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Case: North American Freight Car Association, et al. v. Union Pacific
Railroad Company



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IN THE MATTER OF: : Docket Number

NORTH AMERICAN FREIGHT CAR : NOR 42144

ASSOCIATION, ET AL., :

V. :

UNION PACIFIC RAILROAD COMPANY. :

- - - - - X

Hearing Room 1
Federal Energy Regulatory
Commission
888 First Street, NE
Washington, DC

Thursday, June 23, 2016

The above-entitled matter came on for oral argument,
pursuant to notice, at 10:01 a.m.

BEFORE:

HONORABLE JOHN P. DRING
ADMINISTRATIVE LAW JUDGE

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

2 PRESIDING JUDGE: We're on the record.

3 I'm Administrative Law Judge John Dring. And
4 today we have oral arguments on a motion to compel
5 discovery and in the alternative to issue subpoenas in
6 Surface Transportation Board, Docket Number NOR 42144,
7 North American Freight Car Association, et al., versus
8 Union Pacific Railroad Company.

9 At this point, would counsels please enter
10 appearances.

11 MR. MORENO: Your Honor, Jeff Moreno for the
12 American Chemistry Council and The Fertilizer Institute.

13 MR. WILCOX: Tom Wilcox for North American
14 Freight Car Association and Poet Ethanol and Poet
15 Nutrition.

16 PRESIDING JUDGE: Thank you.

17 MR. SHANER: Your Honor, Houston Shaner for
18 American Fuel & Petrochemicals Manufacturers.

19 PRESIDING JUDGE: Thank you.

20 MR. MONROE: Good morning, your Honor. David
21 Monroe for NAFCA and Cargill equally.

22 PRESIDING JUDGE: Thank you.

23 MR. DONOVAN: Good morning, your Honor. Paul
24 Donovan for The Chlorine Institute.

25 PRESIDING JUDGE: Thank you.

1 MR. ROSENBERG: Good morning, your Honor.
2 Robert Rosenberg for American Railcar Industries, Inc.
3 otherwise known as ARI.

4 PRESIDING JUDGE: Thank you.

5 MR. GOLDSTEIN: Good morning, your Honor. Marc
6 Goldstein on behalf of the Union Tank Car Company.

7 PRESIDING JUDGE: Thank you.

8 MR. KALAS: Good morning, your Honor. Matthew
9 Kalas on behalf of Trinity Industries.

10 PRESIDING JUDGE: Thank you.

11 MR. NEUMAN: Good morning, your Honor. Reed
12 Neuman on behalf of GATX.

13 PRESIDING JUDGE: Thank you.

14 Over here.

15 MR. ROSENTHAL: Good morning, your Honor. Mike
16 Rosenthal on behalf of Union Pacific Railroad Company.

17 PRESIDING JUDGE: Thank you.

18 MS. PILLAI: Good morning. Kavita Pillai on
19 behalf of Union Pacific.

20 PRESIDING JUDGE: Thank you.

21 MS. RINN: Good morning. Louise Rinn on behalf
22 of Union Pacific.

23 PRESIDING JUDGE: Thank you.

24 MR. RICHARDSON: Good morning, your Honor.
25 Craig Richardson on behalf of Union Pacific.

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1 PRESIDING JUDGE: Thank you. Thank you very
2 much.

3 Mr. Donovan, I'm relieved to see you don't have
4 a powdered wig on. My law clerk put together, since I
5 don't know any of you, a list here and pictures on the
6 Internet, but you don't have one so this little imp over
7 here put in Blackstone, so I'm glad to see you don't look
8 anything like Mr. Blackstone.

9 MR. DONOVAN: Your Honor, if you had a face
10 like this, you wouldn't put it on the Internet either.

11 PRESIDING JUDGE: All right, all right. I
12 promised myself I wouldn't start out with total strangers
13 with a joke, but I just can't help myself.

14 Let me just say first of all -- this is
15 interesting to me -- I was struck by the high quality of
16 the advocacy of all of the materials that you have
17 submitted in this case. I'm talking about everyone who
18 submitted anything, just very, very good work.

19 I hadn't shared that with my law clerk, whom I
20 hold in very high regard. And this morning, darn if he
21 didn't say the same thing. I think you can all give
22 yourselves a pat on the back, if it's something you'd like
23 to do. It's very good work.

24 Having said that, I have studied all of the
25 materials to great length and feel conversant with all of

1 them. Therefore, I really don't care to hear the audio
2 version of any of this. But if you feel that there's
3 something I either don't understand or something that you
4 haven't put in these written submissions that I should
5 know about, I really do want you to tell me about it.

6 It's just that I want you to feel comfortable
7 that I understand the materials and I want to feel
8 comfortable that I'm not going to have to interrupt you
9 not to tell you not to put something you've already put in
10 writing.

11 I decided here -- I don't usually do this, but
12 I'm going to give you an order of the proceedings which
13 reflect my opinions to date on the arguments here.

14 Mr. Rosenthal, it's probably not going to make
15 you happy to hear this at the beginning, but please keep
16 this in mind, that I have a reputation, I understand,
17 around this building as being very fair and open-minded
18 and that's certainly my intention to remain so in this
19 proceeding.

20 I anticipate -- and my law clerk here again,
21 after
22 seeing the quality of the submissions, he's really -- he
23 thought it could go on pay-per-view -- I really expect a
24 full and thorough and interesting discussion here. Just
25 because I tell you what my initial impressions are does

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1 not suggest where we're going to end up with this.

2 MR. ROSENTHAL: I appreciate that, your Honor.

3 PRESIDING JUDGE: I'd like to start -- I will
4 give you the brief outline first. We're going to discuss
5 discovery versus the subpoenas, and then we're going to
6 discuss UP's hurdles. There are two general categories,
7 as I see it, perhaps collateral attacks on Count II,
8 perhaps on Count I as well. I want to hear more about
9 that.

10 The subpoenas and if it's appropriate and how
11 the Coal Dust test would apply to my decision and issuing
12 or not issuing subpoenas. And then Mr. Rosenthal, if we
13 get through that, we can go through the reply to the
14 petition for subpoenas. I thought it was very well done.
15 It's, I think, a good outline. We'll go through that page
16 by page. I have questions and comments on each one of
17 them. I like the way it organized all your materials, and
18 I think it did so fairly.

19 And then, lastly, we can get to Mr. Wilcox's
20 motion to compel discovery for interrogatory number 16. I
21 think that would do it.

22 Let me just see something here. Let's begin
23 with the request for discovery versus subpoena.

24 I can't for the life of me, see how it would be
25 effective for me to order discovery in this case against

1 trade associations for the information that their members
2 have as they have articulated. They have no ability to
3 compel their members to give up this information and
4 indeed, some of them may be so vexed by this that they
5 might even drop out.

6 I know. I've been in the trade association
7 business. I've been a member of a trade association, and
8 I can fully appreciate the complexities and difficulties
9 of trying to get trade association members to do anything.

10 Having said that, I think that subpoenas are
11 certainly doable in this case, and I would have no problem
12 whatsoever under the appropriate circumstances ordering
13 subpoenas.

14 Mr. Rosenthal, can you address my concerns
15 about discovery versus subpoenas, please.

16 MR. ROSENTHAL: Do you prefer that I
17 stand or --

18 PRESIDING JUDGE: You know what? What would
19 you like to do? Do you want to stay seated?

20 MR. ROSENTHAL: If that's fine with your Honor.

21 PRESIDING JUDGE: Fine. Thank you for the
22 question.

23 MR. ROSENTHAL: I do understand your concerns
24 about discovery against trade associations. We approach
25 this case very much, as we understand it, like the parties

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1 approach the Coal Dust case. We tried to approach this
2 very much like the parties in the Coal Dust case and very
3 much like we've approached other cases where associations
4 have been the complainants, are which is we submitted
5 discovery requesting the types of information that we
6 think we're entitled to and that we need to litigate the
7 case, both to defend against their charges and to prove
8 what we would like to prove in front of the Board. We
9 expected to work with them to reach reasonable
10 compromises.

11 In the Coal Dust case, the Board refers to
12 another case against NAFCA where we did just that. We
13 submitted discovery. The association went out, collected
14 documents from the members. The members submitted
15 testimony, and we were able to use those documents to
16 address the testimony, the Board was able to come to a
17 decision, and we spent a considerable amount of time
18 trying to reach resolution. In fact, I should have
19 probably started off by saying that pursuant to your
20 instructions that the parties continue to work together,
21 we did yesterday reach agreement on a set of stipulations
22 that eliminate a number of the interrogatories and
23 document requests that were in dispute.

24 PRESIDING JUDGE: Okay. Good.

25 MR. ROSENTHAL: Faced with the idea and the

1 practice that there is going to be discovery in one way or
2 another, parties have typically been able to work
3 together.

4 As you'll see in the correspondence, a lot of
5 the objections that we received involved relevance. They
6 said well, we just don't think this is relevant. We tried
7 to compromise in that way by offering not just the
8 stipulations that we agreed to but stipulations that
9 addressed a number of other issues. You don't think this
10 matters? Well, then we do, but stipulate to it. If you
11 don't want to fight on that, stipulate to it, and we tried
12 to approach it that way.

13 We also offered in a number of cases to take a
14 sample approach, to ask them to go out and not do all of
15 their members, but we would come up with a list of -- the
16 number we came up with was 35 and said let's go about it
17 that way. Again, we were met with the answer no, we're
18 not going to give you any of this.

19 So we understand that you're not inclined to
20 grant discovery against all of the associations, and there
21 are hundreds and hundreds of members, and frankly, we're
22 not inclined to go after them all with subpoenas, but what
23 we did was we followed the Coal Dust pattern.

24 We said if we can't get discovery against the
25 associations, then what we're going to do is seek

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1 subpoenas against the members. We can't subpoena 900, a
2 thousand, however many there are.

3 What we did was we picked four companies that
4 own the majority at least, perhaps the vast majority of
5 tank cars that we believe were sophisticated, would have a
6 lot of the information that we needed, and we served
7 subpoenas on them.

8 Now, the way this process works is it's been
9 much more rushed than often happens in a normal case. In
10 a normal case, we serve subpoenas. We get replies, we
11 evaluate replies, we look at the burdens. Maybe there
12 were misunderstandings about the scope of what parties
13 wanted.

14 Maybe a party has a particular reason why they
15 can't produce everything in the subpoena, but it would be
16 much more sufficient to produce a smaller segment, and
17 there's that discussion process, the same that goes on in
18 the discovery process. You serve discovery. You get
19 answers. The parties meet and confer.

20 In this case, again, because of the timing, we
21 haven't had a chance to meet and confer about the answers
22 that we received to the subpoenas. The subpoenas were
23 served. The response was supposed to be due the 9th or
24 the 6th. We agreed to grant an extension until the 20th.
25 So we didn't receive the answers until Monday. We've had

1 no time to talk.

2 PRESIDING JUDGE: I trust you've been through
3 those answers.

4 MR. ROSENTHAL: I've absolutely been through
5 those. I want to assure you, that when we received the --
6 when we knew there were going to be objections to the
7 subpoena and we had agreed to grant the schedule and we
8 knew which lawyers at the time were representing the
9 parties, we sent an e-mail. We said look, we're serving
10 these subpoenas, but please, we'd like to talk about them
11 and see if we can work something out.

12 I received one response from one of the
13 parties. We met briefly at a conference. The question
14 was are we willing to be reasonable or are we just serving
15 these subpoenas to make a point? I said we're trying to
16 be reasonable. I think in the time it took to perhaps
17 generate the rather extensive responses, there were no
18 contacts made.

19 So when I look at the responses, I certainly
20 see some of the concerns about the burdens involved. It
21 seems like different parties had different views of the
22 burdens and maybe different understandings of what we were
23 being asked to do, you know, where one party tells me
24 we're going to have to search every document under the
25 sun, somebody else is saying we can collect these

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1 documents for \$1500.

2 So you know, I think there's -- I know there is
3 room to work out reasonable approaches to getting the
4 information we think we need, but we haven't had the
5 opportunity to have those discussions. And maybe their
6 view is we could give you the information, but we don't
7 think it's relevant at all. We're not going to spend a
8 second on it, we're not going to spend a dime on it
9 because we don't think it's relevant. And maybe that's
10 why they haven't reached out.

11 But if their concern is the burden of
12 production, that is certainly something that could be
13 worked out, and we'd really like the opportunity to be
14 able to sit down with them and say what can you reasonably
15 do because the submissions that were put in, some of them
16 were suggesting it was the end of the world. Others
17 seemed to suggest that a lot of the information we
18 requested, most of the information we requested could be
19 gathered with, again, what appeared, from our reading of
20 the submissions, with not much effort.

21 And there are other areas where they
22 complained, we don't have the data. Railinc has the data,
23 for example.

24 PRESIDING JUDGE: Yes.

25 MR. ROSENTHAL: And you know, in some cases --

1 my understanding is that Railinc is a company that happens
2 to be, I guess, owned collectively by the railroad
3 industry, but it's a large data company, and it works as
4 an agent, I think, for some of these companies in tracking
5 their movements to shops.

6 If we had their permission, and this is
7 something we had suggested to the associations as part of
8 one of our compromises, if we had their permission, we
9 could go to Railinc and see how difficult it would be to
10 get the information they want.

11 PRESIDING JUDGE: May I interrupt you for just
12 a second?

13 MR. ROSENTHAL: Please.

14 PRESIDING JUDGE: Mr. Wilcox and others, this
15 sounds very reasonable. Do you have any comments on this?

16 MR. WILCOX: Well, my first comment would be
17 going back to your question at the beginning, I think
18 Mr. Rosenthal has acknowledged that the proper way to get
19 any of this information from the association members would
20 be through subpoenas. He's talking about the process with
21 NAFCA and UP and the prior cases. In fact, there's been
22 one case and another case more recently with AAR. The
23 process, as he describes, is try to reach voluntary
24 agreements on discovery. That was able to occur in those
25 cases.

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1 But the understanding is because the
2 associations did not ultimately have control over the
3 information, that if agreement cannot be made, and in this
4 case I disagreed with one thing. We did. The
5 associations did try to reach agreement. You can see in
6 the correspondence, where we proposed to voluntarily
7 produce things such as cost information.

8 But in the case where there is no agreement,
9 it's a stalemate, the answer is not a motion to compel.
10 The answer is to try to subpoena that information. So
11 that's where we are. That is the answer to your initial
12 question.

13 But in terms of trying to reach an
14 accommodation, I think one of the things we need to
15 discuss, and that's for the car owners to discuss a little
16 bit more, is also whether -- and a question you asked
17 early on, the Coal Dust test, whether there's sufficient
18 interest, whether they are the same as the utilities in
19 the Coal Dust case that have that level of interest that
20 would warrant granting subpoenas.

21 But let's assume for the sake of argument
22 that's the case. Then I think that the car owners -- and
23 they can speak for themselves, but I don't think it's
24 unreasonable to think that the parties could talk about if
25 there was -- subpoenas were inclined to granted as in Coal

1 Dust, then the parties could talk about what would be --
2 how they could be narrowed and the burden.

3 PRESIDING JUDGE: How long would it take to
4 discuss that?

5 MR. WILCOX: I think I'd defer to Mr. Rosenberg
6 on that in terms of speaking for the car owners because
7 they've discussed this.

8 PRESIDING JUDGE: What do you think,
9 Mr. Rosenberg?

10 MR. ROSENBERG: Good morning, your Honor.
11 There are four tank car owners. Frankly, when it gets --

12 PRESIDING JUDGE: Counting Trinity.

13 MR. ROSENBERG: Counting Trinity, yes. When it
14 comes to matters like this, each tank car owner, to a
15 substantial extent has its own views of the matters, and
16 they're going to vary according to what the burden is,
17 what the internal procedures is and how they viewed
18 things.

19 In that respect -- I served as lead counsel for
20 purposes of getting into the pleading, but they're going
21 to have to respond to proposals and each in its own way.
22 I'm not authorized to speak for all of the others in that
23 regard. I do think what seems to be undermined, what
24 seems to be perhaps happening, is that there's a very
25 overly broad set of requests for production are made where

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1 if we have to respond in a short period of time, and we
2 did and now it's coming back, well, we can make them for
3 reasonable, and that's what the Board warned against in
4 the CNN Amtrak decision, that we quoted to start out
5 asking for the world and then was subjected to ask for a
6 narrower set.

7 It's going to -- certain tank car owners I
8 don't think are not going to be able to respond
9 immediately today. They have to see what the proposal is.
10 They'd have to confer with management. I'd ask if any of
11 the individual tank car owners want to supplement that or
12 modify that, I would allow them to do so -- or excuse me.
13 It's not up to me --

14 PRESIDING JUDGE: No, that's all right.

15 Mr. Neuman?

16 MR. NEUMAN: Thank you, your Honor. I do want
17 to just speak a little bit on the process, not so much to
18 repeat what Robert said. I want to just sort of correct a
19 little bit about Mr. Rosenthal said. He mentioned serving
20 the subpoenas. They actually haven't been served, they
21 haven't been issued. They've been included in a motion
22 that was before the Board as a proposed alternative to the
23 motion to compel. And outlined if indeed option B was
24 picked, what the scope of the subpoena would be.

25 My client GATX and the other car owners have

1 been not scrambling, but working very hard in the last few
2 weeks to put together in support of the joint reply that
3 was filed, on behalf of the four car owners, individual
4 statements that tried to enumerate and describe the amount
5 of burden that would be associated with the subpoenas as
6 they were drafted.

7 Normally, as Mr. Rosenthal was saying, you'd
8 have a process where the subpoenas were issued, assuming
9 they were lawfully issued, and if there's any issue about
10 that, that would be taken up in a motion to quash or
11 otherwise, and then you would be looking at compliance
12 with that subpoena, but that would almost of necessity
13 involve some sort of a meet-and-confer process.

14 Here not only did Mike correctly note that
15 absence, but again, we're also talking about the threshold
16 issues whether there's a lawful issuance of subpoenas to
17 nonparties under the right circumstances. I think at some
18 point, we have to have a process where there's a
19 demonstration of need and the unavailability of the
20 records through other sources, perhaps even in a stepwise
21 fashion, and come to the tank car owners if and when
22 there's an absence of availability of the information
23 through other easily accessible means and then to
24 demonstrate that I can't get it from someone else and I
25 need to get it from somewhere and here's what I think is

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1 reasonable and then we have an engagement on that. That
2 all seems to be ahead of us and something that is entirely
3 possible.

4 We're here today by permission to speak to and
5 maybe amplify what we put into other papers, but as
6 nonparties, when the subpoenas haven't been issued yet,
7 we're a little leery of jumping right in and engaging, if
8 you will, on a meet and confer when frankly from our
9 standpoint we're sort of late comers to the game playing
10 catch-up a little bit and are having a tough
11 time assimilating all the issues in the case.

12 I don't have any doubt that my client is
13 willing in good faith to sit down and engage in a process,
14 maybe even before the subpoenas are issued, to try to
15 figure out to make them more reasonable.

16 Again, I just wanted to put it into perspective
17 where we've been.

18 PRESIDING JUDGE: Thank you. That suggests a
19 process before I decide anything today. How would that
20 happen? I'd have to postpone what we're doing today to do
21 that.

22 Mr. Rosenthal? I'd be willing to give you an
23 hour or two hours or three hours if you thought you could
24 be productive and then come back and see what you've got,
25 but it sounds like it's more complicated than that.

1 MR. ROSENTHAL: I was going to say again, I
2 think the process has generally been described correctly.
3 The case that Mr. Rosenberg cites is a case that says
4 don't bring a motion to compel and then come in later and
5 say you'll change your mind.

6 Essentially, with the subpoenas, we're not at
7 the motion to compel stage. We are with respect to some
8 of the individual Complainants where there was a motion to
9 compel. We've met. We've conferred. We've narrowed and
10 we've crystallized some issues. We really are not near
11 there with regard to the subpoenas. We haven't had a
12 chance to respond. We're willing to work with them.

13 When you look at the individual motions to
14 compel that are -- I don't know whether you intended to
15 address them today -- but they are much narrower than the
16 ones that relate to the association. The association
17 discovery presents a special problem in that you try to
18 work it out. If you can't work it out, you have to go to
19 a subpoena --

20 PRESIDING JUDGE: Wait a minute. Let me get
21 this straight so I follow you. You're saying that the
22 motions to compel against the nonparties would be
23 narrower, but they're still nonparties?

24 MR. ROSENTHAL: I'm sorry, your Honor. In this
25 case, there are two groups of Complainants. There are the

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1 Association Complainants, the North America Freight Car
2 Association, all those, and there are some individual
3 shippers, car owners or both, Cargill --

4 PRESIDING JUDGE: Yes.

5 MR. ROSENTHAL: So with regard to Cargill, Poet
6 Nutrition and Poet Ethanol, we actually have documents
7 because unlike the associations, they are leasing cars and
8 shipping stuff. We have, I think, a relatively narrower
9 set of disputes, and they're the ones who are actually
10 seeking damages in this case. And they haven't because
11 we've worked with them and the same type of process we
12 worked with through the subpoenas to narrow disputes.

13 With the associations it's somewhat been an all
14 or nothing process. Either we were going to work
15 something out with them, or we were going to serve
16 subpoenas. So we followed the pattern in the Coal Dust
17 case. We filed our motion to compel. Maybe you'd agree.
18 I don't know. But the more likely course is if they're
19 not willing to work with us, we'd go with subpoenas.

20 Now, my understanding, and folks who were also
21 involved in the Coal Dust case can correct me, I believe
22 what actually happened in the Coal Dust case is that once
23 the Board indicated it was willing to issue subpoenas, the
24 parties then met, conferred and agreed on reasonable
25 production, and I don't know whether it was coordinated

1 through the associations or by the individual members, but
2 I don't think subpoenas were actually issued in that case.

3 It was the notion that you're entitled to some
4 discovery. You're entitled to get it one way or another,
5 work it out and be reasonable, and that's all we're trying
6 to do. We're trying to get what we think we need. We're
7 willing to be reasonable. We've been reasonable with the
8 individual Complainants.

9 We've accepted narrower date ranges when they
10 tell us they have systems that only start recording stuff
11 in 2007 rather than 2001. We understand that. This isn't
12 about creating excessive burdens. This is about coming up
13 with a reasonable way to get information that we think
14 we're entitled to and that doesn't impose excessive
15 burden. We're certainly willing to engage in that
16 process, whether it's today, whether it's over the next
17 week. That's what we're trying to do. We're trying to
18 get the information we need for our case.

19 MR. DONOVAN: Your Honor, may I be heard
20 briefly?

21 PRESIDING JUDGE: Mr. Donovan, yes.

22 MR. DONOVAN: The Chlorine Institute, the
23 American Chemistry Council, the Fertilizer Institute and
24 the AFPM are not subject to any subpoena requests. That's
25 not here.

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1 PRESIDING JUDGE: Right.

2 MR. DONOVAN: The only thing we're subject to
3 is a motion to compel based upon the fact that we haven't
4 and don't have the ability to turn over documents that our
5 members have that we don't have.

6 Speaking for the Chlorine Institute alone,
7 we've turned over a couple hundred pages of documents
8 including responsive documents about car ownership of cars
9 that our members have that they submit to the Chlorine
10 Institute as part of a survey on what cars they have
11 because our mission, of course, is safe transportation of
12 chlorine and other products. So we have some data and we
13 gave that to Mr. Rosenthal.

14 We didn't object to relevancy, although I don't
15 see how it's relevant, but we gave it to him. Okay, fine.
16 We did what we have. We gave it to Mr. Rosenthal. What
17 we are objecting to is what you stated at the outset. We
18 don't control our members. If I go to Dow Chemical or
19 Owen Corporation and say by the way, I want these data on
20 all the cars you own, not just the cars you move chlorine
21 in but all the cars, they're going to tell me are you
22 crazy? No. They're not going to do that. You're
23 absolutely right about that.

24 What I'm suggesting is, based upon the
25 discussion that's going on now, it seems to me this is all

1 about subpoenas.

2 PRESIDING JUDGE: Right.

3 MR. DONOVAN: I don't know why Mr. Moreno,
4 Mr. Shaner or myself need to be here. I think that this
5 -- with no disrespect, I enjoy your company -- but I don't
6 see any reason for us to be here when there's nothing
7 pending realistically that involves us.

8 If you're going to talk about subpoenas and
9 work on a deal with the car owners, that's a different
10 matter. I have some thoughts on that, but my clients are
11 not involved in that directly.

12 PRESIDING JUDGE: Thank you. That's helpful.

13 MR. ROSENTHAL: I don't want to take up any
14 more of Mr. Donovan's time than necessary. But all these
15 parties actually did file opposition to our petitions for
16 subpoenas. If they're not interested at that point, I am
17 more than happy to work with the parties representing the
18 tank cars and try to narrow things down and make things
19 more manageable for them if they're actually willing to
20 respond to the subpoenas. I honestly like these people.
21 I enjoy spending time with them, but I don't mind if they
22 don't want to be part of that process.

23 PRESIDING JUDGE: I understand.

24 MR. DONOVAN: As long as there's an
25 understanding that their motion to compel against my

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1 client is dropped, I'm happy to do that. I'd like either
2 a ruling from you or a comment from Mr. Rosenthal that the
3 motion to compel with respect to ACC, TFI, AFPM and The
4 Chlorine Institute is gone. If that's happening, then I'm
5 gone. The parking garage is right there.

6 PRESIDING JUDGE: Yes, Mr. Rosenthal.

7 MR. ROSENTHAL: I don't think it's -- the issue
8 is do we get discovery in one way or another. I realize
9 that the Coal Dust precedent suggests that the right
10 course is subpoenas. We're happy to pursue it via
11 subpoenas.

12 I think in this particular case, we have an
13 argument for the Board that this is not like Coal Dust.
14 In Coal Dust, there were 16 parties. That's a manageable
15 number. We have here 900 --

16 PRESIDING JUDGE: I'm not giving you 900. I'll
17 just tell you that right now.

18 MR. ROSENTHAL: I absolutely understand, which
19 is why our discussions -- we had some practical
20 alternatives, some sampling that I think we could work
21 out.

22 PRESIDING JUDGE: I'm willing to entertain that
23 if we get to that point.

24 MR. ROSENTHAL: Absolutely. I do think there
25 is a possible motion to compel. I think the Board might

1 see this case as being different from Coal Dust.

2 PRESIDING JUDGE: Motion to compel against
3 whom?

4 MR. ROSENTHAL: Against the Association, but
5 again, for sampling or for something more limited. I
6 don't think that's totally out of the question because,
7 again, Coal Dust was a manageable 16 parties and in this
8 case, we actually polled the Board.

9 We said we think discovery is going to be a
10 real problem in this case because there are so many
11 parties. We think you ought to have them make the
12 complaint more definite, have them identify things like
13 what cars are at issue, what routes are at issue, what are
14 the costs that we're not compensating for you -- what are
15 the market conditions, and the Board said you're right,
16 Union Pacific, those are relevant issues, but you ought to
17 pursue them in discovery.

18 So we think, Coal Dust aside, the Board might
19 well agree, and this is probably the case for it to do it,
20 if it's going to do it any time, that this is a case where
21 associations have to participate in discovery.

22 They have to take on some burden if they want
23 to continue to participate in the case of producing
24 something on behalf of their members. They could decide
25 this isn't for us, but at some level, if they want to

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1 participate, they've got to give us what we need.

2 PRESIDING JUDGE: Let me interrupt you for a
3 second. If they're going to participate, as you suggest,
4 that participation is limited to what they are capable of
5 producing. They could ask for voluntary participation
6 from their members, but they can't force their members to
7 do anything.

8 MR. ROSENTHAL: That may well be the case.
9 Maybe at the end of the day, one of our concerns with the
10 association is that they're going to be here and say we
11 can't come up with -- we can't come up with stuff from our
12 members.

13 PRESIDING JUDGE: They can't promise it.

14 MR. ROSENTHAL: They can't promise anything,
15 but we turn around, the opening evidence is filed and
16 suddenly, there's a statement from one of their members
17 discussing their tank cars and their costs or the burdens
18 on them of this new system.

19 And we sit there and we say what are you doing
20 here? You couldn't produce information about this in
21 discovery but now you're showing up? If that's not going
22 to happen, if they're precluded from coming in later on
23 with the information that they say they can't give us now,
24 then that's okay.

25 PRESIDING JUDGE: I'm in an unusual position.

1 I'm only here for discovery. But if anyone tried to pull
2 that on me in this building, I'd hand them their head.

3 MR. ROSENTHAL: And rightly so. We're willing
4 to go ahead, deal with the subpoenas. Let's see where
5 that works out. Let's have some discussion. If that
6 works out, I would say don't dismiss the motion now. I
7 don't think the Board --

8 PRESIDING JUDGE: Don't --

9 MR. ROSENTHAL: Don't dismiss the motion to
10 compel now, but let us work out and see how the subpoena
11 route goes. If we can reach an agreement on some
12 reasonable production, we can come in and resolve
13 everything, but don't --

14 PRESIDING JUDGE: You're not going to reach
15 that today, are you?

16 MR. ROSENTHAL: I don't think so because I'm
17 not sure they have enough information here. They probably
18 need to go back and talk to people who actually have
19 access to the data. To take some examples from GATX,
20 which actually did an excellent job in describing the
21 costs and did an excellent job in saying if you're asking
22 us for stuff from 2008 to the present, that's pretty easy.
23 We have spreadsheets. But if you're really asking for
24 2001 --

25 PRESIDING JUDGE: You hire 50 more people and

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1 it would cost over a million dollars.

2 MR. ROSENTHAL: I suspect that maybe they know
3 this for GATX because they've done such an excellent job
4 doing that work. But there are probably other parties who
5 might be in a similar situation who if we said how about
6 if you gave us data from 2013 to the present? They'd say
7 oh, that's easy. We thought you were asking about 1987.
8 I think they probably need to have people --

9 PRESIDING JUDGE: I did have that same
10 impression, that it was overly broad. You were overly
11 broad in what you were asking going back to the beginning.

12 MR. ROSENTHAL: To be fair, both parties in
13 this case have asked for data going back to 1987. That's
14 where we started out because that's when these key
15 decisions were made. And they asked the same thing about
16 us. They asked for all of our tank car movements, all of
17 our tank car movements from 1987 to the present in 23
18 specific categories.

19 PRESIDING JUDGE: That's just silly.

20 MR. ROSENTHAL: Absolutely. Some of it seems
21 silly, but in fact today we realize this is a serious
22 case, and it's probably sitting in Mr. Wilcox's office
23 now. We produced today data involving our loaded tank car
24 movements going back to June 2001 with 23 categories of
25 data about all those movements, data from all our empty

1 movements from 2010 to the present, a whole another bunch
2 of 17, 20 categories.

3 My expert consultants tell me it's 400 million
4 cells of data, and that's okay, because this is an
5 important case, and they asked for the information, and we
6 were able to produce it with a reasonable burden. We're
7 just asking for the same opportunity to again, get the
8 data we think we need. We didn't go back to 1987 because
9 we didn't have it, but we found a period of time where the
10 burden was reasonable in relation to what we understood to
11 be the relevant and material.

12 PRESIDING JUDGE: Thank you.

13 Let's go off the record just a second.

14 (Discussion off the record.)

15 (Whereupon, at 11:55 a.m., the oral argument
16 was adjourned, to be reconvened at a later date.)
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1 CERTIFICATE OF NOTARY PUBLIC & REPORTER

2

3 I, JULIE BAKER, the officer before whom the
4 foregoing deposition was taken, do hereby certify that the
5 witness whose testimony appears in the foregoing
6 deposition was duly sworn; that the testimony of said
7 witness was taken in shorthand and thereafter reduced to
8 typewriting by me or under my direction; that said
9 deposition is a true record of the testimony given by said
10 witness; that I am neither counsel for, related to, nor
11 employed by any of the parties to the action in which this
12 deposition was taken; and, further, that I am not a
13 relative or employee of any attorney or counsel employed
14 by the parties hereto, nor financially or otherwise
15 interested in the outcome of this action.

16

17

18

19

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20

District of Columbia

21

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23

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A a.m 1:20 35:15 AAR 19:22 ability 13:2 28:4 able 14:15,16 15:2 18:14 19:24 22:8 35:6 above-entitled 1:19 absence 23:15,22 absolutely 17:4 28:23 30:18,24 34:20 ACC 30:3 accepted 27:9 access 33:19 accessible 23:23 accommodation 20:14 acknowledged 19:18 action 36:11,15 address 13:14 14:16 25:15 addressed 15:9 adjourned 35:16 Administrative 1:24 8:3 advocacy 10:16 AFPM 27:24 30:3 agent 19:4 agree 26:17 31:19 agreed 15:8 16:24 17:7 26:24 agreement 14:21 20:3,5,8 33:11 agreements 19:24 ahead 24:2 33:4 al 1:6 8:7 allow 22:12 alternative 8:5 22:22 alternatives 30:20 America 26:1 American 1:5 2:11 3:3,12 5:3 7:3 8:7 8:12,13,18 9:2 27:23 amount 14:17 23:4 amplify 24:5 Amtrak 22:4 ANE 4:15 answer 15:17 20:9 20:10,11 answers 16:19,21 16:25 17:3 anticipate 11:20	appearances 2:1 3:1 4:1 5:1 6:1 7:1 8:10 appeared 18:19 appears 36:5 apply 12:11 appreciate 12:2 13:8 approach 13:24 14:1,1 15:12,14 approached 14:3 approaches 18:3 appropriate 12:10 13:12 areas 18:21 argument 1:19 20:21 30:13 35:15 arguments 8:4 11:13 ARI 9:3 articulated 13:2 aside 31:18 asked 17:23 20:16 34:13,15,16 35:5 asking 22:5 33:21 33:23 34:7,11 35:7 assimilating 24:11 associated 23:5 association 1:6 2:11 3:3 8:7,14 13:6,7 13:9 14:13 19:19 25:16,16 26:1,2 31:4 32:10 associations 13:1,24 14:3 15:20,25 19:7 20:2,5 26:7 26:13 27:1 31:21 assume 20:21 assuming 23:8 assure 17:5 attacks 12:7 attorney 36:13 audio 11:1 authorized 21:22 availability 23:22 Avenue 2:6 B B 22:23 back 10:22 19:17 22:2 24:24 33:18 34:11,13,24 35:8 BAKER 36:3 based 28:3,24 beginning 11:15	19:17 34:11 behalf 2:3,11 3:3,12 4:3,14 5:3,13 6:3 6:11 7:3 9:6,9,12 9:16,19,21,25 23:3 31:24 believe 16:5 26:21 Beveridge 6:5 bit 20:16 22:17,19 24:10 Blackstone 10:7,8 Board 1:1 8:6 14:8 14:11,16 22:3,22 26:23 30:13,25 31:8,15,18 33:7 brief 12:4 briefly 17:13 27:20 bring 25:4 broad 21:25 34:10 34:11 building 11:17 33:2 bunch 35:1 burden 18:11 21:2 21:16 23:5 27:15 31:22 35:6,10 burdens 16:11 17:20,22 27:12 32:17 Burling 4:6 business 13:7 C C 8:1 capable 32:4 car 1:5 2:11 3:3 6:3 8:7,14 9:6 20:15 20:22 21:6,11,14 22:7,11,25 23:3 23:21 26:1,3 28:8 29:9 34:16,17,23 care 11:1 Cargill 3:4 8:21 26:3,5 cars 16:5 26:7 28:8 28:10,20,20,21 29:18 31:13 32:17 case 10:17 12:25 13:11,25 14:1,2,7 14:11,12 16:9,10 16:20 19:22,22 20:4,8,19,22 24:11 25:3,3,25 26:10,17,21,22 27:2,18 30:12 31:1,8,10,19,20 31:23 32:8 34:13	34:22 35:5 cases 14:3 15:13 18:25 19:21,25 catch-up 24:10 categories 12:6 34:18,24 35:2 cells 35:4 certain 22:7 certainly 11:18 13:11 17:19 18:12 27:15 CERTIFICATE 36:1 certify 36:4 chance 16:21 25:12 change 25:5 charges 14:7 Chemical 28:18 Chemistry 7:3 8:12 27:23 Chicago 5:17 chlorine 2:3 8:24 27:22 28:6,9,12 28:20 30:4 circumstances 13:12 23:17 cites 25:3 CityCenter 4:7 clerk 10:4,19 11:20 client 22:25 24:12 30:1 clients 29:10 CNN 22:4 Coal 12:11 14:1,2 14:11 15:23 20:17 20:19,25 26:16,21 26:22 30:9,13,14 31:1,7,18 collateral 12:7 collect 17:25 collected 14:13 collectively 19:2 Columbia 3:16 36:20 come 14:16 15:15 23:21 24:24 25:4 32:11,11 33:12 comers 24:9 comes 21:14 comfortable 11:6,8 coming 22:2 27:12 32:22 comment 19:16 30:2 comments 12:16 19:15	Commission 1:13 36:21 companies 16:3 19:4 company 1:8 4:3 6:3 8:8 9:6,16 19:1,3 29:5 compel 8:4 12:20 13:3 20:9 22:23 25:4,7,9,14,22 26:17 28:3 29:25 30:3,25 31:2 33:10 compensating 31:14 complainants 14:4 25:8,25 26:1 27:8 complained 18:22 complaint 31:12 complexities 13:8 compliance 23:11 complicated 24:25 compromise 15:7 compromises 14:10 19:8 concern 18:11 concerns 13:14,23 17:20 32:9 conditions 31:15 confer 16:19,21 22:10 24:8 conference 17:13 conferred 25:9 26:24 Connecticut 2:6 considerable 14:17 consultants 35:3 contacts 17:18 continue 14:20 31:23 continued 2:25 3:1 3:25 4:1,25 5:1,25 6:1,25 7:1 control 20:2 28:18 conversant 10:25 coordinated 26:25 Corporation 6:11 28:19 correct 22:18 26:21 correctly 23:14 25:2 correspondence 15:4 20:6 cost 20:7 34:1 costs 31:14 32:17 33:21 Council 7:3 8:12 27:23
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