

INTERSTATE COMMERCE COMMISSION 04/18/96

FINANCE DOCKET # 32760

2949-2968 2.

1 JUDGE NELSON: Then there's a title:
2 "RDI's Coal Transportation Market Study, 1966" and
3 RDI's Illinois Basin Coal Study, 1994, and was co-
4 author of RDI's Powder River Basin study, 1995. All
5 right. So they are certainly in the case, and
6 certainly, the railroad is entitled to see that.

7 So now we have two questions: One,
8 whether he's entitled to any money; and two, if so,
9 how much? I think Number 2 is as much of an issue as
10 Number 1, from what I'm getting.

11 Why is he entitled to money?

12 MR. McBRIDE: If I may be heard and may
13 approach --

14 JUDGE NELSON: This is for work already
15 done.

16 MR. McBRIDE: Well, this is for work
17 that's for sale. The fourth study that Your Honor
18 first referred to that we've given them was paid for
19 by a client, fully paid for, and that is why they were
20 willing, without further compensation, to distribute
21 it to the Western Shippers Coal Union. It wasn't done
22 for us.

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1 JUDGE NELSON: But how about the other
2 three?

3 MR. McBRIDE: The other three, however,
4 they resist, and that's why I'd like to approach. Mr.
5 Vaneniti's associate who is referred to in the
6 testimony as having helped prepare this testimony, Mr.
7 Leshock, wrote to me to explain that each of these
8 reports involve --

9 JUDGE NELSON: The applicants have this
10 letter?

11 MR. McBRIDE: No. I referred in my letter
12 to the fact that I would be establishing their bona
13 fides and sales brochures, but they tell me that they
14 tipped over 3,000 manhours to produce each of these
15 reports, and that these are, if you will, their stock
16 in trade.

17 These are their brochures about these
18 three reports. These are what they sell to the
19 public. This is what they do to make a living, and
20 these prices that we're asking for are the standard
21 prices that they sell these reports to the coal
22 industry, to the railroad industry and what have you.

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1 They have four people who they employ
2 simply for the purpose of marketing these types of
3 materials, including these three studies. The
4 railroads subscribe -- Each of these two railroads
5 subscribe to databases that Resource Data
6 International prepares as well for a fee. This is
7 what they do for a fee.

8 All the gentleman has done --

9 JUDGE NELSON: Are the prices listed on
10 the brochures?

11 MR. McBRIDE: Yes. Yes, indeed, they are.
12 In fact, I think they're getting a break, because they
13 are all three referred to as for \$4500, and they're
14 only asking for \$3500 from the two-year-old study. If
15 I may, here's the 1994.

16 JUDGE NELSON: Have the applicants seen
17 these brochures?

18 MR. McBRIDE: No. I'd be happy to provide
19 them.

20 JUDGE NELSON: Why don't we do that.
21 First of all, they might be able to tell from the
22 brochures that they're not interested in the stuff.

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1 That tells us more than we previously knew.

2 MR. LIVINGSTON: We are interested.

3 JUDGE NELSON: How do you know? You
4 haven't seen the brochures?

5 MR. LIVINGSTON: We have the studies.

6 JUDGE NELSON: Oh, you already have them?

7 MR. McBRIDE: I gave them to them.

8 JUDGE NELSON: Subject to a dispute about
9 it.

10 MR. McBRIDE: I have an escrow rate on the
11 12,000.

12 JUDGE NELSON: So you've got possession of
13 them right now.

14 MR. LIVINGSTON: We wanted them so much
15 that, even if we lost this dispute, we were willing to
16 take that risk, but we needed them right away. We
17 could not await any delay.

18 JUDGE NELSON: So what Mr. Vaneniti wants
19 to do, in effect, here is sell you this stuff, as
20 though you were a customer.

21 MR. LIVINGSTON: And we don't want to buy
22 it. We'll give it back to him in three weeks. We

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1 don't want to make commercial use of it. We don't
2 want to buy it. We're not interested. We are not a
3 customer. We are lawyers in a proceeding who are
4 inspecting this for impeachment materials in regard to
5 his verified statement. We should not have to pay a
6 toll.

7 JUDGE NELSON: Mr. McBride says that the
8 fees are in line with the prices listed on the
9 brochure.

10 MR. LIVINGSTON: I don't care if the
11 brochure said it was \$100,000 or \$4,000 or four
12 dollars. We do not have to pay a fee to inspect prior
13 writings by a witness that are directly relevant to
14 his testimony to see if there is impeachment. Sure,
15 if there's a Xerox charge, we have to pay that. If
16 there's a direct expense involved, we pay that, and we
17 have paid that. That's not a problem, but this --
18 They want to treat us like a customer, and they want
19 to charge us the customer rate.

20 If the railroad wanted to buy this
21 material as a customer, sure, we'd have to pay
22 whatever they charge, whether it was 12,000 or 12

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1 million. They're entitled to set whatever price they
2 want.

3 JUDGE NELSON: So why are you entitled to
4 a discount?

5 MR. LIVINGSTON: We're not buying it.
6 We're giving it back. We're looking at it for
7 inspection to see if there is impeachment, and he laid
8 himself open when he submits a coal statement in this
9 proceeding --

10 JUDGE NELSON: In which he cites the
11 articles.

12 MR. LIVINGSTON: And not only he cites the
13 articles, but these articles are prior writing by the
14 witness which are on the same subject matter, and we
15 are entitled to inspect those.

16 JUDGE NELSON: Mr. McBride says it's as
17 though he's an author of books. Are you, therefore,
18 entitled to free copies of the books?

19 MR. LIVINGSTON: No, not free copies, but
20 you're entitled to inspect the books without having to
21 buy them. You're entitled to see if there is
22 impeachment material.

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1 JUDGE NELSON: What was involved in
2 actually producing these copies?

3 MR. McBRIDE: That's what I was attempting
4 to tell Your Honor about. First of all, I will
5 represent to you that each of these three brochures --
6 the first of these studies is costing \$4,500, but they
7 are proposing to charge them only \$3500 for the two-
8 year-old study and \$500, the standard price, for the
9 other two. So that's the amount. That's where the
10 \$12,500 comes from. We're not trying to jack up the
11 price. This is what they charge the world for their
12 work.

13 This letter indicates that they spent over
14 3,000 manhours on each of these studies to produce.
15 This is what they do for a living, and they have four
16 people, a full time sales staff of four, to market
17 these sorts of materials, again, employees of Resource
18 Data International. Now --

19 JUDGE NELSON: I don't think that Mr.
20 Livingston would quarrel with that.

21 MR. LIVINGSTON: We don't want to buy
22 them.

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1 JUDGE NELSON: That this is a product that
2 they sell. This is inspection in the course of
3 discovery, not a purchase.

4 MR. LIVINGSTON: They want to force us to
5 buy when we don't want to buy.

6 MR. McBRIDE: Now we get to the point.
7 I've been in Postal Rate Commission proceedings, for
8 example, where the author, Theodore White, used to
9 appear. You know, he authored a long list of books.

10 He establishes his credentials by saying
11 I wrote "Making of the President" in 1960, and all
12 the way down the list, and I'm here today to talk
13 about the importance of postal rates of periodicals.

14 I was in a proceeding before this
15 Commission where Professor Arthur von Mehren testified
16 for Trunkline LNG Company before Judge Carson. He's
17 the author of 11 pages of publications, all related to
18 the various things that he testified about. Nobody
19 was entitled to his publications for free. They
20 wanted a copy.

21 Now they want to buy the -- They want get
22 the book. They want to copy it, evidently. They want

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1 to keep the copies and then they want to give the book
2 back. You know, if you take an author's book and you
3 read it and you give it back to him, you've destroyed
4 the value of the product to it, and that's the whole
5 point here.

6 If I may remind Your Honor, this issue
7 came up last Friday about Ms. Nunn. Now -- and Your
8 Honor said, you know, she's entitled --

9 JUDGE NELSON: When I thought that she was
10 looking for money.

11 MR. McBRIDE: Yes, and that she was
12 entitled to --

13 JUDGE NELSON: And I also thought we were
14 dealing with nickels and dimes, and I didn't --

15 MR. McBRIDE: Well, Your Honor, that's
16 exactly right.

17 JUDGE NELSON: -- a multi-million dollar
18 transaction that we'd have to have these fights over
19 these things.

20 MR. McBRIDE: And Your Honor said that if
21 it was \$10 million, that's one case. This is on
22 transcript 2780. If we're talking \$2,000, that's

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1 another one.

2 Now let me make one other major point. He
3 did not in any way rely on these studies in his
4 testimony. He simply -- It's as if they were listed
5 in his curriculum vitae, simply says I'm the author of
6 these studies, simply establishes his credentials.s

7 Now these people understand that they have
8 to pay for the work product of Research Data
9 International. They do. They both subscribe to
10 differing databases of Research Data International.
11 This is how Research Data International does business.

12 JUDGE NELSON: Well, they're not going to
13 use this material.

14 MR. McBRIDE: They are indeed.

15 JUDGE NELSON: Have you made copies of it?

16 MR. LIVINGSTON: I don't know, but we will
17 return the copies -- He made a copy for us. We will
18 return that and any copies we have made in three
19 weeks. We do not want to buy --

20 JUDGE NELSON: They're not going to retain
21 any.

22 MR. LIVINGSTON: We do not want to keep

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1 it.

2 JUDGE NELSON: Whatever they've got, they
3 say they're going to return, and any copies they've
4 made. There will be in their files no copies.

5 MR. LIVINGSTON: Right. We'll give them
6 back to you, and freely.

7 MR. McBRIDE: That's not satisfactory.
8 Now for one thing --

9 JUDGE NELSON: Why is three weeks
10 important? The filing is April 29. It should be much
11 sooner than that.

12 MR. LIVINGSTON: Well, it's for being on
13 the safe side.

14 MR. McBRIDE: Suppose these were part of
15 their filings?

16 JUDGE NELSON: Yes, sir. My question is
17 why the three weeks?

18 MR. LIVINGSTON: Well, that roughly takes
19 one to about the first week -- end of first week in
20 May, and that was the date that the lawyer who was
21 working on this particular aspect of the case told me,
22 three weeks was what I ought to say.

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1 JUDGE NELSON: That lawyer has to be
2 finished with his or her job by the 29th.

3 MR. LIVINGSTON: Right. There may be some
4 loose ends after the filing, either in the forms of --
5 I'm just not sure. Three weeks.

6 MR. NORTON: Well, Your Honor, there is
7 the other side --

8 JUDGE NELSON: Before you were in a big
9 hurry, and you had to go to the printer. That's why
10 we have to speed things up.

11 MR. LIVINGSTON: There may be discovery or
12 other issues that come up after that.

13 MR. NORTON: The other side has in some
14 cases a rebuttal filing, and it may be that he had in
15 mind to need to be able to refer to the report to
16 assess the rebuttal filing.

17 MR. LIVINGSTON: It's on the same date.

18 MR. NORTON: And that, I think, is May 12.

19 MR. LIVINGSTON: From a commercial point
20 of view, from this company's point of view, there
21 isn't any difference between two weeks and three
22 weeks. We are not going to keep the material. We are

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1 not a customer, and what this company is trying to do
2 is use this proceeding to get some forced sales.
3 They're doing their marketing through this proceeding.

4 MR. McBRIDE: Absolutely untrue.

5 MR. LIVINGSTON: And that's just
6 outrageous.

7 MR. McBRIDE: Absolutely untrue. They
8 didn't need these studies. They wanted these studies.
9 They're not relied on in our filing, and in any event,
10 if I may --

11 JUDGE NELSON: Are these any costs
12 directly associated, variable costs, with the actual
13 production of these documents?

14 MR. McBRIDE: Oh, sure.

15 JUDGE NELSON: Searching to find them?

16 MR. McBRIDE: You mean, get the copies and
17 put them in a box and send them?

18 JUDGE NELSON: Xeroxing, postage,
19 shipping, yes.

20 MR. McBRIDE: Of course, but Judge, that's
21 not the issue. That's not how people stay in
22 business. These people generate these kinds of

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1 reports as their business. That's it.

2 JUDGE NELSON: I understand the issue, and
3 I am going to rule with the applicants on this. I'm
4 not going to direct them to pay the \$12,000.

5 MR. McBRIDE: Your Honor --

6 JUDGE NELSON: I think they have the right
7 to inspect these materials, and you may take any
8 appeals you want with the Commission.

9 MR. McBRIDE: May I --

10 JUDGE NELSON: Now having said that, I
11 would like to work out some payment to Mr. Vaneniti
12 and his firm for some increment of time that must have
13 been already sunk into this production, so that these
14 materials are not free in that sense.

15 I would welcome the submission of a bill
16 or a stipulation so that he can be made whole at least
17 for any costs sunk into this production already.

18 MR. McBRIDE: Judge, respectfully, I need
19 to ask two things. First of all, the reports have
20 already been sent to them, and -- I'm not clear, based
21 on their representations before you, as to whether
22 they intend to copy these, which I think would really

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1 be egregious; because then they go around the industry
2 that they're trying to market these to; and if they
3 were part of their filing --

4 JUDGE NELSON: Can you find out if you've
5 already made any copies?

6 MR. LIVINGSTON: Again, I don't know the
7 answer to that, but it's possible.

8 JUDGE NELSON: Why don't we take a break,
9 and you find out.

10 MR. McBRIDE: Well, then they've violated
11 the copyright.

12 JUDGE NELSON: Let's first find out what
13 the facts are.

14 MR. LIVINGSTON: I'm not sure these things
15 are copyrighted, but --

16 JUDGE NELSON: Let's don't get into the
17 Copyright Act unless we have to. Will you -- Let's
18 take a recess in place and contact whoever is working
19 on this and see what the status is of these documents
20 of any copies, and we'll wait for your report.

21 We'll take a recess.

22 MR. McBRIDE: While this is fresh in your

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1 mind, could I make my other request? I really am
2 inclined to appeal this, respectfully, and
3 particularly in light of Your Honor's differing
4 ruling, as I understood it, with respect to Ms. Munn.
5 I need to know the basis for your ruling.

6 What principle is there different from
7 what Your Honor ruled about --

8 JUDGE NELSON: Well, at the time with Ms.
9 Nunn, I didn't have the benefit of argument or great
10 consideration. It was a matter that seemed to rapidly
11 resolve itself and, if we were talking about \$2,000,
12 it would take more than \$2,000 to conduct litigation
13 over it. It seemed to me a small and insignificant
14 sum, as I must have said there.

15 That doesn't mean that, if I'm wrong, I
16 must perpetuate the error. Now that I've had the time
17 to think about it, it seems to me that when a witness
18 comes in and as part of his credentials talks about
19 his studies, the other side is certainly entitled to
20 see the studies and inspect them, pay all reasonable
21 costs associated with that production, but I don't
22 think this puts Mr. Vaneniti in the business of

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1 selling the studies to the opposition.

2 So I'm siding with the applicants on this
3 matter, subject to the submission of a bill for all
4 costs reasonably associated with the production,
5 subject to protecting these documents by cutting down
6 on the number of copies. If they've already been
7 made, we'll find out where they are and what we can do
8 with them, and subject to a rapid return to Mr.
9 Vaneniti.

10 I'm going to work out all those details,
11 and we're going to take a break while Mr. Livingston
12 has a chance to confer with the firm and find out
13 what's going on.

14 Let's take a recess right now, and I'll
15 wait right here.

16 MR. NORTON: Your Honor, just for the
17 record, while we're still here, I'd just like --

18 JUDGE NELSON: Well, what do you have to
19 do with this?

20 MR. NORTON: This is on another point.

21 JUDGE NELSON: Something else?

22 MR. NORTON: This is going back to --

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1 There was a question about whether Mr. Streeter had
2 been provided with a copy of the letter, and Mr.
3 McBride said he wasn't listed on the cover sheet.
4 That is correct.

5 The wrong cover sheet was used, but I have
6 been provided a copy of the list that shows that Mr.
7 Streeter, in fact, was sent the letter, just for the
8 record.

9 JUDGE NELSON: The question is moot,
10 because we're going to have it tomorrow anyway.

11 MR. NORTON: That's correct.

12 JUDGE NELSON: All right, let's take a
13 recess now. I'll wait right here.

14 (WHEREUPON, the proceeding recessed at
15 10:48 a.m. and resumed at 11:05 a.m.)

16 JUDGE NELSON: We've agreed to defer this
17 problem until tomorrow when all sides have a chance to
18 think further about it and possibly communicate with
19 each other. Then we'll take up tomorrow the KCS items
20 as well as this question of Mr. Vaneniti.

21 Is there anything else on the agenda for
22 tomorrow?

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1 MR. NORTON: No, Your Honor.

2 JUDGE NELSON: And we're going to see
3 that, I hope, Mr. Streeter will be here. At least,
4 Mr. Mullins said he would be in touch with him.

5 So we'll see you tomorrow at 9:00 a.m. in
6 a hearing room here. Thank you.

7 (Whereupon, the proceeding was adjourned
8 at 11:05 a.m.)

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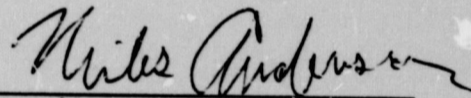
the matter of: **Discovery Conference:
Union Pacific Corporation, et al.
-Control and Merger-
Southern Pacific Rail Corporation, et
al.**

Before: **Surface Transportation Board
Finance Docket No. 32760**

Date: **April 18, 1996**

Place: **Washington, DC**

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



Miles Anderson