

INTERSTATE COMMERCE COMMISSION 03/06/96

FINANCE DOCKET # 32760

1852-1875 3.

1 responses.

2 Then the Applicants will look at the
3 responses. And if we have objections, we'll make a
4 good faith effort to resolve them.

5 We have responded to over, I think, 1,200
6 requests was the number I gave. And it may seem like,
7 Your Honor, all of those were brought to you for
8 review. But in fact, the parties resolved most of
9 those between themselves --

10 JUDGE NELSON: I realize that.

11 MR. LIVINGSTON: -- and only a small
12 fraction were brought to Your Honor. And I think that
13 will be true here.

14 JUDGE NELSON: That's the way it's
15 supposed to work.

16 MR. LIVINGSTON: Right. And we can't --
17 that's the process that Your Honor set up in December
18 for resolving the discovery disputes.

19 JUDGE NELSON: Can you do anything with
20 the --

21 MR. LIVINGSTON: I think we ought to stick
22 to it.

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1 JUDGE NELSON: -- with the breadth of
2 these interrogatories?

3 MR. LIVINGSTON: I think actually --

4 JUDGE NELSON: I mean, some of them are
5 narrow, like the money for the funding. That's
6 narrow.

7 MR. LIVINGSTON: Well, I think --

8 JUDGE NELSON: I mean, that's correct.

9 MR. LIVINGSTON: I think they are --

10 JUDGE NELSON: Some of them seem to call
11 for every thing, every document, every conversation
12 and --

13 MR. LIVINGSTON: I don't think that's so,
14 but it's true we have received objections, at least
15 from WSC, and perhaps some others.

16 JUDGE NELSON: Can you do anything about
17 that, such as narrow --

18 MR. LIVINGSTON: We will look at their
19 objections, and then we will look at what they're
20 responding.

21 When we objected, we would often say we
22 object to this as over-broad, but here's what we're

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1 giving or we're putting some documents in the
2 depository.

3 They would go look and see what they're
4 getting. And then they would think that's not enough,
5 we want more; or oh, that's okay. That's what we were
6 really after. And that would be the end of the
7 matter.

8 We will do the same here when we see their
9 responses, not just their objections, but their
10 responses.

11 JUDGE NELSON: What do you suggest in
12 terms of the timing?

13 MR. LIVINGSTON: I think on this dispute -
14 - I'm not talking about the prematurity dispute which
15 could be argued earlier. I would think we ought to
16 file these file these responses on the 12th.

17 We ought to look at them. And if -- and
18 probably within the next week or so, we will make our
19 judgements and try to work with them to see if there
20 are nay problems.

21 And we'll commit to you that we --

22 JUDGE NELSON: Well, we need to go --

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1 MR. LIVINGSTON: -- will focus those
2 disputes.

3 JUDGE NELSON: We need to go faster than
4 that because of the alleged chilling effect.

5 MR. LIVINGSTON: Your Honor --

6 JUDGE NELSON: If there is no chilling
7 effect, then how cares?

8 MR. LIVINGSTON: There is no --

9 JUDGE NELSON: If there is one, and for
10 present purposes, I can't make a decision whether
11 there is or isn't one on this record, then we've got
12 to move more rapidly.

13 MR. LIVINGSTON: Well, there is -- there
14 is no chilling effect. For one thing, the documents
15 that were written in the past, the notes that he
16 talked about, things that happened in the past, that's
17 water over the dam.

18 JUDGE NELSON: There is nothing to prevent
19 Mr. McBride from filing affidavits that detail for
20 particular persons how they feel about things, if you
21 have a pendency for these requests.

22 MR. LIVINGSTON: Well, so --

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1 JUDGE NELSON: So that we have some
2 explanation of all of these.

3 MR. McBRIDE: You see, the problem is I
4 don't want to give them to Applicants or I will have
5 committed the very -- created the very problem here
6 we're trying to avoid.

7 These people don't want to be identified.

8 MR. LIVINGSTON: Your Honor?

9 MR. McBRIDE: That's the informer's
10 privilege.

11 JUDGE NELSON: You could give them to me.

12 MR. McBRIDE: That's part of it. That's
13 what --

14 JUDGE NELSON: Yes, and give a redacted
15 copy without the signature identifying details. And
16 then we'll -- I could at least see what the affiants
17 are claiming.

18 MR. LIVINGSTON: There is a -- he is
19 required to present evidence if he were to try to
20 bring himself within that narrow NAACP exception.

21 There are no -- there is no evidence
22 presented --

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1 JUDGE NELSON: This is what don't know
2 from the cases: what threshold he has to show and how
3 he shows it.

4 MR. LIVINGSTON: well on the chilling
5 issue, if Your Honor wants to hear more on that on --
6 after the prematurity is argued --

7 JUDGE NELSON: So your view is --

8 MR. LIVINGSTON: -- then that's fine.
9 We'll come in and argue that point.

10 JUDGE NELSON: Your view is to let him
11 respond on the 12th, and then gather sometime
12 thereafter to go through all of this?

13 MR. LIVINGSTON: Well, and there may be
14 nothing to go through. We may be able to work it out.
15 I would hope we could. Maybe we can.

16 JUDGE NELSON: History would teach that
17 you'll work through some of it.

18 MR. LIVINGSTON: A great majority.

19 JUDGE NELSON: Yes.

20 MR. LIVINGSTON: The great majority.

21 JUDGE NELSON: And there will be less left
22 to adjudicate.

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1 MR. LIVINGSTON: Much less. And in some
2 cases, some parties, probably nothing.

3 JUDGE NELSON: Can we speed up the
4 response any, Mr. McBride? Can you get it in sooner
5 than the 12th?

6 MR. McBRIDE: No. I said before that I'm
7 going to do my level best to respond to those four
8 interrogatories by Tuesday.

9 But I can tell you on number six, we had
10 to retain a consultant to go out and try to get the
11 information. And it's about tonnages and rail routing
12 and everything else.

13 JUDGE NELSON: What interrogatory?

14 MR. McBRIDE: Interrogatory number six.
15 And I am doing my level best to get them that
16 information, which is obviously relevant, by Tuesday.
17 And I'm going to try to answer the other
18 interrogatories by Tuesday.

19 But, I mean, my client --

20 JUDGE NELSON: Well, we're not talking
21 about those now. We're talking about interrogatories
22 one and five and document requests 13, 14 and 15 --

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1 MR. McBRIDE: Those are the ones I'm not
2 responding to.

3 JUDGE NELSON: -- 16 and 17.

4 MR. McBRIDE: Those are the ones I'm not
5 responding to.

6 JUDGE NELSON: And 21.

7 MR. McBRIDE: Yes. It's the others that
8 I might be alleged to have an obligation to respond
9 to.

10 JUDGE NELSON: Well, you're not going to
11 do anything more? You're not going to --

12 MR. McBRIDE: No, I just told you that I -
13 -

14 JUDGE NELSON: You're not going to develop
15 the record in any way?

16 MR. McBRIDE: No, that's not so, Your
17 Honor.

18 JUDGE NELSON: Well, let's take
19 interrogatory one.

20 MR. McBRIDE: I'm going to --

21 JUDGE NELSON: Are you prepared to do
22 anything in the world about interrogatory one other

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1 than you've done right now?

2 MR. McBRIDE: I have to see my client's
3 documents to see whether any are responsive to that
4 before I can answer that question.

5 But I do have my own scraps of paper and
6 what have you in a pile in my office which I'm not
7 going to produce. I'm going to claim work product.

8 But I'll show them to Your Honor.

9 JUDGE NELSON: That's fine.

10 MR. McBRIDE: Yes. Okay.

11 JUDGE NELSON: Now my thinking is if you
12 simply --

13 MR. McBRIDE: But I have --

14 JUDGE NELSON: -- you stand on the letter
15 and you say that's it, and I've got nothing more to
16 say; I could help you in no further regard, I would be
17 very strongly tempted to deny the request.

18 MR. McBRIDE: I understand. But I'm going
19 to put them in a box and I'll bring them down here.
20 But I hate to burden you with seeing my deposition
21 notes and my notes of telephone conversations --

22 MR. LIVINGSTON: Your Honor?

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1 MR. McBRIDE: -- and all of that.

2 MR. LIVINGSTON: Your Honor, we're not
3 going to burden you with that.

4 JUDGE NELSON: Well, if I have to do it,
5 I put my hand in there and I pull out a couple and
6 I'll say, Mr. McBride, this is work product.

7 MR. McBRIDE: That's what --

8 JUDGE NELSON: Then I'll say every person
9 -- what's so important that we should override work
10 product?

11 MR. LIVINGSTON: But Your Honor, the
12 process is --

13 JUDGE NELSON: Line byline, document by
14 document, the old fashioned way.

15 MR. LIVINGSTON: If he asserts work
16 product --

17 JUDGE NELSON: What's wrong with that?

18 MR. LIVINGSTON: If he asserts work
19 product, the documents that are work product -- and we
20 agree that there's a work product privilege. There's
21 no dispute about that.

22 We claimed work product privilege

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1 ourselves when discovery was directed to us.

2 JUDGE NELSON: Yes, I recall.

3 MR. LIVINGSTON: And in some cases -- in
4 some particulars, that was challenged.

5 JUDGE NELSON: In -- yes, and sometimes it
6 wasn't.

7 MR. LIVINGSTON: And most of the -- most
8 of the time people said yes, that's right. That's
9 privileged.

10 And Your Honor didn't have to look at it.
11 There was no dispute. And then there will be -- in
12 cases here -- if thy assert Mr. McBride has written a
13 memo to his client and he's asserting attorney/client
14 and work product, Your Honor is never going to have to
15 look at that.

16 JUDGE NELSON: All right, so --

17 MR. LIVINGSTON: There won't be any
18 dispute.

19 JUDGE NELSON: The procedural suggestion
20 then is that we simply let matters go forward until
21 such a time that there is a response and the questions
22 are framed and then we adjudicate.

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1 MR. LIVINGSTON: Yes, and if there --

2 JUDGE NELSON: Assuming the moratorium
3 argument doesn't --

4 MR. KILLORY: Your Honor, it's key that I
5 think Your Honor says this, and I don't think Mr.
6 Livingston will contest it. The prematurity argument,
7 essential to that is a burden argument that won't be
8 resolved by phone and that kind of practice.

9 So moreover to the extent -- for the
10 convenience of Your Honor, we're perfectly happy to
11 put it off until Tuesday.

12 If that's the same day his responses are
13 due, we can't respond. I mean, part of the burden
14 argument is that to take these same people away to
15 develop the responses that are preparing testimony for
16 that's due March 29th just can't be done.

17 So that -- I don't want to mislead the
18 Court that -- if you want to hear us on Friday so that
19 we can resolve it sooner, we'll do that.

20 If it works better for Your Honor, we'll
21 do it Tuesday. That does run it back a little. But
22 we won't be able to follow the process that says well,

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1 let's just see how things ride and let's get the
2 responses in and then --

3 JUDGE NELSON: Will Counsel be prepared to
4 argue it now?

5 MR. KILLORY: Sure, Your Honor.

6 MR. LIVINGSTON: I'm not.

7 JUDGE NELSON: How does the railroad feel
8 about it?

9 MR. LIVINGSTON: I am not. I have not
10 read the read the papers.

11 JUDGE NELSON: You're not? I can
12 sympathize with that.

13 MR. KILLORY: Your Honor --

14 JUDGE NELSON: I will not ask you to do it
15 then.

16 MR. KOLASKY: To be fair to Your Honor, we
17 intended to send a letter obviously to all parties as
18 well was to you this afternoon which would itemize in
19 fairly brief form our position on this.

20 But whatever Your Honor --

21 MR. McBRIDE: Well but then the problem
22 is, and I'll just give you one more example -- I'm not

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1 withholding anything.

2 I want to find out whether this report,
3 the consultant for my client has done for him in this
4 matter, has been divulged to other parties.

5 If it has, they're going to get it. If it
6 hasn't, it's still work product and we're going to
7 decide whether to file it in the case.

8 I'm not standing here refusing to respond
9 to questions. You saw me give them a report last
10 Friday, way ahead of time. I am going to answer his
11 questions.

12 JUDGE NELSON: I understand that.

13 MR. McBRIDE: And I am going to be
14 responsive. I'm a responsible person and we'll give
15 them what we've got.

16 JUDGE NELSON: What do you say about the
17 suggestion of Mr. Livingston that we await your
18 response on the 12th and then see where we go with
19 these issues?

20 MR. McBRIDE: The problem is -- I've got
21 two problems. First of all, there's the chilling
22 effect day by day because I've held off going to see

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1 Mr. Billiel and his colleagues.

2 And my client's notes of meetings with
3 governmental officials and everybody else, including
4 his own members perhaps, because they are parties in
5 the proceeding, are potentially subject to discovery.

6 So people don't even keep notes of
7 meetings and all this --

8 JUDGE NELSON: Well, that is why I
9 proposed Monday or Tuesday --

10 MR. McBRIDE: I understand.

11 JUDGE NELSON: -- to make the chilling
12 effect a very short period of time.

13 MR. McBRIDE: The other problem is --

14 JUDGE NELSON: What could you do by that
15 time?

16 MR. McBRIDE: What could I do?

17 JUDGE NELSON: Suppose I have everybody in
18 here on Tuesday --

19 MR. McBRIDE: Yes.

20 JUDGE NELSON: -- and tell you to be ready
21 to sharpen this case, sharpen the focus and give me a
22 record that I can rule on with respect to these

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1 issues. Can you do anything by Tuesday?

2 MR. McBRIDE: Do you mean by way of
3 affidavit or by giving them documents? Because if I
4 give them documents Tuesday, you're not going to have
5 seen them and had a chance to review them.

6 I can tell you what I've instructed my
7 client to do.

8 JUDGE NELSON: Then what is your
9 suggestion? If you can't do it by Tuesday, when do
10 you want to do it?

11 MR. McBRIDE: My suggestion is that you
12 hear the prematurity as soon as you can hear it.

13 JUDGE NELSON: So that appears to be
14 Friday.

15 MR. McBRIDE: Friday or Monday. If Friday
16 interferes with the Tennessee case, then Monday
17 morning. I think we're --

18 JUDGE NELSON: They're already prepared to
19 go Friday afternoon, so I'd be taking you on Friday
20 afternoon.

21 MR. McBRIDE: Okay. All right, so I would
22 suggest you take that on Friday afternoon.

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1 JUDGE NELSON: I can do that.

2 MR. McBRIDE: Yes. And then we see where
3 we are. And meanwhile --

4 JUDGE NELSON: Let's assume that I -- at
5 the end of that, rule that discovery is not premature.

6 MR. McBRIDE: Correct.

7 JUDGE NELSON: Where are we then?

8 MR. McBRIDE: Well, then we are all trying
9 to respond as best we can by Tuesday, which I think is
10 the date that applies to just about every one of us
11 that got served late.

12 And then the Applicants will review those
13 responses and see if they want to come to Your Honor
14 for a ruling.

15 But meanwhile, you may -- as you indicated
16 earlier, you may be expecting something from me by way
17 of affidavit.

18 And I couldn't be trying to prepare an
19 affidavit in the meantime. I have two pleadings
20 tomorrow in another case. I've got other things to
21 do.

22 JUDGE NELSON: Maybe you don't need to do

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1 that work --

2 MR. McBRIDE: Right.

3 JUDGE NELSON: -- until you know -- well,
4 two things: 1) the fate of the prematurity argument -
5 -

6 MR. McBRIDE: Right.

7 JUDGE NELSON: -- and that you can know
8 Friday --

9 MR. McBRIDE: Right, right.

10 JUDGE NELSON: -- and 2) to what extent
11 the Applicants want to continue the fight.

12 MR. McBRIDE: Right. And let me point out
13 to Your Honor also that I've tried to get hold of my
14 client yesterday and this morning before this hearing
15 started, even though it's two hours earlier out there.

16 And I found out from his wife, whom I woke
17 up this morning, that he's in Wyoming and we can't
18 reach him.

19 And he has one staff person at the Utah
20 Mining Association. Now, I don't know how I'm
21 supposed to get him to do all of this.

22 JUDGE NELSON: So what you want to do then

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1 is go ahead and make the response that you would
2 otherwise make on March 12th, not have to bother with
3 me.

4 MR. McBRIDE: Yes.

5 JUDGE NELSON: Then leave it to the
6 discoverers to invoke a conference if they want.

7 MR. McBRIDE: Well, but I still need to be
8 heard once you sort out the prematurity argument on
9 Friday. I still need to be heard since my objections
10 are before you on this chilling effect problem --

11 JUDGE NELSON: I can't --

12 MR. McBRIDE: -- on the specific --

13 JUDGE NELSON: Unless the cases convert me
14 to something --

15 MR. McBRIDE: Right.

16 JUDGE NELSON: -- I have doubt whether on
17 this record I could rule your way.

18 MR. McBRIDE: I hear you. But if I could
19 put in an affidavit, it might change your mind,
20 right?J

21 JUDGE NELSON: There's no rule that says
22 you can't strengthen the case.

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1 MR. McBRIDE: Well, here's the problem.
2 Here's the problem. They asked an all-documents
3 request, and I say a request for all communications
4 between me and other parties in a proceeding calls for
5 an equally broad response. That's work product.

6 Now, I think Your Honor can rule on that,
7 quite respectfully. That's the -- the request was so
8 broad that we had to make this broad response.

9 JUDGE NELSON: Let's assume that every --
10 there's a box of papers and they are all indeed work
11 product. That doesn't get us home.

12 We then have a qualified privilege in
13 which we weight such things was the need for these
14 documents, why they can't get them elsewhere --

15 MR. McBRIDE: Right.

16 JUDGE NELSON: -- what burdens are
17 involved, to what extent the documents reflect the
18 lawyer's thoughts, comments, analyses and so forth.

19 MR. McBRIDE: Right.

20 JUDGE NELSON: We have work to do with
21 those documents.

22 MR. McBRIDE: None of which has to be done

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1 if we wait until March 29th to find out what evidence
2 we have filed to find out what any of this has to do
3 with anything.

4 JUDGE NELSON: That's the prematurity.
5 That's going to be Friday.

6 MR. McBRIDE: That's why I suggested that
7 be Friday. But in any event --

8 JUDGE NELSON: I'm trying to understand
9 what happens -- well, maybe I shouldn't worry about
10 what happens. I should just have everybody in Friday,
11 let the chips fall where they may --

12 MR. KILLORY: It may work -- consistent
13 with what Your Honor said about your schedule, until
14 Sunday

15 JUDGE NELSON: You know that I have Monday
16 and Tuesday free.

17 MR. LIVINGSTON: So Your Honor, what time
18 would we be here on Friday?

19 JUDGE NELSON: I have it set now at two
20 o'clock.

21 MR. LIVINGSTON: That's fine. Well, maybe

22 --

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1 JUDGE NELSON: I gave the pipeline the
2 option of whether they wanted the first part of the
3 day or the second, and they took the first.

4 MR. LIVINGSTON: But from what -- I gather
5 we'll be here then Friday on the prematurity as well
6 as on Mr. Lubel's other --

7 JUDGE NELSON: Mr. Lubel has some other
8 stuff.

9 MR. LIVINGSTON: -- some other matters
10 that will be up. Why don't we do that and then see
11 where we are?

12 But it seems to me that everybody is
13 working towards the same deadlines.

14 JUDGE NELSON: Yes, I think that we have
15 a consensus that the thing to do now is to rule on
16 this prematurity point on Friday.

17 So I'm going to defer any further ruling
18 on Mr. McBride's questions pending argument on the
19 prematurity motion, which will be held Friday at 2:00
20 p.m., along with Mr. Lubel's request.

21 And I will see you all Friday afternoon at
22 2:00 p.m.

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1 MR. McBRIDE: Thank you.

2 MR. LIVINGSTON: Thank you, Your Honor.

3 (Whereupon, the discovery conference
4 concluded at 11:26 a.m.)

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CERTIFICATE

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

Discovery Conference:
Union Pacific Corporation, et al.
-Control and Merger-
Southern Pacific Rail Corporation, et
al.

Before: Surface Transportation Board
Finance Docket No. 32760

Date: March 6, 1996

Place: Washington, DC

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

Mike Puleff