

INTERSTATE COMMERCE COMMISSION 03/01/96

FINANCE DOCKET # 32760

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1 You hear this sort of thing all the time.

2 But I will say this, Mr. Roach claimed
3 that Mr. Davidson testified that these various coals
4 do not compete.

5 Well, I beg to differ and I'll show you
6 the testimony.

7 JUDGE NELSON: Well, I really don't care
8 about it now.

9 MR. McBRIDE: Okay.

10 JUDGE NELSON: I'm not going to make that
11 decision.

12 MR. McBRIDE: I'm just representing to you
13 that he said there was competition between and among
14 these coals.

15 JUDGE NELSON: Anything else from the
16 Applicant side --

17 MR. ROACH: Yes.

18 JUDGE NELSON: -- on the question of the
19 produceability of the -- of this rate information?

20 MR. ROACH: Yes, just a final comment on
21 the procedural side. I said that WCTL didn't appeal,
22 not that WCS didn't appeal. WCS doesn't have an

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1 outstanding request.

2 They had three days to appeal. Western
3 Coal Traffic League didn't appeal.

4 I think that the argument is that it was
5 irresponsible for Western Coal to then make a request
6 for the information that had been denied to Western
7 Coal Traffic League is, itself -- I don't want to say
8 "irresponsible" because I'll write an apology letter.
9 but bizarre -- bizarre.

10 If you see somebody denied something, he
11 had better make sure he gets it by asking for it and
12 litigating the issue.

13 And Your Honor, the notion that people can
14 freely come in here and ask you to "reconsider" your
15 prior rulings is yet another way to end-run the appeal
16 time. It's just fantastic to me.

17 If this is the biggest rail merger in
18 world history, the most cosmic transaction, and the
19 rates are just final to litigate that, he should have
20 asked for them a long time ago.

21 MR. McBRIDE: If Your Honor -- please, we
22 were taking depositions which I thought were going to

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1 show the very thing I could now represent to you and
2 that would perfect this record which was not perfected
3 at that time.

4 And had I gone to the Board, even if I had
5 a procedural right to appeal a ruling to which I
6 wasn't a party, we wouldn't have had that kind of
7 record. Now, we do.

8 JUDGE NELSON: All right. I'm not
9 persuaded by the procedural arguments that there is a
10 bar to this discovery.

11 I'm going to allow this discovery to go
12 forward mainly because it involves coal, which is a
13 vital commodity to the energy of the country, a
14 commodity over which the railroads have a unique power
15 and the exploration of the extent to which, if any,
16 there is competition between these coals or between
17 these railroads for this coal seems to be something on
18 which we ought to allow people to go forward and not
19 stop.

20 And if I didn't understand it before, I
21 understand it now.

22 So I am going to order discovery of the

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1 rate information subject to the kinds of conditions we
2 can work out to protect the information. I'm amenable
3 to suggestions from the railroads as to what specific
4 provisions they want to fashion so that we can feel
5 reasonably confident about these materials.

6 MR. McBRIDE: May I --

7 JUDGE NELSON: And I'm asking the
8 railroad, not you. So far, you're getting the
9 discovery.

10 MR. McBRIDE: I understand. But I wanted
11 to be fair to them and let them see what the
12 interrogatories were. I wanted to ask that they --

13 JUDGE NELSON: You can show them anything
14 you want. But I'm asking Mr. Norton for suggestions
15 on how we want to shape this.

16 MR. NORTON: Your Honor, I would suggest
17 that we might do, as I think you said earlier, the
18 limitation on outside counsel only would be --

19 JUDGE NELSON: Is that acceptable to you?

20 MR. NORTON: This --

21 JUDGE NELSON: Outside counsel only?

22 MR. NORTON: This applies to both of us.

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1 MR. ROACH: I must say I'm so stunned by
2 the ruling that I don't know. I have to consult with
3 my clients.

4 If we have to answer a whole new set of
5 interrogatories after the deadline -- I see here a
6 list of something like 30 coal utilities and requests
7 for --

8 JUDGE NELSON: That's all for further
9 debate. The issue right now is --

10 MR. ROACH: Frankly, it never occurred to
11 us --

12 JUDGE NELSON: -- how we're going to
13 handle the commercial sensitivity part. And the
14 suggestion has been outside counsel only.

15 MR. ROACH: I need to consult with my
16 client. It never occurred to us that we would be
17 ordered to answer interrogatories on a subject that we
18 have not even been served with and where the deadline
19 had passed.

20 JUDGE NELSON: Now, we may need to cut
21 these down and simplify them so that when you talk to
22 your client, you are talking about fewer, rather than

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1 many.

2 MR. McBRIDE: It's one interrogatory, and
3 it's the utilities that are listed in the two SP
4 business plans. And we just want the comparative
5 rates.

6 JUDGE NELSON: Let me see this material.

7 MR. McBRIDE: Sure. And I wanted to say
8 also to Your Honor that we cannot effectively present
9 our case without one outside consultant being able to
10 see -- you know, for each party, being able to see the
11 answers to the interrogatories.

12 Our coal experts -- Mr. Mills has got one.
13 I've got one. I don't know about the other parties --
14 who need to see this information because they're the
15 people who are going to have to put the rebuttal
16 testimony together.

17 JUDGE NELSON: Now why this huge list of
18 shippers? Why can't you cut that down?

19 MR. McBRIDE: They are the -- they are the
20 utilities that are listed in this SP plan as the
21 people that they successfully marketed coal to in the
22 last few years.

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1 And I want to see the comparative rates so
2 that I can prove to the Board that SP got the business
3 because it offered lower rates.

4 So I need UP's rates to be able to do
5 that.

6 MR. ROACH: This is a comprehensive
7 interrogatory asking for all kinds of rate
8 information, routing information, who handled what
9 coal to 30 different utilities.

10 He should have asked this question in
11 January or December.

12 JUDGE NELSON: Yes, I think considering
13 the late stage we find ourselves at, I want you to
14 refine the list and cut it down and sharpen it.

15 MR. ROACH: There was nothing anyone could
16 have said in a deposition that would have --

17 JUDGE NELSON: I am prepared to order
18 discover, but not of this magnitude at this stage of
19 the game.

20 MR. McBRIDE: How about ten utilities?

21 JUDGE NELSON: Well, you work that out
22 with counsel. Let's take -- let's take a break here.

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1 MR. ROACH: How about we give them the
2 redacted information. How about that?

3 MR. McBRIDE: That's SP. I need the UP
4 rates to compare.

5 MR. ROACH: This is unbelievable. We were
6 not asked for this by anyone and WCTL --

7 JUDGE NELSON: What SP redactions were
8 there before?

9 MR. NORTON: The revenue information and
10 the --

11 JUDGE NELSON: All right. Why don't we
12 give them that, and then we'll see about how
13 restricted it has to be?

14 MR. ROACH: This is just what Mr. Mills
15 lost in the fight that we had in January. We're now
16 being --

17 JUDGE NELSON: I understand that.

18 MR. ROACH: I mean, it's just -- it's a
19 wholly different issue than what we were here to
20 debate.

21 JUDGE NELSON: Well, the first suggestion
22 is, from the SP, that they turn over what they had

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1 previously redacted. Then we'll figure out who sees
2 it.

3 MR. NORTON: And that would be on --

4 JUDGE NELSON: And that's all SP has to
5 do.

6 MR. NORTON: And that would be limited to
7 outside counsel only.

8 JUDGE NELSON: Well, we'll talk about
9 that. He has problems with that. What are you
10 looking at now?

11 MR. McBRIDE: I just wanted to show Your
12 Honor and them where I got this list from. These are
13 the same utilities as are listed in the SP plan who
14 they got the business away from other railroads from.

15 JUDGE NELSON: That has nothing to do with
16 what we're now asking.

17 MR. McBRIDE: I'm sorry.

18 JUDGE NELSON: The question now is the
19 suggestion made by Mr. Norton on behalf of the SP,
20 that he gives you want he previously redacted.

21 MR. McBRIDE: Right.

22 JUDGE NELSON: In theory --

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1 MR. McBRIDE: Right.

2 JUDGE NELSON: -- that makes it easy for
3 him. You can find what was previously been -- you
4 have an unredacted version in your files, I'm sure.

5 MR. NORTON: Sure.

6 JUDGE NELSON: All right, I'm going to
7 direct that.

8 MR. NORTON: Okay.

9 JUDGE NELSON: And that will leave open
10 now the question of who can see it.

11 MR. McBRIDE: Well, and since he says
12 that's not rate information though, I mean those rates
13 and Mr. Roach's clients' rates --

14 JUDGE NELSON: No, I'm not going to give
15 you any more. That was discovery. That was
16 redaction. We're fighting about it, and now we're
17 going to have those redactions delivered.

18 MR. McBRIDE: Right.

19 JUDGE NELSON: And that's that.

20 MR. McBRIDE: But I'm talking about the
21 interrogatory we were just referring to.

22 JUDGE NELSON: Any more, I'm not going to

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1 get into. We are in a late stage. There are these
2 difficulties. And I want to make things go smoothly.

3 MR. McBRIDE: If Your Honor would please,
4 one --

5 JUDGE NELSON: And not in a cumbersome
6 way. Now, do you have this bunch of redactions also,
7 Mr. Roach, from your materials?

8 MR. ROACH: I don't believe so, Your
9 Honor. Did we redact anything from UP business plans?

10 (No response.)

11 MR. ROACH: We will check and if we did,
12 we'll produce it for --

13 JUDGE NELSON: So for UP, we have to
14 fashion something.

15 MR. McBRIDE: Yes, because here's my
16 problem.

17 MR. ROACH: If we redacted material from
18 our coal business plans, we will produce the redacted
19 information. I don't believe we did.

20 But we -- each of the two railroads were
21 asked to go down a level in their business plans.

22 JUDGE NELSON: All right. To the extent

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1 that there were previous redactions, they are going to
2 be turned over.

3 Now to the extent that you want them
4 searching files for 30, because somebody else said it,
5 I'm not going to do it that way. I don't care who
6 said it.

7 MR. McBRIDE: I'm not arguing --

8 JUDGE NELSON: I'm asking you to sharpen
9 this --

10 MR. McBRIDE: Right.

11 JUDGE NELSON: -- focus it and cut them.

12 MR. McBRIDE: I will.

13 JUDGE NELSON: And if you can't do it --

14 MR. McBRIDE: I will.

15 JUDGE NELSON: -- it's a simple matter to
16 deny the whole business.

17 MR. McBRIDE: That's fair enough.

18 JUDGE NELSON: I want to open the door
19 here some.

20 MR. McBRIDE: Do you want us to negotiate?

21 JUDGE NELSON: I want -- yes. I want to
22 get a helpful suggestion from counsel.

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1 MR. McBRIDE: I have two suggestions.

2 JUDGE NELSON: And then the second problem
3 is who can see it.

4 MR. McBRIDE: The least burdensome, I
5 thought, was to simply ask them for the data --

6 JUDGE NELSON: You talk to them about it

7 MR. McBRIDE: -- of the ten largest or
8 whatever. The other was we deposed Mr. Sharp already.
9 They could give him the information and then we could
10 reopen that deposition and ask him about it.

11 Because that took place in the intervening
12 period between your ruling and now, and he was their
13 coal witness.

14 MR. ROACH: You know, we also had a long
15 acrimonious, complicated argument last time with WCTL
16 that went to this same sort of material, Your Honor.

17 And you may recall, we were ordered
18 finally to negotiate over a list of utilities --

19 JUDGE NELSON: And it didn't work.

20 MR. ROACH: And it did work. We did it.
21 And we are doing it. And here we are with a whole
22 other effort to get at the same stuff.

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1 We have searched. We have agreed on 15
2 utilities. We have spent weeks searching the files.

3 JUDGE NELSON: Well, I can go through here
4 and pick every other one.

5 MR. ROACH: This is just fantastic.

6 JUDGE NELSON: Or at random, every fifth
7 one. I can close my eyes and stab the piece of paper,
8 and that's the way it will be.

9 MR. ROACH: They want us --

10 JUDGE NELSON: Do you want me to do that?

11 MR. McBRIDE: I'd rather you do that then
12 let them pick because they're going to go back and
13 then choose the ones that are best for them.

14 MR. ROACH: I think you should stay with
15 what you ordered last time. And I think Your Honor
16 may not recall everything he ordered last time.

17 We had to search 15 utilities' files in
18 both of these railroads and report to WCTL every
19 instance where the two had competed for the same --
20 the two coals had competed to go to the same utility.

21 We're still finishing that search. It was
22 a huge job. And we did it in response to arguments of

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1 just this kind.

2 JUDGE NELSON: So in doing that work, why
3 can't you also get this price and volume information,
4 whatever it is he gave --

5 MR. ROACH: Because we'll have to go back
6 and do a thousand more searches to get this because
7 that's not what we've been searching for.

8 JUDGE NELSON: How far have you gotten?

9 MR. ROACH: I don't know. I think we're
10 close to being complete with that work.

11 JUDGE NELSON: Can you find that out?

12 MR. ROACH: I can find it out.

13 JUDGE NELSON: All right, let's take a
14 break while counsel finds that out.

15 (Whereupon, the proceedings went off the
16 record at 3:11 p.m. and resumed at 3:24 p.m.)

17 JUDGE NELSON: Mr. Norton.

18 MR. NORTON: Your Honor, with respect to
19 the request for the additional discovery, which is
20 separate from the redaction question, we have agreed
21 that we will in addition to providing the information
22 that we were called upon to provide with respect to

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1 the list of shippers identified by Western Coal
2 Traffic League in response to earlier requests that
3 you ruled on on January 26th, which were called on us
4 to identify where there was an overlap in situations
5 where both companies have significant proposals to the
6 same facility.

7 We will, in those instances where that
8 happened, we will also give information about the
9 final rate positions of the parties, in addition to
10 the overlap.

11 MR. MILLS: Is that for all the applicants
12 for both Union Pacific and Southern Pacific?

13 MR. NORTON: That's correct, yes.

14 MR. MCBRIDE: And just so I make sure we
15 have clarity on this. The way these rates are often
16 times quoted, they are shipper cars and rail cars
17 often times, and they are different types of rates or
18 tonnage levels. I presume we're going to get that
19 kind of breakdown, because those are the rates.

20 JUDGE NELSON: There's a question, Mr.
21 Norton, whether they'll get a breakdown when it's
22 shipper cars versus railroad cars. There are

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1 different rate structures.

2 MR. NORTON: Well, we would -- the rate
3 information is probably going to be comparable in both
4 cases if they are responding to bids that we provided
5 in both ways.

6 JUDGE NELSON: Anything else?

7 MR. ROACH: Well, we'll give the final bid
8 for each, if that's broken down two ways, shipper
9 cars, non-shipper cars.

10 JUDGE NELSON: The final bid is whatever
11 it is.

12 MR. ROACH: Right.

13 MR. NORTON: Now we would also think that
14 this information, as we indicated before, ought to be
15 subject to a higher level of confidentiality.

16 JUDGE NELSON: That's the next question.
17 I'm prepared to turn it over to counsel only.

18 MR. MCBRIDE: We have a coal expert and so
19 does Mr. Mills. The coal expert is going to review
20 this material and draw the inference and submit the
21 rebuttal testimony. He is outside all of these
22 companies. He's a consultant, just like Mr. Sharp.

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1 So we're not giving this to somebody who is then going
2 to derive commercial advantage.

3 JUDGE NELSON: For who does he work? Who
4 are his clients?

5 MR. MCBRIDE: Well, he has done work for
6 coal companies and utilities, as well as railroads.
7 His data base goes to the Union Pacific, Mr. Sharp
8 testified.

9 His name is Mr. Jerald Vanonneti. He is
10 with Resource Data International. He signed the
11 protective order in this proceeding. He sat in on Mr.
12 Sharp's deposition to prepare this testimony. He's an
13 honorable person. Your Honor can order him to do
14 whatever Your Honor orders him to do with the
15 information, but I have to have him be able to prepare
16 rebuttal testimony about it.

17 MR. MILLS: We would also like to request
18 that we have one expert who we have not yet finally
19 identified, but we'll be in a similar role, Western
20 expert for -- Western Shippers Coalition also will be
21 permitted to see the information under the same
22 guidelines, but only one.

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1 MR. NORTON: It's not clear how much
2 expertise is needed to hear the two rates and
3 determine one is higher or lower than the other. I'm
4 not sure that this is the same kind of information
5 that is necessary access to the outside experts who
6 are going to be continuing to represent the people we
7 have to negotiate with, and possibly also our
8 competitors.

9 JUDGE NELSON: I think that Mr. Norton has
10 the better of it on this one as far as you are going
11 to get the numbers that you can make sense out of
12 them. We have experienced counsel here, and deal with
13 such things. I don't think you need experts.

14 MR. MCBRIDE: I should have told you
15 something.

16 JUDGE NELSON: In the better world, it
17 would be nicer to have them. But we are dealing with
18 highly sensitive stuff.

19 MR. MCBRIDE: Let me explain the problem.
20 I'm sorry, I --

21 JUDGE NELSON: Which you read at the last
22 minute for. I want you to have some of it, but I want

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1 to respect these protections.

2 MR. MCBRIDE: I understand. I just want
3 to explain to you that this is a little more
4 complicated than just putting two rates along side one
5 another. Because if it's PRB coal, for example,
6 versus Colorado or Utah, PRB coal is in the 8,000 to
7 8,500 btu per pound range. Colorado Utah coal is in
8 the 11,000 pound per btu range. Then you have to look
9 at ratings of boilers. This is what these kinds of
10 experts do.

11 I am not that expert.

12 JUDGE NELSON: The expert can do all that,
13 Mr. Norton, as long as you can -- price.

14 MR. MCBRIDE: But he has got to take the
15 numbers and put them on an equal footing so that he
16 can draw a conclusion from them. It is a little more
17 complicated, because the utilities buy the coal on a
18 per BTU basis, so they make these kind of
19 computations. So do the railroads I'm sure, if they
20 are marketing right. He has to be able to draw a
21 conclusion about these somewhat adjusted numbers.

22 JUDGE NELSON: Is there a way to code the

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1 numbers so the consultant will know what they are?

2 MR. NORTON: Well, I think that's already
3 provided for as to the response to 30 CTL. We were
4 going to be doing that.

5 JUDGE NELSON: I'm lost now.

6 MR. NORTON: No. Part of the ruling on
7 January 26th was that the information would be
8 provided of the overlap, would be provided ultimately
9 in a coded form. So we would be indicating --

10 JUDGE NELSON: So then the consultant can
11 look at the code?

12 MR. NORTON: Well, if that applies here,
13 that would alleviate that problem.

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

15 MR. MCBRIDE: Let me make another point.
16 If they are going to give us what is not historical
17 rate information where one railroad won the business
18 over another, then I think almost by definition, that
19 information is not going to be at all useful to him,
20 even if they wanted to theorize he was going to do
21 something with it for some other client in the next
22 negotiation. Every one of these situations --

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1 JUDGE NELSON: Now we're talking about two
2 different things. If the rate -- we're talking about
3 the turnover of rates.

4 MR. NORTON: Right.

5 JUDGE NELSON: The winning bid. Is that
6 right?

7 MR. NORTON: Well, the winning and the
8 losing.

9 JUDGE NELSON: And the losing bid, the
10 last bid.

11 MR. NORTON: That's right.

12 JUDGE NELSON: If there is a system of
13 coding them, which you would have to work out, what
14 harm can it be if the consultant sees the code?

15 MR. NORTON: I don't think we would have
16 the same problem in that case.

17 MR. ROACH: But if he sees the rates and
18 what's coded is who is the utility, I think that's
19 what we were talking about.

20 JUDGE NELSON: I am trying to code the
21 price.

22 MR. ROACH: Well, it's not going to tell

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1 him anything if he doesn't see what the price is.
2 That's the problem.

3 I mean this is what we argued about at
4 length last time.

5 JUDGE NELSON: He can see -- we can make
6 a code of relative strength, like 3X and 2X.

7 MR. MCBRIDE: We can accept the coding of
8 the utilities and just take the prices and the rates
9 and go from there, which I understood was Mr. Norton's
10 --

11 JUDGE NELSON: No, no. The problem is
12 that he doesn't want your consultant seeing the
13 prices. My suggestion is that we code the prices.

14 MR. ROACH: Give a ratio instead of a --

15 JUDGE NELSON: Yes. Something that would
16 reflect magnitude, but without the actual real
17 dollars. Could we do that?

18 MR. NORTON: That could be done.

19 MR. ROACH: To go to the consultant, and
20 the actual prices to the lawyer.

21 JUDGE NELSON: Yes. Exactly.

22 MR. ROACH: I think that would be

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1 acceptable.

2 JUDGE NELSON: So I'm going to direct
3 that, that coded prices be provided the consultant,
4 and the real prices to counsel only, outside counsel
5 only, no --

6 Okay. What else do we have?

7 MR. ROACH: I have one other thing I need
8 to say about this, the matter we just resolved, Your
9 Honor. That is, that by agreeing to this we are
10 foregoing our right to appeal. We did this before
11 with KCS, as you may recall. We found ourselves back
12 here.

13 We very much do not want to find ourselves
14 back here with yet another bite of the apple on this
15 issue. We thought it was resolved January. Now we're
16 trying to resolve it on March 1. We are stipulating
17 to something that we very much would prefer to appeal
18 from, frankly.

19 JUDGE NELSON: Well, if we were here for
20 a third time with seeking further discovery with
21 reference to this alleged coal competition, I would be
22 very upset at it. You remind me. Twice is enough.

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1 MR. MCBRIDE: Fair enough, Your Honor. I
2 just need to know since our evidence is due in four
3 weeks and we have to work through a consultant, when
4 the applicants estimate we'll get this information.

5 JUDGE NELSON: How soon can this
6 production go on?

7 MR. ROACH: Just as soon as we can do it.
8 We're near the point of identifying where the overlap
9 is. I think it will be a matter of days to go to the
10 overlap cases and get the rate information.

11 MR. MCBRIDE: Could we set an outside date
12 of next Friday?

13 JUDGE NELSON: A week from today. How's
14 that?

15 MR. ROACH: Yes. Unless we come back to
16 you and show you cause, which I don't imagine we'll be
17 able to do.

18 JUDGE NELSON: That's fine.

19 MR. MCBRIDE: And then I guess we could
20 come back and show you cause if our understanding of
21 this didn't work.

22 JUDGE NELSON: Well, I don't really want

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1 to see this again.

2 MR. MCBRIDE: I understand.

3 JUDGE NELSON: We've been through it twice
4 now in a different context.

5 MR. MCBRIDE: That we understand what
6 we're being told here in kind of hieroglyphics. But
7 it may be that their hieroglyphics and ours are a
8 little different.

9 JUDGE NELSON: You're going to see the
10 real numbers and the hieroglyphics. You can
11 understand what they did. I would expect Mr. Roach
12 and Mr. Norton or whoever does the work, if there's a
13 question about how the coding translates to the real
14 numbers, that somebody could help them see that
15 relationship.

16 MR. ROACH: Sure.

17 JUDGE NELSON: All right?

18 MR. ROACH: As long as everybody is being
19 fair and candid with everybody, we'd like the study of
20 Mr. Vananneti or Vasanetti that you said you'd give
21 the applicants at the hearing today.

22 MR. MCBRIDE: Yes, sir.

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1 MR. ROACH: Thanks.

2 MR. MCBRIDE: You bet.

3 JUDGE NELSON: All right. Now what else
4 do we have today? We have Mr. Lubel's -- is there any
5 other item, or is that it now?

6 What do you have?

7 MR. MILLS: We have a request for
8 depositions of one Burlington Northern witness and two
9 Union Pacific witnesses.

10 JUDGE NELSON: Well put aside this
11 argument of the non-testifying witnesses. What else
12 is there about it?

13 MR. MILLS: About those witnesses?

14 JUDGE NELSON: Yes. Who are they, and why
15 do you want them?

16 MR. MILLS: One is a Burlington Northern
17 witness who was involved in some bidding for a
18 movement to energies or gulf state utilities, Nelson
19 Generating Station in Louisiana, and which there was
20 some bidding that took place between the Burlington
21 Northern, the Union Pacific, as originating carriers,
22 the Kansas City Southern and the Southern Pacific as

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1 terminating carriers. The result of that bidding, in
2 our clients view, indicates that this merger will
3 result in a loss of competition.

4 Our client has had some conversations with
5 Mr. Shala, the individual in question participating in
6 the bidding, that indicates that he may or may not or
7 perhaps share in the bidding view. We'd like to
8 inquire of him about that in particular.

9 JUDGE NELSON: Who is he?

10 MR. MILLS: His name is Mr. Sammy Shala,
11 S-H-A-L-A.

12 JUDGE NELSON: He works for the BN?

13 MR. MILLS: He works for the BN, and he is
14 headquartered in Fort Worth, I think.

15 MS. JONES: Yes. He is.

16 JUDGE NELSON: What's his job?

17 MS. JONES: He is Assistant Vice President
18 for Coal Marketing at the BN Santa Fe.

19 JUDGE NELSON: And he was involved with
20 some bidding you say?

21 MR. MILLS: Yes. And some conversations
22 concerning the impact of this merger on the Burlington

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1 Northern Santa Fe's ability to compete for movement,
2 the movement of coal to that particular plant.

3 JUDGE NELSON: What are those plants
4 again?

5 MR. MILLS: One is the one I just referred
6 to, the Nelson plant. That is near Lake Charles,
7 Louisiana, which is one of the -- the line from
8 Houston to New Orleans, over which the Burlington
9 Northern will obtain traffic rights in the settlement
10 agreement.

11 That plant is now served by the Kansas
12 City Southern, which is a blue line.

13 JUDGE NELSON: A blue dotted line?

14 MR. MILLS: No. It's a north-south blue
15 line.

16 JUDGE NELSON: Oh I see. From Shreveport
17 coming down.

18 MR. MILLS: Right. Down to Lake Charles.
19 The plant is located just north of Lake Charles on
20 that line. They are in the process of constructing a
21 spur, or actually a line down to the red line, just to
22 the west of Lake Charles, which is a second line.

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1 JUDGE NELSON: I don't see where Lake
2 Charles is.

3 MR. MILLS: May I approach?

4 JUDGE NELSON: Yes, please. Oh I see it
5 over here.

6 MR. MILLS: That line was constructed in
7 order to give this plant a --

8 JUDGE NELSON: What is it that's located
9 at Lake Charles?

10 MR. MILLS: The Nelson --

11 JUDGE NELSON: Go slowly. You know all
12 about this, and I don't know anything about it.

13 MR. MILLS: Gulf States utilities, Nelson
14 Generating Station is located just the north of Lake
15 Charles on that blue Kansas City Southern Line.

16 JUDGE NELSON: And it burns coal.

17 MR. MILLS: It burns powder river basin
18 coal produced in Wyoming.

19 JUDGE NELSON: It gets in on the blue
20 line.

21 MR. MILLS: Right above present, it is
22 railed from the powder river basis to Kansas City by

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1 the Burlington Northern, and then down to this plant
2 via the Kansas City Southern.

3 JUDGE NELSON: All right.

4 MR. MILLS: An alternative route for the
5 coal based on this new construction I just told you
6 about is either Burlington Northern or Union Pacific
7 to Fort Worth, Texas. Then it's via the Southern
8 Pacific to the plant. The Southern Pacific will have
9 access to the plant as a result of this new
10 construction.

11 JUDGE NELSON: SP is the orange line?

12 MR. MILLS: Yes.

13 JUDGE NELSON: How does the orange line
14 get from Fort Worth to Lake Charles?

15 MR. MILLS: I believe it moves from Fort
16 Worth to Dallas, and then down through Houston, and
17 then to the east through Beaumont and Orange, Texas,
18 to the Lake Charles.

19 JUDGE NELSON: So on the one hand, you get
20 the coal now from the KCS?

21 MR. MILLS: Correct.

22 JUDGE NELSON: After the merger, the KCS

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1 is still there.

2 MR. MILLS: That's right. And the SP will
3 also be there as an independent entity, absent the
4 merger. After the merger, will be a single entity, UP
5 and SP.

6 JUDGE NELSON: So what?

7 MR. MILLS: I'm getting into highly
8 confidential matters. So again, I gather the record
9 is closed on this point.

10 JUDGE NELSON: Well, you can close it and
11 you police the room.

12 MR. MILLS: I don't think anybody else is
13 here that wasn't here earlier that indicated they are
14 not highly confidential.

15 JUDGE NELSON: I'm not getting why you
16 want this Burlington Northern to witness what this is
17 about.

18 MR. MILLS: The bidding that occurred for
19 this movement last August, shortly after the merger
20 application was filed, resulted in the best
21 terminating carrier rate among the two options, Kansas
22 City Southern, from Kansas City to the plant, and

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1 Southern Pacific, from Fort Worth to the plant. The
2 best option in terms of the rate level was the
3 Southern Pacific from Fort Worth.

4 Absent the merger, either the Burlington
5 Northern or the Union Pacific could originate the coal
6 and take it to Fort Worth and hand it off to the
7 Southern Pacific for delivery of the plant. That was
8 the -- Southern Pacific was the best of the
9 terminating carrier options.

10 JUDGE NELSON: If the merged company could
11 cut out the KCS --

12 MR. MILLS: Well, the merged company could
13 cut out the KCS and could also cut out the Burlington
14 Northern.

15 JUDGE NELSON: They could do that today.

16 MR. MILLS: They could cut out the KCS
17 today. They can not cut the Burlington Northern out
18 today, but they could after the merger, by not giving
19 them a competitive rate via Fort Worth.

20 JUDGE NELSON: I do not see the need for
21 this. I am going to deny that request for that
22 deposition.

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1 Who else do you want?

2 MR. MILLS: We have also requested that
3 two witnesses from the applicants, Mr. Goth of the
4 Union Pacific's Coal Marketing Department, and Mr.
5 Hutton of the Southern Pacific's Coal Marketing
6 Department. That request was -- it's technically out
7 of time. It was served yesterday morning. I don't
8 know whether Mr. Roach intends to object to it or not,
9 but it covers several of the same subjects we wanted
10 to go into with Mr. Shala.

11 MR. ROACH: I do intend to object, but
12 it's governed by the --

13 JUDGE NELSON: Sustained. I am denying
14 that request. So I am denying the deposition as to
15 all three.

16 What is left? Mr. Lubel?

17 MR. LUBEL: Yes, Your Honor.

18 JUDGE NELSON: We're down to you now.
19 This has to do with the deposition of Mr. Eis.

20 MR. LUBEL: It's brought up -- it has come
21 up --

22 JUDGE NELSON: In the settlement

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1 privilege.

2 MR. LUBEL: Well the privilege that they
3 are claiming under the trackage rights agreement.
4 Your Honor, I'll be very brief, because the evidence
5 that we have and that we have presented to you is so
6 strong and so compelling, that we feel it speaks for
7 itself.

8 We have found evidence, Your Honor, we
9 have basically done what you told us. When you
10 considered this Burlington Northern agreement before,
11 your ruling was, it's not an absolute privilege, but
12 you've got to make a showing. You said show me
13 somebody who said something or you think might have
14 said something that gives you reason to believe
15 there's some relevant evidence there. That is exactly
16 what we have done, Your Honor.

17 Now I have submitted a letter to Your
18 Honor. I have got a notekook, the black notebook that
19 has the attachments to it. There are five or six
20 points in there. But I will go to the one point --

21 JUDGE NELSON: This book is like an inch
22 and a half thick. There's no way that I could --

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1 MR. LUBEL: Your Honor, all that is --
2 it's the letter is six pages. All it is is the things
3 that were referred to, the prior deposition
4 transcripts, the prior hearing transcripts.

5 JUDGE NELSON: I have your letter of
6 February 28th.

7 MR. LUBEL: And attached to that, Your
8 Honor, is the entire report.

9 JUDGE NELSON: I as a matter of fact read
10 it on the subway this morning, quickly.

11 MR. LUBEL: The showing that we make, Your
12 Honor, is in the form of this call report. It's
13 attached. It's exhibit 4. It's attached to the
14 letter. It is a call report of October 5, 1995,
15 conversation between Mr. Brad Skinner of the Tex-Mex
16 Railroad and Mr. Roland Briedenberg, Vice President
17 Transportation of Burlington Northern Santa Fe.

18 If you go to the second page of that, Your
19 Honor, and I will quote.

20 JUDGE NELSON: The one that says the final
21 part of the conversation?

22 MR. LUBEL: The final part was

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1 interesting. He says -- and this has to do with
2 again, the agreement that was entered in --

3 JUDGE NELSON: I have it as the first
4 page. I guess that's the way the fax did it.

5 MR. LUBEL: Roland told me -- now Roland
6 again is with Burlington Northern. Told me that they
7 are not interested in Mexico. That they will not bid
8 in the privatization process. They have a limited
9 capital budget and do not want to be distracted by
10 activities there.

11 I said, well if you are not interested in
12 Mexico, why are you going to be handling the trackage
13 rights all the way down to Brownsville, that they are
14 getting under this agreement with the applicants.

15 He said, Brad, I was in the conversation
16 when the trackage rights were awarded. Now this is --
17 we've gotten under the tent, Your Honor. We've gotten
18 inside. Here's somebody talking about these
19 negotiations.

20 He said I was on the conversation when the
21 trackage rights were awarded. Dick Davidson, that's
22 the President for UP, said the following. That he

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1 would award the western trackage rights. That's out
2 west, I-5 corridor, California, things like that. As
3 long as we would take the rights from Texas to New
4 Orleans, Texas to Memphis, and to Brownsville. It was
5 a package deal.

6 Then he says, Rob, which is Rob Krebs of
7 Burlington Northern Santa Fe, and Roland said, well we
8 would prefer that Tex-Mex be our operator from Corpus
9 to Houston. I have given Your Honor a map that shows
10 where these areas are.

11 The significance of this, Your Honor --

12 JUDGE NELSON: Let me find the map.

13 MR. LUBEL: Here's the map that just shows
14 you where.

15 JUDGE NELSON: Oh. I have it over here.
16 Go through it again, slowly.

17 MR. LUBEL: Read what he says here?

18 JUDGE NELSON: No. Tell me what it is you
19 think they are saying.

20 MR. LUBEL: In general, Your Honor, what
21 they are saying is, they weren't that interested in
22 these routes to South Texas. Specifically he mentions

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1 Corpus -- Houston to Corpus Cristi.

2 JUDGE NELSON: Where does Tex-Mex, where
3 does it operate?

4 MR. LUBEL: It goes -- I believe it goes
5 across from Corpus Cristi to La Reda. It goes across
6 right there. We've given you kind of a blow-up there.

7 JUDGE NELSON: It's shown as UP on here.

8 MR. LUBEL: No. The UP is the line coming
9 down, Your Honor. That line across is intended to be
10 Tex-Mex.

11 JUDGE NELSON: This east-west railroad?

12 MR. LUBEL: Yes. If I could tell you the
13 significance, Your Honor, I think that will come back
14 and add some light to the map.

15 The significance is, as you recall, their
16 agreement, the applicants agreement with Santa Fe,
17 they say -- I mean with Burlington Northern Santa Fe,
18 they this satisfies the competitive problem, the
19 reductions from two to one. And that the Burlington
20 Northern will be a strong competitor in all areas.

21 But this memo, Your Honor, contradicts
22 that.

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1 JUDGE NELSON: What are we talking about
2 now?

3 MR. LUBEL: There are two to one in South
4 Texas. The one I have showed you here is -- right now
5 you've got Sante Fe -- I mean you've got Union Pacific
6 and Southern Pacific going from Houston down to Corpus
7 Cristi and Brownsville. Now they will be merged.

8 JUDGE NELSON: Look on the colored map,
9 you can see it better. I see Houston, and I see
10 Brownsville.

11 MR. LUBEL: Corpus Cristi is on the way
12 down there, Your Honor.

13 JUDGE NELSON: There's one railroad there,
14 shown in red.

15 MR. LUBEL: That's the UP. SP has the
16 trackage rights, currently has trackage rights over
17 the UP. They are an independent carrier now before
18 the merger, with trackage rights over the UP.

19 JUDGE NELSON: So it is as though two
20 railroads operate.

21 MR. LUBEL: Right. That's not really an
22 excuse, Your Honor.

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1 JUDGE NELSON: Between Houston and
2 Brownsville. That would be a two to one situation?

3 MR. LUBEL: That's right.

4 JUDGE NELSON: Do they treat it as a two
5 to one situation?

6 MR. LUBEL: Yes. That is not in dispute.

7 JUDGE NELSON: Their answer is that that
8 will be mitigated by the Burlington Northern.

9 MR. LUBEL: And this memo --

10 JUDGE NELSON: Where are they on the map?

11 MR. LUBEL: Well, they are going to be
12 allowed --

13 JUDGE NELSON: The green railroad.

14 MR. LUBEL: I don't know all of their
15 routes, but they are going to be allowed down here.

16 JUDGE NELSON: -- trackage rights over the
17 same. So --

18 MR. LUBEL: Like replacing the Southern
19 Pacific.

20 JUDGE NELSON: Coming in instead of the
21 Southern Pacific. All right. So now what?

22 MR. LUBEL: The premise of their argument,

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1 that the settlement will create a strong competitor
2 there, and this memo contradicts that.

3 JUDGE NELSON: Now let's see why.

4 MR. LUBEL: Because the memo is saying
5 that we would really rather have Tex-Mex be the
6 carrier that comes down here. It says -- it starts
7 off saying we're not that interested --

8 JUDGE NELSON: Go through it slowly. See
9 again, you know this stuff thoroughly and you believe
10 in it. I don't know it at all, at least
11 superficially, and I don't know that I believe it. So
12 when you go that fast, you are losing me.

13 MR. LUBEL: Certainly, Your Honor. If you
14 reference the memo, the memo is self-explanatory.

15 JUDGE NELSON: I am looking at the second
16 page of the call report.

17 MR. LUBEL: Yes.

18 JUDGE NELSON: The call report is a report
19 of a phone call.

20 MR. LUBEL: That's right.

21 JUDGE NELSON: Between --

22 MR. LUBEL: Mr. Skinner.

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1 JUDGE NELSON: Skinner, who is a Tex-Mex
2 employee.

3 MR. LUBEL: Right.

4 JUDGE NELSON: And Mr. Briedenberg is it?

5 MR. LUBEL: Yes. Mr. Briedenberg, who has
6 brought --

7 JUDGE NELSON: Works with the --

8 MR. LUBEL: That's correct.

9 JUDGE NELSON: That's Roland Briedenberg.

10 MR. LUBEL: That's right.

11 JUDGE NELSON: And that's the railroad
12 that is going to come in there and be the antidote.

13 Now he says we. Who is the author of
14 this? Oh, of the Tex-Mex.

15 MR. LUBEL: Roland told me that they are
16 not interested in Mexico.

17 JUDGE NELSON: We talked about Mexico.
18 Roland, that's the BN, told me they are not interested
19 in Mexico. They -- the privatization process, and
20 then there are the reasons.

21 They are not interested in Mexico, tends
22 to show, you would say, that they are not interested

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1 in the trackage rights between Houston and
2 Brownsville.

3 MR. LUBEL: Right. That's what he said.
4 He said --

5 JUDGE NELSON: Is that what Mexico means?

6 MR. LUBEL: Well, Mexico -- you obviously
7 get into Mexico by going down over those grounds.

8 JUDGE NELSON: As well as by way of San
9 Antonio and La Redo.

10 MR. LUBEL: That's true, Your Honor. But
11 Mr. Skinner says, well if you are not interested in
12 Mexico, why are you going to be handling the trackage
13 rights all the way down to Brownsville. In other
14 words, why have you accepted this under this
15 agreement?

16 JUDGE NELSON: The Tex-Mex man says to
17 Burlington. If you're not interested, why are you
18 doing these trackage rights.

19 He said, Brad -- who is Brad?

20 MR. LUBEL: This is Brad -- Brad is the
21 guy who is being talked to.

22 JUDGE NELSON: He says Brad, I was in the

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1 conversation when the trackage rights were awarded.
2 That is, the Burlington Northern.

3 Dick Davidson -- who is that?

4 MR. LUBEL: President of Union Pacific,
5 Your Honor. The applicant is here.

6 JUDGE NELSON: This is what --

7 MR. LUBEL: This is inside the
8 negotiation.

9 JUDGE NELSON: Mr. Briedenberg is telling
10 Skinner that Davidson said --

11 MR. LUBEL: Right.

12 JUDGE NELSON: That he -- Davidson is a UP
13 man, you said?

14 MR. LUBEL: President of Union Pacific.

15 JUDGE NELSON: He would award the western
16 trackage rights. I don't know what that means. As
17 long as we would take. Who is we?

18 MR. LUBEL: Your Honor, as long as we,
19 that's Burlington Northern Santa Fe, would take these
20 other rights.

21 MR. KOLASKY: Your Honor.

22 JUDGE NELSON: Suggesting there was some

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1 deal that it was a --

2 MR. LUBEL: The point here, Your Honor, is
3 that they were saying --

4 JUDGE NELSON: Whereby Burlington in
5 return for taking the trackage rights to Brownsville
6 would get something else.

7 MR. LUBEL: It's the western rights. See
8 under the trackage rights agreement, Your Honor, they
9 get a lot of rights out in California, all up and down
10 what is known as the I-5 corridor. Those and other
11 rights in the western states are very important to
12 Burlington Northern.

13 What we say this shows is that he is
14 saying that if you want those western rights, you've
15 got to take these rights too, even though --

16 JUDGE NELSON: Are the western rights,
17 whatever they are, end up with the Burlington
18 Northern?

19 MR. LUBEL: Yes. They get trackage rights
20 out there.

21 JUDGE NELSON: So Davidson can be read as
22 saying or reported as saying that he -- who is he to

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1 award the rights? He's the president?

2 MR. LUBEL: He is the president of Union
3 Pacific.

4 JUDGE NELSON: And that's the controlling
5 company?

6 MR. LUBEL: They are the applicants here.
7 They are the ones cutting this deal, Your Honor.

8 JUDGE NELSON: He is saying he would award
9 to the Burlington the western trackage rights, which
10 is something the Burlington wants.

11 MR. LUBEL: Here's a map that shows the
12 western.

13 JUDGE NELSON: As long as we would take
14 the rights from Texas to New Orleans to Memphis and to
15 Brownsville.

16 MR. LUBEL: Right.

17 JUDGE NELSON: So it was a package deal.
18 Is that where I should stop reading?

19 MR. LUBEL: Yes. Then the next sentence,
20 the next sentence is, while it does alarm you to the
21 fact that Rob and Roland of Burlington Northern --

22 JUDGE NELSON: Who is Rob?

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1 MR. LUBEL: Rob is Rob Krebs, who was the
2 chairman of the board, incoming -- he was the
3 president, now the chairman of the board of Burlington
4 Northern.

5 JUDGE NELSON: And Roland? That's --

6 MR. LUBEL: That's the person who is
7 saying this.

8 JUDGE NELSON: Says, well we would prefer
9 that Tex-Mex be our operator from Corpus to Houston.

10 MR. LUBEL: Again, showing that they would
11 prefer somebody else come down that way rather than
12 them.

13 JUDGE NELSON: Dick's response was -- oh,
14 this is the -- when the package deal is proposed.

15 MR. LUBEL: The package deal was proposed
16 above. I think his response --

17 JUDGE NELSON: Burlington's response is,
18 we prefer Tex-Mex be our operator. Burlington wanted
19 to use Tex-Mex to do their work to Brownsville?

20 MR. LUBEL: I believe it's saying that
21 we'd rather have the Burlington Northern company.
22 We'd rather have the Tex-Mex handling this route.

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1 JUDGE NELSON: Who is we?

2 MR. LUBEL: We, being Burlington Northern.

3 JUDGE NELSON: So instead of getting the
4 trackage rights, they wanted to have Tex-Mex get them?

5 MR. LUBEL: That's right.

6 JUDGE NELSON: Is that right?

7 MR. LUBEL: That's the fair inference from
8 it. The point, the whole point that it shows,
9 especially referring to it as a package deal, Your
10 Honor, is that it may show that Burlington Northern is
11 not as interested in the south Texas routes. What
12 that could lead the Board to conclude, that could lead
13 the Board either to deny this merger or to condition
14 the merger on granting rights to a different
15 competitor in that region who might be more interested
16 in that.

17 JUDGE NELSON: What is this stuff that
18 follows?

19 MR. LUBEL: Well, Your Honor, the stuff
20 that follows is -- it seems to be Mr. Briedenberg
21 making --

22 JUDGE NELSON: It sounds unfortunate.

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1 MR. LUBEL: It does. I've not brought
2 that up. We didn't quote that.

3 JUDGE NELSON: We don't need to --

4 MR. LUBEL: I have not brought that up,
5 Your Honor.

6 JUDGE NELSON: Who knows how accurate it
7 is.

8 MR. LUBEL: Our point is, Your Honor, that
9 we have now made the showing that you have asked us
10 for. You have said go out and find where somebody --

11 JUDGE NELSON: All right. So let's see
12 what it is you have shown. That the negotiations
13 included within them a package deal, whereby
14 Burlington Northern agreed to the trackage rights to
15 Brownsville as a package, because it wanted the more
16 attractive western.

17 MR. LUBEL: It actually says more than
18 just Brownsville. It says that the rights from Texas
19 to New Orleans to Memphis and to Brownsville.

20 JUDGE NELSON: All right. So this was the
21 package deal, and here's the Burlington. So what?
22 What are you proving?

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1 MR. LUBEL: Your Honor, what we have
2 proved is that we have made the showing that Your
3 Honor said, that they might not have been as
4 interested. Burlington Northern might not be as
5 interested in the South Texas route.

6 JUDGE NELSON: If they hadn't have gotten
7 the sweetest stuff out west. So what?

8 MR. LUBEL: That they didn't necessarily
9 want it, Your Honor. That they really didn't want it.
10 That they only took it because they had to take it,
11 because --

12 JUDGE NELSON: So what?

13 MR. LUBEL: Because the applicants were
14 saying to them, if you don't take this, you can't have
15 those.

16 JUDGE NELSON: Let's assume that exact
17 case.

18 MR. LUBEL: Okay.

19 JUDGE NELSON: They never really wanted
20 it, but they are stuck with it as part of a business
21 decision because there was other more attractive
22 stuff.

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1 MR. LUBEL: Exactly.

2 JUDGE NELSON: So what?

3 MR. LUBEL: What that might lead the
4 commission to conclude, I think it's very logical,
5 Your Honor, is that the Burlington Northern Sante Fe
6 might not be as effective a competitor in that area as
7 the applicants are saying. They might not be -- if
8 they are not that interested in it, they might not be
9 that respective a competitor. Hence, the Board might
10 condition the merger.

11 JUDGE NELSON: That they might just be
12 there for show business.

13 MR. LUBEL: Yes. And that the Board might
14 condition the merger on giving those rights in that
15 area to someone else. There's further support for
16 this that I point out in my letter, Your Honor.

17 There was an affidavit previously
18 submitted by Tex-Mex from a Mr. Fields, Mr. Larry
19 Fields. You may recall this. He said that in the
20 last year, Burlington Northern has made some very
21 curious rate decisions. They have raised their rates
22 for grain traffic down to Mexico so high, as to price

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1 them out of the market. That is another indication
2 that maybe they won't be that interested.

3 JUDGE NELSON: What is FMN?

4 MS. JONES: Mexican Railroad.

5 MR. LUBEL: I believe that's the Mexican
6 railway, Your Honor.

7 Your Honor, our point is, we're not here
8 to litigate. We're not here to litigate. In fact,
9 whether Burlington Northern --

10 JUDGE NELSON: How about a condition that
11 turns that business over to the FMN?

12 MR. LUBEL: That certainly could be a
13 possibility.

14 JUDGE NELSON: Then that sits nicely.

15 MR. LUBEL: According to Mr. Davidson's
16 remark, it wouldn't sit that nicely with him
17 necessarily. But the point is, Your Honor, we're not
18 here to litigate whether or not Burlington Northern in
19 fact will be an effective competitor. That is for the
20 Board to decide. But we feel we have clearly made the
21 showing that Your Honor required to justify our
22 inquiring into at least this aspect of the

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1 negotiations.

2 We have already made our other argument
3 before Your Honor.

4 JUDGE NELSON: Put the slurs to one side.
5 I don't like them. It's too easy to not like them.
6 Therefore out of discovery because of them. I am
7 trying to discipline myself not to do that.

8 MR. LUBEL: We do not --

9 JUDGE NELSON: To your credit, you are not
10 relying.

11 MR. LUBEL: We do not rely on that, Your
12 Honor.

13 MR. KOLASKY: Your Honor, may I be heard
14 on this for one moment?

15 JUDGE NELSON: On what?

16 MR. LUBEL: I'll yield.

17 MR. KOLASKY: On behalf of Conrail. We
18 support KCS's motion. I just want to make one
19 additional point.

20 We are going to be showing, and so our
21 affirmative case, that there are very serious
22 impediments in terms of the trackage rights that the

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1 Burlington Northern is receiving.

2 The response that we've been hearing
3 consistently in all of the depositions is that the
4 trackage rights were awarded to Burlington Northern in
5 this area because that is who the shippers wanted, and
6 because they are the meanest, scariest competitor
7 around.

8 We think that the evidence that Mr. Label
9 has adduced suggests, as we have suspected for some
10 time, that that is not in fact the case. That in
11 fact, the Burlington Northern is not interested in
12 being an effective competitor in this particular
13 region.

14 JUDGE NELSON: I understand their
15 contention.

16 MR. KOLASKY: Okay.

17 JUDGE NELSON: What discovery is it you
18 want now?

19 MR. LUBEL: Well, Your Honor, first.

20 JUDGE NELSON: What do you want to do with
21 whom?

22 MR. LUBEL: If Mr. Eis's deposition

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1 continues on Monday, we want to be able to ask him
2 questions about the negotiations. We also feel at the
3 very least, we should be able to depose Mr.
4 Briedenberg, who made these statements. He is the
5 Burlington Northern employee who made these statements
6 about --

7 JUDGE NELSON: Well, first things first.
8 Mr. Eis is a deponent.

9 MR. LUBEL: Yes. He is already set. It's
10 a continuation of his deposition.

11 JUDGE NELSON: Was he present at these
12 meetings?

13 MS. JONES: Excuse me. He was present and
14 Mr. Greenberg was not.

15 MR. LUBEL: Well, Ms. Jones says Mr.
16 Briedenberg was not. By this statement, Mr.
17 Briedenberg obviously indicates he was present at some
18 conversation where this was said.

19 MS. JONES: And there's sworn testimony
20 from several witnesses as to who was present. No one
21 has ever testified --

22 JUDGE NELSON: Now I am confused with all

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1 these allegations back and forth.

2 Let's get back to this fellow, Mr. Eis.
3 Who does he work --

4 MR. LUBEL: Mr. Eis is the Burlington
5 Northern person who is involved in negotiation of the
6 settlement agreement.

7 JUDGE NELSON: Was he in the meetings when
8 Mr. Davidson made these remarks?

9 MR. LUBEL: Well, Your Honor, we don't
10 know if this was necessarily a meeting or a telephone
11 conversation. He said I was in the conversation when
12 the trackage rights were awarded. That very well
13 could have been a telephone conversation between these
14 three, Mr. Davidson, Mr. Briedenberg, and Mr. Krebs:

15 The fact that Mr. --

16 JUDGE NELSON: What does Mr. Eis have to
17 do with these conversations?

18 MR. LUBEL: These conversations, he wasn't
19 necessarily a party to this conversation.

20 JUDGE NELSON: The name isn't even
21 mentioned in these.

22 MR. LUBEL: That's right. That is why we

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1 need Mr. Briedenberg.

2 JUDGE NELSON: Why do you want to ask Mr.
3 Eis about them?

4 MR. LUBEL: Because Mr. Eis was involved
5 in the negotiations of the Burlington Northern UP
6 agreement. He has submitted a statement in this case
7 where he said, and this is also in my letter, Your
8 Honor. Mr. Eis has said in his statement that the
9 agreement was negotiated --

10 JUDGE NELSON: Of the hard negotiations.

11 MR. LUBEL: The hard negotiation.

12 JUDGE NELSON: I remember that. Well
13 that's different.

14 MR. LUBEL: So we said, okay. Why do you
15 --

16 JUDGE NELSON: You've got two claims here.
17 One is that you want to probe Mr. Eis on what he meant
18 by these strenuous negotiations. The other is this
19 business of the package deal with BN as the unwilling,
20 unhappy, grumbling railroad in that area.

21 MR. LUBEL: And we need to depose Mr.
22 Briedenberg.

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1 JUDGE NELSON: And whether it will really
2 perform.

3 MR. LUBEL: We need to depose Mr.
4 Briedenberg on that.

5 JUDGE NELSON: Greenberg?

6 MR. LUBEL: Briedenberg. Mr. Briedenberg.

7 JUDGE NELSON: Oh, he's one of these --

8 MR. LUBEL: He is the one that was
9 talking.

10 JUDGE NELSON: Let's stay with this, with
11 Briedenberg. He is a vice president.

12 MR. LUBEL: I think the testimony -- he's
13 number two in there. Their network operations or
14 systems department. There was testimony that his
15 responsibilities would include --

16 JUDGE NELSON: And he is telling Skinner
17 these things?

18 MR. LUBEL: Yes. We got this call report
19 from Mr. Skinner of Tex-Mex.

20 JUDGE NELSON: I understand that. He is -
21 - if there's a deal, it's in the remarks of Davidson.

22 MR. LUBEL: Yes, Your Honor.

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1 JUDGE NELSON: Mr. Davidson is not
2 Briedenberg. Briedenberg knows only what he reports
3 he heard Davidson say.

4 MR. LUBEL: That's right.

5 JUDGE NELSON: Why aren't we going for
6 Davidson?

7 MR. LUBEL: Well, Your Honor, in Mr.
8 Davidson's deposition, we did ask, start to ask him
9 about the -- whether the Burlington Northern had ever
10 expressed that view that it was not really that
11 interested in the south Texas area, and they object,
12 saying you can't get into that at settlement.

13 JUDGE NELSON: Well then why do you want -
14 - I'm still not getting clearly why you want Mr.
15 Briedenberg. He is simply reporting something he
16 heard Mr. Davidson say.

17 MR. LUBEL: There's two sides of a
18 conversation. If Mr. Briedenberg says that this is
19 what was -- well, because Mr. Briedenberg knows two
20 things. He knows the level of Burlington Northern
21 Sante Fe's interest in Mexico, as he has reflected in
22 this call report. And of course he also knows what

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