

INTERSTATE COMMERCE COMMISSION 03/20/96

FINANCE DOCKET # 32760 2069-2197 1+

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

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DISCOVERY CONFERENCE

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IN THE MATTER OF: :

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

Wednesday, March 20, 1996

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

The above-entitled matter came on for
hearing, pursuant to notice, at 9:00 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

(9:04 a.m.)

JUDGE NELSON: Please be seated. Let's see who is ahead today.

MR. LIVINGSTON: For the Applicants, Your Honor, Bill Livingston, also with Karen Kramer of our office of Covington Burling and Gerry Norton.

MR. MCBRIDE: Good morning, Your Honor, Michael McBride for the Western Shippers Coalition.

MR. DOWD: Your Honor, Kelvin Down for the Western Coal Traffic League and Arizona Electric, Wisconsin Utilities, Entergy and Texas Utilities.

MR. ENGLERT: Good morning, Your Honor, Roy Englert for Burlington Northern and Atchison, Topeka and Santa Fe.

JUDGE NELSON: Your name again, sir?

MR. ENGLERT: Roy Englert.

JUDGE NELSON: Englert?

MR. ENGLERT: Englert, yes, Your Honor. And with me is Adrian Steel. Both of us are from Mayer, Brown & Platt.

MR. ONGMAN: Your Honor, John Ongman,

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1 Geneva Steel Company and Omaha Power Company.

2 MR. LUBEL: Your Honor, good morning, Alan
3 Lubel from the Kansas City Southern Railway.

4 MR. BEHR: Your Honor, Douglas Behr from
5 the Society of the Plastics Industry.

6 MR. PERGOLIZZI: Frank Pergolizzi from the
7 Texas Utilities Electric Company.

8 MR. DiMICHAEL: And Your Honor, Nicholas
9 DiMichael for the National Industrial Transportation
10 League, the Dow Chemical Company and Kennecott Utah.

11 JUDGE NELSON: All right, I have first of
12 all much of the day set aside here if we need it.
13 There have been times when we know our schedule has
14 jammed me into other cases and other things. But I'm
15 clear today, and I would like to take as much time as
16 we need until maybe either as late as 3:30 if we have
17 to. And if we have to go beyond that, so be it.

18 All right, that's the good news is that I
19 have time to deal with you. The bad news is that I
20 have not have time to do any more than superficially
21 skim the materials. So, I'll need help with the
22 facts, the contentions and so forth.

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1 And I understand some problems have been
2 resolved. I have these here in a memorandum in the
3 following order: the Applicants' disputes with
4 everybody. Then I have International Paper concerning
5 the deposition of Mr. Dealy. Then I have WSC and WCTL
6 on this matter of the coal bids, KCS on the deposition
7 of Krebs, and then two or three Conrail matters.

8 And that's the order in which I have them
9 here. And any reason I shouldn't use that order?

10 MR. ENGLERT: Your Honor, if I may, the
11 International Paper Dealy dispute has been resolved,
12 but is not reported for a decision. And I believe
13 that all the --

14 JUDGE NELSON: The business with Dealy, is
15 that correct?

16 MR. ENGLERT: The Dealy deposition --

17 JUDGE NELSON: Okay, that's good.

18 MR. ENGLERT: -- has been scheduled for
19 the day after tomorrow.

20 JUDGE NELSON: Fine.

21 MR. ENGLERT: And I believe all the
22 Conrail disputes are also resolved, certainly with us,

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1 and I believe with the Applicants as well.

2 MR. LIVINGSTON: That's right. We have
3 something against Conrail in our letter. But the
4 thing that Conrail had against us has been resolved.

5 MR. ENGLERT: And finally, Your Honor, if
6 I might make a suggestion, the Krebs matter is old
7 business, if you will, and it's rather discreet. And
8 I wonder if that might be advanced on the agenda.

9 JUDGE NELSON: Mr. Englehart, is it?

10 MR. ENGLERT: Englert.

11 JUDGE NELSON: Could you keep your voice
12 up? I'm having a little trouble hearing you.

13 MR. ENGLERT: Yes sir.

14 JUDGE NELSON: Come up and take a front
15 seat. You don't need to sit in the bleachers there.
16 You're a major player here, and I'll hear you better
17 this way. What is your suggestion, sir?

18 MR. ENGLERT: My suggestion would be that
19 we might take up the Krebs matter before getting into
20 the Applicants' discovery dispute, which is somewhat
21 more detailed.

22 JUDGE NELSON: Is there objection to doing

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1 that? Does that free some people up so they don't
2 have to hang around? Is that the idea?

3 MR. ENGLERT: Yes, Your Honor.

4 JUDGE NELSON: All right, then that seems
5 to make sense. So the issue is KCS, Mr. Lubel. And
6 you'll have to take me back to where we were. I read
7 quickly your letter of March 13th, which is all I know
8 about this.

9 And it is so detailed and factual that I
10 think if you take me through it, it will help a little
11 more. This is the matter that we deferred until we
12 could see what the Bredenberg deposition had say as I
13 recall.

14 MR. LUBEL: That's correct, Your Honor.

15 JUDGE NELSON: And you want a deposition
16 of Mr. Krebs, and Mr. Krebs is the --

17 MR. LUBEL: President.

18 JUDGE NELSON: -- Chairman of the Board or
19 President?

20 MR. LUBEL: I misstated that. He's the
21 President of Burlington Northern.

22 JUDGE NELSON: CEO of the Burlington

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1 Northern.

2 MR. LUBLL: Yes.

3 JUDGE NELSON: So we have that test to
4 deal with that Ms. Jones argued last time. All right,
5 I'll hear you then. Take me through this business
6 with Krebs, what it is you want, why you need it. So
7 --

8 (Whereupon, the proceedings went
9 immediately into a highly confidential session.)

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1 JUDGE NELSON: What's next? The
2 Applicants' material, do you want to start with that
3 now?

4 MR. LIVINGSTON: That would be fine, Your
5 Honor.

6 JUDGE NELSON: I have your letter of March
7 13th.

8 MR. LIVINGSTON: Right, which was
9 supplemented with a letter of March 18th.

10 JUDGE NELSON: I don't know that I have
11 that.

12 (Pause.)

13 JUDGE NELSON: Yes, I do.

14 MR. LIVINGSTON: The March 13th letter is
15 sort of the basic letter, and maybe it makes sense to
16 go through these so Your Honor --

17 JUDGE NELSON: Yes, I did go through that
18 one. So all right, let's start with the March 13.

19 MR. LIVINGSTON: Okay, there are some that
20 have been settled or resolved or deferred.

21 JUDGE NELSON: The first bullet, I have a
22 note here that it's no longer an issue.

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1 MR. LIVINGSTON: Now, that's not entirely
2 correct.

3 JUDGE NELSON: I see.

4 MR. LIVINGSTON: Illinois Power is off the
5 table.

6 JUDGE NELSON: Yes.

7 MR. LIVINGSTON: That's resolved, so
8 that's been withdrawn. The second one listed there
9 was International Paper. They have filed -- now have
10 filed a response. So that particular aspect of it is
11 taken care of.

12 However, we have a dispute with them,
13 which is item -- listed in the March 18th letter
14 concerning the adequacy of the response. And it is
15 the same dispute essentially that we have with Dow and
16 with Kennecott.

17 JUDGE NELSON: So, we'll get to it when we
18 get to that.

19 MR. LIVINGSTON: That would be fine.

20 JUDGE NELSON: Now, what's this South
21 Orient?

22 MR. LIVINGSTON: South Orient and TRL

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1 submitted statements of position saying that they were
2 going to participate in the proceeding. They've
3 entered in the proceeding.

4 They say they're going to seek conditions,
5 possibly oppose. We served them with discovery. They
6 haven't filed any responses. We've heard --

7 JUDGE NELSON: And what is it you want?

8 MR. LIVINGSTON: Well, we would like our
9 discovery -- we would like an order requiring them to
10 respond. They have not responded at all.

11 JUDGE NELSON: Who are they?

12 MR. LIVINGSTON: They are railroad
13 companies in Texas. They operate -- they are
14 shortline railroads and --

15 JUDGE NELSON: Do they have counsel?

16 MR. LIVINGSTON: They -- the papers they
17 submitted were -- they did not list counsel. In other
18 words, it was submitted pro se by the President of the
19 company.

20 JUDGE NELSON: And what is it that you
21 want from them?

22 MR. LIVINGSTON: I don't have -- well, the

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1 discovery requests are listed -- we sent Your Honor a
2 volume of --

3 JUDGE NELSON: Well, is it those large
4 broad --

5 MR. LIVINGSTON: I don't have the
6 discovery requests in front of me.

7 JUDGE NELSON: I mean, we're dealing with
8 two small railroads with pro se representation from
9 Texas and you want to hit them with the same kind of
10 discovery that everybody is answering in this case?

11 MR. LIVINGSTON: They didn't get the same
12 kind of discovery that everybody is answering.

13 JUDGE NELSON: Okay.

14 MR. LIVINGSTON: But I don't have in front
15 of me the discovery requests. The problem here is
16 that they haven't filed anything.

17 JUDGE NELSON: Well, I can't compel
18 responses to discovery requests that I can't see.

19 MR. LIVINGSTON: Your Honor, we served --

20 JUDGE NELSON: That's not logical.

21 MR. LIVINGSTON: -- discovery requests on
22 them. They didn't file any objections. They were

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1 required to do it in five days. They didn't file. We
2 --

3 JUDGE NELSON: Well, I understand that,
4 but I just can't give --

5 MR. LIVINGSTON: They were required to
6 file responses. They did not --

7 JUDGE NELSON: I'm just not comfortable
8 with a blank check directing two small companies who
9 don't even have a lawyer, so far as we know, to answer
10 some interrogatories that you haven't got here to show
11 me.

12 So on this record, I'm going to deny your
13 request with regard to South Orient and TRL. Let's
14 move to the next subject.

15 MR. LIVINGSTON: Your Honor, can you wait
16 one second on that? Let me -- Gerry, do you have
17 copies of the them?

18 (Pause.)

19 MR. LIVINGSTON: Your Honor, we'll
20 resubmit that with the discovery requests, but --

21 JUDGE NELSON: We can do it without
22 prejudice to another ruling at another conference.

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1 MR. LIVINGSTON: The next series has to do
2 -- there are several bullets on here all having to do
3 with KCS --

4 JUDGE NELSON: Yes sir.

5 MR. LIVINGSTON: -- which I'm prepared to
6 address. We have --

7 JUDGE NELSON: And the point of this
8 bullet is that KCS tells you that they've got
9 something, but not everything. And you want to see
10 what they've got now.

11 MR. DOWD: Your Honor, Mr. Lubel stepped
12 out for a moment.

13 JUDGE NELSON: Oh, can we find him?

14 MR. DOWD: I was going to see if I could
15 find him.

16 JUDGE NELSON: Do you want to take a
17 recess for a moment?

18 (Pause.)

19 JUDGE NELSON: Do you want to take a
20 break?

21 MR. LIVINGSTON: Or we can move on to the
22 next set of bullets.

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1 JUDGE NELSON: All right, what's the next
2 item? That's also KCS.

3 MR. LIVINGSTON: There are four KCS.

4 JUDGE NELSON: Yes, let's get to Conrail
5 then.

6 MR. KILLORY: The next one is Conrail,
7 Your Honor.

8 MR. LIVINGSTON: That's right, the next
9 one is Conrail.

10 JUDGE NELSON: Request 35.

11 MR. LIVINGSTON: This was a request for
12 trackage rights agreements and haulage agreements.

13 JUDGE NELSON: May I see it? Is it in
14 this book?

15 MR. LIVINGSTON: Yes, it is in the book.
16 These things are listed alphabetically, and it's
17 request number 35.

18 JUDGE NELSON: How do I find that?

19 MR. KILLORY: Your Honor, this is the
20 letter we submitted yesterday. It has number 35 in
21 the letter.

22 MR. LIVINGSTON: Okay.

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1 JUDGE NELSON: All right, the request is
2 "Produce each current haulage or trackage rights
3 agreement in effect between Conrail and any other
4 railroad."

5 MR. LIVINGSTON: That's correct.

6 JUDGE NELSON: And their response was
7 what?

8 MR. KILLORY: It was we objected on the
9 grounds of relevance and burden, Your Honor. This was
10 a subject that was covered in the March eighth
11 hearing. But we also went on to say --

12 JUDGE NELSON: I recall this from before.

13 MR. KILLORY: -- we went on to say,
14 pursuant to what we thought was the duty you expressed
15 at the hearing, that there were some parallel or
16 similar questions asked by BN/SF that were much more
17 narrowly drawn.

18 And in response to that, there was not as
19 great a burden to go dig out some identifying -- for
20 identified lines, which is what Your Honor --

21 JUDGE NELSON: I recall that, yes.

22 MR. KILLORY: And we produced those. And

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1 we indicated in our response that we would make those
2 items available to Applicants as well. It was --

3 JUDGE NELSON: And have you done so?

4 MR. KILLORY: Yes.

5 JUDGE NELSON: Yes?

6 MR. KILLORY: We're in the process of
7 doing that today. They're being stamped and copied.
8 They will be sent over after this hearing.

9 JUDGE NELSON: All right, so that takes
10 care of the specific trackage rights.

11 MR. KILLORY: That's right. There were
12 seven --

13 JUDGE NELSON: Then we have this generic
14 request for all trackage --

15 MR. KILLORY: For everything.

16 JUDGE NELSON: All right.

17 MR. KILLORY: And Your Honor, at the
18 hearing, asked Applicants to narrow it. And they said
19 no, we would at least attempt to give an identified
20 subset. But the burden and relevance issue still
21 remained as to the entire universe of --

22 JUDGE NELSON: Well relevance --

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1 MR. KILLORY: It's almost as though, Your
2 Honor, they -- well, they said that trackage rights
3 are at issue here.

4 JUDGE NELSON: That was the claim and
5 therefore --

6 MR. KILLORY: But that's like saying well,
7 if we had said, you know, your quality of service is
8 at issue, they had said, "Well, give us every document
9 from Conrail's files that addressed quality of
10 service."

11 And that's just too broad a sweep. If
12 they would give us some narrow focus, as BN/SF had, we
13 are willing to respond. But it's just inappropriate
14 to say open up all your files for all your cases and -

15 -
16 JUDGE NELSON: I remember this, and I
17 remember saying can't you find, through your client
18 and their resources, some examples through which they
19 may want to show what I thought was what you wanted to
20 show, namely the trackage rights do work, can work and
21 can provide meaningful competition by way of
22 illustration.

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1 And you were going to say "See, Conrail,
2 here's what they do." And I was asking you whether in
3 all the resources of all these railroads that you
4 represent, all these lawyers, all these experts,
5 economists, whatever you've got, you can't find one
6 man or woman that could find for you and point you in
7 the direction of a place where you might find some
8 trackage rights agreements that you could say were
9 working.

10 And you come back from all of that and the
11 answer is no?

12 MR. LIVINGSTON: I don't recall being
13 instructed in tat fashion. I do recall --

14 JUDGE NELSON: It was not an instruction.
15 There was discussion along those lines.

16 MR. LIVINGSTON: I recall there being a
17 statement by Your Honor that the Applicants want to
18 show that trackage rights are a meaningful form of
19 competition, and indeed we do want to show that.

20 JUDGE NELSON: Well, that's why I was
21 trying to understand why you needed them. And I
22 thought that's what your claim was.

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1 MR. LIVINGSTON: Okay, we want to get
2 copies of their trackage rights agreements, which they
3 have --

4 JUDGE NELSON: Just for the fun of it?

5 MR. LIVINGSTON: No, we want to look at
6 them and see where they are, see what the compensation
7 terms are, and then see if they are working and will
8 provide viable forms of competition.

9 JUDGE NELSON: All right. How many do you
10 have across the country?

11 MR. KILLORY: I'm informed that -- well,
12 for currently effective, it's in the universe of
13 approximately 200 agreements, Your Honor, although I
14 can't be held to that precise number.

15 Apparently, there are thousands. But to
16 identify the currently effective ones, it's in that
17 neighborhood.

18 JUDGE NELSON: Tell me your name again.
19 I've forgotten.

20 MR. KILLORY: My name is Joseph Killory,
21 another one hard to pronounce. It looks like Killery,
22 Your Honor, K-I-L-L-O-R-Y, but pronounced with the

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1 second syllable.

2 JUDGE NELSON: Mr. Killory, okay.

3 MR. LIVINGSTON: Your Honor, 200 --

4 MR. KILLORY: For Wilmer, Cutler &
5 Pickering for Conrail, Your Honor.

6 MR. LIVINGSTON: The 200 agreements is not
7 extensive. At a minimum, it seems to me they ought to
8 provide us with a list of them showing where they are
9 located and how many miles of track they have.

10 JUDGE NELSON: That sounds reasonable.

11 MR. KILLORY: Your Honor, if I may be
12 heard? First of all, the 200 agreements are not kept
13 in a discreet set of files. In fact, they're
14 warehouse --

15 JUDGE NELSON: Well, first things first.
16 What about this list?

17 MR. KILLORY: Well if you want to get into
18 settlement purposes, yesterday we offered to resolve
19 this matter by providing a list of all our trackage
20 agreements.

21 JUDGE NELSON: All right, I'm going to
22 direct the production of such a list as Mr. Livingston

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1 just asked for showing the agreements --

2 MR. LIVINGSTON: The location and the
3 milage.

4 JUDGE NELSON: -- location and the number
5 of miles involved. That list will be produced.

6 MR. KILLORY: On the number of miles, Your
7 Honor, I'll have to check. It may be an extensive
8 burden to dig it up, but we'll do it.

9 JUDGE NELSON: It may be approximate.

10 MR. KILLORY: Okay.

11 JUDGE NELSON: All right, so you get the
12 list. Then, why couldn't you give the list to your
13 people and say pick out what you want from this list?

14 MR. LIVINGSTON: Well Your Honor, we would
15 just as soon have them produce the materials, but
16 we'll take the list.

17 JUDGE NELSON: Let's start with the list
18 and see where it goes.

19 MR. KILLORY: We could have avoided being
20 here --

21 JUDGE NELSON: How soon can we get the
22 list to Mr. Livingston?

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1 MR. KILLORY: The only issue is --

2 JUDGE NELSON: Time is of the essence.

3 MR. KILLORY: The number of miles is the
4 only issue. As to the location and the list of them,
5 I think that will just be a matter of days.

6 JUDGE NELSON: With regard to the number
7 of miles, do you have in mind certain dimensions that
8 you're particularly interested in like long or short
9 or 100 or --

10 MR. LIVINGSTON: Sure, there's an obvious
11 difference between one that's 300 yards long and one
12 that's 300 miles long.

13 JUDGE NELSON: Obviously, and I don't know
14 which ones you're interested in.

15 MR. LIVINGSTON: Well, we're interested in
16 the longer.

17 JUDGE NELSON: The longer.

18 MR. LIVINGSTON: But -- in general. But
19 there may be other middle-sized ones or relatively
20 short ones that are in critical --

21 JUDGE NELSON: What if we gave them --

22 MR. LIVINGSTON: We just need to see the

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1 list.

2 JUDGE NELSON: I was just thinking of a
3 way to do this if it turns out that he can't find the
4 miles without a lot of work. Say we made up a
5 category of short, medium and long and you defined
6 short as five miles or under; medium as -- I don't
7 know, what's medium? Fifty miles or under? And long
8 is 50 miles or over.

9 And he could have his engineers do
10 something like that. Would that be useful?

11 MR. LIVINGSTON: Well, my guess is tat we
12 would just be creating more work for them as well as
13 us.

14 JUDGE NELSON: That's true when we don't
15 know -- how about if we take a recess --

16 MR. LIVINGSTON: It would be easier just
17 to --

18 JUDGE NELSON: -- while you telephone the
19 client and see what we can find out about this matter
20 of the miles?

21 MR. KILLORY: And it may well be, Your
22 Honor, that the identification of what the trackage

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1 agreement is, it says, "This line," and it would be
2 readily identifiable to the people in the railroad
3 business to know that from point A to point B is --

4 JUDGE NELSON: Let's find that out now.
5 Let's take a brief recess. Should I come back or wait
6 for you to call me?

7 MR. KILLORY: If you want to continue with
8 the other matters, Your Honor, that's --

9 JUDGE NELSON: Well, we're going to get
10 confused jumping back and forth.

11 MR. KILLORY: Why don't you --

12 JUDGE NELSON: I'd rather get this case --

13 MR. KILLORY: Why don't you just give me
14 five minutes, Your Honor?

15 JUDGE NELSON: All right.

16 MR. LIVINGSTON: Is it possible on the
17 list that we would also have the compensation totals,
18 at least for trackage rights that are in excess of,
19 say, ten --

20 MR. KILLORY: Your Honor, I do know that
21 to come up with the response where we gave for 20
22 different lines -- for 18 different lines, we gave the

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1 rate agreements, that took a fair amount of time to
2 pull together.

3 JUDGE NELSON: Those are already going to
4 be in the Applicants' hands.

5 MR. KILLORY: Your Honor, they're already
6 being provided to Applicants today, as well as to
7 BN/SF for 20 of these lines. But that took some time
8 to put together.

9 JUDGE NELSON: Twenty of the 200?

10 MR. KILLORY: That's right.

11 JUDGE NELSON: So to get at those terms --

12 MR. KILLORY: It would take more time.

13 JUDGE NELSON: -- he says takes a lot more
14 time.

15 MR. LIVINGSTON: Well again, I think it
16 would be easier if they would just produce 200
17 agreements. That doesn't strike me as that many
18 agreements.

19 JUDGE NELSON: Well, he knows what the
20 records are. Why don't you ask your --

21 MR. KILLORY: Why don't i get on the
22 phone, Your Honor?

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1 JUDGE NELSON: -- ask your people what's
2 involved in the list; what's involved in a list if we
3 include the prices; what's involved in simply doing
4 the job that Mr. Livingston wants done?

5 MR. KILLORY: Okay, Your Honor.

6 JUDGE NELSON: And I'll go up to my
7 office, and then call me on this line. Mr.
8 Livingston, you're the party who wants them, so the
9 burden is on you. I think this phone works.

10 And if not, you'll have to use a quarter
11 and get the pay phone. My number is -- you may
12 remember, is 219-2550. I'll be up there waiting to
13 hear from you all.

14 (Whereupon, the proceedings went off the
15 record at 10:05 a.m. and resumed at 10:38 a.m.)

16 JUDGE NELSON: Please be seated. How do
17 we stand on the matter of the list of the trackage
18 rights agreements?

19 MR. KILLORY: Your Honor, I think I have
20 an arrangement that will work. I have talked to a
21 number of operating people at Conrail. They say they
22 can pull together a list that includes the mileage and

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1 the rate for all the trackage agreements, and they can
2 have it by a week from today.

3 JUDGE NELSON: Is satisfactory, Mr.
4 Livingston?

5 MR. LIVINGSTON: Yesterday would be
6 better, but I'll take what I can get.

7 JUDGE NELSON: Very good. Thank you, Mr.
8 Killory.

9 MR. KILLORY: Thank you, Your Honor.

10 JUDGE NELSON: What's the next item? Do
11 we have other business with Conrail or is --

12 MR. LIVINGSTON: I think they're --

13 MR. KILLORY: That's it, Your Honor.

14 MR. LIVINGSTON: I believe they're done.

15 JUDGE NELSON: Is that it for you?

16 MR. KILLORY: Yes. As I believe Mr. Steel
17 opened up, we had a motion to compel going the other
18 direction, but that's been resolved with BN/SF.

19 JUDGE NELSON: So there's no more business
20 here that --

21 MR. KILLORY: That's correct.

22 JUDGE NELSON: You're free to go if you

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1 want then.

2 MR. KILLORY: Thank you, Your Honor.

3 MR. LIVINGSTON: They also have a motion
4 against us, and that's also been resolved.

5 JUDGE NELSON: Thank you, Mr. Killory, and
6 thanks for pursuing this and taking care of it.

7 MR. KILLORY: I appreciate the time.

8 JUDGE NELSON: For now the problem is
9 going away.

10 MR. LIVINGSTON: Your Honor, if could now
11 take one out of order?

12 JUDGE NELSON: Yes.

13 MR. LIVINGSTON: Because there's a lawyer
14 here who only has only one matter --

15 JUDGE NELSON: That's fine.

16 MR. LIVINGSTON: -- and we've resolved it.
17 And it's International Paper, and we've had
18 discussions this morning. And the arrangement is that
19 -- and he can correct me if I've got this wrong --
20 that they will, within one week produce documents
21 relating to their Pine Bluff and Camden, Arkansas
22 facilities and their Gardner, Oregon facility.

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1 JUDGE NELSON: Where is this in the letter
2 of March 13th?

3 MR. LIVINGSTON: It would -- it was
4 mentioned in the -- it's actually in the letter of
5 March eighth.

6 JUDGE NELSON: Yes, I remember seeing it.
7 So, I must have gone through that this morning.

8 MR. LIVINGSTON: Right. It's in the --
9 it's referred to in the second -- the third paragraph
10 in the letter of March eighth.

11 MR. GOODSON: Your Honor, Andrew Goodson
12 for International Paper. It's document request 26 --

13 MR. LIVINGSTON: Right.

14 MR. GOODSON: -- I believe.

15 MR. LIVINGSTON: But in any event, here is
16 the -- let me just put on the record what we've agreed
17 to since we have an agreement, I believe. That they,
18 in response to that discovery request, will limit it
19 to the three facilities that I just mentioned, and
20 further limit it to internal documents which discuss
21 transportation options, which discuss transportation
22 competition, which compare transportation offers or

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1 which compare transportation service and price, as
2 well as contracts with other carriers, regardless of
3 load for product moving in and out of those facilities
4 to be produced in a week.

5 MR. GOODSON: Just one correction. These
6 are internal studies or analyses of those issues, not
7 documents or any document that might relate to it, but
8 --

9 MR. LIVINGSTON: Not picking up bills of
10 lathing or things of that kind, but --

11 JUDGE NELSON: All right, with that
12 clarification --

13 MR. LIVINGSTON: I think we --

14 JUDGE NELSON: -- do you agree with that?

15 MR. GOODSON: We have an agreement.

16 MR. LIVINGSTON: I think we have an
17 agreement.

18 JUDGE NELSON: What's next in dispute
19 then?

20 MR. LIVINGSTON: Related to the
21 International Paper is a similar request having to do
22 with Dow and Kennecott. And we have made a similar

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1 proposal to the lawyer representing those two clients.
2 And he is now conferring.

3 JUDGE NELSON: And that's Mr. DiMichael?

4 MR. LIVINGSTON: DiMichael.

5 JUDGE NELSON: Yes. So we'll --

6 MR. LIVINGSTON: So --

7 JUDGE NELSON: -- defer that.

8 MR. LIVINGSTON: -- we will defer that.

9 Next is -- well, we could back up and do KCS, but
10 they're -- I see Mr. Lubel is not in the room. In his
11 absence --

12 JUDGE NELSON: If he doesn't show up
13 eventually, he may lose by default.

14 MR. GOODSON: I'll see if I can find him.

15 MR. NORTON: Lock the doors.

16 JUDGE NELSON: What do you have with Mr.
17 Dowd here? He's a veteran of the Vermont litigation
18 with me. Do we want to see if we can get him in and
19 out of here or do you have one or two discreet things,
20 or is it an involved business?

21 MR. DOWD: Well, we're also involved in a
22 few of the other matters, Your Honor, but --

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1 JUDGE NELSON: So you would want to stick
2 around or --

3 MR. DOWD: I have as much time as you
4 have, Your Honor.

5 JUDGE NELSON: All right. Then we'll go
6 back to Mr. Livingston and see what you want us to
7 take up next.

8 MR. LIVINGSTON: Well, next on the list of
9 the March 13 letter after the Conrail objection is a
10 refusal by parties, which are our associations, from -
11 - the associations are refusing to attempt to obtain
12 the information from their members. So it's sort of
13 a threshold issue involved in our discovery of the
14 association parties.

15 There are five association parties. They
16 actually fall into two categories. Three of the
17 associations are permanent associations. The National
18 Industry Transportation League, for instance, is a
19 permanent, ongoing entity.

20 Two of the associations, however, are
21 special ad hoc associations that were created solely
22 for purposes of this case. That would be the Western

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1 Shippers Coalition and the Coalition for Competitive
2 Rail Transportation.

3 These associations served discovery
4 requests on the Applicants and obtained information
5 from the Applicants.

6 We expect that they will be submitting
7 evidence on March 29th. They will -- they have access
8 to their members' information and --

9 JUDGE NELSON: What is it you want from
10 the members?

11 MR. LIVINGSTON: We want them -- we want -
12 - for instance, this Western Shippers Coalition, we
13 have asked -- we have put requests to them that would
14 ask them to get information, not from the entity
15 itself, which may not have any information, but from
16 its members.

17 JUDGE NELSON: Is that Mr. DiMichael's
18 group?

19 MR. LIVINGSTON: No, that's Mr. McBride's.

20 JUDGE NELSON: Mr. McBride's.

21 MR. LIVINGSTON: But the same is true for
22 all these groups.

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1 JUDGE NELSON: Do you have the
2 interrogatories here? They're in that large volume,
3 I believe, or at least the responses, which should
4 recite the interrogatories.

5 JUDGE NELSON: Let's see where in the --

6 MR. BEHR: Your Honor, we're going to move
7 back here for just a moment. My name is Douglas Behr.
8 I'm here on behalf of the Society of the Plastics
9 Industry.

10 JUDGE NELSON: You don't want me to even
11 look at the interrogatories?

12 MR. BEHR: I don't because I think, Your
13 Honor, what we're here -- the matter we're here on is
14 premature. What Applicants have asked for is a
15 contravention of a general objection that has been
16 raised.

17 They have not specified in their letter to
18 Your Honor any specific interrogatory to which -- the
19 answer to which they are not satisfied with.

20 This letter addresses solely the general
21 objections raised by each of these associations.

22 JUDGE NELSON: Which letter are you

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1 referring to?

2 MR. BEHR: The letter of the 13th --

3 JUDGE NELSON: Yes.

4 MR. BEHR: -- which is the basis of
5 today's hearing.

6 JUDGE NELSON: And I'm on page two of
7 that.

8 MR. BEHR: Right. It says --

9 JUDGE NELSON: The third bullet from the
10 bottom is the one we're talking about.

11 MR. BEHR: Right. It says, "The refusal
12 of the association parties to make any inquiry of
13 members about responsive information."

14 JUDGE NELSON: I thought there was a
15 position taken that the associations, one or more of
16 them, had no power to compel this information from
17 their members.

18 MR. BEHR: That's true.

19 JUDGE NELSON: Now you're saying --

20 MR. BEHR: That's our interpretation. But
21 what we're discussing now --

22 JUDGE NELSON: An ICC precedent that said

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1 in that situation then no discovery.

2 MR. BEHR: That's correct, Your Honor.

3 JUDGE NELSON: And I thought that was the
4 case.

5 MR. BEHR: Yes. But we're not --

6 JUDGE NELSON: So what's premature about
7 it?

8 MR. BEHR: The only point I'm trying to
9 make is we've raised a general objection because the
10 Applicants have not cited the response to any specific
11 interrogatory.

12 MR. LIVINGSTON: This is a threshold issue
13 of principle that all of these associations are
14 asserting that they have no obligation to obtain
15 information or even to inquire of their members --

16 JUDGE NELSON: Well, let's address that.

17 MR. LIVINGSTON: That, it seems to me, is
18 the only issue, not any specific interrogatory.

19 JUDGE NELSON: That's right. But in order
20 to understand what it is they can't get from their
21 members, I thought what it is that you want. I don't
22 like to decide these questions in the dark here, Mr.

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1 Livingston.

2 MR. LIVINGSTON: So --

3 JUDGE NELSON: In the big, thick volume,
4 help me find where these interrogatories are.

5 (Pause.)

6 MR. DOWD: Your Honor, if it would help,
7 I have the copy of the set that was served Western
8 Coal Traffic League.

9 JUDGE NELSON: Okay, let me look at what
10 Mr. Dowd has. Well, are these typical?

11 MR. DOWD: I don't know.

12 MR. LIVINGSTON: The Western Shippers
13 Coalition is one set.

14 MR. DOWD: I only have one copy, Your
15 Honor, but you're welcome to it. This is the set
16 served on the Western Coal Traffic League.

17 JUDGE NELSON: Okay, you're the coal
18 people now?

19 MR. DOWD: That's correct, Your Honor.

20 MR. LIVINGSTON: Your Honor, I'm looking
21 at the western -- well, which one are we looking at?

22 JUDGE NELSON: I've got the Coal Traffic

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1 League interrogatories.

2 MR. LIVINGSTON: All right.

3 JUDGE NELSON: Are these all the same or
4 are there important differences?

5 MR. McBRIDE: Three are some important
6 differences. They pertain to some of those matters
7 that I raised a Constitutional objection to.

8 JUDGE NELSON: The First Amendment issues?

9 MR. McBRIDE: Yes sir.

10 (Pause.)

11 MR. LIVINGSTON: For instance, if you look
12 on page six --

13 JUDGE NELSON: Of what?

14 MR. LIVINGSTON: Of -- you're looking at
15 the Western Coal Traffic League?

16 JUDGE NELSON: Yes. All right, is that
17 agreeable with you?

18 MR. LIVINGSTON: Yes, I think --

19 JUDGE NELSON: Because this is you
20 discovery.

21 MR. LIVINGSTON: Yes, I think -- I don't
22 think we need to go through these one by one, but --

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1 JUDGE NELSON: I don't intend to. I just
2 want to get a flavor of what you want.

3 MR. McBRIDE: They illustrate -- if you
4 look alt page six of that document, there's an
5 interrogatory or document request 15. It asks for
6 presentations made to various --

7 JUDGE NELSON: We've been through this
8 before in the context of the joint defense privilege,
9 I believe.

10 MR. LIVINGSTON: I don't think -- I don't
11 think this involves --

12 JUDGE NELSON: Mr. McBride, is this
13 different?

14 MR. McBRIDE: Your Honor, since you have
15 our interrogatories, perhaps I could help explain a
16 little bit what they've asked for and what we have
17 responded with.

18 JUDGE NELSON: Well, take interrogatory
19 one. Is that in issue?

20 MR. McBRIDE: Your Honor, the Western Coal
21 Traffic League has objected to all interrogatories and
22 document requests that would require the production of

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1 information or documents from its members.

2 It has not objected to the production of
3 documents or information which it has, or which it has
4 received independently.

5 And in fact, in response to the request
6 that Counsel cited, we are going to be producing
7 documents. There aren't that many, but there are some
8 documents relate to joint presentations. And those
9 are being produced.

10 What we've objected to is the request that
11 the Traffic League procure from its individual members
12 member-specific information regarding their plant
13 operations, their fuel supply, their pricing and all
14 these other matters that are within our objection.

15 And my letter yesterday generally
16 described that.

17 MR. LIVINGSTON: Well looking at that one
18 as an example --

19 JUDGE NELSON: Which one?

20 MR. LIVINGSTON: The number 15.

21 JUDGE NELSON: Fifteen?

22 MR. LIVINGSTON: Yes, on page six. The

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1 request was for documents given by WCTL or its
2 members. And they objected, as they do on all of
3 these, giving anything with respect to their members.

4 JUDGE NELSON: This number 15 has to do
5 with governmental communications.

6 MR. LIVINGSTON: Your Honor --

7 JUDGE NELSON: Do I have the wrong thing
8 here?

9 MR. McBRIDE: May I also respond to your
10 question a moment ago, which I deferred to Mr. Dowd
11 on?

12 JUDGE NELSON: I think that Mr. Livingston
13 and I are on two different pages here.

14 MR. McBRIDE: Well, I just wanted to --

15 JUDGE NELSON: I'm looking at the
16 Applicants' first set of interrogatories --

17 MR. LIVINGSTON: Oh --

18 JUDGE NELSON: -- directed to the Western
19 Coal Traffic League.

20 MR. LIVINGSTON: I'm looking at the
21 responses in the larger book that we gave you.

22 JUDGE NELSON: Oh, all right. Now, I

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1 don't know how to find things in the larger book.
2 They just go on and on.

3 MR. LIVINGSTON: They're in alphabetical
4 order.

5 JUDGE NELSON: Alphabetical?

6 MR. LIVINGSTON: Yes.

7 JUDGE NELSON: Well, what am I looking for
8 in the alphabet now?

9 MR. LIVINGSTON: Well, if you want to look
10 at Western Coal --

11 JUDGE NELSON: W?

12 MR. LIVINGSTON: Yes.

13 JUDGE NELSON: Okay.

14 MR. LIVINGSTON: It stands for Western
15 Coal Traffic.

16 JUDGE NELSON: Where do I find the
17 alphabetical book?

18 (Laughter)

19 JUDGE NELSON: How about if Mr. Livingston
20 comes up here and shows me where in the volumes we're
21 looking? Is there any objection to that?

22 MR. LIVINGSTON: I'll do it for you.

1 MR. LUBEL: Mr. DiMichael represents the
2 National Industrial Transportation League.

3 MR. LIVINGSTON: Excuse me, Your Honor.
4 I've made an error. I told Mr. DiMichael that I
5 wouldn't raise this issue when he wasn't in the room,
6 and --

7 JUDGE NELSON: Well, let's see if we can
8 find him.

9 MR. LIVINGSTON: And he's also
10 representing Dow and Kennecott.

11 MR. McBRIDE: Well, maybe you can find --

12 JUDGE NELSON: Let me give Mr. Dowd back
13 these interrogatories. That's going to confuse me
14 more.

15 (Pause.)

16 JUDGE NELSON: With regard to those that
17 seek these inter-governmental communications and these
18 communications between members about litigation
19 positions, I thought that I ruled that that was more
20 appropriate for discovery in light of the positions
21 actually filed by these parties, and then we would
22 explore it in that context.

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1 MR. LIVINGSTON: Your Honor --

2 JUDGE NELSON: I don't know why we're
3 revisiting those. Those were the ones where there
4 were claims of First Amendment and joint defense
5 privilege and this and that. And I said I would
6 rather rule on those --

7 MR. LIVINGSTON: Your Honor, I would --

8 JUDGE NELSON: -- in the context of the
9 particular request for conditions that the parties
10 were pressing.

11 MR. LIVINGSTON: Your Honor, I --

12 JUDGE NELSON: We're not back to that
13 stuff, are we?

14 MR. LIVINGSTON: No, this is simply an
15 illustration. We submitted discovery requests to the
16 associations which asked them to produce stuff in
17 their own files, as well as to obtain information from
18 their members.

19 And this is an example, and it shows that
20 the -- in this case, the Western Coal Traffic League
21 is willing to produce the documents that is has --

22 JUDGE NELSON: Yes.

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1 MR. LIVINGSTON: -- but it's not willing -
2 - it's standing on its general objection that it's not
3 willing to inquire of its members.

4 JUDGE NELSON: Well, let me see -- I still
5 don't see the interrogatory. Mr. McBride is trying to
6 find it.

7 MR. McBRIDE: I'm trying to help you, Your
8 Honor, and I'm having the same trouble you did.

9 MR. DOWD: I would agree with Counsel,
10 Your Honor, that the issue here is not --

11 JUDGE NELSON: Let's not debate the issue
12 --

13 MR. DOWD: -- the specifics of an
14 interrogatory.

15 JUDGE NELSON: -- ladies and gentlemen,
16 until I can see the interrogatory.

17 MR. LIVINGSTON: Your Honor, there are
18 lots of interrogatories and discovery requests here.
19 What's involved is a principle of whether, in any
20 case, they have to go to their members.

21 JUDGE NELSON: Well, sometimes great
22 principles come down to little, piddly fights about a

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1 particular interrogatory. And that's my experience in
2 life, so I want to see it.

3 Now, I'm looking at responses of the
4 Western Coal Traffic League to Applicants' first set
5 of interrogatories. And which interrogatory is it
6 that raises this problem?

7 MR. LIVINGSTON: Your Honor, to avoid --

8 JUDGE NELSON: Is it back here at this
9 other tab?

10 MR. LIVINGSTON: Yes.

11 JUDGE NELSON: Okay.

12 MR. DOWD: They all raise the problem,
13 Your Honor.

14 JUDGE NELSON: Where is the interrogatory
15 itself? That's what I want to see. What's being
16 asked for?

17 MR. LIVINGSTON: Well, Your Honor, let me
18 give you another example that will avoid this
19 governmental question. And that's on page seven of
20 the responses of the Western Coal Traffic League.

21 JUDGE NELSON: Okay. You find it for me
22 in the thick book.

1 (Pause.)

2 MR. LIVINGSTON: Number 24, which asks for
3 the --

4 JUDGE NELSON: "Produce all documents in
5 the possession of WCTL, or its members, relating to
6 the effect of the UP/SP merger on coal transportation
7 service, competition or routings to any facility of a
8 WCTL member."

9 There's a word missing in there somewhere.
10 Should there be an "and" after the comma or a comma
11 after "competition?"

12 "Coal transportation, service,
13 compensation or routing." I see, it's words in a
14 series. "To any facility of a WCTL member."

15 MR. LIVINGSTON: There response is that
16 there are no responsive documents. What the response
17 means is that WCTL itself has no documents, but they
18 have a general objection. They're not saying that
19 their members don't have --

20 JUDGE NELSON: They say they have no power
21 to compel their members to produce such documents to
22 them.

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1 MR. LIVINGSTON: Right.

2 JUDGE NELSON: All right. What about
3 that?

4 MR. LIVINGSTON: There are numerous
5 requests in here that ask not only of WCTL, but also
6 of its members.

7 JUDGE NELSON: All right. So, what's
8 wrong with their position?

9 MR. LIVINGSTON: What's wrong with their
10 position is this. They have -- all of the
11 associations have participated in this case, are
12 supported by their members, will be submitting
13 evidence, will be relying, presumably, on information
14 obtained from their members.

15 They have obtained discovery from the
16 Applicants, and they shouldn't be allowed, if they are
17 collecting information from their members, to submit
18 to make an affirmative case to hide behind their
19 association and shield themselves, the individual
20 companies, from discovery.

21 And at a minimum, they ought to be
22 required -- these associations ought to be required to

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1 inquire of their members, do you have any documents
2 responsive to this?

3 Send us the documents. And maybe they
4 can't compel it, because the association doesn't own
5 the member, doesn't control it in an ownership sense.
6 But if the member refuses to participate in discovery,
7 then the Commission and Your Honor certainly has the
8 power to say well then, you cannot submit as evidence
9 in this proceeding information from that particular
10 member if that member is not willing to produce
11 information in discovery.

12 There are no cases that they've cited that
13 say that that's improper. This really isn't a
14 question of do the associations themselves have power
15 to control their members.

16 JUDGE NELSON: Maybe they can stand on
17 this principle. But at the same time -- I'm just
18 thinking out loud -- they can't have it both ways.

19 MR. DOWD: Your Honor, it's not a question
20 of --

21 JUDGE NELSON: They can't say here's a
22 position about this merger, but we refuse to produce

1 anything our members have in their files about this
2 merger.

3 MR. DOWD: Your Honor, it's not a question
4 of having it both ways. The law, both in the
5 Commission and in the Federal courts is clear, that
6 where an association or an organization is a party, it
7 cannot be required to produce information or documents
8 from its members unless it has control over that
9 information.

10 And "control" is defined in the case law
11 specifically as the legal right to obtain documents on
12 demand. This issue has arisen before the Commission
13 in the past in the Farmland case.

14 And the position that we took in our
15 letter yesterday was upheld in that case, that where
16 the association has no right or power to require its
17 members to provide information, then that association
18 cannot be compelled to attempt to do so. And that --

19 JUDGE NELSON: Say I'm a member of the
20 Federal Bar Association. Can the FBA compel me to
21 produce documents?

22 MR. DOWD: I'm not familiar with the rules

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1 of the Federal Bar Association.

2 JUDGE NELSON: I would think not. I would
3 think they have no such power.

4 MR. DOWD: I would assume they don't
5 unless they have an awfully peculiar association.

6 JUDGE NELSON: But suppose they then take
7 a position about the need for better trained, paid,
8 administrative law judges in the Federal Government,
9 and the other side says, "What have you got that
10 supports that assertion?"

11 And you say, "I personally have nothing,
12 and I can compel nothing from the members. Yours very
13 truly, Mr. Dowd."

14 Then the other side has the argument that
15 this association is unable or unwilling to back up its
16 position. To be sure, it can't compel documents from
17 members. But it's stuck with the way it's then left -
18 -

19 MR. DOWD: Your Honor --

20 JUDGE NELSON: -- namely a position on the
21 merits for which it can muster no support, no
22 corroboration.

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