

INTERSTATE COMMERCE COMMISSION 04/19/96

FINANCE DOCKET # 32760

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UNITED STATES OF AMERICA  
SURFACE TRANSPORTATION BOARD

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DISCOVERY CONFERENCE

-----X  
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, April 19, 1996

Federal Energy Regulatory  
Commission  
Hearing Room 4  
Second Floor  
888 First Street, N.E.  
Washington, D.C.

The above-entitled matter came on for  
hearing, pursuant to notice, at 9 a.m.

BEFORE:

THE HONORABLE JEROME NELSON  
Administrative Law Judge

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

(9:02 a.m.)

JUDGE NELSON: Let's get a record of who's here.

MR. NORTON: Gerald Norton for SP and Applicants. With me is John Bulgozdy. Mr. Livingston was unable to be here. He is out of town, and I'll be holding down the fort.

MR. STEEL: Adrian Steel on behalf of Burlington Northern and Santa Fe.

MR. KILLORY: Joseph Killory on behalf of Conrail, Your Honor.

MR. BILLIEL: Michael Billiel, Department of Justice.

MR. MULLINS: William Mullins and Harrilee Molm with the firm of Troutman Sanders, on behalf of Kansas City Southern Railway Company.

MS. METALLO: Virginia Metallo, Collier, Shannon, Rill & Scott, on behalf of KCS.

MR. STREETER: Richard Streeter on behalf of the Railroad Commission of Texas.

MR. PERGOLIZZI: Frank Pergolizzi on

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1       behalf of TU Electric.

2               JUDGE NELSON: Who are they?

3               MR. PERGOLIZZI: Texas Utilities Electric  
4       Company.

5               JUDGE NELSON: Mr. Dowd?

6               MR. DOWD: Your Honor, Kelvin Dowd. I'm  
7       here today on behalf of Central Power and Light  
8       Company and City Public Service Board of San Antonio.

9               JUDGE NELSON: All right. The agenda is  
10       continued from yesterday. We have the -- according to  
11       my notes, this matter of KCS's turnover or non-  
12       turnover of some alleged report that it made to the  
13       Department of Justice. Then, we have the matter of  
14       the document we were looking at yesterday and its  
15       confidential treatment. That was a memorandum from  
16       KCS's president to the NITL recipient that discussed  
17       this Texas Commission business, which led us to ask to  
18       have Mr. Streeter be here.

19               Then, we have the Applicant's fifth set  
20       dispute involving KCS, which involves, among other  
21       things, the question of the KCS's knowledge of  
22       financial contributions or financial solicitations in

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1 opposition to the merger. Does that cover it?

2 MR. NORTON: No, Your Honor. There are  
3 two others which I added yesterday. We have a  
4 controversy with Justice Department about the backup  
5 for the work papers underlying one of their verified  
6 statements.

7 JUDGE NELSON: Yeah, I had a note from you  
8 that there was going to be something additional with  
9 Justice.

10 MR. NORTON: This we -- we had it on the  
11 agenda for yesterday and deferred it, and it's here  
12 today.

13 And then there's a last-minute question  
14 that arose with respect to Texas Utilities about the  
15 time period for responding to the recent discovery  
16 request, whether it's the full 15 days or the six days  
17 that Your Honor had indicated in connection with this  
18 phase two of discovery.

19 And that is the agenda, as I understand  
20 it.

21 JUDGE NELSON: Well, let's take the old  
22 business first.

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1 MR. NORTON: Sure.

2 MR. DOWD: Your Honor, if we could, we'd  
3 like to object to the notion that a TU Electric  
4 issue --

5 JUDGE NELSON: We're not there yet. That  
6 will be the last item on the agenda, and the first  
7 question about it will be whether it belongs on the  
8 agenda. We have old business to take care of first.

9 Here's Mr. Wood of the NITL. Are you here  
10 to participate, or are you just --

11 MR. WOOD: One moment, Your Honor. Can we  
12 go off --

13 JUDGE NELSON: Certainly.

14 MR. WOOD: -- for just a moment?

15 JUDGE NELSON: Off the record.

16 (Whereupon, the proceedings were off the  
17 record briefly.)

18 JUDGE NELSON: We went off the record to  
19 rearrange the schedule somewhat, as we're going to  
20 take up this matter of the memorandum to NITL a bit  
21 later.

22 Mr. Streeter started to tell me that he is

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1 here on sudden notice and didn't know what was going  
2 on. Well, that gives me some concern. I thought that  
3 lawyers in this case were in touch with you about what  
4 was going on.

5 MR. STREETER: Your Honor, yesterday  
6 morning I had to go down to the Pittston Coal Company  
7 and spent the day with them. I had no notice  
8 whatsoever that my appearance was going to be required  
9 at any point today. I called my wife from Charlotte,  
10 North Carolina, last night. In fact, I'm supposed to  
11 be in Florida on a firm retreat. But, nonetheless, I  
12 was told that I was to be here at 9:00 a.m. to discuss  
13 something, and I understand it has something to do  
14 with some letter that has been written.

15 JUDGE NELSON: All right. Let's begin at  
16 the beginning. Who has a copy of this document?

17 MR. MULLINS: We do, Your Honor.

18 JUDGE NELSON: This allegedly confidential  
19 document.

20 MR. MULLINS: We do, Your Honor.

21 JUDGE NELSON: William, will you give it  
22 -- do you have an extra copy?

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1 MR. MULLINS: Yes.

2 JUDGE NELSON: What we're going to  
3 discuss, Mr. Streeter, whenever you're prepared to do  
4 so -- and you've just seen this for the first time  
5 obviously -- is a dispute about this document. There  
6 isn't any question about its having been turned over.  
7 You'll do better if you listen to me first and then  
8 read it, because otherwise you're going to get neither  
9 what I'm saying nor what's on there, so --

10 MR. STREETER: Let me put my glasses on.

11 JUDGE NELSON: If you're anything like me.  
12 This piece of paper is a memorandum from the  
13 president, I guess it is, of the KCS to some personage  
14 with the NIT League. And in there is discussed some  
15 communication with a member of the Texas Railroad  
16 Commission with a -- in the context of rounding up  
17 opposition to this merger.

18 The memorandum has been turned over. It's  
19 not a question of its production. They have it. It  
20 has been handed over with a confidential label, and  
21 the railroads seek to lift that classification. So  
22 the only issue in front of us is whether that piece of

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1 paper is or is not properly classified as  
2 confidential.

3 One of the people whose alleged  
4 confidences might be involved is your client, the  
5 Texas Commission. So I thought that since he seems to  
6 be at least involved in all of this that we ought to  
7 have your knowledge, your participation, your thoughts  
8 about the release of this, and, indeed, your  
9 consultation with the client if you think that's  
10 necessary.

11 Sometimes people say things in confidence,  
12 and then when you look at them on a piece of paper you  
13 say, "I don't care. He can put it in The New York  
14 Times as far as I'm concerned." If you asked them in  
15 the first place, "Is this in confidence?" they'd say,  
16 "Of course it is." If you asked them in the second  
17 place, it doesn't make much difference. If we have  
18 that kind of thing, that makes life easier.

19 Another way of going at it is with  
20 deletions of names. So instead of saying Commissioner  
21 whatever his name is, it would just say Commissioner.  
22 I see that done where these concerns are at issue.

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1 But I have to make a decision about the  
2 release of this document -- in other words, putting it  
3 in the public domain -- and wanted your participation  
4 and thoughts, insofar as your Commissioner is involved  
5 in the communication.

6 Now, that's the background. Take whatever  
7 time you need to get prepared, to make phone calls.  
8 What's the time difference down there?

9 MR. STREETER: It's an hour difference,  
10 and I'll have to call the Commissioner. I hope he's  
11 in today. I've got his office number with me, so as  
12 soon as 8:30 comes, which is when the Railroad  
13 Commission opens for business, I will place a call --

14 JUDGE NELSON: 8:30 Texas time.

15 MR. STREETER: 8:30 Texas time.

16 JUDGE NELSON: Which would be 9:30 our  
17 time.

18 MR. STREETER: In about 25 minutes. So --

19 JUDGE NELSON: Well, we can wait for that.  
20 And if we can't get it resolved, then we can't get it  
21 resolved. We can always take it up Monday when I'm  
22 free. I'm free Monday, Tuesday, and Wednesday.

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1 But do you get the problem now? So take  
2 whatever time you need to study that thing and get in  
3 touch with your Commission and we'll see where we go  
4 with it.

5 So we're holding two items in abeyance for  
6 now. Why don't we now get to this next business with  
7 KCS -- the so-called fifth set. Now, do I have that?

8 MR. NORTON: Well, Your Honor, there is --

9 JUDGE NELSON: I had something yesterday  
10 and it was incomplete, and then you sent me some pages  
11 today. Let me see if I have everything.

12 MR. NORTON: You should have it in the  
13 binder that we provided you.

14 JUDGE NELSON: That's this?

15 MR. NORTON: Yes.

16 JUDGE NELSON: Yes.

17 MR. NORTON: Tab 4.

18 JUDGE NELSON: So let me start there. But  
19 what is the stuff you sent me this morning? Probably  
20 still sitting in my office.

21 MR. MULLINS: Your Honor?

22 JUDGE NELSON: I'm trying to get my own

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1 paperwork straight. You sent me the missing ICC  
2 orders, for which I thank you. And I got them all  
3 filed. And then there were two attachments.

4 MR. NORTON: And they were the attachments  
5 to the --

6 JUDGE NELSON: Something from a paralegal  
7 from Troutman Sanders.

8 MR. NORTON: Right.

9 JUDGE NELSON: And what was the other one?

10 MR. NORTON: The letter from KCS, someone  
11 at KCS.

12 JUDGE NELSON: Oh, here it is. I do have  
13 it now. So the interrogatory in question is at Tab 4?

14 MR. NORTON: That's correct.

15 JUDGE NELSON: That's about this knowledge  
16 of money?

17 MR. NORTON: Money, funds for other  
18 support.

19 JUDGE NELSON: Let's see where it starts.  
20 It says, "Do you have any information about any offers  
21 made by or on behalf of any party to this proceeding  
22 opposing the merger, or anyone affiliated to provide

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1 funds or other consideration to another such party?"  
2 In other words, does the KCS know anything about any  
3 parties giving things to some other party to help  
4 finance opposition to the merger. Have I got that  
5 restated correctly?

6 MR. NORTON: That's correct.

7 JUDGE NELSON: And the KCS says it's not  
8 relevant. It's work-product, joint and common defense  
9 privilege, and protected by the First Amendment. And  
10 you say insofar as relevance, it's always relevant to  
11 show where the money comes from and who is really  
12 behind things. And I --

13 MR. NORTON: That's right.

14 JUDGE NELSON: -- understand that claim.

15 Now, what about this matter of it being  
16 subject to work-product and joint and common defense  
17 privilege? Joint and common defense privilege is  
18 simply an extension of work-product, as I understand  
19 it.

20 MR. NORTON: Well --

21 JUDGE NELSON: It has to qualify for work-  
22 product to get into the joint and common defense

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1 privilege.

2 MR. NORTON: Right. It's really -- we  
3 view it more as an exception to the waiver doctrine.  
4 If you disclose something that is work-product or  
5 privileged in a common defense, joint -- a common  
6 interest/joint defense context --

7 JUDGE NELSON: Then you've not waived it.

8 MR. NORTON: -- then you haven't waived  
9 it.

10 JUDGE NELSON: Well, it's a different way  
11 of saying the same thing.

12 MR. NORTON: That's right.

13 JUDGE NELSON: And First Amendment, we  
14 know that. That's the right of associations invoked.  
15 It's the NAACP case.

16 MR. NORTON: Right.

17 JUDGE NELSON: All right. So what is your  
18 view now about the work-product and joint and common  
19 defense privilege?

20 MR. NORTON: Well, there certainly is no  
21 showing that the information called for here is in the  
22 nature of work-product or is in the nature of

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1 attorney-client privilege. It's calling for  
2 information about offers of financial or other  
3 material support. And on the face of it, those seem  
4 to be implausible arguments to make that any  
5 information of this nature would be either attorney-  
6 client communication or work-product.

7 JUDGE NELSON: The financing of the effort  
8 would not constitute work-product?

9 MR. NORTON: Financing of someone else's  
10 effort. It's like offering funds --

11 JUDGE NELSON: Yes.

12 MR. NORTON: -- to another party to have  
13 them go out and be your stalking horse. And they  
14 certainly haven't cited anything that would --

15 JUDGE NELSON: Well, say, for example, the  
16 paper suggests the example of the KCS helping to  
17 finance the Coalition.

18 MR. NORTON: That's right.

19 JUDGE NELSON: Suppose that's the story.  
20 And the Coalition and KCS are comrades at arms here in  
21 the sense that both oppose the transaction and have  
22 decided, to some degree, to work together to

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1 coordinate, and so forth. They would get the joint  
2 privilege, then, between them --

3 MR. NORTON: As --

4 JUDGE NELSON: -- if we have work-product.

5 MR. NORTON: That's correct.

6 JUDGE NELSON: And so your point is that  
7 one party's knowledge of money coming into the joint  
8 effort is not work-product.

9 MR. NORTON: Or its knowledge of offers  
10 that it or others have made.

11 JUDGE NELSON: Yes.

12 MR. NORTON: Likewise.

13 JUDGE NELSON: Suppose there is money paid  
14 from the KCS to the Coalition to help them organize  
15 the shippers? Your point is, why is the knowledge of  
16 that money part of work-product?

17 MR. NORTON: That certainly is one point,  
18 yes. I mean, it just doesn't --

19 JUDGE NELSON: Well, suppose that the  
20 evidence of the money is a check drawn by KCS payable  
21 to the Coalition for \$100,000, purpose to help  
22 coordinate opposition to the merger. The merger is

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1 litigation, so why isn't the check a document prepared  
2 in anticipation of litigation?

3 MR. NORTON: Well, that's a pretty  
4 extreme, I think, invocation of the work-product  
5 doctrine.

6 JUDGE NELSON: I don't know that. Is it?

7 MR. NORTON: I've never seen any cases --  
8 certainly, nothing has been cited to us that would  
9 support that far-reaching a claim. I mean, it is not  
10 revealing the work done; it is a very -- the most  
11 general description of a category of activity  
12 undertaken. And, of course, work-product is not  
13 outvoted, as Your Honor has noted previously. And  
14 given the relevance, it's important for the Board to  
15 know who is behind these activities.

16 We think that there would be a case for  
17 overriding whatever slim theoretical work-product  
18 claim might be made in those circumstances.

19 JUDGE NELSON: What if we knew that the  
20 KCS was behind the entire Coalition. What then? Does  
21 that cheapen the statements of the other shippers?

22 MR. NORTON: Well, that would be one way

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1 to put it. It would be relevant for the Board to  
2 know --

3 JUDGE NELSON: We could argue that, I  
4 guess.

5 MR. NORTON: Sure. Sure.

6 JUDGE NELSON: What do we know, in fact,  
7 about KCS's financial or other backing of the  
8 Coalition?

9 MR. NORTON: Right now, we don't know  
10 anything. That's what we're trying to find out.

11 JUDGE NELSON: Well, we have these  
12 documents.

13 MR. NORTON: Yeah, we do know Mr. Lubel  
14 stated on the record at a hearing we cited in the  
15 letter that KCS had been involved in the Coalition in  
16 some unspecified way. We have from the exhibits  
17 evidence of involvement in soliciting members and in  
18 generating or gathering and preparing shipper  
19 statements. We don't know what else. That's what  
20 we're trying to find out.

21 JUDGE NELSON: The same documents would  
22 support the inference of a common/joint defense effort

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1 and privilege.

2 MR. NORTON: And that may well be --

3 JUDGE NELSON: If they do prove that.

4 MR. NORTON: That would be true if the  
5 question were, have they waived work-product or  
6 attorney-client privilege. That's not the issue. The  
7 issue is simply limited to, what information do you  
8 have about financial support or other --

9 JUDGE NELSON: So we're down to the  
10 contention that that can't constitute work-product  
11 under any view.

12 MR. NORTON: Well, that is one contention.  
13 And if it could, it would not be sufficient to give it  
14 an absolute protection, and our interest in being able  
15 to establish what is here is --

16 JUDGE NELSON: Well, first, we have to see  
17 if it crosses the threshold of work-product.

18 MR. NORTON: That's correct.

19 JUDGE NELSON: If it isn't, you get it.

20 MR. NORTON: That's right.

21 JUDGE NELSON: Unless there is some other  
22 privilege.

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1 MR. NORTON: Right.

2 JUDGE NELSON: If it is work-product, then  
3 we apply the balancing test.

4 MR. NORTON: Right.

5 JUDGE NELSON: So what do we have -- is  
6 this Mr. Mullins doing this one? On this narrow  
7 question now -- I don't want to hear this whole  
8 universe of defenses. I wanted to hear about the  
9 narrow question of whether knowledge of the financing  
10 of this joint effort -- assume a joint effort here on  
11 the part of this Coalition and KCS. What has that got  
12 to do with the work-product? Where does work-product  
13 fit into all of that?

14 MR. MULLINS: Well, he asked -- the  
15 question asked for funding and other consideration.  
16 As evidence, he proffers a letter from a paralegal  
17 done at my direction at the request of Jack Estes, who  
18 by the way if we're -- should be talking to the  
19 Coalition, it probably should be appropriate that  
20 Mr. Estes be here.

21 JUDGE NELSON: He is ill. I had a letter  
22 from him, which I had here yesterday.

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1 MR. NORTON: We are not pressing this  
2 question against CCRT or any other issues against them  
3 today.

4 JUDGE NELSON: Does everyone have this  
5 letter of April 17 to me?

6 MR. NORTON: I got -- is that the fax the  
7 other night?

8 JUDGE NELSON: Which he says he is home  
9 ill.

10 MR. NORTON: Right, yeah.

11 JUDGE NELSON: That he has spoken with  
12 you, and so forth.

13 MR. NORTON: Right.

14 JUDGE NELSON: Well, in any event, what is  
15 the work-product? If you have to answer this  
16 question, how do you reveal work-product?

17 MR. MULLINS: Are we moving -- can I -- I  
18 mean, I have some -- a document on the Estes issue, if  
19 you care to -- I mean, are you --

20 JUDGE NELSON: I don't know what that is.  
21 We'll get to it when we get to it, I guess.

22 MR. MULLINS: We have a letter from

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1 Mr. Norton deferring any issues against CCRT, the  
2 Coalition. We have a letter back from Mr. Estes  
3 saying -- is to request that you defer making any  
4 ruling involving CCRT until he has an opportunity to  
5 appear before you.

6 JUDGE NELSON: Oh, I see. So this isn't  
7 even right, you're saying.

8 MR. MULLINS: Correct. That's right. And  
9 I --

10 JUDGE NELSON: And we shouldn't be  
11 discussing it at all.

12 MR. MULLINS: Without Mr. --

13 JUDGE NELSON: What about that, Mr.  
14 Norton?

15 MR. NORTON: Well, we're certainly in a  
16 position to discuss whether the information that KCS  
17 is asked to provide is work-product. They don't need  
18 Mr. Estes to address that question.

19 MR. MULLINS: If we're involving the joint  
20 or common defense, and we are claiming a joint and  
21 common defense with Mr. Estes, I believe it's very  
22 relevant whether or not Mr. Estes is here. Here is

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1 the counsel for the Coalition.

2 JUDGE NELSON: Well, how soon can he be  
3 here?

4 MR. NORTON: Well, he is -- he can't be  
5 here today. My understanding was that he was --

6 JUDGE NELSON: Yeah, he says he's home  
7 ill.

8 MR. NORTON: Yeah, he has a medical  
9 problem.

10 JUDGE NELSON: Right.

11 MR. NORTON: He thought maybe next week,  
12 but he wasn't sure.

13 But, Your Honor, I think we're at a point  
14 where there --

15 JUDGE NELSON: Is there any way to  
16 stipulate our way through this? Let's go -- is there  
17 objection to going off the record for a moment? Off  
18 the record.

19 (Whereupon, the proceedings were off the  
20 record from 9:24 a.m. until 9:28 a.m.)

21 JUDGE NELSON: We've been discussing a  
22 procedure here to try to move the resolution of this

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1 along, possibly by way of stipulation. And I  
2 recognize that Mr. Mullins needs some time to confer  
3 with the client to get some basic information, which  
4 he then may convey to us collectively here in public,  
5 or he may choose to give me on an in camera basis so  
6 that I can then decide where we're going to go.

7 So it's my suggestion that we take that  
8 time to enable Mr. Mullins to communicate with the  
9 client, and then we're in a better position to see  
10 where we're going, because we're kind of going in  
11 circles right now over material we're not all that  
12 sure about on either side.

13 I see Mr. Wood is now back in the room, so  
14 we're going to defer this matter of the dispute over  
15 the fifth set until we get more information from the  
16 KCS.

17 MR. MULLINS: We also have the matter of  
18 our supposed alleged deficiencies of producing  
19 documents to --

20 JUDGE NELSON: We'll get to that. You may  
21 tell the client that the KCS was on television the  
22 other night in a documentary on Negro Leagues

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1 baseball, and particularly the Kansas City Monarchs,  
2 a team in which Satchel Page starred, among others.  
3 And highlighted is a scene of the KCS Railroad hauling  
4 fans to Chicago for a championship game that ends the  
5 Negro League season that year.

6 (Laughter.)

7 The locomotives and passenger cars are  
8 prominently displayed --

9 (Laughter.)

10 -- en route to the ball game. I thought  
11 it was a nice piece of publicity for that railroad.

12 MR. MULLINS: Thank you. I didn't see  
13 that.

14 JUDGE NELSON: No. But, you see, it has  
15 a historic --

16 MR. MULLINS: I'll pass that --

17 JUDGE NELSON: -- interesting context. It  
18 was on two nights ago on ETV here in Washington.

19 Can we do any further business before we  
20 take recesses here?

21 MR. MULLINS: The Department of Justice  
22 matter, the -- again, this is the --

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1 JUDGE NELSON: That's new business. Oh,  
2 no, that's still old business. Yes, all right. Let's  
3 take that up, then.

4 This was an allegation that in the  
5 turnover of papers -- papers which parties had given  
6 to DOJ and DOT -- there was some missing piece of  
7 paper, insofar as KCS's documents for DOJ. And we  
8 need to find out about that. What's the story with  
9 that, Mr. Mullins?

10 MR. MULLINS: Well, he is alleging we have  
11 refused to turn over relevant documents to this  
12 proceeding. I am claiming that we have produced all  
13 relevant documents that are related to this  
14 proceeding, and I think you should hear from  
15 Mr. Norton what he claims that we haven't done -- have  
16 or haven't done.

17 JUDGE NELSON: What is the complaint,  
18 Mr. Norton?

19 MR. NORTON: The complaint is that it is  
20 our understanding that in connection with this  
21 proceeding KCS provided to the Justice Department a  
22 study on the subject of collusion in the railroad

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1 industry in an effort to persuade the Department to  
2 take a position concerning the merger, and that this  
3 request was covered by Document Request 15 in the  
4 second set, which called for presentations, memos,  
5 etcetera, to a variety of entities, including the  
6 Justice Department, in connection with the merger.

7 We narrowed that last week to  
8 presentations to the Justice Department and other  
9 federal agencies, that they made a production --

10 JUDGE NELSON: I recall that.

11 MR. NORTON: -- which did not include this  
12 document. And the first question, I guess --

13 JUDGE NELSON: Well, the first question is  
14 is there such a document?

15 MR. NORTON: That's correct. And we have  
16 every reason to believe that there is, and if there's  
17 any question about that we can address it further.

18 JUDGE NELSON: So the focus is on some  
19 document which they believe to have dealt with the  
20 subject of collusion in the railroad industries, which  
21 document they further believe that the KCS turned over  
22 to the Justice Department. Now what, if anything, can

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1 you tell us about this?

2 MR. MULLINS: Well, I think I might know  
3 what he is referring to. I don't confirm or deny the  
4 existence of such a document. I think I know why he  
5 is saying what he is saying, but it would -- I would  
6 suggest that the best way to handle this situation  
7 would be for you to have an in camera discussion with  
8 Ms. Metallo and Mr. Billiel of the Department of  
9 Justice, and I believe that they could clarify what I  
10 believe Mr. Norton is discussing.

11 JUDGE NELSON: Is there objection to that  
12 procedure?

13 MR. NORTON: I think there's a distinction  
14 between an in camera examination of the document and  
15 an in camera discussion with opposing counsel.

16 JUDGE NELSON: That's correct.

17 MR. NORTON: And I -- without further --

18 JUDGE NELSON: Both methods have been used  
19 in the law. I was in one once in a nuclear explosion  
20 case, a weapons detonation lawsuit, in which we were  
21 on the side of supplying the confidential material and  
22 the expert to meet in camera with the court. It was

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1 a clumsy procedure, but it can be done.

2 MR. NORTON: Well, without a further --

3 JUDGE NELSON: If someone tells me it's  
4 unprecedented, I can tell you, no, it isn't. I was in  
5 one once.

6 MR. NORTON: I wasn't suggesting that, but  
7 it is -- without a further showing as to why there  
8 should be such an in camera discussion --

9 JUDGE NELSON: Well, that's a fair point.

10 MR. NORTON: -- I don't --

11 JUDGE NELSON: Is the document itself  
12 here?

13 MS. METALLO: Your Honor, the reason for  
14 the in camera discussion --

15 JUDGE NELSON: First things first. Is the  
16 document here?

17 MS. METALLO: Your Honor, I respectfully  
18 suggest that I need to complete my sentence before --

19 JUDGE NELSON: Go right ahead.

20 MS. METALLO: -- I answer the question.  
21 One of our concerns is that assuming, theoretically,  
22 hypothetically, that such a document exists, the mere

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1 fact of acknowledging that we've given any information  
2 to the Department of Justice could destroy one of our  
3 privileges. And that is the reason why we are  
4 requesting an in camera argument.

5 JUDGE NELSON: That is known in the trade  
6 as the Glomar response.

7 MR. NORTON: I was involved in a case  
8 where that was invoked.

9 JUDGE NELSON: Crafted in our office in  
10 the Department of Defense, so you're talking to the  
11 right person.

12 MR. NORTON: Your Honor, I don't think  
13 there is --

14 JUDGE NELSON: Maybe Mr. Billiel can give  
15 us some help on this. Why is Mr. Steel up? What do  
16 you care about this?

17 MR. STEEL: Well, we're alleged to be --

18 JUDGE NELSON: Are you one of the  
19 conspirators?

20 MR. STEEL: We're part of the alleged  
21 conspirators, right, so it has some relevance to us.  
22 And, Your Honor, they have pages 73 to about 84 of

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1 their submission and comments made the issue of the  
2 collusion --

3 JUDGE NELSON: Who is "they"?

4 MR. STEEL: KCS. Made the issue that  
5 collusion amongst UP, SP, SN, and Santa Fe is an  
6 issue, and argue that it's a reason why this merger  
7 should not be approved. For past history, they allege  
8 a settlement agreement may have come out of such  
9 collusion, and it may be a reason why the agreement  
10 won't work in the future.

11 JUDGE NELSON: Does the Department's  
12 position refer to this alleged collusion?

13 MR. STEEL: I believe it does not, sir.  
14 Mr. Billiel --

15 MR. NORTON: The Department's position --

16 JUDGE NELSON: I quickly read it, and I  
17 didn't see anything like that.

18 MR. NORTON: It refers to the risk of  
19 collusion, certainly, in Mr. Majure's statement. But  
20 not this particular variation.

21 MR. BILLIEL: It refers to the risk of  
22 tacit collusion.

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1 JUDGE NELSON: What can you tell us about  
2 this problem, Mr. Billiel?

3 MR. BILLIEL: Well, Your Honor, as you  
4 know, we've taken the general position that anything  
5 people give us should not be discoverable unless we  
6 rely on it in our testimony. And we do not discuss  
7 this hypothetical collusion at all.

8 In addition to our general objection to  
9 production of this kind of material, in this case the  
10 type of document that we're talking about involves  
11 possible allegations of federal law that we have  
12 jurisdiction to enforce.

13 JUDGE NELSON: So you're concerned with  
14 the informant privilege, then.

15 MR. STEEL: But we know who it is. It's  
16 KCS, the informant, so there's no need to worry about  
17 who the informant is.

18 MR. MULLINS: Well, Mr. Steel, unless you  
19 have a copy of this alleged document, I don't know how  
20 you can make these allegations. Has somebody given  
21 you a copy of this alleged document?

22 MR. STEEL: Yes.

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1 MR. MULLINS: I'd like to see it.

2 MR. STEEL: Are you finished? The  
3 circumstances by which we are aware of the existence  
4 of this document is that at a deposition in this  
5 matter one of the counsels for KCS had the document  
6 out and was reading from the document and wanted my  
7 partners to pull a document like this and read from  
8 it. You can see what the title of the document is.  
9 That's how we know it exists. It does exist.

10 It was a -- to the best of our  
11 recollection, not my personal recollection, it was  
12 evidence of collusion amongst Western carriers for  
13 presentation to Anne Bingaman in late January of this  
14 year. It exists.

15 Now, they've agreed to produce all of  
16 those documents. Apart from Mr. Billiel's position,  
17 they agreed to produce all of those documents as part  
18 of the resolution of this discovery dispute. They  
19 want to say perhaps it is not responsive and not  
20 related to this proceeding.

21 If you'll listen to Mr. Mullins, he stood  
22 up and said, "We have given everything related to this

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1 proceeding," and that's how they're carving this out.  
2 But they cut a deal. They produced things that are  
3 responsive and relevant to this proceeding. This is,  
4 by their own comments, relevant to this proceeding.

5 JUDGE NELSON: Tell me more --

6 MR. STEEL: And all of a sudden they want  
7 to change their minds.

8 JUDGE NELSON: Well, tell me more about  
9 this matter of what happened at the deposition.

10 MS. METALLO: It sounds like you were  
11 spying on our work-product.

12 MR. MULLINS: That's extraordinary.

13 MR. STEEL: What's extraordinary? She is  
14 at a deposition.

15 JUDGE NELSON: Is there a record of all of  
16 this? Is this in a transcript?

17 MS. METALLO: I'm reading my work-product  
18 at a deposition and you're spying on my papers?

19 JUDGE NELSON: Ladies and gentlemen, this  
20 is not going to help me at all. I'm not interested in  
21 the who struck John. I can leave the room, you can go  
22 at it until you're happy, and then you can call me and

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1 I'll come back down. Would you rather do that?

2 MR. MULLINS: Can I have some boxing  
3 gloves?

4 JUDGE NELSON: I've got no interest in  
5 this aspect of the case at all.

6 MR. STEEL: I'll tell you who got -- it  
7 was reported to me by Roy Hoover, who appeared here  
8 before you one day.

9 JUDGE NELSON: Now, let's go back. What  
10 happened when, and let's get the transcript. Is there  
11 a deposition transcript of this incident?

12 MR. STEEL: Not of the incident.

13 JUDGE NELSON: Well, you said questions  
14 were asked.

15 MR. STEEL: Yes. I could find out whose  
16 deposition it was.

17 JUDGE NELSON: Yeah. Who was the witness?

18 MR. STEEL: We don't know. Mr. Billiel  
19 was at the deposition, I know that.

20 JUDGE NELSON: I think we should get it  
21 here.

22 MR. NORTON: Your Honor, I don't think he

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1 is suggesting that the deposition transcript sheds any  
2 light on this.

3 JUDGE NELSON: Oh.

4 MR. STEEL: It does not. During the  
5 deposition --

6 JUDGE NELSON: To the extent that there is  
7 some document, and questions have been asked about it  
8 at a deposition, to that extent it is already  
9 published.

10 MR. NORTON: No, I don't think --

11 MR. STEEL: No. What I understand has  
12 happened was Ms. Metallo was holding the document up  
13 in front of her and asking the witness a question  
14 about the document. When she held it up, it came in  
15 plain view of everyone sitting at the deposition  
16 table. No one is prying into anything.

17 JUDGE NELSON: Were you there?

18 MR. STEEL: She holds something up, is  
19 Mr. Englert supposed to shield his eyes from what  
20 Ms. Metallo --

21 JUDGE NELSON: Were you there at that  
22 time?

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1 MR. STEEL: I was not. Mr. Englert was,  
2 and he is available to come up and testify about every  
3 fact. There is nothing untoward done here. We didn't  
4 hold the document up; Ms. Metallo did. That's how we  
5 know it exists. They can tell you it doesn't exist,  
6 and they may have destroyed it, or it may be gone, but  
7 they cut a deal --

8 JUDGE NELSON: Well, if the matter is that  
9 sensitive to all counsel, I have no reason to doubt  
10 your word that Mr. Englert told you this. But I think  
11 it really goes beyond hearsay here, and I'm sure  
12 you're telling me truthfully what Mr. Englert told  
13 you. You're a person of absolute integrity in  
14 dealings here.

15 Nevertheless, if we're going to have to  
16 get into the contention that there has been a waiver  
17 insofar as questions were asked from the document,  
18 with regards to the questions, and a plain view  
19 observation of the existence of the document, then I  
20 would really need to hear from someone who did see it  
21 and hear it, which is not you.

22 MR. STEEL: I can do that. I can do that.

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1 JUDGE NELSON: And --

2 MR. STEEL: He is available and ready to  
3 come.

4 JUDGE NELSON: -- that would seem to me  
5 one thing we could do. If there, then, is a document  
6 discovered by plain view without breaching any rules  
7 of procedure or etiquette, then the Glomar response is  
8 inapplicable. And then I can say, "Let me see the  
9 document." So that's my thinking. Any comments on  
10 that?

11 MS. METALLO: Yes, I have two comments on  
12 that.

13 JUDGE NELSON: Yes, ma'am?

14 MS. METALLO: The document, if one  
15 exists --

16 JUDGE NELSON: I gather you were taking  
17 the deposition.

18 MS. METALLO: Right. I had several  
19 different work-products with me at all of the  
20 depositions that I was reviewing, as I was asking  
21 questions. Nothing -- none of my work-product was  
22 ever introduced on the record, nor was it intended to

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1 be made public. If somebody was glancing over my  
2 shoulder or looking at my notes, that is beyond my  
3 control.

4 MR. STEEL: If there is no allegation for  
5 how --

6 MS. METALLO: Secondly --

7 MR. STEEL: -- that happened and stop it.  
8 He did not --

9 MS. METALLO: I'm being interrupted. I  
10 did not interrupt you.

11 JUDGE NELSON: Mr. Steel, she is right.  
12 Why don't we hear her side of the story.

13 MR. STEEL: Well, ask her to state the  
14 facts.

15 JUDGE NELSON: And if you've got some  
16 answer, we'll come back to it. You weren't there.

17 MS. METALLO: You weren't there. I was  
18 there.

19 JUDGE NELSON: I wasn't either.

20 MS. METALLO: I did not --

21 JUDGE NELSON: So --

22 MS. METALLO: -- use any of my work-

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1 product as I was deposing anybody and hold it up.

2 JUDGE NELSON: Well, if it becomes  
3 important --

4 MS. METALLO: That's not my style.

5 JUDGE NELSON: If it becomes important to  
6 find out what was there, what happened, we will.

7 MS. METALLO: Secondly, Your Honor, the  
8 staff -- the BN/SF is arguing that they know, in fact,  
9 that this report -- that they know who the informant  
10 is. If that's the case, then why was each and every  
11 party in this proceeding asked precisely the same  
12 interrogatory?

13 JUDGE NELSON: Besides, it isn't always  
14 who the informant is. It sometimes is what he or she  
15 said. So even if we put on The New York Times that  
16 the informant is the Kansas City Southern, that  
17 doesn't do away with the Department's concern about  
18 the informant privilege. It can be what the Kansas  
19 City Southern told them that could become equally  
20 sensitive and protectable. So I'm not persuaded by  
21 that argument that everyone knows who it was.

22 Well, what do you suggest? We've got

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1 several ideas here.

2 MR. NORTON: Your Honor?

3 JUDGE NELSON: Mr. Norton, yes?

4 MR. NORTON: I want to pick up on a point  
5 that Mr. Steel raised, which was that --

6 JUDGE NELSON: Oh, one thing I would want  
7 to see is the extent to which collusion has been put  
8 in the case. You say it's in KCS's submission?

9 MR. STEEL: Yes, Your Honor. Yes, it is.

10 MR. MULLINS: Your Honor, we did not make  
11 an argument that they had colluded.

12 JUDGE NELSON: Well, whatever it is, I'll  
13 look at it but --

14 MR. MULLINS: We made an argument that if  
15 they have colluded, that -- now let me explain why  
16 this is important. The ICC when they -- or now the  
17 STB, when they approve a merger transaction --

18 JUDGE NELSON: Infer any trust immunity.

19 MR. MULLINS: That's correct. On  
20 everything.

21 JUDGE NELSON: I know that.

22 MR. MULLINS: So what we made was the

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1 argument that if they have colluded in a manner that  
2 violates the anti-trust laws that whatever anti-trust  
3 immunity is afforded to this merger it should not be  
4 afforded to any activity that may have violated the  
5 anti-trust laws, because that -- you know, you can't  
6 -- in other words, the STB should not, because of its  
7 anti-trust immunity -- ability to immunize from the  
8 anti-trust laws, immunize conduct that may violate the  
9 Sherman Act.

10 JUDGE NELSON: Is the immunity  
11 retroactive?

12 MR. MULLINS: It's unclear. This is a  
13 real unclear area of the law as to how far the  
14 immunity goes.

15 JUDGE NELSON: It has to be prospective to  
16 make any sense.

17 MR. MULLINS: But the immunity says that  
18 it's exempt from the anti-trust laws as necessary to  
19 allow the transaction to go forward. That's the --

20 JUDGE NELSON: Which sounds prospective,  
21 let's face it.

22 MR. MULLINS: Yeah. But if the

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1 transaction -- in order to allow the transaction to go  
2 forward, you have to immunize conduct that happened in  
3 the past. You know, it gets into a real iffy area of  
4 the law, because the statute says, "Anti-trust  
5 immunity to allow the transaction to go forward."

6 JUDGE NELSON: But if the transaction  
7 itself could never have been borne without two  
8 railroads talking to each other, there must be some  
9 immunity that precedes the approval. There has to be  
10 some retroactive effect.

11 MR. MULLINS: Yes.

12 JUDGE NELSON: The question is where you  
13 draw the line.

14 MR. MULLINS: That's right.

15 JUDGE NELSON: All right. I understand  
16 that claim.

17 What is your suggestion, Mr. Norton?

18 MR. NORTON: Your Honor, I wanted to go  
19 back to the point that Mr. Steel alluded to, and that  
20 is that the --

21 MR. MULLINS: I just want to make it clear  
22 that we have not accused them anywhere in our

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1 filing --

2 JUDGE NELSON: Well, I'll read this if  
3 it's necessary.

4 MR. NORTON: The way in which this issue  
5 was resolved last week, it was a broader request we  
6 were discussing, and we agreed to narrow it to Justice  
7 Department and some of the other federal agencies  
8 that --

9 JUDGE NELSON: We've been through that.

10 MR. NORTON: But there's another point.  
11 I specifically went over to Mr. Lubel, we were over in  
12 Room 3, and said, "I want to be clear that what you're  
13 producing includes the study that we understand you  
14 have done on collusion, and we understand was provided  
15 to the Justice Department."

16 JUDGE NELSON: Where did you get that  
17 understanding?

18 MR. NORTON: I have that information  
19 from --

20 JUDGE NELSON: You heard it from  
21 Mr. Steel --

22 MR. NORTON: Right.

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1 JUDGE NELSON: -- who heard from someone  
2 else that there was such a document.

3 MR. NORTON: That's right. And I --

4 JUDGE NELSON: You've never seen this  
5 document.

6 MR. NORTON: That's correct. But I did  
7 alert Mr. Lubel to our expectation that that document,  
8 if it existed, would be part of the response. He did  
9 not say anything one way or the other about it. He  
10 wasn't sure what was produced or what hadn't been  
11 produced yet.

12 So there was clear indication that we  
13 understood this was part of what we were going to be  
14 getting if it existed, and they did not in any way  
15 carve out that, or in the letter that transmitted  
16 documents they did not say that we're withholding  
17 something --

18 JUDGE NELSON: So what?

19 MR. NORTON: -- as a waiver.

20 JUDGE NELSON: Oh, they're invoking this  
21 claim too late?

22 MR. NORTON: Well, that is a narrow way in

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1 which you could resolve the question.

2 MR. STEEL: Your Honor, I'm prepared, if  
3 he would --

4 MR. NORTON: We had understood we were  
5 going to be getting whatever it was they had, and they  
6 weren't holding anything back.

7 MR. MULLINS: Any non-privileged  
8 documents, and we also -- and I -- I state again on  
9 the record --

10 JUDGE NELSON: Let's get by that. I make  
11 nothing whatsoever of the fact that the document has  
12 not yet been turned over. We're here now to see  
13 whether it should be, and, if so, under what  
14 circumstances.

15 Well, we've got two suggestions. One is  
16 that I entertain an in camera submission, or, rather,  
17 recital by Ms. Metallo and Mr. Billiel. That's one  
18 way to go. Another is to find out from Mr. -- what is  
19 your colleague's name?

20 MR. STEEL: Englert.

21 JUDGE NELSON: Englert what he knows about  
22 the existence of the document and how he learned it,

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1 and so on and so forth. We could explore the entire  
2 circumstances, which has the logical appeal that if I  
3 can draw a fair inference that there is, in fact, such  
4 a document then we don't have to worry about what I  
5 called the Glomar response. That is, where the  
6 admission of the existence of the document itself has  
7 independent significance, if he has learned it by  
8 plain view.

9 Now, if he has learned it by violating  
10 some rule or other, then we'll have to deal with that  
11 matter and whatever its consequences are. I have no  
12 idea what happened or whether he learned anything. He  
13 might come in here and say, "I've never heard of  
14 this," so --

15 MR. STEEL: Well, I --

16 JUDGE NELSON: -- for all we know.

17 MR. STEEL: Yesterday -- after yesterday  
18 morning's postponement of this to today, he was in  
19 Boston preparing -- meeting with some people on this  
20 matter. I left him a message.

21 JUDGE NELSON: Is he in town today?

22 MR. STEEL: He's in town. He left a voice

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1 mail message reiterating exactly what I told you, said  
2 he was comfortable with his characterization of what  
3 happened. He is prepared to come and testify under  
4 oath. And if they don't want to take that as what  
5 happened, that's fine. He is ready to come and --

6 JUDGE NELSON: Well, let's hear  
7 Ms. Metallo. If --

8 MR. STEEL: If they want to challenge that  
9 seriously, it exists, we've seen it.

10 JUDGE NELSON: One way to go is to get him  
11 in here and find out what he knows, if anything, about  
12 the existence of this document. We would have to put  
13 him on the stand under oath, which I don't like to do  
14 with lawyers. But what are your thoughts about taking  
15 that road, or anyone else's for that matter?

16 MS. METALLO: Your Honor, I have no  
17 objection to that. Again, I will restate that I did  
18 not in any way intend to make any of my notes of  
19 preparations publicly available to anybody at the  
20 deposition. And that if somebody looked over my  
21 shoulder and saw where -- from what I was reading  
22 from, that's beyond my control. There was no intent

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1 to disclose to anyone at the deposition from what I  
2 was reading what.

3 JUDGE NELSON: Well, I haven't looked at  
4 the rules on this kind of thing for a long time.

5 MS. METALLO: Anything that --

6 JUDGE NELSON: So I don't really know.  
7 But it seems to me there may be a distinction between  
8 whatever is in plain view and peeking over a shoulder  
9 or trying to get at something. I don't know.

10 What are your thoughts, Mr. Billiel? Do  
11 we want to explore this with Mr. Englert?

12 MR. BILLIEL: Well, Your Honor, I think  
13 even assuming what Mr. Englert says absolutely totally  
14 is true, I think there are important reasons that any  
15 such document should not be turned over.

16 JUDGE NELSON: That's a different story.

17 MR. BILLIEL: So I --

18 JUDGE NELSON: I'm trying to get over the  
19 threshold here, with or without Englert, of the  
20 possibility that there may, in fact, be such a  
21 document. And if we can get that acknowledged, we  
22 don't need Englert, and we then move on and see what

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1 we do with it.

2 But I know that you have troubles  
3 acknowledging the existence of such document. But if  
4 it has come into view, and there is one, and we're --

5 MS. METALLO: Your Honor, can we just --

6 JUDGE NELSON: -- willing to agree to  
7 that, then maybe we can move from there.

8 MS. METALLO: Just one more point. One of  
9 the reasons why I think it's important that this  
10 argument be heard in camera is, again, let's assume  
11 that theoretically, hypothetically, that there might  
12 be more than one such document. We have no idea which  
13 document was claimed to have been seen at this  
14 deposition, so we don't even know -- you know, again,  
15 this is the problem I'm dealing with.

16 JUDGE NELSON: I would narrow it, I think,  
17 to whatever document you were reading from when you  
18 read the question.

19 MS. METALLO: Well, Your Honor, I was  
20 involved in more than one deposition, and I cannot  
21 tell you -- you know, I had extensive files with me at  
22 each of the depositions. I cannot tell you which --

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1 from which deposition I read which document, assuming  
2 any of these documents fall into the category that has  
3 been described here.

4 JUDGE NELSON: Well, do you mean if we  
5 found a specific deposition of a specific witness  
6 which you took, and we asked you to take as much time  
7 as you needed, within reason, to go through your  
8 records and notes and give us whatever you were  
9 reading from when you asked question so-and-so, on  
10 page so-and-so of line so-and-so, you couldn't help us  
11 in that regard?

12 MS. METALLO: Your Honor, I cannot. And,  
13 again, I can explain this to you in camera. I cannot  
14 explain it here without violating -- without, you  
15 know, waiving further a privilege that might be  
16 available to my client.

17 MR. STEEL: Your Honor, we do know what  
18 document it is. It was labeled as a presentation to  
19 Anne Bingaman. It was in late January of this year.  
20 We know what document it is. It says Anne Bingaman on  
21 it.

22 I believe --