

INTERSTATE COMMERCE COMMISSION 03/08/96

FINANCE DOCKET # 32760

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UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

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DISCOVERY CONFERENCE

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IN THE MATTER OF: :

UNION PACIFIC CORPORATION, :
UNION PACIFIC RAILROAD COMPANY, :
and MISSOURI PACIFIC RAILROAD : Finance Docket
COMPANY : No. 32760
:
- CONTROL AND MERGER - :
:
SOUTHERN PACIFIC RAIL CORPORATION, :
SOUTHERN PACIFIC TRANSPORTATION :
COMPANY, ST. LOUIS, SOUTHWESTERN :
RAILWAY COMPANY, SPCSL CORP., :
AND THE DENVER AND RIO GRANDE :
WESTERN RAILROAD COMPANY. :
-----X

Friday, March 8, 1996

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

The above-entitled matter came on for
hearing, pursuant to notice, at 2:00 p.m.

BEFORE:

THE HONORABLE JEROME NELSON
Administrative Law Judge

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

(2:05 p.m.)

JUDGE NELSON: Please be seated. I always like to recite who is here so that we have a record. Mr. Livingston?

MR. LIVINGSTON: Bill Livingston for the applicant with Michael Rosenthal and Jerry Norton representing SP.

MR. HUT: Stephen Hut, Your Honor, for Consolidated Rail Corporation. With me is Joseph Killory.

MR. EDWARDS: John Edwards with Zuckert, Scoutt and Rasenberger for the Texas Mexican Railway Company and Sierra Pacific.

MR. MCBRIDE: Michael McBride with my associate Daniel Aronowitz for Western Shippers Coalition, Your Honor. Good afternoon.

MR. DiMICHAEL: Your Honor, Nick DiMichael for the National Industrial Transportation League, Dow Chemical Company, Kennecott Energy, and Western Resources.

MR. ONGMAN: Your Honor, John Ongman for

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1 Geneva Steel Company.

2 MR. BILLIEL: Your Honor, Michael Billiel,
3 Department of Justice.

4 MS. JONES: Erika Jones, the Burlington
5 Northern Railroad Company and the Atchison, Topeka,
6 and Santa Fe Railway Company. With me is Adrian Steel
7 and Donald Falk.

8 MS. KOLESAR: Patricia Kolesar. Today I'm
9 here representing Western Coal Traffic League, Texas
10 Utilities Electric Company, Arizona Electric Power
11 Company, and Wisconsin Power and Light Company,
12 Wisconsin Public Service Corporation, and Entergy Inc.

13 MR. KACZMAREK: Chris Kaczmarek here on
14 behalf of Montana Rail Link.

15 MS. METALLO: Virginia Metallo here on
16 behalf of KCS. And with me is Harrilee Molm.

17 MR. GARRETT: Good afternoon, Your Honor.
18 Art Garrett on behalf of the Society of the Plastics
19 Industry and Union Carbide Corporation.

20 JUDGE NELSON: I have read all of the
21 letters pertaining to the areas in dispute here today,
22 which I understand to be the depositions of Lewis,

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1 Matthews, and Krebs, and the seeking of the McKinsey
2 study. Is there someone here from KCS?

3 MS. METALLO: Yes. Your Honor. Virginia
4 Metallo.

5 JUDGE NELSON: Metallo?

6 MS. METALLO: That's correct.

7 JUDGE NELSON: I have read the letters
8 from Mr. Lubel, letters from Ms. Jones, and the
9 letters from Mr. Roach. Where is Mr. Roach these
10 days?

11 MR. LIVINGSTON: Mr. Roach is working on
12 this case, Your Honor. He's actively involved.

13 JUDGE NELSON: Well, that's fine. he's
14 most knowledgeable on these details, not that you're
15 not helpful, but he's somewhat closer to a lot of
16 those things. But we'll get along just fine anyway.

17 I have also read all of the papers
18 associated with the argument that discovery is
19 premature. And I am prepared to make certain rulings.
20 I do not need to hear oral argument here today on each
21 and every aspect of every one of these disputes.
22 First, I don't need to. Some of them sufficiently

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1 clear to me that I can decide them.

2 Secondly, my schedule is quite tight. I
3 am breaking at 3:00 o'clock to begin the
4 cross-examination of a witness in the gas pipeline
5 case who has been hanging around here for two days and
6 who was from out of town and whom I want to finish
7 today. So if we're not finished by 3:00, -- and we
8 very well may not be -- we will simply recess. And
9 I'll come back with you as soon as we get that witness
10 off.

11 I should also add that I feel part of the
12 responsibility for not getting through with that
13 witness yet, because I had a lot of questions of the
14 last witness. And so a lot of the time is chargeable
15 to me, is my fault. And there's no reason why my
16 fault should force that man to sit here for an entire
17 weekend until we can resume the hearings of the
18 pipeline case or make him ship back and forth
19 unnecessarily. In fact, that case may not resume now
20 until Wednesday. So I want to get him on and off
21 today.

22 All right. My review of this matter

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1 brings me out as follows. With regard to the
2 requested depositions, I am denying the deposition of
3 Mr. Lewis.

4 With regard to the request for Mr.
5 Matthews, I am going to grant that deposition, limit
6 it to the presentation Mr. Matthews made at the
7 meeting -- was it the board meeting?

8 MS. METALLO: That was one of his
9 communications, Your Honor.

10 JUDGE NELSON: That's correct. I'm
11 authorizing the deposition as to with respect to that
12 meeting. I will leave it to you to negotiate with the
13 other side the place to have the deposition, how long
14 it shall be, and so on and so forth. And to that
15 extent I'm granting it.

16 With respect to Mr. Krebs, I would need to
17 hear more. I'm not persuaded one way or the other by
18 the papers as to how to come out on the matter of
19 Krebs. I do note Ms. Jones' letter, which alleges
20 that there's a particular test to be employed or a
21 special hurdle when you're dealing with the CEO of the
22 company or a top officer, whatever it is. And there

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1 are some factors there. I am going to ask you, Ms.
2 Metallo, to see if you can't address those.

3 With regard to the McKinsey study, I am
4 denying that discovery. It seems to me too long ago,
5 too old, too far afield, gets us into a collateral
6 dispute, and seemingly involves some burden that goes
7 beyond the slides and actually extends the production
8 of the documents.

9 So, Ms. Metallo, you have won as to
10 Matthews with regard to the speech made at the
11 meeting. And I may give you Krebs, but I need to know
12 somewhat more than I've gotten on the papers. I don't
13 have a confidence either way with regard to Mr. Krebs.

14 Why don't you address now why you need Mr.
15 Krebs with particular reference to the test set out on
16 Page 2 of Ms. Jones' letter? See on Page 2 the
17 paragraph that begins, "Moreover"? She refers to the
18 liberal standards of the federal rules, and she says
19 that "The CEO of a corporation normally may be deposed
20 only where the party seeking the deposition
21 demonstrates that the executive has unique or superior
22 personal knowledge of particular material

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1 information."

2 So I'm asking you to please help me on
3 that regard. What's Mr. Krebs got that's unique or
4 superior personal knowledge of particular material
5 information?

6 MS. METALLO: To begin with, Your Honor,
7 Mr. Krebs is the executive responsible for the BN-SF
8 position to enter into a settlement negotiation
9 agreement with the applicant in this transaction.

10 When we deposed Mr. Grinstein at Fort
11 Worth, he stated in his deposition that he was opposed
12 to such an agreement and wasn't --

13 MS. JONES: Your Honor, this is
14 confidential. We need to close the transcript at this
15 point, close the hearing. We have designated this
16 disagreement as --

17 JUDGE NELSON: Who's here that shouldn't
18 be here?

19 MS. JONES: This is not highly
20 confidential. It is standard confidential. If
21 everyone in the room has signed the undertaking, then
22 it's effectual for everyone to stay.

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1 This is the material I objected to Mr.
2 Lubel's releasing in a public letter in my letter this
3 morning. And it should not have been raised without
4 closing the transcript.

5 JUDGE NELSON: Well, that seems to me a
6 side question.

7 MS. JONES: It is, Your Honor. I just
8 wanted to --

9 JUDGE NELSON: Is everyone in the room
10 cleared as far as you're concerned?

11 MS. JONES: Yes, Your Honor.

12 JUDGE NELSON: All right. May I see that
13 deposition, that page where Krebs is referred to?

14 Let's ask Ms. Jones. Should we make this
15 a separate transcript?

16 MS. JONES: Yes, please, Your Honor, this
17 portion.

18 (Whereupon, the hearing went under
19 protective order and any persons not
20 covered by the protective order vacated
21 the hearing room.)
22

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1 JUDGE NELSON: We are now back on the
2 public transcript and we're turning to the question of
3 the alleged premature discovery on the part of the
4 applicants.

5 Let me give back -- I have a copy of
6 Grinstein's deposition, and I especially want to give
7 it back if there's anything super sacred in there.

8 Is this your map? I have one. I have the
9 entire set of applications. I just forgot to bring it
10 down.

11 Here's how I come out on this matter of
12 the prematurity. I start with the proposition that I
13 do not read any authority in this case, being the
14 guidelines and the Commission's orders, the U.S.
15 Constitution, or anything else, as mandating the
16 notion that the applicants' discovery shall not go on,
17 no. I don't see that anywhere.

18 Nor do I have any problems whatsoever with
19 the serving of the discovery requests on the February
20 26th or whatever it was, the last day of the period.
21 Whenever we make a time period, it has to end
22 somewhere. And if someone does something on the last

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1 day of the period, that strikes me as at worst good
2 lawyering and at best in full compliance with the time
3 period. So I have no problems with that whatsoever
4 and don't want to waste time with it.

5 That being said, I am convinced that what
6 we've got here is a problem for exercise of such
7 limited discretion as I have. And I am the prisoner
8 of the Commission's schedule as reflected in
9 Commission orders. So I don't have a lot of running
10 room.

11 But what I want to suggest to you, the
12 outlines and guidelines of what I'd like to see
13 happen, and then I'm going to try to turn things over
14 to you while I go into the next room to deal with the
15 cross-examination of a witness and then come back here
16 and see what we have been able to agree upon and what
17 we haven't.

18 And then to the extent that you can't
19 agree, I'll have to do it. And I assure you, as I
20 always do, the ones I lay down are infinitely worse
21 than the ones you come up with because you know the
22 real case, the real problems and your own schedules.

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1 All I know is what I hear from you.

2 It seems to me appropriate that some
3 discovery can go on now. I was persuaded as a
4 candidate for this -- and I'm saying this as
5 guidelines. Ms. Jones' material had the look of it --
6 and it may be a deceptive look, but that it was fewer
7 in number, somewhat more focused.

8 There were particularly some about
9 specific things. There were some of the applicants'
10 requests about a man who made a speech and what did he
11 have behind it when he made it, that kind of thing
12 that would lend itself to being asked and answered at
13 this time without tremendous burdens on the
14 intervenors.

15 And so if I have to go through line by
16 line, interrogatory by interrogatory, we could be here
17 until midnight. And I can do that, but I don't want
18 to do it. I want to see if the applicants can't work
19 out some few sharp, specific interrogatories, like
20 those already asked, with the knowledge that I'm going
21 to authorize some of them.

22 And the more the applicants seek, the

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1 poorer their litigation posture with me is going to
2 be. And the more the intervenors say, "We can't
3 answer them. We can't answer them. We're
4 overwhelmed," the poorer their litigation posture is
5 going to be with me. The applicants are going to have
6 to ask less than they want. And the intervenors are
7 going to have to answer more than they want. Those
8 are my guidelines. And I leave that up to you.

9 Finally, with respect to the guidelines,
10 I do not want you to be asking at this time any of the
11 questions that raise the alleged constitutional
12 questions.

13 Those interrogatories and document
14 requests seem to me for present purposes not so
15 pressing as to warrant adjudication of these
16 constitutional issues in what I referred to the other
17 day as the abstract. Those if they have to be
18 adjudicated seem to me to make much more sense in
19 light of inconsistent and responsive applications, if
20 there are any, "comments, protests, requests for
21 conditions, and any other opposition and argument
22 due," to quote the Commission's language.

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1 So what I want to do is break the
2 discovery into two pieces: one that can manageably go
3 on now that is sufficiently specific that something
4 can happen.

5 And I keep in mind the applicants'
6 comments that some of the positions are not mysteries
7 here. We know each other pretty well. We have some
8 feel for what the contentions are. I even do from
9 just having sat here on the bench and heard these
10 things. The applicants also have some idea of what's
11 going on.

12 I also keep in mind that to some extent
13 here, to a large extent, we have big firms and
14 well-financed litigation. This is not some pro bono
15 effort or some three characters who drifted in from
16 Fifth Street. We have major firms of the city here
17 who are in my view fully armed to carry on
18 high-pressure litigation under deadlines. And I'm
19 influenced by that here.

20 So I want you to try to come up with
21 something that can happen now. And the rest should
22 happen later. Now, here are my thoughts about later.

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1 Some of the discovery is premature, not in
2 the sense that there's a commandment against doing it
3 now, but in the sense that it would make better
4 allocation of resources to do it later because it will
5 be focused in the context of particular positions
6 taken by particular parties who either are filing
7 other applications or I think in most cases will be
8 pressing requests for conditions.

9 I think I can evaluate all the disputes
10 better in that contexts. And I think some of them may
11 dwindle or go away or at least be reduced in number.

12 I have in mind tinkering with the schedule
13 somewhat. The applicants' letter, which, by the way,
14 again, gentlemen, I don't get this morning until I
15 arrive here at 8:00 o'clock, I would appreciate a
16 little more cooperation in that regard. Obviously
17 I've read it three times. And so no harm is done.
18 But if you could get stuff in here sooner, it would be
19 better for me.

20 The applicants' letter goes on to some
21 extent about the burdens they are confronting by the
22 current discovery schedule, which would allow under

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1945

1 their view if the discovery were to go on beginning
2 April 1, there's a portrayal of what would then
3 happen. The response time runs to the 16th. And
4 there would be a dispute. There would be a conference
5 with me. Then they have to make a filing on April
6 29th. And they would, as a practical matter, eat up
7 all of that time, have little time to deal with
8 discovery, and maybe have the functional equivalent of
9 no discovery at all.

10 I am persuaded by that. It's not an
11 answer to me to hear that, "Well, that's their own
12 fault. They got into it." I'm not interested in
13 motivations. I'm dealing here with the Commission's
14 order.

15 So I could give you some ideas here. And
16 only you know how to make this work. But my thoughts
17 were with regard to the second piece of discovery.
18 Remember the first piece is the piece that we can
19 agree on that should go on now.

20 With regard to the second piece, first of
21 all, that they be new interrogatories, redrawn as
22 focused on the positions taken in the March 29

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1 filings, that we've got to give the applicants a few
2 days to digest those filings and get their
3 interrogatories ready. So I pick a date out of the
4 air, April 3rd, for the service of the new sharpened,
5 focused interrogatories.

6 We can't let go of the original response
7 time. We'd have to sharpen it, shorten it so the
8 applicants can get these materials and get this
9 response quicker than they otherwise would have.

10 That's the intervenor's price for having
11 pressed the argument about prematurity. Fair is fair.
12 And if we want to put off some of this discovery, you,
13 ladies and gentlemen on the intervenor's side, will
14 have to move somewhat faster to accommodate the
15 applicants. How much faster I don't know. I just put
16 a date down on myself of a week, say April 10th.

17 April 12th is a Friday. I will block my
18 schedule to be available the entire day, all day
19 Friday, and on into the night if necessary, to resolve
20 whatever I have to by that time.

21 And that which I then order produced I
22 picked a date April 16th should be produced, which

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1947

1 then leaves the applicants roughly a short two weeks
2 there to get ready and make their final filing.

3 That's not much time, but I don't know
4 what else I can do given the procedural schedule
5 adopted by the Commission, now the Board. I can't
6 fool with that. What I can fool with are those
7 intervening days.

8 So I'm suggesting to you something like
9 that. Shorten response time on the intervenors' side,
10 less time to prepare their April 29th filings, of
11 course, than the applicants would like.

12 But I think given the assets here on both
13 sides in terms of the firms, the abilities of these
14 firms, the abilities of the men and women involved
15 that we can get this job done. And I have to take
16 that into consideration in the case I'm dealing with.

17 It's not some other case. It's this case.
18 And we've got top-flight legal talent on both sides.
19 I want you to find a way to do this with the requests
20 that I now think are premature that will be better and
21 sharper focused in light of the March 29th filing.

22 So those are the guidelines. That's the

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1948

1 kind of thing I'd like to get out of here. I've got
2 very few minutes before I have to get ready to hear
3 the cross-examination of this witness. And my idea
4 was to leave you alone to try to work something out.

5 Yes, sir?

6 MR. HUT: Just for a moment, Your Honor.
7 I will stifle every urge I have to reargue portions of
8 this and just suggest perhaps the following gloss on
9 your suggestions may make some sense to modus
10 operandi.

11 Our responses are currently due on --

12 JUDGE NELSON: These are suggestions in
13 terms of the dates. The outline is what I'm going to
14 order.

15 MR. HUT: And that's what I'm going to
16 speak to, just the dates.

17 Our responses are due on Tuesday. There's
18 an awful lot within the parameters of your guidelines
19 I think to review and discuss. And it may make some
20 more sense --

21 JUDGE NELSON: If you can get an agreement
22 with the other side --

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1 MR. HUT: -- to do that over the weekend.

2 JUDGE NELSON: -- that Phase 1 shall be
3 turned in on whatever the next day will be, that's
4 fine.

5 MR. HUT: What I would like to do is try
6 to agree on what Phase 1 will be over the weekend or
7 early next week with Mr. Livingston and Mr. Norton to
8 adjourn, if we could, responses on those, say, to a
9 week from today. And by then we will hopefully
10 identify the Phase 1 --

11 JUDGE NELSON: I don't rule out anything
12 so long as it does start giving some discovery now,
13 which I think they're entitled to. The better job
14 they can do on their request, the more I'm going to be
15 inclined to want to order it. The more they ask for
16 every piece of paper dealing with railroads in
17 America, the less they're going to get from me this
18 time or maybe ever.

19 So I don't want to discourage you. I want
20 to encourage you to have discussions here, here and
21 now, when I leave. Mr. Hut, we're all here in the
22 same room. And you may have this room. And I think

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1950

1 we have even additional rooms around here that Ms.
2 DiCianno can help find for you. At this time on a
3 Friday, they're usually available. And I'm going to
4 ask you to try to go to work on some definition of
5 what's going to happen in the schedules and so on and
6 so forth.

7 Yes, ma'am?

8 MS. METALLO: I just would like a
9 clarification.

10 JUDGE NELSON: Ms. Metallo?

11 MS. METALLO: I just would like a
12 clarification that this recommendation and ruling
13 apply to all parties, including those that just joined
14 on other parties' filings.

15 JUDGE NELSON: Everyone that supported the
16 notion of prematurity I'm intending to cover.

17 MR. LIVINGSTON: Which was not by any
18 means everyone. Many did not support it. And many
19 have not filed objections on --

20 JUDGE NELSON: Then they're in a position
21 that they can -- I can't rule for people who aren't
22 here. I'm dealing with these matters that are before

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1951

1 me. I have letters from -- let me see if I have this
2 correctly.

3 I have it as Conrail's request supported
4 by KCS, the WSC, the Tex-Mex, Dow, Kennecott Utah
5 Copper, Kennecott Energy, Western Resources, National
6 Industrial Transportation League, WCTL, Arizona
7 Electric Power Co-op, Wisconsin Power and Light,
8 Wisconsin Public Service Company, Texas Utilities, and
9 Entergy. Are there others who want to be in that --

10 MR. EDWARDS: Yes, Your Honor. Sierra
11 Pacific. Sierra Pacific.

12 JUDGE NELSON: Yes. I did see a letter
13 regarding this point from --

14 MR. EDWARDS: Richard Allen.

15 JUDGE NELSON: There were two letters, one
16 from Tex-Mex and one from Sierra Pacific, both from
17 Mr. Allen.

18 MR. EDWARDS: Yes, Your Honor.

19 JUDGE NELSON: Absolutely right. Anyone
20 else?

21 MR. KACZMAREK: Your Honor, Chris
22 Kaczmarek, Montana Rail Link.

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1952

1 We actually raised the same objections.
2 I do not believe a letter separate from that was
3 submitted to Your Honor, though. But these are
4 precisely the same crematory objections were raised by
5 our client.

6 JUDGE NELSON: Do we have some document
7 evidencing that?

8 MR. KACZMAREK: Well, our response to the
9 discovery.

10 JUDGE NELSON: Mr. Livingston, what do you
11 say?

12 MR. LIVINGSTON: I don't have his response
13 in front of me, but --

14 JUDGE NELSON: Mr. Norton seems to --

15 MR. LIVINGSTON: I believe that that's
16 correct.

17 MR. NORTON: Yes. I think that's correct.

18 JUDGE NELSON: You agree that his people
19 would be --

20 MR. KACZMAREK: That was our first
21 objection in response.

22 JUDGE NELSON: We'll go off the record for

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1953

1 a moment.

2 (Whereupon, the foregoing matter went off
3 the record briefly at 3:00 p.m.)

4 JUDGE NELSON: Yes, sir?

5 MR. GARRETT: Yes. Your Honor, I
6 represent Union Carbide and Society of the Plastics
7 Industry. We would be in the same position whereby we
8 filed objections and raised this in our objections,
9 which I have copies of. That would be --

10 JUDGE NELSON: Let me ask the applicants
11 if they have some evidence of this.

12 MR. LIVINGSTON: I'll check my notes.

13 JUDGE NELSON: Livingston is looking.

14 MR. LIVINGSTON: I don't have their
15 document. I have notes of their document, though.

16 JUDGE NELSON: Well, so far we've covered
17 everybody except --

18 MR. McBRIDE: You got me, Western Shippers
19 Coalition?

20 JUDGE NELSON: You're in there.

21 MR. McBRIDE: Howrey and Simon on behalf
22 of Coastal Corp. filed the same objection. A member

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1954

1 of WSC asked me to speak on their behalf this
2 afternoon. Same objection.

3 JUDGE NELSON: They're covered. Now, are
4 there any problems on the applicants' side?

5 MR. NORTON: Yes, Your Honor. I don't
6 believe that Coastal raised this in their objections,
7 but --

8 JUDGE NELSON: Who is Coastal? Who are
9 they?

10 MR. McBRIDE: It's a coal-producing
11 company in Utah.

12 JUDGE NELSON: Are they part of the --

13 MR. McBRIDE: My group, but they're also
14 a separate party of record. And they told me that --

15 JUDGE NELSON: Well, why aren't they
16 covered by the fact that your group is getting the
17 benefit of this?

18 MR. McBRIDE: Because I don't purport to
19 produce discovery on behalf of each member but just on
20 behalf of the group. They were served separately.

21 JUDGE NELSON: Would they be the only coal
22 producer left hanging if we denied their request?

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1955

1 MR. McBRIDE: I doubt it. No, I don't
2 think so. I think there are others that may be
3 separately represented. And I don't speak for them
4 here.

5 JUDGE NELSON: What is your name, sir,
6 representing this producer?

7 MR. GARRETT: I'm sorry, Your Honor. I
8 represent Union Carbide Corporation and --

9 JUDGE NELSON: Oh, Union Carbide.

10 MR. McBRIDE: I'm Michael McBride, and I
11 --

12 JUDGE NELSON: I know that.

13 MR. McBRIDE: -- speak up for Coastal.

14 JUDGE NELSON: Well, Mr. McBride, it seems
15 to me that you're one of the architects of this,
16 perhaps not of the prematurity argument.

17 MR. McBRIDE: I did make that.

18 JUDGE NELSON: I know you did. It
19 dovetails the constitutional question. So it seems to
20 me your client should get whatever the benefits or
21 burdens are of this ruling. I don't have any problem
22 with that.

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1956

1 Now, this gentleman represents?

2 MR. GARRETT: I'm Art Garrett. And I
3 represent the Union Carbide Corporation and the
4 Society of the Plastics Industry, which you might know
5 as SPI or have seen as SPI.

6 JUDGE NELSON: We've had them here before.

7 MR. GARRETT: It's Marty Bercovici --

8 JUDGE NELSON: Yes.

9 MR. GARRETT: -- you've often seen here.

10 JUDGE NELSON: Yes indeed.

11 MR. GARRETT: I work with Marty.

12 JUDGE NELSON: And what's the problem?
13 That you took a position about prematurity, and nobody
14 can find that?

15 MR. NORTON: I think we do.

16 JUDGE NELSON: We now have it?

17 MR. NORTON: Yes.

18 JUDGE NELSON: All right, Mr. Norton. So
19 I'm going to include these people. Mr. Garrett's
20 people get the benefits and the burdens of this
21 ruling.

22 Anything else?

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1957

1 MR. GARRETT: Yes, Your Honor, real quick.

2 JUDGE NELSON: You've got to be fast.

3 I've got to get to --

4 MR. GARRETT: One other objection we had
5 was just to the fact that the actual discovery that we
6 received was on February 27th, which was the day
7 after. So that's another objection that we have. And
8 I just raise that because that's something that I
9 think you might want to take into consideration.

10 JUDGE NELSON: The deadline was the 26th?

11 MR. GARRETT: Correct.

12 JUDGE NELSON: What was the language?
13 Served?

14 MR. GARRETT: Hand-served by the deadline.

15 JUDGE NELSON: What about that? He's
16 saying you're out of time on one of these.

17 MR. LIVINGSTON: I'm told everything was
18 served. We served many requests that day. And they
19 were all served by messenger is my information. So I
20 would believe him to be incorrect, but I didn't
21 personally deliver it to him on the 26th. I would
22 have to investigate that.

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1958

1 MR. GARRETT: We'd be happy to reserve
2 that objection and raise it later. We have a witness
3 and would be prepared to put on testimony on that if
4 need be.

5 JUDGE NELSON: What do you want to do
6 about this?

7 MR. LIVINGSTON: Well, Your Honor, this is
8 something that needs to be looked into. And if I --

9 JUDGE NELSON: Obviously. If the date was
10 -- let me see the language. This is in the discovery
11 guidelines.

12 MR. GARRETT: Which I have.

13 JUDGE NELSON: I have, too.

14 MR. GARRETT: Okay.

15 JUDGE NELSON: My discovery guidelines.
16 What page?

17 MR. GARRETT: I believe on Page 2.

18 JUDGE NELSON: Paragraph?

19 MR. GARRETT: Top of the page.

20 JUDGE NELSON: Five. "No written
21 discovery request shall be served." Is "served"
22 defined in there?

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1959

1 MR. GARRETT: Hand-served.

2 JUDGE NELSON: The federal court service
3 is dropping it in the mailbox sometimes.

4 MR. GARRETT: But it says here "All
5 discovery requests, responses, and objections shall be
6 served in the most expeditious manner possible by hand
7 delivery in the Washington, D.C. area."

8 JUDGE NELSON: All right. How are we
9 going to straighten this out procedurally?

10 MR. LIVINGSTON: I believe he was. My
11 information is that everybody was served by --

12 JUDGE NELSON: You say he was. He says he
13 wasn't. What do you want me to do. I have nothing to
14 rule on now, just two lawyers' say-sos.

15 MR. GARRETT: We did not bring this up
16 today, Your Honor. I just raise it. We will be happy
17 to take care of it at the --

18 MR. LIVINGSTON: I don't think it's right
19 for adjudication.

20 JUDGE NELSON: See if you can't work it
21 out.

22 MR. DiMICHAEL: And, Your Honor, I just

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1960

1 want to say that the claims in our office are in the
2 same boat here. And I think the same thing applies.
3 We did not actually receive these, it appears, until
4 the 27th.

5 JUDGE NELSON: And you're the NIT League
6 and Dow Chemical?

7 MR. DiMICHAEL: That's right, exactly.

8 JUDGE NELSON: Well, now, in thinking
9 about this, let's assume the toughest possible case
10 for the applicants, which is that they do not, in
11 fact, get served until the next day.

12 MR. LIVINGSTON: If the things went out
13 the door on the 26th and everybody else got them on
14 the 26th, I think that's a pretty compelling case that
15 there was service that was much more direct and
16 complete than dropping it in a mailbox.

17 JUDGE NELSON: I just want to make an
18 observation that if I deny production from them on
19 that ground, then I'm denying discovery as to some of
20 the key parties in the case, --

21 MR. LIVINGSTON: The parties that are
22 involved here --

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1961

1 JUDGE NELSON: -- which I might do. I'm
2 just thinking out loud. That's not necessarily the
3 happiest result. So we've got to get this in shape
4 here soon so we know whether you're going to be
5 complying or not.

6 I have Monday and Tuesday free to deal
7 with you all if necessary.

8 MR. LIVINGSTON: I think this is
9 premature, but I would note that there's no claim of
10 prejudice, nor could any plausibly be made.

11 JUDGE NELSON: Maybe during the break --

12 MR. LIVINGSTON: And I can't imagine
13 they're going to refuse to produce on this ground.

14 JUDGE NELSON: My suggestion may be this.
15 We're going to take a break. And during that time,
16 contact your offices and see if you can get in mind
17 any clearer picture of what happened. If you used a
18 messenger service, there are usually messenger records
19 of what they did. Sometimes they take signatures.

20 We get messengers here who do everything
21 from roller skating, throwing paper on the wall, to
22 those who demand that Jack Nelson come down in person

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1962

1 and sign for things. And I always assume it's what
2 service you hire and what you pay for.

3 So if you got those latter people, you
4 will have signatures.

5 MR. GARRETT: Your Honor, we have a
6 messenger record that shows that it was delivered to
7 us at like 9:00 a.m. on February --

8 JUDGE NELSON: Then the question is what
9 I ought to do about that in the context of these being
10 some of the key shippers in the case.

11 MR. LIVINGSTON: I'm told that these
12 materials went out in the evening, after working
13 hours, after close of business hours, and were
14 delivered to places around town.

15 I don't know what the situation at their
16 building is. It seems to me quite possible that the
17 messenger delivered it and they're in a building that
18 wasn't open or, for some other reason, they weren't
19 there to take service that --

20 JUDGE NELSON: What's the paragraph again?

21 MR. LIVINGSTON: It can't be blamed on us.

22 JUDGE NELSON: We'll see if we can look at

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1963

1 this again. The paragraph in the guideline that deals
2 with service that defines?

3 MR. GARRETT: How it's defined?

4 JUDGE NELSON: Yes.

5 MR. LIVINGSTON: I don't think there's any
6 question these all went out together that night. And
7 maybe they weren't there to take service at 9:00
8 o'clock or whenever the messenger arrived.

9 MR. DiMICHAEL: Your Honor, I would just
10 submit that counsel does not have any factual basis at
11 this point to be arguing this point one way or the
12 other. We received these physically in our office on
13 the morning on the 27th.

14 JUDGE NELSON: I see the problem. There's
15 an ambiguity here about receipt. The applicants can
16 well say that they did serve these in the most
17 expeditious manner possible, namely a messenger. They
18 made hand delivery in the Washington, D.C. area. They
19 can't help it if nobody got them until the next day.
20 In that theory, they could have been there at 11:59.

21 MR. DiMICHAEL: The other paragraph, Your
22 Honor.

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1964

1 JUDGE NELSON: What other paragraph?

2 MR. LIVINGSTON: We have the certificate
3 of service.

4 JUDGE NELSON: I'm asked to reply, which
5 says "No written shall be served after February 26."
6 Well, I would still read this as saying as long as
7 they use the most expeditious manner on February 26th,
8 they have complied.

9 I am persuaded by this reading that there
10 is not a violation of the literal letter of the
11 guidelines. And I am going to overrule that objection
12 and hold that those parties who received the material
13 the next day are bound by whatever we work out here in
14 the way of discovery machinery.

15 I do say again, though, this is not the
16 first time. This is probably the third time that
17 something like this has happened because it's happened
18 twice with me. Let's try, from here on out at least,
19 to see what we can do so that people receive these
20 papers, these faxes, during normal business hours and
21 not at 7:00, 8:00, or 9:00 o'clock at night. I just
22 say that not as an order but a request that I hope we

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1965

1 can improve this in the future.

2 Whose copy of the order do I have? Yes,
3 Mr. McBride.

4 I now must adjourn these proceedings and
5 take a recess and report to the other hearing. I'll
6 be back as soon as that proceeding lends itself to my
7 coming back.

8 If in the meantime you are able to reach
9 agreement on some things, Ms. DiCianno here will be
10 around to assist you and can come in and get me. If
11 it looks like we can make progress and I can release
12 you, that will be fine.

13 So for now we're going to take a recess.
14 And I'm going over to the Tennessee gas pipeline.

15 (Whereupon, the foregoing matter went off
16 the record at 3:11 p.m. and went back on
17 the record at 4:26 p.m.)

18 JUDGE NELSON: Have we got agreement on
19 anything?

20 MR. HUT: Well, let me give you the good
21 news first, Your Honor. We, Conrail, and I believe
22 other parties do have an agreement with BN-SF. We

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1966

1 have agreed that some of their interrogatories to
2 Conrail will be responded to. They understand that
3 those responses made include reiterated objections on
4 some relevance grounds, but they will do that.

5 JUDGE NELSON: But that's Phase I?

6 MR. HUT: And they for their part -- yes
7 -- took an interrogatory off the table and reserved it
8 for Phase 2.

9 JUDGE NELSON: Tex-Mex did the same thing?

10 MR. HUT: Tex-Mex did the same. We had --

11 MS. METALLO: Yes, Your Honor.

12 MR. HUT: We had understood that you have
13 asked the applicants to go formulate a list of
14 proposals of what discovery might be appropriate for
15 Phase 1 and what might be appropriate for Phase 2.

16 In anticipation that they would do that,
17 the non-applicant parties, the non-SF parties, tried
18 to put our heads together. And we began going through
19 the common discovery to identify what we thought
20 belonged in first phase and what we thought belonged
21 in the second.

22 When the applicants came back, we were

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1967

1 informed that they thought the proper process was,
2 notwithstanding your earlier suggestion for framework,
3 that we, nonetheless, go ahead and respond as we are
4 otherwise obligated to do by the discovery guidelines
5 on Tuesday to all of it and then --

6 JUDGE NELSON: Are we on the record or off
7 the record? On the record. The first thing I've
8 learned is that the applicants understood my ruling as
9 meaning that everyone should have to go forward and
10 respond to every request as though it were business as
11 usual and nothing has happened. That is incorrect.
12 That is not what I intended. I don't want to waste
13 any time with such a ruling.

14 We're now going to turn to the question of
15 what we can handle in two phases. The first phase,
16 Mr. Livingston, will be the question of what
17 interrogatories you want to identify that are sharp,
18 that are specific for which you don't think you need
19 anything more and which you think they ought to
20 respond to now. And I appreciate your beginning at
21 the beginning and specifying.

22 I also understand that an agreement has

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1968

1 been reached between the intervenors and the
2 Burlington Northern-Santa Fe. Is that correct?

3 MR. HUT: It is certainly correct as to
4 Conrail, as to Tex-Mex, as to KCS.

5 MR. KACZMAREK: And Montana Rail Link.

6 JUDGE NELSON: Do you all want to recite
7 what the agreement is in terms of what interrogatories

8 --

9 MR. HUT: If you would like us to, Your
10 Honor.

11 JUDGE NELSON: I don't care as long as you

12 --

13 MR. HUT: I don't think we need to enter

14 --

15 JUDGE NELSON: So you've got Phase 1
16 worked out with the BN-Santa Fe. Let's turn now to
17 the question of the applicants. Where is the first
18 interrogatory?

19 MR. LIVINGSTON: Your Honor, it is not
20 correct that we understood your ruling as being as you
21 described.

22 JUDGE NELSON: That doesn't matter. I'm

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1969

1 prepared to go through beginning with the first one.
2 Are we looking at the applicants' first set of
3 interrogatories and production of documents to
4 Consolidated Rail?

5 I'm turning now to Page 6, the first
6 interrogatory. It strikes me as one that need not be
7 at Phase 1. With regard to Number 2 --

8 MR. LIVINGSTON: Your Honor, we regard
9 that, Number 1, as very important. We asked them to
10 tell us what they wanted to answer, what they thought
11 should go in Phase 1. They refused --

12 JUDGE NELSON: Well, I'm doing it now. I
13 told you if you can't agree, you'll have to take the
14 one I come up with. And we're about to get it. Do
15 you want five minutes more to see if you can agree?
16 Are you prepared to make no agreement, Mr. Livingston?

17 MR. LIVINGSTON: Your Honor, we did ask
18 them what they -- we were not prepared to withdraw the
19 discovery request in the abstract. We believe these
20 are all proper discovery requests and --

21 JUDGE NELSON: Are you prepared to offer
22 any help at all with regard to these? What have we

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1970

1 got here?

2 MR. HUT: Your Honor, 72 of them are --

3 JUDGE NELSON: Sixteen interrogatories.

4 MR. HUT: It's 56 document requests.

5 JUDGE NELSON: Let's start with the 16
6 interrogatories. Is it your position that you can't
7 weed out any one of them as appropriate for Phase 1,
8 as distinguished from Phase 2?

9 MR. LIVINGSTON: Your Honor, what we have
10 proposed was that they tell us on Tuesday what it was
11 they were going to object to and give us nothing on,
12 what they were going to give us partially on. And
13 then we would work through it from there the way we
14 have had to work through it when we have responded to
15 not 56 document requests and interrogatories, but over
16 1,000.

17 We are responding on Tuesday, the
18 applicants, to I think 150 discovery requests on
19 Tuesday from these same parties and other parties.
20 And we will be filing our responses. And they will
21 see where we are objecting, and they will see where we
22 are responding. And then we can negotiate from there.

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1971

1 We asked them for the same courtesy. What
2 I got in response was they wouldn't even tell us which
3 ones they were prepared to answer now with no
4 objections.

5 And we would have ended up negotiating a
6 deal in which they would have felt free as to the
7 Phase 1 discovery requests simply to say, "We're going
8 to object on grounds of relevance." We end up not
9 getting anything. And then we find out on April 10
10 that they object to Phase 2, and we don't get anything
11 then either.

12 JUDGE NELSON: All right. Are you
13 finished now? I have reviewed Interrogatories 1, 2,
14 3, 4, 5, 6, 7, 8, and 9 and find them appropriate for
15 reformulation in the context of whatever filings the
16 intervenors make. And they shall be propounded under
17 a new schedule that we will adopt for Phase 2.

18 With regard to Interrogatory 10, that
19 seems to me something we could handle in Phase 1.

20 MR. HUT: Except only to this extent, Your
21 Honor. I don't know what this meeting was. And if it
22 were with government officials, it raises the same

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1972

1 First Amendment --

2 JUDGE NELSON: Mr. Hut, I say to you the
3 same thing I said to the other side. If you can't
4 agree, you'll have to take mine. Here's mine. If you
5 don't like it, take it to the Surface Transportation
6 Board.

7 Interrogatory 10 will be answered in Phase
8 1. Interrogatory 11, which points to a particular
9 brochure and asks who got it, I'm going to order that
10 to be in Phase 1. It also asks for a detailed
11 explanation of the bases for each of the cited
12 figures, include the data used and how they were done.

13 I leave that to the Conrail Company to
14 tell about what's involved in that. If they can
15 answer that readily, they do so. If that involves
16 some extensive creation of material or calculations,
17 then they will answer to that effect.

18 Similarly, Number 12 points to a
19 particular brochure and asks for facts that support
20 it. I think that can be answered.

21 Questions with reference to --

22 MR. HUT: In the same fashion, is Number

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1973

1 11, Your Honor, that it --

2 JUDGE NELSON: Say it again.

3 MR. HUT: In the same fashion, is Number
4 11 --

5 JUDGE NELSON: That is correct. Your
6 response can be that it's unduly burdensome or
7 whatever. But there should be an answer, similarly as
8 to Number 12, which points to a particular brochure.

9 Number 13, involving communication with
10 state legislators seems to be near the area of the
11 alleged First Amendment privileges. And I believe
12 that those are better resolved later when we see the
13 actual intervenor filings. So Number 13 will be in
14 Phase 2.

15 So will Number 14.

16 MR. McBRIDE: If I may remind, Your Honor,
17 simply I think 13 through 17 were on my list. And
18 they're identical to mine but for the name. They were
19 my --

20 JUDGE NELSON: I'm dealing with one thing
21 at a time. We'll get to you. I'm dealing now with a
22 document titled "Applicants' First Set of

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1974

1 Interrogatories and Request for Production of
2 Documents to Conrail." Conrail is the one who moved
3 for relief on the ground that they were premature.
4 And that's what I'm addressing.

5 Interrogatory 14 is for Phase 2.
6 Interrogatory 15, what is that driving at, Mr.
7 Livingston? Can you help me on that one as to whether
8 it fits in Phase 1 or 2? Who is Mr. Hagen?

9 MR. HUT: I can speak to that, Your Honor.
10 Mr. Hagen is the retired CEO and Chairman of Conrail.
11 So I don't know about his availability to provide us
12 the information responsive to that. Mr. Anschutz, as
13 you know, I think is the CEO.

14 JUDGE NELSON: We've covered who Mr.
15 Anschutz is.

16 Can you tell me anything about 15 that
17 will help me decide where it belongs?

18 MR. LIVINGSTON: Well, I think it should
19 be answered. It's --

20 JUDGE NELSON: Maybe it could. The
21 question is now or later.

22 MR. LIVINGSTON: I think it should be

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1975

1 answered now.

2 JUDGE NELSON: What is it you seek there?

3 MR. LIVINGSTON: It has to do with
4 possible purchase of Conrail. Conrail has been making
5 statements in the press, public statements, about
6 purchasing part of SP. There are lots of documents in
7 this record. And I think it's in the filing with the
8 Commission they have already made. They've induced
9 many communities to submit support for that.

10 We're asking a question about its
11 relevance of --

12 JUDGE NELSON: Is Conrail going to file a
13 rival application?

14 MR. HUT: No, it's not, Your Honor.
15 Conrail is not going to make a specific divestiture
16 proposal for divestiture or sale to it. Conrail will
17 oppose the merger and will urge that sale or
18 divestiture of certain parallel lines is the
19 appropriate remedy for any --

20 JUDGE NELSON: So that would be a --

21 MR. HUT: Nothing specific. It's applied
22 for --

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1976

1 MR. LIVINGSTON: They're going to seek a
2 condition for sale. And they intend to --

3 JUDGE NELSON: It will be a request for
4 condition?

5 MR. HUT: Yes, sir.

6 JUDGE NELSON: I think we can look at that
7 better in the context of the request for condition.
8 And that will be in Phase 2.

9 Question 16. The answer to 16 is no.
10 Sixteen has been answered.

11 Now, with reference to the document
12 requests --

13 MR. HUT: And the document requests, I
14 should say, Your Honor, are common -- this is the
15 first 24-25 for --

16 JUDGE NELSON: Well, Number 1 wants work
17 papers underlying your submission. That seems to me
18 appropriate for Page 2.

19 MR. LIVINGSTON: Your Honor, they will get
20 the work papers on April 10th. This is asking for
21 them on April 1.

22 MR. HUT: We're going to provide them on

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1977

1 April 1, Your Honor, as part of our document
2 depository.

3 JUDGE NELSON: That's fine. So they will
4 answer 1A. Now, 1B, "transcript, publications written
5 to any witnesses presented for testimony for Conrail."
6 Conrail. What do you mean "witnesses"?

7 MR. HUT: We'll put in some sworn
8 statements, Your Honor. And I think for any
9 transcripts that are not readily available to the
10 applicants, we'll try to supply those. But
11 publications, we are going to propose testimony from
12 economic experts who have publications that will fill
13 this room. They are as readily available to the
14 applicants as to us.

15 JUDGE NELSON: What do we mean by "written
16 testimony," prior testimony in other cases? Is that
17 what we're seeking?

18 MR. LIVINGSTON: If they have a witness
19 who has given prior verified statements or prior --

20 JUDGE NELSON: Or testified. I think that
21 that's fair. I'm going to deny it as to publications.
22 That seems to me to ask for the world.

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1978

1 With respect to written testimony and
2 transcripts, I'm going to grant it. What if I limited
3 it to testimony involving railroads?

4 MR. HUT: Or to issues relevant to the
5 proceeding.

6 JUDGE NELSON: Yes. We need some
7 limitation there. Some of these people testify in
8 FERC cases and are experts on this and that. Can we
9 get some limiting language with regard to --

10 MR. LIVINGSTON: To railroad matters, on
11 related issues, railroad merger matters or other
12 related --

13 JUDGE NELSON: I'll accept railroad
14 matters related to issues in the pending merger
15 proceeding. And that we're going to do in Phase 1.
16 Is that correct?

17 MR. HUT: Yes, conceivably if by April 1.

18 MR. KILLORY: That's what the request is.

19 MR. HUT: The request is that we furnish
20 them to them by April 1.

21 JUDGE NELSON: By April 1. So you'll
22 comply with that.

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1979

1 Number 2, Phase 2. Number 3, Phase 2.
2 Number 4, Phase 2. Number 5, Phase 2. What does
3 Number 6 refer to? What is the IC settlement
4 agreement?

5 MR. HUT: Illinois Central, Your Honor.

6 JUDGE NELSON: What has that got to do
7 with this case?

8 MR. LIVINGSTON: It's one of the
9 settlement agreements in the case, Your Honor.

10 JUDGE NELSON: In this case?

11 MR. LIVINGSTON: Yes.

12 JUDGE NELSON: A settlement that the
13 applicants made with IC?

14 MR. LIVINGSTON: With the Illinois Central
15 Railroad. That's correct.

16 JUDGE NELSON: What has Conrail got
17 documents about it? I don't follow that.

18 MR. LIVINGSTON: If Conrail or anyone else
19 has documents that relate to that settlement, analyze
20 the settlement, critique the settlement, we're
21 entitled to it.

22 JUDGE NELSON: All right. Phase 2. What

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1980

1 is the Utah Railway settlement agreement? Is that
2 another one in this case?

3 MR. LIVINGSTON: That's also a settlement
4 agreement.

5 JUDGE NELSON: Phase 2. Number 8 I'm
6 going to direct it be in -- help me with this one, Mr.
7 Hut. You're going to be pressing for a condition.
8 And they want all documents relating to it.

9 MR. HUT: And they will get all of the
10 ones we rely on relating to that condition, Your
11 Honor.

12 JUDGE NELSON: How soon will that be?

13 MR. HUT: In our work --

14 JUDGE NELSON: In the work papers on April
15 1?

16 MR. HUT: Sure.

17 JUDGE NELSON: So Number 8 will be
18 answered not in the context of any condition that
19 might be imposed, but in the context of whatever
20 you're specifically requesting. Is that correct?

21 MR. HUT: Yes, that's right.

22 JUDGE NELSON: And that will be answered

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