

INTERSTATE COMMERCE COMMISSION 03/20/96

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1 MR. DOWD: Your Honor, the --

2 JUDGE NELSON: No substantiation.

3 MR. DOWD: -- the key distinction between

4 --

5 JUDGE NELSON: Why isn't that the way  
6 things get --

7 MR. DOWD: The key distinction between  
8 your hypothetical and this case is that the Western  
9 Coal Traffic League has not yet taken any position on  
10 the merits.

11 JUDGE NELSON: Well, that was going to be  
12 my --

13 MR. DOWD: We do not --

14 JUDGE NELSON: -- my next question.

15 MR. DOWD: -- we do not deny -- we do not  
16 deny tat if the comments of the Western Coal Traffic  
17 League include the statement of a witness, that  
18 witness must be available for deposition.

19 If the comments of the Western Coal  
20 Traffic League make arguments or take positions  
21 regarding specific facts regarding specific members,  
22 it will be incumbent upon the League to provide the

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1 basis for those assertions, and to make them available  
2 to the Applicants.

3 JUDGE NELSON: How about if you seek  
4 particular conditions?

5 MR. DOWD: If we seek particular  
6 conditions in the comments, it will be incumbent on  
7 the League, I believe, to provide the support -- the  
8 basis for those conditions.

9 JUDGE NELSON: All right, all right. This  
10 seems to me a reasonable, solid, lawyer-like position.  
11 He recognizes the potential pitfalls of the position  
12 and is willing to confront them in the context of any  
13 specific position that his client takes in the  
14 proceeding. Why isn't that enough?

15 MR. LIVINGSTON: Your Honor, we --

16 JUDGE NELSON: In other words, that this  
17 is what we had called phase two discovery last time.

18 MR. LIVINGSTON: We went through the  
19 distinctions between phase one and phase two.

20 JUDGE NELSON: Yes, but we didn't then  
21 know what we now know, namely that there was a problem  
22 about a rule of law insofar as it applied to the

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1 compelling of associations to produce data from  
2 members. I had never heard that one before. Now  
3 we're hearing it.

4 MR. LIVINGSTON: It was not argued before,  
5 but we went through these discovery requests. We went  
6 through Conrail's, but the results were applied to  
7 these coalitions and associations, just as they were  
8 applied to all other parties.

9 And the -- and it was determined that some  
10 of those discovery requests are phase one. Now the  
11 ones that are phase two where there has been a proper  
12 prematurity objection raised, those are already in  
13 phase two.

14 Sop that's -- that's by the Board. But  
15 the ones --

16 JUDGE NELSON: I think what Mr. Dowd is --

17 MR. LIVINGSTON: None of these are  
18 determined to be phase one already and there is no  
19 reason for --

20 JUDGE NELSON: What Mr. Dowd is suggesting  
21 is that the -- the problem that I see here, namely  
22 honoring their legal position about their

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1 powerless to compel material from members, may  
2 clash with a subset position taken in any case.

3 It may require some balancing and some  
4 fine-tuning, some probing. But that all doesn't  
5 happen until we see what, if anything, they're saying  
6 in this case.

7 For all we now know, the coal shippers may  
8 file nothing or may file a piece of paper that says go  
9 ahead with the merger.

10 MR. LIVINGSTON: I don't think there's any  
11 -- if they were going to file nothing, they would know  
12 that and they would tell you that right now, Your  
13 Honor. They're -- I don't think that's a likely  
14 scenario and they know whether it's a likely scenario.

15 JUDGE NELSON: I really think the fight  
16 now is about when, not whether.

17 MR. LIVINGSTON: Your Honor, I think --

18 JUDGE NELSON: If there's a rule of law,  
19 like Mr. Dowd says, that protects -- logically you  
20 would think there would be. You can't be asked to do  
21 the impossible.

22 MR. DOWD: Your Honor, I have the cases

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1 for you.

2 MR. LIVINGSTON: Your Honor, I've been --

3 JUDGE NELSON: You cited a case in your  
4 letter. I read it.

5 MR. DOWD: I brought copies for you.

6 JUDGE NELSON: You had a quotation in  
7 there.

8 MR. LIVINGSTON: They cited the Farmland  
9 case, which was not a merger case. I've been involved  
10 in at least two cases recently in Federal court where  
11 the associations are on the other side, where the  
12 court required the association to seek information  
13 from its members, even though the association didn't  
14 own the members, didn't control the members in that  
15 sense.

16 JUDGE NELSON: I think there comes a time  
17 when that may happen.

18 MR. LIVINGSTON: And that was part of the  
19 general discovery.

20 MR. DOWD: Your Honor, there are --

21 JUDGE NELSON: And the association can't  
22 have it that it can be in there, slugging it out and

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1 taking positions and at the same time, not giving up  
2 any discovery.

3 MR. LIVINGSTON: And two of these -- two  
4 of these --

5 JUDGE NELSON: Without paying a heavy  
6 price, it seems to me.

7 MR. LIVINGSTON: I think it's also worth  
8 emphasizing, Your Honor, this is not true of his  
9 client, but it's true of two of the associations here.  
10 Two of the associations are not permanent entities.

11 These were coalitions. The National  
12 Industrial Traffic League is a large organization with  
13 many members.

14 MR. DOWD: Your Honor, I'm not -- Your  
15 Honor, I'm not up here for the Western Shippers  
16 Coalition or the Coalition for Competitive --

17 MR. LIVINGSTON: Well, two of these  
18 coalitions --

19 MR. DOWD: -- so I think we should take  
20 that separately.

21 JUDGE NELSON: Let's deal with these  
22 permanent associations right now.

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1 MR. LIVINGSTON: Okay, there are three  
2 permanent associations.

3 JUDGE NELSON: Right.

4 MR. LIVINGSTON: And they've been actively  
5 involved here. They're all going to be filing  
6 evidence.

7 JUDGE NELSON: That's the coal people, the  
8 NIT League and the Plastics.

9 MR. LIVINGSTON: Plastics.

10 JUDGE NELSON: All right.

11 MR. LIVINGSTON: Western Coal Traffic  
12 League --

13 JUDGE NELSON: Okay. Why shouldn't we  
14 defer this question until it's presented in the  
15 context of whatever specific position they take in  
16 their filings?

17 MR. LIVINGSTON: Well because, first of  
18 all, there's already been a determination that the  
19 subject matter of the interrogatories in question are  
20 either phase one or phase two. And we want -- we're  
21 seeking the phase one ones now.

22 Second, I don't hear from him a commitment

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1 to respond to this discovery after he files his  
2 comments. He's saying he's simply going to give us  
3 the work papers that support the testimony or the  
4 basis for the testimony, and they'll make the witness  
5 available.

6 But it doesn't strike me that he's going  
7 to be willing to allow his association to produce  
8 documents from the files of his members in response to  
9 the discovery requests of this sort.

10 MR. DOWD: Your Honor, the Western Coal  
11 Traffic League has no power today, tomorrow, next  
12 month to require any information to be produced from  
13 its members. We can't do it.

14 You can stand here and order me to do it,  
15 and I couldn't comply.

16 JUDGE NELSON: That position may be all  
17 right now, but might get your position in trouble next  
18 month.

19 MR. DOWD: What I think -- what I think is  
20 the case, and the reason I believe there is no --

21 JUDGE NELSON: We can't have a system that  
22 entertains a submission and a position through a party

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1 who, at the same time, says we're powerless to pull or  
2 members or to tell our members to get you anything  
3 about it.

4 MR. DOWD: Well, I would --

5 JUDGE NELSON: That one comes out a little  
6 --

7 MR. DOWD: I would not --

8 JUDGE NELSON: -- a little too tight for -  
9 -

10 MR. DOWD: I would not disagree with the  
11 proposition that if the Western Coal Traffic League,  
12 as part of its presentation, includes assertions which  
13 are grounded upon facts specific to individual members  
14 regarding their operating systems or their whole  
15 supplier arrangements, that if the Coal League is not  
16 prepared to produce the documents or the information  
17 or if it is in the form of a verified statement, the  
18 witness for deposition that supports that, that  
19 position has no credibility.

20 I'll be the first one to say that a party  
21 that makes a claim and can't support its claim has no  
22 right to expect the claim to be taken seriously.

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1 JUDGE NELSON: There are cases where the  
2 U.S. is told by the courts, yes, you have these  
3 privileges. But there comes a point where you've got  
4 to pony up the stuff, notwithstanding the privilege,  
5 or else you can't make a case.

6 MR. DOWD: And to use your term, Your  
7 Honor, when the time comes, we'll pony up the stuff.  
8 If we make the claim, if we make an assertion of fact,  
9 we will present documents. We will make available  
10 documents that support those facts.

11 MR. LIVINGSTON: Your Honor --

12 MR. DOWD: But we're not going to take a  
13 position that we don't have foundation for. If we  
14 present a witness, the witness will be available.

15 JUDGE NELSON: And if the position is we  
16 can't ask our members, we have no power to get  
17 anything from them, then you can make what you want of  
18 that.

19 MR. LIVINGSTON: Well, they certainly have  
20 the power to ask, and --

21 JUDGE NELSON: Yes.

22 MR. LIVINGSTON: -- and the Commission has

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1 the power to say if the member does not respond, we'll

2 --

3 JUDGE NELSON: We'll disregard the  
4 position.

5 MR. LIVINGSTON: -- we'll disregard  
6 anything --

7 MR. DOWD: The Commission -- I would beg  
8 to differ, Your Honor. The Commission does not have  
9 that power. If the law cannot compel the production  
10 of information from a non-party, there can't be a  
11 preclusion of a party --

12 JUDGE NELSON: Well, I understand your  
13 position.

14 MR. DOWD: -- taking the position. There  
15 can be --

16 JUDGE NELSON: I'm not sure I agree with  
17 it though.

18 MR. DOWD: Well, there can be -- there can  
19 be a question of credibility.

20 JUDGE NELSON: I think there are cases  
21 where the United States has been told -- and it goes  
22 for the United States, it certainly goes to the

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1 Western Coal Shippers -- you can't bring this case and  
2 then sit back and claim the privilege.

3 So, you've got a choice, United States.  
4 Pull the case or turn over the privileged stuff. I  
5 believe I've been in cases of that nature.

6 I don't think the Board is powerless to  
7 draw adverse inferences or disregard a case if any  
8 party finds itself in this position of putting forward  
9 a case while at the same time sitting on a privilege  
10 that would shed light on the methods of that case.

11 But I think we've got to designate this in  
12 the context of a position and what we'll then see what  
13 Mr. Dowd's client is saying, what he is then willing  
14 to turn over, pursuant to his commitment this morning.

15 MR. LIVINGSTON: The problem we have on  
16 this commitment is he says we'll give you the evidence  
17 we're going to present and we'll give you everything  
18 that supports --

19 JUDGE NELSON: So the factual assertions  
20 there will give you the backup for it.

21 MR. LIVINGSTON: We'll lose all the  
22 support for it. What we want -- of course, we want to

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1 get the stuff in the files that doesn't support the  
2 position, but undercuts it which is inconsistent with  
3 -- which undercuts their position and that's what's in  
4 there -- that's what the numbers ought to be required  
5 to produce. They ought to be able to cherry pick  
6 their members, find one member who's got a position  
7 that they want to be able to present and there are  
8 three other members who have inconsistent stuff and  
9 they're biased, they bury them, they don't represent  
10 anything from them. We ought to be able to get into  
11 the files of all the members --

12 JUDGE NELSON: Maybe you have reason to  
13 believe they have a member who would be a dissident,  
14 but we don't know that now.

15 MR. LIVINGSTON: It's not a question of  
16 being a dissident. They could all be supportive of  
17 whatever the relief is being sought is, but they may  
18 have materials in their files that doesn't support the  
19 allegations they're making.

20 We want to find out if the allegations  
21 they're making are going to be supportive --

22 JUDGE NELSON: It may be that when we look

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1 at the actual claim, we can see better and your people  
2 will have a better idea as to what shippers there  
3 might be that would have something in their files that  
4 would -- what members that would make sense in this  
5 department.

6 MR. LIVINGSTON: The timing on the  
7 associations is even more difficult than it is with  
8 the other parties and that's one of the reasons I'm so  
9 reluctant to agree to anything --

10 MR. DOWD: Your Honor, it's not a timing  
11 problem here, it's the consequence of the schedule.  
12 That's the applicant's schedule.

13 JUDGE NELSON: We know that. That's not  
14 our problem.

15 But what could I do? I could say Mr.  
16 Dowd, suppose I say you're hereby ordered to ask your  
17 customers to answer these questions. He mails out a  
18 thing and they ask him and that's that.

19 MR. DOWD: Your Honor, the law is  
20 otherwise because it would be an illusory rule to say  
21 you have an obligation to ask. The logical  
22 expectation is you ask and they say no.

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1           Your Honor, this is an organization of  
2 natural competitors like the association of American  
3 Railroads. The level at which this organization gets  
4 involved in matters before the Interstate Commerce  
5 Commission is at the level of common interest. That's  
6 why they participate in things like the rail cost  
7 adjustment factor cases and things like that. It does  
8 not get involved in individual disputes between  
9 private parties. And the reason is you're dealing  
10 with companies that are loathe to turn over all this  
11 information and certainly not to one another.

12           JUDGE NELSON: What do you lose by faxing  
13 out this request and getting back the responses you  
14 get?

15           MR. DOWD: Your Honor, I have two problems  
16 with it. The first is it is contrary to law. The  
17 rule of law --

18           JUDGE NELSON: And they can't even be  
19 asked to --

20           MR. DOWD: The rule of law is in response  
21 to a motion to compel such answers that if the  
22 material is not within --

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1 JUDGE NELSON: That's a different story.  
2 We're talking about asking you to ask the members, not  
3 to compel answers.

4 MR. DOWD: But what is the basis? There's  
5 been an interrogatory propounded under the  
6 Commission's rules. The Commission's rules require  
7 the documents or the material be in the possession --

8 JUDGE NELSON: Write them a letter that  
9 says "Dear Member: You don't have to answer this  
10 question, but if you feel like it, please do. The  
11 question is do you have any material dealing with" --

12 MR. DOWD: With all due respect, Your  
13 Honor. It seems ritualistic to me.

14 JUDGE NELSON: You don't know. There may  
15 be members who will say I'll tell you what I've got.  
16 I'd love them to know and then there will come a  
17 boxful of documents.

18 MR. BEHR: May I?

19 JUDGE NELSON: Yes sir.

20 MR. BEHR: I'd like to turn this around a  
21 little bit.

22 JUDGE NELSON: What group is this? The

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1       Plastics?

2               MR. BEHR: Yes, and just suggest to Your  
3 Honor that we were here arguing that we should be  
4 allowed to ask Your Honor to order the applicants to  
5 poll their stockholders as to their positions relating  
6 to this merger, that they would say they can't be  
7 compelled to do that. And I think we're in the same  
8 position.

9               We are a corporation, chartered under the  
10 law of the State of New York. As a corporation, we  
11 have constitutional standing in this matter.

12              JUDGE NELSON: The Society is a  
13 corporation?

14              MR. BEHR: The Society is a corporation.  
15 We have members. They have stockholders. We have not  
16 sought discovery from their stockholders as to their  
17 positions --

18              JUDGE NELSON: Let me assume with you that  
19 as a general proposition you have no power to compel  
20 your members to do anything and -- other than pay  
21 dues, I suppose, but if they don't you can kick them  
22 out probably.

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1 MR. BEHR: We can't even do that.

2 JUDGE NELSON: You can't direct them to  
3 produce documents and that I can't either, as a legal  
4 matter. What's that got to do with the insistence of  
5 the applicants of the ritual that you ask them?

6 MR. BEHR: The question is, if we can't --  
7 can we be required to answer a question that requires  
8 information from our specific members?

9 JUDGE NELSON: That's not the issue. The  
10 issue is can you write your members and say "Dear  
11 Member, the applicants of the Burlington Northern UPSP  
12 rail merger proceedings have asked the following. We  
13 have no power to tell you to answer this question, but  
14 if you choose to answer it, I'll see that they get the  
15 answer."

16 MR. BEHR: They can write that letter.

17 JUDGE NELSON: What's wrong with that  
18 letter?

19 MR. BEHR: What's wrong with them writing  
20 that letter is my response to that? Our client has no  
21 interest in writing that letter. We don't believe the  
22 court has the authority to do that. If counsel for

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1 the applicants wishes to write that letter to the  
2 appropriate member, any corporation, Mr. DiMichael  
3 represents that thousand member Society of Plastics  
4 Industry. If counsel wants to inquire of Mr.  
5 DiMichael if his client would like to provide that  
6 information, he certainly can do that.

7 JUDGE NELSON: Well, Dowd is in here as a  
8 party.

9 MR. DiMICHAEL: Your Honor --

10 JUDGE NELSON: So they're stuck. They  
11 can't hide this --

12 MR. DiMICHAEL: That's a very important  
13 point because I think there's two things going on  
14 here. First of all, that letter in theory could be  
15 written, but there are no consequences to that letter  
16 if somebody here says yes or somebody especially says  
17 no. It's a futile act to require us to do that, but  
18 more important is the point that you just raised. The  
19 members of the association --

20 JUDGE NELSON: It looks a little better to  
21 do that than say we'll do nothing. We won't even  
22 write a letter.

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1 MR. DiMICHAEL: But Your Honor, the  
2 members of the Association, under the Commission's  
3 rules are not parties to the case. The Association is  
4 a separate entity --

5 JUDGE NELSON: I understand this position.

6 MR. DiMICHAEL: That is a key position  
7 because it is beyond the bounds of the authority in  
8 this case to order discovery of nonprofits --

9 JUDGE NELSON: So the question then is  
10 what about all this. Is there a rule of law here or  
11 do you deny that?

12 MR. LIVINGSTON: I don't think there's any  
13 rule of law that prevents the Commission from saying  
14 you, as a party, the Association, can be required to  
15 circulate these to the members and request information  
16 and that if they do not respond there may be  
17 consequences. One of the consequences may be that if  
18 you later tried, you as the association on behalf of  
19 your members, tried to rely on information that you  
20 obtained from the members, we will not admit that  
21 evidence.

22 JUDGE NELSON: Do we have a membership

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1 list of these groups or is that in dispute still?

2 MR. DOWD: Not for us. I know we have --  
3 we haven't been asked to provide a list of our  
4 members, but we don't have any objection.

5 JUDGE NELSON: I think you did  
6 voluntarily.

7 MR. DOWD: Probably. I think it was in  
8 our notice to intent to participate.

9 JUDGE NELSON: How about these 26 people?  
10 Is there a membership list or is that sacred?

11 MR. BEHR: I don't have one, Your Honor.  
12 The issue hasn't been raised with the Society.

13 JUDGE NELSON: Mr. DiMichael is giving me  
14 a lengthy list of from A to Z.

15 MR. DiMICHAEL: A to Z, Your Honor, 600  
16 members. In fact, a number of carrier members too.  
17 Including, I might add the Southern Pacific --

18 JUDGE NELSON: Suppose I were to authorize  
19 the applicants to draft a letter which we would reveal  
20 here which they would send on their time and at their  
21 expense to each and every member saying to the members  
22 whatever it is the letter says.

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1 MR. DOWD: Your Honor, the applicants  
2 can't propound discovery against nonparties.

3 JUDGE NELSON: But they can use the U.S.  
4 mails.

5 MR. DOWD: That's true, there's no rule  
6 against that.

7 MR. McBRIDE: Your Honor, with a week and  
8 a half to go, if such a letter were sent to the  
9 members of the group I represent, what would happen  
10 here is comments which I'm sitting here working on and  
11 everybody else is trying to work on which are due next  
12 Friday, our phones ring all day and all night from all  
13 of our members saying what do I do with this letter?

14 JUDGE NELSON: Well, you see if you would  
15 you willing to write the letter you wouldn't have all  
16 that. It would be what you wanted it to say and you  
17 can keep control. In this refusal to even write a  
18 letter asking, you're taking such a hardball position  
19 that I'm going to have to contrive a solution. I'm  
20 not going to write a thousand people. That solution  
21 may be to have Mr. Livingston write the letter and  
22 whatever comes of it comes of it.

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1 MR. DOWD: Well, obviously, Your Honor, if  
2 it's a choice between the Association writing this  
3 letter and the applicants, we would certainly do it  
4 ourselves.

5 JUDGE NELSON: I think that would be a  
6 sound --

7 MR. DOWD: And we would, however, insist  
8 upon our full rights in writing this letter, our right  
9 to inform the member --

10 JUDGE NELSON: You can have it say  
11 whatever you want it to say. If you circulate a draft  
12 and get Mr. Livingston's agreement on it, so be it,  
13 then you cut off complaints about the content of the  
14 letter, but otherwise, it can say whatever you want it  
15 to say. You're a lawyer.

16 MR. DOWD: I'd like to avoid future debate  
17 about this.

18 MR. DiMICHAEL: If we are to --

19 JUDGE NELSON: Well, why don't we agree on  
20 the draft letter?

21 MR. DOWD: I'm not about to negotiate with  
22 applicants a letter, Your Honor. That's -- that is

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1 effectively allowing the propound discovery. I'm sure  
2 that Mr. Livingston and I could not agree on the  
3 contents of the letter.

4 JUDGE NELSON: It's any letter you want  
5 which is the way I was thinking. Write whatever you  
6 want and we'll see what flows from it.

7 MR. LIVINGSTON: I would hope that the  
8 letter would say, they can say what they want in the  
9 letter, but I should point out that it will be the  
10 applicant's position that the consequences may flow  
11 from a failure to respond. They can say whatever they  
12 want to say from their own position, but there are no  
13 --

14 MR. DOWD: We certainly are not going to  
15 suggest --

16 JUDGE NELSON: Let them tell whatever they  
17 want to tell.

18 MR. DOWD: In any way shape or form that  
19 there are any consequences --

20 JUDGE NELSON: He has offered to say --  
21 the idea of the importance of this is that there may  
22 be something that is volunteered.

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1 MR. LIVINGSTON: Some people may think  
2 that if the applicants are going to argue that the  
3 failure to respond has consequences. They may rather  
4 respond --

5 JUDGE NELSON: They may not know that  
6 unless it goes in the letter.

7 MR. DOWD: No, and no coercive language  
8 will be used in this letter, Your Honor.

9 MR. DiMICHAEL: Respond to what?  
10 Apparently what we're going to have to do is propound  
11 --

12 JUDGE NELSON: Want me to draft the  
13 letter?

14 MR. DiMICHAEL: We're going to have to  
15 send all the discovery under this letter? Your Honor,  
16 this is just simply not proper because we have no  
17 power to compel and why should we in a sense be  
18 required to write on an act that we have -- that the  
19 Board has no power to enforce.

20 JUDGE NELSON: How are you hurt by writing  
21 this letter?

22 MR. DiMICHAEL: There's a potential for

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1 massive confusion. And I will have to say a fair  
2 amount of expense because it looks as if we're not  
3 only going to have to write a letter, but it has to be  
4 sent with the discovery which has been propounded that  
5 is going to generate from my members 600 phone calls.  
6 In fact, I will guarantee 2,000 phone calls saying  
7 what have I just gotten here and what do I have to do?  
8 I would submit in the last week and a half this is  
9 just simply not proper and the proper thing to do is  
10 wait and see what we file, then they can propound what  
11 they need.

12 JUDGE NELSON: Let me ask you, I've heard  
13 from Mr. Dowd on the subject, what about the other two  
14 gentlemen? Waiting to revisit this in the context of  
15 whatever position the Association actually takes. I'm  
16 a little concerned about a position that's so horrible  
17 that it comes out that we can take, we can make a  
18 substantive submission to the Board, making, if you  
19 will, a particularized request for particular relief,  
20 but we cannot and will not ask our members for one  
21 piece of paper to back up that position.

22 MR. DiMICHAEL: Your Honor --

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1 JUDGE NELSON: I wonder if you get to  
2 that, whether we haven't got the foundation for the  
3 Board's permissible drawing of an inference that the  
4 position (a) has no support or (b) cannot be  
5 maintained. I say to you again, gentlemen, I don't  
6 think you can have it both ways. And I'm concerned  
7 for me anyway, that you know that that's how I feel  
8 about it. So we just don't put this off for a week  
9 and come right back here again and the answer is you  
10 will get nothing, no, no, a thousand times no, not one  
11 piece of paper.

12 If that's all that it's going to be then  
13 we can start thrashing it out now.

14 Is that the deal?

15 MR. DiMICHAEL: It doesn't -- the answer  
16 to that depends on the types and the kind and the  
17 direction of the evidence that we in fact file.

18 JUDGE NELSON: Not if your opposition is  
19 you'll file nothing from members, you'll ask nothing  
20 from members.

21 MR. DOWD: What if no member specific  
22 representations are made in the comments? What if the

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1        comments deal exclusive --

2                JUDGE NELSON: The hypothetical --

3                MR. DiMICHAEL: The applicants have a  
4        burden on this to go forward and to prove that the  
5        Board should and has evidence to support a decision  
6        under a public interest entity --

7                JUDGE NELSON: That has nothing to do with  
8        it.

9                MR. DiMICHAEL: But if we, in our evidence  
10        attack the premises and the accuracy of the evidence  
11        that they have submitted without making any references  
12        to individual members or individual facts on our part,  
13        then isn't -- it seems to me we can do that and  
14        undermine their case and cause and have a legally  
15        supportable reason for the Board to say you haven't  
16        proven your case without any representations at all  
17        about individual facts from individual members.

18                JUDGE NELSON: What relief would you be  
19        seeking from the Board?

20                MR. DiMICHAEL: It would depend upon what  
21        the evidence was.

22                MR. DOWD: Your Honor, let me give you a

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1 hypothetical.

2 JUDGE NELSON: We have to deal with this.

3 MR. DOWD: An association such as the  
4 Western Coal Traffic League, or the Western Shippers  
5 Coalition submits comments, the gist of which is per  
6 se the reduction from 3 railroads to 2 in the West is  
7 anticompetitive and under the law cannot be. Period.  
8 Supported by Professor Jones of Princeton University.  
9 No member information is included. No claims were  
10 made regarding specific impacts. No request for  
11 relief other than deny the merger. Now that would not  
12 implicate in any way, shape or form any of the  
13 concerns that Mr. Livingston has, but it is entirely  
14 a plausible outcome.

15 JUDGE NELSON: That to me is one case.  
16 Another case might be as a condition of approval of  
17 the merger open the bidding for the right to supply  
18 competitive rail service between Brownsville and  
19 Houston, hauling plastics. That last one, the one I  
20 just gave, presumably it will have a little more than  
21 that in it, that one gives the applicants a better  
22 foundation for you to put up or shut up whether your

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1 members have a need for all this, in my view.

2 In a position that says why is that fair  
3 for such relative bidding, but we will not tell you,  
4 cannot, will not and never will what our members have  
5 to say that might support this contention, sets you up  
6 for a potential downfall with the Surface  
7 Transportation Board which you would then be buying by  
8 rolling the dice with this litigation position.

9 But I come out again that that will be in  
10 the context of that hypothetical, the Plastic Shippers  
11 which is different from the case Mr. Dowd put which  
12 has some general economic attack upon the broad sweep  
13 of the merger, going from what, 2 to 1 is bad for  
14 America. It's per se illegal, evil. You don't need  
15 to know Shipper Jones' opinion about all that, I would  
16 think, to evaluate the economic clash of economic  
17 experts. I could see differences based upon  
18 positions, but I want you to know my thinking which is  
19 the sharper you get and the more detailed you get and  
20 the more specific you request conditions of relief,  
21 the worse position you're in when you then say you  
22 can't put up anything.

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1           We can't ask our members for anything and  
2           moveover we refuse to ask them anything. That  
3           position gets shabbier and shabbier, the more you're  
4           in there with specific submissions looking at  
5           particularized relief to me. So with all of that,  
6           I'm going to defer this entire business --

7           MR. LIVINGSTON: Your Honor, may we say  
8           one more thing?

9           JUDGE NELSON: Very briefly, please

10          MR. LIVINGSTON: There's one other aspect  
11          of this. The three permanent associations, I'm sure  
12          there are big league numbers who support the merger  
13          and I'm sure there are some that oppose. I think it's  
14          useful for the Commission to know, to inquire of these  
15          members to get and discovery would do that. We'd get  
16          into what their position was, what their own internal  
17          evaluation is. Maybe it will turn out that X percent,  
18          some large percentage of this league actually supports  
19          the merger. And it may be true of others as well and  
20          that's another reason why the discovery on the  
21          permanent associations, the letter ought to go out.  
22          They ought to write a letter -- they can say whatever

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1 they want in the letter, except that it ought to  
2 request their members to respond.

3 MR. DOWD: Your Honor, equally briefly, I  
4 credit their arguments that to do the letter at this  
5 time would be burdensome, would swamp them with  
6 details and responses at the very time they have to be  
7 preparing pleadings and I'm not going to direct it  
8 now. I may direct it in the context of some specific  
9 position that the Association takes.

10 On denying all that discovery now, without  
11 prejudice to its renewal in Phase 2. Now we have the  
12 question of the other associations and whether there  
13 should be some differences as to them. Now who are  
14 they again?

15 MR. MCBRIDE: Western Shippers Coalition,  
16 I represent. There's another coalition which I do not  
17 represent.

18 JUDGE NELSON: Why are they different?

19 MR. LIVINGSTON: Well, these are much  
20 smaller groups, I believe. These are entities that  
21 aren't like the National Industrial Traffic League,  
22 it's a mixture, a hodge podge of companies around the

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1 country. These are companies that have a unified  
2 interest on this merger and have come together  
3 strictly for purposes of the merger --

4 JUDGE NELSON: Do we know their  
5 membership?

6 MR. LIVINGSTON: I believe we do now.

7 MR. McBRIDE: He knew it from the first  
8 day I filed the pleading and I gave him another copy  
9 of the list --

10 JUDGE NELSON: I recall you had said you  
11 had sent it.

12 MR. McBRIDE: That's correct.

13 JUDGE NELSON: What's the other group  
14 called?

15 MR. LIVINGSTON: It's called the Coalition  
16 for Competitive Rail Transportation.

17 JUDGE NELSON: Are they here represented?

18 MR. LIVINGSTON: I don't believe so. They  
19 did file a response --

20 JUDGE NELSON: So they take a chance of  
21 whatever happens.

22 MR. LIVINGSTON: A response signed by a

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1 man named John Estes.

2 JUDGE NELSON: Is Mr. Estes a lawyer?

3 MR. LIVINGSTON: He calls himself  
4 "Executive Director" of the Coalition for Competitive  
5 Rail Transportation.

6 JUDGE NELSON: Well, the FERC rule is that  
7 people who don't show up at such conferences are bound  
8 by what happens at them.

9 MR. NORTON: Your Honor, I called, I  
10 placed a call to Mr. Estes to discuss the discovery  
11 response to see whether we could avoid this dispute  
12 and he didn't return the call.

13 JUDGE NELSON: Do you know him?

14 MR. NORTON: No.

15 JUDGE NELSON: Do you have any dealings  
16 with him?

17 MR. NORTON: No.

18 JUDGE NELSON: For all we know, we don't  
19 know what this group is.

20 MR. LIVINGSTON: I believe it is a group  
21 that has come together for this proceeding.

22 JUDGE NELSON: Is it a bona fide group as

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1 far as you know?

2 MR. LIVINGSTON: They have papers on the  
3 case.

4 JUDGE NELSON: I mean I could make up a  
5 group.

6 MR. LIVINGSTON: They served the papers in  
7 the case.

8 JUDGE NELSON: Loyal JAG Corp Alumni  
9 against the merger. I could round up a couple of guys  
10 who would say they were part of it.

11 (Laughter.)

12 MR. LIVINGSTON: If you did that and filed  
13 paper in this proceeding, you would be a part of it.

14 MR. McBRIDE: And we would have served you  
15 with discovery.

16 (Laughter.)

17 JUDGE NELSON: How many members in your  
18 group, Mr. McBride?

19 MR. McBRIDE: We have 28, but I've been  
20 restraining myself because Mr. Livingston is wrong on  
21 the facts in several respects. Three of the members  
22 of our coalition and I just added a member the other

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1 day and I think two more yesterday, but three of the  
2 members are permanent associations, the Colorado  
3 Mining Association, the Utah Mining Association, and  
4 the Western Coal Transportation Association, so the  
5 same problem applies to me, but multiplied by three.  
6 That's point one.

7 JUDGE NELSON: No.

8 MR. LIVINGSTON: We're not seeking --

9 JUDGE NELSON: You're certainly not  
10 powerless to tell the permanent associations --

11 MR. McBRIDE: Oh we're --

12 JUDGE NELSON: The permanent association  
13 may say Mr. McBride, go whistle.

14 MR. McBRIDE: That leads to my point too.  
15 I stayed out of this last discussion except to tell  
16 you about the telephone call problem, but weeks ago  
17 because I suspected that knowing Your Honor as a  
18 person who tries to be fair here, we might get to this  
19 kind of discussion. I asked my client to ask of his  
20 members if they had anything about this merger if they  
21 would send it to him or me and we could take a look at  
22 it and see whether it was responsive or privileged and

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1 maybe we could cut off -- I didn't get anything except  
2 that we then went out, this is my next point and I  
3 told Your Honor this, in response to their  
4 interrogatory No. 6 which asks for a lot of detail.  
5 Coal, tonnages, routes, finance, mines, all that. We  
6 asked our coal consultant, Resource Data  
7 International. Mr. Vanetti who was at Mr. Sharp's  
8 de[position]. We had him from 4/23 data, some other  
9 public data to develop what we believe the correct  
10 answers to that interrogatory to be because they have  
11 access to it and we then sent it out to each of the  
12 coal producers and utilities in the group and said if  
13 any of this is wrong, please let us know because  
14 otherwise we're going to provide it as evidence. We  
15 did that. We provided the information and they wrote  
16 you the letter before they even came over to look at  
17 my documents, but later that day or the next day they  
18 got my documents. They got hundreds of pages of them.  
19 I have done everything I can to answer the questions  
20 that are directly responsive to what --

21 JUDGE NELSON: What is you want from Mr.  
22 McBride that he hasn't given?

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1 MR. LIVINGSTON: Well, is he representing  
2 that he has made an inquiry of his members and this is  
3 what they gave him?

4 JUDGE NELSON: Yes.

5 MR. McBRIDE: Yes. My client made an  
6 inquiry of his members, we got documents, we provided  
7 them to the applicants.

8 JUDGE NELSON: What is it you want him to  
9 do that he hasn't done? You seem troubled about this.

10 MR. NORTON: I believe, I may have  
11 misunderstood the representation, but it was in  
12 response to one particular interrogatory, but they  
13 made a request to the members, not to everything.

14 MR. McBRIDE: No, no, no, no, no. I said  
15 two things. I asked the client to ask of the members  
16 if they had anything about the merger and we could  
17 take a look at them. He sent me some papers whether  
18 he got them from them or from his own files I don't  
19 even know. He's on the road, but I produced those.  
20 Then I made a second inquiry, separate inquiry. You  
21 did misunderstand on Interrogatory No. 6 to get that  
22 right because that seemed to be the heart of what they

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1 were coming at us about cold, so I answered the  
2 question and gave him hundreds of pages of data. They  
3 can't identify one specific document request or  
4 interrogatory other than the ones to which I have  
5 constitutional objectives that I have not responded  
6 to. I dare them to do it.

7 JUDGE NELSON: Why don't these  
8 representations suffice?

9 MR. LIVINGSTON: Your Honor, if he's made  
10 the inquiries as he says --

11 MR. NORTON: It isn't clear what he's  
12 saying that he just asked about documents relating to  
13 the merger or whether he asked the members if they had  
14 anything responsive to these discovery requests.  
15 There's a difference.

16 MR. McBRIDE: I haven't sent them all the  
17 discovery requests. I asked them about anything about  
18 the merger and then I asked the about the coal.

19 JUDGE NELSON: You asked them if they had  
20 any documents about this merger?

21 MR. McBRIDE: Yes.

22 JUDGE NELSON: Was this done orally or in

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1 writing?

2 MR. McBRIDE: I asked my client to do it.  
3 I don't even know most of these people.

4 JUDGE NELSON: How did you do it, orally?

5 MR. McBRIDE: Yes, over the telephone with  
6 my client.

7 JUDGE NELSON: Anything else? I'm going  
8 to rule that no further discovery is needed with  
9 regard to Mr. McBride's group or groups.

10 That leaves us this coalition that is  
11 unrepresented.

12 Does anyone know anything about this  
13 group?

14 MR. LUBEL: Your Honor --

15 JUDGE NELSON: Mr. Lubel?

16 MR. LUBEL: We have become involved with  
17 that coalition. If I think this is the group and it's  
18 been set, we're not involved, KCS is not involved with  
19 them any more. That's all I know about that.

20 JUDGE NELSON: Do you know who they are?

21 MR. LUBEL: I don't know Mr. Estes.

22 JUDGE NELSON: Do you know anything about

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1       them?

2               MR. LUBEL: They do exist and made up of  
3       shippers who are concerned about the merger.

4               I can -- at a break I can try to get in  
5       touch with Mr. Estes.

6               JUDGE NELSON: Do yo know him?

7               MR. LUBEL: I don't know him.

8               JUDGE NELSON: They did file responses.  
9       They didn't ignore them. It's in the big book there  
10      under C, Coalition for --

11              MR. McBRIDE: They didn't give us a copy.

12              MR. LIVINGSTON: And he --

13              JUDGE NELSON: Well, there's another FERC  
14      rule here and that is that you can be excused so far  
15      as things now appear, but you're at your own risk  
16      because you have to know what might happen. It's up  
17      to you.

18              As far as I know, we're through with your  
19      issue.

20              MR. BEHR: We're through with the --

21              JUDGE NELSON: We're through for now. We  
22      may well have to come back.

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1 MR. LIVINGSTON: I think it's really quite  
2 immaterial that they're not here. They have filed  
3 their objections and responses and on page 4 they make  
4 as a general objection no. 11 the statement that  
5 they're not going to talk to their members. They call  
6 themselves a voluntary ad hoc membership organization  
7 which I think distinguishes it from the permanent  
8 members.

9 JUDGE NELSON: What's their position in  
10 the case so far?

11 MR. LIVINGSTON: They have filed a paper.  
12 I don't know what it says. I don't have it with me.

13 JUDGE NELSON: Does anyone have that?

14 MR. LIVINGSTON: In any event, they have  
15 stated their objections --

16 JUDGE NELSON: I don't like to answer  
17 orders directing some coalition to produce stuff when  
18 we don't even know what its position is.

19 MR. LIVINGSTON: They ought to at least do  
20 what Mr. McBride did, or something like it, there  
21 ought to be an order that says this objection is  
22 overruled, you are required to circulate these

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1 discovery requests.

2 JUDGE NELSON: I can't overrule the  
3 objection. The objection is that they are powerless  
4 to compel things from members, that's probably a valid  
5 objection.

6 MR. LIVINGSTON: They can be directed.

7 JUDGE NELSON: What they can be asked to  
8 do is to ask their membership --

9 MR. LIVINGSTON: To circulate these  
10 discovery requests to their members and request  
11 responses.

12 JUDGE NELSON: You draft a letter in which  
13 you may recite that you're doing it at my request and  
14 I don't want -- I don't know what this letter is going  
15 to say, so I don't want to spend time haggling over it  
16 with you without the other side being there. How can  
17 we practically get this done?

18 MR. LIVINGSTON: I think the practical  
19 thing is we need an order to Mr. Estes saying you have  
20 four days to make inquiries of your members as to  
21 whether they have materials that are responsive to  
22 these requests.

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1 MR. DOWD: Your Honor --

2 MR. LIVINGSTON: I really think it would  
3 be outrageous for them to glean an advantage on this  
4 discovery dispute by not showing up at the hearing.

5 JUDGE NELSON: I don't want to do that.

6 MR. DOWD: Your Honor, just for the record

7 --

8 JUDGE NELSON: I'm trying to see, if I  
9 knew what the position was, are they one of these  
10 people that's going to file something next?

11 MR. DOWD: Your Honor, I don't know. I'd  
12 just like to get on the record that since we're  
13 dealing here with an unknown party that is  
14 unrepresented and the applicants are being deputized  
15 by Your Honor to make inquiries on an unknown position  
16 that nothing that happens with regard to this  
17 organization and their production will not be  
18 prejudicial to anyone else.

19 JUDGE NELSON: They're not being deputized  
20 to do anything, Mr. Dowd, and it's got nothing to do  
21 with anybody else. I'm trying to make suggestions and  
22 discuss and work out here a solution. I haven't

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1 ordered anything.

2 MR. LIVINGSTON: Your Honor, this man  
3 Estes gives his address as Alexandria, Virginia. We  
4 tried to phone him. He's filed responses. He's  
5 obviously filed another paper in the case because this  
6 is CCRT 2. He's not represented. He's pretty close  
7 to being a lawyer given the nature of the document.

8 JUDGE NELSON: Isn't there a John Estes  
9 that worked in the Solicitor's Office at the FERC at  
10 one time? I know that name from somewhere.

11 MR. LIVINGSTON: Perhaps it is the former  
12 JAG Corps.

13 (Laughter.)

14 JUDGE NELSON: Part of that other group.

15 MR. LIVINGSTON: I really think there's  
16 only one solution and that's to issue an order to Mr.  
17 Estes to circulate these discovery requests and --

18 JUDGE NELSON: Why is his group different  
19 in terms of the need to make him do something now?  
20 Why don't we also put him in the Phase 2 category and  
21 see when he does.

22 MR. LIVINGSTON: This is like Mr.

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1 McBride's group. This is the group that is put  
2 together for the merger.

3 JUDGE NELSON: It may not do anything.

4 MR. LIVINGSTON: But you have a group of  
5 parties coming together and saying we're going to  
6 participate in the merger proceeding, but we're going  
7 to do it in our own way --

8 JUDGE NELSON: One indication of a group  
9 that doesn't do anything and doesn't answer responses  
10 is that it hasn't got any money and maybe won't amount  
11 to doing anything anyway.

12 Maybe this is a little premature.

13 MR. LIVINGSTON: I don't see it that way  
14 at all. They filed --

15 JUDGE NELSON: They filed something you  
16 can't show me.

17 MR. LIVINGSTON: I can show it to you.  
18 I'll put it right in front of you.

19 JUDGE NELSON: What is it?

20 MR. LIVINGSTON: The responses to these --

21 JUDGE NELSON: When are they going to get  
22 into this case prior to this time?

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1 MR. LUBEL: Your Honor, I'm not an expert,  
2 but there are two things that they filed, didn't we  
3 all have to file just an intent to participate?  
4 Notice of intent.

5 JUDGE NELSON: It doesn't say any  
6 position.

7 MR. LUBEL: Right.

8 JUDGE NELSON: Like a notice of appeal.

9 MR. LUBEL: So we've only got two things  
10 and the first thing --

11 JUDGE NELSON: Doesn't tell us anything.

12 MR. LUBEL: Yes. I want to participate.

13 JUDGE NELSON: I'm going to put this group  
14 in the second category and if Mr. Estes, whoever he  
15 is, hears this or sees this he should realize that if  
16 they've got a serious position to make they may have  
17 to face up to discovery concerning that position. If  
18 they file nothing or something that is innocuous then  
19 there's no sense wasting a lot of time.

20 So I'm going to rule that as the Coalition  
21 for Competitive Rail Transportation, that also  
22 discovery is premature and should await the filing of

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1 any substantive position that that Coalition may take.

2 What is next?

3 (Pause.)

4 Should we go off the record for a moment?

5 Is there an objection to going off the record?

6 MR. LIVINGSTON: I have one last follow-up  
7 question.

8 JUDGE NELSON: Let me address a logistical  
9 question. Do you have an objection to doing that?

10 MR. LIVINGSTON: No, I don't, but I have  
11 one final follow-up.

12 JUDGE NELSON: What is your follow-up?

13 MR. LIVINGSTON: The hearing scheduled for  
14 Phase 2, I think is April 12th, that's the date that  
15 sticks in my mind.

16 JUDGE NELSON: We can change that, if we  
17 need to.

18 MR. LIVINGSTON: The problem with that for  
19 me is that from an Association point of view is that  
20 the discovery of the two phase process, they write the  
21 letter, then they get responses, then they produce the  
22 document and that leaves very little time until April

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1 20th and that process, if it's going to go forward has  
2 to go forward prior to April 12th.

3 I would think that we would need a hearing  
4 on the associational discovery prior to April 12th.

5 JUDGE NELSON: I'm certainly willing to do  
6 that. the Association will be filing their papers  
7 when, the 29th?

8 MR. DOWD: The 29th with everybody else.

9 MR. LIVINGSTON: Well, maybe we can do it  
10 on that -- the 29th 1-- we can do it on that day in  
11 the afternoon.

12 MR. DOWD: Are you kidding? Unlikely.  
13 The Board is open until midnight. A lot of us file at  
14 11:30.

15 JUDGE NELSON: Why don't we do it -- how  
16 about 3rd or 4th?

17 MR. LIVINGSTON: I don't think this will  
18 take long. Those letters, if they don't go out to the  
19 association members, even April 4th is pushing it, for  
20 us to get the material back and use it by April 29th.

21 JUDGE NELSON: I'm available the first  
22 part of the day April 1.

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1 MR. DOWD: What letters are we talking  
2 about? What are we talking about?

3 JUDGE NELSON: I think he's talking about  
4 the kind of letters that say you don't have to tell me  
5 anything, but if you feel like telling me something,  
6 please answer the following questions.

7 MR. DOWD: I thought --

8 JUDGE NELSON: He thinks that's important.

9 MR. DOWD: I thought Your Honor's ruling  
10 was you're going to wait and see what comments are  
11 filed.

12 JUDGE NELSON: We are. We're now on April  
13 1, 1996, the comments were filed the previous Friday  
14 and Mr. Livingston wants to expedite a discovery  
15 conference in preference to the group's position and  
16 move it up to the first week of April.

17 MR. BEHR: But Your Honor, don't the  
18 entities have to do that after the comments are filed?  
19 It seems to me we need to discuss responses to  
20 interrogatories and doing it the next Monday doesn't  
21 allow any time for counsel for the applicants to --

22 JUDGE NELSON: What's your suggestion?

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1 MR. BEHR: I think no earlier than the 3rd  
2 or the 4th.

3 JUDGE NELSON: That's fine. That's more  
4 than a week speed up of what we would have done.

5 MR. LIVINGSTON: I'm not talking about --  
6 we're limited to the one associational issue of  
7 getting the information from their members.

8 JUDGE NELSON: Yes. That's what we're  
9 talking about.

10 MR. NORTON: We would be able to address  
11 that on the 1st. All we need to know is whether they  
12 fled. We'll have that information, sufficient to  
13 address this very specific issue.

14 JUDGE NELSON: I don't follow that.

15 MR. DOWD: Yeah, Your Honor, I don't  
16 either. It would seem at a minimum that the  
17 applicants would be required to come in and be  
18 prepared to specify --

19 JUDGE NELSON: Midnight on Friday, March  
20 29th. You show up here at 9 a.m. on April 1st, what  
21 is it that you're going to say?

22 MR. LIVINGSTON: We would want to -- we'll

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1 see what they file.

2 JUDGE NELSON: What I don't want you to  
3 say is now give me the same discovery you gave me  
4 before. I'm not going to help you. I'm not going to  
5 focus it. I'm not going to tell you anything. I want  
6 everything I want to be focused. I don't want that  
7 ritual.

8 What I'll expect to hear from you, here is  
9 that position, here is what they said, here is the  
10 problem with Ogden, Utah or the Mexican traffic or  
11 whatever it be. Here's what we want to get from them.

12 MR. LIVINGSTON: There will be some of  
13 that, but there will also be some --

14 JUDGE NELSON: There's every piece of  
15 paper in the world written from the Year 1 to date, it  
16 ain't going to happen.

17 MR. LIVINGSTON: We're not going to ask  
18 for every piece of paper in the world.

19 MR. DOWD: Your Honor, shouldn't there  
20 also be, before we have a conference, at least a token  
21 effort among counsel to see if they've got a problem

22 --

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# **CORRECTION**

THE PREVIOUS DOCUMENT(S)  
MAY HAVE BEEN FILMED  
INCORRECTLY.....



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20 also be, before we have a conference, at least a token  
21 effort among counsel to see if they've got a problem  
22 --



1 JUDGE NELSON: that was the other  
2 suggestion. Mr. --

3 MR. BEHR: Behr.

4 JUDGE NELSON: Mr. Behr made that  
5 suggestion, but there ought to be enough time for the  
6 applicants to evaluate the association's position and  
7 to tell the Association what it wants and the  
8 association to see what it wants to give up, knowing  
9 that it may have to give up something, at least as far  
10 as I'm concerned. And then come in and why wouldn't  
11 the 3rd or 4th be sufficient for that?

12 MR. LIVINGSTON: What time on the 3rd,  
13 Your Honor?

14 JUDGE NELSON: I see here that I've got  
15 oral argument in another case, but I may be able to,  
16 I've been wanting to juggle that anyway because I  
17 don't think I'm gong to be ready and what I'd like to  
18 do is contact those folks and see what works to  
19 minimize the inconvenience to them, so that I can do  
20 more detailed preparation for them. That would then  
21 free me up on the 3rd and we could start the usual  
22 9:30 ICC starting time. It would be fine for me.

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1 Before I do that, I would want to contact and we have  
2 time here today, to contact -- it's a three party  
3 case, one of them is the Commission so it's an easy  
4 case to make phone calls, see if they can slip that  
5 oral argument a few days.

6 So I mean subject to that, I'm willing to  
7 take you on the 3rd or 4th at the latest on this  
8 Association discovery.

9 All right? Let me put a note on my  
10 calendar. I'm going to block out those two days and  
11 ask counsel to be available within that time frame, so  
12 then I'll pick when it is and have you in here on the  
13 3rd or 4th.

14 What is the next item?

15 MR. LIVINGSTON: The next item involves  
16 Dow and Kennecott and I had a discussion with Mr.  
17 DiMichael earlier today. He was going to talk to his  
18 people and I made a proposal to him along the lines of  
19 the proposal we made to -- and it was agreed to by  
20 International --

21 MR. DiMICHAEL: We are in the midst of  
22 talking -- I've talked to the client and I need to get



1 back with him on a counterproposal.

2 JUDGE NELSON: I wanted to take a little  
3 time anyway to contact people in this other case.  
4 Would a recess be useful right now? Do you want to  
5 make it an early lunch and come back --

6 MR. LIVINGSTON: I don't know if we're all  
7 that far from finishing.

8 JUDGE NELSON: All right, then we'll take  
9 a recess for whatever purposes we need to agree and  
10 confer and then I'll be available in the office. Call  
11 me when you're ready to resume.

12 I'll see what I can do about the 3rd and  
13 4th.

14 (Whereupon the proceedings went off the  
15 record at 11:48 a.m. for a lunch break.)  
16  
17  
18  
19  
20  
21  
22



1 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2 (12:34 p.m.)

3 JUDGE NELSON: Please be seated.

4 MR. LIVINGSTON: Your Honor, returning to  
5 the letter, we are still in discussions with Dow  
6 Kennecott, and I think we're on the verge of a deal,  
7 but Mr. DiMichael is still on the phone and we all  
8 thought it would be best if we could continue on  
9 through the letter.

10 JUDGE NELSON: All right.

11 MR. LIVINGSTON: And looking at the bottom  
12 of page 2, the item after Dow --

13 JUDGE NELSON: Gateway Western.

14 MR. LIVINGSTON: -- and that has been  
15 deferred for agreement, so we can skip that one.

16 The next one is Wisconsin Electric, and  
17 this is supplemented by our March 18th response.  
18 There are three other companies -- Illinois Transit,  
19 Springfield Plastics, and Mountain Plains Communities  
20 and Shippers Coalition -- which filed similar  
21 responses.

22 The position taken by all of these

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1 parties, and they're all represented by the same  
2 lawyer -- and the Wisconsin Electric filing they made  
3 is -- claims their position.

4 JUDGE NELSON: Who represents them?

5 MR. LIVINGSTON: I've got it in the large  
6 book, and it's the last tab.

7 MR. NORTON: His name is McFarlane, Your  
8 Honor, and I --

9 JUDGE NELSON: Oh, it says "Objections to  
10 Request for Discovery." I see it.

11 MR. LIVINGSTON: Right.

12 MR. NORTON: I spoke to him about whether  
13 we could resolve this, and he said he planned to stand  
14 on his objections, so we --

15 JUDGE NELSON: All right.

16 MR. LIVINGSTON: And he's not here; he's  
17 in Chicago.

18 JUDGE NELSON: Fine. So what is it you  
19 want, and what is it he's saying?

20 MR. LIVINGSTON: Well, his -- what we want  
21 is a ruling on his objection, which is his position is  
22 that as a shipper he is not required to participate in



1 discovery in abandonment cases or in merger cases. We  
2 think that there is no basis for that position, either  
3 for Wisconsin Electric or for the other three  
4 companies that he represents.

5 He does not cite any merger cases where  
6 discovery was prevented against shippers, and Your  
7 Honor has heard from other shippers already, such as  
8 Dow, who have I wouldn't say cooperated in  
9 discovery --

10 JUDGE NELSON: We've had discovery against  
11 shippers.

12 (Laughter.)

13 MR. LIVINGSTON: That's right, who have  
14 not resisted discovery on the grounds that as  
15 shippers --

16 JUDGE NELSON: I know of no rule that  
17 immunizes all shippers. I wish I had heard long ago  
18 what it --

19 MR. LIVINGSTON: Indeed, I have a -- he  
20 cites a case on page 2 of his objections, which is a  
21 staff decision. I have the Commission's decision  
22 here, which I'd be happy to give Your Honor if you

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