

INTERSTATE COMMERCE COMMISSION 03/08/96

FINANCE DOCKET # 32760

2041-2068 3.

1 transportation. What better way to show it than out
2 of the mouth of the enemy?

3 MR. HUT: So fact-dependent, Your Honor,
4 just one set of --

5 JUDGE NELSON: I'm granting 41. The
6 question is when and how and whether we narrow it.
7 Can we do anything about it? You're certainly
8 entitled to it, Mr. Livingston. Again we have the
9 problem of every trackage rights agreement.

10 MR. LIVINGSTON: Of course, we have
11 another request for the agreements themselves.

12 JUDGE NELSON: Mr. Norton, you're fairly
13 knowledgeable in the railroad business, aren't you?
14 Do you have any feel for whether particular trackage
15 rights agreements can be located that can narrow the
16 focus of this?

17 MR. NORTON: I can speak in the abstract.

18 JUDGE NELSON: In the abstract.

19 MR. NORTON: The request is focused on
20 instructions, guidelines, and policies, rather than
21 agreements themselves. So I don't think it presents
22 quite the problem that a large number of agreements

NEAL R. GROSS

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

1 would. And there may be provisions in particular
2 agreements that would be relevant here, but that's not
3 what this is looking for.

4 MR. LIVINGSTON: Again, Your Honor, I
5 would say that they should make a good faith response.
6 Now, we don't know how they operate their railroad.

7 JUDGE NELSON: I'm going to grant 41 as of
8 March 12th.

9 MR. HUT: Again subject to objections,
10 Your Honor?

11 JUDGE NELSON: Of course. You always have
12 objections. There again the only one that seems to
13 make any sense to me is burden. I see relevance. I
14 don't see privilege.

15 MR. HUT: And it may go back on relevance,
16 but I at least reserve that right.

17 JUDGE NELSON: The issue is not trackage
18 rights work.

19 MR. HUT: But the question of how they
20 work elsewhere is so fact-dependent that it's just no
21 --

22 JUDGE NELSON: Does Conrail take a

NEAL R. GROSS

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

1 position in this case about the meaningfulness of the
2 trackage rights agreements with BN-Santa Fe?

3 MR. HUT: With the BN-Santa Fe.

4 JUDGE NELSON: Yes.

5 MR. HUT: They are so fact-dependent they
6 happen to have to do with whether they given the
7 structure of the roots, given the infrastructure
8 available will provide --

9 JUDGE NELSON: Well, that may be. And it
10 may be up to the applicants to try to find one that
11 makes an analogy. That's their job, not yours. And
12 my leaning is that in the end you're going to have to
13 turn over 41. So you might as well start the task.

14 MR. HUT: Okay, Your Honor.

15 JUDGE NELSON: Get the wheels going on it.

16 All right. Forty-two, same kind of thing.
17 Let's hear what your response is on March 12th. This
18 goes to how you deal with the trackage rights.

19 Forty-three is Phase 2. What's SSW?

20 MR. LIVINGSTON: It's St. Louis South
21 Western. It's a railroad, a part of the SP system
22 sometimes called the Cotton Belt Railroad. It's the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 part of the SP that runs generally from El Paso
2 eastward through Texas and up to St. Louis.

3 JUDGE NELSON: Phase 2.

4 MR. LIVINGSTON: It is the part that
5 Conrail has talked about buying.

6 JUDGE NELSON: Phase 2. We'll see what
7 they say in their statement.

8 Number 45.

9 MR. HUT: This is beyond question
10 irrelevant, Your Honor. I have no idea what --

11 JUDGE NELSON: What does this go to?

12 MR. LIVINGSTON: This goes to the quest. on
13 of if they make a purchase, whether they, in fact, can
14 operate this Cotton Belt line.

15 JUDGE NELSON: Phase 2. Forty-six I guess
16 we should look at in the context of whatever their
17 position is. That seems to me Phase 2 material if
18 that. Forty-seven the same thing.

19 Forty-eight. I don't know what 48 means.
20 Can you help me with that? "Closures of or surcharges
21 on interline routes by Conrail." What is it? And
22 what's it got to do with the case?

NEAL R. GROSS

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

1 MR. ROSENTHAL: That has to do with how
2 Conrail could work with other railroads if they get
3 the rights that they may be seeking.

4 JUDGE NELSON: Phase 2. Phase 2 and with
5 the qualification as pertaining to the position you
6 take in the filing on March 29.

7 I don't know enough about 49, but I'll bet
8 if I ask, the answer is the same that that may pertain
9 to some position they're going to take. So that's
10 Phase 2.

11 Similarly, Number 50 is Phase 2. Number
12 51 is Phase 2. Number 52 is for Phase 2. All of
13 these will be reviewed in a context of Conrail's
14 position as filed on April 29th.

15 Fifty-three.

16 MR. McBRIDE: I think you meant March 29,
17 Your Honor.

18 JUDGE NELSON: March 29 is correct. Item
19 53 by its very terms looks to be Phase 2. And I so
20 rule. Fifty-four. What is the presentation in
21 Marmaduke, Arkansas January 17th, 1996? What are you
22 seeking there? What do we know about that here?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 MR. LIVINGSTON: I think it was a
2 presentation to shippers. Mr. Hut presumably knows
3 more.

4 MR. HUT: Mr. Hut has never heard of
5 Marmaduke, Arkansas.

6 JUDGE NELSON: You don't know what you're
7 missing, then.

8 MR. LIVINGSTON: They've had this request
9 for some time.

10 MR. HUT: I've read it in your papers, but
11 I've never heard it spoken before now.

12 JUDGE NELSON: We granted before, didn't
13 we, materials that they may have used to try to
14 solicit shippers? Is that Phase 1 or Phase 2? One?
15 Okay. This is Phase 1 material. This seems to be
16 readily discoverable without much great effort. And
17 you'll produce this one on March 12th.

18 Number 55.

19 MR. HUT: If again we place that in issue
20 in our papers, that seems to me we will provide work
21 papers that support those claims if we make the
22 material on April 1 in our depository. And I would

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 suggest that's the way to handle that.

2 JUDGE NELSON: Well, does your position
3 involve something going in or out of Marmaduke,
4 Arkansas?

5 MR. HUT: That's 55.

6 JUDGE NELSON: Oh, we're on 55?

7 MR. HUT: Yes.

8 MR. LIVINGSTON: Fairly narrow request.

9 JUDGE NELSON: Yes, that's just back up
10 these assertions. So that seems to me easy.

11 MR. HUT: Well, but the assertions may not
12 be germane to our filing was my only observation.

13 JUDGE NELSON: So what? They're entitled
14 to show the Board that you go around the country
15 making statements about them which you cannot back up
16 if that's what the discovery produces. That's fair.
17 I'm granting 55.

18 MR. LIVINGSTON: March 12th.

19 JUDGE NELSON: And that seems easy to me.
20 Yes, March 12th.

21 Number 56.

22 MR. HUT: That's that same thing.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 JUDGE NELSON: We had Hagen before.

2 MR. HUT: You ruled it Phase 2.

3 JUDGE NELSON: Phase 2. And that
4 concludes it.

5 So next we have to work out what the dates
6 are in Phase 2. How were those dates that I
7 suggested?

8 MR. HUT: It works fine for us, Your
9 Honor.

10 JUDGE NELSON: Well, it's the applicants
11 that have to field a squeeze. I can't do any more for
12 you than the Commission's order lets me do. Do you
13 have any suggestion as to how to make this better from
14 your point of view?

15 MR. LIVINGSTON: What are the dates, April
16 3?

17 JUDGE NELSON: I had an April 3 for the
18 redrawn interrogatories. And I do want to urge you to
19 focus them. There's two kinds of focusing you can do.
20 One is on the position they take. And two is in
21 general terms.

22 Some of this stuff is very broad. What I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 think is that you're asking sometimes for something
2 that you suspect you know what it is, but you're
3 afraid to make a narrower request for fear of
4 narrowing yourself out of it. I've been in a position
5 of litigation. But the more narrow you can describe
6 it, the better.

7 So my date would be April 3rd. That was
8 to give you -- in your hypothetical in your letter,
9 you had yourself starting up on April 1. I thought
10 you need a little more time than that to review the
11 filings of March 29.

12 So that's why I suggested April 3rd. If
13 you want to do it sooner, I'll make the production be
14 sooner. And then you'll have the materials a day or
15 so earlier.

16 Give me a date that you want to file
17 interrogatories.

18 MR. LIVINGSTON: Why don't we suggest it
19 in this phase? I have no idea what we're going to get
20 on the 29th. I assume we will get a lot of paper if
21 that's the due date. We don't their responses be due
22 five days after we serve.

NEAL R. GROSS

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

1 JUDGE NELSON: Whenever that may be.

2 MR. LIVINGSTON: We could do it on April
3 3rd and they'll be due on April 8th. If we can do it
4 on April 1st, they would have five days.

5 JUDGE NELSON: Let's give them five
6 working days.

7 MR. LIVINGSTON: Well, now you're talking
8 -- well, the difficulty, Your Honor, and the reason we
9 oppose this Phase 2 or one of the reasons is that
10 what's going to happen here is we're going to submit
11 reformulated requests. We're not going to get any --

12 JUDGE NELSON: Well, you don't have to.
13 You can stick by your guns on some of them if you
14 want.

15 MR. LIVINGSTON: Indeed we will.

16 JUDGE NELSON: Then we'll spend time like
17 we're doing today, and we'll come out with something.

18 MR. LIVINGSTON: We'll serve them. Seven
19 days later we won't get documents. We'll get
20 objections. We won't get file searches. We'll get
21 nothing. We'll be in here two days later saying,
22 "Judge, this is no good."

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 JUDGE NELSON: "We got nothing."

2 MR. LIVINGSTON: "We got nothing."

3 JUDGE NELSON: How do we stake that out?

4 MR. LIVINGSTON: And then you're going to
5 say, "This is no good."

6 JUDGE NELSON: Give me a suggestion.

7 MR. LIVINGSTON: But then they're going to
8 say after you order them they'll search the files.
9 But then they're going to say, "We need a week to do
10 that." And by then time's up. Clock rings.

11 Our evidence is due on April 29th. This
12 schedule is such that we can't --

13 JUDGE NELSON: If you're arguing for the
14 original position that everything should be done now
15 by March 12th, I'm not going to grant that. So let's
16 save our time.

17 MR. LIVINGSTON: Okay. I just want to
18 make sure I've made my record on that issue.

19 JUDGE NELSON: Perfectly clear. Your
20 letters to me are clear. The problem is caused by the
21 Commission, not you, not me, nobody here. It's the
22 Commission that set this case into a box. And I just

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 want to try to do what we can within that time frame.

2 MR. LIVINGSTON: One suggestion I have is
3 this, and that is that they should begin now
4 collecting the documents. Mr. Hut knew the answers to
5 almost none of the questions. How many trackage
6 rights agreements do you have? Where are they?

7 JUDGE NELSON: Give me some suggestions
8 with reference to dates, --

9 MR. LIVINGSTON: They should now --

10 JUDGE NELSON: -- actual dates that you
11 want things done. And I'm open to suggestions.

12 MR. LIVINGSTON: How about that they
13 provide us a statement with respect to all of these
14 Phase 2 and April 1 materials, a description of what
15 they are going to produce?

16 They don't have to produce it. They don't
17 have to actually give us the documents. They don't
18 have to give us the trackage rights agreements, but
19 they tell us now or very soon on the one, the request
20 for trackage rights agreements, "We're going to give
21 you those on April 10th," or whatever the day is,
22 "five days after you serve the reformulated letter."

NEAL R. GROSS

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

(202) 234-4433

(202) 234-4433

1 JUDGE NELSON: This seems to me another
2 round of nothing.

3 MR. LIVINGSTON: That way we will know,
4 Your Honor, if what we're going to get on April 10th
5 is a stiff arm.

6 JUDGE NELSON: The ones that I --

7 MR. LIVINGSTON: If that's what we're
8 going to get, we need to know that now.

9 JUDGE NELSON: The ones that I put for
10 Phase 2 seem to me to lend themselves to analysis in
11 light of whatever Conrail's filing is. We're not
12 going to know that until the 29th.

13 I mean, if they come in then and there's
14 some hardball refusal to give you any documents, I'm
15 going to order you to give them the documents that
16 pertain to their position.

17 MR. LIVINGSTON: But it will be too late.

18 JUDGE NELSON: We're seeing that already.

19 MR. LIVINGSTON: It will be too late. The
20 game will be over.

21 JUDGE NELSON: Give me some dates that
22 will move it up.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 MR. LIVINGSTON: The only way to move this
2 up is to find out now --

3 JUDGE NELSON: Would you be ready to file
4 your -- we're not going to find anything now. I've
5 considered that. I've rejected it. I've read your
6 letters. I've heard your argument. I feel we're in
7 a bind put by the Commission here, and I'm trying to
8 do the best we can without it.

9 MR. LIVINGSTON: Well, then another
10 possibility would be this, Your Honor, that if --

11 JUDGE NELSON: When I was a young man at
12 Fort Benning, Georgia, there were times when the
13 commander would say, "Lieutenant, stop fighting the
14 problem." Mr. Livingston, that's where we are now.
15 My suggestion is not to fight the problem. Let's try
16 to solve it. And I'm looking for some creative
17 solutions that help.

18 Could you be ready to go and get your
19 interrogatories out by April 1? It gives you only a
20 weekend to read the filings. I thought that was too
21 short.

22 MR. LIVINGSTON: I don't know. I hope we

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 could do it as early as possible. That's why I
2 suggested whenever we get it in, they respond in five
3 days.

4 JUDGE NELSON: You would have a motivation
5 to do it as soon as possible so you get this response
6 in five.

7 MR. LIVINGSTON: That's correct.

8 JUDGE NELSON: Okay. Why don't we do
9 that, then?

10 MR. LIVINGSTON: Well, I think we've done
11 that to say we'll do it as soon as we can and whenever
12 we get it done, they've got five days.

13 JUDGE NELSON: Let's make it five calendar
14 days, then, instead of working days.

15 MR. LIVINGSTON: Can we have a rule on the
16 following lines, Your Honor, that if they're going to
17 object on relevance, they collect the documents so
18 that if Your Honor rules, "Get out of here on
19 relevance," rejects the relevance objection, --

20 JUDGE NELSON: Let's go --

21 MR. LIVINGSTON: -- the documents are in
22 this room ready to be produced?

NEAL R. GROSS

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

1 JUDGE NELSON: Let's go one step at a
2 time. The first step will be that the reformed
3 interrogatories -- I hope they'll be reformed -- will
4 be served whenever the railroad feels like serving
5 them. Service shall mean in-hand delivery to counsel
6 prior to 5:00 p.m. on the day in question.

7 Five calendar days thereafter the Conrail
8 Company will respond. And now your suggestion was
9 what in terms of the response?

10 MR. LIVINGSTON: When they respond, if
11 they assert a privilege objection or a relevance
12 objection, either one, that they have the documents
13 collected, they don't wait. We may challenge those
14 rules. So that if Your Honor rules on April --

15 JUDGE NELSON: We'll have the documents
16 here to look at, in other words?

17 MR. LIVINGSTON: We have the privilege and
18 the relevance objection documents collected and in
19 this room so that they can be turned over the instant
20 Your Honor --

21 JUDGE NELSON: Sounds good to me. That
22 won't work for the burden objections, which by their

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 very nature will not have produced documents.

2 MR. LIVINGSTON: And as to that, they
3 should not be permitted to say "Burdensome" and
4 produce nothing. They should be required --

5 JUDGE NELSON: I think I've suggested that
6 already that there's got to be some detailed showing
7 as to what's involved, what files, where, how many
8 people, precisely what the burden is.

9 MR. LIVINGSTON: And they've got to
10 produce everything they can get their hands on that is
11 reasonable within what's been requested. If it's --

12 JUDGE NELSON: Now let's take a date when
13 we're going to come in here with the material should
14 in camera inspection be necessary and so forth. How
15 about April 12th as the outside date for all of this?
16 Do you want it sooner? You want April 11th?

17 MR. LIVINGSTON: Does Your Honor have a
18 calendar? I don't.

19 JUDGE NELSON: I do.

20 MR. LIVINGSTON: I just wanted to know
21 what the day of the week all --

22 JUDGE NELSON: Monday is the 8th.

NEAL R. GROSS

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

1 MR. LIVINGSTON: What's the 29th?

2 JUDGE NELSON: Twenty-ninth of March is a
3 Friday. Twenty-ninth of April is a Monday. So you
4 have that final weekend to prepare your papers.

5 MR. LIVINGSTON: Monday after the 29th is
6 what?

7 JUDGE NELSON: Is May --

8 MR. LIVINGSTON: Or is April?

9 MR. HUT: April 1.

10 MR. LIVINGSTON: No, no. The week after
11 would be April 8th?

12 MR. HUT: April 8th.

13 MR. LIVINGSTON: Is a Monday?

14 MR. HUT: Is a Monday.

15 MR. LIVINGSTON: Well, we'd certainly want
16 no later than the 12th, Friday.

17 JUDGE NELSON: That's what I'm thinking.
18 At the outside it should be Friday.

19 MR. LIVINGSTON: And they should be here
20 with the documents.

21 JUDGE NELSON: Yes.

22 MR. LIVINGSTON: In this room.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 JUDGE NELSON: Or a demonstration as to
2 why they can't.

3 MR. HUT: Subject to burdensome
4 objections.

5 JUDGE NELSON: Yes, a detailed description
6 of the alleged burden.

7 MR. LIVINGSTON: But, Your Honor, even
8 when they're going to object to burden, if they say,
9 "You're asking us to go everywhere," they should be
10 required to follow the principles that have been set
11 down in this case.

12 For instance, we objected on burden. And
13 we said, "We're only going to search the vice
14 presidents and above, the marketing department."
15 That's the kind of principle they should be following.

16 JUDGE NELSON: Well, if they are smart
17 enough to come in with constructive suggestions like
18 that, they might find a willing buyer right here. If
19 they want to come in and say, "There's a burden, and
20 we've got nothing," if they come in and say, "This is
21 very burdensome, but here's what we've done and here's
22 what we've got, here's what we've turned over,"

NEAL R. GROSS

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

(202) 234-4433

(202) 234-4433

1 they're in a much better posture.

2 MR. HUT: Your Honor?

3 JUDGE NELSON: But they know that.
4 They're sophisticated litigators, --

5 MR. LIVINGSTON: The risk we're running --

6 JUDGE NELSON: -- as you are.

7 MR. LIVINGSTON: The risk we run is if
8 they take the burdensome approach, we'll never get the
9 documents in time. Indeed even on April 12th, we're
10 talking about filing our applicants two weeks later.

11 MR. HUT: Mr. Livingston has assumed
12 throughout this that we're going to stiff arm them,
13 we're not going to negotiate in good faith. I think
14 we need to build in some time, frankly, Your Honor,
15 for some sort of meet and confer process. That's
16 standard. And we are happy to sit down and try to
17 work out all differences with them.

18 I would also respectfully request, Your
19 Honor, that if five business days doesn't work, that
20 we split the difference and do six calendar days
21 because five calendar days is really awfully short.

22 JUDGE NELSON: All right. Six calendar

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20006

1 days. So six calendar days after you receive these
2 requests, you'll respond to them.

3 MR. LIVINGSTON: Six calendar days?

4 JUDGE NELSON: Calendar days. Then on
5 April the 12th, on April the 12th, everyone comes in
6 here. And you have ready for in camera inspection
7 such documents that you've got that you don't want to
8 produce.

9 And you're further instructed that when
10 you make your response six calendar days after the
11 applicant serves the requests, if those responses
12 invoke alleged burdens, the burdens must be detailed
13 as to time, money, physical limitations, geography, or
14 any other factors making the alleged burden.

15 You are encouraged while asserting such
16 burdens to make meaningful production of such
17 documents in such efficient way as you can get hold of
18 them by yourself narrowing them or putting them in
19 groups or suggesting a way to do it.

20 MR. HUT: We expect to try to do that.

21 JUDGE NELSON: Any other questions?

22 MR. HUT: Only one question. And that is:

NEAL R. GROSS

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

1 Do you want to build in at least some opportunity for
2 a meet and confer so that the applicants and we can
3 attempt to resolve --

4 JUDGE NELSON: I assume that all along
5 that will be going on. Do you want me to mandate a --

6 MR. HUT: I wouldn't if, for example, they
7 served us on the 4th or the 5th and 5 calendar days
8 later on the 11th we responded. It doesn't build in
9 very much time for sitting --

10 JUDGE NELSON: Well, that's their choice.
11 If they want to force the case into that mold, then
12 they can do it by virtue of the machinery. The timing
13 will be in their --

14 MR. LIVINGSTON: I would also say, Your
15 Honor, that we are prepared to discuss things now. We
16 don't need to wait to meet and confer. They've got
17 our discovery.

18 JUDGE NELSON: That's fine.

19 MR. LIVINGSTON: They've got the Phase 2.
20 If they want to call us up tomorrow and say --

21 JUDGE NELSON: You have some idea of
22 what's going on and --

NEAL R. GROSS

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

1 MR. LIVINGSTON: And they can start these
2 searches now. We can work these things out now.
3 We're on board for doing that.

4 JUDGE NELSON: You all should know from
5 dealing with me that when I start to hear compromises
6 and solutions like that I tend to adopt them. I'm not
7 an all or nothing person.

8 MR. McBRIDE: I've got to --

9 JUDGE NELSON: So I want to encourage it.

10 MR. McBRIDE: -- tonight, but if Your
11 Honor would give me two minutes whenever it's
12 appropriate.

13 JUDGE NELSON: With what issue?

14 MR. McBRIDE: I offered to answer some
15 questions and some requests. I'm in a different
16 category. I'd like to be heard if they're agreeable
17 so I don't have to come back Monday.

18 JUDGE NELSON: If I've made these rulings
19 with regard to the Conrail people, everyone else
20 should be guided by these rulings. And so should the
21 applicant.

22 It makes no sense for them to insist on

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 some other party to answer the substantially similar
2 question that I've already ruled would be in Phase 2,
3 for example, for Conrail, to turn around and ask
4 somebody else's client to answer that very same
5 question on March 12th. I'm suggesting don't do that.

6 Work out solutions to all of your other
7 problems that are congruent with the rulings I've made
8 today. If you then need to see me on Monday, I'll be
9 around. And you just call up, and we'll have to make
10 arrangements how to get the reporter here and so
11 forth.

12 MR. LIVINGSTON: At the moment --

13 JUDGE NELSON: Why is that so difficult?

14 MR. LIVINGSTON: Nothing is scheduled for
15 Monday at the moment. So I don't --

16 JUDGE NELSON: That's fine.

17 MR. LIVINGSTON: -- think anybody will be
18 here at 9:00. And I'd be happy to work with WSC on
19 their issues. This First Amendment issue has yet to
20 be resolved.

21 JUDGE NELSON: Monday I'm going to put
22 down UP-SP. And I'm available to be on call. The

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

(202) 234-4433

(202) 234-4433

1 only problem we'll have is how to get the reporter.
2 I don't know how the service works.

3 MR. LIVINGSTON: Your Honor, have you
4 deferred --

5 JUDGE NELSON: Off the record for a
6 moment.

7 (Whereupon, the foregoing matter went off
8 the record at 5:58 p.m. and went back on
9 the record at 5:59 p.m.)

10 JUDGE NELSON: You've insisted on
11 production according to the original schedule.

12 MR. LIVINGSTON: That's correct.

13 JUDGE NELSON: You've been denied due
14 process of law, every other right guaranteed by the
15 U.S. Constitution, the Interstate Commerce Act, and
16 any other holy writ. And the record will show that
17 you've made each and every one of those claims.

18 And I encourage you, as I have throughout
19 the case, if someone would get us some guidance from
20 the Surface Transportation Board, we'd be delighted to
21 follow it.

22 MR. STEEL: Your Honor, one --

NEAL R. GROSS

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

1 JUDGE NELSON: If the Board would loosen
2 the schedule as long as we're on the record, it would
3 make this difficult discovery go a little better.

4 MR. STEEL: One clarification. The Phase
5 2 dates, does that apply to the six calendar days that
6 would apply to discovery that, for instance, my
7 client, Burlington Northern-Santa Fe, would ask of
8 other people as well? Is that correct?

9 JUDGE NELSON: I don't understand the
10 question.

11 MR. STEEL: If after the March 29th
12 filings, my clients, Burlington Northern and Santa Fe,
13 --

14 JUDGE NELSON: Yes, sir.

15 MR. STEEL: -- should serve discovery --

16 JUDGE NELSON: Yes.

17 MR. STEEL: -- on some of these other
18 people, will we have the same six-day response time?
19 That will apply to all discovery dates?

20 JUDGE NELSON: I don't know. I'm not
21 going to rule on some discovery I haven't even seen.
22 I don't know what you have in mind, --

NEAL R. GROSS

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

1 MR. STEEL: I don't know.

2 JUDGE NELSON: -- what the positions are.

3 MR. STEEL: It depends on what they say.

4 And we may have discovery --

5 JUDGE NELSON: My ruling is I'm sorry, I
6 can't give you an advisory opinion.

7 Anything else?

8 MR. HUT: Thank you, Your Honor, for
9 coming on such short notice.

10 JUDGE NELSON: I will be around Monday.
11 I don't know how we'll work this out mechanically, but
12 if you need me Monday, we'll try to do something.

13 (Whereupon, the foregoing matter was
14 concluded at 6:00 p.m.)

15
16
17
18
19
20
21
22

NEAL R. GROSS

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

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 8, 1996

Place: Washington, DC

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

Walter R. Rulff