

INTERSTATE COMMERCE COMMISSION 03/01/96

FINANCE DOCKET # 32760

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1 Mr. Davidson said.

2 Mr. Davidson can't necessarily speak to  
3 what Burlington Northern really wanted out of this.  
4 Mr. Briedenberg is the one that has it all, has both  
5 sides, or both of those issues.

6 JUDGE NELSON: Well, you know who you  
7 want. You don't want Davidson and you want  
8 Briedenberg.

9 MR. LUBEL: We've already had Davidson.  
10 We would certainly like, Your Honor, let me make it  
11 clear. We would certainly like to be able to reopen  
12 Mr. Davidson's deposition to ask about these matters.  
13 But I've not laid that before you here. We're just  
14 saying going forward, we feel we should have the right  
15 to question Mr. Briedenberg about this.

16 JUDGE NELSON: All right. First as to  
17 Briedenberg or Davidson. Let's see, Briedenberg works  
18 for the --

19 MR. LUBEL: Burlington Northern.

20 JUDGE NELSON: Burlington Northern. And  
21 Davidson works for the UP. So why don't we take first  
22 the one he wants, which is Briedenberg, which is your

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1 man, Mr. --

2 Why shouldn't he have them?

3 MR. LUBEL: Just to make it clear. We  
4 would take Mr. Davidson if they want to bring him back  
5 to answer this.

6 JUDGE NELSON: No. Stick with  
7 Briedenberg. You started out wanting him. Why not  
8 Briedenberg?

9 MS. JONES: A couple of points, Your  
10 Honor. First of all, Mr. Briedenberg was not in any  
11 of these discussions, and reports that whatever this  
12 says about what he said, if it is even true, is second  
13 hand information.

14 Mr. Eis, several others testified about  
15 this. Mr. Eis, whose deposition does continue on  
16 Monday, was the negotiator for Burlington Northern.  
17 Mr. Briedenberg was never in the room, and there's  
18 sworn testimony on that point. It's from several  
19 witnesses.

20 Mr. Eis has already submitted --

21 JUDGE NELSON: I know, and I too wondered  
22 why he wants Briedenberg, as I read this.

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1 MS. JONES: The point of the --

2 JUDGE NELSON: Briedenberg is a reporter,  
3 more than anything.

4 MR. LUBEL: But he said he was in the  
5 conversation.

6 MS. JONES: But the testimony that you say  
7 you want, Mr. Lubel, on a company's level of interest  
8 in Mexico, was already the subject of 20 pages of  
9 deposition with Mr. Eis already, including from Mr.  
10 Lubel and Mr. McGeorge of the Justice Department. And  
11 13 pages of testimony from Mr. Grimstein, both from  
12 Mr. McGeorge and from Ms. Metallo, who is co-counsel  
13 to Mr. Lubel. That's 23 pages of testimony on the  
14 subject of the company's interest in Mexico, both -

15 JUDGE NELSON: Did you have this phone  
16 memorandum at the time?

17 MS. JONES: I did not, Your Honor. Mr.  
18 Lubel may have. I'd like to know how long he has had  
19 this.

20 JUDGE NELSON: When did you get this, Mr.  
21 Lubel?

22 MR. LUBEL: Your Honor, I have had this

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1 for a number of weeks. We did ask. We again, asked  
2 Eis about the negotiations. They objected as to  
3 privilege.

4 MS. JONES: Why didn't Mr. Lubel bring  
5 this forward earlier and allow us to address it?

6 MR. LUBEL: Your Honor, there is a  
7 fundamental issue here though. They say because one  
8 of their witnesses said one thing, that you can't  
9 contradict it. We have now presented you with  
10 evidence that contradicts exactly what she is saying,  
11 exactly what that man testified to.

12 If we don't have the right to present  
13 contradictory evidence, if their first -- this  
14 explanation is what goes, and we don't have the right  
15 to contradict it, then there is no proceeding. There  
16 is no contest of anything.

17 JUDGE NELSON: Mr. Roach, if it's a fight  
18 over Briedenberg, why do you care, as long as I don't  
19 order Davidson.

20 MR. ROACH: For the exact reason that Your  
21 Honor just raised. How long has KCS and Tex-Mex had  
22 this document? We are here now for the sixth time re-

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1 arguing the settlement privilege.

2 JUDGE NELSON: It's the first time I have  
3 seen it.

4 MR. ROACH: We are here for the sixth time  
5 re-arguing the settlement. That is one point. You  
6 may recall that KCS argued it extensively and lost.  
7 Then Tex-Mex came in with an affidavit of their fellow  
8 about why they thought they had made a particularized  
9 need about Mexico and about the Tex-Mex. Your Honor  
10 found a particularized need with respect to three  
11 particular matters.

12 JUDGE NELSON: So you are really saying  
13 he's been sitting on this too long.

14 MR. ROACH: Exactly. Let me give you the  
15 very clear evidence of that. The letter he sent you  
16 isn't a letter that's about this document. It is a  
17 letter that re-states all his arguments, and then  
18 throws in this document. It is clear that what he is  
19 doing here is, he's trying to get an appeal --

20 JUDGE NELSON: Let me ask Mr. Allen if he  
21 knows. How does it happen that this call report found  
22 its way into the hands of KCS? What do you know about

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1 this?

2 MR. ALLEN: Well, let me say, Your Honor,  
3 that it was not -- this is not a matter that Tex-Mex  
4 has brought up. It was not Mr. Skinner's either  
5 intention or desire that this particular memorandum be  
6 made public. I want the record clear on that.

7 MR. ROACH: I'd like to know who stamped  
8 it highly confidential. Whose document is it?

9 JUDGE NELSON: Well, Mr. Allen is going to  
10 tell us what he knows about it. He is counsel for  
11 Tex-Mex.

12 MR. ALLEN: What I know about it is that  
13 it's an internal document prepared by Mr. Skinner that  
14 at some point in the past, Mr. Skinner shared with the  
15 folks at KCS, without any intention or desire that it  
16 be made public. It has been made public. Having been  
17 made public, I would agree entirely with Mr. Lubel,  
18 that I believe it is highly relevant to the issues in  
19 this case.

20 It is a high official of the Burlington  
21 Northern Sante Fe, reporting a conversation that he  
22 had with the head of UP, indicating that the BN had no

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1 interest in providing this service to Mexico, would  
2 rather have the Tex-Mex do it, and was told by --

3 JUDGE NELSON: I see all that. What I am  
4 really exploring is this waiver argument, estoppel or  
5 whatever you want to --

6 MR. McGEORGE: It has gone between two  
7 parties in the case. Then Mr. Lubel had no basis for  
8 stamping it highly confidential, except to -- Mr.  
9 Davidson from seeing it and answering.

10 JUDGE NELSON: Why are we taking up time  
11 with whether there's a label properly on it or not?

12 MR. ROACH: Because I can't show it to my  
13 client.

14 MR. LUBEL: Your Honor, as we did for  
15 Burlington Northern in response to Ms. Jones' request,  
16 and as we will do for Mr. Roach, we would agree to a  
17 limited exception to allow him to show his client,  
18 whoever has a need to know and his client, the  
19 document.

20 I hasten to add, Your Honor --

21 JUDGE NELSON: Words are being attributed  
22 to Mr. Davidson here that are quite unfortunate.

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1 MR. ROACH: Here's the point about  
2 estoppel.

3 JUDGE NELSON: He ought to be knowing  
4 about it.

5 MR. ROACH: Here is the point about  
6 estoppel.

7 JUDGE NELSON: So let's get rid of this  
8 label confidential. I want him to be able to show  
9 this.

10 MR. ROACH: If you read Mr. Lubel's  
11 letter, it is six pages of re-stating all the old saws  
12 that you've heard before about how this really wasn't  
13 a settlement, and there wasn't an adverse claim, and  
14 we're relying on the settlement agreement. Then he  
15 tosses in this --

16 JUDGE NELSON: Mr. Allen, do you care if  
17 Mr. Roach shows this to his client?

18 MR. ALLEN: I don't care if Mr. Roach  
19 shows it to his client. I think Mr. Skinner's view is  
20 that it was not his intention or desire, as I have  
21 stated, to have the document public, made publicly  
22 available. But since it does relate to an alleged

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1 conversation with Mr. Davidson, I have no objection.

2 JUDGE NELSON: I would think Davidson  
3 ought to see it.

4 MR. ALLEN: We would say, Your Honor, that  
5 I'm not sure I share Mr. Lubel's view that the  
6 additional comments that you referred to are not  
7 relevant. I think they are relevant.

8 JUDGE NELSON: I don't make any judgement  
9 about that. I just --

10 MR. ALLEN: I think that Mr. Eis --

11 JUDGE NELSON: He has not relied on them  
12 here as a basis for discover.

13 MR. ALLEN: I do think that Mr. Eis, who  
14 is going to be deposed on Monday, should be permitted  
15 to be asked about any conversations that he may have  
16 had with Mr. Davidson that confirms or doesn't confirm  
17 the remarks that Mr. Davidson allegedly made.

18 JUDGE NELSON: Now my view of the later  
19 remarks is that under any view, they are unfortunate  
20 and could raise questions. But they are not being  
21 relied on here as a basis for discovery.

22 So, yes sir.

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1 MR. McGEORGE: I'm just wondering if I  
2 speak for the waiver issue.

3 JUDGE NELSON: Tell me again who you are.

4 MR. McGEORGE: I am for the Department of  
5 Justice. We have been interested in this issue, to  
6 find out what we can. I can't imagine that we  
7 wouldn't try to find out whether Burlington Northern  
8 Sante Fe would be an effective competitor in this  
9 area.

10 We have asked lots of questions for Mr.  
11 Eis and others as well, but we've been blocked when  
12 we've tried to get into testing the contention that  
13 Burlington Northern was interested in these routes and  
14 would be an aggressive competitor.

15 MR. McGEORGE: We've respected that and  
16 we'll take it up when we have the opportunity, but  
17 we've been blocked each time we've tried to get in and  
18 test these assertions.

19 And in terms of the labor issues, I can  
20 tell you we've had a continuing interest and this is -  
21 - we have not seen the letter until a couple of days  
22 ago and we would certainly like to ask questions of

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1 Mr. Eichs and anybody else we have a chance to to test  
2 the assertion.

3 JUDGE NELSON: Well, treated as a  
4 Department of Justice request, it takes on a different  
5 light. Certainly you don't take the baggage of the  
6 waiver of the estoppel or whatever it was, latches --

7 MR. LUBEL: That's my point.

8 JUDGE NELSON: I think that's well said.

9

10 MR. ROACH: May I be heard then on whether  
11 there is a particular need?

12 JUDGE NELSON: Yes, I want to give you  
13 plenty of time because my leaning here, Mr. Roach, is  
14 that I think he's crossed the threshold into the  
15 negotiations and it's just a question of how we do it  
16 and who the witness is and what mechanics. You can  
17 persuade me on it.

18 MR. ROACH: Let me see if I can change  
19 your mind about it. The legal issue on settlement  
20 privileges, Your Honor, and I've worked on five  
21 previous hearings on this subject, was is there a  
22 particularized need to get into the back and forth of

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1 the settlement negotiations versus drawing on all the  
2 other evidentiary courses that are available.

3 Now they have asked and when I say they I  
4 mean ASC and EOJ, Conrail, etc., have asked every  
5 single witness for UP and every single witness for BN  
6 Santa Fe is BN Santa Fe interested in serving Mexico?  
7 Have they said anything to the contrary? There's lots  
8 of sworn testimony that they are. There's lots of  
9 sworn testimony from the UP witnesses that we think  
10 they are and we're frightened of how effective they're  
11 going to be. And there are quite a number of  
12 questions about whether things were said in some of  
13 the negotiations that we allowed witnesses to say no  
14 to, in pursuit of Your Honor's prior rulings, as you  
15 may recall, including these inflammatory things about  
16 Mexico.

17 Did BN Santa Fe say in the settlement  
18 talks they weren't interested? We let our witnesses  
19 answer, but now you have some piece of -- well, I'll  
20 not supply the word -- third order hearsay, that I  
21 know to be full of inaccuracies and that I know Ms.  
22 Jones regards it as full of inaccuracies, but let's

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1 focus on it and ask ourselves is there anything in  
2 here that tells us that in the settlement talks there  
3 were statements made that proved that BN Santa Fe  
4 isn't interested in Mexico.

5 I submit to you that the answer, just on  
6 the face of this document, is no.

7 The only things that it says about the  
8 settlement talks and I believe sincerely that this  
9 report is utterly inaccurate, but let's take what it  
10 says on its face.

11 JUDGE NELSON: We have to, for these  
12 purposes.

13 MR. ROACH: We have to. Well, you may  
14 have to. I think you could just toss these in the  
15 wastebasket as a piece of information that these folks  
16 have had, as he admits, for weeks, never brought to  
17 you and now bring to you with a notebook that they're  
18 going to use to appeal to the Board on the settlement  
19 privilege issue. They should have appealed three  
20 months ago. I think that's just incredible.

21 JUDGE NELSON: I think the fact that the  
22 Department now invokes discovery, they can't be stuck

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1 with this waiver.

2 MR. ROACH: They never got a request  
3 pending, but I'll yield to that point. Let me just  
4 address the matter.

5 The first comment spoken about here is the  
6 comment that UP allegedly said that the offer of  
7 rights was a package, that we wanted BN Santa Fe to  
8 take all the rights.

9 JUDGE NELSON: No, it's higher than that.  
10 It begins with "Roland told me, they are not  
11 interested in Mexico."

12 MR. ROACH: No, but see that isn't the  
13 statement made in the settlement talks. That's a  
14 statement that Mr. Briedenberg allegedly made on the  
15 phone to Mr. Skinner. So it doesn't say that in the  
16 settlement talks --

17 JUDGE NELSON: It certainly is a reason to  
18 conduct a deposition of Briedenberg.

19 MR. ROACH: That's not what we're  
20 debating. We're debating settlement privilege. We  
21 can have a separate argument about --

22 JUDGE NELSON: Well, if the first one is

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1 easier.

2 MR. ROACH: I don't have any problem --

3 JUDGE NELSON: Why don't I just direct  
4 discovery, a deposition of Mr. Roland Briedenberg on  
5 the question of his company's interest in Mexico.

6 MR. ROACH: Number one, no one has ever  
7 contested that all the BN witnesses could be asked  
8 about their interest in Mexico. They all answered and  
9 we can have a separate debate about whether there's a  
10 need for one or because of this piece of hearsay that  
11 somebody came up with. I'm here defending settlement  
12 privilege and my point is that sentence does not refer  
13 to anything said in the settlement talks. It refers  
14 to something Mr. Briedenberg actually said in a phone  
15 call to Mr. Skinner in October.

16 JUDGE NELSON: All right, then it's not  
17 privileged.

18 MR. ROACH: Right, and we can talk some  
19 other time about a deposition request.

20 JUDGE NELSON: We can have a deposition  
21 for that easily.

22 MR. ROACH: It hasn't been noticed for

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1 today, Your Honor, we're here debating another  
2 deposition that wasn't noticed for today.

3 JUDGE NELSON: What if it is privileged?

4 MR. ROACH: Well, then you get to, he said  
5 he was in the conversation and Davidson said the  
6 following and I don't even want to speak these words  
7 and attribute them to the President of UP, I don't  
8 think they're accurate. But let's take them as  
9 accurate, that he would afford the western rights as  
10 long as they take the rest. It's a statement that  
11 they want the rights taken as a package. Does that  
12 prove incentive that he isn't interested in Mexico?  
13 Of course not. It just proves that UP wanted BN Santa  
14 Fe to take all the rights. He has testified to that.  
15 He has already acknowledged that. He has said all the  
16 shippers told them they wanted BN Santa Fe, that it  
17 was needed because it could serve all the points and  
18 had a broad network and was the strongest competitor.  
19 They didn't particularly want BN Santa Fe as its  
20 strongest competitor to get these rights, but he knew  
21 he had to. Yet, it was important that they serve all  
22 the points. So that isn't some bombshell. That's

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1 just a statement that we've always known and it  
2 doesn't give you a particularized need to pierce the  
3 settlement privilege and allow inquiry into issues  
4 relating to Mexico. I haven't even heard a definition  
5 of what issues they think they may inquire into. It's  
6 going to end up being everything, but that's my  
7 comment on that sentence.

8 Then you have the sentence above the Tex-  
9 Mex, Rob and Rollie, I don't know where the period is,  
10 Rob and Rollie said well, we would prefer that Tex-Mex  
11 be our operator from Corpus to Houston and they  
12 responded negatively with language that we all think  
13 needs to be explained or clarified and I don't think  
14 was ever spoken by anyone. But suppose that that  
15 occurred as well. Suppose that the BN Santa Fe asked  
16 to have Tex-Mex be its operator from Corpus Cristi to  
17 Brownsville. For lots of reasons, that could have  
18 happened. It could have happened because the Tx-Mex  
19 has lower costs --

20 JUDGE NELSON: You mean to do the work it  
21 would have done under the agreement?

22 MR. ROACH: To move traffic as BN Santa

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1 Fe's agent over the rights --

2 JUDGE NELSON: Under the agreement?

3 MR. ROACH: Yes, right, from Corpus to  
4 Brownsville. There isn't a lot of traffic that goes  
5 to Brownsville, BN Santa Fe has said it in testimony  
6 it's going to start with Hollage to Brownsville  
7 because the volumes are lighter. Okay, supposedly  
8 said in the settlement talks, we'd like to have Tex-  
9 Mex be our agent which they may well, could well have  
10 said for all I know. Tex-Mex has lower costs than BN  
11 Santa Fe perhaps. It's popular with Mexican shippers.  
12 We've got testimony on that. We have pointed to the  
13 fact that Tex-Mex is a popular railroad with Mexican  
14 shippers, it's Mexican owned. Supposedly BN Santa Fe  
15 asked for them.

16 JUDGE NELSON: Who is Mr. Cerrera?

17 MR. ROACH: He's the chairman of the FMN?

18 MR. ALLEN: No, he's the chairman of TMN.  
19 He's the principal owner of Tex-Mex.

20 MR. ROACH: Suppose Mr. Davidson said no,  
21 I don't want that. I don't want a low cost operator  
22 in there. I don't want a Mexican company in there

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1 which will be more popular with the shippers and  
2 capture more business at Brownsville. TMN is a strong  
3 competitor, they can go to Brownsville.

4 So what? It doesn't prove through  
5 evidence, it doesn't allow them to -- it doesn't give  
6 you the particularized need to pierce these settlement  
7 talks and allow at large discovery into discussions of  
8 Mexico or even broader than that. I don't know what  
9 they're asking for. It just isn't the traditional,  
10 particularized need that has been insisted on in every  
11 one of these arguments.

12 What we have is a bombshell, inflammatory  
13 piece of third order hearsay that they should have  
14 given you two months ago and when analyzed does not  
15 establish the particularized need.

16 JUDGE NELSON: I am persuaded that the  
17 particularized need has been shown for discovery into  
18 the question of the meaningfulness of the alleged BN  
19 Santa Fe competition over the route between  
20 Brownsville and Corpus Cristi.

21 MR. ALLEN: Excuse me, Your Honor. I  
22 don't think that the memorandum is limited to Corpus

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1       Cristi and Brownsville. In fact, I think the  
2       discussion had to do with Corpus Cristi and Houston.

3               MR. ROACH: I did misspeak when I said  
4       Corpus Cristi and Brownsville.

5               JUDGE NELSON: There's a reference to the  
6       trackage rights all the way down to Brownsville and  
7       then the so-called trackage deal involves rights from  
8       Texas to New Orleans to Memphis and to Brownsville.  
9       Those are different rights.

10              MR. LUBEL: That's right. That's the  
11       whole scope that we should be allowed to go into, Your  
12       Honor. Those three routes.

13              JUDGE NELSON: The rights from Texas to  
14       New Orleans --

15              MR. ROACH: I don't know what the  
16       particularized --

17              JUDGE NELSON: To Brownsville, from  
18       Houston to those points.

19              I'm sorry, reading it in context, I find  
20       the particularized need is limited to probe the extent  
21       to which the BN Santa Fe would be a meaningful  
22       competitor over the trackage rights to Brownsville and

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1 that's all I'm going to allow.

2 Now the question is how to work this out  
3 in terms of witnesses.

4 MR. LUBEL: And, Your Honor, on that when  
5 you say they would be a meaningful competitor, I  
6 assume that this allows us to go into what went on in  
7 negotiations that might have indicated --

8 JUDGE NELSON: That's why I find a  
9 particularized need, yes. There was a tradeoff, a  
10 package deal, would enable you to explore your  
11 contention that there really won't be good service  
12 there because they're only half-hearted about it and  
13 only took it as part of the package to get something  
14 more. That's your claim.

15 MR. LUBEL: And our objection would be --

16 JUDGE NELSON: I don't find a  
17 particularized need. I don't want to reargue this.  
18 You had enough time on this.

19 MR. ALLEN: I would like to clarify, when  
20 you say trackage rights to Brownsville, I assume you  
21 mean trackage rights from Houston to Brownsville  
22 because the trackage rights go from Houston to Corpus

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1       Cristi down to Brownsville.

2               JUDGE NELSON:       Yes.       Houston to  
3       Brownsville. Now the question is what's going to be  
4       the most useful and efficient thing. You before  
5       wanted Briedenberg as opposed to anyone else involved.  
6       Yo still do?

7               MR. LUBEL: Yes, Your Honor, that would be  
8       our --

9               MS. JONES:    Your Honor, Mr. Eichs's  
10       deposition was taken Monday. He was the one in the  
11       room and we will not object or appeal in order that  
12       allows that question to be directed to Mr. Eichs.

13              JUDGE NELSON: You're saying he was there  
14       --

15              MS. JONES: Mr. Eichs was the only one who  
16       was there.

17              JUDGE NELSON: Where?

18              MS. JONES:    In any discussions of  
19       negotiations of the rights. He was the only business  
20       person from my client who was there.

21              MR. LUBEL:    But that's contradicted by  
22       this memo.    This memo indicates there was a

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1 conversation, Your Honor, that Briedenberg was a part  
2 of.

3 JUDGE NELSON: Let me say that we have  
4 gone over this before.

5 MS. JONES: Mr. Eichs was the only  
6 business person from BN Santa Fe at the negotiations.  
7 There's sworn testimony on the record. His deposition  
8 continues Monday. Mr. Lubel completed his questioning  
9 of Mr. Eichs, by the way, and could ask this question  
10 again on Monday. He can ask him if Mr. Briedenberg  
11 was present at the negotiations and he will be told  
12 no, he was not. Mr. Eichs can answer the question  
13 that you have just directed be answered and we can get  
14 on with this.

15 MR. LUBEL: Your Honor, she has just, Ms.  
16 Jones, with all due respect, has just indicated why it  
17 is essential why we question Mr. Briedenberg. Mr.  
18 Eichs is going to say I don't know about this  
19 conversation.

20 JUDGE NELSON: Yes.

21 MR. LUBEL: So if we take that as given  
22 that doesn't mean it didn't take place. It just means

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1 that Mr. Eichs doesn't know about it. That gets back  
2 to this philosophical question about do we have  
3 discovery? When you have discovery you have to be  
4 able to question Mr. Briedenberg.

5 Now if Mr. Briedenberg says that this  
6 conversation never took place, either with Mr. Skinner  
7 or Mr. Davidson or Mr. Krebs then that will be  
8 something substantial for the Board, but we can't rely  
9 on -- we know that Mr. Eichs doesn't know about this.  
10 She just said that. So we have to question Mr.  
11 Briedenberg.

12 MS. JONES: Mr. Lubel, that is not what I  
13 said. What I said was was Mr. Briedenberg was not in  
14 the negotiations and if you're suggesting that my  
15 client committed perjury I suggest that on the record  
16 and I take offense at that.

17 MR. LUBEL: No, not at all.

18 MS. JONES: Mr. Eichs has already  
19 testified --

20 JUDGE NELSON: Could we back up and help  
21 me through this. Mr. Eichs is who again?

22 MS. JONES: Mr. Eichs is the chief

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1 negotiator for the Burlington North and Santa Fe, the  
2 only negotiator.

3 JUDGE NELSON: He works for Burlington.

4 MS. JONES: He does. He was at the  
5 negotiations in Omaha when these deals were hammered  
6 out and the only business person where, accompanied by  
7 one attorney.

8 JUDGE NELSON: Mr. Briedenberg wasn't even  
9 there?

10 MS. JONES: He was not there Your Honor.

11 JUDGE NELSON: So he has heard something.

12 MS. JONES: He apparently has heard  
13 something.

14 JUDGE NELSON: All right.

15 MS. JONES: On the record, on sworn  
16 testimony.

17 JUDGE NELSON: So Mr. Lubel wants to make  
18 discovery of what Mr. Briedenberg has heard, what's  
19 wrong with that?

20 MS. JONES: He can ask Mr. Eichs.

21 JUDGE NELSON: No, I'm going to direct  
22 that the deposition be taken of Roland Briedenberg,

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1 Vice President of Transportation, BN Santa Fe, subject  
2 of the report of October -- can't read that day --  
3 5th, 1995.

4 MS. JONES: Does that mean then that we  
5 can not get cumulative testimony from Mr. Eichs?

6 JUDGE NELSON: I don't know anything about  
7 that. Let's just talk about Mr Briedenberg.

8 MS. JONES: This follows that. Mr.  
9 Eichs's testimony completes on Monday. And Mr. Eichs  
10 testified to this, it isn't clear why we need a future  
11 element --

12 MR. LUBEL: Your Honor, we'll accept her  
13 proffer that Mr. Eichs didn't know about that.

14 MS. JONES: And that means you're not  
15 going to question about this?

16 JUDGE NELSON: Do you need anything more  
17 with Eichs?

18 MR. LUBEL: Other people have the right to  
19 question him. I shouldn't speak for them, but Your  
20 Honor is going to put one of these choices to me as  
21 you've done before --

22 JUDGE NELSON: I'm going to give you

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1 Briedenberg's evidence.

2 MR. LUBEL: That's what we're asking for.

3 JUDGE NELSON: Based on the Call report.

4 Now what that has to do with the forthcoming  
5 deposition of Mr. Eichs, I can't answer the abstract  
6 of that question.

7 MR. LUBEL: Mr. Eichs was the one who said  
8 we negotiated aggressively and I said give me some  
9 examples and he said I can't, that's privileged.  
10 That's a different proposition. That's why we would  
11 want to question --

12 JUDGE NELSON: That doesn't have anything  
13 to do with your last package deal with Brownsville.

14 MS. JONES: Your Honor, I am unclear about  
15 what the ground rules are about Mr. Eichs's continued  
16 deposition. What is permitted? What are you  
17 enlarging?

18 JUDGE NELSON: What question is it that  
19 you would be concerned about?

20 MS. JONES: I have questions that are  
21 generally directed to what happened that weekend in  
22 Omaha.

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1 MR. McBRIDE: I haven't had a chance to  
2 depose Mr. Eichs yet. We didn't get our turn at bat  
3 and I would like to know what BNSF was not interested  
4 in -- I took it as part of the package deal.

5 JUDGE NELSON: I'm not -- let me deal with  
6 Ms. Jones. This is hard enough. There's going to be  
7 a deposition for a man named Briedenberg.

8 MS. JONES: Yes.

9 JUDGE NELSON: About this Call report?  
10 Period. What's that got to do with this other  
11 deposition of this other witness?

12 MS. JONES: You have just ruled, Your  
13 Honor, that you have found particularized need to  
14 break the settlement privilege as it relates to the  
15 negotiations involved that Mr. Briedenberg has been in  
16 attendance and I need to know whether you are ruling  
17 that Mr. Eichs can answer questions about that  
18 negotiation as it related to this Brownsville to  
19 Corpus Cristi route. If you are, then it's not clear  
20 why that isn't cumulative.

21 JUDGE NELSON: So you want some advance  
22 ruling?

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1 MS. JONES: No, Your Honor.

2 JUDGE NELSON: I don't give advisory  
3 rulings.

4 MS. JONES: I'm not asking for an advisory  
5 ruling, Your Honor. We have instructed the witness  
6 consistent with your rulings on the settlement  
7 privilege and instructed our witnesses not to answer  
8 what happened in that weekend.

9 JUDGE NELSON: And that's fair advice.  
10 Now that wall has been breached insofar as Briedenberg  
11 is concerned. So what you want to know is -- let's  
12 see what counsel has to say.

13 MR. ROACH: I understood you to say as far  
14 as Briedenberg with respect to Houston to Brownsville  
15 interest.

16 JUDGE NELSON: The question is and I'm  
17 still not getting the connection, but since there's a  
18 particularized need to ask Briedenberg, is there a  
19 particularized need to ask Eichs? I think Mr. Lubel  
20 said no.

21 MR. LUBEL: That's my perspective.

22 MR. McBRIDE: What he has shown you is

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1 some evidence that this was a package deal and that  
2 has been our theory too. I'd appreciate it if counsel  
3 doesn't jump in and try to distract the Judge with all  
4 these snickers and laughs. It goes on a lot. We've  
5 dealt with it in depositions all the time.

6 MR. ROACH: That isn't true at all.

7 MR. McBRIDE: My point is we have believed  
8 for some time this was a package deal. If BN Santa Fe  
9 didn't care about parts of this deal that it got and  
10 we believe this shows that evidence and I'd like to  
11 ask Mr. Eichs a line of questioning about the corridor  
12 I care about, the central corridor to find out if that  
13 was just part of the package too or something BNSF  
14 really cared about.

15 JUDGE NELSON: If I'm getting this, we got  
16 here two problems with regard to Mr. Eichs. One is  
17 whether Mr. Eichs could be asked about the Brownsville  
18 business and two, whether he can be asked about  
19 something else on the ground of other suspicions about  
20 the deal.

21 Let's talk about the Brownsville business  
22 first. Is there any lawyer here that wants to

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1 interrogate Eichs about this Brownsville business?

2 MR. McBRIDE: Yes, Your Honor.

3 JUDGE NELSON: And the Department?

4 MR. KOLASKY: Yes.

5 JUDGE NELSON: I'm going to let that go  
6 forward.

7 I see no reason why Mr. Eichs should get  
8 immunity from these same questions if there's a  
9 particularized need for Briedenberg as there is for  
10 Mr. Eichs. I think both witnesses should be open on  
11 the question of the negotiation insofar as they  
12 involve the BN Santa Fe operation between Houston and  
13 Brownsville.

14 MS. JONES: I accept that, Your Honor. In  
15 which case I then ask why do we need to pose the same  
16 questions to Mr. Briedenberg. They'll find out what  
17 they need to know from Mr. Eichs.

18 JUDGE NELSON: Well, that's the same  
19 argument you made before and I was not persuaded then  
20 and I'm not persuaded now. It seems to me the two  
21 depositions aren't going to make the railroad collapse  
22 and they're both appropriate in these circumstances.

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1 Now what other questions do we have about  
2 Mr. Eichs?

3 MR. ROACH: Well, as to whether there's a  
4 particularized need with respect to the central  
5 corridor. The whole finding, Your Honor, that was  
6 just made was that there was a particularized need  
7 with respect to this issue of interest in Mexican  
8 traffic.

9 JUDGE NELSON: What is the central  
10 corridor?

11 MR. ROACH: The central corridor is part  
12 of the so-called western rights that they claim that  
13 BN Santa Fe wanted.

14 JUDGE NELSON: Well, they're the good  
15 ones. Mr. McBride wants to throw them in.

16 MR. McBRIDE: No, no. I'm sorry. This is  
17 a big country. You can't just lump everything into  
18 the west and say it's all part of it.

19 JUDGE NELSON: What is it that you want to  
20 ask about?

21 MR. McBRIDE: The western rights that I  
22 think they may have been talking about are this I-5

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1 corridor. Everybody is going to see it in Southern  
2 California. They'll know what you're talking about.

3 I think in the purple lines here indicates  
4 each carrier might have a single line service from  
5 Southern California to wherever. The central corridor  
6 that I'm talking about is this orange-ish line here  
7 coming from Central California, Northern California,  
8 across Nevada, Utah and to Denver, which is now the,  
9 these gold lines between Denver and Rio Grande.

10 JUDGE NELSON: Does BN have trackage  
11 rights over this?

12 MR. McBRIDE: Yes.

13 JUDGE NELSON: And do you have something  
14 like the Call report of October 5, 1995?

15 MR. McBRIDE: All I have is that the Call  
16 report indicates what we have been surmising which is  
17 that this was a package deal because when we have  
18 spoken to BN representative about this other corridor,  
19 we can't get any commitment to provide any service  
20 there at all.

21 We've had presentations about it. There's  
22 nothing.

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1 JUDGE NELSON: Is there anything further  
2 with regard to the special corridor? I rule that  
3 there has been a failure to show a particularized need  
4 to probe the settlement negotiations with respect to  
5 the central corridor.

6 What else remains? There's something else  
7 with Eichs, isn't there?

8 MR. McBRIDE: In his statements --

9 JUDGE NELSON: Are you satisfied now?

10 MR. LUBEL: Satisfied, Your Honor, I have  
11 to report back to my client. We certainly wanted  
12 more.

13 JUDGE NELSON: Is there an issue  
14 remaining?

15 MR. LUBEL: There is on the remark that  
16 Mr. --

17 JUDGE NELSON: I'm talking about previous  
18 negotiations.

19 MR. LUBEL: On Your Honor's ruling, we  
20 appreciate very much. I do have to talk with my  
21 client. We would have liked a broader --

22 JUDGE NELSON: I don't care about that.

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1 I asked if you were satisfied, I didn't mean about the  
2 rulings, generally, no one is satisfied with my  
3 rulings because they never give everyone everything  
4 they want.

5 MR. LUBEL: That's clear, Your Honor. The  
6 second point is --

7 JUDGE NELSON: I mean were you satisfied  
8 for purposes of today and we have more business to do?

9 MR. LUBEL: On this other point with Mr.  
10 Eichs, Your Honor, he submitted a statement, submitted  
11 by Burlington Northern in their comment when he said  
12 we negotiated the agreement aggressively. We said  
13 well why did you say that. He said we wanted to show  
14 that we're a strong company and we negotiate  
15 aggressively and we're going to make the deal work.  
16 I said well, give us some examples because they're  
17 tendering it to the Board for the Board to consider  
18 that these were aggressive negotiations and we said  
19 well, give us some examples and they said well, we  
20 object that's settlement privilege. So would ask that  
21 we be allowed to question him about the aggressiveness  
22 or lack of aggressiveness of the negotiation.

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1 JUDGE NELSON: So your claim is that  
2 having opened up the proposition that there were  
3 aggressive negotiations --

4 MR. LUBEL: They can't have it both ways.

5 JUDGE NELSON: And he said he was doing it  
6 to answer speculation that it was --

7 MR. LUBEL: That's my paraphrasing, Your  
8 Honor.

9 JUDGE NELSON: Say the actual language.

10 MR. LUBEL: The actual language --

11 JUDGE NELSON: It's at 206 and 207.

12 MR. LUBEL: Your Honor, I forgot to bring  
13 it.

14 JUDGE NELSON: Isn't it in one of these  
15 thick notebooks somewhere. Find it.

16 MR. LUBEL: What he said was, Your Honor,  
17 there was speculation, public speculation about this  
18 agreement and we wanted to show --

19 JUDGE NELSON: His verified statement, do  
20 we have that in here. Ms. Jones?

21 MS. JONES: I have --

22 JUDGE NELSON: I wanted to see both and

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1 see what he said.

2 MR. LUBEL: Here, Your Honor, this is page  
3 206 and 207.

4 JUDGE NELSON: Do you have the verified  
5 statement here? I can see that.

6 MR. LUBEL: I'm not sure. Here it is,  
7 Your Honor, page 4 of statement, first sentence at the  
8 top of the page. Our question of 206 and 207 are  
9 quoted from there.

10 JUDGE NELSON: All right, there's a  
11 sentence "the terms of the agreement were negotiated  
12 aggressively and at arm's length."

13 MR. LUBEL: Yes.

14 JUDGE NELSON: Then we come to the  
15 deposition.

16 MR. LUBEL: And it's 206.

17 JUDGE NELSON: I see it. Let me get back  
18 out and get it in context.

19 This is you asking the question?

20 MR. LUBEL: Yes.

21 JUDGE NELSON: You rattled off three or  
22 four questions in one?

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1 MR. LUBEL: To tell him what was going on.  
2 (Laughter.)

3 And then I broke them down.

4 JUDGE NELSON: Mr. Weicker, who is he?

5 MS. JONES: General Counsel, in-house  
6 Counsel.

7 JUDGE NELSON: He's speaking the same  
8 language. You answered the first two, but not the  
9 third.

10 (Laughter.)

11 This fellow says help me with those again.

12 (Laughter.)

13 MR. LUBEL: And then I did it one at a  
14 time. I wanted to see what I was going for.

15 JUDGE NELSON: "What did you mean when you  
16 say the agreement was negotiated aggressively?"

17 He answers.

18 (Pause.)

19 He's not asked why did he say it was  
20 aggressive. He said he's answering some accusations.  
21 He's explained that more. That it's important to be  
22 clear to everybody that we know how aggressively to do

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1 a deal.

2 Then you ask him for examples to show that  
3 it was aggressive and Mr. Weicker tells him not to  
4 answer. That's the story.

5 MR. LUBEL: That's it. That's what we've  
6 had in this whole thing, Your Honor. They go halfway,  
7 they do what helps them before the Commission, before  
8 the Board.

9 JUDGE NELSON: There's nothing wrong with  
10 that.

11 MR. LUBEL: That's true, that's good  
12 lawyering. But as part of discovery we should be able  
13 to explore.

14 JUDGE NELSON: Is Mr Weicker here, his  
15 rulings, I've never seen them, but they're consistent  
16 with my approach for settlement privilege in this  
17 case. Can't fault him.

18 MR. ROACH: Can I ask, Your Honor, if  
19 there's a particularized need?

20 JUDGE NELSON: I'm not sure I've got all  
21 the facts. Eichs is a Burlington man.

22 MR. ROACH: Their chief negotiator.

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1 JUDGE NELSON: So why are you interested?

2 MR. ROACH: I have a great interest in  
3 what a particularized need is and this is a ruling on  
4 whether to increase the settlement privileges. If Mr.  
5 Lubel is right in saying the negotiation was at arm's  
6 length and vigorous constitutes a particularized need  
7 to get all the back and forth of the negotiations, we  
8 can kiss the settlement privilege good-bye. That's my  
9 concern and that's my statement.

10 JUDGE NELSON: I don't know that he's  
11 saying that it's a particularized need case.

12 Another thought, when you make the  
13 privileged stuff itself the issue, as in lawyer-  
14 client, when you say I relied on advice of counsel,  
15 you can't then say I can't tell you what it is.  
16 There's a doctrine that when you wrap yourself up in  
17 something, you get to a point where you can't say well  
18 I won't tell you about it.

19 I think that's what he's getting to.

20 MR. ROACH: We have debated that issue  
21 three or four times.

22 JUDGE NELSON: I think that's what he's

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1 getting to.

2 MR. ROACH: We've debated that issue three  
3 or four times and I have shown Your Honor --

4 JUDGE NELSON: We have had it in the more  
5 generic way as against the allegation of the  
6 applicants having wrapped themselves in the agreement.  
7 So far I've not thought that in general terms. This  
8 is a much more specific claim directed toward a  
9 specific assertion about the nature of the  
10 negotiations and their quality. This is a little more  
11 pointed than the general notion that having embrace  
12 the agreement, you can't hide under it.

13 MR. ROACH: I would respectfully submit,  
14 Your Honor, that there really is not a significant  
15 difference. Whenever you submit an agreement and rely  
16 on it and I've shown you in prior rulings that was the  
17 posture before the Commission. People have settled.  
18 They were relying on settlement and they were  
19 representing that it was a meaningful settlement. At  
20 arm's length it was a product of vigorous business  
21 negotiations. But the Commission has a firm policy  
22 protecting the particulars of the discussion. I wish

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1 we weren't defending this. I've said this a hundred  
2 times, but if you rule in this way that if anybody  
3 says an agreement is a meaningful one --

4 JUDGE NELSON: You know I've been troubled  
5 all along when we've talked about it in its more  
6 general policy terms and those same troubles come back  
7 to roost in the context of this narrower sentence.

8 MR. ROACH: Mr. Riebendorf said the same  
9 thing. It's arm's length negotiations.

10 JUDGE NELSON: I don't have to confront  
11 others.

12 MR. ROACH: No, but they pointed to that  
13 before Your Honor. They pointed you to that before in  
14 making this same argument. It's no different than Mr.  
15 Riebendorf and you ruled against it before and with  
16 Mr. Eichs when you're hearing it today.

17 JUDGE NELSON: That's something. Has a  
18 contention been made before that this assertion about  
19 negotiations opened the door and I ruled against it?

20 MS. JONES: Yes.

21 JUDGE NELSON: This very one?

22 MR. LUBEL: It wasn't this statement. I

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1 think Mr. Roach is correct, Your Honor, that mr.  
2 Riebensdorf did say similar things, but I don't know  
3 that he used this as pointed language as this.

4 JUDGE NELSON: Why don't you show me the  
5 ruling as to Riebensdorf.

6 MR. ROACH: I'm not sure. Look for the  
7 ruling.

8 JUDGE NELSON: Riebensdorf says that rates  
9 ultimately agreed to were the result of arm's length  
10 negotiation with a considerable give and take of both  
11 parties.

12 MR. LUBEL: Well, that was the  
13 compensation level, Your Honor. This is Mr. Eichs  
14 saying it a little more broadly about the term.

15 MR. KOLASKY: Your Honor, if I may be  
16 heard on this. An important point of distinction in  
17 this case and in fact one of the other arguments, Mr.  
18 Lubel advanced, and that has to do with whether or not  
19 this is a settlement. It obviously is a settlement in  
20 one sense as Mr. Roach has maintained. We're arguing  
21 differently, but there is something very unique about  
22 this and it supports the argument of particularized

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1 needs.

2 It's difficult for ICC to merge a  
3 proceeding. The trackage rights are granted as a  
4 condition in a situation where someone has filed a  
5 responsive application seeking those as an affirmative  
6 position. And there's a settlement in which that  
7 responsive application is being settled.

8 At that point the applicant seeking the  
9 trackage rights has submitted a detailed operating  
10 plan which the Commission, now the Board, is in a  
11 position to evaluate. In this case, because of the  
12 timing of the trackage rights agreement of Burlington  
13 Northern and Union Pacific, that has not happened. In  
14 this case, we do not have the kind of detailed  
15 operating plan that would be required in a responsive  
16 application.

17 Instead consistently through the testimony  
18 of all the witnesses, both in verified statements, but  
19 particularly in the depositions, we have been told  
20 repeatedly that Burlington Northern and Union Pacific  
21 witnesses trust us, taken on faith, that Burlington  
22 Northern is the meanest, scariest competitor of all

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1 and they'll do what's necessary to make this work.

2 In that situation, especially given the  
3 evidence that Mr. Lubel has now presented in the form  
4 of this Call report, I think that there is, in fact,  
5 a particularized need to inquire into whether or not  
6 these settlement negotiations were in fact conducted  
7 at arm's length in the manner that the applicants so  
8 affirmatively claim in their own verified statements.

9 MR. ROACH: Your Honor, I submit to you  
10 with utmost respect that both of the assertions that  
11 Mr. Kolasky just made are dead wrong.

12 The settlements have been upheld in prior  
13 cases and where discovery has been denied were not the  
14 subject of detailed applications, detailed operating  
15 plans. It wasn't true of CNW and UPMP. It wasn't  
16 true of SP settlement when they merged and  
17 furthermore, the second statement is also wrong  
18 because there is an operating plan here from BN Santa  
19 Fe. There's a long statement of Mr. Owen that talks  
20 about how they're going to operate. You've been  
21 clearly misled.

22 JUDGE NELSON: I'm interested in my prior

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1 ruling which you say on the Riebendorf testimony came  
2 out the same way.

3 MR. LUBEL: Your Honor, while they're  
4 looking for it, my recollection of the ruling was that  
5 it's not an absolute privilege, but you have got to  
6 come in and show some particular need.

7 JUDGE NELSON: That we have. Ms. Diciano  
8 is going to check the transcript. Her notes show that  
9 I did not allow something. She usually has good  
10 notes.

11 MR. ROACH: Your Honor, I have all the  
12 transcripts of prior hearings here where this was  
13 discussed.

14 JUDGE NELSON: She probably has the page.  
15 (Pause.)

16 MR. ROACH: Your Honor, on January 2, page  
17 357, we had a long argument, Mr. Lubel and I and that  
18 was the first one. Mr. Lubel said on page 357, line  
19 22, the main reason which I'm going to elaborate on is  
20 they have placed an issue with this agreement and  
21 waived any privilege.

22 Then over on page 359, he says "that is,

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1 Mr. Riebendorf was involved with one and he does go  
2 into, I hate to say, in some detail, he goes into  
3 describing the settlement negotiations as what we  
4 would say in a self-serving way. And Judge Nelson, he  
5 relies upon it. He says, Lubel yes, we rely upon it,  
6 we're basing our application on it. And after  
7 considerable many pages later the Judge rules that  
8 they should not on page 433, line 25, "the standard at  
9 this stage of the came to these interrogatories I  
10 don't see that the request is going to get anything."

11 MR. LUBEL: I think he went on to say he  
12 didn't foreclose us to come back and make a showing.

13 MR. ROACH: And there was discussion, I  
14 can't find it, there was discussion about this  
15 specific arm's length give and take quote somewhere  
16 during that afternoon.

17 JUDGE NELSON: What about the argument  
18 that if I allowed this I'm opening up the entire  
19 negotiations?

20 MR. LUBEL: Well, Your Honor, we think  
21 that --

22 JUDGE NELSON: Because give and take and

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1 arm's length can be stretched into every position that  
2 everyone took throughout the negotiation.

3 MR. LUBEL: Isn't that what they're trying  
4 to assert to the Commission to the Board to get  
5 approval for this application?

6 JUDGE NELSON: Lifting the privilege all  
7 together.

8 MR. LUBEL: That's right and it seems like  
9 that ought to be done to give the Board the  
10 opportunity to consider this. In fact, I said in my  
11 letter, Your Honor, if you -- you're not saying that  
12 this is admissible evidence. You're just saying it  
13 can be inquired into. But if you rule it out, then  
14 the Board never gets the chance to make the decision.

15 JUDGE NELSON: And we never needed to go  
16 into the particularized need.

17 MR. ROACH: And Mr. Lubel should have  
18 appealed three business days after January 2nd when he  
19 lost this argument.

20 MR. LUBEL: You said then if we come back  
21 with a particularized showing and that's what we have  
22 done.

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1 JUDGE NELSON: I think it's too broad. I  
2 don't like it. I've been uncomfortable with it from  
3 the beginning and you know that. But I keep feeling  
4 that I have to do something out of respect to  
5 precedent here that cuts the applicants way. So I'm  
6 afraid that if a witness comes in and says these were  
7 arm's length negotiations, I can't find that that  
8 opens the door to explore the entire settlement  
9 process.

10 MR. LUBEL: Aggressive, not just at arm's  
11 length.

12 JUDGE NELSON: Aggressive and arm's length  
13 just proves too much and I don't find it satisfactory.  
14 I don't like the whole doctrine, but to try to get out  
15 of it this way is proving too much with too little.  
16 I'm going to deny the request based on the statements  
17 about the content of the negotiations.

18 Anything else?

19 MR. LUBEL: Your Honor, there is one other  
20 issue. You had ruled previously that we could take  
21 the deposition of Mr Gehring because he came up in a  
22 document that we showed you. This has to do with an

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1 issue with Southern Specific and they have graciously  
2 made him available next Thursday in Denver and we  
3 appreciate that. Basically, they want to limit it to  
4 a two hour time frame. We think we can live with  
5 that. Our only request is that we consider or be  
6 allowed to take the deposition by telephone which is  
7 something I've done a lot and I find it satisfactory.  
8 We have to get our documents out to them in advance.  
9 You get everybody on the telephone and they have --  
10 I've just put that question to them. They've not  
11 responded yet, Your Honor, but if you have any  
12 direction you can give us.

13 They're still considering it, Your Honor.  
14 They've not gotten back to us and since it is next  
15 week, if you could give us some direction on that.

16 MR. NORTON: Your Honor, I did not know  
17 this was going to be coming up today. I had a message  
18 from Mr. Lubel this morning about it. I'm not  
19 involved in that deposition. Mr. Cunningham is  
20 dealing with it and I just don't know what the answer  
21 is.

22 JUDGE NELSON: Where has it been noticed

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1 on the agenda today?

2 Anything else?

3 MR. KOLASKY: Coming back to the  
4 settlement negotiations, Your Honor, in terms of  
5 permitting my client to decide whether to appeal the  
6 limitations that Your Honor is imposing on the scope  
7 of the examination of Mr. Eichs and Mr. Briedenberg --

8 JUDGE NELSON: There again, please be my  
9 guest.

10 MR. KOLASKY: I understand perfectly, Your  
11 Honor.

12 JUDGE NELSON: We could all use guidance  
13 in this area. If the Board wants to supply it, I'd be  
14 delighted.

15 MR. KOLASKY: I also take it, Your Honor,  
16 that if as a result of the additional questioning of  
17 Mr. Eichs and Mr. Briedenberg, we believe additional  
18 evidence of a particular item to go further that we  
19 would know this would be without prejudice to our  
20 coming back to make that --

21 JUDGE NELSON: There has to be an end  
22 somewhere.

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1 MS. JONES: Your Honor, he could have  
2 appealed this ruling in January. Mr. Eichs's  
3 deposition is two months after your ruling. This  
4 could have been --

5 JUDGE NELSON: That's not what he's  
6 talking about. He's saying if he now in the course of  
7 on-going discovery comes up with a smoking gun can he  
8 come in and say here's a smoking gun, I have a  
9 particularized need. He couldn't have done that  
10 earlier because he's got it. That's hypothetical.

11 MS. JONES: Then we're bringing everybody  
12 back, Your Honor?

13 JUDGE NELSON: That's the question of how  
14 we handle it procedurally and mechanically. I don't  
15 want to rule on anything without knowing what we're  
16 talking about. We need to know what it is, how much  
17 it's smoking.

18 MR. ROACH: One thing we won't stipulate  
19 is that parties can sometimes take the position that  
20 they're unable to appeal from rulings vis-a-vis other  
21 parties and other times argue that they can and really  
22 must for verification so they can appeal.

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1 JUDGE NELSON: All these threats of  
2 appeals. I hope someone will take one of them one of  
3 these days. It will be too late to be of any help to  
4 me.

5 MR. MILLS: May I raise a point of  
6 clarification, Your Honor, on your ruling of the  
7 deposition of the applicants, my recollection is that  
8 when I began to discuss the merits, Mr. Roach objected  
9 on the grounds that it was not out of time. We didn't  
10 notice it properly. Was that the basis for your  
11 ruling?

12 JUDGE NELSON: No.

13 MR. MILLS: We didn't go into all the  
14 subjects which we wanted to.

15 JUDGE NELSON: I was not seeing a  
16 sufficient connection with the case to warrant those  
17 depositions right now and if they were out of time,  
18 then that's an additional ground. We have to have a  
19 system to try to make sense.

20 MR. MORENO: Your Honor, if I may clarify,  
21 Dow Chemical also had a late notice deposition issue  
22 and I assume your ruling would be the same in that

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1 case. I would like a point of clarification here. We  
2 noticed this late because we received the applicant's  
3 refusal to put these individuals up to deposition only  
4 a few hours after deadline for the notice and given  
5 that the time frame, the remaining time frame in this  
6 procedure is so short and that you have agreed to make  
7 yourself available to Mr. McBride as of next  
8 Wednesday, we could also bring the notice for that  
9 issue for next Wednesday.

10 JUDGE NELSON: How do we stand on this  
11 matter next Wednesday? What's going on with that?

12 MR. McBRIDE: My pleading is being  
13 prepared by another one of my colleagues right now.  
14 We worked on it into the night last night. We hope to  
15 have a pleading to everyone on the restricted service  
16 list, of course, to Your Honor, by Monday.

17 JUDGE NELSON: So we should be prepared  
18 for a Wednesday conference then?

19 MR. McBRIDE: That's my current  
20 understanding.

21 JUDGE NELSON: 9 a.m.

22 MR. McBRIDE: Yes. I thought it was 9:30,

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1 but I'll do it whenever.

2 JUDGE NELSON: 9 would be preferable.

3 MR. McBRIDE: All right.

4 JUDGE NELSON: I've got the pipeline case  
5 hanging around, so I want tot get to them as soon as  
6 possible. So this request is you'd like to bring  
7 something that Wednesday.

8 MR. MORENO: If you're not going to hear  
9 it today I'd like to bring it up Wednesday.

10 JUDGE NELSON: Is there an objection?

11 MR. ROACH: No objection.

12 JUDGE NELSON: So whatever this thing is,  
13 we'll discuss it on Wednesday.

14 MR. NORTON: But it's not --

15 JUDGE NELSON: Whatever it is, it's for  
16 Wednesday, not now. Please ladies and gentlemen, be  
17 on time because I will be owning my time to the gas  
18 side as soon as I can get to them. So we'll see you,  
19 then we're definitely on Wednesday, 9 a.m. Notify the  
20 reporter and so on.

21 (Whereupon, at 4:51 p.m., the hearing was recessed to  
22 reconvene Wednesday, March 6, 1996 at 9:00 a.m.)

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This is to certify that the foregoing  
transcript in the matter of:

**SURFACE TRANSPORTATION BOARD  
FINANCE DOCKET NO. 32760**

**Before: THE HONORABLE JEROME NELSON  
ADMINISTRATIVE LAW JUDGE**

**Date: MARCH 1, 1996**

**Place: WASHINGTON, D.C.**

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

Chris Baker

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