

INTERSTATE COMMERCE COMMISSION 03/20/96

FINANCE DOCKET # 32760

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1 MR. LUBEL: I think you -- yeah, I don't
2 think there are extra copies sitting around. I don't
3 think it's a thing that he can just pick up and give
4 somebody.

5 MR. LIVINGSTON: Well, I don't think Mr.
6 Lubel knows that. I know I don't know that.

7 JUDGE NELSON: I certainly don't know
8 that.

9 MR. LUBEL: Well, let's just talk to him.

10 JUDGE NELSON: I mean, that's one -- if
11 you've got one copy of the tape --

12 MR. DOWD: In the BN Santa Fe case, Your
13 Honor --

14 JUDGE NELSON: -- and the Intervenor needs
15 that copy to prepare his case, and the applicants are
16 trying to lawfully take that copy away from you at the
17 very time that you need to prepare the case and
18 cripple you, then we can hear about it. Right now I
19 don't have any factual basis to make that finding.

20 MR. LUBEL: Your Honor, I think I was
21 making a little different point, that the information
22 that they are entitled to is the same information that

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1 we will use in our analysis of this case and that we
2 will submit using our submissions to the Board.
3 They're not entitled to other data that may be on
4 there.

5 JUDGE NELSON: I think we'll have to talk
6 to Mr. -- your expert and understand all this and
7 what's involved and why he can't do it and soon he can
8 do it. I'm also looking for any suggestion you might
9 have as to a phase of it or a part of it that could be
10 done right now. If there are two boxes and he's
11 through with the first one, for example, is there's
12 something --

13 MR. LUBEL: I don't believe it works that
14 way, Your Honor.

15 JUDGE NELSON: Mr. Dowd is laughing.

16 MR. LUBEL: I think it's -- the
17 technology.

18 JUDGE NELSON: I don't blame you.

19 MR. DOWD: I'm sorry, Your Honor, but in
20 the BN Santa Fe case, for example, the traffic tapes
21 filled a box about this big and a substantial period
22 of time was required for them to be copied. Our

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1 experience is that railroads don't maintain multiple
2 copies of traffic tapes because the data itself is
3 highly confidential and it's retained in the
4 computers.

5 And they don't -- they take it out and put
6 it on the tapes when they're required to either store
7 it or --

8 JUDGE NELSON: All I'm suggesting is that
9 you make a showing as to this one. There seems to be
10 some confusion. Mr. Livingston is not persuaded of
11 the --

12 MR. LUBEL: Well, let me talk to Mr.
13 Plaistow today and contact Your Honor tomorrow with
14 the ability to make that showing.

15 MR. LIVINGSTON: Your Honor?

16 JUDGE NELSON: Do you have a suggestion?

17 MR. LIVINGSTON: I have a suggestion.
18 It's actually quite similar to that one. I would
19 suggest that at 5:00 today, after you've had a chance
20 to -- Mr. Lubel, to talk to your man, that you call me
21 with your man on the phone, Mr. Plaistow, and we can
22 ask questions of him and you'll be on the phone to

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1 make sure we don't overstep.

2 And maybe between the two of us, and with
3 Mr. Plaistow's help, we can see what the actual facts
4 are, conceivably come to a resolution of the matter.
5 But if not, at least be able then, Your Honor, both of
6 us being fully --

7 JUDGE NELSON: -- knowing what the facts
8 are.

9 MR. LIVINGSTON: Right, to come back to
10 you tomorrow if that's necessary.

11 JUDGE NELSON: How about that suggestion?

12 MR. LIVINGSTON: And I would stress 5:00
13 this afternoon.

14 MR. LUBEL: Your Honor, I'm not going to
15 submit Mr. Plaistow to a deposition by the applicants
16 in this case. We will -- I will talk to him. I will
17 have him on the phone and call Mr. Livingston and --

18 JUDGE NELSON: We don't want him to be
19 questioned informally on the telephone. He may end up
20 on the stand here being questioned in a much more
21 formal way.

22 MR. LUBEL: That's fine. I'll -- you

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1 know, I said I will make this call and I'll have him
2 on the line. But I reserve the right --

3 JUDGE NELSON: I wasn't suggesting -- you
4 can't put him out there and say here's our man, he can
5 explain to you why we can't make this production, and
6 then say you can't cross examine him. And something
7 lesser than cross examination, which is an informal
8 telephone conversation --

9 MR. LUBEL: All I'm saying is --

10 MR. LIVINGSTON: It will be off the
11 record.

12 MR. LUBEL: All I'm saying is --

13 JUDGE NELSON: There will be no reporter.

14 MR. LUBEL: I reserve the right that if I
15 think Mr. Livingston is getting out of line, --

16 JUDGE NELSON: You can tell Mr. Plaistow
17 that he need not answer any further questions. You
18 always have that right. You can hang up the
19 telephone.

20 MR. LUBEL: In the morning, you say?

21 MR. LIVINGSTON: I'd like to do it at 5:00
22 this afternoon.

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1 MR. LUBEL: Okay. If he's available. You
2 know, Mr. Plaistow --

3 JUDGE NELSON: We'll defer this question
4 pending a further conversation between counsel --
5 among the counsel and Mr. Plaistow. How do we spell
6 that?

7 MR. LUBEL: P-L-A-I-S-T-O-W.

8 JUDGE NELSON: Very well. And I'm
9 available tomorrow before I start a 10:00 proceeding.
10 And also, I may have availability tomorrow afternoon.
11 Tomorrow's my better day of the remaining two days of
12 the week. Friday I'm in hearing all day. So if you
13 need me, then you'll have to get me; but we also have
14 a problem of getting the reporter on the line.

15 Sometimes that doesn't happen so fast with
16 ICC.

17 MR. LIVINGSTON: Your Honor, that
18 concludes the KCS dispute, and that leaves only now
19 the -- except for the two things we need to caucus
20 with Mr. Lubel on.

21 JUDGE NELSON: Yes.

22 MR. LIVINGSTON: And that leaves now only

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1 Mr. McBride's letter of March 13th to Your Honor. And
2 we have a --

3 JUDGE NELSON: Let me see if I can find it
4 now.

5 MR. LIVINGSTON: He wrote a letter of
6 March 13th, and we wrote a responsive letter of March
7 18th.

8 JUDGE NELSON: I have his letter of the
9 13th.

10 MR. LIVINGSTON: And there should be a
11 letter in there dated March 18th, which is directly
12 from us, which is directly responsive to Mr. McBride's
13 letter.

14 JUDGE NELSON: For the moment I can't find
15 it.

16 MR. McBRIDE: I've got a copy here. I'll
17 be happy to share with you. It may be my only copy.

18 JUDGE NELSON: I think I have March 18th.
19 The response to WSC letter, yes.

20 MR. LIVINGSTON: Yes, right. And that's
21 -- those are the two documents that are in issue here,
22 and what this has to do with --

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1 MR. McBRIDE: It's my request. I think I
2 ought to be able to go first here.

3 JUDGE NELSON: Give me a moment to review
4 these letters.

5 MR. McBRIDE: Please.

6 JUDGE NELSON: All right, go ahead, Mr.
7 McBride.

8 MR. McBRIDE: Thank you, Your Honor.

9 JUDGE NELSON: Begin at the beginning.

10 MR. McBRIDE: Yes, and I really do intend
11 to begin at the beginning, and you'll recall the
12 beginning of many of these discussions have been to
13 bring you a map. But on this one, I'm not bringing
14 you a map because the problem is I don't know where
15 these places are that we got provided information for
16 pursuant to your earlier ruling.

17 And that's precisely the problem. And in
18 fact, I was struck a little earlier -- I don't take
19 shorthand, so I took down these words the best I
20 could. But Mr. Livingston said to you in discussion
21 about one of these earlier arguments, "We need to
22 know," -- this was when Mr. Dowd was on his feet --

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1 "We need to know where this coal is coming from."

2 JUDGE NELSON: -- the prices.

3 MR. MCBRIDE: Yeah, "if you don't know
4 that, you don't know anything," he said. Well, that's
5 my problem. We asked Your Honor on March 1 to require
6 them to answer an interrogatory -- one interrogatory
7 listing 20 or 25 utilities. You may recall it. You
8 said it was too many. You directed us to try to work
9 it out.

10 We worked off a list of ten utilities at
11 Slover & Loftus, and previously agreed in an earlier -
12 - in response to an earlier ruling, was a way of
13 narrowing the burden on the applicants to produce.
14 Well, then what happened was -- but that's probably my
15 problem.

16 Because we got only two utilities that
17 those ten seemed to fit. The purpose of the question
18 was -- which was places where the utilities got bids
19 from both UP and SP so that we could see the bids and
20 our coal consultant could see the bids in codified
21 form, which was your ultimate ruling, so that we could
22 offer evidence on this issue of whether UP origin coal

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1 and SF origin coal compete.

2 Now, you directed on -- this was all the
3 way back on March 1.

4 JUDGE NELSON: You want to say that there
5 is competition --

6 MR. McBRIDE: Absolutely.

7 JUDGE NELSON: -- between the two coals?

8 MR. McBRIDE: Yes. I have made no secret
9 that that's been our position in this case. That's
10 why I gave them that information in response to that
11 interrogatory six that I told you about earlier.

12 JUDGE NELSON: What do you seek as a
13 result of that?

14 MR. McBRIDE: Pardon me? Well, if I can
15 show to the Board that UP origin coal and SP origin
16 coal compete, --

17 JUDGE NELSON: Yes?

18 MR. McBRIDE: -- then we are going to show
19 the Board there's a real problem if you let these two
20 railroads merge. Because right now, the Southern
21 Pacific is aggressively marketing, is our position,
22 coal at a lower rate than UP. And that's how it's

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1 gotten all these new customers in recent years.

2 And that's what's at risk in the merger.

3 JUDGE NELSON: And therefore, the Board
4 should deny the merger?

5 MR. McBRIDE: Or condition it to protect
6 competition through some other solution. And we put
7 on a notice that we might file an inconsistent
8 application. Now we're likely just to support that of
9 another carrier for divestiture or trackage rights of
10 Southern Pacific Central Corp.

11 Montana Rail Link, for example, intends to
12 offer such an application.

13 JUDGE NELSON: You might say that the
14 commission ought to approve this merger conditioned on
15 breaking out into some new railroad so there would be
16 -- the merged company would compete with the new
17 railroad?

18 MR. McBRIDE: Correct.

19 JUDGE NELSON: Or the new railroad get a
20 monopoly of this stuff?

21 MR. McBRIDE: Well, they'd get the same
22 access that the Southern Pacific now has and could

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1 compete against the Union Pacific.

2 JUDGE NELSON: They'd stand in the SP's
3 shoes?

4 MR. McBRIDE: Exactly.

5 JUDGE NELSON: And UP would stay where it
6 was?

7 MR. McBRIDE: Exactly, Your Honor. And
8 now other carriers have also put on --

9 JUDGE NELSON: If the two coals don't
10 compete, then why should the applicants care?

11 MR. McBRIDE: Exactly.

12 JUDGE NELSON: Well, they would have lost
13 business by the SP's -- what would happen in the SP's
14 would become someone else's.

15 MR. McBRIDE: Well, it would now be
16 combined with the SP, but they wouldn't care.

17 JUDGE NELSON: Montana's.

18 MR. McBRIDE: Oh, you're saying if Montana
19 Rail Link takes over from SP --

20 JUDGE NELSON: SP will lose that revenue.

21 MR. McBRIDE: Well, yeah, they'll get paid
22 for the line. They'll lose their revenues.

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1 JUDGE NELSON: They're not in business to
2 lose revenue, so they could -- their opposition to
3 this need not be based on pure competitive grounds.

4 MR. McBRIDE: Of course, that's right.
5 That's absolutely right. They want to buy a business
6 here. They think it's profitable, I guess. But you
7 know, we have a different theory. Because they've
8 been complaining that SP is not that profitable, and
9 Mr. Davidson testified in his deposition that he had
10 -- they had described within UP SP's pricing as cash
11 flow pricing.

12 And they didn't understand how SP could
13 charge prices this low as compared to what UP was
14 charging. And he admitted that he told the Chemical
15 Manufacturer's Association that SP's cash flow pricing
16 was going to have to stop after the merger. So I've
17 got a theory here different than their theory.

18 JUDGE NELSON: Okay.

19 MR. McBRIDE: In any event, --

20 JUDGE NELSON: So --

21 MR. McBRIDE: So on March 1, you directed
22 that we get information in two forms. That we get the

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1 bids -- and I say we, Mr. Mills was here that day, but
2 it was Slover & Loftus for their clients. And
3 frankly, I understood -- it was a kind of a long day,
4 you may recall. It was after my long motion for
5 reconsideration.

6 I thought we were getting the actual bids,
7 the documents, so we'd know who they went to. There
8 was this big argument from Mr. Roach that only counsel
9 should know who got the bids -- what utilities we were
10 talking about, is what I thought he meant, --

11 JUDGE NELSON: With your counsel.

12 MR. McBRIDE: -- in the form of the bid.
13 Pardon me?

14 JUDGE NELSON: Your counsel?

15 MR. McBRIDE: Yes. So I thought I was
16 going to see those documents, and then my consultant
17 was going to get the same bids in some kind of
18 codified form. We were going to take the dollars out
19 and put two X or three X in. There was -- the way the
20 discussion went on that record.

21 JUDGE NELSON: I recall that discussion.

22 MR. McBRIDE: Instead, what I got, and I

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1 gave it only to Your Honor and the applicants, which
2 was with my letter -- you should have the enclosure.
3 We got four pages of paper. We got sort of sanitized
4 bids here. If you'll go to the last -- to the two
5 pages of enclosures with Mr. Roach's letter, this is
6 not -- these are not the bids.

7 These are some kind of, you know,
8 information drawn from the bids. I have no basis for
9 saying they're not the actual numbers. And in the
10 form, the --

11 MR. LIVINGSTON: Your Honor, if I can just
12 interject one thing. These are highly confidential.
13 And if the specific numbers are mentioned, then we
14 would need to go to a higher --

15 MR. McBRIDE: I don't intend to. I
16 understand that.

17 MR. LIVINGSTON: If there's no -- as long
18 as we stay off that, then --

19 JUDGE NELSON: Maybe we have to so I
20 understand it.

21 MR. LIVINGSTON: Well, if there's going to
22 be --

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1 JUDGE NELSON: Let's -- is there somebody
2 here that shouldn't be here?

3 MR. LIVINGSTON: Either go off the record
4 --

5 MR. McBRIDE: I think we've all signed a
6 protective order.

7 MR. LIVINGSTON: Everybody here is
8 cleared.

9 JUDGE NELSON: Let's treat this as highly
10 confidential. I'm looking at a sheet entitled UP
11 Final Bid to Customer 1 (One Facility). Is that the
12 document you're talking about?

13 MR. McBRIDE: That's right.

14 JUDGE NELSON: All right, let's look at
15 that one.

16 MR. McBRIDE: Okay.

17 JUDGE NELSON: What does that tell me?

18 MR. McBRIDE: Well, okay, what that tells
19 you -- and there's common ground on a lot of this, by
20 the way. Typically a bid will come in, as that one
21 did to Customer 1, in two forms. One for customer
22 owned cars, one for -- in this case, it was steel and

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1 aluminum cars. Sometimes it's customer and railroad
2 cars.

3 And then the rates come in up to a certain
4 tonnage level, and then there's a different rate
5 beyond that tonnage level, which --

6 JUDGE NELSON: Like a volume discount?

7 MR. McBRIDE: Right. The one to Customer
8 2 below all the asterisks was a simpler one. But
9 still, two different rates depending on who provided
10 the cars. And then you'll see on the next page SP's
11 bids to the same two customers, or would be customers,
12 I take it in each case.

13 JUDGE NELSON: That doesn't support the
14 theory that SP is coming in with low volumes.

15 MR. McBRIDE: Well, no; but the first ones
16 may not, but the second -- but look at the second
17 one.

18 JUDGE NELSON: Customer 2?

19 MR. McBRIDE: Yes.

20 JUDGE NELSON: Yes?

21 MR. McBRIDE: Okay? And look at those
22 numbers and compare them to the first page.

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1 JUDGE NELSON: Well, they're broken down
2 by origins, which the UP bid is not.

3 MR. McBRIDE: Right. And at least seven
4 of the numbers for Customer 2 on the second sheet are
5 lower than the numbers for Customer 2 on the first
6 sheet.

7 JUDGE NELSON: Yes, they are.

8 MR. McBRIDE: Okay?

9 MR. LIVINGSTON: Your Honor?

10 JUDGE NELSON: Be that as it may, this is
11 not the time to try the --

12 MR. McBRIDE: Yeah, and I'm not claiming
13 that --

14 JUDGE NELSON: All right.

15 MR. McBRIDE: -- SP always charges a lower
16 price.

17 JUDGE NELSON: All right, now is it your
18 position that with regard to Customers 1 and 2 they
19 didn't give you enough material?

20 MR. McBRIDE: First that they didn't give
21 me the material I thought I was going to get for
22 counsel only, all right?

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1 JUDGE NELSON: What was that?

2 MR. McBRIDE: Which were the bids. Now,
3 I'm trying to be fair to them here. They may say
4 these were the bids. The problem is, I thought when
5 I got the bids I'd know the customer. Because between
6 his law firm and my law firm -- I represent the Edison
7 Electric Institute, he represents the Western Coal
8 Traffic League, we represent a lot of utilities -- we
9 probably represent these people or know somebody we
10 can go talk to.

11 We can't tell them this information,
12 although they probably know it if these are the right
13 bids, but we can find out what kind of boiler problems
14 they've got, what kind of stockpile problems they've
15 got, what -- whether they have any other logistical
16 problems, whether these were real bids or not.

17 Because Mr. Roach takes the position in
18 his covering letter that despite what may appear to
19 you here to be competition and to us, this is -- these
20 are not examples of competition. And he opens the
21 door and says why there are all kinds of reasons why
22 --

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1 JUDGE NELSON: Well, that remains to be
2 seen.

3 MR. McBRIDE: Okay, so -- and I am telling
4 you --

5 JUDGE NELSON: So your first point is
6 you'd like to know who Customer 1 and Customer 2 are?

7 MR. McBRIDE: Correct. So we can test his
8 assertions that he opened the door on.

9 JUDGE NELSON: But if you then go to
10 Customer 1 and Customer 2, aren't you then breaching
11 the --

12 MR. McBRIDE: No, because I can't tell
13 them any of this. But I can certainly call -- suppose
14 it was Wisconsin Electric Power Company you were
15 talking about earlier. I could call them up and I say
16 you can tell me, did you get this from UP and --

17 JUDGE NELSON: Are they a client of
18 theirs?

19 MR. McBRIDE: They are not. But they're
20 a member of the Edison Electric Institute which I
21 represent, and I can get hold of them.

22 JUDGE NELSON: Okay.

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1 MR. McBRIDE: I can say did you get bids
2 from UP and SP?

3 JUDGE NELSON: Yes?

4 MR. McBRIDE: Yes. Could you use either
5 coal in your plant? Yes. What -- do you have boiler
6 problems that would have required you to make some
7 modification -- go from one to the other? Yes, no,
8 maybe, some discussion of the logistics. You know,
9 can you -- do you have a routing problem to get one
10 railroad in easier than the other, the distances --

11 JUDGE NELSON: You can't really tell if
12 there's competition until you are able to talk to the
13 buyer of the goods.

14 MR. McBRIDE: Or a consultant who knows
15 the same information and I have one. And that leads
16 to my second problem. You told them to provide this
17 -- the bids, whatever that means -- in codified form
18 so I could give it to my consultant. That was on
19 March 1st.

20 I got this stuff on March 8th. Your Honor
21 was busy. I put in a request for a hearing on the
22 13th. We couldn't have a hearing last Friday, the

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1 15th. Now it's the 20th, and my evidence is due in
2 nine days, and I've not been able to give a thing to
3 my consultant here.

4 This information is useless because I
5 didn't get it in the form that my consultant could be
6 given it. I proposed to Mr. Roach that he let me,
7 because of the form he did give this to me in, give
8 these sheets to my consultant. He refused to agree to
9 that.

10 He said he'd take it up properly when I
11 asked him about that on the phone, and then I got his
12 letter of the 18th -- that was his prompt response --
13 saying no, you got what you were entitled to and
14 that's that. So my consultant still knows nothing.

15 JUDGE NELSON: So the -- has given you
16 nothing you can give the consultant?

17 MR. McBRIDE: They've given me nothing I
18 can give the consultant, and Mr. Loftus and I
19 represent to you he so told Mr. Roach when we were on
20 the phone -- he's Mr. Dowd's colleague. Neither one
21 of us, even though we represent a lot of utilities,
22 have been able to figure out who these two companies

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1 are.

2 So this information is utterly useless.
3 And Your Honor did not direct the production of
4 utterly useless information. All I want to know is
5 how the two companies are, and I want to be able to
6 give this stuff to my consultant.

7 JUDGE NELSON: All right, so we have --

8 MR. McBRIDE: If I may, just one last
9 thing. He signed the protective order.

10 JUDGE NELSON: Who is he?

11 MR. McBRIDE: Mr. Vananetti with Resource
12 Data International.

13 JUDGE NELSON: Who is Mr. Vananetti?

14 MR. McBRIDE: He's my coal consultant.
15 He's my witness. I'll put on his testimony in nine
16 days. He's subject to this protective order. That
17 should not be a problem.

18 JUDGE NELSON: So we have two issues. One
19 is the identify of the customers, and two is something
20 that counsel can give to this consultant?

21 MR. McBRIDE: That's useful. And Mr.
22 Dowd's consultant has also signed a protective order,

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1 Mr. Loftus told me, so that shouldn't be a problem.

2 JUDGE NELSON: What can we do here?

3 MR. LIVINGSTON: Well, Mr. Roach's letter
4 of March 18th and his prior letter to Mr. McBride of
5 March 8th lay out our position. In general, it's our
6 view that these were issues that were hashed out at
7 two prior hearings. That it was decided that the
8 names of the utilities could be concealed and coded,
9 as they are here.

10 That it was not necessary to have the
11 names. The information --

12 JUDGE NELSON: Stop right there. Mr.
13 Livingston says that it was previously determined that
14 the names of the utilities could be coded as they are
15 here. What about that?

16 MR. McBRIDE: That issue was not squarely
17 discussed on the record. But my understanding of the
18 discussion, and I cited the relevant pages, was when
19 we got the bids, we were going to find out from the
20 bids who got the bids so we'd know the utilities.
21 That was perhaps an unfortunate --

22 JUDGE NELSON: I do remember discussion of

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1 coding of names.

2 MR. McBRIDE: So that the consultant
3 wouldn't know the names.

4 JUDGE NELSON: That was for the
5 consultant?

6 MR. McBRIDE: So that the consultant
7 wouldn't know. The implication obviously was that we
8 would know them.

9 JUDGE NELSON: Maybe I better look at the
10 transcript. Do you have it?

11 MR. McBRIDE: I have it here.

12 MR. LIVINGSTON: Well, it's attached to
13 Mr. Roach's letter.

14 JUDGE NELSON: It's in the same package,
15 so let me --

16 MR. LIVINGSTON: Yes, I think it's -- the
17 discussion starts page 967. It starts at the bottom,
18 and you suggested -- Your Honor suggested, "How about
19 if we code the customers by letter or by number?" And
20 the discussion proceeds from there starting at the
21 bottom of page 967.

22 MR. McBRIDE: I think that was on January

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1 26th when a lot of the information Mr. Loftus was
2 seeking was denied. The transcript I'm talking about
3 was on March 1. We're up into the 1600's here. I
4 have the pages here.

5 JUDGE NELSON: Let's move to March 1 then.

6 MR. McBRIDE: Yeah.

7 JUDGE NELSON: The more recent --

8 MR. McBRIDE: Right.

9 JUDGE NELSON: Let's see what there is
10 there.

11 MR. McBRIDE: And we took a break, and
12 then -- I'm quoting from Mr. Norton at -- maybe I
13 should show this to you so we don't repeat the whole
14 thing in the record here. The discussion begins at
15 the bottom of 16 --

16 JUDGE NELSON: I'm on page 1630. I have
17 to go back and find out what we were going through.

18 MR. McBRIDE: Your earlier discussion was
19 you directing me to reduce my list of some 20 or so
20 utilities to a more manageable number. Off the
21 record, Mr. Norton will recall we agreed on a list of
22 ten utilities, which was the same list that they had

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1 previously worked out with Slover & Loftus, and we
2 were going to get the overlapping bids, as Mr. Norton
3 put it.

4 And I hadn't fully understood what he
5 meant then. I think I do now, that -- places where
6 both UP and SP made a bid to these utilities, those
7 are the two that we got the information for. Is that
8 a fair characterization, Mr. Norton, of how we
9 winnowed down the utilities to two?

10 MR. NORTON: Your Honor, yes. Basically

11 --

12 JUDGE NELSON: It's very hard for me to
13 follow this at the same time that I'm trying to read.

14 MR. NORTON: I'll wait. Sorry.

15 JUDGE NELSON: I don't see anything about
16 the bids so far. Should I keep reading?

17 MR. McBRIDE: I cited in my letter, but
18 bear with me just a moment.

19 JUDGE NELSON: I see a reference to the
20 overlap --

21 MR. McBRIDE: Right.

22 JUDGE NELSON: -- where both companies

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1 have significant proposals to the same facility.

2 MR. McBRIDE: And then at 1639, we get up
3 to "and coded prices be provided to consultant and the
4 real prices to counsel only -- outside counsel only."

5 JUDGE NELSON: The next page mentions
6 bids.

7 MR. LUBEL: Your Honor, may I be excused
8 to see if I can line Mr. Plaistow up for --

9 JUDGE NELSON: Why don't we take a brief
10 recess here and take about ten minutes? Is that
11 agreeable?

12 MR. LIVINGSTON: Fine.

13 (Whereupon, the proceedings went off the
14 record from 2:34 p.m. until 2:53 p.m.)

15 JUDGE NELSON: As to the issue of the
16 bids, --

17 MR. LIVINGSTON: I was just going to say
18 that Mr. Norton will be carrying the ball on this for
19 us. And with Your Honor's indulgence, I may slip out
20 during the discussion so that I can discuss with KCS's
21 counsel a resolution of the KSC -- outstanding KSC
22 issue.

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1 JUDGE NELSON: Very good. My review of
2 the transcript shows that it was Mr. Norton that was
3 the prime player at that time anyway.

4 MR. LIVINGSTON: I was not here.

5 JUDGE NELSON: So I was going to ask him
6 to do more of the talking. Well, Mr. Norton, tell me
7 now what do you think with regard to these two
8 questions? One is the production of the identity of
9 the customers to counsel, and the other is the
10 creation of something that he can give to his
11 consultant that the consultant can meaningfully use.

12 MR. NORTON: Well, Your Honor, the first
13 step is did we do what we were supposed to do? And I
14 think there's no question that we did. The original
15 understanding worked out prior to March 1 was that we
16 were going to go through the -- for the ten utilities
17 identified by Western Coal and determine whether UP
18 had made bids for PRB coal or SP had made bids for
19 Colorado/Utah coal.

20 And in those instances where there was an
21 overlap, we were going to provide that information in
22 coded form.

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1 JUDGE NELSON: Overlap meaning what?

2 MR. NORTON: Where there were bids made by
3 both --

4 JUDGE NELSON: By both railroads?

5 MR. NORTON: Right. And that was the
6 predicate for the resolution on March 1. Essentially
7 what we agreed to there was to expand the response so
8 as to identify the bid price in those instances where
9 there was an overlap. And the bid price was to be
10 identified on a basis that reflected the alternative
11 car ownership categories, if that was the case, which
12 was at the request of Mr. McBride, who raised this
13 issue about the near bid price.

14 A loan might not be sufficient because of the
15 alternative ways in which the price was formulated.
16 And that that information would be available -- and
17 that was the only additional information that we were
18 going to be providing. And that would be available to
19 outside counsel only.

20 And the only information available to the
21 consultants would be the -- a coded relationship of
22 the bid prices if they wanted to use that. We went

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1 through the exercise. We identified the areas of
2 overlap. We converted the bid prices. We extracted
3 the bid prices in the way in which we were required.

4 We provided that to Mr. McBride and also
5 to Western Coal's counsel. And we asked whether they
6 wanted us to do the conversion into the coded ratio or
7 what -- you know, that was something they might be
8 able to do themselves. We repeated that offer when
9 the controversy arose later, and they have never come
10 back and said we would like you to do that.

11 So I think that's a red herring, the
12 question of providing a coded ratio for the
13 consultants. But we did exactly what we were supposed
14 to do. Now, Mr. McBride says he can't use it. Well,
15 there wasn't any commitment or representation that the
16 information he was asking for and agreeing to accept
17 was going to be useful to him in any particular way
18 that he might want to use it.

19 This was what -- we ended up resolving a
20 controversy to produce information that -- and we
21 didn't think we should have to produce at all because
22 this whole request was after the deadline. And this

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1 was a resolution of a controversy in a very pragmatic
2 way. We did what we were supposed to. We gave up
3 something, they gave up something. And now he's
4 trying to undo the deal and require us to do that
5 which --

6 JUDGE NELSON: What about the failure to
7 furnish the actual names of the utilities?

8 MR. NORTON: We weren't required to do
9 that, Your Honor.

10 JUDGE NELSON: Did we discuss that
11 anywhere?

12 MR. NORTON: Yes. What we were supposed
13 to do -- and it starts back in the first hearing --
14 was to provide that information in coded form. It was
15 Your Honor's suggestion as a way to resolve the issue.

16 JUDGE NELSON: I recall the coding
17 discussion with regard to price --

18 MR. NORTON: It came up --

19 JUDGE NELSON: There's an example of two
20 X and three X in the transcript.

21 MR. NORTON: Your Honor, it came up on the
22 first -- at the first hearing, and that was in the --

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1 pages 967 through 69, which were also attached to Mr.
2 Roach's letter of March 18.

3 JUDGE NELSON: Let me look. Mr. McBride,
4 I'll give you back your materials now. And now I have
5 Mr. Roach's letter of the 18th.

6 MR. NORTON: And you'll see at the bottom
7 of page 967 --

8 JUDGE NELSON: I have a faxed copy, but I
9 don't have the transcript pages there. All right.

10 MR. NORTON: And we went through --

11 JUDGE NELSON: Yeah.

12 MR. NORTON: -- and the discussion
13 continues, and that's what we agreed to do.

14 JUDGE NELSON: I do see there something
15 about how about if we code the customers. Now, was
16 that reference to the --

17 MR. McBRIDE: No, no.

18 MR. NORTON: No, this is the first step.
19 This is the first resolution of the controversy with
20 Western Coal.

21 JUDGE NELSON: For which we got the
22 universe down to ten?

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1 MR. NORTON: Ten, right. And then again

2 --

3 JUDGE NELSON: Well, what's that got to do
4 with the bid controversy?

5 MR. NORTON: Well, the bid controversy was
6 resolved by expanding our response to Western Coal.

7 JUDGE NELSON: Let's go off the record for
8 a moment.

9 (Whereupon, the proceedings went off the
10 record briefly.)

11 JUDGE NELSON: All right, Mr. Norton.

12 MR. NORTON: The resolution on March 1st
13 was an amendment in essence of the earlier resolution
14 where we agreed to provide the overlap with the coding
15 of the company names. And the amendment was to
16 provide, in addition to the coding company names, the
17 information about the final bid price in form that
18 corresponded with the --

19 JUDGE NELSON: With the actual price?

20 MR. NORTON: Yes. And that was it.

21 JUDGE NELSON: So in your view, it was
22 always the rule that the shipper's name would be --

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1 MR. NORTON: Absolutely.

2 JUDGE NELSON: -- coded by Customer 1 and
3 Customer 2?

4 MR. NORTON: Absolutely.

5 JUDGE NELSON: Let us ask Mr. McBride
6 about --

7 MR. McBRIDE: I think we have a good faith
8 disagreement here. I'm not going to say that he
9 didn't just state what he understood. But I wasn't
10 even there on January 26th when this was discussed.
11 I thought we were starting over on March 1 with
12 respect to my interrogatory which listed 25 or so
13 utilities by name, and Your Honor said that was too
14 many, narrow it down and then deal with the ones where
15 there were overlap.

16 JUDGE NELSON: I see.

17 MR. McBRIDE: So I thought I was going to
18 get answers with respect to those ten utilities that
19 had previously been agreed to. And that when I got
20 the bids, it would be with respect to those utilities.
21 And I think --

22 JUDGE NELSON: So we really -- we may have

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1 two problems here. One is what were the previous
2 rules and were they complied with; and two is, what
3 then? And I think Mr. Norton's point is the previous
4 rules were complied with. The turn over was in
5 accordance with the understanding.

6 MR. NORTON: Yes, Your Honor. And at the
7 discussion on March 1 -- well, Mr. McBride may not
8 have been here at the earlier hearing. I don't know
9 whether the transcript was available to him. Mr.
10 Mills, who is quite familiar with the earlier hearing
11 for Western Coal, was present on March 1 and was in on
12 the discussions when we all discussed what we had to
13 do on the earlier ruling and how we were going to
14 amend it to account -- to add the bid information.

15 So there wasn't any misunderstanding that
16 we were aware of.

17 JUDGE NELSON: These are the appeals that
18 are the Board. Do any of them deal with this?

19 MR. McBRIDE: No.

20 JUDGE NELSON: They deal with coal, as I
21 recall.

22 MR. McBRIDE: Yeah, there's coal

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1 depositions, not these interrogatories.

2 MR. DOWD: If I may, Your Honor, it seems
3 to us that, as Mr. McBride said, we have sort of a
4 good faith disagreement or a good faith parallel but
5 inconsistent understanding. And I wonder whether it
6 might perhaps be more advisable to look at this as a
7 case where whatever the ground rules were, apparently
8 they did not work because the product of those grounds
9 rules is unusual information.

10 And that what ought to be looked to now is
11 what needs to be done to make the information useable
12 for the reasons Mr. McBride explained earlier,
13 particularly in light of Mr. Roach's sort of editorial
14 comments that well, these numbers aren't really
15 competitive because of all of these considerations
16 that are specific to the utilities.

17 To make them useful, I think we need to
18 know the identify of the utilities.

19 JUDGE NELSON: If Mr. Roach were here now,
20 he'd be on a streak talking about the importance of
21 following the rules and the fact that we had made the
22 rules and that they later didn't work out should not

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1 be the trouble.

2 MR. NORTON: And Your Honor --

3 JUDGE NELSON: We have to live by the
4 rules.

5 MR. NORTON: We specifically said --

6 JUDGE NELSON: We need consistency, he
7 would say.

8 MR. NORTON: We were foregoing an appeal
9 because we had resolved the matter by virtue of that
10 agreement.

11 JUDGE NELSON: He says something in there
12 about foregoing our right to appeal.

13 MR. McBRIDE: Precisely, he does say that.
14 But allow me to be heard on that on two points. First
15 of all, as I say, we have a good faith disagreement
16 about the names. But putting that to one side, I
17 think it is absolutely clear we did not get the other
18 version of this information that was supposed to go to
19 our consultants.

20 I raised that with Mr. Roach with Mr.
21 Loftus --

22 JUDGE NELSON: That's the second issue?

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1 MR. McBRIDE: Yes.

2 JUDGE NELSON: Yes.

3 MR. McBRIDE: And we have not got that.
4 There is nothing I can give them.

5 JUDGE NELSON: I must say that my reading
6 of the transcript portions of Mr. McBride, which I
7 read upstairs during the break, seemed to envision
8 some turnover to the consultants. I mean, now he says
9 he has nothing to give.

10 MR. NORTON: Your Honor?

11 JUDGE NELSON: So we can't have envisioned
12 a turnover of nothing, Mr. Norton.

13 MR. NORTON: We said -- the agreement was
14 that we would provide a coded relationship.

15 JUDGE NELSON: Yes.

16 MR. NORTON: When we provided the original
17 bid information, we said -- we offered to do that. We
18 repeated that offer in the March 18 letter. They have
19 not come back to us and said yes, we want you to do
20 it. And he wants to get something different.

21 MR. McBRIDE: No, that's not true. That
22 is absolutely not true. Mr. Norton was not on the

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1 call. Mr. Loftus, I think it was, or Mr. Mills and I
2 were on the call with Mr. Roach, is why I don't think
3 Mr. Norton tends to misstate anything here. But I
4 said to Mr. Roach on Tuesday, March 12th --

5 JUDGE NELSON: I've talked a lot of times
6 with Mr. Norton over a lot of sessions in difficult
7 circumstances, and he's never impressed me as a man
8 who deals other than completely above board.

9 MR. McBRIDE: You bet! He's a straight
10 shooter. But he wasn't on the call. So I know what I
11 told Mr. Roach. He doesn't. I told Mr. Roach --

12 JUDGE NELSON: He knows only what he heard
13 about it.

14 MR. McBRIDE: Right. I told Mr. Roach
15 look, Arvid, why can't I just give these two sheets to
16 my consultant and you tell us what the names are?

17 JUDGE NELSON: And what's the answer to
18 that?

19 MR. McBRIDE: And he said we'll take it up
20 promptly. I understand your request. And I never
21 heard back from him until the March 18th letter. But
22 in any event, Your Honor, the problem is this.

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1 They're trying to argue what they understood from the
2 earlier January 26th session when you denied a lot of
3 the rate information on the coal -- I thought the
4 universe had changed on March 1 when you granted my
5 motion for reconsideration and that we were working
6 off my interrogatories.

7 So that's where the good faith
8 disagreement between us comes in. But as Mr. Dowd
9 says, in any event, we've got utterly useless
10 information. And all we want to do is be able to talk
11 to a couple of utilities and find out what they can
12 tell us about their competitive circumstances.

13 JUDGE NELSON: Well, we have done a lot of
14 hard work, sometimes complex, sometimes at long hours,
15 and sometimes under pressure. And we've all sometimes
16 not understood things perhaps as clearly as we should
17 have. Let me say something off the record
18 logistically.

19 (Whereupon, the proceedings went off the
20 record from 3:06 p.m. until 3:07 p.m.)

21 JUDGE NELSON: I think the problem we've
22 got then is some uncertainty as to what the ground

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1 rules were. And then, as Mr. Dowd says, let's assume
2 that they were what you say they were, and here are
3 these documents and they don't work. What do we do
4 about it?

5 MR. NORTON: Well, Your Honor, not
6 everything that you end up agreeing to get in
7 discovery turns out to be useful. That's not the test
8 of whether you go back and get a second or third bite
9 at the apple. If he wants the coded relationship, we
10 can provide that maybe by the end of the day.
11 Certainly --

12 JUDGE NELSON: To give to the consultant?

13 MR. NORTON: Yes.

14 JUDGE NELSON: Yes.

15 MR. McBRIDE: Why can't I use this?
16 What's wrong with this? We're nine days away from our
17 conference.

18 JUDGE NELSON: By this, you mean the
19 actual document?

20 MR. McBRIDE: Yes, the two sheets of
21 paper.

22 JUDGE NELSON: Which refers to the

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1 customers, number one and number two?

2 MR. MCBRIDE: And my consultant and his
3 are under the protective order. You tell us the names
4 of the utilities. We're not going to go out and use
5 this information commercially. I've done everything
6 in compliance with the protective order in this case.
7 My consultant is stuck with it. We're honorable
8 people. I don't know what the problem is.

9 JUDGE NELSON: So, how about that
10 proposal, that we give the actual sheets as they stand
11 that refer to Customer 1 and Customer 2 to the
12 consultant. Do you want to talk about it or think
13 about that and call your client perhaps, see what that
14 entails?

15 MR. NORTON: That is a possibility, Your
16 Honor. One thing that occurs to me is that depending
17 upon the consultant's access to information about bid
18 prices -- whether they would be able to determine from
19 the information here who the customer was and --

20 JUDGE NELSON: I don't know that. Maybe
21 your people can help you with that.

22 MR. DOWD: But is Mr. Norton's -- I

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1 thought the objection to telling us the names was
2 grounded on well that wasn't the deal. Was there an
3 independent problem with telling us the names?

4 MR. NORTON: Well, all of this is
5 confidential information. And everything is -- was in
6 that context.

7 JUDGE NELSON: Well, suppose we had the --

8 MR. NORTON: This is something, Your
9 Honor, I can check on and --

10 JUDGE NELSON: Suppose we checked on
11 customer names to counsel only?

12 MR. NORTON: Well, Your Honor, I don't
13 think there's any need for them to have the customer
14 names. I think we could agree to the --

15 JUDGE NELSON: Well, we'll get the second
16 part first if that's easier -- if that's -- the
17 turnover of the sheets as they now stand to the
18 consultant. And as they now stand, they refer to
19 Customer 1 and Customer 2.

20 MR. McBRIDE: And the information is
21 utterly useless without the names because I explained
22 the logistics are important here. If I may, Your

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1 Honor, the rates will show you that there are customer
2 cars and railroad cars, for example. And if the
3 utility owns the trains and they have to go all the
4 way to Utah to get the coal, it may be a different set
5 of economics than if they have to go to Wyoming to get
6 the coal.

7 That's one thing that's important.
8 Another thing that's important is what kind of boiler
9 do you have.

10 JUDGE NELSON: How about Mr. Norton's view
11 that if this was the deal, it was the deal?

12 MR. McBRIDE: And I'm saying --

13 JUDGE NELSON: The deal wasn't that the
14 stuff would turn out that you'd like it. It's
15 whatever it was.

16 MR. McBRIDE: But that's why I asked,
17 you'll recall, a long interrogatory with a bunch of
18 utility names and we simply have to pare that back,
19 and then we were going to work from ten. And I
20 thought we were working from specific utilities so I
21 had somebody to talk to.

22 Not so that I could fill up my office with

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1 useless paper. So, I thought the deal was I would get
2 those names. And that's where I say we have a good
3 faith disagreement.

4 MR. NORTON: Your Honor, by definition,
5 all of the SP bids are origins in Colorado and Utah.

6 MR. McBRIDE: But the UP bid could be
7 Utah.

8 MR. NORTON: No, the UP bids are Powder
9 River Basin.

10 MR. McBRIDE: How do you know that? How
11 would I have know that?

12 MR. NORTON: That was the premise of the
13 --

14 MR. LIVINGSTON: It says in the letter.
15 The letter says that.

16 MR. McBRIDE: But I can't give the letter
17 to the consultant. The consultant is the one who's
18 going to testify about this, not me. I want to give
19 them Mr. Roach's letter and the bids, and I want to
20 know who the utilities are so we can answer Mr.
21 Roach's point.

22 MR. NORTON: First you wanted to know

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1 where they're located. Now you have to know the
2 utility itself.

3 MR. McBRIDE: Exactly.

4 MR. NORTON: We could give you the -- we
5 could tell you which state, for example, the utilities
6 are in, whether it's Colorado or Utah.

7 JUDGE NELSON: That's where the mines
8 are, not where the utilities are.

9 MR. NORTON: I'm sorry, where the mine is.

10 MR. McBRIDE: I explained why we need to
11 talk to the utilities. You see, Your Honor, you can
12 use different types of coal with boiler modifications.
13 You may have enough transits to get it to Wyoming and
14 back, not to get to Utah and back. There are a lot of
15 things that go into this that allow these coals to
16 compete.

17 Without that information, it's useless.

18 JUDGE NELSON: Can he talk to the -- his
19 clients? What could he do or not do with these
20 sheets?

21 MR. NORTON: These sheets are available to
22 outside counsel only. That was the understanding.

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1 JUDGE NELSON: Can he talk to clients
2 about them?

3 MR. NORTON: He can't reveal the contents.

4 JUDGE NELSON: He cannot? So even if he
5 gave you the name of the utility, he would say you
6 couldn't talk to that utility?

7 MR. McBRIDE: Oh, no, no, no. I think
8 he's -- what he would say is I can't talk to my
9 client, the Western Shippers Coalition about this.
10 But I gave you example of Wisconsin Electric Power
11 Company, which is not my client.

12 If he told me one of these were Wisconsin
13 Electric Power Company, there's nothing in the world
14 in this protective order that would prohibit me from
15 then calling them up and saying hello, do you use UP
16 or SP coal? Yes. Which one? They tell me. Did you
17 ever get bids from the other railroad? Yes. What are
18 your circumstances? Would you help me out here, do
19 the two compete or do they not compete --

20 JUDGE NELSON: Can't you do that now?

21 MR. McBRIDE: I could if I knew who to
22 call. That was the point I started out on. As Mr.

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1 Livingston said to you an hour ago, if you don't know
2 where it's coming from -- and I would just change that
3 to where it's going to -- you don't know anything.

4 I can't talk to the people who we're
5 dealing with here who may be --

6 JUDGE NELSON: How big a universe of
7 customers are there? How big a universe of customers
8 are there?

9 MR. McBRIDE: Of SP?

10 JUDGE NELSON: That would be buying this
11 coal, utilities.

12 MR. McBRIDE: There are about 20 to 25
13 utilities. They're the ones I listed in my
14 interrogatories. They're the ones that SP has been
15 selling coal to.

16 JUDGE NELSON: What if you went to each
17 one of them?

18 MR. McBRIDE: I don't have enough time.
19 I don't know who the people are. I just -- this is
20 perfect discovery because we got down to two
21 meaningful things. This is what one offense strives
22 for in discovery is to get down to the heart of the

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1 dispute.

2 And I may find out he's right and they may
3 find out I'm right if I can talk to the people who
4 know.

5 JUDGE NELSON: But Mr. Norton would say
6 even if he gave you the name, you couldn't talk to
7 those --

8 MR. McBRIDE: No, no. Here's what the
9 protective order says. I can't give these to the
10 Western Shippers Coalition, okay? I can't give them
11 --

12 JUDGE NELSON: Because they're a party?
13 Because they're a party?

14 MR. McBRIDE: Because they're my client in
15 the case, okay? But once I know --

16 JUDGE NELSON: You can go to someone
17 else's client?

18 MR. McBRIDE: No, I can't give this to
19 anybody other than my consultant if Your Honor orders.
20 Right, I'm sorry I'm not being clear. I can't give
21 this to anybody but my consultant.

22 JUDGE NELSON: Oh, but you can use it to

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1 have a conversation with someone?

2 MR. McBRIDE: Correct.

3 JUDGE NELSON: Which doesn't reveal the
4 contents of the document.

5 MR. McBRIDE: Right, and find out what the
6 facts are.

7 JUDGE NELSON: And without naming the
8 customers, Mr. Norton, he says he can't have those
9 conversations.

10 MR. NORTON: Well, that was a limitation
11 that he agreed to. We never committed to give the
12 customers -- that information. That was part of the
13 overall resolution of the controversy.

14 JUDGE NELSON: How are you hurt if you
15 gave him the customer names on a counsel only basis?

16 MR. NORTON: If I may consult?

17 JUDGE NELSON: Do you want to take a break
18 and you can talk to the clients too, as well as co-
19 counsel, see if there's a way to work this through.

20 MR. NORTON: I think that might be useful.

21 JUDGE NELSON: Let's take a little time
22 and I'll ask Mr. Norton to call me in the office when

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1 he's ready to resume.

2 MR. LIVINGSTON: Your Honor, if we can do
3 Mr. Lubel a favor, we --

4 JUDGE NELSON: Yes.

5 MR. LIVINGSTON: -- we can be released, I
6 think. We have two remaining issues.

7 JUDGE NELSON: Let's recite where we are
8 with Mr. Lubel. The two remaining issues were Your
9 Honor had asked us to look at the dispute concerning
10 document request number 33 and document request number
11 25. And we've reached the following agreement:

12 As to -- and Mr. Lubel can correct me if
13 I get this wrong. As to document request number 25,
14 they will provide us with a list of their ten largest
15 Kansas grain shippers and their ten largest plastic
16 shippers, along with some information reflecting their
17 volume such as car loads and location.

18 We will then select from those lists no
19 more than five plastic shippers or five grain shippers
20 as to which we would want the shipper files. Five --
21 no more than five plastics plus five grain shippers.
22 As to -- excuse me, request number 33, which had to do

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1 with Kansas City Southern's acquisition of an interest
2 in MexRail -- as to that, he will provide copies of
3 the stock purchase agreement and any related
4 agreements, the board presentation concerning the
5 transaction, and any documents showing the rationale,
6 purpose of justification of the transaction.

7 And he would not, however, have to produce
8 any documents that had already been produced on the
9 same issue by --

10 JUDGE NELSON: All right.

11 MR. LUBEL: That's correct, Your Honor.
12 Now, that's subject to the existence of these
13 documents. I don't know what board presentations may
14 exist, but we assume there may be some that we don't
15 --

16 JUDGE NELSON: You can only produce what
17 exists.

18 MR. LUBEL: Right.

19 MR. LIVINGSTON: With that, I think we are
20 done with KCS except for our conference call at 5:00,
21 which will of course be not here.

22 JUDGE NELSON: That's with regard to the

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1 -- we hope it won't be here. That's with regard to
2 the computer expert on the tapes?

3 MR. LUBEL: Right. And Your Honor, I need
4 to add something as to that. It's good that we did
5 want to talk to Mr. Plaistow, because I found out --
6 although he's my contact as a consultant, I traced it
7 back, and he in fact does have a contact at KCS where
8 in fact they do generate these things originally.

9 I've always dealt with him, and he had the
10 tapes. But he got them from a Mr. Hilary Rawart. I
11 believe it's R-A-W-A-R-T -- of KCS, and he's the
12 person we're trying to get on the phone to see if he
13 can -- how long it will take him to generate these
14 tapes for the applicants.

15 I hasten to add he's preparing a statement
16 for himself also, and so he has the same problem. But
17 I am trying to make a commitment to them to have them
18 these tapes within four or five days.

19 JUDGE NELSON: And the applicants agree
20 with Mr. Rawart being the man?

21 MR. LIVINGSTON: I have no idea if he is
22 the man or not. I assume that we'll be talking to

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1 them later today about this subject.

2 JUDGE NELSON: We'll see how that
3 develops.

4 MR. LIVINGSTON: Okay. Your Honor, I
5 think that releases --

6 JUDGE NELSON: That takes care of KCS.

7 MR. LIVINGSTON: And everybody else except
8 for this one --

9 JUDGE NELSON: This dispute about the
10 bids. And we're going to take a break while Mr.
11 Norton consults with co-counsel and possibly with the
12 client to see what we might do with regard to the
13 Intervenor's need -- asserted need for the names of
14 the customers on a counsel only basis.

15 And for something meaningful that he can
16 give to his consultant. And we welcome any suggestion
17 you have in that regard.

18 MR. LIVINGSTON: Your Honor, I don't think
19 this needs to be long, do you? I would think we would
20 be ready to go -- maybe we can just set a time.
21 Because this is the last issue, and perhaps --

22 JUDGE NELSON: You could throw into the

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1 mix what you had said about -- that the bids reflected
2 certain origins. You or Mr. Roach had clarified that
3 in letters or here orally.

4 MR. LIVINGSTON: I think that's in the
5 letters as they now stand.

6 JUDGE NELSON: I see.

7 MR. LIVINGSTON: The letter that was sent
8 to Mr. McBride makes that clear.

9 JUDGE NELSON: Well, and to what extent
10 can Mr. McBride show that to the consultant? I don't
11 have the faintest idea. So you want me to come back
12 down in about 15 minutes, would that be sufficient?

13 MR. LIVINGSTON: Make it 3:30. That would
14 be 13 minutes. And --

15 JUDGE NELSON: That's enough time to get
16 all this done?

17 MR. LIVINGSTON: Well, I certainly hope
18 so. I know from my own -- that I have a meeting at
19 4:00.

20 JUDGE NELSON: So do I. All right, let's
21 take a break and I'll come back down here in ten
22 minutes or so.

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1 (Whereupon, the proceedings went off the
2 record from 3:19 p.m. until 3:37 p.m.)

3 JUDGE NELSON: Please be seated.

4 MR. LIVINGSTON: We've reached an interim
5 arrangement with Your Honor's assistance. We've had
6 some discussions amongst ourselves. We've not been
7 able yet to resolve the issue. We're going to make
8 one last effort to resolve the issue, but we recognize
9 that the effort may fail.

10 So what we would like is, if Your Honor
11 would schedule or put on the docket for tomorrow an
12 11:00 conference call, I think the issues have been
13 thoroughly hashed out so that if we need to get a
14 ruling -- we've essentially argued it -- hopefully we
15 will be able to report that we've resolved the entire
16 issue or at least part of it.

17 JUDGE NELSON: This is with reference to
18 the bids?

19 MR. LIVINGSTON: Reference to the bids.
20 In the meantime, we will be providing them with a
21 document that's been referred to that sets forth
22 ratios between Customer 1 and Customer 2 that could be

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1 provided to the consultant. They will look at that,
2 but they make no commitment that that will satisfy
3 their needs.

4 In the meantime, we are going to make --

5 JUDGE NELSON: Maybe you don't have to.
6 We'll have to see.

7 MR. LIVINGSTON: We may have to have a
8 ruling on that. In addition, we will make a further
9 check to see whether or not the names of the utilities
10 can be released to the lawyers, which was the other
11 issue. And that also may require a ruling. But we
12 will try our best to see if this can be resolved. If
13 it can't, we would like -- they are very much
14 interested in getting a prompt ruling on this if there
15 can be no resolution.

16 And therefore, they would like to have it
17 resolved -- if we come to an impasse, they would like
18 to have it resolved as promptly as possible. We would
19 suggest an 11:00 conference call tomorrow morning. By
20 that time, we will either need a ruling --

21 JUDGE NELSON: With or without a reporter?
22 I certainly can go without one.

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1 MR. DOWD: Unless you see the need to hear
2 more from us in the way of argument, we wouldn't need
3 a reporter.

4 MR. LIVINGSTON: I don't think we need a
5 reporter.

6 MR. DOWD: -- informing you that we
7 unfortunately need a ruling, and then you'd tell us
8 what we were going to do.

9 MR. LIVINGSTON: Right. And the two
10 issues will be do we have to give the names --

11 JUDGE NELSON: But you'd need a record of
12 the ruling, wouldn't you?

13 MR. DOWD: Yes.

14 MR. LIVINGSTON: But it would probably be
15 useful to have a reporter. We can either get one of
16 the deposition reporters, or Your Honor may want to
17 arrange to have an official reporter at your end.

18 JUDGE NELSON: However it works out with
19 the Board. I don't know what their contractual
20 arrangement is.

21 MR. LIVINGSTON: I don't think we do need
22 a reporter.

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1 MR. DOWD: I mean, we're not -- I mean,
2 your ruling is going to be pretty unambiguous.

3 MR. LIVINGSTON: I don't think there will
4 be any questions.

5 MR. DOWD: -- questions, because they're
6 pretty straightforward.

7 JUDGE NELSON: It's either that they get
8 the names of the customers or they don't and how they
9 protect them.

10 MR. DOWD: Or in lieu thereof what we do
11 get.

12 MR. LIVINGSTON: Right.

13 MR. DOWD: Because I guess there's been an
14 offer at a minimum maybe to give us the states where
15 they're located.

16 MR. LIVINGSTON: I don't think --

17 JUDGE NELSON: I'll give you my reaction
18 to the issue without ruling was that if the set of
19 ground rules we agreed on produces two pieces of paper
20 that are meaningless, then we haven't really done
21 much. Yes, we've complied with the ground rules, and
22 I suppose there is a virtue in that.

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