

INTERSTATE COMMERCE COMMISSION 02/20/96

FINANCE DOCKET # 32760

1191-1319 1+

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

+ + + + +

DISCOVERY CONFERENCE

-----X
IN THE MATTER OF: :

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

Tuesday, February 20, 1996

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

The above-entitled matter came on for
hearing, pursuant to notice, at 10:30 a.m.

BEFORE:

THE HONORABLE JEROME NELSON
Administrative Law Judge

NEAL R. GROSS

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

(202) 234-4433

(202) 234-4433

APPEARANCES:

On Behalf of Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company:

MICHAEL L. ROSENTHAL, ESQ.
ARVID E. ROACH, II, ESQ.
S. WILLIAM LIVINGSTON, Jr., ESQ.
KAREN KRAMER, ESQ.
EUGENE D. GULLAND, ESQ.

of: Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, DC 20044-7566
[202] 662-5388

LOUISE A. RINN, ESQ.
General Attorney
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
[402] 271-4227

JAMES V. DOLAN, ESQ.
Vice President - Law
of: Union Pacific Railroad, Missouri Pacific Railroad
Omaha, Nebraska
[402] 271-5357

NEAL R. GROSS

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

APPEARANCES (cont.):

On Behalf of Southern Pacific Rail Corporation,
Southern Pacific Transportation Company, St. Louis
Southwestern Railway Company, SPCSL Corp., and the
Denver and Rio Grande Western Railroad Company:

PAUL A. CUNNINGHAM, ESQ.
GERALD P. NORTON, ESQ.
of: Harkins Cunningham
1300 19th Street, N.W.
Suite 600
Washington, DC 20036-1609
[202] 973-7600

CAROL A. HARRIS, ESQ.
Southern Pacific Transportation Company
One Market Plaza
San Francisco, California 94105
[415] 541-1000

CANNON Y. HARVEY, ESQ.
Executive Vice President
of: Southern Pacific Rail Corporation
1860 Lincoln Street
Denver, Colorado 80295
[303] 812-5005

On Behalf of Kansas City Southern Railroad
Company:

WILLIAM A. MULLINS, ESQ.
of: Troutman Sanders, Attorneys at Law
601 Pennsylvania Avenue, N.W.
Suite 640
Washington, DC 20004
[202] 274-2953

ALAN E. LUBEL, ESQ.
DAVID FOSHEE, ESQ.
of: Troutman Sanders, Attorneys at Law
Nationsbank Plaza, Suite 5200
600 Peachtree Street, N.E.
Atlanta, Georgia 30308-2216
[404] 885-3174

NEAL R. GROSS

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

APPEARANCES (cont.):

On Behalf of Texas Mexican Railway Company and
Sierra Pacific Power Company:

RICHARD A. ALLEN, ESQ.
JENNIFER OAKLEY, ESQ.
JOHN V. EDWARDS, ESQ.
of: Zuckert, Scoutt & Rasenberger, LLP
888 17th Street, N.W.
Washington, DC 20006-3959
[202] 298-8660

On Behalf of Railway Labor Executives
Association and United Transportation Union:

DONALD F. GRIFFIN, ESQ.
RICHARD S. EDELMAN, ESQ.
of: Highsaw, Mahoney, & Clarke, P.C.
Suite 210
1050 17th Street, N.W.
Washington, DC 20036
[202] 296-8500

On Behalf of the National Industrial
Transportation League:

FREDERICK L. WOOD, ESQ.
of: Donelan, Cleary, Wood and Maser, P.C.
Suite 750
1100 New York Avenue, N.W.
Washington, DC 20005-3934
[202] 371-9500

On Behalf of Western Coal Traffic League:

C. MICHAEL LOFTUS, ESQ.
CHRISTOPHER A. MILLS, ESQ.
JOHN H. LESEUR, ESQ.
of: Slover and Loftus
1224 17th Street, N.W.
Washington, DC 20036
[202] 347-7170

NEAL R. GROSS

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

APPEARANCES (cont.):

On Behalf of International Paper Company and
Utah Railway Corporation:

ANDREW T. GOODSON, ESQ.
EDWARD D. GREENBERG, ESQ.
CHARLES H. WHITE, Jr., ESQ.
of: Galland, Kharasch, Morse & Garfinkle, P.C.
1054 31st Street, N.W.
Washington, DC 20007
[202] 342-6750

On Behalf of the Department of Justice:

JOAN S. HUGGLER, ESQ.
MICHAEL D. BILLIEL, ESQ.
ANGELA HUGHES, ESQ.
Trial Attorneys
Antitrust Division
of: The Department of Justice
555 Fourth Street, N.W.
Room 9409
Washington, DC 20001
[202] 307-6666

On Behalf of the Save the Rock Island Committee,
Inc.:

WILLIAM P. JACKSON, Jr., ESQ.
JOHN T. SULLIVAN, ESQ.
of: Jackson and Jessup, P.C.
3426 North Arlington Blvd.
Arlington, Virginia 22201
[703] 525-4050

On Behalf of the Society of the Plastics
Industry, Inc. and Union Carbide:

MARTIN W. BERCOVICI, ESQ.
of: Keller and Heckman
1001 G Street, N.W.
Washington, DC 20001
[202] 434-4144

NEAL R. GROSS

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

APPEARANCES (cont.):

On Behalf of Geneva Steel:

JOHN W. ONGMAN, ESQ.
of: Pepper, Hamilton & Scheetz
1300 Nineteenth Street, N.W.
Washington, DC 20036
[202] 828-1415

On Behalf of Coastal Corporation:

ROBERT M. BRUSKIN, ESQ.
ROSEMARY H. MCENERY, ESQ.
MARK JOSEPHS, ESQ.
of: Howrey & Simon
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004-2402
[202] 783-0800

On Behalf of Burlington Northern Railroad Company, and Atchison, Topeka & Santa Fe Railway:

RICHARD WEICHER, ESQ.
of: Burlington Northern Santa Fe
1700 East Golf Road
Schaumburg, Illinois 60173
[708] 995-6887

ERIKA Z. JONES, ESQ.
ADRIAN L. STEEL, Jr., ESQ.
KATHRYN A. KUSSKE, ESQ.
of: Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006
[202] 463-2000

On Behalf of the International Union of Machinists and Aerospace Workers:

DEBRA L. WILLEN, ESQ.
of: Guerrieri, Edmond & Clayman, P.C.
1331 F Street, N.W.
Washington, DC 20004

NEAL R. GROSS

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

APPEARANCES (cont.):

On Behalf of the Transportation Communications
International Union:

LARRY R. PRUDEN, ESQ.
3 Research Place
Rockville, MD 20850
[301] 948-4910

On Behalf of Illinois Central Railroad:

KEVIN M. SHEYS, ESQ.
of: Oppenheimer, Wolff and Donnelly
1020 19th Street, N.W.
Suite 400
Washington, DC 20036
[202] 293-6300

On Behalf of Consolidated Rail Corporation:

WILLIAM J. KOASKY, ESQ.
A. STEPHEN HUT, Jr., ESQ.
STEVEN P. FINIZIO, ESQ.
of: Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, DC 20037
[202] 663-6235

On Behalf of the International Brotherhood of
Teamsters:

MARC J. FINK, ESQ.
of: Sher & Blackwell
Suite 612
2000 L street, N.W.
Washington, DC 20036
[202] 463-2503

NEAL R. GROSS

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

APPEARANCES (cont.):

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

JEFFREY O. MORENO, ESQ.
 JOHN K. MASER, III, ESQ.
 NICHOLAS J. DiMICHAEL, ESQ.
 of: Donelan, Cleary, Wood & Maser, P.C.
 Suite 750
 1100 New York Avenue, N.W.
 Washington, DC 20005
 [202] 371-9500

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

C. MICHAEL LOFTUS, ESQ.
 of: Slover & Loftus
 1224 17th Street, N.W.
 Washington, DC 20036
 [202] 347-7170

On Behalf of The Western Shippers Coalition:

MICHAEL F. McBRIDE, ESQ.
 of: LeBoeuf, Lamb, Greene & MacRae
 Suite 1200
 1875 Connecticut Avenue, N.W.
 Washington, D.C. 20009-5728

On Behalf of the State of Texas

REBECCA FISHER, ESQ.
 AMY KRASNER, ESQ.
 of: Consumer Protection Division
 Antitrust Section
 P.O. Box 12548
 Austin, Texas 78711-2548
 [512] 463-2185

ALSO PRESENT:

HARRILEE MOLM, Paralegal
 of: Troutman Sanders, Attorneys at Law
NEAL R. GROSS

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

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

(10:03 a.m.)

JUDGE NELSON: Please be seated. Sorry to be late. All right, we have here Mr. Roach.

MR. ROACH: Yes, Your Honor. I'm accompanied by Michael Rosenthal of Covington and Burling and Jerry Norton representing SP.

MR. LUBEL: Good morning, Your Honor. Alan Lubel of Troutman Sanders on behalf of the Kansas City Southern Railway.

And Your Honor, I left a letter on desk there with the three issues that we would propose to take up this morning.

JUDGE NELSON: I have it here.

MR. DiMICHAEL: Your Honor, my name is Nicholas DiMichael. I'm here with the law firm of Donelan, Cleary, Wood and Maser representing the Dow Company. And with me is Mr. Jeffrey Moreno.

JUDGE NELSON: Mr. Bercovici?

MR. BERCOVICI: Good morning, Your Honor, Martin Bercovici. I'm here for Union Carbide Corporation and for the Society of Plastics Industry.

MR. STEEL: And Adrian Steel on behalf of the Burlington Northern Railroad and the Atchison, Topeka and Santa Fe Railway.

NEAL R. GROSS

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

1 JUDGE NELSON: I didn't hear you, sir.

2 MR. STEEL: Adrian Steel on behalf of
3 Burlington Northern Santa Fe.

4 JUDGE NELSON: What order do you want to
5 proceed in, as Mr. Lubel has probably unfinished
6 business? So, I guess we should take him first.

7 MR. LUBEL: Right, Your Honor. I'd be
8 happy to -- these three issues I proposed. To take
9 the first one, first, on the issue of build-ins or
10 build-outs --

11 JUDGE NELSON: All right.

12 MR. LUBEL: -- I'm ready to proceed. Your
13 Honor, if I might, I've got about five minutes here to
14 present to you. And if I can get it in, I think it
15 will probably handle my rebuttal too.

16 JUDGE NELSON: I wanted to say thank you
17 for contacting me when the deposition ended the other
18 day. I appreciated that courtesy. I was home on-call
19 and on duty, and I heard from your and later Ms.
20 Jones.

21 MR. LUBEL: We just wanted to let you know
22 that we --

23 JUDGE NELSON: And even nicer than the
24 call was the news that you never had to bother me.

25 (Laughter.)

NEAL R. GROSS

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

1 JUDGE NELSON: You were able to take care
2 of the deposition.

3 MR. LUBEL: It went fairly smoothly, Your
4 Honor.

5 JUDGE NELSON: The way it ought to go.
6 All right, sir.

7 MR. LUBEL: There were some questions
8 about settlement privilege maybe, but I'm not here to
9 address that today.

10 JUDGE NELSON: All right.

11 MR. LUBEL: Your Honor, I do have though
12 today another example of how discovery in the case has
13 now led to additional -- us uncovering additional
14 relevant evidence.

15 And particularly, this deals with the
16 question of build-ins or build-outs. And it was the
17 subject of our interrogatories 27 and 28.

18 JUDGE NELSON: Well, let me find them.

19 MR. LUBEL: I have extra copies here, Your
20 Honor. I actually have their response, and I also
21 have what I'll call a diagram to try to represent a
22 building situation.

23 JUDGE NELSON: I have 27 and 28. I have
24 the originals.

25 MR. LUBEL: Here is -- here is the diagram

NEAL R. GROSS

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

1 I was referring to, Your Honor.

2 JUDGE NELSON: Have you shown this to the
3 railroad?

4 MR. LUBEL: I did, I did.

5 JUDGE NELSON: Any problems with my
6 looking at this diagram?

7 MR. ROACH: No sir.

8 JUDGE NELSON: All right.

9 MR. LUBEL: And the -- the first point I'd
10 like to address, Your Honor, is why is it relevant?
11 You know, we're asking for situations where there was
12 a possibility or some document that might have
13 discussed the possibility of a build-in or a build-
14 out.

15 And that type of situation, as I've
16 represented there, is where a railroad is only served
17 by one -- I mean, a shipper is only served by UP or
18 SP.

19 JUDGE NELSON: UP on your diagram.

20 MR. LUBEL: Right. But it has the
21 opportunity where the other railroad, the competing
22 railroad, could build-in. And that exerts a
23 competitive pressure. And I'll fit that in in my
24 analysis.

25 In terms of why this would be relevant:

NEAL R. GROSS

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

1 we all know that -- and I believe that they have
2 admitted that there are certain competitive problems
3 with the merger because these two systems overlap and
4 are parallel.

5 But they say they've solved those
6 competitive problems by granting access to Burlington
7 Northern at all the two-to-one points according to
8 their definition.

9 It's our position in the case that they
10 have not solved all those problems because their
11 definition of competitive harm, their definition of
12 two-to-one, with really only one exception, is as
13 follows: a shipper that is served by both UP and SP
14 and no other railroad.

15 JUDGE NELSON: So that's not your diagram?

16 MR. LUBEL: That's right. It's not the
17 diagram. Now they have made an exception, and for, I
18 believe, it's Mount Belveau, in saying that that --
19 the Burlington Northern will get access thereto.

20 And we think that -- as all the witnesses
21 in the case have -- well, not all, but there has been
22 substantial testimony that this type of situation does
23 lead to competitive pressure.

24 It helps keep the rates down at UP because
25 there's the option of having a build-in and going to

NEAL R. GROSS

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

1 the other line, or vice versa.

2 And I believe that the Applicants have
3 recognized the relevance of it also because they did
4 carve an exception. In the agreement with Burlington
5 Northern, they dealt with, I believe, one or two or
6 those situations.

7 And it is the others that we're interested
8 in. Because again, their definition of a build-in or
9 build-out situation, we think was too narrow.

10 JUDGE NELSON: Are you interested in all
11 potential build-ins and build-outs?

12 MR. LUBEL: No, Your Honor. I've got --

13 JUDGE NELSON: Just certain ones?

14 MR. LUBEL: If you'll -- if you'll let me,
15 I'm only interested in data that they have already
16 gathered, and that's what I'm getting to. We're not
17 asking them to do any search at all.

18 And so -- so it's only interested in the
19 data that Mr. Peterson, in his deposition, said they
20 gathered. We're not asking them to go out and do a
21 blanket search.

22 But their definition of a build-in that
23 should be covered by the settlement agreement is one
24 where there is already like an agreement or some -- an
25 agreement to do the build-in or some formal step has

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 been taken.

2 And we say that there are other possible
3 situations that could be exerting competitive
4 pressure.

5 Now, we could just accept their definition
6 of what's relevant, Your Honor, but I think we'd be
7 overlooking some very important evidence. And you
8 know, we are here to do discovery and to test their --
9 their application.

10 When we were here before on December 20th,
11 our interrogatory did ask for conversations about
12 build-outs, but then it said "or any documents that
13 related to it."

14 And they said that it would be burdensome
15 to find. They said it was not relevant. But I think
16 we've established the relevance, and even I can quote
17 the testimony from their own witnesses that show it's
18 relevant.

19 But they said it was burdensome to go and
20 look at. I think to quote Mr. Roach, he said that "It
21 would be like searching for a needle in a haystack,"
22 it would be some big, broad search.

23 But we've now found out in discovery, Your
24 Honor, that there are some existing documents that
25 were gathered that will alleviate the need for that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 search.

2 Specifically in the deposition of Mr.
3 Peterson, which I have copies of here -- was taken on
4 really a couple of days. But it was in the last --
5 the first day was February sixth, I believe. Well, no
6 -- yes, it was February sixth -- February fifth and
7 sixth. Those are the two portions that I'm referring
8 to.

9 On -- he said that in looking at two-to-
10 one situations, they gathered data on build-out
11 situations. And he was asked, "Was it put in
12 writing?" "Yes, it was put in writing." Yes, they
13 would probably have it.

14 And they did determine -- he also --

15 JUDGE NELSON: Who is "they?"

16 MR. LUBEL: "They," being Union Pacific.
17 He's testifying -- Mr. Peterson was one of the main
18 witnesses for Union Pacific. He submitted over a 300-
19 page statement in this case. He covers a broad range
20 of --

21 JUDGE NELSON: I recall Mr. Peterson.

22 MR. LUBEL: Okay. Anyway, he said that
23 they had gathered data on potential build-out
24 situations. He also said that a few years ago, there
25 was actually a study, an earlier study of potential

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 build-out situations.

2 He said he thinks he probably still has
3 that. And they -- now, they decided -- he said,
4 "Well, we decided that those weren't similar enough or
5 they weren't realistic possibilities, and therefore,
6 you know, we didn't carve those out as exceptions."

7 But we're asking to see those, Your Honor,
8 because we feel that we should -- as part of
9 discovery, we should be able to judge for ourselves
10 whether their determination that they're not feasible
11 is correct.

12 More importantly, we suggest its evidence,
13 to present it and let the Surface Transportation Board
14 decide if it's relevant.

15 JUDGE NELSON: Is this only from UP, or
16 are you also seeking from SP?

17 MR. LUBEL: No, it's only for UP. And all
18 we're asking for, Your Honor --

19 JUDGE NELSON: Because your diagram is the
20 other way around.

21 MR. LUBEL: I know. I use that just as an
22 example, Your Honor, because I think that they could -
23 - we have -- we have the question going both ways.
24 But the -- in other words, we have 27 that goes to UP
25 and 28 is SP, or I might have it backwards.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 But all we're asking for, Your Honor, is
2 the data that Mr. Peterson said that he gathered. He
3 said that he gathered data and that he did an earlier
4 study.

5 JUDGE NELSON: This is about potential UP
6 build-ins --

7 MR. LUBEL: Well -- well, Your Honor --

8 JUDGE NELSON: -- to SP?

9 MR. LUBEL: -- we would say it would be
10 either. Because in gathering their data, they might
11 have considered it both ways.

12 But all we're asking for is the data that
13 he gathered on potential build-in situations that
14 involved either UP or SP.

15 We feel it's relevant, and there's no
16 burden because, you know, he said he had done the
17 gathering. All he's got to do is go and look at it.

18 I'm actually surprised, Your Honor, that
19 they've not made it available to us. I'm surprised
20 that after he mentioned in his deposition that he had
21 gathered his data and we've then asked him for it,
22 that they didn't voluntarily make it available.

23 JUDGE NELSON: What did they tell you as
24 to why you can't have it?

25 MR. LUBEL: Well, I don't know that we've

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 gotten much response other than, you know, they feel
2 they've addressed the situation in what they gave us
3 or -- or, you know -- I don't know that we've gotten
4 a formal response to my letter. I'm sure Mr. Roach
5 will hear.

6 But with all due respect to their case,
7 Your Honor --

8 JUDGE NELSON: You don't know as of this
9 moment why they won't give you this stuff?

10 MR. LUBEL: I think they're standing by
11 their -- their earlier position as stated in their
12 answer to interrogatories 27 and 28, Your Honor.

13 I think they're saying that the other --
14 there are only a couple of situations that were
15 feasible, and they've given us the information on
16 those; that the others were merely, you know --
17 weren't seriously considered.

18 And therefore, they don't have to make
19 them available.

20 And we're saying that the -- you know, I
21 think Mr. Roach just didn't know that his internal
22 people, that his client, had done this study.

23 And therefore, we're just asking to make
24 the study that he said he did available. I -- you
25 know, with all due respect to their case Your Honor,

NEAL R. GROSS

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

1 I think there are some serious problems with their
2 case.

3 And I think that, you know, within the
4 bounds, they are trying to keep that from us, from you
5 and the STB.

6 JUDGE NELSON: Do we know how many of
7 these there are?

8 MR. LUBEL: No. He just said he gathered
9 data. And I don't know how many other situations were
10 in his -- in his -- the data that he gathered. I
11 don't know if it was five other or 50 other.

12 But our point would be is that it's there.
13 We ought to have it so that we can determine whether
14 these are feasible situations for build-ins, and
15 especially present it to the Surface Transportation
16 Board.

17 JUDGE NELSON: Now would your request
18 encompass the others -- other discoverers? I forget
19 whether it's Mr. Bercovici or one of the others
20 pushing for some build-ins.

21 MR. LUBEL: Well, I believe --

22 MR. BERCOVICI: Yes, Your Honor. May I
23 speak to that?

24 MR. LUBEL: Well, just from our
25 perspective, I just want to make clear to you the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 narrow focus. We're only asking for -- Mr. Peterson
2 said he gathered that --

3 JUDGE NELSON: You want the ones that
4 Peterson testified about?

5 MR. LUBEL: The ones he testified about,
6 the data -- the data he gathered and the earlier study
7 he did.

8 I'm not sure that Mr. Bercovici's
9 situation would be in that or now.

10 JUDGE NELSON: Dow has something about
11 that.

12 MR. BERCOVICI: Yes, we do.

13 JUDGE NELSON: And Mr. Bercovici, will --

14 MR. BERCOVICI: May I speak to that, Your
15 Honor.

16 JUDGE NELSON: For the sake of argument,
17 suppose I were to grant Mr. Lubel's, would that take
18 care of you?

19 MR. BERCOVICI: That would take care of
20 me. Can I -- can I speak to the facts?

21 MR. LUBEL: Your Honor, that's all I have.
22 I mean, it seems to me that it's obvious, that it's
23 relevant, that there's no burden to get something that
24 he said he gathered and said is in writing. And we
25 think --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 JUDGE NELSON: Would it make sense to have
2 argument now on the three?

3 MR. BERCOVICI: Yes sir. On these three,
4 I think so.

5 MR. ROACH: Well, I don't -- I think it
6 would be easier for me to say there's no dispute here
7 and he's going to get what he's asking for. And he
8 never called me up on the phone to find out the
9 answer.

10 We've been inundated with depositions and
11 discovery requests. I got his letter on the eighth of
12 February, three days after the testimony a issue.

13 We've been working hard to provide a full
14 response, and we're going to give him a full response.

15 JUDGE NELSON: Fine, so you'll give him
16 these papers --

17 MR. ROACH: That's right, yes.

18 JUDGE NELSON: -- pertaining to that which
19 Peterson testified?

20 MR. LUBEL: And Your Honor, I apologize to
21 you and to Mr. Roach if I didn't -- we've all been
22 busy.

23 MR. ROACH: Yes sir.

24 MR. LUBEL: We did send a letter a couple
25 of days ago announcing it to this hearing and saying

NEAL R. GROSS

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

1 we're still interested in trying to work it out. But
2 everybody has been very busy.

3 And I take his offer and we hope --

4 JUDGE NELSON: I know that Friday two key
5 depositions were going on because I was on call all
6 day to have to rule on them. So I know you were tied
7 up.

8 MR. LUBEL: And there was preparation --

9 JUDGE NELSON: There's no mystery about
10 that.

11 MR. LUBEL: We'll reserve our right,
12 obviously, to come back if we're not satisfied with
13 their response. But we appreciate their --

14 JUDGE NELSON: Well, Mr. Roach, if you
15 turn over everything that Peterson testified to, what
16 does that leave of these other requests?

17 MR. ROACH: Well, I'm not -- I'm not sure.
18 We need to give you the history of these others, which
19 are rather on a different track. We litigated them a
20 couple of weeks ago and --

21 JUDGE NELSON: Maybe I should hear the
22 others first then and then hear you.

23 MR. ROACH: But, you know, if I could just
24 say a couple words of correction with regard to what
25 Mr. Lubel stated. He indicated to you, Your Honor,

NEAL R. GROSS

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

1 that the Applicants have defined what counts, from a
2 competitive standpoint very narrowly and situations
3 where there was actually an agreement to do a build-in
4 or a build-in was underway. That isn't the case.

5 JUDGE NELSON: No, I didn't understand
6 that. I understood him to say that you did include
7 such situations.

8 MR. ROACH: Well, we --

9 JUDGE NELSON: You did.

10 MR. ROACH: Yes, but --

11 JUDGE NELSON: But excluded certain others
12 where, in your judgement, the threat of entry was too
13 remote.

14 MR. ROACH: Right, and --

15 JUDGE NELSON: And it's those that he's
16 fighting about.

17 MR. ROACH: That's right. And the --

18 JUDGE NELSON: Because he says why should
19 he trust your judgement? Let him see.

20 MR. ROACH: Right, and the line --

21 JUDGE NELSON: I was not at all confused
22 about that.

23 MR. ROACH: Okay. All I'm trying to
24 clarify is that the line that we drew was not the line
25 that he suggests; that is, between, on the one hand,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 a formal commitment to do it and everything else on
2 the other hand, but rather was a line that was
3 intended to be identical to what the Commission drew
4 as the right line in BN/Santa Fe, and that is the
5 issue of feasibility.

6 And Mr. Peterson testified about this.
7 The study that they want is a study that was done by
8 a summer associate well before the date range for
9 discovery in this case.

10 We're going to produce it. We are
11 searching to try to find any documents that followed
12 on it with regard to feasibility.

13 JUDGE NELSON: A summer associate lawyer?

14 MR. ROACH: A summer intern, I should have
15 said.

16 JUDGE NELSON: I was going to say, what
17 would a lawyer have with these judgements?

18 MR. ROACH: No, it was a summer -- a
19 management intern for the summer.

20 JUDGE NELSON: That's feasible.

21 MR. LUBEL: Your Honor, if I can just make
22 -- make this particular --

23 MR. ROACH: Can I finish?

24 MR. LUBEL: Excuse me.

25 MR. ROACH: Just, I want to clarify the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 facts here.

2 JUDGE NELSON: I knew Covington was a big
3 firm, but I didn't know --

4 (Laughter.)

5 MR. ROACH: I've got lawyers on the brain
6 here, too many involved. No, this was not a lawyer.
7 It was a summer management intern.

8 Mr. Peterson also testified that in
9 preparing the application here, and in connection with
10 the settlement negotiations, he did a comprehensive
11 study to try to identify all two-to-one situations,
12 including build-in situations.

13 And he went out and he interviewed a lot
14 of people at Union Pacific and gathered "data."

15 Now, it is not correct that he testified
16 that he had a written compilation of data. The
17 writing that you're referring to, that Mr. Lubel
18 referred to, was the earlier study.

19 He asked, "Is that in writing?" and he
20 said "Yes." We are attempting to gather the "data."
21 We have not found writings thus far.

22 But we will, at the very least, give a
23 full narrative response with respect to what data Mr.
24 Peterson collected.

25 So that's all I wanted to clarify, Your

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 Honor. We're going to give him what he's asking for.
2 And that's -- those are the facts on that one.

3 MR. LUBEL: And I would only say a to the
4 more recent gathering of data, if there's anything in
5 writing, we would like to see it, feel we have the
6 right to see it, rather than just a general
7 description, although we appreciate your description
8 of it too.

9 JUDGE NELSON: Maybe we should turn to the
10 other build-in/build-out issues then while we're on
11 them. Mr. DiMichael, is it?

12 MR. DiMICHAEL: That's right, Your Honor.

13 JUDGE NELSON: Yes sir?

14 MR. DiMICHAEL: Your Honor, I am
15 representing Dow here, and we sent -- we faxed a
16 letter to Your Honor on the 16th.

17 JUDGE NELSON: I have it.

18 MR. DiMICHAEL: There -- just as a
19 preliminary matter, there is a prior confidentiality
20 agreement between the SP and Dow and this matter
21 which, at least, could restrict the ability to talk
22 about this.

23 I have talked with counsel for SP prior to
24 this. And they have agreed that as long as the highly
25 confidential designation is adhered to within the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 confines of the hearing in the case, we will not be in
2 breach of the prior confidentiality agreement between
3 Dow and --

4 JUDGE NELSON: So then you want this
5 transcript classified?

6 MR. DiMICHAEL: That's -- that's exactly
7 right.

8 MR. NORTON: That's right. And that is a
9 correct statement, Your Honor.

10 JUDGE NELSON: All right. Then I'm going
11 to ask the reporter if we can make those arrangements.

12 (Whereupon, the proceedings went into a
13 confidential closed session at 10:55 a.m.)
14
15
16
17
18
19
20
21
22
23
24
25

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D. C. 20005

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

(11:52 a.m.)

(Whereupon, the session was reopened at 11:52 a.m.)

MR. LUBEL: Your Honor, the next issue I have is a question of attorney/client privilege. And basically all we're asking is that Your Honor review the two documents in question in camera to determine whether, in fact, there is a basis for them to be considered privileged.

If I might approach with the documents in question?

JUDGE NELSON: How long are these documents?

MR. LUBEL: They're very short. It's just two -- there are only two pages --

JUDGE NELSON: All right.

MR. LUBEL: -- and certain redactions on each of the two pages. It's really just two pages, Your Honor. If I could approach?

It all relates to a February 1995 Board meeting. I also tender a case of International Telephone and Telegraph Corp. v. United Tel Company.

JUDGE NELSON: Well, you're showing me a redacted version.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 MR. LUBEL: Yes, that's all we have, Your
2 Honor. I would refer you to -- if I might lay the
3 foundation for this, Your Honor, this is -- there are
4 two documents. It's a presentation to the Board of UP
5 in February of 1995, and then the second document is
6 materials handed out at the Board meeting.

7 And it's actually the second one that I'm
8 going to refer to first. If you go to --

9 JUDGE NELSON: This is February of '95?

10 MR. LUBEL: February of '95.

11 JUDGE NELSON: Now, the merger was filed
12 in August?

13 MR. LUBEL: Well, see it wasn't -- that's
14 right. That's why we think this is very interesting,
15 Your Honor. And again, this is the time line.

16 The merger is not until August. They
17 admit that UP and SP had some discussions in late
18 summer or September of -- actually, I think they said
19 mid-'94, but we certainly know by September of 94.
20 Okay, that's UP/SP.

21 Then you've got Burlington Northern/Santa
22 Fe filing their merger application, and that's in
23 October of '94.

24 If you come forward, you've got UP and SP
25 now in February of '95, there's testimony that they

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 talked -- or certainly by March, they had talked about
2 a possible merger between them.

3 And then in March or April of '95, they
4 withdraw their opposition from Burlington the
5 Northern/Santa Fe merger and proceed with discussions
6 later on.

7 JUDGE NELSON: So this is at a time when,
8 you say, the UP and SP are talking to each other --

9 MR. LUBEL: Oh yes.

10 JUDGE NELSON: -- about a merger.

11 MR. LUBEL: Yes.

12 JUDGE NELSON: And shortly before they
13 withdraw their opposition to the BN/SF. How do they
14 talk to each other? Do they need an antitrust
15 exemption to do that, or how does that work
16 mechanically?

17 MR. LUBEL: Your Honor, I'm not certain
18 and I don't want to define the scope of that. I mean,
19 there is -- I believe there is some privilege involved
20 in --

21 JUDGE NELSON: My recollection is there is
22 an exemption at the end of the game -- to make that
23 meaningful, you would have to be able to talk,
24 otherwise you could never merge and never take
25 advantage of the exemption at the end of the game.

NEAL R. GROSS

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

1 MR. LUBEL: I don't believe that it is --

2 JUDGE NELSON: Maybe that's the theory.

3 MR. LUBEL: I don't believe it would
4 exclude all collusive conduct, particularly if there
5 was some agreement between these two big merged
6 companies: UP/SP and BN/SF. If you don't oppose my
7 merger, I won't oppose yours. We'll help each other
8 out.

9 But getting specifically, this is an
10 interesting time period because it is February '95.
11 It's -- you know, they say the merger is not really
12 agreed to until July, so these early discussions, we
13 say, were very significant.

14 If Your Honor would go to page 17 of these
15 combined documents, it's page number -- it's page
16 number HC-33000017.

17 Now this is part of the materials handed
18 out at the Board meeting.

19 JUDGE NELSON: I have it.

20 MR. LUBEL: It's on page two.

21 JUDGE NELSON: And whose Board is this?

22 MR. LUBEL: This is the Union Pacific
23 Board?

24 JUDGE NELSON: The Union Pacific Board's
25 meeting?

NEAL R. GROSS

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

1 MR. LUBEL: Yes. And they, of course, end
2 up acquiring or petitioning the Commission to approve
3 their acquiring Southern Pacific.

4 JUDGE NELSON: All right, and they see
5 this sheet --

6 MR. LUBEL: Okay, and this is presented to
7 their Board and it's important, Your Honor, because
8 what I'm trying to show is I'm trying to make a
9 showing -- I might be redundant here.

10 I'm trying to make a showing of why Your
11 Honor should look at this in camera to see, because I
12 think there is some question as to whether this can be
13 considered attorney/client privilege.

14 JUDGE NELSON: There's opposition to my
15 even looking at.

16 MR. LUBEL: Yes, yes. And so I'm trying
17 to make the showing. If you look at this page, and I
18 invite Your Honor to look --

19 JUDGE NELSON: I see the lines you've
20 marked in yellow.

21 MR. LUBEL: Right, I've marked that on
22 counsel's copy also. The first point you need to
23 know, Your Honor, is that this presentation, the
24 presentation at the Board meeting, was not by an
25 attorney.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 They said it was by Mr. White Matthews,
2 who is a financial executor. Now they've said, if I
3 have -- what their position is that what he was
4 relating here or what was being related here by Mr.
5 Matthews, the financial officer, is legal advice or
6 some communication he got from Mr. Bernuth, the
7 general counsel.

8 But it's not Mr. Bernuth talking here.
9 It's not him who made this presentation.

10 JUDGE NELSON: This is some witness
11 repeating what the lawyer has told him?

12 MR. LUBEL: Well, this is actually a
13 presentation, I think, that was made to the Board.

14 JUDGE NELSON: Suppose it is that. I'm
15 Mr. White and --

16 MR. LUBEL: Yes, the financial officer.

17 JUDGE NELSON: -- and I tell the Board
18 what Mr. -- what's his name --

19 MR. LUBEL: The general counsel, Mr.
20 Bernuth.

21 JUDGE NELSON: -- Bernuth has told me. Is
22 that thereby no longer attorney/client because I'm
23 repeating it? Is that your point?

24 MR. LUBEL: No, no, that's not it totally,
25 Your Honor, but it would depend. Our first point is,

NEAL R. GROSS

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

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 and it's important, this is not by the lawyer. This
2 is by the financial executive.

3 Our second point is if you look at the --

4 JUDGE NELSON: The financial executive is
5 -- what's his rank in the company?

6 MR. LUBEL: He's fairly high up, I
7 believe, in the company, that it's -- it's not even
8 the railroad company. I think it's in the owning
9 company. I stand to be corrected by that.

10 But he is a Senior Executive Vice
11 President of Finance, I believe.

12 JUDGE NELSON: So can we draw the
13 inference that -- in Bernuth's company?

14 MR. LUBEL: No, no. Well, yes. I'm not
15 making a distinction between the companies. I think
16 that they're acting in unison, and that's not the
17 basis for our objection.

18 JUDGE NELSON: That when Bernuth talks to
19 a senior financial officer who, in turn, talks to the
20 Board, that the client -- the client is the Union
21 Pacific, and that communications from general counsel
22 to the senior financial officer to the Board are
23 communications from the lawyer to the client.

24 MR. LUBEL: Could be, Your Honor. That's
25 what --

NEAL R. GROSS

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

1 JUDGE NELSON: So far --

2 MR. LUBEL: -- that's -- so far. That's
3 not the basis of our objection.

4 JUDGE NELSON: But the forum should not
5 control here.

6 MR. LUBEL: That's correct. What we -- we
7 have two other points. In addition to the fact that
8 it's not the lawyer talking, it's the context. If you
9 look at the context of the remarks that are taken out,
10 it appears to us that it is arguable that the context
11 is within the context of discussing financial matters.

12 JUDGE NELSON: I don't know that what I
13 said is correct. I'm just thinking this through. I
14 have no researched this problem.

15 MR. LUBEL: I'm -- we're working --

16 JUDGE NELSON: But inside the corporation
17 --

18 MR. LUBEL: Right.

19 JUDGE NELSON: -- if the -- the client may
20 be a number of individuals.

21 MR. LUBEL: Right.

22 JUDGE NELSON: The corporation acts for
23 people, so you've got a couple of key people or the
24 Board and key officers. If they communicate lawyer
25 advice to each other, thinking out loud, the reasons

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 for the attorney/client privilege ought to remain even
2 though it isn't the lawyer in there doing the talking.
3 It's Mr. White saying what the lawyer told him.

4 MR. LUBEL: Let me try to narrow things.

5 JUDGE NELSON: Maybe there's another
6 argument against that. I don't know.

7 MR. LUBEL: There might be, Your Honor,
8 and that would be the next phase. But for -- to try
9 to make your decision easier here, we'll concede
10 theoretically that if Mr. Bernuth gave some legal
11 advice, confidential legal advice, to Mr. Matthews,
12 and all Mr. Matthews is doing is repeating that to the
13 corporation, then the privilege might apply.

14 But again, two more points: given the
15 context of this, we have some question as to whether
16 this could be considered legal advice. Because it
17 seems within a discussion -- it seems to be within a
18 discussion of financial issues and business and
19 operational issues.

20 And the point there is, Your Honor -- I
21 don't have all the authority here, but if Mr. Bernuth
22 is giving his business judgement on this as opposed to
23 legal advice -- if Bernuth -- you know, he may wear
24 more than one hat.

25 JUDGE NELSON: There are cases to make

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 that distinction.

2 MR. LUBEL: And Your Honor, we actually
3 testimony that relates to that in this case. Now,
4 it's to their Applicant partner. But in the
5 deposition of Mr. Runde, and he's the Morgan Stanley
6 executive -- Morgan Stanley was the advisor, financial
7 advisor, to Southern Pacific.

8 And they're talking about a Mr. Harvey of
9 Southern Pacific who is general counsel, and I believe
10 he had some financial position.

11 And we asked -- we said to Mr. Runde,
12 "Well, Mr. Runde, you know, Mr. Harvey, isn't he the
13 legal officer?" And they said, "Yes, but sometimes he
14 plays a financial role."

15 Now that's SP. That's not UP. I want --
16 no one has said that Mr. Bernuth also plays a
17 financial role.

18 But I think that creates some question,
19 Your Honor --

20 JUDGE NELSON: Suppose Bernuth is, at all
21 times, the lawyer, never plays another role? Do you
22 then agree that everything he says is privileged?

23 MR. LUBEL: Well no, Your Honor. Well,
24 it's hard to say. Our argument is --

25 JUDGE NELSON: What if he discusses spring

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 training and the Orioles' chances in a new Florida
2 deal?

3 MR. LUBEL: No, that is not privileged.

4 JUDGE NELSON: Is that privileged?

5 MR. LUBEL: I don't think so, Your Honor.

6 JUDGE NELSON: Unless he tells it to the
7 client.

8 MR. LUBEL: Well, I don't think that would
9 be privileged.

10 JUDGE NELSON: Suppose the client tells it
11 to the Board just to make conversation, to break the
12 ice in an otherwise difficult meeting?

13 MR. LUBEL: I don't think that would be
14 covered, Your Honor. And if he makes an analogy
15 between baseball and business judgements, then that --
16 I don't think that would be privileged either.

17 So our points are, just (1) it's not a
18 lawyer talking, not a lawyer either making his
19 presentation or presenting these materials; (2) the
20 context appears to be discussion of operational
21 matters, business matters, financial matters; and (3)
22 there is some precedent for general counsel, in large
23 companies like this, to give business or financial
24 suggestions not just legal advice.

25 And all that we're asking is that Your

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 Honor look at these two lines and make the initial
2 judgement whether it appears to be legal advice such
3 that it would be protected by the attorney/client
4 privilege.

5 JUDGE NELSON: I didn't get the three
6 points. One is that it's the client saying what the
7 lawyer told him.

8 MR. LUBEL: Well --

9 JUDGE NELSON: Not the lawyer directly --

10 MR. LUBEL: -- they say, that's right.

11 JUDGE NELSON: Two is that you don't know
12 what hat he's wearing.

13 MR. LUBEL: Well, that's really three.

14 JUDGE NELSON: Three. What's two?

15 MR. LUBEL: Two is the context. If you
16 look at the context that these remarks appear, as
17 you're looking through here, they're talking about
18 financial operating comparison, and then pros and
19 coins of the merger.

20 I'm just suggesting that this is in the
21 context of -- and especially if you go to the next
22 page -- it was in other pages. There's a lot of
23 financial --

24 JUDGE NELSON: Well, suppose it's like,
25 say, the pro of the merger is that we get an antitrust

NEAL R. GROSS

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

1 exemption, a major pro?

2 MR. LUBEL: I think that that would -- if
3 I would be in your shoes, I think I would --

4 JUDGE NELSON: And suppose our con is
5 we'll have to spend a million dollars in legal fees
6 and screw around with these lawyers in Washington and
7 waste time in hearings?

8 MR. LUBEL: If from your judgement, and
9 we're relying on your judgement, that those seem to be
10 --

11 JUDGE NELSON: Deal with some ALJ that
12 isn't even an employee of the Transportation --

13 (Laughter.)

14 MR. LUBEL: If, when you look at it, it
15 seems to be matters of legal advice, then that's --

16 JUDGE NELSON: They would win if that's
17 the --

18 MR. LUBEL: Then I guess you would say
19 that you think --

20 JUDGE NELSON: I would look at that in
21 camera and protect it.

22 MR. LUBEL: That's right. And all we're
23 asking you to do is look at it in camera and determine
24 whether it seems to be legal advice.

25 JUDGE NELSON: I certainly would protect

NEAL R. GROSS

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

1 that kind of thing. That's part of legal advice.

2 MR. LUBEL: And I don't think we could
3 have any argument about that.

4 JUDGE NELSON: But you are out to solely
5 to get me to look at this particular document?

6 MR. LUBEL: That's it.

7 JUDGE NELSON: What's the case, say, as to
8 the threshold for that requirement?

9 MR. LUBEL: Well, they cite a case that
10 involved criminal investigation, a -- it was a
11 criminal investigation of Medicare fraud, and there
12 were 11 documents withheld. And the court set out a
13 standard that you must make a showing that there is
14 some reason to think that it might not be legal
15 advice.

16 Now we don't have -- well, I hasten to
17 add, in that case, the case they rely on, they had
18 presented a privilege log.

19 We have yet to receive the privilege log
20 in this case, although Mr. Roach did provide a letter
21 describing these two documents.

22 JUDGE NELSON: My recollection is I've
23 done this twice on the Energy side, once in a merger
24 case. And every time, I sustained the privilege and
25 found it --

NEAL R. GROSS

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

1 MR. LUBEL: I understand.

2 JUDGE NELSON: -- in fact, even in closed
3 cases, I erred in favor of the privilege. And it may
4 be just as professional matter. So I don't know how
5 far it's going to get you.

6 MR. LUBEL: Your Honor, that's all we can
7 ask for. I mean, if you look at these documents, it
8 looks very suspicious that at a key time, discussing
9 this merger that's coming up, there are some things
10 taken out of this report.

11 To me, the fact that a --

12 JUDGE NELSON: How do you know who said
13 what at the meeting?

14 MR. LUBEL: Well, we don't know who said
15 what, and we've not explored that --

16 JUDGE NELSON: Well, you represented that
17 the lawyer wasn't there and that some other person --

18 MR. LUBEL: No, I --

19 JUDGE NELSON: How do you know that?

20 MR. LUBEL: I didn't say the lawyer wasn't
21 there. I think Mr. Roach told us in his letter that
22 this presentation was made by the financial executive
23 --

24 JUDGE NELSON: Oh, I see.

25 MR. LUBEL: -- and he was repeating what

NEAL R. GROSS

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

1 he had been told by the general counsel.

2 JUDGE NELSON: Do we know whether the
3 general counsel was at the meeting?

4 MR. LUBEL: I believe he was, but I don't
5 know.

6 JUDGE NELSON: All right. So the issue is
7 -- is narrowing whether I should look in camera at
8 these redactions that are listed under the pros and
9 cons?

10 MR. LUBEL: Right. That's all we're
11 asking for, Your Honor.

12 JUDGE NELSON: What do they indicate that?
13 That this is an agenda? I'm looking at sheet 17 here.

14 MR. LUBEL: I think if you go back -- and
15 we could go back, and if you go back and look at the
16 table of contents, this was called -- this page was
17 called "Objective and Overview."

18 And the beginning, as you see, talks about
19 their objective was "to expand the western franchise."
20 Now Your Honor, you might want --

21 JUDGE NELSON: All you get is a title.

22 MR. LUBEL: Well no, if we -- if --

23 JUDGE NELSON: Page 17 is a series of
24 votes.

25 MR. LUBEL: Yes. We would get that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 remark, which would then allow us --

2 JUDGE NELSON: And there would be a title
3 where it says "Redacted/Attorney-client privilege."
4 there would be a title.

5 MR. LUBEL: Exactly, Your Honor: we've
6 got Mr. Davidson's deposition coming up the end of
7 next week or the following week.

8 You know, I presume he, being the
9 president of the company, was at this meeting.

10 JUDGE NELSON: So all you want is that
11 one-line title?

12 MR. LUBEL: Yes, the bullets. We would
13 start with the bullets. And if it's determined that
14 we can have that portion of the document, then we can
15 use that to ask questions about --

16 JUDGE NELSON: Well, who knows what's
17 under that bullet? But if they follow the format
18 otherwise on the unredacted items on page 17, it's
19 simply a one-line title.

20 MR. LUBEL: That's right.

21 JUDGE NELSON: And that's what you want,
22 that title?

23 MR. LUBEL: We'd like -- we would like --
24 when you say "title," I assume you mean whatever was
25 redacted from the bullets?

NEAL R. GROSS

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

1 JUDGE NELSON: Something like the other
2 titles.

3 MR. LUBEL: That's correct.

4 JUDGE NELSON: "Transaction, Complete
5 Western Franchise."

6 MR. LUBEL: And our point is like on the
7 cons, you see right under the word "redacted," it says
8 "May require large capital infusion, prevents us from
9 going after other business opportunities, short-term
10 financial impact on UP stock and debt."

11 JUDGE NELSON: Where are you reading?

12 MR. LUBEL: I'm down at the bottom of page
13 two.

14 JUDGE NELSON: I see, yes.

15 MR. LUBEL: It just seems to us that,
16 again, the fact that it's not a lawyer making these
17 statements would seem to us to be enough showing at
18 least to get you to look at it.

19 Then you take the context of it, which
20 seems to be discussion of financial and operational
21 matters and --

22 JUDGE NELSON: So is it just these bullet
23 items on page 17?

24 MR. LUBEL: That is, Your Honor.

25 JUDGE NELSON: That's all you want?

NEAL R. GROSS

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

1 MR. LUBEL: That's all.

2 JUDGE NELSON: Is for me to look at what
3 is listed in those bullets and make a judgement about
4 whether it's attorney/client or not?

5 MR. LUBEL: Correct, Your Honor. But it
6 may be helpful for you to look at then the second
7 place. I view these separately. I view the portions
8 of the two documents separately. That's the first --

9 JUDGE NELSON: What two document?

10 MR. LUBEL: There is -- if you go back to
11 page three --

12 JUDGE NELSON: Oh.

13 MR. LUBEL: I'm sorry, page five, there is
14 a second document.

15 JUDGE NELSON: This is a chart.

16 MR. LUBEL: I'm sorry, it's Bates No. 5,
17 Your Honor.

18 JUDGE NELSON: I see,

19 MR. LUBEL: The one that starts off "SP
20 Complexity?"

21 JUDGE NELSON: Yes.

22 MR. LUBEL: And to get some context, you
23 have to go to the page before that where it says "SP
24 objectives."

25 JUDGE NELSON: So there are some other --

NEAL R. GROSS

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

1 three -- three other bulleted items?

2 MR. LUBEL: Yes, and the point I've made
3 on that on the page before that is where it says at
4 the bottom, "Maintain dominance in the west."

5 That -- that -- as representing another --

6 JUDGE NELSON: Where does that appear?

7 MR. LUBEL: That's the page before, the
8 very last piece.

9 JUDGE NELSON: Oh, I see.

10 MR. LUBEL: That -- now even though in
11 depositions they say maybe a different word should
12 have been used, that causes our client some grave
13 concern that they're talking about, "Well, this merger
14 will allow us to maintain dominance."

15 You then get to the next page and they
16 talk about "complexity," and there are two things --
17 well, most of the page is redacted, especially where
18 it says "difficult to estimate value," and the next
19 line is redacted.

20 So we view these separately. We ask you
21 to look at both of them. The case that I would refer
22 to, Your Honor --

23 JUDGE NELSON: Yes, tell me about the
24 cases. The case --

25 MR. LUBEL: They say we need to make a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 showing. I think that we've made the showing. We've
2 referred Your Honor to the International Telephone and
3 Telegraph case, page 185.

4 Basically, this was -- this was a case
5 where there was a suit between telephone companies.

6 JUDGE NELSON: You've given me a reproduce
7 from the -- reports with some yellow --

8 MR. LUBEL: Yes.

9 JUDGE NELSON: -- and some blue.

10 MR. LUBEL: And I've marked counsel's in
11 the very same place.

12 JUDGE NELSON: Which am I supposed to
13 read, the yellow or the blue?

14 MR. LUBEL: I think you start with the
15 yellow. That gives you some of the background. It
16 establishes that it's their burden to establish the
17 privilege, that it's a complex conclusion of law.

18 And then what they did here, and this is
19 the second column, is the Court said, "Well, we'll
20 have to look at this to determine whether or not the
21 privilege applies."

22 So we offer this as a precedent of the way
23 the Court gets through the first stage of this. The
24 Court looks at it and determines whether or not it
25 appears to be a privileged communication.

NEAL R. GROSS

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

1 And we would ask Your Honor to --

2 JUDGE NELSON: Where the Court says the --
3 it refers to the burden of establishing existence of
4 the privilege --

5 MR. LUBEL: Yes.

6 JUDGE NELSON: -- what does that mean?

7 MR. LUBEL: Well, I think they've done
8 that. And I'll concede that they've done that for
9 now, because --

10 JUDGE NELSON: Fine.

11 MR. LUBEL: -- because they've said --
12 they've said, "This was statements made by our counsel
13 that were being repeated by the financial officer."

14 You know, I guess that makes their prima
15 facie showing.

16 JUDGE NELSON: Circumstances from which
17 one could fairly infer that confidential advice was
18 being given, lawyer unto client.

19 MR. LUBEL: Yes.

20 JUDGE NELSON: The question is, did that
21 really happen?

22 MR. LUBEL: That's right, Your Honor. And
23 the rest of the case --

24 JUDGE NELSON: And what do they say about
25 the law that you have to show?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 MR. LUBEL: Well, they say that I need to
2 make a showing, and that I have not made a sufficient
3 showing. I think they were expecting me to make it in
4 a brief or something.

5 I felt that the way we were doing things
6 here was making it in front of you when we have our
7 motion day.

8 And we think we've made the showing for
9 the three reasons I've established, the showing to at
10 least have you look at it.

11 I understand that you may look at it and
12 say it looks like legal advice to you, and that will
13 be the end of it for now.

14 JUDGE NELSON: Well, I'll tell you what's
15 attractive about it, Mr. Roach, is that it's not the
16 usual request for in camera inspection that's going to
17 involve 50 pages. It looks like 50 bulleted items on
18 two sheets of paper.

19 That makes it a hard case for you because
20 I'm not going to have to sit there for hours with
21 it --

22 MR. ROACH: Okay, well let me --

23 JUDGE NELSON: -- as I have done in the
24 past, and would like to avoid in this case.

25 MR. ROACH: If I may, Your Honor, let me

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 address it, and I'll try to be very focused and crisp
2 in doing so.

3 I do think, however, just as a preliminary
4 comment, that this is --

5 JUDGE NELSON: Don't feel --

6 MR. ROACH: -- step one.

7 JUDGE NELSON: -- pressured for time. If
8 this is important enough for you to resist, even in
9 camera inspection, I want you to feel free to tell me
10 whatever you want about the issue.

11 MR. ROACH: We think it's very important
12 to preserve the attorney/client privilege and to
13 adhere to the law with the respect to in camera
14 inspection.

15 We obviously have no problem with Your
16 Honor appropriately applying the law if you choose to
17 conduct in camera inspection and we have no dispute
18 that it is a discretionary matter.

19 But the law is clear. And it really isn't
20 disputed here by my friend, Mr. Lubel.

21 Let me start with the essential background
22 of this. He asked about these documents at the
23 beginning of January.

24 And I wrote to him on January tenth. It's
25 a long time ago. It's a month and a half ago.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 And I wrote to him as follows: "The
2 information redacted on the documents," citing the
3 numbers of the documents, "refers to privileged
4 attorney/client advice."

5 "In support of this claim of privilege, we
6 advise as follows: (1) the information in both
7 documents reflects legal advice of Carl W. von
8 Bernuth, the general counsel of UPC, Union Pacific
9 Corporation, and Covington and Burling; (2) the first
10 document by number" --

11 JUDGE NELSON: You were involved?

12 MR. ROACH: Our firm was involved.

13 JUDGE NELSON: You, yourself?

14 MR. ROACH: I was involved.

15 JUDGE NELSON: Were you there?

16 MR. ROACH: I was not at the meeting, no.

17 This was a briefing for the UP Board.

18 JUDGE NELSON: Was there a Covington
19 lawyer there?

20 MR. ROACH: No, there wasn't.

21 JUDGE NELSON: Was Bernuth there?

22 MR. ROACH: Carl von Bernuth was
23 physically present.

24 JUDGE NELSON: And you or your firm had
25 conversations with Mr. Bernuth prior to this time?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 MR. ROACH: Correct. And this was the
2 first briefing that the Union Pacific Board had
3 received on the possibility of a transaction. It was
4 presented by L. White Matthews, III, who is the chief
5 financial officer of the corporation.

6 He was the only person who made a
7 presentation. And it was a comprehensive
8 presentation. It was limited to financial matters, as
9 Mr. Lubel suggested.

10 It covered all the key points, including
11 the legal context. But to continue the letter I sent
12 to Mr. Lubel, Your Honor, point two was that "The
13 first document at issue was part of a presentation to
14 the UPC Board on February 23, 1995, made by White
15 Matthews."

16 JUDGE NELSON: Which one are we talking
17 about, the chart marked "SP Complexity?"

18 MR. ROACH: The page that ends with
19 "five."

20 JUDGE NELSON: That's the chart?

21 MR. ROACH: Yes, that is -- that is
22 exactly right. Point three was that "The other page
23 that ends with '17' was included in materials
24 distributed to Board members for the February 23
25 meeting."

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 And the fourth point I made was that "The
2 only parties present during this Board discussion were
3 members of the Board and staff and advisors involved
4 in the matter."

5 And then I said, "Mr. von Bernuth would be
6 prepared to swear to these facts should that be
7 necessary."

8 JUDGE NELSON: That is, swear to the fact
9 that --

10 MR. ROACH: That I just set forth.

11 JUDGE NELSON: -- he was there and they
12 were recitals of things he told.

13 MR. ROACH: And that what was retracted
14 here was attorney/client advice. I then went on and
15 said, "There is no basis" --

16 JUDGE NELSON: He's not challenging that.
17 He concedes this morning that the framework for the
18 attorney/client privilege is there.

19 MR. ROACH: Well, he's --

20 MR. LUBEL: I would just add that there
21 had been no exploration of who they might have
22 repeated these things to after the meeting, but that's
23 not before us now.

24 In other words, if they discussed these
25 things with analysts or other people that weren't

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 subject to the privilege, they might have waived some
2 privileges.

3 JUDGE NELSON: In other words, Mr. Bernuth
4 was there --

5 MR. ROACH: You know, we just keep getting
6 new arguments here. I answered -- I have answered--

7 JUDGE NELSON: Let's deal with the old
8 arguments.

9 MR. ROACH: All right.

10 JUDGE NELSON: Bernuth is there,
11 physically present.

12 MR. ROACH: Right.

13 JUDGE NELSON: That's agreed. It's agreed
14 that the presentations made by Mr. -- what's his name
15 --

16 MR. ROACH: White Matthews.

17 JUDGE NELSON: -- Matthews.

18 MR. ROACH: Ye.s

19 JUDGE NELSON: He's the chief financial
20 officer

21 MR. ROACH: Correct.

22 JUDGE NELSON: And it's agreed that Mr.
23 Matthews -- or you represent --

24 MR. ROACH: He was making the presentation
25 --

NEAL R. GROSS

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

1 JUDGE NELSON: Mr. Matthews is repeating,
2 to some degree, some stuff that Mr. Bernuth told him.

3 MR. ROACH: Absolutely right.

4 JUDGE NELSON: And there's no argument
5 about that so far.

6 MR. ROACH: Right.

7 JUDGE NELSON: All right.

8 MR. ROACH: Now, Mr. Lubel has three
9 points that he -- that he -- well, let's start with
10 the law.

11 I cited in my letter to him on January
12 tenth, to which he has never responded -- he has never
13 asked me for any more facts. He has never suggested
14 new arguments on the waiver. He has never answered my
15 letter.

16 I quoted to him in the letter a Ninth
17 Circuit decision In re Grand Jury proceedings which
18 says that you have to show, in order to have in camera
19 inspection, "a factual basis sufficient to support a
20 reasonable, good faith belief that in camera
21 inspection may reveal evidence that information in the
22 materials is not privileged."

23 Now he then comes in today, never having
24 responded to my letter or cited any contrary law, with
25 a District Court case from Florida, which is not in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 any way contradictory to that.

2 Rather, it's a case where they did do an
3 in camera inspection, but where they stressed -- the
4 Court stressed that "Here, the Defendant," and I'm
5 quoting, "is claiming the attorney/client privilege
6 for all that occurred at the meetings. And it is
7 apparent that the mere attendance of an attorney at a
8 meeting, even when the meeting is held at the
9 attorney's instance, does not render everything done
10 or said at the meeting privileged."

11 It's a wholly different situation. There
12 was a facially implausible claim of privilege being
13 advanced. And the Court thought it appropriate to
14 conduct an in camera inspection.

15 Now what does he offer you as his basis
16 for finding some good faith reason to think we're
17 misrepresenting that this is attorney/client
18 privilege?

19 He says first, it wasn't von Bernuth
20 talking. The answer to that is, there was only one
21 brief presentation for management by the senior
22 officer present, which was Mr. Matthews.

23 Mr. von Bernuth was there. The
24 presentation covered legal matters, as well as other
25 matters.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 He said second, the context --

2 JUDGE NELSON: What is Mr. Wilson -- is
3 that his name?

4 MR. ROACH: White Matthews.

5 JUDGE NELSON: Matthews? What if he
6 erroneously or incorrectly reflects the advise that
7 Mr. Bernuth gave him, and Mr. Bernuth then corrects
8 it?

9 MR. ROACH: What if -- what if he does?

10 JUDGE NELSON: How do we know that didn't
11 happen?

12 MR. ROACH: It's still attorney/client
13 advice. I don't understand, Your Honor. I mean, it
14 would still be privileged attorney/client advice if
15 it's -- if it's in the presentation and it's legal --
16 it's legal advice.

17 JUDGE NELSON: Of course, it wouldn't make
18 any difference because all he wants is what's on that
19 bullet anyway. Is that bullet a subject matter
20 heading like -- I'm looking at page 17.

21 MR. ROACH: No, they're comments about
22 legal aspects of this matter. They're comments --

23 JUDGE NELSON: It's not like the other
24 bullets?

25 MR. ROACH: Well, the other --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 JUDGE NELSON: The other bullets are
2 simply topics.

3 MR. ROACH: Yes, they're listing --
4 they're listing very, very briefly pros and cons of
5 the transaction. And some of those pros and cons are
6 legal in nature. Those are the ones we redacted.

7 JUDGE NELSON: So the redactions don't
8 look like the other bullets?

9 MR. ROACH: They look like the other
10 bullets. They are bullet points. They are -- they
11 just happen to be legal topics.

12 JUDGE NELSON: All right. Your point is
13 that he hasn't shown a reason to believe that you're
14 not properly claiming the attorney/client privilege?

15 MR. ROACH: Right. And in his other two
16 reasons, he says that the context is financial. Well,
17 it's not. You have a financial table followed by a
18 general list of pros and cons, which cover financial
19 and legal matters.

20 And then he says well, Mr. von Bernuth may
21 wear multiple hats because Mr. Harvey does for
22 Southern Pacific. Well, that's bizarre. Mr. von
23 Bernuth does not have a financial title. He is solely
24 a lawyer for Union Pacific Corporation.

25 And they have had weeks in which they

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005