

INTERSTATE COMMERCE COMMISSION 02/09/96

FINANCE DOCKET # 32760

1093-1152 3+

1 secrets.

2 MR. CUNNINGHAM: I'd like to suggest that
3 we go off the record while I describe this for all in
4 the place.

5 JUDGE NELSON: Is there an objection to
6 going off the record to discuss the document? Is that
7 all right, Mr. Lubel?

8 MR. LUBEL: Yes sir.

9 JUDGE NELSON: Then we'll off the record.

10 (Whereupon, the proceedings went off the
11 record at 12:43 p.m. and resumed at 12:44 p.m.)

12 JUDGE NELSON: In looking at these
13 documents, I see, among other things, that they target
14 potential business, and list, among other things, a
15 category called probability of winning the business.

16 And then there are estimates in percentage
17 terms. And it would seem to me, knowing nothing more
18 about them than just seeing this, that the SP's own
19 judgement of the probability it had of winning the
20 business is a key piece of information to a potential
21 competitor.

22 MR. CUNNINGHAM: Or to a potential
23 customer.

24 JUDGE NELSON: Or potential customer. So
25 certainly, the material on its face needs protection.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 Mr. Billiel is absolutely right about that. What do
2 we do about it?

3 If the customer is redacted, as they are
4 in the one that I'm looking at, how could anyone
5 otherwise identify what the business was?

6 They can look at the description of the
7 shipment and the origin and destination.

8 MR. CUNNINGHAM: The amount, the car
9 loads.

10 JUDGE NELSON: What column is that in?

11 MR. CUNNINGHAM: You can see there --

12 JUDGE NELSON: Oh, I see, expected value,
13 yes.

14 MR. CUNNINGHAM: Right. I think one could
15 rather readily derive for whom and --

16 JUDGE NELSON: Let's now ask the other
17 side what it is it wants to do with these sheets.

18 MR. LUBEL: Your Honor, I was afraid you
19 were going to ask that because I don't -- I wasn't
20 prepared to address that, although we certainly can.

21 And I don't think we have to because I
22 think the relevant predicate is established by the
23 fact that the Department of Justice has asked for them
24 and they have agreed to turn them over.

25 So I would just defer to them that they

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 have established the relevance.

2 JUDGE NELSON: Well, it helps me in
3 understanding what your objection is to seeing a
4 redacted version and not having consultants look at
5 them.

6 MR. LUBEL: Well because, Your Honor, you
7 know, I am not as conversant with the -- the traffic
8 patterns and the competitive --

9 JUDGE NELSON: Suppose you had the
10 greatest expert in America --

11 MR. LUBEL: Yes.

12 JUDGE NELSON: -- whoever he or she might
13 be, and that person were free to look at these
14 documents. What could they do with them?

15 MR. LUBEL: Again, Your Honor, I would
16 imagine that -- there is an assumption that there is
17 a use for them because the Justice Department has
18 asked for them as part of their analysis.

19 I would -- to try to respond to Your
20 Honor, they would seem to be relevant to the questions
21 of the existing competition, the competitive impact of
22 the merger, whether the SP -- you know, they say the
23 SP will not be competitive if there is not a merger.

24 These may counter that and show that the
25 SP will be competitive without -- will be competitive

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 even without this merger.

2 JUDGE NELSON: All right. Under the
3 existing machinery, what restrictions are these
4 consultants?

5 MR. LUBEL: Your Honor, everything they
6 need -- everything they -- oh, on the consultants?

7 JUDGE NELSON: Yes.

8 MR. LUBEL: Oh, it's your typical
9 protective order. They cannot use them for any
10 purpose other than this proceeding. They cannot
11 reveal them or disclose them to anyone who is not
12 similarly limited to, and covered by, the protective
13 order.

14 JUDGE NELSON: So what is the concern
15 then, Mr. Cunningham?

16 MR. CUNNINGHAM: Your Honor, I think --

17 JUDGE NELSON: That they won't do what
18 they swear to do?

19 MR. CUNNINGHAM: I believe that even if
20 they make -- and we have no reason to assume at the
21 moment that they won't, although that's going to come
22 up shortly. We're beginning to believe that there is
23 some reason.

24 But we -- we believe -- I don't believe
25 that anybody who has got a brain in their head as a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 consultant can forget what they've seen on these
2 pages.

3 And when those consultants are the same
4 consultants that are helping both our competitors and
5 our customers to figure out their strategies in
6 dealing with us, it's impossible for them not to walk
7 from the depository to their engagement.

8 They don't have to turn around and say,
9 "Well Harry, boy, look what I saw at the depository,"
10 which I don't think they're likely to do.

11 In order to say "You know, I really think
12 you could press a little harder on this contract
13 because it's just my intuition," okay? Or, "You might
14 want to go after the polypropylene movement over there
15 because, you know, SP has got some weak" --

16 JUDGE NELSON: How about the argument that
17 whatever damage can be done must have been anticipated
18 by the Commission and the Commission set up this
19 machinery and therefore, that's adequate?

20 MR. CUNNINGHAM: I don't think the
21 Commission, at any point, said that a) its procedures
22 were the end of the procedures; and b) I don't think
23 the Commission has ever anticipated, as we have shown
24 many times in citations of cases before you -- has
25 ever anticipated that the discovery rules would be

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 used as a competitive tool, an access to information
2 for this transaction would be used as competitive
3 tool.

4 JUDGE NELSON: You have no question about
5 my power to modify this order?

6 MR. WOOD: I will take the position, Your
7 Honor, that I disagree with Mr. Roach -- Mr.
8 Cunningham on that. I think that this order was
9 entered into back on September first by the Commission
10 after due consideration and comments by all interested
11 parties.

12 And I think if there is any basis to -- I
13 don't think Mr. Cunningham is late for modifying it,
14 that that has to be presented to the Commission.

15 And I really think that there is a
16 fundamental issue --

17 JUDGE NELSON: Is there a rule in the
18 protective order that says that a document given to
19 one must be given to all?

20 MR. ROACH: No, Your Honor.

21 MR. WOOD: I'm sorry. I'm not sure I
22 follow you.

23 MR. ROACH: We can move this issue, Your
24 Honor, if Your Honor recommends that your order be
25 entered by the Commission.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 JUDGE NELSON: What would you then do,
2 move the Board for a --

3 MR. ROACH: The Board I should have said,
4 yes. And I think if Your Honor recommends it, the
5 Board is extremely likely to enter it. If Mr. Wood
6 wants to file something opposing that, he can do that.

7 JUDGE NELSON: What about the hypothetical
8 that he could turn those over to the Justice
9 Department and not turn them over to anybody else?
10 What would that violate?

11 MR. LUBEL: Well, I think it would violate
12 our due process rights to participate fully in this
13 proceeding.

14 JUDGE NELSON: Discovery is not a part of
15 due process.

16 MR. LUBEL: Okay.

17 JUDGE NELSON: That one you can take to
18 the Commission.

19 MR. LUBEL: Okay.

20 JUDGE NELSON: We could have zero
21 discovery, and you would not be able to argue denial
22 of due process.

23 MR. LUBEL: Your Honor, I --

24 JUDGE NELSON: What we do do, we have to
25 do fair.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 MR. LUBEL: Right.

2 JUDGE NELSON: But discovery itself is not
3 an element of due process.

4 MR. LUBEL: Well but on the question of
5 fairness, the standard view that put the parties in
6 this case, and likely so, is to make factual showing.
7 There's been no showing here, no factual predicate,
8 that any consultant, certainly my client, is also
9 involved in working on contracts, or will be in the
10 future involved working on contracts.

11 So this is just his supposition on that.
12 And again, something that was anticipated by the
13 Commission or could have been anticipated by the
14 Commission when it imposed this order.

15 I'm not that experienced, but I believe
16 these gentlemen will remember when the highly
17 confidential designation -- I'm not even sure they had
18 one.

19 But when the highly confidential
20 designation was created, I think it was for just these
21 type things that they are talking about.

22 But there is a presumption that there will
23 be integrity on behalf of the people who sign the
24 orders. And that if there's any violation of them,
25 that there will be, you know, appropriate sanctions.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 MR. ROACH: I'd like to speak to that
2 because that is not correct.

3 JUDGE NELSON: What consultants are we
4 talking about in particular, everybody's?

5 MR. CUNNINGHAM: We're talking about
6 everybody's except the Department's. And we excluded
7 the Department's because the Department's consultants
8 --

9 JUDGE NELSON: They're not in the railroad
10 business.

11 MR. CUNNINGHAM: They're not in the
12 railroad business, exactly.

13 JUDGE NELSON: And so they have more
14 trust.

15 MR. ROACH: We've submitted to you a
16 number of times, Your Honor, the law that the
17 Commission has held that says that you have to weigh
18 the weight of relevance against the risk of commercial
19 harm, even where a protective order is entered. And
20 we've quoted that to you a number of times.

21 Let me just say a word about relevance
22 here. We are producing these documents to the Justice
23 Department because it wants to do the most thorough
24 job possible of exploring the competitive issues and
25 exhausting issues and eliminating issues.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 Our view is that these documents show in
2 spades what we've already said in our application as
3 to the competitive weakness of SP, as to the absence
4 of competition between UP and SP in many markets, as
5 to the vigor of BN and Santa Fe's competition in those
6 same markets.

7 We don't think we need to produce these.
8 We don't think -- we think they're cumulative. We
9 think there is ample evidence on this as it is. But
10 we want to produce -- and we are prepared to share
11 them with other parties, although we would contest
12 their discovery by other parties. That's the key
13 point I'm trying to make.

14 The other point I want to make is that Mr.
15 Lubel and Mr. Wood and others, when they look at these
16 documents, will have no difficulty understanding
17 whether they do or don't help their case or our case.

18 I think if Your Honor looks at them -- and
19 we have similar documents at UP which I could show you
20 dealing with price increases, price increase risks,
21 price decreases, price decrease risks, that it will be
22 perfectly apparent what is going on and whether it is
23 helpful or not helpful to their case.

24 And if there is anything that they need --
25 that they can show you in particular form, they need

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 to submit to consultants, they can come back with that
2 and they can ask you to modify the order further.

3 So I would suggest to you that this is a
4 fair and appropriate accommodation. And we want the
5 Justice Department to be able to go the extra mile
6 here and explore the facts as deeply as they choose to
7 explore them.

8 JUDGE NELSON: Some of these, the
9 questions, aren't answered. Have the answers been
10 redacted or are they just that the company didn't
11 answer them?

12 MR. CUNNINGHAM: No sir, the company
13 didn't answer them.

14 JUDGE NELSON: So even the non-answering
15 of a question might have some significance, I suppose.

16 Well, what do we do about -- Mr. Wood,
17 where are you in this?

18 MR. WOOD: Well, Your Honor, I concur
19 completely with Mr. Lubel. I think this would be --
20 one of the critical issues is the competitiveness, the
21 competitive impact of this transaction. And they put
22 in issue the ability, in particular, and we discussed
23 earlier today of Southern Pacific to compete.

24 And certainly, the characterizations that
25 have been put on the record about the SP being a weak

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 competitor, I think we should have an opportunity to
2 test that.

3 We fully recognize that we can't share
4 this information with -- with our clients. We
5 reluctantly acknowledge that the Commission has
6 imposed that limitation on us.

7 But now they want to further handicap us
8 by preventing our --

9 JUDGE NELSON: Did the parties agree on
10 the protective order?

11 MR. WOOD: We did not.

12 JUDGE NELSON: Or was it something that
13 was handed down?

14 MR. WOOD: Pardon?

15 MR. ROACH: Handed down.

16 MR. CUNNINGHAM: It was handed down.

17 JUDGE NELSON: How did it get there?

18 MR. ROACH: We petitioned for it.

19 JUDGE NELSON: And the Commission --

20 MR. WOOD: They asked and we opposed.

21 JUDGE NELSON: -- granted your request?

22 MR. ROACH: Correct.

23 JUDGE NELSON: Without modification?

24 MR. ROACH: Correct.

25 JUDGE NELSON: Where is the agreement? Is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 it -- the protective condition -- is it in here, the
2 order?

3 MR. WOOD: I have a copy of it, Your
4 Honor. For the record, it's attached to the
5 Commission ICC in this proceeding, Decision No. 2,
6 sir, September 1, 1995.

7 JUDGE NELSON: May I take a look at it?

8 MR. WOOD: I have no objection.

9 JUDGE NELSON: Up until now, I've never
10 had to grapple with it. So let me see it. What
11 paragraph would deal with the restrictions that the
12 consultants would be under?

13 MR. ROACH: There's a paragraph with
14 respect to the treatment of highly confidential
15 information. I think it's -- you'll see "HIGHLY
16 CONFIDENTIAL" --

17 JUDGE NELSON: Why don't you show it to
18 me?

19 MR. ROACH: And then you'll see an
20 attached undertaking that says, "Highly confidential
21 material limited to counsel or consultant," and he has
22 to undertake that he will not sue the material for
23 purposes other than this case and will destroy it, et
24 cetera.

25 And paragraphs -- really, it's paragraphs

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 five through seven of the --

2 JUDGE NELSON: Let me read them. And then
3 the next thing I'm going to ask you to hand to me is
4 whatever you see in any Commission order or Board
5 order that would give me the authority to alter the
6 Commission's established protective order.

7 Because if I don't have the power to do
8 it, we're wasting a lot of time.

9 (Pause.)

10 MR. CUNNINGHAM: Your Honor, I think that
11 it -- to the extent that there's a contention here
12 that we cannot modify the order, I think we need to
13 take Mr. Roach's suggestion to heart.

14 But pending that --

15 JUDGE NELSON: It may refer you to the
16 Board on this issue.

17 MR. ROACH: Yes, I think if you look at
18 paragraph nine, you could infer that only the
19 Commission can modify the order.

20 JUDGE NELSON: Well, I'm slow. As I say,
21 I'm a Bostonian and not a New Yorker. So I'm still on
22 number five.

23 (Laughter.)

24 JUDGE NELSON: Stay with me a little.

25 MR. CUNNINGHAM: And if the order cannot

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 be modified. We would ask that the documents not be
2 made available to the other parties pending on getting
3 an order from the Commission.

4 (Pause.)

5 JUDGE NELSON: The consultant has to sign
6 the undertaking.

7 MR. LUBEL: And they have, Your Honor.

8 JUDGE NELSON: And where is that required,
9 that the consultant sign?

10 (Pause.)

11 MR. ROACH: Yes, it's paragraph five:
12 "Providing that such outside counsel or outside
13 consultants have been given and have read a copy of
14 this protective order and agree to be bound by its
15 terms prior to receiving access to such materials."

16 JUDGE NELSON: All right. Now, where do
17 I have the power to fool with this? This is a Board
18 order.

19 MR. CUNNINGHAM: Well, you have the
20 ability to decide, Your Honor, whether or not
21 discovery is to be afforded parties other than the
22 Department of Justice, to whom we have voluntarily
23 provided these documents, and on what terms.

24 JUDGE NELSON: Do I have the power to say
25 that they shall go only and solely to the Department

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 of Justice?

2 MR. CUNNINGHAM: Yes.

3 JUDGE NELSON: Where is that power?

4 MR. CUNNINGHAM: It's the power to decide
5 what discovery shall be granted.

6 JUDGE NELSON: Where is it written, if
7 anywhere, that discovery which is turned over to one
8 person shall be turned over to all?

9 MR. WOOD: I believe it's in the
10 guidelines that Your Honor adopted following the
11 conference in early December --

12 JUDGE NELSON: Let's look at those --

13 MR. WOOD: -- where we --

14 MR. ROACH: Those guidelines can be very

15 --

16 JUDGE NELSON: If they're mine, I've got
17 the power to alter or amend them.

18 MR. ROACH: That's correct, Your Honor.

19 JUDGE NELSON: Let's find them.

20 (Pause.)

21 JUDGE NELSON: December fifth, what
22 paragraph?

23 MR. ROACH: The power to vary is at the
24 end, very end, the last two lines of the --

25 JUDGE NELSON: That's there even

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 implicitly, if it isn't actually -- but the power --
2 the requirement that a document turned over to one is
3 turned over to all. I'm getting a signal of eight.
4 Ms. Jones was giving me eight fingers, so I'll look at
5 paragraph eight.

6 It says, "Discovery requests are to be
7 served on all parties of the restricted service list,
8 and discovery responses need only be served on the
9 party that propounded discovery and any party
10 requesting copies of such responses in writing, except
11 the documents produced by a party in response to a
12 discovery request shall be placed in the depository in
13 lieu of being served."

14 So either everyone can ask to get them, or
15 they shall go into the depository.

16 MS. JONES: The next sentence --

17 JUDGE NELSON: "All discovery responses
18 shall immediately be placed in the depository of the
19 responding party, and that party shall simultaneously
20 provide written notice to all parties on the
21 restricted service list that it has responded to
22 another party and that it has placed such responses in
23 its depository."

24 So the machinery, one way or another, as
25 it now stands, is that a turnover to one party is a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 turnover to all.

2 MR. WOOD: Let me stress, if I may, Your
3 Honor, that the predicate for that understanding --
4 you may recall that we tried to work those guidelines
5 out by --

6 JUDGE NELSON: I remember that.

7 MR. WOOD: The predicate for that was the
8 clear understanding that with the highly confidential
9 category and the Commission's protective order, that
10 the persons who were on the restricted service list
11 would be persons who -- who would undertake -- who
12 would sign the undertaking and bind their consultants
13 and outside counsel.

14 JUDGE NELSON: So the notion that a
15 turnover to one is a turnover to all is a product of
16 my discovery guidelines.

17 MR. CUNNINGHAM: Yes sir.

18 JUDGE NELSON: Not the Commission's order.

19 MR. CUNNINGHAM: Correct.

20 JUDGE NELSON: Then if I may vary the
21 discovery guidelines for good cause, as paragraph ten
22 says, I could vary the requirement --

23 MR. CUNNINGHAM: That's correct.

24 JUDGE NELSON: -- consistent with due
25 process, that a turnover to one is a turnover to all.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 If I could do that, I could certainly condition the
2 notion that a turnover to one is a turnover to all,
3 and could further condition it in the case of
4 particular documents.

5 So I think I have the power to do what you
6 want me to do by virtue of the discovery guidelines
7 and the power to alter them for good cause.

8 All right, I'm past that threshold.

9 MR. ROACH: There's one other predicament.

10 JUDGE NELSON: Now, what am I going to do
11 about this?

12 MR. ROACH: There's one other provision I
13 need to point Your Honor to because I think it is
14 genuinely arguable either way whether Your Honor can
15 impose additional protections at odds with the
16 protective order.

17 And let me just show you what I mean.

18 JUDGE NELSON: Appreciate it.

19 MR. ROACH: There was an order, Decision
20 No. 6, the issuance of the procedural schedule which,
21 among other things, gave Your Honor the role of
22 discovery.

23 And it has attached to it a schedule. And
24 in the notes to that schedule, it states "Access to
25 documents subject to protective order will be

NEAL R. GROSS

COURT REPORTER AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 appropriately restricted," which I think could well be
2 read as meaning that Your Honor has the authority to
3 restrict documents that are subject to the protective
4 order.

5 MR. WOOD: I think all that says, Your
6 Honor, is precisely what had already been done in the
7 context of the discovery guidelines.

8 JUDGE NELSON: Let me find it first, Mr.
9 Wood.

10 MR. CUNNINGHAM: It certainly does not
11 limit Your Honor to -- the condition and the
12 availability of documents --

13 JUDGE NELSON: I have ordered number seven

14 --

15 MR. ROACH: This is number six, sir, the
16 FERC case. I can hand Your Honor a copy if you wish.

17 JUDGE NELSON: I will get it, but why
18 don't I have it here? The FERC with an incomplete
19 orders file? That has never happened in the history
20 of mankind.

21 (Laughter.)

22 JUDGE NELSON: Ah, it looks like it came
23 off a computer. Decision No. 6 --

24 MR. ROACH: Double-spaced, yes.

25 JUDGE NELSON: -- Notice of Issuance of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 Procedural Schedule. It looks different from the
2 others.

3 MR. ROACH: Yes.

4 JUDGE NELSON: What page?

5 MR. ROACH: The very last page.

6 JUDGE NELSON: We do have it.

7 MR. ROACH: Right at the end on the back
8 of the last sheet, single-spaced --

9 JUDGE NELSON: You see, that lady has
10 earned her day off on alternate Fridays.

11 (Laughter.)

12 JUDGE NELSON: Or else Adrienne, I'm not
13 sure. The page?

14 MR. ROACH: The very last page --

15 JUDGE NELSON: The last page.

16 MR. ROACH: -- page 16.

17 JUDGE NELSON: Yours is single-spaced.

18 MR. ROACH: The last page is.

19 JUDGE NELSON: I see.

20 MR. ROACH: There we go.

21 JUDGE NELSON: Oh yes, the famous schedule
22 was there.

23 MR. ROACH: That's correct.

24 (Pause.)

25 JUDGE NELSON: Was this issued after the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 discovery guidelines or before?

2 MR. ROACH: Before.

3 JUDGE NELSON: Just before?

4 MR. ROACH: Just before.

5 JUDGE NELSON: All right. So the
6 Commission envisioned documents relevant to
7 evidentiary filings be in a depository. That's not
8 this. Access to documents subject to protective order
9 will be appropriately restricted.

10 MR. LUBEL: Your Honor, couldn't that be
11 read to just mean physical -- you know, you can keep
12 it in a confidential place? You can limit it to
13 people who have signed the confidentiality order? I
14 don't know that that --

15 JUDGE NELSON: I don't think that sentence
16 sets a limitation on anyone's power, as I read it.

17 MR. CUNNINGHAM: I concur, Your Honor.

18 MR. ROACH: No, I was suggesting it could
19 be --

20 MR. CUNNINGHAM: No, Mr. Roach was
21 suggesting that.

22 JUDGE NELSON: The paragraph ends up
23 saying, "The Administrative Law Judge assigned to this
24 proceeding will have the authority initially to
25 resolve any discovery disputes."

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 MR. ROACH: Yes, and I --

2 JUDGE NELSON: This is a discovery issue?

3 MR. ROACH: Absolutely. That's my point.

4 It could be read as giving Your Honor to further
5 restrict access to documents.

6 JUDGE NELSON: All right. One way or
7 another, I'm convinced that I have the authority to
8 grant the relief sought. The question is shall I do
9 so?

10 What showing do you have? Mr. Lubel made
11 the point that as far as he knows, there is no reason
12 to believe that any of these consultants won't behave
13 like ladies and gentlemen and do what they're swearing
14 to do.

15 You said it's humanly possible, but --

16 MR. CUNNINGHAM: Your Honor, I will take
17 a case in point. Mr. Crowley, working very closely
18 with --

19 JUDGE NELSON: The coal people.

20 MR. CUNNINGHAM: -- the coal people.

21 JUDGE NELSON: His affidavit was in here.

22 MR. ROACH: Evidently --

23 MR. CUNNINGHAM: Evidently works very
24 closely with the coal people and many of the members
25 in the -- in their regular negotiations with railroads

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 over contracts for the transport of enormous amounts
2 of goods.

3 JUDGE NELSON: I think he says that.

4 MR. CUNNINGHAM: He does. I just wanted
5 to bring that up. Mr. Crowley is not alone in the
6 consulting community assisting the carriers and -- in
7 opposition or questioning the merits of this
8 transaction.

9 And it lists Mr. Crowley and it's a
10 perfect capacity to compartmentalize his mind. I
11 think there is a reasonable risk that he will carry
12 with him the knowledge gained in this case to those
13 transactions.

14 JUDGE NELSON: Now let me ask you, what is
15 Mr. Lubel to do? The poor fellow is only a lawyer.
16 He can't deal with all this complicated data and all
17 this business. How is he going to make sense of it?

18 MR. CUNNINGHAM: I would contend that
19 there is no data and there are no propositions in
20 these documents that any lawyer competent to represent
21 a party in this transaction cannot understand.

22 I know that if Mr. Lubel himself, who has
23 not claimed to have spent his lifetime in the railroad
24 industry or the utility industry, is not capable of
25 discerning the nuances of all the pieces of those

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 documents, there are other people in his firm which
2 have that.

3 I know that Mr. Wood is fully capable of
4 making that analysis, having stood across from him in
5 these proceedings almost my entire professional life.

6 And I know that the other counsel
7 representing the clients here have the capacity to
8 understand these matters. There is no rocket
9 scientist or brain surgery --

10 JUDGE NELSON: Well, we are -- we are
11 blessed here with able lawyers who are specialists in
12 the field. These ladies and gentlemen didn't wander
13 in here from Fifth Street, and we all know that.

14 And I've dealt with Mr. Wood before in
15 FERC cases, and I know his abilities. I'm just trying
16 to think a way through here.

17 MR. ROACH: Well, the further point I wish
18 to make, and it's partly repetition and partly not, is
19 that --

20 JUDGE NELSON: Is there a retiree that
21 might be available for these purposes? We get
22 somebody that has no more professional ambition,
23 doesn't have to provide anything to anybody and has
24 enough money to live happily ever after that might
25 want to take this task on?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 MR. CUNNINGHAM: I don't think we have to
2 look so far, Your Honor. We have the entire
3 Department of Justice and all of its economists and
4 all of its lawyers --

5 JUDGE NELSON: You mean they're all
6 retired?

7 MR. CUNNINGHAM: -- who have a statutory
8 right to appear in this proceeding and to present
9 issues relating to competition.

10 And I think I can assure -- Mr. Pullman is
11 not here, but I can assure that there is nothing in
12 these documents that relates to the interest of Labor
13 --

14 JUDGE NELSON: What if the Department does
15 something with these documents? Then what happens?

16 MR. CUNNINGHAM: What if the Department
17 does something?

18 JUDGE NELSON: Yes. Suppose Mr. Billiel
19 sees things and wants to make points up?

20 MR. CUNNINGHAM: We'll have to -- I think
21 we should wait until we get that.

22 JUDGE NELSON: And then see what happens?

23 MR. ROACH: It can be filed under seal.

24 JUDGE NELSON: The order envisions that.

25 MR. ROACH: The point I'd like to make,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 Your Honor, if I may is that what's most acutely
2 sensitive in these documents is not what is probative
3 in these documents.

4 The problem is that they -- what makes
5 them acutely sensitive is they're right down at the
6 more retailed, detailed level and they tell you about
7 exact rate --

8 JUDGE NELSON: I see that.

9 MR. ROACH: -- and exact timing.

10 JUDGE NELSON: Well, what is it that
11 changed the belief that the company had that the order
12 the Commission approved would do the trick?

13 MR. ROACH: That materials of this level
14 of detail have never been produced, that we have a
15 vast record full of historical traffic data, market
16 shares --

17 JUDGE NELSON: You didn't anticipate
18 having to turn these over?

19 MR. ROACH: Absolutely, absolutely. And
20 it is cumulative and it is not probative in any way
21 that what is in the record isn't.

22 But the Justice Department wants them, and
23 we want to persuade the Justice Department there's
24 nothing hidden beneath the surface at a higher level
25 of --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 JUDGE NELSON: So what you're really
2 saying is that the protective order, as to this level
3 of sense, this is a category -- if there were one
4 thing called higher than highly confidential, that
5 would be these?

6 MR. ROACH: Absolutely, absolutely.

7 JUDGE NELSON: And that the machinery of
8 the order simply won't work?

9 MR. ROACH: Absolutely.

10 JUDGE NELSON: Because the allure is too
11 great to the consultant's eyes.

12 MR. CUNNINGHAM: It's too pertinent to the
13 daily give and take, commercial give and take, of all
14 the parties to this proceeding.

15 And there is conveniently a neutral party.

16 JUDGE NELSON: Does the Department support
17 this restriction?

18 MR. BILLIEL: Well Your Honor, as I've
19 said before, I agree with Mr. Cunningham and Mr. Roach
20 that this is the most highly sensitive information
21 that a company can produce.

22 JUDGE NELSON: I understcod that.

23 MR. BILLIEL: As to -- you know, I really
24 have no basis for saying who these consultants are and
25 what they do. So I'm really not competent to speak to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 that.

2 JUDGE NELSON: If you told me that you
3 thought I ought to tighten things the way the
4 Applicants want them tightened, that would be
5 persuasive to me. I would give that weight because
6 you're the one person in here that has no economic
7 stake in this operation.

8 If you're unable to tell me that, then so
9 be it, if you can't take a position.

10 MR. BILLIEL: I think I really can't take
11 a position, Your Honor.

12 MR. ROACH: Let me also say, Your Honor,
13 that we've had more than one instance where highly
14 confidential material has come back to Union Pacific
15 from shippers. And we don't know why that happened or
16 how that happened. But I refer to this --

17 JUDGE NELSON: In this case?

18 MR. ROACH: Yes. I referred to this in
19 prior argument.s

20 JUDGE NELSON: I remember you mentioned
21 it.

22 MR. ROACH: There is a risk of leak.

23 JUDGE NELSON: What has happened
24 specifically to the degree that you can be technical?

25 MR. ROACH: One incident that I know some

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 detail about is that a shipper who has discussed very
2 specifically in Mr. Peterson's verified statement, in
3 a section that was redacted from the highly
4 confidential filing, called Union Pacific and said, "I
5 have a copy of this page, and I'd like you to tell me
6 why" -- and so forth, why you didn't give me more of
7 this or that, or whatever. I'd rather not go into all
8 the details.

9 And he declined to say how he got it. And
10 I don't know. I don't know how he got it. But it
11 happens. It happens. And the Commission recognizes
12 that it happens and you have to --

13 JUDGE NELSON: What have we got here, the
14 -- we've got the Kansas City Southern, and you're the
15 --

16 MR. WOOD: Well speaking for the National
17 Industrial Transportation League and Dow Chemical, we
18 don't have, obviously like Mr. Lubel, a direct
19 involvement in this certainly.

20 But I'm just concerned that this is going
21 to establish precedence.

22 JUDGE NELSON: Are there other shipper
23 lawyers here who are concerned about access to these
24 materials?

25 MR. FINIZIO: Well, Your Honor, I'm

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 Finizio from Conrail, and we do have some concern,
2 although I've been listening and there are, I think,
3 accommodations that we would be willing to hear to
4 reach --

5 JUDGE NELSON: What would you suggest?

6 MR. FINIZIO: We are -- I think we are
7 amendable to making sure that there's a process that
8 if it comes to the point where we think our consultant
9 should see the documents and we can talk to the
10 Applicants or come to you to address those concerns .

11 MR. ROACH: We're agreeable to that.
12 We're agreeable to that.

13 JUDGE NELSON: I was thinking along those
14 lines to authorize the redactions and authorize the
15 showing only to counsel. And what was your third
16 point?

17 MR. CUNNINGHAM: Limit the subject matter
18 covered to chemicals and coal.

19 JUDGE NELSON: I don't know enough about
20 the yet to understand what are the implications of
21 that. But say as to the first -- the first two,
22 without prejudice to some lawyer coming in with
23 reference to some particular document that he or she
24 thinks he needs, they need help on and explain why.

25 And we'll look at in context of a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 particular sheet.

2 Now that only works if it works. If it
3 produces Mr. Lubel here with 300 sheets, we're right
4 back where we started.

5 MR. WOOD: All I can say about that, Your
6 Honor, with -- I appreciate the kudos from Mr.
7 Cunningham and others, but you know, I -- like Mr.
8 Lubel said, with all my experience, I may not fully
9 appreciate what the competitive significance of a
10 piece of information is.

11 And just having myself or lawyers from my
12 firm review it may not enable us to understand --

13 JUDGE NELSON: Is Conrail a competitor
14 with Kansas City Southern?

15 MR. FINIZIO: Conrail doesn't ship -- or
16 doesn't move in the same region. There are interim
17 change movements that come across country.

18 JUDGE NELSON: I mean, could Conrail and
19 Kansas City Southern use these materials against each
20 other?

21 MR. FINIZIO: I can't answer that
22 question, particularly --

23 JUDGE NELSON: Mr. Lubel?

24 MR. LUBEL: I can't either, Your Honor.

25 JUDGE NELSON: Let's ask Applicants' guys.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 MR. LUBEL: Again, we couldn't -- well
2 again, it begs the question maybe, but we couldn't
3 because of the protective order.

4 I would also add to what Mr. Wood said,
5 Your Honor. We've got a physical burden to --

6 JUDGE NELSON: Well, I tell you what I was
7 trying -- thinking about. And that is to send you out
8 to the field to come in with some nominees that we
9 could look at.

10 And I was trying to get it down to one or
11 two.

12 MR. LUBEL: In other words, bring in
13 consultants who don't do regular --

14 JUDGE NELSON: Somebody new, that's right.

15 MR. LUBEL: People who don't do regular
16 business for us.

17 JUDGE NELSON: Put them under oath.

18 MR. FINIZIO: Yes, if it helps, Conrail
19 does have --

20 JUDGE NELSON: Tell them if they violate
21 this, they'll be debarred from further proceedings of
22 the Service Transportation Board, the Federal Energy
23 Regulatory Commission to the extent that I could bring
24 influence to bear.

25 They will stand responsible for -- not

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 only would they consent to injunctions in here, but
2 they would consent to the payment of attorneys fees --

3 MR. FINIZIO: First-born children.

4 JUDGE NELSON: -- in pursuing that. So
5 make some really, really strong sanctions. And they
6 would be people who have no more plans to be in the
7 railroad shipping business.

8 Retirees or people on the verge of
9 retirement are your best candidates. And get them
10 under oath and then we might have something to work
11 with.

12 MR. FINIZIO: I was going to suggest, for
13 what it's worth, we do have such a consultant.

14 JUDGE NELSON: I'm not hearing you, sir.

15 MR. FINIZIO: I was going to suggest, for
16 what it's worth, we do have such a consultant already
17 in the employ of Conrail who is a retiree. So it is
18 a practical possibility.

19 MR. ROACH: Let me say a word about that.
20 We've seen, in a number of these cases, that railroads
21 have downsized and their marketing people have become
22 unemployed and, in some cases "retired," they've taken
23 early retirement.

24 JUDGE NELSON: Well, we can also go by
25 age.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 MR. ROACH: And I think we would want a
2 commitment --

3 JUDGE NELSON: I'm not asking for any
4 blanket approval. I'm suggesting that there may be
5 one or two people in the world that we can come up
6 with who, in their particular unique situations, we
7 can trust.

8 MR. CUNNINGHAM: Your Honor, we cannot
9 argue with the --

10 MR. ROACH: No, we want them to be bound
11 not to do this kind of work.

12 JUDGE NELSON: We'd have to see who they
13 are and what they say and what their backgrounds are
14 and what your clients think of them and so on and so
15 forth.

16 We're pursuing that right now in another
17 case that I am handling, with reference to a little
18 company called Texaco and another little company
19 called the Williams Oil Pipeline.

20 And we are going to come to a solution.
21 I am convinced of that. And counsel are trying to
22 work toward that.

23 Well, if they can do it, why can't you do
24 it? One answer is that's only one company. Here
25 we've got three.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 MR. WOOD: I can undertake -- I'm not sue,
2 you know, how my clients would feel about that. I'm
3 not sure who would be responsible for --

4 JUDGE NELSON: Maybe you can't find
5 anybody.

6 MR. WOOD: -- compensating this consultant
7 for his time and resources. You know, we're under
8 enough budget constraints as it is.

9 JUDGE NELSON: Then you don't hire him,
10 period. If you can't afford it, you don't do it.

11 MR. LUBEL: Your Honor, with what you're
12 saying --

13 JUDGE NELSON: You've got to buy the
14 ticket.

15 MR. LUBEL: I don't understand -- the
16 definition of "construct," as Mr. Cunningham has said
17 that you're talking about, I don't understand it to
18 exclude people who are currently consultants in this
19 case.

20 It's just -- the definition is people who
21 wouldn't be involved advising the company on business
22 matters in the future.

23 JUDGE NELSON: Suppose you had a
24 consultant -- I don't know who these consultants are,
25 nor do I care.

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 MR. LUBEL: The reason I say, Your Honor,
2 is that we're under great time constraints in this
3 case. We've got depositions one, sometimes two a day.

4 JUDGE NELSON: Well, those are all the
5 problems that you find yourself with here.

6 MR. LUBEL: That's right. And we rely
7 on --

8 JUDGE NELSON: We can't just relieve you
9 from that.

10 MR. LUBEL: -- we rely on consultants to
11 help us review documents. and I'm just saying that
12 we've now created a little bit of a satellite
13 proceeding where we've got to bring some people in.

14 So we will try to identify within our
15 existing consultants, or in new consultants, people
16 who fit the criteria you have said.

17 We will bring them to you and present them
18 to you.

19 JUDGE NELSON: So what I'm going to do for
20 now is direct the turnover of these sheets, in
21 redacted form, to counsel only. They may go to the
22 Justice Department in whatever form you agree with Mr.
23 Billiel on.

24 And counsel who want to get approval of
25 some special mechanism for the additional protection

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 to which I find these documents entitled will submit
2 to the other side a proposed arrangement with a
3 proposed person.

4 If there's agreement, that's fine. And if
5 there's not agreement, I'll thrash it out.

6 If you decide that's too burdensome or too
7 costly or too time consuming, then you do not buy a
8 ticket and you do not see the play.

9 MR. ROACH: Your Honor, may I say one last
10 thing about the due process in equities issue? And
11 that is simply this: these parties never asked for
12 these documents.

13 If they were so crucial, they would have
14 asked for them. And they don't have very strong
15 equities to be --

16 JUDGE NELSON: Well, at the moment --

17 MR. ROACH: -- Department of Justice has
18 and they have them.

19 JUDGE NELSON: -- at the moment, I've
20 granted your conditions, Mr. Roach. Are you
21 complaining about that?

22 MR. LUBEL: Your Honor, I don't want to
23 make this the debating society, but --

24 JUDGE NELSON: Now there was a third
25 condition.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 MR. CUNNINGHAM: Yes, there is a third
2 condition, Your Honor.

3 JUDGE NELSON: We haven't covered that
4 yet.

5 MR. CUNNINGHAM: The third condition --

6 JUDGE NELSON: Explain that to me more,
7 Mr. Cunningham.

8 MR. CUNNINGHAM: We have narrowed the
9 discovery in this case, the significant discovery, to
10 two principal areas. We had a third principal area in
11 which we produced an enormous amount of paper and
12 which, as far as we can tell, has never been read,
13 about grain.

14 And we don't think the grain is an area
15 where there is any significant inquiry going on, and
16 there's no need to take the competitive risk.

17 The two areas where there have been
18 significant effort to make discovery on the part of
19 the parties on the other side are chemicals, where
20 many of the competitive issues have been asserted
21 here, and coal, where other concerns --

22 JUDGE NELSON: The KCS competes with you
23 in the first categories.

24 MR. CUNNINGHAM: And to some extent, they
25 compete at the current time with the other Applicant

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 with respect to coal.

2 JUDGE NELSON: Yes, I say "you"
3 collectively.

4 MR. CUNNINGHAM: Yes.

5 JUDGE NELSON: Yes.

6 MR. CUNNINGHAM: But more importantly,
7 they are issues that have been raised by the Western
8 Coal Traffic League about coal questions.

9 And we don't have any illusion that those
10 would be --

11 JUDGE NELSON: So your proposal is?

12 MR. CUNNINGHAM: To turn over the reports
13 in the form that you have there for the chemicals,
14 including the plastics, marketing groups and the coal
15 marketing groups.

16 JUDGE NELSON: But not the grain?

17 MR. CUNNINGHAM: Not the gain.

18 JUDGE NELSON: And is that what causes the
19 fight?

20 MR. CUNNINGHAM: We haven't talked about
21 it yet.

22 MR. LUBEL: We think we should have the
23 right under the restrictions you said now, because you
24 -- you've put some restrictions on it, to anything
25 that's turned over to Justice.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 But I don't know if he's talking about
2 giving us a more limited universe than what Justice
3 gets. But we certainly think that grain ought to be
4 included.

5 JUDGE NELSON: Can you clarify that? What
6 are you giving Justice?

7 MR. CUNNINGHAM: We are giving Justice the
8 entire set.

9 JUDGE NELSON: So why can't you give the
10 entire set redacted to counsel only?

11 MR. CUNNINGHAM: We don't see any need to
12 take the risk when they haven't not been pursuing in
13 discovery with respect to those other issues.

14 JUDGE NELSON: What is the risk?

15 MR. WOOD: Your Honor, I need to address
16 that because the Commission's order directs us to
17 avoid duplicative discovery. And we've all been
18 relying on other parties' discovery to assist us in
19 producing information with respect to this case.

20 The mere fact that we haven't directed a
21 specific request about information doesn't --

22 JUDGE NELSON: I don't like the notion
23 that the lawyers in this case are at risk.

24 MR. CUNNINGHAM: Your Honor --

25 JUDGE NELSON: If we can't trust each

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20006

1 other, brothers and sisters, we can't make the system
2 work.

3 MR. CUNNINGHAM: It's not a question of --

4 JUDGE NELSON: And you're turning -- your
5 proposal, Mr. Cunningham, is to turnover to lawyers
6 own.

7 MR. CUNNINGHAM: Your Honor, that's like
8 the proposal --

9 JUDGE NELSON: We've got to start with the
10 assumption that our own profession works or we can
11 never get anywhere.

12 MR. CUNNINGHAM: Then we will be required
13 to reconsider our willingness to provide documents to
14 Justice.

15 It isn't a matter of trust, Your Honor.
16 It's how far discovery needs to go. And these parties
17 haven't pursued it with respect to these other areas
18 and you haven't granted it with respect to these other
19 areas --

20 JUDGE NELSON: This is as to the grain?

21 MR. CUNNINGHAM: As to all the other
22 commodities we move on the railroad. There are many
23 marketing groups that --

24 JUDGE NELSON: Well, we've had coal and
25 plastic. We've had talk about grain.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 MR. CUNNINGHAM: And we're delighted to
2 produce it with respect to coal and plastic. And if
3 anybody looked at the documents in the depository
4 dealing with grain, I would believe that was an area
5 of serious inquiry.

6 We're not trying to stiff them with
7 respect to grain.

8 JUDGE NELSON: Haven't we had documents
9 pertaining to grain?

10 MR. CUNNINGHAM: They're still sitting
11 there as far as we know.

12 MR. LUBEL: And these are obviously new
13 ones. Your Honor, if DOJ --

14 MR. CUNNINGHAM: Boxes and boxes never
15 touched, Your Honor.

16 MR. LUBEL: If DOJ asks for it formally or
17 informally, not only do we not have to ask for it,
18 that we run the risk of doing duplicate discovery is
19 we ask for it.

20 It is a false assumption for them to say
21 we have not asked for it because only DOJ asked it and
22 we --

23 JUDGE NELSON: Well, let's ask Mr.
24 Billiel. Could you live with the coal and the
25 plastics only in the interest of moving this along?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 MR. BILLIEL: I think I would start there.
2 I haven't finished discussing with the Applicants what
3 other --

4 JUDGE NELSON: Let's start there.

5 MR. CUNNINGHAM: Okay.

6 JUDGE NELSON: Plastics and coal only for
7 now.

8 MR. CUNNINGHAM: Thank you, Your Honor.

9 JUDGE NELSON: Redactions, copies to
10 counsel. Later on we can talk about others and later
11 on we can talk about machinery that shippers or
12 intervenors may want to suggest with regard to
13 particular consultant examinations.

14 So I'm granting -- again, I'm granting all
15 three of your conditions right now with the further
16 proviso that the turnover be limited to coal and
17 plastics --

18 MR. CUNNINGHAM: Thank you, Your Honor.

19 JUDGE NELSON: -- for present purposes.
20 Anything else on that?

21 MR. CUNNINGHAM: Coal and chemicals.

22 JUDGE NELSON: Chemicals. That includes
23 plastics?

24 MR. CUNNINGHAM: Yes.

25 JUDGE NELSON: Anything else now? There

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 was this matter of a subpoena?

2 MR. LUBEL: Yes. Okay, we've got Mr.
3 Grinstein's deposition coming up next month.

4 JUDGE NELSON: Do we have everything else
5 of yours? I don't remember.

6 MR. LUBEL: No, but let's take that first.

7 JUDGE NELSON: What do you want to take
8 first?

9 MR. LUBEL: Well, we might as well take
10 that first because it is something we need to get out
11 of the way.

12 JUDGE NELSON: As a matter of form -- I
13 don't know how it works with the ICC or the Board.
14 Over here, there is a form which the Secretary of the
15 Commission gives you, I sign, and she then puts a seal
16 on it.

17 I don't know what the procedure is.

18 MR. LUBEL: I'm not --

19 MR. ROACH: It's so extraordinarily rare
20 that none of it knows what it is.

21 MR. WOOD: I have seen it.

22 MR. ROACH: People don't --

23 MR. WOOD: I had the occasion once to
24 serve a subpoena issued by Administrative Law Judge at
25 the ICC. And my recollection was that it did require

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 a seal.

2 But my problem is I don't believe the new
3 Service Transportation Board even has a seal or forms,
4 Your Honor.

5 MR. LUBEL: That's why we put one
6 together. As I said in our letter, Your Honor, you
7 now the difficulty we've had in getting this thing
8 scheduled. He's no longer an dX of the company.

9 We've cited the statute. We --

10 JUDGE NELSON: Is there a way to arrange
11 his appearance voluntarily without a subpoena?

12 MS. JONES: Your Honor, we already have.
13 I don't understand the need for a subpoena.

14 JUDGE NELSON: Then why do we need a
15 subpoena?

16 MS. JONES: I have no idea.

17 MR. LUBEL: Just for the two reasons I
18 stated, Your Honor, that he -- we had trouble
19 scheduling it. He's no longer an employee.

20 We don't want to get to Fort Worth and
21 have any problems. So we're doing this out of --

22 JUDGE NELSON: When is it now scheduled
23 for?

24 MR. LUBEL: A week from today.

25 MS. JONES: It's a week from today at ten

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20006

1 o'clock.

2 JUDGE NELSON: That's the same day as
3 Anschutz.

4 MS. JONES: Yes, it is.

5 JUDGE NELSON: Only one is in Fort Worth
6 and the other is here.

7 MS. JONES: That's right. There are no
8 more open dates, Your Honor, until we get into March.

9 JUDGE NELSON: And who is going to defend
10 that deposition?

11 MS. JONES: I am, Your Honor.

12 JUDGE NELSON: You're going to be there?

13 MS. JONES: Yes.

14 JUDGE NELSON: I have no reason to doubt
15 Ms. Jones. And you're representing that the witness
16 will be there?

17 MS. JONES: Yes sir.

18 JUDGE NELSON: God willing.

19 MS. JONES: God willing and American
20 Airlines.

21 (Laughter.)

22 JUDGE NELSON: And you're going to be
23 there.

24 MS. JONES: Yes, I intend to be there.

25 JUDGE NELSON: And we'll go ahead with

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 that deposition. I don't see the need for the
2 subpoena in these circumstances.

3 You're going to produce Mr. Grinstein?

4 MS. JONES: Yes sir.

5 JUDGE NELSON: Next Friday in Fort Worth,
6 Texas?

7 MS. JONES: Yes sir.

8 JUDGE NELSON: And where will he be?

9 MS. JONES: He will be at the building 777
10 Main Street in Fort Worth. We had originally proposed
11 the 38th floor, and we shortly informed counsel that
12 we are moving it to the 13th floor.

13 There's a law firm located in that
14 building. I'll notify counsel in writing of that
15 change.

16 JUDGE NELSON: And what time of day will
17 this be?

18 MS. JONES: Ten o'clock.

19 JUDGE NELSON: A.M. --

20 MS. JONES: A.M.

21 JUDGE NELSON: -- I assume. Anything else
22 with reference to Mr. Grinstein's deposition? I am
23 going to rely on Ms. Jones' representation and see no
24 need for the subpoena at this time.

25 What's next?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 MR. LUBEL: Your Honor, I have abundance
2 of caution, and I'm not really -- I didn't want to
3 debate this today.

4 But we might as well tell you what they
5 have said. They have said that they want to limit the
6 scope of his deposition to just what he said in this
7 Forbes article.

8 We've taken the position that when we
9 wrote back in December asking for his deposition, we
10 said --

11 JUDGE NELSON: Now this is a different
12 debate. We're talking now of the scope of the
13 deposition?

14 MR. LUBEL: Yes, the scope. In -- Mr.
15 Grinstein was the Chairman of the Board of BN during
16 very -- a lot of significant events relating to this
17 proceeding.

18 When we wrote the letter saying we wanted
19 to depose him, we said we wanted to depose him in
20 connection with this merger, the merger of BN-SF and
21 the settlement agreement that's in his case.

22 JUDGE NELSON: Now tell me again who he
23 was.

24 MR. LUBEL: Okay, Mr. Grinstein was the
25 Chairman of the Board of Burlington Northern, Your

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20006

1 Honor. If I might, I made some notes on this.

2 JUDGE NELSON: During what period of time?

3 MR. LUBEL: For, as far as I know, a
4 number of years prior to the 1995. He went -- he was
5 the outgoing Chairman. He was there until December
6 '95 -- December 31, '95. So he --

7 JUDGE NELSON: So he was there while the
8 agreement was negotiated?

9 MR. LUBEL: Not only that, Your Honor. He
10 was there when the Burlington Northern merger took
11 place, when the -- and when the agreement was
12 negotiated in this case.

13 And that's what was -- and so clearly, he

14 --

15 JUDGE NELSON: And was he there when, Ms.
16 Jones, you made that filing that rests so heavily upon
17 the agreement?

18 MS. JONES: Well, that was the same day.

19 JUDGE NELSON: I forget what you call it.

20 MS. JONES: Our comments --

21 JUDGE NELSON: Yes, about three-quarters
22 of an inch thick. Was he there at that time?

23 MS. JONES: He may have been in the
24 building that day, Your Honor. But I --

25 JUDGE NELSON: But it would be on the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 paper?

2 MS. JONES: -- on December 31 and his last
3 day of service is December 31.

4 JUDGE NELSON: What happened to him on
5 December 31? Was he fired?

6 MS. JONES: He retired.

7 JUDGE NELSON: Retired?

8 MS. JONES: He's now a private citizen.
9 He did not testify --

10 JUDGE NELSON: He would make a good
11 consultant.

12 (Laughter.)

13 MS. JONES: Except he's already busy in
14 his retirement and as you --

15 MR. LUBEL: We could stipulate to that ,
16 Your Honor.

17 MS. JONES: -- as you recall, we talked
18 two weeks ago about whether there really was a need to
19 bring him back from retirement.

20 And we agreed to do that for the hearing,
21 but --

22 JUDGE NELSON: I remember that. He was
23 travelling or something.

24 MS. JONES: And he continues to have a
25 very busy schedule. Mr. Lubel's concern about the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 scope of this deposition is indeed my concern.

2 I now have a letter from another counsel
3 suggesting intention to question Mr. Grinstein on his
4 general knowledge of the entire corporation, all
5 railroad related matters, agreements that had been
6 struck between Union Pacific and two other railroads
7 last week when Mr. Grinstein has been deeply in his
8 retirement.

9 I think we run a great risk, Your Honor,
10 of imposing an undue burden on this retired private
11 citizen --

12 JUDGE NELSON: What's your suggestion?

13 MS. JONES: My suggestion is that we limit
14 the scope of this deposition to his Forbes interview,
15 which is all that was ever proposed to you as a reason
16 to produce him out of retirement, and to terminate it
17 at the close of business on Friday and ensure that we
18 do not have to bring him back.

19 MR. LUBEL: Your Honor, may I respond?

20 JUDGE NELSON: What is he -- what is he
21 doing in retirement?

22 MS. JONES: I do not know, Your Honor. He
23 does not have to report that to us.

24 JUDGE NELSON: Where does he live? Do you
25 know that?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20006

1 MS. JONES: I believe he lives in Fort
2 Worth.

3 JUDGE NELSON: So this is handy for him at
4 least. It's his hometown?

5 MS. JONES: Yes, Your Honor. It was his
6 request that do it in Fort Worth. I presume it was
7 his community.

8 JUDGE NELSON: I was thinking also of
9 starting with the notion that it be no more than one
10 business day.

11 MR. LUBEL: That's fine with us, Your
12 Honor.

13 JUDGE NELSON: So time itself will end it.

14 MR. LUBEL: That's fine with us, Your
15 Honor.

16 JUDGE NELSON: Who else -- you mentioned
17 somebody else wants to ask a question.

18 MS. JONES: Well, I've now been notified
19 by Mr. McBride, counsel for the Western Shippers, that
20 they have retained special counsel to question Mr.
21 Grinstein because apparently they don't have anyone
22 from the firm that can do that and --

23 JUDGE NELSON: Mr. McBride isn't here.

24 MS. JONES: Mr. McBride is not here. I
25 do not know who else plans to --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 JUDGE NELSON: Did he have notice that the
2 question of the Grinstein deposition was coming up?

3 MR. LUBEL: No, Your Honor.

4 JUDGE NELSON: So it's not fair to hold
5 him for that.

6 MR. LUBEL: No, it's not.

7 MS. JONES: Mr. Lubel served his letter
8 requesting the subpoena late yesterday afternoon.

9 MR. LUBEL: Your Honor, might I remind --

10 JUDGE NELSON: Who else besides -- what's
11 this other lawyer's name?

12 MS. JONES: Mr. McBride representing the
13 Western Shippers Coalition.

14 JUDGE NELSON: What are they? I'm not
15 sure I've heard --

16 MR. LUBEL: Western Shippers --

17 MR. WOOD: Western Shippers, shippers in
18 the western region of the United States.

19 MR. WOOD: Principally coal companies.

20 JUDGE NELSON: Well now, that slow I'm
21 not, Mr. Wood. I can figure out that they were in the
22 west, but what are they shipping?

23 MR. WOOD: Well Your Honor, in fact, one
24 or two of our individual clients may well be members
25 of that coalition. They are, if I can put it in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 context -- my understanding is that they're primarily
2 concerned with the -- what's been described as the
3 central corridor between Denver and California, and
4 the group of shippers who are concerned about the
5 impact of the merger on their situation.

6 JUDGE NELSON: Well --

7 MR. WOOD: That group has retained legal

8 --

9 JUDGE NELSON: Since some of your members
10 are members of that group, can you help me understand
11 what it is they want to get out of Grinstein?

12 MR. WOOD: I wish I could, Your Honor. I
13 have not talked to Mr. McBride about what he intends
14 to inquire.

15 JUDGE NELSON: Mr. Lubel knows?

16 MR. LUBEL: Well no, Your Honor, but I can
17 -- if I can just establish some predicate here by
18 quoting from three Commission decisions as to why we
19 want to depose Mr. Grinstein --

20 JUDGE NELSON: That's a different story.
21 I'm first dealing with the unrepresented coalition
22 here. What would you suggest here, Ms. Jones?

23 We're going to have to divvy up that day,
24 and we've got a party that wants to take depositions
25 and isn't here to tell us about it.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 MS. JONES: Well, I'm prepared to propose
2 a limitation of the close of business. He will not be
3 required to reappear, that counsel be admonished to
4 coordinate their time so that we don't find ourselves
5 at four o'clock in the afternoon with one counsel
6 having occupied the entire time with questions leaving
7 no time for others.

8 JUDGE NELSON: Oh, we could very well.

9 MS. JONES: We could very ell.

10 JUDGE NELSON: In which case the day ends.

11 MS. JONES: In which case the day ends.

12 JUDGE NELSON: That's what happens. Mr.
13 Grinstein says good-bye and you tell him he may leave.

14 MS. JONES: That would also be acceptable.

15 MR. LUBEL: But --

16 JUDGE NELSON: That's exactly the way --

17 MR. LUBEL: -- Your Honor, we have a five
18 day --

19 MS. JONES: We propose ten o'clock. If
20 you would like to me to inquire to his availability at
21 9:00, I can. I assumed you would want to come in that
22 morning. I tried to do that as an accommodation --

23 JUDGE NELSON: Ms. Jones, this lawyer for
24 the coalition, what is his name again?

25 MS. JONES: The lawyer who wrote to me is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20006

1 Michael McBride. The lawyer they have retained
2 specially to question Mr. Grinstein is a Steven
3 Brigance, B-R-I-G-A-N-C-E.

4 JUDGE NELSON: Where are those gentlemen
5 located?

6 MS. JONES: I am informed that Mr.
7 Brigance is a former employee of the Burlington
8 Northern and he is located in Arlington, Texas, which
9 is near Fort Worth.

10 JUDGE NELSON: How about Mr. McBride.
11 Where is he?

12 MS. JONES: He is located in Washington
13 D.C.

14 JUDGE NELSON: Would it be possible to
15 arrange a conference with Mr. McBride, Mr. Lubel and
16 you to work out the details of this deposition as
17 early as if not this afternoon, Monday?

18 MS. JONES: I'm sure it would, Your Honor.
19 But I don't know that there might not be 20 other
20 counsel who intend to attend this deposition.

21 No one besides Mr. Lubel and Mr. McBride
22 have notified me of their intention to participate.

23 JUDGE NELSON: Is the procedure such that
24 they don't have to tell you, they just show up?

25 MS. JONES: That's right, Your Honor.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 JUDGE NELSON: Then there's really no way
2 that we can anticipate it now other than to say it's
3 one business day.

4 MS. JONES: That's right, Your Honor.
5 That was the reason I had proposed the limitation to
6 the Forbes article, which by the way is quite a broad
7 restriction.

8 JUDGE NELSON: Would you like me to rule
9 that you may go first?

10 MR. LUBEL: We were -- a lot of people
11 have assumed we were going to go first, Your Honor.

12 JUDGE NELSON: That's not what I asked.

13 MR. LUBEL: We were prepared to go first,
14 but --

15 JUDGE NELSON: I can make a ruling that
16 you could go first on the ground that you are the only
17 one that cared enough to come in and seek a deposition
18 and came here for those purposes.

19 MR. LUBEL: Your Honor, I appreciate that.
20 I don't think that's necessary. I think among counsel
21 we can --

22 JUDGE NELSON: You think you can work out
23 who --

24 MR. LUBEL: We can work that out, and I
25 don't want to --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20006

1 JUDGE NELSON: All right. The day shall
2 start at 10:00 a.m. is your suggestion?

3 MS. JONES: 10:00 a.m. is our proposal.

4 JUDGE NELSON: And when shall it end?

5 MS. JONES: I would propose 5:00 p.m.

6 JUDGE NELSON: 5:00 p.m. And you will
7 take, I assume, the -- an hour break for lunch?

8 MS. JONES: Yes, Your Honor.

9 JUDGE NELSON: That's a typical FERC
10 hearing. And we would take a break in the morning and
11 a break in the afternoon so that people can take a
12 rest, catch their breath, make phone calls and so
13 forth, or as may be necessary during the deposition.

14 But at least, there should be one morning
15 break, one hour for lunch, one afternoon break.

16 MR. LUBEL: Your Honor, my -- since we're
17 going to take a morning break, why don't we plan to
18 start at 9:00?

19 MS. JONES: I will ask Mr. Grinstein. I
20 proposed 10:00 as an accommodation to those of you who
21 would have to fly from Washington. If you don't need
22 the courtesy, I will ask him if he'll start at 9:00.
23 He'll be there.

24 MR. LUBEL: Okay, he'll be there. We'll
25 be there.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 JUDGE NELSON: Nine o'clock we're saying
2 now?

3 MS. JONES: Well, Your Honor, we have many
4 unrepresented people here who may want to fly in and
5 we may be back to --

6 MR. LUBEL: So we get to start first.
7 We'll start first and --

8 MS. JONES: I'm perfectly happy to ask him
9 to start at 9:00.

10 JUDGE NELSON: That's fine. That's
11 cooperative. So you're giving an extra hour of time
12 with this witness?

13 MS. JONES: Yes.

14 JUDGE NELSON: So we start at 9:00. And
15 if no one else in the world is there except Mr. Lubel,
16 Mr. Lubel will begin. Is that fair?

17 MS. JONES: And may I count on --

18 JUDGE NELSON: I would assume that Mr.
19 Lubel would take at least an hour. And therefore --

20 MS. JONES: I think that's a fair
21 assumption, Your Honor.

22 JUDGE NELSON: -- everyone else would
23 arrive at 10:00 when they think it's going to be, and
24 they'll find Lubel's questioned for an hour at worst.

25 MS. JONES: I will notify counsel of the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005