

INTERSTATE COMMERCE COMMISSION

02/27/96

FINANCE DOCKET # 32760

1421-1468

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 27, 1996

Federal Energy Regulatory  
Commission  
Hearing Room 7  
Second Floor  
888 First Street, N.E.  
Washington, D.C.

The above-entitled matter came on for  
hearing, pursuant to notice, at 2:00 p.m.

BEFORE:

THE HONORABLE JEROME NELSON  
Administrative Law Judge

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

(2:10 p.m.)

JUDGE NELSON: Let's take appearances, so we have a record of who's here. Mr. Gulland?

MR. GULLAND: Gene Gulland, for the Applicants.

MR. NORTON: Gerald Norton, for the Applicants.

MS. HARRIS: Carol Harris, for the Applicants.

MS. RINN: Lorian Rinn, for Applicants.

MR. MULLINS: William Mullins, for Kansas City Southern Railway Company. With me today is Mr. David Foshee, of our firm, and Mr. Bob Dreiling, who is in-house counsel at Kansas City Southern Railway Company.

Ms. Patteye Simpson, who is in our sales and marketing department, and spent 17 years in the UP's sales and marketing department.

We have Mr. Lynn Turner, who is with Kansas City Southern Railway Company. Again, just joined us two years ago, spent a bout 13 or 14 years with the Southern Pacific in their sales and marketing department.

MS. O'BRIEN: And Kellee O'Brien, for

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1 Burlington Northern Railroad Company, Atchison, Topeka  
2 and Sante Fe.

3 JUDGE NELSON: Well, all I know about  
4 where we are now is -- the subject is, of course,  
5 interrogatory 62 and 63, which had to do with a  
6 universe that we've discussed of 50 shippers,  
7 involving coal, grain, or chemical, over a series of  
8 corridors.

9 I think there were eight corridors, and  
10 they were on a list. In trying to reach some  
11 agreement on a narrowing of the scope, which would  
12 enable this production to go on, without tremendous  
13 burden, undue burden to the Applicants.

14 Counsel have conferred, and I see, in  
15 letters -- I have Mr. Mullins's letters of February  
16 23rd, 26th, representing efforts to reach agreement,  
17 and culminating in the unsuccessful effort.

18 According to Mr. Mullins's letters, they  
19 were willing to cut their list from 50 shippers to 23,  
20 but that, somewhere along the line, there was a  
21 counter-offer to limit the request to 21 shippers, and  
22 the 23 would have been all right with KCS, but 21  
23 wasn't.

24 And so this dispute is now about the  
25 addition of two shippers. I know an easy way to

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1 resolve it. Is that all that's left? For this, that  
2 we brought people from Omaha, San Francisco?

3 MR. MULLINS: It's not all that's left.

4 JUDGE NELSON: On the face of it, I don't  
5 even understand why the dispute is of this de minimis  
6 nature. So, it's obvious that there must be more to  
7 it than meets the eye.

8 MR. MULLINS: I think so.

9 JUDGE NELSON: Why don't you tell me about  
10 it, Mr. Mullins?

11 MR. MULLINS: That is correct. We  
12 believe, on investigation of further information, and  
13 speaking with Mr. Turner and Ms. Simpson, who have  
14 vast experience in how UP runs their sales and  
15 marketing department, and how SP runs their sales and  
16 marketing department.

17 We took you up on your directive, to me,  
18 to be able to establish however I wanted to establish  
19 that this would not be a burden to them, although I  
20 would suggest that, since they're the ones objecting  
21 to the discovery, they have the burden to show that it  
22 is a burden to produce these documents.

23 And, upon further discussion, we have  
24 learned that it is not as burdensome as Applicants  
25 would lead us to believe, to produce documents not

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1 only for the 23 shippers, but for the 50 shippers.

2 And we stand here asking for relief, and  
3 asking that they produce information related to all 50  
4 shippers.

5 And we are -- stand ready, willing, and  
6 able to answer any claims that they have, regarding  
7 burden. You can specifically, if you want to, swear  
8 them under oath, and take their testimony, whatever  
9 you need to do, Judge Nelson.

10 But these are the people, right there, who  
11 have specific knowledge of how these files are  
12 organized, and how it would not be a burden. And  
13 we're interested to hear Applicants' arguments as to  
14 why it is a burden, to produce 50 shippers.

15 JUDGE NELSON: So, do you want to start  
16 with 50?

17 MR. MULLINS: That's correct.

18 JUDGE NELSON: The 23 and the 21 are by  
19 the wayside, because they were unsuccessfully attempts  
20 to resolve it?

21 MR. MULLINS: That, and we have learned  
22 additional information that, in our belief, 50  
23 shippers is not a burden.

24 JUDGE NELSON: So we've got 50 shippers,  
25 of three commodities, over eight corridors, is it?

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1 MR. MULLINS: Yes.

2 JUDGE NELSON: Where is that sheet that  
3 you showed me last time, that listed all this?

4 MR. MULLINS: That's in attachments to  
5 Kansas City Railway Company's third discovery request.

6 JUDGE NELSON: Didn't you have a chart, or  
7 something like that?

8 MR. MULLINS: Yes, sir. I have it with  
9 me. Do you want me to?

10 JUDGE NELSON: Please, let me see it.

11 MR. MULLINS: I can give you my copy.

12 JUDGE NELSON: Let's see if I have mine.  
13 I have the Kansas City Southern third request. And  
14 what sheet am I looking for now?

15 MR. MULLINS: The attachment on the back,  
16 attachment 1.

17 JUDGE NELSON: I see. I have page one.

18 MR. MULLINS: I can just give you a copy,  
19 Your Honor.

20 JUDGE NELSON: I think I have it.

21 MR. MULLINS: Okay.

22 JUDGE NELSON: Attachment 1 to KCS's third  
23 discovery request.

24 MR. MULLINS: That's correct.  
25

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1 JUDGE NELSON: It's a document of some  
2 three pages. Well, I suppose what we have here is a -  
3 - what looks like it's going to be a factual dispute.  
4 And I hate to have lawyers on the stand, and I didn't  
5 really anticipate this, but --

6 MR. MULLINS: Well, we believe Ms. Rinn  
7 and Ms. Harris have been representing to you that --

8 JUDGE NELSON: -- put them up there, if  
9 necessary.

10 MR. GULLAND: I think Ms. Rinn and Ms.  
11 Harris can address the issues. If you wish them to be  
12 under oath --

13 JUDGE NELSON: I don't think so  
14 necessarily, unless Mr. Mullins wants to contend that.  
15 He's got people there he want to put on, who are, I  
16 guess, going to counter this in some way.

17 MR. GULLAND: I don't understand why it is  
18 that the agreement I thought we had, we didn't have.  
19 The discrepancy of one shipper, I should say, had to  
20 do with the fact that one shipper file that has been  
21 requested --

22 JUDGE NELSON: This is history. Those are  
23 off the table is exactly what Mr. Mullins is saying,  
24 and he's now prepared to go forward requesting  
25 production of the entire universe of documents. The

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1 50 shippers, the eight corridors.

2 So, do you want to start with what this  
3 burden is? You can start with Ms. Rinn or Ms. harris,  
4 wherever you want to start. And we'll hear the  
5 recital -- now, this is unsworn.

6 MR. MULLINS: That's fine.

7 JUDGE NELSON: And we'll see where it  
8 goes, and I guess I'm sorry I didn't know this was  
9 coming. I would have directed the Applicants to  
10 produce someone capable of getting up there.

11 MR. MULLINS: Well, we believe that Ms.  
12 Rinn and Ms. Harris have been testifying all along to  
13 you, about the burden. They've been sitting in here,  
14 providing testimony, discovery conference after  
15 discovery conference, about how burdensome it is.

16 JUDGE NELSON: And I have taken their word  
17 for it.

18 MR. MULLINS: And you have taken their  
19 word for it, that's correct.

20 JUDGE NELSON: And now, if we have a  
21 factual dispute.

22 MR. MULLINS: That's right.

23 JUDGE NELSON: I would -- I'm not sure  
24 where this goes, whether we're going to have unsworn  
25 testimony versus sworn. Let's hear what it is they

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1 say, and then you can say what it is you want to  
2 counter. So, how do you want to begin? With the, Ms.  
3 Rinn or Ms. Harris?

4 MR. GULLAND: Ms. Rinn.

5 JUDGE NELSON: Well, Ms. Rinn, take us  
6 through here, step by step, what the problems are,  
7 what you have to do, where the stuff is, how many  
8 hours it involves. Tell us all you can, factually,  
9 about the problems we're confronting, and we'll see  
10 where it leads.

11 MS. RINN: Yes, sir.

12 JUDGE NELSON: This is with regard to the  
13 entire search for the 50 shippers, the three  
14 commodities, the eight corridors.

15 MS. RINN: Yes, sir. I, of course, came  
16 today prepared to talk about the 23, and, in  
17 particular, the 14, that were indicated as being UP  
18 customers. But I believe that I'll be able to adjust  
19 appropriately.

20 JUDGE NELSON: I'll be happy to give you  
21 some time, to refocus, if the case has taken a turn  
22 that you suddenly didn't anticipate.

23 I have the whole afternoon here, and I  
24 want to be sure we get this right. And not be -- this  
25 is not a game where surprise counts. If you'd like

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1 some time to confer with counsel, and maybe confer  
2 with the client, and work out some more details before  
3 you prepare to give this recital.

4 MS. RINN: I think I'm prepared to go  
5 forward now, Your Honor, if you can allow a little bit  
6 of hesitancy while I do a little bit of mental  
7 arithmetic.

8 While I change my figures, because, in  
9 preparation for this hearing, I did, in fact,  
10 undertake a factual investigation, planning on, if I  
11 had to undertake this search, how much would it  
12 require in terms of resources, and how much would it  
13 require in terms of time, in order to produce these  
14 documents.

15 JUDGE NELSON: Well, you're an experienced  
16 lady. You're not like some person that's just up  
17 there counting the file drawers, and suddenly gets  
18 caught with a switch. So you know enough to ask for  
19 time, if you want it, and you want to go forward.

20 MS. RINN: At least at this point, Your  
21 Honor.

22 JUDGE NELSON: Then, let's go.

23 MS. RINN: Okay. As I said, I came in  
24 anticipating that we were going to be arguing about  
25 the burden, from Union Pacific's perspective, for

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1 providing the files associated with the 14 customers  
2 of the 23 that were identified by KCS as being UP  
3 customers.

4 And, based on consulting with the  
5 coordinator I have in marketing sales department,  
6 contacting the appropriate personnel about how much  
7 paper there were, was. How many file drawers, and  
8 translating that.

9 We came up with the approximation of 24 --  
10 24, 25 boxes of documents. Comparing that to what we  
11 have as empirical experience.

12 For producing the files, the entire  
13 contents of the files, of the ten plastics customers  
14 for Union Pacific, which accounted for approximately  
15 15 boxes, and it took us 124 hours to simply copy the  
16 contents of those 15 boxes.

17 I estimated that, with 24 boxes, which was  
18 a ratio of 1.67, to 15 boxes, it would take us 206  
19 hours merely to copy.

20 JUDGE NELSON: Two hundred and six hours  
21 to copy the documents --

22 MS. RINN: Without any attempt at a  
23 review.

24 JUDGE NELSON: In the 24 boxes?

25 MS. RINN: Yes.

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1 JUDGE NELSON: And those are the documents  
2 that pertain to how many shippers?

3 MS. RINN: Fourteen.

4 JUDGE NELSON: Fourteen of the 50?

5 MS. RINN: That is correct. Now, right  
6 now, I have, in order to accommodate the discovery  
7 demands that have been made on us, in this case, where  
8 I have not one but two Xerox machines, set aside an  
9 entire large conference room to do nothing but receive  
10 and copy documents.

11 And I have people, in ordinary  
12 circumstances, coming in at six-thirty in the morning,  
13 and working until about nine o'clock at night, copying  
14 documents. Just to keep up with ordinary demand

15 I have not sat down and figured out what  
16 the elapsed time would be, in order to cover the 206  
17 hours of copying with the 14 shippers that they're  
18 talking about.

19 But just say that, of the 50, the same  
20 proportion holds. So that we'd be doing 28 out of the  
21 50. I think it is a fair estimate to say we're  
22 talking 400 hours of copying.

23 And I am prepared to say, based on my past  
24 experience, and having done significant document  
25 productions, I have consistently found it is not

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1 satisfactory to go to outside print firms --

2 JUDGE NELSON: Four hundred hours of  
3 copying would give you about 28 boxes?

4 MS. RINN: Yes.

5 JUDGE NELSON: Not 50?

6 MS. RINN: No. I'm saying 28 boxes for 28  
7 customers. I'm just doing a roughed doubling.

8 JUDGE NELSON: So what would 50 be?

9 MS. RINN: Well, if it were going to be  
10 50, and we had to produce it, and not knowing exactly  
11 who those customers are -- but I do remember for the  
12 list of 50 customers they had for FMC.

13 I remember quite distinctly that the  
14 commodity they indicated for FMC is soda ash, and that  
15 FMC is our largest single shipper of soda ash, and  
16 they ship nationwide.

17 My recollection is that I had been given  
18 an estimate we had something in the neighborhood of a  
19 minimum of ten to 12 boxes of FMC soda ash alone.

20 I think it is fair to say that the 24  
21 boxes, that I have actually had estimated for me, at  
22 this point in time, is but a small fraction of the  
23 total number of boxes I would have to come up with, in  
24 terms of the 50 who were on the list in January.

25 JUDGE NELSON: Do you have an estimate of

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1 the number of hours it would take to photograph the  
2 boxes for the 50 shippers?

3 MS. RINN: No, I do not. I do not.

4 JUDGE NELSON: You know that it's going to  
5 be greater than 400 hours?

6 MS. RINN: Absolutely. Absolutely.

7 JUDGE NELSON: Would it be less than 800  
8 hours?

9 MS. RINN: This I'd have to ask your  
10 indulgence, Your Honor. I would have to go back and  
11 refamiliarize myself with the list of 50, as to who is  
12 on that.

13 JUDGE NELSON: How long would it take you  
14 to do that?

15 MS. RINN: Maybe ten, 15 minutes.

16 JUDGE NELSON: Why don't we do that?

17 MS. RINN: And I would be giving you a  
18 rough estimate, but I was fairly familiar with most of  
19 those customers, and how extensive their files were  
20 before.

21 JUDGE NELSON: Why don't you review your  
22 thoughts. The first step is copying?

23 MS. RINN: The first step is copying. Or  
24 I had also estimated it by using a different process.

25 JUDGE NELSON: What other steps are we

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1 going to have?

2 MS. RINN: Well --

3 JUDGE NELSON: What do you do after you  
4 copy? Then you review the copies, I'd say?

5 MS. RINN: If we followed the process that  
6 was used on the SPI situation, we copied the entire  
7 contents, with no attempt to do any review, sent it to  
8 Washington, where our counsel, Covington and Burling,  
9 review --

10 JUDGE NELSON: You don't have to follow  
11 any models. Just tell me what it is you are going to  
12 do with these documents. It's first, you're going to  
13 copy them, and you're going to get us some details  
14 about that. Then what happens?

15 MS. RINN: Then I'd send them to Covington  
16 to review, for privilege to pull those documents.

17 JUDGE NELSON: All right.

18 MS. RINN: They would then number the  
19 documents, and put them into the depository.

20 JUDGE NELSON: Minus anything they pull?

21 MS. RINN: That is correct. And I --

22 JUDGE NELSON: -- client or something of  
23 that nature.

24 MS. RINN: And, given the fact that the  
25 process that is being used is putting an individual

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1 sticker on each piece of paper, and that that is a  
2 time-consuming process.

3 JUDGE NELSON: So the burden is the  
4 copying and the review time.

5 MS. RINN: And the review time. Then,  
6 after the review is completed, you have to physically  
7 attach a sticker, so we have a document number.

8 JUDGE NELSON: Who does that?

9 MS. RINN: Covington & Burling has people  
10 who do that. And I think it is fair to say that,  
11 after the review has been completed --

12 JUDGE NELSON: I'll call that stickering.

13 MS. RINN: Yes. You need at least as much  
14 time to do the stickering, and then the copying to put  
15 the documents in the depository.

16 Because what we do, Your Honor, in order  
17 to facilitate making documents available to everybody,  
18 is we have a working copy that we use to send out to  
19 make copies for people as they request it.

20 And, therefore, we maintain an intact set  
21 of documents, at all times, in the depository. So  
22 after having stickered the documents that are going to  
23 be produced, a copy has to be made so that we have the  
24 two, intact sets. So that we can promptly respond to  
25 any requests by the parties.

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1 I think it is fair to say that it would  
2 take us at least as long, probably another quarter  
3 percent -- let's call it 125 percent, as long to  
4 sticker and copy the documents, to put them into the  
5 depository, as it took us to copy the documents in the  
6 first place.

7 JUDGE NELSON: We'll call copying, initial  
8 copying is x. And stickering, and what's that last  
9 copying? Intact? What did you call it?

10 MS. RINN: Basically, copying an intact,  
11 numbered set of documents.

12 JUDGE NELSON: Intact copying would be  
13 1.25 x?

14 MS. RINN: Yes.

15 JUDGE NELSON: And you will come up with  
16 what x's?

17 MS. RINN: Yes.

18 JUDGE NELSON: And then you've got this  
19 review time, in the middle?

20 MS. RINN: Yes, sir.

21 JUDGE NELSON: And you'll give us  
22 something about that.

23 MS. RINN: Yes.

24 JUDGE NELSON: Now, what I don't see on  
25 here is any search time. You come upon these files

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1 pretty easily?

2 MS. RINN: We have already begun it, and  
3 I believe that I could have the 14 out of the 23, I  
4 could have those gathered by the end of business  
5 tomorrow, because I've already had my people starting  
6 on that.

7 JUDGE NELSON: Well, that's 14, but that's  
8 not --

9 MS. RINN: For me to come up with the  
10 remaining ones? For me to come up with the remaining  
11 ones, particularly given that some of those other  
12 files are very extensive, my belief we have said it  
13 would take another week.

14 And my recommendation, and the way I would  
15 probably organize it -- because you're probably  
16 talking about 50 files, is that, in fact, I would want  
17 to do it on a staggered basis.

18 Because, otherwise, you are talking -- for  
19 instance, my soda ash chemical people, of at least  
20 three out of the five major producers. How are they  
21 supposed to do business, if I take all of them, and  
22 hold on to them until I finish copying?

23 So the total amount of time is one issue.  
24 The elapsed time, in doing this in a reasonable way,  
25 from the time I begin pulling the files from my

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1 marketing department, until I've copied them returned  
2 them and brought the next set in. The elapsed time is  
3 literally months.

4 JUDGE NELSON: Okay. Now, have we got  
5 anything else? We've got search time, initial copying  
6 time, review time, and the process of stickering and  
7 making the intact copies.

8 MS. RINN: Yes, sir.

9 JUDGE NELSON: Anything -- other phases?

10 MS. RINN: To get them into the  
11 depository, no. I have also looked at an alternative  
12 means of doing it.

13 JUDGE NELSON: Well, I don't want to hear  
14 about that now.

15 MS. RINN: Okay.

16 JUDGE NELSON: I want to hear about this  
17 one, what the burden is. And the burden lies in those  
18 five steps?

19 MS. RINN: Combined --

20 JUDGE NELSON: Four, because we're  
21 combining stickering with the intact copying.

22 MS. RINN: In terms of the resources it  
23 would take, and the time that would be elapsed until  
24 we were able to complete production on the 50, but --

25 JUDGE NELSON: Now, you want to take time

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1 to confer with your people in Omaha, to further refine  
2 these numbers.

3 MS. RINN: And I will, I will check my  
4 notes to find out to what extent -- I brought my  
5 detailed notes, from when we were arguing about  
6 interrogatories 21 and 23 back in January, to see to  
7 what extent I have that. And then I can call up my  
8 people in Omaha.

9 But there are a couple of other aspects to  
10 this issue that I would also like to bring out, sir.  
11 And that is that we have to put this in context. This  
12 is not the only document request we have pending.

13 In the last seven days alone, we have been  
14 served with 12 sets of discovery requests, two from  
15 KCS, that total 159 requests, between all the  
16 interrogatories, document requests, and requests for  
17 admissions. All of which we also have to be  
18 responding to in a very prompt manner.

19 And I would also like to bring out, to  
20 your attention that, during the last few months, we  
21 have already searched, looked at more than 100  
22 different shipper files.

23 Eighteen of those involve chemical  
24 shippers, where our search was for documents that  
25 related to negotiations that would be likely to

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1 contain the type of information they're seeking here  
2 for chemical customers.

3 Another 14 -- and here, these numbers are  
4 all from Union Pacific's point of view, involved coal  
5 customers. That, again, were aimed at competitive  
6 type of documents that we have produced, and put into  
7 the depository.

8 So it is not as if we are dealing with a  
9 vacuum of shipper documents, that relate to  
10 competitive issues. We have, in fact, done  
11 significant searches in the past. And, as I said,  
12 this is not the only document request we have pending.

13 JUDGE NELSON: I understand. I have a  
14 note concurrent with other requests.

15 MS. RINN: Then there is the third aspect,  
16 sir. There is a burden associated in the direct  
17 process, which is the time, the resources it takes for  
18 us to gather the files, review the files, process them  
19 in a disciplined way, so that the depository is in  
20 fact useful, instead of in chaos --

21 JUDGE NELSON: Isn't that on our list  
22 already?

23 MS. RINN: Yes. This was leading up to my  
24 next point. When you are talking about a document  
25 search of this scope, in terms of this number of

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1 shippers, you're talking about taking a critical mass  
2 of the working files of our marketing department away  
3 from them, which seriously interferes with their  
4 ability to do business.

5 To meet the day to day needs of our  
6 customers, to get new rates, to work out contracts, to  
7 deal with service issues.

8 The more files that we gather at a single  
9 time, the longer it takes from the time we begin to  
10 gather the files in until we can get done with them,  
11 and turn them back, the greater the burden on our  
12 marketing sales department to do their job, and the  
13 greater the burden on our customers.

14 And that is an aspect that I don't think  
15 has been alluded to, in the previous discussions we've  
16 had about what it takes to do document production.

17 JUDGE NELSON: These are collateral harms,  
18 but nonetheless harms.

19 MS. RINN: Yes, sir, and I believe  
20 relevant to determining burden, because I think you  
21 have to look at the full context.

22 JUDGE NELSON: Do you have any estimate,  
23 or perhaps you'll get that on the phone, of the total  
24 number of documents involved, in the universe of the  
25 50 shippers, for the three commodities and the eight

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1 corridors?

2 MS. RINN: That, I would appreciate a  
3 little more time to review my notes, and to talk to  
4 somebody. But I --

5 JUDGE NELSON: I'm going to give you that  
6 time.

7 MS. RINN: I can say, safely, that, with  
8 the exception of Union Carbide and Hoechst-Celanese, on  
9 this list, who are the two major customers, and  
10 accounted for a disproportionate share of the 24  
11 boxes, the other 12 of the 14 customers were  
12 relatively small ones.

13 The list of 50 contains some very  
14 significant Union Pacific customers, so I believe  
15 you're not talking three times 14, or four times 14,  
16 in terms of how it expands, the scope of the search.

17 That you are talking significantly more  
18 than that, because you're talking some very, very  
19 large chemical customers --

20 JUDGE NELSON: You're going to get us a  
21 rough approximation of the total number of documents,  
22 sheets of paper --

23 MS. RINN: Yes, sir.

24 JUDGE NELSON: -- involved here?

25 MS. RINN: Yes, sir.

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1 JUDGE NELSON: This is all physical paper.  
2 We're not talking about computers now.

3 MS. RINN: That is correct.

4 JUDGE NELSON: All right. Now, let me ask  
5 Mr. Gulland and Mr. Norton, do you want me to get Ms.  
6 Harris up there, and have her get the same account  
7 from the SP point of view?

8 Or, do you want to, for present purposes,  
9 assume that she will talk about the same impediments,  
10 and she will then get on the phone with her people,  
11 and attempt to fill those in with some precision? How  
12 do you want to proceed?

13 MR. NORTON: Your Honor, I'm inclined to  
14 think that it would be largely duplicated. I know the  
15 process is similar and the burdens are comparable.  
16 And it might make more sense, and expedite things, if  
17 we take that as a --

18 JUDGE NELSON: Are you willing to have her  
19 submit, stand off a little, on the UP case. That is,  
20 well, based on what Ms. Rinn has to say, and then  
21 whatever Mr. Mullins's UP witnesses have to say. Who  
22 is it you have, who's going to testify about UP?

23 MR. MULLINS: Ms. Patteye Simpson.

24 JUDGE NELSON: So, it will be Ms. Rinn  
25 versus Ms. Simpson. And, if you are willing to have

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1 the issue decided on the basis of those two persons,  
2 that's fine. Is Ms. Simpson a lawyer?

3 MS. SIMPSON: No.

4 MR. MULLINS: No, Your Honor. And we  
5 believe -- UP and SP have different systems. That Ms.  
6 Simpson can talk to you about the UP system, and Mr.  
7 Turner can speak to the SP system.

8 JUDGE NELSON: Well, let's first ask the  
9 Applicants. Are you willing to stand off with UP's  
10 case?

11 MS. HARRIS: Well, Your Honor, we have a  
12 few additional points. We have been engaged in the  
13 process of reviewing some of these shipper files, for  
14 production into the depository.

15 And we have found that, even once we have  
16 the papers duplicated, the review for privilege and  
17 the review for responsiveness are very time-consuming  
18 and costly processes.

19 I was personally involved in the privilege  
20 review of some of the files that have already been  
21 placed in the depository, and it takes -- just for  
22 privilege review, it takes quite a few hours of going  
23 through these files, because of the volume of the  
24 materials involved.

25 We've been relying largely on paralegals,

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1 here, in Washington, for that process --

2 JUDGE NELSON: You say privileges. You're  
3 looking for attorney-client in there?

4 MS. HARRIS: That's right. In all of  
5 these files, because of the heavily regulated nature  
6 of the industry, the fact that so much business is  
7 done with contracts --

8 JUDGE NELSON: Well, she'll give us an  
9 estimate of review time on the UP side. Are you  
10 suggesting that the number is heavier on the SP side?

11 MS. HARRIS: I just know that it's been  
12 very heavy. We'll confer, during the break, and see  
13 if our numbers match. But I would like to emphasize  
14 that that burden should not be underestimated.

15 JUDGE NELSON: That's what I propose to  
16 do, is have you either singly or both submit some  
17 numbers, and then put them up to the KSC witnesses.

18 And they'll tell us in what respect they  
19 think the numbers are wrong, and then they can be  
20 subject to cross on that. They're all non-lawyers, I  
21 take it?

22 MR. MULLINS: Not Mr. Dreiling. He's our  
23 equivalent of Ms. Harris and Ms. Rinn.

24 JUDGE NELSON: Well, let's keep the same  
25 procedure as to him. We'll not have him on the stand.

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1 MR. MULLINS: Okay.

2 JUDGE NELSON: And non-lawyers we can get  
3 up here --

4 MR. MULLINS: That's correct.

5 JUDGE NELSON: -- and have at them.  
6 That's it. So, what do you think of that procedure?  
7 On the Applicants' side, any problems with it?

8 MS. HARRIS: Well, Your Honor, there's one  
9 other point that I'd like to make, which is that the  
10 cost of this exercise shouldn't be underestimated.

11 Because of the unwieldiness of these  
12 files, we found that, in our initial preparation of  
13 shipper files, for this discovery process, our  
14 reproduction cost exceeded 500,000 dollars, which is  
15 a very large amount for our company.

16 The files, the dismantling of them, the  
17 reproduction of odd-size pages --

18 JUDGE NELSON: That will come in under the  
19 initial copying category.

20 MS. HARRIS: Well, we were talking in  
21 terms of time, but this would be -- this would be the  
22 expense.

23 JUDGE NELSON: Oh, you want to present in  
24 dollar terms, rather than hours. Well, that's  
25 possible.

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1 MS. HARRIS: I want to point out that the  
2 expense is very considerable. The expense of the  
3 reproduction, not to mention the --  
4

5 JUDGE NELSON: Well, let's be sure we can  
6 work out the same language. Do we want to talk  
7 dollars or hours?

8 MS. HARRIS: In addition to the hours  
9 you've got the actual reproduction cost, which a high  
10 rate, because of the cost of the dismantling of the  
11 files, the odd-sized pages --

12 JUDGE NELSON: Are your witnesses prepared  
13 to dispute in terms of hours or costs, or both?

14 MR. MULLINS: Neither, Your Honor, because  
15 of the paradigm in which they have set and established  
16 the frames of the debate. And we believe there's an  
17 entire different way, different methodology to get out  
18 the same information that does not involve this  
19 burden.

20 JUDGE NELSON: Oh, I see. They're going  
21 to testify to a whole different approach?

22 MR. MULLINS: That's correct.

23 JUDGE NELSON: That doesn't involve  
24 searching, copying, reviewing, stickering, or making  
25 of the intact copies.

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1 MR. MULLINS: But not in the method in  
2 which the Applicants have put forth, that is correct.

3 JUDGE NELSON: A faster way to do it, a  
4 shortcut.

5 MR. MULLINS: Absolutely. An alternative  
6 means and methodology, that would satisfy KCS and  
7 answer these interrogatories.

8 JUDGE NELSON: Well, if you're not  
9 quarrelling with these increments, then maybe we don't  
10 need to reduce them to numbers.

11 I thought it was going to be a contest  
12 where the railroads would say the initial copying  
13 involves x, and the KCS would say that's an overstated  
14 figure, and the true number is about a thirds of that.  
15 That we were going to have a factual series of things  
16 like that.

17 MR. MULLINS: We don't believe that we  
18 have to get into that sort of factual dispute. I  
19 believe what's important is, if you hear a process by  
20 which SP and UP could get these documents, but answer  
21 these interrogatories --

22 JUDGE NELSON: Have you suggested this  
23 process to the Applicants?

24 MR. MULLINS: I just learned about the  
25 process last --

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1 JUDGE NELSON: Just heard about it?

2 MR. MULLINS: -- last night. And they  
3 just flew up this morning, Your Honor, and I apologize  
4 for the short notice of all this, but quite frankly,  
5 we didn't understand it ourselves.

6 JUDGE NELSON: Well, one way to do that,  
7 then, is to -- this is a different dispute than I  
8 thought it was going to be. It's a whole  
9 methodological dispute.

10 So it doesn't make any difference what the  
11 hours are, associated with searching, copying,  
12 reviewing, stickering, etcetera, etcetera. You've got  
13 a way to cut through all of that?

14 MR. MULLINS: That's correct.

15 JUDGE NELSON: Does it make sense to take  
16 a recess, so that counsel can discuss this  
17 alternative, with the Applicants?

18 MR. GULLAND: I'm not here to discuss it.  
19 I wish I had heard about it before I walked into the  
20 room today. This is incredible.

21 JUDGE NELSON: Well, that's always would  
22 have been better than now, but we're still here now.  
23 And we're all together. You don't need me, at the  
24 moment, to explain to them what this alternative  
25 approach is, and have them evaluate it. Are you

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1 willing to do that?

2 MR. DREILING: Yes, Your Honor.

3 JUDGE NELSON: Tell me your name again,  
4 sir.

5 MR. DREILING: Dreiling, Robert K.  
6 Dreiling. I'm Assistant General Counsel for Kansas  
7 City Southern.

8 JUDGE NELSON: Yes, Mr. Dreiling.

9 MR. DREILING: It struck me, in listening  
10 to their presentation, is they're talking about  
11 gathering files, boxes, and copying boxes of files,  
12 and putting numbers on the boxes of files --

13 JUDGE NELSON: Mr. Dreiling, I don't want  
14 to argue about all that.

15 MR. DREILING: I said --

16 JUDGE NELSON: The question is you've got  
17 some other method, that's going to save them a lot of  
18 time and effort.

19 MR. DREILING: Yes.

20 JUDGE NELSON: That you want to suggest.

21 MR. DREILING: We have a method --

22 JUDGE NELSON: Is there any reason why I  
23 shouldn't declare a recess now, let this conversation  
24 go on between counsel -- I don't care about these  
25 boxes, unless I have them.

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1 MR. DREILING: Yes.

2 JUDGE NELSON: And, if you can work  
3 something out, or -- you come and call me. And, if  
4 you work something out, you do, and, if not, we  
5 resolve it.

6 MR. DREILING: I think we should have a  
7 recess and talk about it.

8 JUDGE NELSON: All right. What do we  
9 need? Is half an hour enough?

10 MR. MULLINS: We believe that would be  
11 adequate.

12 JUDGE NELSON: It's 20 of three. I'll  
13 come back down here at three-fifteen, and we'll see  
14 where we stand at that time.

15 MR. MULLINS: Fine.

16 JUDGE NELSON: That gives us 35 minutes.

17 MR. MULLINS: Thank you.

18 (Whereupon, the foregoing  
19 matter went off the record at  
20 2:41 p.m., and went back on the  
21 record at 5:16 p.m.)

22 JUDGE NELSON: What is the situation now,  
23 with regard to the outcome of conversations between  
24 the parties?

25 MR. GULLAND: Your Honor, I believe we've

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1 reached a resolution of this dispute. And I will  
2 outline my understanding of it, and I'll ask my  
3 colleagues, first, to correct any misstatements or  
4 omissions that I've made.

5 I speak to UP issues. Mr. Norton will  
6 speak to SP issues. Then I'll turn it over to Mr.  
7 Mullins, and he can clarify to the extent that he  
8 believes things need clarifying.

9 We're focussing now on the 50 shippers  
10 that are identified in interrogatories 62 and 63 of  
11 KCS. I'll call that the universe of shippers.

12 The parties have agreed, because of prior  
13 documentation and shipper files that have been  
14 produced to be excluded from that universe of shippers  
15 are the following: Collingwood, Farmland, Formosa --

16 JUDGE NELSON: What was that first?

17 MR. GULLAND: Collingwood. Farmland,  
18 Formosa, Georgia Gulf, Phillips, Farmer's Coop,  
19 Riceland Food, and Vic Cal Grains.

20 After you subtract those from the universe  
21 of shippers, Applicant Union Pacific will produce  
22 responsive information, responding to interrogatory  
23 number 62 and 63, for the periods 1994, and '95, from  
24 the following sources of information.

25 First, from its so-called MAAP, M-A-A-P,

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1 which is the Union Pacific Major Accounts Active Play.

2 Second, Union Pacific will ask the current  
3 responsible regional representatives, of which we  
4 estimate there are several dozen, to conduct  
5 electronic searches of their e-mail for the 1994 and  
6 '95 period.

7 They will then send us printouts of the  
8 responsive information, which we will screen, and  
9 after screening, turn over the responsive information  
10 to KCS. We'll place it in the depository, and advise  
11 them promptly when the information is placed in the  
12 depository.

13 We believe that Union Pacific can fairly  
14 promptly produce the MAAP information. It is our  
15 expectation that we can communicate to the marketing  
16 representatives instructions for what they have to do  
17 to make this work by Thursday of this week.

18 And we also hope, by that time, to have an  
19 estimate to give to KCS of how long we expect it to be  
20 before the marketing representatives send us back the  
21 hard copy information from their e-mail systems.

22 MS. RINN: Again, the one clarification.  
23 It is not marketing representatives. Account  
24 representatives.

25 MR. GULLAND: Thank you. Mr. Norton will

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1 address the SP production issues. I should add one  
2 thing that I did omit. That is that, as to Union  
3 Carbide, which is one of the 50 shippers, Union  
4 Pacific is to search the MAAP information, but not the  
5 e-mail information.

6 JUDGE NELSON: Mr. Norton?

7 MR. NORTON: As to the same universe of  
8 shippers, and for the same time period, SP will do an  
9 electronic search of its ASAP and PINS, P-I-N-S --

10 JUDGE NELSON: When you say the same  
11 universe, are you deducting the same shippers --

12 MR. NORTON: Yes.

13 JUDGE NELSON: -- that Mr. Gulland  
14 mentioned?

15 MR. NORTON: Yes, that's right. For  
16 requests --

17 JUDGE NELSON: Go back to where you were, m  
18 before I interrupted.

19 MR. NORTON: Okay. For the same universe  
20 of shippers described by Mr. Gulland, and the same  
21 1994, '95 time period, SP will do an electronic search  
22 of its ASAP and PINS systems, to identify requests  
23 that are covered by interrogatory number 62 and 63.

24 And we will then produce that information  
25 on the same basis as outlined by Mr. Gulland. And we,

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1 too, will attempt, by Thursday morning, to get a  
2 better determination of when we think this search can  
3 be completed.

4 JUDGE NELSON: Mr. Mullins?

5 MR. MULLINS: That's acceptable with KCS.  
6 Just note for the record -- I believe Applicants also  
7 are aware of this, of the time frame and the  
8 expeditious need.

9 In that our comments are due March 29th,  
10 and we will have to get whatever comments we have to  
11 the printer by approximately March 26th, in order to  
12 print some 300 copies on the service list.

13 And -- which I'm sure Applicants are aware  
14 of the burden of that. And so the need for expedition  
15 is great, in order to get this information so that we  
16 can incorporate it into our comments.

17 JUDGE NELSON: That same need has me  
18 bringing you in here on a Tuesday, instead of waiting  
19 for the normal Friday discovery conference.

20 MR. MULLINS: Yes, it does.

21 JUDGE NELSON: I'm well aware of that  
22 pressure.

23 MR. MULLINS: We appreciate it.

24 JUDGE NELSON: So does that conclude this  
25 dispute?

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1 MR. MULLINS: Yes, it does.

2 JUDGE NELSON: I commend counsel and their  
3 colleagues here, in helping work through to this  
4 solution. It's a lot better to come up with an  
5 agreement than it is to roll dice with some judge.

6 I don't run railroads. I don't know these  
7 offices. And you deal with me, it's like a bull in  
8 the china shop. I pick you out one, but the one you  
9 pick for yourself is always better. So I am pleased  
10 that counsel have been able to work this out.

11 How do we stand now, as far as this week's  
12 events? What are we looking at, as far as any counsel  
13 in this room know?

14 MR. MULLINS: It was my understanding Mr.  
15 Lubel had two or three minor issues that he wanted to  
16 discuss with Applicants. They might be able to work  
17 those out before Friday.

18 I've also maybe seen letters back and  
19 forth -- I have no firsthand knowledge, from other  
20 parties, that they're still in disputes with  
21 Applicants. As far as KCS is concerned, I know Mr.  
22 Lubel has two or three concerns, and, if he can't work  
23 them out, then I suspect that he will be here on  
24 Friday.

25 JUDGE NELSON: What do you know on your

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1 side?

2 MR. NORTON: I don't think we know of  
3 anything for sure. There's one question, I know, that  
4 has been raised. There's a possibility about some  
5 redactions of coal revenue data.

6 That is similar to a question you ruled on  
7 a couple of weeks ago, and it's possible that will get  
8 worked out. I don't know yet.

9 MR. GULLAND: Your Honor, I'm not aware of  
10 any disputes, which is not to say that there aren't  
11 any.

12 JUDGE NELSON: What did we do in terms of  
13 the scheduling of any conference Friday, should it be  
14 necessary? Have we done anything about it?

15 MR. MULLINS: I believe, under the rules,  
16 the parties have to notify you by close of business  
17 tomorrow, if they plan on attending -- or calling a  
18 Friday conference.

19 JUDGE NELSON: I know that. I mean in  
20 terms of the timing.

21 MR. NORTON: We agreed -- the last time,  
22 the notice said it would be nine o'clock, if there  
23 one.

24 JUDGE NELSON: Good, because I do have  
25 hearing obligations with the Tennessee Pipeline.

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1 MR. NORTON: Right.

2 JUDGE NELSON: I want to get on with that  
3 as soon as I can.

4 MR. NORTON: Yes, that was the reason.

5 JUDGE NELSON: They will be waiting, but  
6 we'll start promptly at nine, if there's need for one.  
7 Please pass the word that time is of the essence, that  
8 I will begin at nine. Anything else we need to do  
9 today?

10 (No response.)

11 All right. Thank you very much for your  
12 cooperation. I'm sorry you had to come all this way,  
13 but we certainly reached, I think, a better result  
14 than we would have by hammering one out in  
15 adjudication. That concludes this conference.

16 MR. MULLINS: Thank you, Your Honor.

17 (Whereupon, the foregoing  
18 discovery conference went off  
19 the record at 5:25 p.m.)  
20  
21  
22  
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24  
25

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**CERTIFICATE**

This is to certify that the foregoing transcript in

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

Before:              Surface Transportation Board  
Finance Docket No. 32760

Date:                February 27, 1996

Place:                Washington, DC

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

Charles P. Rupp