

INTERSTATE COMMERCE COMMISSION 04/12/96

FINANCE DOCKET # 32760

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UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

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DISCOVERY CONFERENCE

In the Matter of:

UNION PACIFIC CORPORATION,
UNION PACIFIC RAILROAD COMPANY,
and MISSOURI PACIFIC RAILROAD COMPANY

Finance
Docket
No. 32760

- CONTROL AND MERGER -

SOUTHERN PACIFIC RAIL CORPORATION,
SOUTHERN PACIFIC TRANSPORTATION
COMPANY, ST. LOUIS, SOUTHWESTERN
RAILWAY COMPANY, SPCSL CORP., and
THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY.

Friday, April 12, 1996

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

The above-entitled matter came on for
hearing, pursuant to notice, at 9:30 a.m.

Before:

THE HONORABLE JEROME NELSON
Administrative Law Judge

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

(9:37 a.m.)

MR. NORTON: Gerald Norton for Southern Pacific and applicants.

MR. LIVINGSTON: William Livingston, Union Pacific, applicants.

MR. McBRIDE: Michael McBride for the Western Shippers Coalition.

MR. BERCOVICI: Martin Bercovici for Union Carbide Corporation, Your Honor.

MR. KILLORY: Joseph Killory and Stephen Hut for Conrail, Your Honor.

MR. HUT: Good morning, Your Honor.

MR. EDWARDS: John Edwards for Sierra Pacific and the Texas Mexican Railway Company.

MS. FELASCO: Michele Felasco, Department of Justice.

MR. ESTES: My name is John T. Estes, Your Honor. I represent the Coalition for Competitive Railway Transportation.

And, in passing, may I just comment that I was expected here in early March, I understand.

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1 That was a surprise to me. I wasn't informed by the
2 applicants. I'm not on the restricted service list.
3 And if I had known, I would have been here. I have
4 not initiated proceedings, but I'm here today.

5 JUDGE NELSON: Who else?

6 MR. STREETER: Richard Streeter.

7 JUDGE NELSON: Are you representing the
8 Texas Railroad Commission?

9 MR. LUBEL: Your Honor, Alan Lubel
10 representing the Kansas City Southern Railway along
11 with William Mullins.

12 MR. DiMICHAEL: Your Honor, Nick DiMichael
13 representing National Industrial Transportation League
14 and Dow Chemical.

15 MR. MORENO: Your Honor, Jeff Moreno
16 representing Kennecott Energy Company.

17 JUDGE NELSON: All right, then. That
18 takes care of it.

19 We may as well begin in the order in which
20 they're listed in the appendix. So the first item up
21 is communication with government officials.

22 MR. LIVINGSTON: Your Honor, are you

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1 referring to our letter of April 10th?

2 JUDGE NELSON: I have a volume here. It's
3 called the "Index to Appendix Setting Forth Relevant
4 Requests and Responses to Applicants' April 10
5 Letter."

6 MR. LIVINGSTON: We have not received
7 those. That's just a compilation of the discovery
8 responses that are referred to in the April 10 letter.
9 The April 10 letter is the one that itemizes the
10 various disputes. It might be better to -- the items
11 start on Page 2 of the April 10 letter.

12 JUDGE NELSON: Well, let's begin with
13 communications with government officials.

14 MR. LIVINGSTON: I'll be happy to, Your
15 Honor. Your Honor, on the one right before that
16 failure to respond, which is the very first one on
17 there, there will be nothing to present to you today
18 on that.

19 JUDGE NELSON: All right. Communications
20 with government officials. Now, this is these
21 requests whereby the applicants want the shippers to
22 tell them various things about their conversations

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1 with state and federal officials. Is that right?

2 MR. LIVINGSTON: It's not just shippers.
3 This applies to numerous respondents, including
4 Conrail, Tex-Mex, and some shippers, Dow, Kennecott.

5 JUDGE NELSON: Oh, the fight is with
6 everyone, then?

7 MR. LIVINGSTON: Not with everyone, not
8 with all parties. There are --

9 JUDGE NELSON: Well, who is disputing it?

10 MR. LIVINGSTON: There are seven parties.
11 Conrail, Tex-Mex, Western Shippers Coalition, the
12 CCRT, Dow, Kennecott, and Sierra Pacific, as I
13 understand it, are the ones who have put an oar in the
14 water on this. And KCS, although not initially making
15 the argument, has now indicated that they would like
16 to sign on to the First Amendment privilege.

17 JUDGE NELSON: Well, why don't we just
18 begin with the first one. Do you have them in
19 alphabetical order there?

20 MR. LIVINGSTON: Well, the requests are
21 all the same. And I think the issue is all the same.
22 It really doesn't have much to do with -- the question

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1 is whether or not they can assert a First Amendment
2 privilege.

3 JUDGE NELSON: Let me see the typical
4 interrogatories. Would that be Tab 1?

5 MR. LIVINGSTON: If you look at Tab 9 I
6 think would be the better one.

7 JUDGE NELSON: But the index says
8 "Communications With Government Officials, Tab 1."

9 MR. LIVINGSTON: That's also in Tab 9, but
10 Tab 1 will do also, and particularly 14 and 15.

11 JUDGE NELSON: All right. Now, these
12 people are shippers and Conrail and who else fighting
13 this?

14 MR. LIVINGSTON: Two railroads and if you
15 count KCS, although we would regard them as making the
16 objection too late, three railroads.

17 JUDGE NELSON: What's the other railroad
18 besides Conrail?

19 MR. LIVINGSTON: Tex-Mex.

20 JUDGE NELSON: And shippers.

21 MR. LIVINGSTON: There are three --

22 JUDGE NELSON: And KCS to the extent

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1 they're in here.

2 MR. LIVINGSTON: Yes. Three shippers,
3 Dow, Kennecott, and Sierra Pacific, and two ad hoc
4 coalitions of shippers, which themselves are not
5 shippers.

6 JUDGE NELSON: For present purposes, can't
7 we call everybody shippers? Aren't they the same for
8 purposes of this issue?

9 MR. LIVINGSTON: It's not clear to me that
10 they would say that they are the same. They have
11 asserted that they are not the same. They have
12 asserted that they are a group and that although they
13 represent the shippers --

14 JUDGE NELSON: For purposes of my
15 understanding, we have opposition from either shippers
16 themselves or groups of shippers.

17 MR. LIVINGSTON: And railroads.

18 JUDGE NELSON: And railroads.

19 MR. LIVINGSTON: Right. And some parties
20 did not oppose.

21 JUDGE NELSON: And you want to know what
22 they're telling various entities in the federal and

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1 state governments.

2 MR. LIVINGSTON: Yes. We want the
3 documents that they have presented.

4 JUDGE NELSON: All right.

5 MR. LIVINGSTON: We were faced --

6 JUDGE NELSON: They say that the First
7 Amendment to the Constitution protects them insofar as
8 it deals with the right to petition document.

9 MR. LIVINGSTON: That's correct. And
10 that's the issue, whether there's a First Amendment
11 privilege.

12 JUDGE NELSON: And isn't there a second
13 issue, namely if there is such a privilege, whether it
14 yields in these circumstances?

15 MR. LIVINGSTON: It may be that one gets
16 to that by applying a privilege.

17 JUDGE NELSON: Mr. McBride's papers
18 originally took the view that this was a qualified
19 privilege and not an absolute one.

20 MR. LIVINGSTON: I don't recall him using
21 those words, and I don't want to speak for him. Our
22 position would be --

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1 JUDGE NELSON: Let me be sure I understand
2 his original letter. Yes, although First Amendment
3 rights are not absolute, he goes on to say he will not
4 carry the burden.

5 So is it your position that this matter of
6 petition to the government for redress of grievances
7 doesn't fit this case?

8 MR. LIVINGSTON: No. There isn't any
9 question but that the parties have the First Amendment
10 right to approach the Department of Justice and
11 express their views or to approach a congressman or to
12 approach the White House or any other governmental
13 entity, state or federal, and present their case if
14 they can be heard.

15 There are plenty of First Amendment
16 protections for the activities that these people
17 engage in. But there is not a doctrine that says that
18 they can shield from discovery what they are doing.

19 It is quite common for corporations to
20 present information to governmental bodies. And it's
21 quite common for that information to be subject to
22 discovery.

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1 Information doesn't become immune from
2 discovery because it's handed over to a governmental
3 official or presented to a congressman.

4 JUDGE NELSON: I think I have your point.
5 Let me get the other side now.

6 What cases are there, if any, that say
7 that this First Amendment right transforms itself into
8 a privilege for discovery purposes?

9 MR. McBRIDE: The cases are legion, Your
10 Honor, but let me begin by saying --

11 JUDGE NELSON: What's your best one?

12 MR. McBRIDE: Well, I'll give you Adolph
13 Coors Company versus Movement Against Racism.

14 JUDGE NELSON: Do you have that cite?

15 MR. McBRIDE: I hope it's cited in my
16 original letter. I believe so. If not, I'll provide
17 you a copy of it. I have it right here.

18 JUDGE NELSON: Well, I didn't remember it,
19 but there were many citations.

20 MR. McBRIDE: Yes, sir. We were moving
21 very fast back in the three days we had to do this,
22 Your Honor. And I, frankly, just don't recall if that

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1 case was cited here. But I have it right here, and I
2 can hand it up.

3 JUDGE NELSON: Well, just tell me about
4 it. This is your best shot.

5 MR. McBRIDE: Well, this is relying on the
6 Supreme Court's opinion in NAACP versus Alabama, which
7 is cited in our papers.

8 JUDGE NELSON: I have that one here. That
9 has to do with membership lists.

10 MR. McBRIDE: Well, that's correct, Your
11 Honor.

12 JUDGE NELSON: We're talking about
13 petitioning government for redress of grievances.

14 MR. McBRIDE: Well, it's a First Amendment
15 case. And our point is that the First Amendment
16 privileges and rights are protected by the courts,
17 even in discovery. And we were citing that case from
18 that --

19 JUDGE NELSON: Let's see what the -- this
20 is the Tenth Circuit?

21 MR. McBRIDE: This is the Eleventh
22 Circuit, 1985. And the court in the Eleventh Circuit

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1 commenting on the NAACP case described the Supreme
2 Court's holding as a privacy interest in the group
3 association and described the chilling effect posed by
4 disclosure. And the courts had only answered orders
5 compelling disclosure in the face of the substantial
6 standards, which is why Your Honor is correct and I
7 have not argued that this is an absolute First
8 Amendment right.

9 The court has to find some purpose that
10 outweighs the chilling effect that disclosure would
11 have on the --

12 JUDGE NELSON: Let me see when we get to
13 that since you have no privilege. So I'm interested
14 in any cases that say that this matter of the right to
15 petition for redress of grievance creates a discovery
16 breach.

17 MR. McBRIDE: I went to my library last
18 night and read Storie on the Constitution. Let me
19 read to you what Storie had to say about the petition
20 to redress grievances. "The remaining clause" -- he's
21 talking about the five rights under the First
22 Amendment. "It appears that the right of the people

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1 peaceably to assemble and to petition for redress of
2 grievances, a right inestimable in itself but often
3 prohibited in foreign governments, is in the pretense
4 of preventing insurrection and dangerous conspiracies
5 against the government. This would seem unnecessary
6 to be expressly provided for in a republican
7 government since it results from the very nature of
8 its structures and institutions. It is impossible
9 that it could be practicably denied until the spirit
10 of liberty and wholly disappear and the people had
11 become so servile-based as to be unfit to exercise any
12 of the privileges of free men."

13 He goes on to explain it's the most
14 important right in the Constitution. If you don't
15 have a right to go to your government and complain
16 about what's being done to you, you don't have any
17 rights at all.

18 JUDGE NELSON: Livingston would say he's
19 not restricting that right.

20 MR. LIVINGSTON: No.

21 JUDGE NELSON: You certainly have a right
22 to go talk to anyone.

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1 MR. LIVINGSTON: That's right.

2 MR. McBRIDE: And the Eleventh Circuit
3 recognizes that by forcing the disclosure of these
4 sorts of rights, that the people have an associational
5 context and that they have individuals, you may truly
6 exercise.

7 JUDGE NELSON: Does the Eleventh Circuit
8 case deal with the petition clause, the redress?

9 MR. McBRIDE: No, it does not. No, it
10 does not.

11 JUDGE NELSON: Is there any case that
12 does?

13 MR. McBRIDE: Yes. Yes, sir. We cited it
14 in my original letter to you. Bear with me just a
15 moment.

16 JUDGE NELSON: Sure.

17 MR. McBRIDE: This is on Page 5.

18 JUDGE NELSON: I have it.

19 MR. McBRIDE: We cited two cases.

20 JUDGE NELSON: McDonald v. Smith and U.S.

21 v. --

22 MR. McBRIDE: That's correct.

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1 JUDGE NELSON: Do either of those deal
2 with discovery privileges?

3 MR. McBRIDE: Those themselves do not.
4 And that's why I have to cache together the cases that
5 protect constitutional rights and privileges from
6 discovery with those cases that recognize these
7 rights.

8 JUDGE NELSON: How does the discovery
9 impinge on the rights?

10 MR. McBRIDE: Well, I brought with me the
11 client's notes of all of these meetings. And I could
12 tell Your Honor these are the materials the other side
13 would like to see.

14 JUDGE NELSON: That's right.

15 MR. McBRIDE: You said on March 6th, when
16 we argued this, that you needed to see some documents.
17 And there was some discussion subsequently about
18 whether we ought to have these here today. So I
19 brought them.

20 And I have, for example, -- and if Your
21 Honor please, I'd be happy to hand this up -- a
22 communication by my client intended to be maintained

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1 in confidence with the Chief of Staff of the Governor
2 of Utah about this case, faxed to him, and signed by
3 my client. I'd be happy to hand it up to you. You'll
4 see what a confidential communication it is and was
5 intended to be.

6 And, as I represented to you in my letter
7 of yesterday, my client assures me that the Governor
8 of Utah and the Attorney General of Utah, who
9 represent the State of Utah as a party in this case,
10 fully intend that their communications with them be
11 maintained in confidence. We are not talking about
12 something wholly different. And I want Your Honor to
13 be clear about the distinction, the difference between
14 Mr. Livingston.

15 This is my filing in this case for the
16 Western Shippers Coalition. We have submitted as an
17 exhibit to Mr. Jordan's testimony -- Mr. Jordan is the
18 Director of the Western Shippers Coalition -- this
19 study by the Kingsley Group on the economic impacts of
20 this merger on Utah. And this study was never
21 intended to be maintained in confidence. A copy was
22 given to the governor.

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1 A copy was given to a lot of people,
2 including the legislature, the Union Pacific, and now
3 every party in the case. We would make no claim that
4 we shouldn't produce it or couldn't produce it in
5 discovery, and we did produce it in discovery.

6 But this communication, which I'll be
7 happy to hand up to Your Honor for in camera
8 inspection, is an entirely different type of
9 communication. This is talking about strategy that
10 should be engaged in if the governor should meet with
11 the top officials of the Union Pacific Railroad.
12 That's not the kind of communication that they're
13 entitled to discover. This is common interest joint
14 defense with another party in the case.

15 JUDGE NELSON: It sounds to me like work
16 product right off the bat.

17 MR. McBRIDE: And it's that, too. Well,
18 I wasn't representing him at the time.

19 JUDGE NELSON: That's not a brief of the
20 Justice Department. Why haven't you got work product?

21 MR. McBRIDE: Because this is October '95.

22 JUDGE NELSON: So what?

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1 MR. McBRIDE: He retained me in January.
2 He didn't have counsel at the time.

3 JUDGE NELSON: So what? Work product
4 doesn't have to be limited to lawyers.

5 MR. McBRIDE: Well, some judges take a
6 different view of it.

7 JUDGE NELSON: It could be done by
8 consultants.

9 MR. McBRIDE: Well, I agree with that,
10 too, but this is a common interest communication. And
11 the larger point here is we have other notes of his
12 meetings with the governor.

13 And I'll tell Your Honor. Talk about
14 chilling effect. After March whatever it was when
15 this issue came to light, the client informed me he
16 started keeping his notes in code.

17 JUDGE NELSON: Now, why is it that if
18 people want to go talk to their governmental
19 representatives they don't want it known? What is so
20 secret about it?

21 MR. McBRIDE: It depends on whether it's
22 for the purpose of going out and holding a press

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1 conference, which is obviously not intended to be
2 confidential, or for the purpose of engaging in some
3 sort of common interest in litigation and the State of
4 Utah is a party here as a different example altogether
5 or in the case I just gave you some advice about how
6 to deal with the senior officers of Union Pacific
7 Railroad when they were going to come in for a
8 meeting.

9 JUDGE NELSON: Aren't there times when you
10 would go to the government and communication would not
11 be confidential and there are other times that it
12 would be?

13 MR. McBRIDE: Exactly right.

14 JUDGE NELSON: So how do we know?

15 MR. McBRIDE: You might have to look at
16 the communications and decide whether these are the
17 sort of things that were intended to be maintained in
18 confidence or not, which is why I brought them and
19 which is why I just drew the distinctions between
20 documents that I have drawn for you.

21 And I think you will see that these notes
22 were the sort of thing that were intended to be

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1 maintained in confidence. And I'm happy to provide
2 them to you.

3 JUDGE NELSON: My most recent governmental
4 communication -- I was trying to think last night --
5 was an esteemed institution of the Maryland government
6 known as the Department of Motor Vehicles.

7 MR. McBRIDE: Were you petitioning for
8 redress of grievances?

9 JUDGE NELSON: I had given a car away,
10 made a charitable donation, my son's old car, took the
11 license plates off, turned them in, and months later
12 received a computer-printed memorandum from the DMV to
13 the effect that there was no insurance on the car.

14 That was incorrect. There was insurance
15 on the car at all times. And ultimately it ended up
16 my wife took a day off. She gets paid less than I do.
17 So it cost us less. She went to Glen Burnie, Maryland
18 to have communications with the DMV.

19 Now, I was thinking about that and
20 thinking whether there's anything confidential in what
21 she had to do with them so far as I know. I cannot
22 think of anything.

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1 MR. McBRIDE: I agree. I agree because
2 there's no expectation of confidentiality --

3 JUDGE NELSON: I thought it was a case of
4 bureaucratic bumbling at its worst. And here's a
5 woman who has to take time off work and go from here
6 to Glen Burnie, Maryland to get it straightened out.

7 MR. McBRIDE: Let me tell you at least two
8 reasons why --

9 JUDGE NELSON: If anything, I should have
10 been on television complaining about it.

11 MR. McBRIDE: Right. First of all, it's
12 not political. It's the sort of thing that's
13 ordinary. It's not advocating some change in law or
14 policy. She's regulated in the manner in which she
15 drives an automobile. There's no First Amendment
16 right there.

17 JUDGE NELSON: What if I go to my
18 congressman, who is Albert Wynn, to complain about the
19 pay of administrative law judges? Is that political?

20 MR. McBRIDE: Well, if you're asking him
21 to adopt legislation, suppose he says to you, "Judge,
22 this is terrific. Let's go hold a press conference on

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1 this. I can get on the evening news" and you say
2 "Fine"? Well, that communication isn't going to be
3 confidential because neither of you had an
4 expectation.

5 But if you say "No, no, no." --

6 JUDGE NELSON: What if I say "No, no"?

7 MR. McBRIDE: -- "I'm going to get in all
8 kinds of trouble" --

9 JUDGE NELSON: That would be more of his
10 --

11 MR. McBRIDE: That's right.

12 JUDGE NELSON: They'll lop my head off.
13 I don't want any of that known.

14 MR. McBRIDE: Now we're in an entirely
15 different category. As the Department of Justice told
16 you on March 4th, it's called Rovario, and it's the
17 informer's privilege.

18 You may have something you want to go to
19 the congressman on and say, "Boy, I am getting a raw
20 deal from Betsy Moeller over here in FERC" or "the
21 Chief Judge. They're mistreating me. I want you to
22 look into that."

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1 JUDGE NELSON: Let's assume your way that
2 there may be times when it is important,
3 constitutionally, of course, to have confidential
4 communications with government officials and there may
5 be other times when it isn't. How do we work them out
6 other than my going through a paper, for example, and
7 the other side doesn't know what I'm looking at and it
8 takes time? We're not going to take your word for it,
9 I suppose?

10 MR. McBRIDE: No, sir. No, sir. That's
11 why I brought the documents. All right?

12 JUDGE NELSON: The record should show it's
13 a thin stack. It looks to me like it's about a
14 quarter of an inch.

15 MR. McBRIDE: Not even that.

16 JUDGE NELSON: Not that?

17 MR. McBRIDE: But then I also have a
18 three-page series of notes which we might get into
19 down the line here on another request, which are the
20 client's notes, which have written at the top with
21 attorneys' advice "Common Interest Privilege - Joint
22 Defense." And these are notes of a meeting with other

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1 parties in this proceeding. And we're going to get to
2 that. So you've got three more pages to get through
3 if you're going to do it.

4 But I'll solve the whole problem. They
5 can't cite you one case in the 109 years of the
6 Interstate Commerce Commission or the Surface
7 Transportation Board where anybody that's ever cared
8 less about such communications, where the Board or the
9 Commission has ever taken into account some agreement
10 between me and Mr. Bercovici, if we had one, which I
11 don't think --

12 JUDGE NELSON: That's different. We're
13 not talking about that. We're talking now about your
14 communications with government officials.

15 MR. McBRIDE: Or communications with a
16 government. I know of no case in which the Surface
17 Transportation Board or the Interstate Commerce
18 Commission has ever said, "Oh, my God. McBride said
19 the same thing" or "something different" to the
20 Government of the United States or the State of Utah.

21 JUDGE NELSON: You're getting into
22 relevance and need, which are different --

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1 MR. McBRIDE: Exactly.

2 JUDGE NELSON: -- questions right now.

3 MR. KILLORY: Your Honor?

4 MR. McBRIDE: Well, you asked how I might
5 cut through all of this. And my point is if you were
6 to find none of this is relevant, you wouldn't have to
7 decide these difficult questions.

8 JUDGE NELSON: Your letter says that.

9 MR. McBRIDE: Yes, sir.

10 JUDGE NELSON: And I'm going to ask them
11 about relevance.

12 You had a comment here?

13 MR. KILLORY: Yes, Joseph Killory for
14 Conrail, Your Honor.

15 JUDGE NELSON: Killory?

16 MR. KILLORY: Killory, K-I-L-L-O-R-Y.

17 I don't want to interrupt the
18 constitutional discussion with something so mundane,
19 but we have a very serious burden objection that I
20 don't want the record to reflect that everybody has
21 got a little, thin stack of documents like this.
22 There's an enormous burden issue which triggers just

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1 the kind of balancing Your Honor is getting into.

2 So we would like to be heard on that at
3 some point in this discussion.

4 JUDGE NELSON: That, of course, could lead
5 to one result as to Conrail, another result as to this
6 one and that one. I don't know that I can deal with
7 that one.

8 MR. KILLORY: That's true. That's true.
9 I just thought if you were going to make a generalized
10 ruling, we would like to be heard --

11 JUDGE NELSON: No.

12 MR. KILLORY: -- on the relevance issue.

13 JUDGE NELSON: I won't make an assumption
14 that Mr. McBride's thin stack of papers equals
15 everybody else's.

16 MR. McBRIDE: But, if Your Honor please,
17 coming back to your problem, how do you decide this
18 question, you had that problem on March 6th. And I
19 understood it. And you told me you couldn't decide
20 this question in the abstract. And I respected that.

21 JUDGE NELSON: Well, I was trying to avoid
22 a juggling constitutional question, --

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1 MR. McBRIDE: Which is exactly --

2 JUDGE NELSON: -- you also find in NAACP
3 versus Alabama.

4 MR. McBRIDE: You bet. But may I ask Your
5 Honor to take one moment to look at this one document
6 that I referred to previously in camera here so you'll
7 see the sensitivity --

8 JUDGE NELSON: Before I do it, I want to
9 get an idea from the other side now. What we have
10 here legally is language in the U.S. Constitution,
11 which unquestionably is there, which by analogy to
12 other cases can be portrayed as creating a discovery
13 privilege, a qualified discovery privilege, for
14 confidential communications made to governmental
15 officials.

16 Now, why is it your business if I want to
17 go talk to my congressman on a confidential basis?
18 What on earth has the Union Pacific Railroad got a
19 right to know about it?

20 MR. LIVINGSTON: Your Honor, if Conrail
21 made a presentation to a congressman or to the
22 Department of Justice, a study by an economist,

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1 statements by its officers about what it said the
2 impact would be, those documents are directly relevant
3 to the merger. They analyze the issues in the merger
4 case. There isn't any --

5 JUDGE NELSON: Mr. McBride agrees that
6 he's made public those portions.

7 MR. LIVINGSTON: What he has made public
8 is what he has chosen to file on the public record.
9 If all we're allowed to discover is what's on the
10 public record, we don't have any discovery rights at
11 all. Discovery is intended to get at matters that
12 aren't on the public record.

13 Sure, he's willing to give us his press
14 releases and he's willing to give us his publicly
15 filed evidence. Big deal. Discovery is intended to
16 get into the files of the company --

17 JUDGE NELSON: What do you think --

18 MR. LIVINGSTON: -- to get the
19 confidential information.

20 JUDGE NELSON: Take the witness there.
21 What's his name?

22 MR. McBRIDE: Jordan.

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1 JUDGE NELSON: Jordan. Make up a case for
2 me of what Mr. Jordan might have said that will help
3 me understand why you need this and what it's all
4 about.

5 MR. LIVINGSTON: I don't know what they
6 have told the government officials.

7 JUDGE NELSON: Make up a smoking gun.

8 MR. LIVINGSTON: They could have had a
9 presentation where they said, "Here are the reasons,
10 the real reasons, why we would like to" --

11 JUDGE NELSON: What if he says, "I'll give
12 you a million dollars for your vote"? Is the
13 privilege attached to that?

14 MR. LIVINGSTON: Of course not.

15 JUDGE NELSON: I think it doesn't.

16 MR. LIVINGSTON: Of course not. Of course
17 it doesn't. But there isn't any --

18 JUDGE NELSON: Is there any suggestion of
19 that going on?

20 MR. LIVINGSTON: I'm not alleging that.
21 But I am saying that if they made presentations to
22 government officials to try to sway them to support

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1 and to paint a picture of the merger that's different
2 from their public filings -- and presumably they are
3 different from their public filings or they wouldn't
4 be making such a fuss about this. They're clearly
5 trying to hide something. But we're entitled to see
6 what it is.

7 If they're telling one story behind closed
8 doors and another story on the public record, that
9 could well turn out to be relevant.

10 JUDGE NELSON: What is their public
11 position? Let's start with Mr. McBride.

12 MR. LIVINGSTON: Well, it's a thick
13 document. They have I think four --

14 JUDGE NELSON: I certainly haven't read
15 it.

16 MR. LIVINGSTON: Well, I'll let him do
17 that, Your Honor.

18 There are I think four expert witnesses in
19 there focusing on issues relating to traffic around in
20 the Rocky Mountain area.

21 JUDGE NELSON: What do they want?

22 MR. LIVINGSTON: What?

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1 JUDGE NELSON: What do they want?

2 MR. LIVINGSTON: I believe they want the
3 merger denied, Mr. McBride's --

4 JUDGE NELSON: If they say to the Board,
5 "Deny this merger for various reasons. It's going to
6 do bad things to shipper interests in the West" --

7 MR. McBRIDE: It's not our position.

8 JUDGE NELSON: What is your position?

9 MR. McBRIDE: Our position is we're
10 opposed unless, as the cab cover says, responsive
11 applications are granted or competitive conditions are
12 imposed, and we support the responsive application in
13 a separate filing of Montana Rail Link. We'll be
14 happy to hand it up.

15 JUDGE NELSON: In a short few sentences,
16 what's the opposition based on?

17 MR. McBRIDE: The opposition is based on
18 the fact that Utah is probably the most adversely
19 affected state in the union because they go from two
20 major railroads to one. And we don't believe that the
21 agreement with Burlington Northern/Santa Fe will lead
22 to substitution of that same competition. And that's

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1 why we support bringing a new competitor in there, as
2 Your Honor and I have discussed previously with the
3 map.

4 MR. LIVINGSTON: Well, the deal does bring
5 a new competitor in. It brings in Burlington
6 Northern.

7 JUDGE NELSON: So that's what they're
8 saying, that they don't like this because of its
9 anti-competitive consequences, which they say will not
10 be cured by the BN/Santa Fe agreement but can be cured
11 by the imposition of other conditions. That seems to
12 be it in a nutshell.

13 Now they go to the Governor of Utah
14 hypothetically or their congressman. And what is it
15 that they would say in a hypothetical?

16 MR. LIVINGSTON: Whenever any of these --

17 JUDGE NELSON: "Don't believe us. This is
18 a terrific merger."

19 MR. LIVINGSTON: We need discovery to find
20 out what they're saying. Are they saying --

21 JUDGE NELSON: Do you have any reason to
22 believe that they're saying anything different from

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1 their public case?

2 MR. LIVINGSTON: I have every reason to
3 believe that because they won't produce the documents.
4 That seems to me indication enough that there's
5 something to hide. But, in any event, we're entitled
6 to see the presentations that they've made.

7 It may be that WSC is not the best choice.
8 Conrail is the one that's been making the
9 presentations. If they say it's a burden, they have
10 obviously made --

11 JUDGE NELSON: Is this the submission to
12 the Governor of Utah that this is all about with
13 respect to Mr. McBride's letter?

14 MR. LIVINGSTON: When the discovery was
15 posed to them, we didn't know that they had talked to
16 the Governor of Utah. Maybe we did know that, but we
17 wanted to know whether they had made a presentation to
18 the Department of Justice or any of the other
19 government agencies and, if they had, to produce the
20 documents. That's what we asked of all of these
21 parties.

22 Now, maybe all they talked to was the

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1 Governor of Utah. I don't know.

2 JUDGE NELSON: I know you're asking. And
3 if we assume that there's a constitutional flavor that
4 protects some of this --

5 MR. LIVINGSTON: Your Honor, I'd like to
6 be heard on that. There is no basis for this. There
7 is no case that comes remotely close to supporting
8 their position on this, none. There is no ICC
9 precedent for this. There is no case of any sort that
10 I know of.

11 He's relying on the NAACP versus Alabama,
12 where there was evidence of harassment and threats and
13 danger to the members of an organization in a highly
14 charged and difficult atmosphere.

15 The same kind of argument was attempted to
16 be made more recently in the Coors case. People
17 asserted that they were in danger from the Ku Klux
18 Klan if they had to engage in certain discovery in a
19 case involving Adolph Coors Brewery Company. And the
20 Court of Appeals rejected the argument and permitted
21 the discovery to go forward and I think made it clear
22 that when somebody wants to raise that NAACP argument,

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1 there's got to be evidence of reprisals, threats,
2 danger, that sort of thing.

3 This is a commercial case.

4 JUDGE NELSON: It isn't enough that --

5 MR. LIVINGSTON: There is no showing here
6 of any threats or reprisals or --

7 JUDGE NELSON: -- a person says that, say,
8 "I want to go see my congressman about the working
9 conditions of administrative law judges"? Isn't it
10 enough that I say I want to have this meeting be in
11 confidence?

12 MR. LIVINGSTON: And have it protected
13 from discovery?

14 JUDGE NELSON: Sure.

15 MR. LIVINGSTON: Just because one wants to
16 have a meeting in confidence doesn't protect it from
17 discovery. But that's not what this is about.

18 JUDGE NELSON: How about if the
19 congressman agrees? How about if he agrees that we
20 sign a piece of paper reciting confidentiality upon
21 which we each put a drop of our mutual blood and then
22 a wax seal comes down on it, a notary comes in and

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1 there are blue ribbons on it and all formalities of
2 that?

3 MR. LIVINGSTON: I don't think engaging in
4 those acts protects anything from discovery.
5 Otherwise people whenever they wrote a document would
6 say, "I don't want this document ever disclosed in
7 discovery" and every time they write an internal memo.

8 Discovery is all about producing things
9 that were not written for the public eye that are in
10 the internal files of a company.

11 JUDGE NELSON: So the right to petition
12 for redress of grievances is really a right to
13 petition publicly for a redress of grievance?

14 MR. LIVINGSTON: And privately.

15 JUDGE NELSON: Not if you can get it.

16 MR. LIVINGSTON: But if you injected
17 yourself into a proceeding where the documents you
18 have written are relevant to the case, as these are,
19 then you cannot interpose the First Amendment as a
20 barrier to the production of relevant information
21 absent some extraordinary showing of the kind made in
22 the NAACP case.

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1 JUDGE NELSON: We'll get back to the
2 showing. Anything else on the question of whether
3 there is a privilege?

4 MR. LIVINGSTON: I would emphasize again,
5 Your Honor, this is an absolutely extraordinary
6 argument that's being made that there is no support
7 for. There is nothing in the case law that would say
8 that you can go to your congressman or the Department
9 of Justice and shield from discovery everything that
10 you give them.

11 JUDGE NELSON: Well, I think Mr. McBride
12 recognizes that none of the redress cases go to the
13 discovery privilege; correct?

14 MR. McBRIDE: I haven't found one, but
15 what I have found are cases that say other
16 constitutional rights can be protected in discovery.
17 There has to be a first case sometime. This is it.

18 JUDGE NELSON: You have them that tell how
19 important the redress clause is.

20 MR. McBRIDE: That's right.

21 JUDGE NELSON: And you have cases that
22 take on the First Amendment protections and convert

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1 them into privileges, qualified privileges.

2 MR. McBRIDE: From discovery.

3 MR. LIVINGSTON: Your Honor, in the
4 antitrust field, in the Noerr-Pennington cases, where
5 people try to make into an antitrust claim joint
6 activity by competitors who are petitioning for
7 grievances, in those cases, it is a defense to the
8 Sherman Act for the conspirators, the alleged
9 conspirators, to say, "We were not conspiring for
10 commercial purposes. We were joining together to make
11 a common petition for grievances." That's protected
12 activity. And the Sherman Act claim will be
13 dismissed.

14 But they are subject to discovery on the
15 communications that they had with the government and
16 the communications that they had between themselves.
17 They can't not --

18 JUDGE NELSON: Let's ask Mr. McBride about
19 that, the Noerr-Pennington business.

20 MR. McBRIDE: That's exactly why --

21 JUDGE NELSON: Let's see if I understand
22 it.

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1 MR. McBRIDE: Yes, sir.

2 JUDGE NELSON: It has to do with the right
3 of competitors to jointly petition the government for
4 redress of grievances?

5 MR. McBRIDE: Correct.

6 JUDGE NELSON: And not violate the
7 antitrust laws?

8 MR. McBRIDE: That's correct.

9 JUDGE NELSON: Because that privilege
10 creates a defense?

11 MR. McBRIDE: That's correct.

12 JUDGE NELSON: Then he says that's got
13 nothing to do with discovery.

14 MR. McBRIDE: That's right. And you know
15 why that's true? And that's why I've not asserted
16 absolute First Amendment rights here. The reason why
17 that's true -- and I'll hand up the case to you. It's
18 their case.

19 And, by the way, the Coors case was their
20 case, too. That's why I couldn't find it in my
21 letter. It's in their letter.

22 The case that they cited is North Carolina

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1 Electric Membership Corp. versus Carolina Power and
2 Light Company from the Fourth Circuit in 1981. The
3 citation is 666 F. 2nd 50.

4 And the case makes it clear. The whole
5 point of the Noerr-Pennington case is the reason you
6 get to discover those communications is why? Because
7 they're trying to determine whether the communications
8 to the government that are argued to be protected by
9 Noerr-Pennington as an exemption to the antitrust laws
10 might have been a sham in order to come within that
11 protection. And so you have to have discovery in the
12 antitrust context to determine whether that's true.

13 JUDGE NELSON: That's what you meant.
14 There was a paragraph in your letter yesterday that I
15 struggled with and didn't understand.

16 MR. McBRIDE: I apologize. It was a --

17 JUDGE NELSON: I know you were in a hurry.
18 I understand that.

19 MR. McBRIDE: Yes. I apologize. But
20 that's what --

21 JUDGE NELSON: Tell me about that position
22 again.

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1 MR. McBRIDE: My point is simply --

2 JUDGE NELSON: The discoverability of
3 those materials is essential in order to assure that
4 the privilege is correctly claimed --

5 MR. McBRIDE: That the communications were
6 not yet --

7 JUDGE NELSON: -- will allow a privilege
8 when you turn them over?

9 MR. McBRIDE: Well, it's what's a
10 qualified privilege. This is why we need judges to
11 decide these questions. Because the Government of the
12 United States comes to you and says, "We want to apply
13 the Sherman Act and the Clayton Act to these people"
14 and they're claiming that we can't even talk about it
15 or that they don't have to tell us anything about the
16 communications that we allege violate those statutes
17 because of Noerr-Pennington.

18 JUDGE NELSON: This Noerr-Pennington case,
19 what's the name of it?

20 MR. McBRIDE: North Carolina Electric
21 Membership versus Carolina Power and Light.

22 JUDGE NELSON: Was itself an antitrust

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1 action?

2 MR. McBRIDE: The action was, yes, a
3 Sherman Act case.

4 JUDGE NELSON: A damaged private action?

5 MR. McBRIDE: That's correct.

6 JUDGE NELSON: In which some of the
7 governmental joint conduct with the government was
8 alleged to violate the Sherman Act?

9 MR. McBRIDE: Yes. And the holding of the
10 case -- I want to be absolutely up front with Your
11 Honor. This is why I've just told you what I told
12 you. This is what the first paragraph of the opinion
13 says after saying it's a Sherman Act, "We hold that
14 the Noerr-Pennington exemption from antitrust
15 liability does not extend to discovery of evidence.
16 And, therefore, we reverse." So in that context --

17 JUDGE NELSON: It's like that case?

18 MR. McBRIDE: Yes. It's essential to
19 prove the Sherman Act claim that you determine whether
20 the communications were properly within
21 Noerr-Pennington or --

22 JUDGE NELSON: So there's a case where the

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1 invocation of the redress clause did not create a
2 discovery privilege?

3 MR. McBRIDE: That's right. And that's
4 because of the overriding state interest in proving a
5 violation of the Sherman Act. And that's why I've
6 said to you that their burden is to prove some
7 substantial or overriding state interest here just to
8 find they're invading my client's justifiable
9 expectations of privacy in communications with the
10 Governor of Utah and others.

11 JUDGE NELSON: So you're saying that the
12 Carolina case really stands for the finding of a
13 qualified privilege and a finding that the discovery
14 carried the day there?

15 MR. McBRIDE: That's exactly right.

16 JUDGE NELSON: Not an absolute
17 pronouncement that the redress clause was not creating
18 the privilege?

19 MR. McBRIDE: Exactly right, exactly
20 right. You have to in each case decide: What
21 possible relevance would this communication have?
22 There, Your Honor, if I may say so --

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1 JUDGE NELSON: Is this the closest we come
2 to a case that deals with the redress clause in the
3 context of discovery?

4 MR. McBRIDE: As my research has --

5 JUDGE NELSON: Why don't you hand it up?
6 I'll look at it.

7 MR. McBRIDE: Sure. But if I may just say
8 just one sentence?

9 JUDGE NELSON: Yes, sir.

10 MR. McBRIDE: The communications in this
11 case were at the core of the cause of action that was
12 alleged in the case. My client's communications with
13 the Governor of Utah are about as peripheral as one
14 can get from this case. The communications qua
15 communications.

16 JUDGE NELSON: I'm not sure I follow that
17 last point.

18 MR. McBRIDE: The point being that --

19 JUDGE NELSON: Your point is that this
20 merger is anti-competitive and doing bad things to
21 your clients and you need relief. How do you then say
22 that your conversations with the Utah folks don't go

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1 to the core of the case?

2 MR. McBRIDE: Because it --

3 JUDGE NELSON: Were you in there talking
4 about the Orioles?

5 MR. McBRIDE: No, no, no. I told you they
6 were talking about this case. I'm not saying this
7 doesn't have to do with the case. What I'm saying it
8 is the underlying facts that matter to the Surface
9 Transportation Board, not what my client may have used
10 in the way of an adjective or an adverb if that's what
11 happened, about Mr. Lewis or Mr. Davidson in
12 conversation with the governor that the Surface
13 Transportation Board will care about.

14 JUDGE NELSON: I understand your point,
15 which is that this goes to really relevance and need.

16 MR. McBRIDE: Yes.

17 JUDGE NELSON: But what the Board is
18 really interested in is the merits of your position,
19 not what you've told some governor.

20 MR. McBRIDE: Exactly.

21 JUDGE NELSON: I know that. And the other
22 side is trying to say, "Well, he may have told a

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1 governor different things. It goes to weight,
2 credibility, and so forth."

3 MR. McBRIDE: My colleagues hopefully
4 summarized --

5 JUDGE NELSON: Any problems if I look at
6 this? It's not marked. I'm looking at this opinion
7 here in the Fourth Circuit.

8 Mr. Killory, you have something to say on
9 this case?

10 MR. KILLORY: I hate to bring it back down
11 away from the lofty constitutional issues, but there
12 are two very limited points in response to what Mr.
13 Livingston said.

14 JUDGE NELSON: If you can do that, that's
15 fine.

16 MR. KILLORY: The relevance issue really
17 goes to your constitutional considerations as well as
18 our very serious burden objections. So I think it
19 sort of relates to both aspects.

20 One is that when this very question was
21 put by KCS to applicants -- there's nobody in this
22 room who has a client that has had more private

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1 meetings with government officials, shippers, and
2 other parties.

3 And when this very question was put asking
4 for all communications, presentations, et cetera,
5 relating to all of these meetings that you had,
6 understandably, to lock up political support for --

7 JUDGE NELSON: They said they answered
8 them.

9 MR. KILLORY: They said, and I quote,
10 "Applicants object to this interrogatory as unduly
11 vague and unduly burdensome and over-broad and that it
12 seeks information that is neither relevant nor
13 reasonably calculated to lead to the discovery of
14 admissible evidence. Without waiving this objection
15 and subject to the general objections stated above,
16 applicants respond as follows. Certain public
17 communications of this type" --

18 JUDGE NELSON: I saw that.

19 MR. KILLORY: -- "brought out during this
20 proceeding and the proposed transaction are being
21 produced." Nothing else said in that answer.

22 JUDGE NELSON: What happened with that?

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1 I don't recall any further debate about it.

2 MR. LUBEL: We never got it, Your Honor.

3 JUDGE NELSON: You never?

4 MR. LUBEL: We got the public
5 presentation.

6 JUDGE NELSON: You never pursued the
7 discovery as to the North Carolina --

8 MR. LIVINGSTON: They did pursue it, and
9 they got materials.

10 MR. LUBEL: Oh, Your Honor, I remember
11 seeing one set of notes, -- they can tell me if I'm
12 wrong -- one set of notes of some meeting with a
13 government official. But they've got support from 17
14 governors, all of these state people. They didn't
15 give us all of the details that showed the
16 communications with those people.

17 And based on that objection, they could
18 give us whatever they wanted to.

19 MR. KILLORY: As a further point, Your
20 Honor, I think it's important to remember what your
21 rulings were on March 8th and how it relates to what
22 we're doing here.

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1 The burden we have is an enormous one
2 because while we haven't had as many, Conrail has not
3 had as many, absolutely without exercising their
4 political right to meet with representatives and
5 congressman, what you ruled on March 8th was that to
6 the extent we had any communications with shippers,
7 speaking for Conrail, shippers or Mexico, we should
8 produce.

9 We presented the packets. We produced
10 them to the other side. It's a very different issue
11 here when you're talking about --

12 JUDGE NELSON: What do you say about this
13 North Carolina case?

14 MR. KILLORY: I haven't looked at the
15 North Carolina case.

16 JUDGE NELSON: Does anyone have comments
17 on it?

18 MR. LIVINGSTON: Your Honor, I think it
19 would stand for the proposition that while activity
20 may be covered by the First Amendment and protected,
21 that doesn't mean that communications made in
22 connection with that activity are immune from

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1 discovery. That's the difference here.

2 The activities of the parties in
3 contacting governmental entities are protected by the
4 First Amendment, of course. That doesn't mean they
5 are immune from discovery by virtue of the First
6 Amendment.

7 JUDGE NELSON: So this is the only case,
8 Mr. McBride, that's ever addressed the redress clause
9 in the context of discovery?

10 MR. McBRIDE: Well, if Your Honor please,
11 I can't tell you that because the --

12 JUDGE NELSON: The only one you found?

13 MR. McBRIDE: Well, up to March 4th and
14 5th, when we were busily doing the research and then
15 Your Honor ruled this was all premature on the 8th,
16 then we haven't been researching the Constitution
17 until yesterday morning, when I got in and found their
18 after-midnight communication. And then I did the best
19 I could in four or five hours.

20 MR. LIVINGSTON: Your Honor, we cited
21 another case in our letter to you of a District Court
22 decision in Wisconsin in 1995, General Motors versus

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1 Johnson Matthey.

2 JUDGE NELSON: On the Noerr-Pennington
3 business?

4 MR. LIVINGSTON: Right. Well, it's where
5 a corporation was -- I'm reading from our letter --
6 sanctioned for refusing to comply with a discovery
7 order to turn over lobbying documents. And the court
8 held that the First Amendment claim was not
9 substantially justified.

10 One of the things I'd like to emphasize
11 here, what we were arguing this morning and what the
12 issue was at this hearing is this blanket, essentially
13 blanket, First Amendment privilege that's being
14 asserted without any support.

15 JUDGE NELSON: It would have to yield upon
16 an appropriate showing of need and other factors.
17 It's a qualified privilege.

18 MR. MCBRIDE: And, for example, that's
19 exactly right. Suppose the Governor of Utah had said
20 to their client -- and they did know we had met with
21 the Governor of Utah, by the way. Mr. Livingston
22 corrected that. Their client has been in to see him,

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1 and so has mine.

2 Suppose the governor told them and they
3 had an affidavit or even just a letter representation
4 that "We really support the merger. We're just doing
5 this for some crazy reason." Now you might begin to
6 wonder whether there's something about our
7 credibility.

8 Mr. Livingston suggests without any basis
9 in this fishing expedition that these notes are going
10 to show you that my client has a different position
11 than it's taken in the case. I'll tell you that's not
12 so. That's not why we're protecting these. We're
13 protecting these because we want to have confidential
14 communications with government officials.

15 And the Justice Department told you in its
16 March 4th letter, contrary to the representation of
17 applicants' counsel, that numerous shippers had told
18 it that they were concerned about threats of reprisal
19 here.

20 And a former lawyer with the Interstate
21 Commerce Commission just yesterday called me to tell
22 me that his client in this case, which I'll name for

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1 you in camera if you like and you can call him if you
2 like, told me that one hour after their public
3 opposition to this position to this proceeding was
4 announced the Southern Pacific Railway told them,
5 "We're not locking the gate to your facility anymore.
6 We don't have time to get off the train. And they're
7 starting to mistreat them for service."

8 And I've got a letter in my office, which
9 I think I neglected to bring down here today, from
10 somebody who only wants you and the Justice Department
11 and me to see it to give to you about their concerns
12 about threats of reprisals.

13 MR. KILLORY: Moreover, Your Honor, on the
14 relevance point, it's one thing to say, as they did on
15 March 8th, "Gee, we need to see whether these shippers
16 have been bamboozled and misled into taking a
17 position." But to apply that notion to government
18 officials, to say that the Department of Justice has
19 been tricked by WSC or by Conrail or by somebody else
20 into taking an erroneous position, that's just
21 foolish. I mean, it's demeaning to those officials as
22 well.

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1 MR. LIVINGSTON: Your Honor, we're not
2 attempting to demean the Department of Justice.

3 JUDGE NELSON: What is there in the North
4 Carolina opinion here that -- what language creates a
5 qualified privilege?

6 MR. McBRIDE: Well, it's the --

7 JUDGE NELSON: Show me the --

8 MR. McBRIDE: -- holding in the very first
9 paragraph that the Noerr-Pennington exemption does not
10 extend to discovery of evidence because those
11 communications were central to the cause of action;
12 whereas, what I'm telling you in the case they
13 themselves cited -- it's marked up. So you may not
14 want me to hand this one up to you. But what the
15 Eleventh Circuit said --

16 JUDGE NELSON: That's not a redress case?

17 MR. McBRIDE: Not a redress case.

18 JUDGE NELSON: I'm interested in this.

19 MR. McBRIDE: I understand.

20 JUDGE NELSON: What language is there in
21 there that creates a qualified privilege?

22 MR. McBRIDE: Well, the court's holding

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1 that the communications in question in that case were
2 discoverable because without them you couldn't prove
3 whether the Noerr-Pennington exemption was being
4 properly raised in a Sherman Act context or not.

5 JUDGE NELSON: Where is that?

6 MR. McBRIDE: If Your Honor would read
7 just the first paragraph of the opinion, I think
8 you'll get the substance of what I just described to
9 you.

10 JUDGE NELSON: It can be read as a
11 straightforward holding that the Noerr-Pennington
12 exemption, which, in turn, is an anchor to the redress
13 clause, does not extend to discovery of evidence.

14 MR. McBRIDE: Right, in that context. I'm
15 representing to you if you read the whole opinion, I
16 think you'll see it's because communications were
17 essential to the cause of action. The communications
18 qua communications.

19 JUDGE NELSON: Cause of action is for
20 violations of the antitrust law?

21 MR. McBRIDE: That's right.

22 JUDGE NELSON: By the municipals, co-ops?

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1 MR. McBRIDE: That's right, in their
2 concerted actions. And they said, "Oh, no," they're
3 covered by Noerr-Pennington, "We're exempt from the
4 Sherman Act."

5 And then somebody says, "Well, let me see
6 your communications," see if they're covered by
7 Noerr-Pennington.

8 They say, "Oh, no. We can't give you
9 those in discovery. That would show our rights."

10 And the court says, "Well, not in this
11 context. You've got to turn them over because they
12 are what is at issue."

13 JUDGE NELSON: It certainly can be read as
14 against you here, Mr. --

15 MR. McBRIDE: Oh, I'm not disputing that.

16 JUDGE NELSON: Are there any comments from
17 any other lawyers on the intervenor side or the
18 government side about this North Carolina thing? What
19 does the Department of Justice say about all of these
20 things? Your name is what, ma'am?

21 MS. FELASCO: Michele Felasco.

22 JUDGE NELSON: Helasco?