

INTERSTATE COMMERCE COMMISSION 03/08/96

FINANCE DOCKET # 32760 1981-2040 2+

1 on April 1?

2 MR. LIVINGSTON: Your Honor, if they have  
3 documents that analyze conditions, those are relevant.  
4 This is a large railroad. They're undoubtedly done  
5 internal analyses. Why aren't those being turned  
6 over? We emptied our files.

7 JUDGE NELSON: Phase 2. Phase 1 will be  
8 a turnover of the documents relating to the conditions  
9 that this particular railroad is seeking. The broader  
10 sweep is for Phase 2, where I hope this can be pared  
11 done.

12 MR. HUT: And for Phase 1, is it  
13 satisfactory to produce them on April 1, the --

14 JUDGE NELSON: That's fine.

15 MR. HUT: Thank you.

16 JUDGE NELSON: I again that I'm not happy  
17 with the broad nature of this language. If these  
18 persist in Phase 2, that's not going to help you any.  
19 I had hoped in Phase 2 that we see some new ones,  
20 sharpened in light of whatever their filings are.

21 MR. LIVINGSTON: Your Honor, we, the  
22 applicants, responded to requests like this.

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1982

1 JUDGE NELSON: I'm not impressed with that  
2 argument. It's not a case for finger pointing now.  
3 Number 9.

4 MR. LIVINGSTON: It's not a question of  
5 finger pointing. It's a question of our getting our  
6 hands on relevant documentation in the case. As it  
7 now stands, we're going to be exposed to discovery and  
8 they're not to the same extent if they don't have to  
9 answer --

10 JUDGE NELSON: Well, we'll talk about any  
11 protection you may feel you need.

12 Number 9. Oh, that could be seeking the  
13 world. Let's deal with that in Phase 2 if we have to  
14 deal with it in those terms. Phase 2 if it persists,  
15 strikes me as much too wide. That was as to 10. My  
16 comment as to 11, Phase 2.

17 What's 12 driving at? Conrail has  
18 materials about the financial position or prospects of  
19 SP? Assume they do. What does that get you?

20 MR. LIVINGSTON: That's an issue that's  
21 been raised in this case as to the financial viability  
22 and the financial position of the Southern Pacific.

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1983

1 Conrail has probably done studies of that. They are  
2 taking public positions. We want to see what they  
3 have in --

4 JUDGE NELSON: Let's see in the filing on  
5 March 29th if there's some position about the  
6 financial position of SP. And then we may want to  
7 look at that discovery. That's Phase 2.

8 Thirteen, Phase 2. That gets us into this  
9 joint privilege that I hope to either avoid resolving  
10 -- no. That one I don't mind resolving. That's a  
11 non-constitutional ground. But I think it's best  
12 resolved in the context of a specific intention.

13 Fourteen. Mr. Hut, it strikes me that  
14 there may be an argument for the stuff that you have  
15 used in your attempt to solicit support from shippers  
16 provided we don't get into the alleged constitutional  
17 issues for the --

18 MR. HUT: That's why we're there.

19 JUDGE NELSON: How does that happen?

20 MR. HUT: Certainly a --

21 JUDGE NELSON: If a railroad writes to a  
22 shipper, what constitutional issue is involved there?

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1984

1 MR. HUT: With respect to a shipper, I'm  
2 not sure that I could suggest one, Your Honor. I was  
3 speaking to the public officials.

4 JUDGE NELSON: No. I'm first on the  
5 shippers. I think they've got the best case. Now,  
6 you're not exactly like they are. They came in  
7 holding out 2,000 shippers. And so they opened that  
8 issue up.

9 MR. HUT: As to shippers --

10 JUDGE NELSON: But I still think there  
11 ought to be some discovery of your efforts to seek  
12 support from shippers.

13 MR. HUT: We are going to present some  
14 shipper support letters, Your Honor. And I know or I  
15 would think that with our work papers we will present  
16 in packets --

17 JUDGE NELSON: The question is: Should  
18 that be Phase 1 or Phase 2?

19 MR. HUT: We'd be happy to give it to them  
20 on April 1, Your Honor.

21 JUDGE NELSON: All right.

22 MR. HUT: I would suggest that --

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1985

1 JUDGE NELSON: So insofar as Number 14  
2 seeks materials used to seek support from shippers,  
3 that will be produced on April 1.

4 MR. LIVINGSTON: Your Honor, they have  
5 already been beating the bushes for shippers.  
6 Shippers have filed statements to --

7 JUDGE NELSON: You're going to get all of  
8 this stuff on April 1.

9 With respect to public officials, that's  
10 Phase 2. With respect to the railroads who are not  
11 parties to this case, I see no problems. Are there  
12 any such communications.

13 MR. HUT: I don't know of any, Your Honor,  
14 but I don't want to represent one way or the other  
15 without having first checked. We haven't done that.

16 JUDGE NELSON: So that could be in Phase  
17 1 or on April 1 insofar as it involves railroads who  
18 are not parties to this merger proceeding. Railroads  
19 who are parties we get into this joint fence business.  
20 And I want to litigate that in Phase 2. The word  
21 "others" I'll construe as meaning any nongovernmental  
22 nonparty and direct that that be produced on April 1.

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1           Number 15, Phase 2 insofar as it deals  
2       with   Department   of   Justice,   Department   of  
3       Transportation, state governors, attorney generals,  
4       public utility commission.   What about foreign  
5       governments,   Mr.   McBride?       How   are   these  
6       communications wrapped up in any constitutional  
7       privilege?

8           MR. McBRIDE:   My three days of research  
9       didn't get into that area, Your Honor.   And I make no  
10      claim on that.   I did not make that argument to you.  
11      I know of no communications by my client.

12          JUDGE NELSON:   All right.   I'm going to  
13      direct production.   And we're interested in this  
14      Mexican stuff because there are issues surrounding it.  
15      So if you've got any presentations, letters,  
16      memoranda, white papers, or other documents sent to  
17      any Mexican government official, you're going to have  
18      to produce them.   And I say that's Phase 1.

19          Any other government official I construe  
20      as meaning official of some foreign country.   Is that  
21      you mean there, other foreign country?

22          MR. LIVINGSTON:   It could be a state

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1 government or a federal government official.

2 JUDGE NELSON: Okay. State or federal is  
3 for Phase 2. Papers sent or given to any security  
4 analyst relating to the merger. What do you say? Is  
5 that Phase 1 or Phase 2?

6 MR. HUT: That's Phase 2. I wouldn't even  
7 know how to go about -- I guess if ordered, I would,  
8 of course, go about trying to find out how to do it.  
9 I don't know that there have been any security  
10 analysts or bond-rating agencies.

11 JUDGE NELSON: Well, there's a whole  
12 string there, consultant, financial advisers.

13 MR. HUT: Consultants, financial advisers,  
14 analysts, I assume so. Chamber of Commerce and  
15 shipper or trade organizations get into the  
16 associational questions. I would think that those  
17 would be for April 1.

18 JUDGE NELSON: On its face and not having  
19 heard any arguments to the contrary from you, I see  
20 nothing privileged there. I mean, unless there's some  
21 work product, there may be some burden questions of  
22 finding them. But on their face I see no reason why

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1988

1 that's not proper discovery.

2 MR. LIVINGSTON: Of course it's proper  
3 discovery. If he gave a submission to the security  
4 analyst saying, "Well" --

5 JUDGE NELSON: You know, sometimes I must  
6 go with the firm. I'll make a ruling Mr. Roach's way,  
7 and he'll keep talking. And then I say to him, "Now,  
8 Mr. Roach, I just made a ruling for you."

9 MR. LIVINGSTON: I may have misunderstood.

10 JUDGE NELSON: Mr. Livingston, I'm in the  
11 course of deciding if you're entitled to these  
12 materials subject to any privileges or any questions  
13 of working out undue burden problems. The question  
14 is: Can they be in Phase 1 or 2?

15 On their face they look large to me and  
16 just by sheer size would be more appropriate for Phase  
17 2 unless you've got a limitation you want to suggest  
18 that we can have them do something in Phase 1.

19 Of these various addresses, can you pick  
20 out one or two that might be appropriate for a more  
21 immediate search?

22 MR. LIVINGSTON: Well, we think they're

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1989

1 all important. The federal government officials and  
2 the --

3 JUDGE NELSON: I've already ruled that's  
4 for Phase 2.

5 MR. LIVINGSTON: And the security --

6 JUDGE NELSON: Start with the words  
7 "security analyst."

8 MR. LIVINGSTON: Well, certainly the  
9 security analyst and the other financial consultants,  
10 financial advisers, investment bankers, people that  
11 they are dealing with for money reasons and are  
12 telling those people what they think the impact of the  
13 merger will be on Conrail or on --

14 JUDGE NELSON: Do you think you could do  
15 that in Phase 1 limited to --

16 MR. HUT: I'm not sure of the elements of  
17 the impact on Conrail, but the answer is subject to  
18 burden and relevance objections, we can --

19 JUDGE NELSON: We'll do the financial  
20 addresses on April 1, is it? And we'll leave the  
21 others --

22 MR. LIVINGSTON: Why isn't that due on

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1990

1 March 12th, which is the normal due date? That's the  
2 day we're responding to. We got 150 requests on  
3 February 26th. We're responding on Tuesday. They've  
4 got 56 or 70 requests. Why are they waiting until  
5 April 1?

6 JUDGE NELSON: That one seems to me very  
7 difficult to do. Let's see. This is March -- what's  
8 today's date? Eighth? They're going to find all of  
9 that stuff in two days?

10 MR. LIVINGSTON: We didn't serve this  
11 today. We served it. They had 15 days, just like we  
12 have 15 days.

13 JUDGE NELSON: As a practical matter, you  
14 don't want the answer they're going to give you on  
15 March 12th, which is going to be, "We can't find  
16 anything" or "We've made one search, and we found the  
17 following memorandum." You want a search here. You  
18 want these materials.

19 MR. LIVINGSTON: Of course I want a  
20 search. And I want whatever they have to --

21 JUDGE NELSON: If you want to press for a  
22 response by the 12th, then you'll get such responses

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1991

1 as they can give you by the 12th.

2 MR. LIVINGSTON: Well, I assume that --

3 JUDGE NELSON: Do you want that?

4 MR. LIVINGSTON: I assume they will give  
5 me a good faith response. And that's what I'm looking  
6 for here: a good faith response.

7 JUDGE NELSON: They do the best they can  
8 with what they've got in terms of the materials and  
9 the time.

10 So let's see what you can do by March the  
11 12th with regard to these financial addressees. Now,  
12 that excludes the Chamber of Commerce or the shipper  
13 or trade organizations. We'll put them off for Phase  
14 2.

15 Number 16. Isn't that covered by 15?

16 MR. LIVINGSTON: No. It --

17 JUDGE NELSON: Oh, no. Notes of meetings  
18 might be different from -- well, I'm going to make the  
19 same ruling on 16 that I've made on 15. Let's see if  
20 we can summarize what it is, which is that any of the  
21 communications with governmental officials are for  
22 Phase 2 as are the matter of Chambers of Commerce or

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1992

1 shipper or trade organizations relating to the merger.

2 I am ordering production with regard to  
3 the communications to any Mexican government official  
4 by April 1 and by March 12th whatever you can tell the  
5 applicants about your communication with these  
6 financial recipients.

7 Are we clear on that?

8 MR. HUT: Yes, sir.

9 JUDGE NELSON: All right. Seventeen. 17A  
10 has two parts. Do you know anything about your  
11 documents relating to shipper surveys or interviews?

12 MR. HUT: I do not, Your Honor. If --

13 JUDGE NELSON: That seems like the kind of  
14 thing that if it exists, you could get at pretty  
15 readily.

16 MR. HUT: It's probably a discrete --

17 JUDGE NELSON: Yes.

18 MR. HUT: -- set of papers.

19 JUDGE NELSON: You can find out if there  
20 either is such a thing or isn't.

21 MR. HUT: Yes. There may be a question  
22 here as to relevance because it's not clear to me what

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1993

1 they may --

2 JUDGE NELSON: So that is what I think  
3 about 17A. Produce that. See, there are two pieces  
4 in A, one dealing with what they think of the merger.  
5 And the other is what they think of possible  
6 conditions.

7 It makes no sense to break those two  
8 because you've got to conduct the same search to find  
9 the so-called surveys. So I'm going to rule as to 17A  
10 that they be turned over on April 1 in conjunction  
11 with your pressing for some particular condition.

12 17B I am going to deny as overly broad at  
13 any time. Eighteen. Help explain this one a little  
14 bit to me. Give me a hypothetical of what kind of  
15 transaction we're talking about here.

16 MR. LIVINGSTON: If they are in the  
17 business or they have said they want to purchase  
18 lines, if they have done studies on that of what it is  
19 they want to purchase and what they're willing to pay  
20 or what they think the value is, they'll produce that.

21 JUDGE NELSON: Phase 2. Nineteen. How  
22 would Conrail have documents relating to the trackage

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1994

1 rights compensation for the BN-Santa Fe people? I  
2 don't follow that one. They don't pay that money.

3 MR. LIVINGSTON: It's compensation for the  
4 lines in question or any other lines that might be --  
5 let's say they've done a study that they want trackage  
6 rights over the same lines or made any other kind of  
7 study.

8 If they don't have any documents, they  
9 don't have any documents. If they have documents,  
10 we'd like to have them produced.

11 JUDGE NELSON: This means the trackage  
12 rights compensation they would have sought had they  
13 obtained trackage rights over certain lines that are  
14 in this case?

15 MR. LIVINGSTON: Well, not just what they  
16 might have sought. Any. They may have done an  
17 analysis of what's an appropriate compensation for a  
18 particular line. They may have done an analysis of  
19 whether the BN compensation is an appropriate  
20 compensation. They may have done --

21 JUDGE NELSON: It strikes me as very far.  
22 For the moment I'm going to say Phase 2. And if it

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1995

1 isn't sharpened up with reference to certain lines and  
2 certain trackage rights that are in dispute, I'm going  
3 to have trouble with it.

4 Now, for example, if you want to know if  
5 they had anything about these trackage rights over the  
6 Houston -- what is it? -- Brownsville, that kind of  
7 thing I could see.

8 MR. LIVINGSTON: Your Honor, one of the  
9 huge issues in this case is --

10 JUDGE NELSON: My suggestion to you is to  
11 pick out the trackage rights. There are probably  
12 trackage rights all over America in this case. But  
13 pick out the ones that there's really a serious fight  
14 about and ask them if they've got anything about  
15 those. And I'll hear that in Phase 2.

16 MR. LIVINGSTON: The BN-Santa Fe  
17 settlement lines are the ones there's a fight about.

18 JUDGE NELSON: How many of those are  
19 there?

20 MR. LIVINGSTON: The whole set of trackage  
21 rights.

22 JUDGE NELSON: Well, are they --

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1 MR. LIVINGSTON: Hundreds and hundreds of  
2 miles.

3 MR. McBRIDE: There are 4,000 miles.

4 MR. LIVINGSTON: Four thousand miles.

5 JUDGE NELSON: That's overly broad. I'm  
6 going to --

7 MR. LIVINGSTON: Your Honor, if they've  
8 done a study of that, why can't they produce it?

9 JUDGE NELSON: I am denying Number 19  
10 without prejudice to its reformulation in the context  
11 of any particular position that Conrail may take in  
12 the filings of March 29 and with a view to focusing on  
13 some particular dispute in this case.

14 As to Number 20, it's a phase of the same  
15 thing. And I'm going to make the same ruling as to 20  
16 that I made as to 19. If we can come back with  
17 something sharper in Phase 2, we'll look at discovery  
18 of it.

19 Number 21 is clearly Phase 2 material  
20 because it's going to involve the asserted joint  
21 privilege, which I'd rather see in the context of a  
22 particular position.

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1997

1 MR. LIVINGSTON: Your Honor, on 21 what?

2 JUDGE NELSON: Phase 2.

3 MR. LIVINGSTON: Are the constitutional  
4 issues not to be ruled on until --

5 JUDGE NELSON: No. That's a  
6 non-constitutional issue, but I also believe that it  
7 is best ruled on in the context of a particular  
8 position taken by Conrail.

9 MR. LIVINGSTON: Well, if they want to  
10 assert a privilege, then we will know where the  
11 privilege is being asserted. At the moment the only  
12 way for us to find out whether they're even going to  
13 assert a privilege and on what is to put a question  
14 like this to them.

15 JUDGE NELSON: Well, maybe we can ask Mr.  
16 Hut. Are you going to assert a privilege as to Number  
17 21?

18 MR. HUT: Yes, Your Honor.

19 JUDGE NELSON: All right.

20 MR. LIVINGSTON: Well, I don't --

21 JUDGE NELSON: That's effectively been  
22 answered.

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1 MR. LIVINGSTON: But I don't know. On  
2 every agreement he has with another party?

3 MR. HUT: Well, first of all, to the  
4 extent we have agreements with another party, yes.  
5 But I don't know indeed whether there are agreements.

6 JUDGE NELSON: Twenty-one I am going to  
7 deny as written without prejudice to its renewal in  
8 Phase 2 when I can review this in the context of a  
9 particular position taken by the Conrail Company in  
10 its filings of March 29, 1996.

11 Twenty-two. I am going to grant that in  
12 Phase 1 with regard to the conditions that are being  
13 sought in the March 29th filing and direct production  
14 on April 1 of those presentations, minutes, and so  
15 forth.

16 MR. HUT: With respect to the Conrail  
17 conditions?

18 JUDGE NELSON: That's correct. With  
19 respect to presentations involving conditions that  
20 someone else should seek, help me out on that one, Mr.  
21 Livingston.

22 MR. LIVINGSTON: If they've made

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1 presentations to the Board about conditions being  
2 sought by KCS or any of the other conditions that  
3 might be applied here, that is a document that's a  
4 study or addresses a relevant issue in the case.

5 These are relevant documents. They are  
6 within the scope of this proceeding.

7 JUDGE NELSON: Phase 2.

8 MR. LIVINGSTON: We would like to get  
9 copies of them.

10 JUDGE NELSON: I think he has something  
11 there. And I think I'm going to order it to be  
12 produced. If you can find this stuff by April 1; that  
13 is, your presentations involving others' conditions,  
14 give it to them. If not, you can do the others in the  
15 second phase, whatever we come up with.

16 But with regard to your own, I expect that  
17 production on April 1, --

18 MR. HUT: Yes, sir.

19 JUDGE NELSON: -- your own conditions.

20 Number 23. What's your suggestion about  
21 this, Mr. Hut? It's a very broad question.

22 MR. HUT: I think it's produceable. That

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1 is relating to wife-beating, Your Honor. I think this  
2 is as far afield as can possibly be. We intend,  
3 actually, to raise no issue about collusion.

4 JUDGE NELSON: This is kind of in Mr.  
5 Billiel's ballpark. Look at this Number 23. Do you  
6 have it there, Mr. Billiel? Can someone show it to  
7 him or do you have it?

8 MR. BILLIEL: Studies, reports, analysis  
9 of collusion.

10 JUDGE NELSON: Relating to collusion.

11 MR. BILLIEL: Right.

12 JUDGE NELSON: How can we sharpen that  
13 into a meaningful interrogatory? I mean, he may just  
14 say, "I have none." Is collusion defined in the  
15 interrogatories?

16 MR. BILLIEL: Well, I think one issue that  
17 the applicants invest in their application,  
18 particularly Mr. Willig's testimony, was the  
19 possibility of --

20 JUDGE NELSON: Well, I think that the  
21 applicants are certainly entitled to seek evidence,  
22 that which would lead to the discovery of admissible

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1 evidence that would show collusion among competing  
2 railroads. I don't have any trouble with the  
3 propriety, indeed relevance, of them.

4 I've got two problems with it. One,  
5 should it be in Phase 1 or Phase 2? And, two, how can  
6 we reword it to make more meaningful sense out of it?

7 MR. LIVINGSTON: Your Honor, if they have  
8 a report that addresses the collusion in --

9 JUDGE NELSON: Titled "Collusion"?

10 MR. LIVINGSTON: A report that studies it,  
11 that analyzes it. Collusion is one of the big issues  
12 that's been raised in this case, both questions of  
13 tacit collusions, some parties have alleged that there  
14 might be actual collusion. Those are issues in this  
15 case.

16 Now, Conrail is a major railroad here. If  
17 their own strategic planning department --

18 JUDGE NELSON: All right.

19 MR. LIVINGSTON: -- has made a study, we  
20 ought to get it.

21 JUDGE NELSON: The word is a major word,  
22 then. So he's seeking a search of your files for

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1 anything that might say "collusion." Now, you can't  
2 look for every paper in the company's files to find a  
3 word "collusion." You might find someone wrote a  
4 paper that said, "There is no collusion." Then you'd  
5 have to go find that paper.

6 MR. HUT: Your Honor?

7 JUDGE NELSON: We've got to get a handle  
8 on that.

9 MR. HUT: We'll abide by the ruling. We  
10 are not raising any issue that the competitive  
11 circumstances of this merger will permit tacit or  
12 overt collusion.

13 JUDGE NELSON: That's an argument for why  
14 it should be in Phase 1, Mr. Hut. I don't know if  
15 that helps you any.

16 MR. HUT: Because we are not raising the  
17 issue? We're not bringing it up. I can understand if  
18 others are trying to place the matter --

19 JUDGE NELSON: Well, Mr. Livingston says,  
20 "I don't care. This is discovery. I may have a  
21 chance to get some ammunition here."

22 MR. HUT: As I say, I didn't mean to argue

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1 with Your Honor. If that's the ruling, we'll go look  
2 for documents that could bear that title or apparently  
3 contain the word in a "Re:" line.

4 JUDGE NELSON: If there's any file labeled  
5 "Collusion," Mr. Livingston, I'm going to ask him to  
6 find that, make a search whether there's any file,  
7 computer or hard copy, that has the word "collusion,"  
8 at least in his title. And we'll see what comes up  
9 with it. And that one you can produce March 12th, it  
10 seems to me.

11 MR. HUT: Or respond to it any way, Your  
12 Honor.

13 JUDGE NELSON: Yes. Respond to it. If  
14 you can't find it or if it turns out there's a great  
15 burden or you've got 82 files called "Collusion," then  
16 we'll see what happens.

17 All right. Number 24.

18 MR. LIVINGSTON: Your Honor, a document  
19 that could study collusion and not have it in the  
20 title, if they've got --

21 JUDGE NELSON: Oh, I never would have  
22 thought of that. Well, then what are we going to do

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1 about defining the term "collusion" so that we get a  
2 meaningful search? Here's Ms. Metallo. Do you have  
3 a suggestion?

4 MS. METALLO: Well, actually I do, Your  
5 Honor. We received the exact same interrogatory.  
6 That's why I interjected. My client has raised this  
7 issue. And it's precisely the reason why we would  
8 like the McKinsey study that you have denied us access  
9 to.

10 JUDGE NELSON: This is not the time to  
11 reargue McKinsey.

12 MS. METALLO: I'm just pointing out, Your  
13 Honor, that we believe that --

14 JUDGE NELSON: I will say this, that if  
15 those discussions are six years old, we're not  
16 interested in them now. We're talking real stuff  
17 going on today.

18 All right. I say again, Mr. Livingston.  
19 This is your chance. I want to give you this one, but  
20 I want you to -- you surely can't be expecting Mr. Hut  
21 and his troops there to go through every piece of  
22 paper in the company's possessions and guess what you

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1 might think relates to collusion and say, "Is this  
2 collusion or not?" This can go on for months.

3 MR. LIVINGSTON: Of course not, but he  
4 could call the head of the marketing department and  
5 head of the strategic planning department, sales, and  
6 say, "Have you got studies, reports, or analyses  
7 dealing with collusion among competing railroads?"

8 JUDGE NELSON: Granted.

9 MR. LIVINGSTON: And they will say, "Yes,  
10 we have them," --

11 JUDGE NELSON: I've just made a --

12 MR. LIVINGSTON: -- "No, we don't," or  
13 "Let me check."

14 JUDGE NELSON: I'm just granting the  
15 request as reformulated here by Mr. Livingston. That  
16 takes care of 23. See how easy it would have been.

17 Number 24 deals with trackage rights.  
18 Certainly the applicants are entitled to materials  
19 relating to the terms or affecting the sub-trackage  
20 rights. The problem I have with that one is it seems  
21 to be seeking the world.

22 MR. HUT: Trackage rights at issue in this

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1 case.

2 JUDGE NELSON: In this case, first of all,  
3 can we get that by March 12th?

4 MR. LIVINGSTON: Your Honor, it shouldn't  
5 be limited to trackage rights in this case. Conrail  
6 has trackage rights in its system. One of the issues  
7 in this case -- and it's a big issue -- is whether  
8 trackage rights in favor of the Burlington Northern  
9 will provide an effective remedy. And there are  
10 people who are going to argue --

11 JUDGE NELSON: Absolutely.

12 MR. LIVINGSTON: And I think Conrail is  
13 going to argue it's not effective. Now, Conrail has  
14 trackage rights on its lines. Have they done any  
15 studies of the effectiveness of their trackage rights  
16 tenants in situations where it is the trackage rights  
17 tenant?

18 JUDGE NELSON: Effectiveness is in the  
19 interrogatory but is also the phrase "relating to the  
20 terms for," which is much broader. Why don't we cut  
21 it down to effectiveness and see what you can come up  
22 with?

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1 MR. HUT: You want us to respond to that  
2 by the 12th or by --

3 JUDGE NELSON: I just wanted to think that  
4 through with you.

5 MR. HUT: It seems to me it's a Phase --

6 JUDGE NELSON: Do you know how the files  
7 are set up with regard to your trackage rights?

8 MR. HUT: No, I don't, Your Honor. Mr.  
9 Livingston is right about one thing. Conrail is a  
10 trackage right tenant and certainly the landlord and  
11 I believe a tenant. There are massive numbers of  
12 files that relate in one way or another to trackage  
13 rights.

14 JUDGE NELSON: Maybe Mr. Livingston's  
15 clients would have some idea of particular trackage  
16 rights.

17 MR. LIVINGSTON: We're not asking for  
18 copies of the agreements.

19 JUDGE NELSON: Let me finish. Maybe there  
20 are some particular trackage rights that they in the  
21 railroad business know are problem children for the  
22 Conrail company or that haven't worked out well or, on

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1 the contrary, that have given Conrail a terrific  
2 competitive weapon that you could use to see how good  
3 trackage rights are. Your clients might have some  
4 help in that regard.

5 MR. LIVINGSTON: We have asked some  
6 specific interrogatories on specific trackage rights  
7 segments. And those I think Your Honor has said are  
8 all in Phase 2.

9 In addition to those specific trackage  
10 rights situations, we don't know what's in their  
11 files. But they I'm sure have a strategy department,  
12 a planning department. If they have done a study  
13 either about a particular trackage right segment on  
14 their line or trackage rights generally, study or an  
15 analysis, are trackage rights a way that you could  
16 have competitive service?

17 JUDGE NELSON: Do you know whether in the  
18 company there's an office that has charge of trackage  
19 rights?

20 MR. HUT: I could inquire about it. I  
21 don't know.

22 JUDGE NELSON: There probably is, but --

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1 MR. HUT: I don't know whether it's one.  
2 I don't know whether it's done in the field.

3 JUDGE NELSON: All right. Why don't you  
4 answer this interrogatory by March 12th?

5 MR. HUT: Subject to whatever objections  
6 --

7 JUDGE NELSON: Whatever claims you want to  
8 make, including burdensome. But at least we can get  
9 a handle on what the task is. Now let me suggest --

10 MR. HUT: As to effectiveness, Your Honor,  
11 but not as to term?

12 JUDGE NELSON: As to effectiveness. Let  
13 me suggest this here, Mr. Hut. If you just want to  
14 answer an interrogatory and say it's overly  
15 burdensome, that's one thing. If you answer it by  
16 telling me you've got to search every office from  
17 Philadelphia to wherever it is and that your  
18 preliminary inquiries tell you that there are 86  
19 places that it might be in 10,000 cubic feet and so  
20 many hours of search time are involved, then you're  
21 telling me a lot more and also the applicants. Then  
22 if we get some claim like that, we know what we have

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1 to try to do.

2 If you answer that there are the following  
3 offices in the company in which such files might be  
4 and you list the offices, that might enable Mr.  
5 Livingston's people to pick out which ones they want  
6 you to search. So you can help us with these answers.  
7 Hardball resistance isn't going to help me any and  
8 isn't going to help you that much.

9 Where were we? Number 26, computerized.  
10 Oh, Conrail business plans or strategic plans. That's  
11 always fair game in discovery. It seems to me very  
12 open-ended. I don't see anything particularly urgent  
13 about it. That looks like Phase 2 material to me.

14 Number 26. I don't have any idea what  
15 Number 26 means. Can you help me on it? What is it?

16 MR. HUT: Your Honor, traffic data is  
17 where tonnages go to different points on the railroad  
18 from particular shippers.

19 JUDGE NELSON: We had that from the  
20 applicants turned over, didn't we, something like  
21 that?

22 MR. HUT: Yes, we did, but, of course,

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1 this is their version.

2 JUDGE NELSON: I understand.

3 MR. HUT: These are the most sensitive  
4 data in the company, and I believe I am --

5 JUDGE NELSON: Suppose we direct a  
6 production to counsel only, outside counsel only.

7 MR. HUT: I don't think they're relevant  
8 to any aspect of Conrail's filings. And because they  
9 are so irrelevant and so sensitive, I really would  
10 respectfully request, Your Honor, that this be  
11 deferred to Phase 2.

12 JUDGE NELSON: This is really serious  
13 stuff here?

14 MR. HUT: This is serious stuff.

15 MR. LIVINGSTON: Your Honor, this --

16 JUDGE NELSON: Any reason why this should  
17 be Phase 1?

18 MR. LIVINGSTON: Absolutely.

19 JUDGE NELSON: Why? What do you need with  
20 this?

21 MR. LIVINGSTON: Well, first of all, if we  
22 get it in Phase 2, I don't know what good it could

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1 possibly do us. In fact, I think that is generally  
2 true here. We will not have time to develop it and  
3 use it, especially computerized data, where it will  
4 have to be inputted and worked with in order to see  
5 what's in it.

6 These are data that are typically turned  
7 over in rail merger cases.

8 JUDGE NELSON: Give me a hypothetical of  
9 what you might find from these?

10 MR. LIVINGSTON: We need their traffic  
11 data to see where their traffic flows are.

12 JUDGE NELSON: Well, how does that help?

13 MR. LIVINGSTON: Because the consultants  
14 who deal with these data can then study them and study  
15 the traffic flows and study traffic impact, which are  
16 all among the issues in this case.

17 JUDGE NELSON: What does that tell you?

18 MR. LIVINGSTON: We have produced traffic  
19 data. It shows what the impact of the merger -- it  
20 allows you to study the impact of mergers and proposed  
21 conditions. If somebody says, "I want a condition to  
22 go from here to there, I want that right to run

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1 traffic," well, you want to do an analysis of what the  
2 impact of that's going to be, how many cars you're  
3 talking about, and what the traffic is and what's  
4 moving where.

5 These data are essential. If we get them  
6 on April 1 --

7 JUDGE NELSON: I see the relevance. But  
8 now we've got two questions. One is when to get them.  
9 And two is what kind of competitive problems we've got  
10 here.

11 When you turned these data over to the  
12 other side --

13 MR. LIVINGSTON: Yes, before we filed the  
14 application.

15 JUDGE NELSON: Would you let me finish?  
16 Under what terms in terms of protection?

17 MR. LIVINGSTON: I think it's outside  
18 consultants, outside counsel. And I'm not sure about  
19 inside counsel. But certainly it was outside  
20 consultants and outside counsel.

21 JUDGE NELSON: So outside counsel have for  
22 UP and SP all of these very materials you seek as to

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1 Conrail? Is that correct?

2 MR. LIVINGSTON: We have turned over to  
3 other parties our traffic tapes.

4 JUDGE NELSON: They're in the hands of  
5 outside consultants?

6 MR. LIVINGSTON: And outside counsel,  
7 correct.

8 JUDGE NELSON: And outside counsel?

9 MR. LIVINGSTON: Correct.

10 JUDGE NELSON: The same stuff you're  
11 seeking from Conrail?

12 MR. LIVINGSTON: Right.

13 JUDGE NELSON: Well, what about that?

14 MR. HUT: Can I be heard on relevance?  
15 Because what does our traffic have to do with their  
16 merger? We are not applying for a specific condition  
17 like a sale or trackage rights to Conrail.

18 JUDGE NELSON: Off the record for a  
19 moment.

20 (Whereupon, the foregoing matter went off  
21 the record at 5:12 p.m. and went back on  
22 the record at 5:13 p.m.)

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1 JUDGE NELSON: Mr. Hut, you were saying  
2 that you don't think these are relevant because what's  
3 the relevance of your traffic. Mr. Livingston says he  
4 needs to study your traffic so that he can get a  
5 picture of what the effect of a condition would be on  
6 you.

7 MR. HUT: But the condition on me -- we're  
8 not applying for any specific condition, such as a  
9 sale to Conrail. You're suggesting the  
10 appropriateness of divestiture. The question of its  
11 effect on Conrail --

12 JUDGE NELSON: How about if we limited 26  
13 to the traffic data that would show the impact upon  
14 Conrail of whatever Conrail is requesting on March 29?

15 MR. HUT: If there are any studies of  
16 that. I don't know how feasible that is, but --

17 JUDGE NELSON: Let's start with that. You  
18 ask your computer people --

19 MR. LIVINGSTON: Well, Your Honor, I --

20 MR. HUT: Your Honor?

21 JUDGE NELSON: -- pertaining to whatever  
22 it is you're going to seek, your position you're going

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1 to take on March 29.

2 MR. HUT: I guess I just want one more  
3 thing. These data are so sensitive that we are  
4 currently trying to scrub our submission to make sure  
5 that nothing we say --

6 JUDGE NELSON: We'll get to that problem.

7 MR. HUT: -- implicates these traffic  
8 data.

9 JUDGE NELSON: We're jumping the gun.  
10 First is what they're going to be. Now, I'm trying to  
11 fashion them so that they're tailored to whatever your  
12 position is on March 29. That automatically protects  
13 those that don't pertain to your condition. So what  
14 you're going to have to do is talk to your computer  
15 people and see if there is some way to get this out of  
16 the computer.

17 Now, Mr. Livingston, I don't want to take  
18 a lot of time with why I should order these data as to  
19 something they're not even requesting. That just  
20 looks like a fishing expedition.

21 MR. LIVINGSTON: They're going to be  
22 requesting conditions for sale. And they may not even

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1 say it should be a sale to Conrail. They say it  
2 should be a sale. But we all know --

3 JUDGE NELSON: whatever the words may be,  
4 they're going to make a filing on March the 29th. And  
5 I'm going to direct production of these computerized  
6 materials subject to whatever claims they may have  
7 insofar as those materials pertain to the position  
8 you're taking on March 29. And to that extent I'm  
9 granting Number 26 and ordering it effective April 1.

10 MR. LIVINGSTON: Your Honor, I don't think  
11 that will be timely for us to make --

12 JUDGE NELSON: I understand your position.  
13 And I think that that order is consistent with  
14 previous orders on others, which is that the ones that  
15 pertain to their position are getting filed on April  
16 1 when they take that position. I see nothing wrong  
17 with that.

18 How do these materials come out? What do  
19 you get? I mean a computer? A box? A television  
20 set? A document? What does it look like?

21 MR. HUT: I have to confess to Your Honor  
22 that I --

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1 JUDGE NELSON: You're closer to my  
2 generation than you want to admit.

3 (Laughter.)

4 JUDGE NELSON: Let's ask the young people.  
5 What do you get when you get the computerized Conrail  
6 traffic data?

7 MR. LIVINGSTON: I think you get it in the  
8 form of tapes, data tapes.

9 JUDGE NELSON: A tape?

10 MR. LIVINGSTON: I believe that's correct.

11 JUDGE NELSON: Which you play on a  
12 machine?

13 MR. McBRIDE: They also come on disks  
14 sometimes. I can't say they do for Conrail. I'm  
15 simply saying I know my consultants sometimes get from  
16 the ICC and elsewhere --

17 MR. HUT: It could be machine-readable,  
18 Your Honor, I think, which is why --

19 JUDGE NELSON: Does the tape play on a  
20 screen or does it play out like music?

21 MR. EDWARDS: Your Honor, the tape is  
22 another medium like a floppy disk.

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1 JUDGE NELSON: Yes.

2 MR. EDWARDS: It's just a medium that --

3 JUDGE NELSON: It contains data. So it  
4 shows on a television screen?

5 MR. EDWARDS: It's filled with data just  
6 like a floppy disk. It would be flown into a  
7 computer. And it would be manipulated by -- and it's  
8 a database.

9 JUDGE NELSON: How can we protect and  
10 safeguard this material? What's your suggestion?

11 MR. HUT: Well, I think, first of all, the  
12 condition that you --

13 JUDGE NELSON: Outside counsel certainly  
14 must see it, --

15 MR. HUT: Outside counsel.

16 JUDGE NELSON: -- at a minimum. Otherwise  
17 what's the sense of it. They've got consultants,  
18 outside consultants. They say that there's have gone  
19 there.

20 MR. HUT: Why don't we first see if there  
21 are any that are responsive to the request as you've  
22 reformulated it? We'll make it available to outside

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1 counsel if they think that it is something that they  
2 need to undertake to consult about with their  
3 consultants. We'd be happy to revisit that question  
4 on or about April 1 if there are any, rather than  
5 talking about it now.

6 JUDGE NELSON: You're going to produce on  
7 April 1?

8 MR. HUT: Correct, to outside counsel.

9 JUDGE NELSON: You don't want to start  
10 killing another week's time with a debate over who may  
11 see it. They're already contending they're in a time  
12 bind. So let's see if we can't straighten this out.

13 MR. LIVINGSTON: Your Honor?

14 JUDGE NELSON: Yes, sir?

15 MR. LIVINGSTON: We have a protective  
16 order that governs highly confidential material. We  
17 have produced material just as confidential, if not  
18 more so, the same traffic tapes, subject to the same  
19 protective order.

20 And if we can't give it to outside  
21 consultants --

22 JUDGE NELSON: I'm going to direct that

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1 production under the terms of the protective order.  
2 If you have something specific to suggest, then you  
3 could come in and do so.

4 MR. HUT: Subject to reserved objections?

5 JUDGE NELSON: Objections you have, of  
6 course. I see no privileges there.

7 MR. HUT: No privileges.

8 JUDGE NELSON: The only thing you might  
9 have is relevance is certainly there. You might have  
10 a question of burden.

11 MR. HUT: Don't know that.

12 JUDGE NELSON: And we don't know enough  
13 about the computers to know that. And, again, if it  
14 does turn out there's a burden objection, the more  
15 specific and detailed you can make that one, the  
16 better.

17 Number 27. Who is Richard C. Levin?

18 MR. HUT: He's the President of Yale, Your  
19 Honor. I could tell you that. I don't know if there  
20 have been any consultations between him and --

21 JUDGE NELSON: I was going to say I have  
22 a lot of relatives named Levin, but that isn't one of

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1 them. And I would be shocked to find any of them in  
2 the railroad industry, but one never knows.

3 MR. HUT: Econometric analyses of rail  
4 prices.

5 JUDGE NELSON: I don't see why we need to  
6 -- who are these other people?

7 MR. LIVINGSTON: Your Honor, these are  
8 people who have written in the field of pricing and  
9 railroad pricing. Mr. Levin has written extensively  
10 in the field, as have I believe most of these other  
11 people, econometric analyses of rail pricing. Some of  
12 them were discussed in the Willig statement, I  
13 believe.

14 If Conrail has been communicating with the  
15 people, has documents with them --

16 JUDGE NELSON: Phase 2. Number 28. Looks  
17 like Phase 1 to me.

18 MR. HUT: It's awfully broad, Your Honor,  
19 but subject to burdensomeness and --

20 JUDGE NELSON: Maybe we can cut it down.  
21 Let me look at the map again.

22 MR. LIVINGSTON: Your Honor, can I speak

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1 to that? He says it looks "awfully broad." As I  
2 gather, he hasn't even consulted with his client on  
3 the subject. Why do we need to rule on the burden  
4 objection in the abstract?

5 JUDGE NELSON: Oh, we don't unless there  
6 are things that we can figure out. We don't. I  
7 directed him when he made responses to be as specific  
8 as he can about the alleged burdens. All I'm trying  
9 to see right now is what we might be getting into.

10 Where is Conrail operating?

11 MR. HUT: Northeast, Your Honor, from  
12 Chicago through to New York and Pennsylvania, Ohio --

13 JUDGE NELSON: This is the old New York  
14 Central-Pennsylvania railroad?

15 MR. HUT: Yes.

16 JUDGE NELSON: Erie, Lackawanna, those --

17 MR. HUT: Yes, exactly, sir.

18 JUDGE NELSON: I remember that litigation.  
19 What's that got to do with Mexican competition? Well,  
20 Mexican goods can find their way to Boston. And  
21 Boston-produced goods can find a market in Mexico. So  
22 there may be such material.

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1 MR. LIVINGSTON: And, in addition, Conrail  
2 has proposed to buy the lines that would give it  
3 direct access to Mexican gateways.

4 JUDGE NELSON: I'm granting Number 28.  
5 And I think that should be in Phase 1 unless you can  
6 show me why it shouldn't.

7 MR. HUT: Well, I would respectfully  
8 suggest that the showing we make with respect to  
9 Mexico, the Mexican gateways, if any, sharply limit  
10 the range of relevant inquiries here.

11 JUDGE NELSON: Is there any position that  
12 you're going to take on March 29th if you can say that  
13 has to do with competition for traffic to and from  
14 Mexico?

15 MR. HUT: I don't know that at this stage,  
16 Your Honor, in all candor. We may. We're looking at  
17 that. That's one of the things that certainly --

18 JUDGE NELSON: All right. Let's cut it to  
19 that. Let's make 28 to be produced on April 1 insofar  
20 as it relates to any position you're taking in the  
21 filings to be made on March 29th.

22 Number 29.

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1 MR. KACZMAREK: Your Honor, if I may, up  
2 to approximately 24 or 25, all the parties' here  
3 document requests have been the same. Now you're  
4 reading off the requests to Conrail. And our requests  
5 are now diverging somewhat.

6 So to the extent that some of them that  
7 we'll be going to now are the same, if there's a way  
8 we could read them out or part of them to see if we do  
9 indeed have those? Otherwise I think we have a case  
10 where we have slightly different requests from here on  
11 out.

12 JUDGE NELSON: What I'm thinking to do is  
13 to try to get through Conrail's because they're the  
14 ones who made the motion and have you in here Monday  
15 morning first thing to take up all the others --

16 MR. KACZMAREK: If I may, Your Honor?

17 JUDGE NELSON: -- unless there's agreement  
18 in the meantime.

19 MR. EDWARDS: As to the document requests  
20 that have been gone through, they're identical to all  
21 parties. So I'm unsure that those need to be  
22 rehashed.

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1 JUDGE NELSON: Oh, he says when I get to  
2 Number 29, it's not the same as his Number 29.

3 MR. EDWARDS: But all the rest of them  
4 that we've gone through basically have been the same.

5 JUDGE NELSON: Is there any reason why I  
6 should not continue now what we're doing, which is  
7 going through the Conrail interrogatories?

8 MR. KACZMAREK: No. That's not what I'm  
9 suggesting.

10 JUDGE NELSON: Is there any reason why you  
11 can't figure out what to do in light of the rulings I  
12 make here?

13 MR. KACZMAREK: I think we possibly can.  
14 If that is amenable, I think we definitely can.

15 MR. LIVINGSTON: We can certainly figure  
16 out from how you ruled on Interrogatory Number 3 how  
17 that should apply to his Interrogatory Number 3. We,  
18 of course, are accepting that --

19 JUDGE NELSON: Take them all the way. I  
20 hope you get volumes of guidance from the Surface  
21 Transportation Board. I would welcome it.

22 MR. DiMICHAEL: Excuse me, Your Honor. Am

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1 I correct that what you'll do, you'll go through  
2 Conrail's now and then you'll take the others up the  
3 first thing on Monday morning?

4 JUDGE NELSON: Well, another idea came to  
5 mind in this discussion. That is to say that whatever  
6 I rule on Conrail's, you try to apply those rulings to  
7 yourselves. And to the extent you can't, I'm  
8 available here Monday morning.

9 For the record, it is now 5:22. I've been  
10 sitting since 9:30 in a gas pipeline rate case of some  
11 complexity. And there comes a point at which it's  
12 hard to keep concentrating and make rulings that  
13 reflect the best judgment.

14 I'm still feeling all right, for the  
15 record. I'm prepared to go and finish up with the how  
16 many other -- 56 document requests. But once we get  
17 beyond that point, I will want to adjourn and ask the  
18 parties to abide by those rulings, see what they can  
19 agree upon. And I'll be here Monday if you want to  
20 talk to me about them.

21 So we're on Number 29. Do I need them  
22 now? Maybe I'll need it again.

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1 MR. LIVINGSTON: Your Honor, if you would  
2 prefer, we can just return Monday morning and break  
3 now or continue on. I'm not sure at this stage --

4 JUDGE NELSON: Why don't we continue.

5 MR. HUT: As long as Your Honor is  
6 prepared to do that.

7 JUDGE NELSON: Twenty-nine.

8 MR. HUT: We'll respond to that on March  
9 12 if we have any documents, Your Honor.

10 JUDGE NELSON: Twenty-nine?

11 MR. HUT: Yes.

12 JUDGE NELSON: Number 30.

13 MR. HUT: That one came the First  
14 Amendment --

15 JUDGE NELSON: That gets you to your  
16 privileges, I think. Well, who is the Coalition for  
17 Competitive Rail Transportation?

18 MR. HUT: I don't know yet, but that will  
19 be --

20 JUDGE NELSON: Who are they, Mr.  
21 Livingston? Is that a government group?

22 MR. LIVINGSTON: I think it's a party to

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1 this case. Is that right?

2 JUDGE NELSON: I'm not sure I've heard of  
3 them. But, if so, it raises the two-party problem.  
4 Phase 2, if at all.

5 Number 31.

6 MR. HUT: This is the mirror image of the  
7 very one that you denied back in December if I may  
8 remind, Your Honor, on settlement privilege grounds,  
9 which doesn't answer the Phase 1/Phase 2 nature of it.  
10 But we thought their documents related to our  
11 discussions with them, they interposed a settlement  
12 privilege objection.

13 JUDGE NELSON: So how does that fit you?  
14 You haven't made any settlement.

15 MR. HUT: That was the point.

16 JUDGE NELSON: They want your document.

17 MR. HUT: That was the point. We asked  
18 for any notes they had of discussions between them and  
19 Conrail. They said, "No settlements." So I'm just  
20 forecasting for you that we will find privilege here,  
21 just as they did to us, and I think use the same  
22 objection.

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1 JUDGE NELSON: On the theory that they  
2 were --

3 MR. HUT: Looking for --

4 JUDGE NELSON: -- seeking a deal to  
5 settle?

6 MR. HUT: Yes.

7 MR. LIVINGSTON: Your Honor, we've said  
8 here that that --

9 JUDGE NELSON: Well, there's some virtue  
10 in consistency here. I'm going to make the same  
11 ruling. And you may invoke the settlement privilege,  
12 then.

13 MR. LIVINGSTON: Your Honor, I would like  
14 to accept that ruling. We do say here that except to  
15 the extent the applicants may be required to do so,  
16 they need not --

17 JUDGE NELSON: Look at that last sentence.  
18 Very good. I'm glad you brought --

19 MR. LIVINGSTON: If they're going to  
20 assert privilege, let them assert the privilege. And  
21 then let us have a chance to bring the matter on for  
22 hearing.

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1 JUDGE NELSON: He is not seeking documents  
2 depicting the back and forth of negotiations.

3 MR. LIVINGSTON: Except to the extent that  
4 we are required to produce them.

5 MR. HUT: And their assertion of privilege  
6 has been much broader than that. But I don't have a  
7 problem in responding and invoking such privileges as  
8 I think I have on March 12th.

9 JUDGE NELSON: All right. On March 12th.  
10 And remember the same standard of particularized need  
11 will apply so that you'll then have to make that  
12 showing to pierce that wall.

13 Number 32. I don't understand the stuff  
14 after the comma, the "including but not limited to,  
15 whether Conrail would be subject to conditions imposed  
16 by the Board to address anti-competitive consequences  
17 of any such response if it did so." If it did what?

18 MR. LIVINGSTON: If it filed a responsive  
19 application, it could be the subject of a request for  
20 conditions. And people would be free to say your  
21 responsive application raises competitive problems.

22 JUDGE NELSON: So 32 is 2 parts, I guess.

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1 First is about your decision not to submit a  
2 responsive application. And the second is about: If  
3 you had done so, would you then be subject to  
4 conditions imposed by the Board?

5 MR. HUT: Have we written about it? And  
6 would we be speculating to that extent?

7 JUDGE NELSON: What do you say about the  
8 first part of 32?

9 MR. HUT: I say it is both irrelevant, I  
10 can't imagine what it would show, and I say if there  
11 are any documents, they would be subject to work  
12 product protection. But subject to both of those  
13 objections, if it's Your Honor's preference, we will  
14 respond that way on the 12th.

15 JUDGE NELSON: I would think some of it  
16 might be work product or attorney-client.

17 MR. LIVINGSTON: I don't think he can know  
18 whether it's work product or attorney-client.

19 JUDGE NELSON: No. At the moment he  
20 hasn't papers.

21 MR. LIVINGSTON: He doesn't know what the  
22 documents are.

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1 JUDGE NELSON: He hasn't seen a piece of  
2 paper, nor have I. And, yet, you, Mr. Livingston,  
3 were in the other day urging me to order production of  
4 a whole host of documents, none of which we have seen.  
5 So it doesn't help either way to do that.

6 I'm going to grant Number 32 for answer on  
7 -- that one you could do March 12th, it seems to me.

8 MR. HUT: We could certainly respond to it  
9 with any objections, Your Honor.

10 JUDGE NELSON: Right.

11 MR. HUT: Yes, sir.

12 JUDGE NELSON: The harder part of it is  
13 the second part, finding a document that says, "If we  
14 had done this, would that have happened?"

15 MR. HUT: Well, that's just irrelevant on  
16 its face.

17 JUDGE NELSON: That's hard to find maybe.  
18 I don't know. But it seems to me that I don't know  
19 how the files are set up, but if somebody asks me for  
20 such a document, that's a lot harder to find than a  
21 document that does relate to something.

22 Number 33. Conrail. This seeks documents

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1 in Conrail's possession relating to someone else's  
2 acquisition of SP. Is there some plan there, some  
3 particular thing you're driving at, Mr. Livingston?

4 MR. LIVINGSTON: Conrail has said it's  
5 interested in seeing sales of SP lines. We want  
6 documents that relate to possible sales, possible  
7 acquisition, including a possible acquisition by  
8 Conrail.

9 JUDGE NELSON: That you have. That seems  
10 to be a fair --

11 MR. HUT: Well, except, Your Honor, --

12 JUDGE NELSON: -- focused request.

13 MR. HUT: -- we are not making a proposal  
14 or making an application for a purchase. This seems  
15 to be classic Phase 2. It ought to be tailored narrow  
16 to the conditions that we seek.

17 JUDGE NELSON: Phase 2. Number 34, Phase  
18 2. Thirty-five on its face looks like it ought to be  
19 produced subject to any problems.

20 MR. HUT: Every agreement, Your Honor?  
21 Isn't this --

22 JUDGE NELSON: Well, that's what I wanted

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1 to pin down. We have thousands of miles of track.

2 MR. HUT: And relevance, quite candidly,  
3 because we're --

4 JUDGE NELSON: There again maybe you'll  
5 talk to your people. Last time I suggested this you  
6 didn't seem to want to do it. But maybe talk to your  
7 clients and see if they don't know of some particular  
8 trackage rights deals that they think would be  
9 particularly good candidates.

10 MR. LIVINGSTON: Your Honor, we produced  
11 these. They have these in their contract files,  
12 probably in the law department or something.

13 I must say I object to this procedure. No  
14 other party has had to go through in advance of  
15 getting responses and have its document request  
16 vetted. Mr. Hut here hasn't any idea of whether there  
17 are five --

18 JUDGE NELSON: So what is your --

19 MR. LIVINGSTON: -- agreements or two.  
20 All he knows is there are two agreements.

21 JUDGE NELSON: What is your suggestion?

22 MR. HUT: Now, that is not true.

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1 MR. LIVINGSTON: My suggestion is that he  
2 go and: a) find out where these are, how many there  
3 are, and produce them if he can. And if it's too much  
4 trouble --

5 JUDGE NELSON: That will all be in his  
6 answer. The question is I'm trying to figure out when  
7 he's going to give that response.

8 MR. LIVINGSTON: I think he ought to give  
9 it on March 12th. He's had this for -- that's the  
10 response date. We are responding to 150 requests on  
11 March 12th.

12 JUDGE NELSON: Once again, pressing for  
13 such a response invites a response that's I suspect  
14 not going to help you much. Give him the response  
15 that's appropriate on March 12th.

16 Number 35. Number 36 is Phase 2 material.

17 MR. LIVINGSTON: Your Honor, it directly  
18 relates to the primary application, as do I think all  
19 of these.

20 MR. HUT: It relates to nothing that  
21 Conrail intends to say about it.

22 JUDGE NELSON: Exactly. They're going to

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1 be in here for a position. And if that position has  
2 something to do with the West Coast, we'll look at  
3 this claim in that light. That's a Phase 2 in my  
4 view.

5 MR. LIVINGSTON: If they've got documents  
6 in their files that relate to this, we should be  
7 entitled to them. They're a party to the case. They  
8 can't hide their documents just by saying they're not  
9 going to take a position on an issue.

10 JUDGE NELSON: And they're not hiding  
11 them. It's a question of what we can get done  
12 meaningfully in Phase 1.

13 You know, I could have held that all of  
14 this stuff was for Phase 2. I'm trying to give you  
15 something here, and you're fighting me on every one of  
16 them. It doesn't seem to help me much.

17 MR. LIVINGSTON: Well, Your Honor, the  
18 reason I'm fighting hard is that if we get this  
19 material, I'm not quite sure when Phase 2 is, but the  
20 date earlier mentioned was -- I'm not sure whether  
21 it's April 1. Is that the date or April 10th? I  
22 think April 10th is the date.

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1 JUDGE NELSON: That's just a date I put on  
2 a piece of paper. That doesn't have to be the --

3 MR. LIVINGSTON: Well, that's what --

4 JUDGE NELSON: We haven't adopted that  
5 yet.

6 MR. LIVINGSTON: As I understand it, we  
7 have to resubmit the Phase 2 requests.

8 JUDGE NELSON: Number 36 is for Phase 2,  
9 and your objection is noted. Number 37, that seems to  
10 me can we define the phrase "top executives"?

11 MR. LIVINGSTON: The CEO and the executive  
12 vice presidents and the vice presidents.

13 JUDGE NELSON: All right. With reference  
14 to the CEO and anyone with a title of vice president.

15 MR. HUT: That's a very --

16 JUDGE NELSON: That's a lot of people?

17 MR. HUT: Executive vice president and  
18 senior vice president is narrow, but vice president?  
19 They've not produced to that level at all.

20 MR. LIVINGSTON: If he would just tell us  
21 that. That's the kind of thing we told other people,  
22 and we worked out a list of officers. We're perfectly

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1 happy to work out a list of officers.

2 JUDGE NELSON: How many vice presidents  
3 are there?

4 MR. HUT: I cannot tell you, Your Honor.

5 JUDGE NELSON: You don't know?

6 MR. HUT: I have not made that inquiry.

7 JUDGE NELSON: All right. Then we're not  
8 in a position to rule on Number 37. So what do we do?

9 MR. LIVINGSTON: He should respond on  
10 Tuesday, March 12th, and --

11 JUDGE NELSON: That seems to me an easy  
12 one. I'm granting 37 on March 12th. Thirty-eight.

13 MR. HUT: This is the most overly broad --

14 JUDGE NELSON: Phase 2, if at all. Number  
15 39. That you should be able to do in 10 minutes.

16 MR. HUT: We'll respond to that.

17 JUDGE NELSON: By March 12th. Now, for 40  
18 what does the word "breakup" mean?

19 MR. LIVINGSTON: Break up into sale and  
20 not necessarily bankruptcy, but you sell this piece to  
21 one guy and you sell that piece to another guy. And  
22 pretty soon a railroad disappears.

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1 MR. HUT: Again, Your Honor, this has to  
2 read on what Conrail will say in its filing. This  
3 looks like a Phase 2 issue to me.

4 MR. LIVINGSTON: Your Honor, Conrail has  
5 proposed publicly that they are going to urge  
6 conditions requiring sale. They've undoubtedly done  
7 analyses of the sale SP lines. And those are in their  
8 --

9 JUDGE NELSON: It sounds to me like it's  
10 going to have to do with a condition, and I'm going to  
11 make it be Phase 2.

12 Number 41, certainly relevant. It goes to  
13 how you operate your trackage rights.

14 MR. HUT: But our trackage rights are not  
15 at issue in this proceeding, Your Honor. I would  
16 respectfully suggest --

17 JUDGE NELSON: Other railroads operating  
18 with trackage rights on Conrail.

19 MR. HUT: But that's not the UP or the SP  
20 or the BN-SF.

21 JUDGE NELSON: So what? He wants to show  
22 that trackage rights are a meaningful form of

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