

INTERSTATE COMMERCE COMMISSION 04/19/96

FINANCE DOCKET # 32760

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1 willing to endeavor to find out what may exist that
2 there has got to be some obligation on the Applicants'
3 part to cut some of these requests --

4 JUDGE NELSON: I expect that.

5 MR. NORTON: Absolutely.

6 JUDGE NELSON: But I expect that I -- but
7 doesn't it make sense first for them to hear from you?

8 MR. PERGOLIZZI: It may.

9 JUDGE NELSON: And you then can make
10 suggestions as to the cuts?

11 MR. PERGOLIZZI: That's what we hope to
12 do, Your Honor. We're willing to try that.

13 JUDGE NELSON: In other words, put the
14 ball in their hands right now, TUE's hands, to see
15 what he can learn from the client, and as a result of
16 that make some suggestions about how to trim this.

17 Are you willing to take that off?

18 MR. PERGOLIZZI: No. I think, really, the
19 obligation to trim and narrow --

20 JUDGE NELSON: Would normally be in the
21 party seeking the discovery and --

22 MR. PERGOLIZZI: And I do think that we

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1 ought not to be --

2 JUDGE NELSON: I'm quite willing to put it
3 there if you want.

4 MR. PERGOLIZZI: Well, I think that's
5 where it should be. As I said, I've identified a
6 number of --

7 JUDGE NELSON: Then what should come
8 first, the trimming process, before you talk to the
9 client?

10 MR. PERGOLIZZI: I think it could go on
11 simultaneously. I can ask what's available. You can
12 trim. I've identified a few that I think are, in
13 fact, very burdensome.

14 JUDGE NELSON: So why don't you both
15 confer by phone at, say, 6:00 p.m. today, Eastern?
16 How would that be?

17 MR. NORTON: That's fine, Your Honor.

18 MR. PERGOLIZZI: I'm not sure that will be
19 possible for me, but I will try to work something out
20 with Mr. Norton on that.

21 MR. NORTON: We can do a better job of
22 trimming it if we know where it hurts.

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1 JUDGE NELSON: I just want to get this
2 process going.

3 MR. PERGOLIZZI: Well, Your Honor --

4 JUDGE NELSON: And not have it be Alfonse
5 and Gaston here. We've got to --

6 MR. PERGOLIZZI: Well, the process, with
7 all due respect --

8 JUDGE NELSON: Your suggestion is both
9 sides move along.

10 MR. PERGOLIZZI: With all due respect, the
11 process should have begun about two weeks ago.

12 JUDGE NELSON: I understand that position.
13 So what have we agreed upon? That the Applicants will
14 be conferring to see how they can trim these requests.

15 MR. NORTON: That's correct.

16 JUDGE NELSON: That the Respondent here,
17 the TUE Company, will be conferring with counsel to
18 see how the existing requests line up, what burdens
19 there are, what problems there are, and the counsel on
20 each side will be talking to each other before the day
21 ends. We've agreed on all of those things, correct,
22 to report their progress in each direction?

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1 MR. NORTON: That's correct.

2 JUDGE NELSON: What do you want to do
3 next?

4 MR. PERGOLIZZI: I think we should then
5 file our objections on Tuesday and take it from there.

6 MR. NORTON: Your Honor, I think if
7 they're going to object --

8 JUDGE NELSON: Let's move it up to Monday,
9 so we'll pick up that day at least. Is Mr. Dowd
10 available to help out on this?

11 MR. DOWD: Your Honor, I'm --

12 JUDGE NELSON: Or are you involved in the
13 deposition also?

14 MR. DOWD: No, I'm not involved in
15 Mr. Crowley's deposition. If I might offer the
16 suggestion, the Tuesday date is the date prescribed by
17 the discovery guidelines for TU to make its initial
18 responses, whether in the form of straightforward
19 objections, conditional objections, or statements of
20 what will be produced. I think --

21 JUDGE NELSON: The Applicants' problem is
22 that that is too late to do them any good.

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1 MR. DOWD: Well, Your Honor, with all due
2 respect, that's the Applicants' problem.

3 My suggestion is that since the Tuesday
4 date, under the guidelines, is an appropriate filing
5 date for TU, the response to these requests, that that
6 be used as the date on which TU can make, with a fair
7 amount of specificity, can explain to the Applicants
8 precisely what will be produced, what cannot be
9 produced, and when that will be produced.

10 That will give a reasonable amount of
11 time, as Mr. Pergolizzi explained, no one in that
12 utility is working on the weekend on this assignment.
13 So that would give a reasonable amount of time for
14 them to look at their files, for us to confer --

15 JUDGE NELSON: Suppose we added to that --

16 MR. DOWD: -- full information --

17 JUDGE NELSON: Suppose we added that we
18 have here in the room Tuesday, ready to turn over,
19 such documents as you can.

20 MR. PERGOLIZZI: Your Honor, we will turn
21 -- you won't have to -- if there are readily available
22 documents, it's going to be a small number. Most of

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1 what they have asked for is going to require a lot of
2 work, and we will not have them on Tuesday. I've done
3 enough of these requests for other utilities to know
4 that this is not information they can put their hands
5 on and have to us to produce on Tuesday.

6 I'd also add Tuesday is the right day,
7 because if they're going to reformulate and narrow any
8 of their requests, it makes no sense for us to propose
9 objections to questions they are going to drop.

10 JUDGE NELSON: Well, Mr. Norton himself
11 recognizes that he can't ask for the impossible. So
12 if they started working diligently today, and couldn't
13 conceivably have this stuff in your hands until it's
14 too late, what good does it do?

15 MR. NORTON: Absolutely, Your Honor. We
16 recognize that, and that's why we wanted to see what
17 is within the realm of the possible and the --

18 JUDGE NELSON: So that's the goal here is
19 what can we practically do?

20 MR. PERGOLIZZI: What we can do is I think
21 what has been done in a lot of people's responses.
22 When we respond on Tuesday, we will identify, you

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1 know, what documents are coming for which responses.
2 If we've got them, we'll get them up here.

3 JUDGE NELSON: What do we lose if we move
4 it up to Monday?

5 MR. PERGOLIZZI: Well, we lose the ability
6 to see the reformulated request, to the extent they're
7 going to make an effort to do that. And we really --

8 MR. DOWD: Your Honor, realistically, it's
9 now noon. It's almost noon today, and this is -- this
10 doesn't -- this gives us a few hours to see if we can
11 get them to --

12 JUDGE NELSON: So what you lose is --

13 MR. DOWD: What you lose is the practical
14 ability to get a useful answer, because you're -- the
15 work has to be done by individuals who are in the
16 business of making power, not in the business of doing
17 discovery. And those people, as a matter of practical
18 reality, are going to do this file search on Monday.
19 That's when they'll do it. And we'll get the
20 information from them --

21 JUDGE NELSON: Monday can also be a day
22 when you're on the phone with Mr. Norton and back and

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1 forth.

2 MR. PERGOLIZZI: I suspect --

3 JUDGE NELSON: You don't have to stop
4 talking to them today.

5 MR. PERGOLIZZI: I suspect that --

6 JUDGE NELSON: I would hope the
7 conversations would continue.

8 MR. PERGOLIZZI: I would think that would
9 be the more productive date and time.

10 MR. NORTON: And we will also be available
11 over the weekend.

12 JUDGE NELSON: Well, why don't we set up
13 Tuesday for -- off the record for a moment.

14 (Whereupon, the proceedings were off the
15 record, from 11:43 a.m. until 11:47 a.m.)

16 JUDGE NELSON: We have been discussing the
17 next procedural step, and we've agreed that we'll have
18 a discovery conference at 2:00 p.m. next Tuesday, and
19 the first item on the agenda will be Applicants' 12th
20 set of discovery requests, as directed to TUE.

21 We further understand that the Applicants
22 are going to work this afternoon to trim and focus the

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1 requests, that counsel for TUE will be in touch with
2 his client to try to see what kind of meaningful
3 responses can be made, and that we will work out some
4 universe of some kind of practical production by
5 2:00 p.m. next Tuesday.

6 And we'll convene to have a report on
7 that, if there need be. And if Mr. Norton is, at that
8 point, satisfied that all has been done that can be
9 done then you don't even need to come here. But I
10 will block out 2:00 p.m. next Tuesday and ask the
11 Reporter to advise his firm of that and we'll advise
12 the Board.

13 MR. PERGOLIZZI: Thank you.

14 MR. NORTON: Thank you, Your Honor.

15 JUDGE NELSON: I want to break now for
16 lunch, but I think I'd like to ask for the document so
17 that I could look at it -- from the KCS submission to
18 the Department, Ms. Metallo's document.

19 MR. MULLINS: Your Honor, if lunch is done
20 at 1:30, maybe we ought to give you -- I mean, I don't
21 know if -- I don't believe you'll be able to review
22 the document while you're at lunch.

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1 JUDGE NELSON: I don't intend to take it
2 there. I intend to take it up to my office and leave
3 it on the desk.

4 MR. MULLINS: I'm just trying to give you
5 time to --

6 JUDGE NELSON: Come back from lunch and go
7 to the office and look at it quickly.

8 MR. MULLINS: Right. Okay. You said
9 1:45. I wanted to make sure that was enough time for
10 you to --

11 JUDGE NELSON: Why don't -- instead of
12 giving it to me now, then, why don't -- if it's all
13 that sensitive, why don't you hold on to it, or you
14 can give it to Ms. Diciano.

15 MR. NORTON: Well, I think he was just
16 raising a question about the schedule, not the --

17 MR. MULLINS: Yeah, I was just trying to
18 make sure that you had enough time to go to your
19 lunch, get -- read the document, and come back by --

20 JUDGE NELSON: Why don't you give it to
21 Ms. Diciano, and then as soon as I need to look at it
22 I know where it is.

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1 MR. MULLINS: Fine.

2 JUDGE NELSON: And I will look at it at
3 the first available opportunity, and then we'll
4 reconvene.

5 Is there anything else left now?

6 MR. NORTON: I think not that we can
7 resolve in --

8 JUDGE NELSON: Mr. Billiel has something?

9 MR. NORTON: -- in 10 minutes.

10 JUDGE NELSON: No, I mean, for this
11 afternoon. What else is on the agenda?

12 MR. NORTON: The questions about the
13 Justice --

14 JUDGE NELSON: Oh, some Justice Department
15 work papers.

16 MR. NORTON: Right.

17 JUDGE NELSON: So Mr. Billiel will be here
18 anyway. I was going to ask you to stick around for
19 this -- Ms. Metallo's document dispute, but you'll be
20 here anyway.

21 All right. So we have the two things,
22 then. We have the document dealing with alleged

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1 collusion, and we have some Justice Department work
2 papers. And the document in question is now going to
3 be -- who has it now?

4 MS. METALLO: I have it.

5 JUDGE NELSON: Will you hand it now to
6 Ms. Diciano and we'll put on the record that you're
7 giving it to her?

8 MS. METALLO: Okay.

9 JUDGE NELSON: All right. I can see that
10 the document has been handed to my clerk, and she will
11 take possession of it and I will take a break for
12 lunch, look at it as soon as I can, and then
13 reconvene.

14 MR. MULLINS: What time, Your Honor?

15 JUDGE NELSON: Let's say --

16 MS. METALLO: Do you want to look at --

17 JUDGE NELSON: Off the record.

18 (Whereupon, off the record briefly.)

19 JUDGE NELSON: Let's convene at 2:00, and
20 we'll take a lunch break now.

21 (Whereupon, at 11:51 a.m., the discovery
22 conference recessed for lunch.)

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A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(2:25 a.m.)

JUDGE NELSON: I've reviewed the in camera submission, and I can give you my tentative thoughts about it, at least as a legal matter, and then I may have some questions about it.

It is unquestionably an illustration of people petitioning government for redress of grievances. It seems to me classically that. It also seems to me work-product, in the sense that it's obviously done by lawyers. It even says it is, and it is prepared for litigation, obviously.

It is also the kind of thing that if I were in the Anti-Trust Division of the Justice Department I'd want people to feel free that they could have a privilege to come in and tell me about it, and it wouldn't be released unless there were agreement or it got used in a case.

So I think it's a legal matter. It unquestionably falls within the protection of those three doctrines. So what to do about it?

That kicks it over, then, into the

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1 qualified privilege area. What I thought I'd try to
2 do, Ms. Metallo, was to see first of all -- as you
3 know from previous experiences, I like to try to have
4 the other side have some idea of what we're looking
5 at, as long as I can do so safely without breaching
6 privileges, and so forth.

7 And it may be that if they care there are
8 some portions in here that we could cut loose. So
9 let's look at it jointly here. Incidentally, it does
10 not say on it the name of whoever this person was,
11 Assistant Attorney General. There is no such name in
12 these papers. The papers are obviously written to the
13 Anti-Trust Division, but there is no whatever her name
14 was, Assistant Attorney General, mentioned here that
15 I saw.

16 There is a page called Summary. We can
17 certainly say that. And then there's a section -- can
18 I give the title that appears at the top of page 2?

19 MS. METALLO: Your Honor?

20 JUDGE NELSON: Do I have your only copy?

21 MS. METALLO: That's my only copy.

22 JUDGE NELSON: Oh, my goodness. How about

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1 Mr. Billiel? Do you have a copy?

2 MR. BILLIEL: I don't have a copy, Your
3 Honor.

4 JUDGE NELSON: Well, how are we going to
5 do this? I don't want to make a xerox. What I
6 propose to do is to tell them generally what's in here
7 by giving the titles. See the Roman numerals? I
8 think you'll have no problem with Roman 1, 2, 3, 4.
9 You might have problems with Roman 5. You should have
10 no problems with Roman 6. Let's see what we can do in
11 terms of disclosure of the Roman numerals, so they'll
12 get an idea of the organization of what we've got in
13 these. Just those bold face --

14 For the record, Mr. Billiel is up here
15 examining the document with Ms. Metallo and going
16 through it.

17 MS. METALLO: We have no concerns on
18 Romans 1, 2, 3, 4, and 5.

19 JUDGE NELSON: Well, you're right where I
20 was, then, so let's tell them what they are. I want
21 you to get a feeling for this as much as we can
22 fairly, Mr. Norton, so if we protect it -- and I'm

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1 sure we'll protect some chunks of it, if not all of it
2 -- I don't want you to have a feeling that you're in
3 a knife fight in the dark here.

4 MR. NORTON: We appreciate that, Your
5 Honor.

6 JUDGE NELSON: The first section is called
7 Summary. The second is called Facts. The third is
8 entitled -- may I read the -- STB's Railroad Merger
9 Review Authority is Limited to Considering the
10 Competitive Effects of a Merger. Roman 4 is entitled
11 STB Authority to Approve Railroad Mergers Which are
12 Pro-Competitive Does Not Extend to Immunizing
13 Concerted Conduct in Violation of Sections 1 and 2 of
14 the Sherman Act.

15 MR. NORTON: Could I have that --

16 JUDGE NELSON: STB Authority to Approve
17 Railroad Mergers Which are Pro-Competitive Does Not
18 Extend to Immunizing Concerted Conduct in Violation of
19 Sections 1 and 2 of the Sherman Act.

20 I'd like to describe, in general terms,
21 the things that are referred to in that section
22 without disclosing any of the content of the section.

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1 Can I do that?

2 MS. METALLO: There are some --

3 JUDGE NELSON: For example, come up and
4 I'll point to things.

5 MS. METALLO: Okay.

6 JUDGE NELSON: That section contains a
7 number of citations to authorities -- cases, ICC
8 opinions. It is, in essence, a section of legal
9 argument.

10 Section V, there is objection to
11 disclosing its title, and for the moment I am going to
12 honor that. Section VI is entitled Conclusion. The
13 whole business is 11 pages.

14 There are attached three exhibits. The
15 first exhibit I -- can you help me --

16 MS. METALLO: Yes, Your Honor.

17 JUDGE NELSON: -- discuss that at all? I
18 didn't know what that was or where it fit or where it
19 was cited.

20 MS. METALLO: I believe the first two
21 exhibits are now documents that are on the record here
22 and --

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1 JUDGE NELSON: Very good. This one we
2 certainly know what it is.

3 MS. METALLO: Right.

4 JUDGE NELSON: We've seen that many times.
5 So may I refer to this as --

6 MS. METALLO: Yes, it's already on the
7 record.

8 JUDGE NELSON: Exhibit 1 to the submission
9 here is a memorandum dated October 11, 1995, from
10 Mr. W.W. Graham to M.S. Bueller on the subject of
11 UP/SP-Geneva Steel. That's the first I've seen of it.

12 Exhibit 2 is an old draft. It is the call
13 report from Mr. Skinner dated -- the copy is kind of
14 blurred here -- October 5, 1990 --

15 MS. METALLO: '95, I believe.

16 JUDGE NELSON: -- '95. And it is just the
17 one we know, nothing gimmicked up about it. It's got
18 the same deletions, and it's just simply a xeroxed
19 copy of the one we've worked with frequently in this
20 case. There's nothing secretive about that.

21 Number 3 is a list-like summary of some of
22 the factual points that the submitters wanted to make,

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1 and it seems to me protectable material. It hasn't in
2 it anything that isn't in the fact portion.

3 The fact portion contains -- may I make a
4 comment on the apparent relationship of the fact
5 portion to the KCS public filing? It appears to
6 parallel this public filing, specifically pages 73
7 through I guess it would be 78.

8 Now, I haven't read every line and every
9 word of both of the documents with eagles' eyes here
10 -- I could spend a couple of hours doing that -- but
11 I see enough to tell you, Mr. Norton, that the essence
12 of the factual allegations that appears in the public
13 pages of the KCS submissions is spread out in the
14 factual pages of the submission in question.

15 I think it is fair to say that every
16 factual claim in the KCS submission finds a
17 correspondingly similar factual allegation in the
18 submission in question.

19 The level of detail is somewhat greater in
20 the protected submission, but I, in my reading, did
21 not encounter dramatic or overwhelming differences in
22 the fact. One is more detailed than the other, but I

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1 didn't see that much difference. Now, that's the
2 problem with in camera inspection. You might go over
3 there and tell me there's 32 differences, and they are
4 all critically important, but I have to do the best I
5 can with what I have.

6 MR. NORTON: No, I understand, Your Honor.

7 JUDGE NELSON: Which is my reading of both
8 documents.

9 MR. NORTON: It would be helpful, I think,
10 if we could cover the pages, how many pages each of
11 these --

12 JUDGE NELSON: With respect to the facts,
13 may I reveal that? The first half of the facts -- the
14 first half of the first page really is a description
15 of the -- may I -- take a look at page 2, or come up
16 here if you would. I wanted to describe what these
17 two paragraphs are, which is before we get here.

18 MS. METALLO: Yes, that's fine.

19 JUDGE NELSON: Any problems with this?

20 MS. METALLO: No.

21 JUDGE NELSON: The first half of the first
22 page is factual only in the sense that it describes

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1 two proceedings, two mergers. One is the BN/Santa Fe,
2 already approved, and the other is the Union
3 Pacific/Southern Pacific, which is this case, for
4 which application has been sought.

5 Then come, let's see, the equivalent of
6 five pages of fact presented -- may I describe the way
7 in which the material is set out? Chronologically.
8 May I describe the time periods in which the material
9 is set out? I'll show you to refresh your
10 recollection.

11 MS. METALLO: I think --

12 JUDGE NELSON: If you think this is
13 significant, there are this and this. Well, if you
14 object to it -- this one and this one.

15 MS. METALLO: I'd rather not.

16 JUDGE NELSON: All right. Chronological
17 order, we have roughly five pages. So that you're not
18 deceived, these are not full pages. We're dealing
19 with bullets, indented items, sometimes one- and two-
20 line items. So that -- what did I say? Five pages?
21 Sounds like more than it is because of the typography
22 chosen.

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1 MR. NORTON: I understand.

2 JUDGE NELSON: Well, that's it as to the
3 facts, and they are facts that, as I say, include all
4 of the things that are mentioned in the public file.

5 Because of the level of detail, I would
6 guess that there are other things in here, too, but
7 they don't seem to have made their way into the public
8 filing, whatever they are. They are certainly not in
9 the Department of Justice's filing, which I've again
10 examined closely.

11 Topic 3, the title of which we told you,
12 I think we described as legal argument with
13 authorities, and so forth. Title 4 is similarly
14 structured, with cases, authorities, and so forth.
15 Title 5, which they want protected, is less than one
16 page worth, half of which appears to be a citation to
17 remarks in the public record. See if we can't cut
18 this part loose.

19 Isn't this all public, too?

20 MS. METALLO: It is public.

21 JUDGE NELSON: Any problems with that?

22 MS. METALLO: It is work --

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1 JUDGE NELSON: It is work-product, I know
2 that.

3 MS. METALLO: -- product.

4 JUDGE NELSON: But we are in a qualified
5 privilege, and, I mean, I can't find any overwhelming
6 need for this. But what I can find is it seems to me
7 to do little harm to the work-product concept --

8 MS. METALLO: Well, Your Honor --

9 JUDGE NELSON: -- and yet serve the public
10 interest by disclosing. The more we have public and
11 the less secret, the better, as a general rule.

12 MS. METALLO: My response is assume for a
13 second that we are going to proceed with perhaps
14 private litigation. The obvious point is getting the
15 opportunity to give advance notice --

16 JUDGE NELSON: I see your point. I see
17 your point.

18 MS. METALLO: -- work-product.

19 JUDGE NELSON: Half of the -- I'll respect
20 that. Half of topic 5 is material which appears to be
21 drawn from public sources, public remarks, and so
22 forth, but which if taken out does reveal work-

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1 product. It reveals selection, research, thinking,
2 and so forth, and I will protect it.

3 The conclusion I think is legitimately
4 protected. It is the point of the submission and the
5 point of people's right to petition the government for
6 redress of grievances, to go talk to the Anti-Trust
7 Division, and my leaning is to protect that.

8 My overall feeling about the entire
9 document, Mr. Norton, is that at best it contains
10 nothing exonerating. That is, this is not Brady-type
11 material which if you saw you could help prove what a
12 terrific merger you've got there. There's no smoking
13 gun.

14 MR. STEEL: No wonder they're fighting so
15 hard.

16 (Laughter.)

17 JUDGE NELSON: -- that nature in there.
18 If anything, the claims are, as I say, repetitive of
19 the public position, and then even more so. So, if
20 anything, they've argued more strenuously in these
21 papers than they do in the public filing.

22 I don't really know what great purpose you

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1 could make of it. I've been trying to think and
2 there's nothing in here that's going to be the key to
3 success, it seems to me, in the case. It is true that
4 whatever the submission says I find almost none of it
5 in the Justice Department filing.

6 So from the face of things we can't even
7 say that within the four corners of the documents it
8 had a great influence. Now, who knows? I mean, maybe
9 in the mind of the reader it left an influence, but
10 the Department says what it says, and it really
11 doesn't say the things that this submission is saying.

12 Mr. Billiel, is there any place I should
13 be looking that I'm not seeing in your submission?
14 I've gone through the entire -- what do we have here?
15 12 pages. Well, up through the conclusion, 12 pages,
16 but reserving final judgment. Am I missing something
17 here?

18 MR. BILLIEL: Well, to be clear, that's
19 not our entire filing. We also had some --

20 JUDGE NELSON: The same statements that
21 are referred to in this filing.

22 MR. BILLIEL: Yes.

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1 JUDGE NELSON: Yeah. Well, I've not read
2 them, but I take your word for what they say.

3 MR. BILLIEL: Likewise, verified
4 statements that --

5 JUDGE NELSON: The discussion is about the
6 diminution of competition, the concern about it, the
7 extent to which it would or would not be remedied by
8 the BN/SF conditions, the extent to which the merits
9 are overstated allegedly, and the extent to which the
10 SP is not in as bad a shape as some people think it
11 is. That's what I'm getting out of this.

12 There is no quotation from the KCS
13 submission. There is no reference to it, directly or
14 indirectly, or any of its factual aspects, or even
15 legal aspects. The Department appears to have done
16 its own legal work here. It's not cut and paste.
17 It's something from somebody that came in.

18 So having told you what I can tell you
19 about it, I am of the view that that's about that,
20 that I'm going to otherwise protect it. And I'm
21 certainly --

22 MR. NORTON: If you give us a moment just

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1 to confer --

2 JUDGE NELSON: Of course.

3 MR. STEEL: Your Honor, if we could just
4 make a few thoughts about it, then perhaps it may be
5 acceptable. Several times the government has referred
6 to the Rovario (sic) privilege, and during lunch I
7 went and got a copy of the case, and I'll hand one
8 to --

9 JUDGE NELSON: Roviaro.

10 MR. STEEL: Roviaro, sorry. And one to
11 you.

12 JUDGE NELSON: I was around in those days.

13 MR. STEEL: It's highlighted. It says
14 that once the identity of the informant is disclosed,
15 then the contents aren't protected any further. And
16 it's the government's privilege mainly that -- to
17 protect and not -- and not theirs. I'm not saying
18 that we don't need to read the -- get to the qualified
19 balancing that you're getting to, but there is no
20 absolute privilege here. And I'll --

21 JUDGE NELSON: I'm not finding an absolute
22 privilege.

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1 MR. STEEL: I understand that.

2 JUDGE NELSON: Oh.

3 MR. STEEL: I understand that. That's
4 where we're starting.

5 MS. METALLO: My claim for privilege is
6 not grounded on this. My claim is grounded in the
7 work-product privilege.

8 MR. STEEL: How can one have a work-
9 product privilege with the Department of Justice?
10 That doesn't seem possible.

11 MS. METALLO: United States versus AT&T.
12 Would you like --

13 JUDGE NELSON: She's prepared the papers
14 in anticipation of litigation. Period. It's
15 certainly work-product.

16 MR. STEEL: A joint privilege with the
17 government --

18 JUDGE NELSON: Ms. Metallo, I've already
19 found. You don't have to argue with him. Let's move
20 along. If you keep talking you'll talk me out of it.
21 I'm with you on the notion that the entire thing is
22 fairly covered by the work-product privilege. The

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1 question is whether the balancing of circumstances,
2 which is necessary for work-product, requires
3 production or not. So far, I'm finding it does not.

4 MR. STEEL: Several of the allegations, if
5 you have read their allegations in the petition --
6 sorry, in the comments, I apologize -- allege that
7 Santa Fe, Burlington Northern, UP, or SP have engaged
8 in a variety of activities that you say -- you
9 represent are basically the same activities that they
10 have described in this document.

11 And then, the conclusion, you heard
12 Mr. Mullins argue this morning, is they want to
13 argue --

14 JUDGE NELSON: Well, at least some. I
15 told you there is more detail in the document, and it
16 may well be seen as making ten claims instead of
17 seven, or --

18 MR. STEEL: Well, what's important --

19 JUDGE NELSON: If you want me to take that
20 time, I'd have to go through --

21 MR. STEEL: What's important to us is
22 that --

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1 JUDGE NELSON: -- word by word and line by
2 line, and I'll do that if it becomes necessary.

3 MR. STEEL: What's important to us is that
4 we know what the grounds of the claims are. If there
5 are seven, and it's the same seven, then that's fine
6 because we can rely on the comments to do it. But
7 Mr. Mullins said this morning they were going to
8 argue, and I would assume in a brief, that the STB
9 should not allow anti-trust immunity to go to the
10 aspects of the BN/Santa Fe settlement agreement. And
11 that's something we otherwise have a right to get
12 under the statute.

13 And they have made this relevant. It
14 wasn't DOJ's brief or comments that made this
15 relevant. It's KCS who has made this very relevant to
16 all four of our companies. And it's a little unfair
17 for them to do that.

18 JUDGE NELSON: Well, let's stop for a
19 moment. You're asking me, then -- your concern is the
20 question of anti-trust immunity as it affects the
21 BN/Santa Fe agreement, and so the question is what, if
22 anything, is in here about that. We'll take a look.

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1 MR. STEEL: I understand them to be using
2 this material for two purposes. One is to convince
3 the STB that this is not -- the trackage rights
4 agreement is not a proper and viable competitive --

5 JUDGE NELSON: Nothing on this document
6 shows that it went to the STB. It appears --

7 MR. STEEL: No, no, no. We're asking the
8 STB in our proceeding where the relevancy is is what
9 this --

10 JUDGE NELSON: Well, we're talking now
11 about the Justice Department document, and I gather
12 your concern is about what they say about the anti-
13 trust immunity as it affects the BN/Santa Fe
14 agreement. So I want to take a moment to look in here
15 and see what, if anything, there is about that
16 particular point.

17 By that, we mean the trackage rights
18 agreement --

19 MR. STEEL: Yes, Your Honor.

20 JUDGE NELSON: -- we're talking about in
21 this case.

22 MR. STEEL: And I thought that was one of

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1 the headings that you read to us was exactly that
2 statement.

3 JUDGE NELSON: Well, let me get there.

4 MR. STEEL: I thought it was maybe 4?

5 JUDGE NELSON: Well, we don't just jump
6 there. We've got to start with page 1, if you want me
7 to do a slow, careful job here.

8 MR. STEEL: I apologize.

9 JUDGE NELSON: I can tell you with
10 confidence, and then I'm going to ask Ms. Metallo and
11 Mr. Billiel to corroborate this in case I've missed
12 the subtlety, that neither the summary nor the
13 conclusion even mentions the BN/Santa Fe trackage
14 rights agreement with UP and SP. And I'll ask counsel
15 to take a look at this and see if I'm right. I looked
16 at the summary, and I looked at the conclusions.

17 There is this generalized reference, but
18 I don't see any particularized reference. Yeah, I
19 looked at those two things.

20 MS. METALLO: Right. That's right.

21 JUDGE NELSON: You know that's right.

22 MS. METALLO: Right. I know that's right.

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1 JUDGE NELSON: You're the primary author?
2 Your name is last. That usually means you did the
3 work.

4 They corroborate that I'm right on that.
5 So that's the first thing to say.

6 So if some quick and busy person in the
7 Department of Justice chooses to read only the
8 summary, which is what very often happens in the
9 bureaucracy, that reader isn't even going to know that
10 there's a BN/SF agreement with UP and SP that has to
11 do with this case. It isn't there. Now, let's move
12 on.

13 I told you that the factual portion
14 contains descriptions of the two proceedings?

15 MR. STEEL: Yes, sir.

16 JUDGE NELSON: Under the Union Pacific/
17 Southern Pacific proceeding there is no reference to
18 the agreement.

19 MR. STEEL: No, sir.

20 JUDGE NELSON: Now, I'm going to skip all
21 of this factual stuff, because that isn't what you're
22 really concerned with.

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1 MR. STEEL: The --

2 JUDGE NELSON: You're concerned about
3 anti-trust immunity.

4 MR. STEEL: The only reference -- well,
5 they use in their comments, and you read them this
6 morning I believe, this alleged improper activity for
7 two purposes. One is to argue to the STB that the
8 merger, as conditioned, shouldn't be approved because
9 perhaps our past conduct would show we wouldn't
10 compete in the future. That's one aspect. And on
11 page 81, they make this argument about that they
12 should not immunize the anti-trust laws.

13 But if you told us that the factual
14 allegations in the submission are the same, and there
15 are no new basic allegations --

16 JUDGE NELSON: No, sir, I cannot tell you
17 that.

18 MR. STEEL: You can't tell me --

19 JUDGE NELSON: I can tell you there's more
20 detail.

21 MR. STEEL: That's what is important to
22 us, because the Department of Justice still has

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1 another filing to make. So we don't know what they're
2 filing on June -- on April 29th. They could still
3 pick up on one of those facts, after seeing everything
4 else, and say something about it, and we'd be
5 precluded from doing much about it at that point.

6 JUDGE NELSON: And when will that filing
7 be made?

8 MR. STEEL: April 29th. Assuming they
9 don't prevail, April 29th.

10 MR. NORTON: Well, maybe they don't intend
11 to file.

12 MR. STEEL: Or maybe you don't intend to
13 file. That's --

14 MR. BILLIEL: I don't think we can.

15 MR. STEEL: Well, you're a lot of help.

16 (Laughter.)

17 MR. BILLIEL: The only other thing we're
18 planning on filing is our brief.

19 MR. STEEL: But as I understood what your
20 characterization is it's that everything that's in the
21 public thing that we've seen is also in there. But
22 you're not able to confirm that there is not some

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1 other allegation in there, but you --

2 JUDGE NELSON: I'm telling you with my
3 naked eye --

4 MR. STEEL: -- any major --

5 JUDGE NELSON: -- that there is more
6 detail alleged in the protected submission than there
7 is revealed in the public submission. Whether all of
8 that detail doesn't boil down to the same thing, I
9 don't know yet. It would take me several hours to
10 sort that all out.

11 MR. STEEL: Well, that is --

12 JUDGE NELSON: Well, I see your problem.

13 MR. STEEL: And that particular
14 instance --

15 JUDGE NELSON: Mr. Steel has the problem
16 that he may get sandbagged yet, without the
17 opportunity to ever answer, something that he has
18 never seen and sees for the first time in some public
19 submission, or is influencing a public submission.
20 What can we do about that procedurally, Mr. Billiel?

21 MR. BILLIEL: Well, Your Honor, first of
22 all, I would say we have already -- we have filed all

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1 of the evidence we're going to file. The only --
2 under the procedural schedule, the only other thing
3 the Department has is its brief.

4 And so far, unless, you know, KCS or
5 somebody else puts it there and, you know, SP or BN,
6 anyone who still has to file evidence puts something
7 in, the only conspiracy evidence the Department has to
8 cite is what's in the KCS --

9 JUDGE NELSON: Is what's already in.

10 MR. BILLIEL: Right.

11 JUDGE NELSON: The Department represents
12 that its brief -- the factual aspects of its brief --
13 will be limited, as it must be, to the record already
14 made. Is that correct?

15 MR. BILLIEL: Together with what the
16 Applicants and others have yet to file. The
17 Department --

18 JUDGE NELSON: Suppose we put it this way.
19 Can you make a representation that any factual
20 allegations in the protected submission that have not
21 already become public will not be any part of your
22 brief?

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1 MR. BILLIEL: Yes, I can.

2 JUDGE NELSON: Does that help?

3 MR. STEEL: That would help. And if KCS,
4 assuming there's a fact --

5 JUDGE NELSON: In other words, Mr.
6 Billiel --

7 MR. STEEL: -- that we don't know about.

8 JUDGE NELSON: -- the BN, the UP and SP,
9 are not going to have to meet anything factually that
10 they don't now know.

11 MR. BILLIEL: From that document.

12 JUDGE NELSON: With respect to the
13 protected submission.

14 MR. BILLIEL: That's what the Department's
15 concern is. That's correct.

16 JUDGE NELSON: Fine.

17 MR. STEEL: And we won't see anything from
18 KCS either of that nature.

19 MS. METALLO: Well, with the exception
20 that if new facts come to our attention, we'll use
21 them.

22 MR. STEEL: Well, it won't have been in

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1 that submission.

2 JUDGE NELSON: New facts, by definition,
3 wouldn't be those in the protected submission. If you
4 subsequently discover a memorandum that says, "Let's
5 divide the market" --

6 MS. METALLO: Well, we tried to get that
7 one, Your Honor, but they objected.

8 (Inter.)

9 JUDGE NELSON: I really never saw that
10 one.

11 MS. METALLO: He said he wouldn't allow us
12 to ask for it.

13 JUDGE NELSON: Well, I think we have a
14 representation that the brief will be based on the
15 record already made, the factual allegations already
16 revealed, and that any allegations in the protected
17 submission that have not already been revealed will
18 not be in the Department of Justice's brief.

19 MR. STEEL: Or argued in advance by KCS.

20 JUDGE NELSON: KCS?

21 MS. METALLO: That would not preclude us
22 from continuing to argue what we've already got in our

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1 public -- in our brief.

2 MR. STEEL: That's correct. Right. The
3 comments. You could argue that all you wanted to.

4 JUDGE NELSON: Fine.

5 MR. STEEL: Those factual episodes.

6 JUDGE NELSON: So that no one is going to
7 be sandbagged by something that's in the protected
8 submission that has yet to see the public eye.

9 MS. METALLO: And --

10 JUDGE NELSON: Is that right?

11 MS. METALLO: Yes. And this ruling has
12 nothing to do with any proceedings unrelated to this
13 specific proceeding.

14 JUDGE NELSON: No, we're dealing only with
15 this proceeding.

16 MR. STEEL: Right. We'll deal with that
17 when we have to deal with this, right.

18 JUDGE NELSON: Any other comments or
19 questions about this submission?

20 MR. STEEL: Let us talk for just a second
21 and --

22 JUDGE NELSON: Yes. Take some time. Do

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1 you want me to go back up to the office?

2 MR. STEEL: No, it will take just a
3 second.

4 JUDGE NELSON: We're off the record.

5 (Whereupon, the proceedings were off the
6 record from 2:59 p.m. until 3:02 p.m.)

7 JUDGE NELSON: While Ms. Metallo and
8 Mr. Steel are on the phone, talking with respective
9 clients I assume, we're going to take up another loose
10 end here with the Department of Justice. What is this
11 particular problem, Mr. Norton?

12 MR. NORTON: Your Honor, this relates to
13 the -- the government's evidence included a verified
14 statement from Mr. Majure, which was in --

15 JUDGE NELSON: Major (phonetic)?

16 MR. NORTON: M-A-J-U-R-E.

17 JUDGE NELSON: Oh, I saw his name.

18 MR. NORTON: Yeah.

19 JUDGE NELSON: I read it as Muhjure
20 (phonetic).

21 MR. NORTON: Yeah.

22 JUDGE NELSON: Major (phonetic)?

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1 MR. NORTON: Yeah. And it is based, in
2 part, upon analysis and the conclusions he draws from
3 certain information provided by shippers, some of whom
4 he interviewed and some of whom he did not himself
5 interview, but he reviewed the fruits of interviewing.

6 The problems that we're addressing arise
7 because when we go to the backup papers for the
8 surveys that underlie his submission, there are a
9 number of gaps and problems that we can't sort out
10 that would permit us to examine, to verify/confirm his
11 characterization in getting ready for his deposition
12 next week.

13 And we've raised these questions with
14 Mr. Billiel, and he has said he has produced all he
15 thinks he has to produce in this respect. So that's
16 the basic picture.

17 Now, what I'd like to do, I have a
18 collection of -- well, the Majure statement, I think
19 it's actually just certain excerpts from it, an
20 excerpt from a -- what is referred to as a matrix
21 which summarizes -- purports to summarize the
22 interviews and surveys, not all of them, some of them.

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1 And then some documents which reflect the
2 surveys themselves and the questionnaires that were
3 used by the interviewers in developing this
4 information. And I think when we have this it will be
5 helpful when I address the problems.

6 Now, Mr. Majure indicates in his statement
7 at page 3 --

8 JUDGE NELSON: I have that here. That's
9 the --

10 MR. NORTON: Yes, at 3, at the top of the
11 page, that he spoke directly with over 40 shippers or
12 associations of shippers. It also examined reports of
13 interviews with over 300 additional shippers who were
14 interviewed under my direction.

15 And then at various places in the -- in
16 his statement he discusses information that was
17 provided, as he says, for example, on page 26,
18 "According to shippers I interviewed," and then he
19 goes on to discuss trackage rights in Amarillo. This
20 is in the second full paragraph on page 26.
21 Elsewhere, there are a number of generalizations and
22 statements made, for example, on pages 39 and 40, 41,

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1 about shippers' perceptions and information provided
2 by shippers.

3 JUDGE NELSON: Right.

4 MR. NORTON: For the moment, we don't have
5 to get into the particulars as --

6 JUDGE NELSON: So he speaks with 40
7 shippers. He examines reports of interviews with 300
8 additional shippers. And he refers to shipper
9 problems.

10 MR. NORTON: That's correct.

11 JUDGE NELSON: Right?

12 MR. NORTON: And he makes a lot of
13 generalized statements and characterizations of
14 information provided by shippers.

15 JUDGE NELSON: Fine. Now, what is it you
16 want?

17 MR. NORTON: Well, the underlying papers
18 that were produced don't identify the 40 or the 300,
19 for one. We don't have a list to figure out who the
20 base is that we're dealing with. In addition, the
21 matrix that -- the sample that is provided at Tab B,
22 which I guess is -- this is just a couple of pages out

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1 of a much longer document -- that refers to only about
2 175 out of the additional 300 shippers that he
3 referred to who he did not directly interview.

4 JUDGE NELSON: I don't follow this. I'm
5 looking at Tab B.

6 MR. NORTON: Right.

7 JUDGE NELSON: And I see two pages.

8 MR. NORTON: This is two out of -- these
9 are two excerpts out of a longer document.

10 JUDGE NELSON: Are these Justice documents
11 or railroad documents?

12 MR. NORTON: Yes, these are Justice
13 documents.

14 JUDGE NELSON: All right. And he has
15 given you these two pages.

16 MR. NORTON: No, he has given us a longer
17 document. I just have two here as a sample.

18 JUDGE NELSON: All right.

19 MR. NORTON: Which I'll come back to in a
20 moment. But this is just to give you the flavor of
21 what we're dealing with.

22 JUDGE NELSON: Okay. You have all of the

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1 pages, whatever they are.

2 MR. NORTON: We have all of the pages.
3 That's not the problem.

4 JUDGE NELSON: Now, are these supposed to
5 be the companies that were interviewed, or about whom
6 the reports come?

7 MR. NORTON: Well, this -- these are
8 supposed to describe --

9 JUDGE NELSON: Some are in capitals and
10 some aren't.

11 MR. NORTON: Yeah, I don't know any rhyme
12 or reason for that. But that's not our immediate
13 problem.

14 We have been provided with survey forms --
15 and let me get to the survey forms. If you turn to
16 Tab C --

17 JUDGE NELSON: Yes.

18 MR. NORTON: -- you'll find the first
19 verified statement, which goes on for --

20 JUDGE NELSON: Of some shipper, I guess.

21 MR. NORTON: Yes.

22 JUDGE NELSON: Gifford-Hill Company.

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1 MR. NORTON: Three pages.

2 JUDGE NELSON: All right.

3 MR. NORTON: That's followed by a shipper
4 information master form, which is the survey interview
5 or questionnaire form. And then, Tab D -- that's for
6 Gifford-Hill Company, and that's --

7 JUDGE NELSON: So this would be one of the
8 40 people the witness talked to or --

9 MR. NORTON: Well, that's not --

10 JUDGE NELSON: -- one of the other 300?

11 MR. NORTON: That's what is not clear.

12 JUDGE NELSON: Not clear.

13 MR. NORTON: And then, if you turn to
14 Tab D, there's another --

15 JUDGE NELSON: How did you get this form?

16 MR. NORTON: This was produced -- made
17 available to us as part of the backup for his
18 statement, part of the work papers.

19 JUDGE NELSON: Well, how many are there
20 like this that were turned over?

21 MR. NORTON: There --

22 JUDGE NELSON: Like Tab C.

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1 MR. NORTON: -- are about 50 out of -- on
2 the matrix reflected at Tab B, there are about 175
3 companies out of the 340 total that are discussed in
4 the matrix. But we only got the underlying survey --

5 JUDGE NELSON: Let's see, we start out
6 with 40 interviews, and then 300 reports of
7 interviews.

8 MR. NORTON: Right.

9 JUDGE NELSON: Then we have the so-called
10 matrix for how many people?

11 MR. NORTON: About 175.

12 JUDGE NELSON: And then we have individual
13 verified statements of how many?

14 MR. NORTON: Well, no, the individual
15 verified statement --

16 JUDGE NELSON: Like Cody Miller.

17 MR. NORTON: Yeah.

18 JUDGE NELSON: How many Cody Millers are
19 there in the case?

20 MR. BILLIEL: That was actually from the
21 application.

22 MR. NORTON: Yeah, that's from the

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1 application.

2 JUDGE NELSON: That's the application.

3 MR. NORTON: Yeah. So that -- it's the
4 form following the --

5 JUDGE NELSON: Cody Miller is your
6 witness.

7 MR. NORTON: It's the form following his
8 verified statement that I'm referring to.

9 JUDGE NELSON: All right. We have a form.

10 MR. NORTON: Right.

11 JUDGE NELSON: And how many such forms do
12 we have?

13 MR. NORTON: About 50 for the 175 people
14 in the matrix.

15 JUDGE NELSON: And we don't know whether
16 those 50 include 40 who were interviewed or in the
17 other 300.

18 MR. NORTON: Right.

19 JUDGE NELSON: Or what they had to do with
20 Dr. Majure.

21 MR. NORTON: Right.

22 JUDGE NELSON: All right.

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1 MR. NORTON: And we have concerns about
2 having to rely on the description of the summary in
3 the matrix, because in the cases where we've been able
4 to look at the underlying survey reported, compared
5 with the matrix there are some significant
6 differences. And that's what I wanted to draw your
7 attention to -- the two examples.

8 Let's say, the Gifford-Hill, which is
9 Tab C --

10 JUDGE NELSON: Yes. We also have the
11 matrix for Gifford-Hill.

12 MR. NORTON: Yes, right. Let's go to the
13 matrix first, and there's a statement there in the box
14 with -- about view of transaction, the last sentence
15 says, "Doesn't think BN/SF will be compet." It looks
16 like competitive with its trackage rights" is what
17 they are abbreviating.

18 JUDGE NELSON: Yes?

19 MR. NORTON: And if we look in the
20 survey --

21 JUDGE NELSON: At the form?

22 MR. NORTON: On page 4, it says at the

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1 bottom the following -- yeah, that would be Bates
2 Number 1631.

3 JUDGE NELSON: I have it.

4 MR. NORTON: Okay. And on the last entry,
5 after the last typed entry -- and I believe what it
6 says, if we're read the handwriting correctly, is
7 "Biggest concern, BN/SF-UP/SP agreement was never made
8 public. Will BN/SF" --

9 JUDGE NELSON: See what happens with
10 secrecy?

11 (Laughter.)

12 All right. Now it is public.

13 MR. NORTON: It was public a long time
14 ago. It was public when the statement was made.

15 JUDGE NELSON: Well, this fellow didn't
16 know that.

17 MR. NORTON: Well, that's the point.

18 JUDGE NELSON: So if people think things
19 are secret, they suspect.

20 MR. NORTON: Well --

21 JUDGE NELSON: Now, you can go tell those
22 people, "Well, they are public."

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1 MR. NORTON: But if we go on --

2 JUDGE NELSON: And then you see what
3 happens.

4 MR. NORTON: The characterization --

5 JUDGE NELSON: But there are plenty of
6 things in this case that are not only perceived as
7 secret but are secret. And so if there's suspicion
8 and hostility growing out of it --

9 MR. NORTON: Your Honor, that's not --

10 JUDGE NELSON: -- you've met it. I'm
11 giving you a lecture on another subject, which we may
12 have to confront some day.

13 (Laughter.)

14 MR. NORTON: I understand that.

15 JUDGE NELSON: All right.

16 MR. NORTON: Our concern -- and then
17 reading further, it goes on --

18 JUDGE NELSON: It says, "Will BN/SF be
19 competitive?" There's a question mark. "Don't know
20 anything about how much trackage rights will cost.
21 Will not benefit from agreement because no plant" --
22 it's illegible.

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1 MR. NORTON: "Of theirs," I believe it
2 says.

3 JUDGE NELSON: "Will fit criteria. No
4 plants were served by UP/SP."

5 MR. NORTON: And what we are suggesting is
6 that that comment is quite different from what appears
7 in the matrix where they just --

8 JUDGE NELSON: So what --

9 MR. NORTON: Well, they're asking us --

10 JUDGE NELSON: So you have this guy in as
11 a witness.

12 MR. NORTON: The problem is with Gifford-
13 Hill we've got the underlying form.

14 JUDGE NELSON: Not Gifford-Hill,
15 Dr. Majure, the man who made up the matrix.

16 MR. NORTON: We're going to be doing that,
17 Your Honor, next week. But we are not in a position
18 to probe the reliability of the matrix if we don't
19 have the underlying questionnaires, as we do for this
20 one.

21 JUDGE NELSON: Oh, I see what you mean.

22 MR. NORTON: The trackage rights --

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1 JUDGE NELSON: You want to have something
2 like this questionnaire for everybody.

3 MR. NORTON: That's correct.

4 JUDGE NELSON: The whole world of
5 shippers.

6 MR. NORTON: Right. Well, no, the ones
7 that they described and --

8 JUDGE NELSON: Which ones?

9 MR. NORTON: The ones in all -- all of the
10 ones in the matrix, the 175 that he relied upon.

11 JUDGE NELSON: Not 340?

12 MR. NORTON: Well, we'd like those, too,
13 because we don't know how they selected and winnowed
14 out and decided to include the 175.

15 JUDGE NELSON: How did the matrix come to
16 you?

17 MR. NORTON: It was provided as the basis
18 on which Dr. Majure relied, as to those shippers he
19 did not interview. He didn't look at the underlying
20 survey forms. He only looked at the matrix. And what
21 we wanted --

22 JUDGE NELSON: He said he looked at 300

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1 reports.

2 MR. NORTON: He looked at --

3 JUDGE NELSON: But now we know he looked
4 at 175 of them.

5 MR. NORTON: I believe what he said was he
6 examined reports of interviews with over 300
7 additional shippers. It is not clear that he looked
8 at actual interview reports on 300 shippers.

9 JUDGE NELSON: But whatever he saw,
10 whatever he calls a report is what you want to see.

11 MR. NORTON: Yes.

12 JUDGE NELSON: Is that correct?

13 MR. NORTON: That's correct.

14 JUDGE NELSON: All right. Now, what's the
15 story with this, Mr. Billiel?

16 MR. BILLIEL: Your Honor, there were --
17 this gives three types of shipper information that
18 Dr. Majure relied on. One was interviews which he was
19 part of, and we have produced --

20 JUDGE NELSON: That's the 40 interviews.

21 MR. BILLIEL: That's the 40. And we have
22 produced his handwritten notes of all of the

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1 interviews he was a participant in to the operators.
2 And they have had some questions about which writing
3 is his notes, and we have -- we're working with them
4 to resolve that.

5 JUDGE NELSON: This dispute is not about
6 those 40, then.

7 MR. NORTON: That's correct.

8 JUDGE NELSON: All right. Now he says he
9 looked at 300 reports, and you've given a matrix of
10 175 names.

11 MR. BILLIEL: Okay. When we began the
12 project -- and I should say at the outset I never
13 counted these personally. When we began the project,
14 we were giving Dr. Major the raw interview forms. As
15 time went on, and I believe there should be well over
16 100 of those, 100 or 150 in what we gave to the
17 applicants --

18 JUDGE NELSON: Forms like the one we have?

19 MR. BILLIEL: Forms like the one at Tabs C
20 and D.

21 JUDGE NELSON: 150, approximately, that
22 they already have.

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1 MR. BILLIEL: I believe that's correct.

2 JUDGE NELSON: All right. So far so good.

3 What are we missing?

4 MR. BILLIEL: At some point, we determined
5 that for several reasons, a) to make the process of
6 reviewing the interviews more available for him, and
7 b) because so many shippers were concerned about the
8 confidentiality of what we were telling them, that the
9 more efficient and desirable way to do it was not to
10 get Dr. Majure the underlying forms, but to make the
11 matrix.

12 And for those interviews, that kind of
13 second stage of interviews, all Dr. Major ever saw was
14 the matrix. So we have given Applicants --

15 JUDGE NELSON: So some of his information
16 comes directly from 40 interviews. There's no point
17 about those. Insofar as his information then came
18 from others' reports of the interviews they conducted,
19 there were two kinds. One, those for which he has had
20 written interview reports, and, two, those for which
21 he used only what's on the matrix. The two don't
22 overlap, I take it.

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1 MR. BILLIEL: I think there may be some
2 shippers who were interviewed twice.

3 JUDGE NELSON: Because in the case just
4 shown, we have this -- what's his name -- Gifford-Hill
5 for whom there's a written report and a matrix entry.

6 MR. BILLIEL: I believe that's the
7 explanation for that.

8 JUDGE NELSON: That there were two
9 interviews?

10 MR. BILLIEL: That there were two
11 interviews with the same company.

12 JUDGE NELSON: That may be our answer to
13 the alleged inconsistency, then, if there was a
14 different interview.

15 All right. So now the Applicants have the
16 handwritten forms, insofar as the witness ever looked
17 at them, the only ones he ever looked at. And they
18 have the matrix, which is all else he ever looked at.
19 So what else do you want?

20 MR. NORTON: Well, Your Honor, we want to
21 probe the reliability of the matrix.

22 JUDGE NELSON: Of the matrix.

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1 MR. NORTON: Yes.

2 JUDGE NELSON: How the matrix got there.

3 MR. NORTON: Yes.

4 JUDGE NELSON: Is that it? So he wants
5 the interview reports that led to the matrix, those
6 interview reports for those people about whom the
7 witness saw only the matrix, in order to test the
8 accuracy of the translation from the interview report
9 to the matrix. What task is involved there?

10 MR. BILLIEL: Excuse me?

11 JUDGE NELSON: What's involved in getting
12 that?

13 MR. BILLIEL: Well, it involves going
14 through several hundred interview forms and making
15 copies and screening out any work-product that's
16 there, which is a substantial -- fairly substantial
17 burden for the Department.

18 In addition, the -- you know, we would
19 take the position inherently any -- any interview he
20 did not directly participate in this issue arises. I
21 mean, if he relies on the handwritten notes, that's an
22 issue. He is inherently relying on the summary, and

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1 the Applicants are free to say this guy just relied on
2 something someone fed him, and that's --

3 JUDGE NELSON: And I'm sure they will.

4 MR. BILLIEL: They will.

5 JUDGE NELSON: I mean, I suppose the
6 Department's position gives you the argument that all
7 he knows is what's on a matrix that someone else gave
8 him.

9 MR. NORTON: Well, that's true, but --

10 JUDGE NELSON: And that you couldn't even
11 get the materials that the matrix-maker looked at.

12 MR. NORTON: That doesn't --

13 JUDGE NELSON: Incidentally, who made up
14 the matrix?

15 MR. BILLIEL: One of our paralegals.

16 JUDGE NELSON: One of?

17 MR. BILLIEL: Our paralegals.

18 JUDGE NELSON: A paralegal. Is that
19 person available for deposition? That's one way to go
20 at this, have him or her examine it as to what was
21 done.

22 MR. NORTON: Yeah, we would need the

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