

INTERSTATE COMMERCE COMMISSION 02/09/96

FINANCE DOCKET # 32760

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1 MR. EDELMAN: And again, I would --

2 JUDGE NELSON: He had to put money into  
3 something. He doesn't get control of the railroads  
4 for free.

5 MR. EDELMAN: He controlled RGI  
6 Industries, which bought it in a leveraged buy-out.  
7 The money that was put --

8 JUDGE NELSON: Someone paid money. Real  
9 money must have changed hands.

10 MR. EDELMAN: I don't know if any of his  
11 changed hands.

12 MR. CUNNINGHAM: Several billion dollars  
13 with.

14 JUDGE NELSON: Went from the RGI Company  
15 to the stockholders of the Southern Pacific and Denver  
16 Rio Grande?

17 MR. ROACH: Yes, to Santa Fe.

18 JUDGE NELSON: So RGI's money was  
19 involved.

20 MR. ROACH: Santa Fe Industries.

21 JUDGE NELSON: And RGI is wholly owned --  
22 no, RGI is -- what --

23 MR. CUNNINGHAM: RGI at the time was  
24 controlled by the Anschutz Corporation.

25 JUDGE NELSON: The Anschutz Corporation.

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1 And the Anschutz Corporation and Mr. Anschutz. So  
2 isn't there an inference that Mr. Anschutz put -- how  
3 much money in, did you say?

4 MR. CUNNINGHAM: No, there is no inference  
5 that he personally put his money into --

6 JUDGE NELSON: No, they may not have been  
7 his dollars, but --

8 MR. CUNNINGHAM: Right.

9 JUDGE NELSON: -- if we pierce the  
10 corporate veil, if Anschutz is the Anschutz  
11 Corporation and is RGI, and RGI paid -- how much money  
12 did it pay to the stockholders?

13 MR. CUNNINGHAM: I don't know the purchase  
14 price, Your Honor.

15 JUDGE NELSON: Do you know that, Mr.  
16 Roach?

17 MR. ROACH: Well, I think Mr. Cunningham  
18 is correct that it involved billions of dollars. Some  
19 of it --

20 JUDGE NELSON: Let's say billions of  
21 dollars.

22 MR. ROACH: Some of it was equity. Some  
23 of it was debt.

24 JUDGE NELSON: That billions of dollars  
25 had to come from somewhere.

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1 MR. ROACH: Absolutely.

2 JUDGE NELSON: It may have come from a  
3 corporation called RGI. But if that's just an alter-  
4 ego of Anschutz, one way or another, Anschutz did put  
5 money in.

6 MR. EDELMAN: No, he didn't. It's my  
7 suspicion he didn't. The decision of the RGI  
8 Industries case says that Mr. Anschutz and the  
9 Anschutz Corporation don't intend to put any money in.

10 JUDGE NELSON: Where did RGI get the  
11 money?

12 MR. EDELMAN: Morgan Stanley was going to  
13 place stock -- I'm sorry, this is not my area of law,  
14 Your Honor, so -- but they borrowed money. They --  
15 they put the assets of the railroad up as collateral  
16 and they went to the stock market.

17 JUDGE NELSON: People have bought ball  
18 clubs that way.

19 MR. EDELMAN: People have bought hockey  
20 teams that way.

21 JUDGE NELSON: I understand that it can be  
22 done by some people. Well in any event, you really  
23 are back to wanting to know this old stuff --

24 MR. EDELMAN: Yes, I am.

25 JUDGE NELSON: -- on the theory that Mr.

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1     Anschutz's alleged non-payment of his own money shows  
2     that things needn't be looked at in such a bad light  
3     as he portrays them, that they could always turn  
4     around and take his money?

5             MR. EDELMAN: Yes.

6             JUDGE NELSON: So you are --

7             MR. EDELMAN: And that -- and also, that  
8     the structure of his deal is not necessarily in the  
9     public interest.

10            JUDGE NELSON: Because?

11            MR. EDELMAN: Because he walks away with  
12    a billion dollars through buy of this deal --

13            JUDGE NELSON: That you can ask him about.

14            MR. EDELMAN: -- but he hasn't put  
15    anything up. And the predicate for the public  
16    interest in the deal is that SP lacks capital. I  
17    mean, these things all work together.

18            MR. CUNNINGHAM: Your Honor, may I?

19            JUDGE NELSON: Yes, Mr. Cunningham.

20            MR. CUNNINGHAM: I have not spoken a great  
21    deal yet, but this time -- this time -- let's go back  
22    to the statutory standard. Is this transaction in the  
23    public interest?

24            We have no showing by Mr. Edelman -- and  
25    I understand his amazement which I, at times, share at

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1 the ability of some people to make money in ways that  
2 the rest of us don't quite comprehend.

3 We have no showing of the nexus between  
4 the question asked in this interrogatory, the two  
5 questions, and the public interest standard posed in  
6 the statute.

7 JUDGE NELSON: Let me look at the statute.  
8 I have it in front of me now.

9 (Pause.)

10 JUDGE NELSON: Well, 49 U.S. Code 11-  
11 344(c) says, "The Commission shall approve and  
12 authorize a transaction under this section when it  
13 finds the transaction is consistent with the public  
14 interest." And then is the sentence, "The Commission  
15 may impose conditions governing the transaction."

16 That's a little different from the Federal  
17 Power Act.

18 MR. EDELMAN: Your Honor, also Section B  
19 lists several above it.

20 JUDGE NELSON: B has specifics, yes.

21 MR. EDELMAN: Specifics, right.

22 JUDGE NELSON: Okay. I held in Northeast  
23 Utilities Service Company, recorded at 53 FERC,  
24 paragraph 6-3020 at page 65211 in the 1990 as follows:  
25 "In any event, Section 203 [that is, of the Federal

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1 Power Act] requires a determination as to whether the  
2 proposed acquisition will be consistent with the  
3 public interest."

4 "The proposed transaction here is a  
5 merger, not a stand-alone PSNH. There is no  
6 requirement that the Commission examine some non-  
7 merger scenario in comparison with the proposal before  
8 it."

9 "The statute is not hostile to merger, nor  
10 does it treat them as presumptively harmful [citing  
11 cases]."

12 "Whether certain benefits could or could  
13 not be achieved without a merger is simply not the  
14 issue [citing a Commission case]."

15 And I was sustained to the regard by the  
16 Commission, and I know the Court of Appeals sustained  
17 all aspects of the merits of the merger. I don't know  
18 whether that was even debated by the Court of Appeals.

19 So if this were a FERC case, I would be  
20 tempted to say whether the SP could find cash, short  
21 of this merger, through some other way is not the  
22 cognizable under Section 203 of the Federal Power Act.

23 Now, does the Interstate Commerce Act lead  
24 to a different result? Its language is different  
25 somewhat.

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1 MR. EDELMAN: I'll let Mr. Cunningham go  
2 first since I've been monopolizing.

3 MR. CUNNINGHAM: The Act, Your Honor, does  
4 not lead to a different result. The question before  
5 the Commission is --

6 JUDGE NELSON: The word "proposed" got my  
7 attention in Northeast Utilities is not in the  
8 Interstate Commerce Act.

9 MR. CUNNINGHAM: But "the transaction" is  
10 the one --

11 JUDGE NELSON: "The transaction."

12 MR. CUNNINGHAM: -- being defined as the  
13 one in the application and has been so accepted. I  
14 don't think anyone will dispute that.

15 The transaction here is the one contained  
16 in the application. The question before the  
17 Commission is whether that transaction is consistent  
18 with the public interest.

19 What investments were made in the past by  
20 anyone are irrelevant to the consistency of this  
21 transaction in all respects.

22 There is no investment theory that has  
23 been advanced for 20 years that suggests that what  
24 investors did in the past is determinative of what  
25 they did -- will do in the future.

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1 And I don't think Mr. Edelman is making  
2 that argument here.

3 JUDGE NELSON: No, he's saying that let's  
4 suppose that Mr. Anschutz never put any money in,  
5 simply went to banks and borrowed money on the  
6 strength of the acquisition of the railroads.

7 And the banks loaned him the money. And  
8 he then bought the railroads and today he runs them.  
9 So if he never put any money in and stands to come out  
10 with a billion dollars, so what?

11 So maybe he could be the subject of a  
12 condition fashioned in some sense of equity along the  
13 notion that there is something fundamentally unfair  
14 that renders the transactions otherwise inconsistent  
15 with the public interest to have Mr. Anschutz walk  
16 away with a million dollars while organized labor  
17 gives up increases to which it otherwise would be  
18 entitled and suffers the brunt of disruptions,  
19 dislocations flowing from the merger.

20 That in order to even that playing field  
21 somewhat, Labor ought to get some money. I mean, I  
22 can see that claim. I don't know how the Board would  
23 react to it.

24 So if he needs all that --

25 MR. CUNNINGHAM: To the extent, Your

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1 Honor, let's assume --

2 JUDGE NELSON: -- he needs to show -- to  
3 make this equitable contention, he needs to show that  
4 Anschutz never put any money in.

5 MR. CUNNINGHAM: To the extent that the  
6 information is not provided, he is free to derive  
7 whatever conclusion he wishes. The Commission stated  
8 at the beginning that none was put in.

9 An analysis of the financial --

10 JUDGE NELSON: Where does that appear, in  
11 the --

12 MR. CUNNINGHAM: In this -

13 JUDGE NELSON: -- the opinion you cite?

14 MR. CUNNINGHAM: -- in this opinion we  
15 cite, yes. To the extent he wishes to make such an  
16 argument and --

17 JUDGE NELSON: Can we stipulate that he  
18 never put any of his personal money in?

19 MR. CUNNINGHAM: We can stipulate that he  
20 did not put his personal money into SPR or its  
21 subsidiary railroads, yes.

22 MR. EDELMAN: And excuse me -- and TAC  
23 didn't either?

24 MR. CUNNINGHAM: Yes.

25 JUDGE NELSON: Who's TAC?

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1 MR. CUNNINGHAM: The Anschutz Corporation.

2 JUDGE NELSON: All right, and nor did the  
3 Anschutz Corporation, yes.

4 MR. CUNNINGHAM: Whether or not he is  
5 entitled to, under the public interest standard, which  
6 I think is not the consideration allowed by the public  
7 interest standard, but were it allowed, whether or not  
8 he is entitled to profit from the value that --

9 JUDGE NELSON: It's a whole different  
10 question.

11 MR. CUNNINGHAM: -- is an entirely  
12 different question.

13 JUDGE NELSON: It's a different question.  
14 That's for the Board.

15 MR. CUNNINGHAM: Which is for the Board.

16 JUDGE NELSON: Assuming that Mr. Edelman  
17 focuses on the Board.

18 MR. CUNNINGHAM: And we are free to argue  
19 as to that value.

20 JUDGE NELSON: Well, my view is that,  
21 especially given the stipulation, I don't think we  
22 need to go into the history here, interrogatories 33  
23 and 34.

24 MR. EDELMAN: But sir -- Your Honor, 34 is  
25 what he did after he bought the railroad. So all

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1 they've stipulated is that he didn't put any money in  
2 at the start-up. And in particular, we've got a key  
3 point here is that in '91, the employees give wage  
4 concessions.

5 So I think it's perfectly reasonable in  
6 connection with my condition that I --

7 JUDGE NELSON: Well, that is a point that  
8 maybe from 1991 at least. What do you say about that,  
9 Mr. Cunningham?

10 MR. CUNNINGHAM: As to whether monies were  
11 put into the company?

12 JUDGE NELSON: That he's entitled to make  
13 the claim --

14 MR. CUNNINGHAM: I'm trying to remember  
15 when the public offering was made, the first public  
16 offering. Do you remember for SP stock?

17 MR. ROACH: A year and a half, two years  
18 ago. I think it was '93.

19 MR. CUNNINGHAM: It seems to me that at  
20 the time the company --

21 JUDGE NELSON: If you want to take a  
22 recess and check with the clients as to what you can  
23 say or not say, I would certainly encourage it.

24 MR. CUNNINGHAM: We are not -- I am not in  
25 a position to do that today because --

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1 JUDGE NELSON: Because they're --

2 MR. CUNNINGHAM: -- the client is not  
3 available. But neither client nor counsel or --

4 JUDGE NELSON: Someone must be running the  
5 Southern Pacific Railroad today, Mr. Cunningham.

6 MR. CUNNINGHAM: Mr. --

7 JUDGE NELSON: Let us hope.

8 MR. CUNNINGHAM: Well actually, they're  
9 either --

10 JUDGE NELSON: Let us hope it is not the  
11 Union Pacific.

12 (Laughter.)

13 MR. CUNNINGHAM: It is not. I assure you  
14 that. But Mr. Anschutz doesn't run the --

15 JUDGE NELSON: Let's -- may we go off the  
16 record for a moment?

17 MR. CUNNINGHAM: Yes.

18 JUDGE NELSON: All right, anything else?

19 MR. CUNNINGHAM: Would we go off the  
20 record, Your Honor?

21 JUDGE NELSON: Is there any objection to  
22 going off the record?

23 MR. EDELMAN: No, Your Honor.

24 JUDGE NELSON: Off the record.

25 (Whereupon, the proceedings went off the

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1 record at 11:05 a.m. and resumed at 11:12 a.m.)

2 JUDGE NELSON: We've been attempting to  
3 see whether there's any way of working out this  
4 informally by stipulations, and I don't think we're  
5 getting anywhere.

6 So, we're down to the question of  
7 interrogatory number 34. I'm going to deny number 34  
8 insofar as it goes back prior to the time when Labor  
9 made the wage concessions.

10 It seems to me that there came a time when  
11 Labor made wage concessions. Let's see if we can pin  
12 that date down.

13 MR. EDELMAN: It's in '91 and I --

14 JUDGE NELSON: It's in your materials  
15 here, isn't it?

16 MR. EDELMAN: Yes.

17 MR. ROACH: Your Honor, this is getting  
18 into the issue with respect to the law of governing  
19 conditions, that I wanted to make just a very brief  
20 statement.

21 JUDGE NELSON: All right. Go ahead, Mr.  
22 Roach.

23 MR. ROACH: The Commission has held in  
24 many cases, Your Honor, that there are two bases for  
25 imposing conditions on rail mergers, and two bases

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1 only. One is a significant reduction in competition  
2 and the other is that the merger will cause some other  
3 railroad to be unable to provide essential services.

4 That is set forth in 49 C.F.R. Section  
5 1180.1 and in many decisions of the Commission.

6 There simply is no legal basis for the  
7 kind of balancing of equities condition that Mr.  
8 Edelman is proposing that, in history, an investor  
9 made money and employees have wage reductions, and so  
10 the Commission should re-engineer society in the way  
11 that he is proposing.

12 And I do think that there is an obligation  
13 on the part of Mr. Edelman to lay a foundation in the  
14 law for the imposition of that sort of condition.

15 And it's important to the Applicants, not  
16 because I am here representing Mr. Anschutz's personal  
17 interests. I'm not. But because if we have a  
18 precedent that allows discovery into some sort of  
19 free-wheeling condition theory of this kind, we've set  
20 an improper and damaging precedent for purposes of the  
21 application itself.

22 MR. WOOD: Your Honor, I'd like to address  
23 that --

24 JUDGE NELSON: Now, Mr. Wood, we've got  
25 enough lawyers pitching in here. I don't need to hear

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1 anybody else. Mr. Cunningham, do you have something  
2 to say?

3 MR. CUNNINGHAM: Not to that.

4 JUDGE NELSON: So the contention is not  
5 only is Mr. Anschutz's pocketbook irrelevant on the  
6 merits, that as a theory that he's available to bail  
7 them out, it's also irrelevant to the imposition of  
8 any condition. What do you say to that?

9 MR. EDELMAN: I say it's wrong. I say --  
10 in Lowden v. United States and United States v. Lowden  
11 in 1939, I don't recall the cite -- I can get it for  
12 you.

13 It was the original case in which employee  
14 protections were imposed by the Commission in  
15 connection with a merger. It was done on the  
16 Commission's own discretion, not pursuant to the  
17 statute, based upon equitable considerations.

18 It was a power that they had to condition  
19 the transaction. The original employee protective  
20 conditions were not statutory. They were -- they were  
21 enacted into positive law by Congress after they were  
22 imposed by the Commission as a matter of its own  
23 discretion.

24 Second, one of the conditions in 11-344 (b)  
25 relates to the employees. Third, 101(a) Rail

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1 Transportation Policy -- I don't know if it's 5 or  
2 something like that -- concerns fair wages and  
3 equitable working conditions as a general policy of  
4 the statute.

5 And 11-344(c), with its general discussion  
6 of public interests -- and the Ninth Circuit held --  
7 and I can't recall which case. It may have been  
8 something -- Anacostia and Pacific or it may have been  
9 something to do with the ASFSP, that the Commission  
10 could use 11-344(c) to impose protections for  
11 employees.

12 So I think that there's enough there for  
13 me to say that I can ask for those conditions on  
14 behalf of the employees involved.

15 And the fact that I don't have a case like  
16 this just means it hasn't been done before.

17 MR. ROACH: Your Honor, I should have  
18 addressed employee protection conditions, and I stand  
19 corrected.

20 The reason I didn't is that the law there  
21 is very clearly defined: Section 11-347 of the  
22 statute specifies exactly what protection employees  
23 are to received.

24 Furthermore, the Lowden case, which we  
25 don't agree prevails after 11-347, but even if it did,

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1 that the Lowden case dealt with the issue of to what  
2 extent employees should be protected by receiving some  
3 portion of the benefits of the transaction.

4 It's a very different notion to say that  
5 employees can have a lien on an investor or a third  
6 party. And there is no precedent whatsoever for that.

7 If we need to brief this issue, we'd be  
8 delighted to brief it. Because if you're going to get  
9 into the idea that you can pose conditions on  
10 shareholders and financial participants in these  
11 mergers, you are revolutionizing merger law and  
12 creating a tremendous impediment to --

13 JUDGE NELSON: Well, I don't know about  
14 all that.

15 MR. ROACH: There's a great deal of --  
16 there's also a great deal of law, and Your Honor  
17 referred to this in the FERC context. There's a great  
18 deal of law in the rail merger context that Congress  
19 favors and wishes to encourage rail mergers.

20 The enactment of the public interest  
21 standard, the enactment of the provisions of 11-345  
22 that expedited the schedule, the revisions to the list  
23 of criteria to be considered all are supported by  
24 reports of the Congress that say we are seeking to  
25 encourage rail mergers.

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1 MR. EDELMAN: Your Honor, I would say --

2 JUDGE NELSON: That all may be. But this  
3 is discovery here.

4 MR. EDELMAN: That's right. We're talking  
5 about --

6 JUDGE NELSON: We don't have to resolve  
7 conclusively --

8 MR. EDELMAN: -- that all may lead to  
9 relevant --

10 JUDGE NELSON: All we're dealing with is  
11 the deposition of one person. And the only real  
12 question, it seems to me, is the discoverability of  
13 Mr. Anschutz between the period 1991 and -- when was  
14 this -- these conditions where you gave up money?

15 MR. EDELMAN: It was in 1991, and I don't  
16 -- I'm sorry, I don't have the exact date here.

17 JUDGE NELSON: Is that in --

18 MR. EDELMAN: I can see that in the last  
19 agreement, the BMW agreement, you can see in the very  
20 last item, Article IV, effective July 1, 1991, the  
21 rates of pay in effect on June 30, '91 are going --

22 JUDGE NELSON: Let's say July 1.  
23 Arguably, if you can have a legal predicate to advance  
24 this condition, you could make the claim that the  
25 employees suffered from July 1991 on.

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1 And therefore, the imposition of a  
2 prospective condition ought to be one which balances  
3 equity.

4 And so you would say in order to fully  
5 show my equitable case, I need to show what, if any,  
6 money Mr. Anschutz put into the railroad from July of  
7 '91 until August of '94, when the merger was  
8 announced.

9 MR. EDELMAN: Five, five.

10 JUDGE NELSON: Ninety-five. So we're down  
11 to the four years, fighting about that. Now aside  
12 from the claim that it's not relevant because no such  
13 condition can lawfully be fashioned, what other reason  
14 is there for him not to answer these questions?

15 Is there a privilege?

16 MR. CUNNINGHAM: There's no privilege,  
17 Your Honor. I don't --

18 JUDGE NELSON: There's no undue burden.

19 MR. CUNNINGHAM: There may be an undue  
20 burden.

21 JUDGE NELSON: What? He simply says I put  
22 the following money in or I put no money in. What's  
23 burdensome about that?

24 MR. CUNNINGHAM: Well, it -- the question  
25 going on the equity.

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1 JUDGE NELSON: Yes.

2 MR. CUNNINGHAM: As I tried to suggest  
3 when we were off the record, Your Honor, the question  
4 of one's contribution to the value of a company is not  
5 formulated necessarily in the fashion that Mr. Edelman  
6 has --

7 JUDGE NELSON: It may be sweat equity, S-  
8 W-E-A-T, yes. It may not be dollars.

9 MR. CUNNINGHAM: And therefore, the  
10 question is again, assuming the predicate which, as  
11 Mr. Roach has pointed out most articulately, I think,  
12 is missing --

13 JUDGE NELSON: Can't Mr. Anschutz testify  
14 about what he put in in any sense of "put in" from  
15 July 1, 1991 --

16 MR. CUNNINGHAM: I think if Mr. Anschutz  
17 is going to be a witness in this case --

18 JUDGE NELSON: Yes, we know that.

19 MR. CUNNINGHAM: -- Mr. Edelman will have  
20 the right to take his deposition. He will be -- have  
21 the right to ask the questions.

22 And should he establish this nexus, and we  
23 don't want to come back here again, Mr. Anschutz will  
24 answer the questions.

25 Otherwise, I'll ask him not to answer and

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1 we'll be back.

2 JUDGE NELSON: I don't understand what  
3 that means. I don't know what that means.

4 MR. CUNNINGHAM: I don't know what  
5 questions Mr. Edelman is going to ask. But I think  
6 that Mr. Anschutz is appearing because he wants to --  
7 he is willing to talk about the issues raised in his  
8 testimony and he's making himself available for  
9 discovery.

10 JUDGE NELSON: Well, he has to.

11 MR. CUNNINGHAM: That's right.

12 JUDGE NELSON: He can't be a witness in a  
13 case and put in a verified statement and run railroads  
14 and hide from the Federal Government. He's in the  
15 wrong business if he wants secrecy.

16 MR. CUNNINGHAM: That's exactly right.

17 JUDGE NELSON: He ought to bail himself  
18 out if that's what he wants.

19 MR. CUNNINGHAM: Therefore, I think --  
20 he's entirely capable of testifying as to the values  
21 that he has contributed to. This transaction, if Your  
22 Honor, will --

23 JUDGE NELSON: So if he is asked about --  
24 without passing judgement now on the legal unpinings,  
25 if he is asked about what he has put into the railroad

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1 from January of 1/1990 -- I'm sorry, July 1, 1991,  
2 until the proposed merger, is he going to answer?

3 MR. CUNNINGHAM: I don't know what he's  
4 going to do.

5 MR. CUNNINGHAM: You don't know what he'll  
6 do?

7 MR. CUNNINGHAM: No, but I --

8 JUDGE NELSON: All right. That's a fair  
9 and --

10 MR. CUNNINGHAM: But he's going to be  
11 available.

12 JUDGE NELSON: -- candid answer. It  
13 suggests to me that, again, we ought to defer this.

14 MR. EDELMAN: We might --

15 JUDGE NELSON: We might see what happens  
16 in the context of the deposition,

17 MR. EDELMAN: Your Honor, we might know  
18 whether or not Counsel is going to instruct him not to  
19 answer.

20 JUDGE NELSON: Do you know that?

21 MR. CUNNINGHAM: I don't know that.

22 JUDGE NELSON: He does not know that.

23 MR. EDELMAN: Well, I --

24 JUDGE NELSON: I think Mr. Cunningham is  
25 in a situation where he needs consultation with the

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1 corporation and the client, which he can't get right  
2 now, in order to see if there isn't a way to steer our  
3 way through this.

4 And maybe there is, and maybe there isn't.

5 MR. CUNNINGHAM: And I think the time to  
6 find that out is on Friday.

7 JUDGE NELSON: But certainly -- for  
8 guidance, I'm going to defer this. But certainly,  
9 insofar as Mr. Anschutz is a witness, and he is, and  
10 insofar as he is going to testify about the need for  
11 capital and the need to attract capital, it seems to  
12 me he's open to questioning about that need and why  
13 the merger is the source of that need.

14 And you agreed that he could testify about  
15 that need, with or without the merger --

16 MR. CUNNINGHAM: Yes.

17 JUDGE NELSON: -- in the future  
18 prospectively.

19 MR. CUNNINGHAM: Absolutely.

20 JUDGE NELSON: To the extent that there is  
21 an attempt here, or going to be an attempt, to impose  
22 a condition fashioned in the equitable side on the  
23 ground that the employees gave up something and Mr.  
24 Anschutz ought to give up something, the railroads  
25 contend that there's no legal basis for that

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1 condition.

2 I have not the job of resolving that now.  
3 That seems to be ultimately for the Board.

4 But it would seem to me that answering  
5 questions about what he put into the railroad or the  
6 corporations, or whatever the hierarchy was, would be  
7 proper under that theory.

8 Now they don't need to go on too long. He  
9 hasn't gotten any privileges he can claim here. He  
10 could certainly be asked about what he does and what  
11 he's done since July of 1991.

12 I also think he can be probed about his --  
13 any financial bias he may have, just like any other  
14 witness. And if he stands to benefit financially from  
15 this transaction, Labor is entitled to probe that in  
16 an effort to show that he is biased.

17 So I would give them all of those  
18 guidelines, including the liberality of discovery  
19 rules, the fact that it may take up more time and  
20 money than it's worth to have some collateral side-  
21 show over this; that fighting over such discovery only  
22 breeds suspicion and hostility, which he certainly  
23 doesn't need in the context of this litigation; and  
24 that sometimes the best long way home may be the best  
25 short cut.

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1 Or in this case, a direct, forthright  
2 answer to these questions may get the whole thing  
3 behind us and get on with whether the transaction is  
4 consistent with the public interest.

5 Legally, I see that 11-34(b) (sic) -- (d)  
6 does specify the interest of carrier employees  
7 affected by the proposed transaction.

8 I see also another section that talk about  
9 conditions and protection. But as a lawyer coming to  
10 grips with it, I don't know of anything that compels  
11 an interpretation one way or the other about the  
12 breadth of the Board's power in considering the  
13 interest of carrier employees.

14 It may, in the end, want to consider such  
15 a condition or it may want to throw it out at the  
16 outset. I don't know.

17 But it seems me I see much to be gained by  
18 having him answer the questions, at least from July 1,  
19 1991, as to what he did.

20 If he -- if there's a contention that  
21 there is a matching of benefits and that the railroad  
22 wants to claim that it isn't fair or accurate for Mr.  
23 Edelman to focus on what the employees gave up without  
24 looking at what Mr. Anschutz may have done, that's a  
25 good time to attempt to show what he had done and have

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1 him explain it.

2 I don't see great burden. I don't see  
3 privileges. I don't see anything except arguable  
4 notions of privacy, which don't seem to really fit  
5 this case.

6 We're in a federal regulatory arena. He  
7 surrendered some of that privacy when he started  
8 running the Anschutz Corporation, taking over RGI,  
9 controlling Southern Pacific Rail Corporation,  
10 controlling major railroads, and applying to the  
11 Service Transportation Board for authority to merge.

12 Moreover, he comes in as a witness talking  
13 about the need for capital and investor perception.

14 So given all of those things, I think Mr.  
15 Edelman has slightly the better of the argument. And  
16 that would be my leaning --

17 MR. CUNNINGHAM: I hear your leaning --

18 JUDGE NELSON: -- is to try to move along  
19 with it and see what he can testify to as to what he's  
20 done and move beyond this issue.

21 MR. CUNNINGHAM: I hear your leaning, Your  
22 Honor.

23 JUDGE NELSON: Prospectively, I think  
24 you're absolutely right. Prospectively, he certainly  
25 seems to me subject to questioning about himself, his

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1 plans, his intentions and so forth with or without  
2 merger in the future.

3 And if we can get rid of the past by  
4 asking him what he's done during those five years or  
5 four years, well so be it.

6 MR. CUNNINGHAM: I hear your leaning, Your  
7 Honor.

8 JUDGE NELSON: I can see a case made. And  
9 therefore, I tend to lean with it now rather than want  
10 to cut it off, especially in view of your lawyer-like  
11 caution here, and not having sufficient opportunity to  
12 confer and not knowing exactly what the true state of  
13 the facts are, let alone what the witness's own view  
14 would be.

15 So I think that we could stand to gain  
16 more than we would lose by forcing me into some  
17 ruling. So what I've said is dictum. It's just  
18 preliminary thinking right now.

19 And so I'm going to defer this pending the  
20 actual deposition of Mr. Anschutz, which I understand  
21 will be conducted next Friday --

22 MR. CUNNINGHAM: Yes.

23 JUDGE NELSON: -- in Washington D.C. in  
24 Covington & Burling's offices.

25 MR. CUNNINGHAM: That's correct, Your

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1 Honor.

2 JUDGE NELSON: And I will be available by  
3 telephone or in person, if that should be necessary.  
4 All right, what is next?

5 MR. EDELMAN: Thank you, Your Honor.

6 MR. LOFTUS: Your Honor, if I may, Michael  
7 Loftus on behalf of the Western Coal Traffic League.

8 JUDGE NELSON: Into the settlement  
9 privilege again?

10 MR. LOFTUS: Well, Your Honor, I guess.  
11 I'm not certain that that's -- that there is any  
12 settlement privilege with regard to what we seek.

13 JUDGE NELSON: This is the matter of Mr.  
14 Crowley?

15 MR. LOFTUS: Well, it is the matter, Your  
16 Honor, of --

17 JUDGE NELSON: And the focus on the  
18 trackage rights charge and whether it isn't too high?

19 MR. LOFTUS: Yes, Your Honor, but --

20 JUDGE NELSON: Your theory being that you  
21 can prove that it's too high or your man thinks it's  
22 too high? And that -- the relevance of that is that  
23 it gives the Applicants the predicate to boost their  
24 own charge for transporting the coal so as to meet the  
25 artificially high standards set for BN and Santa Fe in

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1 the agreement.

2 And therefore, the entire transaction has  
3 upward, inflationary impact on the unit train coal  
4 rates, which is not consistent with the public  
5 interests. Have I got that picture?

6 MR. LOFTUS: That's part of it, Your  
7 Honor.

8 JUDGE NELSON: What do I -- what do I not  
9 have?

10 MR. LOFTUS: Well, Your Honor, what we are  
11 specifically requesting is an order compelling Mr.  
12 Rebensdorf to respond to questioning about the  
13 discussions that he had.

14 JUDGE NELSON: Yes.

15 MR. LOFTUS: He has submitted a verified  
16 statement in this -- in the merger application where  
17 he has described -- he spends ten pages of that  
18 statement talking about the compensation terms.

19 And he said -- and we've set this out,  
20 Your Honor. And I really don't have a lot to add to  
21 what we've said in writing.

22 JUDGE NELSON: I've read this.

23 MR. LOFTUS: He said that the rates  
24 ultimately agreed to were the result of arm's length  
25 negotiations with a considerable give and take.

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1 And what we saw to inquire of him about,  
2 Your Honor, was that give and take between the  
3 parties. What were the discussions with regard to the  
4 trackage rights fees that would apply to unit train  
5 coal travel?

6 JUDGE NELSON: There is a representation  
7 here by Mr. Roach in a letter to me dated February  
8 seventh, with copies to all: "We can represent that  
9 Mr. Rebensdorf can recall no statements made during  
10 the negotiations to the effect that the rate agreed  
11 upon for bulk traffic was unreasonably high or would  
12 impede BN Santa Fe's competitiveness for coal traffic.  
13 Nor do Applicants have any documents to that effect."

14 Doesn't that stipulation tend to diffuse  
15 a lot of the -- your argument here?

16 MR. LOFTUS: Your Honor, it --

17 JUDGE NELSON: I shouldn't say  
18 "stipulation," the representation.

19 MR. LOFTUS: It does address it, Your  
20 Honor. I consider it a strange procedure to go  
21 through where rather than being allowed to question  
22 the witness about his testimony, we must rely on --

23 JUDGE NELSON: That may or may not be, but  
24 we take the case as we find it today. If there are  
25 problems or things that you want to pursue above Mr.

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1 Roach's representation, this is also a time that we  
2 could do that.

3 Mr. Roach is here. If it's about the  
4 meaning or nuances or something along those lines,  
5 maybe we could put that in focus --

6 MR. LOFTUS: There are questions that --

7 JUDGE NELSON: -- and with that, sharpen  
8 up whether you need these materials.

9 MR. LOFTUS: There are questions with  
10 regard to that, Your Honor. But our request went  
11 beyond the discussions directly with the Burlington  
12 Northern and Santa Fe and to the discussions that Mr.  
13 Rebensdorf had with other potential participants in  
14 the settlement agreement they ultimately worked out  
15 with the BN Santa Fe, again focused solely on the  
16 trackage rights compensation that would be paid with  
17 regard to unit train coal traffic.

18 JUDGE NELSON: How does that fit your  
19 case? What could you discover there?

20 MR. LOFTUS: Well, Your Honor, first of  
21 all, we don't know whether they ever, in fact,  
22 discussed that subject matter.

23 JUDGE NELSON: No, let's assume. Make up  
24 a hypothesis like we did with Mr. Edelman when we were  
25 discussing Mr. Anschutz. We made up a best possible

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1 case, namely Mr. Anschutz never put any money in.

2 What's the best thing you could find?

3 MR. LOFTUS: Well, Your Honor, the -- the  
4 basic proposition is that the Applicants have  
5 recognized that there are anti-competitive aspects to  
6 this merger.

7 They have sought to address those and  
8 solved them with the settlement they entered into.

9 And so the question is will that  
10 settlement truly solve them? That's the first  
11 proposition. And the trackage rights compensation is  
12 relevant to that -- to that issue.

13 Now in addressing the level of that  
14 trackage rights compensation, and whether it is  
15 reasonable and will permit effective competition, if  
16 there were discussions with other carriers about the  
17 compensation levels and those other carriers expressed  
18 views as to their ability to compete effectively at  
19 those levels -- if they said they're too high, we  
20 think, for bulk traffic; it ought to be --

21 JUDGE NELSON: 1.9 or --

22 MR. LOFTUS: -- 1.9, 2.0, 2.5, whatever,  
23 Your Honor, that would be relevant.

24 JUDGE NELSON: It would -- in the sense  
25 that it would corroborate your theory. It would be

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1 merely corroborative.

2 MR. LOFTUS: But, Your Honor, I think that  
3 there are two aspects to this. One of them --

4 JUDGE NELSON: You see, whether it's too  
5 high or not is simply an economic inquiry. What  
6 really counts is how does that hurt you?

7 And I understand your theory is that it  
8 hurts by giving the Applicants an excuse to justify  
9 their own rate increase.

10 MR. LOFTUS: But some --

11 JUDGE NELSON: So we would be paying 3.0  
12 for everybody's when we ought to be paying only 1.9.

13 MR. LOFTUS: To the --

14 JUDGE NELSON: Therefore, the entire  
15 merger inflates the rate structure. Isn't that the  
16 claim?

17 MR. LOFTUS: Yes, Your Honor. To the  
18 extent that there is a premium built in, they can use  
19 --

20 JUDGE NELSON: That's what Mr. Crowley  
21 seems to be saying there.

22 MR. LOFTUS: That's true. That's correct,  
23 Your Honor.

24 JUDGE NELSON: So for those purposes, the  
25 fact that they may have talked to Railroad X and

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1 Railroad X said, "Your price is too high," what's that  
2 going to get you? It's just cumulative.

3 MR. LOFTUS: Well, I don't know that it is  
4 cumulative. The one is based on the economics. And  
5 there will be arguments about the level of the cost  
6 and what should be included and so on. And some of  
7 that is reflected in this correspondence.

8 But the fact that another railroad in  
9 discussions about trackage rights that it would use to  
10 compete for this traffic had concerns and expressed  
11 them in the discussions, that, I don't believe, would  
12 be merely corroborative, Your Honor.

13 I believe it would be a different --  
14 evidence of a different nature that would be  
15 probative.

16 JUDGE NELSON: What other railroad do you  
17 have in mind?

18 MR. LOFTUS: Mr. Rebensdorf, Your Honor,  
19 in his testimony --

20 JUDGE NELSON: Makes a reference to the  
21 Kansas City Southern.

22 MR. LOFTUS: Well, he describes -- he  
23 lists the carriers that they had discussions with  
24 about the possibility of entering into a similar  
25 arrangement.

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1 He says, "I was charged with attempting to  
2 negotiate an agreement that would preserve rail  
3 competition for all customers who, prior to the  
4 announcement of the merger, were served by both" --  
5 I'm skipping a lot of it.

6 JUDGE NELSON: I went through that very  
7 quickly.

8 MR. LOFTUS: All right.

9 JUDGE NELSON: Yes.

10 MR. LOFTUS: And then he said, "The first  
11 step was to initiate discussions with other railroads.  
12 UP either contacted or was contacted by 11 railroads,"  
13 and then he lists them: "Santa Fe, BN, IC, Conrail  
14 and KCS; four regional carriers: WC Gateway, Western,  
15 Utah Railway and Montana Railway and then Railtex and  
16 Omni Track."

17 Now I mean, I would assume, Your Honor,  
18 that the extent of the discussions with a number of  
19 these were such that they never got into the type of  
20 detail I'm talking about.

21 And a few questions would quickly  
22 establish that. But I don't know that. But the point  
23 is --

24 JUDGE NELSON: I still don't see what you  
25 would get out of these discussions with other

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1 railroads other than corroboration.

2 And if this were normal discovery,  
3 corroboration is fine and you're entitled to seek it.

4 But we're in the arena of the protection  
5 of the settlement negotiations and the particularized  
6 needs standard. And there, I'm not so sure that  
7 corroboration is so important.

8 MR. LOFTUS: But Your Honor, this  
9 settlement -- they put up this witness --

10 JUDGE NELSON: It seems to me your better  
11 battleground is Mr. -- what's your witness -- Mr.  
12 Crowley's theory as to what would happen with this  
13 allegedly, unduly, high rate --

14 MR. LOFTUS: I understand, Your Honor.

15 JUDGE NELSON: -- and how to show that,  
16 rather than the give and take of how that number got  
17 there.

18 If he proves the number is too high, and  
19 you could find something from their papers that also  
20 says it's too high -- it's an admission -- I suppose  
21 that helps.

22 So that just could mean any number of  
23 things. But if it means that it inflates the entire  
24 rate structure of the merged company, then you've got  
25 something to talk to the Board about.

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1 MR. LOFTUS: I agree with you, Your Honor.

2 JUDGE NELSON: But I don't see you  
3 focusing on that even.

4 MR. LOFTUS: Well for purposes, Your  
5 Honor, of this motion, which is simply addressed at  
6 obtaining responses from Mr. Rebensdorf --

7 JUDGE NELSON: If there's nothing in there  
8 about the rate being unreasonably high, as Mr. Roach  
9 represents, what can you conceivably find, other than  
10 take up time and go through papers and --

11 MR. LOFTUS: Your Honor? Your Honor, the  
12 purpose of asking questions in this deposition is to  
13 learn. I don't know.

14 JUDGE NELSON: This is not the normal  
15 situation because we have the coloration of the  
16 protection given to the settlement process.

17 So it's not the ordinary discovery way:  
18 the witness comes in and is given some threshold  
19 protection, as we've been through.

20 MR. LOFTUS: Your Honor, in the FERC  
21 proceeding where I was asked to testify as a witness,  
22 all of my work product that was subject to the  
23 attorney/client work privilege was revealed in  
24 discovery because they wanted to rely on my  
25 testimony.

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1 They are putting up this witness to  
2 testify about this settlement negotiation and they  
3 have him describing it. They have him making  
4 affirmative statements.

5 JUDGE NELSON: And they rely on the  
6 statement -- on the entire settlement as though the  
7 merger couldn't exist without the settlement.

8 MR. LOFTUS: Exactly.

9 JUDGE NELSON: I know that, and they're  
10 not in the best position for that reason. But Mr.  
11 Roach, working away at the problem here, has made this  
12 representation. What is then not covered by this  
13 representation?

14 He says, "Mr. Rebensdorf can recall no  
15 statements made during the negotiations to the effect  
16 that the rate agreed upon for bulk traffic was  
17 unreasonably high, for it would impede BN Santa Fe's  
18 competitiveness for coal traffic."

19 Isn't he saying there's nothing there?

20 MR. LOFTUS: He's certainly --

21 JUDGE NELSON: There is no smoking gun.

22 MR. LOFTUS: Oh absolutely, Your Honor.  
23 He is -- he is creating that impression and he is  
24 using words that -- he's talking about statements made  
25 during the negotiations.

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1           So he is, I assume, saying that no, the BN  
2 representatives did not say the -- tried to dredge  
3 compensation amount for bulk traffic is, we believe,  
4 unreasonably high.

5           It doesn't say that the BN representatives  
6 didn't come in and say, "We believe the compensation  
7 for bulk traffic should be 2.5 gross mils per ton  
8 mile." It doesn't say that.

9           It says, "They said it shouldn't be  
10 unreasonably high," or it is that "The rate agreed  
11 upon was unreasonably high."

12           In terms of the statement about "It would  
13 not impede BN Santa Fe's competitiveness for coal  
14 traffic," I assume that what that means is that they  
15 never made that specific statement.

16           But that does not negate the fact that  
17 they may have -- or the possibility that they may have  
18 been negotiating for a lower rate for that purpose, to  
19 be more competitive.

20           JUDGE NELSON: Under Mr. Crowley's theory,  
21 which is really that there is a conspiracy there to  
22 raise rates, why would any railroad --

23           MR. LOFTUS: That's a bit strong, Your  
24 Honor.

25           JUDGE NELSON: Why would they want to have

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1 discussions about a lower number? If the deal is  
2 let's shake hands on a high number, and then we force  
3 everybody into that high rate, which is your theory,  
4 what do we need to hear about whether it should have  
5 been 1.9 or 1.2 or 2.5?

6 Under the conspiracy theory, it's high.

7 MR. LOFTUS: Well, Your Honor, I don't  
8 know that I would characterize it as a conspiracy  
9 theory. And it seems to me that from the BN Santa  
10 Fe's perspective, they should have an interest in  
11 obtaining rights as a part of this settlement  
12 agreement that are useful to them to conduct their  
13 business and to make money.

14 I don't -- I don't question that, Your  
15 Honor. The -- if in fact, this rate is --

16 JUDGE NELSON: You see, that's where I had  
17 trouble in the first place, understanding why the BN  
18 Santa Fe would make a deal for a price that is so high  
19 that the traffic won't move under it?

20 MR. LOFTUS: Well --

21 JUDGE NELSON: That's just a phony rate  
22 then.

23 MR. LOFTUS: Well, Your Honor, I --

24 JUDGE NELSON: So I thought it was your  
25 contention that that indeed is a phony rate,

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1 artificial, bogus, no car of coal is ever going to  
2 move under it.

3 The real rate is going to be a lower rate,  
4 which the Applicants will set and thereby capture and  
5 retain monopoly control of this traffic.

6 So there won't be any -- the alternative  
7 is a paper rate that's meaningless. That's not the  
8 contention, as I understand it.

9 MR. LOFTUS: No, Your Honor.

10 JUDGE NELSON: It is that the -- that  
11 unduly high rate sets up an atmosphere in which the  
12 Applicants can raise their rate.

13 MR. LOFTUS: Well, I -- Your Honor --

14 JUDGE NELSON: That is your witness's  
15 theory.

16 MR. LOFTUS: Your Honor, to be --

17 JUDGE NELSON: So we have kind of a  
18 destructive price increase attributable to the merger.  
19 That's very serious business if that's going to  
20 happen. It seems to me you're entitled to make what  
21 you can out of it.

22 MR. LOFTUS: Yes, Your Honor.

23 JUDGE NELSON: But you've got the  
24 representations. You've got Mr. Crowley.

25 MR. ROACH: He also has answers from Mr.

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1 Rebensdorf that there are no documents that BN  
2 provided as to the --

3 JUDGE NELSON: I'm struggling to see what  
4 could conceivably be in the records, documentary or  
5 oral recollections that's going to help you beyond  
6 what you've got now.

7 MR. ROACH: Your Honor, quite possibly not  
8 a thing. Mr. Rebensdorf comes back for a continuation  
9 of his deposition on Monday.

10 I would expect that if you grant ;this  
11 order, that my questions can be covered in a very  
12 brief period of time with Mr. Rebensdorf. And I may  
13 learn absolutely nothing beyond what Mr. Roach has  
14 stated in his letter.

15 But Your Honor, the simple proposition  
16 we're here before you with is they have advanced this  
17 witness to testify about this.

18 JUDGE NELSON: I don't --

19 MR. LOFTUS: He has made affirmative  
20 statements. We want to ask him about them. We should  
21 be permitted to. It is that simple. And this so-  
22 called settlement privilege should not -- you should  
23 not allow them to interpose that.

24 JUDGE NELSON: What is the best thing you  
25 could find, what he would say to you?

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1 MR. LOFTUS: Your Honor, I would ask him  
2 what -- "Mr. Rebensdorf, you started off these  
3 negotiations with the position that the trackage  
4 rights compensation for bulk traffic, including in-  
5 train coal traffic, would be 3.0 mils per gross ton  
6 mile, correct" Yes, we know that.

7 Okay, "Did the BN propose any other rate  
8 level for bulk traffic, including coal? Yes or no?  
9 If the answer is yes, what was it?"

10 JUDGE NELSON: 2.5.

11 MR. LOFTUS: Okay.

12 JUDGE NELSON: What do you then do with  
13 that?

14 MR. LOFTUS: Well number one, we then ask  
15 him --

16 JUDGE NELSON: How did it get to three?

17 MR. LOFTUS: Well, we ask him that. We  
18 also ask what did the BN say in support of their  
19 number, why that would be more appropriate or why they  
20 wanted that rather than three?

21 JUDGE NELSON: What do you want them to  
22 say, because they --

23 MR. LOFTUS: I want them --

24 JUDGE NELSON: -- thought it would attract  
25 traffic?

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1 MR. LOFTUS: I want them to say -- if I  
2 could write their answer --

3 JUDGE NELSON: We didn't want to be picks  
4 at the trough?

5 MR. LOFTUS: If I could write their answer  
6 --

7 JUDGE NELSON: Yes.

8 MR. LOFTUS: -- what I'd like them to say  
9 is "We believe that, at 2.5, we could be much more  
10 competitive, that otherwise, we might have a hard time  
11 obtaining traffic under these rate levels."

12 MR. ROACH: That's outside the parameters  
13 of my representation. I didn't select these words.

14 JUDGE NELSON: That's not the -- that's  
15 not -- so you would want to prove --

16 MR. ROACH: I mean, that's ruled out by --

17 JUDGE NELSON: Let's assume that happened,  
18 that Mr. Rebensdorf says that BN said that they could  
19 be more competitive at a price of 2.5 than they could  
20 at a price at 3.0.

21 MR. LOFTUS: Yes.

22 JUDGE NELSON: What does that get you?

23 MR. LOFTUS: Well, I think, Your Honor,  
24 that that is evidence that would support concerns we  
25 have about the level of the compensation and the

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1 effect that to the extent that compensation contains  
2 a premium over and above the Applicants costs,  
3 including return, that that can operate to the  
4 Applicants' benefit in one of two ways.

5 One way is to allow them to effectively  
6 defeat competition by taking advantage of their lower  
7 cost structure. And the other way is to allow  
8 competition, but at a higher rate level than would  
9 otherwise obtain if there was, in fact, a level  
10 playing field.

11 And Mr. -- Mr. Rebensdorf testifies, "It  
12 was my intent that the trackage rate placed both  
13 carriers on a level playing field." That's the  
14 relevance, Your Honor.

15 JUDGE NELSON: All right, should we --

16 MR. LOFTUS: It may be -- it may be that  
17 I ask two or three questions and I'm done, Your Honor.  
18 I mean --

19 JUDGE NELSON: Let's hear now from Mr.  
20 Roach.

21 MR. ROACH: Your Honor, Mr. Loftus said  
22 this is an odd procedure, and I think it is an odd  
23 procedure. This is now the sixth time that we've  
24 argued the settlement privilege and Mr. Loftus would  
25 like to just rule it out altogether.

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1 You've heard that. You answered that.

2 JUDGE NELSON: Not in the context of the  
3 precise focus upon the --

4 MR. ROACH: Right.

5 JUDGE NELSON: -- trackage rights price  
6 charged in the agreement between BN and Santa Fe and  
7 the Applicants with regard to unit train coal traffic.

8 MR. ROACH: Absolutely.

9 JUDGE NELSON: We're focusing right in on  
10 something precise.

11 MR. ROACH: I understand that. Although  
12 as I've argued before, you can chop this thing into a  
13 thousand little pieces and focus in on each one of  
14 them. And what these gentlemen always come up with in  
15 support of their efforts to --

16 JUDGE NELSON: Maybe that needs to --  
17 maybe they need to dispose of a thousand pieces. So  
18 be it. That doesn't advance the -- let's talk about  
19 this figure, these representations, this discovery.

20 MR. ROACH: Okay. All I'm trying to say,  
21 Your Honor, is that we are here reluctantly defending  
22 a privilege, reluctantly.

23 There is nothing in these conversations  
24 that is going to hurt our case. I've said that as  
25 Counsel.

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1 We're defending it as ever applicant has  
2 in every one of these merger cases, and as all of our  
3 friends across the aisle from us would be doing if  
4 they entered into a settlement with us.

5 We're defending it because it's good  
6 public policy, because we're going to have future  
7 transactions, because --

8 JUDGE NELSON: We've been through all of  
9 that.

10 MR. ROACH: Okay.

11 JUDGE NELSON: I understand all those  
12 arguments.

13 MR. ROACH: As to this issue, as I said,  
14 I didn't choose these words with any artifice or  
15 trickiness. I talked to John Rebensdorf. He  
16 indicated to me that there was nothing in the  
17 discussions that would be helpful to Mr. Loftus in his  
18 theory that he could find proof that people led or  
19 said in the talks, "Oh, this is going to prevent BN  
20 from being competitive or this is too high for BN to  
21 be competitive."

22 The fact is, these are the identical rates  
23 that were approved by the ICC and the BN Santa Fe  
24 settlement with SP.

25 That was the lodestar that everybody was

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1 looking to, and that's where they ended up.

2 JUDGE NELSON: You're talking about the  
3 3.0?

4 MR. ROACH: The 3.0 and 3.1 for bulk and  
5 non-bulk. I have given you the representation. There  
6 were questions and answers in Mr. Rebensdorf's  
7 deposition as to whether there were any documents that  
8 are helpful on this. He answered -- I let him answer  
9 them. No.

10 And that can be the end of the discussion.  
11 What I'm troubled by is -- as you say, I'm trying to  
12 finesse these issues.

13 I don't want to appeal on this. I don't -  
14 - you know, but I --

15 JUDGE NELSON: I appreciate that.

16 MR. ROACH: -- but I'm -- what is  
17 happening is I'm having to go and try to rule out  
18 point after point. And in effect, these gentlemen are  
19 backing into the content of the settlement  
20 discussions.

21 They're nibbling away; they're slicing  
22 away. I'm taking -- I'm trying --

23 JUDGE NELSON: To the extent that you make  
24 a representation that that was not discussed, that  
25 breaches the --

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1 MR. ROACH: And they've learned at least  
2 the negative.

3 JUDGE NELSON: That's correct. That's  
4 correct.

5 MR. ROACH: And what they haven't learned,  
6 and the only thing he's told you he wants to know, is  
7 the trading of numbers. What is --

8 JUDGE NELSON: Isn't your -- your man  
9 Rebensdorf, isn't he open for full examination as to  
10 the workings of the 3.0?

11 MR. ROACH: Absolutely. He's been  
12 examined in spades about it. We've got a guy named  
13 Kauders they're going to depose who is a cost expert  
14 who is the counterpart to Mr. Crowley on all this  
15 theorization. He'll -- he can be examined --

16 JUDGE NELSON: Well, I don't mean just the  
17 numbers, but this theory that --

18 MR. ROACH: Competitiveness?

19 JUDGE NELSON: Yes.

20 MR. ROACH: Absolutely, absolutely.

21 JUDGE NELSON: As apart of a scheme --

22 MR. ROACH: Absolutely.

23 JUDGE NELSON: -- whether intended or  
24 innocent --

25 MR. ROACH: Absolutely.

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1 JUDGE NELSON: -- to set in motion the  
2 framework for rate increases?

3 MR. ROACH: Absolutely. They've asked to  
4 have --

5 JUDGE NELSON: Or the other alternative,  
6 to enable the Applicants to low-ball the traffic and  
7 capture all of them.

8 MR. ROACH: Right.

9 JUDGE NELSON: Can't they ask them all  
10 about that?

11 MR. ROACH: You bet. And they asked Mr.  
12 Peterson that all week. He's our lead competition  
13 expert for --

14 JUDGE NELSON: Now we're talking about  
15 Rebensdorf.

16 MR. ROACH: I know. But there's another  
17 expert witness who addresses all of this as well.

18 JUDGE NELSON: Suppose they say Mr.  
19 Rebensdorf was the rep of discussions in the  
20 negotiations about setting the rate at 3.0 so as to  
21 enable the Applicants to low-ball the traffic. Can  
22 they ask that question?

23 MR. ROACH: Well, you know, I'm back to  
24 this issue of can I find out from John Rebensdorf that  
25 the answer is no and let him answer no? I think the

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1 answer is no. If the answer is no, I'll let him  
2 answer no.

3 You know, what I'm trying to prevent is  
4 for them to get the script of the settlement talks.  
5 That's what the Commission has said isn't supposed to  
6 be discoverable. It's -- I think -- frankly, I think  
7 this whole procedure is close to --

8 JUDGE NELSON: It seems to me that your  
9 representation in the letter of February 7 covers  
10 certainly part of the case that the coal people want  
11 to make, if they want to make the case that the high  
12 rate, the allegedly high rate, would make BN Santa FE  
13 a non-competitor. Your representation is that isn't  
14 in there.

15 MR. ROACH: Right.

16 JUDGE NELSON: There isn't anything in the  
17 representation about the high-ball theory of Mr.  
18 Crowley, which is that the 3.0 sets up the predicate  
19 for increases. Maybe you could find out about that  
20 and then get rid of the issues.

21 MR. ROACH: I will -- I will gladly find  
22 out about that and get rid of that issue. And I am  
23 prepared to stipulate right here and right now that  
24 UP/SP and BN Santa Fe have not conspired to hold rates  
25 up through this settlement, period.

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1 And they can ask any witness they want to  
2 about that. And I will let them answer, and I will  
3 let them answer whether there was such discussion of  
4 conspiring to hold rates up in settlement --

5 JUDGE NELSON: All right. With that  
6 representation then, I've heard enough. I'm going to  
7 deny this request for the failure to have shown  
8 particularized need as it has played out in light of  
9 today's representations and transcript and the  
10 representation in the letter of February 7 to me.

11 What is next? What's in the new business?

12 MR. ROACH: Thank you, Your Honor.

13 MR. LUBEL: I think I have some things,  
14 Your Honor.

15 JUDGE NELSON: Do we want to take a lunch  
16 break?

17 MR. LUBEL: Fine with me.

18 MR. ROACH: Can we say a word about the  
19 schedule? We have a deposition that's resuming at  
20 2:30.

21 JUDGE NELSON: Let's go off the record  
22 here.

23 (Whereupon, the proceedings went off the  
24 record at 11:56 a.m. for a lunch break and resumed at  
25 12:36 p.m.)

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A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(12:36 p.m.)

JUDGE NELSON: Please be seated. Mr. Lubel?

MR. LUBEL: Your Honor, I yield my time to Mr. Billiel.

JUDGE NELSON: That's fine. Mr. Billiel?

MR. BILLIEL: This relates to the letter that Mr Cunningham sent in about the confidentiality -

JUDGE NELSON: Yes.

MR. BILLIEL: The Applicants have agreed to produce to the Department, pursuant to requests we made, certain marketing documents that are monthly reports that summarize their competitive activity.

And they have indicated that they don't have a problem producing them to the Department under the -- the provisions of the current protective order.

But they have expressed some concerns about producing them to other parties under those conditions.

The Department has reviewed samples of the documents, and I can say that they include information about current, or even future, marketing or pricing plans which are in the grand scheme of things the most

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1 highly confidential thing -- any highly confidential  
2 competitive information you can have.

3 JUDGE NELSON: These are plans of the  
4 merged company or the individual --

5 MR. BILLIEL: Of the individual companies.

6 JUDGE NELSON: All right.

7 MR. BILLIEL: So as I said, the Applicants  
8 have agreed to make them available to the Department.  
9 The issue is under what conditions they are available  
10 to other parties.

11 JUDGE NELSON: Do we have a suggestion?

12 MR. BILLIEL: Mr. Cunningham can speak to  
13 you about that.

14 MR. CUNNINGHAM: I suggested, Your Honor,  
15 in my letter to you that we make them subject to two  
16 conditions, further conditions: 1) that the documents  
17 be redacted as to the names of the enterprises with  
18 whom SP is dealing or UP to the extent that they also  
19 have similar documents.

20 And second, that the documents be made  
21 available to outside counsel only and not to  
22 consultants, many of whom are active in negotiations  
23 that these documents address.

24 But otherwise, counsel have these  
25 documents that can be made available.

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1 JUDGE NELSON: Where would they be  
2 physically?

3 MR. CUNNINGHAM: They could be -- they  
4 would be made available in the depository, subject to  
5 request.

6 JUDGE NELSON: In redacted form?

7 MR. CUNNINGHAM: In redacted form.

8 JUDGE NELSON: To lawyers only?

9 MR. CUNNINGHAM: Yes.

10 JUDGE NELSON: Are there any objections to  
11 that? Mr. Lubel?

12 MR. LUBEL: Your Honor, I had gone ahead  
13 and planned to address this, certainly not in this  
14 order, but we have strong objections.

15 We don't have any -- we don't object to  
16 the redacting. I don't think that's appropriate for  
17 the reasons I'm going to say.

18 But we do object to the limitation. And  
19 the main reason is that there is a protective order in  
20 place by -- issued by the Commission in this case. It  
21 created a highly confidential designation.

22 And that is sufficient to take care of the  
23 concerns they have. Because the documents they're  
24 talking about and the concerns they have about them  
25 were in existence and available and they had to

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1 anticipate that they could have been asked for when  
2 the protective order was entered.

3 And you know, they could -- and there is  
4 a due process concern here because by limiting us and  
5 not letting consultants who might have a better  
6 understanding of what the documents are, not letting  
7 them see them or limiting just to counsel, and counsel  
8 might not have a full appreciation or be able to make  
9 full use of the information.

10 And the point is, you know, they -- they  
11 have used this protective order. We tried to get the  
12 protective order so that our in-house counsel could  
13 see the documents. And they said oh no, we can't do  
14 that. We can't let the client -- just the outside  
15 lawyers and consultants.

16 And that's what was raised before the  
17 Commission, and the Commission ruled that the in-house  
18 lawyers could not look at it.

19 Now they're trying to raise something new  
20 and basically modify the protective order --

21 JUDGE NELSON: Do I have the authority to  
22 modify the Commission's order?

23 MR. ROACH: We believe you do, Your Honor,  
24 to impose additional protection. It's part of  
25 discovery.

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1 MR. CUNNINGHAM: I have one other  
2 condition that I suggest in my letter that slipped my  
3 mind here.

4 JUDGE NELSON: Well, the first two are --  
5 one is --

6 MR. CUNNINGHAM: The third was that we  
7 limit this to certain commodities. And we would  
8 propose that it be limited to chemicals, including  
9 plastics, and coal, which have been the major areas of  
10 inquiry here.

11 JUDGE NELSON: That we might be able to  
12 do.

13 MR. LUBEL: Well, now I --

14 JUDGE NELSON: Let's talk about the first  
15 condition, which is redaction. You would redact what?

16 MR. CUNNINGHAM: We're redacting the names  
17 of the parties discussed, names of parties and  
18 individuals discussed in these documents.

19 These are reports, Your Honor. And I have  
20 --

21 JUDGE NELSON: If the redactions occur,  
22 how could the enemy use them?

23 MR. CUNNINGHAM: If the redaction -- well,  
24 there are two ways the enemy could use them, Your  
25 Honor. And I'm not, again, suggesting --

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1 JUDGE NELSON: Is the enemy another  
2 railroad or a shipper?

3 MR. CUNNINGHAM: Both.

4 JUDGE NELSON: Both.

5 MR. CUNNINGHAM: The enemy here is someone  
6 who -- there are two things that are being projected.  
7 One is the information itself, which is about the  
8 ability of the company to make a plan and how it is  
9 going to make a plan.

10 So is there a pricing strategy? Are there  
11 contract negotiations pending?

12 JUDGE NELSON: These are separate for each  
13 railroad?

14 MR. CUNNINGHAM: These are -- I don't know  
15 the nature of his --

16 JUDGE NELSON: That's why Mr. Roach is up.

17 MR. ROACH: I'll need to address mine in  
18 a moment.

19 MR. CUNNINGHAM: All right, let me  
20 describe our -- I'll be glad to describe our  
21 documents. They are in a particular form which we  
22 hold to be of competitive importance.

23 This has been developed over some time for  
24 SP and there's a very particularized way it controls  
25 its marketing strategies.

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1 JUDGE NELSON: Do you have one here?

2 MR. CUNNINGHAM: I do, and I'd be glad to

3 --

4 JUDGE NELSON: May I look at it?

5 MR. CUNNINGHAM: You certainly may. I  
6 have one that's redacted.

7 JUDGE NELSON: Do you have an unredacted?

8 MR. CUNNINGHAM: Not with me, no, I do  
9 not.

10 JUDGE NELSON: Well, we'll work with what  
11 we have.

12 MR. CUNNINGHAM: Yes. This is for the  
13 chemicals group.

14 JUDGE NELSON: This is a book of pages  
15 with a clip and the pages are about an inch thick.  
16 What's the most sensitive part in here? I mean, they  
17 say everything.

18 MR. CUNNINGHAM: The most --

19 JUDGE NELSON: I just want to get an  
20 example of the workings.

21 MR. CUNNINGHAM: The most sensitive  
22 things, Your Honor, are the discussions of past and  
23 present and future negotiations concerning active  
24 efforts to attract more business.

25 JUDGE NELSON: Well, there are sections

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1 that begin with a word that begins with "O." Can I  
2 say that word?

3 MR. CUNNINGHAM: I think --

4 JUDGE NELSON: I'm pointing to it now.

5 MR. CUNNINGHAM: It's not subject to the  
6 confidentiality -- no, you can begin with that. Yes,  
7 the opportunity --

8 JUDGE NELSON: Yes, there's a word  
9 "opportunity" here. Would those chapters be the ones  
10 that would contain the most sensitive material?

11 MR. CUNNINGHAM: There are several. These  
12 materials go through several of the chapters, Your  
13 Honor. We thought about trying to limit certain  
14 chapters and --

15 JUDGE NELSON: Well, I'm just trying to  
16 open to one so that I can get a better understanding.

17 MR. CUNNINGHAM: Well, let me see if I can  
18 find you an example.

19 JUDGE NELSON: Point me to one.

20 MR. CUNNINGHAM: Okay, here's a revenue  
21 recovery plan, for example. And I just picked this  
22 one randomly.

23 JUDGE NELSON: Now, we're making a public  
24 transcript here. We haven't directed any close  
25 sessions here. So you be careful. These are your

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