

NOR 42144

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



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BEFORE THE SURFACE TRANSPORTATION BOARD

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NORTH AMERICA FREIGHT CAR :
ASSOCIATION; AMERICAN FUEL AND :
PETROCHEMICALS MANUFACTURERS; :
THE CHLORINE INSTITUTE; THE :
FERTILIZER INSTITUTE; AMERICAN : Docket Number
CHEMISTRY COUNCIL; ETHANOL : NOR 42144
PRODUCTS, LLC, d/b/a POET :
ETHANOL PRODUCTS; POET :
NUTRITION, INC.; and :
CARGILL INCORPORATED, :
Complainants, :
vs. :
UNION PACIFIC RAILROAD COMPANY, :
Respondent. :
- - - - - X

ORAL ARGUMENT

Washington, D.C.
Tuesday, September 20, 2016

BEFORE:
HONORABLE JOHN P. DRING
ADMINISTRATIVE LAW JUDGE

REPORTED BY: SARA A. WICK, RPR, CRR

1 Oral argument before HONORABLE JOHN P. DRING,
2 on Tuesday, September 20, 2016, in Washington, D.C.,
3 at the offices of the Federal Energy Regulatory
4 Commission, 888 First Street Northeast, Hearing Room
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1 P R O C E E D I N G S

2 PRESIDING JUDGE: We are on the record.

3 This is a continuation of oral arguments in the
4 petition for subpoenas and motion to compel
5 discovery in Surface Transportation Board Docket
6 Number NOR 42144, North American Freight Car
7 Association, et al. versus Union Pacific Railroad
8 Company. I'm Administrative Law Judge John Dring.

9 I'm open to suggestions as to organization
10 today. I have my own ideas. I would like to finish
11 this -- these motions today. I think the only way
12 we will not do that is if everyone tells me and
13 convinces me that you have wonderful new ideas to
14 settle this on your own. I think that's probably
15 unlikely at this point. So I anticipate finishing
16 under those circumstances.

17 Now, UP has distributed a revised petition
18 for subpoenas, which shows some positive development
19 in negotiations. I think -- and this is open to
20 discussion, but I think for the purposes of getting
21 through all of this today, that I might use the tank
22 car owners -- off the record.

23 (Discussion off the record.)

24 PRESIDING JUDGE: Back on the record. I
25 was thinking of using the tank car owners' petition,

1 the reply to the petition for subpoenas dated June
2 20th and walk through that as an outline for
3 discussions.

4 Does anyone think anything about that
5 idea, good or bad? Does that sound okay?

6 Mr. Rosenthal?

7 MR. ROSENTHAL: Your Honor, what I had
8 thought -- I agree with your Honor that we ought to
9 roll through everything today and make sure we
10 complete it, unless lightning strikes.

11 PRESIDING JUDGE: Unless something good
12 happens.

13 MR. ROSENTHAL: So what I would like to
14 do -- one of my concerns is having a complete record
15 so that we can move on, and if the Board needs to
16 address some things, we can do that.

17 So what I had thought was we would at
18 least start -- I have a very few words to say about
19 our motion to compel the associations, which is sort
20 of, as we phrased it, if you had granted that
21 motion, we wouldn't need to move on to the petition.
22 But I would like on the record the fact that we need
23 to move on to the petition.

24 PRESIDING JUDGE: Okay.

25 MR. ROSENTHAL: For dealing with the

1 petition, we can certainly handle the discussion in
2 any way that you would like. I agree, I think we
3 ought to move through the requests, and whether we
4 do that from the revised petition and the particular
5 language in there or the replies, we will handle it
6 as you want. I had thought we could go through the
7 requests.

8 PRESIDING JUDGE: My idea is that it would
9 actually be an amalgam of the two. We use the TCO's
10 document as sort of a broad outline and sort of
11 shuffle yours in there. If you just want to go
12 through yours first, I don't care. I do have
13 specific comments about yours.

14 Do you want to go through those first?

15 MR. ROSENTHAL: Well, I think either way
16 we're going request-by-request. I think going with
17 the -- what the revised subpoenas reflect is not --
18 it's a pretty one -- I would say it's a somewhat
19 one-sided compromise. You reacted to the first set
20 of subpoenas, and you said that they looked
21 overbroad.

22 PRESIDING JUDGE: Right.

23 MR. ROSENTHAL: We heard those concerns.
24 We've also had some discussions with the tank car
25 owners. And so then we did revise and narrow them,

1 which is what you see.

2 PRESIDING JUDGE: All right. Let's go
3 through that, and if we miss anything, we can go
4 through the TCO document. Do you want to do that?
5 The parties can discuss as they deem appropriate the
6 issues that arise as we go through your requests for
7 production. Do you want to do that? How does that
8 sound? I'm getting absolutely nothing over here.
9 At least Mr. Rosenthal was upset.

10 MR. MORENO: Your Honor, the only thing I
11 would add to this is there are certain underlying
12 themes that cross multiple requests.

13 PRESIDING JUDGE: Yes, that's right.

14 MR. MORENO: I think it would be desirable
15 to avoid repetition of the same argument from one
16 request to the next, and to the extent we can
17 address those themes by addressing requests
18 together, I think that would more efficiently get us
19 through this.

20 PRESIDING JUDGE: Which would suggest
21 going through the TCO document.

22 MR. MORENO: Yes.

23 PRESIDING JUDGE: All right. Look, let's
24 do this. I have some specific comments and
25 questions on Mr. Rosenthal's most current document.

1 Let's just -- let's go through that first, because I
2 don't think that will take much time.

3 Okay. We are at page 3, request for
4 production. And Mr. Rosenthal says that Railinc can
5 give him 2(a); is that correct? Is that not what
6 you said?

7 MR. ROSENTHAL: I'm sorry, your Honor.
8 I'm just trying to make sure I understand.

9 PRESIDING JUDGE: It's your recent
10 document, your September 15th revised petition for
11 subpoenas.

12 Do you have that?

13 MR. ROSENTHAL: Yes, I do.

14 PRESIDING JUDGE: And I just have some
15 comments and questions on those, and we can do that
16 first, and then we can go through the TCO document.

17 Okay?

18 MR. GOLDSTEIN: Excuse me, Judge. Just
19 for clarity, you're in the initial document, and
20 then there's the set of attached subpoenas.

21 PRESIDING JUDGE: This is the one that was
22 filed September 15th.

23 MR. GOLDSTEIN: So you are looking at one
24 of the attached subpoenas, I'm assuming Union Tank
25 Car's?

1 PRESIDING JUDGE: They all look the same.
2 I just picked the first one. Aren't they all the
3 same?

4 MR. ROSENTHAL: They're all the same, your
5 Honor.

6 PRESIDING JUDGE: In the first one it's
7 page 3, request for production. The other page 3 is
8 just the certificate of service, which wouldn't make
9 any sense.

10 MR. ROSENTHAL: I just wanted to make sure
11 you were talking about the request for production,
12 that page.

13 PRESIDING JUDGE: That's the next page 3.
14 All right. I believe you have stated,
15 Mr. Rosenthal, that Railinc can provide you with
16 your information requested on 2(a); is that correct?

17 MR. ROSENTHAL: That's correct.

18 PRESIDING JUDGE: And it has all of 4 as
19 well.

20 MR. ROSENTHAL: What it has is it has
21 documents -- it has data that we can use, we hope,
22 to derive the information that we are requesting.
23 It has raw data. We will have to do a fair amount
24 of legwork to figure out what's moved to repair
25 facilities, what hasn't. But we're willing to do

1 that type of work.

2 PRESIDING JUDGE: That's fine. All right.
3 So that's all of 4.

4 All right. Now, as to 2(b) through (e),
5 doesn't the Railinc TME provide this information?

6 MR. ROSENTHAL: My understanding from
7 Railinc is no, that they don't have that
8 information, that these would be billings that were
9 done by the tank car owners to their lessees or from
10 tank car owners to other railroads.

11 PRESIDING JUDGE: So what does the TME
12 provide that --

13 MR. ROSENTHAL: So there are --

14 PRESIDING JUDGE: Go ahead. I'm looking
15 for the TCO where they discussed the TME.

16 MR. ROSENTHAL: One thing that Railinc
17 does is it performs the billing for what's called
18 mileage equalization, and mileage equalization
19 involves tracking loaded and empty movements, and if
20 there's more than a 6 percent difference, empties
21 exceed loads, they bill mileage equalization.

22 PRESIDING JUDGE: That's right. That's
23 page 9 of the TCO document.

24 MR. ROSENTHAL: What these other requests
25 deal with are other types of charges that railroads

1 might impose, like Union Pacific's item 55(c), other
2 types of charges. That's not a part of mileage
3 equalization. That's what we're saying, mileage
4 equalization doesn't do a sufficient job.

5 PRESIDING JUDGE: Oh, yes. That's empty
6 mileage versus mileage equalization?

7 MR. ROSENTHAL: Yes. There are overlaps,
8 but the bills would be separate. It's a -- again,
9 it really goes to -- are other railroads charging
10 something similar to our item 55(c), which is being
11 challenged.

12 PRESIDING JUDGE: You say that Railinc
13 will provide part of 3. And I have a general --
14 let's see. Why do you have the period as 2013
15 through '15? I have some questions on some of your
16 dates.

17 MR. ROSENTHAL: Sure. Absolutely. What
18 request number 3 tries to get at is how are these
19 empty cars moving around the rail network and how
20 are they moving to repair facilities and are they
21 moving efficiently, and how will item 55(c) and
22 similar charges affect incentives to tank car owners
23 or shippers or whoever is directing these moves to
24 make more efficient movements. What's the effect of
25 this charge going to be. That's very much in

1 dispute in this case, what's the effect of this
2 charge.

3 And so by looking at this period, which is
4 fairly -- we thought a fairly narrow period, we're
5 gathering data on movements of these cars around the
6 system into repair facilities.

7 So we tried to choose a period, a year
8 before we implemented item 55(c) and a year after.

9 PRESIDING JUDGE: All right. And your
10 concern is that if the owners, the car owners don't
11 have sufficient incentive to move efficiently, they
12 may not do so, thereby costing you money?

13 MR. ROSENTHAL: One of the -- just to take
14 a step back, we think, Union Pacific thinks that our
15 ability to implement charges like this item 55(c) is
16 covered by Board precedent. There was a 1987
17 decision involving a railroad called Indiana Harbor
18 Belt. There was a second decision. It overruled
19 the first one. We call it IHB II, where the Board
20 said you can make these charges.

21 We said in our motion to dismiss we win,
22 this is covered by precedent. The associations and
23 the other Complainants came in and said no, that's
24 not what the precedent says, we think there are
25 circumstances that are different than what the

1 precedent was meant to apply to, and the Board, if
2 it wants to, can reconsider its precedent. And so
3 discovery is required. And one of the reasons why
4 the Board said in this IHB II that railroads can
5 impose these charges is we don't think the current
6 mileage equalization system provides those
7 directing --

8 PRESIDING JUDGE: The 6 percent wasn't
9 sufficient?

10 MR. ROSENTHAL: One, it doesn't directly
11 address moves to shops, and we don't think it gives
12 sufficient incentives. And there were some other
13 reasons, too. So if they're -- if the other side is
14 arguing that the circumstances of the world have
15 changed or that the Board should reconsider or for
16 some reason we don't need these charges, they don't
17 do anything or they do something bad, they will
18 disrupt the existing incentives, which is one thing
19 the Complainants suggested in their motion to
20 dismiss, we just want to look at the data, look how
21 movements of cars are occurring, and say what's
22 happening, are there sufficient incentives, what's
23 happening where we've put in this charge in the past
24 year, what's happened where other railroads have
25 similar charges. And we're willing to do the work

1 and dig through the data and figure out what, if
2 anything, we can get from it, but we just need the
3 data to work with.

4 PRESIDING JUDGE: Have you -- I've been
5 curious all along, have you done any even back of
6 the envelope estimation of the potential value of
7 this case? You're talking about essentially
8 reassigning the methodologies, rewriting the
9 methodologies for billing in the entire industry,
10 aren't you?

11 MR. ROSENTHAL: No. We're talking
12 about -- again, we think there are a number of
13 railroads that have imposed these charges. This is
14 affecting -- in this part, count 1 involving this
15 charge 55(c), what it involves is imposing charges
16 where certain movements used to be free, certain
17 movements of tank cars. For almost every type of
18 car in the industry, they -- the owners pay -- or
19 the shippers pay for these movements. This is a
20 very --

21 PRESIDING JUDGE: Except for the tank
22 cars.

23 MR. ROSENTHAL: This is a unique tank car
24 thing. We thought we were bringing tank cars more
25 in lines with other cars.

1 PRESIDING JUDGE: I see.

2 MR. ROSENTHAL: That's not to say there is
3 no money involved. There's a substantial amount of
4 money involved. I can tell you what these -- what
5 the tank car owners have been billed so far under
6 this system, because there was some issue of, you
7 know, should we be subpoenaing them, do they have a
8 clear interest. They have a clear interest. This
9 is millions of dollars. Charging for something that
10 used to be free, the charges are substantial, and
11 there's a reason why we're willing to go through the
12 data and go through this exercise.

13 PRESIDING JUDGE: That's what I was
14 curious about.

15 MR. ROSENTHAL: Again, we're willing to
16 work with the Railinc data. In this particular one,
17 Railinc can't give us everything we need, because
18 they don't know why cars have moved to repair --
19 they don't know the repairs that were done. So when
20 we see a move that looks like it's inefficient, that
21 it went from one shop to another shop, why did that
22 happen? Why was it necessary to go from shop to
23 shop? Why did a car move to a shop that was 1,000
24 miles away instead of one that was 200 miles closer?
25 Maybe we would know more if we knew more --

1 PRESIDING JUDGE: Do you think that the
2 tank car owners operate their system
3 serendipitously?

4 MR. ROSENTHAL: No. We think what they do
5 is that they haven't been paying for the costs
6 associated with moving a car a thousand miles away
7 rather than 200.

8 PRESIDING JUDGE: So it's only money, and
9 it's only your money? Is that what you're saying?

10 MR. ROSENTHAL: It's money that, yeah,
11 one, we're having free moves, and two, the system
12 has, at least in places, limited resources. If
13 we're moving somebody's cars a thousand miles where
14 they only need to move 200, we're devoting the
15 resources, and somebody else, another shipper that
16 could use those resources doesn't have them because
17 other cars are being shuffled around more than they
18 have to be. They sit in yards. They sit at repair
19 shops.

20 PRESIDING JUDGE: Don't the -- I would
21 think in this day and age the TCOs would have some
22 sort of computer system to dispatch their cars here
23 and there. Don't you? Don't you have something
24 like that? On what basis do you make these
25 decisions? Isn't there some sort of overarching

1 policy that you use, or is this an ad hoc decision
2 when you move a car from one repair facility to
3 another? Does some guy in a little office someplace
4 out on a switch out in the middle of a prairie make
5 a decision? Don't you have a policy? Anyone?

6 MR. ROSENBERG: Your Honor, with a reply
7 to the UP petition for subpoena, we submitted
8 statements from each tank car owner, and I think
9 each tank car owner explained that it is a
10 individual case-by-case determination that's made,
11 taking into account a number of factors that include
12 distance, the cost, the ability of one repair shop.

13 PRESIDING JUDGE: You don't have a policy
14 that establishes criteria for this in each of the
15 companies? It's ad hoc?

16 MS. KENEDY: No, it's not ad hoc.

17 PRESIDING JUDGE: What is it, then, if
18 it's not ad hoc?

19 MR. ROSENBERG: Discretion of judgment.

20 PRESIDING JUDGE: That sounds ad hoc to
21 me. Is that what you call policy? Is it?

22 MR. ROSENBERG: Yes. If someone wants to
23 augment, but --

24 PRESIDING JUDGE: I'm just curious about
25 this.

1 MR. ROSENBERG: In each case, there are
2 lots of factors that have to be taken into account,
3 and it can't be specified in advance.

4 PRESIDING JUDGE: So who makes these
5 decisions? At what level do you make a decision to
6 do this, to move a car? Who makes the decision to
7 move a car?

8 MR. GOLDSTEIN: We're talking about just
9 repair facilities; right?

10 PRESIDING JUDGE: Who is this creature?
11 You have a car that's in repair facility A, and
12 someone, I want to know who, someone decides to give
13 an order and move it to repair facility B. Who is
14 that person? At what level of sophistication are we
15 talking about here? Apparently, you don't have a
16 manual, a book that you go to to determine when it's
17 appropriate to move from A to B or A to Z. How do
18 you make those decisions? Is this just some guy who
19 wakes up in the morning and says here's a car over
20 here, well, you know what, I think it should go
21 to -- it's in Spokane, and I really think it ought
22 to go to South Carolina today. Is that as
23 unsophisticated as your operation is? If it's not,
24 what's the level of sophistication?

25 MR. ROSENBERG: I think there are a number

1 of people who have been doing this for a number of
2 years. There are substantial costs associated with
3 the repairs. There's substantial liability if the
4 car is not properly cleaned, if a car is not
5 properly repaired.

6 PRESIDING JUDGE: I understand why you
7 would do -- go through these exercises. I'm simply
8 trying to find out if there is, you know -- I would
9 like to think of myself as someone with a very
10 ordered mind, and I would sure like to think that
11 you guys have ordered minds, too. As such, I would
12 think you would have a policy on how to move your
13 cars around. That's all I'm asking. If you don't,
14 just admit it, and we will move on.

15 MR. GOLDSTEIN: Judge, maybe I can add
16 some clarity. One of the requests that came, I
17 think it was as a part of the revised request, was
18 specifically whether or not the tank car owners had
19 written policies to address movements to and from
20 repair facilities.

21 PRESIDING JUDGE: Glory be to God.

22 MR. GOLDSTEIN: I think the answer across
23 the board was we don't have written guidelines or
24 policies. And the reason to that is because there's
25 certain judgments -- and I can only speak for Union

1 Tank with respect to this. That happens at a
2 reasonably high level. There are certain
3 individuals who are tasked with making
4 determinations about once a repair is indicated,
5 where that repair is going to happen. So for Union
6 Tank, Union Tank operates much of its own repair
7 facilities. Certain repair facilities do certain
8 things. Some of them do multiple things.

9 So there are determinations made based on
10 where it is, what the work that needs to be done,
11 and then there are other considerations. Then those
12 are moved. So it's ad hoc in that there's no formal
13 policy, but there is a set of criteria that are
14 applied to make sure that it works efficiently for
15 the company.

16 PRESIDING JUDGE: Is there someone in each
17 company that has ultimate responsibility for those
18 decisions, or is this a team of people? How do you
19 operate that?

20 MR. GOLDSTEIN: And I can only answer for
21 Union Tank. My understanding is that it's a small
22 group of people responsible for those moves.

23 PRESIDING JUDGE: All right.

24 Mr. Rosenthal, is any of this news to you?

25 MR. ROSENTHAL: Their position, no,

1 because we did talk about getting documents and had
2 been our request 6 --

3 PRESIDING JUDGE: Let me interrupt you for
4 a second. The reason I ask you this is I'm
5 wondering if it would be beneficial to you and
6 easier for these people -- maybe it's more
7 difficult. Would it be easier for you to depose the
8 responsible authority in each of these companies to
9 see what -- if they have a methodology and to ask
10 them questions about how they make these decisions,
11 which is your concern. You have these concerns.
12 You would like to put a dollar figure with each one.
13 But I would think the first thing you would want to
14 do is find out why the devil they moved these
15 things. And I cleaned that up really well. I'm
16 very proud of myself.

17 MR. ROSENTHAL: Some of the questions that
18 we asked, and depending on the answers we get, a
19 deposition of a knowledgeable person might be a good
20 way to get the answer.

21 PRESIDING JUDGE: See, the problem here
22 is, if you get the information you've asked from
23 these people, I'm not sure how you would
24 determine -- how you place a value on that
25 information. If they say yeah, we moved a car

1 yesterday from Spokane to Charlotte, North Carolina,
2 and you say that's a long ways, and look, you've got
3 these other shops along the way, why didn't they do
4 that, you still don't know. If you sat down with
5 the person who in Seattle made this decision, you
6 might find out why he did it. Is that fair?

7 MR. ROSENTHAL: I agree --

8 PRESIDING JUDGE: I have no idea why I'm
9 getting excited about this case. It's inherently a
10 boring case. There's something about the way you
11 guys are doing this, you're definitely pulling my
12 chain here.

13 MR. ROSENTHAL: I'm not trying to. So
14 your Honor, the first thing -- as I said, I think a
15 deposition of the people who are making the
16 decisions could be very valuable. But there are a
17 couple of steps that we would like to take first.
18 One, we would like to look at the data and see if
19 there are things going from Seattle to wherever,
20 because they said -- I don't want to get to a
21 deposition and have them say that doesn't happen.

22 Second, because they say they don't have
23 policies and all sorts of documents, we've tried to
24 revise our requests and narrow it to look for
25 documents where they talk about decisions for moving

1 cars to facilities in connection with item 55(c) or
2 similar charges.

3 PRESIDING JUDGE: But isn't that still a
4 pretty broad universe? TCOs, how big is that
5 universe?

6 What I'm getting to here is, is it more
7 efficient and less burdensome and more narrowly
8 drawn to have an expert in each TCO talk to
9 Mr. Rosenthal about how you move these things rather
10 than go through all your files -- and I don't know
11 how big this universe is, and if he's looking for
12 the information, he doesn't know either. Which is
13 less burdensome, and which makes more sense?

14 MR. MORENO: Your Honor, before we get too
15 far down this road, I think this is one of those
16 issues that underlies multiple requests, and we're
17 talking about the efficiency issue.

18 PRESIDING JUDGE: Yeah, I'm very concerned
19 about that.

20 MR. MORENO: I think there's a threshold
21 question as to the relevancy of this issue and as to
22 the need.

23 PRESIDING JUDGE: All right. Let me
24 address that for you, because I have been through
25 this on my own time in the past week with some

1 granularity as to my role in these proceedings. I
2 began with my own thoughts about how we proceed here
3 at the FERC and when a case is set for hearing. Say
4 a tariff is filed, a new tariff or a complaint is
5 filed, which is basically what we have, tariff
6 filings to change a tariff or a complaint on some
7 ongoing operation of a tariff. That document, which
8 is a detailed document from a company or a
9 complainant, is filed with the Commission. The
10 Commission reviews it and issues an order, and the
11 order -- if they set it for hearing, the order is
12 quite explicit as to what the issues are.

13 I don't see that with STB proceedings, I
14 think because there are a lot of reasons, but
15 fundamentally, we operate very differently.

16 So my concern here, working for the STB on
17 these cases, is that I don't -- because I don't have
18 that sort of granular instruction as to what the
19 case is about, I don't want to foreclose the Board's
20 options. This could really truncate a case if I
21 determine well, this isn't relevant, because in
22 order to determine relevance -- unless it's
23 Mr. Donovan's birthday. That's clearly not
24 relevant. But there may be other things that are
25 relevant that I could be persuaded oh, no, this is

1 not, because all of a sudden I'm making these sort
2 of policy decisions, because the Board hasn't
3 articulated any thing that would clearly tell me
4 what the issues are.

5 So I look at my role or my opportunity to
6 narrow the scope of these cases as to relevance very
7 carefully. I'm more inclined to let something in
8 because of who I am than I might do in a FERC
9 proceeding.

10 Do you understand that?

11 MR. MORENO: I understand that. If I may,
12 your Honor, I may be able to assist you in some of
13 that analysis here because I think there are two
14 factors clearly pertinent to this.

15 One of them is that simply the
16 Complainants, not the tank car owners but the
17 Complainants have offered to stipulate to the
18 economic axiom, your Honor, that charging for
19 something that was previously free will --

20 PRESIDING JUDGE: We were going to get to
21 that. Go ahead, because I think that makes a lot of
22 sense.

23 MR. MORENO: All the other details that
24 Mr. Rosenthal seeks in this proceeding as with
25 respect to why a car moved from here to there

1 doesn't really get to -- it's not really pertinent
2 to that question. If they're charging for this,
3 we're going to -- the tank car owners are going to
4 take steps, to the extent possible, weighing all the
5 other factors that are also considered when they
6 decide to move a car to a certain shop, they're
7 going to consider the costs now that UP is charging.
8 And if they can minimize or avoid that cost, in the
9 context of all the other factors, they will do so.
10 We will stipulate to that.

11 As to why an individual car moved from
12 point A to point B a year ago, I don't see how that
13 adds to Mr. Rosenthal's case.

14 Now, as to the IHB II decision, your
15 Honor, Mr. Rosenthal has latched on to a single
16 paragraph in a 21-page decision where the Board did
17 not state that the charges in that case were lawful
18 because of the efficiencies. What the Board stated
19 was that its old rule did not encourage efficiency,
20 and therefore, that was kind of an additional
21 corollary rationale as to why the Board's decision
22 in IHB II was relevant.

23 What was at the core of IHB II was there
24 were certain small terminal railroads who had shops
25 located on their lines, and they were bearing the

1 brunt of these repair movements. But yet, because
2 they were small railroads with a very small
3 geographic footprint, they didn't benefit from the
4 revenues that go along with those movements.

5 PRESIDING JUDGE: I read that. I
6 understand.

7 MR. MORENO: We don't have that situation
8 here, your Honor. That's one of the things we're
9 arguing is a different factor here. UP is the
10 largest railroad in the country, and it earns tens
11 of billions of dollars on tank car movements. And
12 what we are -- the ICC upheld those charges in the
13 IHB 2 decision because it concluded at the end of
14 the day those charges would ultimately still be
15 borne by the railroads through the mileage allowance
16 system because those charges, according to the ICC,
17 would be incorporated in the mileage allowance rate
18 and then railroads would be paid.

19 The whole point of this was to reallocate
20 the burden among railroads, not to shift the burden
21 to shippers. And what we have here in this
22 proceeding is having shippers now spending tens of
23 millions of dollars in this. Partly this gets to
24 count 2 of our complaint, your Honor, where we're
25 saying mileage allowances aren't getting paid

1 anymore. We aren't getting the compensation.

2 This can be the most efficient charge in
3 the world, but if there is no compensation of the
4 car owners at the end of the day, in other words, we
5 have to get paid back for the money that we pay, we
6 will pay initially, but ultimately through the
7 allowances we get paid back. If that does not occur
8 even under IHB II, the decision would have been
9 different, and there would not have been -- and
10 therefore, all this focus on efficiency is a
11 distraction, we believe, from the core issue of this
12 case, which is compensation, are we being
13 compensated.

14 PRESIDING JUDGE: Mr. Rosenthal,
15 Mr. Moreno has touched on something I wanted to get
16 to at some point anyway, and I think with apologies
17 to Mr. Moreno, last time we met I characterized it
18 as Mr. Wilcox's offers of stipulation. I was, I
19 think, referring to Mr. More a notice's.

20 What's wrong with the ideas that
21 Mr. Moreno and others have expressed in the TCO
22 reply document? There are a couple. They say
23 that "for instance," and they list two. I don't
24 know if there are more than two or not. That is,
25 let's see, at page 22 of the TCO document, the

1 stipulations. It seemed rather --

2 MR. ROSENTHAL: I'm sorry, your Honor.
3 Which?

4 PRESIDING JUDGE: The June 20th reply, the
5 TCO reply to your petition for subpoenas, June 20.

6 MR. ROSENTHAL: I believe there may have
7 been two documents.

8 PRESIDING JUDGE: Highly confidential,
9 that's the one I have here, but I'm not sure if this
10 part is confidential or not. It's pretty plain.
11 There are a couple of them there.

12 I did have a question for the TCOs. It
13 says on the third line of E there, it says "for
14 example." I don't know if "for example" and you
15 give two examples. I don't know if there are
16 others, or is it just really two? How many of these
17 great ideas did you have? Two great ideas or more?

18 MR. GOLDSTEIN: I think the tank car
19 owners are referring to the great ideas of the
20 Complainants. They were not our ideas.

21 PRESIDING JUDGE: Wait a minute. Oh, I
22 see. I see. I'm sorry.

23 MR. MORENO: That was an offer that we
24 made prior to the subpoenas that were being filed.

25 PRESIDING JUDGE: What do you think of

1 these? I mean, does that help or not? Maybe it
2 doesn't help. I don't know. Because Mr. Moreno was
3 just mentioning stipulations, stipulate to something
4 to narrow the scope here as to efficiency. What do
5 you have? Do you have other concepts that you could
6 discuss here with regard to stipulations that may
7 narrow the scope here.

8 MR. MORENO: Well, we looked at the
9 stipulations that UP proffered to the tank car
10 owners in their negotiations over the past month,
11 and there were two that related to the efficiency
12 that with some adjusted wording would work for us
13 and I can read them out for the record right here.

14 PRESIDING JUDGE: Go ahead.

15 MR. MORENO: The first one is that,
16 , "Union Pacific's adoption of 55(c) will cause tank
17 car providers to consider the charges imposed by UP
18 when directing empty cars to and from repair
19 facilities."

20 MR. ROSENBERG: If I may interject, I
21 think that was UP's --

22 MR. MORENO: That is a variation upon
23 UP's.

24 PRESIDING JUDGE: He said they started,
25 this but this is -- he's modified it.

1 MR. MORENO: Yes. And the second
2 stipulation is that "Union Pacific's adoption of
3 item 55(c) will cause tank car providers to attempt
4 to reduce empty repair miles on UP, when possible,
5 to avoid the UP tariff charge on repair moves when
6 doing so is less costly in combination with other
7 considerations that go into the selection of repair
8 facilities."

9 PRESIDING JUDGE: Both of these seem
10 inherently logical to me, I mean, you may argue that
11 it's logical and I agree with this but it's not
12 enough, but do you agree with these statements?

13 MR. ROSENTHAL: Well, I agree with at
14 least the first one as a matter of logic. The
15 problem is that they don't go far enough. And we
16 had proposed a set of stipulations that we thought
17 would go far enough. And the reason they don't go
18 far enough is it's kind of shown from --

19 PRESIDING JUDGE: But you have other
20 stipulations that may avoid this more as we've found
21 ourselves in?

22 MR. ROSENTHAL: Yes. If you have any of
23 the larger --

24 PRESIDING JUDGE: I have them upstairs.
25 Sorry.

1 MR. ROSENTHAL: That's fine. But yes, we
2 won't go through all of the back and forth that led
3 to this. But yes, after Mr. Moreno proposed that,
4 we said we think we're moving along the right track,
5 it doesn't go far enough, here's what we would like
6 to say. And so we've been back and forth over this.

7 The problem seems to be that the other
8 side -- we just have different views of what the
9 likely effects of this rule will be. At times what
10 they say is oh, it's actually going to be --

11 PRESIDING JUDGE: What the effects of
12 what?

13 MR. ROSENTHAL: What the effects of these
14 new charges, these item 55 charges will be. In
15 their reply to the motion to dismiss, they said that
16 it undermines the current incentives to efficiently
17 manage the nation's car fleet. So it's one thing to
18 say in a stipulation that oh, we will take them into
19 account. But if what they're going to then tell the
20 Board we take them into account but it has a
21 terrible effect on the railroad network, well, then,
22 saying that they take them into account for
23 discovery purposes doesn't get them anywhere. We
24 need to be able to look at documents to say yeah,
25 you take them into account, but will it be a good or

1 a bad effect of taking them into account.

2 PRESIDING JUDGE: Let me ask this. When
3 you have concerns, do you express concerns about the
4 valuation of taking something into account. These
5 same mythical people who dispatch over here that I
6 was referring to earlier, would they also be able to
7 give you some insight as to that question, as to
8 what quantifying the effects?

9 MR. ROSENTHAL: That is certainly
10 possible. That is certainly possible.

11 PRESIDING JUDGE: If you've got these
12 people in the deposition, you could ask them
13 questions like that, if they're the appropriate
14 people.

15 MR. ROSENTHAL: You could. And if that's
16 all we get, that's fine. But one thing, as I'm sure
17 your Honor knows from experience, what you do when
18 you have depositions is that you also have
19 somebody's documents so that you know whether what
20 they're saying in that deposition actually matches
21 with what they say when they're talking to the rest
22 of the world in a business context.

23 PRESIDING JUDGE: Well, I think a
24 deposition in this context would be unusual, but
25 only unusual as to the format, because you wouldn't

1 have those documents. But at this point, I think
2 you're almost flying blind here, and the value of
3 deposing such an individual would be to find out how
4 the system operates, does it make any sense. And
5 you may also get some cost analysis out of it as
6 well.

7 Mr. Donovan rises.

8 MR. DONOVAN: Thank you, your Honor. I
9 think I would propose a solution. I know that the
10 STB does not have the equivalent of a Rule 30(b)(6)
11 rule.

12 PRESIDING JUDGE: Right.

13 MR. DONOVAN: I would propose that a
14 30(b)(6)-type deposition could be used here. Now,
15 admittedly, it would have to be under subpoena
16 because they're not parties.

17 PRESIDING JUDGE: That's correct. I was
18 going to get to that.

19 MR. DONOVAN: That would be an issue
20 there. But let me digress from my main point just
21 to say, a lot of these decisions are actually made
22 by the lessee, by the shipper. You understand, your
23 Honor, that the tank cars have to be inspected every
24 10 years, and TIH cars, my client's cars, have to be
25 inspected every five years.

1 So if you've got some car that's going to
2 go for inspection, you're going to send it for
3 repair at the same time. That's your efficiency
4 number 1. You're not going to send it twice. When
5 it's not moving, it's not making money, and you're
6 paying for it while it's not making money. So
7 that's number 1.

8 A 30(b)(6)-type subpoena, deposition,
9 agreed-upon deposition, however it's worked, can
10 simply be bring your records with you that show the
11 information that I'm asking for. I'm asking for
12 what criteria you use in making decisions. And this
13 30(b)(6) witness representing that company is going
14 to have to show up and say these are the criteria we
15 employ, and these are the records we rely upon in
16 making that.

17 Now, that's going to solve a lot of
18 problems. I talked with Mr. Rosenthal 10 days ago
19 about setting up a discovery schedule with respect
20 to documents that I won't discuss now because
21 they're under seal, et cetera, but documents that I
22 received from UP that I reviewed that I want to
23 depose witnesses on. And they have a tremendous
24 amount to do with the efficiency argument and every
25 other argument we're talking about.

1 So I want to set those discovery --
2 deposition schedules up. I have asked for four with
3 potentially two more, a maximum of six deponents, to
4 be done in Omaha at their convenience in the next
5 two months, during October/November, because it
6 starts to snow in Omaha, I've been there, in
7 December. And that kind of procedure, it seems to
8 me, cutting through, with all due respect, the
9 nonsense of discovery and tens of thousands of
10 documents and data points, when, in fact, this case
11 really doesn't have very much to do with any of
12 that, it has to do with money.

13 PRESIDING JUDGE: All right. Thank you.

14 MR. ROSENTHAL: Two brief points to what
15 Mr. Donovan said, which I think are important.

16 PRESIDING JUDGE: Yes.

17 MR. ROSENTHAL: One, he has UP documents
18 that he's going to use to depose the witnesses.
19 Two, efficiencies are important.

20 MR. DONOVAN: Mr. Donovan did not say
21 efficiencies were important.

22 MR. ROSENTHAL: Okay. Fine. So he has
23 documents that he's going to use to depose the UP
24 witnesses. And that's what we're requesting. I
25 don't want to just go in there and say, so do you

1 send cars from here to there when there doesn't seem
2 to be a reason. I want to be able to say look,
3 number 6, I've said produce all documents discussing
4 item 55(c) or similar charges by other railroads in
5 connection with your instructions to a lessee to
6 direct particular cars to particular repair
7 facilities. So do you have documents. Does the
8 lessee ever say why are you sending the car really
9 far because it's going to cost a lot of money? Do
10 they come back and say oh, we're doing it because of
11 good reason X, Y, and Z? Do they change their mind?

12 Those things are relevant. They're
13 documents that would be used actually in deposing a
14 witness and saying why is this happening, is it
15 happening, why is it happening. I need a basis for
16 the depositions. Otherwise, I'm really flying
17 blind.

18 PRESIDING JUDGE: Couldn't you have a
19 subpoena duces tecum with -- just don't do it all in
20 one day?

21 MR. ROSENTHAL: Yes, your Honor, we could,
22 but these are the documents -- among what I've asked
23 for are among the documents that I would want to use
24 in an actual deposition. So some of this, I
25 wouldn't depose. Some of this is for our analysis.

1 But yes, I would love to ask the witness about the
2 results of our analysis once we've had it done, and
3 I would love to ask him about their contracts with
4 repair facilities and how it influences them, their
5 communications with lessees and how it influences
6 them, the documents about retrofitting and how this
7 plan affects them.

8 It doesn't make -- this is essentially the
9 documents that I would request in a subpoena duces
10 tecum and ask them to bring them with them. There's
11 nothing different here. And I want these documents
12 to depose their witnesses.

13 PRESIDING JUDGE: Mr. Goldstein, do you
14 have some comment on that?

15 MR. GOLDSTEIN: I do, your Honor.

16 PRESIDING JUDGE: Please.

17 MR. GOLDSTEIN: I guess my response would
18 be, we went down the road talking about a deposition
19 because we thought it would be more efficient than
20 producing documents. If we're producing documents
21 and then we're having depositions, we've now done 50
22 percent more of the work. So it needs to be -- it
23 was a compromise position.

24 PRESIDING JUDGE: What's the document
25 production burden here? I was going to do that line

1 by line, but can you just give me an overview? I
2 don't want to impose -- this is not a leading
3 question. You know I don't want to impose undue
4 burden.

5 MR. MONROE: Your Honor, can I say
6 something?

7 PRESIDING JUDGE: Sure.

8 MR. MONROE: I'm here representing
9 Cargill, who is not one of the tank car owners, but
10 it does own cars.

11 PRESIDING JUDGE: I understand. I know
12 who you are.

13 MR. MONROE: And it's a lessee as well.

14 PRESIDING JUDGE: Right.

15 MR. MONROE: I'm interested in this
16 because many of the same requests made to the tank
17 car owners were made to Cargill as well. So he's
18 asking for much of the same information. Now,
19 obviously, we're probably a smaller operation than
20 the major tank car owners, but we've got hundreds,
21 if not thousands, of cars, if you're talking about
22 over the time period we're talking about.

23 You seem to have a skeptical attitude
24 about how cars get sent to repair stations.

25 PRESIDING JUDGE: You think I have a

1 skeptical attitude? You're the first person who has
2 dared to articulate my attitude, but I must say
3 you're wrong. Congratulations. You're the first
4 person, but you're also a loser.

5 MR. MONROE: I've been there before. The
6 problem is, this is a -- what we used to call in
7 college, when I was in college like 50 years ago, a
8 multi-variant issue. All right. If you're a
9 salesman and you're driving all around the country
10 and you rely on the car to do your job and you break
11 down somewhere, you're not going to have a policy
12 that says how am I going to get my car fixed,
13 because common sense says you get it done as quickly
14 as possible, as close to where you broke down as
15 possible, and as cheaply as possible.

16 PRESIDING JUDGE: Mr. Monroe, I think
17 that's perfectly logical, and I would, frankly, be
18 shocked if that weren't the answer in a deposition,
19 should Mr. Rosenthal pose a similar question to
20 whomever is responsible for dispatching these cars.

21 MR. MONROE: And that will be the answer.

22 PRESIDING JUDGE: You see, you were wrong.

23 MR. MONROE: But in each instance, it's
24 going to be a different answer.

25 PRESIDING JUDGE: It's a different place,

1 but the policy would be look, it broke down in
2 Spokane, and there is a repair facility in Seattle
3 as opposed to moving it to Charlotte, so we will
4 move it to Seattle. You know what? That probably
5 makes sense, if they can do the work.

6 MR. MONROE: It makes sense if the closer
7 repair station is charging twice as much or has a
8 backlog and can't finish in 30 days.

9 PRESIDING JUDGE: I understand, it's a
10 multi-variable problem, as you say.

11 MR. MONROE: Right. So the problem that I
12 have, getting back to the actual discovery part of
13 this, because each of these decisions depends upon a
14 variety of factors, how close is the repair station,
15 how much are they charging, do they do this kind of
16 work, do they have a backlog, because as the car
17 operator and the car owner or lessee, we want the
18 car to be in revenue service as much as possible.
19 So there's an efficiency argument that goes the
20 other way. The car owners and the car lessees have
21 a very strong interest in being as efficient as
22 possible in getting it to the repair station and
23 getting it back. So sending it all the way across
24 the country to Charlotte on a lark is not going
25 to -- that doesn't make any sense from the car

1 owner's perspective.

2 PRESIDING JUDGE: That's what I thought.

3 MR. MONROE: Okay. So the reality is --
4 and I'm speaking for Cargill again -- if UP wants to
5 know -- wants the data and all the documents as to
6 all these cars that go to repair stations over --
7 how many times over the course of five or seven
8 years and their lifetime, we're talking about
9 thousands -- at least hundreds and probably for
10 Cargill thousands of situations, all of which have
11 particular facts that dictate why it happened -- why
12 we went here instead of here or why we went there
13 instead of there.

14 The problem is, if you want all the
15 documents to explain how each and every one of those
16 decisions was made, then it's -- for Cargill, we're
17 talking we might as well just shut down the business
18 and put all of our people pulling up those
19 documents, the invoices, and the e-mails, and we've
20 got to talk to people, what are the phone calls that
21 you make. Well, we called five repair stations,
22 these guys couldn't do it, this is why we picked
23 that guy. The burden --

24 PRESIDING JUDGE: See, you misjudged the
25 Judge, because I agree with you.

1 MR. MONROE: Then I better sit down.

2 PRESIDING JUDGE: It's a test. He did.
3 He sat down. Good. Yes?

4 MR. MORENO: I have one thing to add to
5 that. This whole discussion seems to be talking
6 about the common sense of what UP is going to charge
7 something, we're going to try to avoid this. But I
8 think what is really definitive here is the ICC
9 itself and the IHB II, when it referred to
10 efficiencies and the charging for these empty
11 movements encouraging efficiencies reached that
12 conclusion without a shred of evidence. No
13 discovery was involved in that. The ICC itself
14 relied upon the common sense. If it was good enough
15 for the agency, why isn't that good enough for UP
16 without imposing the burdens that Mr. Monroe and
17 others have discussed here upon a large group of
18 non-parties in this proceeding.

19 PRESIDING JUDGE: Well, I mean, I think
20 IHB II imposed a policy. It's broad policy
21 guidance. And Mr. Rosenthal is talking about the
22 effectuation of that. So it is a little different,
23 given enough time.

24 MR. ROSENTHAL: But your Honor, if they
25 agreed that IHB applied to this situation and

1 justified our charge, we would have won our motion
2 to dismiss, and we wouldn't be here. They're the
3 ones who are saying IHB's logic is no longer
4 applicable, and they're the ones who are trying to
5 relitigate the facts in IHB. We said dismiss, and
6 they said oh, no, things have changed, things have
7 changed, you can't justify these charges any longer,
8 or UP can't justify these charges any longer. And
9 it's not just a matter of do you take something into
10 account. It's what happens.

11 So when they come and they say oh, here,
12 we've got a good reason why we moved the car really
13 extra long, and if we didn't, the world would
14 come -- if we had to take into account UP's costs,
15 the world would come to an end, we would send it to
16 repair facility that wasn't as equipped to handle it
17 or had a terrible backlog or something. And if
18 that's what they're telling the world, if that's
19 what they're saying, if that's the facts, we want to
20 know, is that what their documents show. Or are
21 they just upset that they're being asked to pay for
22 something that they didn't have to pay for before,
23 and because now they not only have to take into
24 account what's their contract with the repair
25 facility and how long is their car offline, but how

1 much do they have to pay Union Pacific for actually
2 doing the work of moving the car.

3 And that's all we're trying to find out,
4 is not will there be an effect. Economically, there
5 probably will. But is it a good effect, one the
6 Board was trying to promote with its IHB II
7 decision, or is it a bad effect, one of the reasons
8 why these people are arguing that the IHB II
9 decision shouldn't apply. And the only way we can
10 get that is by looking at the documents.

11 PRESIDING JUDGE: Yeah. Mr. Rosenthal, I
12 am very sympathetic to you for, among other reasons,
13 the one I articulated as to my reluctance to narrow
14 the scope of this proceeding. That's the Board's
15 responsibility, not mine.

16 But I have to balance my sympathy for your
17 understandable desire to get this information
18 against the burden imposed on the car owners.

19 MR. ROSENTHAL: Which is why, for document
20 requests 3 and 4, we said we will get the
21 information from Railinc, which is why in number 6
22 we've narrowed it from all these documents, looking
23 at all the reasons why things move to repair
24 facilities, to specific documents that discuss item
25 55(c) or similar charges in connection with

1 instructions to lessee. It's why we narrowed number
2 5 from saying look, all your documents regarding
3 contracts with repair facilities to just the
4 contracts. It's why we narrowed them all, to make
5 this something that's manageable.

6 PRESIDING JUDGE: I think we've gotten to
7 the point, you all understand my philosophy, I
8 understand your positions quite well. Perhaps we've
9 gotten to a point where we can simply go through
10 your current requests for productions one by one and
11 determine the burden and thereby determine whether
12 you get it or not.

13 Yes, Mr. Wilcox?

14 MR. WILCOX: One issue going to one thing
15 you said about the burden. You started to say
16 earlier what was the relative burden, and also
17 something Mr. Rosenthal has said about UP's charges,
18 whether UP can do it, the efficiencies on UP.

19 It's the overall issue that permeates a
20 bunch of requests is the issue of UP seeking
21 discovery for documents involving other railroads,
22 because the burden varies significantly whether the
23 case is narrowed to UP, which is our complaint. UP
24 has sought to expand it by saying --

25 PRESIDING JUDGE: And I was going to get

1 into that.

2 MR. WILCOX: Okay. Then I will sit down.

3 PRESIDING JUDGE: It's in there, isn't it?
4 That's one of the ones we're going to discuss?

5 MR. WILCOX: Well, the request, for
6 example 2(b) through (e), documents by railroad. So
7 that issue is out there particularly from the
8 Complainants.

9 PRESIDING JUDGE: Yes, it is.

10 MR. WILCOX: And, I believe, with the car
11 owners as well.

12 PRESIDING JUDGE: Since we're right at --

13 MR. ROSENTHAL: Should we start with
14 number 1?

15 PRESIDING JUDGE: I kind of thought that
16 would be appropriate, but Mr. Wilcox wanted to -- I
17 think you lose, Mr. Wilcox.

18 MR. WILCOX: I was just using 2 as an
19 example. I wanted to make that point before we
20 started going through them one by one, that that is
21 an issue.

22 PRESIDING JUDGE: That's fine. It's an
23 overarching concern, I suppose.

24 MR. WILCOX: Yes, sir.

25 PRESIDING JUDGE: Fine. Mr. Rosenthal,

1 let's proceed with number 1. Go ahead and you can
2 explain what you need, and then I will ask TCOs what
3 their concerns would be.

4 MR. ROSENTHAL: For some perspective,
5 we've talked about narrowing. Originally, we said
6 give us all documents that refer or relate to item
7 55(c). That was, we thought, perhaps too broad.

8 PRESIDING JUDGE: Instead of "relating,"
9 you say "impact."

10 MR. ROSENTHAL: Yes. First, item 55(c)
11 was put into place at the end of 2014. So this is a
12 fairly narrow time frame. Now we're saying
13 documents discussing or describing the actual or
14 anticipated impact of item 55(c) and all
15 communications other than routine transactional
16 documents to or from lessees or other car owners.

17 PRESIDING JUDGE: What does the
18 word "impact" mean? What is that?

19 MR. ROSENTHAL: What do they think the
20 consequences, the effects will be? What's it going
21 to do to their decisions? How is it going to affect
22 how they move cars? What's it going to cost them?
23 Is it making them change their way of dealing with
24 repairs? I don't know. I thought it was narrower
25 than asking for all documents. When we said all

1 documents, they said oh, my gosh, that could be
2 everything, it could be invoices, it could be bills.
3 So we tried to figure out a way to --

4 PRESIDING JUDGE: I have a Pavlovian
5 response from the bench side to anything that
6 says "all."

7 MR. ROSENTHAL: And that's what we tried
8 to focus. We don't want their invoices. I don't
9 even know what they have. I'm sort of flying blind.
10 But we said all right, we want to know what the
11 effect is going to be and communications, what do
12 you tell other people about item 55(c).

13 PRESIDING JUDGE: And the same goes to
14 communications with the lessees.

15 MR. ROSENTHAL: It's a narrow group of
16 communications. We're not saying what are your
17 communications to the people to whom you lease cars
18 and to other car owners.

19 PRESIDING JUDGE: Mr. Goldstein, you seem
20 to have had the most caffeine today. Do you want to
21 respond to that?

22 MR. GOLDSTEIN: I can tell you first, your
23 Honor, I've had no caffeine today.

24 PRESIDING JUDGE: Well, then you're
25 naturally energy I can. You should run for

1 president.

2 MR. GOLDSTEIN: Not this go around. Thank
3 you, your Honor. I can speak on behalf of UTC.

4 PRESIDING JUDGE: Yes. Go ahead. That's
5 what I had anticipated.

6 MR. GOLDSTEIN: I could generally
7 characterize the concern, the overarching concern is
8 that there are documents that would have to -- there
9 would be electronic documents that would have to be
10 searched and there would be paper documents with
11 respect to most of these. So there are different
12 burdens associated with each of those searches. So
13 that's the first issue.

14 PRESIDING JUDGE: I mean, look. This is
15 2016. How much paper do you guys use?

16 MR. GOLDSTEIN: My understanding, your
17 Honor, is a surprising amount of paper is still used
18 in the rail car industry.

19 PRESIDING JUDGE: Well, so what's the flip
20 side of that question, then?

21 MR. GOLDSTEIN: I'm undercaffeinated.

22 PRESIDING JUDGE: No. How much electronic
23 communications? Maybe you haven't gotten there at
24 all? Is it all paper?

25 MR. GOLDSTEIN: My point in raising that;

1 we would be willing to concede that the search, as
2 opposed to what we would actually find, is
3 considerably easier to conduct if we can get
4 together and come up with a set of search terms for
5 electronic media. To the extent that these groups
6 of documents are electronic, it's far easier and
7 less burdensome for us to gather them and be able to
8 search them.

9 PRESIDING JUDGE: Yeah. Even I understand
10 that.

11 MR. GOLDSTEIN: Right. The problem
12 becomes, to the extent that we have, and I know that
13 UTC has, paper documents that may be potentially
14 responsive. Then that becomes a manual review, and
15 that becomes much more significant in terms of the
16 review part.

17 And the third piece of it is what we
18 think, particularly, for example, for number 1, my
19 understanding from the folks that we've talked to
20 inside UTC is that their expectation is there are
21 very few, if any, documents that are responsive to
22 the request.

23 PRESIDING JUDGE: See, now that, you hit
24 on something that I would think would be a
25 reflection that would be appropriate for all of

1 these questions. You may simply dismiss some of
2 them and say we just don't have them, and that's
3 fine.

4 MR. GOLDSTEIN: And we've discussed this
5 with Mr. Rosenthal. The concern is --

6 PRESIDING JUDGE: That's PFFT there. All
7 right.

8 MR. GOLDSTEIN: I don't think that any of
9 us are comfortable saying that there are no
10 documents, because there may be -- and I think we
11 described it as sort of extraneous or stray
12 documents here and there where, for example, a
13 lessee has asked a question, what is item 55(c),
14 what is this charge, and we respond it's a charge,
15 and you're going to have to deal with it from UP.

16 I don't think that the tank car owners are
17 comfortable saying there are no documents that are
18 responsive to 1 and if the question is, if there are
19 any we have to go do the search, that's why the
20 electronic search may be more manageable, but the
21 paper search is considerably burdensome.

22 PRESIDING JUDGE: Mr. Rosenthal, would
23 you, please, respond to what Mr. Goldstein had to
24 say there? I anticipate that you have something to
25 say there.

1 MR. ROSENTHAL: Sure. Just two things.
2 Well, maybe more than two.

3 PRESIDING JUDGE: All right.

4 MR. ROSENTHAL: Certainly, there are
5 burdens involved in discovery. Complainants asked
6 UP for all documents that refer or relate to Union
7 Pacific's decision to begin charging for empty
8 repair moves among everything else. So we've gone
9 through all of our documents related to item 55(c).

10 PRESIDING JUDGE: Foolishly, you didn't
11 come before me.

12 MR. ROSENTHAL: No, foolishly, we
13 understood that they were relevant, and this is a
14 case involving substantial money, and that's what
15 happens in modern discovery, is that people do
16 searches for documents.

17 PRESIDING JUDGE: Yes.

18 MR. ROSENTHAL: As I said -- look, we are
19 in a procedurally -- we are in a bit of an odd stage
20 because subpoenas haven't issued. And so there have
21 been representations made about what does and
22 doesn't exist, maybe not with respect to this
23 particular one but with respect to other things.

24 So one thing to Union Pacific, it's
25 important to have a record and say we asked for this

1 and this is what they told us because one of our
2 concerns, we don't want somebody to come in later in
3 the case and say look at this great document.

4 PRESIDING JUDGE: We had that discussion
5 last time with regard to the antipathy I hold for
6 sandbagging.

7 MR. ROSENTHAL: Yeah. And I don't want to
8 say that, because I don't know -- I'm not saying it
9 would be intentional. But one of our concerns and
10 one of the things we tried to address in a lot of
11 these stipulations is we said look, we're willing to
12 accept certain statements about the way the world
13 is, and as long as you also stipulate that you're
14 not going to come back in at the end of the
15 proceeding and tell us something different. And
16 that's, in part, what really held us up, but that's
17 the crux of our concern.

18 PRESIDING JUDGE: But they can't stipulate
19 to that?

20 MR. ROSENTHAL: A lot of times, there's a
21 little bit of unwillingness, it seems, to come in
22 and stipulate that we're not going to come in with
23 documents later on or with evidence later on that
24 says something else. That's our concern.

25 PRESIDING JUDGE: Is this just the tender

1 administrations of a lawyer to his or her client
2 that prevents such a stipulation, over there on the
3 other side?

4 MR. MORENO: From the Complainants' side,
5 we have been willing to stipulate that we have no
6 intent of offering any of this stuff on opening
7 evidence. What we are hesitant to do is to
8 completely foreclose ourselves from offering
9 anything that we might need to address what UP might
10 say on reply. Our affirmative case has nothing to
11 do with these issues.

12 PRESIDING JUDGE: Can we memorialize this?
13 I mean, I think this is a small step for mankind.

14 MR. MORENO: It is in writing in our prior
15 offers to UP.

16 PRESIDING JUDGE: Do you want to accept
17 that prior offer, and we will continue on down the
18 road here? I mean, I don't like sandbagging any
19 more than you do.

20 MR. ROSENTHAL: And I wish that had been
21 what had been addressed. We do have one set of
22 stipulations that you will see we keep saying we've
23 addressed a certain set of questions through
24 stipulations. We have a set of stipulations, and to
25 get those stipulations, we did agree to something

1 like what Mr. Moreno suggests, that they weren't
2 going to say it on opening and you may have the
3 precise language about what would happen on reply.
4 In that case --

5 PRESIDING JUDGE: But it doesn't cover
6 what you're concerned about now?

7 MR. ROSENTHAL: In that case, we were
8 willing to stipulate there, to give them -- I think
9 we ended up giving them a chance to come back on
10 rebuttal and rebut something we said, because we
11 were actually confident enough in the facts.

12 Here, if we say --

13 PRESIDING JUDGE: Yeah, I would allow
14 that.

15 MR. ROSENTHAL: Here, if we say, you know,
16 they have no documents about the impact of item
17 55(c), that's what they stipulate, or item 55(c)
18 will reduce costs, will take into account costs
19 because of item 55(c), and then we say that will
20 make -- and by taking into account costs, we think
21 we will have more efficient moves, that will reduce
22 the costs of the rail network and benefit all
23 mankind, and they come back and say no, we have
24 documents that show that because we've taken this
25 into account, we've sent cars to repair shops that

1 weren't qualified to do the work, the cars broke
2 down and caused increased costs.

3 So they say sorry, we didn't use it on
4 opening, we didn't talk about the impacts on
5 opening, but when you talked about the impacts on
6 reply, now we can submit documents related to the
7 impacts.

8 Either they have to agree not to do that,
9 or we need to see their documents. That's the
10 essence of preventing sandbagging.

11 PRESIDING JUDGE: That's not --

12 MR. ROSENTHAL: That's why you have
13 discovery, your Honor. It's one important reason.

14 PRESIDING JUDGE: Yeah, I know. What I'm
15 saying is, maybe there are degrees of sandbagging.
16 That's not the worst I've heard.

17 MR. ROSENTHAL: And your Honor, it
18 probably may not be the worst --

19 PRESIDING JUDGE: You probably read my
20 appendix C. So you know how bad it can get.

21 MR. ROSENTHAL: Yes, your Honor. And it
22 may not be the worse you've heard, and it may not be
23 the worse I can imagine. It's just an example that
24 actually came up based on the correspondence and my
25 reaction from reading the correspondence. There's a

1 benefit to conducting discovery and having somebody
2 say there's nothing there, as long as it's then
3 absolutely clear that there's nothing there. And
4 when something shows up later, you know, they've had
5 a record which says, you know, it wasn't there, and
6 I can go to the Board and say look, we asked for it,
7 they told us it wasn't there, and now --

8 PRESIDING JUDGE: So we've gotten good
9 value out of that discussion, but Mr. Goldstein
10 referenced something that you may want to consider,
11 and that is as to 1 here and the impact. He was
12 talking about an electronic search and maybe
13 narrowing the terms. Is that something that you
14 might entertain? It's something I might entertain.

15 MR. ROSENTHAL: If they have suggestions,
16 my sense is that asking about item 55(c), if as they
17 say they likely have very few documents, it might be
18 that they could do an electronic search on item
19 55(c) and only come up with a handful of documents
20 to begin with.

21 If there's some other way of narrowing it,
22 I would certainly entertain that.

23 PRESIDING JUDGE: Two or three terms
24 maybe, item 55(c) and Donovan 's birthday and
25 something else?

1 MR. ROSENTHAL: I think what you can do is
2 say is what comes up when you search for item 55(c)?
3 How many documents even come up? If there are a
4 lot, we can talk about revising it, but if there are
5 thousands, we say you're right, we can't work with
6 that.

7 PRESIDING JUDGE: There's some productive
8 murmurings going on over here. What's going on?

9 MR. NEUMAN: I think there is -- the
10 difference among the car owners in terms of how far
11 back electronic records exist that might be
12 responsive is a variable.

13 PRESIDING JUDGE: Right.

14 MR. NEUMAN: But just generally speaking,
15 I do think that there's a productive way with some
16 employment of three or four key search terms to get
17 at the types of documents that Mike is talking
18 about.

19 To reiterate what we had put into our
20 response in general as well as the stipulations that
21 we tried to work through with Mr. Rosenthal, the car
22 owners don't have studies, reports, things that are
23 labeled "impact of 55(c)." You're talking about
24 one-off or random or relatively isolated
25 communications, in management conversations, we

1 should discuss this at the next meeting, blah, blah,
2 blah, what do you think, one-offs. Whether in the
3 aggregate they're interesting or not, who knows.

4 But I think there is a way to devise
5 search terms that could get at that and keep the
6 burden relatively small. The question was raised as
7 to how many custodians. Is it all, there's your
8 favorite word again, all custodians or the ones who
9 are most likely to have because of their management
10 responsibilities, maybe they're the most likely to
11 have the records. If it's two or three or four key
12 custodians, I think that's workable. 28 or 30 or 50
13 custodians, just because they're cc'd on all the BS,
14 if you will, that goes around, that's where it gets
15 sort of slippery.

16 PRESIDING JUDGE: That's logical.

17 MR. NEUMAN: But I think there's something
18 workable there.

19 MR. ROSENTHAL: Your Honor, again, a lot
20 of this is what's worked out in the back and forth
21 of discovery once discovery has been issued.

22 Here, if we had just been able to serve
23 discovery, we could have discussed it, or frankly,
24 parties come up and do a search that they think is
25 reasonable, in many cases. And that's okay.

1 Our problem is, we need the Board to issue
2 subpoenas so that they have an obligation to do this
3 sort of reasonable discovery, and we are, again,
4 more than willing to talk about. We don't think
5 they should have to search all custody yarns. Union
6 Pacific did not search every custodian, every
7 employee in its network for these documents.

8 PRESIDING JUDGE: Let's do this. I will
9 grant you some authority to do something along these
10 lines. Is that amorphous enough? That's a
11 beginning. That's my beginning. It's a foundation.
12 It may be a foundation on sand, but at least there's
13 a foundation there. We can talk about that. We can
14 talk about number of custodians and who might it be.
15 Frankly, you guys can do this on your own, if I give
16 you enough guidance.

17 MR. ROSENTHAL: Your Honor, I suspect that
18 if you agreed to issue the subpoena and we can go
19 document by document, that we will come to these
20 agreements and come up with reasonable ways of
21 approaching it.

22 PRESIDING JUDGE: I don't want to do that.
23 I don't want to do that. I want some sort of
24 agreement up front. I don't want to have to come
25 back here a month from now and quibble about some

1 term that I was not insightful enough to nail down
2 today. I don't want to do that. I've got other --
3 I have a docket. I have other things to do. I
4 mean, I like this. I like you guys. But I think we
5 ought to be precise here and efficient. I don't
6 want to move this case to the 11th floor and then to
7 move it back down here. That's not an efficient
8 move.

9 MR. ROSENTHAL: I understand, your Honor.

10 PRESIDING JUDGE: Did you get it?

11 MR. ROSENTHAL: Yes.

12 PRESIDING JUDGE: From Spokane to
13 Charlotte, I don't want to do that.

14 MR. ROSENTHAL: I understand. Certainly,
15 if they know, if they have proposals for limiting
16 somehow the number or some wording that would work
17 for limiting the people who are searched for this --

18 PRESIDING JUDGE: I tell what you we can
19 do. If we have an agreement to talk about this and
20 an agreement to agree, you guys can send me a
21 document saying this is what we've memorialized
22 here, and I will have a subpoena issued for it, if
23 that's what you want.

24 Or Mr. Wilcox and I had this experience
25 just a little while ago. What do we call that? A

1 gentleman's or gentlewoman's subpoena? What do we
2 call that? It was kind of strange. It didn't even
3 feel good, but it worked.

4 MR. WILCOX: No, it worked. You
5 essentially indicated you wanted to issue a
6 subpoena, and then we worked out the language, and
7 the subpoenas were issued, and we moved on from
8 there.

9 PRESIDING JUDGE: So we could do that
10 here; right?

11 MR. WILCOX: It worked in the other case.

12 PRESIDING JUDGE: Yeah, it did.

13 MR. WILCOX: I'm just speaking for that
14 case, a much smaller case.

15 PRESIDING JUDGE: That case had some more
16 contentious people, I think. These were parties
17 that really -- a grain elevator operator in the
18 middle of nowhere and didn't want to participate and
19 said if you bother me I will send someone out to
20 hurt your son or something, something weird.

21 MR. WILCOX: Not quite that. They were
22 upset, yes.

23 PRESIDING JUDGE: Yeah, they were pretty
24 upset. So I'm sure we can work something out here.
25 What do you think of that?

1 Mr. Neuman?

2 MS. KENEDY: I'm Jennifer Kenedy, your
3 Honor. I just wanted to clarify, maybe we can do
4 this for each one to wrap up what our marching
5 orders are so that there's an understanding between
6 the parties as to what we are supposed to agree to
7 agree to do.

8 I heard your Honor say electronic
9 communications only, so there would be electronic
10 searches of -- one search term would be 55(c), maybe
11 two or three other search terms that the parties
12 could agree upon. And then we would determine who
13 the appropriate, reasonable number of custodians
14 were that we would be searching.

15 PRESIDING JUDGE: That's correct.

16 MS. KENEDY: Thank you.

17 PRESIDING JUDGE: Mr. Rosenthal?

18 MR. ROSENTHAL: Who is going to determine
19 the appropriate, reasonable number of --

20 PRESIDING JUDGE: You guys are going to
21 have to work that out.

22 MS. KENEDY: We know our businesses, and
23 we will have to communicate about that.

24 PRESIDING JUDGE: I would be very, very
25 disappointed if you couldn't do that. That's not

1 heavy lifting. You guys are paid enough to lift
2 heavy objects.

3 All right. So we're down to 3, a part of
4 3, are we?

5 MR. ROSENTHAL: I was going to start with
6 2(a).

7 PRESIDING JUDGE: You already said you've
8 got that covered, you've got that nailed down.

9 MR. ROSENTHAL: I'm sorry. One issue, we
10 can get it from Railinc, but the data are actually
11 sort of -- data that we would be getting are
12 technically their data, and we need their
13 authorization before Railinc will release the data,
14 and we haven't been able to agree on that
15 unfortunately.

16 PRESIDING JUDGE: Why can't you agree to
17 have the data released? Would you rather aggregate
18 it yourself?

19 MR. ROSENBERG: We've agreed on a number
20 of elements. There have been some stumbling blocks.
21 One related to the cost of it. A second related to
22 how it was shared. I think as of last Friday, I
23 think there was mostly a reasonable offer from UP on
24 those respects.

25 There's also a concern with to the extent

1 the data is going to be aggregated versus showing
2 individual car owners.

3 PRESIDING JUDGE: What do you mean? What
4 are you talking about? You want to aggregate it?
5 You don't want to aggregate it? What? And cost, do
6 you have a problem with cost?

7 MR. GOLDSTEIN: I think we've worked out
8 the cost.

9 MR. ROSENBERG: UP has indicated, I
10 believe, that it's willing to pay for the Railinc
11 work and to provide copies.

12 MR. ROSENTHAL: There were three
13 conditions that the tank car owners -- when we said
14 we could get the data from Railinc and just needed
15 their permission, the rail car owners said there
16 were three conditions: Union Pacific has to pay for
17 the data, we have to share it with them, and the
18 data has to be aggregated so we can't tell which
19 data applies to which car owner.

20 I've considered it taking it back, and my
21 client may be mad at me. But what we said is look,
22 we will pay, we don't think we should, it's their
23 data, but we will pay, we will share if you drop
24 this crazy objection to aggregating the data,
25 because the data aren't kept in aggregated form.

1 They're by car owner. These are bills that car
2 owners get for mileage equalization. So you're
3 somehow asking us to get it from Railinc but now
4 change the form and mask. And we said we will
5 compromise, I don't know if you like it, but now to
6 say we can't even get the data we wanted without
7 changing it.

8 PRESIDING JUDGE: It's protected work
9 product. You're not going to use it in your
10 business, are you?

11 MR. ROSENTHAL: I'm sorry?

12 PRESIDING JUDGE: It's a protected work
13 product. You're not going to use it in your
14 business, are you?

15 MR. ROSENTHAL: There's a confidentiality
16 order in this proceeding.

17 PRESIDING JUDGE: So then what's the
18 problem? I don't understand what you want them to
19 aggregate? I understand why you want them to, but I
20 don't think that's reasonable.

21 MS. KENEDY: We have a very strong
22 competitive interest in keeping that information
23 confidential. It provides no added benefit or
24 relevance to the information he's seeking. They're
25 trying to show the efficiency of rail movements.

1 That can be done in an aggregated form. That data
2 is just as useful to them in an aggregated fashion.
3 But it's highly competitive information that, I
4 think, I speak for everybody at the table here that
5 we do not want to share on an individual tank owner
6 basis.

7 PRESIDING JUDGE: So how does he get his
8 aggregated data? I mean Railinc is giving him data.
9 Does Railinc have to aggregate it? Or he aggregates
10 it?

11 MS. KENEDY: I believe that Railinc can do
12 that. It might cost something, and we would have to
13 discuss how that happens. But I don't know enough
14 about that. I believe we've had conversations that
15 Railinc might do that for us, and we can talk about
16 it. But because we were butting heads just on the
17 simple issue of aggregation in the first place, we
18 never got to that second discussion.

19 PRESIDING JUDGE: Okay. Give me a good
20 reason why it shouldn't be aggregated?

21 MR. ROSENTHAL: Why it shouldn't be
22 aggregated?

23 PRESIDING JUDGE: Yes.

24 MR. ROSENTHAL: I will give you a couple.
25 We're just asking for the bills that they received

1 for mileage equalization. The question is, how much
2 did they bill you, GATX, you, Union Tank company,
3 you, American rail lease. That's not how the data
4 are.

5 Second, if these guys all behave the same,
6 if everything was absolutely the same, maybe
7 aggregated data could do it. But the point is,
8 aggregation masks differences among the companies,
9 and we need to look at those differences to
10 understand the other data that we get. If somebody
11 is paying mileage equalization, they may behave
12 differently than if they're not paying anything at
13 all.

14 PRESIDING JUDGE: I understand. You've
15 won that. Let me ask you -- just a minute,
16 Mr. Neuman. I want to ask you a question about what
17 Ms. Kenedy had to say. And that is, she's expressed
18 a heightened level of concern over having you obtain
19 this data disaggregated because it's highly
20 confidential, for competitive reasons.

21 What can you do to assuage Ms. Kenedy's
22 concerns? How can you ensure -- this is an answer,
23 I think, I could answer, but I want to hear it from
24 you. How can you ensure that her worst fears
25 aren't -- or any of her fears aren't realized with

1 regard to this?

2 MR. ROSENTHAL: We have a protective order
3 that's been entered into the Board. That's the form
4 of the protective order the Board uses in many, many
5 cases for much more significant data than does a
6 tank car company pay mileage equalization because
7 its lessees happen to move more empty cars. The
8 idea that this is even competitively sensitive is
9 kind of hard to swallow. But we have a protective
10 order that prevents us from sharing, and we have
11 undertakings that the people who get this
12 information have all signed that they're going to
13 abide by the protective order.

14 PRESIDING JUDGE: Ms. Kenedy, I've been
15 doing this similar work for a long time. I've seen
16 stuff go back and forth that I thought man, this
17 really gives me pause, and this isn't one of them.
18 I think we're going to -- go ahead.

19 MS. KENEDY: Well, I think our response to
20 that, your Honor, and I understand what you're
21 saying, is that we are non-parties. We are not
22 parties to this proceeding. There's a different
23 standard. This information is competitively
24 sensitive, even amongst ourselves. And he has not
25 demonstrated that he requires the information on an

1 individual tank car basis sufficient to get it even
2 to a party, much less to a non-party. It makes us
3 extremely uncomfortable to just produce that on an
4 individual tank car basis. And I think there's
5 information that's competitively sensitive as a
6 non-party that we don't feel comfortable even with
7 the protective order in place that it's being shared
8 even amongst the parties in this case. And without
9 the demonstrated relevance that he needs it on an
10 individual basis, I don't understand why we would be
11 compelled to produce it, if we're willing to get it
12 in an aggregated form.

13 PRESIDING JUDGE: I think it's going to
14 have to be aggregated. I do. Do you want to argue
15 with me? If you start arguing with me over this, we
16 are going to be here for days and days and days.

17 MR. ROSENTHAL: That's fair. But the
18 issue of aggregation is something that comes up a
19 couple of places. So I just want to understand,
20 because I'm not sure I'm understanding the concern.
21 We do have a protective order.

22 As for being non-parties.

23 PRESIDING JUDGE: Yes.

24 MR. ROSENTHAL: We can go through -- and I
25 was prepared to start by going through what the

1 Board's rules are and how they apply differently to
2 non-parties. Which is, when you have somebody with
3 such a clear interest in the proceeding -- and they
4 have a clear interest. I can give you the numbers
5 that show you --

6 PRESIDING JUDGE: I have struggled with
7 that issue. I understand it.

8 MR. ROSENTHAL: If you would like some
9 documents that show, I can cite you to their own
10 papers that say we're victims of this, too. That's
11 what their reply to our motion to compel said.
12 There's no question they are affected just as much
13 as -- maybe even more than Cargill and Poet in terms
14 of the amounts that Union Pacific has billed their
15 tank car owners. They get the money from mileage
16 equalization. They are in it as deeply as anybody
17 else. And what the Board has said is that when
18 you -- if you can't get the information from the
19 associations, if those documents don't exist or
20 can't be forced to be produced, you can get it from
21 people with a clear interest in the case.

22 The reason we're here is because the
23 associations say they don't have the documents. We
24 gave you an exhibit to our subpoena that showed
25 their answers, we don't have it, we don't have it,

1 we don't have it. There's no other way to get this.

2 And if it's aggregated, what we can't do
3 are the types of analyses we are willing to do with
4 other Railinc data, which is let's look at cars that
5 are moving, let's look at why this is happening,
6 let's look at the incentives created by this system,
7 and let's see what the effects will be.

8 And so if I can't tell whether Union Tank
9 Car is behaving differently from GATX because one is
10 making mileage allowance payments, one is being
11 charged payments like ours by another railroad, then
12 I've got a mush of data that tells me nothing about
13 what the impacts of item 55(c) are going to be.

14 We have got a protective order. There's
15 no -- the data aren't aggregated as they're kept.
16 There's just no good reason to change the data,
17 which then just makes them useless.

18 PRESIDING JUDGE: Mr. Neuman?

19 MR. NEUMAN: Mr. Rosenthal has hit upon a
20 couple of things that, I think, sort of underscore
21 our concern.

22 The information is in Railinc in a certain
23 form. Mr. Rosenthal and other folks who have
24 contacted Railinc know more than we do about how
25 they have that information and what the effort would

1 be to reproduce it in a different way.

2 Aggregation of data is what we suggested
3 right up front to avoid the concern about
4 attribution to individual car companies of
5 individual data in such a way that would get into
6 the concerns that Ms. Kenedy was raising.

7 Our concern really is that if there are
8 individual records in Railinc that describe events
9 and can give him information as to what happened or
10 didn't happen in a certain transaction, that's fine.
11 The attribution that this is a GATX versus a Trinity
12 versus a UTC thing as if there's a pattern or
13 there's something that he's trying to discern,
14 that's where it gets very troublesome for us.

15 PRESIDING JUDGE: So you're not really
16 talking about aggregation. You're just talking
17 about nonattribution.

18 MR. NEUMAN: At least for my client, that
19 is the concern is that the information not be
20 presented in a way that this is all GATX, this is
21 all UTC, this is all Trinity, in a way that gets at
22 revealing, frankly, very sensitive information. The
23 protective order is what it is. We understand that,
24 but it isn't a proxy for just disclosing highly
25 sensitive information without a good reason.

1 PRESIDING JUDGE: To what degree do you
2 have to aggregate? Could it be just as simple as
3 removing any identification marker?

4 MR. NEUMAN: I can't speak to that,
5 because again we have not had the interactions with
6 Railinc that UP has had and to the extent that
7 Mr. Rosenthal is hitting upon an extra costly burden
8 to ask Railinc to do something different with the
9 information, we're not interested in that.

10 PRESIDING JUDGE: He's not asking -- you
11 guys are asking for the aggregation which costs
12 money. He's not asking.

13 MR. NEUMAN: We're concerned about
14 attribution, your Honor, and that's -- I just wanted
15 to clarify.

16 PRESIDING JUDGE: Is there a way to
17 provide Mr. Rosenthal the information he needs
18 without attribution? That is to say, not
19 aggregating?

20 MR. NEUMAN: It would be an effort to get
21 it from our own files. It already exists at
22 Railinc. We wouldn't produce it.

23 PRESIDING JUDGE: No, from Railinc.

24 MR. NEUMAN: Right, from Railinc. We
25 haven't had a specific proposal from him as to how

1 he would -- how that would be done. The discussion,
2 unfortunately, has only been about aggregating the
3 information or not.

4 PRESIDING JUDGE: Mr. Rosenthal, do you
5 have any insight as to this? I think that it sounds
6 good if you can do that.

7 MR. ROSENTHAL: So the problem is that,
8 again, in trying to figure out what the impacts of
9 this ruling are going to be, we need to connect up
10 behaviors with evidence. So I guess you could
11 imagine saying railroad A, B, and C and changing
12 everything to A, B, and C. But happens when I want
13 to, say, depose somebody. Are you railroad A, B, or
14 C. What happens when I'm trying to present
15 information to the Board and I want to say this
16 person had contracts that provide for X and that
17 explains Y. How do I then link -- do we have to do
18 everything as a -- it's administratively
19 impractical.

20 Again, we've got a protective order. If
21 they think it's highly confidential, they can
22 designate it highly confidential. My clients can't
23 even see it. It's outside counsel only and
24 consultants.

25 Again, there's a lot of very highly

1 protected stuff that goes on in STB proceedings, as
2 well as, I'm sure, FERC proceedings. And we've
3 had -- and it's been litigated in front of the
4 Board. I didn't bring the cases with me, but I
5 could probably point you to cases where the Board
6 said look, there's a protective order.

7 MS. KENEDY: Your Honor, if I can speak
8 once more, and you are probably sick of hearing from
9 us on this.

10 The issue as we see it, first of all, as
11 non-parties, it's all about the ratios of loaded
12 miles to empty miles. And UP has not articulated
13 why they need owner-specific data in order to show
14 whether there's a reduction in empty versus loaded
15 miles. That is the issue. The fact that it's
16 attributable to a particular owner, it's not
17 meaningful or relevant at all. And given our very
18 large concerns, competitive concerns about revealing
19 that attribution, I don't think that he has met the
20 burden for relevance even as to a party, much less
21 to the nonparties here today.

22 PRESIDING JUDGE: Mr. Rosenthal has spoken
23 to your non-party status, and I agree with what he
24 has to say in regard to that. You're non-parties,
25 but you're in sort of a quasi-party role here

1 because of the curious way this complaint was filed.

2 If I didn't respect the process that
3 administrative law in general has for protecting
4 documents, I probably shouldn't be here. I would
5 not be able to do my job if I didn't think that, in
6 ordering a production of documents, they would be
7 handled properly when they are confidential.

8 So I'm going to allow Mr. Rosenthal to
9 have the information in a disaggregated manner.

10 All right. Now what, Mr. Rosenthal?

11 MR. ROSENTHAL: If folks want to take a
12 break, that's fine, but if not, we will go to 2(b).

13 PRESIDING JUDGE: We will go to 2(b).

14 MR. ROSENTHAL: All right. Our request
15 2(b) asks for documents that will show whether --
16 how much these tank car companies turn around and
17 bill their lessees for these empty -- for these
18 mileage equalization payments that Railinc bills
19 them in part A. In other words, Railinc bills them,
20 and then there's a question what happens to those
21 charges. If they pass those charges all along to
22 somebody else, that has implications for whether
23 these charges have any influence on their behavior.
24 If they bear the charges, that has implications.
25 And that's what we're trying to find out.

1 They say mileage equalization, that's
2 enough to make us to be efficient. They probably
3 said that today. But if they then turn around and
4 bill their lessees and recover all those charges,
5 then that supports our argument that mileage
6 equalization isn't doing the trick, isn't providing
7 the incentives they say it's providing.

8 PRESIDING JUDGE: What is "sufficient to
9 show me"?

10 MR. ROSENTHAL: That means that I don't
11 know what their documents look like, but if they
12 bill their lessees, presumably there are bills that
13 go out that charge this, that would be fine. If
14 they have a spreadsheet in their normal working
15 practice that compiled this information, not
16 separate bills but here's our lessees and here's
17 what we billed them, that would be fine.

18 "Sufficient to show" is an attempt to
19 minimize the burden. I don't want all documents
20 related to this, but I don't know what their
21 documents look like, and if they have the
22 information, I will take it in the easiest form it's
23 available.

24 PRESIDING JUDGE: Who over in the tank car
25 owners' side of the world can respond to that and,

1 perhaps, shed some light on how your documents are
2 retained that would show this? Don't all jump up at
3 once.

4 MR. ROSENBERG: I'm willing to start, your
5 Honor. The first point is that under the in re,
6 Private Tank Cars precedent, the division of costs
7 between the lessor and the lessee, Union Pacific is
8 and should be indifferent. How it gets divided up
9 shouldn't matter to UP. UP is getting paid.

10 The second is that the tank cars owners
11 offered to provide other information in the form of
12 their exemplar or starting model leases that would
13 address this sort of provision so that UP would see
14 how it's handled.

15 Also UP will have received, I think, the
16 individual leases of Cargill and Poet. So we will
17 have some actual leases to work from there.

18 So given that the information, you know,
19 is not -- we think there's a basic relevance
20 objection which Complainants may be better equipped
21 to address and that UP will have other information
22 showing how the pass-through works. We think that
23 ought to be sufficient as opposed to having to
24 develop all of this information.

25 PRESIDING JUDGE: You've offered the

1 starting model leases?

2 MR. ROSENBERG: Yes, your Honor.

3 MR. GOLDSTEIN: We've offered the relevant
4 provisions of the starting leases, not the entire
5 lease but the relevant provisions.

6 PRESIDING JUDGE: No, I understand.

7 Mr. Rosenthal, why is that not sufficient?

8 MR. ROSENTHAL: The leases tell me what a
9 provision says. A lease doesn't actually tell me
10 how much money they're billing these other companies
11 for. We have other issues with model leases.

12 I'm frankly not willing to rely on their
13 statement that we will come up where the model
14 leases. We don't think there are model leases.
15 There are documents -- again, the Complainants made
16 this point, I think, in response to our motion to
17 compel, that these leases change from contract to
18 contract and when they're renewed.

19 So we have ways of dealing with our actual
20 request for leases, which is, I think, is our
21 request number 11 or 12. This, we're just asking
22 for a bottom-line number, how much do you pay, and
23 we said we would take it in the easiest way
24 possible.

25 As for the relevance, I think I explained

1 the relevance, which is if they pass through the
2 costs, it affects incentives. We certainly in the
3 normal course of business don't care, but in a case
4 that involves incentives, Union Pacific certainly
5 wants to look and say how much of these mileage
6 equalization payments are you recovering, so is
7 mileage equalization providing an incentive. We get
8 that from the numbers, not from model lease terms.

9 PRESIDING JUDGE: I'm interested in
10 exploring two components of this request. One is
11 the period 2008 to 2015, and the other is the burden
12 that it would be on the TCOs to produce such
13 documents.

14 What about the first one, Mr. Rosenthal?

15 MR. ROSENTHAL: What we're trying to do --
16 you will see a lot of the time periods we started
17 out --

18 PRESIDING JUDGE: I understand why it's
19 2008. I'm just wondering if you would be satisfied
20 with a shorter period. Although let's talk about
21 the burden.

22 Is there a burden to this?

23 MR. ROSENTHAL: Yeah, exactly.

24 PRESIDING JUDGE: Let's do that first.
25 TCOs?

1 MR. ROSENBERG: My understanding, and I
2 believe someone represented, this is not the
3 information that's not maintained in the normal
4 course of business. It requires a special study to
5 pull the information together.

6 PRESIDING JUDGE: All right.
7 Mr. Rosenthal, we're not doing special studies.

8 MR. ROSENTHAL: Again, that's why we said
9 documents sufficient to show. They are billing
10 their lessees, apparently, for these costs. So
11 somebody has got the bills. I'm asking for a
12 special study. If their easiest thing to do is to
13 produce their bills to lessees, that's fine. I can
14 do the addition. I don't need them to do the study.
15 I just need the documents, your Honor.

16 PRESIDING JUDGE: What about a
17 statistically significant sampling in that period?

18 MR. ROSENTHAL: I don't see -- we're
19 trying to maxim the mileage equalization payments to
20 what's billed out. So taking a couple of lessees
21 doesn't tell us whether the money is all flowing out
22 or --

23 PRESIDING JUDGE: What about in different
24 time periods, say months and not years?

25 MR. ROSENTHAL: I think mileage

1 equalization payments are billed on an annual basis.
2 So presumably, they're billed. Again, I don't know.
3 I don't have the documents. But presumably, they're
4 billed to everybody on an annual basis. So we're
5 not talking --

6 PRESIDING JUDGE: So how much of a burden
7 is this?

8 MR. ROSENBERG: It is considerable to go
9 by lessee and by car mark. This is another case --

10 MR. ROSENTHAL: Your Honor, Car Mark, each
11 owner has, I think, maybe one, maybe two Car Marks.
12 So Car Marks, these are GATX cars, UTLX cars. Each
13 owner has a Car Mark. That's not an added burden to
14 looking through things. It's a matter of billing
15 lessee by lessee.

16 MR. ROSENBERG: And each lessee may have
17 separate leases, separate types of cars. Why can't
18 this information be aggregated?

19 MR. ROSENTHAL: I'm sorry. For what?

20 MR. ROSENBERG: How much of the total --
21 you're asking about excess mileage charges.

22 MR. ROSENTHAL: If somebody could tell me,
23 not aggregated among company by company, but if
24 somebody could say -- I don't remember which company
25 you represented --

1 MR. ROSENBERG: ARI.

2 MR. ROSENTHAL: If ARI can say, in total,
3 I billed X of this to lessees, one, I mean, I would
4 say, first, you're telling me it's impossible to
5 figure out how to total it because we don't have the
6 documents, so I would question that, I would
7 question how you're going to get the total for your
8 company if you're telling me you can't get it
9 individually. If I'm told, if it's represented to
10 me that they keep this as a total number, then that
11 might be something we could work with.

12 PRESIDING JUDGE: What about it? That
13 doesn't sound like -- is that a lessor burden?

14 MS. KENEDY: Can I just ask a basic
15 relevance question, your Honor?

16 PRESIDING JUDGE: Yes.

17 MS. KENEDY: I'm not understanding why
18 what is paid as between the lessors and the owners
19 or the lessees is relevant to the analysis here, and
20 that seems like a very basic question that we
21 haven't really discussed.

22 PRESIDING JUDGE: That's a fair question.

23 MS. KENEDY: If they're getting paid,
24 they're getting paid. And let's assume that we even
25 have to produce this massive amount of data. I'm

1 not sure it would get to the incentive, this very
2 mushy idea of what is incentivizing whom.
3 Obviously, if we're passing on costs to our lessees,
4 that's going to impact that relationship in the
5 future. There's going to be different incentives to
6 do business.

7 I'm not understanding if they're getting
8 paid, what the relevance is for us having to do this
9 search?

10 PRESIDING JUDGE: That's a fair question.

11 MR. ROSENTHAL: I apologize if I'm not
12 explaining this well. I've tried to explain this a
13 couple of different times.

14 One of the arguments that's been advanced
15 is that the mileage equalization system provides
16 adequate incentives for us, tank car owners or car
17 owners in general, to efficiently move cars to
18 repairs. That's one of these things that we
19 consider when we make these decisions because we
20 incur these mileage equalization charges.

21 If it turns out that they don't because
22 they're passing them along to their lessees, that
23 argument that mileage equalization is enough, that
24 goes away because these costs are all being passed
25 along. They're not bearing them. They don't have

1 to factor them into their decision, because their
2 lessees are paying them.

3 PRESIDING JUDGE: If that's controlled by
4 contractual arrangements, what kind of public policy
5 could the Board initiate that would promote one sort
6 of activity over another?

7 MR. ROSENTHAL: The Board could say that
8 we -- that it's valid for us to impose a charge
9 that's not mileage equalization but that actually
10 applies to moving these empty cars to repair
11 facilities, to try to put the incentives on folks
12 who are making the decisions.

13 That's a fairly significant part
14 potentially of this case, is item 55(c) a reasonable
15 charge to impose, given the way the railroad system
16 operates.

17 MR. GOLDSTEIN: I guess based on
18 Mr. Rosenthal's explanation just now, it's not clear
19 to me why the original proposal to provide lease
20 terms, which describe the contractual relationship,
21 rather than have to drill down to the amounts over
22 the course of a series of years, particularly at the
23 level of detail that they seem to be asking for, why
24 that's not sufficient to get at the point that he's
25 trying to make to rebut the issue in the case.

1 PRESIDING JUDGE: So you're talking about
2 lease terms, not model leases?

3 MR. GOLDSTEIN: What we've offered is the
4 model lease terms, and Mr. Rosenthal questioned
5 whether or not there are model leases. At least
6 with respect to UTC, there's a set of model leases.
7 That's what we use, and then some of the terms are
8 customized for -- we've gone back and forth, and
9 there's obviously this issue of how do you sort of
10 represent that the model term, you know, stays
11 consistent. That might be something that we need to
12 deal with.

13 PRESIDING JUDGE: Yeah, I was just
14 thinking that. Maybe --

15 MR. GOLDSTEIN: At the first level, it's
16 not clear to me why the amounts that are paid as
17 opposed to the fact that the amounts are or are not
18 paid under the contractual relationship are
19 important. It's far easier for us to provide the
20 contract terms.

21 PRESIDING JUDGE: Maybe you can have the
22 model leases for each company with some sort of
23 analysis provided along with the model leases
24 articulating variances in the leases as they're
25 actually executed.

1 MR. ROSENTHAL: And we've had those sorts
2 of discussions for things where we're looking at
3 lease terms. But that kind of -- I mean, that's the
4 sort of vague, fishy, well do X percent of the
5 leases have this percent, Y percent have that term.
6 When here, all we're really looking -- and again,
7 maybe for some other things that there's no other
8 way to approach other than to get the leases, maybe
9 that's the way to deal with it. But when we're just
10 looking for a number and somebody says we can give
11 you an aggregated number, if we have it, let's just
12 get the number and not have to figure out what do
13 the leases say and how do the leases apply by
14 percentage and who is -- I just don't know how I
15 would get -- the most direct way to get the
16 information that we are going for here is just to
17 get a number. And if there's a way to get the
18 number, if they have those documents, just produce
19 the documents. Don't incur the burden. We will
20 sort through your bills, if that's what they want to
21 do.

22 PRESIDING JUDGE: Or maybe they would like
23 to give you the number.

24 MR. ROSENTHAL: If they want to do it an
25 easier way, but going through leases and trying to

1 decide who has different terms and how those would
2 affect the number, I just don't see how that gets us
3 to a bottom line as easy as just getting the number.

4 PRESIDING JUDGE: Mr. Wilcox?

5 MR. WILCOX: To have some perspective and
6 context, we didn't start out looking for numbers.
7 The UP, over a year ago when we started talking
8 about leases, was looking for sample leases and
9 specific sample provisions, not numbers. The letter
10 from August 24 says, "as our discovery requests made
11 clear, we are concerned specifically with provisions
12 addressing the treatment of mileage allowance and
13 mileage equalization. Are the association
14 complainants interested in pursuing an approach that
15 use a representative sample and stipulations."

16 And we went down that route, and we had --
17 NAFCA was willing to offer up sample leases with
18 these mileage equalization and those provisions.
19 And then UP then a year into this changed -- it
20 started asking for lease rates and average lease
21 rates, which are not relevant.

22 As Ms. Kenedy said, the railroads should
23 be indifferent whether the car they get is leased or
24 whether it's a private car. They should -- the
25 issue that we hear is compensation. What happens

1 after that, you know, the cases go back to 1918.
2 What happens after that is really not their concern.

3 MR. ROSENTHAL: Respectfully, we certainly
4 have discussed leases and getting sample leases, but
5 we also had express interrogatories where we were
6 looking for just the same types of numbers we're
7 asking for from the tank car owners.

8 Two issues are getting confused. One is
9 looking at lease and lease terms; the other is
10 looking at numbers. We had requests that went to
11 both. Just like for these tank car owners, we have
12 request 2(b) which implicates certain numbers, and
13 we have request 11 or maybe it's 12 which relates to
14 leases. They both involve leases in some sense, but
15 one is looking for a number, and the other is
16 looking for leases. I don't need lease terms to
17 answer number 2(b). I need a number or pages of
18 number, which I will do the legwork on and figure
19 out what the number is.

20 PRESIDING JUDGE: What would be the -- go
21 ahead.

22 MR. MORENO: Your Honor, I've been
23 listening to this. There's a fundamental disconnect
24 between what UP says it wants to use this
25 information for and the information it's requesting

1 here.

2 In order for UP to demonstrate efficiency
3 impacts of its charge here, it would need every
4 individual lease. It would need every piece of
5 individual billing. And it would need to connect
6 all of those to each of the individual moves and so
7 why each move was made.

8 In the form that UP is talking about, it
9 needs all three of those pieces, and that's an
10 extreme amount of detail here.

11 We're on a slippery slope here where this
12 case, while it happens to have been brought by a
13 number of trade associations representing individual
14 interests, could have been brought by any one of
15 their members. And yet, the discovery that UP is
16 seeking, would that ever be permitted among all of
17 these tank car owners and among every other possible
18 association member in order to try to demonstrate
19 what UP wants to demonstrate here?

20 The ICC never had that in mind in IHB II.
21 It was looking in the broad picture concept of
22 efficiencies are encouraged if you have to pay for
23 something and you have inefficiencies if you don't
24 have to pay for something. And that's the concept
25 we've agreed to stipulate to, and that's why we

1 think all of this is really getting into an in-depth
2 burdensome area where the ICC and the STB never went
3 in their past decisions and never intended that we
4 had in this case.

5 This just seems to be a very large fishing
6 expedition at this point, your Honor.

7 PRESIDING JUDGE: Thank you.

8 MR. ROSENTHAL: It really isn't. If an
9 individual company had brought this, they would have
10 leased cars from tank owners, and we would have had
11 the tank car owners because they're the ones who
12 lease cars.

13 This is brought -- read the complaint.
14 Read the motion -- our reply to the motion to
15 dismiss. They're making arguments about how this is
16 going to affect the rail car industry. We've gone
17 through the stipulation route. We've explained why
18 stipulations just don't get us where we need to go.

19 We're being sued by a number of trade
20 associations, a number of individuals for changing
21 something that we thought was precedent in 1987 and
22 with mileage allowances, which we haven't even
23 gotten to, which have been done essentially the same
24 way since early 2000s. This is a radical change in
25 the way the world works, and if it's going to

1 happen, we want to present the STB with evidence
2 about the way the world works and why its old
3 decisions were right, why our charge is reasonable.

4 Again, we're talking about a simple number
5 here. We're not talking about -- this shouldn't be
6 mountains and mountains and mountains of evidence.
7 Most of the places -- again, there are a couple of
8 these where we're looking for some numbers from the
9 tank car owners. Most of the other ones, when we
10 get beyond 2, we're talking about stuff we can get
11 from Railinc, and we think we will use the data.

12 I appreciate Mr. Moreno's concerns about
13 how I'm going to make my case, but we actually have
14 thought about how we're going to use this data, how
15 it supports our arguments. I've now said about
16 three or four times why we think this data are
17 relevant. So I won't repeat it.

18 We're not just casually asking for data.
19 We haven't been back here three or four times
20 because we think it's irrelevant. We think this is
21 what the Board wants to know so that it can address
22 is our charge reasonable.

23 PRESIDING JUDGE: All right. TCOs, what's
24 the least burdensome way of satisfying the request
25 on (b), the "sufficient to show" clause? What's the

1 least burdensome way to do that?

2 MR. GOLDSTEIN: I think our position
3 continues to be that the least burdensome way to do
4 it is to provide the master leases, in part, because
5 we're providing those in response to other requests
6 to UP as well. So it takes care of both of the
7 requests.

8 I guess I'm still unconvinced as to why
9 the number itself is somehow important as opposed to
10 the operation of the contractual relationships. If
11 UP can now understand that through our contracts we
12 either do or we don't pass those charges along, that
13 should be sufficient. Whatever the number is,
14 particularly without the context of how many tank
15 cars you have, all those other things, it's not
16 clear to me that that provides any greater insight
17 than does the lease terms themselves.

18 MR. WILCOX: I have a question for
19 clarification. Does 2(b) through (d), is that
20 addressed to every tank car leased by the four tank
21 car owners, regardless whether it moves on UP or
22 not? That number is in the hundreds of thousands;
23 right?

24 MR. GOLDSTEIN: Cars?

25 MR. WILCOX: Yes.

1 MR. ROSENTHAL: No, Tom, it's focused on
2 lessees. Again, the lessees are being billed. I
3 don't believe -- again, if I'm wrong about the
4 burdens, somebody tell me otherwise. I don't think
5 lessees are billed for mileage equalization payments
6 on a tank car by tank car basis. I suspect, but I
7 don't know because I don't have the documents, that
8 there is an annual bill that they get with a number.
9 That's what we're saying. What are you billing your
10 lessees? And to know from the contracts that some
11 are billed and some aren't billed doesn't -- again,
12 doesn't tell me are these tank car owners actually
13 bearing the mileage equalization charge? Are they
14 bearing some, all? I don't know. Let's just have a
15 number. I don't want to guess whether it's 0 to
16 100. I want to know where it is.

17 MR. WILCOX: But not all of those lessees
18 move on the UP.

19 MR. ROSENTHAL: But mileage equalization
20 charges are not specific to UP. The system doesn't
21 work like that. It's a global system. Mileage
22 equalization is billing for moving all over the
23 network. So in a corresponding way, I'm asking for
24 how the charges are passed along all over the
25 network. It's the corresponding A and B.

1 MR. GOLDSTEIN: Your Honor, you were
2 asking for sort of context of numbers. Union Tank,
3 which I think is the largest of the four that are
4 here, has more than 120,000 tank cars and 400
5 different lessees. So you have lots of permutations
6 and you've got lots of data that needs to be
7 reviewed and dealt with.

8 PRESIDING JUDGE: Yeah, that seems
9 unreasonable. It does.

10 MR. ROSENTHAL: Again, your Honor, it's
11 not a tank car by tank car thing. Somebody is
12 billing these lessees, unless you tell me otherwise,
13 once a year for this number.

14 PRESIDING JUDGE: Is that right,
15 Mr. Goldstein?

16 MR. GOLDSTEIN: I think that is right,
17 your Honor.

18 PRESIDING JUDGE: So what's the burden
19 there, with once a year?

20 MR. GOLDSTEIN: We have 400 lessees and
21 120,000 cars distributed between them.

22 MR. ROSENTHAL: It's not the cars. The
23 cars don't matter. You're billing on a lessee. I
24 just want the bill to the lessee.

25 MR. GOLDSTEIN: I understand. But it

1 comes per car.

2 MR. ROSENTHAL: No, it doesn't. I'm
3 sorry, your Honor. I don't want to argue back and
4 forth.

5 PRESIDING JUDGE: It's aggregated per
6 lessee.

7 MR. ROSENTHAL: Your Honor, they're not
8 done by car. Mileage equalization bills are not
9 done by car.

10 PRESIDING JUDGE: They don't collect it
11 that way, and he's not talking about giving it to
12 you that way.

13 MR. ROSENTHAL: I don't want by car. By
14 lessee, that's all I want.

15 PRESIDING JUDGE: What's wrong with that,
16 by lessee? You have 400 lessees?

17 MR. ROSENTHAL: 400 bills per year. I can
18 look through those.

19 MR. GOLDSTEIN: I still don't understand
20 why the number is relevant versus the process by
21 which it is handled through the contracts. Why does
22 the number matter as opposed to what we do?

23 MR. ROSENTHAL: Again, because we're
24 trying to say how much of this money that we're
25 seeing in 2(a) do you ultimately end up incurring

1 after charging other companies in 2(b). It's just a
2 simple A minus B.

3 PRESIDING JUDGE: All right. What about
4 -- do you absolutely need -- since it's 400 for each
5 year. Do you absolutely need to go all the way back
6 to 2008?

7 MR. ROSENTHAL: If I were told that the
8 burdens were significantly different -- for example,
9 I believe --

10 PRESIDING JUDGE: I've got a case before
11 me, for instance, that involves 10 years of billings
12 by the hour on a very large energy system. Now, we
13 attempted to narrow that down, because there's a
14 bell curve where the activities of interest
15 occurred. They occurred in three years in the
16 middle. So we took those three years and not the
17 out years.

18 MR. ROSENTHAL: I understand completely,
19 your Honor. When we initially filed our request,
20 one of the companies, GATX, told us look, there's a
21 difference -- maybe I'm getting this wrong, and if I
22 get this wrong or I'm mixing parts of this, please
23 tell me. But somebody said look, if you go for one
24 part of the data, it would cost us X to do the
25 search because we had a computer system that we put

1 in in 2009 to track this. And so after 2009, it's
2 easy, but when you wanted to go back to 2001, that
3 was really expensive and manual.

4 So yes, if somebody says --

5 PRESIDING JUDGE: That's the --

6 MR. ROSENTHAL: If somebody says here's
7 what I have on the computer system and beyond that
8 it gets really burdensome, I would say okay, maybe
9 that might sound reasonable. If they tell me they
10 have nothing, that's a different story. But if they
11 say -- does it have to be 2008? Could it be '9 or
12 '10 because it's a huge difference to me in terms of
13 burden? Yeah, I'm not trying to be unreasonable.
14 Again, these are the things that get discussed --

15 PRESIDING JUDGE: Have you had that
16 discussion with the TCOs?

17 MR. ROSENTHAL: No, because they've
18 refused to --

19 PRESIDING JUDGE: Mr. Donovan?

20 MR. DONOVAN: Your Honor, I'm suffering
21 from a disconnect here. Maybe it's because tomorrow
22 I will be one year older. That may be the
23 disconnect.

24 It seems to me that what Mr. Rosenthal is
25 saying is that on behalf of the defendant, Union

1 Pacific, he wants the car owners to turn over to
2 them mileage equalization payments that they got
3 from lessees under the mileage equalization formula
4 for all the railroads that they deal with.

5 Now, not a single dollar of that might be
6 due to a UP movement. It could be dealing with the
7 Canadian Pacific. I have a case in the Northern
8 District of New York District Court fighting the
9 Canadian Pacific about empty mileage charges. Are
10 those charges going to be in? Of course, they are.
11 What do they have to do with this case and the
12 defendant Union Pacific?

13 I suggest, without knowing, because I
14 never try and anticipate anybody's thought process,
15 what this defense is all about is trying to junk the
16 mileage equalization program. That's what this is
17 really all about. The other railroads are trailing
18 along now, looking at the reasonableness of UP's
19 actions. There haven't been complaints filed
20 against some of those other railroads, but there
21 could be. And if, in fact, this is an industrywide
22 effort to junk mileage equalization, let's let
23 Mr. Rosenthal and Union Pacific say that.

24 But at the same time, don't burden these
25 car owners with something that doesn't have a thing

1 to do with the actions of the Union Pacific in this
2 case. We, in this case, are examining what they
3 did. We know that, item 55(c), and why they did it.
4 After depositions that I requested Mr. Rosenthal to
5 make available to me, deponent, which he is yet to
6 respond to, I suggest we're going to be able to
7 establish that.

8 MR. ROSENTHAL: We're making a case
9 involving Union Pacific. Mileage equalization as
10 paid by the tank car owners is not paid to specific
11 railroads. Railroads don't get money from specific
12 tank owners. It's a global thing, as I just said.
13 So this is not a way to focus on UP or not UP or
14 whatever. There's no larger plot here. It's just,
15 as I've said several times now, it's a question of
16 looking at arguments about the incentives created by
17 the mileage equalization system. Is it sufficient?
18 The ICC, when it was deciding the Indiana Harbor
19 Belt case, said we don't think so, that's why we're
20 going to allow these charges.

21 They want to revisit that argument. We
22 want to look at has something changed so the system
23 is now somehow more efficient. So tell us, 2(a), we
24 can get the mileage equalization amounts from
25 Railinc, but 2(b), where those payments go, we have

1 to know -- we have to get it from the tank car
2 owners, who are the ones charging people.

3 Again, 400 documents, whatever it is,
4 bills, we will put them together. Maybe they have
5 them compiled in a spreadsheet. Maybe it's
6 computerized and we can somehow limit the burden to
7 those years that they have it on computer.

8 PRESIDING JUDGE: Mr. Goldstein, for each
9 of these years, do you have one number for each of
10 the 400?

11 MR. GOLDSTEIN: I apologize, your Honor.
12 I don't know the answer to that question. I suspect
13 for at least the recent years, just understanding
14 how the business is run, I'm sure that that must be
15 captured in some reasonably accessible electronic
16 form.

17 PRESIDING JUDGE: I would think so.

18 MR. GOLDSTEIN: I don't know if it goes
19 back to 2008. But like Mr. Rosenthal said, if this
20 is what we're ultimately going to do, and he's
21 recognized that GATX has drawn some lines and
22 they're going to be reasonable, we can work together
23 on that. But I don't know specifically the answer
24 to that question, but I assume it is, yes.

25 PRESIDING JUDGE: Can you find that out?

1 MR. GOLDSTEIN: I can. I could try to
2 find it out in the relatively short term while we're
3 here, if that's your question.

4 PRESIDING JUDGE: Yeah, it is. I think
5 that might be reasonable, as long as it's not an
6 undue burden.

7 MR. GOLDSTEIN: I can, your Honor.

8 PRESIDING JUDGE: So you will get 400 for
9 each year, but we're not sure how many years yet,
10 because it may become burdensome as you go back.

11 MR. ROSENTHAL: Yes, your Honor. Again,
12 if this had been discovery conducted normally and
13 somebody had come and said we have a computer system
14 or something that makes a reasonable cut-off, we
15 would look at that and would certainly consider it
16 and obviously, if we disagreed, there would be
17 someone saying it's reasonable to cut it off at a
18 particular year because of, you know, that's when we
19 started using computers.

20 PRESIDING JUDGE: So you will do that?
21 You will do that for me, Mr. Goldstein?

22 MR. GOLDSTEIN: I'm doing it right now,
23 your Honor.

24 MR. ROSENBERG: Your Honor, ARI indicated
25 to UP that ARI has only been a tank car owner from

1 2011, so data does not go back further by
2 definition.

3 PRESIDING JUDGE: Sure. That's fine.

4 MR. ROSENTHAL: This is a perfect example.
5 We say 2008, and they wave their arms. If they have
6 data from 2011 and that's all they have, going
7 forward, we can't ask for more than that.

8 PRESIDING JUDGE: All right. Let's move
9 on to (c).

10 MR. ROSENTHAL: It will go faster. When
11 we had our meet and confer, somebody at some point
12 made the wise suggestion, and I probably should have
13 taken it up, of going backwards, because the tail
14 end is a little bit easier. But I think these are
15 related. So it's probably worth plowing ahead.

16 PRESIDING JUDGE: All right.

17 MR. ROSENTHAL: (C) is, again, simply
18 looking for the same time period, and I would make
19 the same concessions as to reasonableness depending
20 on the record.

21 It's like the mileage equalization
22 payments, but it's asking about these companies'
23 payments for charges that are like item 55(c).
24 Union Pacific is not the only railroad that is
25 making these types of charges. I don't know whether

1 people are paying them or not. I don't know what's
2 actually happening to these charges. But I've read
3 that there are some, and the question is, are other
4 people paying them. And it may not go back to 2008,
5 because I don't know when other railroads adopted
6 the charge. It may be relatively recent, like some
7 folks are suggesting, but it probably goes back
8 further, because the IHB case started in 1987. So
9 we're just saying, are we out there -- one, are we
10 out thereby ourselves, are people paying these
11 charges, and two, if you're paying the charges,
12 again, this goes to our incentive argument, you
13 know.

14 Does that explain why we don't see a lot
15 of empty cars moving to, say, Canadian Pacific, to
16 take Mr. Donovan's example, because Canadian Pacific
17 has had these charges. If that's the case, that's a
18 pretty good indication that our charge is going to
19 have some effect. So are there other railroads out
20 there, are you paying them.

21 Again, this could be a simple by railroad
22 bottom-line number for the period that they have,
23 where the data are readily available.

24 PRESIDING JUDGE: When you
25 say "documents," you want to make those electronic

1 documents with a search or what?

2 MR. ROSENTHAL: I think we should handle
3 it the same way. They ought to figure out what they
4 have reasonably.

5 PRESIDING JUDGE: The same as you did in
6 number 1?

7 MR. ROSENTHAL: The same as we just talked
8 about with (b). Let's figure out what's reasonably
9 available.

10 PRESIDING JUDGE: I know that. I'm
11 talking about the actual document itself. Handle
12 that as we did in 1?

13 MR. ROSENTHAL: I'm trying to do it as
14 sufficient to show. I'm not sure it makes sense to
15 do it as a, again, broad search. I think this is
16 probably the same thing. I think they're getting --
17 well, I don't know, again, but they're making
18 payments to railroads. So this is also sort of in
19 the nature of a bill or an invoice that they would
20 be receiving. Maybe they've got one big electronic
21 compilation of it. Maybe it's separate
22 monthly/annual bills. I don't know. But it's for a
23 specific type of charge. However they have it, in a
24 reasonable way, that's all I'm asking for.

25 PRESIDING JUDGE: TCOs, can you speak to

1 burden on that?

2 MR. MORENO: Your Honor, first of all,
3 Complainants would be more than willing to stipulate
4 that other railroads are assessing similar charges
5 to UP's item 55(c).

6 So the question really comes, what does it
7 matter how much they're billing under those charges?
8 UP knows the rate that they're charging. It's in
9 tariffs that are public tariffs, just like UP is in
10 a public tariff. The only question is, if I move
11 from point A to point B, how much did I pay? UP can
12 take the miles and add that or do the
13 multiplication. What does it need the details of
14 how much each tank car owner has paid for?

15 MR. ROSENTHAL: If I had all the
16 information, if I knew all the empty movements to
17 shops, which is data that I'm asking for in request
18 4, maybe I could put it altogether and figure that
19 out. So I'm glad Mr. Moreno seems to agree that
20 that type of information is appropriate.

21 But really, again, I'm just looking for a
22 bottom line number. Are you paying other railroads?
23 How much?

24 Let me just say, to clarify the way things
25 often work, just because a railroad has a tariff out

1 there that says pay X, you can also have
2 arrangements through contracts where people don't
3 necessarily pay X, they reach private agreements.

4 So knowing that some railroad has a
5 document that says we're going to charge you X
6 doesn't actually mean that the charges are being
7 incurred and paid. So we want to know what's
8 actually being paid. Is something just a paper
9 document, or is it being paid so that we can decide
10 and help analyze whether it's having some sort of
11 impact on their behavior. When they're being
12 charged charges similar to ours, what are they
13 doing? The first question is, are you being
14 charged, and this is just getting to are you being
15 charged.

16 PRESIDING JUDGE: So Mr. Goldberg, what do
17 you think?

18 MR. ROSENBERG: I think you conflated our
19 names.

20 MR. GOLDSTEIN: You said Goldberg, which
21 is --

22 PRESIDING JUDGE: Oh, I'm sorry. I did.
23 That's one of the reasons why I like my name. No
24 one can at least do that. They do other things to
25 it, but not that.

1 Mr. Wilcox.

2 MR. WILCOX: This now comes back to the
3 question that we have raised, the objection we've
4 raised, which is the relevancy of other railroads to
5 this case. Our case is against UP. It's specific
6 to UP and whether UP is in the same boat as the
7 short-line railroads from IHB in terms of the
8 Board's policy on those specific short-line
9 railroads being allowed to charge these tariffs.
10 There are other short-line railroads who have
11 followed IHB II, but the UP, as Mr. Moreno said,
12 class 1 railroad making billions of dollars off of
13 these shipments, they're in no way in the same boat
14 as these other railroads.

15 UP is the one who has tried to bootstrap
16 from our filings to say we're doing a comparison of
17 UP and other railroads. We're doing nothing of the
18 sort.

19 To the extent UP is going down the road
20 of, well, we're a class 1 railroad doing it and
21 here's another class 1 railroad, CP or BNSF, they're
22 doing it so it's okay, our argument is, are you
23 really going to make that argument in an industry,
24 it's a super consolidated industry with maybe four
25 main players.

1 When you start bringing the other
2 railroads into it, first of all, I would argue the
3 fact that there are other short-line railroads that
4 meet the IHB II criteria, that's not really relevant
5 when you have a class 1 doing this.

6 Anyway, I lost my train of thought.

7 PRESIDING JUDGE: Do you want to limit it
8 to class 1 railroads?

9 MR. WILCOX: Well, that's our point. As I
10 said, it permeates other questions. Once you get
11 into, you know, the empty mileage charges for
12 railroads, then you get into leases from other
13 railroads. You get into other things. The burden
14 expands significantly.

15 Our case is against UP and specific as to
16 their tariff. This exercise has all been about UP
17 going fishing, finding for things to put in their
18 reply that really have not a lot to do with our
19 opening.

20 PRESIDING JUDGE: As I told you,
21 Mr. Wilcox, I think this is responsive. He gets
22 relevance; you get burden. I'm going to be more
23 liberal on what I give him in the categorization,
24 but I'm going to be strict that whatever he gets is
25 not going to burden you very much.

1 That's not a perfect way of doing things.
2 This is, by far, not a perfect world. This is not a
3 perfect proceeding. I'm just trying to get through
4 it as best I can here.

5 MR. WILCOX: Yes, sir.

6 PRESIDING JUDGE: If I had a lifetime, I
7 could probably do a better job, but I don't have a
8 lifetime for this.

9 So what constitutes a reasonable burden
10 for (c)? You know what? I think I'm doing a good
11 job. I don't think anyone likes me here today.

12 MR. WILCOX: Well, we have to determine --
13 to the extent we talk about documents from other
14 railroads, we have the individual Complainants, Poet
15 and Cargill, and we also have the car owners.

16 PRESIDING JUDGE: Right.

17 MR. WILCOX: So speaking for Poet, they do
18 have this information. They have a smaller fleet.
19 It's more of a burden to produce information from
20 other railroads. Cargill is in a different boat,
21 and the car owners are in a still different boat in
22 terms of burden.

23 PRESIDING JUDGE: There may be different
24 years, as Mr. Goldberg pointed out -- yeah, I know.
25 He said his only goes back to 2011. I will stop

1 doing that. I promise.

2 So how are we going to handle this?

3 Really, Mr. Rosenberg, how are we going to
4 handle this?

5 MR. ROSENBERG: At least in ARI's case, I
6 would need to get back to them to see how difficult
7 this information is to start breaking it down by
8 individual railroad.

9 To us, it seems, if UP gets to adopt
10 whatever charges it wants and they go into effect,
11 then without -- it just publishes a tariff. Unlike
12 FERC, it doesn't have to have a justification. It
13 just adopts it. It becomes effective unless someone
14 elects to challenge it. Then in this case the other
15 associations and Poet and Cargill file their
16 complaint, and then UP should know whether or not it
17 had a justification for its charges. Instead, it's
18 directing all of this to us.

19 Anyway, getting back, ARI would need -- I
20 would need to check with ARI as basically how
21 difficult this is, whether the information can be
22 brought together easily or not. I'm sure we had
23 some discussion of this back in June. I'm just
24 short on my recall of the details.

25 PRESIDING JUDGE: Is this the type of

1 issue, given my predilection to allow Mr. Rosenthal
2 to have something, that the parties can work out?

3 MR. ROSENBERG: It's going to depend on
4 the burden it imposes on us.

5 PRESIDING JUDGE: That's right.

6 MR. ROSENBERG: It might be relatively
7 feasible to do. It's going to take, you know,
8 man-hours of a certain sort to pull this information
9 together. I'm just not sure how extensive a special
10 study it is.

11 PRESIDING JUDGE: No, no special studies.
12 My concern is that is this something that I can
13 trust you all to do on your own, or do you have to
14 gather some information and we will all meet here
15 again to discuss it?

16 MR. ROSENBERG: It's hard to know at this
17 point. Let's see. If I can mention another issue
18 that I probably wanted to defer, but I will mention
19 it now. If it turns out that you do issue a
20 subpoena, that puts us, I believe, on a fairly short
21 clock in terms of appealing it to the Board.

22 PRESIDING JUDGE: Right.

23 MR. ROSENBERG: Yeah, that's probably not
24 conducive to working things out amicably.

25 PRESIDING JUDGE: Well, I don't have to

1 issue anything until you figure out what's workable,
2 and then I will issue a memorialization of your
3 agreement as to what's workable.

4 MR. NEUMAN: Your Honor, if I may speak
5 from GATX's standpoint. An awful lot of information
6 that is requested does exist. As we indicated, the
7 ESI cut-off date is what it is, and that makes it a
8 lot easier to retrieve information after a certain
9 date.

10 I am not aware that there is a single
11 document that would be searchable with a push of a
12 button to pull up payments to railroads of the type
13 that are discussed. I think it's a piece of a piece
14 of a piece of some things that would have to be put
15 together within the mileage billing system, if you
16 will. I think there's a little bit of an exercise
17 of pulling some things apart and putting them back
18 together. We indicated in the affidavit attached to
19 our original response that there was a fair amount
20 of sweat equity involved in doing that. I will have
21 to go back and double-check as to exactly what that
22 is. But I would not want to leave you with the
23 impression that it's merely a data search for
24 documents that exist that would speak to the exact
25 point. I'm pretty sure that there's a fair amount

1 of homework. Whether it's a science project or a
2 science quiz, I can't really characterize it. A
3 special study may be too big of a word. But it is a
4 homework assignment that does entail a fair amount
5 of burden.

6 MR. MONROE: Your Honor, again, Cargill is
7 in a position that's kind of between. It's in the
8 middle of this, but it's not really one of the big
9 tank car owners. But we're subject to the same
10 request.

11 I want to make sure that, to the extent
12 that you make decisions related to the other tank
13 car owners, the main tank car owners, that we're not
14 going to be necessarily bound by that, because we
15 may have other issues.

16 I will mention the one that's applicable
17 here. For Cargill to produce this kind of
18 information, it's got a vendor that handles its data
19 and IT. That vendor goes back to 2007. But the
20 vendor only keeps current information, for the last
21 year or so.

22 To go back to 2012 and '10 or whatever,
23 they have to do that at night where they essentially
24 reload the archived data while the system is not
25 working on other things, then extract that data, and

1 they can do that basically like a year or maybe two
2 years a night. So it's not simply a push the button
3 and it all spits out. It's a process that involves
4 time and involves money, because every time they
5 have to reload the archived data and then do the
6 work, they're charging us for that.

7 And that's the easy part. When we get to
8 our requests, I will talk about the hard part where
9 we're talking about hundreds of thousands of dollars
10 it's going to cost to do. So I just want to put
11 that on the table that this is not -- even when
12 we're talking about electronic data, it's not simply
13 an easy we will push the button and the computer
14 will spit something out.

15 PRESIDING JUDGE: Okay. I think the way
16 I'm going to handle this is I'm not going to allow
17 it.

18 MR. ROSENTHAL: I'm sorry, your Honor. I
19 thought the issue was you were going to go see what
20 the actual burden is. We've talked about the
21 relevance of it, your Honor.

22 PRESIDING JUDGE: Cargill has got too much
23 of a burden on this.

24 MR. ROSENTHAL: Cargill -- with respect,
25 your Honor, Cargill is not a tank car company.

1 Cargill is a shipper. Cargill may have other
2 issues. I think we ought to --

3 PRESIDING JUDGE: So you're just talking
4 about the tank car owners in this?

5 MR. ROSENTHAL: I don't know, but I think
6 what you said was let's figure out the burdens on
7 the tank car owners. This is their business, is
8 dealing with tank cars. I understand that's not
9 Cargill's business.

10 PRESIDING JUDGE: All right.

11 MR. ROSENTHAL: Again, these are the same
12 types of charges. Let's just see what the burdens
13 are.

14 PRESIDING JUDGE: Mr. Goldstein is looking
15 up other information. Can you look this one up,
16 too? Can you get back to me with some sort of
17 coherent --

18 MR. GOLDSTEIN: I can get back to you.
19 Let's see whether or not it's coherent. I now know
20 my contact is available and will start pursuing
21 answers to the questions.

22 PRESIDING JUDGE: Let's see what that
23 burden is. Let's do (d).

24 MR. ROSENTHAL: (D) again is the parallel
25 point. (C) and (d) look at charges from other

1 railroads and are those charges passed along. In
2 fact, there are probably efficiencies involved in
3 dealing with all of them. Again, I don't know.
4 Let's see what the people find. But just as (b) was
5 the flip of (a), (d) is the flip side of (d). How
6 much of this are you simply passing along, how much
7 are you incurring it yourself.

8 PRESIDING JUDGE: How much of a burden is
9 this?

10 MR. ROSENBERG: At least in ARI's case,
11 again, I would need to go back and check, but where
12 the request asks "or to show where you have waived
13 billing or collection," trying to determine where
14 costs may have been waived starts to become a
15 fact-specific inquiry. If you're looking -- it's
16 one thing to find a number, but to inquire -- that
17 sort of treatment becomes a burdensome and, frankly,
18 invasive.

19 MR. ROSENTHAL: I can accept the concept
20 that it might be more burdensome. I just think we
21 ought to find out. It may be just a number where
22 they say we've written this off. I just don't know
23 what the records are like.

24 PRESIDING JUDGE: Is this another one
25 more, Mr. Goldstein? It's becoming quite easy, just

1 give him everything to do.

2 MR. GOLDSTEIN: But it will only be an
3 answer on behalf of UTC.

4 MR. ROSENTHAL: That's the thing. There
5 are a lot of other folks here. You can't always get
6 what you want, but if I can get it from some because
7 they have different systems, I think we're entitled
8 to know that, too. I don't want to get the least
9 common denominator.

10 PRESIDING JUDGE: So you all want to look
11 at these and see what's doable? Are we at (e) now?

12 MR. ROSENTHAL: (E) is much more
13 straightforward, your Honor, I'm happy to say. We
14 are really looking to see whether these companies,
15 which are large, you know, car-owning companies,
16 probably the largest, together more than the
17 majority of tank cars, have studies or analyses or
18 reports regarding the costs of moving empty tank
19 cars.

20 It goes to two possible things. One, have
21 they done studies that show can we minimize these
22 costs, are there more efficient ways of going about
23 it to minimize the costs that we're now incurring
24 because of these charges or because of empty mile
25 charges. It goes to your point of do they have

1 plans, policies, do they think about it, do they
2 analyze it. If the answer is no, which they may
3 say, that's okay. It doesn't hurt to ask.

4 And two, there's the suggestion from
5 Complainants in their complaint about the level of
6 our charges. These are high charges, they exceed
7 the level of loaded movements. If they've looked at
8 what does it cost to move an empty car, you know, if
9 they've done a study or analysis of it, then I think
10 that goes to the question of are these charges
11 themselves reasonable. If they don't have studies
12 and analyses, like I said, it's a simple do you have
13 these documents.

14 PRESIDING JUDGE: TCOs, that doesn't seem
15 burdensome. Either you have it or you don't. Is
16 that correct? So if you have it, give it to them.

17 Already. Where are we?

18 MR. ROSENTHAL: Number 3 is something I
19 think we have somewhat covered. Again, we've said
20 we can get almost all of this data from Railinc,
21 again with their permission. We got held up before
22 on issues of aggregation, masking, or whatever. I
23 think we've gotten past that.

24 The one thing that we can't get from
25 Railinc is the work that was performed at repair

1 facilities. And I understand -- and I want to be
2 careful of sort of getting back and forth about what
3 we were talking about in settlements. So if people
4 want to withdraw statements, I understand. Let
5 me -- and flag me down if I'm going too far.

6 But we had talked about dropping the
7 request for work performed in exchange for the tank
8 car owners providing information about arrival and
9 departure dates and locations from repair work.
10 That would help us in figuring out when cars were
11 actually moved to shops. So it gets us some of what
12 we want in exchange for dropping something else.
13 Again, we get the data from Railinc.

14 PRESIDING JUDGE: Is that an operable
15 agreement?

16 MR. ROSENTHAL: That was taken off the
17 table because they were very concerned about
18 aggregation.

19 PRESIDING JUDGE: Would this be operable?
20 Mr. Goldstein says that's operable.

21 MR. GOLDSTEIN: Yes, we offered that, and
22 we can do that.

23 PRESIDING JUDGE: All right. Good.

24 MR. MONROE: Your Honor, can I ask
25 Mr. Rosenthal to repeat that? I'm not sure I

1 understood exactly. Obviously, that was your
2 dealings with the tank car owners, but for purposes
3 of Cargill, is that -- are you offering that same
4 possibility or not?

5 MR. ROSENTHAL: I have to think about
6 that. I don't even know if this was an issue with
7 respect to Cargill. Perhaps. I believe Cargill
8 made some sort of similar statement about some data
9 that might be available.

10 PRESIDING JUDGE: The way this is going, I
11 think that I would like a written report from all of
12 you, when Mr. Goldstein gets and all the others get
13 this information, a written report as to -- if there
14 is not an agreement, tell me, but if there is an
15 agreement, tell me that, too, and I will memorialize
16 it for the Board. All right? Because there are
17 some moving parts here, and you're still looking for
18 information. So this is not the day I can just say
19 yes or no to everything.

20 Is that fair?

21 MR. ROSENTHAL: Yes, your Honor, I think
22 so.

23 MR. ROSENBERG: Your Honor, can we have a
24 moment?

25 PRESIDING JUDGE: Yes. Do you want a

1 break?

2 MR. ROSENBERG: No. I think this goes
3 back to the concern that I had flagged earlier.

4 PRESIDING JUDGE: Are you talking about
5 number 4 now?

6 MR. GOLDSTEIN: No, it's a bigger issue.

7 MR. ROSENBERG: No. It's basically -- I
8 guess it's, in part, what you're proposing. If it
9 takes the form of a subpoena, we certainly need to
10 preserve our rights to an appeal. If we have an
11 agreement that resolves everything and we're both
12 happy with it, then --

13 PRESIDING JUDGE: I'm assuming you're not
14 happy with any of this pretty much. So I'm just
15 asking for you to memorialize something for me so
16 that I know what my next step has to be.

17 MR. NEUMAN: Would that take the form,
18 your Honor, of us, subject to the homework that
19 we're doing on these individual items, preparing a
20 report to you as to the items on which we can,
21 quote, agree in terms of our receptivity to
22 receiving a subpoena that hits those agreed items?
23 And ideally would be all of them, and if not, would
24 we indicate to you that we are amenable to subpoena
25 on these agreed terms and the following are not?

1 PRESIDING JUDGE: You may do that, but
2 articulate the -- I've asked for parameters and
3 what's doable and what constitutes -- you probably
4 won't agree with Mr. Rosenthal, but I need something
5 in writing that tells me what constitutes a
6 reasonable or unreasonable burden. That's what
7 Mr. Goldstein has been looking into on behalf of his
8 company.

9 MR. NEUMAN: The writing up of an
10 agreement on the various items, if it's
11 comprehensive, would be fairly easy to do in a way
12 that, then, would translate right in for you to do
13 whatever you need to do to issue it. As to the
14 items where there's disagreement, I don't know that
15 it's going to be possible in one writing for the
16 parties to say the disagreement is this.

17 PRESIDING JUDGE: It doesn't have to be.
18 If you want two different documents and serve
19 everyone, that's fine. I just want you to inform me
20 of what the parameters are for a reasonable search,
21 if that's what we're talking about. Do it in
22 writing so that I know what we have -- we probably
23 have to convene again before we settle all this.

24 MR. ROSENBERG: You would need, in effect,
25 a shared understanding, even if it's not an

1 agreement?

2 PRESIDING JUDGE: That's fair, yes.

3 MS. KENEDY: What would the timing be for
4 these submissions, your Honor?

5 PRESIDING JUDGE: A reasonable time
6 period.

7 MS. KENEDY: Of course. That's what I
8 thought.

9 PRESIDING JUDGE: No, and I didn't plant
10 that question.

11 MR. ROSENTHAL: I'm sensitive to the
12 notion that everyone wants to preserve their rights
13 to at the end of the day say, you know, we don't
14 have -- I understand you may want to say we don't
15 want to give you anything at the end of the day, and
16 we can --

17 PRESIDING JUDGE: We've already been
18 there. We're past that.

19 MR. GOLDSTEIN: What I want to clarify, I
20 suppose, for example, to the extent on number 1
21 we've arguably agreed that a solution is for us to
22 do an electronic search, we're going to agree on
23 certain search terms, it's going to be this --

24 PRESIDING JUDGE: You still have your
25 right to appeal that, if that's your question.

1 MR. GOLDSTEIN: That is my question.

2 PRESIDING JUDGE: Yes, you may appeal
3 that.

4 MR. GOLDSTEIN: May I ask a different
5 question, your Honor, just by way of schedule? This
6 will get faster, but I just want to understand, do
7 you intend to take a break at some point, or are we
8 going right through?

9 PRESIDING JUDGE: Today?

10 MR. GOLDSTEIN: It would not be the first
11 hearing where that was used as leverage.

12 PRESIDING JUDGE: I can go right through,
13 but if you guys want to take a break, we will take a
14 break. I think we're at the point here where this
15 is going pretty quickly, don't you?

16 MR. ROSENTHAL: I think it's going faster.
17 I'm willing to keep going. I think 4 is stuff we
18 can get from Railinc. We just have the
19 masking/aggregation issue. I think you've dealt
20 with that.

21 5 is a request that we narrowed
22 substantially. We had asked for contracts and
23 documents related to negotiations of contracts.
24 They said oh, this is too much. So we said look, we
25 just want contracts with repair facilities. And

1 again, we're looking at the reasons why you might
2 see the movement from -- I'm sorry. I've forgotten
3 the example. Seattle to Spokane versus Seattle
4 to --

5 PRESIDING JUDGE: Charlotte.

6 MR. ROSENTHAL: Charlotte. Thank you,
7 your Honor. So we think contracts might crystallize
8 -- the contracts these tank car owners have with
9 repair facilities will crystallize why you're seeing
10 these movements, because they're getting a much
11 cheaper rate on some, because they have volume
12 incentives.

13 PRESIDING JUDGE: Oh, I see.

14 MR. ROSENTHAL: We don't know. We're also
15 looking --

16 PRESIDING JUDGE: Why this date? What's
17 this date?

18 MR. ROSENTHAL: Again, this is to have a
19 very narrow period of a year before and a year after
20 we put in place item 55(c), because we think that
21 one possible response to item 55(c) is to say oh my
22 gosh, we're going to be incurring these costs of
23 moving to wherever, Charlotte, maybe we have to have
24 a couple more repair facilities that are closer to
25 us, maybe we want to have more uniform rates with

1 these repair facilities, we didn't care when we
2 could move something to Charlotte what the guy in
3 Seattle charged, now we care.

4 So we just say, let's just see the
5 contracts, simple contracts. I realize it creates
6 confidentiality issues. We've had some of that back
7 and forth. My same answer is, we've got protective
8 orders.

9 PRESIDING JUDGE: How much of a burden is
10 this?

11 MR. GOLDSTEIN: I don't think we're all
12 similarly situated, your Honor.

13 PRESIDING JUDGE: Does anyone have an
14 overwhelming burden here?

15 MR. GOLDSTEIN: UTC operates most of its
16 own. So it doesn't have contracts.

17 PRESIDING JUDGE: So you can be
18 magnanimous on this.

19 MR. NEUMAN: GATX has a network of
20 third-party vendors, and that set of contracts
21 exist.

22 PRESIDING JUDGE: Let's go ahead and
23 grant -- yes?

24 MR. ROSENBERG: Never mind.

25 PRESIDING JUDGE: Okay. As Harvey Korman

1 said in "Blazing Saddles," third door down on the
2 left.

3 MR. ROSENTHAL: Your Honor, I tried to
4 show that movie to my children, and they just didn't
5 get it. And I found it's the funniest movie ever.

6 PRESIDING JUDGE: We have a "Blazing
7 Saddles" party in my group once a year. One of my
8 friends actually went and saw Mel Brooks at the
9 Kennedy Center recently where Mel took questions
10 after the movie.

11 MR. ROSENTHAL: I think if any evidence is
12 needed that millenials have a problem, it's my kids
13 and "Blazing Saddles."

14 PRESIDING JUDGE: That movie means a lot
15 to me. Actually, most of us sit in the screening
16 when we have it once a year, and we just recite all
17 the lines. But you have to recite them just before
18 the actor does. And we can do that. All right.

19 MR. ROSENTHAL: Number 6, we touched on
20 this one earlier on when we were saying what are
21 the -- we had originally asked for, I think, also
22 some documents relating to instructions for moving
23 these cars, trying to get at the policies, whatever
24 it is that actually works. And the tank car owners
25 came back and told us that, as they told you, we

1 don't have policies, guidelines. So this is one
2 where we said we're not going to just ask you to
3 search. But for those things, you've told us they
4 don't exist, okay.

5 But do you have documents where you've
6 had -- that are sort of showing discussions with
7 lessees about item 55(c) or similar charges when
8 you're telling them to move shops to repair
9 facilities. Does somebody come back and say you're
10 telling me to move this car from Seattle to
11 Charlotte, I don't want to do it because it's going
12 to cost me a lot of money under UP's system, and
13 they come back and explain what it is, we're doing
14 it because this is where we have the contract, this
15 is a better shop, it has less whatever. So I think
16 it's trying to get at exactly what we were having
17 trouble getting at through policies.

18 PRESIDING JUDGE: I see.

19 MR. ROSENTHAL: What are the actual
20 reasons why these things occur, are they good, are
21 they bad.

22 PRESIDING JUDGE: It makes sense. This is
23 an electronic search, since it's recent. Search
24 terms, Charlotte, perhaps? Only one person got
25 that. That's very good.

1 MR. ROSENTHAL: I suspect in crafting
2 terms for the first search which relates to the
3 impact of item 55(c), there might be a lot of
4 overlap. So I think it's probably one computer
5 search, and maybe we can come up with some narrowing
6 terms to try to figure this out. It does involve
7 other railroad charges, but maybe we can figure
8 out -- and this is one of the things we've asked --
9 what other railroads are imposing these charges and
10 that would help narrow it down.

11 MS. KENEDY: If I could speak to that for
12 a second, I think it's going to be really important
13 here, this is very amorphous, I can tell you there
14 aren't any discussions about that. I'm sure that's
15 what our search is going to reveal. We don't even
16 think about your tariff when we make these
17 decisions. And that will be Trinity's position.

18 PRESIDING JUDGE: That's fine. All you
19 have to do is say that.

20 MS. KENEDY: That's why it's so
21 frustrating to have to produce all this information
22 to prove a negative.

23 But that being said, it's going to be very
24 important that there be a specific number of
25 custodians, that we come up with three or four

1 search terms.

2 PRESIDING JUDGE: Right.

3 MS. KENEDY: That it only be ESI.

4 PRESIDING JUDGE: Just the way we did it
5 before.

6 MS. KENEDY: Right. Otherwise, it's a
7 needle in the biggest haystack ever.

8 PRESIDING JUDGE: I think Mr. Rosenthal
9 said we are going to use -- we're going to adopt the
10 same format we adopted previously.

11 MR. ROSENTHAL: Your Honor, that's what I
12 would propose. This is what people do in discovery.

13 MS. KENEDY: It's going to be very
14 important that the search terms be as we discussed
15 with 1, two or three or four search terms and a very
16 limited number of custodians.

17 PRESIDING JUDGE: Right.

18 MS. KENEDY: Because what we're being
19 asked to do, and this specific request, I think, is
20 a great example, is to find a communication that I
21 suspect doesn't exist or there's one or two of a
22 million copies.

23 PRESIDING JUDGE: I don't want you to have
24 to go through that. That's my gift to you today.

25 MS. KENEDY: Thank you.

1 MR. ROSENTHAL: We will absolutely work
2 and discuss appropriate search terms.

3 MR. GOLDSTEIN: Your Honor, another issue
4 with respect to 6, if I'm reading the request
5 correctly, is that this is one that has the original
6 timetable of 2001 to present.

7 PRESIDING JUDGE: That doesn't seem
8 reasonable, does it?

9 MR. ROSENTHAL: Yeah. We can do that in
10 the same way that we're dealing with the repair
11 facilities and do January 1st, 2013.

12 MR. GOLDSTEIN: And your Honor, another
13 question. In developing the search terms,
14 obviously, item 55(c) is a specific term of art.
15 And so it's easy for us to presumably put that into
16 the mix.

17 PRESIDING JUDGE: Right.

18 MR. GOLDSTEIN: With respect to -- I'm
19 concerned that unless someone who knows more about
20 this than I, and there are many, know the search
21 terms that are relevant for the other railroad
22 charges -- and I don't know. Mr. Rosenthal --

23 MR. ROSENTHAL: I suspect we can tell,
24 yes.

25 PRESIDING JUDGE: To be determined, you

1 can put that in your report to me.

2 MR. GOLDSTEIN: You understand there are
3 similar terms that would be specific enough to be
4 searched to make this a fruitful exercise because
5 otherwise, to do it --

6 MR. ROSENTHAL: I'm not saying that there
7 are terms like -- I don't know whether people use
8 the words "item 55(c)," but I think we could come up
9 with a reasonable term to get at these types of
10 charges.

11 That's part of what we had to do to do our
12 own discovery. So I think we can come up with some
13 reasonable terms.

14 MR. GOLDSTEIN: The murmuring at the
15 table, one concern is that because we're looking for
16 what we all believe is a needle in the haystack,
17 that there is not much, if any, of that.

18 PRESIDING JUDGE: That's too easy. All
19 you have to do is search for needle, not haystack.

20 MR. GOLDSTEIN: If the search terms aren't
21 right, we're going to end up with a huge amount.

22 PRESIDING JUDGE: If it looks like that,
23 put it in your report, and I will deny it.

24 MS. KENEDY: Can I make a suggestion?
25 What if we did the search just for 55(c) first,

1 which I suspect will yield nothing, and then really,
2 is it likely, then, that if we search for "other
3 similar charges" or whatever terms that you come up
4 with, that that's going to yield something?

5 PRESIDING JUDGE: If you search for 55(c)
6 and nothing is going to come up, you can search for
7 55(c) and anything else, and it's still not going to
8 come up.

9 MR. GOLDSTEIN: Presumably, we wouldn't be
10 doing that, because the same communication -- it's
11 not going to be a Boolean search, if that makes
12 sense to anybody else in the room. You're going to
13 be searching for 55(c) and whatever else --

14 PRESIDING JUDGE: Oh, I see. I was
15 mistaken. Thank you.

16 MR. ROSENTHAL: I think we can come up
17 with some reasonable search terms that will isolate
18 this. One of the reasons it's a needle in the
19 haystack is because we've done all we can do to pare
20 this back to the most narrow thing. I would like to
21 know in general, when they're not discussing these,
22 why they're moving from Seattle to Charlotte.

23 PRESIDING JUDGE: Let's not be defensive.
24 You've already won.

25 MR. ROSENTHAL: Okay. I want to make sure

1 I don't lose for winning.

2 PRESIDING JUDGE: When I was a Social
3 Security judge, there was -- actually, before I was
4 a judge, I was a senior attorney, and one of the
5 judges used to pay a lot of the cases, but the word
6 at the Bar was, when you see him fidgeting, stop,
7 because you're starting to upset him. You've
8 already won, and you may lose if you continue. I'm
9 not that guy, but you did win.

10 Next?

11 MR. ROSENTHAL: Number 7 is again what we
12 have narrowed into a fairly narrow search and one
13 that we may have narrowed to the point where they
14 will tell us that there are no documents. They have
15 made similar representations. But it's documents
16 involving plans for retrofitting the tank cars.
17 Retrofitting is one of these reasons why the
18 Complainants argued that the IHB case shouldn't
19 apply because there's going to be all these
20 retrofits.

21 PRESIDING JUDGE: I understand.

22 MR. ROSENTHAL: So we want to say are
23 there all these retrofits.

24 Again, I guess I've been told informally,
25 not by everybody, that there are no plans. I've

1 seen some statements in 10-Ks that suggest maybe
2 that's not the case. But I just ask that they
3 search for them. I think it's reasonable.

4 PRESIDING JUDGE: What about this "actual
5 or anticipated impacts"? You have to define impact,
6 and that all seems kind of amorphous to me.

7 MR. ROSENTHAL: I think if you're looking
8 for retrofits, plans about retrofits in general,
9 you're probably encompassing everything else.

10 PRESIDING JUDGE: So you could search
11 retrofits? The Kenedy person is saying no.

12 MR. ROSENTHAL: Item 55 in retrofits.

13 MS. KENEDY: We already did a -- I don't
14 want to get into all of the settlement
15 communications. But we've spent a great deal of
16 time on this side of the room trying to locate
17 anything that we can to figure out if we can be
18 responsive.

19 So to suggest that the reason why we're
20 having a needle in a haystack because we're not
21 being cooperative; I will just say, not fair.

22 With respect to formal plans, we have made
23 that inquiry of our clients, and they have responded
24 that there are no formal plans. True to many of the
25 other requests and responses and negotiations,

1 counsel for UP is still asking us to do searches for
2 things we've told him we do not have. We don't have
3 any formal plans. The search has been conducted.
4 So now he wants to do -- us to do an ESI search
5 for "retrofit," which I can offer without even
6 consulting with my client will reveal probably
7 hundreds of thousands of documents.

8 MR. ROSENTHAL: No, no, no. Again, a
9 couple of things. One, as I said at the very
10 beginning --

11 PRESIDING JUDGE: What are "plans"?
12 Ms. Kenedy says "formal plans," and you say "plans,"
13 and I'm starting to be skeptical here.

14 MR. ROSENTHAL: Honestly, your Honor, I
15 get nervous when I hear someone say formal plans
16 versus plans. That's when I get nervous. We don't
17 have a formal plan; we just have a plan.

18 PRESIDING JUDGE: You say "produce all
19 documents discussing." Why not "discussing
20 retrofitting tank cars." Is that even broader?

21 MR. ROSENTHAL: My concern is that would
22 be even broader. Yes. I understand there is a --
23 again, this is something we're trying to calibrate.

24 PRESIDING JUDGE: Plans, what is a plan?
25 I don't understand the context.

1 MR. ROSENTHAL: Just for example, all
2 right. In the -- and I don't do this to pick on
3 anybody, but in the GATX --

4 MR. ROSENBERG: But.

5 MR. NEUMAN: Now that I've taken the
6 opportunity.

7 MR. ROSENTHAL: But in the GATX 10-K, for
8 example --

9 PRESIDING JUDGE: I'm not naming any
10 names, but the GATX 10-K.

11 MR. ROSENTHAL: Honestly, not all these
12 companies are public. So I can't look at 10-Ks. A
13 lot of these companies have other businesses. So
14 maybe something is not significant, and it doesn't
15 appear in a 10-K. GATX is the lucky one who puts
16 this in the 10-K.

17 "We have a fleet of approximately 125,000
18 rail cars, approximately 13,900 tank cars, currently
19 used to transport flammable liquids affected by the
20 new rules, over 90 percent of our tank cars have a
21 compliance deadline of 2023 or later. We expect to
22 modify some of the most modern of our affected tank
23 cars to comply with the new standards. However, for
24 the majority of the affected cars, we currently
25 anticipate retiring, redeploying, or selling them

1 rather than performing retrofits."

2 PRESIDING JUDGE: So that's a plan.

3 MR. ROSENTHAL: Somebody looked at this
4 and decided they could put it in their 10-K. So
5 that's a plan.

6 PRESIDING JUDGE: That's fine. Does
7 anybody have a plan like that?

8 MS. KENEDY: I don't think that's really a
9 plan, but we didn't put it in our 10-K.

10 PRESIDING JUDGE: If you don't have a
11 plan, you're good.

12 MS. KENEDY: It seems to me, if we're
13 deciding what is burdensome -- and people can jump
14 in and disagree with me if they want to -- we're
15 deciding that there are a limited number of terms
16 that can be searched. We're going to identify a
17 limited number of custodians who would be the
18 appropriate custodians to search.

19 PRESIDING JUDGE: Right.

20 MS. KENEDY: It seems to me, "if you're
21 going to look for something like retrofit," which is
22 ridiculously overly broad, it should be coupled with
23 item 55(c), so that would at least potentially,
24 conceivably come up with responsive documents.

25 MR. ROSENTHAL: Your Honor --

1 MS. KENEDY: Wait a second. I'm not done
2 yet. The problem here is this idea of "similar
3 charges imposed by other railroads." I think you
4 could potentially do a limited search of limited
5 custodians in ESI involving retrofit, 55(c). This
6 whole idea of similar charges, I don't even know how
7 you get there.

8 PRESIDING JUDGE: I don't even know what a
9 similar charge is.

10 MS. KENEDY: Either do I.

11 MR. ROSENTHAL: Your Honor, we've
12 addressed, honestly, the same thing in number 6, and
13 we said we think we can come up with terms. A
14 similar charge is a charge for empty moves to shops,
15 which is what doing in item 55(c). That's what a
16 similar charge is. Other railroads have these
17 charges in tariffs.

18 PRESIDING JUDGE: Why is that similar? I
19 mean you're talking about retrofits.

20 MR. ROSENTHAL: No, no.

21 PRESIDING JUDGE: We're not generalizing
22 here. We're trying to get specific. All right.
23 What? What did you hear her say that she didn't
24 say?

25 MR. ROSENTHAL: She was saying we could

1 look for retrofits -- or maybe she was saying we
2 couldn't -- involving item 55 but how do we look for
3 retrofits involving similar charges. So I was
4 explaining the similar charges part.

5 MS. KENEDY: How do you do that search?
6 What do you search?

7 MR. ROSENTHAL: You can search -- other
8 railroads have tariffs, like you would search item
9 55(c), they have tariffs that have numbers and
10 designations. I think we could do a big -- if we
11 want to talk technically, we could do a big search.

12 MS. KENEDY: You have to tell us what
13 those are.

14 MR. ROSENTHAL: We will work with you.
15 And I think there's --

16 PRESIDING JUDGE: It sounds hard. If you
17 can come up with it.

18 MS. KENEDY: That's what I wanted to pin
19 down on. Because he will say that and comes back
20 and says you have to do this generic search, and
21 that's when it becomes a burden for us.

22 MR. ROSENTHAL: I said just like I will
23 work with them to identify these other charges, I
24 will make suggestions for a search. And if they
25 come back and say it's unreasonable, then we can be

1 up here in front of you, and you can say it's
2 unreasonable.

3 PRESIDING JUDGE: All right. You're the
4 big idea guy here for this one. So you help them.

5 MR. ROSENTHAL: I will help them.

6 PRESIDING JUDGE: Help them along.

7 MR. ROSENTHAL: I will.

8 MR. NEUMAN: Your Honor, if I may speak to
9 the earlier part of this discussion --

10 MR. ROSENTHAL: I do want to go back to
11 retrofits, but go ahead.

12 MR. NEUMAN: Yeah, and I don't want to
13 undo whatever good Ms. Kenedy has done. But the
14 fact that GATX, a responsible public company that
15 puts out on its 10-K information that is germane to
16 the interest of potential investors, and keep its
17 nose clean with the SCC does, indeed, reference the
18 fact that it is constantly evaluating, as it should,
19 its compliance obligations under existing law. And
20 the fact that they chose to mention that they are
21 looking at the impact of these various rail
22 regulatory requirements on their legal obligations,
23 including retrofitting obligations, is something
24 that they look at, and they wanted to tell the
25 public that that was the case.

1 The fact that they evaluate how to comply
2 with the law, I don't know if that necessarily --

3 PRESIDING JUDGE: Maybe that's not a plan.
4 I don't know. Maybe you need to define "plan."

5 MR. NEUMAN: I guess I would suggest, is
6 that look at another way, if in arm's length we
7 received a subpoena out of the blue and we're
8 determining our best internally our obligation to
9 comply with, it we would almost always be suggesting
10 that our obligation would go so far as to connect
11 the dots between 55(c) and any decisionmaking on
12 retrofitting and hardly any farther than that. More
13 generally, your request for plans, whatever that
14 means, for retrofitting independent of behavioral
15 modifications with respect to 55(c) or similar
16 mileage related charges, if I will, is a nonstarter.

17 PRESIDING JUDGE: I think we've gotten
18 pretty granular here with linking "55(c)" and
19 "retrofitting." I'm not sure "similar charges" is
20 going to get you anywhere.

21 MR. ROSENTHAL: There are two concerns.
22 The larger concern is that the Board has said when
23 Complainants were deciding whether to allow these
24 charges in the IHB II decision it didn't face a
25 world where many, many cars had to be retrofitted.

1 That's probably true.

2 But do many, many cars have to be
3 retrofitted? Is that, in fact, true? Well, GATX
4 says we think we're going to retire, redesignate,
5 whatever, we may not retrofit all that many cars, so
6 maybe it doesn't matter. That's what we're trying
7 to get out. That's what we're saying, are you
8 really going to retrofit all these cars, have you
9 thought about how you're going to stage them so that
10 you can minimize the costs of moving them?

11 The answer might be no, but all we're
12 saying is, you've got to look for those documents,
13 because they're relevant to this case.

14 PRESIDING JUDGE: I don't think there's
15 any argument at this point about that, but I don't
16 know what similar charges -- wait, wait. Just
17 forcing these lovely people over here to do a search
18 that may be rather extensive for something that we
19 may not -- may not even exist, I'm not sure that
20 that is a burden that I wish to impose upon them.

21 MR. ROSENTHAL: And your Honor, that's why
22 I said that I am willing to work with them to
23 define -- these similar charges are, again, like we
24 have item 55(c), other railroads have charges that
25 are designated by numbers. It's not a difficult

1 search.

2 PRESIDING JUDGE: I tell you what. You
3 work with these lovely people over here to try to
4 define it, and if you can't, put that in a report,
5 and I will deny it.

6 MR. ROSENTHAL: That's all I'm asking.
7 Let's work at it and let's see if we can get a
8 reasonable --

9 MS. KENEDY: It should be by tariff
10 number.

11 PRESIDING JUDGE: That's your problem with
12 him. You write it all up for me, and you give it to
13 me, and I will say yes or no.

14 MS. KENEDY: Fair point.

15 MR. GOLDSTEIN: Your Honor, I apologize.
16 I want to make sure that I'm clear with the
17 understanding -- are we done talking about 7?

18 PRESIDING JUDGE: Yes, we are.

19 MR. GOLDSTEIN: So the resolution for what
20 is being sought as (a) with respect to plans, we're
21 conquering that by doing what search?

22 PRESIDING JUDGE: You're going to
23 define "plans" and then search it. You tell me if
24 it -- this is a good faith effort at some point. I
25 sense that there's been a mix of good faith and not

1 so good faith here. But I'm asking you to try to
2 work on this. You have to define "plans" so you
3 know what you're talking about, and then find the
4 search terms and the number of custodians. Right?

5 Right, Ms. Kennedy?

6 MS. KENEDY: Right. But on the plan
7 issue, your Honor, that was something that -- that
8 is something that we went back and asked our
9 clients, they had no formal plans, and they
10 responded. It seems to me --

11 PRESIDING JUDGE: Then you're out of it.

12 MS. KENEDY: If we're doing a search for
13 55(c) and retrofit together, that certainly will
14 yield results that may have information relative to
15 the (A) part of that request. I don't think it's
16 going to be productive for either side for us to do
17 searches for "retrofit" and "plan."

18 PRESIDING JUDGE: I wasn't suggesting that
19 necessarily.

20 MR. NEUMAN: Can I speak to a limitation
21 on that? This particular request as now drafted is
22 without regard to date, but it references 55(c).
23 55(c) has only been in existence so long. The plans
24 for retrofitting generally obviously could open the
25 door to a whole lot of more burdensome stuff. To my

1 point earlier, I can't imagine that a reasonable
2 search would be anything other than plans,
3 evaluations, considerations, whatever, with respect
4 to the imposition of 55(c). I'm sorry, but that to
5 me is about the only logical, reasonable scope we
6 could come up with.

7 PRESIDING JUDGE: January 13?

8 MR. ROSENTHAL: I'm sorry. This was a
9 question that was boiled down from an earlier one.
10 The retrofitting here is in response to a specific
11 rulemaking. That's a fairly recent rulemaking.
12 That puts in a definite date limitation.

13 PRESIDING JUDGE: The date is?

14 MR. ROSENTHAL: I don't remember what the
15 date is.

16 MR. NEUMAN: Mike, it's not if you just
17 parse (a).

18 MR. ROSENTHAL: I agree retrofitting as a
19 consequence of this PHMSA rule.

20 MS. KENEDY: I think (b) encompasses (a),
21 if that's true.

22 PRESIDING JUDGE: Mr. Goldstein, you're
23 talking to everyone else. What did you say?

24 MR. GOLDSTEIN: I'm sorry. I will let
25 Mike speak for himself. I don't think that Mike

1 agrees with how --

2 MR. ROSENTHAL: There are two issues. One
3 is plans for dealing with this PHMSA retrofitting.
4 Now, because we want to know are there going to be a
5 lot of cars retrofitted or a little, if they say
6 that they have searched for plans and that's what
7 they say in response to a subpoena, I'm fine with
8 that.

9 PRESIDING JUDGE: So just use the
10 word "plan"?

11 MR. ROSENTHAL: If they said there are no
12 plans --

13 MS. KENEDY: We said there were no plans.

14 MR. ROSENTHAL: I want that as a response
15 to discovery.

16 PRESIDING JUDGE: That would be a Boolean
17 search term, "planned retrofit"; right? No?

18 MR. ROSENTHAL: I understand your concern.
19 I'm not asking for that.

20 MS. KENEDY: I think we're talking past
21 each other. We looked for do we have a formal plan
22 in place for retrofitting whatever number of cars
23 required to be retrofitted. We went back and talked
24 to our client and in good faith gave a response no,
25 we do not have a formal plan.

1 PRESIDING JUDGE: That's fine.

2 MS. KENEDY: Now what I'm hearing unless
3 I'm misunderstanding you is we're supposed to now go
4 do an ESI search --

5 PRESIDING JUDGE: I think you're out of
6 it. I don't think you have to do that since you've
7 already responded.

8 MR. ROSENTHAL: Here's my issue. One is
9 that the responses that were given to me that we
10 have no plans -- and this is in response to 7 (a).
11 The responses that were given to me that we have no
12 plans were given to me in a confidential settlement
13 document, and I'm not willing to just take off a
14 discovery request and make it like we never asked.
15 We want the record clear that we asked and that the
16 answer is no.

17 PRESIDING JUDGE: Look, they've given you
18 the answer. Maybe they don't have to run --

19 MR. ROSENTHAL: They can stipulate. Let's
20 get something on the record that they have no plans.

21 PRESIDING JUDGE: That's fine.

22 Ms. Kenedy, is that all right?

23 MS. KENEDY: Yeah, we will stipulate.

24 PRESIDING JUDGE: I just don't want you to
25 have to do anymore work. You've answered the

1 question. You don't have to do anymore work.
2 Whatever Mr. Rosenthal thinks is appropriate to
3 satisfy his -- the tidy part of his mind, then let's
4 give it to him. But you don't have to do anymore
5 work if you've already answered the question.

6 MS. KENEDY: Okay.

7 MR. ROSENBERG: I thought I was offering
8 to stipulate.

9 MR. ROSENTHAL: That's fine. It wasn't as
10 clear. We can do it that way.

11 MR. ROSENBERG: It's not an offer to
12 stipulate, then, because Ms. Kenedy has already said
13 she doesn't have any plans.

14 MR. ROSENTHAL: I just want something on
15 the record that we asked and they answered.

16 PRESIDING JUDGE: My concern was that it
17 was an offer to stipulate, and it was never
18 effectuated.

19 MR. ROSENTHAL: That is different from --
20 just to make -- just to wrap up the other point,
21 that is different from (b), which is -- no, I guess
22 if you have no plans for retrofitting --

23 PRESIDING JUDGE: B is subsumed in A.
24 That was Ms. Kenedy's point.

25 MS. KENEDY: This is ridiculous. If I

1 search the word plan and retrofitting, I guarantee
2 you there will be hundreds of pages of documents on
3 that search. When you asked if we had a formal
4 plan, then no, because we did that search, that's
5 the case. But you're conflating the two today.
6 There must be nothing on 55(c) and retrofit, because
7 you have no plans. You have no plans.

8 MR. GOLDSTEIN: (B) is a little more
9 specific than that. (B) says impacts of 55(c) on
10 the plans.

11 MR. ROSENTHAL: So if you have no plans, I
12 assume you have nothing in (B).

13 MR. ROSENBERG: If we stipulate as to A,
14 that takes care of B as well?

15 PRESIDING JUDGE: Let him tell you,
16 because that's what he just said.

17 MR. ROSENTHAL: Look, I am willing to
18 define -- you're right. There is some imprecision
19 in the use of the word "plan." If you want to
20 distinguish it. I don't know if you want to say
21 plans or formal plans, or perhaps the way to
22 distinguish it is to have, as you say, we will have
23 item 55(c), we will have this term that I'm going to
24 work with you on other documents, and we will look
25 for retrofits. It will be item 55(c), similar

1 charges, and retrofits.

2 MS. KENEDY: And after a certain date?

3 MR. ROSENTHAL: After the PHMSA. If it
4 comes up with zero, it comes up with zero.

5 MS. KENEDY: That seems like that would
6 work.

7 PRESIDING JUDGE: Great. Memorialize that
8 for me.

9 MR. ROSENTHAL: We're all trying, your
10 Honor.

11 PRESIDING JUDGE: Yeah, I know you will.
12 That's what I'm afraid of. All right. I'm counting
13 on my fingers. We still have 10, I think.

14 MR. ROSENTHAL: It was number 2 that was
15 really the hold up. We are moving more quickly.

16 Number 8, I suspect we can deal with this
17 in a similar way through agreed upon search terms.
18 We've now switched from item 55(c) to this thing
19 called mileage allowances, which are payments that
20 are imposed for tank -- payments made for tank cars.

21 MR. ROSENBERG: Required, not necessarily
22 made.

23 MR. ROSENTHAL: What we are asking for
24 is -- we are asking the tank car owners to search
25 for a couple of specific types of documents in which

1 these issues would be discussed with their lessees
2 or with potential lessees, because we think that the
3 universal understanding -- well, the near universal
4 understanding of people involved in the industry is
5 that, frankly, the Complainants are wrong when they
6 claim that this national tank car allowance
7 agreement requires payments of mileage allowances.
8 And we think that that is going to be proven in one
9 way by the communications, when people say do I have
10 to pay mileage allowances, no, can railroads charge
11 zero mileage rates, yes.

12 Now, I don't know whether the
13 communications exist, but again I think it's -- in
14 fact, the tank car owners have told us that this is
15 rarely discussed, we have no position, whatever. I
16 think the same way, we could -- if they don't
17 discuss mileage allowances and we exclude contracts,
18 we could do a search for mileage allowances, zero
19 mileage rates, maybe a few similar terms that we
20 found, and if there are documents, there are
21 documents. If they're not, they're not. But it's a
22 search with some defined terms.

23 PRESIDING JUDGE: Mr. Neuman?

24 MR. NEUMAN: That all sounds good, and I
25 think the proof is in the pudding. There's an awful

1 lot of documents that exist, at least within my
2 client's system at GATX, that refer to or make
3 reference to communications, inquiries from lessees
4 about daily contract charges, this and that and the
5 other thing. A lot of documents exist. An ESI
6 search would yield an awful lot of hits unless the
7 search terms were narrowed because otherwise, we're
8 talking about an awful lot of hits that we would
9 then have to weed out. 50,000, the number that was
10 used was pretty scary when we put together the
11 affidavit. The idea was, it would yield an awful
12 lot of information that someone would have to go in
13 with a meat cleaver to cop out.

14 PRESIDING JUDGE: You've got the whip
15 hand. Go ahead and narrow it.

16 MR. NEUMAN: So I hear what you're saying
17 and again, to the extent in the front end that
18 agreed limited search terms could reduce much, if
19 not all, of that burden, that information is
20 gleanable. It was very burdensome as it was first
21 drafted.

22 MR. ROSENTHAL: That's why we tried to
23 focus it, because again --

24 PRESIDING JUDGE: He got your attention
25 that way.

1 MR. ROSENTHAL: Once you start talking
2 about communications, you're sort of looking at
3 e-mail, e-mail external to the company.

4 The other thing that we had open, and the
5 offer is still on the table is that I thought a lot
6 of this could have been resolved through
7 stipulations. I think they came very close -- I
8 think we came very close there. The press of time
9 may have stopped us from doing it. But a lot of
10 these statements that tank car owners have said
11 about their knowledge, whether they care about
12 mileage allowances, might actually be susceptible to
13 a stipulation.

14 Again, I think we can work on some search
15 terms, and I just wanted to leave the stipulation
16 point open, because I think it's a possibility.

17 MR. ROSENBERG: I think on the
18 stipulation, there was --

19 MR. ROSENTHAL: There's one sticking
20 point.

21 MR. ROSENBERG: There was less
22 disagreement about facts, more disagreement about
23 the characterization.

24 PRESIDING JUDGE: Work it out. Give it to
25 me in the report.

1 MR. ROSENTHAL: Number 9 have been
2 addressed through a stipulation with the Association
3 Complainants, Mr. Moreno's folks.

4 PRESIDING JUDGE: What's this period? Why
5 2005 on 10?

6 MR. ROSENTHAL: Okay. This -- now, the
7 reason is because we're now looking at cost data.
8 This is a larger question of cost data where I think
9 we have some fundamental disagreements with the
10 other parties. 2005, what we're trying -- part of
11 what we're trying to do is, again, explaining why we
12 think parties generally don't ask for, pay mileage
13 allowances, why this really isn't the industry
14 practice and why no one would have agreed that it
15 should be the industry practice. And the reason is
16 because we think these mileage allowance formula
17 does a very poor job of reflecting what it's
18 actually supposed to reflect, which is ownership and
19 maintenance costs of tank cars, plus what's the
20 market.

21 It's sort of a mushy concept to begin
22 with. And we think the formula doesn't do a very
23 good job of it, and it's a formula that was put in
24 place in 1987. Some of the elements go back to 1970
25 and how they're determining tank car values. We

1 said there's a reason why people don't use mileage
2 allowance, because it doesn't do what it's supposed
3 to do. So how do you do it? How do you show that
4 the formula doesn't properly measure or doesn't
5 adequately measure ownership and maintenance costs?
6 You ask for evidence regarding ownership and
7 maintenance costs.

8 PRESIDING JUDGE: So that's Railinc, isn't
9 it? Isn't some of that in Railinc?

10 MR. ROSENTHAL: There are certain --
11 there's a component of the ownership and maintenance
12 costs that Railinc compiles based on data that are
13 provided by three of the tank car owners.

14 PRESIDING JUDGE: Okay.

15 MR. ROSENTHAL: So that's a component.
16 That's a component called lessor costs. But that's
17 not the only thing they're being compensated for.
18 They're being compensated for ownership costs and
19 for what this formula calls lessee costs.

20 So the question is, what are these -- the
21 other point is, we're being told, we're being
22 accused of not compensating them for ownership and
23 maintenance costs. That's what the complaint says.
24 So we think it's only natural to say well, what are
25 those costs? Because that's certainly what they

1 asked us for in discovery. They asked us for all of
2 our documents. Not the tank car owners, I
3 understand, but the Association Complainants, asked
4 us for all of our documents relating to the costs of
5 owning -- associated with owning and maintaining
6 tank cars. They asked for all documents in which we
7 quantified the costs of private car ownership for
8 which we are reimbursing customers. It asks for
9 documents regarding the extent to which we
10 reimbursed tank car owners for ownership and
11 maintenance costs.

12 And this whole case is about -- the second
13 half of the case at least, and it ties back into the
14 first, is what are these ownership and maintenance
15 costs that we're not adequately compensating you
16 for.

17 And the other side apparently has a
18 theory. They must know what they're going to say
19 these costs are.

20 Now, the theory jumps back and forth a
21 little bit. Sometimes they say no, we're just
22 saying you have to pay the formula amount. But
23 other times, they're saying oh, no, we have to
24 reduce our rates by a certain amount so that we're
25 covering these costs. And they've asked us, again,

1 for not only the cost discovery but for a lot of
2 discovery about our rates, when do we pay mileage
3 allowances, when do we not. And we've given them
4 data on all of our car movements and rates going
5 back to 2001 or 2002, perhaps. That's what they
6 asked for, and that's what we produced.

7 So there's a lot of information out there
8 that they're apparently going to use to try to show
9 that we're not compensating for ownership and
10 maintenance costs. We're just saying, what are
11 those costs.

12 Again, we narrowed this down. We didn't
13 say all your documents relating to costs.

14 PRESIDING JUDGE: "Studies, analyses, or
15 reports." That should narrow it pretty well. What
16 do you think?

17 MR. MORENO: First of all, I have to
18 object, your Honor, to Mr. Rosenthal's
19 characterizations of what we've said and what this
20 case is about and why there are no mileage
21 allowances being paid today. These costs, the only
22 costs that are relevant here, and we've said this to
23 Mr. Rosenthal all along, are those reported to
24 Railinc for purposes of calculating allowances under
25 the ex parte 328 agreement. Ex parte 328 is a

1 rulemaking proceeding. That determines what are the
2 relevant costs unless and until it's overturned or
3 reversed by the STB.

4 What Mr. Rosenthal wants this information
5 for is clearly to challenge ex parte 328. He's free
6 to do that, your Honor, in that docket, by going and
7 petition to reopen. There are very specific
8 procedures in ex parte 328 for reopening that
9 proceeding and changing those costs and modifying
10 the formulas.

11 Mr. Rosenthal wants to do an end run
12 around that in this proceeding and try and undo what
13 was agreed to in a rulemaking proceeding through an
14 adjudicatory proceeding. That is not procedurally
15 proper. That would be overturned by a court of law
16 for doing that.

17 The costs here -- we just are arguing that
18 we're entitled to payment of the mileage allowances.

19 PRESIDING JUDGE: So you think that's a
20 collateral attack on ex parte 328?

21 MR. MORENO: We believe it's a collateral
22 attack on ex parte 328 and yes, and frankly, we
23 believe that's what UP's objective is and has been
24 all along. I can't go into this because we have
25 people in the room, but UP produced documents to us

1 in discovery, and we believe that is truly what the
2 objective was in even implementing this new repair
3 movement charge.

4 And all of these costs -- we have not
5 asked UP for tank car costs. Mr. Rosenthal is
6 conflating costs with rates. We asked UP for the
7 rates that it has been charging to shippers and
8 whether those rates included mileage allowances or
9 did not include mileage allowances, and UP has not
10 produced any tank car cost information to us in this
11 proceeding.

12 PRESIDING JUDGE: Okay.

13 MR. ROSENTHAL: Just very briefly. We
14 actually -- when we got this complaint, we
15 understood that shippers didn't like, that tank car
16 owners or whoever, didn't like item 55(c) because it
17 was imposing a new cost. We were kind of surprised
18 by the mileage allowance point, because as I think I
19 said, railroads rarely pay mileage allowances. It's
20 been the industry pattern for years. That's why we
21 said in our motion to dismiss look, as a matter of
22 law, we don't have to pay. We were willing to
23 litigate the case. If the case is do we have to pay
24 this ex parte 328 mileage allowance, the fact that
25 we never paid, I think, almost speaks for itself.

1 But then they said oh, no, we want to
2 look, have you lowered your rates sufficiently as an
3 alternative to cover costs. And document request
4 number 8, "produce all documents relating to,
5 discussing, referring to, mentioning, or commenting
6 on costs associated with owning and maintaining
7 railroad tank cars whether the cars are owned by UP
8 or its customers or car owners." That was the
9 Association's first set of discovery requests. So
10 to say they never asked for this stuff is not true.
11 We don't have as much information on this stuff
12 because we're railroads. If we own the tank cars,
13 we own a couple that we use to move water. We don't
14 own tank cars. We don't know the answer. But the
15 tank car owners, whose business it is to own and
16 maintain tank cars, presumably know that, and
17 they're the ones who would have that information.

18 MR. MORENO: Your Honor, we've had a lot
19 of back and forth over the scope of this discovery,
20 and we've modified the scope of our requests over
21 time. In what is tab 23 to UP's subpoena petition
22 is correspondence that we sent to Mike Rosenthal
23 dated September 11 of 2015, almost exactly a year
24 ago, where we stated to him "in either case, the
25 relevant costs of car ownership are not the actual

1 cost to car ownership incurred by association
2 complainant members or by UP, for that matter, but
3 the costs utilized by the ex parte 328 formula to
4 calculate mileage allowances. As such, actual cost
5 of car ownership as calculated by Complainants or by
6 UP are not relevant."

7 We made it very clear, we're not seeking
8 those actual costs in this particular proceeding.

9 MR. ROSENTHAL: Honestly, that was your
10 litigation position maybe when you wrote your
11 letter. When you filed your response to the motion
12 to dismiss, that wasn't your position.

13 MR. MORENO: We also told Mr. Rosenthal,
14 "if the amended complaint or complainant discovery
15 requests have caused UP to misconstrue complainant's
16 allegations, Complainants are prepared to further
17 amend their complaint to make it more clear and to
18 discuss ways to narrow their discovery requests to
19 better reflect the forgoing allegations."

20 As a result of that, we have not pursued
21 that one request that Mr. Rosenthal --

22 MR. ROSENTHAL: You may not have pursued
23 it, but we certainly looked for the documents and
24 produced what we had.

25 PRESIDING JUDGE: Maybe you all can

1 stipulate to this at this particular point.

2 MR. MORENO: I'm not sure what stipulation
3 Mr. Rosenthal would have in mind.

4 MR. ROSENTHAL: I mean, I don't have a
5 particular stipulation in mind, because honestly,
6 your Honor, they've been going back and forth on, I
7 think, what their legal theory of the case is. Why
8 in the world did they ask us for all of our rates
9 going back to 2001 and all of our movements, whether
10 we paid mileage allowances or not, if they're not
11 trying to find some cost difference in our rates.

12 MR. MORENO: I can answer that question.
13 The reason we asked for rates has to do with the
14 discounting. UP has alleged that the rates that it
15 charges for -- on movements where it does not pay a
16 mileage allowance are less than the rates UP would
17 charge if it did have to pay a mileage allowance.

18 So our request is simply attempting to
19 understand whether and to what extent UP has, in
20 fact, discounted its rates. And UP has produced
21 those documents. But that's a uniquely UP thing.
22 It has nothing to do with how much did I pay for
23 this repair or how much did I pay to move this car
24 here. Those are maintenance and ownership costs
25 that are a part of the ex parte 328, and we have

1 never contested those costs. As long as ex parte
2 328 is in place, those are the costs and the only
3 costs that we believe are relevant here.

4 MR. ROSENTHAL: Again, if they were only
5 relevant, I don't understand why the complaint, you
6 know, alleges that we haven't -- we've refused --
7 that you're saying we've refused to compensate car
8 owners, whether through mileage allowances or
9 reduced line hall rates, and in your motion to
10 dismiss, you talk about we refuse to permit the
11 provider of the car to recoup some or all of its
12 tank car ownership costs.

13 We want to show that the tank car owners
14 have recouped some or all of their ownership costs.
15 But to get to that, we need to know what these
16 ownership costs are.

17 And I understand your theory is that it
18 has to be these ex parte 328 costs. That's your
19 legal theory of the case. We're obligated to pay
20 that amount, no more, no less.

21 Our theory is, it's perfectly reasonable
22 to charge zero -- it's reasonable and lawful to
23 charge zero mileage rates that appropriately
24 compensate people for car ownership costs reflected
25 in market conditions and that's what this discovery

1 is going to, so we can show or answer your
2 challenges that we haven't done it.

3 MR. MORENO: Our position is much simpler
4 than that. Our position is that UP is required by
5 law to compensate us for the use of our private
6 cars, and mileage allowances are the default
7 mechanism for compensating that, and they're not, by
8 their own admission, paying mileage allowances on
9 the majority of this.

10 Alternatively, then, what they are saying
11 is that we are discounting our rates. We are
12 challenging the fact that there's a discount in
13 these rates. We're not arguing over whether the
14 magnitude of the discount, whether it's sufficient
15 to cover the costs. We're arguing they're not
16 discounting. It's a bogeyman in some ways.

17 That's our case, as simple as that.

18 MR. ROSENTHAL: Again, unless they're
19 planning to say something about the level of the
20 discount, then the documents that we produced in
21 discovery should really end this case, or maybe we
22 ought to go for summary judgment or something like
23 that. Maybe there's a lot less to this case.

24 PRESIDING JUDGE: This is getting far
25 deeper -- let me finish. This is getting far deeper

1 into the relevance weeds than I have thus far
2 ventured. So let's just dispense with that. It's
3 all very interesting and entertaining, and I'm sure
4 the Board will really love to hear these arguments,
5 but I'm not going to fool around with this because
6 as I told you a number of hours ago, I'm not going
7 to do anything that would narrow the Board's ability
8 to do whatever the Board wants to do with you
9 people. Okay?

10 So let's just try to figure out how I can
11 grant this number 10 in the least painful way to the
12 Complainants.

13 MS. KENEDY: Just one issue I want to
14 raise. Trinity is in a very unique position here.
15 We are a tank owner that is not a part of the lessor
16 costs that are used to calculate under ex parte.

17 PRESIDING JUDGE: That's correct. Yes. I
18 remember.

19 MS. KENEDY: So we are a different animal.
20 I don't mean to dissociate myself from my brethren
21 here.

22 PRESIDING JUDGE: Sometimes you have to do
23 that.

24 MS. KENEDY: Sometimes you do, and the
25 burden becomes exponentially large when we're not

1 even a part of that calculation. I just wanted to
2 make sure any sort of agreement we reach, that we
3 are excluded from it.

4 PRESIDING JUDGE: I understand that. I'm
5 sure Mr. Rosenthal agrees with you.

6 MS. KENEDY: Thank you.

7 PRESIDING JUDGE: Don't you?

8 MR. ROSENTHAL: I understand that Trinity
9 is in a bit of a different position.

10 MS. KENEDY: I don't know that he's
11 capable of agreeing with us.

12 MR. ROSENTHAL: I don't know that it
13 matters for this particular question. But I think
14 if I can get something from the others, that gives
15 me enough. I think that will be good enough. I'm
16 willing not to fight for Trinity if I can get
17 something from the others.

18 PRESIDING JUDGE: That will be good
19 enough. You can put that in your report, too, that
20 will be good enough.

21 How are we going to cut this knot?
22 "Studies, analyses, and reports," that doesn't sound
23 overly burdensome. Either you have it or you don't.
24 Right?

25 MR. ROSENTHAL: I think so. What we tried

1 to do -- again, we tried not to ask for all
2 documents relating to costs.

3 PRESIDING JUDGE: I know. Because you
4 would never get it; right?

5 MR. ROSENTHAL: Because I would never get
6 it. And then also just to show that we do listen,
7 one of the issues that was raised in our meet and
8 confer calls was well, gee, if we're doing studies
9 about how to price for a particular lessee, do we
10 really have to go through all that. And I said no,
11 I don't think that's right. And that's why it
12 says "other than studies, reports, analyses related
13 to individual lessees." So we tried to carve that
14 out. We tried to listen.

15 PRESIDING JUDGE: All right.

16 MR. ROSENTHAL: And again, you know,
17 beyond that, I'm not sure how to narrow it more
18 than -- a study, I think, is a fairly common
19 concept.

20 PRESIDING JUDGE: Yeah, that's what I
21 said. Any comments over there? All right.

22 MR. ROSENBERG: If I can comment, it's one
23 thing to ask about studies, analyses, or reports,
24 particularly in the case of ARI. Those things don't
25 exist. Then we get to (c) and (d), "documents

1 sufficient to show." We're in this exercise of
2 reinventing things. How you want to define the cost
3 of owning the cars, maintaining, those are vague,
4 expansive items.

5 PRESIDING JUDGE: It needs to be an
6 electronic search narrowed by terms; right?

7 MR. ROSENBERG: I don't think that's even
8 possible or feasible. If you start searching for
9 cost or ownership or maintenance or owning and
10 maintaining, you would get a flood of stuff.

11 PRESIDING JUDGE: The Boolean search term
12 that encompasses all of these, can you do that?

13 MR. ROSENBERG: I think here it's not
14 possible. I think our discussions have gotten
15 stymied on the issue of both basic relevance and the
16 fact that we are willing, particularly for
17 maintenance costs, willing to provide the lessor
18 cost information that's turned over to Railinc.

19 We haven't discussed this, and I don't
20 have authorization from my fine colleagues, I don't
21 have authorization from my client, I don't have
22 authorization from the better part of my mind.

23 PRESIDING JUDGE: Let me just interrupt.
24 I think this does -- this is terribly infirm. This
25 is very, very broad, and I'm just going to -- and

1 no, you can't say anything. I'm just going to say
2 no.

3 MR. ROSENTHAL: How about the studies and
4 analysis part?

5 PRESIDING JUDGE: No, you get those. You
6 just don't get (c) and (d). C and D is no.

7 11, what?

8 MR. ROSENTHAL: 11, I think, will be --
9 11, I'm hoping, is easy because it's a fairly
10 defined term. This is, again, getting to the three
11 tank car owners that submit things to Railinc. So
12 Trinity is free from that one. I'm seeing smiles.

13 MS. KENEDY: So exciting.

14 PRESIDING JUDGE: Memorialize that,
15 Trinity. Don't forget. Get it in there that you're
16 not included in it.

17 MR. ROSENTHAL: So here is also where we
18 can get part of the information from Railinc,
19 because these companies submit this data to Railinc.
20 Railinc says they keep it for a particular period,
21 maybe 2009. I don't recall standing here. But we
22 can get that data from Railinc. We just ran into
23 the same aggregation aggravation, which I think
24 we've gotten past.

25 PRESIDING JUDGE: Yes, we have. So this

1 is Railinc with no aggregation.

2 MR. ROSENTHAL: There's one additional
3 point, though, which is, when these parties submit
4 information about these lessor costs to Railinc,
5 it's already aggregated internally in certain ways.
6 These are about car repair costs they pay. One of
7 the interesting issues in this case is the question
8 of how charges like item 55(c) go into the mileage
9 allowance formula. And in fact, that, as we
10 understand it, is a lot of the Complainants'
11 argument, that in the old days, when everyone was
12 paying mileage allowances, these costs were
13 included, and somehow they circled around, and
14 everybody was happy.

15 And they asked us, actually, one of their
16 requests to us was, "please explain if and how your
17 charges for empty repair movements will be reflected
18 in the level of mileage allowance charges determined
19 pursuant to ex parte 328." That was their
20 interrogatory number 18, I believe. So they asked
21 us, they want us to tell them how these charges work
22 their way into the mileage allowance.

23 The way the mileage allowance formula
24 works and the lessor costs and these costs that are
25 given to Railinc work is they're supposed to include

1 that. And so what we've asked the tank car owners
2 for are for -- we say all documents that refer or
3 relate to development of that cost. What are their
4 underlying work papers? How do they figure out --
5 we want to see, because this cost is not called out,
6 it's not a line item in the data that they provide
7 Railinc. It's presumably buried as a repair cost --

8 PRESIDING JUDGE: So you think they have
9 policy statements on how to do this? You think this
10 is something the accounting department is --

11 MR. ROSENTHAL: No, I think you actually
12 see the math. I think someone would say these are
13 the costs that we've paid. They're going into
14 either a repair category or a general and
15 administrative category, and they're being spread
16 out among cars.

17 We asked, and what we were told -- again,
18 we're not focused on all documents. We're looking
19 for the documents that went into producing specific
20 data given to Railinc. One of the things that GATX
21 -- again not to pick on them, but I will, because
22 they were very cooperative in originally opposing
23 the subpoena, that they said, we don't have this
24 data going back -- we have this data, these
25 worksheets or whatever, going back, I believe it

1 was, three years or something. This is done for a
2 project. It makes us think that there's a pretty
3 well-defined group of documents that are being used
4 to determine these. Either they have them or they
5 don't. If they don't keep them, if they throw them
6 out --

7 PRESIDING JUDGE: So they can look and see
8 if they have them. It's not something that you need
9 to work at developing a definition, because it's
10 either something that exists or doesn't.

11 MR. ROSENTHAL: I think so. I think at
12 least GATX seemed to not what we were talking about.

13 MR. NEUMAN: We did, and I'm waiting for
14 the time when Mike says that he's not meaning to
15 pick on GATX and then he doesn't.

16 You're right. You recited what I told
17 you, that we do have worksheets. "All documents,"
18 there's that bugaboo again, all documents, including
19 relatively inane or off-the-mark, you know,
20 references to these things, or even the aggravation,
21 to use your word a few minutes ago, about doing
22 these things. It seems a little bit beyond the
23 pale. But if the worksheets are things that get
24 directly to the calculation, is what you're talking
25 about, we do have those worksheet documents.

1 MR. ROSENTHAL: Just to be clear, it's all
2 that relate to the development. Not all documents
3 that refer or relate to these costs, but the
4 development process.

5 MR. NEUMAN: The e-mail, are you going to
6 get it to me Monday or Friday, that relates to it.
7 There has to be some rule of reason here.

8 MR. ROSENTHAL: I agree. I'm looking
9 for -- there are numbers that are consolidated.
10 There are tables that are used to consolidate those
11 numbers. I took GATX's response to mean that I had
12 communicated this in some way that was
13 understandable.

14 PRESIDING JUDGE: Could you possibly
15 include in your report some articulation of what
16 GATX has, and that would be the standard, and if
17 anyone else has it, they produce it, and if they
18 don't, they can forget it?

19 MR. ROSENTHAL: We can try. I do think
20 this is something that we understand.

21 PRESIDING JUDGE: That's generic, but it's
22 awfully tailored.

23 MR. NEUMAN: I don't know if that shoe is
24 going to fit.

25 PRESIDING JUDGE: Then maybe he only gets

1 one shoe.

2 MR. ROSENBERG: If I may speak, are you
3 looking for something binary, yes or no, with this?

4 PRESIDING JUDGE: Yeah. They either have
5 it or they don't; right? Under GATX protocol, if
6 they match that up, then they have it and they give
7 it to you. If they don't match it up, they don't
8 give it to you.

9 MR. ROSENTHAL: Either these underlying
10 documents exist or they don't. If the kind of thing
11 exists, we want them, yes.

12 MR. ROSENBERG: I'm, perhaps foolishly,
13 trying to go to the substance. It is whether, in
14 fact, 55(c) charges are included or not? Is that
15 what you're after?

16 MR. ROSENTHAL: Again, it's not
17 necessarily just item 55(c), but there are other
18 railroads that include these. So I just want to
19 know whether -- I don't know whether it's going to
20 call out item 55(c). I doubt it because of the time
21 of when we implemented this and when these reports
22 were prepared. But the smaller railroads have
23 charged these. CP charges them. KCB, I believe,
24 charges them. So yeah, I'm looking for the
25 documents. I'm looking to see how is this number

1 constructed.

2 It's the same question the association
3 Complainants asked. They would probably be
4 delighted to see an answer to it.

5 MR. GOLDSTEIN: So it would not be
6 sufficient for us to simply answer and say charges
7 of that sort are included in the development of
8 lessor costs or not?

9 PRESIDING JUDGE: No. If you have
10 worksheets, you provide the worksheets. If you
11 don't have them --

12 MR. GOLDSTEIN: I guess my question is,
13 why? Again, why is the number relevant? The
14 concept is.

15 MR. ROSENTHAL: Oh, because to the extent
16 they're included, the number is potentially
17 important, because --

18 PRESIDING JUDGE: It shows what the lessor
19 costs are.

20 MR. ROSENTHAL: I apologize for getting
21 too much into the weeds. It's not just lessor
22 costs. As I tried to explain, they're trying to
23 unite this item 55(c) together with mileage
24 allowances by saying that, in the old days, when the
25 Board was deciding IHB 3, these charges were okay

1 because they would come back through the mileage
2 allowances.

3 Now we really care because mileage
4 allowances aren't paid anymore.

5 And our counter is no one has paid mileage
6 allowances very much for a very long time. Why does
7 this suddenly matter? It certainly doesn't matter
8 if it turns out that these charges are very small in
9 relation to the mileage allowance payments, which we
10 think is the case. So it just goes against -- part
11 of knowing what the number is and how it's
12 incorporated goes to this argument that somehow this
13 is what constitutes the sea change that required
14 overruling IHB II. It's complicated, but it's a
15 simple set of documents, if it exists.

16 MR. GOLDSTEIN: Although I think you're
17 talking about an extraordinarily sensitive set of
18 documents with respect to the development of our
19 internal costs that we're then going to provide --
20 you're saying it's a simple document. It may be.
21 But for UTC, I suspect for others, it's not a
22 document that we are anxious to provide if there is
23 an alternative that is less restrictive.

24 MR. ROSENTHAL: Yeah, and I do understand
25 that. I just don't think there is, to the extent

1 there's something that shows this number. Frankly,
2 these are documents that, I believe, Railinc has a
3 right to audit. So it's not like nobody ever could
4 possibly see these, and we've got our protective
5 order.

6 So I understand the sensitivity, but
7 that's why we've got a very narrow set of defined
8 documents with our protective order.

9 PRESIDING JUDGE: Ms. Kenedy already lost
10 on the protective order. Mr. Moreno lost on
11 substance. You can take your pick. You can lose
12 either way.

13 MS. KENEDY: But I won on getting
14 excluded.

15 PRESIDING JUDGE: All right. Let's move
16 on. Number 12.

17 MR. ROSENTHAL: Number 12, we've talked a
18 lot about lease agreements and how to get to a bunch
19 of the issues.

20 PRESIDING JUDGE: Shorter period? Why
21 2001?

22 MR. ROSENTHAL: Why 2001?

23 PRESIDING JUDGE: Because it's 15 years?

24 MR. ROSENTHAL: No, because we're trying
25 to look at a period over which the practice of

1 charging mileage allowances has somewhat changed.
2 As I said, we're not -- nobody really charges them
3 anymore. Our sense is they haven't been really
4 charged since the early 2000s. And we thought there
5 might be some differences in leases when it was more
6 of a common practice. So that's why we sort of went
7 back to a further period. I think 2001 was
8 consistent with their request to Union Pacific for
9 our movement data going back to 2001.

10 PRESIDING JUDGE: So it's 400 times 16
11 times 3 or 4?

12 MR. ROSENTHAL: I'm sorry. No. What
13 we've asked -- we were having these arguments about
14 exemplar lease terms and things like that, and we
15 didn't like that. So we said look, we will just
16 pick 35 customers. So it's 35 customers.

17 PRESIDING JUDGE: All right.

18 MR. ROSENTHAL: And the leases for those.
19 And some of them might not be customers of --
20 Trinity might not lease to half of them. I don't
21 know. But it was a way to --

22 PRESIDING JUDGE: So 35 for all those
23 years?

24 MR. ROSENTHAL: Yes, over the years.

25 PRESIDING JUDGE: That's 35 shippers.

1 MR. ROSENTHAL: They may have had a lease
2 that was renewed in 2004 and again in 2010. You're
3 right.

4 PRESIDING JUDGE: Some of these shippers
5 are pretty good size. They may have lots and lots
6 of leases, don't you think, or is it something you
7 do on a fleet-wide basis?

8 MR. ROSENTHAL: My sense -- well, they
9 would be better to ask. I've seen some where there
10 seems to be a master lease that tends to be renewed
11 every once in a while, plus riders and other stuff.
12 But they would know -- unfortunately, they know much
13 better than I do how these leases are done.

14 PRESIDING JUDGE: How burdensome is this,
15 folks?

16 MR. ROSENBERG: Very. In the case of ARI,
17 there are 80 lessees total. This could be 35 out of
18 80. The things are not digitized. It is a massive
19 burden. Also, they have the Cargill and Poet
20 leases, because they are parties in this proceeding.

21 MR. ROSENTHAL: The problem with just
22 relying on Cargill and Poet, your Honor, is Cargill,
23 I think, has a fairly extensive history. They've
24 been around for a while. Some of these Poet
25 entities, they haven't been around. We've seen the

1 leases. They've been produced. There aren't that
2 many.

3 The other potential -- two more issues.
4 One of the issues is we don't know whether -- we
5 just don't know whether the leases differ depending
6 on the types of car and the types of shipper.
7 Cargill mostly does agricultural products. Poet
8 does some ethanol and some agricultural products,
9 methanol sort of by-products. There are lots of
10 other shippers who do petroleum, chemicals that we
11 don't know what the world looks like for them.

12 The second issue, and it's tied in with
13 the next request, involves lease rates. If there's
14 an easy way to get lease rates, we probably don't
15 need as much, and we don't need to go back as far.
16 But one of the things that we're very interested in
17 looking at as a way to discuss how well the mileage
18 allowance formula works, does it really capture
19 market rates, is to actually look at some of these
20 market rates and the way -- one way to do that is by
21 looking at the leases. If there's an easier way, we
22 take that. But we thought by looking at a sample of
23 leases over time, a cross-section of shippers, which
24 is how we picked 35, we're looking at a
25 cross-section of shippers of different commodities

1 over a different time period. So we are trying to
2 kill two birds with one stone, get some exemplar
3 leases and get a sense of how lease rates have
4 actually varied over time.

5 PRESIDING JUDGE: Mr. Rosenberg said this
6 is very burdensome. Is there a way to combine these
7 two and maybe get more on the rates and less on the
8 agreements themselves?

9 MR. ROSENTHAL: As I said, I'm open --
10 one -- well, two things. One, I don't know whether
11 that's true for everybody. I got the sense that
12 some of these companies might have a more modern
13 recordkeeping system and an easier ability to pull
14 up leases. One could imagine there's a filing
15 cabinet that says --

16 PRESIDING JUDGE: So how would you define
17 that? If you can pull them up electronically, then
18 you respond? If you don't have an electronic
19 system -- or if you have an electronic system that
20 goes back two years, you give two years' worth of
21 response? That seems more reasonable. I don't want
22 these people doing file dives in musty old cabinets.

23 MR. ROSENTHAL: Yeah, I can see that, or
24 perhaps -- again, if there's another way of getting
25 at the lease rates, then looking at a more recent

1 cross-section of leases --

2 PRESIDING JUDGE: Any ideas over here?
3 Any responsive ideas?

4 MR. ROSENBERG: Others may have other
5 ideas. Again, we offered to provide our model
6 leases to UP for the relevant time period. We
7 thought that that went pretty far.

8 With respect to lease rates themselves,
9 there's some volatility. In one of our
10 communications, I referred to some information from
11 Genscape. Here's the document. May I approach?

12 PRESIDING JUDGE: Sure. Thank you.

13 MR. ROSENBERG: These are for short-term
14 lease rates, but there is data there that has a
15 chart that shows how they've varied. And if what we
16 think is the case, that UP wants to show that
17 there's some volatility in the market, he can get
18 that in other ways, frankly.

19 PRESIDING JUDGE: Yeah, there is an
20 article, I think in this week's Economist, Maersk,
21 the container shipper, they thought they were
22 smarter than everyone else a few years ago by
23 diversifying and having containers and oil
24 production. Because they thought they would
25 fluctuate opposite each other, of course until they

1 didn't. So now they're thinking of splitting the
2 company up because that didn't work out very well
3 for them. Yeah, same idea.

4 MR. ROSENBERG: I can actually show you a
5 more recent posting from Genscape that discusses how
6 tank cars are being rented to store oil right now,
7 effectively arbitrage.

8 PRESIDING JUDGE: Mr. Wilcox knows about
9 that. Our other case.

10 MR. ROSENTHAL: This talks about lease
11 rates for a particular model of car over a certain
12 period of time. I don't know where they get these
13 data. I don't know whether these guys are willing
14 to -- again, it's one type of tank car.

15 MR. ROSENBERG: It's actually several
16 types of tank cars.

17 MR. ROSENTHAL: I just don't know what
18 these data are, and they're not from -- I assume
19 they're not from -- I don't know where they're from.
20 So I don't know whether people are going to -- I
21 can't establish that those mean anything; right?

22 PRESIDING JUDGE: I know.

23 MR. ROSENTHAL: Again, this is another
24 issue where I don't want to pick on GATX again --

25 MR. NEUMAN: But.

1 MR. ROSENTHAL: -- but my sense is that
2 some companies may have better compilation of rates
3 than others and rates over time. Again, GATX has
4 helpfully sent over a copy of the 10-K that shows
5 some index, some internal index that they create,
6 but it involves a lot of different types of cars,
7 not just tank cars. But it suggests that maybe the
8 information is somehow available electronically.

9 Again, I'm willing to pull it out of
10 leases.

11 PRESIDING JUDGE: Let's just have them
12 produce anything they can produce electronically
13 without any heavy lifting, and define heavy lifting.
14 How's that? I'm getting tired. I don't know about
15 anybody else.

16 MR. NEUMAN: What can be produced
17 electronically, I can't speak to. Mike is correct
18 that we did provide some information that was put
19 into the 10-K. Now, whether that information is a
20 buildup from information that he is seeking, I can't
21 say.

22 PRESIDING JUDGE: I understand.

23 MR. NEUMAN: I did suggest to him, and I
24 renew the suggestion that, frankly, that information
25 that's available there and other public domain

1 places is capable, with some sharp accounting, of
2 figuring out a lot of what he needs to do. To the
3 extent it would require our people to do accounting
4 exercises that his highly paid people could do, I'm
5 a little bit repellant to that suggestion. But if
6 you direct us to look through ESI for documents, we
7 will do that, but I suggest that I'm not sure
8 they've completely exhausted their ability to get
9 this information from somewhere else.

10 MR. ROSENTHAL: Your Honor, I realize
11 we've been going at this a long time. I can give
12 you a copy of what their lease price index is, and
13 you will see that it really is a compilation of cars
14 and something that's indexed. He's given it to me.
15 We've looked at it. It's just not close to what
16 we're actually looking for. It doesn't get at the
17 information we're looking at, which is do these
18 mileage allowance payments come anywhere close to
19 what the market is saying.

20 PRESIDING JUDGE: I just don't know that
21 we've found a way yet to give you what you need
22 without an undue burden on the Complainants.

23 MR. MORENO: And your Honor, please tell
24 me to shut up and sit down if you don't want to hear
25 me on this. I still haven't heard from

1 Mr. Rosenthal, why does he need to know what the
2 tank car owners are charging their lessees, and how
3 does that inform the question of whether UP is
4 paying either one of them for the use of the tank
5 cars? And that's the issue in the case.

6 MR. ROSENTHAL: Jeff, that's fair. There
7 is an issue about -- look, there really is -- we've
8 given you the data. People know that UP does not
9 pay mileage allowances on most of its tank cars.

10 The question is, is it lawful or unlawful.
11 And part of the argument that it's lawful is that
12 somehow this national tank car allowance agreement
13 requires us to do it, and we say it doesn't, it
14 doesn't, that's not the right reading of it.

15 And there's lots of ways you would know
16 it's not the right reading of it. One, the fact
17 that nobody has done it for years and years and
18 years, nobody asks for mileage allowances. The
19 other is, no one would agree that's the only way to
20 compensate people, because it's an old formula that
21 hasn't worked over the years and is not working.
22 It's not reflecting what it's supposed to reflect.
23 It's not reflecting actual market rates for tank
24 cars.

25 And how do you show that? You say look

1 what you get through the formula, look what these
2 rates are.

3 PRESIDING JUDGE: One easy way to reduce
4 the burden is to change the time frame.

5 MR. GOLDSTEIN: Reduce the number of
6 shippers.

7 PRESIDING JUDGE: That, too.

8 MR. ROSENTHAL: I thought 35 was pretty
9 low. We were trying to get a spread of them. If
10 somebody tells me that it's significantly easier to
11 go to 30, 25, I don't know. This is a number that
12 we put out there, and the response was no, we're not
13 going to do it. But if folks are interested in
14 negotiating a number --

15 PRESIDING JUDGE: Let's try and narrow the
16 list. Do you want to narrow the list?

17 MR. ROSENTHAL: This is not -- we did not
18 put out this specific list until Thursday or Friday.
19 So I don't expect these folks to know whether, you
20 know -- as Mr. Rosenberg says, his company has 80
21 leases. Maybe we've hit all 35 within the 80.
22 Maybe we've hit five. We don't know that. That may
23 be my fault for not getting the list out earlier.

24 PRESIDING JUDGE: Some of these companies
25 are a lot bigger than others?

1 MR. ROSENTHAL: It's a spread of companies
2 that transport different types of products and tank
3 cars.

4 MR. ROSENBERG: From ARI's perspective, we
5 would much rather produce the model leases and,
6 frankly, develop information on the average lease
7 rates than have to go through this exercise, which
8 is going to be very burdensome. If you're
9 talking -- otherwise, if you're talking a sample,
10 then I would think 10 percent would be enough to
11 meet your needs.

12 MR. ROSENTHAL: 10 percent may be
13 different for a company that has 400 leases and
14 somebody who has 80. So I want to be sensitive to
15 everybody's --

16 MR. ROSENBERG: 10 percent not to exceed
17 the 35 or whatever.

18 PRESIDING JUDGE: We've got to narrow it
19 somehow.

20 MR. ROSENTHAL: I think it would be -- if
21 they want to give us a list of lessees, you know, we
22 can probably go through that. I don't want to agree
23 that they have to do 10 and find out that none of
24 the 10 are ARI's 80.

25 PRESIDING JUDGE: So you want them to come

1 back with a list to you?

2 MR. ROSENTHAL: If they can do that, we
3 can probably come up with --

4 PRESIDING JUDGE: And how many on the
5 list?

6 MR. ROSENTHAL: I would like them to list
7 whoever the lessees are, because we would like to --
8 if they're common ones, we might want to do it that
9 way. I kind of hate bidding against myself since I
10 opened with --

11 PRESIDING JUDGE: That's probably an
12 exercise they would like to do without you, of
13 course.

14 MR. ROSENTHAL: They probably should.

15 MR. GOLDSTEIN: Can I ask a slightly
16 different question? I think this is what Robert was
17 raising. If the two alternatives that are on the
18 table would be production of leases or getting at
19 what you're looking for in 13, average lease rates,
20 for a period of time to be determined, the reason
21 you want the leases is because you want the lease
22 rates?

23 MR. ROSENTHAL: There are two things. I
24 think it's getting closer to what Robert had
25 suggested. I think we're interested in the terms,

1 one, and two, we're interested in the rates.

2 PRESIDING JUDGE: Model lease and rates is
3 what he suggested.

4 MR. ROSENTHAL: I would be willing to go
5 just with number 12. I think we can get what we
6 need from number 12 and not from number 13 if we can
7 get all of number 12.

8 But as Robert suggested, there may be room
9 for compromising on number 12 if we get number 13.

10 MR. GOLDSTEIN: I think it may be far more
11 palatable to my client, if the alternatives are
12 those two, as opposed to three, which -- between the
13 two choices that would appear to be left other than
14 appealing, I suspect, I really don't know, that they
15 would be much more inclined to consider average
16 lease rates than to have to do both the burden of
17 having to find them and produce them, but also, you
18 know, the confidentiality issues associated with
19 disclosing them.

20 MR. ROSENTHAL: I think there's room for
21 compromise there. Yes, I agree.

22 If we go on that route, in talking
23 about -- there have been suggestions of what terms
24 might be relevant, which lease terms. In other
25 words, they would produce -- their leases have

1 different provisions that deal with repairs and who
2 is responsible and who pays mileage charges. There
3 may be a couple more terms I've seen in leases
4 beyond the ones that were listed in your collective
5 letter. But again, we would exclude the rate term.

6 To me, I'm willing to make that sort of
7 compromise for a set of model leases plus data.

8 PRESIDING JUDGE: You have to do
9 something.

10 MS. KENEDY: I just had a quick question,
11 your Honor.

12 PRESIDING JUDGE: Go ahead.

13 MS. KENEDY: If I understand what he's
14 saying, the claimed relevance of this is is that
15 he's trying to establish that the national tank car
16 allowance system or agreement is not really
17 reflecting the actual market rates that are being
18 charged, and not to sound like a broken record, but
19 we are not a part of that formula. So we
20 respectfully would ask to be excluded from anything,
21 because it would have no probative value on that
22 issue.

23 PRESIDING JUDGE: Yeah. Go ahead and put
24 it in the report. You're out.

25 Now, then, those who are in, let's figure

1 this out.

2 MR. WILCOX: I think, again, to raise the
3 relevance argument, although that ship has sailed, I
4 think the statement that there are so much variation
5 in these leases that you need a total of 35, I think
6 that's an overstatement. I think those leases are
7 very similar. NAFCAs, early on in this process, the
8 car owners who lease to Poet and Cargill, were
9 willing to stipulate that the leases that were given
10 to UP are representative of what everybody else
11 gets. Now, UP didn't believe us because these dealt
12 with agricultural or ethanol cars. They didn't deal
13 with crude oil cars. But putting my NAFCAs hat on, I
14 would say that the final number, to the extent they
15 go that route, should be substantially less than 35
16 shippers.

17 PRESIDING JUDGE: Like how many? What do
18 you think?

19 MR. WILCOX: I don't want to put a number
20 on it.

21 PRESIDING JUDGE: Well, should it be
22 representative -- you've got different types of
23 shippers here. Should that be taken into account?

24 MR. WILCOX: If I can base it on my
25 personal experience, I would say less than 10 would

1 do it. And I also would say that the burden to
2 individual companies and the car owners is not
3 really reflective of just having a name on the
4 sheet, because you've got, over that period of years
5 master contracts, riders, supplemental leases. The
6 documentation associated with each lease can be
7 quite extensive, and a lot of it is paper.

8 PRESIDING JUDGE: How do we get around
9 that problem?

10 MR. ROSENTHAL: As I said, again, if we
11 get what we are looking for in number 13, I do think
12 we can reduce the number of actual leases or sets.

13 I am still left uneasy about how much they
14 vary, because I'm relying on somebody to say this is
15 representative, which is why, again, we wanted to --
16 you know, pick a number.

17 Again, I appreciate the notion that maybe
18 they don't change, but what I'm working against is
19 like in the reply to the motion to dismiss, the
20 Complainants said "the terms of such leases may vary
21 from one lease to another and can change over time
22 as old leases expire and new leases begin."

23 So again, I worry that I'm trapped with
24 right, wrong. I just need to do it on my own.

25 MR. ROSENBERG: If I can make a suggestion

1 without the benefit of clearance from others or my
2 client, and relying, in part, on Mr. Wilcox's
3 comment and also general experience and a degree of
4 common sense. I would think that what he's really
5 interested in, such as what happens to any mileage
6 allowances that are received, that there's not going
7 to be a lot of variation. So perhaps it makes more
8 sense to let him see the master leases -- excuse me,
9 the generic exemplars first and see if there's much
10 variation between them. I suspect that there's not
11 going to be. And that can give him the confidence
12 to go forward.

13 I don't think that Complainants are going
14 to be arguing differences about the provisions that
15 are most of interest or most seemingly potentially
16 relevant for these issues here. I think it's a
17 problem that's got a lot of potential to solve
18 itself without imposing all the burdens that the
19 other approach entails.

20 MR. ROSENTHAL: Again, here's an issue --
21 we have struggled with the question of how to make
22 this lease provision production something that's
23 more manageable, recognizing that, you know, if it's
24 just exemplars, we end up relying on them saying,
25 you know, that's it.

1 PRESIDING JUDGE: You lose on the burden;
2 you win on the relevance. So keep that in mind.
3 We're not going to go all day on this.

4 MR. ROSENTHAL: Exactly. And I'm trying
5 to think of some way to minimize the burden to get
6 the exemplars. And it may just be reducing the
7 number of --

8 PRESIDING JUDGE: You better try
9 something, because this is the last couple, and I'm
10 just ready to shut it down. Let's do it.

11 MR. ROSENTHAL: If we can reduce the
12 number of shippers, again, I want to see their list,
13 but --

14 PRESIDING JUDGE: Mr. Wilcox said less
15 than 10. How about nine?

16 MR. ROSENTHAL: How about 10?

17 PRESIDING JUDGE: He said less than 10.

18 MR. ROSENTHAL: Okay. How about nine?

19 PRESIDING JUDGE: Nine, that's what I
20 said.

21 MR. ROSENTHAL: But that assumes that
22 we're getting number 13, that we're getting their
23 lease rates from some other form than actually
24 having to look at lease agreements. And then I
25 would be satisfied.

1 PRESIDING JUDGE: What do you think, guys,
2 gals, women, men? Whatever. You're out. Of course
3 you are.

4 MS. KENEDY: My tiny little victory of the
5 day.

6 PRESIDING JUDGE: Of course you are. Your
7 little happy dance over there.

8 MR. ROSENTHAL: For ARI, I would need to
9 go back to them. It's not going to be anything that
10 they are going to be thrilled to hear.

11 MR. GOLDSTEIN: And are we talking about
12 13 -- we're talking about 2001 to present?

13 MR. ROSENTHAL: Again, if somebody tells
14 me that their computer -- they've got all this data
15 but it's only since whatever --

16 MR. GOLDSTEIN: When you say you want
17 calculated average lease rates, that that is a
18 manual operation, that that data is not included --
19 based on the responses I'm getting on other
20 questions, that -- it's going to be the same
21 exercise we would have to do based on -- we would
22 have to go through the leases, do the work, get the
23 averages based on the paper leases.

24 MR. ROSENTHAL: I'm trying to come up with
25 some way --

1 PRESIDING JUDGE: So you're saying he can
2 do it just as easy as you can.

3 MR. ROSENTHAL: Then just give me the
4 leases, the 35 leases.

5 MR. GOLDSTEIN: Except I think my client's
6 preference would be that we want to keep the leases,
7 because we would prefer to keep them confidential,
8 and we would prefer to give them average lease
9 rates, because that's not disclosing the particular
10 lease rates per lessee.

11 PRESIDING JUDGE: So you would be willing
12 to do those calculations.

13 MR. GOLDSTEIN: I suspect that we would
14 prefer to do it. I guess I don't understand why you
15 need a 15-year period for that, to understand what
16 the variance is, if you're looking for a trend that
17 has something to do with item 55(c).

18 MR. ROSENTHAL: We can probably live with
19 the period that we lived with for cost data. So
20 2005, if that helps, which is narrower.

21 MR. GOLDSTEIN: I would raise the same
22 question with 11. Because it's not called out
23 specifically, it's 2001 forward.

24 MR. ROSENTHAL: Again, the first set of
25 stuff, number 11, from 2009. That was the date that

1 Railinc says it keeps.

2 PRESIDING JUDGE: So 11 is from 2009?

3 MR. ROSENTHAL: Yes. I would not ask for
4 earlier stuff than we're going to be able to get
5 from Railinc.

6 PRESIDING JUDGE: That's good. Thank you.

7 MR. ROSENBERG: Can I bring up another
8 matter which I should have brought up at the outset?
9 Can we ask that this transcript be designated as
10 confidential, since --

11 MR. ROSENTHAL: Highly confidential? Your
12 choice.

13 PRESIDING JUDGE: It's up to you folks.
14 It's whatever you want to do. Have you really
15 discussed anything confidential here?

16 MR. ROSENBERG: If we mark it highly
17 confidential, I'm not sure that, for example, our
18 clients can see it.

19 MR. ROSENTHAL: Fair enough.

20 PRESIDING JUDGE: But you want it
21 confidential?

22 MR. ROSENBERG: Yes, your Honor, and I
23 apologize for not so stating at the outset.

24 MR. ROSENTHAL: My understanding is that
25 the Board has been treating these discovery

1 conferences generally as confidential until things
2 are cleared.

3 MR. WILCOX: On the other hand, though,
4 the transcript from our hearing was filed by the
5 Board on their public Web site.

6 MR. ROSENTHAL: We had tried to get ahold
7 of it, and they said we're not releasing it until
8 we're sure there's nothing confidential in it.

9 MR. WILCOX: Okay. They didn't ask me.

10 PRESIDING JUDGE: I don't think they ask
11 anyone. I think they just review it.

12 MR. WILCOX: I didn't have a problem with
13 it, but I noticed that they went ahead and filed it.

14 PRESIDING JUDGE: What are we doing for 12
15 and 13? Let's memorialize it.

16 MR. ROSENTHAL: I think we can provide a
17 choice. Let's have 35 and go with that in number
18 11.

19 PRESIDING JUDGE: You mean number 12?

20 MR. ROSENTHAL: I'm sorry. Yes. Have 35
21 in 12 and get rid of 13, and we will calculate lease
22 rates. Or give us some calculated lease rates for
23 13, and we will go with nine leases in number 12.

24 PRESIDING JUDGE: All right.

25 MR. ROSENTHAL: Hopefully, they can agree

1 on one methodology that we can use.

2 PRESIDING JUDGE: Please do.

3 Mr. Rosenberg, you look perplexed.

4 MR. ROSENBERG: I wanted to check on the
5 list of 35 to see if it was -- it's alphabetical,
6 okay, as opposed to priority or size or something
7 like that.

8 MR. ROSENTHAL: I did it late at night. I
9 probably did it alphabetically, or tried to.

10 PRESIDING JUDGE: Number 29 is Goldberg
11 Enterprises. All right.

12 Have we had enough fun? Apparently not.

13 MR. GOLDSTEIN: I'm looking at some of
14 these. Do you know that these are the entities by
15 which -- for example, many of these are large
16 companies. Are they shipping under those names?

17 MR. ROSENTHAL: My understanding, those
18 names, I believe, were taken from Union Pacific's
19 records. We were looking at the names that were
20 appearing under -- I assume these are waybills.
21 They may be different -- to the extent you're
22 getting to the point that they may be somehow
23 different from the lessee names, you know, again, if
24 you tell us you can't figure out who it is or
25 something, we're willing to work with you. We don't

1 know who leases from you.

2 MR. GOLDSTEIN: Or the other thing I'm
3 thinking is, when you look at -- take any of them.
4 And they've got 25 subsidiaries, and we've got 400
5 lessees. I assume you will understand it and we
6 will be able to work that out if that turns out to
7 be the case.

8 MR. ROSENTHAL: Yes.

9 PRESIDING JUDGE: Yes; yes.

10 MR. ROSENTHAL: If there's
11 Exxon/ExxonMobil and you've got separate contracts
12 with all of them, we're not going to say they're all
13 Exxon.

14 PRESIDING JUDGE: When do you all want to
15 get your report back to me? No pressure, no rush.
16 Just tell me.

17 MR. GOLDSTEIN: Your Honor, we will do a
18 first draft. Two weeks for us to process it and get
19 it to wherever it's going to get to get it to him on
20 October 4.

21 PRESIDING JUDGE: Him?

22 MR. GOLDSTEIN: I apologize, your Honor.

23 PRESIDING JUDGE: That's all right. I'm
24 just pulling your lariat.

25 MR. GOLDSTEIN: To get it to Judge Dring?

1 MR. ROSENTHAL: We can certainly try to do
2 that.

3 MR. GOLDSTEIN: Does that work?

4 PRESIDING JUDGE: I'm not going anywhere.

5 MR. GOLDSTEIN: October 5th, your Honor?

6 PRESIDING JUDGE: That's fine.

7 I'm sure that works for Ms. Kenedy.

8 Need we stay much longer?

9 MR. DONOVAN: I have one other question
10 for Mr. Rosenthal. I contacted him 10 days ago
11 about depositions. I think they're potentially
12 dispositive of a great many issues in this case, and
13 I would like to get on with it so we don't have to
14 go through this kind of stuff too many more times.

15 I don't know whether you want me to serve
16 notices of depositions.

17 PRESIDING JUDGE: That's nice. That's not
18 my problem.

19 MR. DONOVAN: You don't have anything to
20 do with notices of depositions? You're going to
21 stay out of that?

22 PRESIDING JUDGE: I don't. I certainly
23 sympathize, though.

24 MR. DONOVAN: No, no, we will take care of
25 it.

1 PRESIDING JUDGE: Although in the Marines,
2 they had something scatological about where you find
3 sympathy in the dictionary.

4 MR. ROSENTHAL: Your Honor, not to -- I
5 think this disposes of the issues related to the
6 subpoena. What we still have are motions to compel
7 Poet and Cargill. We don't have to do it today.
8 I'm not going to insist on resolving it today. But
9 that remains out there.

10 Every time we come in here, we leave
11 saying, we've now get a sense of your Honor's
12 proclivities, and we will figure it out on our own.

13 PRESIDING JUDGE: I don't trust you
14 anymore.

15 MR. ROSENTHAL: I don't trust ourselves
16 anymore. I think we ought to set a date and get it
17 done with.

18 PRESIDING JUDGE: All right. Do I have
19 that up in my office somewhere?

20 MR. ROSENTHAL: You should. It will be
21 the -- there's a May 25th, 2016, motion to compel
22 discovery from individual Complainants. And then
23 there is a August 19th motion to compel responses to
24 third set of discovery requests to Cargill,
25 Incorporated.

1 PRESIDING JUDGE: Okay. When do we want
2 to do this, folks, the relevant folks?

3 MR. WILCOX: End of next week, something
4 like that?

5 PRESIDING JUDGE: Do you want to do it the
6 30th?

7 MR. MONROE: Your Honor, I cannot do the
8 30th.

9 PRESIDING JUDGE: What about the 29th?

10 MR. MONROE: I can do the 29th.

11 PRESIDING JUDGE: Anyone else?

12 MR. DONOVAN: I can't be here, your Honor,
13 but I don't think that's relevant. I'm going to be
14 with Judge Friedman that week.

15 MR. ROSENTHAL: The 29th is all right.

16 PRESIDING JUDGE: I will ask the board to
17 issue a scheduling order, but we will show up here
18 anyway, won't we?

19 MR. ROSENTHAL: Hope springs eternal, your
20 Honor.

21 MR. MORENO: Are we done with respect to
22 the motion to compel association members?

23 PRESIDING JUDGE: I said I wasn't going to
24 do that. A selected group is going to meet here on
25 Thursday, the 29th, at 10:00 a.m. Right?

1 MR. ROSENTHAL: Yes, your Honor.

2 PRESIDING JUDGE: Right.

3 Anything else?

4 Off the record.

5 (Whereupon, at 2:19 p.m., the oral
6 argument was concluded.)

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CERTIFICATE OF NOTARY PUBLIC & REPORTER

I, SARA WICK, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn; that the testimony of said witness was taken in shorthand and thereafter reduced to typewriting by me or under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

Notary Public in and for the

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Commission Expires: NOVEMBER 14, 2017

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