

INTERSTATE COMMERCE COMMISSION 02/20/96

FINANCE DOCKET # 32760

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1 could have gone and researched Mr. von Bernuth's title
2 and his functions. And they have made no showing
3 whatsoever --

4 JUDGE NELSON: Are any of these people
5 witnesses?

6 MR. ROACH: No.

7 JUDGE NELSON: Mr. Harvey --

8 MR. ROACH: But I offered them an
9 affidavit of von Bernuth a month and a half ago. And
10 the next thing that happened was this was noted for
11 today.

12 I mean, this is -- this is just beyond the
13 -- Your Honor. And what we're going to end up with is
14 we're --

15 JUDGE NELSON: Let me ask you practically.
16 You've got very few deletions here.

17 MR. ROACH: Yes.

18 JUDGE NELSON: I could probably look at
19 them in quick order --

20 MR. ROACH: You could. But --

21 JUDGE NELSON: -- and sustain the claim.

22 MR. ROACH: -- it's a never --

23 JUDGE NELSON: And if I do that, what have
24 you lost?

25 MR. ROACH: What I've lost is --

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1 JUDGE NELSON: On the other hand, if I
2 return that it's improperly claimed, then we have the
3 basis for discovery. So, what do you lose by showing
4 it to me?

5 MR. ROACH: Then there is -- then there is
6 no threshold test for that point. And what I've got
7 is my friend who's going to get our privileged log
8 here momentarily and he'll be back. He'll say "Well,
9 now you should look at every one of these documents
10 because you've concluded in the first test litigation
11 of this matter" --

12 JUDGE NELSON: Not necessarily.

13 MR. ROACH: So there really isn't any
14 hurdle for them to jump over --

15 JUDGE NELSON: Well, I could distinguish
16 this particular incident in terms of its timing, its
17 personnel and so forth.

18 MR. ROACH: Well, I submit that they have
19 made no showing whatsoever. We gave them a detailed
20 proffer of proof, and offered to back it with an
21 affidavit.

22 And if that isn't enough to just -- to put
23 the burden where it belongs here --

24 JUDGE NELSON: I don't think you need the
25 affidavit because I thin he's agreeing with anything

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1 the affiate would say.

2 MR. ROACH: I didn't think I needed one
3 either, but I'm careful in protecting these matters
4 and careful in documenting our responsible conduct in
5 redacting things.

6 And I don't think that it should just be
7 automatic that you look behind what counsel does in
8 discovery in a responsible way, especially if we make
9 this short of showing.

10 JUDGE NELSON: Is there a way to
11 distinguish this case, Mr. Lubel, so that we don't --
12 you don't come in and I have to look at every claim
13 that's attorney/client privilege and review it in
14 camera?

15 MR. LUBEL: Yes, Your Honor.

16 JUDGE NELSON: Is this one different?

17 MR. LUBEL: Well, it is because of the --
18 as I noted initially, the significance of the time
19 period and what this is.

20 This is an early consideration by this
21 company of the merger. And it -- you know, it's at a
22 time that's critical, we think, in terms of showing
23 what their motivations are in going forward with this
24 merger.

25 And I can represent that I'm not going to

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1 do what -- we're not going to have a floodgate problem
2 here.

3 And you know, we're all here together.
4 You're the referee here. You'll -- I know that you
5 can deal with it if we try to get out of hand with it,
6 Your Honor.

7 I think again that we've made the
8 sufficient showing to allow --

9 JUDGE NELSON: Try again on why you think
10 it is that Mr. Roach is improperly invoking the
11 privilege.

12 MR. LUBEL: I'm sure that these are some
13 interesting remarks. I would bet that they're
14 interesting remarks about -- about this merger and
15 maybe their own internal view of why they're doing
16 this merger or whether it's appropriate or not.

17 JUDGE NELSON: But you're not going to see
18 them if they're attorney/client.

19 MR. LUBEL: Well, that's true. That's
20 true. But getting back to the showing, I'm really
21 just repeating myself now.

22 I mean, I -- it's not presented by the
23 lawyer. This is --

24 JUDGE NELSON: We've been through a lot of
25 battles with Mr. Roach, hard fights. Sometimes he's

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1 won, sometimes he's lost. Do we have any reason to
2 believe --

3 MR. LUBEL: Yes, Your Honor.

4 JUDGE NELSON: -- that he would be
5 improperly claiming a privilege here?

6 MR. LUBEL: Yes. Your Honor, I'm not
7 saying that they would be doing anything in bad faith.
8 But I believe, and I've been --

9 JUDGE NELSON: it's a high stakes game if
10 he's playing it because it will blow up in his face if
11 I look at the stuff.

12 MR. LUBEL: Over 20 years, I have seen
13 these situations come up before. And people make
14 subjective judgements. If there is a remark that
15 maybe would be a little damaging to their case,
16 there's a way to make a subjective judgement and
17 rationalize, you know, that's akin to what the
18 attorney said. Let's call that, you know,
19 attorney/client advice.

20 It's much like we dealt with earlier today
21 when we talked about feasibility. They made the
22 judgement that these build-outs were not feasible.
23 But we shouldn't have to rely on their judgement. I
24 mean, it should be tested.

25 And here, we're just asking it to be

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1 tested by you for the reasons that I've set forth.

2 JUDGE NELSON: Let me ask you something.

3 MR. LUBEL: And I might also add that I
4 said it was more than financial.

5 JUDGE NELSON: I have a question, Mr.
6 Roach. Is there a difference between five and page
7 17? Page five looks like a chart.

8 MR. ROACH: They both refer to legal
9 considerations.

10 JUDGE NELSON: Five could be simply a
11 chart that was handed to people. Seventeen could have
12 been an outline of a talk that was given. Can you
13 help us on those?

14 MR. ROACH: Five was a presentation that
15 was made. There were overheads. So five is
16 overheads.

17 JUDGE NELSON: Who made -- oh, five is an
18 overhead --

19 MR. ROACH: Mr. Matthews --

20 JUDGE NELSON: -- while Mr. Matthews was
21 talking?

22 MR. ROACH: Right. And 17 is part of
23 back-up materials that are in the Board book that they
24 can look at, but that aren't actually spoken from,
25 okay?

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1 JUDGE NELSON: So the only thing they
2 heard directly was five.

3 MR. ROACH: Right. Can I respond to the
4 notion that I'm making subjective --

5 JUDGE NELSON: Well, you're helping me
6 now.

7 MR. ROACH: I understand.

8 JUDGE NELSON: I was coming out just the
9 other way. It looked to me like 17 was the more
10 sensitive stuff in the sense that it got communicated
11 to them in a speech. It isn't.

12 The representation is that 17 is back-up,
13 which they may never even have looked at. Is that
14 correct?

15 MR. ROACH: Yes.

16 JUDGE NELSON: But that five was an
17 overhead that was projected while Mr. Matthews was
18 making a talk?

19 MR. ROACH: They looked at both as far as
20 I'm concerned, Your Honor. These are Board materials.
21 I presume they looked at both.

22 But I'm really -- I need to respond to
23 this argument that I'm making subjective judgements.

24 JUDGE NELSON: Well, don't you see a
25 difference between a bunch of paper that's available

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1 to look at if they feel like it and the actual stuff
2 they heard?

3 MR. ROACH: I don't think so. I think the
4 Board considers and looks at both. But the point I'd
5 like to stress, Your Honor, is I didn't make
6 tendentious, subjective judgements here.

7 JUDGE NELSON: You think both are in the
8 same category?

9 MR. ROACH: I'm --

10 JUDGE NELSON: It seems to me he has a
11 weaker case for the stuff that's in the background if
12 we didn't even know if they looked at it. He has a
13 stronger case for me to see the case that was up on
14 projector that they actually heard about.

15 MR. ROACH: I really do not see the
16 distinction. I think how strong a case he has turns
17 on whether he has given you the slightest reason to
18 believe that we have improperly redacted
19 attorney/client advice from any of these papers.

20 And what I am here to represent to you is
21 we discussed this with UP's general counsel. Our
22 lawyers didn't sit off in a room making tendentious
23 judgements. We discussed this with counsel.

24 And if necessary, we'll bring Mr. von
25 Bernuth here and he'll explain to you the basis for

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1 each of these decisions and why it is legal advice and
2 why it was redacted.

3 This is not something where we just wing
4 it, and we go out and redact things where it's even
5 arguable that there's a legal context.

6 JUDGE NELSON: Do you want to hear Mr.
7 Bernuth on these subjects?

8 MR. LUBEL: Your Honor, he made that
9 offer.

10 MR. ROACH: I did.

11 MR. LUBEL: And again, my first thought
12 was well, we can depose Mr. Bernuth. But why do
13 through all that?

14 It's here. It can be looked at. It can
15 be over with. And I don't think we need to make this
16 to the level of professionalism, Your Honor.

17 I'm not challenging Mr. Roach's
18 professionalism. But every -- every lawyer has a duty
19 to his client to advocate vigorously for that client.
20 And here, you know, you've got the financial officer
21 making statements. He's talking about operational
22 matters, not just financial matters.

23 JUDGE NELSON: Do you see a difference
24 between page 17 and page five --

25 MR. LUBEL: Your Honor, I --

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1 JUDGE NELSON: -- as to which one you
2 would want me to look at?

3 MR. LUBEL: I'd rather -- well, let me
4 see, five seems to have more there. I find it hard to
5 make the distinction, Your Honor. I have to agree
6 with Mr. Roach on that.

7 I mean, quantitatively, five has more and
8 it is -- it is more information. And when he's
9 talking -- well, but he's talking, but it's a prepared
10 slide.

11 JUDGE NELSON: What form is 17 in?

12 MR. LUBEL: Well, 17 was just written --
13 a written document that was handed out. There
14 seems --

15 JUDGE NELSON: But in the back-up papers.

16 MR. LUBEL: -- from our point of view --
17 from our point of view, either one -- this is the
18 presentation by the chief financial officer, Mr.
19 Matthews. We think that raises some question about
20 whether it was financial and operative or business
21 judgements rather than strictly legal information
22 being given, and at least enough showing to have an in
23 camera inspection.

24 JUDGE NELSON: Supposing I were to say to
25 Mr. Roach, "Mr. Roach, there are" -- what are there --

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1 "five redactions at issue here. You pick any one of
2 them, show me the one, and the claim stands or falls
3 on the one, your pick." How would you react to that?

4 MR. ROACH: Well I'm a gambling man, I'd
5 rather take that than nothing, Your Honor, but --

6 JUDGE NELSON: All right, that's what I'm
7 going to do. I'm going to direct Mr. Roach to select
8 any one of the five.

9 MR. LUBEL: He gets the choice of which
10 one?

11 JUDGE NELSON: He picks. Show it to me
12 and I'll rule whether it's attorney/client and I'll
13 draw the inference from that having observed Mr. Roach
14 in action here that he's an attorney of good faith.

15 MR. LUBEL: If I could suggest an
16 alternative, just a slight alternative there, Your
17 Honor, why doesn't Your Honor just pick one of the
18 five places, and that would be a lot more random.

19 Again, no offense to them, but if they --
20 if they have the right to choose, they would chose
21 presumably the one that's most clearly within their
22 privilege.

23 JUDGE NELSON: How do I find them without
24 looking at them?

25 MR. LUBEL: No, I'm just saying there are

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1 --

2 JUDGE NELSON: Oh, I just pick one off the
3 sheet here?

4 MR. LUBEL: You pick you and you use that
5 as a test case.

6 JUDGE NELSON: And a test, and if it
7 sustains the privilege, that's the --

8 MR. LUBEL: We'll live with that. We'll
9 live with that, Your Honor.

10 JUDGE NELSON: But if it doesn't, then we
11 get to go the next one.

12 MR. ROACH: I'll hand you page 17 because
13 I just reached for it. I'll hand you whatever you
14 want. Seventeen has more material on it. You can
15 take what you want. It's got it right there.

16 JUDGE NELSON: He says either one on 17.
17 Which one do you want me to look at?

18 MR. ROACH: You can look at both of them.

19 JUDGE NELSON: I'll look at one, which
20 one?

21 MR. ROACH: Look at whatever you like. I
22 can't redact it here.

23 MR. LUBEL: I would look at both of them,
24 Your Honor. It seems that --

25 JUDGE NELSON: All right, I'm now looking

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1 at the --

2 MR. LUBEL: Okay.

3 (Pause.)

4 JUDGE NELSON: I have two reactions. One,
5 it undoubtedly reflects attorney/client advice and I
6 intend to protect it. Two, if you got it, you
7 couldn't do anything with it.

8 MR. LUBEL: Thank you, Your Honor.

9 JUDGE NELSON: It seems to me of no
10 litigation. It isn't thing that we couldn't see
11 anyway. There are no dramatic words, no smoking guns,
12 more or less legal truisms.

13 MR. LUBEL: Thank you, Your Honor.

14 JUDGE NELSON: All right.

15 MR. LUBEL: We'll always wonder what was
16 on the other document?

17 JUDGE NELSON: Anything else?

18 MR. LUBEL: One last issue, Your Honor.

19 JUDGE NELSON: I may say, having seen
20 those, that I have no doubt about the validity of
21 other claims and would suspect that you would get
22 nothing from them if I gave them to you.

23 Anything remaining?

24 MR. LUBEL: Your Honor, we have one other
25 issue, and this has to do --

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1 JUDGE NELSON: Designating an advanced
2 all-party --

3 MR. LUBEL: Yes, yes. And this is
4 something that I think for other people also, although
5 there's a deposition going on today.

6 The Applicants have followed the practice
7 of in advance designating all portions of all
8 depositions as highly confidential, meaning only an
9 outside counsel can look at them, then to be followed
10 up by their later -- you know, declassifying once
11 they've had a chance to look at the transcript itself.

12 We feel, and I'll explain briefly why,
13 that that is over-broad and an abuse of the highly
14 confidential designation. I'll give some examples,
15 and that the better practice would be for them to, as
16 the deposition is going on, when a highly confidential
17 document is mentioned or some testimony that they feel
18 is highly confidential, that they designate it at that
19 time.

20 We're not asking that there be a debate at
21 that time.

22 JUDGE NELSON: When they do it?

23 MR. LUBEL: Yes. We're not saying that we
24 have the right to debate it then. Once they designate
25 it, it's their -- it's their right to do that.

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1 Let me give an example of how we did that,
2 Your Honor.

3 JUDGE NELSON: We go through that here
4 from time to time. And I can tell you, and I can tell
5 you it's a lot more cumbersome to try to do it was you
6 go along than it does once you're back looking at it.

7 MR. LUBEL: Your Honor, but --

8 JUDGE NELSON: You've got a hard one here.

9 MR. LUBEL: The example -- but I hope to
10 make some progress on it, Your Honor, because we have
11 a real --

12 JUDGE NELSON: You drew a FERC Judge. We
13 have this practice.

14 MR. LUBEL: Well, we have a real live
15 example here, Your Honor, and that was Mr.
16 Rebensdorf's deposition. And Mr. Rebensdorf is a very
17 key person, high up in the company, head of Strategic
18 Planning. He negotiated the agreement with Burlington
19 Northern.

20 In his deposition, there were two
21 representatives from Conrail there, who aren't privy
22 to highly confidential material. The deposition went
23 on for two days.

24 At, I believe, three points during the
25 deposition, they were asked to leave because highly

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1 confidential material was being discussed, and they
2 did.

3 And I think that sets a model by which we
4 could do this.

5 JUDGE NELSON: It can be done.

6 MR. LUBEL: Yes. And Your Honor, it --

7 JUDGE NELSON: And you have another model,
8 this morning's proceedings, Mr. Lubel.

9 MR. LUBEL: Seeing where you're going,
10 Your Honor --

11 JUDGE NELSON: There have been times when
12 during this proceeding, lawyers wanted these
13 proceedings closed.

14 MR. LUBEL: If I might, I just have about
15 a minute more, Mr. Roach. The problem we have, Your
16 Honor, the problem for us with doing it this way is
17 that they say they will later designate, okay?

18 We have had about 14 or 15 depositions.
19 The designations have come 16 days later, eight days
20 later.

21 We just, in the last day or two, got Mr.
22 Runde's deposition, the designations of the highly
23 confidential portions. It was taken January 16th.

24 The problem is we can't share things with
25 our client --

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1 JUDGE NELSON: Maybe -- maybe our problem
2 is to speed that process up.

3 MR. LUBEL: That's what I'd ask for. And
4 I'll give one more example and then I'll stop.

5 JUDGE NELSON: Because you need that
6 declassified stuff to use with your consultants.

7 MR. LUBEL: Well, not the consultants so
8 much as to be able to work with our clients to --

9 JUDGE NELSON: You can show it now to the
10 consultants. It's the client you can't show it to.

11 MR. LUBEL: Right. But I'll give you just
12 one more example, Your Honor. And that was Mr.
13 Grinstein's deposition last Friday. Now, this was not
14 their show. This was Burlington Northern. But they
15 followed the lead of the Applicants.

16 We started the deposition. They
17 designated the whole thing as highly confidential.
18 What's one of the first things that was talked about?
19 The Forbes article, you know, that was published in a
20 national magazine.

21 Now here's my question: they've
22 designated it highly confidential. Does that mean
23 that I can't tell my client that Mr. Grinstein
24 endorsed that article? He said he agreed with
25 everything in there, that they didn't misrepresent

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1 him?

2 JUDGE NELSON: I see the problem.

3 MR. LUBEL: That's not highly
4 confidential. All I would ask, Your Honor, is that
5 maybe some three-day period, that, you know, within
6 three days after --

7 JUDGE NELSON: What we need here, Mr.
8 Roach, is a suggestion which gets us somewhere in
9 between doing it instantly as we go along and doing it
10 16 days later.

11 MR. ROACH: Sure.

12 JUDGE NELSON: I'd like to get some help
13 on that.

14 MR. ROACH: Let me address it briefly if
15 I may, Your Honor. First of all, I -- when Mr. Lubel
16 raised this issue, again many weeks ago, I wrote to
17 him and I said, "If there is anything that you want us
18 to turn to first, we will do it immediately."

19 And we never heard back from him on that.
20 We have had requests from some other parties and --

21 JUDGE NELSON: I don't understand what
22 that means.

23 MR. ROACH: It means if there's a segment
24 of the deposition you want to promptly declassify so
25 you can discuss it with your client, we'll do it --

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1 we'll move it to the front of the line and do it
2 promptly. And we have done that for some other
3 parties.

4 We have never had that -- Mr. Lubel take
5 us up on that offer. We are moving as fast as we can.
6 I expect that we will be declassifying most of the
7 remaining depositions this week.

8 I have been lashing my people to get it
9 done. But here's the problem. First of all, I don't
10 know when my witnesses are going to say highly
11 confidential things. And a lot of these are just full
12 of highly confidential material.

13 JUDGE NELSON: I know.

14 MR. ROACH: Second, this Conrail example
15 is a perfect example of how I hurt myself by trying to
16 be reasonable in these cases.

17 I let the Conrail people sit there. And
18 I tried to guess when we were getting in trouble and
19 had to ask them to leave the room. And I'm not going
20 to do that again.

21 We're going to have these depositions on
22 a highly confidential basis and then we'll declassify
23 them properly.

24 As far as speed, I mean, I'll do my
25 absolute darndest to get them done this week. We have

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1 had 35 sets of discovery requests, written discovery
2 requests, in the past --

3 JUDGE NELSON: What's left? How many
4 depositions after these?

5 MR. ROACH: We're close to the end of the
6 schedule. We've got about four or five left.

7 JUDGE NELSON: That have not been taken?

8 MR. ROACH: That have not been taken.
9 We've have, Lord, about 17 or 18 taken. We've
10 declassified about a third of those, and we're getting
11 close to being finished with --

12 JUDGE NELSON: Well, why don't you make an
13 agreement that you can -- the outstanding depositions
14 will be finished this week. And with those yet to be
15 taken, you'll give them a turnaround of "X" days?

16 Tell me what "X" will be, and I'll approve
17 it. You can work with him on that. We're going to
18 take a recess for some discussions anyway.

19 MR. ROACH: I mean -- fine. I mean,
20 barring that we come to you with good cause, we will
21 try to finish in five business days.

22 JUDGE NELSON: If this were an ordinary
23 litigation --

24 MR. LUBEL: If you can't, you know --

25 MR. ROACH: Right.

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1 MR. LUBEL: -- we can talk about it.

2 JUDGE NELSON: We know that there's a
3 tight time frame. But and we know --

4 MR. ROACH: That's fine with us, Your
5 Honor.

6 JUDGE NELSON: So I want to -- we'll take
7 a recess, and we're going to talk about the build-in
8 materials and how to work out a scope of that and
9 particularly with Mr. Norton, and the mechanics of
10 turning over -- some of those build-in materials are
11 more sensitive than others. I have forgotten which.

12 And then we're going to talk, I think, Mr.
13 Roach and Mr. Lubel, with regard to this matter of
14 declassifying of depositions so that we can clean up
15 what's outstanding and make a commitment as to the
16 future.

17 MR. ROACH: I think we're -- I think
18 we're together on that.

19 JUDGE NELSON: If you are, then I don't
20 need to do anything. But if you agree on something
21 and you want -- if you find something that you want to
22 be reflected, you tell me and I'll recite it as an
23 order.

24 MR. LUBEL: Thank you.

25 JUDGE NELSON: How much time do we need?

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1 Do we want to get lunch as well as do these talks, or
2 -- Mr. Norton, you make a suggestion because you're
3 going to be the one involved and on the phone and so
4 forth here. Would an hour do it?

5 MR. NORTON: I think it probably won't be
6 that much. Initially if we could just -- if I could
7 see what they want and --

8 JUDGE NELSON: Why don't we take a break
9 and then you call me when you're ready to resume.

10 MR. NORTON: Okay.

11 JUDGE NELSON: How would that be?

12 MR. NORTON: Fine.

13 JUDGE NELSON: All right. We're going to
14 break, and I will be on call for Mr. Norton.

15 (Whereupon, the proceedings went off the
16 record at 12:36 p.m. and resumed at 1:54 p.m.)

17 JUDGE NELSON: Please be seated. Off the
18 record.

19 (Whereupon, the proceedings went off the
20 record at 1:54 p.m. and resumed at 1:54 p.m.)

21 JUDGE NELSON: I'm advised with regard to
22 the outstanding -- remainder of the outstanding issues
23 that we discussed this morning that there's agreement
24 between counsel, or among counsel, and all of that
25 will be reflected in an exchange of correspondence

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1 which will recite what the agreement is.

2 Any further comment on that?

3 (No response.)

4 JUDGE NELSON: I want to ask whether we --
5 what we should do in terms of the next discovery
6 conference. Let's go off the record and see how we
7 stand regarding that.

8 (Whereupon, the proceedings went off the
9 record at 1:55 p.m. and resumed at 1:56 p.m.)

10 JUDGE NELSON: We will keep in effect the
11 current Wednesday/Friday machinery for discovery
12 conference and be ready on each Friday as it may be
13 needed.

14 Anything else we need to discuss today?

15 (No response.)

16 JUDGE NELSON: All right, that adjourns
17 this discovery conference.

18 (Whereupon, the discovery conference was
19 concluded at 1:56 p.m.)

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CERTIFICATE

This is to certify that the foregoing transcript in the

matter of: SURFACE TRANSPORTATION BOARD
FINANCE DOCKET NO. 32760

Before: THE HONORABLE JEROME NELSON
ADMINISTRATIVE LAW JUDGE

Date: FEBRUARY 20, 1996

Place: WASHINGTON, D.C.

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

/s/ Mike Rudoff

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