

INTERSTATE COMMERCE COMMISSION 03/01/96

FINANCE DOCKET # 32760 1529-1615 2+

1 what I wanted -- and before I answer that question,
2 let me tell you that in our letter to Ms. Jones on
3 this issue, we have volunteered to reduce the burden
4 and suggested that we will hold the deposition
5 wherever you want to.

6 If they're in Shaunberg, Illinois, we'll
7 go out there.

8 JUDGE NELSON: We'll get to that.

9 MR. GREENBERG: And we think a half-day
10 would take care of it.

11 JUDGE NELSON: We'll get to that. But I
12 want to respect -- if there is a Commission policy
13 here of being grudging about depositions, I want to at
14 least keep it in my mind.

15 MR. GREENBERG: And we want Dealey.

16 JUDGE NELSON: Dealey? Well, I'm going to
17 order the deposition of Mr. Dealey and now --

18 MS. JONES: Your Honor --

19 JUDGE NELSON: -- can we work it out in
20 terms of time --

21 MS. JONES: Your Honor, I haven't been
22 heard at all on that.

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1 MS. JONES: On either one, Your Honor.

2 JUDGE NELSON: All right, tell me about
3 Dealey.

4 MS. JONES: You kept asking me to sit
5 down. Mr. Dealey is not going to be able to add
6 anything that Mr. Greenberg does not already know.

7 He has heard testimony from Mr. Eichs that
8 the teams are just now being organized. Forty-eight
9 hours ago, the team had its first meeting, and the
10 team is starting to put together the operating plans
11 that he wants to inquire about.

12 Mr. Dealey doesn't know the answer right
13 now. But he complains he doesn't have the operating
14 information because it doesn't exist. And it won't
15 exist in this deposition either.

16 We may know something more in several
17 weeks. And if Your Honor believes that the operating
18 information is important, we would be prepared to
19 produce a witness from this team who may be able to
20 answer questions in a few weeks, but not now.

21 The answers don't exist, and they won't
22 exist if you order the deposition.

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1 JUDGE NELSON: Do you want this in a few
2 weeks from some person they'll give you or do you want
3 to get at Mr. Dealey now?

4 MR. GREENBERG: We want -- we would like
5 to have Mr. Dealey now. We have a March 29 common
6 date. And it's true, they have been telling us over
7 and over again that they haven't thought about it.

8 It's not our application, Your Honor.
9 We're not the ones who asked for an expedited decision
10 on this issue.

11 But I submit to you that we need to have
12 on the record from one of their witnesses some
13 explanation of how they think that they can operate
14 the --

15 JUDGE NELSON: Let me see that agenda that
16 you have. There was a document you had in discovery.

17 MR. GREENBERG: Yes.

18 JUDGE NELSON: Ms. Jones gave you this?

19 MR. GREENBERG: This came actually -- yes,
20 I think so.

21 MS. JONES: We produced some material. I
22 don't know which ones --

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1 MR. GREENBERG: I have a copy for you if
2 you'd like.

3 JUDGE NELSON: It says "highly
4 confidential." Should I not be looking at it? Is it
5 so secret I can't see it?

6 MR. GREENBERG: It's their document.

7 JUDGE NELSON: Ms. Jones, can I read this
8 paper?

9 MS. JONES: Yes, Your Honor. I assume
10 you're eligible to --

11 JUDGE NELSON: What if I read it out loud?
12 Am I --

13 MS. JONES: Well, then we ought to enter
14 a closed -- we should close the hearing.

15 JUDGE NELSON: All right, then let's close
16 the hearing because we may need to discuss its
17 contents.

18 (Whereupon, the proceedings went into a
19 confidential closed session.)
20
21
22

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

2 2:23 p.m.

3 (Whereupon, the session was reopened.)

4 JUDGE NELSON: What is next?

5 MR. LUBEL: Your Honor, I'm afraid Ms.
6 Jones needs to be here for at least my issue. I don't
7 know if there --

8 JUDGE NELSON: Is there any request for
9 which -- sure, how about -- this request of
10 reconsideration of a ruling?

11 MR. McBRIDE: Yes, Your Honor, Western
12 Shippers Coalition.

13 JUDGE NELSON: Why don't we do that one?

14 MR. McBRIDE: Thank you very much. First
15 of all, let me just set the stage. We made a request
16 for the information that we are seeking on the SP side
17 by letter to the Applicants pursuant to the discovery
18 guidelines on February 22nd and --

19 JUDGE NELSON: Is this the one that I
20 ruled that was -- that I thought was going to be an
21 agreement and then I said it was without prejudice to
22 coming back to me if you couldn't work something out?

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1 MR. McBRIDE: I wasn't here, but I read
2 the transcript, and that was my understanding of what
3 you ruled.

4 JUDGE NELSON: But I don't remember --

5 MR. McBRIDE: It was Mr. Loftus.

6 JUDGE NELSON: -- the details of what it
7 was all about.

8 MR. McBRIDE: Well, rates and revenues.

9 JUDGE NELSON: Whose rates and revenues?

10 MR. McBRIDE: Of the Applicants, SP and
11 UP. Mr. Loftus was seeking at that time with respect
12 to coal --

13 JUDGE NELSON: What they would charge him
14 for coal --

15 MR. McBRIDE: That's correct. And you
16 gave him the tonnage information and denied him rate
17 and revenue information.

18 JUDGE NELSON: On what ground?

19 MR. McBRIDE: It was not entirely clear to
20 me. But as I understood it you thought that tonnages
21 would be sufficient

22 Mr. Roach had represented that the two

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1 coals involved did not compete. So you didn't see, as
2 I understood it, why price mattered.

3 If I might draw this for an analogy, if
4 you're got a diamond company buying a bread company,
5 what difference does it make what they charge for
6 diamonds and bread if they don't compete?

7 JUDGE NELSON: I remember struggling with
8 these two coals. I never did fully get on board with
9 Mr. Loftus on that claim.

10 MR. McBRIDE: That was my impression of --

11 JUDGE NELSON: Are we revisiting it now?
12 Is that --

13 MR. McBRIDE: I am indeed because of
14 subsequent developments.

15 JUDGE NELSON: All right.

16 MR. McBRIDE: And I just wanted to say,
17 because they have the position procedurally that I
18 don't even have a right to raise this question, that
19 I raised it with them on February 22nd in a letter
20 saying that I wanted to depose Mr. Gray of the
21 Southern Pacific, and that there were redactions from
22 the Southern Pacific business plans, which I have here

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1 and have furnished Your Honor, and that I wanted the
2 unredacted versions of the deposition.

3 Mr. Cunningham dutifully responded to me
4 on Saturday the 24th saying he wouldn't do it.

5 I reiterated that on the record in the
6 deposition, at the Gray deposition on the 26th. The
7 transcript --

8 JUDGE NELSON: Let's get down to the
9 issue.

10 MR. McBRIDE: Yes, fine.

11 JUDGE NELSON: I don't care about all this
12 in here.

13 MR. McBRIDE: Okay.

14 JUDGE NELSON: If I -- if I'm wrong, I
15 want to hear about it and correct the error --

16 MR. McBRIDE: Thank you.

17 JUDGE NELSON: -- if it's important enough
18 to. There's also an interest in finality.

19 MR. McBRIDE: Yes.

20 JUDGE NELSON: We make a ruling, we stick
21 with it, particular in a case that's marching along on
22 tough schedules.

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1 MR. McBRIDE: Fair enough, but you also --

2 JUDGE NELSON: So the question is, am I
3 wrong here and am I seriously wrong? Now, you tell
4 me.

5 MR. McBRIDE: Let me just digress for a
6 moment to a relevant FERC proceeding that Your Honor
7 may recall that I participated in, the Trunk-line LONG
8 I tried with my now-deceased partner, Mr. Shiflett.

9 And I will never forget that in that case
10 where economics was at issue -- Your Honor may recall
11 this case. It was a pretty big one.

12 The witness for NERA, the economic
13 consultant firm there, had authored an article. This
14 was in the fall of 1982 just before things kind of
15 fell apart in the gas markets.

16 And the title of the article was, "Setting
17 National Gas Prices without Regard to Supply," or
18 "Playing Hamlet without the Prince of Denmark."

19 That title never left me. Price and
20 supply are inextricably intertwined, at least where
21 the products compete.

22 Now as Your Honor knows better than

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1 anybody in this room, natural gas is generally a
2 fungible commodity. So you don't have these
3 arguments, generally speaking.

4 But the products don't compete. You heard
5 that argument from Mr. Roach on January 26th.
6 Transcript 924, I believe it is, he said, "The two
7 coals do not compete."

8 Well, if Your Honor -- subsequent to that
9 time when you ruled and you indicated that we could
10 revisit it, we deposed Mr. Sharp, who is the outside
11 consultant on coal, a notable point I might add since
12 both of these applicants have plenty of people who are
13 in-house experts on coal, but they went outside.

14 JUDGE NELSON: He is an Applicant witness?

15 MR. McBRIDE: He's an Applicant witness,
16 a testifying witness, Mr. Sharp. He's a consultant
17 over here in Arlington.

18 And he said based on doing his library
19 work, work data, Form 423 and that sort of thing, but
20 never having talking to anyone at SP, he concluded
21 that SP and UP largely do not compete.

22 SP coal from Colorado and Utah largely do

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1 not complete with coal from the Powder River Basin in
2 Wyoming and Montana or coal from the Hannah Basin in
3 Wyoming.

4 However, when confronted at deposition --
5 that was his prepared direct testimony, which is what
6 I believe Mr. Roach was relying on on January 26th.

7 At his deposition, he acknowledged that
8 certain coals compete. I have provided Your Honor
9 with the citations in the letter.

10 Subsequently thereto, I had the
11 opportunity to review in detail what are now the
12 Exhibits 5 and 6 to the Gray deposition, which I
13 provided to you, these two business plans.

14 I gave you but one of many examples.

15 JUDGE NELSON: I have no opportunity to
16 review that material --

17 MR. McBRIDE: Understood.

18 JUDGE NELSON: -- or any of the material.

19 MR. McBRIDE: I would like to give you, if

20 I may --

21 JUDGE NELSON: What I did is --

22 MR. McBRIDE: -- just one cite --

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1 JUDGE NELSON: I read the beginning of the
2 letter and then I look at the transcript of what I
3 ruled, and I tried to remember and figure it out.

4 MR. McBRIDE: Do you have the letter
5 there, Your Honor, or may I approach?

6 JUDGE NELSON: I think I have it.

7 MR. McBRIDE: All right.

8 JUDGE NELSON: What letter are we talking
9 about?

10 MR. McBRIDE: My letter to you on February
11 28th.

12 JUDGE NELSON: Right in front of me.

13 MR. McBRIDE: Yes sir, right -- bottom of
14 page two, top of page three. I quoted just one of
15 many examples I can give you from these reports.

16 JUDGE NELSON: This is for the proposition
17 that two coals compete?

18 MR. McBRIDE: Correct. This is an SP
19 internal document.

20 JUDGE NELSON: Who buys them, utilities?

21 MR. McBRIDE: Utilities, steel companies,
22 and some other --

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1 JUDGE NELSON: Let's take an example.

2 MR. McBRIDE: -- consumers of coal.

3 JUDGE NELSON: A utility where?

4 MR. McBRIDE: Commonwealth Edison, a
5 company in Chicago.

6 JUDGE NELSON: A company in Chicago.

7 MR. McBRIDE: Right.

8 JUDGE NELSON: You can --

9 MR. McBRIDE: EBA.

10 JUDGE NELSON: You can use either one --

11 MR. McBRIDE: Yes sir.

12 JUDGE NELSON: -- to acquire up plants.

13 MR. McBRIDE: Correct. And an example we
14 used --

15 JUDGE NELSON: And we're talking coal-
16 generated electricity.

17 MR. McBRIDE: Correct. The example we've
18 used in the case is Toledo Creek.

19 JUDGE NELSON: And they're fungible for
20 these purposes?

21 MR. McBRIDE: That's largely correct.

22 JUDGE NELSON: Or your witnesses -- some

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1 witnesses say so.

2 MR. McBRIDE: Correct. Yes, there are
3 some limitations on that because the BTUs may differ
4 and you may have a --

5 JUDGE NELSON: Environmental consequences
6 differ.

7 MR. McBRIDE: Yes. And sometimes,
8 therefore, that's why there's been some switching that
9 has gone on. I am not standing here to tell you that
10 all the competition is Powder River Basin coal.

11 Sometimes there is some blending with some
12 eastern high-sulfur coal.

13 JUDGE NELSON: You said to some degree --

14 MR. McBRIDE: It depends on the Clean Air
15 Act. Correct.

16 JUDGE NELSON: -- the fuels from --

17 MR. McBRIDE: Correct.

18 JUDGE NELSON: The Powder River is
19 Wyoming?

20 MR. McBRIDE: Yes, to a very large --

21 JUDGE NELSON: They compete with the
22 Colorado --

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1 MR. McBRIDE: That's correct.

2 JUDGE NELSON: To some degree --

3 MR. McBRIDE: Correct, and the Wyoming --

4 JUDGE NELSON: -- the utility has
5 switching capabilities.

6 MR. McBRIDE: Right. And UP serves
7 Wyoming. SP does not. SP serves Utah and Colorado.
8 And with one minor exception, UP does not really serve
9 most of these mines that we're talking about here, not
10 in Colorado, I should say, a little more in Utah,
11 right?

12 So SP has some sole-source mines --

13 JUDGE NELSON: So the rail competition --

14 MR. McBRIDE: The rail competition --

15 JUDGE NELSON: -- is a good thing because

16 --

17 MR. McBRIDE: Yes.

18 JUDGE NELSON: -- it helps keep the
19 transportation price down.

20 MR. McBRIDE: Yes. I can give you
21 ballpark numbers. I'm not talking about any specific
22 movements.

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1 But these days, a ton of coal, believe it
2 or not, may cost as little as four dollars. And to
3 move it may cost well over ten dollars. So the
4 delivered cost of the coal to these power plants these
5 days, which often times it two-thirds of the cost of
6 generating the electricity, is more rail
7 transportation than anything else.

8 JUDGE NELSON: So the utility's choice --

9 MR. McBRIDE: Yes sir.

10 JUDGE NELSON: -- switchability --

11 MR. McBRIDE: Yes sir.

12 JUDGE NELSON: -- disciplines the two
13 railroads?

14 MR. McBRIDE: Absolutely right.

15 JUDGE NELSON: All right.

16 MR. McBRIDE: Yes sir.

17 JUDGE NELSON: Or so you are claiming?

18 MR. McBRIDE: That's right.

19 JUDGE NELSON: All right. Now, what's
20 next? What's --

21 MR. McBRIDE: All right.

22 JUDGE NELSON: -- that got to do with

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1 discovery?

2 MR. McBRIDE: And what that's got to do
3 with discovery is replete throughout these exhibits
4 that I gave you -- if I may turn to the one that I
5 quoted -- could I approach?

6 It will be easier for you than trying to
7 find what I sent you. For the record, Bates No. HC-
8 65000305 --

9 JUDGE NELSON: This is a document called
10 "Business Up for Bid."

11 MR. McBRIDE: Yes sir.

12 JUDGE NELSON: So this is something that
13 you have discovered?

14 MR. McBRIDE: Yes.

15 JUDGE NELSON: Yes.

16 MR. McBRIDE: Yes. This was produced in
17 redacted form because of Your Honor's earlier ruling,
18 all right? And the document reads, "Who is the likely
19 competition? Wyoming Powder River Basin Coal." And
20 this is the SP internal document.

21 JUDGE NELSON: This is an analysis by the
22 SP.

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1 MR. McBRIDE: Internally of the Coal --
2 Business Unit.

3 JUDGE NELSON: Well, what is it that you
4 want that you don't have?

5 MR. McBRIDE: The rate and revenue
6 information because what is driving the competition --

7 JUDGE NELSON: The rate and revenue
8 information in what?

9 MR. McBRIDE: From SP. And we're going to
10 get to a set of interrogatories to UP about the same
11 question. But for now, if I may, just talk about --

12 JUDGE NELSON: Stay with SP.

13 MR. McBRIDE: -- SP, right. The coal --
14 1996 baseline business --

15 JUDGE NELSON: SP is the one that moves
16 through Colorado?

17 MR. McBRIDE: That's correct.

18 JUDGE NELSON: Right?

19 MR. McBRIDE: Right, right.

20 JUDGE NELSON: And you want to know
21 specifically what?

22 MR. McBRIDE: I want to know what rates

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1 they redacted from these reports to show that the
2 reason they got the business and they discussed 20 or
3 so, maybe more, examples in here of utilities they've
4 gotten the business from in recent years because of
5 the rates.

6 And all the way through, they talk about
7 putting competition -- putting competitive prices to
8 UP or to BN or what have you.

9 I'll give you an example here of --

10 JUDGE NELSON: You know what rates you're
11 paying.

12 MR. McBRIDE: Well, I don't represent all
13 these people, but I represent some of the coal
14 producers, as does Mr. Moreno, for example, in Utah,
15 who provides some of this coal.

16 And they don't know because the utilities,
17 the shipper pays the bill. And I wish I represented
18 all those utilities, but I don't.

19 JUDGE NELSON: Well, do you represent any
20 utilities?

21 MR. McBRIDE: I represent a few, yes.

22 JUDGE NELSON: And who are they?

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1 MR. McBRIDE: I represent Tennessee Valley
2 Authority in this case, for example. But they're not
3 a member of my Western Shippers Coalition?

4 JUDGE NELSON: Who is?

5 MR. McBRIDE: Commonwealth Edison Company,
6 who Mr. Mills happens to represent in this case, and
7 I do some work for too.

8 JUDGE NELSON: Let's take Commonwealth
9 Edison.

10 MR. McBRIDE: Yes sir.

11 JUDGE NELSON: That's Chicago?

12 MR. McBRIDE: Yes.

13 JUDGE NELSON: All right. Commonwealth
14 Edison pays the railroad to bring the coal to it.

15 MR. McBRIDE: That's correct.

16 JUDGE NELSON: So it knows what it pays.

17 MR. McBRIDE: It --

18 JUDGE NELSON: And it knows what the rates
19 are.

20 MR. McBRIDE: That's right. But those
21 agreements are confidential --

22 JUDGE NELSON: Aren't the rates -- are

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1 they published or --

2 MR. McBRIDE: No, those contracts are
3 highly confidential.

4 JUDGE NELSON: There's no more tariff
5 system?

6 MR. McBRIDE: That's correct.

7 JUDGE NELSON: All right.

8 MR. McBRIDE: That's correct. Now, you
9 can deduce, as experts do, what some of these rates
10 approximate or are. And I gave you, if you would look
11 at the last sheet of paper with my letter, a recent
12 trade press article deducing what these rates are in
13 something called a coal transportation report.

14 The article indicates -- it's entitled
15 "Colorado/Utah Market Watch - Competitive Prices, Low
16 Rail Rates, Push Coal East."

17 That's what's going on here. And if I may
18 say so, Your Honor, I don't mean to exaggerate, but
19 this is --

20 JUDGE NELSON: So you're trying to find
21 out on behalf of some coal -- who do you represent?

22 MR. McBRIDE: I represent a series of coal

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1 producers.

2 JUDGE NELSON: Coal producers.

3 MR. McBRIDE: I represent a series of coal
4 producers in Utah and Colorado.

5 JUDGE NELSON: Plant operators.

6 MR. McBRIDE: I've got a sheet of paper
7 here. Rather than read all these names, if you could
8 just take a --

9 JUDGE NELSON: No, you just tell me in
10 general.

11 MR. McBRIDE: Arco Coal Company, Andolex
12 Resources, Coastal Coal, Colorado Mining Association.

13 JUDGE NELSON: All right, these are mine
14 owners though.

15 MR. McBRIDE: That's right. Cypress Amex.
16 I could go on.

17 JUDGE NELSON: Together with utilities.

18 MR. McBRIDE: That's right, some
19 utilities, very few.

20 JUDGE NELSON: Some utilities.

21 MR. McBRIDE: Yes.

22 JUDGE NELSON: Who want to know what the

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1 ongoing prices are --

2 MR. McBRIDE: Of SP.

3 JUDGE NELSON: -- on the SP for shipments
4 of coal, from the coal field to these.

5 MR. McBRIDE: To show that they got the
6 business that they have gotten in recent years because
7 they- offered lower prices.

8 Now let me also tell you, subsequent to me
9 writing the letter to you on Wednesday, at this break-
10 neck pace we're proceeding under here, I deposed the
11 Chairman of the Board of Union Pacific Railroad, Mr.
12 Davidson.

13 Mr. Davidson told me that some of these
14 coals compete, although he had the impression that the
15 Colorado/Utah coal didn't compete very well because
16 it's higher priced. That's in the transcript 162 of
17 this deposition.

18 But he conceded that UP coal from Hannah
19 Basin -- that he has personally marketed in
20 competition with SP-origin coal. That's at transcript
21 163.

22 JUDGE NELSON: But what's the point of

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1 this to why you need these prices?

2 MR. McBRIDE: The point is that he also
3 testified under oath in that deposition that he
4 believed that it was probably so that he had
5 characterized SP's pricing as cash flow pricing, and
6 that those rates were probably going to have to go up
7 after this merger.

8 And he told that to a group of attendees
9 of a chemical manufacturing association meeting in
10 Washington in September of last year, the day that he
11 signed the agreement with the Burlington
12 Northern/Santa Fe.

13 JUDGE NELSON: That's already there.

14 MR. McBRIDE: What?

15 JUDGE NELSON: You have that.

16 MR. McBRIDE: Well, but what I need to
17 show -- here's what I need to show. What Your Honor
18 understood on January 26th, because Mr. Roach made an
19 argument I presume based on Mr. Sharp's testimony, was
20 that these coals do not compete.

21 We have subsequently shown through these
22 exhibits, by their own admission --

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1 JUDGE NELSON: Fine. Let's --

2 MR. McBRIDE: -- that these coals do
3 compete.

4 JUDGE NELSON: -- assume for the sake of
5 the argument that there is evidence --

6 MR. McBRIDE: Right.

7 JUDGE NELSON: -- which, if admitted,
8 would tend to show the coals do compete.

9 MR. McBRIDE: All right.

10 JUDGE NELSON: And there will also be
11 evidence the other way.

12 MR. McBRIDE: Now, he told you --

13 JUDGE NELSON: So what?

14 MR. McBRIDE: He told you also on January
15 26th that the tonnage information that we were going
16 to get was irrelevant because the coals didn't
17 compete.

18 Now that Your Honor has asked me to assume
19 and the record assumes that the coals do compete, and
20 I represent to you that's what all these pages show --
21 I could go on for hours -- I need to show you then, I
22 need to show the Board, that the competition between

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1 them is not based on sulfur content, you know, the
2 Clean Air Act.

3 It's not based on ash content. It's not
4 based on obstinance. It's based on an aggressive
5 marketplace.

6 If I may use an analogy: Southern Pacific
7 is the Southwest Airlines of this industry. It's a
8 pesky little competitor that has stolen a lot of coal
9 business from Union Pacific and Burlington Northern.

10 And the way it has done that is by under-
11 pricing them. They discovered in recent years that
12 they could do that on the back haul of a --

13 JUDGE NELSON: What's all this got to do
14 with the merger? Of what use do you want to put
15 these?

16 MR. MCBRIDE: When I get SP's rates, and
17 if I get UP's rates, then I can show the Board that SP
18 has consistently, or often at least, undercut UP's
19 prices

20 And that because of Mr. Davidson's sworn
21 testimony that I briefly described to you, and other
22 similar testimony, that the threat to my clients after

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1 this merger, that the prices are going up to the kind
2 of levels that UP wanted to charge.

3 And my thesis is, this is the most
4 important railroad case ever --

5 JUDGE NELSON: You already can prove --

6 MR. McBRIDE: -- and that's --

7 JUDGE NELSON: -- that they do compete.

8 MR. McBRIDE: I proved they largely --

9 JUDGE NELSON: Let me follow this through.

10 MR. McBRIDE: Yes, right.

11 JUDGE NELSON: You also can prove
12 statements, admissions by some Applicant here, that
13 they're going to jerk this price up after the merger.

14 MR. McBRIDE: That's what we believe is a
15 fair inference.

16 JUDGE NELSON: And if you've got that, I
17 don't see what a peak at these actual ongoing numbers
18 gives you --

19 MR. McBRIDE: Because they prove --

20 JUDGE NELSON: -- that you don't have
21 already.

22 MR. McBRIDE: -- they prove that the

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1 Applicants' argument, which Mr. Roach already flagged
2 for you on January 26th, that it's all irrelevant that
3 the tonnage on SP has been going up faster than the
4 tonnage on UP or whatever the numbers will show.

5 Because they are sperate markets. They
6 are not separate markets. And SP has been competing
7 on price.

8 And our thesis will be that Union Pacific
9 wants this merger in part to drive up the prices by
10 that pesky little competitor, which will cost my
11 clients money.

12 JUDGE NELSON: All of which you can show
13 without knowledge of the existing prices.

14 MR. McBRIDE: No sir. No sir.

15 JUDGE NELSON: Why?

16 MR. McBRIDE: Because the relative rates
17 offered by each, and the rate that caused SP to get
18 the business undercutting Union Pacific we will show
19 was consistently the reason the business was obtained
20 if we get these numbers.

21 That's what I represent and believe. What
22 the Applicants will say without those numbers is that

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1 there were a lot of other reasons why SP got that
2 coal.

3 They will say we were really competing
4 with Eastern coal and it was high sulphur. And they
5 went to the SP coal because it was low sulphur.

6 JUDGE NELSON: So the numbers go to help
7 you prove ongoing competition between the two
8 railroads for the coal.

9 MR. McBRIDE: Yes.

10 JUDGE NELSON: For the two coals.

11 MR. McBRIDE: That pre-existed that
12 merger.

13 JUDGE NELSON: Yes.

14 MR. McBRIDE: And that the threat from the
15 merger is, and it's the biggest threat to our clients
16 --

17 JUDGE NELSON: Well, what --

18 MR. McBRIDE: -- in the whole case other
19 than --

20 JUDGE NELSON: -- what was the reason why
21 I sustained their objections to --

22 MR. McBRIDE: I think you thought --

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1 JUDGE NELSON: -- producing the numbers?

2 MR. McBRIDE: The best that I can read the
3 transcript, and I gave the pages to you -- but I'll
4 put in right in front of you because I don't want to
5 put words in your mouth.

6 But the best that I understood is here's
7 what you said. After you and Mr. Loftus were going
8 back and forth, you said, "Yes, we're saying that if
9 you got the volume numbers, that's all you need."
10 This is at transcript 935.

11 "You don't need the revenues because you
12 can deduct," it says, I presume deduce, "everything
13 else from the volume numbers. And all I'm saying is
14 why don't we look at it supporting that stipulation?"

15 And then you said on the next page, I'm
16 skipping over here, "Now if you come in and you're
17 unable to get any kind of explanatory material out of
18 them about the rates that they would charge or would
19 have charged in these projections, then maybe we'll
20 look at it."

21 So as I read this, Your Honor, you thought

22 --

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1 JUDGE NELSON: Well, I'm not clear. But
2 I'm sure that Applicants' counsel could help --

3 MR. McBRIDE: Well, could I make one more
4 please?

5 JUDGE NELSON: -- get a focus on it.

6 MR. McBRIDE: He's standing before I'm
7 done, but I want to make another point. I'm not sure
8 why he's standing because he's not objecting.

9 JUDGE NELSON: Before you make another
10 point, let me follow that I understand it.

11 MR. McBRIDE: Yes, yes.

12 JUDGE NELSON: This has to do with coal
13 from two geographical areas.

14 MR. McBRIDE: Correct.

15 JUDGE NELSON: Each of which is served by
16 one of the Applicants.

17 MR. McBRIDE: Correct.

18 JUDGE NELSON: You have evidence that the
19 two coals compete with each other in the sense that
20 the utilities have the capability to switch one unto
21 the other.

22 MR. McBRIDE: And we know some about that,

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1 but we don't know all of that. They know a lot we
2 don't.

3 JUDGE NELSON: And you have some evidence
4 of some admission that they plan to boost the prices
5 after the merger.

6 MR. McBRIDE: It's an inference. Mr. --
7 Mr. Davidson did not say, "We're going to raise your
8 rates." But it was understood. That was the fear,
9 and we say that's the inference.

10 JUDGE NELSON: And you need the pricing in
11 order to show that the theoretical competition between
12 the fuels translates into a real one between the
13 railroads.

14 MR. McBRIDE: Yes, and I need it to rebut
15 Mr. Sharp. That's the whole point. Mr. Sharp's
16 testimony was included in the application.

17 Mr. Sharp says, "Based on the published
18 FERC data," and everything else, and without ever
19 talking to the SP, he drew the inference from that
20 circumstantial --

21 JUDGE NELSON: Let's --

22 MR. McBRIDE: -- evidence that the fuels

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1 don't compete. And I want to show --

2 JUDGE NELSON: Let me interrupt for a
3 moment --

4 MR. McBRIDE: Yes.

5 JUDGE NELSON: -- so that we can see if
6 we're in shape to get rid of that other issue, because
7 I know that Mr. Greenberg's schedule is tight.

8 MR. McBRIDE: Certainly.

9 JUDGE NELSON: Yes, Ms. Jones?

10 MS. JONES: Your Honor, I have located Mr.
11 Dealey, and first of all, he is temporarily in the
12 Shaunberg Office for the foreseeable future.

13 So if this goes forward, we would revise
14 my request that it be held there and not in Fort
15 Worth.

16 JUDGE NELSON: Fine.

17 MS. JONES: And they know the company is
18 split between the two locations. Mr. Dealey's son,
19 who is a child, is entering Children's Hospital in
20 Chicago on Monday for serious surgery.

21 He is unavailable until the recovery is
22 complete. He expects it to be a week. But of course,

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1 if there are complications, it could be longer. So he
2 would be available no sooner than the week after that.
3 And that would depend on his son's recovery.

4 JUDGE NELSON: Well, you tell him that we
5 wish the boy well. And we're not going to intrude on
6 that at all.

7 And I'll see that nothing happens along
8 those lines.

9 MS. JONES: Assuming that that --

10 JUDGE NELSON: Let the kid get out of the
11 woods, and then you can worry about his deposition.

12 MS. JONES: We will --

13 JUDGE NELSON: In the meantime, you always
14 have an offer to take this other witness that she --

15 MS. JONES: Mr. Malessa stands --

16 JUDGE NELSON: -- wanted to give you.

17 MS. JONES: And we believe that his
18 schedule is more flexible.

19 JUDGE NELSON: That you could work out.

20 MS. JONES: Yes. Yes, Your Honor.

21 JUDGE NELSON: And so we'll have it in the
22 -- what's this town, Shaunberg?

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1 MS. JONES: Shaunberg in Chicago.

2 JUDGE NELSON: And we'll accommodate the
3 medical situation that the son finds himself in.

4 MS. JONES: And it would be -- his
5 recovery is, as expected, it will be toward the middle
6 of the month.

7 I should advise, Your Honor, that my
8 client has directed me to consider filing an appeal of
9 this order. So that -- I just wanted to get that on
10 the record also.

11 JUDGE NELSON: With my best wishes.

12 MS. JONES: Okay.

13 JUDGE NELSON: All right. If you want to
14 work out somebody else, then you can talk with Ms.
15 Jones.

16 MR. GREENBERG: We will talk with Ms.
17 Jones. Thank you very much, Your Honor.

18 MR. McBRIDE: I have one statement --

19 JUDGE NELSON: Now we're back to this coal
20 business. Are you through now, Mr. McBride?

21 MR. McBRIDE: No, not quite, Your Honor.
22 My distinct impression of this whole colloquy that

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1 went on between you and Mr. Loftus and Mr. Roach on
2 January 26th was that the premise for the whole
3 discussion was Mr. Sharp's premise that these coals
4 did not compete.

5 Therefore, the prices, Mr. Roach
6 contended, were irrelevant.

7 JUDGE NELSON: Let me suggest that we not
8 dwell on a ruling in January that we can't understand,
9 that I don't remember, and in turn --

10 MR. McBRIDE: I'm sorry.

11 JUDGE NELSON: -- the only thing I
12 remember is that it turned on a presentation from Mr.
13 Loftus that I continued to struggle with why he needed
14 the material.

15 MR. McBRIDE: Fair enough. I --

16 JUDGE NELSON: And that -- perhaps
17 confusion produced confusion and that's why the record
18 is where it is and that's why I made that ruling.
19 We're here now.

20 MR. McBRIDE: Yes sir.

21 JUDGE NELSON: Okay. We've heard your
22 claim now as to why you need these numbers.

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1 MR. McBRIDE: I was just being respectful
2 because you had made a ruling based on something. And
3 I felt obliged to kind of bring it altogether.

4 JUDGE NELSON: I may very well have been
5 wrong or completely misunderstood.

6 MR. McBRIDE: I appreciate the candor,
7 Your Honor, I really do. But, I mean, for example --

8 JUDGE NELSON: The older you get the,
9 easier it is.

10 MR. McBRIDE: You said to Mr. Roach in
11 transcript 924: "So his view is that the two coals
12 don't really compete," talking about Sharp's
13 testimony. Mr. Roach: "The two coals do not
14 compete."

15 And he went on. And that was the premise
16 for the whole thing.

17 If the coals don't compete, then maybe
18 prices are irrelevant. It's diamonds and bread again,
19 my analogy there.

20 But if they do compete, then the price is
21 relevant as far as --

22 JUDGE NELSON: I understand your position.

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1 And this is not the forum in which to adjudicate
2 whether they compete. You have the right to make that
3 submission.

4 MR. McBRIDE: Yes sir.

5 JUDGE NELSON: All right. Is there
6 anything else before we get to the railroad?

7 MR. McBRIDE: I just wanted to say that
8 this is also true of the Hannah Basin coals, which UP
9 sole-serves in Wyoming.

10 Mr. Davidson conceded in a deposition the
11 other day to me that the Hannah Basin coals compete
12 with SP coal origins. So we need that data as well.

13 JUDGE NELSON: You mean the pricing you
14 want?

15 MR. McBRIDE: That's right.

16 JUDGE NELSON: For the shipment of these
17 coals.

18 MR. McBRIDE: Yes. And the last thing I
19 would say as I raised in my letter is I thought it
20 might be argued that it was an abuse of discovery
21 given Your Honor's ruling on January 26th, if I served
22 any discovery about rate information.

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1 So I have held off until today, but I am
2 prepared today to serve the Applicants and the other
3 parties in the room with interrogatories about that if
4 Your Honor reconsiders this ruling.

5 JUDGE NELSON: Now we may have problems of
6 secrecy and who sees what and how we keep it and all
7 of that we'll have to work out.

8 MR. McBRIDE: I am an honorable person.
9 Your Honor said when I was here on the morning of the
10 26th, not the afternoon, that you had never had a
11 problem with that sort of thing at FERC, where I
12 practice occasionally.

13 JUDGE NELSON: You were partners with
14 Barry Shiflett?

15 MR. McBRIDE: Yes sir.

16 JUDGE NELSON: Yes. Well, that's high --
17 that's innocence by association.

18 (Laughter.)

19 MR. McBRIDE: And as Your Honor often
20 knows, we are on the pipeline side of these sorts of
21 things and have these concerns too. The shippers have
22 these concerns.

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1 JUDGE NELSON: Barry was a marvelous guy
2 and a superb lawyer.

3 MR. McBRIDE: Thank you.

4 JUDGE NELSON: And he is missed.

5 MR. McBRIDE: Yes, he is.

6 JUDGE NELSON: We may have problems with
7 who can see what if I -- if I order it, what you can
8 get out of it.

9 MR. McBRIDE: Of course.

10 JUDGE NELSON: We've got an intense
11 competitive situation here.

12 MR. McBRIDE: Of course, it's highly
13 confidential. I don't dispute it.

14 JUDGE NELSON: The more you tell me the
15 coals compete, the more it looks like that railroads
16 compete for them, the more they'll be concerned about
17 disseminating this information.

18 MR. McBRIDE: But we're honorable people.
19 We're lawyers here. We work these things out as you
20 do at FERC. And we'll arrive at some reasonable
21 accommodation at that because, if I may just add --

22 JUDGE NELSON: There will have to be a way

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1 to do it.

2 MR. McBRIDE: Of course. And my clients
3 have just as much of a concern with it as the
4 railroads do because the utility business, as you well
5 know, is becoming very competitive.

6 We're all out there fighting with one
7 another and merging and stealing customers and
8 everything else.

9 JUDGE NELSON: We have this every day.

10 MR. McBRIDE: Of course.

11 JUDGE NELSON: I had a big fight in the
12 Texaco case about it.

13 MR. McBRIDE: So, we'll abide by whatever
14 protection is necessary for the data because it's of
15 mutual concern.

16 JUDGE NELSON: All right. Mr. Roach?

17 MR. McBRIDE: And I want to just say that
18 Mr. Mills is here whose firm made the original
19 request. And as I understand it --

20 JUDGE NELSON: I should recognize Mr.
21 Norton. These are SP materials right now we're
22 seeking.

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1 MR. McBRIDE: Yes. But Western Coal
2 Traffic League, as I understand it --

3 JUDGE NELSON: And you said --

4 MR. McBRIDE: -- endorses the motion.

5 MR. MILLS: We do, Your Honor.

6 JUDGE NELSON: Do I have the message now
7 of why they want it? Anything you want to add to
8 that?

9 MR. MILLS: The only thing I would add,
10 Your Honor, is that with respect to the pricing
11 information, I think the Applicants have taken the
12 position that they will continue the SP's aggressive
13 pricing in the future.

14 They want to make -- coal, so why wouldn't
15 they? The pricing information, particularly with
16 respect to the SP Oregon coal and the Southern Wyoming
17 Hannah Basin coal is relevant to that question because
18 if that evidence shows -- that pricing information
19 shows, as we believe it will, that the Hannah prices
20 are quite a bit higher, then that, we think, is
21 evidence that --

22 JUDGE NELSON: What is they would

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1 stipulate to all this stuff, that there is such
2 competition, that they do compete with each other,
3 that the SP has local -- captured the traffic by low-
4 balling them, whatever all these propositions are?

5 MR. McBRIDE: If they want to --

6 JUDGE NELSON: Would that get rid of it?

7 MR. McBRIDE: If they want to disavow Mr.
8 Sharp's testimony in that these coals do compete and
9 that price is the consideration, then I think we could
10 proceed. But I don't think they're going to do that.

11 JUDGE NELSON: All of this comes from
12 Sharp?

13 MR. McBRIDE: Yes, that's the coal
14 witness.

15 JUDGE NELSON: He is a consultant retained
16 by the Applicants?

17 MR. McBRIDE: Yes. And we have asked, by
18 the way --

19 JUDGE NELSON: So his point, or the
20 Applicants' point, is that there is no divination of
21 competition here.

22 MR. McBRIDE: Because they're separate --

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1 JUDGE NELSON: Because there's no
2 competition.

3 MR. McBRIDE: Correct, correct. And I
4 have shown you from their own documents that they do,
5 from the mouth of Mr. Davidson, the Chairman of the
6 Board.

7 And I want to make one last point because
8 it may -- you may hear it from the Applicants. The
9 letter from SP's counsel indicated that these
10 documents did not include rate information.

11 They do in several cases. In fact, at HC-
12 65000293, and I'll show you this, Mr. Norton, if you
13 like. Somebody may have gotten tired, but there's a
14 rate here that wasn't redacted.

15 And it uses the word "rate," and it's for
16 Union Electric Company. I'm not going to read off the
17 number unless Your Honor wants me to, but I'll show
18 you the page.

19 So I don't want to hear an argument that
20 there aren't any rates in this document because there
21 were and there still are at least one. And here is
22 the reference.

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1 JUDGE NELSON: What interrogatory are we
2 looking at? Do I have the actual question here?

3 MR. McBRIDE: It was my request to them
4 for the unredacted versions of these two plans that I
5 brought most directly to Your Honor that you said you
6 would rule on at the outset here.

7 We also have the Slover and Loftus
8 interrogatories here that Your Honor had before you in
9 January.

10 But my request is broader than that
11 because it is as to this whole document. And I will -
12 - I'm momentarily going to hand you those documents.

13 This is what it's like every day in this
14 case to go through all of this paper.

15 MR. MILLS: Your Honor, if I may, on
16 behalf of the Western Coal Traffic League, we did seek
17 revenue information on both Southern Pacific and Union
18 Pacific coal movements.

19 And that's what Your Honor ruled on the
20 last time. So we have an interrogatory, a motion to
21 compel, but it was denied.

22 JUDGE NELSON: Maybe I don't need to see

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1 the language in front of me --

2 MR. McBRIDE: Here it is.

3 JUDGE NELSON: -- if I understand what it
4 is you're seeking.

5 MR. McBRIDE: Number 18, Your Honor, if I
6 recall the record, was the one --

7 JUDGE NELSON: It's the details of the
8 prices at which these coals are moving on the two
9 railroads?

10 MR. McBRIDE: That's exactly right.

11 JUDGE NELSON: Over defined periods of
12 time?

13 MR. McBRIDE: Yes. The data in these two
14 business plans, so that's '94 and '95 data as I
15 understand it. And then my interrogatories would be
16 for approximately the same time period to UP and SP if
17 you will allow that.

18 JUDGE NELSON: All right. Let me -- let
19 me turn now to the Applicants. And let me suggest,
20 Mr. Roach, that this is not the place to adjudicate
21 whether the two fuels, in fact, compete.

22 That's for the Surface Transportation

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1 Board. This is just discovery.

2 He's got a colorable claim and wants to go
3 further in discover.

4 MR. ROACH: Yes, and that's really all I
5 wanted to say before I turn it over to Mr. Norton is
6 that we disagree most, most strenuously with Mr.
7 McBride's representations as to what the evidence
8 shows or can be inferred to show with what the real
9 facts are, et cetera.

10 But the whole argument that we had last
11 time, Your Honor, with Mr. Loftus and myself and you,
12 was not -- it did not turn on whether I was right in
13 representing that they don't compete.

14 The whole idea was that he was entitled to
15 discovery into his contention that they do compete.
16 And what it turned on was the highly sensitive and
17 proprietary nature of the revenue data, and the
18 adequacy of the volume projections for him to get his
19 chance to prove his side of that debate.

20 And I just wanted to say that and leave it

21 --

22 JUDGE NELSON: We thought that the volume

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1 would be enough?

2 MR. ROACH: Absolutely, and there's a long
3 record on this. And you weren't, at all, unclear I
4 think once we were finished, Your Honor.

5 It's true that all the maps and who, which
6 coal and all that took some time to go through.

7 But I didn't win or lose that debate over
8 whether I could convince you the coals don't compete.
9 As you very responsibly have done on every issue like
10 this.

11 You said, "I don't want to get off the
12 merits, Mr. Roach. I want to know what you can tell
13 me about why they shouldn't have a chance to discover
14 this."

15 JUDGE NELSON: I have to peek at the
16 merits in --

17 MR. ROACH: Absolutely.

18 JUDGE NELSON: -- order to understand the
19 relevance.

20 MR. ROACH: Right.

21 JUDGE NELSON: But once I get that
22 contention, of course I can't adjudicate which coal

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1 competes with which, if any. So -- Mr. Norton?

2 MR. NORTON: Your Honor, most of what
3 you've heard today on this point has very little to do
4 with the question that was -- that prompted the
5 appearance today, the redactions of revenue
6 information from the SP business plans in accordance
7 with the ruling in January.

8 Almost all of the discussion was solely --

9 JUDGE NELSON: When you say "revenue
10 information," --

11 MR. NORTON: Revenue projections.

12 JUDGE NELSON: -- you're including price?

13 MR. NORTON: No, that's precisely the
14 point.

15 JUDGE NELSON: Oh, not price.

16 MR. NORTON: All of the discussion has
17 been about rates. The business plans and the
18 redactions that were made were of projections of
19 revenue. They were not of rates.

20 MR. McBRIDE: If I may, Your Honor, I
21 object because that's what I pointed out to you at the
22 end, that the document contains a couple of references

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1 at least to rates that were not redacted, disproving
2 their point that it contains no rate evidence.

3 MR. ROACH: I thought it was improper to
4 stand up when someone else was talking.

5 MR. McBRIDE: If you have an objection,
6 it's always all right.

7 MR. ROACH: Oh, it's always all right.
8 Okay, I'll remember that.

9 JUDGE NELSON: Well, let me go back. I
10 thought that what Mr. Norton said was that our
11 discussion with Mr. McBride here turned on rates,
12 seemed to involve rates.

13 MR. NORTON: Exactly.

14 JUDGE NELSON: That's what I thought he
15 wanted.

16 MR. NORTON: That's right.

17 JUDGE NELSON: All right.

18 MR. NORTON: He never asked for it before.
19 In two sets of discovery requests, they did not call
20 for this rate information. What we did in the
21 business plan, in accordance with the ruling made on
22 this issue on -- Western Coal had requested revenue

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1 information, was we redacted the projections of
2 revenue continued in the plan.

3 We did not redact projections of volume,
4 nor did we redact rates.

5 There aren't that many -- I'm not sure how
6 many references there are, but there are not very
7 many. And this is proof that we didn't.

8 JUDGE NELSON: But he knows how many
9 carloads are moving --

10 MR. NORTON: That's right. Well, these
11 are projections. These were not historical carloads.

12 JUDGE NELSON: Projected carloads.

13 MR. NORTON: Right.

14 JUDGE NELSON: What he doesn't know is,
15 what the -- what you guessed you were going to gross
16 by moving these goods.

17 MR. NORTON: That's correct. And that was
18 precisely the distinction that was drawn on January
19 26th in your ruling on the WCTL discovery request.
20 And it was again, as Mr. Roach indicates, it was the
21 sensitivity, not the question of whether there is
22 competition or not.

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1 JUDGE NELSON: Is there a way to deal with
2 that sensitivity by a very limited turnover?

3 MR. NORTON: That's always a possibility,
4 Your Honor. But I think -- let me just go back to the
5 --

6 JUDGE NELSON: Say counsel will --

7 MR. NORTON: There are two -- that would
8 be one possibility if we had to do it, obviously.
9 There are two very distinct issues, though, and I
10 think they've gotten mixed together.

11 The redaction question of the revenue
12 information is one question, and that's what we've
13 addressed in our letter. And that was -- that was
14 what was governed by --

15 JUDGE NELSON: I haven't heard anything
16 about that today. It's all about rates today.

17 MR. NORTON: That's exactly the point,
18 Your Honor. The second thing in Mr. McBride's letter
19 at the tail-end was his notion that he can now come in
20 with some new interrogatories, not only to SP but to
21 UP, inquiring into rate information, which he never
22 asked for before.

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1 It has nothing to do with these
2 redactions. It is a complete attempt to just add
3 something that was a belated afterthought, that the
4 deadline for further discovery ended on the 26th of
5 February.

6 They could have done it then to preserve
7 whatever right they felt they had. But there is
8 nothing in the information that he has identified in
9 the deposition that, in any way, justifies disclosure
10 of the redacted revenue information.

11 And there is certainly nothing that says
12 that he should be entitled now, after the deadline, to
13 come in with interrogatories --

14 JUDGE NELSON: If the governing
15 consideration before was the sensitivity of the
16 materials, did we discuss any ways to protect it or
17 limit it?

18 MR. NORTON: Not at that time, Your Honor.
19 Your Honor ruled and denied the request. We had
20 agreed to produce --

21 JUDGE NELSON: We just assumed that if
22 they had been turned over, it would have been under

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1 the usual procedures --

2 MR. NORTON: That's correct.

3 JUDGE NELSON: -- with the warehousing and
4 the circulation and all that?

5 MR. NORTON: That's correct.

6 MR. ROACH: Well, it was also a delicate
7 balancing process. You were looking at should I grant
8 everything, should I have special protection, should
9 I grant part? And we ended up resolving it. p

10 And these folks didn't appeal. WCTL
11 didn't appeal. And now we have our friends, some more
12 coals interests, double-teaming us here and raising
13 that whole issue all over again because they asked a
14 question of Mr. Davidson and he said, "I don't think
15 the coals compete."

16 And now they come in here and they say,
17 "Oh, he really can be inferred to say they do compete,
18 so I want discovery that was denied another party
19 weeks ago."

20 That's what we're dealing with here.

21 MR. NORTON: And, Your Honor, the redacted
22 revenue information that is contained in these reports

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1 is not going to show the rates. It is not of that
2 nature. It is projections. It is not actual, and
3 none of his arguments about the need to show
4 competition support --

5 JUDGE NELSON: Well, where he wants this -
6 - this rate material he wants to get? It's not in
7 these documents?

8 MR. NORTON: It is not in these documents.
9 He didn't ask for it. He's had two rounds already.
10 He didn't ask for it in those two rounds.

11 He now wants a third one after the
12 deadline. He has had plenty of opportunity long
13 before this to go into this question if he thought
14 this was so essential to his case that he had to have
15 it.

16 It is much too late in the day to start
17 out new discovery on rate information that he could
18 have asked for before, which is highly sensitive in
19 any event.

20 And it would involve the same -- in
21 addition, to get rate information, it's not just a
22 matter of going to a report on a shelf. That is

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1 something that goes into particular shippers and
2 particular situations.

3 There is a burden involved in doing that
4 which goes beyond the question of the redactions here.
5 It's entirely unjustified and is just too late in the
6 day, it seems to us.

7 JUDGE NELSON: What do you say about the
8 procedural aspects?

9 MR. McBRIDE: Well, first of all, I didn't
10 get into that in the opening because you said you
11 didn't want to hear it. But I'm happy to reply to it.

12 Of course I didn't appeal the ruling. I
13 wasn't a party to the original request. And in any
14 event, the way I read the record, as I think counsel
15 somewhat conceded here, Your Honor expected there
16 might be further developments on this.

17 And you denied it without prejudice and
18 people were going to try to work things out.

19 As to the lateness, the alleged lateness
20 of this, here's the problem. I was days away from
21 asking these kinds of interrogatories when the party
22 that was in this case before me, Western Coal Traffic

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1 League, asked very similar discovery.

2 And Your Honor ruled, I was aware of that,
3 "The parties shall avoid any duplicative discovery
4 requests." That's in the guidelines.

5 So I said well, I'm not going to burden
6 these people with the same questions. And then Your
7 Honor ruled.

8 Now, as counsel -- one of my members
9 points out, I'm not --

10 JUDGE NELSON: Mr. Norton says that the --

11 MR. McBRIDE: -- I'm a responsible lawyer.

12
13 JUDGE NELSON: -- rate information isn't
14 even in these documents.

15 MR. McBRIDE: Well, may I get to that in
16 just a moment? I just want to complete this
17 procedural thought that, as Mr. Moreno points out to
18 me too, once you had ruled we couldn't have the rate
19 and revenue information, I thought it would be
20 inappropriate to propound additional discovery asking
21 for the very thing you had just ruled we couldn't
22 have.

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1 JUDGE NELSON: Then why are you doing it?

2 MR. McBRIDE: Well, that -- instead of
3 propounding and burdening, that's the distinction I'm
4 drawing, I did it the only responsible way that I
5 know, which is to ask you to reconsider, which is why
6 I'm before you now. All right? Now --

7 MR. ROACH: Well --

8 MR. McBRIDE: I'm not finished.

9 MR. ROACH: I'm getting ready to object,
10 but I'll sit down.

11 (Laughter.)

12 MR. McBRIDE: Now Your Honor asked about
13 whether the documents contained rate information.
14 First of all, I said rate and revenue at the outset.

15 The do certainly contain revenue
16 information. I showed you they contain rate
17 references. I can show you more to a Coors rate
18 redaction item here.

19 The print is so small down here at the
20 bottom, I think they must have forgotten to redact
21 that too. But I'll find it for you if it's important.
22

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1 JUDGE NELSON: Well, either they do or
2 they don't. If it's not in there, there's nothing to
3 produce.

4 MR. McBRIDE: Well, that's part of it.
5 They do.

6 MR. NORTON: The representation was that
7 we did not -- the redacted information was revenue
8 projections. It was not rate information. There is
9 no inconsistency.

10 JUDGE NELSON: So anything -- anything Mr.
11 Norton gives you from the previous redactions is not
12 going to be rate information.

13 MR. McBRIDE: All right. In any event, as
14 to the revenues, this is really not a very difficult
15 question.

16 Yes, it's labelled "revenues," and it
17 appears to me that it's not just projections, but
18 revenues that were actually earned and that they're
19 working off of for future periods.

20 But all you do to get the revenues is
21 multiply the rates times the tons, and you get
22 dollars. That's revenue.

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1 But that's necessarily rate. Now we've
2 got the tons, and we can derive the rates, or at least
3 the approximation of the rates, from the revenues.

4 So we're not talking about two wildly
5 different things here. And I will say Mr. Roach
6 indicated that it didn't -- your ruling didn't turn on
7 whether the coals compete. That's the way I read the
8 record.

9 And he went on to argue at that time that
10 yes, and we'll give them the tonnages. And guess
11 what? They're all irrelevant because they're separate
12 markets.

13 So that's the argument that we're going to
14 be met with here. And I don't know how the Board is
15 going to rule because I was candid enough, I hope
16 you'll agree, to tell you that I don't represent to
17 you that these two coals compete at every single power
18 plant and every single destination.

19 JUDGE NELSON: No, I recall it was to some
20 extent.

21 MR. McBRIDE: Largely. So we've got a
22 factual dispute. Your Honor is familiar with this.

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