

INTERSTATE COMMERCE COMMISSION 04/19/96

FINANCE DOCKET # 32760 3149-3205 4.

1 underlying documents to do that. Whoever it is,  
2 whether it's Dr. Majure or the paralegal who put the  
3 chart together, we can't effectively --

4 JUDGE NELSON: Suppose the matrix is all  
5 wrong. That is, that shippers didn't say what the  
6 matrix says they said. It's not Dr. Majure's fault.  
7 He is truthfully reading the matrix.

8 Suppose the matrix says Mr. Billiel had on  
9 slacks and a blazer and a red tie on April 19th when  
10 he represented the Department in this discovery  
11 conference. And Dr. Majure makes an analysis based on  
12 your wearing a blazer and slacks and a red tie today.  
13 In truth and in fact, you're wearing a suit with a  
14 kind of a paisley tie, and the matrix would be all  
15 wrong. And so any description off that matrix would  
16 be factually inaccurate. What do we do about that  
17 gap?

18 MR. NORTON: That's precisely our problem.

19 JUDGE NELSON: It's potentially a  
20 troublesome problem, Mr. Norton. Would there be  
21 certain shippers on the matrix that you would want to  
22 cull out here as to whom we could get the statement,

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1 so they don't have to go through for everybody?

2 MR. NORTON: Yeah, I think there are 120  
3 of them for whom we don't have the form, so that's --

4 JUDGE NELSON: Within that universe of  
5 120, are there some that are more significant than  
6 others?

7 MR. NORTON: It's --

8 MR. BILLIEL: There are certainly some  
9 that are quoted in the statement.

10 MR. NORTON: Yeah, there --

11 JUDGE NELSON: Of the 120?

12 MR. NORTON: He does refer to some  
13 specifically, but he makes a lot of sort of broader  
14 generalizations.

15 JUDGE NELSON: Well, let me get this  
16 category. We have the 40 interviews, and then we have  
17 how many actual interview forms that were turned over?  
18 About 150?

19 MR. BILLIEL: I believe that's the  
20 correct --

21 JUDGE NELSON: Approximately.

22 MR. BILLIEL: Approximately, yeah.

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1 JUDGE NELSON: And that leaves how many  
2 for which he knows matrix only, roughly?

3 MR. BILLIEL: 175, I believe.

4 JUDGE NELSON: No, you have duplication.

5 MR. NORTON: I think it's about 125 in  
6 that. The matrix includes 175 --

7 MR. BULGOZDY: Well, although he said that  
8 there might be second interviews.

9 MR. NORTON: That's true.

10 MR. BULGOZDY: So it would be all -- it  
11 could be potentially all 175.

12 JUDGE NELSON: So we would have 40 direct  
13 interviews, 140 interviews for which forms exist, and  
14 another 175 interviews which are memorialized in the  
15 matrix only, as far as the witness is concerned.

16 Now, of that 175, did you say he mentioned  
17 some?

18 MR. BILLIEL: Yes.

19 JUDGE NELSON: Certainly, then, we've got  
20 to come up with the backup as to those.

21 MR. BILLIEL: Well, Your Honor --

22 JUDGE NELSON: He singles out particular

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1 shippers, about whom he knows only what's in the  
2 matrix. I think you've got to produce the -- whatever  
3 work papers underlie the matrix as to those mentioned.  
4 That's only fair.

5 As to the others -- what do we know  
6 numerically about the numbers that Mr. Billiel  
7 mentioned? That is, how many of the 175 are  
8 specifically mentioned in the testimony? Roughly.

9 MR. NORTON: I don't have a count on that.

10 JUDGE NELSON: Two? Three? Or is it 50  
11 or --

12 MR. NORTON: I'd say it's somewhere  
13 between that. A lot of the statements are made on a  
14 broad basis. You know, various shippers use  
15 indefinite terms. But since it's all in the context  
16 of his drawing generalizations from the 340, it  
17 carries weight even if he's not identifying the  
18 particulars.

19 On the burden of redaction, I don't know  
20 that that is really even a problem here, because on  
21 the ones that have been produced, so far as we're  
22 aware, there haven't been any redactions. And it

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1 doesn't look like they reflect any protected work-  
2 product.

3 JUDGE NELSON: Do you know how many of the  
4 175 are mentioned in the testimony, approximately?

5 MR. BILLIEL: I believe there are  
6 approximately 25 or 30 shippers mentioned by name.  
7 That's a guess.

8 JUDGE NELSON: Now, these are not people  
9 that were personally interviewed.

10 MR. BILLIEL: No.

11 JUDGE NELSON: They are not people for  
12 whom there were forms.

13 MR. BILLIEL: I don't know. I --

14 JUDGE NELSON: But --

15 MR. BILLIEL: I know there are --

16 JUDGE NELSON: There are some, but you  
17 don't know how many.

18 MR. BILLIEL: I know there are a total of  
19 25 to 30 shippers that are mentioned by name, some of  
20 whom he may have talked to himself.

21 JUDGE NELSON: I'm just trying to pick out  
22 a number. We've got -- if we add the 50 and the 150

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1 and the 40, we've got 190 for whom there is already  
2 backup of the 365.

3 MR. BULGOZDY: No, because we don't have  
4 -- we have not yet identified Dr. Majure's notes for  
5 all of the 40 shippers. We are working with DOJ --

6 JUDGE NELSON: Are they --

7 MR. BULGOZDY: By our reckoning, we might  
8 have potentially 30 shippers represented in  
9 Dr. Majure's notes that have been produced. But we're  
10 trying to work with --

11 JUDGE NELSON: Do you mean as to the 40  
12 that he interviewed, the Department has not given you  
13 what it says they've given you?

14 MR. BULGOZDY: At least we haven't been  
15 able to specifically identify it.

16 MR. BILLIEL: I believe the discrepancy  
17 comes from there are some cases where he met with  
18 groups of shippers, which may not be --

19 JUDGE NELSON: Well, however it is  
20 straightened out, I am going to order production of  
21 all work papers underlying Dr. Majure's actual  
22 interviews with shippers or groups of shippers. If

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1 they haven't been turned over already, they should be,  
2 and we'll talk about how long that will take.

3 With regard to the remainder, you've  
4 already given 150 forms, so that makes a total of at  
5 least 190. There will be backup of 190 out of 365.  
6 So what I'm thinking of doing is, just to pick a  
7 number out of the air, how many more do you want?

8 MR. NORTON: Well, Your Honor, I think  
9 that -- those numbers don't quite reflect the problem.  
10 We only have 50 out of the -- reports for 50 out of  
11 the 175 on the matrix. See, they've turned over  
12 reports for others who aren't included in the matrix.

13 JUDGE NELSON: Mr. Billiel told me there  
14 are 150.

15 MR. NORTON: That may well be, but --

16 JUDGE NELSON: 150 forms.

17 MR. BILLIEL: You should have forms for  
18 people who are not on the matrix.

19 MR. NORTON: That's right.

20 MR. BILLIEL: Because, see, that includes  
21 forms for people that they did not include in the  
22 matrix, because they have the form. But what we need

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1 to probe what --

2 JUDGE NELSON: Well, he's got two kinds of  
3 opinions -- those which he gets on forms, not counting  
4 the ones he spoke to --

5 MR. NORTON: Right.

6 JUDGE NELSON: -- and those which he gets  
7 off the matrix. How many were there that he got off  
8 the forms only?

9 MR. BILLIEL: I believe it's the -- the  
10 total of the forms they have, which is 150.

11 JUDGE NELSON: 150?

12 MR. BULGOZDY: Well, they produced --

13 JUDGE NELSON: That's what I thought  
14 before.

15 MR. BULGOZDY: They produced a binder with  
16 150.

17 JUDGE NELSON: They told me I don't  
18 understand it. That looks to me like there's a backup  
19 for 190 shippers -- 40 of them actually interviewed  
20 and 150 as to which the witness looked at forms. Are  
21 we right so far, Mr. Billiel?

22 MR. BILLIEL: I believe so.

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1 JUDGE NELSON: You know what you've given  
2 me.

3 MR. BILLIEL: Yes.

4 JUDGE NELSON: All right. That's that.

5 Then, there's another 175. There's a  
6 universe of 365. If we count the actual interviews,  
7 the ones which he knows about through forms, and the  
8 one in which he knows about through the matrix,  
9 there's a universe of 365. Of those 365, you now have  
10 190. I'm asking for a suggestion as to a reasonable  
11 number that will not pose undue burden on the  
12 Department for the rest.

13 Well, we have a certain number -- we don't  
14 know how big or small it is -- in that universe of 175  
15 on the matrix who were specifically mentioned by  
16 Dr. Majure, correct?

17 MR. BILLIEL: That's right.

18 JUDGE NELSON: So I'm going to order  
19 production of the -- any underlying forms or backup  
20 papers with regard to the shippers specifically  
21 mentioned by Dr. Majure. So now you've got the actual  
22 interviews, you've got every time he looked at a form,

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1 and you've got every time he mentioned somebody and  
2 his forms, backups, or whatever he had for anyone he  
3 mentioned. Why isn't that enough?

4 MR. NORTON: If I may just confer.

5 Your Honor, the problem that leaves us is  
6 that we still have only forms for a minority of those  
7 who are on the matrix, and maybe one possibility would  
8 be to split the difference in terms of the number. We  
9 have forms for, as I understand it, about 50 out of  
10 the 175 on the matrix.

11 Ideally, we want, you know, the forms for  
12 all of the rest of them so we can probe the  
13 underlying --

14 JUDGE NELSON: I didn't know that the  
15 forms are also people on the matrix. I thought it was  
16 that some of them are and some of them aren't.

17 MR. NORTON: Yes.

18 JUDGE NELSON: Is that correct?

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

20 JUDGE NELSON: Some are and some aren't.

21 So there are some entries on the matrix for which  
22 there were no personal interviews, which the witness

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1 never mentioned in his testimony, and for which he  
2 never looked at forms.

3 MR. NORTON: That's right.

4 JUDGE NELSON: So what?

5 MR. NORTON: But he relies on the matrix.

6 JUDGE NELSON: So what?

7 MR. NORTON: Well, we can't probe the  
8 basis of his judgment and opinion if we can't get  
9 beyond the matrix.

10 JUDGE NELSON: Well, you've already got  
11 190 plus, maybe over 200.

12 MR. NORTON: But they're not  
13 necessarily --

14 JUDGE NELSON: Of the shippers at issue.

15 MR. NORTON: They're not necessarily the  
16 same ones that are on the matrix.

17 JUDGE NELSON: I'm missing something.

18 MR. BULGOZDY: If I may, Your Honor. One  
19 of the problems is that Dr. Majure makes very broad  
20 generalizations based upon the matrix. In the one  
21 form that we've -- and he talks about, for example,  
22 trackage rights and whether or not they'll be

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1 effective, and he bases his opinion on this -- surveys  
2 of 340 people, of which at least 175 are only  
3 reflected on the matrix, and we don't have the  
4 underlying forms.

5 JUDGE NELSON: Are his personal interviews  
6 on the matrix?

7 MR. BULGOZDY: No. No. So what happens  
8 is, for example, on the form that we showed you on  
9 Gifford-Hill, who filed a verified statement in  
10 support of the merger, the paralegal at Justice who  
11 transmitted the survey form to the matrix did some  
12 editorializing. And so the matrix appears to say that  
13 the individual from Gifford-Hill finds -- thinks  
14 negatively about trackage rights. But if we look at  
15 the underlying survey --

16 JUDGE NELSON: Of the entire matrix, and  
17 of 175 people --

18 MR. BULGOZDY: Yes, right.

19 JUDGE NELSON: -- of that universe of 175,  
20 we know that you have the underlying forms as to some  
21 of them.

22 MR. BULGOZDY: Yes, about 50.

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1 JUDGE NELSON: Do you know how many there  
2 are?

3 MR. BULGOZDY: Approximately 50, right.

4 JUDGE NELSON: 50.

5 MR. BULGOZDY: Yes, and we simply want the  
6 remainder --

7 JUDGE NELSON: All right. Then, there's  
8 125 missing.

9 MR. BULGOZDY: That's correct. Right.

10 JUDGE NELSON: All right. Of that 125, do  
11 you know who they are?

12 MR. BULGOZDY: Yes.

13 JUDGE NELSON: Are any of them people that  
14 were singled out for specific mention by Dr. Majure?

15 MR. BULGOZDY: We haven't made that  
16 determination.

17 MR. NORTON: We'd have to check to see  
18 that.

19 JUDGE NELSON: Could you do that now?

20 MR. BULGOZDY: I don't think I --

21 MR. NORTON: Do you have that information?

22 MR. BULGOZDY: No.

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1 JUDGE NELSON: Because I've ordered that,  
2 and I've -- to the extent I haven't already, I'll  
3 order it again. He can't talk about particular  
4 shippers, and then you've sent only papers pertaining  
5 to that shipper, Mr. Norton. That's not going to  
6 work.

7 MR. BULGOZDY: I'd have to go through the  
8 entire report page by page. I haven't identified  
9 every place where Dr. Majure --

10 JUDGE NELSON: Well, that's what you want  
11 me to do. That's what you want the Department to do.  
12 So in order to get some grip of what you've got here,  
13 I've got to know that.

14 MR. BULGOZDY: Well, we would like the  
15 Department to produce the underlying surveys for the  
16 remaining people on the matrix. There is no rhyme or  
17 reason for producing some of the surveys but not all  
18 of them.

19 JUDGE NELSON: Sure there is. Relative  
20 burden.

21 MR. BULGOZDY: Well, they are very  
22 relevant to go --

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1 JUDGE NELSON: That's the problem he's got  
2 over there.

3 MR. BULGOZDY: Well, they're relevant,  
4 because they go to the reliability of the matrix.

5 MR. NORTON: Your Honor, from what  
6 Mr. Billiel said --

7 JUDGE NELSON: Well, I don't think he is  
8 contending they're irrelevant. No, of course they're  
9 relevant. The question is, what's the respective  
10 burden on the Department?

11 MR. NORTON: I think he heard you say --  
12 when you said relative burden, I think he heard you  
13 say relevant.

14 JUDGE NELSON: Didn't mean to say that.

15 MR. NORTON: No, I think you -- you didn't  
16 say it. He misunderstood.

17 JUDGE NELSON: Where are these physically,  
18 these 125 underlying interview reports?

19 MR. BILLIEL: They're at our offices.

20 JUDGE NELSON: How hard is it for you to  
21 get hold of them? Are they in one file drawer?  
22 Wouldn't we save a lot of time for everyone if you

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1 simply hand them over?

2 MR. BILLIEL: I could get -- the originals  
3 are all in a file drawer. They have to be copied and  
4 Bates stamped and marked confidential.

5 JUDGE NELSON: How about if the Applicants  
6 pay for that?

7 MR. NORTON: I think we pay for copies  
8 anyway, but sure.

9 JUDGE NELSON: And pay the -- like if this  
10 were an FOI request, you can assess the hourly rate of  
11 those involved, that kind of thing.

12 MR. BILLIEL: I'm not sure that works,  
13 Your Honor.

14 JUDGE NELSON: Maybe it doesn't for these  
15 purposes.

16 MR. NORTON: And we would be happy to do  
17 whatever we could to relieve them of the burdens  
18 involved in collating or copying.

19 JUDGE NELSON: Mr. Bulgozdy is looking  
20 over to see how many are specifically mentioned.

21 MR. NORTON: That's correct, yeah.

22 JUDGE NELSON: To get an idea of that

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1 size. Want to bounce back now to the protected  
2 document?

3 MR. NORTON: Yeah. Let me just mention,  
4 though, just so we have the timeframe in mind, if  
5 there's any way that we can resolve this today, it  
6 means an awful lot to us, because that way we can have  
7 a chance to look at the documents over the weekend.  
8 The deposition is coming up next week.

9 JUDGE NELSON: When is the deposition?

10 MR. NORTON: Majure is Wednesday?  
11 Wednesday.

12 MR. BILLIEL: I seriously doubt we can get  
13 them for Monday.

14 JUDGE NELSON: Why is that? When I was  
15 with the Department, we worked on Saturday.

16 (Laughter.)

17 MR. BILLIEL: Well, maybe if I did it  
18 myself.

19 JUDGE NELSON: Charge them your rate.

20 MR. NORTON: They could send it to an  
21 outside service for copying and Bates stamping, and  
22 we'd save --

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1 JUDGE NELSON: And you'll pay for all of  
2 that?

3 MR. NORTON: Sure. Absolutely. And they  
4 work overtime. We know that for a fact.

5 (Laughter.)  
6 24 hours a day.

7 JUDGE NELSON: Yeah, there must be a way  
8 to do this mechanically. Let's go off the record for  
9 a moment.

10 (Whereupon, the proceedings were off the  
11 record briefly.)

12 JUDGE NELSON: We are going to shift gears  
13 for a moment to the KCS protected submission. There  
14 was a question about it, Ms. Metallo, and that is  
15 whether we can reveal the date of it.

16 MS. METALLO: Well, could I ask for what  
17 purpose?

18 JUDGE NELSON: I don't know. It's not my  
19 document.

20 MS. METALLO: How does that help  
21 anybody --

22 JUDGE NELSON: What do you need the date

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1 for?

2 MR. NORTON: Well, it's a matter of having  
3 the -- an understanding of when this information was  
4 in the hands of KCS. For example, it shows when they  
5 had the call report from Tex-Mex.

6 MS. METALLO: We've already -- we know  
7 that this is January 19, '96.

8 MR. NORTON: Well, that's --

9 MS. METALLO: Except for the --

10 MR. NORTON: The precise date is not  
11 necessary.

12 MS. METALLO: -- litigation matter, I  
13 don't see what purpose you would need the date.

14 MR. NORTON: The precise date -- just  
15 confirmation that we're talking January '96 is good  
16 enough.

17 JUDGE NELSON: January of '96. Are we  
18 done with this now? I am, so far, protecting it. I  
19 mean, I'm always open to hear something, but --

20 MR. NORTON: And there was a question also  
21 about the title of it.

22 JUDGE NELSON: The title of the document?

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1 MR. NORTON: Yeah. I don't know whether  
2 that has been addressed.

3 MR. NORTON: I don't think we discussed  
4 the title of the document.

5 MR. STEEL: I don't have particular  
6 concerns about that, about the title. I do have two  
7 thoughts and questions. One is you indicated that we  
8 could not have the caption for paragraph 5, and that's  
9 okay. It's okay because you ruled it's okay.

10 (Laughter.)

11 But is it not a new subject matter?  
12 That's all we're concerned about. If it's not a new  
13 factual allegation or something, then that's fine.  
14 But it -- it's not that kind of allegation. It's not  
15 a new fact, see, because we have no idea what the  
16 caption is. And we don't need to know as long as it's  
17 not a new allegation of some improper conduct.

18 MS. METALLO: I did, Your Honor -- it  
19 contains an allegation of conduct that is far outside  
20 the scope of this proceeding. Therefore, on the basis  
21 of relevancy, I don't see --

22 JUDGE NELSON: Yeah, I'm going to respect

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1 that. I'm going to continue to protect the title  
2 that's labeled Roman 5.

3 MR. STEEL: Well, then, so I can explain  
4 to my client, who I have not been able to get in touch  
5 with, and may be concerned about the ruling and may  
6 want to appeal or do whatever they want to do with  
7 respect to it, it's not a factual --

8 JUDGE NELSON: Well, you can tell the  
9 client that the title constitutes, clearly, work-  
10 product. It constitutes the heart of someone's right  
11 to petition the government for redress of grievance.  
12 And --

13 MR. STEEL: If it's characterizing and  
14 summarizing our conduct that's fine. That's their  
15 right to do that. But I thought that the basic facts  
16 in the fact section were sort of details you're unable  
17 to confirm in a short period of time, not  
18 substantially different from the facts in the public  
19 thing.

20 JUDGE NELSON: Roman 5, on its face, draws  
21 upon the facts previously set up, yes.

22 MR. STEEL: Okay. If it's just a

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1 characterization of those prior facts, in some sort  
2 of --

3 JUDGE NELSON: I think that's a fair  
4 statement.

5 MR. STEEL: -- a conclusion based on fact,  
6 that's fine. But that's what we're concerned about.  
7 And that will be the same thing with the chronology  
8 that you indicated that we couldn't --

9 JUDGE NELSON: The chronology is the  
10 setout of the facts.

11 MR. STEEL: Right.

12 JUDGE NELSON: Display of the facts.

13 MR. STEEL: But you said we -- she was  
14 concerned about the timing of the chronology. Does  
15 the chronology go beyond the facts as they're  
16 represented in the public thing -- in the public  
17 description of the chronology?

18 Do you know that, Ms. Metallo?

19 MS. METALLO: I did not author the public  
20 comments. I believe that --

21 JUDGE NELSON: Is there something in the  
22 chronology that isn't in the public filing?

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1 MR. STEEL: Well, if --

2 JUDGE NELSON: I can't -- I would say  
3 probably yes, just because there is so much detail.

4 MR. STEEL: The public filing, I believe,  
5 probably starts with episodes occurring in 1991 with  
6 this McKinsey report. That's the things it refers to.  
7 If the chronology in the public submission starts in  
8 1982, that's a whole different --

9 MS. METALLO: Do you mean in the private  
10 submission?

11 MR. STEEL: Sorry -- the private  
12 submission starts in '92, that's different to us. If  
13 it's McKinsey in 1991, that's fine, or perhaps if it's  
14 the denial of the merger of SF/SP in 1986, that --

15 JUDGE NELSON: May I give the first year  
16 for which I see an entry? I'll show it to you. Come  
17 up, too, Mr. Billiel, to be sure I don't misread.  
18 Notwithstanding this, the first thing we see is this.

19 MS. METALLO: Right.

20 JUDGE NELSON: Can I give this? Take your  
21 time. I propose to give them this date, that  
22 particular year.

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1           Suppose I point to this reference here,  
2           the public filing, and say that this is consistent  
3           with this.

4           MS. METALLO: That's fine.

5           JUDGE NELSON: The public filing on  
6           page 73, Mr. Steel --

7           MR. STEEL: Yes, sir.

8           JUDGE NELSON: -- contains, at its first  
9           instance, a reference to something that happened in  
10          the early 1990s, line 2, page -- I'm sorry, it's on  
11          page 73, Roman 5.

12          MR. STEEL: Yes, sir.

13          JUDGE NELSON: Line 2. Do you have it in  
14          front of you?

15          MR. STEEL: Yes, sir, I see it.

16          JUDGE NELSON: Do you see that early  
17          1990s?

18          MR. STEEL: Yes, sir.

19          JUDGE NELSON: The chronological aspect of  
20          the fact section in the protected submission, the  
21          first year inside the chronology, or the beginning of  
22          the chronology, is consistent with that label.

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1 MR. STEEL: Is the year outside the  
2 chronology or -- I mean, outside -- if that's all  
3 you're going to give us, that -- we'll take it. But  
4 I just wanted to explain to my client if that's the  
5 description that's in the record. That's the first  
6 date in the chronology? Dates could be the 1980  
7 denial of the SF/SP merger. That's no big deal. What  
8 we'd be concerned about was some alleged improper  
9 conduct predating the early 1990s -- this reference to  
10 the McKinsey and Company report.

11 JUDGE NELSON: I would love to answer his  
12 question here, Ms. Metallo. I think we could put this  
13 part of the issue to rest if you'll let me. It's only  
14 this that gives me trouble.

15 MS. METALLO: Right. I know, and I'm  
16 trying to --

17 JUDGE NELSON: Maybe confer with  
18 Mr. Billiel on why is that there. Could be it's  
19 erroneous.

20 MS. METALLO: I can explain it to you now.  
21 We don't have --

22 JUDGE NELSON: We are talking publicly

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1 now.

2 MS. METALLO: Yes.

3 JUDGE NELSON: Yes.

4 MS. METALLO: We don't know specific dates  
5 and times for some of these bullet points.

6 JUDGE NELSON: Oh.

7 MS. METALLO: We also know from -- well,  
8 we have reason to believe that some of this may have  
9 begun as early as then.

10 JUDGE NELSON: I see.

11 MS. METALLO: So that's the problem.

12 JUDGE NELSON: So does it --

13 MS. METALLO: I don't want to be --

14 JUDGE NELSON: What I'd like to do, then,  
15 is without revealing the numbers describe this period  
16 with reference to the term early 1990s that is public,  
17 and then tell what you just told me about these  
18 entries without revealing these numbers.

19 MS. METALLO: That's fine.

20 JUDGE NELSON: There is a -- the  
21 chronology is broken into two pieces, and the first  
22 piece includes a timeframe which slightly predates the

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1 period early 1990s, just barely so. There, then,  
2 follows roughly a half a page of items, all of which  
3 are consistent with the description early 1990s. A  
4 couple of them don't have a date, and the author  
5 explains that it is possible, for all that she knows,  
6 that they may have occurred in that period slightly  
7 before the early 1990s.

8 The second time period is more  
9 contemporary. All right?

10 MR. STEEL: And is it consistent with the  
11 public filing?

12 JUDGE NELSON: Yes.

13 MR. STEEL: Dates and things like that.

14 JUDGE NELSON: Yes, yes, yes.

15 Now, again, I say that the level of detail  
16 in the Justice submission appears to be greater than  
17 the amount of detail in the public filing, and so I am  
18 sure that there are things in the protected submission  
19 that -- details that aren't in the public. But so be  
20 it; that's part of what we're dealing with here.

21 MR. STEEL: Well, our understanding would  
22 be that those details will not show up further in this

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1 proceeding.

2 JUDGE NELSON: I understand the --

3 MR. STEEL: We're not being able to see  
4 those from KCS or the Department of --

5 JUDGE NELSON: To the extent that they're  
6 not already in the record --

7 MR. STEEL: Correct.

8 JUDGE NELSON: -- through the Department  
9 or KCS or anybody, my understanding is they're not  
10 going to be in the Department's brief, and they're not  
11 going to be in KCS's brief.

12 MS. METALLO: That, Your Honor, is --

13 JUDGE NELSON: Is that fair?

14 MS. METALLO: I went to check with my  
15 client, and we need an additional -- I think an  
16 additional carve-out. We, KCS -- KCS does not want to  
17 be limited in any of the arguments that it has already  
18 raised in any of its papers. It wants to be able to  
19 make this argument.

20 But more -- but almost -- well, as  
21 important, if not more important, let's assume for the  
22 sake of argument that the Department of Justice

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1 decides to open up an independent investigation based  
2 on some of the information we gave them. And let's  
3 say that that information includes third parties and  
4 other sources for which they could get independent  
5 confirmation of the facts. We would not want them to  
6 be precluded from entering into such an investigation.

7 JUDGE NELSON: That seems to me to have  
8 nothing to do with this. We're talking about filings  
9 to be made in this proceeding. That's all I've got  
10 jurisdiction over.

11 MS. METALLO: Absolutely, Your Honor. But  
12 what if -- what if the Department of Justice does an  
13 investigation, interviews some of the third parties,  
14 and finds evidence that it finds relevant to --

15 JUDGE NELSON: Independently learns  
16 something and then files it in this proceeding.

17 MS. METALLO: Yes.

18 JUDGE NELSON: Is that the claim?

19 MS. METALLO: Yes. But it would be the  
20 same claims that we put in that document.

21 JUDGE NELSON: Well, let me look at that.  
22 I'm just looking at the -- the last filing would be

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1 June 3rd. When is the cutoff of discovery here, if  
2 any?

3 MR. STEEL: May 14th.

4 JUDGE NELSON: Where does that appear?

5 MR. STEEL: In the procedural orders that  
6 establish it.

7 JUDGE NELSON: Right.

8 MR. STEEL: It -- May 14th is the filing  
9 of rebuttal in support of inconsistent applications.  
10 And as we know, KCS asserts to have the joint defense  
11 with other parties.

12 JUDGE NELSON: Where is there a rule that  
13 says all discovery ends on May 14th?

14 MR. NORTON: It isn't stated anywhere.

15 JUDGE NELSON: For one thing, I'd be happy  
16 to see that. But --

17 (Laughter.)

18 MR. STEEL: It is stated in the procedural  
19 orders. They characterize what the schedule does. It  
20 says all discovery in the evidentiary phase will end  
21 on May 14th.

22 JUDGE NELSON: Let me find it.

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1 MR. STEEL: We'll have to find it. It's  
2 either decision 6 or 9.

3 MS. METALLO: Judge Nelson?

4 JUDGE NELSON: We plan to conclude -- you  
5 had marked this one for me.

6 MS. METALLO: Yes.

7 JUDGE NELSON: The evidentiary phase of  
8 this proceeding by May 14th.

9 MR. STEEL: Right. So up until that date,  
10 somebody --

11 JUDGE NELSON: That doesn't even contain  
12 the word "discovery."

13 MR. STEEL: That's what -- you can submit  
14 evidence to the STB through that date. You might have  
15 to make a motion to have it, but if the KCS or the  
16 Department of Justice found the smoking bullet -- gun,  
17 they'd be making the motion to take it, because it's  
18 relevant.

19 JUDGE NELSON: Well, they're not going to  
20 file anything on May 14th, Department of Justice  
21 isn't.

22 MR. STEEL: I understand. I understand.

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1 The Department of Justice --

2 JUDGE NELSON: Right, Mr. Billiel?

3 MR. BILLIEL: That's right, your Honor.

4 MR. STEEL: And I believe they --

5 JUDGE NELSON: And how about the KCS? Are  
6 you making a filing on May 14th?

7 MS. METALLO: Not that I know of.

8 JUDGE NELSON: But we're talking about the  
9 briefs to be filed on June 3rd.

10 MR. STEEL: But I'm concerned that she  
11 said that she wanted to -- I understand the Department  
12 of Justice doing an independent investigation or for  
13 seeing that separately. But she indicated also that  
14 she needed to carve out --

15 JUDGE NELSON: She is concerned that the  
16 Department may go talk to somebody independently,  
17 arrive at something --

18 MR. STEEL: We're comfortable with that.

19 JUDGE NELSON: -- in no way affected by  
20 the protected submission --

21 MR. STEEL: Right.

22 JUDGE NELSON: -- and then take

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1 something --

2 MR. STEEL: The same fact comes out.

3 JUDGE NELSON: Right.

4 MR. STEEL: The government says, "Hold on,  
5 we've got to tell you this."

6 JUDGE NELSON: Yeah.

7 MR. STEEL: "Because I just found it out..  
8 I've got to tell you." That's okay. She also said  
9 she wanted not to be inhibited from arguing the full  
10 force of what they made. But they can't use anything  
11 in that submission, part of the submission, that's not  
12 in a public submission, or we ought to be able to see  
13 it. I mean --

14 JUDGE NELSON: What if we made that rule,  
15 and on June 3rd the Department or the KCS allegedly  
16 violates it?

17 MR. STEEL: We'd be unhappy, and we'd make  
18 a motion to strike that, I would assume, from their  
19 brief.

20 JUDGE NELSON: You could do that.

21 MR. STEEL: Well, but that's sort of  
22 sandbagging us, because --

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1 JUDGE NELSON: Suppose you came in here  
2 and asked me for authority to -- asked me to order  
3 production of all papers underlying the new assertion.  
4 That the discovery which then didn't count so much has  
5 now become important.

6 MR. STEEL: Well, but we have no  
7 opportunity to do anything about it then. We're at  
8 June 4th, 5th. The oral argument is less than a month  
9 away, and we have no chance to do anything about it.

10 JUDGE NELSON: Well, you always have the  
11 right to file papers, tell the court what is going on.

12 MR. STEEL: Not after June 3rd.

13 JUDGE NELSON: Well, what do you suggest  
14 as a protective measure?

15 MR. STEEL: That they be limited in their  
16 arguments to the evidence they've submitted to date  
17 concerning all those collusions and improper activity  
18 allegations, and if they want --

19 JUDGE NELSON: I can't make them do  
20 anything about the content of the brief that they  
21 don't want to do. That's -- my power --

22 MR. STEEL: But this morning they were

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1 willing to --

2 JUDGE NELSON: That's evident once we're  
3 talking about discovery. He can ratify an agreement  
4 they've made and make it a matter of record.

5 MR. STEEL: Right. If they don't want to  
6 agree to it, then that's --

7 JUDGE NELSON: Then so be it.

8 MR. STEEL: That presents a different  
9 story. They may be planning on using something in  
10 there.

11 JUDGE NELSON: There may be a trick here,  
12 that they are holding on to this material with the one  
13 hand while they're going to zap it with you on June  
14 3rd after --

15 MR. STEEL: I don't think that's the  
16 intention of Ms. Metallo or the client at all. I  
17 think it's a matter that they're trying to make sure  
18 that they can argue fully, which their right --  
19 entitled to do, and bring it to the client for --

20 JUDGE NELSON: Let's ask Ms. Metallo again  
21 to clarify the --

22 MS. METALLO: I might have misspoken.

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1 Maybe I was misunderstood. I want to reserve KCS's  
2 ability to make every argument made in its highly  
3 confidential filing. And as long as this is  
4 preserved, that will work fine with KCS's rights.  
5 With respect to DOJ, we wanted to make sure that any  
6 information -- even if they got the lead from our  
7 presentation, but then they independently investigated  
8 and confirmed, they would be free to use it. Those  
9 are the two carve-outs.

10 MR. NORTON: In whatever other proceeding  
11 would be appropriate.

12 MS. METALLO: In this proceeding as well,  
13 though.

14 JUDGE NELSON: But he says, Mr. Billiel,  
15 that he's not going to file anything new factually on  
16 June 3rd. Why are you worried about him doing  
17 something he says he's not going to do? You don't  
18 believe him?

19 (Laughter.)

20 MS. METALLO: It's not that I don't  
21 believe him. I just -- I think it's hard for people  
22 sometimes to predict what they're going to do with

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1 things they might not already know about.

2 JUDGE NELSON: When I was with the  
3 Department, we had a very high standard and message  
4 about our ethical conduct and our representation with  
5 the courts and the tribunals we appeared before. We  
6 were taught that they looked to us for candor and  
7 truth, and they looked to everybody like that but they  
8 look harder at us for it. And that we ought to be on  
9 that level with these tribunals.

10 Now, I know they have now all of these in-  
11 house investigation and gumshoes running all around  
12 the Department, and all sorts of alleged prosecutorial  
13 abuse of one thing and another. But I would like to  
14 think that, fundamentally, career lawyers over there  
15 haven't changed all that much. And if Mr. Billiel  
16 makes a representation like that to me here, that's  
17 going to be it. Period. I'm satisfied with that. So  
18 if I betray my own background as an alum of the  
19 Department, so be it.

20 Now, with regard to KCS, she wants  
21 assurances that this commitment doesn't impinge upon  
22 their right to make any arguments they previously

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1 made, and I so recognize there is no such intention.  
2 All that we're talking about is the use of factual  
3 materials in the protected submission, insofar as they  
4 have not yet been used, that there not be sandbagging  
5 in the briefs.

6 Are you clear on that one, Ms. Metallo?

7 MS. METALLO: Yeah. I guess where I'm  
8 unclear is I understand that the Department would not  
9 rely on our submission for anything.

10 JUDGE NELSON: I'm satisfied with the  
11 Department. I'm talking to you. We can't have here  
12 a regime whereby you persuade me, as you have so far,  
13 to protect this submission, and then on June 30th you  
14 whip in some stuff from it that we've never seen  
15 before, it's too late, "I've got you, railroads." We  
16 don't want that to happen.

17 Now, can we get a commitment from you that  
18 that is not going to happen?

19 MS. METALLO: Yes, Your Honor. I've  
20 agreed to it. The only arguments we will continue to  
21 make, if we do do a subsequent filing in June, would  
22 be the arguments that we've made of our highly

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1 confidential filing, our comments that were filed on  
2 the 29th of March.

3 MR. STEEL: And there would be no facts  
4 that are reflected in the private that aren't put in  
5 here. I mean, that's --

6 JUDGE NELSON: That what we seem to be not  
7 getting pinned down.

8 MR. STEEL: What I'm seeing as pinned  
9 down --

10 JUDGE NELSON: No.

11 MR. STEEL: -- is not going to expand on  
12 some of this with some of that, and that's not fair to  
13 us.

14 JUDGE NELSON: Let's go off the record for  
15 a moment.

16 (Whereupon, the proceedings were off the  
17 record from 3:59 p.m. until 4:03 p.m.)

18 JUDGE NELSON: We've been discussing what  
19 kind of ground rules we can make about the use of the  
20 protected submission, in terms of KCS's brief to be  
21 filed on June 3rd. And it seemed to me that there are  
22 three kinds of fact for purposes of the present

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1 question.

2 First, those which are in the protected  
3 submission and are also in the KCS filing that's  
4 already public, or highly confidential but in the  
5 public. As to that category of fact, it remains open  
6 for KCS or anyone else to argue those facts.

7 A second category of fact are factual  
8 aspects of the protected submission which are not in  
9 the KCS previous filing. As to those, KCS should not  
10 use those facts in its January 3rd brief.

11 MS. METALLO: June 3rd.

12 JUDGE NELSON: June 3rd, I'm sorry.

13 There is a third category of fact --  
14 namely, that which comes in from new and independent  
15 sources other than the protected submission. And as  
16 to that category, KCS is free to use them subject to  
17 whatever answering or -- submissions the carriers may  
18 have the right to make. Does that describe our  
19 situation?

20 MS. METALLO: Yes.

21 JUDGE NELSON: All right.

22 MR. STEEL: And only the procedural --

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1 they'd have the ability to file it within a procedural  
2 schedule, of course. But --

3 JUDGE NELSON: They can only file what the  
4 Board allows them to file.

5 MR. STEEL: Okay. That's fine.

6 JUDGE NELSON: Is there any other business  
7 we have to do today?

8 MR. STEEL: Except I will just tell you I  
9 think that's fine with us. We will advise the client  
10 who we were unable to get to today, and if that's  
11 acceptable you will hear nothing further. If not,  
12 we'll do what we do, but I don't know that that's any  
13 serious risk.

14 JUDGE NELSON: Are we still on the record?

15 I want to say, Ms. Metallo, that you've  
16 handled yourself in the best standards of the  
17 profession here today in some very difficult  
18 circumstances. You've helped us to steer our way  
19 through to reasonable courses of action, and I think  
20 that it reflects credit upon you in the efforts you've  
21 made on behalf of the client in these regards, which  
22 have culminated in the protection of the document for

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1 which you're seeking protection.

2 Thank you all very much.

3 MR. NORTON: Your Honor?

4 JUDGE NELSON: We have --

5 MR. NORTON: Nice try.

6 JUDGE NELSON: -- the business of the  
7 underlying work papers still at issue?

8 MR. NORTON: That's correct. Yes.

9 JUDGE NELSON: Well, KCS is free to go.

10 MS. METALLO: Your Honor, do I get --

11 JUDGE NELSON: You'll need that. I don't  
12 want it.

13 (Laughter.)

14 Okay. I've given back the protected  
15 submission to Ms. Metallo, who is about to leave. KCS  
16 business is through now.

17 MR. STEEL: Your Honor, may I also be  
18 excused?

19 JUDGE NELSON: You may.

20 MR. STEEL: Thank you.

21 JUDGE NELSON: Thank you, too, Mr. Steel,  
22 for helping with some difficult stuff here today. I

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1 appreciate it.

2 MR. STEEL: Thank you.

3 JUDGE NELSON: Now we're down to -- the  
4 remaining question was the number of witnesses that  
5 the witness Majure singled out for mention --

6 MR. NORTON: Yes, Your Honor.

7 JUDGE NELSON: -- within that universe of  
8 125.

9 MR. NORTON: Well, that is one of the  
10 remaining questions, and we have identified 25 that  
11 were specifically identified. And based on  
12 Mr. Bulgozdy's familiarity with the files and the  
13 records here, and his recollection, 15 of those 25,  
14 the information is in the matrix rather than in  
15 interviews. Eight of them were not in the matrix and  
16 there are also no notes.

17 JUDGE NELSON: Wait. Give me this again  
18 now. We start with 40 actual interviews.

19 MR. NORTON: No. These are shippers  
20 mentioned --

21 MR. BULGOZDY: These are shippers  
22 mentioned by Dr. Majure specifically in his report.

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1 MR. NORTON: Right. That's what we're  
2 looking at.

3 JUDGE NELSON: Oh, this is a new universe.

4 MR. NORTON: Different universe.

5 JUDGE NELSON: How many are there?

6 MR. NORTON: About 25.

7 JUDGE NELSON: 25?

8 MR. NORTON: Right. Eight of them there  
9 was nothing in the matrix and we also have no notes.

10 JUDGE NELSON: Well, certainly as to those  
11 eight, then, you've got to produce.

12 MR. BULGOZDY: At least based upon what I  
13 can tell from what I have here, we have no --

14 JUDGE NELSON: That is, they are neither  
15 in the matrix nor do you have their interview reports.

16 MR. BULGOZDY: As far as we can tell based  
17 upon the documents I have available to me here. And,  
18 for example, one of them I'm confident we have no  
19 notes.

20 JUDGE NELSON: Well, I don't need to get  
21 into those details. But Mr. Billiel as I've said, any  
22 witness that he singles out for mention --

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1 MR. BULGOZDY: Right.

2 JUDGE NELSON: -- as to those witnesses,  
3 you've got to produce notes, forms, whatever you may  
4 have. So that's the 25.

5 MR. BULGOZDY: That's 10 of the 25.

6 JUDGE NELSON: Now, how many of those 25  
7 are in the matrix?

8 MR. NORTON: 15.

9 JUDGE NELSON: 15.

10 MR. NORTON: And of those 15, we have the  
11 survey responses only for three, and for 12 of them we  
12 have nothing.

13 JUDGE NELSON: All right. As to those 12  
14 that are in the matrix but for which there are no  
15 forms, which 12 are specifically mentioned by  
16 Dr. Majure, you've got to produce them. So I'm trying  
17 to see where we are in terms of totals. And that  
18 gives you 12 of the matrix people, correct?

19 MR. NORTON: Well, 20 total, yeah.

20 JUDGE NELSON: Well, eight -- the eight  
21 that we've ordered production --

22 MR. NORTON: Right.

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1 JUDGE NELSON: -- are in the matrix?

2 MR. BULGOZDY: No.

3 MR. NORTON: No.

4 JUDGE NELSON: They're no place?

5 MR. NORTON: They are no place.

6 JUDGE NELSON: Okay. Are they not  
7 personal interviews?

8 MR. NORTON: Not that we can tell.

9 JUDGE NELSON: Okay. They are eight --

10 MR. BILLIEL: I suspect those are  
11 interviews he did personally and that are in his  
12 handwritten notes.

13 JUDGE NELSON: In that first universe.  
14 But whatever it is you'll produce as to those eight.

15 MR. BILLIEL: We will either produce it or  
16 identify what type of --

17 JUDGE NELSON: But our problem, then, is  
18 with the universe of 175 in the matrix.

19 MR. NORTON: Right.

20 JUDGE NELSON: So you've now got 12 of  
21 them.

22 MR. NORTON: Well, we have about 50 of

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1       them already.

2               JUDGE NELSON: Plus you have the forms he  
3       has given you. Of those 150 forms you have, how many  
4       of them are in the matrix?

5               MR. NORTON: About 50.

6               JUDGE NELSON: 50. So you, then, have 62  
7       -- backup for 62, or will have backup for 62 of the  
8       175 in the matrix. Less than half.

9               MR. NORTON: Right.

10              JUDGE NELSON: I don't think that's good  
11       enough.

12              MR. NORTON: We don't either. And we  
13       don't really see a basis for drawing a distinction  
14       between the --

15              JUDGE NELSON: Where in his testimony does  
16       he rely upon the matrix itself as a whole? Show me  
17       pages.

18              MR. NORTON: He doesn't do it that way.  
19       He doesn't cite to the matrix. What he does is in the  
20       beginning he describes his methodology and says, "I  
21       interviewed, you know, 40, and I relied on reports of  
22       interviews of over 300." And that second step

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1 occurred in two ways. One, he read some --

2 JUDGE NELSON: One was the matrix and the  
3 other were notes.

4 MR. NORTON: Right.

5 JUDGE NELSON: We know that.

6 MR. NORTON: Beyond that, he --

7 JUDGE NELSON: He never again mentions  
8 that, then.

9 MR. NORTON: He doesn't -- that's right.  
10 He doesn't -- after that, he doesn't distinguish --

11 JUDGE NELSON: Well, is there some general  
12 place that he mentions shippers in general?

13 MR. NORTON: Oh, throughout.

14 JUDGE NELSON: For example?

15 MR. NORTON: Well, page 29 was one -- 26,  
16 I'm sorry, I believe.

17 JUDGE NELSON: You had this before, but  
18 it's more meaningful now. What paragraph of page 26?

19 MR. NORTON: Page -- the second full  
20 paragraph, the third line.

21 JUDGE NELSON: "According to shippers I  
22 interviewed."

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1 MR. NORTON: Right. And then --

2 MR. BULGOZDY: Well, he says shippers in  
3 the area.

4 MR. NORTON: Yeah.

5 JUDGE NELSON: Am I reading the wrong  
6 place? Page 26. Is it the paragraph that begins,  
7 "Consider"?

8 MR. NORTON: That's correct.

9 JUDGE NELSON: All right. The second  
10 sentence refers to "shippers I interviewed."

11 MR. NORTON: I'm sorry. That's not a good  
12 example.

13 MR. BILLIEL: Go to the next several  
14 paragraphs. He goes on and identifies the number of  
15 shippers by name.

16 MR. NORTON: Yeah, page 39 is a better  
17 example.

18 JUDGE NELSON: 39.

19 MR. NORTON: Yes.

20 JUDGE NELSON: What line?

21 MR. NORTON: In the first full paragraph,  
22 the fifth line, the sentence begins, "Some shippers

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1 will prefer," and it goes on. The next paragraph, the  
2 first sentence, "Shippers' perceptions," the second  
3 sentence, "Other shippers," the next sentence -- I'm  
4 sorry, the second sentence after that, "Indeed, many  
5 of the shippers."

6 JUDGE NELSON: Well, I could do --

7 MR. NORTON: It just continues --

8 JUDGE NELSON: -- this, Mr. Billiel, if  
9 this is any use. It may be more work for you. I  
10 could order production of all of the underlying  
11 papers, the reports, the interviews, or the interviews  
12 of those witnesses that Dr. Majure is referring to in  
13 those sentences. Which would be easier for you to  
14 deal with?

15 MR. BILLIEL: Well, Your Honor, I --

16 JUDGE NELSON: Because if he's making  
17 undifferentiated representations about some shippers,  
18 and shippers' perceptions, it seems to me that the  
19 Applicants have the right to test them. And if all  
20 he's getting is off a matrix, and we don't have the  
21 input to the matrix, I think we have problems with  
22 that.

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1 Now, one thing I could say is produce  
2 every form you have, the whole 175, or now it would be  
3 113 that you'd have to produce. Another way to do it  
4 is to say produce only the forms pertaining to the  
5 shippers that he has in mind in these sentences. And  
6 I offer you that, if that would be easier. I do not  
7 know.

8 I think, yeah -- I think if I were doing  
9 it I'd give them all the forms. It's quicker and  
10 simpler. Xerox them all. It will take you more time  
11 to sit down with Dr. Majure and pull this whole thing  
12 apart.

13 I'm going to order this production of the  
14 forms underlying the matrix, but I want to do it on  
15 such terms that the Department can live with them,  
16 time-wise and financially, and so forth, and I'm open  
17 to any suggestion there.

18 MR. NORTON: We will do anything that will  
19 permit the process to be expedited. We will pay the  
20 cost. We will work with Mr. Billiel to make  
21 arrangements to get expedited copying by overnight  
22 service, or whatever, so we can get that --

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1 JUDGE NELSON: Is there a xerox in the  
2 Department, so if they went over there right now,  
3 under your supervision, this process could go on?

4 MR. BILLIEL: We could start, Your Honor.

5 JUDGE NELSON: I leave that to you.

6 MR. NORTON: I think he may agree that it  
7 would be easier sending it out.

8 MR. BILLIEL: As you alluded to earlier,  
9 it's not easy finding anyone in the Department on  
10 Fridays.

11 JUDGE NELSON: People used to file the  
12 temporary restraining orders on Friday afternoon --

13 MR. NORTON: Your Honor, we will --

14 JUDGE NELSON: -- against us, thinking  
15 that.

16 MR. NORTON: We will --

17 JUDGE NELSON: We'd prove them wrong,  
18 but --

19 (Laughter.)

20 MR. NORTON: We will provide paralegal  
21 assistance to help, if that's necessary, to take them  
22 to the printer, do whatever --

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1 JUDGE NELSON: Well, I don't know that I  
2 need to make a formal order as to the terms of this  
3 turnover, unless you want me to do. But I want it to  
4 be to the maximum convenience of the Department, with  
5 the least burden time-wise, or financially, on the  
6 Department, which has limited resources.

7 MR. NORTON: Which we understand. And we  
8 also want to make sure that we get it as soon as we  
9 can, because --

10 JUDGE NELSON: Well, I'll just --

11 MR. NORTON: -- time is very short.

12 JUDGE NELSON: What I think I'll do is  
13 leave it to Mr. Billiel, and if there are problems  
14 with the solution you come and see me Monday.

15 MR. NORTON: Can we get this to -- do you  
16 think we'll be able to get these copied --

17 JUDGE NELSON: Anything else you need me  
18 for?

19 MR. NORTON: -- underway tonight?

20 MR. BILLIEL: Again, I'm reluctant to turn  
21 anything over until I've had a chance to look at it.

22 MR. NORTON: I understand.

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1 JUDGE NELSON: My leaning here,  
2 Mr. Billiel, is to leave this in your hands for now,  
3 rather than get into a lot of specifics, with the  
4 condition that we have to have it turned over  
5 reasonably, and I want it to be done in the easiest  
6 possible way for -- considering the limited staff they  
7 have.

8 MR. NORTON: We understand that, Your  
9 Honor.

10 JUDGE NELSON: So those are my guidelines.

11 MR. NORTON: Right.

12 JUDGE NELSON: And if you have problems,  
13 I'll be available Monday. I'll be working, so you can  
14 come in. Don't we have a session coming --

15 MR. NORTON: Tuesday at 2:00.

16 JUDGE NELSON: -- Tuesday at 2:00 on the  
17 subject of?

18 MR. STEEL: TUE.

19 JUDGE NELSON: TUE.

20 MR. STEEL: Right.

21 JUDGE NELSON: So Tuesday afternoon could  
22 be a place to wrestle things out if we have to.

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1 MR. NORTON: Yeah, I -- Your Honor, if we  
2 come to that, the deposition is the next day, and once  
3 we get these there's a lot of laborious analysis and  
4 comparison we -- that's why we want to try and get the  
5 process going so we can --

6 JUDGE NELSON: Well, I don't think you're  
7 going to have problems. I don't think that Mr.  
8 Billiel is going to be some rambo litigator here who  
9 is going to make this --

10 MR. NORTON: Oh, I --

11 JUDGE NELSON: -- trouble for you.

12 MR. NORTON: -- I'm not --

13 JUDGE NELSON: So I don't expect problems.

14 MR. NORTON: I'm not --

15 JUDGE NELSON: But if there are, I'm  
16 available Monday by phone or in person. All you have  
17 to do is --

18 MR. NORTON: Fine.

19 JUDGE NELSON: -- dial the telephone.

20 MR. NORTON: Thank you.

21 JUDGE NELSON: You'll be around Monday, I  
22 assume, Mr. Billiel?

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1 MR. BILLIEL: Yes.

2 JUDGE NELSON: Very well. That concludes  
3 our activities for today.

4 (Whereupon, at 4:18 p.m., the discovery  
5 conference was adjourned.)  
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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:

Surface Transportation Board  
Finance Docket No. 32760

Date:

April 19, 1996

Place:

Washington, DC

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

Charles Fyett