

INTERSTATE COMMERCE COMMISSION

02/23/96

FINANCE DOCKET # 32760

1344-1403 1+

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

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DISCOVERY CONFERENCE

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IN THE MATTER OF: :

UNION PACIFIC CORPORATION, :
UNION PACIFIC 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. :
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Friday, February 23, 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 9:30 a.m.

BEFORE:

THE HONORABLE JEROME NELSON
Administrative Law Judge

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

9:43 A.M.

JUDGE NELSON: We'll take appearances so that we show who's here.

MR. GULLAND: Good morning, Your Honor. I'm Gene Gulland. I'm here on behalf of the Applicants.

MR. ROSENTHAL: Michael Rosenthal on behalf of the Applicants.

MR. NORTON: Gerald Norton, the same.

MR. MULLINS: William Mullins on behalf of Kansas City Southern Railway Company.

MR. FOSHEE: David Foshee, the same.

MS. O'BRIEN: Kelley O'Brien on behalf of the Burlington Northern Railroad Company and Atchison, Topeka and Santa Fe Railroad Company.

MR. BILLIEL: Michael Billiel, Department of Justice.

JUDGE NELSON: All right, the dispute this morning then is KSC's interrogatory 62 and 63. Is that correct?

MR. MULLINS: That's correct, Judge Nelson.

JUDGE NELSON: All right. Mr. Mullins?

MR. MULLINS: We're here today to present

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1 to you another example of how discovery has led to the
2 need to file further discovery and to narrowly focus
3 our discovery requests, specifically interrogatories
4 62 and 63.

5 If I can walk you through a little bit of
6 the history of these interrogatories, we served these
7 interrogatories on January the 11th.

8 Applicants claim to not have received
9 these interrogatories until January 25th, for whatever
10 reason.

11 I'll accept the fact that they didn't do
12 that, but they were served on January --

13 JUDGE NELSON: I don't care about all
14 that, Mr. Mullins.

15 MR. MULLINS: -- 11th.

16 JUDGE NELSON: Let's get down to what it
17 is you want and why you want it and why they won't let
18 you have it.

19 MR. MULLINS: Certainly. The bottom line
20 of -- the bottom line of these interrogatories are
21 questions related to specific information regarding 50
22 specific shippers. And I'll tell how we came up with
23 these shippers.

24 You, before, have told us about
25 interrogatories 21 and 22 and other interrogatories

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1 about how they've been too broad, and we needed to
2 narrow and focus our requests.

3 On January 11th, when we served these
4 interrogatories, that's precisely what we did. What
5 we did is we took the traffic tapes -- the traffic
6 tapes are the tapes that UP and SP provide that have
7 all the information about all the shipments.

8 What we did is we took those traffic
9 tapes. We looked at the corridors that the KCS is
10 interested in, we looked at the shippers in those
11 corridors. We then -- out of that universe of
12 shippers, we then narrowed the universe to only
13 shippers of coal, grain, chemicals, which are
14 narrowing parameters which you, yourself, have
15 established, and we came up with a list of 50
16 shippers.

17 We then attached that list of these 50
18 shippers and filed these interrogatories on 62 and 63.

19 Applicants are claiming that we are asking
20 the same question that we asked in interrogatories 21
21 and 22.

22 And because we entered into a stipulation
23 in 21 and 22, that they don't have to answer 62 and
24 63.

25 My response to that is that (1) yes, it is

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1 the same question, but more importantly, and the
2 important part is, is that these are different
3 shippers.

4 And these are shippers that were narrowed
5 and got from the traffic tapes. These are coal, grain
6 and chemical shippers who met all of your requests.

7 JUDGE NELSON: What happened with 21 and
8 22? What was the resolution of that? They say it was
9 a stipulation.

10 MR. MULLINS: Yes. What happened with
11 that is in 21 and 22, we had -- we had initially asked
12 for all shippers. You, of course, you know, said, you
13 know, that's ridiculous. They claimed burden and all
14 that.

15 So we narrowed it to a list of 200
16 shippers.

17 JUDGE NELSON: Well, I didn't just say
18 that because I woke up in the morning feeling --

19 MR. MULLINS: No, no, you had --

20 JUDGE NELSON: There was a showing by the
21 other side --

22 MR. MULLINS: Absolutely, absolutely.

23 JUDGE NELSON: -- which persuaded me that
24 that would be an undue burden.

25 MR. MULLINS: Absolutely. And you were --

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1 and so taking -- taking that, we understand that and
2 we tried to work with that. So we narrowed it to a
3 list of 200 shippers.

4 At the time, we didn't have the traffic
5 tapes. We didn't have all of the specific information
6 that we have now in order to narrow that list.

7 In fact, quite frankly, we took some of
8 these shippers basically from this group that is
9 opposed to the merger. We just listed all of their
10 shippers.

11 We didn't -- we didn't -- we weren't able
12 to use the traffic tapes back in December when we
13 initially filed and did this as we have in the January
14 11th.

15 But in any event, what happened then was
16 we narrowed it to a list of 200. they continued to
17 object to the burden. And we came here in front of
18 you, and you ordered them to produce that.

19 We would -- we then -- you ordered them,
20 pursuant to the narrowed list, you said -- you asked
21 them to go through their files and produce it, as long
22 as it was coal, chemical and grain.

23 JUDGE NELSON: This is for how many
24 shippers?

25 MR. MULLINS: This is -- this was for

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1 about 200 shippers, and then we narrowed it even
2 further between agreement between the parties.

3 JUDGE NELSON: All right.

4 MR. MULLINS: We then came in front of you
5 again because they were claiming that our universe in
6 revised interrogatories -- we served revised
7 interrogatories pursuant to your order --

8 JUDGE NELSON: Which cut the universe to
9 100?

10 MR. MULLINS: -- which cut the universe
11 down.

12 JUDGE NELSON: Then what happened?

13 MR. MULLINS: They claimed -- they came in
14 here and claimed burden again, or they were coming in
15 here to claim burden. But before that, we agreed to
16 enter into a stipulation with the parties to work --
17 and it's a general stipulation.

18 And it didn't cover the specific 100
19 shippers. It didn't cover any -- it was a just a
20 general point stipulation.

21 Now when we entered into that stipulation,
22 we had served interrogatories 62 and 63, and they had
23 interrogatories 62 and 63.

24 JUDGE NELSON: Did you have the traffic
25 tapes at that time?

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1 MR. MULLINS: Yes, we did, and we were
2 able to use the traffic tapes to come up with this
3 list of shippers.

4 JUDGE NELSON: Which list?

5 MR. MULLINS: This list that was in 62 and
6 63.

7 JUDGE NELSON: No. I mean, at the time of
8 the stipulation --

9 MR. MULLINS: Right.

10 JUDGE NELSON: -- did you have the traffic
11 tapes?

12 MR. MULLINS: Yes, we did. And that's how
13 we -- that's how we came up with the list that we
14 filed in 62 and 63, because we had already -- by the
15 time we agreed to the stipulation, we had already
16 filed 62 and 63.

17 JUDGE NELSON: So you -- you have nothing
18 more now, or when you filed 62 and 63, than you had at
19 the time you entered into the stipulation regarding 21
20 and 22?

21 MR. MULLINS: That's correct.

22 JUDGE NELSON: Did I get that correct?

23 MR. MULLINS: That's correct

24 JUDGE NELSON: All right.

25 MR. MULLINS: That's correct.

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1 JUDGE NELSON: So they say that should
2 have been the end of it?

3 MR. MULLINS: They say that should have
4 been the end of it, that they entered into the
5 stipulation on 21 and 22, and therefore, they should
6 not have to answer 62 and 63.

7 JUDGE NELSON: These 50 that you want now,
8 were they included within the 100 that you would have
9 sought before?

10 MR. MULLINS: There may be some, yes. But
11 by far, the vast majority were not?

12 JUDGE NELSON: Why is that?

13 MR. MULLINS: Because at the time, we
14 didn't have the specific information. We weren't able
15 to go through the traffic tapes, look at the corridors
16 that we were specifically interested in, and come up
17 with the coal, grain, chemical shippers that -- that
18 you have ordered us to do.

19 JUDGE NELSON: In other words, you had the
20 tapes, but hadn't yet had a chance to analyze them?

21 MR. MULLINS: We had -- we had the tapes,
22 that's correct. And we -- we had analyzed -- we were
23 in the process of analyzing them. And some of the
24 shippers that were included in 21 and 22 were from the
25 traffic tapes. But we --

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1 JUDGE NELSON: When did you get the tapes

2 --

3 MR. MULLINS: I believe --

4 JUDGE NELSON: -- approximately?

5 MR. MULLINS: -- we got the tapes probably
6 early December, late November, and --

7 JUDGE NELSON: Let's say December 1 for
8 sake of argument.

9 MR. MULLINS: Right, okay.

10 JUDGE NELSON: And when was the
11 stipulation regarding interrogatories 21 and 22?

12 MR. MULLINS: I believe that was on
13 January -- January 26th. Is that right, Mr. Norton?

14 MR. NORTON: Yes.

15 MR. MULLINS: Yes, January 26th.

16 JUDGE NELSON: And then when did you serve
17 interrogatories 62 and 63?

18 MR. MULLINS: January 11th. And remind
19 you that -- that the interrogatories 21 and 22 were
20 served eventually way back in November. But pursuant
21 to your revised request, we had served those on the
22 29th, the revised interrogatories.

23 JUDGE NELSON: So then when you served 62
24 and 63 on January 11th --

25 MR. MULLINS: Right.

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1 JUDGE NELSON: -- by that time, you had
2 analyzed the tapes?

3 MR. MULLINS: We had fully analyzed the
4 tapes --

5 JUDGE NELSON: Knew the corridors and knew
6 the shippers and so forth?

7 MR. MULLINS: Absolutely.

8 JUDGE NELSON: All right. So why doesn't
9 this stipulation of the 26th preclude everything that
10 --

11 MR. MULLINS: Because --

12 JUDGE NELSON: -- preceded it?

13 MR. MULLINS: Because --

14 JUDGE NELSON: That's their position, I
15 guess.

16 MR. MULLINS: That is their position. The
17 stipulation of the 26th, Your Honor, only dealt with
18 the general notion of competition as contained within
19 interrogatories 21 and 22.

20 It didn't deal with any specific shippers,
21 despite the fact that you had ordered them to produce
22 the files for specific shippers in 21 and 22. Because
23 we, in a spirit of cooperation with the Applicants,
24 were willing to work with them on developing a
25 stipulation, we agreed to the stipulation.

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1 But we agreed to the stipulation knowing
2 that 62 and 63 were out there. Applicants themselves
3 knew that 62 and 63 were out that. And in fact, when
4 they entered into the stipulation, they didn't stand
5 up in front of you, Judge, and say, "By the way,
6 Judge, this stipulation also covers interrogatories 62
7 and 63."

8 JUDGE NELSON: Well, I'm -- the version
9 I'm reading of the stipulations is set out in a letter
10 to me from Mr. Roach, I guess it is. Yes, Mr. Roach's
11 letter to me dated February 22, which I received by
12 fax.

13 It was not here when Ms. Diciano left work
14 yesterday, which would be somewhere after five
15 o'clock. So I don't know exactly -- it was 1747 it
16 arrived here, which by Army time means 5:47.

17 In any event, I got it this morning. And
18 on pages -- pages three and four are paragraphs that
19 cite the stipulation. Can you look at that and tell
20 me if that -- if that's all there is to the
21 stipulation would be those two paragraphs?

22 MR. MULLINS: That is all there is to the
23 stipulation. It wasn't specific to any specific
24 shippers or any specific corridors.

25 If you -- if you look at those --

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1 JUDGE NELSON: Was there any language
2 about this stipulation satisfying other
3 interrogatories?

4 MR. MULLINS: No sir.

5 JUDGE NELSON: Or being regarded as
6 waiving other --

7 MR. MULLINS: Not at all, none.

8 JUDGE NELSON: So that, I'd have to read
9 in here, I suppose?

10 MR. MULLINS: That's right. And if I can
11 --

12 JUDGE NELSON: Go ahead.

13 MR. MULLINS: -- explain to you --

14 JUDGE NELSON: Get a little more into what
15 you'd like to show.

16 MR. MULLINS: Sure. And that's why --

17 JUDGE NELSON: Maybe get some examples
18 from the tapes.

19 MR. MULLINS: Right, that's what I'd like
20 to -- to get into right now is the relevance of why
21 this is important to ICC -- to the -- to the STB
22 decision making process.

23 It's a little hard to remember to call it
24 the STB when I worked there for six and a half years
25 as the ICC.

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1 But not -- Your Honor, not -- February
2 15th, last week, the ICC issued various decisions
3 regarding various things.

4 And in one of those decisions, they
5 established the criteria for those parties who want to
6 request that conditions be imposed on the transaction,
7 conditions to protect competition.

8 And one of the conditions is that they
9 would not impose conditions on a railroad
10 consolidation unless it found that the consolidation
11 may produce effects harmful to the public interest,
12 such as a significant reduction of competition in an
13 affected market.

14 And then there's all these specific
15 criteria that you have to meet when you're trying to
16 request the ICC to impose a condition.

17 The stipulation is a general stipulation.
18 The ICC wants you to provide specific evidence as to
19 specific shippers in specific corridors that are --

20 JUDGE NELSON: Get down to some -- give me
21 an example of something you have gleaned from the
22 tapes with regard to specific corridors and specific
23 shippers about which you're seeking to probe deeper.

24 MR. MULLINS: Sure. For example, we want
25 to know if there is a shipper who ships between, let's

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1 say Houston and San Antonio, all right? There's only
2 two railroads going between Houston and --

3 JUDGE NELSON: Does anyone have the map?
4 I have it upstairs, but if -- Mr. Rosenthal, you look
5 like you might have it there.

6 MR. ROSENTHAL: No, I didn't bring that
7 volume.

8 JUDGE NELSON: You're usually well-armed
9 here.

10 MR. MULLINS: He is, he is normally.

11 JUDGE NELSON: Is this going to be so
12 simple that I'll get it right away or --

13 MR. MULLINS: Yes.

14 JUDGE NELSON: -- or would it be useful
15 for me to have the map in front? What do counsel for
16 the Applicants think?

17 MR. NORTON: Let's try it and see how far
18 we get.

19 JUDGE NELSON: The map is only two minutes
20 away, but --

21 MR. MULLINS: Just -- I'll pick an easier
22 corridor for you, okay, instead of Houston. Houston -
23 - I can pick any corridor.

24 JUDGE NELSON: Pick -- no, I don't want
25 any. Now you said you've identified --

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MR. MULLINS: Right, yes.

JUDGE NELSON: -- 50 shippers --

MR. MULLINS: Yes.

JUDGE NELSON: -- as a result of studies
of specific corridors --

MR. MULLINS: That's right.

JUDGE NELSON: -- and specific shippers.

MR. MULLINS: That's right.

JUDGE NELSON: And I want to hear --

MR. MULLINS: Okay.

JUDGE NELSON: -- for hypothetical
purposes --

MR. MULLINS: Right.

JUDGE NELSON: -- and this, of course,
will be your best one --

MR. MULLINS: That's correct.

MR. MULLINS: -- what it is and where you
hope to go with it.

MR. MULLINS: Okay.

JUDGE NELSON: And I can get a better
understanding because the argument on the other side
is really something like analogous to law of the case,
which is, at most, a discretionary doctrine.

And if I've got some discretion, then I've
got to know the circumstances in which they're urging

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1 me to -- you would be urging me to use it and say, in
2 effect, to depart from law of the case.

3 MR. MULLINS: Sure.

4 JUDGE NELSON: If the stipulation rises to
5 that level.

6 MR. MULLINS: Sure.

7 JUDGE NELSON: If it doesn't, then this is
8 an ordinary dispute.

9 MR. MULLINS: Right.

10 JUDGE NELSON: Either way, I need to know
11 more about it.

12 MR. MULLINS: Sure. Let's take the
13 corridor between Houston and New Orleans.

14 JUDGE NELSON: Yes sir.

15 MR. MULLINS: There's only two railroads
16 that ship between Houston -- only two ways to get
17 between -- from Houston to New Orleans: UP or SP.

18 JUDGE NELSON: What goods move between
19 those two terminals?

20 MR. MULLINS: A lot of goods. But what --
21 I mean, we -- we could tell you -- through their
22 traffic tapes, we would be able to tell you exactly
23 what the -- every good that moved between Houston and
24 New Orleans.

25 JUDGE NELSON: Well, don't we know?

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1 MR. MULLINS: I don't have the information
2 here, but we do know, yes. We could -- we know that.
3 And that's exactly how we got these shippers.

4 JUDGE NELSON: You don't know enough right
5 now to talk in terms of a specific commodity?

6 MR. MULLINS: No, I do, Your Honor. Let
7 me explain. What we did is we took the universe of
8 the shippers that are shipping between Houston and New
9 Orleans --

10 JUDGE NELSON: Yes.

11 MR. MULLINS: -- on the UP line, okay? We
12 came up with a list of all the shippers shipping
13 between Houston and New Orleans on the UP line, okay,
14 and all the shippers on the SP line shipping between
15 Houston and New Orleans.

16 And then we gleaned out of that universe
17 of shippers those that are related to coal, chemicals
18 or grain.

19 JUDGE NELSON: So there are cars of coal,
20 chemicals and grain moving between the two cities?

21 MR. MULLINS: Correct.

22 JUDGE NELSON: Which way is most of this
23 flow? Or is it fairly equal?

24 MR. MULLINS: Most of it probably -- most
25 of it flows from Houston to New Orleans, and then

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1 sometimes on to other destinations. But most of it
2 flows from Houston to New Orleans.

3 JUDGE NELSON: Both are big port cities.

4 MR. MULLINS: Absolutely.

5 JUDGE NELSON: And yet, more stuff is
6 coming in or being shipped out from Houston?

7 MR. MULLINS: That's correct. And so
8 then, what -- what we want --

9 JUDGE NELSON: And there -- in all three:
10 coal, grain and chemicals?

11 MR. MULLINS: That's correct. Coal is
12 probably the least amount of commodities going between
13 Houston and New Orleans. Chemicals is the big, big
14 commodity going between Houston and -- and New
15 Orleans.

16 JUDGE NELSON: Of the three, that's the
17 big one?

18 MR. MULLINS: Yes, that's correct.

19 JUDGE NELSON: What kind of chemicals?

20 MR. MULLINS: Plastics --

21 JUDGE NELSON: We've had all of these
22 plastics people in.

23 MR. MULLINS: That's right. Plastics is
24 a huge one, all kinds of fertilizers and --

25 JUDGE NELSON: Let's go off the record for

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1 a moment.

2 (Whereupon, the proceedings went off the
3 record at 9:56 a.m. and resumed at 9:56 a.m.)

4 JUDGE NELSON: Back on the record. All
5 right, so let's envision carloads of chemicals moving,
6 let us say, from Houston to New Orleans.

7 MR. MULLINS: Right.

8 JUDGE NELSON: What happens to these goods
9 once they get to New Orleans?

10 MR. MULLINS: They are either used by the
11 person there in New Orleans to make further products
12 or they're in an intermediate process or, you know,
13 for example, if it's gasoline, it would go to a
14 wholesale gasoline storage tank.

15 And then from there, you know, the trucks
16 will take it to the gasoline station.

17 JUDGE NELSON: Is gasoline included in the
18 category of --

19 MR. MULLINS: Yes.

20 JUDGE NELSON: -- chemical products?

21 MR. MULLINS: Yes, it is.

22 JUDGE NELSON: So they're moving in tank
23 cars?

24 MR. MULLINS: That's correct.

25 JUDGE NELSON: All right. And you've got

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1 two railroads who are competing with each other?

2 MR. MULLINS: Correct.

3 JUDGE NELSON: Okay.

4 MR. MULLINS: Shipping gasoline from
5 Houston to New Orleans.

6 JUDGE NELSON: Okay.

7 MR. MULLINS: What we want to know is if
8 there's -- for example, in interrogatory number 62, we
9 want to know if there was a shipper on the UP line, a
10 shipper of gasoline on the UP line, who said -- who
11 went to UP and said, "UP, you've got to lower my rate.
12 And the reason why you've got to lower my rate is
13 because my competitor down there on the SP line who is
14 shipping gasoline to New Orleans, is beating the pants
15 off of me."

16 "And I've got to get a lower
17 transportation rate in order to compete in the
18 marketplace."

19 And UP says, "Well, okay." You know, the
20 marketing people look at it, and they look at all the
21 costs and everything. And then they decide whether or
22 not they can lower the rate.

23 JUDGE NELSON: Suppose you prove all that?

24 MR. MULLINS: If we prove all that, Your
25 Honor, that is the absolute key to the ICC's decision

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1 making process on whether there's a reduction in
2 competition in the Houston to New Orleans corridor.

3 And that's precisely why these Applicants
4 are sitting here --

5 JUDGE NELSON: Suppose there is?

6 MR. MULLINS: Suppose there is. If we can
7 establish for the ICC that this type of competition,
8 both in 61 and 62, is occurring and is occurring with
9 specific shippers and specific corridors, the ICC is
10 going to say that that's a two-to-one corridor and
11 that somebody needs access in there to keep it two
12 railroads after the merger.

13 JUDGE NELSON: In the example you gave, is
14 it not a two-to-one corridor?

15 MR. MULLINS: No, it's not. And
16 Applicants --

17 JUDGE NELSON: Why?

18 MR. MULLINS: -- have not defined it as a
19 two-to-one corridor?

20 JUDGE NELSON: Why isn't it?

21 MR. MULLINS: Because they define two-to-
22 one as a point, as just a point in Houston. And this
23 is the big -- and this is getting into the merits of
24 the case that the ICC will decide this issue.

25 And we all -- we all know here what the

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1 big argument is going to be --

2 JUDGE NELSON: Well, I don't want to try
3 merits.

4 MR. MULLINS: Yes.

5 JUDGE NELSON: But I have to understand it
6 enough to see why we're in this example.

7 MR. MULLINS: Okay. This -- their
8 argument is that it's not a two-to-one because they
9 don't look at corridors, Your Honor. They look at
10 points.

11 And by "points," I mean they look at
12 Houston. They only look at Houston. And what they
13 say is well, there are three railroads serving Houston
14 because BN serves Houston and UP serves Houston and SP
15 serves Houston.

16 So that's not a two-to-one, that's a
17 three-to-two. That's their argument.

18 JUDGE NELSON: What happens when they look
19 at New Orleans?

20 MR. MULLINS: They say the same thing.
21 New Orleans, they say, oh, that's a five-to-four
22 because you've got four railroads going into New
23 Orleans.

24 JUDGE NELSON: They measure the railroads
25 that serve a particular point --

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1 MR. MULLINS: Correct.

2 JUDGE NELSON: -- totally without
3 reference to where the goods come from or go to?

4 MR. MULLINS: Absolutely, Your Honor.

5 JUDGE NELSON: Simply an abstract
6 arithmetical count --

7 MR. MULLINS: That's absolutely right.

8 JUDGE NELSON: -- of the number of
9 railroads in a particular city.

10 MR. MULLINS: That's correct. That's
11 exactly what they do. And they're claiming that in --
12 and Mr. Roach, by the way, understands totally what
13 I'm talking about because Mr. Roach, in the Wisconsin
14 Central/Fox Valley Western merger case, he was
15 representing Chicago Northwestern, he asked identical
16 questions and wanted the identical information in
17 corridors.

18 And I have his own words here, Your Honor,
19 if you want to read them where he, himself, said,
20 "This is critical information to the ICC's decision
21 making process, and we need this information."

22 And yet, they have the audacity to stand
23 up here and say, "Well, we can't give you that
24 information. That's burdensome." And that's
25 precisely the type of information the ICC looks at,

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1 and they know it too.

2 And that is why they're sitting here
3 fighting all of this.

4 JUDGE NELSON: Now this type of
5 information that you just gave in this hypothetical,
6 this had some specificity to it.

7 MR. MULLINS: Absolutely.

8 JUDGE NELSON: It dealt with two places
9 and it dealt with a commodity, plastics. I don't see
10 that kind of specificity at all in interrogatory 62
11 and 63.

12 MR. MULLINS: The specificity comes by
13 listing the shippers in the attachment and the
14 corridors in the -- related to the -- to the shippers.

15 What we did is say there's 50 shippers in
16 these corridors --

17 JUDGE NELSON: Well, can I see that?

18 MR. MULLINS: Sure, that's -- that's
19 attached to the interrogatories, and I'll give you a
20 copy of the interrogatories.

21 JUDGE NELSON: Well, I have 62 and 63
22 here.

23 MR. MULLINS: Yes.

24 JUDGE NELSON: Oh, so where do I find this
25 specificity?

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1 MR. MULLINS: If I may approach, Your
2 Honor?

3 JUDGE NELSON: Yes, of course.

4 MR. MULLINS: Right here.

5 JUDGE NELSON: Oh. You see, I don't have
6 that list --

7 MR. MULLINS: Okay.

8 JUDGE NELSON: -- unless I missed it.

9 MR. MULLINS: Well, there is certainly the
10 --

11 JUDGE NELSON: I have here what is marked
12 "Attachment 1" to KCS's third discovery requests,
13 which I probably have somewhere in this pile of paper
14 of this case, but -- I see.

15 You see, what I usually do is I work from
16 the response because the response sets out the
17 interrogatory and then tells me why they don't want
18 you to have it.

19 So for a short-cut, I usually get the
20 whole picture by looking at the response, which is
21 what I did here. And obviously, the response doesn't
22 have your attachments. So let me look at this for a
23 moment.

24 (Pause.)

25 JUDGE NELSON: Where the is the example we

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1 just talked about?

2 MR. MULLINS: Well for example, we know
3 Houston -- we know the shipper in Houston -- the first
4 shipper is Air Products Chemical.

5 JUDGE NELSON: Well, let's look at one to
6 New Orleans.

7 MR. MULLINS: Well, the -- okay. The
8 corridor between Houston and New Orleans is listed as
9 one of the corridors that we're interested in on
10 Attachment 2.

11 JUDGE NELSON: Attachment 2?

12 MR. MULLINS: Yes.

13 JUDGE NELSON: Well, what's one and two?

14 MR. MULLINS: One is the list of shippers
15 in these corridors that we're interested in --

16 JUDGE NELSON: Oh, I see.

17 MR. MULLINS: -- and two is the list of
18 the corridors.

19 (Pause.)

20 JUDGE NELSON: Are these big shippers?

21 MR. MULLINS: They are very big shippers,
22 most of them.

23 JUDGE NELSON: You can identify them and
24 note --

25 MR. MULLINS: Yes, that's correct.

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1 JUDGE NELSON: Well, some names I see and
2 obviously know. Others I've never heard of in these
3 court reforms.

4 MR. MULLINS: Now realize, the reason --

5 JUDGE NELSON: Which means nothing. I'm
6 just --

7 MR. MULLINS: Yes, these are --

8 JUDGE NELSON: -- looking for some
9 assurance from you that you haven't got mom and pop
10 groceries thrown in here.

11 MR. MULLINS: No, mom and pop groceries
12 are not thrown in here.

13 JUDGE NELSON: Just by accident from the
14 tapes.

15 MR. MULLINS: Well, there might be
16 accidents. But I mean, we tried not to do that. And
17 you know, this is how the shipper name appears in
18 their case.

19 So, Your Honor, we have to, ourselves, try
20 to figure out what the name of the shipper is from the
21 tapes.

22 JUDGE NELSON: If we see a shipper named
23 Union Carbide or Pennzoil, we can draw the inference
24 that those are big customers.

25 MR. MULLINS: That's correct. And you --

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1 I mean, you can look at Allied Signal, you know, Arco
2 Chemical --

3 JUDGE NELSON: Yes.

4 MR. MULLINS: -- Goodyear Tire, Georgia
5 Pacific, you know, Pennzoil, Phillips Chemical. These
6 are not mom and pop shippers.

7 JUDGE NELSON: All right, so we have
8 specific shippers of specific goods of specific
9 corridors.

10 MR. MULLINS: That's correct.

11 JUDGE NELSON: And their answer is you
12 stipulated away all this stuff?

13 MR. MULLINS: That's correct. And we
14 didn't. We stipulated to the general notion that this
15 type of a competition occurs.

16 JUDGE NELSON: Where is the KCS operating
17 in all of this? What's the --

18 MR. MULLINS: We don't operate in these
19 corridors.

20 JUDGE NELSON: I know that. So let's take
21 -- take Houston and New Orleans. Why do you care if
22 two railroads now can monopolize that traffic?

23 MR. MULLINS: Right.

24 JUDGE NELSON: What's it got to do with
25 you?

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1 MR. MULLINS: I'll tell you precisely what
2 it has And this is why KCS houses self-interest in
3 this case is because if the Commission decides there
4 is a monopoly between Houston and New Orleans, the
5 Commission will order the Applicants to provide access
6 to another railroad.

7 JUDGE NELSON: Aha, which you might be a
8 candidate for.

9 MR. MULLINS: Which we might be a
10 candidate for. So we'll get to get new traffic and
11 new shippers and serve from Houston to New Orleans, an
12 area that we don't serve now. And --

13 JUDGE NELSON: What if it turns out to be,
14 oh, BN/SF, just to pick a name out of the hat?

15 MR. MULLINS: And that's precisely -- you
16 know, Your Honor --

17 JUDGE NELSON: That doesn't help you any.

18 MR. MULLINS: No, hitting precisely on the
19 problem in this case. We can spend -- we're spending
20 all this time and money and energy and millions of
21 dollars here trying to prove that there's a monopoly
22 between certain corridors.

23 All the ICC does is say another railroad
24 has to get access in that corridor. And the
25 Applicants can turn right around and give that access

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1 to BN/Santa Fe.

2 And they've entered into an agreement with
3 BN/Santa Fe that says, "If additional access is
4 ordered, BN/Santa Fe gets to be the first guy." And
5 we --

6 JUDGE NELSON: How does that help you?

7 MR. MULLINS: It doesn't help us. It
8 doesn't help us.

9 JUDGE NELSON: So if you prove this whole
10 case, you may not get anything.

11 MR. MULLINS: Theoretically, we may not
12 get anything. But we have to go on the -- you know,
13 we could walk away tomorrow and say -- say, you know,
14 forget it, let the shippers do it, you know?

15 JUDGE NELSON: Do you attack that aspect
16 of the BN/Santa Fe agreement --

17 MR. MULLINS: Absolutely.

18 JUDGE NELSON: -- that provides that if
19 further access is ordered, BN/Santa Fe shall get first
20 crack?

21 MR. MULLINS: Absolutely. I mean, that --
22 and they also entered into an agreement with Illinois
23 Central that says if BN/Santa Fe doesn't want it,
24 Illinois Central gets it.

25 JUDGE NELSON: The Commission or Board

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1 doesn't have to accept that condition and rubber-stamp
2 it, do they?

3 MR. MULLINS: No, but the Board doesn't
4 like to go into private contracts and reverse private
5 contracts. And so they have entered into a private
6 contract --

7 JUDGE NELSON: And so if the Board
8 endorses the private contract --

9 MR. MULLINS: Right.

10 JUDGE NELSON: -- you're out anyway. You
11 could engage in months of discovery here and prove the
12 monopoly, and never get a chance to enter that
13 corridor.

14 MR. MULLINS: Right, so -- precisely.

15 JUDGE NELSON: Then why are we fighting
16 about it?

17 MR. MULLINS: Because we're fighting about
18 it in the hope, the small hope, that (1) that we can
19 prove that there's a monopoly in that corridor; and
20 (2) that we're the railroad.

21 JUDGE NELSON: So you need to persuade the
22 Board of two things: (A) that there's a monopoly; and
23 (B) that they should modify the outstanding agreement.

24 MR. MULLINS: Or that they should not
25 impose the BN/Santa Fe settlement agreement as a --

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1 JUDGE NELSON: As a --

2 MR. MULLINS: -- condition.

3 JUDGE NELSON: Exactly, and leave that
4 open for competitive bidding.

5 MR. MULLINS: Correct.

6 JUDGE NELSON: So you need to win on both
7 of them.

8 MR. MULLINS: That's right.

9 JUDGE NELSON: And who knows? Maybe you
10 will.

11 MR. MULLINS: Maybe we will, exactly.
12 That's why we're spending millions of dollars.

13 JUDGE NELSON: All right. I don't have
14 judge likelihood of success on the merits.

15 MR. MULLINS: Right.

16 JUDGE NELSON: This is discovery. All
17 right, let's turn to the Applicants for now. Is there
18 anything else you want to say right now?

19 MR. MULLINS: No.

20 JUDGE NELSON: Well, let's here about all
21 this business of stipulation and see if you're not
22 prepared to move beyond that stipulation as to --
23 assume there never was a stipulation -- as to why this
24 discovery shouldn't go on.

25 Mr. Gulland, is it?

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1 MR. GULLAND: Gulland, yes.

2 JUDGE NELSON: Yes.

3 MR. GULLAND: Let me first say that I'm
4 pinch-hitting for Mr. Roach --

5 JUDGE NELSON: I figured.

6 MR. GULLAND: -- not because this is not
7 regarded as important, it's regarded as very
8 important. And Ms. Rinn of UP and Ms. Harris of SP
9 wanted to be here, but this came up so suddenly, and
10 it was quite a surprise, that none of those three
11 could rearrange their schedules.

12 JUDGE NELSON: That's too bad because from
13 the latter two at least, if we get to the problems of
14 burdens, we get some help in how to deal with these
15 records and files.

16 MR. GULLAND: Well, it's extraordinarily
17 burdensome, Your Honor. And you know, this whole
18 dispute is kind of like a horror movie monster. You
19 know, you think you've killed it and it's dead, in
20 this case because of the stipulation that was entered
21 into, and then you find that it comes alive again.

22 And what they seem to be seeking here is
23 discovery that would enable them to prove the truth of
24 the stipulation that the parties entered into.

25 And we do feel --

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1 JUDGE NELSON: It's a little sharper than
2 that, isn't it?

3 MR. GULLAND: It isn't, Your Honor.

4 JUDGE NELSON: It focuses on particular
5 commodities --

6 MR. GULLAND: Let me just --

7 JUDGE NELSON: -- corridors, shippers and
8 --

9 MR. GULLAND: No particular commodities.
10 If you look at that list, there is no listing of
11 particular commodities. That's simply not true.

12 JUDGE NELSON: Well, we could work one
13 out.

14 MR. GULLAND: The list -- the list is --

15 JUDGE NELSON: He says that it deals with
16 three groups: grains, chemicals and coal.

17 MR. GULLAND: Well as to grain, I think
18 Your Honor is aware that, you know, 25 shipper files
19 have been opened up. Utility files have been opened
20 up.

21 Twenty of the largest plastics files have
22 been opened up in other sources of discovery.

23 JUDGE NELSON: What I might do is -- if I
24 wanted to try to tighten this up is ask Mr. Mullins to
25 specify for each of those corridors what the leading

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1 commodity is as he did with chemicals in the Houston
2 to New Orleans.

3 And we could cut through some of it that
4 way, so it would be one commodity search for each
5 corridor. One of the things I was thinking about --

6 MR. GULLAND: I'm unable to address how
7 that would affect the burden.

8 JUDGE NELSON: I know it, and I'm
9 concerned about that --

10 MR. GULLAND: And I apologize.

11 JUDGE NELSON: -- because we really need
12 Ms. Rinn or Ms. Harris, or both, who have that
13 knowledge of the files. But let's worry about that if
14 we have to.

15 But under your view, they've stipulated
16 all of this away?

17 MR. GULLAND: Well, this isn't --

18 JUDGE NELSON: This is a non-issue?

19 MR. GULLAND: This is not a technical
20 argument. It's not a "gotcha" argument, Your Honor.
21 Out of an abundance of charity, I assume that Mr.
22 Mullins is unaware of the letter that Mr. Lubel wrote
23 on January 25, 1996, the afternoon before the
24 stipulation was entered.

25 JUDGE NELSON: Is that in front of me

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1 right now?

2 MR. GULLAND: It isn't. I want to show
3 you a copy of it wherein Mr. Lubel provides copies of
4 this discovery.

5 And as Mr. Roach says in his letter, that
6 was not focused on -- he was not aware of request 62
7 and 63 at the time that the stipulation was entered
8 into.

9 JUDGE NELSON: Incidentally, since you're
10 here for Mr. Roach, I always remind him that when you
11 fax something in here at 1749, there's a chance that
12 it isn't going to get read until 0800 hours the next
13 morning --

14 MR. GULLAND: And we apologize --

15 JUDGE NELSON: -- which is exactly what
16 happened. So --

17 MR. GULLAND: We apologize for that. But
18 this -- this did come as a surprise, and we weren't
19 alerted to the fact that there was going to be any
20 request of this character made and --

21 JUDGE NELSON: Well, no harm, no foul. I
22 get in here at 8:00 and I did search the fax machine
23 because my clerk had left a note that she couldn't
24 find anything on the fax.

25 And there is was, and I've read it, so be

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1 it. I see these paragraphs of the stipulation.

2 MR. GULLAND: But let me just touch
3 briefly on the background, Your Honor.
4 Interrogatories 21 and 62 are identical in terms
5 except that one covers -- 21 covers 100 listed
6 shippers and 62 covers 50.

7 But they identically, in identical terms,
8 request every instance of a request made by a shipper
9 for lower rates in order to compete with a rival that
10 is located on the lines of another applicant. That's
11 the gist of 21 and 62.

12 Similarly, 22 and 63 are identical and
13 inquire into whether any shipper ever sought lower
14 rates or better service to match rates of service
15 that's provided by another operator.

16 These are very general interrogatories.
17 They are specified to the limited extent that they
18 identify particular shippers and particular corridors.
19 But there is no particular category of commodity.

20 JUDGE NELSON: And there's a sentence
21 added which refers to the limiting attachments.

22 MR. GULLAND: Correct.

23 JUDGE NELSON: And aside from that
24 sentence, are the interrogatories the same in each
25 case?

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1 MR. GULLAND: Yes. And aside from the
2 difference in numbers of the shippers: 100 on the one
3 hand versus 50 on the other.

4 JUDGE NELSON: Yes.

5 MR. GULLAND: And you go -- if you went
6 back and looked at the transcript of the December 20th
7 discovery conference, there are almost 40 pages of
8 dialogue about these requests.

9 At that time, it wasn't limited yet to
10 100. The problem that the Union Pacific and the
11 Southern Pacific people were identifying was basically
12 this: it's a needle in a haystack.

13 Because you've got -- even when you
14 identify a particular shipper, multiple files spread
15 out around the country assigned to different marketing
16 personnel, depending on the commodity involved.

17 And it doesn't help to specify corridors
18 because of the nature of the file system. It is just
19 a mass of documentary material.

20 And the problem was combing through all of
21 this documentary material to find that needle in the
22 haystack.

23 You probably know an awful lot --

24 JUDGE NELSON: We've been through that
25 problem on several occasions.

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1 MR. GULLAND: Exactly. You know about
2 that a lot better than I do because you've heard Ms.
3 Rinn and Ms. Harris address the problem of their
4 files.

5 That's why the stipulation that was
6 entered into was so important, because it gave them
7 what they wanted.

8 True, Mr. Mullins says, "Well, it was
9 merely a general stipulation, not a specific
10 stipulation regarding these 50 shippers."

11 Well with all respect, it was a specific
12 stipulation with respect to the 100 shippers that were
13 covered by the old interrogatories 21 and 22. And
14 there is no reason in principle why it is any less a
15 specific governing stipulation simply because they are
16 trying to now proceed under interrogatories 62 and 63,
17 which include an awful lot of the same shippers.

18 JUDGE NELSON: Oh no, in all fairness, the
19 stipulation doesn't refer to interrogatories 62 and
20 63, or to waiving other objections or other problems.
21 It's -- it doesn't have any -- by its terms, any such
22 effect.

23 MR. GULLAND: Well until this morning,
24 they had never made the argument that the stipulation
25 was not meant to --

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1 JUDGE NELSON: You and Mr. Roach know how
2 to do those things and you --

3 MR. GULLAND: We didn't know that --

4 JUDGE NELSON: -- didn't do that. Well,
5 they say --

6 MR. GULLAND: We didn't know there was 62
7 and 63.

8 JUDGE NELSON: They say that they served
9 62 and 63 on January 11th, and that the stipulation
10 was entered on January 26th.

11 MR. GULLAND: But Your Honor, the letter
12 that I submitted to you from Mr. Lubel of KCS
13 acknowledges that he's serving us on the 25th.

14 That's why I said that I was being
15 charitable to Mr. Mullins when he represented to you
16 that we had been served on January 11th.

17 I was being charitable assuming that he
18 did not know the true fact.

19 MR. NORTON: Your Honor, if I might just
20 add because --

21 JUDGE NELSON: Well, why don't we get this
22 fact clear? So, Mr. Gulland says that interrogatories
23 62 and 63 were not in hand until January 25th --

24 MR. GULLAND: That's correct.

25 JUDGE NELSON: -- the day before the

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1 stipulation was entered.

2 MR. GULLAND: And it was part of a massive
3 material that daily accumulates on our desks. And Mr.
4 Roach -- I'll let Mr. Norton speak for himself. But
5 Mr. Roach did not focus on 62 and 63 when he entered
6 into this stipulation.

7 JUDGE NELSON: I see, the stipulation came
8 not realizing that 62 and 63 had come in that day or
9 the day before.

10 MR. GULLAND: Exactly. And then a week
11 later, we --

12 JUDGE NELSON: I can understand that
13 better --

14 MR. GULLAND: -- we submitted our response
15 to 62 and 63 and said, "Well, that's covered by the
16 stipulation."

17 JUDGE NELSON: Now I understand. That
18 could be just the kind of thing I could do.

19 MR. GULLAND: And we didn't hear -- we
20 didn't hear word one about it, about this problem --

21 JUDGE NELSON: Let's see if we can get the
22 date clearer here. Mr. Mullins, can you help us on
23 this? Mr. Gulland contends that he didn't receive 62
24 and 63 until sometime on January 25th.

25 Is that right or is that wrong?

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1 MR. MULLINS: Well, I don't know whether
2 it's right or wrong. I can accept their notion that
3 they did not get it on January the 11th. Your Honor,
4 what's important here though is that we have a
5 certified stamp copy that these were filed at the ICC
6 on January 11th, public notice.

7 Whether or not they received them or not
8 until the 25th, they were on constructive public
9 notice that on January 11th of filing. They're a big
10 law firm. They send somebody down to the document --
11 to the public filing room every single day to see what
12 was filed.

13 They knew they were filed. In fact, the
14 reason why we sent them that letter was because three
15 days before we sent them that letter, Mr. Norton
16 called us and said, "Hey, we understand you filed
17 discovery on January 11th. We don't have a copy."

18 Well, how did they know we had filed it?

19 JUDGE NELSON: All right, before I get to
20 Mr. Norton then, let me see if I understand it. There
21 was notice in the form of service upon the ICC or
22 Service Transportation Board, it would have been at
23 that point, of the interrogatories.

24 But for one reason or another, they didn't
25 get in the hands of Mr. Roach, or also Mr. Cunningham

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1 according to this letter, until sometime on January
2 25th.

3 There's a letter from Mr. Lubel dated
4 January 25th to Mr. Roach and Mr. Cunningham which
5 says, "Gentlemen, we understand that KCS's third
6 discovery requests, KCS-14, were not received. And we
7 therefore faxed you a copy earlier today."

8 "Since KCS-15 was served on that same day,
9 we also faxed you a copy in the event that document
10 suffered the same fate as KCS-14."

11 "Finally, enclosed is a disk containing
12 these two documents, together with KCS 16, which was
13 telecopied to you yesterday. Sincerely yours," and
14 it's signed "Alan."

15 So if those are the facts, then the
16 argument is that the stipulation --

17 MR. MULLINS: Your Honor, if I can -- if
18 I can --

19 JUDGE NELSON: -- can't be read -- how do
20 you read the stipulation?

21 MR. GULLAND: The real argument, Your
22 Honor, is --

23 JUDGE NELSON: No, let me get Mr. Mullins
24 first.

25 MR. MULLINS: Okay, let me --

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1 JUDGE NELSON: Then I want to get over to
2 SP for a moment.

3 MR. MULLINS: Even under their own facts,
4 they received a copy on the 25th, the morning of the
5 25th.

6 JUDGE NELSON: And therefore?

7 MR. MULLINS: And therefore, the
8 stipulation which was entered into on the 26th, even
9 under their own facts, they had an entire day to look
10 at the interrogatories.

11 And they could have come to you, Your
12 Honor, and said, "By the way, stipulation 21 and 22,
13 that also covers interrogatories 62 and 63."

14 JUDGE NELSON: So it's your point is that
15 whether by constructive notice or actual notice, they
16 could have and should have recited that the
17 stipulation covered 62 and 63.

18 MR. MULLINS: Absolutely.

19 JUDGE NELSON: They didn't do so and
20 therefore, they cannot now be heard from --

21 MR. MULLINS: Absolutely.

22 JUDGE NELSON: -- to make that assertion.

23 MR. MULLINS: Absolutely. And we would
24 have objected if they had tried to apply it to 62 and
25 63.

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1 JUDGE NELSON: And so the case is simply
2 one of let's get down to what the relevant burdens are
3 and --

4 MR. MULLINS: Correct.

5 JUDGE NELSON: -- see what we do with
6 them.

7 MR. MULLINS: That's correct.

8 JUDGE NELSON: All right. Mr. Norton,
9 what do you say now?

10 MR. NORTON: Well, Your Honor, if I might
11 just address the factual sequence?

12 JUDGE NELSON: Yes sir.

13 MR. NORTON: I was involved in it. I
14 believe it was on the 23rd -- it was, I think, the day
15 before we got -- we actually received the third set
16 that we got the fourth set late at night.

17 And that triggered the question well, what
18 -- where is the third set? And we called --

19 JUDGE NELSON: The third set contained 62
20 and 63?

21 MR. NORTON: Yes.

22 JUDGE NELSON: All right.

23 MR. NORTON: We called KCS. We called Mr.
24 Mullins and asked what was going on and said we never
25 got it. And apparently Covington had raised the same

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1 question.

2 He said he would fax a copy over. And
3 eventually at the end of the day, we received a copy.

4 I don't know that I had even seen it
5 before -- certainly before the stipulation that was --

6 JUDGE NELSON: Does Mr. Lubel operate out
7 of the Atlanta office primarily?

8 MR. MULLINS: In this case, no, Your
9 Honor. He's -- he's here every single week, Monday
10 through Friday.

11 JUDGE NELSON: So all of the work was done
12 here in Washington?

13 MR. MULLINS: That is correct, Your Honor.

14 JUDGE NELSON: All right.

15 MR. NORTON: At the time that we were --
16 there was an exchange of correspondence relating to
17 the stipulation that was entered on the morning -- at
18 the hearing on the 26th.

19 And when that was being prepared, our
20 letter proposing the stipulation was being prepared,
21 we did not know what was in 62 and 63.

22 And we -- as Mr. Roach's letter indicated,
23 we hadn't focused on it. And indeed, even after
24 receiving it, we didn't focus on the fact that it
25 there was a different universe of shippers than were

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1 covered by their "revised version of 21 and 22" that
2 we were specifically addressing at that hearing on the
3 26th.

4 It is inconceivable that we would have --
5 had we realized what was covered by 62 and 63 and that
6 it was thought to be different in some meaningful way
7 and in addition to what had been served previously,
8 that we would have gone forward with the stipulation
9 disposing of the one without -- without not also
10 disposing of the other.

11 And then when we responded, as Mr. Gulland
12 was, I think, about to indicate -- when we responded
13 to the third set, our response to 62 and 63 -- and
14 this was back in early February -- said this is -- not
15 only the same objections about burden et cetera, but
16 that this is covered by the stipulation.

17 And that's the last we heard of it.

18 Now, this is not necessarily -- this is
19 not a technical argument that, you know -- as Mr.
20 Gulland said, "this is not a 'gotcha' situation."

21 The same arguments that made it
22 appropriate to enter into that stipulation because of
23 the burdens involved, and the same reasons that led
24 Your Honor to call for a narrowing of the requests,
25 apply to these as much as to the earlier version

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1 originally --

2 JUDGE NELSON: To a lesser degree. You
3 must -- he's identified particular corridors and he's
4 identified particular shippers.

5 MR. NORTON: Well, no more particular that
6 what was involved previously. And the shippers is
7 just a change in number. It is still -- while 50 is
8 fewer than 100 --

9 JUDGE NELSON: Yes.

10 MR. NORTON: -- it is still enormously
11 burdensome. Because as the testimony -- the
12 explanations by Ms. Rinn and Ms. Harris, I think,
13 revealed at the first time this was addressed, to
14 answer those questions, you have to go through the
15 shipper files.

16 And it is a very voluminous --

17 JUDGE NELSON: Why is Ms. Harris not here,
18 incidentally?

19 MR. NORTON: The same reason. We -- we
20 were here --

21 JUDGE NELSON: You knew about this
22 dispute. You knew about this conference. And you
23 know that she's important when it comes to describing
24 burdens.

25 MR. NORTON: Your Honor, we were here

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1 Tuesday.

2 JUDGE NELSON: Well, then you know that I
3 tend to rely on here.

4 MR. NORTON: I understand --

5 JUDGE NELSON: So why isn't she here?

6 MR. NORTON: She was not able -- let me
7 explain. We were here Tuesday. At that time, KCS
8 indicated that they did not have anything that they
9 knew of to put on the agenda this morning.

10 JUDGE NELSON: I see.

11 MR. NORTON: Mr. --

12 JUDGE NELSON: So you didn't really know
13 until Wednesday late.

14 MR. NORTON: We got the letter late
15 Wednesday. And at that point, you know, it's
16 difficult from the West Coast to make the necessary
17 arrangements and --

18 JUDGE NELSON: All right, I understand
19 that.

20 MR. NORTON: -- the child care, and she
21 just couldn't do it. We would like to have her here
22 too, and I know UP would like to have Ms. Rinn here as
23 well.

24 JUDGE NELSON: Well, I wasn't going to get
25 after Mr. Gulland about the absence of Ms. Rinn

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1 because he is already in a pinch-hitting role.

2 But you're in the front line here, so I
3 thought --

4 MR. NORTON: Oh, she -- if --

5 JUDGE NELSON: -- that you're in a
6 position to take it.

7 MR. GULLAND: May I say one other thing,
8 Your Honor? With all respect to Mr. Mullins, the
9 correspondence of Mr. Lubel on February seventh and
10 February 21 at least implicitly, and almost
11 explicitly, reflect Mr. Lubel's understanding that the
12 stipulation also applied to 62.

13 JUDGE NELSON: Which letter are you
14 referring to?

15 MR. GULLAND: This is the Troutman Sanders
16 letter of February 21, which has attached to it the
17 Troutman Sanders letter of February seventh.

18 It's a letter -- the letter was copied to
19 you, February 21, in which they notified Applicants of
20 their --

21 JUDGE NELSON: That invokes this
22 conference?

23 MR. GULLAND: -- intention to raise the
24 issue. That's correct.

25 JUDGE NELSON: All right. Now where in

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1 there do you say that explicitly or implicitly --

2 MR. GULLAND: Well, if you go to the
3 attachment first, which is the letter of February
4 seventh --

5 (Pause.)

6 MR. GULLAND: No, I'm sorry. I'm told
7 that you may be looking at the wrong letter. I have -
8 -

9 (Pause.)

10 JUDGE NELSON: I have a letter from Mr.
11 Lubel dated February 21 about raising this issue. It
12 refers to a letter of February seventh --

13 MR. GULLAND: It should have been
14 attached.

15 JUDGE NELSON: -- which I have, which is
16 a one-page item.

17 MR. GULLAND: Yes sir.

18 JUDGE NELSON: So I have both of these.
19 Now what am I supposed to be reading? First, on the
20 letter of February 21, what paragraph?

21 MR. GULLAND: Well, I'd go first to the
22 letter of February seventh.

23 JUDGE NELSON: Yes sir.

24 MR. GULLAND: And in that letter, Mr.
25 Lubel says, "In light of the document," which seems to

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1 indicate that there was a search for information on
2 behalf of KCS, "we renew our request for information
3 concerning the evidence."

4 Mr. Norton can address this. The argument
5 was, and you can see it in the letter of February 21st
6 that's attached to the letter of February the seventh,
7 that there -- there was an indication that Applicants
8 had indeed already conducted some search for the
9 information that was covered by 62 and 63.

10 So that the burden problems previously
11 addressed were no longer an obstacle. And you see the
12 footnote on the first page of the letter of February
13 21: "The stipulation is to KCS interrogatories 21 and
14 22, involving a different group of shippers, was
15 entered into in reliance of Applicants' burdensomeness
16 objection and without knowledge that searches for this
17 information had already been conducted and born
18 fruit."

19 Your Honor, if searches for this
20 information had already been conducted and born fruit,
21 that information would be provided. There would be no
22 problem with --

23 JUDGE NELSON: What is he referring to?

24 MR. GULLAND: I'll let Mr. Norton --

25 JUDGE NELSON: That inadvertent turnover?

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1404-1420 2.

1 MR. GUILAND: Yes.

2 MR. NORTON: Yes, Your Honor.

3 JUDGE NELSON: I've never seen that since
4 it was --

5 MR. NORTON: Well, let me --

6 JUDGE NELSON: -- destroyed, wasn't it?

7 MR. NORTON: Well, we have thoughts --

8 MR. MULLINS: We have a copy if you want
9 to see it.

10 MR. NORTON: Let me describe -- let me
11 explain the situation. The document in question --
12 and there is a reference to two documents, but it's
13 really the same one that was copied twice I think --
14 was a transmittal -- cover transmittal sheet that was
15 from the SP people who are gathering the shipper files
16 together to send to counsel.

17 As you recall, the way that SP went at its
18 discovery requests at the early stage was to copy the
19 shipper files for the 150 largest shippers, which is
20 an enormous undertaking.

21 And this was before we got to the stage of
22 trying to respond to specific requests that, you know,
23 were not involved in the shipper files.

24 One of those cover sheets was included
25 inadvertently in the shipper file as it was copied and

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1 put in the depository.

2 And that has a comment on it from one of
3 the sales people about -- that a particular company
4 which produces a chemical at locations in Texas and
5 Louisiana: "We must keep them competitive with
6 producers of the same commodities which are located on
7 UP lines."

8 That is the commodity -- the comment that
9 was included in the cover sheet.

10 The purpose of these -- of the search that
11 was being conducted at that point was not to go and
12 review the files and to extract this information. The
13 purpose was to get the files to see how we could
14 respond.

15 And the comments were not to elicit
16 substantive comments, but comments about the
17 documents. You know, are there privilege issues or
18 other sensitive -- confidentiality problems that we
19 need to focus on in producing the documents?

20 So this was not part of a substantive
21 search to try to respond to the particular information
22 of 21 and 22.

23 The response to 21 and 22 was across the
24 board to produce the shipper files. And that's what
25 this transmitted, was some shipper files from an

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1 office in Blue Bell, Pennsylvania.

2 So it is incorrect, and I explained this
3 to Mr. Mullins and Mr. Lubel yesterday. It is
4 incorrect to draw from this document the inference
5 that we have already done the search that would permit
6 us readily to answer either 21 and 22 or 62 and 63.

7 Your Honor, I just -- I was surprised to
8 see this referenced because we had understood that
9 they had agreed to either --

10 JUDGE NELSON: Okay, let me get back to
11 Mr. Gulland who was taking the view that the letter of
12 February seventh explicitly or implicitly acknowledged
13 that the stipulation had disposed of interrogatory 62
14 and 63. Wasn't that your position?

15 MR. GULLAND: My position is that the
16 letters of February 7 and 21 reflect, I think pretty
17 clearly, the notion that they're "renewing" --

18 JUDGE NELSON: Oh, the word "renew."

19 MR. GULLAND: Well, let me finish.
20 They're renewing the 62 and 63 because contrary to the
21 understanding they had when they entered into the
22 stipulation governing 21 and 22, they know believed,
23 incorrectly we would say, that the work had
24 substantially been done so that the burdensome problem
25 no longer existed.

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1 And accordingly --

2 JUDGE NELSON: And had it not been laid to
3 rest, there would have been nothing to renew.

4 MR. GULLAND: That's exactly --

5 JUDGE NELSON: The word "renew" itself
6 suggested it was a dead matter, or so they understood?

7 MR. GULLAND: Right.

8 JUDGE NELSON: Well, I appreciate that
9 argument as a lawyer. It's good work.

10 MR. MULLINS: I -- can I --

11 JUDGE NELSON: Let's see how far it goes.

12 MR. MULLINS: Can I address that, Your
13 Honor?

14 JUDGE NELSON: Of course.

15 MR. MULLINS: They're trying to confuse
16 two issues here. The issues are the answers to
17 interrogatories 21 and 22 versus the answers to
18 interrogatories 62 and 63.

19 They are two separate issues. The burden
20 that they speak about, the document that Mr. Norton
21 just referred to, which is no longer -- he's brought
22 it into the record, and I suggest you look at it --
23 goes to whether or not they answered 21 and 22.

24 And that's a whole separate argument about
25 whether or not they've already got answers to 21 and

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1 22 that they've refused to turn over.

2 And I suggest that you look at the
3 document for that purpose.

4 But more importantly, it's interesting
5 they say that we've waived this because of the
6 February seventh letter, yet they didn't object to
7 interrogatories 62 and 63 until February ninth, two
8 days after the seventh letter.

9 JUDGE NELSON: What did they say then?

10 MR. MULLINS: That's when they filed their
11 response to the third discovery request. So
12 technically, it wasn't bright to bring it in front of
13 Judge Nelson until they had already objected on
14 February ninth.

15 So we had no right to bring it to you
16 until their objection.

17 JUDGE NELSON: And where is that
18 objection?

19 MR. MULLINS: That's right here, and that
20 is their response to our third discovery request.

21 JUDGE NELSON: It's probably what I'm
22 looking at. Okay, I have it.

23 MR. MULLINS: Okay.

24 JUDGE NELSON: It's where they assert the
25 stipulation.

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1 MR. MULLINS: February ninth. So until
2 they objected, we had no right to bring this issue in
3 front of you on 62 and 63.

4 JUDGE NELSON: Let me ask this, Mr.
5 Billiel. I see you in the room. The claim is made
6 here that this is really going to -- let's get through
7 the stipulation for a moment as to the merits, that
8 all this has to do with an attempt to show a dimmed
9 show of competition and thereby the need for a
10 condition which the Board would oppose which would in
11 some way or another open up competition, open it up
12 for other railroads to try to come in there to be the
13 saving grace competitor.

14 Now that sounds to me like Department of
15 Justice business. What do say about the merits of all
16 that vis a vis this request?

17 MR. BILLIEL: Well, I'm not addressing the
18 burden issue at all. But I think on the pure merits
19 issues, the importance of this information to the
20 competitive analysis, I think Mr. Mullins is
21 absolutely, 100 percent correct.

22 JUDGE NELSON: If we could get it down to
23 some workable basis for the Applicants, would the
24 Department want to see this information?

25 MR. BILLIEL: Yes. In fact, the

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1 Applicants are working on providing us with a similar

2 --

3 JUDGE NELSON: I'm sorry, I didn't hear
4 you.

5 MR. BILLIEL: In fact, we've been trying
6 to get similar information. In fact, the Applicants
7 have provided some to us. But you know, we are -- we
8 also rely heavily on the discovery of other parties
9 who analyze particular corridors they're interested in
10 more intensely --

11 JUDGE NELSON: Well, I know that you don't
12 necessarily always attend every one of these
13 conferences.

14 And so when I see you here, I have to draw
15 the inference that you have an interest in this one.

16 MR. BILLIEL: Right. Well, actually the
17 thing that peaked -- the particular thing that peaked
18 my interest was the suggestion. I have not seen this
19 document before -- that there was some indication that
20 there was -- had been a search already done, that
21 there was some existing information we might not have
22 been given access to which is --

23 JUDGE NELSON: Well, should I count you as
24 supporting this discovery, assuming we get through
25 this problem of the stipulation?

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1 MR. GULLAND: I'll just say one thing
2 about that. The fundamental problem is that, you
3 know, KCS talks about these conditions and their
4 interest in the routes in question.

5 But they haven't filed any notification
6 that they've sought any traffic rights covering any of
7 these routes.

8 I mean, if we were in another context, I
9 would say there's a real standing problem on KCS's
10 request for this information.

11 MR. MULLINS: Your Honor, he is -- he is
12 giving technical arguments here. We filed a notice on
13 January ninth saying that we're requesting conditions.
14 And we listed the corridors that we want the
15 Commission to order divestiture of track and open it
16 up to a bidding process, so --

17 JUDGE NELSON: Are they any of these
18 corridors?

19 MR. MULLINS: They are not all of those
20 corridors, but they are certainly -- some of those
21 corridors are included. Yes, that's correct.

22 JUDGE NELSON: What do we have here, one,
23 two, three, four, five, six -- well, I tell you with
24 regard to the stipulation, I'm going to rule that --
25 I think I have discretion as to whether to treat this

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1 stipulation as precluding discovery on interrogatory
2 62 and 63.

3 I don't know of any rule of law in the
4 U.S. Constitution or the Interstate Commerce Act that
5 commands that I treat a stipulation as to
6 interrogatories 21 and 22 as disposing of 62 and 63.

7 So I think it's a discretionary question.
8 And I'm going to exercise my discretion in favor of
9 discovery here against the Applicants on the theory
10 that if they knew about interrogatories 62 and 63,
11 they certainly didn't mention them in the stipulation.

12 And if they didn't know about them, it's
13 even harder for me to understand that a stipulation is
14 supposed to dispose of something about which they
15 didn't even know.

16 Apart from the technicalities of the
17 wording of the stipulation, I am influenced by the
18 claim that discovery here goes to the heart of the
19 need, to the assertion that there will be need for the
20 imposition of conditions necessary to preserve or
21 enhance competition, and that this, if it proves
22 successful, will help lead the KCS down that path.

23 I am also influenced by the Department of
24 Justice's attendance here today, which I note they
25 don't always send a representative to one of these

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1 conferences and Mr. Billiel's comments in support of
2 this discovery.

3 So I'm going to direct that some discovery
4 go forward. The question now is how to tailor this
5 and how to focus it so that it is a manageable task.

6 And there are a couple of things we could
7 do. One is to try to hack through some of it now.
8 The other is to reconvene when we can have Ms. Rinn
9 and Ms. Harris here and get their assistance.

10 And I am open to the suggestio of the
11 Applicants as to how they want to proceed, now knowing
12 that you're going to have to make some discovery with
13 regard to 62 and 63.

14 And I want to work and get it in some
15 livable shape. How do you want to proceed? Do you
16 want to try nd thrash out some boundaries now or do
17 you want to do it when we can have more time?

18 And if you want to take a brief recess to
19 have time to confer with each other or make phone
20 calls, that's all right too.

21 Do you want to take a recess for, say,
22 five or ten minutes?

23 MR. MULLINS: Your Honor, can I address
24 the burden issue before we get to that issue, because
25 I have some things to say about the burden issue? And

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1 --

2 JUDGE NELSON: Well, we haven't yet heard
3 from the Applicants. It's their burden. I'm
4 convinced from previous showings that this is not
5 easy. And I want to put the ball in their hands right
6 now.

7 Now -- right now, you've got the
8 discovery. Keep talking, you can talk yourself out of
9 it.

10 MR. MULLINS: I don't want to do that.

11 JUDGE NELSON: My advice to you is to sit
12 down and let's see what the Applicants want to do in
13 terms of helping to shape the record regarding the
14 burden.

15 You'll have plenty of time, Mr. Mullins,
16 to respond to whatever they have to say about the
17 burden, including the opportunity to show by whatever
18 way you want that it's phony, that there is no burden,
19 that the work has already been done, whatever it may
20 be.

21 MR. GULLAND: Your Honor, I know from --

22 JUDGE NELSON: How do you want to proceed?

23 MR. GULLAND: For my part, I would not
24 feel comfortable proceeding in the absence of Ms.
25 Rinn. And Mr. Norton can address whether he would in

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1 the absence of Ms. Harris.

2 MR. NORTON: Your Honor, I think the
3 suggestion of deferring resolution of the burden side
4 of it makes good sense.

5 In the meantime, we may be able to work
6 with the other side.

7 JUDGE NELSON: Exactly. The down side of
8 this is we would put the whole thing off for a period
9 of time, a maximum of one week.

10 MR. NORTON: I think under the
11 circumstances --

12 JUDGE NELSON: That hinders the
13 discoverers.

14 MR. NORTON: Well, Your Honor, it doesn't
15 -- they have had access to this type of evidence from
16 shipper files that we've produced. They've got the
17 ten plastics shippers. They've got the 25 grain
18 shippers.

19 MR. MULLINS: The 25 grain shippers were
20 only in Central Kansas and did not cover any of the
21 corridors listed in the --

22 MR. NORTON: But if there were evidence of
23 this nature that they could have found in those files,
24 we would have heard about it.

25 So I mean, they're not totally deprived.

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1 And I think it makes good sense because we're --
2 neither of us can address the burden question --

3 JUDGE NELSON: Is there a way of doing
4 this any quicker because the time is running on all
5 this now so that we don't to wait a week.

6 MR. MULLINS: Can I suggest that we can
7 schedule it for Wednesday or Monday or something? And
8 then we work -- we work for the rest of the day, maybe
9 over the weekend, to try to resolve it. And then we
10 convene back here on Monday.

11 JUDGE NELSON: That's reasonable if those
12 lawyers are available. Can you check with them?

13 MR. NORTON: I think we have to --

14 JUDGE NELSON: We're at -- it's what, 7:30
15 out there now?

16 MR. NORTON: I can't --

17 JUDGE NELSON: Eight-thirty in Omaha.

18 MR. NORTON: I can't reach anyone. I know
19 Ms. Harris is not accessible at the moment.

20 JUDGE NELSON: What does she come in,
21 about nine o'clock there?

22 MR. NORTON: I believe that's --

23 JUDGE NELSON: Twelve o'clock our time.

24 MR. NORTON: Yes. Why don't we -- why
25 don't we do this? We could consult with them about

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1 mutual availability, because we need to get both of
2 them here at the same time, and then with an eye
3 toward trying to work a day that will be sometime
4 sooner than next Friday?

5 And then we'll --

6 JUDGE NELSON: How about if we have a
7 conference call this afternoon?

8 MR. GULLAND: For purposes of scheduling?

9 JUDGE NELSON: With Mr. Mullins, Mr.
10 Gulland, Mr. Norton and me?

11 MR. NORTON: Sure.

12 MR. MULLINS: That's fine, Your Honor.

13 MR. NORTON: What time would you like to
14 do it, Your Honor?

15 JUDGE NELSON: How is earlier rather than
16 later, 3:00?

17 MR. MULLINS: Three o'clock?

18 MR. NORTON: That's fine.

19 JUDGE NELSON: All right, let's go off the
20 record for a moment.

21 (Whereupon, the proceedings went off the
22 record at 10:43 a.m. and resumed at 10:44 a.m.)

23 JUDGE NELSON: On the record. We've
24 agreed first of all to a telephone conference call
25 this afternoon at 3:00 p.m. eastern when we'll have on

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1 the line Mr. Gulland, Mr. Norton, Mr. Mullins and me,
2 where we will discuss the procedural status of this
3 request of this discovery pertaining to
4 interrogatories 62 and 63.

5 In the meantime, counsel has agreed to
6 confer among themselves in an attempt to work out some
7 limitations. And Mr. Gulland and Mr. Norton are going
8 to be conferring with Ms. Rinn and Ms. Harris,
9 respectively, to ascertain whatever they want to learn
10 in terms of burdens and in terms of the availability
11 of those two lawyers to be here to assist us, sooner
12 rather than later.

13 If there has to be a resolution by me, I'd
14 rather move it up because time is running on the
15 Intervenor, and I want them to get this material
16 sooner rather than later, and not have to wait until
17 next Friday necessarily.

18 I did explain to all counsel that I'm in
19 hearings all next week in a gas pipeline case. And so
20 I will try to squeeze you all in probably before those
21 hearings and see where we go with that.

22 But for these purposes, I'm going to have
23 to put you in second place. They've been waiting for
24 a long time in a dispute of over \$400 million that
25 they want to get adjudicated. And I owe them that

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1 time.

2 I hope they read this transcript and see
3 that.

4 But we'll -- we'll work out a way of
5 juggling in and around the schedule of that case.

6 Any other comments or questions before we
7 adjourn? All right, that concludes this conference
8 and I will speak to counsel this afternoon at 3:00
9 p.m. eastern. Thank you.

10 (Whereupon, the discovery conference was
11 concluded at 10:47 a.m.)

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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. 3260

Date: February 23, 1996

Place: Washington, D.C.

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