

INTERSTATE COMMERCE COMMISSION 03/06/96

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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Wednesday, March 6, 1996

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

The above-entitled matter came on for
hearing, pursuant to notice, at 9:00 a.m.

BEFORE:

THE HONORABLE JEROME NELSON
Administrative Law Judge

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

(9:02 a.m.)

JUDGE NELSON: Please be seated. Let's get a record of who is here. For the Applicants?

MR. LIVINGSTON: For the Applicants, Bill Livingston, also Carolyn Corwin, and Michael Rosenthal, all with -- representing Union Pacific; Gerald Norton and Paul Cunningham representing Southern Pacific.

JUDGE NELSON: And for the Intervenor?

MR. McBRIDE: Good morning, Your Honor, Michael McBride --

JUDGE NELSON: Mr. McBride.

MR. McBRIDE: -- from LeBoeuf, Lamb, Green and MacRae for Western Shippers Coalition. With me are my colleagues Linda Breggin and Daniel Aronowitz.

MR. MORENO: Good morning, Your Honor, Jeff Moreno from the law firm of Donelan, Cleary, Wood & Maser. We represent the Dow Chemical Company, Kennecott Utah Copper Corporation and Kennecott Energy Company.

MR. JOSEPHS: Marc Josephs with Howrey and

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1 Simon representing Coastal Corporation.

2 MR. DiMICHAEL: Nicholas DiMichael with
3 the law firm of Donelan, Cleary representing the
4 National Industrial Transportation League.

5 MR. EDWARDS: Good morning, Your Honor.
6 John Edwards with Zuckert, Scoutt & Rasenberger
7 representing the Tex/Mex Railroad and Sierra Pacific.

8 MR. LUBEL: Your Honor, Alan Lubel with
9 Troutman Sanders representing the Kansas City Southern
10 Railway.

11 MR. GOLDSTEIN: Your Honor, Ellen
12 Goldstein with Weiner, Brodsky, Sidman & Kider
13 representing the Montana Rail Link.

14 MR. STEEL: Good morning, Your Honor,
15 Adrian Steel representing Burlington Northern and the
16 Santa Fe.

17 MR. ONGMAN: Good morning, Your Honor.
18 I'm John Ongman with Pepper, Hamilton & Scheetz
19 representing the Geneva Steel Company and Omaha Power
20 Company*.

21 MR. BILLIEL: Good morning, Your Honor,
22 Michael Billiel, Department of Justice.

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1 MR. KILLORY: Your Honor, Joseph Killory
2 of Wilmer, Cutler & Pickering representing Conrail.

3 JUDGE NELSON: All right. We have, I
4 think, two matters. One is all of the stuff raised in
5 Mr. McBride's letter of March fourth.

6 And then do we still have this matter of
7 Dow Chemical and two depositions?

8 MR. MORENO: Yes, Your Honor.

9 JUDGE NELSON: I never got any opposition
10 to that. Is there a problem with these two witnesses?

11 MR. LIVINGSTON: Yes, we do oppose it,
12 Your Honor.

13 JUDGE NELSON: Well, I think what I'm
14 going to do is defer that for a moment. The other
15 issues seem to me more involved.

16 Well, just give me it for a second. What
17 is the ground of the opposition of these depositions?

18 MR. LIVINGSTON: Well, these are -- the
19 requesting party is Dow Chemical. We presented three
20 witnesses on chemicals issues.

21 JUDGE NELSON: We've been through this
22 contention that so-call non-testifying witnesses are

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1 not subject to deposition. I have rejected that
2 contention.

3 And I don't know whether you were here or
4 not, but Mr. Roach was making that argument. And I
5 ruled that with regard to such non-testifying
6 witnesses, they're really no different from anybody
7 else.

8 We will look at them in terms of
9 relevance, burden, privileges, where they can be
10 taken, when and so on and so forth.

11 So, what else do you have?

12 MR. LIVINGSTON: Well, I'm aware of your
13 rulings last time. These -- we did present three
14 witnesses on these issues, and they answered the
15 questions that were put to them.

16 We have also provided Dow with the files,
17 the very extensive files, nearly 10,000 pages relating
18 to the Dow -- the Dow Chemical that the Applicants
19 had.

20 The two witnesses they want -- in
21 addition, not only did they not put in verified
22 statements, these are men in the Marketing Department

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1 or involved in the marketing of chemicals and
2 plastics.

3 They apparently deal with Dow. They are
4 indistinguishable from representatives of the company
5 who call on dozens of other shippers.

6 They are, in our judgement,
7 indistinguishable from the coal shipper witnesses.

8 JUDGE NELSON: Both are for UP?

9 MR. LIVINGSTON: They both are UP.

10 JUDGE NELSON: Mr. Coale, C-O-A-L-E, and
11 Mr. Witte?

12 MR. LIVINGSTON: Mr. Witte. One is
13 chemicals and one is -- one involves chemicals and one
14 involves plastics.

15 JUDGE NELSON: Yes.

16 MR. LIVINGSTON: These are fairly,
17 relatively low-level people.

18 JUDGE NELSON: Aren't plastics part of
19 chemicals?

20 MR. LIVINGSTON: I believe that's right.
21 I think plastics --

22 JUDGE NELSON: That's a subcategory of

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1 chemicals.

2 MR. LIVINGSTON: I believe that --

3 JUDGE NELSON: See what you can learn in
4 this business?

5 MR. LIVINGSTON: This -- to permit them --

6 JUDGE NELSON: Which one is higher as
7 between the two?

8 MR. LIVINGSTON: I think they're equal?

9 JUDGE NELSON: Equal?

10 MR. LIVINGSTON: Yes. But these are not
11 the chief executive officers of the company or the
12 vice -- executive vice president in head of -- charge
13 of sales or anything of that kind.

14 This is -- this is reaching into the low
15 levels of the company to find witnesses who --
16 apparently what they want is somebody who can talk
17 about relations with Dow, which is an area where if
18 there's any area, it's an area where Dow does not need
19 discovery.

20 Dow has access to its own employees, and
21 they've now had access to all of our files on what Dow
22 is doing in the transportation area.

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1 If they think that --

2 JUDGE NELSON: What harm is done by a
3 deposition here?

4 MR. LIVINGSTON: Your Honor, we are in --

5 JUDGE NELSON: You say that these are
6 comparatively low-level and you're not interrupting
7 the great affairs of the company here. What's --

8 MR. LIVINGSTON: It interrupts the affairs
9 of the presentation of this case by the Applicants.
10 We are under enormous pressure because of the schedule
11 in this case to complete discovery responses, to
12 prepare for responding to rebuttal, and to engage in
13 all the other activities that this case imposes.

14 Indeed, this is such a stressful time in
15 the case that there is a moratorium on written
16 discovery now.

17 And this -- these depositions, we think,
18 are unnecessary. They are inconsistent with the
19 spirit of the moratorium.

20 I realize the moratorium doesn't
21 specifically apply to depositions. It only applies to
22 the service of written discovery.

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1 But nonetheless, it's inconsistent with
2 that slow-down period.

3 This kind of discovery is the sort of
4 thing you would see in a large federal court anti-
5 trust where every marketing representative is deposed
6 and there are dozens or hundreds of depositions.

7 It's not the way --

8 JUDGE NELSON: Well, they say that these
9 names of these two men continue to pop up on
10 correspondence and on documents. I mean, there is
11 some particularization --

12 MR. LIVINGSTON: Any shipper can come in
13 here and say well, Mr. Jones at UP and Mr. So-and-so
14 at SP deals with us on a regular basis and we want to
15 take his deposition.

16 And we would be doing the entire Sales
17 Department and the entire Marketing Department of
18 these two companies.

19 And that's about the level of
20 justification we have here. They can't point to
21 critical facts that these people know, that they
22 haven't been able to get from other sources, including

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1 their own sources, which I think is really kind of
2 important here.

3 JUDGE NELSON: Okay. I think I understand
4 your position. Is this Mr. Moreno on this issue?

5 MR. MORENO: Yes, Your Honor.

6 JUDGE NELSON: What can you help me with
7 in terms of if I wanted to order these depositions,
8 how to limit them, structure them, make it as easy as
9 possible to get them over with, possibly choose one
10 instead of the two?

11 Could you give me any ideas along those
12 lines?

13 MR. MORENO: Well, Your Honor, although
14 plastics and chemicals are generally treated in a
15 common manner, I believe under the Union Pacific they
16 have two separate marketing departments.

17 Therefore, Mr. Witte is on a separate
18 hierarchy from Mr. Coale.

19 JUDGE NELSON: I remembered when we had
20 problems with the searching of the records. I thought
21 that the plastics were a subset of chemicals.

22 MR. MORENO: Plastics -- generally

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1 chemical manufacturers do also tend to manufacture
2 plastics. The reason we have asked for these two
3 witnesses is because the railroad itself handles the
4 marketing separate -- distinctly for plastics and for
5 chemicals.

6 JUDGE NELSON: What level are they on in
7 the company?

8 MR. MORENO: Mr. -- I do not know Mr.
9 Witte's precise title. But Mr. Coale is Product
10 Manager of Plastics, and he has been with the UP
11 Plastics Department since January of 1990.

12 So, one reason for selecting him is
13 because he has been there much longer than many other
14 individuals and has had direct experience about --

15 JUDGE NELSON: How much time would you
16 need for these depositions?

17 MR. MORENO: I think we could handle these
18 depositions in half a day, Your Honor.

19 JUDGE NELSON: Both?

20 MR. MORENO: We could possibly -- well, I
21 think we might be able to arrange the schedule to do
22 the two of them on the same day.

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1 JUDGE NELSON: Where are these people
2 located, if you know?

3 MR. MORENO: I'm not -- I'm not sure. The
4 Applicants will have to speak to that.

5 JUDGE NELSON: Mr. Livingston, where are
6 they?

7 MR. LIVINGSTON: Omaha.

8 JUDGE NELSON: Omaha. Well, you would go
9 to Omaha for these purposes.

10 MR. MORENO: Yes, Your Honor, we would.

11 JUDGE NELSON: And I'm going to direct
12 those depositions and direct that the combined time of
13 the depositions shall not exceed four hours.

14 MR. MORENO: I think we can handle that.

15 JUDGE NELSON: And you can allocate the
16 four hours as you want. If you take up three hours
17 and 55 minutes with Mr. Coale, you've got five minutes
18 with the next man.

19 Are there questions about that?

20 MR. LIVINGSTON: I understand your ruling,
21 Your Honor. I would like to be heard one more time.
22 And I realize you've made the ruling, but no argument

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1 was made here as to why these witnesses are needed.

2 It is simply that they've been at the
3 company a long time and they deal with Dow. If that's
4 going to be the standard --

5 JUDGE NELSON: I've read --

6 MR. LIVINGSTON: -- there is no limits --

7 JUDGE NELSON: I've read Mr. Moreno and
8 Mr. DiMichael's letter of March fourth, and I am
9 persuaded by the reasons set out there that we ought
10 to have the depositions.

11 I am of the view that they ought to be as
12 simple as possible to impose as little a burden as
13 possible. And I can't see how four hours of time
14 divided between the two men is going to be a serious
15 detriment to the company.

16 MR. LIVINGSTON: Well, there are not only
17 the four hours to the men, but it's the time we spend
18 in preparation.

19 JUDGE NELSON: You've got Ms. Rinn sitting
20 right out there. She can defend those depositions.

21 MR. LIVINGSTON: Ms. Rinn --

22 JUDGE NELSON: You try the case any way

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1 you want, but you don't even have to spend money to
2 get her there. She's on the payroll.

3 And that's headquarters, and that's where
4 the two people are. And I see no reason these
5 depositions can't go forward.

6 I'd like to turn now to the other issues,
7 and that is Mr. McBride's issues. And here's what I
8 want to do on this, ladies and gentlemen.

9 I'm very pressed for time today because
10 I'm handling another case. And I have a conference
11 call in yet a third case to take up at 10:15.

12 So rather than present the argument in the
13 kind of rough-and-tumble, informal give and take way
14 that we normally do, which I prefer, I'm going to ask
15 that it be done in a more structured court of appeals
16 way, which I do not like.

17 But it is a way of conserving our time.

18 I am going to give to the Intervenors, and
19 I'm including the Department of Justice in that group,
20 a half an hour.

21 Divide it as you want. Take some rebuttal
22 time if you want, and pick who you want to share that

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1 time.

2 It could be all you. I would think I
3 would like to hear from Mr. Billiel for a moment or
4 two at least, but I leave that with you.

5 So that you would open, and then we would
6 hear from the Applicants, and then there would be
7 rebuttal, 30 minutes on each side.

8 I'll give you a moment or two to decide
9 how you want to do it.

10 And then I will go up and probably take
11 this call, and see what my ruling is going to be and
12 come back down here.

13 Do you want to take a few minutes now to
14 organize?

15 MR. McBRIDE: I talked to them beforehand,
16 so I think I have a general idea here. I would like
17 you to hear from Mr. Billiel. I think Mr. DiMichael
18 may want to say a word or two.

19 I would propose that we take five minutes
20 out of the time that you've allocated to me for Mr.
21 Billiel and Mr. DiMichael.

22 And any other Intervenor who wishes to be

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1 heard -- but I can tell you at the outset which
2 parties support our position.

3 And that may eliminate the need for most
4 of them to get on their feet.

5 JUDGE NELSON: No, no. We don't need a
6 whole bunch of parties. I don't want to hear anybody
7 that hasn't at least filed a letter with me.

8 MR. McBRIDE: That's what --

9 JUDGE NELSON: That would be you --

10 MR. McBRIDE: Yes.

11 JUDGE NELSON: -- Mr. Allen on behalf of
12 Tex/Mex and the Sierra Pacific --

13 MR. McBRIDE: Right.

14 JUDGE NELSON: -- the Department of
15 Justice --

16 MR. McBRIDE: Right.

17 JUDGE NELSON: -- and the NITL League.

18 MR. McBRIDE: NITL League, and --

19 JUDGE NELSON: Have I missed someone?

20 MR. McBRIDE: -- Mr. Lubel sent a letter
21 which he -- I just saw this morning. And maybe you
22 haven't seen it yet.

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1 JUDGE NELSON: I don't have it.

2 MR. McBRIDE: But he said in one sentence
3 he endorses his position.

4 JUDGE NELSON: Well, if he says me too,
5 that's fine.

6 MR. McBRIDE: Right.

7 JUDGE NELSON: If you want him to present
8 it, he can present it.

9 MR. McBRIDE: And I have --

10 JUDGE NELSON: It's up to you.

11 MR. McBRIDE: And I have authority, if
12 Your Honor please, from the Chemical Manufacturers
13 Association. I can show you the letter from Mr. Stone
14 who could not be here this morning.

15 JUDGE NELSON: The NITL League letter did
16 deal in more detail with this alleged joint defense
17 matter --

18 MR. McBRIDE: Yes.

19 JUDGE NELSON: -- more -- more than yours
20 did. So maybe there is some interest in hearing from
21 that. But ;you tell me how you want to divide the
22 time. You're going to have 30 minutes.

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1 MR. McBRIDE: All right. Five minutes for
2 Mr. Billiel and three for Mr. DiMichael. I'll take
3 the remaining.

4 JUDGE NELSON: Do you want any rebuttal?

5 MR. McBRIDE: Yes, I'll take seven minutes
6 for rebuttal. That leaves me with 15 for the opening.

7 JUDGE NELSON: So you will go for 15, and
8 then next would come --

9 MR. McBRIDE: Mr. Billiel and then Mr.
10 DiMichael.

11 JUDGE NELSON: And Mr. Billiel would be
12 how long?

13 MR. McBRIDE: Five minutes, Mr. DiMichael
14 for three.

15 JUDGE NELSON: And then we will hear a
16 half an hour from the Applicants, and then seven
17 minutes rebuttal.

18 MR. McBRIDE: Yes, Your Honor.

19 JUDGE NELSON: Let's go off the record for
20 a moment.

21 (Whereupon, the proceedings went off the
22 record at 9:15 a.m. and resumed at 9:16 a.m.)

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1 JUDGE NELSON: We're going to begin with
2 Mr. McBride, and I will tell Counsel I will try not to
3 ask as many questions as I ordinarily do because I
4 want to give you a chance to get this all in focus.

5 I have read the letters consistent with --
6 in such a way that's consistent with my other -- other
7 case all day, and remembering that the Applicants'
8 letter I received at about 4:30 yesterday.

9 So it went home with me on the subway and
10 it's been read twice now. So, I have read everything.

11 MR. McBRIDE: Very well.

12 JUDGE NELSON: But it's a quick reading.
13 So that's another reason that you can help me orally.
14 Go ahead, Mr. McBride. You've got 15 minutes.

15 MR. McBRIDE: Thank you very much, Your
16 Honor. And if I may say so, with meaning no
17 disrespect because you're in charge, but I would
18 appreciate any interruption with any question you've
19 got. I prefer it that way.

20 But in any event, let me just say that the
21 parties that you listed, and I informed you about CMA,
22 all support our position on the chilling effect of the

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1 discovery that the Applicants have propounded to
2 Western Shippers Coalition.

3 And I believe similar questions went to
4 many of the other parties. I haven't reviewed them
5 all, but I certainly see the same kinds of questions
6 have gone to some of the other parties who are here,
7 even to the Department of Justice, which I regard as
8 quite extraordinary.

9 Now the issue then really is the chilling
10 effect of these discovery requests that were
11 preponderate last Monday night after I left the office
12 at 8:15.

13 When I got in Tuesday morning, there they
14 were. The evening, that is, of February 26th.

15 And I want to tell Your Honor what was
16 going on at that very moment because that's why I
17 asked for this extraordinary hearing. And I provided
18 you with some of this in the letter.

19 Starting a couple of weeks before that
20 discovery, whenever the Utah Legislature came into
21 session in early February of 1996, my client,
22 exercising its First Amendment rights to petition,

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1 sought the adoption of a resolution before the Utah
2 Legislature opposing this merger unless the
3 competitive problems in SP's central corridor could be
4 resolved.

5 And a flurry of legislative activity
6 occurred, not only on our side, but I might add, on
7 the side of Union Pacific.

8 Union Pacific had an extraordinary amount
9 of legislative resources devoted to opposing that
10 resolution. Mr. Davidson had previously been in the
11 state. Mr. Burns, the president, had previously been
12 in the state.

13 I believe they both met with the governor.
14 At least I'm quite sure Mr. Burns did.

15 The General Counsel to whom these
16 gentlemen, on the UP side at least, I believe report
17 Mr. Dolan ended up testifying before the Utah
18 Legislature on Thursday, February 22nd, I believe was
19 the date. So did my client.

20 The subcommittee of the House that had
21 relevant jurisdiction -- of the Senate, excuse me,
22 that had relevant jurisdiction reported the resolution

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1 out.

2 It was adopted 23 to nothing on Friday,
3 February 23rd, if my information is correct.

4 The very next business day, we were hit
5 with this discovery. Now, I will say that in the
6 Applicants' letter, Counsel from Covington and Burling
7 represent that they were unaware of what was going on
8 in the Utah Legislature.

9 JUDGE NELSON: They say they served
10 everyone with everything that same day.

11 MR. McBRIDE: Right. I have no basis to
12 dispute that. But I will tell you their client is the
13 party propounding this discovery, and their client was
14 very well aware of what was going on in Utah.

15 And I don't know where the idea for these
16 questions came from. But the effect -- intent is not
17 the issue here. The effect of this discovery was to
18 immediately impose a chilling effect on my client and
19 the members of his organization in Utah where the
20 Legislature had three more days before it went out of
21 session last Thursday.

22 JUDGE NELSON: What happened? The result

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1 --

2 MR. McBRIDE: And on me.

3 JUDGE NELSON: What do you say happened as
4 a result of this?

5 MR. McBRIDE: Well what happened was that,
6 because their demanding notes of meetings with all
7 governmental officials, including governors and
8 attorney generals, as specifically referred to in
9 their discovery requests, that -- and I hope this
10 doesn't constitute any kind of waiver.

11 But I had to advise my client of these
12 discovery requests and inform him that until Your
13 Honor ruled, I had no way of knowing whether any notes
14 taken of any such meetings by either him or the
15 governmental officials with whom he was meeting might
16 be discovered in this case.

17 JUDGE NELSON: Who is "him" for these
18 purposes?

19 MR. McBRIDE: Alexander Jordan. He is the
20 Director of the Western Shippers Coalition, and in his
21 other life is the President of the Utah Mining
22 Association.

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1 I also was, as it so happened that
2 Tuesday, February 27th, on a break from the
3 depositions in this case.

4 I had deposed SP's witness Gray the day
5 before. I was going to depose Mr. Davidson the next
6 day.

7 And the relevance of that is I had just
8 received the client's authorization to go talk to the
9 gentlemen and ladies at the Department of Justice who
10 were working on this case.

11 And I decided right then and there when I
12 read those discovery requests first thing that morning
13 that since they're demanding the notes of any
14 meetings, that I might take it those meetings with DOJ
15 or that they might take it, that I couldn't call them
16 and arrange that meeting and exchange information with
17 them until Your Honor ruled here

18 And I told Mr. Billiel that Thursday
19 afternoon after Your Honor directed me to call him and
20 tell him you wanted him here this morning.

21 So, we have been chilled here for more
22 than a week mere by the pendency of these discovery

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1 requests from exercising our First Amendment rights.

2 Now, I might tell Your Honor yesterday,
3 the Sixth Circuit ruled in a case that parties may
4 have been following in the newspapers. I have a copy
5 for Your Honor, the case -- excuse me, the case of
6 Proctor & Gamble.

7 JUDGE NELSON: This is Proctor & Gamble
8 Co. v. Bankers Trust Co.

9 MR. McBRIDE: That's right.

10 JUDGE NELSON: No. 95-4078. This is a
11 slip opinion --

12 MR. McBRIDE: Right.

13 JUDGE NELSON: -- from the Sixth Circuit.
14 And the case was decided --

15 MR. McBRIDE: Decided.

16 JUDGE NELSON: -- and filed on March 5,
17 1996.

18 MR. McBRIDE: Right. And I'll offer this
19 case for two propositions. The Sixth Circuit ruled,
20 first of all, that prior restraints on the exercise of
21 First Amendment rights are almost never permitted,
22 absence some urgent national security or some

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1 competing Constitutional concern.

2 JUDGE NELSON: We don't need the Sixth
3 Circuit for that, do we?

4 MR. McBRIDE: Well, they had to reverse a
5 District Judge because --

6 JUDGE NELSON: Isn't that Near v.
7 Minnesota or Minneapolis?

8 MR. McBRIDE: Well, that's right. But
9 they had to admonish the District Judge in that case
10 that he had done precisely that: he violated the
11 Constitution.

12 We also have, at the tail-end of the
13 opinion, the Sixth Circuit saying that the solution
14 that the Applicants are suggesting here in their
15 letter of some kind of disclosure followed by
16 protective orders and coding and all that, is not the
17 way to go.

18 If the evidence is relevant, it generally
19 ought to come in. And if it's not relevant, it ought
20 not to come in.

21 But we don't use protective orders and
22 then allow the parties to decide what's confidential

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1 and what's not. That's the very last paragraph on the
2 opinion, which you'll find on page eight of this
3 print-out.

4 So, their solution doesn't do it. And the
5 real problem here is the fears and threats that have
6 already occurred: fears of retaliation, threats that
7 have already occurred.

8 JUDGE NELSON: Do you claim a chilling
9 effect insofar as the events of the other House of the
10 Utah Legislature? Is it the House or Senate? I
11 forget.

12 MR. McBRIDE: The Senate had voted on
13 it --

14 JUDGE NELSON: The Senate had voted for
15 you.

16 MR. McBRIDE: -- and the House didn't get
17 to it before they went out of session.

18 JUDGE NELSON: Now, are you claiming that
19 this discovery had anything to do with the House's
20 action or inaction?

21 MR. McBRIDE: I told you what I advise the
22 client. I was not out there. I don't know what notes

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1 weren't taken or could have been taken or were taken,
2 notwithstanding the advice.

3 I don't know how governmental officials
4 may have reacted.

5 But I can tell you this: that word
6 "outraged" in my letter is not from me. It's from my
7 client, that they would try to do this sort of thing
8 to prevent him from having this opportunity under the
9 First Amendment to exercise his rights before the Utah
10 Legislature.

11 And I can also tell Your Honor this, and
12 I think UP knows very well about this because Mr.
13 Dolan testified in that same hearing I told you about.

14 He urged that Utah Senate committee not to
15 report out that resolution. Because if they adopted
16 this, then other western legislatures would take it
17 up.

18 Well, that's quite right. We're going to
19 run it around the other western legislatures. And
20 we're being chilled from exercising those rights as
21 well, as well as with the United States Congress by
22 this sort of discovery.

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1 It's abusive. It's irrelevant. It has
2 nothing to do with this case.

3 And what I'd like to do if I may, Your
4 Honor, briefly is to talk about the specific discovery
5 requests, rather than getting bogged down in all these
6 cases, and tell you how offensive they are.

7 I'd like to begin with interrogatory
8 number five: "Identify the financial contributors to
9 WSC and the amounts contributed." You'll find this on
10 page 11 of my letter.

11 JUDGE NELSON: They say they have -- they
12 make some suggestion that the WCO -- WSC, I'm sorry,
13 may be a front for some railroads.

14 MR. McBRIDE: I shouldn't have to respond
15 to that --

16 JUDGE NELSON: What about that?

17 MR. McBRIDE: -- but I will because Your
18 Honor asked me. I mean, I was offended by that. In
19 fact, I actually had to laugh about it last night as
20 one --

21 JUDGE NELSON: Well, I wasn't laughing.
22 It's put forward --

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1 MR. McBRIDE: No, no, I --

2 JUDGE NELSON: -- as a reason why they
3 want to probe exactly who is and who isn't the WSC.

4 MR. McBRIDE: Well, one of the other
5 counsel called me to inform me about this pleading
6 before I saw it. And he knew I had never represented
7 a railroad in 20 years.

8 And I can tell you to respond to the
9 allegation directly, there's no truth to it.

10 We haven't received a nickel, so far as I
11 know, from a railroad. But if we did, it would be
12 none of their business because we do support the
13 notices that other carriers have filed here to try to
14 settle the competitive problem in the central
15 corridor.

16 And I don't want any mistake on the record
17 about that. The lady is here from Montana Rail Link.
18 Wisconsin Central called me last night thinking you
19 were going to do this by conference call. The lawyer
20 called me from Chicago and couldn't be here this
21 morning.

22 But they're interested in this as well.

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1 They both filed notices to file inconsistent
2 applications with respect to the central corridor,
3 which is our primary area of concern here.

4 JUDGE NELSON: Aren't there cases that
5 authorize the probing of finances?

6 MR. McBRIDE: There are if there's a
7 compelling interest. In Buckley v. Valeo, for
8 example, the one we cited, the Supreme Court held that
9 candidates getting federal matching funds, that their
10 contributors have to be disclosed, as we all know;
11 that the public has a compelling interest in that.

12 But that brings me to an essential point
13 here, Your Honor. We have raised colorable First
14 Amendment claims here. And I've provided you with the
15 resolution in Utah and I'm informing you of our other
16 activities in our letter.

17 The burden immediately shifts, says the
18 Coors case, the very case that they cited, 777 F.2nd
19 1538 at page 1541 and others. The burden shifts to
20 them to justify this kind of intrusion into our First
21 Amendment rights when I identify those kinds of
22 interest.

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1 And that cases are legion, and they don't
2 dispute the point in their error, that it's their
3 burden to show a compelling interest here.

4 JUDGE NELSON: So is the First Amendment
5 right -- I assume it's the right of association that
6 we're talking about here, extend to money.

7 MR. McBRIDE: Three rights were --

8 JUDGE NELSON: There are three in three.
9 Which one --

10 MR. McBRIDE: There are four in there.

11 JUDGE NELSON: Four all total.

12 MR. McBRIDE: We're not arguing about
13 freedom of the press here. We're arguing --

14 JUDGE NELSON: Which one -- which one
15 deals with money?

16 MR. McBRIDE: Speech. That's what the
17 Supreme Court said in Buckley v. Valeo. The
18 expenditure of funds is protected speech under the
19 First Amendment.

20 We're arguing about that, the freedom of
21 association --

22 JUDGE NELSON: So if a railroad gave you

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1 money, and let's take the worse possible case, kept it
2 secret --

3 MR. McBRIDE: Okay.

4 JUDGE NELSON: Don't tell anyone, but
5 here's a million dollars to try to knock off those big
6 boys from Omaha and San Francisco. What we don't need
7 is another big merge group.

8 You do it in the name of shippers. That
9 will be appealing. People like shippers.

10 MR. McBRIDE: I'm glad Your Honor does.

11 JUDGE NELSON: You're in favor of low
12 rates and all that kind of thing, and you're moving
13 coal to the -- from the mine to the generator and
14 people need electricity.

15 I'd rather do it that way than do it
16 myself as a railroad. But keep this secret.

17 MR. McBRIDE: Right.

18 JUDGE NELSON: Now, are you saying that
19 the First Amendment protects that contribution against
20 scrutiny by the Applicants?

21 MR. McBRIDE: Yes sir, that's exactly what
22 I'm telling you. There is no compelling interest in

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1 them knowing where those monies came from, or the
2 amounts, which is the thing that they've asked for
3 here.

4 That's exactly what I'm saying.

5 JUDGE NELSON: And that's Buckley v.
6 Valeo.

7 MR. McBRIDE: That's right. And let me
8 quickly point out that a number of the other
9 interrogatories asked for our communications with
10 government officials, which I think Mr. Billiel can
11 address.

12 But as an informers privilege here, I can
13 tell you that utilities who you may think are big and
14 powerful and have nothing to fear, do fear.

15 I cited some examples in my letter. I can
16 tell you about another one I learned from my client,
17 I think it was yesterday or Monday after my letter
18 went to you, that one of the members of my group has
19 been told you'd better get out of that Western
20 Shippers Coalition because this merger is going to be
21 approved.

22 Now, I view that as a threat.

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1 JUDGE NELSON: And the members, the
2 Applicants point out, are known. You have disclosed
3 a membership list.

4 MR. McBRIDE: Well, we chose to do that.

5 JUDGE NELSON: Yes. Since the members are
6 known --

7 MR. McBRIDE: The members --

8 JUDGE NELSON: -- already, what does --
9 what does this discovery add to the problem of
10 possible retaliation?

11 MR. McBRIDE: Well for one thing, there
12 are other people who don't wish to be named as members
13 who have told me that they may wish to contribute to
14 the Western Shippers Coalition --

15 JUDGE NELSON: Your letter says that.

16 MR. McBRIDE: -- but they fear
17 retaliation.

18 JUDGE NELSON: So if they're not members,
19 but they're possible financial backers.

20 MR. McBRIDE: That's right. And there are
21 other people who are considering joining the Western
22 Shippers Coalition. And I had to inform some of them,

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1 who I have another client relationship with, that this
2 sort of thing is going on.

3 Now if I may quickly say, they have also
4 asked in interrogatory one and in some of the
5 documents requests for all of our communications on
6 this side of the aisle, if you will.

7 And I'm not including Mr. Billiel in that.
8 I don't know what the Department of Justice's position
9 in this case is going to be.

10 That was the first thing I would talk
11 about if I went over there to talk to him.

12 JUDGE NELSON: Well, there were four kinds
13 of communications, I believe.

14 MR. McBRIDE: That's right.

15 JUDGE NELSON: One is intra your own
16 group. Two --

17 MR. McBRIDE: Right, which they now say
18 they weren't secrets, by the way.

19 JUDGE NELSON: Oh, that's out of the case
20 now?

21 MR. McBRIDE: Well, that's the way I read
22 their footnote number two.

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1 JUDGE NELSON: Well, we'll find it.

2 MR. McBRIDE: And they can correct me if

3 I'm --

4 JUDGE NELSON: Two is with other parties
5 in the case.

6 MR. McBRIDE: Some of whom are in my
7 group, by the way, so that doesn't solve anything, the
8 first representation.

9 JUDGE NELSON: And three -- and this
10 overlaps to some extent with governmental officials.

11 MR. McBRIDE: Correct.

12 JUDGE NELSON: And I forget what the
13 fourth one was.

14 MR. McBRIDE: Well, any consultant group
15 or consultant --

16 JUDGE NELSON: Consultants and others.

17 MR. McBRIDE: Yes, and security analysts
18 and all the rest of them. And now, I don't have a
19 problem with security analysts, so I didn't raise that
20 with Your Honor specifically in the letter.

21 I could have gone on for 50 pages about
22 our problems here. But any consultant and

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1 communications with all of these counsel? That's what
2 they're asking about.

3 They want to know what information we've
4 exchanged and what strategy we've discussed.

5 I have discussed strategy with several of
6 these people.

7 JUDGE NELSON: Why isn't all of that
8 covered by --

9 MR. McBRIDE: Work product? Well, it is.
10 But my problem here is that it is work product, and
11 that's the genesis of the common interest, joint
12 defense document.

13 But my problem in bringing this to Your
14 Honor now is they're chilling our ability to
15 strategize here and work together by these very
16 discovery requests.

17 And that's protected, not just by some
18 Commonlaw work product doctrine. It's protected by
19 the First Amendment.

20 JUDGE NELSON: If we could resolve this,
21 Mr. McBride, on non-Constitutional grounds, your own
22 letter suggests that possibility --

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1 MR. McBRIDE: But I'm not sure you can do
2 it on all of them. But if you can --

3 JUDGE NELSON: Maybe reach everything.

4 MR. McBRIDE: I would suggest to Your
5 Honor respectively that -- and I know this issue is
6 not up before you today, and I did not ask for the
7 expedited hearing on it, but I'm informed that the
8 matter may be brought to you today for a Friday
9 hearing if you're available.

10 The point is that --

11 JUDGE NELSON: You also say --

12 MR. McBRIDE: -- none of this is
13 appropriate now.

14 JUDGE NELSON: You argue relevance and you
15 argue undue burden --

16 MR. McBRIDE: Correct, correct.

17 JUDGE NELSON: -- and say that that's
18 later.

19 MR. McBRIDE: But if Your Honor were to
20 decide that it's not relevant -- I mean, I don't get
21 to tell you how to decide the case.

22 If you decide none of this is relevant or

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1 it's unduly burdensome, then that would be the end of
2 it.

3 JUDGE NELSON: You see, I'm from the
4 generation, and indeed the school, that taught that
5 there was something special and important about
6 avoiding Constitutional questions.

7 And we all are the product of whoever we
8 are. I can't get out of that.

9 So if I could do it on non-Constitutional
10 grounds, I would prefer it.

11 MR. MCBRIDE: Well, my time is up. But I
12 just want to say that I was taught the same thing, and
13 that's why I suggested it to Your Honor.

14 Because I think none of these requests are
15 at all relevant, and they are burdensome. And let me
16 just explain the relevance point briefly, and then
17 I'll sit down.

18 The communications, as I put it "qua
19 communications" of all of us or with our clients or
20 with other parties in the proceeding, are not, in and
21 of themselves, relevant.

22 Underlying facts may be. But does the

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1 Service Transportation Board give a whit about what I
2 talk to these people about? Is that relevant
3 evidence?

4 And do they give a whit about whether I'm
5 getting any money from people who don't want to be
6 named, or even from a railroad? I don't think so.

7 But as I told you, in any event, and I've
8 told them so we can cut off this discussion about a
9 railroad front group, we don't have any money from
10 railroads.

11 But if I got some tomorrow, I would take
12 it and it would be none of their business.

13 JUDGE NELSON: I had a question.

14 MR. McBRIDE: Sure.

15 JUDGE NELSON: Your time is up, but I'm
16 going to ask you anyway. The right to petition a
17 government in the First Amendment, which you rely
18 upon, clearly covers the Federal Government.

19 What can you tell me about its
20 applicability to state --

21 MR. McBRIDE: I was going to write you a
22 footnote about this, and I was --

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1 JUDGE NELSON: Well --

2 MR. McBRIDE: I didn't have time.

3 JUDGE NELSON: -- now's the time.

4 MR. McBRIDE: If I remember -- if I
5 remember right, in as early as 1925, and I can't
6 remember the name of the case, the Supreme Court said
7 that the First Amendment is part of those fundamental
8 rights that applies to the states as well.

9 And then through a series of later
10 decisions, they applied some of the other amendments
11 to the Bill of Rights, but not all of it to the
12 states.

13 But the First Amendment, I think, was --
14 was the first or one of the first --

15 JUDGE NELSON: Oh, so you get there that
16 way?

17 MR. McBRIDE: That's right.

18 JUDGE NELSON: The applicability of the
19 First Amendment itself to the states?

20 MR. McBRIDE: That's right.

21 JUDGE NELSON: So the states could make no
22 restricting the right to petition themselves for --

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1 MR. McBRIDE: That's right. And the
2 Supreme Court --

3 JUDGE NELSON: And so this discovery would
4 violate the state version of the First Amendment.

5 MR. McBRIDE: If we're just talking about
6 lobbying the state. But in any event, if Your Honor
7 pleases --

8 JUDGE NELSON: I follow you with the
9 Federal Government --

10 MR. McBRIDE: Yes.

11 JUDGE NELSON: -- but your position also
12 extends to states.

13 MR. McBRIDE: Yes, it does.

14 JUDGE NELSON: I wanted to see what the
15 Constitutional basis of that was.

16 MR. McBRIDE: Right.

17 JUDGE NELSON: It's the incorporation of
18 the First Amendment?

19 MR. McBRIDE: Yes, through the 14th.

20 JUDGE NELSON: Through the due process
21 clause?

22 MR. McBRIDE: That's right, Your Honor.

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1 JUDGE NELSON: All right Next is Mr.
2 Billiel.

3 MR. BILLIEL: Thank you. Your Honor. This
4 is an issue that the Department feels quite strongly
5 about.

6 Unlike any of the other parties in this
7 case, the Department has no internal people who know
8 the facts relative to this merger.

9 The only way we get information is what we
10 get from other parties, both the Applicants, shippers
11 and other railroads.

12 And we think it's very, very critical that
13 people feel free to come and talk to us.

14 As far as I've been able to determine, the
15 only other situation that anyone in my office can
16 remember we were asked for discovery like this that is
17 for all of our communications with all of the parties
18 was in the SF/SP merger in which we took the exact
19 position we're taking here.

20 JUDGE NELSON: And what happened?

21 MR. BILLIEL: We -- I don't believe the
22 Applicants in that case pressed us on it. We

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1 disclosed our communications with the other parties to
2 the extent that our witnesses relied on them at the
3 time they testified, which we will do here.

4 And that at the end --

5 JUDGE NELSON: There is some claim here
6 that fair is fair, that there's a parity between the
7 discovery the Intervenors have engaged in of the
8 Applicants and that which the Applicants now want to
9 do to the Intervenors.

10 MR. BILLIEL: Yes sir.

11 JUDGE NELSON: What about that?

12 MR. BILLIEL: Well, Your Honor, I would --
13 I would answer that in part by saying there is nothing
14 that they can get from us that they can't get from
15 other parties.

16 As Mr. McBride has alluded to, as we
17 learned last Friday, one of the issues Mr. -- is
18 interested in is competition of Western Coal.

19 So, the Applicants are perfectly within
20 reason to ask Mr. McBride what facts he has about that
21 subject.

22 Whether he communicated those facts to the

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1 Department, or the manner in which he communicated
2 them, is wholly irrelevant to any subject.

3 JUDGE NELSON: That -- that says something
4 about the difficulty of ruling on these questions
5 generically, in the abstract.

6 We know a lot about the issue involving
7 the competition between the coals.

8 MR. BILLIEL: Right.

9 JUDGE NELSON: We've been through that.

10 MR. BILLIEL: Right.

11 JUDGE NELSON: And if these
12 interrogatories were focusing on something like that,
13 I could get a better handle on it in terms of
14 relevance, need and so forth, Mr. Billiel.

15 But all of this is you're asking for a
16 general rulings in the abstract here, that under no
17 hue should any of this material be turned over.

18 MR. BILLIEL: Well, my view is that it
19 should be turned over if the Department relies on it
20 in its testimony. And there is a provision in the
21 procedural schedule that, when testimony is filed, all
22 the underlying information is turned over.

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1 JUDGE NELSON: Your main point in the
2 letter is the need for confidentiality of outside
3 people, the so-called "informant." Have you been
4 giving assurances of confidentiality to such people
5 who have talked to you about this merger?

6 MR. BILLIEL: The -- what we've been
7 telling people who we've talked about -- we've spoken
8 to is that we will probably file economic testimony,
9 and that if our economist relies on the information
10 they give us in this testimony, we will -- we may have
11 to produce that to the applicants, in which case we
12 will mark it "highly confidential," and only the
13 Applicants and outside counsel will get access to it.

14 And that's exactly what we've done in
15 prior railroad mergers.

16 JUDGE NELSON: And there does come a time
17 --

18 MR. BILLIEL: Right, but --

19 JUDGE NELSON: -- and I say this as an
20 alumnus of the Department, this -- albeit, that the
21 informant has to come out.

22 MR. BILLIEL: Now, I have no argument

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1 there.

2 JUDGE NELSON: We can't hide him or her
3 for reference.

4 MR. BILLIEL: I have absolutely no
5 argument with that.

6 JUDGE NELSON: What about this notion of
7 protecting by redactions identity or identifying
8 details? Does that work?

9 MR. BILLIEL: It may in certain
10 circumstances. I'm not sure how useful that would be
11 to the Applicants.

12 JUDGE NELSON: Well, that's a different
13 story. Do you have any idea what volume of paper
14 we're talking about here, from the Department's point
15 of view?

16 MR. BILLIEL: It's not great, Your Honor.

17 JUDGE NELSON: All right. Anything else?

18 MR. BILLIEL: No.

19 JUDGE NELSON: Thank you. Mr. DiMichael,
20 you're the expert on the joint defense --

21 MR. DiMICHAEL: I hope so, Your Honor.

22 JUDGE NELSON: Well, I need education on

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1 it --

2 MR. DiMICHAEL: Okay.1

3 JUDGE NELSON: -- because this one is new
4 to me. I've never heard of it before. So --

5 MR. DiMICHAEL: Okay. On this, Your
6 Honor, I have three minutes here, so I'll try to do
7 this quickly.

8 I think the letter that we sent to you on
9 March fourth lays that out. I would just address a
10 couple of things. I note that --

11 JUDGE NELSON: That D.C. Circuit case is
12 the key case --

13 MR. DiMICHAEL: Yes. I certainly believe
14 that the AT&T case is the key case. You have a case
15 there in which there were actually two separate suits,
16 and parties were exchanging information between the
17 suites that were related suits, culminating type of
18 issues.

19 But even two separate suits -- and the law
20 says, for example, that you don't need a formal joint
21 defense agreement. It can be just a very informal
22 exchanges of information with parties who have common

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1 interests.

2 And the AT&T case reads that very, very
3 broadly.

4 JUDGE NELSON: Do you have an example of
5 that in this case?

6 MR. DiMICHAEL: I do. And this is one
7 reason why, for example, the League is very concerned
8 about this. As we note in the letter here, the League
9 and the Chemical Manufacturers Association, and the --
10 Plastics Industry have all gone in together and
11 jointly funded a study of the competitive effects of
12 this -- merger and the study is ongoing.

13 And since we've all jointly funded it, we:
14 the League and CMA and SPI, are all exchanging
15 information and talking to the expert about the study.

16 But question number 13, for example, asks
17 for all communications between the League and any
18 other party into this case including obviously CMA and
19 SPI.

20 By its terms, that question would seem to
21 implicate any documents that I have exchanged with
22 counsel, for example, to CMA concerning this jointly

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1 funded study.

2 JUDGE NELSON: Isn't that work product?

3 MR. DiMICHAEL: Well, that was what I
4 would say. But it would seem that it would -- that
5 the question argued very broadly for any
6 communications, even through -- and there was a severe
7 concern here that because I might have exchanged this
8 information with counsel for the other parties, that
9 would then lose the work product privilege.

10 And this seems to me this is exactly what
11 the common interest sort of adjunct to the work
12 product privilege is supposed to protect: people on
13 the same side of the case exchanging information,
14 exchanging common legal strategy.

15 And it seems, Your Honor, the Applicants
16 have said well, this is all premature. But if you
17 read the questions that they've asked -- question
18 number 13, as I said, asked for all communications
19 between the League and any other party.

20 Now, if that doesn't -- I would grant that
21 maybe that question or 100 percent of it doesn't -- is
22 not absolutely coextensive to work product, but it's

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