

INTERSTATE COMMERCE COMMISSION 04/03/96

FINANCE DOCKET # 32760

2594-2638

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

:
- CONTROL AND MERGER - :
:

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

-----X
Wednesday, April 3, 1996

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

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

BEFORE:

THE HONORABLE JEROME NELSON
Administrative Law Judge

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

(9:27 a.m.)

JUDGE NELSON: This discovery conference was convened by the Southern Pacific. Well, let's get a record of who's here.

MR. NORTON: Gerald Norton representing Southern Pacific on behalf of applicants.

JUDGE NELSON: And that's all we have, the -- let the record who no one else is here representing any party.

MR. NORTON: No, Mr. Pergolizzi, I believe.

MR. PERGOLIZZI: Right, Frank Pergolizzi on behalf of WCTL, TU Electric, Arizona Electric, Wisconsin Public Service, Wisconsin Power & Light, and Entergy.

JUDGE NELSON: All right.

MR. NORTON: They're here as observers.

JUDGE NELSON: Mr. Norton, this is about a discovery request -- interrogatories which you propounded to the Cen-Tex and South Orient Railroad?

MR. NORTON: That's correct.

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1 JUDGE NELSON: Which they have never
2 answered?

3 MR. NORTON: They have never answered,
4 they have never objected to, they have -- however, if
5 Your Honor -- please, I could just go through the
6 sequence and maybe put things in context.

7 JUDGE NELSON: Please do, and we'll have
8 a record of exactly what's gone on here and what
9 hasn't.

10 MR. NORTON: There's been a lot of paper
11 flowing around. Cen-Tex and South Orient are related
12 entities that operate some short lines in Southwest
13 Texas. They filed a notice of intent to seek
14 conditions. We served discovery on them on February
15 26th, at the same time we served the other parties.

16 They did not file any objection during the
17 five day period specified by your guidelines or at any
18 time. They did not file any responses within the 15
19 days required or at any time. They did not contact
20 us to say when responses would be due as required by
21 your guidelines.

22 They did not file any motion seeking

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1 relief claiming privileged prematurity or any of the
2 other issues that other parties raised. They did not
3 join in any of those motions. They took no action at
4 all basically. When we raised this question at the
5 hearing -- well, we raised this issue by -- I think it
6 was March 13 for a hearing that was then held on
7 March 20th.

8 At that time, Your Honor denied it without
9 prejudice because the papers were not complete. We
10 did not press the matter at that time. As I believe
11 you had suggested, we contacted them about what was
12 going on that day, and I think three times, perhaps --
13 I think it was March 20, March 26, March 29 and again
14 yesterday, we called them, talked to them, tried to
15 get some indication of whether they were going to
16 respond and when.

17 We couldn't. They yesterday said they'd
18 get back to us. They never did. We said that
19 otherwise we were going to have to go on with this
20 hearing today, and they were fully aware of that. We
21 talked to them and faxed them the letter.

22 JUDGE NELSON: Why don't you detail these

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1 conversations a little more? Who spoke to whom and
2 who said what?

3 MR. NORTON: On March 20, I spoke to James
4 Craig, who was returning my call to the individual who
5 was initially listed on the papers who we had served
6 and explained that we had these discovery requests
7 that they had --

8 JUDGE NELSON: Who is Mr. Craig?

9 MR. NORTON: I don't believe I know his
10 title. He was identified as being a representative of
11 the entities. And he was responding to my call to the
12 designated individual, being Joel Williams, the
13 president, who is the person I had initially called.
14 And he returned my call to Mr. Williams.

15 JUDGE NELSON: The discovery shows as the
16 applicant's first set of interrogatories and request
17 for production of documents to Cen-Tex Raillink
18 Limited/South Orient Railroad Company Limited.

19 MR. NORTON: That's correct.

20 JUDGE NELSON: There's a certificate of
21 service that says you made service by overnight mail
22 on Mr. Joel T. Williams, III, President, Cen-Tex

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1 Raillink Limited/South Orient Railroad Company at 4809
2 Cole Avenue, Suite 350 LD-126, Dallas, Texas, 75205.

3 That is what the certificate says.

4 MR. NORTON: That's right.

5 JUDGE NELSON: Do you know whether Mr.
6 Williams received those interrogatories?

7 MR. NORTON: Well, whether he did at that
8 time, he did subsequently, because that day, March 20,
9 I faxed him another set overnight. I don't recall
10 whether it was faxed or overnight delivery, but we
11 sent another set.

12 JUDGE NELSON: Then what happened?

13 MR. NORTON: And then nothing further
14 happened. We -- my colleague, Mr. Bulgozdy --

15 JUDGE NELSON: Well, when was it you had
16 this --

17 MR. NORTON: That was March 20th.

18 JUDGE NELSON: March 20th?

19 MR. NORTON: It was right after the
20 hearing.

21 JUDGE NELSON: Did you first fax him
22 another set or first phone him?

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1 MR. NORTON: First I called Mr. Williams,
2 the president, and Mr. Craig returned my call to Mr.
3 Williams.

4 JUDGE NELSON: And then what did you say
5 and what did he say?

6 MR. NORTON: I explained that we had -- I
7 was calling about these discovery requests which we
8 had served at the time for objections -- you know,
9 deadlines for objections and responses that they had
10 passed that we had not received anything and that, you
11 know, we were going to be seeking relief from Your
12 Honor if they didn't respond. And --

13 JUDGE NELSON: What did he say?

14 MR. NORTON: He said he would look into
15 it.

16 JUDGE NELSON: When did this faxing of the
17 additional copy occur? Was that before that
18 conversation or after?

19 MR. NORTON: No, it was immediately
20 afterward.

21 JUDGE NELSON: Immediately afterwards?

22 MR. NORTON: Yes. Yes, March 20. My

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1 letter indicates -- a copy of which was sent to Your
2 Honor. This was by facsimile. "Enclosed is a copy of
3 the discovery that had previously been served." So
4 they got it -- a second copy was sent on March 20. On
5 March 26, my colleague, John Bulgozdy, in my absence,
6 followed up not having heard anything, called Mr.
7 Craig and did not get any concrete response about
8 whether or when there would be a response.

9 JUDGE NELSON: Did he converse with Mr.
10 Craig?

11 MR. NORTON: Yes, he did.

12 JUDGE NELSON: What did he say, if you
13 know?

14 MR. NORTON: I don't have first hand -- I
15 have a copy of a letter that was sent that day
16 confirming the conversation, which I can provide you,
17 Your Honor.

18 JUDGE NELSON: Can the reporter take
19 these letters and make them part of the transcript?
20 Let's do that. Why don't you give them to the
21 reporter.

22 *****INSERT LETTERS*****

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1 MR. NORTON: In fact, I'll run through
2 them first, and then --

3 JUDGE NELSON: Of course.

4 MR. NORTON: -- I'll turn them over. This
5 was a confirming -- a letter confirming a telephone
6 conversation which is described in the letter, which
7 again restated a history of the service of the papers
8 in the absence of any response. And again, that Mr.
9 Craig told Mr. Bulgozdy that he would take it under
10 advisement and get back and that we would have to seek
11 remedies if they did not respond.

12 March 29, Mr. Bulgozdy again had a
13 conversation with Mr. Craig about their failure to
14 respond. He said he hadn't seen the request until a
15 few weeks ago. This was what Mr. Craig told Mr.
16 Bulgozdy. And he indicated that one item we were
17 particularly interested in was the 100% traffic tape,
18 and there was some reference to the rulings indicating
19 that matters such as the traffic tape should be served
20 no later than April 1 under your earlier rulings on
21 Phase I and Phase II, although they were not parties
22 to those motions.

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1 But if were to apply those standards, --
2 and I -- that's the essence of it. The -- we got no
3 response on April 1. We got no response yesterday.
4 Mr. Bulgozdy again called Mr. Craig and spoke with
5 him. We had sent them Monday the letter noticing the
6 hearing for today. We faxed a copy of that letter to
7 them.

8 They had not responded, so we -- to us, so
9 we called -- we confirmed that they had received a
10 copy of the April 1 letter. He was aware of the
11 hearing and said he would -- he couldn't answer as to
12 when we would get response of information. He would
13 consult with his principals and get back to us.

14 And we never heard further. So we've
15 talked to them four times. We get promises about
16 we'll get back to you, but nothing has happened. And
17 I would be happy to submit these for the record.

18 JUDGE NELSON: At no time in these four
19 conversations, according to your recital, did Mr. --
20 what's his name, Carrey?

21 MR. NORTON: Craig.

22 JUDGE NELSON: Craig -- did Mr. Craig deny

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1 having received the interrogatories?

2 MR. NORTON: No.

3 JUDGE NELSON: And indeed, on one
4 occasion, gave knowledge that he had had them for
5 several weeks is that correct?

6 MR. NORTON: That's correct.

7 JUDGE NELSON: What is it you want me to
8 do?

9 MR. NORTON: Well, what I would like you
10 to do, Your Honor --

11 JUDGE NELSON: First of all, why don't you
12 give those letters to the reporter.

13 MR. NORTON: Under the -- I think
14 extraordinary circumstances here, Your Honor, we've
15 had a lot of discovery disputes, but no one has taken
16 this brazen an approach disregarding their
17 obligations. We think there's really only one
18 practical option that makes sense to preserve the
19 integrity of the process.

20 And that is to dismiss their request for
21 conditions. And let me go back and --

22 JUDGE NELSON: I don't think I have the

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1 power to do that.

2 MR. NORTON: Well, Your Honor, I think
3 there is authority under -- let me just explain what
4 I'm referring to there for the record. On March 29th,
5 they did take some action. They filed a request for
6 conditions, a copy of which --

7 JUDGE NELSON: I have a copy of that. It
8 came with your papers.

9 MR. NORTON: That's correct.

10 JUDGE NELSON: And it has the name James
11 R. Craig on there shown as Chief Financial Officer.

12 MR. NORTON: Right. And that request has
13 now imposed upon applicants a significant burden to
14 have to -- even though it is not itself a substantial
15 document, they -- in their briefing, they can invoke
16 evidence that is submitted by others. We don't know
17 whether they're a stalking horse for others in any
18 event.

19 JUDGE NELSON: What is it they want?

20 MR. NORTON: They want various trackage
21 rights in Texas. And we have to respond to those
22 requests and address them, and they impose a very

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1 substantial burden on the applicants along with having
2 to respond to the -- you know, I think over 100
3 filings that were made on March 29.

4 I think it's four feet of paper that -- on
5 my table. And even though it may not be a substantial
6 document, it does impose substantial burdens. And
7 what we want is the relief that is authorized under
8 Commission Board Rule 1114.31(v), which provides that
9 in circumstances where a party fails to serve answers
10 to interrogatories after proper service, the
11 commission on motion and notice may strike out all or
12 any part of any pleadings of that party or dismiss the
13 proceeding or any part thereof.

14 We think that gives the board, and hence
15 Your Honor, as the board's delegate --

16 JUDGE NELSON: How would I get that power?

17 MR. NORTON: Because this is a discovery
18 -- this is part of the discovery rules. And as we
19 understand the Commission's decisions and decision
20 six, I believe it was, and it was implemented in 20
21 and 23, you have essentially the authority of the
22 Commission or the Board now with respect to discovery

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1 --

2 JUDGE NELSON: I could certainly answer on
3 the order of directing these people to answer the
4 interrogatories and produce whatever it is you're
5 requesting. No question we would have that power.
6 But the power to strike them out of the case
7 altogether seems to me a more substantive remedy that
8 the Board would have to render.

9 MR. NORTON: Well, Your Honor, if that
10 were the case, that really would deprive you of a --
11 of what would be the only significant remedy to deal
12 with this kind of discovery problem. Directing them
13 to answer is giving them a fourth bite at the apple.
14 And that doesn't seem to be the appropriate response
15 for this kind of a circumstance.

16 JUDGE NELSON: When is your next filing?

17 MR. NORTON: April 29.

18 JUDGE NELSON: Okay, we're a month away.

19 MR. NORTON: Well, we have printer's
20 deadlines that shorten that period. And Your Honor,
21 if there's a question of authority, I think the way to
22 test it -- and we think --

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1 JUDGE NELSON: If you have all this
2 background, and the record will show it; and you have
3 an order from me to produce, and that order goes
4 ignored, why can't you simply tell the Board that
5 those circumstances you can't even -- can't be
6 expected to fashion any meaningful response to the
7 Cen-Tex people?

8 MR. NORTON: Well, Your Honor, if you were
9 to take that approach, that basically vindicates their
10 strategy of disregard. Because it means that
11 ultimately they don't get any sanction for just
12 sitting on their hands.

13 JUDGE NELSON: You could urge the
14 Commission to reject their request -- the Board,
15 rather.

16 MR. NORTON: Well, if they end up
17 responding to the discovery, I would -- it would be --
18 it would not be a very appealing position to have to
19 argue that -- it would be a highly --

20 JUDGE NELSON: What I'm trying to get at
21 --

22 MR. NORTON: Let me suggest, if I might,

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1 if there's a question about the authority, a way that
2 that can be resolved is to take the action that we are
3 suggesting. And if they think that's beyond your
4 authority, they can take an appeal to the Board and
5 get a resolution on it.

6 JUDGE NELSON: I was going to suggest
7 something different. Say I enter an order requiring
8 production within one week. And if that week comes
9 and goes and you've got nothing, you then go to the
10 Board.

11 MR. NORTON: Your Honor, that --

12 JUDGE NELSON: Over the Board for --

13 MR. NORTON: That is putting on us a
14 further burden at a time when we are, you know,
15 desperately --

16 JUDGE NELSON: The burden of making one
17 simple motion? That doesn't sound so -- you've got
18 all sorts of lawyers involved there. That's not a
19 significant --

20 MR. NORTON: I really -- I don't want to,
21 you know, cry too much, but we do have just
22 extraordinary demands in a very short period of time

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1 to try to deal with the filings that have been made.
2 And the approach seems to me just to, you know,
3 vindicate and reward their --

4 JUDGE NELSON: No, it doesn't. It gives
5 them one more week to produce the --

6 MR. NORTON: Which is a lot more time than
7 the people who went -- followed the rules, filed
8 objections, filed responses, raised questions before
9 Your Honor. They've had to respond to most of these
10 or a lot of these same questions already. And there's
11 just -- it just turns everything upside down to say
12 that someone who disregards all of their obligations
13 gets a free ride for another -- still another period
14 of time and puts us having to deal with -- further
15 behind the schedule in dealing with their response.

16 JUDGE NELSON: Well, let the record show
17 that I don't think I have the authority to put them
18 out of the case. If I did have the authority, I would
19 exercise it in your favor in the present
20 circumstances. Given the conversations, the notice,
21 the amount of time that's gone by, I would put them
22 out of the case.

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1 I don't think I have the power to do that.
2 And that's a power that seems to be in the Board, not
3 me. It's a more draconian remedy, so serious that I
4 think you ought to take it to the Board.

5 Now, what can I do for you? I can
6 certainly enter an order which could be the predicate
7 for such a motion, be it next week or in a few days or
8 whatever. Given the fact that I don't think I have
9 the authority to throw someone out of the case
10 altogether, what next -- what would your request be?

11 MR. NORTON: Well, let me -- I think two
12 variations on that. One would be that if you were to
13 enter the order that we're seeking and it turns out
14 that the Board concludes that you didn't have that
15 authority, we would run the risk of not getting the
16 discovery that we're seeking.

17 So that the risk on the legal question --
18 because if it went up on appeal and then the Board
19 says no --

20 JUDGE NELSON: I've decided that in my own
21 mind. I don't have the power to do it. So I'm not
22 going to do it. I'm asking you is there anything less

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1 than that that I can do?

2 MR. NORTON: Well, I suppose you could
3 preclude them from making any further filings, which
4 I think is something short of dismissal. I don't know
5 whether you would see it as subject to the same
6 question of authority.

7 JUDGE NELSON: I don't know where I get
8 that either. It seems to me the most I can do, unless
9 you have some other thought, is to enter an order
10 directing production. And whether you want that order
11 is up to you.

12 MR. NORTON: If the order could be crafted
13 in such a way that it would not -- their production
14 and response would not moot our argument that you had
15 the authority to dismiss their request for conditions
16 -- if we were to appeal that, --

17 JUDGE NELSON: You could appeal to the
18 Board right now from my ruling that I have no
19 authority to dismiss someone from a case. I could
20 then enter an order and recite that whatever
21 proceedings occur under that order would be without
22 prejudice to your position that these people should

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1 have been thrown out effective today.

2 I would not say that you were waived
3 anything or overtaken. You will have a higher
4 argument if I enter an order to produce and Mr. Craig
5 ponies up material by Friday going to the Commission
6 saying because you didn't have it on Monday, he should
7 have been thrown out of the case retroactively, even
8 though you've gotten it Friday.

9 That's not going to be a good package to
10 sell. But you could try.

11 MR. NORTON: Well, Your Honor --

12 JUDGE NELSON: If the Cen-Tex people
13 continue to do what they've done, nothing will happen.
14 They'll ignore the order. And then you have the
15 predicate to seek whatever relief you want from the
16 Board by way of drawing negative inferences,
17 unilaterally declaring that negative inferences or
18 seeking relief by a motion.

19 So I don't know what I could do more than
20 enter an order of production. In other words, once
21 you get from discovery over the threshold into the
22 merits of the case, it seems to me that's in the

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1 province of the Board.

2 And to go over that threshold and start
3 dealing with remedies that pertain to the merits,
4 those seem to me sanctions that the Board ought to be
5 imposing, not me.

6 MR. NORTON: Would it be Your Honor's view
7 that you would also lack authority if, after you
8 ordered them to respond -- let's say by Friday, and
9 they did not do so, that you could not at that point
10 strike their request?

11 JUDGE NELSON: If you've shown me
12 something -- is there anything in the Commission
13 orders in this case that address the question of
14 sanctions? I don't remember anything.

15 MR. NORTON: I don't believe anything
16 there so specifically, but I think the -- decision
17 four authorizes Your Honor to entertain the rule upon
18 all the --

19 JUDGE NELSON: Let me find it. I have the
20 file here, I believe. I see that. I have authority
21 for the handling of all discovery matters and initial
22 resolution of all discovery disputes. I think we've

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1 gone beyond a discovery dispute into the impact of
2 sanctions as they impacts merits.

3 And I don't think I have that authority.

4 MR. NORTON: Well, Your Honor, the rule
5 that we're invoking is part of the Commission's
6 discovery rules.

7 JUDGE NELSON: I understand that.
8 Normally the trial judge would have authority to
9 impose sanctions. But I'm a borrowed agent of the
10 Board here. I think I have only so much authority as
11 the Board has given me, and I do not find an authority
12 to impose sanctions. And I can see a rational basis
13 for them not wanting me to have that authority.

14 That ought to be their business. That
15 goes to the ultimate shape of the merits of the case.
16 It's a different question from the mechanics of
17 discovery and the privileges and the burdens and the
18 relevance and all the disputes we've had. So I adhere
19 to the view that I don't think I have the authority to
20 impose sanctions, absent some Commission expression to
21 that effect.

22 MR. NORTON: Your Honor, this might be a

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1 variation on what --

2 JUDGE NELSON: We're taking up time now
3 and repeating ourselves, and I don't know that we're
4 getting anywhere.

5 MR. NORTON: No, this is just in terms of
6 how you phrase your view. I was thinking that an
7 analogue to what we're dealing with here is the
8 authority of magistrates to make recommended decisions
9 as opposed to definitive decisions. And would it be
10 fair to say that what you would be -- the view you
11 would be expressing would be that -- equivalent to a
12 recommendation for the --

13 JUDGE NELSON: I would certainly recommend
14 that in the circumstances you've outlined here,
15 corroborated by these repeated conversations with this
16 party and corroborated by your letters, I would
17 certainly recommend the imposition of some sanctions
18 upon the Cen-Tex Raillink Limited/South Orient
19 Railroad Company Limited for their repeated ignoring
20 of the rules of the game of discovery in this case.

21 If I had the power to impose them, I would
22 impose them. I don't think I do, but I will certainly

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1 recommend that the Board impose them. And you have a
2 record of my saying that.

3 MR. NORTON: Okay.

4 JUDGE NELSON: Any other questions?

5 MR. NORTON: No, Your Honor. In that
6 event, I think the -- we talked about Friday. I think
7 that's an appropriate deadline to impose for
8 responses. And we'll have to take it from there.

9 JUDGE NELSON: So I would hereby direct
10 the Cen-Tex Raillink Limited/South Orient Railroad
11 Company Limited to respond to the applicant's first
12 set of interrogatories and request for production of
13 documents dated February 26, 1996, and to respond by
14 -- I'm trying to think. What time is it in Dallas?

15 They're two hours earlier than we are?

16 MR. NORTON: One hour earlier.

17 JUDGE NELSON: One hour different? So
18 let's say 5:00 p.m. Dallas time on Friday.

19 MR. NORTON: So it's clear, Your Honor --

20 JUDGE NELSON: And such response shall
21 constitute transmittal of the response to your office
22 at Harkins Cunningham by fax or overnight delivery

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1 service. And you should have that response by, at the
2 latest, 7:00 p.m. Eastern this coming Friday.

3 MR. NORTON: And just so it's clear, a
4 response, I take it, means respond in full, not a raft
5 of objections. They've waived -- the time for
6 objections is long past.

7 JUDGE NELSON: I don't know what I can say
8 that.

9 MR. NORTON: Well, Your Honor, that would
10 be --

11 JUDGE NELSON: I'm just saying that they
12 have to make a kind of response everyone else has been
13 making.

14 MR. NORTON: Your discovery guidelines
15 specifically require all objections to be stated
16 within five days. And that's what everyone else has
17 been doing. And they haven't done even that. And I
18 think at a minimum the response ought to be a
19 substantive response, not a response full of
20 objections.

21 JUDGE NELSON: Let's say that it can be
22 whatever response they want to make. And if there are

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1 objections, then we have a schedule conference Friday
2 the 12th, I believe, concerning other matters, don't
3 we?

4 MR. NORTON: That's correct, yes.

5 JUDGE NELSON: And I will add to that
6 agenda on the 12th any discovery disputes then
7 outstanding with reference to the response of the Cen-
8 Tex/South Orient Railroad -- what's their other name?
9 Cen-Tex Raillink Limited/South Orient Railroad Company
10 Limited. So if there is some response, we can examine
11 it at that time.

12 MR. NORTON: Your Honor, that puts us in
13 -- as if they had -- they're in no worse position than
14 if they had done everything properly. And we are
15 severely prejudiced that way because they can file,
16 you know, objections to everything and we won't be
17 able to get a response until the 12th.

18 They have had repeated opportunities to
19 file objections. The rules impose a five day limit
20 for very good reason to get objections aired so they
21 can be ruled on promptly so the substantive response
22 can come within the 15 day period that's specified

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1 under the rules and the guidelines.

2 And to permit them still to be able to
3 raise objections at this late date is totally
4 inconsistent with the purpose and thrust of the rules
5 --

6 JUDGE NELSON: Maybe they'll have material
7 to turn over.

8 MR. NORTON: Well, if they're able to make
9 objections, I can -- given their approach to date, I
10 would be confident that we'll see objections rather
11 than material.

12 JUDGE NELSON: Then we address the
13 objections.

14 MR. NORTON: Your Honor, the time to raise
15 objections was back in February. That's what everyone
16 else did. If they didn't raise the objections then,
17 they should be deemed to have waived any objections --

18 JUDGE NELSON: Well, I see that point.
19 What is you want me to do then? You --

20 MR. NORTON: Just to make clear --

21 JUDGE NELSON: -- order a response and I
22 did, and you say that's not good enough.

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1 MR. NORTON: No, no, no. I just want to
2 clarify that response means substantive response.
3 Documents and information, not objections. The time
4 to raise objections passed back on the beginning of
5 March, a month ago. And they can't come in now
6 raising objections that they could and should have
7 raised then.

8 JUDGE NELSON: I see your argument.

9 MR. NORTON: It would be totally -- it
10 would be grossly unfair to us to leave us in the
11 position where they can -- after ignoring repeatedly
12 their obligations to respond, and repeatedly ignoring
13 the letters and say that they're going to follow up --
14 to be able to come in and give something other than
15 complete responses on the merits and substance --

16 JUDGE NELSON: What if we told them to
17 show up here on April 12th?

18 MR. NORTON: Your Honor, what we want --

19 JUDGE NELSON: I've already recommended
20 some discovery sanction. I told you I don't think I
21 have the authority to issue one. I'm ordering them to
22 respond. And the fact that it's late and they should

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1 have responded earlier, that's all the predicate for
2 why there ought to be a sanction imposed. If I had
3 the authority, I'd impose one.

4 E. I don't know what else I can do now.

5 MR. NORTON: Well, I think it's simply,
6 Your Honor. And I think all you have to indicate is
7 that their right to make objections to the particular
8 request has passed because they didn't do it in a
9 timely fashion and objections are waived. And they
10 have to respond to the request without objections.

11 I suspect on a lot of them they're not
12 going to -- they don't have any documents.

13 JUDGE NELSON: Are they a small operator?

14 MR. NORTON: Well, they're --

15 JUDGE NELSON: Like a one person office?

16 MR. NORTON: I don't know. They run some
17 railroads. I don't know how many people they have,
18 but they run a couple of different railroads, and they
19 are seeking significant trackage rights over parts of
20 the applicant's lines in various parts of Texas.

21 I mean, it is not tiny relief that they're
22 seeking here. It is very significant. And it is

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1 imposing on us a very substantial burden to try to
2 respond --

3 JUDGE NELSON: Why don't you appeal from
4 my ruling that I don't have the authority to impose
5 sanctions?

6 MR. NORTON: Well, I can't say what we'll
7 do. I have to consult with my client, but we may well
8 do that.

9 JUDGE NELSON: You could do that quickly.
10 And if the Commission reverses, then we have some
11 guidance on it.

12 MR. NORTON: Do -- should we prepare --

13 JUDGE NELSON: I don't know that these
14 people realize the seriousness of the situation
15 they're in here. Do they have lawyers?

16 MR. NORTON: Well, I don't know whether --

17 JUDGE NELSON: It isn't a fly by night
18 outfit?

19 MR. NORTON: No, it --

20 JUDGE NELSON: Do they have money, do they
21 have equipment?

22 MR. NORTON: Yes.

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1 JUDGE NELSON: Do they --

2 MR. NORTON: They run railroads. I can
3 show you where they are in the map.

4 JUDGE NELSON: If it's just some little
5 phoney thing, then what do you even care about them?

6 MR. NORTON: They run railroad lines that
7 go from over here, from Presidio to --

8 JUDGE NELSON: Well, there's a line there.
9 It says on it SP -- I can't read it it's so small.
10 SQR?

11 MR. NORTON: I think it's SO.

12 JUDGE NELSON: What does that stand for?

13 MR. NORTON: South Orient.

14 JUDGE NELSON: That's their railroad?

15 MR. NORTON: They run over here, and then
16 the Cen-Tex runs from -- I can't read it -- Brownwood
17 over through Fort Worth.

18 JUDGE NELSON: That says CTE.

19 MR. NORTON: Yeah, that's --

20 JUDGE NELSON: That's the Cen-Tex?

21 MR. NORTON: Cen-Tex, to Fort Worth. And
22 they're seeking other rights --

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1 JUDGE NELSON: So they've got a railroad
2 that runs from Fort Worth, Texas southwest to the
3 Mexican border?

4 MR. NORTON: That's correct. And they're
5 seeking trackage rights --

6 JUDGE NELSON: And they own --

7 MR. NORTON: -- in east Texas to
8 Texarkana.

9 JUDGE NELSON: All right, so they look
10 like a substantial enough outfit.

11 MR. NORTON: Oh, yeah.

12 JUDGE NELSON: At least on paper. All
13 right, I'm going to grant your request for -- I'm
14 going to say that they've -- their conduct so far
15 constitutes waiver of objections, and that what
16 they've got to do now is answer the interrogatories
17 and produce the documents.

18 If they've got any business that they want
19 to conduct before me, I'll be here on April the 12th
20 and you'll be here, I assume, on April the 12th --

21 MR. NORTON: I'm afraid so.

22 JUDGE NELSON: -- on other matters, and

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1 I'll be happy to hear from them then as to what's
2 going on in this situation.

3 MR. NORTON: Should we prepare an order --

4 JUDGE NELSON: They ought to be advised
5 that they're better represented by counsel if they can
6 hire one or have one. And if not, we can certainly
7 talk to Mr. Craig or whoever the railroad wants to
8 send here. Will you see that they get a copy of this
9 transcript?

10 MR. NORTON: Yes, I was thinking that it
11 might expedite things to prepare an order that we
12 could get signed and sent out today just boiling down
13 --

14 JUDGE NELSON: I'm not sure mechanically
15 whether it would because I think that an order has to
16 go from here over to the Board which then issues it.

17 MR. NORTON: Well, --

18 JUDGE NELSON: I'm willing to consider
19 one.

20 MR. NORTON: Let me consult with my
21 colleagues. If we think --

22 JUDGE NELSON: You may prepare an order if

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1 you want me to sign it and bring it over. I'll be
2 here. I'm hearing oral argument this afternoon on an
3 oil pipeline case --

4 MR. NORTON: Okay.

5 JUDGE NELSON: -- in this room. And you
6 can just walk in and I'll see you and know what you're
7 here for if that's what it is.

8 MR. NORTON: Very good.

9 JUDGE NELSON: I don't guarantee I'll sign
10 it unless I like it, but you can --

11 MR. NORTON: I have every confidence that
12 that would be the case.

13 JUDGE NELSON: Have it fairly reflect our
14 discussions here. If there is no order, then it's up
15 to you if you want to send this transcript to the Cen-
16 Tex Raillink/South Orient Railroad Company. Do they
17 have a fax machine?

18 MR. NORTON: Yes.

19 JUDGE NELSON: You've sent them faxes
20 before?

21 MR. NORTON: Yes, they do.

22 JUDGE NELSON: All right. So you may want

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1 to send them the transcript so that they get a feel
2 for what's going on. And then the choice is theirs.

3 MR. NORTON: Thank you, Your Honor.

4 JUDGE NELSON: You can ignore things, and
5 you ultimately end up paying a price. If this company
6 continues down that route, they may have to pay that
7 price.

8 All right, that concludes this proceeding.
9 If you have an order you want to prepare and bring it
10 around, I will take a look at it this afternoon. If
11 you decide otherwise, simply deal with the transcript.

12 MR. NORTON: Thank you.

13 JUDGE NELSON: So in any event, I will see
14 you and all the others, I guess, at the next
15 conference on April the 12th. That concludes this
16 proceeding.

17 (Whereupon, the proceedings were concluded
18 at 10:06 a.m.)

19

20

21

22

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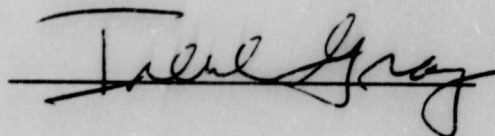
the matter of: Discovery Conference:
Union Pacific Corporation, et al.
-Control and Merger-
Southern Pacific Rail Corporation, et
al.

Before: Surface Transportation Board
Finance Docket No. 32760

Date: April 3, 1996

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.



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March 20, 1996

VIA FACSIMILE

Mr. James Craig
South Orient Railroad
4809 Cole Avenue
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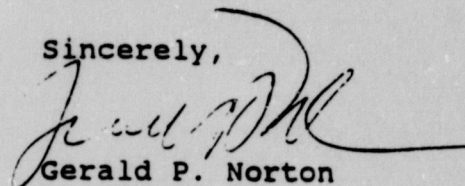
Re: Finance Docket No. 32760, Union Pacific Corp.,
et al. -- Control & Merger -- Southern Pacific
Corp., et al.

Dear Mr. Craig:

Following up on our telephone conversation today, here
is a copy of the discovery served on Cen-Tex/South Orient on
February 26, objections were due March 7 and answers March 12.

Please contact me or John Bulgozdy (ext. 7617) as soon
as possible about this.

Sincerely,



Gerald P. Norton

Enclosure

cc: Arvid E. Roach, II
The Honorable Jerome Nelson

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March 26, 1996

VIA FACSIMILE

Mr. James Craig
South Orient Railroad
4809 Cole Avenue
Suite 350, LB 126
Dallas, Texas 75205

Re: Finance Docket No. 32760, Union Pacific Corp.,
et al. -- Control & Merger -- Southern Pacific
Corp., et al.

Dear Mr. Craig:

This will confirm our telephone conversation yesterday concerning Applicants' discovery that was served on South Orient/Cen-Tex and TRL. As I confirmed, Applicants served this discovery on February 26, 1996. Neither South Orient/Cen-Tex nor TRL filed any objections by March 5, 1996 as required by the Discovery Guidelines. Neither South Orient/Cen-Tex nor TRL filed any responses on March 12, 1996, as required by the Discovery Guidelines. We had previously brought this to your attention in two letters sent last week.

The purpose of my call was to determine when Applicants will be served with responses by South Orient/Cen-Tex and TRL. In response, you stated that these parties had ignored Applicants' discovery because, in your view, Applicants should wait to see what the parties filed on March 29th. When I reiterated my request for some estimate of when Applicants would receive responses to discovery, you stated that you would take it under advisement and get back to me.

HARKINS CUNNINGHAM

James Craig
March 26, 1996
Page 2

I am waiting for your response. If discovery responses are not forthcoming, Applicants will seek all reasonable and appropriate remedies for the inaction of South Orient/Cen-Tex and TRL.

Sincerely,

John B. Bulgozdy
John B. Bulgozdy

cc: Arvid E. Roach, II

James Craig
March 26, 1996
Page 3

bcc. Gerald P. Norton

HARKINS CUNNINGHAM

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March 29, 1996

VIA FACSIMILE

Mr. James Craig
South Orient Railroad
4809 Cole Avenue
Suite 350, LB 126
Dallas, Texas 75205

Re: Finance Docket No. 32760, Union Pacific Corp.,
et al. -- Control & Merger -- Southern Pacific
Corp., et al.

Dear Mr. Craig:

This will confirm our telephone conversation today concerning Cen-Tex/South Orient's failure to respond to Applicants' discovery. Cen-Tex/South Orient has neither objected, nor responded, to Applicants' discovery. This complete omission to obey the Surface Transportation Board's ("STB") discovery guidelines is inexplicable.

During our conversation today, you gave us various reasons for your failure to respond that you had not seen the properly served discovery requests until a few weeks ago, and that you had just read today the STB's decision on the appeal from Judge Nelson's March 8 rulings. However, Judge Nelson's rulings clearly provided for some discovery to go forward.

One of the items sought by Applicants' discovery requests is all computerized 100% Cen-Tex/South Orient traffic data for 1994. See Doc. Req. 25. As I reiterated emphatically today, it is critical that Applicants receive any and all traffic data from Cen-Tex/South Orient. Under Judge Nelson's rulings, such data should be served no later than April 1, 1996.

HARKINS CUNNINGHAM

James Craig
March 29, 1996
Page 2

In an effort to obtain responsive information, I asked when Applicants would be provided with 100% traffic data. You stated that you would wait until Applicants re-filed discovery, and provide responsive information "in the normal course." When I indicated that this is not the substance or effect of Judge Nelson's rulings, on traffic data, you stated that you would take a look at Applicants' discovery today, see what we were requesting, see what is available, and "go from there." When I asked how long it would take for you to gather traffic information, you said that you did not know, and you would get back to me on Monday or Tuesday with an estimate of time. I requested that you respond no later than Monday, April 1, 1996.

You should be aware that the ALJ clearly required responses to certain discovery requests on April 1, 1996. The ALJ has also provided for expedited responses to additional discovery. To the extent you are seeking to rely on the March 8, 1996 order, you should be aware of its provisions.

We appreciate all efforts to expedite production of responsive information.

Sincerely,

John B. Bulgozdy
John Bulgozdy

Enclosure

cc: The Honorable Jerome Nelson (w/enc.)
Arvid E. Roach, II, Esq. (w/o enc.)
David L. Meyer, Esq. (w/o enc.)
Paul A. Cunningham, Esq. (w/o enc.)

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April 2, 1996

VIA FACSIMILE

Mr. James Craig
South Orient Railroad
4809 Cole Avenue
Suite 350, LB 126
Dallas, Texas 75205

Re: Finance Docket No. 32760, Union Pacific Corp.,
et al. -- Control & Merger -- Southern Pacific
Corp., et al.

Dear Mr. Craig:

This will confirm our telephone conversation earlier today concerning the discovery hearing to be held tomorrow, April 3, 1996, on the failure of Cen-Tex/South Orient to respond to Applicants' discovery. You confirmed that you had received a copy of our April 1 letter to Judge Nelson, and that you were aware of the hearing.

I asked again if Cen-Tex/South Orient would provide responsive information, but you were unable to answer and said you would consult your principals and get back to me.

Not having heard further, we will be advising Judge Nelson that it will evidently be necessary to proceed with the hearing tomorrow.

Sincerely,

John B. Bulgozdy
John B. Bulgozdy

cc: Arvid E. Roach, II, Esq.