

INTERSTATE COMMERCE COMMISSION 03/01/96

FINANCE DOCKET # 32760

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UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

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DISCOVERY CONFERENCE

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IN THE MATTER OF: :

UNION PACIFIC CORPORATION, :
UNION PACIFIC RAILROAD COMPANY, :
and MISSOURI PACIFIC RAILROAD : Finance Docket
COMPANY : No. 32760
:

- CONTROL AND MERGER -
:

SOUTHERN PACIFIC RAIL CORPORATION, :
SOUTHERN PACIFIC TRANSPORTATION :
COMPANY, ST. LOUIS, SOUTHWESTERN :
RAILWAY COMPANY, SPCSL CORP., :
AND THE DENVER AND RIO GRANDE :
WESTERN RAILROAD COMPANY. :
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Friday, March 1, 1996

Federal Energy Regulatory
Commission
Hearing Room 3
Second Floor
888 First Street, N.E.
Washington, D.C.

The above-entitled matter came on for
hearing, pursuant to notice, at 1:30 p.m.

BEFORE:

THE HONORABLE JEROME NELSON
Administrative Law Judge

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COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

APPEARANCES:

On Behalf of Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company:

MICHAEL L. ROSENTHAL, Esq.
ARVID E. ROACH, II, Esq.
S. WILLIAM LIVINGSTON, Jr., Esq.
KAREN KRAMER, Esq.
EUGENE D. GULLAND, Esq.
of: Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, DC 20044-7566
[202] 662-5388

LOUISE A. RINN, Esq.
General Attorney
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
[402] 271-4227

JAMES V. DOLAN, Esq.
Vice President - Law
of: Union Pacific Railroad, Missouri Pacific Railroad
Omaha, Nebraska
[402] 271-5357

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WASHINGTON, D.C. 20005

APPEARANCES (cont.):

On Behalf of Southern Pacific Rail Corporation,
Southern Pacific Transportation Company, St. Louis
Southwestern Railway Company, SPCSL Corp., and the
Denver and Rio Grande Western Railroad Company:

PAUL A. CUNNINGHAM, Esq.
GERALD P. NORTON, Esq.
of: Harkins Cunningham
1300 19th Street, N.W.
Suite 600
Washington, DC 20036-1609
[202] 973-7600

CAROL A. HARRIS, Esq.
Southern Pacific Transportation Company
One Market Plaza
San Francisco, California 94105
[415] 541-1000

CANNON Y. HARVEY, Esq.
Executive Vice President
of: Southern Pacific Rail Corporation
1860 Lincoln Street
Denver, Colorado 80295
[303] 812-5005

On Behalf of Kansas City Southern Railroad
Company:

WILLIAM A. MULLINS, Esq.
of: Troutman Sanders, Attorneys at Law
601 Pennsylvania Avenue, N.W.
Suite 640
Washington, DC 20004
[202] 274-2953

ALAN E. LUBEL, Esq.
DAVID FOSHEE, Esq.
of: Troutman Sanders, Attorneys at Law
Nationsbank Plaza, Suite 5200
600 Peachtree Street, N.E.
Atlanta, Georgia 30308-2216
[404] 885-3174

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WASHINGTON, D.C. 20006

APPEARANCES (cont.):

On Behalf of Texas Mexican Railway Company and
Sierra Pacific Power Company:

RICHARD A. ALLEN, Esq.
JENNIFER OAKLEY, Esq.
JOHN V. EDWARDS, Esq.
of: Zuckert, Scoutt & Rasenberger, LLP
888 17th Street, N.W.
Washington, DC 20006-3959
[202] 298-8660

On Behalf of Railway Labor Executives
Association and United Transportation Union:

DONALD F. GRIFFIN, Esq.
RICHARD S. EDELMAN, Esq.
of: Highsaw, Mahoney, & Clarke, P.C.
Suite 210
1050 17th Street, N.W.
Washington, DC 20036
[202] 296-8500

On Behalf of the National Industrial
Transportation League:

FREDERICK L. WOOD, Esq.
of: Donelan, Cleary, Wood and Maser, P.C.
Suite 750
1100 New York Avenue, N.W.
Washington, DC 20005-3934
[202] 371-9500

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WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

APPEARANCES (cont.):

On Behalf of Western Coal Traffic League:

C. MICHAEL LOFTUS, Esq.
CHRISTOPHER A. MILLS, Esq.
JOHN H. LESEUR, Esq.
of: Slover and Loftus
1224 17th Street, N.W.
Washington, DC 20036
[202] 347-7170

On Behalf of International Paper Company and
Utah Railway Corporation:

ANDREW T. GOODSON, Esq.
EDWARD D. GREENBERG, Esq.
CHARLES H. WHITE, Jr., Esq.
of: Galland, Kharasch, Morse & Garfinkle, P.C.
1054 31st Street, N.W.
Washington, DC 20007
[202] 342-6750

On Behalf of the Department of Justice:

JOAN S. HUGGLER, Esq.
MICHAEL D. BILLIEL, Esq.
ANGELA HUGHES, Esq.
ROBERT McGEORGE, Esq.
Trial Attorneys
Antitrust Division
of: The Department of Justice
555 Fourth Street, N.W.
Room 9409
Washington, DC 20001
[202] 307-6666

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WASHINGTON, D.C. 20005

APPEARANCES (cont.):

On Behalf of the Save the Rock Island Committee, Inc.:

WILLIAM P. JACKSON, Jr., Esq.
JOHN T. SULLIVAN, Esq.
of: Jackson and Jessup, P.C.
3426 North Arlington Blvd.
Arlington, Virginia 22201
[703] 525-4050

On Behalf of the Society of the Plastics Industry, Inc. and Union Carbide:

MARTIN W. BERCOVICI, Esq.
of: Keller and Heckman
1001 G Street, N.W.
Washington, DC 20001
[202] 434-4144

On Behalf of Geneva Steel:

JOHN W. ONGMAN, Esq.
of: Pepper, Hamilton & Scheetz
1300 Nineteenth Street, N.W.
Washington, DC 20036
[202] 828-1415

On Behalf of Coastal Corporation:

ROBERT M. BRUSKIN, Esq.
ROSEMARY H. McENERY, Esq.
MARK JOSEPHS, Esq.
of: Howrey & Simon
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004-2402
[202] 783-0800

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WASHINGTON, D.C. 20006

APPEARANCES (cont.):

On Behalf of Burlington Northern Railroad Company, and Atchison, Topeka & Santa Fe Railway:

RICHARD WEICHER, Esq.
of: Burlington Northern Santa Fe
1700 East Golf Road
Schaumburg, Illinois 60173
[708] 995-6887

ERIKA Z. JONES, Esq.
ADRIAN L. STEEL, Jr., Esq.
KATHRYN A. KUSSKE, Esq.
KELLEY E. O'BRIEN, Esq.
of: Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006
[202] 463-2000

On Behalf of the International Union of Machinists and Aerospace Workers:

DEBRA L. WILLEN, Esq.
of: Guerrieri, Edmond & Clayman, P.C.
1331 F Street, N.W.
Washington, DC 20004

On Behalf of the Transportation Communications International Union:

LARRY R. PRUDEN, Esq.
3 Research Place
Rockville, MD 20850
[301] 948-4910

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WASHINGTON, D.C. 20005

APPEARANCES (cont.):

On Behalf of Illinois Central Railroad:

KEVIN M. SHEYS, Esq.
of: Oppenheimer, Wolff and Donnelly
1020 19th Street, N.W.
Suite 400
Washington, DC 20036
[202] 293-6300

On Behalf of Consolidated Rail Corporation:

WILLIAM J. KOLASKY, Esq.
A. STEPHEN HUT, Jr., Esq.
STEVEN P. FINIZIO, Esq.
of: Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, DC 20037
[202] 663-6235

On Behalf of the International Brotherhood of Teamsters:

MARC J. FINK, Esq.
of: Sher & Blackwell
Suite 612
2000 L street, N.W.
Washington, DC 20036
[202] 463-2503

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WASHINGTON, D.C. 20005

(202) 234-4433

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APPEARANCES (cont.):

On Behalf of Kennecott Utah Copper Corp.,
Kennecott Energy Company, and Dow Chemical Company:

JEFFREY O. MORENO, Esq.
JOHN K. MASER, III, Esq.
NICHOLAS J. DiMICHAEL, Esq.
of: Donelan, Cleary, Wood & Maser, P.C.
Suite 750
1100 New York Avenue, N.W.
Washington, DC 20005
[202] 371-9500

On Behalf of Arizona Electric Power Cooperative,
Central Power and Light Company, City of Austin,
Texas, Commonwealth Edison Company, and Lower Colorado
River Authority:

C. MICHAEL LOFTUS, Esq.
of: Slover & Loftus
1224 17th Street, N.W.
Washington, DC 20036
[202] 347-7170

On Behalf of The Western Shippers Coalition:

MICHAEL F. McBRIDE, Esq.
of: LeBoeuf, Lamb, Greene & MacRae
Suite 1200
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009-5728

On Behalf of the State of Texas

REBECCA FISHER, Esq.
AMY KRASNER, Esq.
of: Consumer Protection Division
Antitrust Section
P.O. Box 12548
Austin, Texas 78711-2548
[512] 463-2185

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ALSO PRESENT:

HARRILEE MOLM, Paralegal
of: Troutman Sanders, Attorneys at Law

VIRGINIA METALLO

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

1:27 P.M.

JUDGE NELSON: I'll ask for appearances.

MR. ROACH: Mr. Roach and Michael Rosenthal for the Applicants.

JUDGE NELSON: Mr. Greenberg?

MR. GREENBERG: It's Edward Greenberg for International Paper.

MR. MCBRIDE: Michael McBride and Daniel Oranowitz for the Western Shippers Coalition.

MR. MILLS: Christopher Mills for Energy Services, Inc., and its affiliates, the Western Coal Traffic League and other electric utilities.

MR. KOLASKY: William Kolasky for Conrail.

MR. LUBEL: Your Honor --

JUDGE NELSON: Your name is what, sir?

MR. KOLASKY: Beg your pardon?

JUDGE NELSON: Tell me the name again.

MR. KOLASKY: William Kolasky.

JUDGE NELSON: Kolasky.

MR. LUBEL: Your Honor, Alan Lubel for the Kansas City Southern Railway.

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1 MR. MORENO: Jeff Moreno for the Dow
2 Chemical Company, Kennecott Utah Copper Corporation
3 and Kennecott Energy Company.

4 MR. ONGMAN: John Ongman for Geneva Steel
5 Company and Omaha Power Company.

6 MR. BILLIEL: Michael Billiel from
7 Justice.

8 MR. McGEORGE: Bob McGeorge, Department of
9 Justice.

10 MR. ROACH: We know that Mr. Norton and
11 Ms. Jones are on their way. I don't know why they're
12 not here yet, but they should be here soon.

13 JUDGE NELSON: Well, we can begin. The
14 agenda I have has five items: ACS, International
15 Paper, Kennecott, the Western Coal Traffic League and
16 Entergy and the Western Shippers Coalition.

17 MR. MORENO: Your Honor, Kennecott has
18 resolved their dispute with Southern Pacific.

19 JUDGE NELSON: Very good.

20 MR. MORENO: But late yesterday, Dow
21 Chemical Company served a notice concerning deposition
22 they are requesting.

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1 JUDGE NELSON: Well, are you Dow?

2 MR. MORENO: I am also with Dow, yes.

3 JUDGE NELSON: Well, I don't think you can
4 do that late yesterday and bring it on to this caucus.
5 We have a procedure.

6 MR. MORENO: We are hoping, if the
7 Applicants do not object, that we can bring this at
8 this time because the Applicants did not notify us
9 until late Thursday night that they would not make
10 those two -- late Wednesday night, rather, that --

11 JUDGE NELSON: Well, let's take that as
12 the last item then.

13 MR. MORENO: That's fine, Your Honor.

14 JUDGE NELSON: And we'll see what
15 objections there are or where it goes. Do you have
16 any pre-set agenda here, or shall I just take them in
17 the order in which they're on my paper?

18 MR. LUBEL: Your Honor, I think Mr.
19 Greenberg has needs --

20 JUDGE NELSON: Oh, Mr. Greenberg has a
21 plane to catch. That's right.

22 MR. LUBEL: Thank you, Your Honor.

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1 JUDGE NELSON: So let's deal with Mr.
2 Greenberg.

3 MR. GREENBERG: Okay, Your Honor, I think
4 you have a -- good, okay.

5 JUDGE NELSON: I should explain that I
6 have had virtually no time to prepare because I was in
7 hearings yesterday until 4:30, when the day normally
8 ends here. Then I went out to AU to teach a class and
9 conduct some student conferences.

10 And I was on duty this morning at 9:30 in
11 the gas pipeline case. So I riffled through the
12 papers, but not with enough time to really get a good
13 -- a confident feel that I know what's going on.

14 So, assume some ignorance here and help me
15 through it.

16 MR. GREENBERG: Fine, and I really
17 appreciate your taking us out of order here. We have
18 requested -- I guess our dispute involves two issues.
19 We have requested the ability to take depositions of
20 two individuals, employees of the Burlington
21 Northern/Santa Fe.

22 JUDGE NELSON: That is Mr. Dealey and Mr.

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1 Kean, is it?

2 MR. GREENBERG: Is it Kean?

3 MS. O'BRIEN: Kean.

4 MR. GREENBERG: I believe --

5 JUDGE NELSON: Kean.

6 MR. GREENBERG: -- it's pronounced Kean,
7 yes. And we were notified by the BN that they will
8 not make those individuals available.

9 We provided Your Honor with a letter, I
10 understand you have not had a chance to read it, of
11 February 28th which details the bases for these
12 individuals, very briefly why we need these
13 individuals.

14 Very briefly, International Paper has two
15 very major facilities. And as you may recall, we're
16 very concerned about whether the BN will provide a
17 realistic alternative to provide competitive service
18 for those mills.

19 Those mills produce a very substantial
20 amount of outbound rail traffic and also take in a
21 substantial amount of inbound rail traffic.

22 And the presence of competition is vitally

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1 important, both from a standpoint of rates as well as
2 service.

3 We've been very concerned every since the
4 operating -- ever since we received the application
5 and the BN presentation about whether or not the BN
6 could provide realistic service.

7 So we have been very concerned and have
8 had participated in depositions of the operating
9 witnesses.

10 JUDGE NELSON: Do these points show on the
11 map?

12 MR. GREENBERG: Yes, they do, Your Honor.
13 This is the Houston/Memphis corridor.

14 JUDGE NELSON: They're in Arkansas. Is
15 that --

16 MR. GREENBERG: They are. Here's Pine
17 Bluff and here's Camden.

18 JUDGE NELSON: All right.

19 MR. GREENBERG: And as you can see --

20 JUDGE NELSON: And they're on the line of
21 the --

22 MR. GREENBERG: They're on the line of

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1 both. They're on the line. They're on the -- the SP
2 line and the UP line, criss-crossed at both places.

3 And at both facilities there are very
4 major --

5 JUDGE NELSON: So this would be a two-to-
6 one --

7 MR. GREENBERG: Yes.

8 JUDGE NELSON: -- in the terminology of
9 this case?

10 MR. GREENBERG: It is.

11 JUDGE NELSON: All right.

12 MR. GREENBERG: Okay. And in both places,
13 there is -- there are substantial rail switching
14 facilities that International Paper and the railroads
15 have made available for handling of IP's traffic
16 because there was such a substantial amount.

17 In fact at Pine Bluff, IP actually owns
18 the land on which the switching -- the switching yard
19 is located. And the railroads have built tracks.
20 There's an operating contract on how these will be
21 maintained.

22 We've been very concerned about whether or

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1 not he BN provides a realistic alternative, either
2 from the standpoint of service and rates.

3 Now as soon as the application -- as soon
4 as the Applicants advised the public that they were
5 going forward with this -- with this application,
6 International Paper began asking both the Applicants,
7 as well as BN, what was going to happen.

8 How would this mill be -- how would these
9 mills be served? What kind of operation would it be?
10 What kind of facilities would be made available for
11 the handling of this traffic?

12 How many cars? What kind of car supply is
13 there going to be? How are the crews going to be
14 handled? And what kind of rates will there be?

15 And it met with no success until in
16 December. In December, the Applicants and BN met to
17 discuss IP specifically. And Mr. Dealey was involved
18 in that meeting.

19 And the agenda of that meeting was to
20 decide how IP was going to be serviced. There is no
21 testimony in this record by any of these --

22 JUDGE NELSON: How do you know all this?

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1 MR. GREENBERG: We have -- we were
2 provided last week, very belatedly, in discovery with
3 -- the Applicants provided us with copies of the media
4 agenda indicating that Mr. Dealey was present.

5 JUDGE NELSON: He's with?

6 MR. GREENBERG: He is with the -- is with
7 the BN. He was present talking with the UP. And one
8 of the major items in the agenda was what do we do
9 about International Paper? Can we handle it, and how
10 will it be handled?

11 There is no witness in this proceeding
12 which has testified specifically about IP. Every --
13 every witness that they have proffered with a verified
14 statement has said -- that we have deposed says, "It
15 may work, don't know. We never looked at it."

16 Mr. Dealey has, and we want to take his
17 deposition. Similarly, Mr. Kean. On the date -- by
18 the way, one more point on this. On the date of that
19 meeting, December 20th, the Union Pacific sent a
20 letter saying --

21 JUDGE NELSON: Of '95?

22 MR. GREENBERG: Of '95. Union Pacific

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1 sent a letter to International Paper. I assume the
2 conclusion of it indicated that there was going to be
3 a meeting with International Paper on January 15th.

4 And the BN, at that time, would provide
5 chapter and verse on how these operations would be
6 conducted.

7 The meeting was held, no chapter and
8 verse, no chorus, no nothing, no discussion about how
9 the --

10 JUDGE NELSON: So, there were two
11 meetings?

12 MR. GREENBERG: There was a meeting
13 between the BN and the UP on December 20th. There was
14 a meeting between IP and the BN on January 15th.

15 And at that meeting, there was no
16 discussion at all. The BN was unprepared to talk
17 about how the operations -- operations would
18 reportedly be conducted.

19 Mr. Dealey did not attend that meeting.
20 Instead, Mr. Kean attended. And at that meeting, Mr.
21 Kean was asked, as he had been in the past, what are
22 the operations going to be like? And how do we know,

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1 how does IP know, that it's going to get competitive
2 rates?

3 We would like to see from you now. We
4 don't want to wait until the application is approved.
5 We want to see from you now a competitive set of
6 rates. What would the BN bid on this traffic?

7 Because UP and SP in the past have been
8 required by IP to bid for the traffic.

9 JUDGE NELSON: How does the BN get in
10 there? It looks like it's miles away.

11 MR. GREENBERG: Well, that's a very good
12 question, Your Honor. But it's going to get traffic
13 joints over the SP line between Houston and Memphis.

14 JUDGE NELSON: There's the -- oh, the
15 yellow line.

16 MR. GREENBERG: Yes.

17 JUDGE NELSON: And here is Houston.

18 MR. GREENBERG: Yes, it is.

19 JUDGE NELSON: And here is Memphis.

20 MR. GREENBERG: Yes. And so they
21 supposedly will be able to operate --

22 JUDGE NELSON: I see.

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1 MR. GREENBERG: -- over -- over this line.
2 But we are very concerned that that's -- for a lot of
3 reasons, that may not be realistic. And so we wish to
4 speak to Mr. Dealey about that.

5 Now Mr. Kean comes to International Paper
6 on January 15th and --

7 JUDGE NELSON: Has nothing to say?

8 MR. GREENBERG: -- has nothing that tells
9 about the operations, but is very concerned about
10 offending a potential customer and says, "Okay, we'll
11 come back and we'll give you the competitive rate
12 quote that you want."

13 Well, we have received a quote. I do not
14 want to get into, on the record today, what the quote
15 is. But I can represent to Your Honor that it is very
16 substantially higher than the rate quotations that
17 have -- that have been provided on which the traffic
18 moves today as a result of the competitive bidding
19 that exists on the railroads who can physically serve
20 the --

21 JUDGE NELSON: So as far as you know,
22 you're looking at two railroads becoming one and a

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1 second railroad with trackage rights and a proposed
2 price that's way ahead of what you pay today?

3 MR. GREENBERG: Yes.

4 JUDGE NELSON: Those are the facts?

5 MR. GREENBERG: Precisely. And so we want
6 to know from Mr. Kean a number of questions. But one
7 of the questions we want to know from Mr. Kean is how
8 on earth did you come up with a rate like this?

9 What are your -- I mean, is it based upon
10 your operating costs? And if your operating costs are
11 that high, why are they that high because the
12 Applicants have been saying that BN is going to
13 provide a perfect competitive alternative to us.

14 JUDGE NELSON: Aren't you --

15 MR. GREENBERG: The BN has said that as
16 well.

17 JUDGE NELSON: Aren't you concerned with
18 what the merged company's rate is going to be?

19 MR. GREENBERG: Oh, you bet. We don't
20 have it, and that's a problem. If the BN is not an
21 existing, realistic alternative competitor, then we
22 are very concerned about what the rates are going to

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1 be on the --

2 JUDGE NELSON: You're at the mercy of the
3 merged company.

4 MR. GREENBERG: Yes.

5 JUDGE NELSON: But this testimony from
6 Dealey and Kean isn't going to tell you anything about
7 what the merged company will do.

8 MR. GREENBERG: No, it's going to tell us
9 what the BN is going to do. This is going to tell us
10 whether the BN is --

11 JUDGE NELSON: Is the Applicant holding
12 out the BN as a competitor in this situation --

13 MR. GREENBERG: It is, Your Honor.

14 JUDGE NELSON: -- to these plants in
15 Arkansas?

16 MR. GREENBERG: Absolutely, right.

17 JUDGE NELSON: Okay. And what do you know
18 about the reasons why they don't want you to depose
19 these people? The BN, what's their objection?

20 MR. GREENBERG: I don't actually think
21 that we've gotten much of an answer other than, I
22 believe, it would have been the standard. That is,

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1 you could have asked these questions of other people.

2 I suspect that is the --

3 JUDGE NELSON: Well, we'll hear from them.

4 MR. GREENBERG: Thank you, Your Honor.

5 JUDGE NELSON: We didn't get your
6 appearance, Ms. Jones, because -- namely because you
7 came in late. But I see you there, so why don't you
8 recite for the record that you're here now.

9 MS. JONES: I'm Erika Jones with the
10 Atchison, Topeka & Santa Fe Railway Company and the
11 Burlington Northern Railroad Company. And I apologize
12 for --

13 JUDGE NELSON: Did you hear everything
14 that Mr. Greenberg had to say?

15 MS. JONES: I did, Your Honor.

16 JUDGE NELSON: All right.

17 MR. GREENBERG: And one last thing, Your
18 Honor, and then I'll sit down. And it's simply that
19 there is no way -- we have asked questions of the
20 people, of the witnesses, who have been proffered.

21 They simply do not have the information.
22 We regard this information as extremely probative and

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1 relevant to the issue before us.

2 If the BN is going to provide us with
3 competitive service, then we probably don't have a
4 position in this case and we may walk away.

5 But at the moment, we're very concerned
6 about whether that's the case.

7 JUDGE NELSON: Mr. Roach, you're not
8 directly involved in this?

9 MR. ROACH: Here I am.

10 JUDGE NELSON: I've got to --

11 MR. ROACH: Here I am.

12 JUDGE NELSON: I've got to discipline our
13 time here today. I've got a lot of other things doing
14 and four or five items on this agenda.

15 Let's hold up now. Let me talk to Ms.
16 Jones and see what their problems. These are BN
17 employees, correct, Ms. Jones?

18 MS. JONES: Yes, they are --

19 JUDGE NELSON: All right.

20 MS. JONES: -- Your Honor.

21 JUDGE NELSON: So why don't you want their
22 deposition taken?

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1 MS. JONES: Well, there are -- there are
2 three different reasons. One of them, which may be
3 the reason Mr. Roach set out, is the reason that we
4 offered Mr. Greenberg, is the -- is a general concern
5 that we share with the Applicants about effective non-
6 testifying witnesses and the standard for which we
7 should be held for their production.

8 We have a particular concern. We are not
9 the primary applicants here, and my clients are in the
10 middle of a merger. And taking business people away
11 from the business day where they're in the middle of
12 implementing the prior merger is quite problematic to
13 my client.

14 We associate ourselves with the letter
15 that Mr. Roach submitted that lays out some very deep
16 concerns about burdens and producing witnesses, non-
17 testifying witnesses, in this case.

18 And we affiliate ourselves with those
19 arguments, and primarily offer those as the reason.

20 I also have specific reasons as to both
21 the --

22 JUDGE NELSON: With regard to burdens, I

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1 am certainly willing to work with you in seeing that
2 these depositions are fixed in time and in length and
3 in place. And we can work out all of the mechanics to
4 the convenience of the deponents if we have got that
5 problem.

6 I see a distinction, perhaps, between the
7 proffered witnesses and these so-called -- what do you
8 call them, non-testifying witnesses?

9 MS. JONES: Correct, Your Honor.

10 JUDGE NELSON: Whatever label you put on
11 them. In terms of --

12 MS. JONES: And they --

13 JUDGE NELSON: -- convenience of schedule,
14 we may owe this latter group more in the way of trying
15 to work things out for them.

16 But I don't know of anything in the
17 Constitution or the Interstate Commerce Act or the
18 Administrative Procedure Act or the regulations of the
19 Surface Transportation Board that hold that people are
20 immune from deposition merely because they didn't
21 submit proposed testimony.

22 MS. JONES: Your Honor --

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1 JUDGE NELSON: Do you have some authority
2 for that one?

3 MS. JONES: Yes, Your Honor, there is.
4 And it's been researched and presented by Mr. Roach.
5 It is a disapproved form of discovery by --

6 JUDGE NELSON: Disapproved by whom?

7 MS. JONES: -- by the Board.

8 JUDGE NELSON: Well, let's hear about it
9 then, Mr. Roach.

10 MR. ROACH: Your Honor, I don't want to --

11 JUDGE NELSON: We're talking generically
12 now.

13 MR. ROACH: Yes.

14 JUDGE NELSON: Then we'll get to the
15 specifics.

16 MR. ROACH: Yes. And I know you have a
17 tight schedule, and I don't want to burden that
18 schedule. But I want to say to you that this -- and
19 I've said this before. This issue of depositions of
20 non-testifying witnesses could meet a bare standard of
21 relevance is a very, very crucial issue from the
22 standpoint of the Applicants and from the standpoint

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1 of holding to the schedule in this case, which is of
2 a fair amount of importance.

3 The Board has made clear it's of
4 importance. And the Board has said in its order
5 denying the extension of time that it repeats its
6 injunction to the parties to keep their discovery and
7 their pleadings to the most relevant issues.

8 And we have over 20 requests now for
9 depositions of non-testifying witnesses. And our
10 friends are not bringing them on all at the same time,
11 because they don't want you to see them all in a big
12 masse.

13 But they are there, and they will be back
14 with more.

15 We have put on 21 witnesses in
16 depositions. It has taken seven weeks. And our
17 position, and we'll go into this in detail on each of
18 these witnesses, is that the witnesses who were
19 available could address the substance of all of the
20 issues that they're now asking to depose other people
21 about.

22 Not every detail, not every detail,

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1 because, for example, you will her a request for
2 depositions of some coal marketing people who --

3 JUDGE NELSON: Well, they're not here now.
4 We're dealing with Mr. Greenberg.

5 MR. ROACH: Yes. I mean, the reason --
6 the current reasons you're going to hear are well,
7 these people know something that the other witnesses
8 don't know. And that -- of course, that can always be
9 true. They'll --

10 JUDGE NELSON: Well, he points to a
11 meeting where Mr. Dealey --

12 MR. ROACH: Right.

13 JUDGE NELSON: -- was.

14 MR. ROACH: Okay, and I'll --

15 JUDGE NELSON: Who better to talk about he
16 meeting than Mr. Dealey?

17 MR. ROACH: Sure, and there are thousands
18 of meetings that have taken place that they could list
19 another 200 people.

20 But let me -- I'll get to that. I'll get
21 to the specifics in just a moment. I'm trying to set
22 the background here.

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1 As to the legal standard, if I may, the
2 Commission decided a case called the Annual Volume
3 Rates on Coal Rawhide Junction to Sawhorse Bluff on
4 January 4, 1985. It's a well-known ICC precedent on
5 the issue of depositions.

6 And it denied depositions and it pointed
7 to the fact that the Commission's rule speaks in terms
8 of whether "a deposition will prevent a failure or
9 delay of justice."

10 That is -- that is the phrase in the
11 Commission's rule.

12 JUDGE NELSON: Was that a case going to
13 hearing?

14 MR. ROACH: It was a case that was under
15 provisions that would meet the APA definition of an
16 on-record hearing, just as this is. But I don't agree
17 --

18 JUDGE NELSON: There isn't going to be a
19 hearing here.

20 MR. ROACH: No, but --

21 JUDGE NELSON: Was there a trial-type
22 hearing in that case?

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1 MR. ROACH: No. No, there wasn't. It was
2 simply -- the parties had an entitlement to one in the
3 discretion of the Commission, just as here.

4 It's -- there are some magic words in the
5 statute that speak of "hearing on the record," and
6 that triggers certain rights under the APA including
7 discovery rights.

8 It was no different from this case in that
9 respect.

10 The Commission has discretion as to
11 whether actually hold the oral hearing and testimonies
12 --

13 JUDGE NELSON: But there was no later
14 hearing in the case you're relying on?

15 MR. ROACH: I'm virtually certain that's
16 correct, that there was not. The Commission said
17 that, in denying the request for depositions -- and
18 I'm quoting from page two -- that the Petitioner had
19 not explained why taking depositions would serve to
20 prevent a failure or delay of justice.

21 And it said, "That the Petitioner has not
22 shown that the information it seeks may not be

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1 obtained through other means of discovery, such as
2 interrogatories, requests for the production of
3 documents or inspection visits, that are readily
4 available and less disruptive than depositions, and
5 has not shown that the material is not merely
6 cumulative or in danger of loss."

7 And it went on to say "Depositions," and
8 I'm quoting, "should only be ordered after other means
9 of discovery are shown to be inadequate. And where
10 more conventional discovery procedures are available
11 that are not as disruptive as the taking of
12 depositions, they should be used."

13 Now, we were asked in discovery --

14 JUDGE NELSON: That doesn't draw any
15 distinction between "testifying" and "non-testifying"
16 witnesses.

17 MR. ROACH: No, it doesn't. But it sets
18 a standard for depositions. And the only exception to
19 that standard is the Commission's order in this case,
20 the scheduling order, that says that testifying
21 witnesses may automatically be deposed as a right for
22 discovery.

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1 And so every one of them has been deposed,
2 every one. We've spent seven weeks. We have a tower
3 of deposition transcripts here, including witnesses on
4 this subject, witnesses about operations and the
5 Applicants' intent with respect to operations.

6 Our witnesses King and -- testified about
7 our operating plans. And the BN/Santa Fe's witness --

8 JUDGE NELSON: You don't need to recite
9 all the witnesses.

10 MR. ROACH: -- Mr. Owen spoke about --

11 JUDGE NELSON: I'm familiar with a number
12 of these names.

13 MR. ROACH: Now, they asked us in an
14 interrogatory, "Do you have any other plans with
15 respect to service to Camden and Pine Bluff?" And we
16 said "No, the operating plan is our plan."

17 Now, they talk about this meeting in
18 December. First of all, this meeting was not a
19 meeting held to implement the merger and the operating
20 plan and the settlement agreement.

21 It was a lower level meeting held because
22 of the constant importuning of International Paper,

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1 and Mr. Greenberg was candid about saying that. It's
2 a big, important customer.

3 It asked to meet with people, and it got
4 people worked up about its concerns about service.
5 And some UP and BN/Santa Fe people sat down and talked
6 about that.

7 But I will tell you, Your Honor -- I'll
8 represent to you, and I will present witnesses, if
9 necessary, on this subject that the formal process of
10 implementing the operations which entails that we have
11 to negotiate specific trackage rights agreements and
12 other agreements -- that's all called for in the
13 settlement agreement.

14 It says we have to, by June 1, negotiate
15 implementing agreements -- has only just now
16 commenced.

17 There are teams that have been appointed
18 to do it. They have a schedule to try to get it done.
19 They have meetings coming up. And this was not one of
20 those meetings. This was a meeting of low level
21 people.

22 And when I answered the interrogatory, I

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1 had to correct recently because I didn't know this
2 meeting had occurred. And the people I had consulted
3 in authority at Union Pacific didn't know it occurred.

4 But this meeting is remotely related to
5 any relevant issue in this case at best. Whatever was
6 discussed at this meeting with respect to the issues
7 and how the operations might be done is not a subject
8 --

9 JUDGE NELSON: Well, with low level
10 employees, it couldn't be so disruptive.

11 MR. ROACH: Well, I'm not claiming
12 disruption of their lives as much as I'm claiming
13 disruption of the Applicants' lives.

14 And that gets me to the moratorium issue,
15 which is so crucial. We have a discovery moratorium
16 here in March. It is designed --

17 JUDGE NELSON: That's established by the
18 Commission --

19 MR. ROACH: By Your Honor in the --

20 JUDGE NELSON: -- or in the discovery
21 guidelines?

22 MR. ROACH: In the discovery guidelines.

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1 Now, it's a moratorium on written discovery, so
2 everybody doesn't accuse me of misleading you. That's
3 what it's a moratorium on.

4 But its purpose was broader than just
5 keeping us from having to write on pieces of paper for
6 a month.

7 The purpose of it was so that both sides
8 in this case could devote March to digesting this
9 massive deposition record we have, this massive
10 discovery record we have.

11 We have had 1,200 discovery requests that
12 we have answered. We have produced 200,000 pieces of
13 paper to these adversaries of ours.

14 And we need March just as much as they
15 need March to get our rebuttal case together and
16 prepare.

17 And then we're going to get a huge tower
18 of paper at the end of March from them, and we'll have
19 30 days to respond to it, 14 days to respond to the
20 Department of Justice. If we had to --

21 JUDGE NELSON: What's that got to do with
22 now?

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1 MR. ROACH: Here's what it has to do with
2 it. We've been asked for depositions of ask many
3 people as we have already produced. It has taken us
4 seven weeks to handle those.

5 And if we have to defend depositions all
6 through March, our friends won't all be in those
7 rooms. I'll be in those rooms because I've got to put
8 them all on.

9 They will -- they will have one person in
10 each one of those depositions, and they will destroy
11 the month of March for these Applicants.

12 JUDGE NELSON: You mean the Applicants
13 have only one lawyer in there?

14 MR. ROACH: No, but --

15 JUDGE NELSON: What's happened?

16 (Laughter.)

17 MR. ROACH: No, no. But I'll tell you,
18 when you have witnesses who have not been involved in
19 preparing the applications, are unfamiliar with the
20 issues, it takes twice as long to prepare them for
21 deposition.

22 It takes the time of crucial lawyers on

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1 the Applicants' team. It's not just me. There are
2 others.

3 But it's a limited team, and it's a tiny
4 fraction of the number of lawyers on the other side of
5 the aisle. They've got --

6 JUDGE NELSON: Well, I certainly --

7 MR. ROACH: -- 50 lawyers.

8 JUDGE NELSON: -- am willing to entertain
9 suggestions on how to keep the burdens down and where
10 to have them and how long they can be and that sort of
11 thing.

12 MR. ROACH: Well, let me just speak one
13 more time to the standard.

14 JUDGE NELSON: But some blanket exclusion
15 here does not appeal to me.

16 MR. ROACH: Let me just speak one last
17 word on the standard, and then we can go on.

18 JUDGE NELSON: The standard so far was
19 that you have to show that there were no other means
20 of discovery and that it is not cumulative.

21 MR. ROACH: And what I would like to say,
22 Your Honor, is this: the standard for deposing of

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1 non-testifying witnesses has got to be something more
2 than that anybody can simply stand up and say,
3 "Somebody else who didn't testify knows some piece of
4 information that could be relevant, and even that
5 isn't -- that wasn't known by one of the testifying
6 witnesses."

7 It has to be something more than that, or
8 you've got a prescription for an infinite number of
9 depositions.

10 And Mr. Lubel wrote me a letter a while
11 ago which said, "The number of witnesses will grow
12 geometrically." He wants to treat it -- these -- our
13 friends all want to treat it as --

14 JUDGE NELSON: I hear that every time from
15 you. It's a memorable phrase that you --

16 (Laughter.)

17 MR. ROACH: Well, it was a memorably
18 candid statement. And it's a statement --

19 JUDGE NELSON: That's the way discovery
20 works.

21 MR. ROACH: In Federal court, it is --

22 JUDGE NELSON: I don't know why that's so

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1 surprising.

2 MR. ROACH: It is because this is a case
3 on a very, very expedited schedule where you have an
4 agency with a --

5 JUDGE NELSON: At the FARC we have data
6 requests and then follow-up and then sometimes there's
7 a need for a deposition.

8 MR. ROACH: Right, but you don't have a
9 law that disfavors depositions, and you don't have a
10 Board that has set a schedule and has said, "Don't
11 give us -- don't give us the normal relevance
12 argument. Restrict your discovery from day one to
13 that which is strictly relevant."

14 And that is the difference. And what I'm
15 saying to you, Your Honor, is this doesn't meet that
16 standard of relevance because these were preliminary,
17 tentative, non-authoritative meetings of low-level
18 people.

19 Neither these Applicants nor BN/Santa Fe
20 should have to take the time to attend these
21 depositions, to prepare the people, to make a day for
22 this sort of thing. Because you're going to get

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1 another two dozen of these.

2 And we've got two more coming up today,
3 and maybe three or four more if you allow the notice
4 requirement to be waived.

5 Furthermore, they should have asked for
6 these a long time ago. They knew about the -- the
7 meeting. They point to the letter that they were sent
8 after the meeting. But they didn't ask for these
9 depositions.

10 And they had our interrogatory answer, and
11 they just ignored it. They didn't follow up and
12 demand to depose a bunch of people.

13 They're doing this to create a challenge
14 to the schedule. They're trying to pile up
15 depositions in March to tie us down and to create a
16 basis for asking for another extension of time.

17 We have already litigated it once, and
18 we're going to hear it again. That's my argument.

19 JUDGE NELSON: I wouldn't think they're
20 going to go very far on a new request for time.
21 Didn't the Board make it clear that the time wasn't
22 going to yield?

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1 MR. MILLS: Can I be heard briefly, Your
2 Honor? It will -- it will enable me to say something
3 which is appropriate now that I will not have to say
4 later on response to both Ms. Jones and Mr. Roach.
5 The Coal --

6 JUDGE NELSON: You're here for Entergy and
7 the coal people?

8 MR. MILLS: Yes, that's correct. And
9 again, I will not be repetitive when it's my turn.
10 But there's two points I would like to make.

11 Number one, Ms. Jones says that BN should
12 not have to -- BN/Santa Fe should not have to produce
13 non-testifying witnesses because they're not a primary
14 applicant.

15 While that's true, they are in the
16 position of supporting the Applicants with respect to
17 the settlement agreement.

18 In fact, on their -- in their comments in
19 support of the application, they say in the first two
20 pages that while they "take no position on whether the
21 merger should be approved, if the merger is approved,
22 they strongly believe that the settlement agreement

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1 reached by BN/Santa Fe and UP must be imposed as a
2 condition of the merger to alleviate the competitive
3 harms to shippers that would otherwise lose the only
4 rail competition available to them."

5 JUDGE NELSON: What are you reading from?

6 MR. MILLS: This is their comments on the
7 primary application, which were filed on --

8 JUDGE NELSON: BN comments?

9 MR. MILLS: BN comments.

10 JUDGE NELSON: Yes, I know that position.
11 Anything else?

12 MR. MILLS: The other point I wanted to
13 make in terms of the precedent is that there is
14 precedent for this kind of deposition in the BN/Santa
15 Fe case itself, as we indicated in our letter.

16 That was the situation where there were
17 witnesses -- and I'm just going to speak briefly about
18 the coal area -- who submitted verified statements.

19 They were deposed. They did not have
20 knowledge on particular movements, competitive --
21 particular competitive situations.

22 Several utilities requested the right to

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1 take additional depositions of individuals in the coal
2 markets who did have such knowledge.

3 And while there were some objections to
4 that, that in fact occurred, although it was worked
5 out voluntarily without having to go to the
6 Commission.

7 And three additional coal witness
8 depositions were taken as a result of that.

9 JUDGE NELSON: What else now before we get
10 back? We'll get back to you at the end, Mr.
11 Greenberg. Let's hear more -- Mr. Roach is up again
12 and Ms. Jones.

13 MR. ROACH: One last thought I'd like to
14 add, and Ms. Jones may have a similar point to make,
15 is -- it has to do with, if you will, showing effect.

16 It's not quite the settlement privilege
17 argument, but it's, in a way, analogous to it.

18 If you allow a shipper who asks questions
19 about, you know, what is -- what are the details, what
20 are the exact operating details, going to be under a
21 settlement or under a merger plan, and is able to
22 induce retail level managers or employees of the

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1 railroad to start talking about it, and then uses that
2 as a predicate to depose those people, you're --
3 you're throwing a turn into the very process that you
4 should allow to happen.

5 You should allow these Applicants to take
6 this through. You should allow them to come to
7 implementing agreements, as they are now trying to do
8 as expeditiously as possible pursuant to the
9 settlement agreement.

10 And you should not, instead, say that
11 every time that somebody gets somebody to give them a
12 rate quote -- and of course, the first rate quote --
13 I don't know anything about this rate quote.

14 But the first rate quote any railroad
15 gives any shipper is going to be high. I know that
16 much without knowing a single thing about this rate
17 quote.

18 You then suddenly turn that into
19 litigation, you're producing exactly the opposite to
20 the result that is in the public interest.

21 JUDGE NELSON: Ms. Jones?

22 MS. JONES: I'd like to first respond to

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1 Mr. Mills' point about the precedent from the prior
2 merger. He is correct that a couple of -- I believe
3 his number is right, that there were three non-
4 testifying witnesses produced in the prior merger.

5 But I would point out that it was only
6 three. We are already asked for five, and Mr. Roach
7 was asked for somewhere close to 20 at this point.

8 So the comparison there is more in favor
9 of a limitation than it is in favor of open-ended.
10 And there were no witnesses produced by the settling
11 parties in the BN/SF merger.

12 The Applicants produced three, I believe
13 is the right number, non-testifying witnesses. The
14 settling parties produced none.

15 And we are the settling party here. And
16 the analogy there could work to protect our witnesses
17 from having to be produced.

18 And on the merits that of the two that Mr.
19 Greenberg has requested, Mr. Dealey, who is a Vice
20 President for Transportation, so I have to
21 disassociate myself --

22 JUDGE NELSON: Let's hold up with the

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1 merits of the --

2 MS. JONES: Yes, Your Honor.

3 JUDGE NELSON: Let's first deal with the
4 generic attack. Mr. Roach, I can't keep giving you
5 chances here. This is the last crack now on this
6 question.

7 (Laughter.)

8 JUDGE NELSON: On this question, the non -
9 - so-called non-testifying witnesses and due burdens
10 and so forth.

11 MR. ROACH: I appreciate the opportunity
12 and I'll simply say this. We have said to the parties
13 that we will produce non-testifying witnesses on any
14 significant issue that is not addressed by testifying
15 witnesses. And we have done that.

16 They asked about costing, which is kind of
17 an issue that underlies a lot of the application, and
18 we produced a Mr. Counters because we didn't have a
19 testifying witness on costing.

20 Another party here has asked us about the
21 pro forma financial statements. We have said we will
22 produce witnesses if you want. We think we're going

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1 to work it out informally, but we're ready to do that.

2 What we're not ready to do is to go down
3 the course of progressively, geometrically expanding
4 federal relevance concepts of depositions.

5 And we're doing that in good faith, and
6 we're happy to discuss the matter on an individual
7 basis.

8 MR. GREENBERG: Your Honor, if I could
9 just respond very briefly to a couple of points that -
10 - that --

11 JUDGE NELSON: Let's see what he's -- what
12 he's saying, he and Ms. Jones, that -- that there's a
13 special ICC hostility to depositions that you have to
14 overcome, that you haven't overcome in the case of the
15 request for Dealey and Kean, that there are tactics at
16 work here that are designed to lay the groundwork for
17 further extensions and/or bury the other side in paper
18 when they have to be writing, that there is an evil
19 motive here, namely a use of the power of the shipper
20 to muscle something out of the Applicants before the
21 Applicants are ready to give it to you, and that there
22 are overall burdens on the lawyers involved in what

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1 appears to be an ever-expanding reach of deponents.
2 What do you say about all those things?

3 MR. GREENBERG: Well, you know, if Mr.
4 Roach is willing to stipulate that if it turns out at
5 the end of the merger -- if the merger is consummated,
6 approved and consummated, and it turns out that BN
7 can't provide service, that there will be a condition
8 eliminating or rescinding the merger, then perhaps we
9 can -- perhaps we can take the position seriously.

10 But right now, he's --

11 JUDGE NELSON: This is not the place to
12 negotiate those conditions.

13 MR. GREENBERG: Of course, but he --

14 JUDGE NELSON: Nor do I have the power to
15 do it.

16 MR. GREENBERG: And it is way too late for
17 Mr. Roach to suggest that International Paper is going
18 to sit and wait until the Applicants have decided what
19 they're going to do. They're not presenting it to the
20 Commission, and tell us after the merger is
21 consummated that we'll take what they give us?

22 Thank you, but no thanks. That is not

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1 consistent with the APA or the Constitution. We're
2 not going to accept that. That's ridiculous.

3 Now, Mr. Roach was present in this room,
4 Your Honor, when an agreement was negotiated on how
5 discovery was going to be conducted.

6 The order that you -- that was issued
7 pursuant to that said, "Depositions of other persons
8 or parties on a specified subject matter may be taken
9 with reasonable, written notice."

10 There was no argument back on that date
11 that we weren't going to have any depositions of other
12 non-responsive parties.

13 We sat in this room and argued that very
14 point on that day.

15 JUDGE NELSON: How about his threshold
16 standards that he says you haven't met?

17 MR. GREENBERG: Well, is the issue of
18 whether IP will be able to get service not relevant?
19 Whether or not the BN is going to be able to actually
20 service these facilities is not relevant?

21 The witnesses they sponsored knew nothing
22 about this meeting, and they don't know whether or not

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1 this operation is feasible.

2 The BN operating witness, when I asked
3 them in deposition, I said -- and he said, "How are
4 you going to provide service to Camden?" "We don't
5 know. Maybe it will be -- we haven't thought about
6 it." That's not good enough for us.

7 The agenda that I introduced, Mr. Roach
8 says we're a day late on this issue. We just got this
9 document last week.

10 JUDGE NELSON: What's the agenda?

11 MR. GREENBERG: This is one of the
12 documents -- one of the documents they produced under
13 discovery. The agenda that --

14 JUDGE NELSON: That shows the meeting?

15 MR. GREENBERG: Yes, the meeting. All the
16 points that I asked about, all the points we want to
17 ask Mr. Dealey about, are on here.

18 They want to know how are you going to
19 deal with the -- what -- where are the terminal
20 locations BN is going to operate from.

21 JUDGE NELSON: Were there any people at
22 the meeting that are testifying witnesses?

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1 MR. GREENBERG: No. Mr. -- Mr. Owen was
2 not there. Mr. Owen did testify, but he wasn't there,
3 didn't know what took place.

4 JUDGE NELSON: Now, Ms. Jones --

5 MR. GREENBERG: If I could just make one
6 more point?

7 JUDGE NELSON: Go right ahead?

8 MR. GREENBERG: And that is about the --
9 about moratorium of discovery. Mr. Roach has served
10 International Paper with an enormous volume of
11 depositions -- of document requests and discovery
12 requests that we're supposed to be busy with for the
13 month of March.

14 And the final point I want to make is
15 there was no agreement with International -- between
16 International Paper and anybody else in this room
17 about when we were going to ask for anybody to be
18 deposed.

19 We asked for these individuals when they
20 were identified in discovery that Mr. Roach belatedly
21 produced last week.

22 And I resent the implication that we're

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1 doing this to harass him. That is not the case.

2 JUDGE NELSON: Now, I can't keep hearing
3 from people. I'm going to hear from Ms. Jones. Mr.
4 Roach has had many chances. Ms. Jones?

5 MS. JONES: I would first like to address
6 the discovery question. Mr. Greenberg has had the
7 BN/Santa Fe side of the document productions that he
8 requested since, I believe, late January, and which
9 was a timely response to his requests.

10 And you've had all the information from us
11 for that period of time.

12 As to the sustain of knowledge of the
13 witnesses, he was present or his colleague was present
14 during the deposition of Mr. Eichs a couple of weeks
15 ago in which Mr. Eichs testified that the operating
16 plans simply haven't been developed yet.

17 Now, we can understand why that might be
18 frustrating to International Paper. There is nothing
19 that Mr. Dealey will be able to add to that situation
20 in a deposition.

21 JUDGE NELSON: We'll get to that. I'm
22 dealing with these generic plans.

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1 MS. JONES: I will await your --

2 JUDGE NELSON: And I'm going to rule as to
3 those claims that they are not persuasive to me. I do
4 not choose to make a dichotomy between testifying
5 witnesses and non-testifying witnesses.

6 The first may be deposed, and the second
7 may not.

8 Nor am I concerned with these tactics and
9 motives and allegations back and forth that each side
10 is trying to pull its own maneuvers and fool with the
11 schedule and bury the other in paper.

12 Everyone may have their own tactical
13 considerations and reasons, and it's not my job to
14 unravel all of that stuff.

15 With regard to someone in the situation of
16 International Paper or other shippers, my experience
17 in mergers, and mine is the only kind I know, and this
18 is railroad and electric, is that a merger always
19 brings to the table everyone who wants to get every
20 conceivable piece of the pie they can out of it.

21 And any sophisticated company knows that
22 when they submit a merger application to a regulatory

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1 board.

2 The door is opened to the Mr. Greenberg's
3 of the world doing whatever they can do to get
4 whatever deals they can for their clients, or other
5 railroads or other shippers. Everyone wants in on the
6 action.

7 That doesn't strike me as unusual at all.
8 That's the way the game is played.

9 So, I see nothing wrong in letter these
10 depositions go forward. I want to now get into the
11 details more with regard to Mr. Dealey or Mr. Kean.
12 I'm not clear why we need both.

13 I'm not clear as to what we may propose in
14 terms of length, place, other limitations that would
15 be more acceptable.

16 Dealey is the man who was at the meeting
17 that you say discussed what they were going to do with
18 International Paper.

19 MR. GREENBERG: Yes, Your Honor.

20 JUDGE NELSON: Kean was simply a man who
21 came in with a rate that you think was too high?

22 MR. GREENBERG: No, Your Honor. I believe

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1 that Mr. Kean was also there. I'm not positive. It's
2 not plain to me whether he was --

3 JUDGE NELSON: Was he also at the meeting?

4 MS. JONES: I don't know.

5 JUDGE NELSON: Do you know?

6 MR. GREENBERG: I'm not sure. But Mr.
7 Kean is -- is the BN Account Representative that has
8 been assigned to International Paper. And the parties
9 have been trying -- International Paper has been
10 trying for a long time to deal with this.

11 Let me also add --

12 JUDGE NELSON: So he gave you a rate, and
13 your expert will say that rate is too high and not
14 competitive, period. What more do you want to
15 establish?

16 MR. GREENBERG: Your Honor, we want to
17 know why is it that high? We want to know is it
18 because --

19 JUDGE NELSON: For whatever reason, he
20 woke up at 3:00 a.m. one morning and came up with a
21 high rate.

22 MR. GREENBERG: Well if that's the reason,

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1 then -- then that's the reason. But I suspect the
2 reason is because -- there are other reasons why the
3 rate is that high, and that is because there isn't
4 enough other traffic on this line to permit them to
5 operate efficiently for traffic at Pine Bluff.

6 JUDGE NELSON: How does that help you any?

7 MR. GREENBERG: If that's the case, then
8 something is basically wrong with the representations
9 that the Applicants have been making about how BN will
10 be a perfect competitor on this line.

11 JUDGE NELSON: If it's high --

12 MR. GREENBERG: It's very significant to
13 us.

14 JUDGE NELSON: If the rate is high and the
15 goods won't move under it, then I don't see what the
16 motivation has to do with it.

17 He could do it because he doesn't like
18 your face. He could do it as part of a scheme. He
19 could do it because it has to be high because there
20 are extraordinary costs associated with this.

21 MR. GREENBERG: The Board is being told by
22 the Applicants and by BN that BN is going to be a very

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1 strong competitor in every market, at every two-to-one
2 point.

3 JUDGE NELSON: I understand that.

4 MR. GREENBERG: And if, in my --

5 JUDGE NELSON: And you come in with
6 evidence that shows that he gives you some high-ball
7 price under which not one car will ever move.

8 MR. GREENBERG: Right.

9 JUDGE NELSON: Why isn't that enough?

10 MR. GREENBERG: I'm somewhat concerned
11 that may not be enough. I would like to be able to
12 find out why it is, when we asked for a competitive
13 rate, that we get a rate that is at a level of
14 magnitude -- many levels of magnitude higher than --

15 JUDGE NELSON: If you had to choose, which
16 would you rather have, Dealey or Kean? You see, my
17 leaning was to give you Dealey because he was in a
18 meeting about which you don't know anything.

19 Kean, you know at least what happened. He
20 came in with a piece of paper with a number on it.
21 But you know the workings, see?

22 MR. GREENBERG: Well, what I wanted --

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