.

3 JUDGE NELSON: August third? Let's say we
4 wanted to hear him from August 1 of '95 to date?

5 MR. EDELMAN: Because he had no incentive
6 to put any money in the railroad at that point. His
7 incentive is to make the railroad look -- look damaged
8 so that the only thing that can happen is this merger.

9 We're concerned with --

10 MR. CUNNINGHAM: Your Honor, I strongly
11 dispute that the proposition is in the interest of Mr.
12 Anschutz or any other shareholder of the SP to make
13 the railroad look damaged.

14 JUDGE NELSON: Well, he will be deposed,
15 and you can certainly go at him with those kinds of
16 questions. Whether he has a bias and a motivation is
17 fair game in a deposition, so --

18 MR. EDELMAN: I intend to, Your Honor, but

19 --

20 JUDGE NELSON: There should be no problem
21 with that.

22 MR. EDELMAN: Right.

23 JUDGE NELSON: The question is this old
24 searching to see to what extent he put money into the
25 railroad.

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