

INTERSTATE COMMERCE COMMISSION 01/02/96 FD #32760 342-401 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. :
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Tuesday, January 2, 1996

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

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

BEFORE:

THE HONORABLE JEROME NELSON
Administrative Law Judge

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

(2:00 p.m.)

JUDGE NELSON: Let's begin by getting a record of who is here.

MR. ROACH: Your Honor, for the applicants, Arvid Roach, Jerry Norton, Paul Cunningham, Karen Kramer, and Lou Ann Rinn.

MR. LUBEL: Your Honor, for the Kansas City Southern Railways, myself, Alan Lubel, and Mr. William Mullins, Mr. David Foshee, and Ms. Cara Lee Molm.

MR. WOOD: Your Honor, good afternoon. Frederick Wood for the National Industrial Transportation League.

JUDGE NELSON: Anyone else?

MR. ONGMAN: Your Honor, for Geneva Steel, John Ongman representing Geneva Steel.

MR. BERCOVICI: Your Honor, Margin Bercovici for the Society of the Plastics Industry.

MR. HUT: Good afternoon, Your Honor. Stephen Hut for Consolidated Rail Corporation.

MS. JONES: Your Honor, Erika Jones for the Atcheson, Topeka, and Santa Fe Railway Company and Burlington Northern Railway Company, and Adrian Steel is with me as well.

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1 MR. JOSEPHS: Mark Josephs representing
2 Coastal Corporation.

3 MR. SULLIVAN: John Sullivan for SRIC.

4 JUDGE NELSON: Anyone else? We don't have
5 the Antitrust Division here, I see, and we don't have
6 Labor.

7 MR. LUBEL: Mr. Edelman indicated that he
8 would try to make it, but he didn't know if he would
9 be able to make it or not.

10 JUDGE NELSON: Well, he knows about it,
11 and he received notice.

12 I guess we should begin by making a record
13 of the fact that I'm informed that the President
14 signed the I.C.C. Termination Act of 1995, which
15 leaves us now in a proceeding of the Surface
16 Transportation Board, the successor to the I.C.C.

17 It is my understanding that the merger
18 jurisdiction remains with the Board, that the
19 statutory standard is unchanged. Conversations
20 occurred Friday afternoon between the General Counsel
21 of the I.C.C. and the Chief Judge of the FERC which
22 were predicated on the assumption that the President
23 would sign the bill.

24 The old Commission requested a
25 continuation of the arrangement whereby I was loaned

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1 to it as a borrowed Judge for purposes of discovery in
2 this proceeding, and I think also a general agreement
3 that's in effect was in effect between the FERC and
4 I.C.C. with regard to the borrowing of Judges
5 generally.

6 In any event, for present purposes the
7 Chief Judge informed me that the old Commission had
8 requested that this arrangement would continue. It
9 was my understanding that any PEG work that might be
10 necessary would be executed. Whether it has been or
11 will be in some days, I don't know.

12 I talked this morning with the Chief
13 Judge, and after ascertaining that we would get paid -
14 - there wasn't any question about that -- he directed
15 me to go forward, and I told him that unless I heard
16 to the contrary from him, I would convene this
17 proceeding at two o'clock. I've heard nothing further
18 from him, and so here we are.

19 Anyone have any comments or questions or
20 objections? Now is the time to sound off about the
21 transition, any alleged improprieties in my
22 credentials, the borrowing arrangement. This is fair
23 warning, because this transcript is going to show if
24 somebody pops up later with some objections that it's
25 too late.

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1 As far as Labor is concerned, Labor
2 representatives have ample knowledge of this
3 proceeding, and indeed Mr. Lubel indicates that he's
4 even had conversations with Mr. Edelman about coming.

5 MR. LUBEL: He wasn't sure if he could
6 make it or not.

7 JUDGE NELSON: So he will be bound by what
8 happens. Last chance now for any objections,
9 comments, inquiries, directed to any matters arising
10 out of the I.C.C. Termination Act of 1995 as they may
11 bear upon my role here today.

12 I don't hear anything, and I don't see
13 anything. So let's continue with business as usual,
14 as we were before.

15 What's on the agenda now? We had some
16 leftover items, as I recall. Mr. Lubel?

17 MR. LUBEL: I think there are --

18 JUDGE NELSON: Oh, let me say that
19 recently there came to my office your Mr. -- what's
20 his name?

21 MR. LUBEL: Foshee.

22 JUDGE NELSON: Yes, the gentleman sitting
23 in the back, Foshee, is it? -- with copies of a letter
24 which he said they had gotten over before, but it was
25 not clear to me that we had gotten it, and I looked at

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1 it and tried to read it but didn't really have time to
2 do so.

3 Shortly thereafter, I received a letter
4 from Mr. -- from Covington and Burling signed by Mr.
5 Roach, some six pages, singled spaced, worth of
6 material, of which I haven't had an opportunity to
7 read any. So here, tell us who you are. Mr. Edelman?

8 MR. EDELMAN: I've had more air problems,
9 Your Honor. I was on my way to St. Louis,
10 theoretically.

11 JUDGE NELSON: Mr. Lubel told us that you
12 might or might not make it. Why don't you make an
13 appearance, so we have a record?

14 MR. EDELMAN: Richard Edelman, Railway
15 Labor Executives and United Transportation Union.

16 JUDGE NELSON: Before you came in, I made
17 on the record a statement that reflected the signing
18 of the I.C.C. Termination Act of 1995, my continuation
19 in authority for discovery purposes of the role I
20 previously had pursuant to an extension of the old
21 agreement which the old General Counsel of I.C.C.
22 requested of the Chief Judge of my agency last Friday
23 afternoon, expecting that the President would sign the
24 bill.

25 My instructions were to go forward, and

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1 here I am, but I did offer the opportunity for anyone
2 that has any problems or objections or procedural
3 irregularities that they want to raise. Now is the
4 time to do it, not after we start making rulings and
5 then say, well, I didn't like him, so what authority
6 did he have. So I want to give you ample opportunity,
7 Mr. Edelman.

8 MR. EDELMAN: Appreciate the opportunity.
9 We have no statement.

10 JUDGE NELSON: Nor did any of the others.
11 So we're going to treat that as a waiver for purposes
12 of any authority I may have to make these discovery
13 rulings.

14 Now, Mr. Lubel, you were about to tell me
15 where we were. I was telling you of two letters I had
16 received, one from your side, one from the applicants.
17 It's an even wash. I haven't read either of them. So
18 what's the purpose of this exercise?

19 MR. LUBEL: We're prepared to address what
20 we addressed in our memorandum, Your Honor. I think
21 we have two interrogatories that carry over from last
22 time. One group was 12 and 13, which asked for all
23 communications concerning the settlement agreement --
24 excuse me, the agreement called the settlement
25 agreement entered into with Burlington Northern and

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1 Santa Fe --

2 JUDGE NELSON: Let me see if I can find
3 these now. Off the record for a moment.

4 (WHEREUPON, the proceeding was off the
5 record briefly at 2:07 p.m.)

6 JUDGE NELSON: As I understand it, Mr.
7 Lubel, then we've got two areas here, one being this
8 matter of the probing of the settlement between --

9 MR. LUBEL: Or agreement.

10 JUDGE NELSON: -- agreement, whatever it's
11 called, between B.N. and Santa Fe and the applicants,
12 and the other being this matter of further discovery
13 with regard to the nonsupporting shippers. We're
14 going to take the first one first. So I'm looking at
15 which interrogatories now?

16 MR. LUBEL: Number 13, and what I would
17 focus on there is not just asking for studies,
18 analyses and reports, but also other communications
19 either between the applicants or among the applicants
20 themselves that involved, that relate to or led up to
21 or formed the basis for the B.N./S.F. agreement.

22 JUDGE NELSON: Now we had, as I recall,
23 Mr. Roach, two areas of objection, one being the work
24 product doctrine and the other being the settlement
25 privilege.

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1 MR. ROACH: That's correct, Your Honor,
2 and Your Honor was good enough to give us leave to
3 write you a letter brief, in essence, on --

4 JUDGE NELSON: Which got here so late, I
5 had no chance to read it, but this can be handled
6 orally right now, as far as I'm concerned.

7 I did that, because I felt I didn't know
8 much about the settlement privilege. I have done some
9 research on my own, and now know more about it, but
10 I'm pleased to hear from both counsel on this issue.
11 The other party would be burdened here.

12 MR. LUBEL: I'll go ahead.

13 JUDGE NELSON: Why don't you go ahead, Mr.
14 Lubel.

15 MR. LUBEL: We addressed in our memo four
16 reasons why this information is not privileged and
17 should be produced. I really only want to stress one,
18 but the four are that, first, it's not a settlement.
19 There was no disputed claim. Next, the settlement
20 privilege is an evidentiary privilege, doesn't protect
21 in discovery.

22 The main reason, which I'm going to
23 elaborate on, is that they had placed in issue this
24 agreement and waived any privilege. Finally, to the
25 extent that the agreement is evidence of some larger

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1 conspiracy, then that would negate any privilege also.

2 I'd like to focus on the third of those
3 reasons. Your Honor, they have -- The applicants have
4 placed in issue the agreement with Burlington
5 Northern/Santa Fe. Yet they have made it really the -
6 - you know, one of the main aspects of their
7 application, and that is a distinguishing point
8 between some of the other cases that they have cited
9 in their letter; because I don't think in any of those
10 was an agreement that it have the role that this
11 agreement has in this case.

12 I'm referring, Your Honor, to their
13 application, page 17, the very beginning section,
14 "Effects on Competition." In that very first
15 sentence, they say the U.P./S.P. merger, together with
16 the settlement agreement with Burlington Northern-
17 Santa Fe, will greatly intensify rail competition in
18 the West.

19 JUDGE NELSON: Is that Volume 2?

20 MR. LUBEL: That was Volume 1, in the very
21 first volume, page 17, and at the very beginning of
22 "Effects on Competition," they again highlight and
23 tout the settlement agreement. On the very next page
24 they say that the effects of the merger and the
25 settlement on competition are addressed by a number of

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1 witnesses, and then another -- just one example, the
2 settlement agreement with Burlington Northern-Santa Fe
3 is addressed by Mr. Peterson and also by Mr.
4 Rebensdorf.

5 As we say, Your Honor--

6 JUDGE NELSON: I think I picked up
7 Peterson's testimony. That may be in Volume 2.

8 MR. LUBEL: That is, and Mr. Rebensdorf
9 was in Volume 1, and he does go into -- I hate to say
10 -- in some detail. He goes into describing the
11 settlement negotiations in what we would say was a
12 very guarded, self-serving way.

13 Our point is very simple, Your Honor, that
14 by --

15 JUDGE NELSON: He relies upon it, he said.

16 MR. LUBEL: Yes. They rely upon it.
17 They're basing their application on it. They admit
18 there --

19 JUDGE NELSON: Now there also came in the
20 office today some thick filing made by the Burlington
21 Northern-Santa Fe which I opened up to prepare for
22 today, and I saw in there a heavy reliance upon it.
23 The position is that they have no position, but if
24 there is to be approval, it must be conditioned upon
25 adoption of the settlement or agreement or whatever

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1 it's called. Have I got that right?

2 MR. LUBEL: Exactly, and I've not had a
3 chance to review that, but it just shows --

4 JUDGE NELSON: Well, they say it's pro-
5 competitive.

6 MR. LUBEL: They do, and it shows how much
7 Burlington Northern is a part of this proceeding, how
8 much that agreement is. What we're asking for -- They
9 have identified some of the meetings. They said there
10 were six meetings and various phone conversations.

11 What we're saying is they need to go
12 another level. They need to give us the work-up
13 papers of subordinates, any communications, memos,
14 documents internally or between the applicants and
15 Burlington Northern-Santa Fe that led up to this; in
16 other words, more than just identifying who was at the
17 meetings, but what did their subordinates give them,
18 what did they say about the issues to be discussed
19 relating to this agreement.

20 Your Honor, to make it clear, we are not
21 asking for a document from Mr. Roach to his client
22 saying do this, don't do this, but to the extent --

23 JUDGE NELSON: My inclination would be to
24 say that you don't get that kind of thing.

25 MR. LUBEL: That's right. So, you know,

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1 we would realize that, but to the extent there are
2 communications, either within a company or between the
3 parties to this agreement, that discuss it, that were
4 related to it, that led up to it, we would have the
5 right to that; and again, it's more than just the
6 identification of who was at the meeting but any
7 memos, background materials, communications.

8 Furthermore, if there are any discussions
9 that, you know, were not memorialized, we think they
10 should have a duty to identify those for us also.
11 We've cited a couple of cases. I would just refer to
12 one, Your Honor, that makes our point very well.

13 This involved Federal Rule 408 dealing
14 with settlements. This was a case dealing with the
15 FDIC. This was FDIC v. Entabank. It was basically a
16 dispute between two banks over some mortgages, and the
17 FDIC had settled with the other bank, with who they
18 were fighting with over the mortgages, and then gone
19 against the debtor for the deficiency.

20 In discover the debtor said, let me see
21 all the details of your settlement. I want to see
22 what the discussions were, what the motivations were,
23 the rationale. Of course, there was an objection:
24 Well, that was settlement negotiations.

25 The court said there, you can't have it

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1 both ways. You can't use a settlement both as a sword
2 and as a shield. In other words, they were suing for
3 the deficiency saying, we didn't get enough in the
4 settlement, and yet they said, but you can't look into
5 the details of the settlement.

6 The court went on to say there that
7 permitting the plaintiff to avoid questions as to the
8 motivation behind the settlement when it puts the
9 settlement at issue would impermissibly allow it to
10 use the privilege as a sword and a shield.

11 We cite a number of other cases that go
12 into that same point, Your Honor. When you place
13 something in issue, then you open it up, certainly,
14 for discovery. That would be our argument on that.
15 We've got, you know, as I say, a number of other cases
16 we can refer Your Honor to, but they are variations on
17 that theme.

18 I stress, the cases -- the I.C.C. cases
19 that they cite and that they refer you to -- in none
20 of them was the agreement as prominent as it is in
21 this case. In none of them was it part of the
22 application itself and entered into before the
23 application was filed and relied on as heavily.

24 I would also -- They actually cite one
25 case where our client over a decade ago tried to get

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1 some information about a settlement, and the court
2 said, well, what they've -- or the ALJ at the time
3 said what they've given you is enough, and then the
4 Commission said that it would not hear the appeal
5 because it was an interlocutory appeal, and at that
6 time I don't believe interlocutory appeals were
7 ordered. I just offer that as a way to distinguish
8 some of the cases, because I don't think any of them
9 are really on point with this situation.

10 JUDGE NELSON: Well, if they had given you
11 enough here, and Mr. Roach can persuade me, that would
12 be a consideration.

13 MR. LUBEL: It would be, Your Honor. It
14 is our position that when they -- They can't -- Like
15 in Mr. Rebensdorf's statement, he says, obviously,
16 what's self-serving, what's his -- the version that he
17 wants to tell, and they put that forward, and I don't
18 think they should be able to say, and that's all you
19 get.

20 JUDGE NELSON: Who is Rebensdorf?

21 MR. LUBEL: Mr. Rebensdorf, I believe, is
22 one of the officers of one of the applicants, of U.P.
23 who was involved in negotiations with Burlington
24 Northern and with certain other railroads.

25 The point is, if they are going to go

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1 halfway and describe their version of it and the way
2 they want to present it, I think in this proceeding
3 and with as much as at stake in this proceeding, they
4 have a duty to show what documents and background
5 there are leading up to the matters they discuss.

6 For example, Mr. Rebensdorf says, you
7 know, we were -- you know, we narrowed our focus or we
8 began feeling that to suit our needs, you know,
9 Burlington Northern would be the best settlement
10 partner. Well, where is that decision making process?
11 Where are the documents, if they exist, where that
12 decision making process took place?

13 Again, we think we have the right to see
14 that, especially when they are offering this agreement
15 as a panacea for the competitive -- negative
16 competitive impacts of the merger.

17 JUDGE NELSON: When did all that start?

18 MR. LUBEL: That's an interesting
19 question, Your Honor.

20 JUDGE NELSON: You have six meetings,
21 don't you?

22 MR. LUBEL: Your Honor?

23 JUDGE NELSON: You have the details of six
24 meetings you referred to?

25 MR. LUBEL: They have mentioned meetings,

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1 and I believe it might have been sometime in
2 September.

3 MS. MOLM: Mid-August.

4 MR. LUBEL: Mid-August? Mid-August.

5 JUDGE NELSON: Of what year?

6 MR. LUBEL: Of this year, it started.

7 JUDGE NELSON: Now was that before or
8 after the --

9 MR. LUBEL: I'm sorry, of '95.

10 JUDGE NELSON: Was that before or after
11 there was a notice of intent to file the application?

12 MR. LUBEL: It was after the notice of
13 intent to file, but before the application was filed.

14 JUDGE NELSON: So there was a proceeding
15 in the sense of a promise that they were going to file
16 something?

17 MR. LUBEL: We have taken that position,
18 that there was a proceeding.

19 JUDGE NELSON: But there was no
20 controversy then, you say?

21 MR. LUBEL: That's right.

22 JUDGE NELSON: Within the meaning of Rule
23 408?

24 MR. LUBEL: That would be our first point.
25 There was no disputed claim there that was being

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1 settled. It was really just -- It's in the nature of
2 -- and I'm not as experienced an I.C.C. practitioner
3 as some of these gentlemen, but it's really in the
4 nature of a related application. They're saying --
5 and I believe they have to get some approval for these
6 trackage rights agreements, which again places them in
7 issue and should subject it to discovery.

8 JUDGE NELSON: Suppose they were to say,
9 well, we've given you the details of all the key
10 meetings, you know, when they were and who was there;
11 go ahead and depose everybody. What's wrong with that
12 answer?

13 MR. LUBEL: Well, to make the deposition
14 meaningful, Your Honor -- and this is usually the way
15 it works -- you want to have the background that led
16 up to it. In other words, you don't want to be in the
17 deposition and say, well, Mr. Rebensdorf, how many
18 assistants did you have helping you in these
19 negotiations? Five. And I assume they sent you memos
20 to work things up? Oh, yes, they did. And then we
21 haven't seen them. Then we're in the deposition, but
22 we haven't seen the background that led up to it.

23 So to make the depositions meaningful, we
24 really need whatever background there is that led up
25 to the agreement. You know, we are on a very

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1 expedited schedule here, Your Honor, in terms of the
2 time to do all this, and we may not have time to
3 depose everyone of them.

4 JUDGE NELSON: How does 14 differ from 13?
5 It mentions other people.

6 MR. LUBEL: Yes. I believe this -- This
7 also related to outside consultants. This was also
8 broader. This was not just -- This, we included in
9 here the U.P./S.P. merger and the Burlington Northern
10 settlement agreement, and then the Burlington
11 Northern-Santa Fe merger itself.

12 I believe that we narrowed this one to
13 just the U.P./S.P. merger in --

14 JUDGE NELSON: Yes. I see where you cross
15 in some of those last time.

16 MR. LUBEL: So we're primarily relying on
17 13 here.

18 JUDGE NELSON: How about work product?

19 MR. LUBEL: You know, in terms of work
20 product --

21 JUDGE NELSON: It keeps coming back to
22 that.

23 MR. LUBEL: Well, in terms of work
24 product, I believe that Your Honor really hit the nail
25 on the head before when you said that that's a

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1 discretionary privilege. Here, we certainly have the
2 need for these things. We have no other means to
3 obtain this information.

4 The information is totally in their
5 province. They have it all, and to the extent there
6 are certainly any documents, it is easy for them to
7 make available, where for us to try to get that
8 information, either through depositions -- we can ask
9 about them, but we have no access to that information.

10 JUDGE NELSON: Well, under Rule 26(b)(3),
11 I should give -- if this were a District Court
12 proceeding, and as an FERC Judge we often look at the
13 discovery rules as analogy, and the FERC has told us
14 to do that. So I'm the prisoner of where I come from.

15 If I look at 26(b)(3), I find special
16 protection should be given, at least in such
17 circumstances, to mental impressions, opinions, and so
18 forth of lawyers. Do you have any problem with that?

19 MR. LUBEL: No, Your Honor. It's what
20 we've said.

21 JUDGE NELSON: You don't want that stuff?

22 MR. LUBEL: That's not what we're after.
23 What we're after is the communications among the
24 railroad and the officials of the railroad themselves,
25 between themselves and among the railroads, internally

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1 and between the parties involved in the negotiations,
2 although I do offer a caveat to that. To the extent
3 a lawyer was acting really in a business capacity,
4 giving business advice, then I don't believe a --
5 Certainly not an attorney/client privilege wouldn't
6 attach there, and we do have the --

7 JUDGE NELSON: It's a whole different
8 doctrine, that the work product applies to preparation
9 of litigation materials. It's an advice given in the
10 ordinary counseling sense. You may have an argument
11 about it.

12 That would take us to focus upon some
13 specific aspect of some specific document, which I
14 invited Mr. Roach to bring up last time. If he has
15 some particularized thing involving lawyer
16 impressions, opinions, and so on and so forth, I'll
17 certainly examine that, with a leaning to favor him on
18 that stuff. That's hard core work product, basic
19 lawyer stuff.

20 MR. LUBEL: In the words of the rule, Your
21 Honor, we feel like we have a particularized need,
22 that we can't obtain this information any other way.
23 It's not just without undue hardship. I just don't
24 think we can get it any other way but from them.

25 JUDGE NELSON: Well, he could say, go

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1 ahead and take these depositions, and you could have
2 Mr. -- What's his name? Rasmussen? This witness,
3 what was his name?

4 MR. LUBEL: Rebensdorf.

5 JUDGE NELSON: Rebensdorf. You could have
6 him on the stand -- in a deposition, rather, at the
7 table and say, please show me all the memoranda you
8 received. If he then wheels out a box of stuff,
9 you've got it.

10 MR. LUBEL: Your Honor, I understand that,
11 but I just would -- With all due respect, I believe
12 that that would just create some logistical problems,
13 and especially in terms of being able to prepare for
14 the deposition, to know the things we want to --
15 specific areas we might want to explore with him. We
16 wouldn't have time to do it then.

17 JUDGE NELSON: There's no question, it
18 would make your deposition task harder. Whether that
19 degree of burden is a special showing, I don't know.

20 MR. LUBEL: Then, you know, if they
21 haven't --

22 JUDGE NELSON: Mr. Roach may say, let's
23 not fool ourselves here, that he would invoke that
24 same alleged privilege and instruct the witness not to
25 answer that question at the deposition. If he takes

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1 that position, then --

2 MR. LUBEL: Your Honor, Mr. Mullins is
3 just --

4 JUDGE NELSON: -- that doesn't go anymore.

5 MR. LUBEL: Mr. Mullins has just reminded
6 me -- This is somewhat a technical point, but under
7 the discovery guidelines that have been adopted in
8 this proceeding, we're required to use our best
9 efforts to give 24 hours notice of any documents we
10 intend to question a witness about.

11 Obviously, we wouldn't be able to do that
12 if we haven't seen the documents and don't know about
13 them.

14 JUDGE NELSON: Well, I'd have to excuse
15 you from compliance with that rule.

16 MR. LUBEL: We just think again, Your
17 Honor, that they've also made the point that they
18 don't want to have people deposed more than once
19 unless there's special cause, and we certainly hate to
20 have to do that.

21 JUDGE NELSON: We can also adjust that.
22 If we are dealing with Rebensdorf and the applicant's
23 position is you can't see his papers, and then things
24 happen at the deposition that warrant more time, I
25 could consider that.

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1 MR. LUBEL: I also think, Your Honor, if
2 they're not under some obligation prior to then -- and
3 not just Mr. Rebensdorf, but anybody who knows about
4 or had communications concerning this proposed
5 agreement, the witness could say, well, I don't recall
6 any. There may have been some; I can't recall.
7 That's why --

8 JUDGE NELSON: What if they say that this
9 is overly broad, that there may be hundreds of people
10 in these companies that at one time or another in some
11 way or other were involved in studies, analyses,
12 reports or other communications involving the
13 agreement?

14 MR. LUBEL: Well, I think there is a
15 specific period of time that they would know. Now
16 they might know if this agreement was thought of, you
17 know, earlier in the year. You know, back -- As our
18 timeline that we presented Your Honor showed, these
19 applicants --

20 JUDGE NELSON: Well, if some brakeman has
21 a beer with his buddy says, how are you going to fare
22 under the B.N./S.F. agreement, in theory you would be
23 asking for that. I suspect you don't really want
24 that.

25 MR. LUBEL: That would be correct, Your

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1 Honor.

2 JUDGE NELSON: So there may be something
3 we could do with the focus here in terms of people,
4 subjects.

5 MR. LUBEL: Well, it would be anyone who
6 had any responsibility. I think it's self-defining.
7 The brakeman wouldn't really have had responsibility
8 for dealing with the settlement, but the subordinates
9 of the people involved in the meetings, anyone who
10 prepared something officially or had discussions about
11 it in some official capacity, certainly would.

12 JUDGE NELSON: All right, let's hear from
13 Mr. Roach now with regard to the settlement overtones,
14 the privilege aspects of this, as well as the high
15 threshold work product stuff that Rule 26(b)(3)
16 singles out.

17 MR. ROACH: Thank you very much, Your
18 Honor. We appreciated the opportunity to submit a
19 short letter brief to you, and I will attempt to
20 summarize it now.

21 The only issue in dispute here --

22 JUDGE NELSON: The other way to go is to
23 recess, and let me read it.

24 MR. ROACH: Well, I would be very pleased
25 if Your Honor would read it.

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1 JUDGE NELSON: Or handle it all here
2 orally. It just may delay things, because I want to
3 read also Mr. Lubel's submission.

4 MR. ROACH: I'd like to read Mr. Lubel's
5 submission, too. I'd be delighted to paraphrase --

6 JUDGE NELSON: What do counsel want to do
7 in that regard? Is there an agreement on how to
8 proceed orally or do you want to take a recess while
9 I read this stuff?

10 MR. ROACH: Well, our position would be we
11 would very much like Your Honor to read the letter.
12 Mr. Lubel has spoken at some length orally. Perhaps
13 I could respond briefly, and then we could recess and
14 read the papers.

15 JUDGE NELSON: How do you feel about that?

16 MR. LUBEL: That would be fine with us,
17 Your Honor. I think the -- I've stated our issues,
18 but I'd be happy to have Your Honor review what we
19 wrote and what they wrote also.

20 JUDGE NELSON: Do we have any particular
21 time constraints as far as this afternoon? I mean,
22 that may take me, I don't know, a half an hour to go
23 through that.

24 MR. LUBEL: Ours is fairly short.

25 JUDGE NELSON: Well, Mr. Edelman, do you

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1 have a suggestion?

2 MR. EDELMAN: Yes. I would like to hear
3 Mr. Roach's statement, in part because none of us have
4 also seen any of this either, and at least have some
5 opportunity. To the extent Your Honor may be forming
6 some general impressions about what constitutes work
7 product here and sort of their view that sort of
8 anything that starts with the attorney saying prepare
9 the application on down to everybody else constitutes
10 work product, it's something of interest to the other
11 participants here.

12 JUDGE NELSON: I agree with you, and I'm
13 concerned that not everyone has a copy of everyone's
14 papers. I don't like to do that. Is there a way
15 that, when we take the recess -- say we do -- that you
16 can use our facilities here to reproduce some copies?
17 We have public reproduction facilities here, I
18 believe.

19 MR. ROACH: We'll track it down. We have
20 attempted to serve all the restricted service list,
21 but it was an operation this morning, and it may not
22 have come through to everyone. It did come through to
23 Mr. Lubel. I know that.

24 JUDGE NELSON: And, Mr. Lubel, can you see
25 that sufficient copies of your papers are distributed?

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1 MR. LUBEL: We're working on it right now,
2 Your Honor.

3 JUDGE NELSON: So that we'll hear some
4 response, and then I'll read them. Then I'll have the
5 feeling that everybody has got them available.

6 MR. EDELMAN: The other issue of concern
7 to us also is about the scope of how the B.N./S.F.
8 deal works in with everything else. I think other
9 parties have concern as to that, too.

10 JUDGE NELSON: With regard to the --

11 MR. EDELMAN: Scope of discovery related
12 to the arrangement between U.P.-S.P. and B.N./S.F. and
13 what you can get --

14 JUDGE NELSON: Well, the questions are
15 very broad as to that.

16 MR. EDELMAN: Right.

17 JUDGE NELSON: Do you have a suggestion in
18 that regard?

19 MR. EDELMAN: No, I don't. I'm just
20 saying I want to see what's read about that, because
21 of the potential.

22 JUDGE NELSON: Well, I want to give you
23 and all other counsel a chance to read these
24 submissions. That is somewhat clear on the record,
25 Mr. Roach's letter of January 2 to me, which is six

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1 pages, single-spaced, and there's also -- Is this an
2 attachment? No, it's the restricted service list.

3 MR. ROACH: Yes. There are a set of
4 attachments, Your Honor, which should have been in
5 your --

6 JUDGE NELSON: That I don't have, but this
7 came by FAX.

8 MR. ROACH: All right. Well, there was a
9 hand delivered copy.

10 JUDGE NELSON: The machine shows we got it
11 at 1346, which is 1:46 p.m. So I don't feel so bad
12 having come hereto not having read it.

13 MR. ROACH: We've tendered Your Honor the
14 copy with the attachments.

15 MR. WOOD: Your Honor, so the record is
16 clear, I --

17 JUDGE NELSON: Well, you're not going to,
18 in the time available, be able to reproduce all these
19 attachments, I assume. The basic letter will do it,
20 I take it.

21 MR. ROACH: And there are only a few
22 sentences in these attachments that I need to point
23 out.

24 JUDGE NELSON: Then there is Mr. Lubel's
25 submission which came to me just moments before Mr.

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1 Roach's FAX, and this is a document entitled
2 "Memorandum of Law in Support of Motion to Compel
3 Applicants to Produce Documents and Information
4 Regarding the Negotiations of the Burlington
5 Northern/Santa Fe Tracker's Rights Agreement."

6 It goes on for some eight pages, double-
7 spaced, and contains a couple of attachments which,
8 think, are responses that the companies -- look like
9 company responses thus far.

10 MR. LUBEL: Yes.

11 JUDGE NELSON: One of which is the list of
12 meetings, I see. So that's what I have, and that's
13 what counsel are going to try to reproduce to get in
14 the hands of everyone when we take a brief recess so
15 that I can go back to the office and read these.
16 Other questions about these, Mr. Wood?

17 MR. WOOD: The only point I wanted to
18 make, although Mr. Roach did circulate copies of the
19 letter via FAX, we did not get copies of any of the
20 attachments and were not able to locate all of the
21 attachments in the short time we had. So if you can -
22 - If he could provide us with the attachments this
23 afternoon, that would be appreciated.

24 JUDGE NELSON: I can offer to use our
25 machines, but I don't want to -- If this were a FERC

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1 case, I might well do that, but I don't want to roll
2 up our reproduction expenses here at the behest of the
3 borrowing agency, the new Board. I mean, the first
4 item shouldn't be Xeroxing.

5 MR. EDELMAN: That's appropriate.

6 JUDGE NELSON: So let's see what we can
7 do. If you can't get help, you contact Ms. DeCianno,
8 my clerk, and she will arrange to work out something
9 here so that we get these done.

10 All right, Mr. Roach. You were going to
11 respond orally to the arguments Mr. Lubel had just
12 made.

13 MR. ROACH: Yes. I'll try to be very
14 quick.

15 JUDGE NELSON: You don't have to be quick.
16 This is a contested, serious issue here. It's not the
17 time for quickness. It's a time for a good, thorough
18 response. So don't feel pressured.

19 MR. ROACH: All right. Your Honor, the
20 only issue in issue here is settlement negotiations.
21 We've already agreed to produce, and this was
22 discussed last time, things like studies of the effect
23 of this settlement agreement.

24 We've already put in the application the
25 agreement itself. The issue that we put aside for

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1 further discussion today was the applicant's objection
2 on the basis of the I.C.C.'s well recognized
3 settlement negotiation privilege against producing
4 documents with respect to the process of negotiating
5 these settlements.

6 Your Honor asked us to provide to you the
7 legal authority on that, and we have done so in the
8 letter. The earliest decision that we are familiar
9 with and located was in the Union Pacific-Missouri
10 Pacific-Western Pacific merger case, a decision served
11 April 27, 1981, in which the Commission --

12 JUDGE NELSON: Now is this one of your
13 exhibits?

14 MR. ROACH: That is Exhibit B -- in which
15 the commission rejected an appeal from a decision by
16 Administrative Law Judge Paul Cross in which Judge
17 Cross had refused to allow discovery into settlement
18 negotiations. The party there seeking the discovery
19 happened to S.P., and they were asking the applicants
20 to produce documents about all of their settlement
21 negotiations.

22 The Commission said, and I'm quoting from
23 page 10 of the decision, "Confidential material
24 related to settlement negotiations clearly should not
25 be discoverable in order to encourage private

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1 settlement of disputes."

2 Now then what happened that Mr. Lubel
3 referred to is the applicants entered into a
4 settlement with the Chicago and Northwestern. This is
5 subsequent to the decision I just cited. The decision
6 I just cited was rendered when there was not a
7 settlement in place yet. There were discussions of
8 possible settlement.

9 K.C.S. then renewed the effort to obtain
10 discovery. They said, you've got a settlement with
11 Chicago and Northwestern. They said exactly what they
12 are saying today. You're relying on it as part of
13 your application to resolve competitive issues. We
14 want discovery into the underlying settlement
15 negotiations.

16 Again, Judge Cross denied the request.
17 K.C.S. made the same argument it's making here, that
18 the settlement privilege is a rule of evidence in the
19 Federal courts under Rule 408, that it's not a
20 discovery privilege, which some courts had said at
21 that time, some Federal courts, that it's not at least
22 an absolute discovery privilege.

23 Judge Cross rejected their arguments. The
24 Commission upheld, yes, because it was an
25 interlocutory appeal, but also they could have

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1 reversed on grounds of significant error, and they
2 recited -- and we quote this, and this is Attachment
3 E, "Claims of privilege were made on the basis of,
4 among other things, confidential settlement
5 negotiations."

6 JUDGE NELSON: What page are you on here?

7 MR. ROACH: I'm reading from page 3 of my
8 letter to you, Your Honor.

9 JUDGE NELSON: Oh, I'm looking at E.

10 MR. ROACH: Yes. It's right on page 1, on
11 the bottom, toward the end of the second full
12 paragraph.

13 JUDGE NELSON: I see it.

14 MR. ROACH: "Claims of privilege were made
15 on the basis of..." -- Then it mentions
16 attorney/client and work product and confidential
17 settlement negotiations.

18 Going to the next paragraph Judge Cross
19 held that the primary applicants and C.N.W., the other
20 part to the settlement, had established their claims
21 of privilege and had reasonably responded on privilege
22 requests.

23 Now those precedents, Your Honor, have
24 stood for 15 years without any interruption.

25 JUDGE NELSON: What had happened there

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1 with regard to what the applicants had done that
2 amounted to reasonable response?

3 MR. ROACH: They had produced materials
4 other than settlement negotiation materials, just as
5 we have here. They had produced studies. They had
6 produced the settlement agreement itself, and this is
7 exactly the same thing that just happened months ago
8 in the B.N./Santa Fe case where K.C.S. entered into a
9 settlement with the applicants in B.N./Santa Fe.

10 The Illinois Central came along and said,
11 we want discovery, and we want an extension of time,
12 because this has come late in the game and we need
13 time to get discovery and to deal with this. The
14 Commission said, no, we're not going to give you more
15 time; you can get the contents of the settlement
16 agreement in discovery.

17 The B.N./Santa Fe had not put it on the
18 record the way we did. They had simply entered into
19 it and announced it. The Commission said, you can get
20 the agreement, the terms of the agreement, in
21 discovery, and that's all you need, and they denied
22 the extension of time.

23 Now I asked Mr. Iubel last time if he
24 could -- I challenged him, really, to cite a single
25 instance where settlement negotiations have been

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1 allowed to be discovered into by the I.C.C., and he
2 hasn't done that. He's renewed this argument about
3 the Federal privilege, but as we point out on page 3
4 of our letter, the I.C.C. has a different law here
5 than the Federal courts, absolutely, fundamentally
6 different and, of course, Your Honor here is sitting
7 as an I.C. -- now a Surface Transportation Board
8 Administrative Law Judge in what I believe is the
9 first proceeding of the new agency today.

10 The Commission --

11 JUDGE NELSON: Moreover, the bill says
12 something about previous regulations.

13 MR. ROACH: Exactly right. As we point
14 out in Footnote 1, Section 204 of the bill states that
15 proceedings that were pending upon enactment are to be
16 continued under the provisions of law in effect prior
17 to enactment.

18 JUDGE NELSON: I have that as 204, yes.

19 MR. ROACH: Yes. In the Sandusky case
20 that is Attachment H, the Commission --

21 JUDGE NELSON: Let's talk about E first.
22 This is a merger case --

23 MR. ROACH: Yes, Your Honor.

24 JUDGE NELSON: -- in which the Union
25 Pacific --

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1 MR. ROACH: Was merging with the Missouri
2 Pacific --

3 JUDGE NELSON: -- is seeking to acquire
4 control of the Missouri Pacific?

5 MR. ROACH: Yes, and the Western Pacific,
6 and entered into a settlement with the Chicago and
7 Northwestern to give C.N.W. certain rights --

8 JUDGE NELSON: And did the applicants then
9 come in and urge that agreement --

10 MR. ROACH: Yes.

11 JUDGE NELSON: -- as part of the reason
12 why the Commission ought to vote for the merger?

13 MR. ROACH: Yes. It eliminated an issue
14 with respect to the elimination of competition between
15 certain points, Omaha and Kansas City.

16 JUDGE NELSON: So as far as you're
17 concerned, it's exactly like this case.

18 MR. ROACH: Exactly like this, and K.C.S.
19 knows this. They were the losers in the discovery
20 fight. They have since taken this position in every
21 case that they've been involved in where they've
22 entered into settlement.

23 To go to the Sandusky case, Your Honor,
24 the Commission there said --

25 JUDGE NELSON: I suppose that I could

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1 disagree with Judge Cross, if I wanted to. I don't
2 know that I do, but if the Commission affirmed him,
3 I've got no power to disagree with that.

4 MR. ROACH: Right. It's the Commission
5 that's --

6 JUDGE NELSON: That's the higher court
7 here.

8 MR. ROACH: -- the Commission that said,
9 unequivocally, confidential material related to
10 settlement negotiations clearly should not be
11 discoverable. It's not in this case. It's not on
12 these facts. It's a flat proposition of Commission
13 law and policy. That's why I keep trying to go to
14 Sandusky.

15 It's because they say there, we are not
16 bound by the Federal Rules but rather than by our own
17 policies, and our policy is strongly to encourage the
18 resolution of issues by agreements between the
19 parties, rather than by administrative action, and to
20 discourage action that would chill the negotiation of
21 agreements, and they say, continuing the quote, "a
22 narrow view of the prohibition against disclosing the
23 contents of settlement negotiations would not further
24 our policy of fostering settlements, and we will not
25 adopt that view." It's very clear.

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1 JUDGE NELSON: So you say that -- You've
2 got two things. One, a case just like this in which
3 you say the Commission has affirmed Judge Cross's
4 refusal to allow discovery on these matters.

5 MR. ROACH: Twice.

6 JUDGE NELSON: Secondly, a policy of the
7 I.C.C., now the Surface Transportation Board, which is
8 more restrictive, more protective of these
9 communications than Rule 408.

10 MR. ROACH: Right.

11 JUDGE NELSON: Is that correct?

12 MR. ROACH: And continuing I.C.C. action
13 such as in the B.N./Santa Fe case along the same
14 lines. You've got the terms of the settlement.
15 That's all you need. That's what they said in
16 B.N./Santa Fe.

17 Now let me address this issue about the
18 Federal policy as well.

19 JUDGE NELSON: Where does this leave you
20 then? Suppose I sustained this position? How does he
21 find out anything more about the settlement?

22 MR. ROACH: Well, that goes to the issue
23 of relevance. You see, none of what he wants is
24 relevant anyway. What's relevant is whether --

25 JUDGE NELSON: The agreement isn't

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1 relevant?

2 MR. ROACH: The agreement is relevant, and
3 he has the agreement. What is relevant is does this
4 agreement preserve competition?

5 JUDGE NELSON: How about what the
6 agreement means? Isn't that relevant?

7 MR. ROACH: Sure, it is, and the way that
8 you find out what an agreement means is you read the
9 words of the agreement. You read the words of the
10 agreement.

11 JUDGE NELSON: That's one way. Sometimes
12 there are additional ways to shed light on what an
13 agreement means. I don't know this particular
14 agreement.

15 MR. ROACH: Well, you don't need to know
16 what proposals were made back and forth during the
17 settlement negotiations to interpret the agreement.
18 Furthermore, there's been absolutely no showing --

19 JUDGE NELSON: Thirty-five years of
20 experience in the profession tells me that not always
21 all questions about the meaning of agreements are
22 conclusively resolved on the face thereof.

23 MR. ROACH: Your Honor, if one can imagine
24 possible, unshown, unproven, hypothetical reasons that
25 something in one of these documents could be useful,

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1 that isn't enough to overcome this privilege. That is
2 our position.

3 You know, Mr. Lubel can get up here and
4 say, well, it might say this is anti-competitive on
5 page 99 of some document.

6 JUDGE NELSON: Even if he sharpens his
7 focus to some particular term or provision?

8 MR. ROACH: Well, (a) he hasn't done that.
9 He's had weeks and weeks, and he hasn't mentioned one
10 single factual reason that he needs any of this stuff.

11 JUDGE NELSON: He's here with 12 and 13 --
12 13 and 14, which are very broad.

13 MR. ROACH: Right. You've got Exhibit A
14 to our letter, which is Mr. Rebensdorf's statement,
15 which goes into great detail, and he started to admit
16 that and then he tried to take back the words. It
17 does go into great detail. There's no denying it. It
18 describes the agreement fully. It explains what it
19 does, and it explains what U.P.'s and S.P.'s public
20 position was as to the negotiations.

21 JUDGE NELSON: That's Exhibit A?

22 MR. ROACH: Right, Exhibit A. He can ask
23 all the questions he wants to about that.

24 JUDGE NELSON: What's the one I looked at,
25 in the second volume to the application. There's a

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1 witness --

2 MP. ROACH: Peterson?

3 JUDGE NELSON: Peterson, yes. I don't
4 know why I started there, but it said something of the
5 agreement. I looked in the Table of Contents.

6 MR. ROACH: There are a number of
7 witnesses that talk about this agreement, and they can
8 all be deposed, but the point is, Your Honor, that
9 K.C.S. has got --

10 JUDGE NELSON: Well, Rebensdorf goes into
11 this whole history, I see here, with the meetings and
12 the guidelines, and he's wide open to discovery on all
13 that stuff.

14 MR. ROACH: Right, but what he doesn't do,
15 and that's why there's been no waiver, which is really
16 the only argument they're pressing today -- What he
17 doesn't do is to disclose the back and forth of the
18 negotiations themselves.

19 He doesn't say K.C.S. came in here and
20 asked for A, B, C, D and E, and we proposed, you know,
21 X, Y and Z, and then there were some exchanges of
22 further modifications of position. He doesn't do that
23 for any of the parties that we negotiated with, and
24 the reason is perfectly obvious, Your Honor.

25 If that sort of material can be

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1 discovered, you're not going to see settlements, which
2 is why the Commission has its settlement privilege.
3 It's not that it's inconceivable that there could be
4 some relevance to that sort of stuff. It's that they
5 can get at all the issues in this case without
6 breaching that privilege.

7 They can discover to their heart's content
8 about the traffic movements and how B.N. and Santa Fe
9 are going to compete. You point out, the B.N.-Santa
10 Fe just filed a thick document addressing those and no
11 other issues. That's what the whole B.N.-Santa Fe
12 filing is about.

13 Mr. Rebensdorf has got 66-some pages on
14 the subject. Mr. Peterson has got many, many pages on
15 the subject. Other witnesses address the subject, and
16 there has to be more of a showing of relevance than
17 just some abstract theorizing that maybe there's some
18 green cheese on the other side of the moon; so I'm
19 entitled to discover the moon.

20 JUDGE NELSON: Well, is Rebensdorf subject
21 to deposition?

22 MR. ROACH: Yes.

23 JUDGE NELSON: And probing inquiry
24 regarding every statement he makes?

25 MR. ROACH: Yes. What he's not subject

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1 to, and Your Honor is absolutely right -- I'll stand
2 by my privilege in that deposition, just as I do today
3 -- is questions that say, what did B.N./ Santa Fe
4 propose at the first meeting, what did you respond
5 with, what did B.N./Santa Fe propose at the second
6 meeting, what did you respond with? That is the
7 content, the back and forth, that every settlement
8 party wants to keep confidential.

9 You're going to have devastating effects
10 on settlements in the future if you allow that sort of
11 material to be discovered.

12 JUDGE NELSON: In the proceedings in Tab
13 E there, Union Pacific, did the applicants expose the
14 agreement to the same extent that you did here?

15 MR. ROACH: Yes. It was relied upon. It
16 was produced to the other parties. It was argued
17 about, argued from as a basis for solving competitive
18 problems. There's a whole extensive discussion of it
19 in the Commission's decision.

20 There was an appeal on this issue of
21 whether that settlement was problematic in various
22 ways. It was very much in dispute, in issue.

23 JUDGE NELSON: I can't read Tab E too
24 well. The second page is blurred at the margin, I
25 see. Have you got a cleaner one?

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1 MR. ROACH: I do not, I think, probably
2 have a cleaner one. I think the words can be
3 deciphered. You're right. It fades off a little bit
4 on the first two letters.

5 JUDGE NELSON: And this is the order --
6 We're talking about the order before 1981 which holds
7 that the interlocutory appeal was not cognizable.

8 MR. ROACH: Yes. Yes, and my number one
9 reliance is on Tab B where the Commission --

10 JUDGE NELSON: Where you say the
11 Commission addressed this question.

12 MR. ROACH: Unequivocally states that
13 confidential material relating to settlement
14 negotiations --

15 JUDGE NELSON: How did it take and
16 authorize an interlocutory appeal in Exhibit D and
17 then said in Exhibit E you can't have them?

18 MR. ROACH: I believe it was because the
19 Judge authorized it. There was a procedure at that
20 time where, if the Judge authorized it, you could
21 appeal on all issues, and if he didn't, you could only
22 appeal on extreme -- you know, clear error or change
23 of circumstances or new facts.

24 JUDGE NELSON: So you think he authorized
25 the appeal that is Exhibit D?

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1 MR. ROACH: Yes. That is my recollection,
2 Your Honor.

3 If I could just say one word about the
4 Federal rule, because it's very important here that,
5 even if the Federal rule applied, which it doesn't,
6 there wouldn't be a right to this discovery that
7 they're asking for. Let me just touch on that for a
8 moment.

9 The rule in Federal court on discovery
10 into settlement negotiations -- Now we're not talking
11 about the evidentiary privilege. We're talking about
12 what the Federal courts have established by way of
13 their interpretation of the Rules, by way of a common
14 law development of the Rules with respect to discovery
15 into settlement negotiations. -- is stated in a case
16 called Lesal Interiors that we quote on page 4.

17 Mr. Lubel mentioned this. You have to
18 make two showings: One, "a particularized showing,"
19 and that's a quote, that the documents sought are
20 relevant; and second, the court "must balance against
21 that party's asserted interest and need for the
22 documents the effects that may flow from their
23 discovery" in terms of discouraging settlements and
24 undermining the settlement process, which is what I'm
25 stressing here today.

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1 My point is K.C.S. hasn't even met that
2 Federal standard. They haven't come in to you and
3 made a particularized showing of things they need to
4 get out of these documents that they can't get in lots
5 of other --

6 JUDGE NELSON: Well, they say that you're
7 wrapping yourself in these agreements.

8 MR. ROACH: Right.

9 JUDGE NELSON: And that the other party in
10 the agreements does the same thing.

11 MR. ROACH: Right.

12 JUDGE NELSON: That all are telling the
13 Commission, approve these agreements; these agreements
14 are pro-competitive and the savior of the transaction.

15 MR. ROACH: Absolutely.

16 JUDGE NELSON: And having said that, you
17 can't shield his efforts to probe the agreements.

18 MR. ROACH: And my response to that is
19 he's got everything he needs to probe the agreements.
20 He's got the agreements.

21 JUDGE NELSON: Yes.

22 MR. ROACH: He's got the traffic data.
23 He's got extensive testimony of experts and company
24 officials about the effect of the agreements. He's
25 got shipper testimony. I'm sure he's gone out and

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1 developed a lot of his own testimony.

2 There's just a vast field of material
3 that's relevant to the effects of these agreements.
4 The only thing we're objecting to -- and we're not
5 objecting because there's, again, some smoking gun or
6 problem here. We're objecting, because of the
7 damaging effect on settlement negotiations of this
8 kind of discovery.

9 JUDGE NELSON: What if he focused on some
10 specific aspect of the agreement and said he couldn't
11 get at that anywhere else, made that kind of showing?
12 Where would your argument go?

13 MR. ROACH: Well, I might fail the Federal
14 test. I think I would not fail the I.C.C. test,
15 because it is a flat privilege.

16 JUDGE NELSON: You see that as absolute?

17 MR. ROACH: Yes, it's an absolute
18 privilege. I mean, the I.C.C. would rethink it if it
19 were -- if there were a tremendous need, as Your Honor
20 hypothesizes, but my point is this is utterly
21 hypothetical.

22 These gentlemen have done nothing but make
23 broad-brush arguments without pointing to anything
24 that they need, and that isn't enough.

25 JUDGE NELSON: This proceeding in Tab D --

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1 did it later go on to a trial type hearing?

2 MR. ROACH: This is the same merger, the
3 U.P./N.P. merger?

4 JUDGE NELSON: Yes.

5 MR. ROACH: Yes. It went on to actually
6 a hearing before the Administrative Law Judge in the
7 hearing room, almost the last time that's happened.
8 Since then, the Commission is going on to depositions
9 and taking submissions on paper, but --

10 JUDGE NELSON: As in this case.

11 MR. ROACH: As in this case, but yes,
12 there were opportunities to cross-examine all the
13 witnesses in the hearing room, and there was a massive
14 transcript.

15 JUDGE NELSON: Where in Appendix A --
16 Exhibit A is the language you want me most to read?

17 MR. ROACH: In Exhibit A?

18 JUDGE NELSON: Yes.

19 MR. ROACH: Exhibit A is the Rebensdorf
20 statement.

21 JUDGE NELSON: I'm sorry. It's Exhibit B.

22 MR. ROACH; Yes. Exhibit B -- it's the
23 top of page 10, the second paragraph, confidential
24 material related to settlement negotiations --

25 JUDGE NELSON: My is underlined. Who put

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1 that underlining?

2 MR. ROACH: Somebody at our law firm 10
3 years ago or 15 years ago. This is -- We found this
4 in our files on the case.

5 JUDGE NELSON: So it will be those two
6 paragraphs?

7 MR. ROACH: Right. Yes, it's the second
8 paragraph, really. This is part of a -- The
9 proceeding material is about some broader issues about
10 confidential materials, but the settlement
11 negotiations was a separate issue, and this is the
12 ruling on that.

13 Let me say one word. I do want to be
14 somewhat brief and leave Your Honor the opportunity to
15 read the papers, but the argument is made, there is no
16 settlement here, because there is no dispute. We do
17 address that in the last portion of our letter.

18 We point out that on August 4, 1995, the
19 applicants filed a series of pleadings, petitions for
20 schedule, petitions for protective order. The
21 Commission assigned a docket number to the case.
22 K.C.S., B.N./Santa Fe and others filed --

23 JUDGE NELSON: Mr. Lubel concedes that.
24 There was a proceeding pending at the time these talks
25 were --

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1 MR. ROACH: Right, and there was a dispute
2 as well. There was active participation by B.N./Santa
3 Fe. There were disputes with them about matters such
4 as the base year for the traffic study and the
5 production of the traffic data. There were,
6 similarly, disputes with K.C.S.

7 This is the classic way a merger case
8 goes. You don't have to announce your formal position
9 until the so called comments are due, which is several
10 months into the case, but you're a hostile party the
11 day you come in and start raising issues and seeking
12 discovery.

13 Furthermore, these parties, including
14 B.N./Santa Fe and K.C.S and the others, were out
15 agitating among shippers and local governments and the
16 world at large, trying to develop support for their
17 position of either opposing the merger or seeking
18 conditions.

19 Everybody in this room knows that. The
20 notion that they weren't opposed and that this wasn't
21 an adversary proceeding is ludicrous, and the
22 settlement was entered into in late September after
23 the Commission had already issued five formal
24 decisions in the case, and on the part of B.N./Santa
25 Fe, which then agreed in the settlement not to oppose

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1 the application. That's when they said our position
2 is nonopposition. They hadn't said that before then.

3 So this is really rather misleading to
4 suggest that they are not opponents. They were
5 settled out, and they agreed not to be opponents. So
6 I think that's really a non-issue, Your Honor.

7 The waiver issue, we've addressed. Let me
8 just underscore our position on waiver. We're not
9 waiving the confidential settlement --

10 JUDGE NELSON: Waiver being the notion
11 that you've put these documents -- the settlement in
12 issue?

13 MR. ROACH: Right.

14 JUDGE NELSON: And, therefore, waived
15 protection of underlying materials?

16 MR. ROACH: Right, and it's precisely like
17 the precedent involving K.C.S. What has been put in
18 issue is the settlement itself. It's just like the
19 Commission said in B.N./Santa Fe. You have the terms.
20 What hasn't been put in issue, and what we have not
21 waived, is the confidential settlement negotiation
22 process. That's what the privilege is about.

23 To say, well, if you have a settlement and
24 you describe its terms, all bets are off, the
25 privilege is gone, is absurd. It's a circular

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1 argument. There can't be a waiver doctrine or there
2 would be no privilege here.

3 JUDGE NELSON: What if I were to lean to
4 the view that the breadth of his request, read in
5 light of the flavor of the opinions you're citing here
6 today, would persuade me that he's not entitled to
7 everything, the moon, but that somewhere in between
8 that, give me everything and you get nothing, the
9 particular circumstances of this case might entitle
10 him to something? Where would I be then, besides
11 uncomfortable?

12 MR. ROACH: Well, (a) I think you might
13 well be facing an appeal, although you might not. I
14 mean, this isn't -- As I say, we're not here --

15 JUDGE NELSON: Well, appeal away.

16 MR. ROACH: I'm trying to answer your
17 question. My real answer is --

18 JUDGE NELSON: I know what would happen to
19 that appeal here, but -- what usually happens to them.

20 MR. ROACH: Here's my real answer.

21 JUDGE NELSON: We have here one officer
22 who is designated the Motions Commissioner for these
23 purposes, and she happens to be the Chair at this
24 time, and she decides whether to refer such papers.
25 I recently got one in which she decided it wasn't even

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1 worth referring. So that case resumes tomorrow, and
2 so that's current events.

3 The last thing in the world they want to
4 deal with here are the details of discovery in cases,
5 but then the new Board may look at this differently
6 and see some strong policy issues that I don't.

7 Well, I guess -- Is there anything else
8 before I read this material?

9 MR. ROACH: Well, to give you the serious
10 answer to your question or the right answer to your
11 question, you know, often it is the correct approach
12 to take a discovery request that is -- you know, that
13 has a sphere of relevance and a sphere of irrelevance,
14 sphere of reasonableness and a sphere of
15 burdensomeness, and to try to find a middle ground.

16 JUDGE NELSON: We did some of that last
17 week.

18 MR. ROACH: We did a lot of that last
19 time, and the applicants are working very hard to
20 comply with those orders. We've got, you know, 10
21 parties that have now made discovery requests of us.

22 Occasionally something comes along that's
23 an issue of principle. We've produced a lot of
24 material on this settlement agreement. All we're
25 saying is we shouldn't have to do what no one has had

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1 to do before this Commission for decades, and that is
2 provide confidential negotiations.

3 JUDGE NELSON: Tell me again what the lot
4 of material is you produced. The agreements
5 themselves, of course, the testimony of witness about
6 them. What else?

7 MR. ROACH: Tens of thousands of pages of
8 work papers, including studies of the traffic effects
9 of the settlement agreements.

10 JUDGE NELSON: Whose work papers?

11 MR. ROACH: The testifying witnesses, Mr.
12 Peterson, Mr. Rebensdorf, etcetera.

13 JUDGE NELSON: All of Rebensdorf's work
14 papers?

15 MR. ROACH: Absolutely. As an example, he
16 has a whole section in his testimony about whether the
17 compensation that B.N. has to pay for its trackage
18 rights that it got in this settlement is set at a
19 level that allows vigorous competition. That's one of
20 the things that K.C.S. has been brooding about in the
21 world as one of the arguments they are going to make.
22 Compensation is too high. So it's not competitive.

23 Mr. Rebensdorf discusses that. He
24 compares the compensation with a dozen or more other
25 trackage rights agreements and shows that it's at the

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1 very low end of the range. He has many other
2 arguments and discussions which are supported by work
3 papers about that issue of compensation.

4 Now what relevance does it have? That's
5 a lot of material. They can analyze it. They have
6 other things they can look at. They are a major Class
7 I railroad with a lot of trackage rights agreements.
8 They can go get their own and compare them to ours.

9 What does it add to that for them to find
10 out exactly what figures were traded back and forth in
11 the negotiating process? We submit either nothing or
12 so little that it doesn't justify --

13 JUDGE NELSON: Let me understand one
14 again, because this, you say, is a major issue or they
15 say it's going to be a major issue?

16 MR. ROACH: It's one issue looks like
17 they're going to raise. Right.

18 JUDGE NELSON: That is the compensation
19 that moves between the B.N./Santa Fe, on the one hand,
20 and the applicants, on the other, whereby you let the
21 B.N./Santa Fe use your tracks?

22 MR. ROACH: Right. They pay a certain
23 number of cents per ton mile to move their locomotives
24 and cars across our lines.

25 JUDGE NELSON: And the claim is?

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1 MR. ROACH: And the claim, we believe,
2 that they will make, from various documents they have
3 publicly circulated, is this has been set too high by
4 some sort of anti-trust conspiracy or evil malign
5 intent. The compensation is way too high. So it's
6 not going to allow real competition.

7 So we compare it to lots of other
8 agreements that are allowing real competition and show
9 that it is at the low end of the range of the
10 compensation --

11 JUDGE NELSON: The theory is it's so high
12 that no one will use it?

13 MR. ROACH: Right. Right.

14 JUDGE NELSON: Well, why would you make a
15 deal that's so high that no one would use it?

16 MR. ROACH: We wouldn't.

17 JUDGE NELSON: Why is it in the interest
18 of either side to do that?

19 MR. ROACH: It isn't. We wouldn't, but
20 they have this theory, which Mr. Lubel, I'm sure,
21 would be delighted to expostulate upon, that there is
22 some sort of vast conspiracy that started years ago
23 among all these railroads to carve up the West and
24 create a monopoly or a duopoly, and we've got 800
25 pages that addresses that in Volume 2, and we've got

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1 Mr. Rebensdorf, and we've got reams of facts, and they
2 don't need to get into our settlement negotiations to
3 make their arguments.

4 JUDGE NELSON: Mr. Lubel then might say
5 the price is so high that no traffic is going to move
6 under it, and why would they do that? Because it's a
7 phony, designed to mask some other deal, and let me
8 see what the other deal may be. Is that the essence
9 of the claim, Mr. Lubel?

10 MR. LUBEL: Well, that is part of it, Your
11 Honor. That's one theory. I don't want to interrupt.
12 I would like to have some brief rebuttal.

13 JUDGE NELSON: That this allegedly high
14 price is just window dressing to make it look like
15 there's a deal.

16 MR. LUBEL: And, Your Honor, that is not
17 speculation on our part. This is not something that's
18 totally hypothetical. If I could just point out
19 briefly -- I mentioned this at our last hearing. This
20 is a trackage rights agreement.

21 JUDGE NELSON: Of course, my reaction then
22 is, well, either it is or it isn't, and I don't know
23 that all the discovery is going to get you anywhere on
24 this price. You've got experts that will prove it's
25 too high a price, and it's a phony term.

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1 MR. ROACH: He can ask Mr. Rebensdorf if
2 there's any other deal, and Mr. Rebensdorf will tell
3 him no, and he can ask us in interrogatory, and we'll
4 tell him no. We will reveal the terms of agreements.
5 What we will not reveal is the back and forth of the
6 negotiations. That's the issue.

7 MR. LUBEL: Your Honor, what we're asking
8 for is not just the back and forth of negotiations,
9 but what their internal analysis of this deal is, and
10 I quote from Mr. Grinstein, the --

11 JUDGE NELSON: He says you've got that.

12 MR. LUBEL: -- the Chairman of the Board.
13 There's 100 pages, a little over 100 pages, of
14 Rebensdorf work papers. That's almost, you know --
15 His statement was almost 60-some pages. Your Honor,
16 let me give you one concrete example.

17 JUDGE NELSON: Are you suggesting 100
18 isn't enough or is too many?

19 MR. LUBEL: Well, I just don't think it's
20 quite as many as they indicated there might be, but if
21 I could give a concrete example of what there might be
22 --

23 The Chairman of the Board of Burlington
24 Northern stated in Forbes -- He was being questioned
25 about this settlement agreement.

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1 JUDGE NELSON: Was that the fellow that
2 controlled the corporation that had the documents we
3 were concerned about?

4 MR. LUBEL: No, no. That's Mr. Anschutz
5 of S.P.

6 JUDGE NELSON: That was a different
7 person?

8 MR. LUBEL: That's a different issue. The
9 point is, Mr. Grinstein said -- He's quoted in Forbes
10 as admitting that trackage rights do not necessarily
11 ensure unfettered competition.

12 JUDGE NELSON: You quoted that last time.

13 MR. LUBEL: My point is, if they are going
14 to admit that publicly, what type of internal memos
15 might there be where these people are saying, well,
16 you know, we can give them these trackage rights, but
17 we'll still be able to keep competition--

18 JUDGE NELSON: Is there any reason he
19 can't ask Rebensdorf all about Grinstein's statement?

20 MR. ROACH: No. He can ask Mr. Grinstein
21 in -- what Mr. Grinstein meant in interrogatory. I
22 know what the answer will be. It's not going to be an
23 answer he wants. B.N./Santa Fe has put in their
24 evidence about whether these trackage rights are going
25 to be competitive, and it's hundreds of pages.

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1 JUDGE NELSON: You could depose Grinstein,
2 can you?

3 MR. LUBEL: We've already indicated we'd
4 like to, Your Honor, but the -- That will bring up
5 some other issues, because we're going to have some
6 discovery requests of them, because we're going to
7 want similar information from them as to any
8 background he had --

9 JUDGE NELSON: Is there anything else on
10 the agenda today other than this business of the
11 shippers?

12 MR. ROACH: Not from our perspective.

13 JUDGE NELSON: I'm trying to get an idea
14 where we are.

15 MR. ROACH: Well, I think Mr. Cunningham
16 wanted to talk about Mr. Anschutz for one moment and
17 report to you what he found out about that.

18 JUDGE NELSON: Well, we'll get to that.

19 MR. ROACH: That was the only thing.

20 MR. LUBEL: One or two minor issues, Your
21 Honor. We've got some traffic tape information that -

22 -

23 JUDGE NELSON: I saw some correspondence
24 on that. Well, is this the time to take the recess so
25 I can read these papers, then also ask counsel to see

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1 that everyone has them? Do you have anything else you
2 want to say right now?

3 MR. ROACH: One other sentence, and that
4 is because everybody was interested in work product.
5 You know, the argument today from our perspective
6 isn't about attorney/client privilege and work
7 product. We've objected on that ground to this and
8 many other interrogatories.

9 Your Honor has made clear that you will
10 entertain submissions of work product and that
11 attorney/client is something that you understand is a
12 proper objection, which, of course, it is.

13 JUDGE NELSON: Attorney/client, I begin
14 right off that I will protect.

15 MR. ROACH: Right.

16 JUDGE NELSON: And when we get to
17 26(b)(3), impressions of lawyers, etcetera, I'm
18 prepared to consider that protection. You haven't
19 shown me any of that.

20 MR. ROACH: All I'm saying, that isn't
21 before you today.

22 JUDGE NELSON: That door is open to you.

23 MR. ROACH: That isn't something you need
24 to rule on today. It isn't something that precedent
25 will be set on today. We're just here about

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1 settlement privilege.

2 JUDGE NELSON: I want you to understand
3 clearly that that invitation is there, as the record
4 will show.

5 MR. ROACH: Understood. That's all.
6 Thank you.

7 JUDGE NELSON: All right. Then -- Yes,
8 ma'am? Ms. Jones?

9 MS. JONES: I wanted to invite those who
10 might not have gotten their service copies of our
11 comments, we brought a few extras with us, and we
12 would be pleased to distribute those to anyone who did
13 not yet get them. They were served Friday evening,
14 and you should be getting them in due course; but
15 anyone who --

16 JUDGE NELSON: Do I have that message of
17 that pleading correct, that the position is we have no
18 position, but if you're going to approve this merger,
19 for goodness sake, condition upon the agreement being
20 a condition?

21 MS. JONES: Yes, Your Honor.

22 JUDGE NELSON: And that that agreement is
23 pro-competitive?

24 MS. JONES: Yes, Your Honor, that's right.

25 JUDGE NELSON: Well, I think that, Mr.

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1 Lubel, you've got some work to do, and that is you're
2 going to have to talk to me about these, Exhibit B
3 and -- I guess B, more than E. E can be seen as not
4 doing much. B is your major hurdle.

5 MR. LUBEL: Again, Your Honor, I think--

6 JUDGE NELSON: Not now. I want to go up
7 and read it, but when we come back, I hope you'll be
8 ready on it, including to what extent I'm bound by it
9 and what I do with it and so on and so forth. If it
10 says that you want everything and that says you don't
11 get everything, that's the other one. Let's see
12 where we go from there.

13 MR. LUBEL: There may be one way to help
14 focus this also. Obviously, our concern -- One of our
15 concerns is how they identified what they said were
16 the two to one, the competitive situation that this
17 settlement should apply to, you know; and if there's
18 any background papers where they made those decisions
19 and --

20 JUDGE NELSON: Well, if we can start
21 moving into sharper focus, that helps me. That may
22 even help Mr. Roach, too.

23 MR. ROACH: That's already in the
24 repository. Mr. Peterson was --

25 JUDGE NELSON: We had something on that

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1 last time.

2 MR. ROACH; Mr. Peterson is the man who
3 did it. There are this many pages on how he
4 identified the two to one points. He can depose on
5 it. He discusses it for several pages of his
6 statement.

7 MR. LUBEL: But what about the discussions
8 internally about what standard they should use and,
9 oh, maybe this point we shouldn't define that way,
10 because we want to keep that business; we don't want
11 to let them into it?

12 JUDGE NELSON: There is a definition in
13 the agreement?

14 MR. ROACH: No, but in his determination
15 of how he defines what a two to one point is.

16 JUDGE NELSON: Does two to one appear in
17 the agreement?

18 MR. LUBEL: No. Well, the two to one is
19 what the agreement is supposed to solve. It comes in
20 -- There are a lot of situations where there were two
21 shippers, and now there's just going to be -- two
22 carriers, but --

23 JUDGE NELSON: Is it defined in the
24 agreement?

25 MR. LUBEL: -- there's just going to be

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1 one.

2 MR. ROACH: The agreement identifies every
3 point that the parties could identify where shippers
4 went from two railroads to one and --

5 JUDGE NELSON: What volume has the
6 agreement?

7 MR. ROACH: It's attached to Rebensdorf's
8 --

9 MR. LUBEL: It's in Volume 1.

10 MR. ROACH: It's in Exhibit A to your
11 package.

12 JUDGE NELSON: Oh, it's here?

13 MR. ROACH: Yes. It also has an omnibus
14 clause which is Section 8(i). That's on page -- No,
15 it's 330 at the bottom -- that says --

16 JUDGE NELSON: Where does the agreement
17 begin?

18 MR. ROACH: The agreement begins right
19 after the end of Rebensdorf on --

20 JUDGE NELSON: 318?

21 MR. ROACH: Yes, Your Honor.

22 JUDGE NELSON: I see. it's titled
23 "Agreement."

24 MR. ROACH: Yes. There is also a
25 supplement that corrected some errors that starts at

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1 page 348. So they have to be, unfortunately, read
2 together. Actually, the place to look for the final
3 text of 8(i) is on page 352 at the very bottom. It
4 says, "It is the intent of the parties that this
5 agreement result in the preservation of service by two
6 competing railroad companies for all customers listed
7 on Exhibit 8 to this agreement presently served by
8 both U.P. and S.P. and no other railroad."

9 Then it goes on to say -- and that was,
10 Your Honor -- I'm now talking to you, not quoting.
11 That was the list of points that the parties could
12 identify.

13 JUDGE NELSON: So the phrase two to one
14 customers is in the agreement?

15 MR. ROACH: Then it goes on to say, the
16 parties recognize that some two to one customers
17 aren't on that list, and those and any others that we
18 haven't located are covered by the agreement. So it's
19 no mystery here.

20 If he then wants to argue, well, what it
21 means is something different from what it means, he's
22 not going to find anything in the negotiations that
23 sheds light on that. The parties agreed on a
24 principle.

25 MR. LUBEL: You keep saying negotiations.

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1 What about the internal documents of U.P. where they
2 got ready for negotiations that said what they would
3 offer, what they wouldn't offer, how they would handle
4 it?

5 JUDGE NELSON: Well, if he asked you for
6 all studies, analyses, reports, including work papers
7 and other communications between and among the
8 railroads involved that relate to the phrase two to
9 one customers, would there be arguments or would you
10 answer the -- Well, it seems to me there are three
11 answers: (1) There aren't any. (2) you've already got
12 them; (3) there are documents and you're not going to
13 see them; (4) there are no such documents.

14 You may want to think about what your
15 answer is to that. I have no idea.

16 MR. ROACH: Well, I mean the problem with
17 -- The problem I perceive, Your Honor, with
18 formulating requests is that you can use all kinds of
19 different forms of words that capture parts of
20 different categories.

21 That literally captures a little bit of
22 the settlement negotiations maybe, and a lot of things
23 that are in the depository already, and the studies,
24 reports or analyses of the effect of this settlement
25 that we have searched for, pursuant to Your Honor's

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1 order.

2 JUDGE NELSON: Maybe you have to give up
3 that much.

4 MR. ROACH: And we have given up all of
5 that except the settlement negotiations.

6 JUDGE NELSON: I mean the so called
7 settlement negotiations. If there's a dispute about
8 the meaning of a phrase in the agreement and you're in
9 the position of this heavy essential reliance on the
10 agreement, then you've got a harder burden to say we
11 can't show you papers that shed light on that meaning.

12 MR. ROACH: Right, and I'm not standing
13 here representing to you that there is a single piece
14 of paper --

15 JUDGE NELSON: That's not the best
16 litigation position to be in.

17 MR. ROACH: You know, it's another one of
18 these things where it's purely hypothetical.

19 JUDGE NELSON: Yes.

20 MR. ROACH: I got to be careful not to
21 breach the privilege, but I'm tempted to say to you
22 that I don't think it exists. So it becomes sort of
23 circular here. You know, the negotiation wasn't about
24 theorizing. It was about terms, and that's what we're
25 trying to protect.

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1 It's about, you know, do I get rights from
2 here to there to the moon? Everybody we negotiated
3 with wanted a lot of stuff that had nothing to do with
4 the competitive issues, as we understood them, in this
5 case.

6 K.C.S. was one of them. They know it very
7 well. They came in and asked for a lot of things that
8 had nothing to do with the competitive issues, from
9 our perspective. So did B.N./Santa Fe. So did a lot
10 of others.

11 JUDGE NELSON: I take it, you would say
12 that the Commission's -- Exhibit B would rule out any
13 document which -- if it existed, that shed light on
14 the meaning of the phrase, two to one customers?

15 MR. ROACH: Well, not any document. I
16 would argue that, if there was -- If one of the back
17 and forth kinds of things that happened in settlement
18 issues --

19 JUDGE NELSON: I'm talking created in the
20 negotiations, yes.

21 MR. ROACH: Right. -- was something that
22 somebody might try to rely on --

23 JUDGE NELSON: You would say that's out
24 under the U.P. precedent?

25 MR. ROACH: That's out, and what I would

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1 say is, you know, you're making a hard case based on
2 a pure hypothesis.

3 JUDGE NELSON: You would say in U.S.
4 District Court, you would recognize you would have
5 much more trouble with it.

6 MR. ROACH: Well, I would say that no one
7 has made a showing of particularized need, because
8 they've got all kinds of information about what two to
9 one means. They've got their own theory about what it
10 means. Who cares what these parties agree or didn't
11 agree? What difference does that make?

12 If they want to say this agreement doesn't
13 cover what they consider two to one, and they alluded
14 to that last time, and they said you got to look at
15 source competition between Houston and New Orleans and
16 from God knows where to New Orleans. That isn't
17 covered here. It's obvious it isn't covered here.

18 They can make that argument. They don't
19 need our settlement negotiations to make it.

20 JUDGE NELSON: Suppose I sustained you on
21 13 or 14. Is there any procedure we've adopted that
22 prevents Mr. Lubel from drafting anything different,
23 sharper, more focused?

24 MR. ROACH: Well, I'm not entirely sure,
25 Your Honor. I was thinking about that this morning

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1 when I was reading --

2 JUDGE NELSON: Some notion of a one-shot
3 proposition at the procedures?

4 MR. ROACH: Mr. Lubel sent us some FAXes
5 on late Friday night, and they purported to restate
6 our rulings from last time, and then they added some
7 things. They said, we're trying to restate, plus
8 we've added some things.

9 I don't think they were restating, but
10 that's another issue. On the things they've added,
11 there were some things we can respond to. We're going
12 to respond to them, but there is a bit of a problem
13 there.

14 If we come in here and we litigate an
15 issue, and it's resolved, then is there an infinite
16 loophole for Mr. Lubel to come in with new discovery
17 requests for the things that you just got done ruling
18 he can't have? I don't think so.

19 I think he can make all kinds of new
20 requests, but there's some limit to that. There's
21 some notion of res judicata, because, remember, the
22 Commission set a three-day limit on appeals, and
23 there's a notion of closure. You can't just keep
24 asking and asking and asking for things you've denied,
25 thinking of new arguments for it.

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1 JUDGE NELSON: No, and I really wouldn't
2 want to sanction that.

3 MR. ROACH: That's all I'm saying. It's
4 just a -- I'm protecting myself a little, Your Honor,
5 but sure, he can come back and make new requests. If
6 he has some reason to think that the meaning of two to
7 one was critical in some specific way, he can ask me
8 in interrogatory, and I'll --

9 JUDGE NELSON: He knows enough to sense
10 that I'm already not in love with this request.

11 MR. ROACH: -- I'll do my best to answer.

12 JUDGE NELSON: And yet I'm struggling with
13 the issue here. Well, I think I'd like to read your
14 submissions, and I'd like to hear him when we come
15 back, really, on two areas: One, the matter of the
16 precedent; and two is any suggestion you might have
17 with regard to what I've called sharper focus,
18 particularized need and so on and so forth, if we were
19 in U.S. District Court and I were to apply that
20 balancing test.

21 How much time do we need? I've got to
22 read some pages, and you've got to do some Xeroxing.
23 It's 3:12.

24 MR. ROACH: It may be the Xeroxing that's
25 the critical path.

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1 JUDGE NELSON: I don't know. Well, I want
2 you to call us if you can't get things Xeroxed, and
3 I'll see what we could work out. How many copies of
4 all this do we need for present purposes? Mr. Edelman
5 needs a set, Mr. Wood.

6 MR. ROACH: What do people really need? Mr.
7 Wood has the letter but not the attachments?

8 MR. WOOD: I don't have the attachments
9 with me, because they hadn't arrived when I left.

10 MR. ROACH: But you do have the letter?

11 MR. WOOD: I do have the letter.

12 MR. ROACH: I have the attachments you can
13 look at.

14 JUDGE NELSON: Say we took a break until
15 four. Would that be a problem? You think that's too
16 long?

17 MR. LUBEL: That would be fine, Your
18 Honor.

19 JUDGE NELSON: Mr. -- I've forgotten your
20 name, sir?

21 MR. HUT: My name is Mr. Hut. Whatever
22 the principal combatants here think is appropriate is
23 fine.

24 JUDGE NELSON: Well, if I get ready before
25 four, I'll come back. Otherwise, let's aim at four

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1 o'clock, and I'll ask the reporter to stand by.

2 All right, let's take a recess until four
3 o'clock.

4 (Whereupon, the proceedings were off the
5 record from 3:16 p.m. until 4:10 p.m.)

6 JUDGE NELSON: All right. Mr. Lubel?

7 MR. LUBEL: Yes, sir, Your Honor. I'll
8 move very quickly here. I made some point-by-point
9 notes.

10 First, particularly the U.P./N.P. type
11 systems, which are Attachment B, all it talks about
12 there is balancing test. It's not an absolute
13 protection.

14 Furthermore, the quote is confidential
15 material relating to settlement agreements, and when
16 you start looking at what is talked about earlier in
17 the opinion, they talk about trade secrets and
18 confidential commercial information. And even there
19 it talks about a balance of the importance of that
20 information, protecting someone against having that
21 information in the case.

22 Furthermore, Your Honor, that was in -- I
23 believe it was a 1981 case where -- before the
24 Commission's practice of using protective orders was
25 developed. Here we have protective orders in place

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1 with highly confidential designations to protect any
2 type of information that they might consider
3 confidential. Furthermore, there is the option of
4 redacting confidential information.

5 But all of that aside, Your Honor, one key
6 point that distinguishes this case from those cases
7 they cite was that all that case establishes is there
8 may be a privilege. There may be a privilege. The
9 U.P./N.P. case did not involve a situation in which
10 they went farther and described the negotiations.
11 Here they didn't just say, "We have an agreement.
12 Here is the agreement." They have stuck their chin
13 out if you will, and described the negotiations in
14 Mr. Rebensdorf's affidavit.

15 And that is the concept of placing
16 something in issue. That was not involved, as far as
17 we can tell from looking at the cases they have cited,
18 particularly in Attachment B. In other words, in that
19 case, they didn't describe -- have affidavits that
20 describe the course of the negotiations, which is what
21 they did here. But they only want to go halfway.
22 They want to say, "We describe it, and that's our
23 version, and you don't get to see anything else that
24 relates to it."

25 Furthermore, the centrality of the

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1 settlement agreement in this case, we were -- at the
2 break, we were counting and had somebody do a
3 WordPerfect search, and there are literally hundreds
4 -- I said in my brief dozens -- there are literally
5 hundreds of references to this settlement agreement in
6 the application.

7 All of that aside, Your Honor, so I think
8 that makes a key distinction. But in the first place,
9 and this is in the way of possible limitations, we are
10 only limiting this request -- we are limiting this
11 request just to the Burlington Northern/Santa Fe
12 agreement. They raised a specter of having to reveal
13 negotiations with all of the other -- nine other
14 railroads, not including that.

15 We feel that by describing the
16 negotiations they have opened the door and we have the
17 right to the back and forth as they call it, the back
18 and forth of negotiations. But even if we didn't --
19 even if Your Honor was to rule that we were not
20 entitled to the proposals and counterproposals, which
21 seems to be of utmost concern to them, we think that
22 at the very least we should be able to have their own
23 internal analysis of this agreement -- the analytical
24 material if you will.

25 That would focus on, as the interrogatory

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1 asks for, internal analysis, studies, reports, or
2 other communications on the formulation and developing
3 the definition of 3 to 1, or 2 to 1 situations, any
4 discussion of the meeting of the terms of the
5 agreement, or discussions of the effectiveness of the
6 agreement in preserving effective competition, which
7 as I referred to earlier Mr. Grinstein casts some
8 doubt on in his public statement.

9 So again, Your Honor, we feel this is
10 different because they have opened the door here and
11 placed these negotiations at issue, and they have gone
12 to the extent of describing them, gone halfway. We
13 have the right to see the background behind that. And
14 if Your Honor is inclined to have limitations we would
15 suggest the limitations I mentioned.

16 JUDGE NELSON: All right. I'm prepared to
17 rule on this. I do not read this Union Pacific case
18 as supporting an absolute bar on the discovery of
19 settlement materials in all cases under all
20 circumstances.

21 The opinion itself that Mr. Lubel pointed
22 out talks of balancing. It uses the phrase "a
23 balancing of interest." That is absolutely
24 inconsistent with a flat bar. It is true that the
25 opinion says confidential material, settlement

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1 material, should not be discoverable in order to
2 encourage private of disputes.

3 I think that is simply a recognition of
4 the principle that protecting the confidentiality of
5 settlement negotiations is ordinarily an important
6 thing, because the law favors private settlement of
7 disputes, as does the Commission, the Surface
8 Transportation Board I assume, and the FERC.

9 I regard that as more of a statement of
10 why confidentiality is ordinarily the rule rather than
11 an absolute preclusive rule. I am supported by the
12 citation that appears on page 10 immediately after
13 this -- (quote) "should not be discoverable" (unquote)
14 is the citation. See Reichenbach v. Smith, Fed. 2d
15 1072.

16 When we look at Reichenbach, we see an
17 opinion that deals with balancing and does not lay
18 down absolute rules. It speaks of the discretion of
19 the trial judge and stresses the importance of doing
20 that. It isn't a case that supports an absolute bar.
21 It suggests, rather, that in particular circumstances
22 or that particular case, there were reasons why the
23 trial judge may have decided not to clutter the jury
24 with the details of settlement between two defendants
25 who were in a boat when the accident occurred.

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1 Possibly even because of the relationship
2 between the two defendants. It was apparently
3 boyfriend and girlfriend, and any impeachment that
4 they might have gotten out of the settlement was even
5 neutralized by the facts. And the court even suggests
6 that that relationship may have been in the trial
7 court's mind.

8 That kind of analysis cited by the
9 Interstate Commerce Commission right after its
10 statement of the policy at issue is absolutely
11 inconsistent with the notion that there is a flat bend
12 on this kind of stuff.

13 The Reichenbach opinion is full of talk of
14 trial court discretion, the importance of the ruling
15 in the first instance, and what it really does is
16 tells you why it sustains a discretionary balancing by
17 the trial judge rather than lay down some absolute
18 rule.

19 In fact, it said in deciding whether to
20 permit or limit cross examination of a party, here
21 Ms. Reichenbach concerning a settlement with a co-
22 defendant, the trial court must balance the policy of
23 encouraging settlements with the need for evaluating
24 the credibility of the witnesses. So I don't read
25 that as supporting any flat bend.

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1 Next, the opinion right after the language
2 that's underlined concludes by saying that the judge
3 did not abuse his discretion in denying the motion.
4 There again is a reference to individual discretion
5 and the judge, not some flat rule of law.

6 What I do think the opinion stands for is
7 a ruling that, in the circumstances there presented,
8 the trial judge properly concluded that the materials
9 need not have been produced. Exercise of discretion
10 is not the equivalent of mandate. Discretion embraces
11 the concept of choice, and in this case there was
12 choice and the choice not to conduct the discovery was
13 certainly affirmed by the Commission.

14 When we look at the circumstances, we find
15 that the party seeking the discovery, S.P.T., and I'm
16 quoting from page 9, does not address the specific
17 relevance of the confidential documents withheld.
18 Instead, it argues that applicants should have the
19 burden of showing the need for protection of the
20 documents, citing some ICC rules.

21 So what we have there was a failure to
22 make a showing of any specific relevance, or specific
23 need if you will, coupled with an approach that turns
24 out to have been wrong-headed about where the burden
25 of proof lies, and in those circumstances rejection of

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1 that argument by the trial judge was upheld by the
2 Commission.

3 I find nothing on pages 9 or 10 that even
4 suggests that the argument of waiver was before the
5 agency at that point, let alone that the opinion
6 should be read as barring the discoverability of such
7 evidence in the circumstances we have here where the
8 parties are knee deep in the agreement. I don't see
9 that at all in that opinion, at least on pages 9 and
10 of Exhibit B.

11 What the opinion does do, unquestionably,
12 gives the applicants a flavor here of a suggestion
13 that the Commission doesn't like people poking around
14 in settlement negotiations -- that is, the Interstate
15 Commerce Commission. Not an absolute rule, but a
16 policy that ought to be respected in the ordinary
17 situation in the ordinary case.

18 They also have another case there about
19 this vying of the line with Conrail, and I find that
20 case distinguishable from this case but nonetheless of
21 significance because it reflects that same policy.
22 Applying that policy to what we have here I don't find
23 the kind of specific focused showing of a
24 particularized need such as the district courts would
25 look at to justify any particular production of any

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1 particular thing at this stage of the game.

2 I find this blanket request, the question
3 posed in general terms, and insofar as it is a blanket
4 request for everything and the company's contention or
5 the applicant's contention that we shall get nothing,
6 I am, therefore, for present purposes, sustaining the
7 company and denying interrogatories 13 and 14 because
8 I read the ICC cases as creating a little flavor which
9 tips the balance that way when we're confronted with
10 this generalized "give me everything" approach.

11 That doesn't mean that some other request,
12 more precisely drawn on some showing of particularized
13 need for some particular thing involving some
14 particular issue about the settlement might not come
15 out different. I leave that question open because we
16 don't really have it before us now. So I am denying
17 numbers 13 and 14.

18 What is next?

19 MR. LUBEL: Your Honor, on 14, I thought
20 that had been dealt with last time and we had limited
21 that just to this merger itself.

22 MR. ROACH: Yes.

23 MR. LUBEL: Are you referring to 12 and
24 13, Your Honor?

25 JUDGE NELSON: 12 and 13.

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1 MR. LUBEL: Okay. Thank you.

2 JUDGE NELSON: I'm sorry. What's next?

3 MR. ROACH: Your Honor, could I just say
4 one word about your ruling?

5 JUDGE NELSON: Now this could be a
6 mistake.

7 MR. ROACH: I understand.

8 JUDGE NELSON: Mr. Roach, proceed at your
9 own risk, counselor.

10 (Laughter.)

11 MR. ROACH: Absolutely. I am -- I say it
12 with great trepidation. I simply --

13 JUDGE NELSON: I have had things like this
14 happen to me, and --

15 (Laughter.)

16 MR. ROACH: I'm reasonably tempted to
17 just --

18 (Laughter.)

19 JUDGE NELSON: You have a question?

20 MR. ROACH: We would ask leave, Your
21 Honor, at a later date, if there is a new request, to
22 put before you more information about the context of
23 this ruling. It is our understanding, Your Honor, and
24 I am perfectly happy with your ruling and I'm not
25 contesting it, but it is our understanding that the

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1 ruling on confidentiality had different parts and that
2 the balancing test discussion was separate from the
3 settlement privilege which was a subpart of the
4 confidential materials sought.

5 But I haven't shown you the context. I
6 freely acknowledge that. I --

7 JUDGE NELSON: I don't know what all of
8 that language means.

9 MR. ROACH: I am protecting my record.

10 JUDGE NELSON: My ruling is that a party's
11 right to any so-called settlement papers doesn't exist
12 in the abstract, doesn't exist in general, broad,
13 inclusive terms, even when you have wrapped yourself
14 up in the settlement.

15 I am also ruling that there is no general
16 bar to the discoverability of such stuff, and that it
17 all has to be resolved in the discretion of the trial
18 judge, according to showings of particularized need as
19 the circumstances of the case may suggest. And
20 applying that standard at this stage of the game to
21 these interrogatories I don't see that the requesters
22 are going to get anything. They may come in tomorrow
23 with something different, and then we have a different
24 case in front of us.

25 What is next?

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1 MR. LUBEL: Interrogatory 23, Your Honor.
2 We kind of did the Chinese menu approach to it last
3 time. We had category A, which was shippers -- we
4 wanted communications they've had with shippers, and
5 you ruled previously and we had some limitations on
6 shippers who gave supporting statements. But then we
7 leave that big category of people who they've had
8 communications with but did not give them support.

9 JUDGE NELSON: Do you know who those
10 people are?

11 MR. LUBEL: Well, Your Honor, we do know
12 -- we have the universe, supposedly, of the 3,000
13 people they contacted, and that raises my first point.
14 I have two points here which we think justify some
15 production. The first is burden -- the burden that is
16 involved to us, and then the -- just the importance of
17 shippers to the case.

18 In terms of burden, they clearly have the
19 information. They know who they have talked to. They
20 have whatever correspondence they had with those
21 people. We can't recreate it. You know, we have to
22 go out in the field and contact all of the people that
23 they did. They said, "Well, you have the list." When
24 we looked through the list of the 3,000 people they
25 contacted, for approximately 300 of those shippers

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1 there is no identifying situation.

2 I have Acadiana Railway Company, nothing,
3 no -- no -- don't -- not indicated what state they're
4 in or any address or any contact person or anything.
5 So this is a way to highlight the burden to us of
6 going out -- they said we could go after the people
7 and find out what they said or why they didn't give
8 statements. So there clearly is a burden to us.

9 With another -- on about 175 more there
10 was limited information, but at least with the 300
11 there was no identifying information.

12 JUDGE NELSON: The universe was how many?

13 MR. LUBEL: 3,000.

14 JUDGE NELSON: How many ended up
15 supporting the merger?

16 MR. LUBEL: Over 1,000, like 1,066. That
17 last count they promised --

18 JUDGE NELSON: That's with the
19 supplemental shippers added?

20 MR. ROACH: There are over 1,100 now.

21 MR. LUBEL: Over 1,100, Your Honor.

22 JUDGE NELSON: So we're talking about some
23 1,900 out there.

24 MR. LUBEL: Right. And, you know, it's
25 just -- we feel that if you consider the relative

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1 burdens, Your Honor, they are the applicants, they
2 stand to have the \$750 million in --

3 JUDGE NELSON: Well, for beginners,
4 Mr. Roach, is there any reason why I shouldn't direct
5 the applicants to produce, with reference to the 1,900
6 addresses and phone numbers?

7 MR. ROACH: Yes, there is, and that is an
8 issue of burden as well. Let me just comment. I
9 think Acadiana actually submitted a support statement
10 and the address would be on the statement, and that
11 will be true in a lot of these cases.

12 The list he has is the list that our
13 people used as the central list for this effort, and
14 if there isn't an address there we have to go seek it
15 out. They've got hundreds and hundreds and hundreds
16 and hundreds of addresses. I think this is really --
17 make that argument.

18 But, Your Honor, it is not the end of the
19 world, frankly, if you ask us to produce addresses.

20 JUDGE NELSON: I'm going to direct that --
21 that for every one of those 1,900 that you haven't
22 already, give an address and a phone number and a
23 person where a name is known.

24 MR. ROACH: Okay.

25 JUDGE NELSON: All right. What's next?

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1 MR. ROACH: On the issue of whether we
2 should --

3 JUDGE NELSON: We're not there yet.

4 MR. ROACH: I'm sorry.

5 MR. LUBEL: Your Honor, just to give Your
6 Honor a flavor for this, and I quote from the Journal
7 of Commerce --

8 JUDGE NELSON: So you're now going to have
9 1,900 shippers with who they are, where they are, and
10 their phone numbers.

11 MR. LUBEL: That's true, Your Honor. We
12 still think that that --

13 JUDGE NELSON: Now you know who is who in
14 this business. Why can't you focus on some big
15 customers that aren't supporting and conduct your
16 discovery with them.

17 MR. LUBEL: Well, we can, Your Honor, but
18 there is a reluctance among a lot of these shippers.
19 I quote from the Journal of Commerce from December
20 28th. This was an article about the merger and it
21 says -- this was a quote from shippers, and this is in
22 quotes. It says, "You know, we are doing as much as
23 we can without actually opposing it. We are cognizant
24 of the punishment factor. They say" -- this is a
25 quote -- "They say if you get in our way, we'll never

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1 forget."

2 And what we're saying is is that -- that's
3 published. That is supposed to be a quote from a
4 shipper or -- that is out there and that there is a
5 concern here, and this is not just for my railroad.
6 This is a concern -- it should be a concern of the
7 Commission and the public interest that -- that, you
8 know, there are shippers out there that --

9 JUDGE NELSON: One thing you could do is
10 ask the reporter.

11 MR. LUBEL: Well, that's true, Your Honor.

12 JUDGE NELSON: And see what that answer
13 is.

14 MR. LUBEL: Well, I would suspect he would
15 not want to give us the names of --

16 JUDGE NELSON: You may get an invocation
17 of an alleged --

18 MR. LUBEL: That's right. And the --

19 JUDGE NELSON: You could get corroboration
20 of the fact that there was such statement. You won't
21 get that my notes were wrong.

22 MR. LUBEL: The person wanted anonymity,
23 so I don't think the reporter would tell us. Our
24 point is, though, that if they've had communications
25 with shippers, the shippers have said, "We're not

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1 going to give you a statement. We think this is a
2 problem," etcetera, etcetera, etcetera, you know, if
3 it's in their files we think that -- that, you know,
4 for the integrity of this proceeding, since they again
5 have stressed so much to people that have supported
6 them that if there's any evidence that's sitting in
7 their files of people that didn't support them and why
8 they didn't, we feel that should be discoverable, Your
9 Honor.

10 JUDGE NELSON: See, again, if you had some
11 focus basis for some subgroup out of that 1,900, we
12 could talk. But it just doesn't appeal to me to -- to
13 ask them to give you everything they've got on some
14 universe of 1,900 people all across the western part
15 of the United States.

16 MR. LUBEL: I think we're learning Your
17 Honor's tastes, and we're going to have to table our
18 request.

19 MR. ROACH: Your Honor, we had a long
20 discussion of this issue last time. I think there was
21 a good faith difference as to whether it was resolved
22 and decided. But in any case, what we did decide last
23 time is that we would go search 60 shipper files for
24 any threats, agreements, inducements, etcetera. We
25 are in the process of doing that. This is out of --

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1 JUDGE NELSON: At random?

2 MR. ROACH: Well, no, it was the
3 largest --

4 JUDGE NELSON: Oh.

5 MR. ROACH: -- different commodity areas,
6 and this is among the supporting shippers. And as
7 Your Honor pointed out last time, and Mr. Lubel
8 agreed, this is their more fertile terrain in any
9 case.

10 JUDGE NELSON: What about the non-
11 supporters?

12 MR. ROACH: As to the non-supporters, my
13 position is simply that it's cumulative and that there
14 is no reason to shoulder any more burden here than
15 among the supporters. I mean, I offered before
16 adjourned 50 at random. We ended up exceeding to 60
17 larges.

18 You know, why add 10, 20, 50, or any other
19 number unless a) they find something in the first
20 group that is meaningful, or b) they can deal with the
21 detailed burden explanation that Ms. Rinn put on the
22 record last time, which they have simply ignored.

23 JUDGE NELSON: It seems to me, Mr. Lubel,
24 that you could do better than say, "Give us everything
25 you've got about 1,900 people." There may be people

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1 that you know would be better targets for this kind of
2 pressure. Maybe it's the small people. I don't know.
3 Or the middle people. You're representing a railroad
4 that operates in this area. They know who is who.

5 And to just say to them, "Give us every
6 scrap of paper from all over your files," in Omaha and
7 wherever else they are, regarding 1,900 people in
8 different commodities, without showing anything more
9 than a newspaper quotation, I just don't find that
10 very persuasive.

11 MR. LUBEL: Our request is limited to the
12 transaction, Your Honor, but --

13 JUDGE NELSON: I understand that.

14 MR. LUBEL: I understand. We'll maybe try
15 and focus it even more.

16 JUDGE NELSON: I'm going to deny that as
17 written, again without prejudice to looking at it in
18 a much more sharpened context.

19 Anything else we need to do?

20 MR. ROACH: Your Honor, my clients will
21 have my head if I don't say for the record that there
22 is absolutely no policy on the part of these companies
23 to threaten anybody with retaliation. And we don't
24 know what shipper was quoted in some newspaper
25 article, but that is an outrageous insinuation in our

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1 -- to us, and we'll put on a hundred witnesses to
2 establish that. There is no threat or coercion policy
3 of these merging railroads.

4 JUDGE NELSON: Anything else we need to
5 deal with right now?

6 MR. LUBEL: Your Honor, there is a
7 question, and this has to do with the interrogatory
8 number 20. It was a request for a competition, any
9 communications.

10 JUDGE NELSON: It seems to me also,
11 Mr. Lubel, that your colleague was with me in this
12 Florida litigation that we had where I also had some
13 trouble with overly broad discovery requests.

14 Do you recall that, Mr. Mullins?

15 MR. MULLINS: Yes, Your Honor.

16 JUDGE NELSON: So that that should not
17 come as a surprise that you suddenly met me and I look
18 for more focus. The firm has been with me before in
19 this very context, albeit it in a different dispute.

20 MR. LUBEL: Yes, sir, Your Honor.

21 JUDGE NELSON: So let's recognize that.
22 All right, sir.

23 MR. LUBEL: Okay. As to number 20, you
24 posed a question to me at the last hearing. This is
25 asking basically for communications between

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1 themselves, or among the applicants, concerning
2 competition for any traffic.

3 JUDGE NELSON: And we cut it down, didn't
4 we, to certain commodities?

5 MR. LUBEL: We cut it down in several
6 ways, and the only issue I'd like to address is the
7 time period.

8 JUDGE NELSON: Yes.

9 MR. LUBEL: Because you said what time
10 period, and I --

11 JUDGE NELSON: I picked a date and it
12 turned out you said that date didn't work.

13 MR. LUBEL: Well, I had picked out, I
14 think I said January 1st. I think we had talked about
15 August 1st. But here is the issue that we raise. And
16 what we suggest is that the date for their search go
17 back to June 1, 1994.

18 JUDGE NELSON: Instead of?

19 MR. LUBEL: Instead of August 1, 1995. So
20 that they go back a year. The reason we picked that
21 date --

22 JUDGE NELSON: That's more than a year.

23 MR. LUBEL: Well, we would -- in the
24 alternative, we would say September, and there is
25 relevance to these dates. In mid 1994 they have

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1 agreed that they began informal settlement
2 discussions. They said they dropped them. But that's
3 merger discussions, Your Honor. But that's why we
4 would say that date.

5 JUDGE NELSON: That was when, Mr. Lubel?

6 MR. LUBEL: In approximately June of 1994.
7 For clarity, Your Honor --

8 JUDGE NELSON: That is U.P./S.P.
9 discussions?

10 MR. LUBEL: Right. They said they had
11 agreed to informal discussions. They also admit that
12 in September of '94 they entered into a
13 confidentiality agreement. I'm sure that was among
14 the executives. But our request is --

15 JUDGE NELSON: What did that mean? What
16 were the terms of that?

17 MR. LUBEL: I believe the confidentiality
18 agreement had to do with their discussions. I'm sure
19 they can address this better than I.

20 JUDGE NELSON: Do you mean an agreement
21 whereby they wouldn't tell anybody what they were
22 talking about?

23 MR. LUBEL: Or maybe if they exchanged
24 information in their discussions they would each keep
25 that information confidential.

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1 JUDGE NELSON: And you have that
2 agreement?

3 MR. LUBEL: No, I do not believe we have
4 that agreement.

5 JUDGE NELSON: Is there a dispute that
6 there was such an agreement?

7 MR. ROACH: No, Your Honor.

8 JUDGE NELSON: All right.

9 MR. LUBEL: That's not the focus of my
10 request. I'm just using that as a --

11 JUDGE NELSON: I'm trying to get the
12 timeframe.

13 MR. LUBEL: Right, as a timeframe. My
14 concern is, Your Honor, that the interrogatory
15 basically asks for their internal communications that
16 reveal their own view of how they compete with each
17 other, and where they compete with each other. And if
18 we limit that to communications since August of '94,
19 I am concerned that all we'll have is very guarded
20 statements, and we won't have the candor that the
21 applicants' employees may have used before there was
22 an actual agreement of merger.

23 JUDGE NELSON: August of '95 was the date
24 of the --

25 MR. LUBEL: Notice.

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1 JUDGE NELSON: -- filing of the intention
2 to file?

3 MR. LUBEL: Yes. They filed that with the
4 Commission, Your Honor. And so --

5 JUDGE NELSON: At the beginning of the
6 proceeding.

7 MR. LUBEL: At the beginning of the
8 proceeding as we've defined it. And our point is is
9 that after that date it is very unlikely that the two
10 executives are going to talk about, "Oh, we compete
11 with them here, and we compete with them there," in
12 the way that they might do before that announcement
13 had been made.

14 And we're saying to get a true test -- to
15 get a true test of -- and a candid appraisal of where
16 they might compete with each other, it would be
17 appropriate to go back for a one-year period. And any
18 internal communications of either applicant referring
19 to where they compete with --

20 JUDGE NELSON: Refresh me on the other
21 limitations. We had commodity groups, and we had
22 certain officials, didn't we?

23 MR. LUBEL: And all of those would still
24 apply. I believe -- and you all can help me on this
25 -- I believe we have it limited to the top 45

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1 executives, to certain marketing executives of U.P.,
2 certain commodities, grain coal, chemicals, and I
3 believe we even have limited it to certain corridors.

4 MR. ROACH: The effect of this merger on
5 competition for those commodities, that's the key
6 restriction.

7 JUDGE NELSON: Yes.

8 MR. ROACH: Right.

9 JUDGE NELSON: I recall that.

10 MR. ROACH: Your Honor, I --

11 JUDGE NELSON: Wasn't it queued to the
12 possible effects of this transaction --

13 MR. ROACH: Right.

14 JUDGE NELSON: -- on competition?

15 MR. LUBEL: Well, the way the
16 interrogatory is worded, it would not have that
17 limitation.

18 JUDGE NELSON: Well, as we ultimately
19 developed it, interpreted it, I think it did have some
20 limitations.

21 MR. LUBEL: I believe it might have, Your
22 Honor. That's what I am trying to revisit.

23 JUDGE NELSON: Sounds familiar to me.

24 MR. LUBEL: I am trying to revisit it,
25 Your Honor --

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1 JUDGE NELSON: So the question you're
2 raising now is one of time.

3 MR. LUBEL: It's one of time.

4 JUDGE NELSON: Whether we shouldn't go
5 back prior to August.

6 MR. LUBEL: Prior to August.

7 JUDGE NELSON: We were willing to take
8 August before. What has changed?

9 MR. LUBEL: Reflection, Your Honor. Just
10 looking at it and realizing that from -- if you wait
11 until August, they are not going to have any candid
12 appraisal. Their conversations will be guarded. The
13 memos and everything will be guarded. It seems to me
14 that we ought to be able to go back to the Commission
15 for -- the Commission ought to have available, if
16 there are internal appraisals of competition between
17 these applicants --

18 JUDGE NELSON: Well, that's --

19 MR. LUBEL: -- just limited to the --

20 JUDGE NELSON: As to these documents, my
21 concern was primarily with burden, wasn't it?

22 MR. ROACH: Right.

23 JUDGE NELSON: And so tell us what the
24 problems are with burden by going back further in
25 time.

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1 MR. ROACH: Your Honor, if I could just
2 make one introductory comment. I mean, this is
3 exactly what I was talking about earlier about
4 revisiting issues. I -- this was very extensively
5 discussed and litigated and agreed upon and shouldn't
6 be revisited. But in any case, let me put your mind
7 at ease as to whether the ruling in the concord that
8 we struck last time is a reasonable one.

9 We have already searched the top 45
10 executives' files for any studies about the
11 competitive impact of U.P. and S.P. merging, or of U.P.
12 -- or studies of U.P. and S.P. competition, all the
13 way back to January 1, '93. So this is just a
14 complete red herring. The issue under 20 was whether
15 we had to go down further into the commodity people
16 for three areas of commodities, and Your Honor very
17 reasonably limited that to the effect of this merger.

18 You said, "What date should there be?"
19 And the agreement was August 1, because that's --

20 JUDGE NELSON: Mr. Lubel suggested that
21 date.

22 MR. ROACH: Absolutely. And that's when
23 this merger was announced. And let me tell you, Your
24 Honor, exactly what the situation was about the
25 earlier discussions. They were very, very brief.

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1 There was a brief conversation, there was a standard
2 M&A-type confidentiality agreement signed.

3 JUDGE NELSON: If there isn't much to it,
4 why don't you produce it?

5 MR. ROACH: Well, because that's not what
6 he is looking for. He is looking -- we have agreed to
7 produce that, too. We are producing all of the
8 documents --

9 JUDGE NELSON: As to the three commodity
10 groups --

11 MR. ROACH: We already are obliged to
12 produce all of the documents that were exchanged at
13 these negotiating meetings as well. That was --

14 JUDGE NELSON: As to the three commodity
15 groups, then the difference is the group leaders? Is
16 that what we're after now?

17 MR. ROACH: The difference is whether
18 we've got to go back a year, over a year, and search
19 for some document where some lower down commodity
20 manager is talking about the competitive impact of --
21 competition --

22 JUDGE NELSON: I guess you better bring me
23 back to speed on where we left it. How low?

24 MR. ROACH: On this one, when it was
25 limited to the merger, we took it down at the -- to

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1 the three commodity groups, down to the market
2 managers.

3 JUDGE NELSON: Market managers. That's
4 Ms. Rinn's clients, then.

5 MR. ROACH: Considerably lower than the 45
6 people.

7 JUDGE NELSON: All right.

8 MR. ROACH: And going back to over a year
9 on that isn't going to add anything, because none of
10 those market managers knew anything about a merger of
11 these railroads. That's the point I'm trying to get
12 out to you, Your Honor. There were very brief
13 discussions at the highest level. All of the --

14 JUDGE NELSON: Then we're fighting about
15 documents that don't exist.

16 MR. ROACH: Absolutely. But we -- he is
17 asking us to go search through all of these files to
18 see if somebody had a piece of paper that --

19 JUDGE NELSON: Let's ask Ms. Rinn. How
20 much more work is involved with your commodity
21 managers to look for documents that go back prior to
22 August 1, 1995, back, say, to the date of the
23 confidentiality agreement?

24 MS. RINN: Basic arithmetic would tell
25 you, sir, that we are talking I think a total period

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1 now of, what, 16 months, where before we were talking
2 four months. So it basically makes four times as much
3 additional work in terms of the amount of paper that
4 would have to be reviewed.

5 JUDGE NELSON: That's just arithmetic.
6 You can do better than that.

7 MS. RINN: That's just basic arithmetic.
8 But I have to reinforce what Mr. Roach has said, which
9 is that I --

10 JUDGE NELSON: Mr. Roach says that he
11 thinks there is nothing there anyway, so you've got to
12 conduct searches to find nothing.

13 MS. RINN: Exactly. Which if I tell my
14 clients that they are going to tell me what they think
15 about the law, which they have frequently done on
16 occasion. But they would be very, very vehement about
17 this.

18 The point is that I want to reinforce with
19 Mr. Roach that I was there when we were preparing to
20 make the public announcement of this proposed merger.
21 I was there as we were planning to make the initial
22 shipper contacts. We had only very senior people
23 within the Marketing Department within the circle of
24 people who knew this.

25 And we made it absolutely clear that no

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1 work was to leak out to any of our customers before
2 the evening -- the evening of August 3rd, after we
3 were sure that the information --

4 JUDGE NELSON: So all of this goes to
5 suggest that there may be little, if anything, in
6 these files prior to that time.

7 MS. RINN: What I am suggesting is it is
8 a tremendous amount of work for no yield, which is, to
9 my mind, the best definition of --

10 JUDGE NELSON: Mr. Lubel, I am going to
11 accept Ms. Rinn's representation. I think she is a
12 candid person in this regard. I see no reason to
13 doubt her word, and she has been helpful in the past.
14 And I am coupling that with the fact that you actually
15 did accept this date before, and I am going to say
16 that's the ball game as far as that area goes.

17 MR. LUBEL: Your Honor, I'm --

18 JUDGE NELSON: What's next?

19 MR. LUBEL: Just for the record, Your
20 Honor, I might say that we may go back and look at
21 that and see if we can craft a more specific
22 interrogatory on that point, to get the information
23 we're seeking --

24 JUDGE NELSON: Well, I would say you could
25 try it, but I'm not as open on that one as I am on

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1 some careful approach to the so-called settlement
2 privilege papers.

3 MR. LUBEL: I understand, Your Honor.

4 JUDGE NELSON: Be careful there. I remain
5 open for grabs in my own mind, given the necessary
6 tilt that the Commission gives this by virtue of those
7 two opinions that the -- for consignment.

8 MR. LUBEL: Out of an abundance of costs
9 and just two quick issues, Your Honor, one -- and I
10 mentioned this to Mr. Roach. You posed a question to
11 me at the last hearing, you know, do we want them to
12 identify the documents or make the documents
13 available? And some of our requests ask for
14 identifications of the communications.

15 And I just want to make the point that to
16 the extent there are communications that these top
17 executives know about that weren't committed to
18 writing, I think that some of our requests would
19 include those. And, you know, we -- that may be
20 something we have to follow up on later. But our we
21 -- I did indicate before while we're interested in the
22 documents, if they have them --

23 JUDGE NELSON: We're talking about
24 documents. How do we produce things that aren't
25 documents?

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1 MR. LUBEL: Well, because our requests --
2 well, actually, our first discovery requests were
3 interrogatories that asked for identification of
4 communications. So if there was a communication that
5 falls within one of those interrogatories, and is, you
6 know, square within it and is relevant, then we feel
7 that they should have to identify it.

8 JUDGE NELSON: Do you mean if someone
9 remembers a conversation?

10 MR. LUBEL: That's right. They at least
11 ought to, you know, notify this group of top
12 executives if you have had any discussions that fall
13 within this category.

14 JUDGE NELSON: Are there particular
15 interrogatories that you want to bring to my attention
16 right now, or is this a generic --

17 MR. LUBEL: I would say that it applies to
18 any of them where we asked them to identify a
19 communication.

20 MR. ROACH: Your Honor, I don't know why
21 we're burdening you with this. I had a conversation
22 this morning with Mr. Lubel where I told him that on
23 a request-by-request basis we have responded to their
24 request as it is worded, or as we have agreed to
25 structure it at our last hearing. Some of them were

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1 about documents. Some of them were about
2 communications where we agreed to produce more than
3 just documents. We're not --

4 JUDGE NELSON: I think you'd have to show
5 me a specific instance of where there is a problem,
6 and I'd address it in that context.

7 MR. LUBEL: And the last thing -- and this
8 was the last thing I think we addressed last time --
9 was we have asked for a privilege log, and we'd just
10 like to note that we will be getting that at some
11 point.

12 MR. ROACH: We are working on it.

13 JUDGE NELSON: That is what I called a
14 Vaughn index?

15 MR. ROACH: Yes, and we discussed how it
16 would be in --

17 JUDGE NELSON: Where the document is
18 described, and so forth.

19 MR. ROACH: Right.

20 JUDGE NELSON: I think we do need that.

21 MR. ROACH: Yes.

22 MR. LUBEL: And, Your Honor, just to
23 report, we yet again feel we have resolved the issue
24 on the traffic tapes.

25 JUDGE NELSON: I'm pleased to hear that.

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1 MR. LUBEL: Wait and see what we get on
2 that.

3 JUDGE NELSON: Do we want to -- we have
4 the Monday/Wednesday schedule that we've adopted. Do
5 we want to stick with that?

6 MR. LUBEL: We would, Your Honor. We
7 think it has worked well.

8 JUDGE NELSON: This would mean that we
9 would have no -- I would have no obligations to you
10 all, at least until a week from Wednesday.

11 MR. EDELMAN: Correct, Your Honor.

12 JUDGE NELSON: Which would be nice for me
13 because I have an oil pipeline case that -- in which
14 hearings are resuming tomorrow morning.

15 MR. CUNNINGHAM: Your Honor, I have one
16 other item.

17 JUDGE NELSON: Yes, sir.

18 MR. CUNNINGHAM: If I might.

19 JUDGE NELSON: Mr. Cunningham?

20 MR. CUNNINGHAM: You asked that I contact
21 the Anschutz Corporation, Counsel for the Anschutz
22 Corporation with respect to documents requests.

23 JUDGE NELSON: To the extent that you
24 could find out anything.

25 MR. CUNNINGHAM: To the extent I --

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1 JUDGE NELSON: Understanding you --

2 MR. CUNNINGHAM: I'd like to make a
3 report. As I read your request at 320 in the
4 transcript, there are no documents in -- at the
5 Anschutz Corporation on their board of inside counsel
6 for the Anschutz Corporation that would meet this --
7 these specifications. But I'd like to tell you what
8 is there in case we've misinterpreted it, because I
9 would hope we could put this to an end.

10 There are documents in the files of the
11 Vice President for Acquisitions relating to the tax
12 index of the transaction and the Anschutz Corporation.
13 There are documents which are publicly -- otherwise
14 publicly available documents that he assembled
15 relating to the transaction, and there are analyses of
16 outside counsel to the Anschutz Corporation, looking
17 at the -- interpreting the merger agreement for the
18 Anschutz Corporation and the effects on the Anschutz
19 Corporation.

20 There is nothing relating to competition,
21 the run up to the merger, or the K.C.S. in those
22 documents.

23 JUDGE NELSON: Is there reaction to that?

24 MR. LUBEL: Well, if that's what they
25 represent, Your Honor, we accept that for now.

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1 JUDGE NELSON: Well, clearly, the analyses
2 of counsel you don't get. That which is publicly
3 available there is no need for. The only fight could
4 be about the --

5 MR. LUBEL: Tax --

6 JUDGE NELSON: -- the tax documents, if
7 that's of some interest to you.

8 MR. LUBEL: We're not -- that's not our
9 focus at this time.

10 JUDGE NELSON: All right. Thank you, and
11 I appreciate your help on that, in a situation that
12 may not have been all that easy for you to approach
13 that corporation where you didn't represent it. But
14 it has helped to clear the air on it and get rid of
15 the issue, and I appreciate it.

16 MR. CUNNINGHAM: Thank you, Your Honor.

17 JUDGE NELSON: I'm sure the Surface
18 Transportation Board would, too, if they --

19 (Laughter.)

20 Anything else we need to deal with today?

21 All right. Then I'll be available a week
22 from Wednesday, upon a call on Monday, to resolve any
23 further disputes that may be apparent by that time.

24 (Whereupon, at 4:46 p.m., the proceedings
25 in the above-entitled matter were concluded.)

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CERTIFICATE

This is to certify that the foregoing transcript in

the matter of: Discovery Conference:
 Union Pacific Corporation, et al.
 -Control and Merger-
 Southern Pacific Rail Corporation, et
 al.

Before: Interstate Commerce Commission
 Finance Docket No. 32760

Date: January 2, 1996

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.


