

Before the Surface Transportation Board

STB Docket No. EP 759**Demurrage Billing Requirements**

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**Reply Comments of the
American Chemistry Council, Corn Refiners Association, The Chlorine Institute, and
The Fertilizer Institute
on the Supplemental Notice of Proposed Rulemaking**

The American Chemistry Council, Corn Refiners Association, The Chlorine Institute, and The Fertilizer Institute (collectively, the “Joint Commenters”) hereby submit these reply comments in response to the opening comments of various railroads on the Supplemental Notice of Proposed Rulemaking the Surface Transportation Board served in the above-captioned proceeding on April 30, 2020 (the “SNPRM”).

Railroads generally oppose the SNPRM in favor of their current demurrage¹ billing practices, which obscure information that is critical to understanding demurrage charges. They collectively make two main assertions that the Board should reject. First, they claim providing original ETA and date and time of interchange—the most reliable metrics for identifying demurrage from carrier-caused bunching—is unnecessary and counterproductive. This objection is misplaced. Without this information, rail users lack any metric to signal that carrier-caused bunching is responsible for demurrage. Also, railroads have based this objection on faulty claims about the irrelevance of these metrics and the impact of providing them. Second, railroads assert that they should have the discretion to determine what demurrage billing information to provide and how they will provide it. Other than allowing railroads to make the minimum billing

¹ In these comments, demurrage includes private car storage. *See* SNPRM at 1-2 n.2.

information proposed under the Notice of Proposed Rulemaking in this proceeding (the “NPRM”)² and SNPRM available in a single readily-accessible location on railroad websites, this assertion should be rejected. Providing railroads with such broad discretion would allow them to perpetuate their existing billing practices, which make understanding demurrage charges overly burdensome and allow railroads to avoid accountability for demurrage charges arising from their own actions.

Only the Canadian National Railway Company (“CN”) specifically objects to providing ordered-in date and time, providing billing-cycle information, and making data available in machine-readable form. The Board should reject CN’s objections to providing ordered-in date and time and providing billing-cycle information because the benefits of this information, which are explained in Joint Commenters’ opening comments,³ far outweigh CN’s concerns. The Board should also reject CN’s objection to providing machine-readable data. CN claims that requiring machine-readable data is overly prescriptive,⁴ but railroads have a wide range of options for providing machine-readable data.

I. Railroad objections to providing original ETA and date and time of interchange should be rejected.

Railroads generally claim that providing original ETA and date and time of interchange is unnecessary and will have adverse consequences.⁵ These objections are misplaced. Original ETA and date and time of interchange allow rail users to more easily identify when railroads

² Demurrage Billing Requirements, EP 759 (STB served Oct. 7, 2019).

³ Joint Opening (ACC, CI, CRA, TFI) 2-3.

⁴ CN Opening 11.

⁵ *E.g.*, BNSF Opening 16-18; CN Opening 8-10; CP Opening 4-6; NS Opening 7-8; UP Opening 3-4.

improperly assess demurrage due to bunching that is beyond the shipper's or receiver's reasonable control.

A. Original ETA and date and time of interchange are necessary and appropriate to identify demurrage that arises from circumstances beyond the shipper's and receiver's reasonable control.

Original ETA and interchange information facilitate the ability of rail users to better identify inappropriate demurrage charges. Specifically, they enable a rail user to more easily identify situations when demurrage may arise from bunching or other delay events that the shipper and receiver could not reasonably avoid. In fact, no other metrics alert users to the potential that demurrage arises from a delay, let alone a carrier-caused delay.

Demurrage charges for rail-asset use arising from railroad-caused bunching or other delays beyond the shipper's or receiver's reasonable control, are inappropriate. The Board's policy statement makes clear that demurrage "generally should not be assessed in circumstances beyond the shipper's or receiver's reasonable control."⁶ Demurrage is a penalty intended to incentivize the efficient use of rail assets. It does not achieve this purpose when it results from carrier actions such as bunching. Thus, to avoid being unfairly penalized for carrier-caused bunching and other transit-delay issues that are outside their control, rail users must have a mechanism to identify circumstances when transit delays may be the cause of demurrage.

Original ETA allows rail users to identify when a transit delay beyond the shipper's or receiver's control may have resulted in demurrage and the extent to which demurrage should be offset by credits. It specifies when a car should arrive at its destination based on the railroad's best estimate of how the car will move under reasonable dispatch. A car's arrival after its

⁶ See Policy Statement on Demurrage and Accessorial Rules and Charges, EP 757, slip op. at 21 (STB served Apr. 30, 2020).

original ETA, although not dispositive evidence of carrier-caused bunching, identifies situations when further investigation is warranted to determine the cause of the delay.

For these reasons, original ETA is helpful for addressing inappropriate demurrage charges arising from bunching. Bunching occurs when cars that are tendered separately for transportation are delivered at the same time or at intervals shorter than those at which they were tendered. It can be a normal transportation occurrence, such as where the cars were tendered at intervals that are shorter than the intervals at which the carrier normally switches cars at the origin or switching locations along the route. But it also can result from a missed switch or other transit delay that causes cars to stall at one or more locations, enabling cars behind them to catch up. In the latter situation, the bunching would be outside the reasonable control of the shipper or receiver, and thus, assessing demurrage for resulting rail-asset use would be inappropriate. Original ETA allows rail users to distinguish between these two bunching scenarios so they can identify when bunching should not result in demurrage charges.

For joint-line movements, rail users also need date and time of interchange to capture bunching that occurs upstream of the delivering carrier. In these situations, the original ETA would not indicate a delay because it only applies to the movement over the delivering carrier's line. Date and time of interchange, however, would show the intervals at which the upstream carrier handed off the cars to the delivering carrier and, thus, whether a delay may have occurred upstream.

Absent original ETA and date and time of interchange, rail users cannot readily identify bunching and other delay events that should not result in demurrage. Although CN asserts that the car arrival times are the only relevant data for determining whether demurrage is appropriate

in a bunching situation,⁷ this data does not indicate whether the bunching may have arisen from a transit issue outside the shipper or receiver's reasonable control. Without anything to indicate that bunching was a normal transit occurrence, a rail user would not be able to determine whether a demurrage charge arising from the bunching is appropriate.

Moreover, the tools railroads claim they provide shippers and receivers to adjust their shipment pipeline based on changing transit conditions are no substitute for original ETA and date and time of interchange.⁸ The estimated arrival times that railroads provide through these tools while a car is in transit may not be updated often enough for a rail user to make pipeline adjustments. For example, Norfolk Southern Railway Company does not update a car's ETA while it is dwelling in a yard, which makes identifying a delay in time to address it impossible. Moreover, even if these tools were accurate, they would only enable rail users to see bunching as it occurs, which typically is too late to prevent it from happening. Also, because the tools focus on real-time information, they would not provide historical estimated time of arrival data that a rail user would need to identify whether cars are being delayed. Historical data is especially important where minor delays occur frequently throughout a car's transit. In this scenario, each individual delay may be too minor to warrant an adjustment to a shipment pipeline, but the cumulative delay over days or weeks would have a significant impact on the pipeline.

Even with these tools that railroads claim are sufficient for rail users to make adjustments to their shipment pipelines to account for bunching, rail users have limited, if any, options to avoid demurrage from a bunching event. They cannot simply increase or decrease inputs to

⁷ CN Opening 9.

⁸ See BNSF Opening 3; CP Opening 3; NS Opening 2.

accommodate bunched cars, as Canadian Pacific (“CP”) suggests.⁹ Production adjustments are complicated processes that have far-reaching business consequences. Rail users also cannot easily avoid demurrage from bunching by diverting cars. First, they would need a place to divert the cars. Second, precision scheduled railroading (“PSR”) has limited diversion opportunities because, under PSR, railroads have eliminated interchange locations and adopted blocking techniques that make removing cars from a train difficult. Additionally, rail users will incur fees to divert the cars, which could exceed the demurrage that the railroad would assess.

To be clear, original ETA and date and time of interchange would not be dispositive of whether a demurrage charge arising from bunching is appropriate. But they would be the best and only information that rail users would have to readily identify demurrage that arises beyond their control due to bunching. And they would allow rail users and railroads to focus their resources on addressing demurrage charges that are likely inappropriate. Depriving rail users of this information, either by making it hard to find or unavailable historically, leaves rail users guessing about whether demurrage charges are inappropriate and should be challenged.

B. Providing original ETA and date and time of interchange will not have the consequences that railroads claim.

Railroads advance various claims that original ETA and date and time of interchange will have adverse consequences. Those consequences are overstated.

A key railroad objection to providing original ETA and date and time of interchange is that it will effectively create a transit-time guarantee.¹⁰ But there is no basis for such a claim. First, original ETA is by definition an estimate. Second, railroads make clear in their contracts

⁹ See CP Opening 3.

¹⁰ See BNSF Opening 16-17; CN Opening 2; CP Opening 5; UP Opening 4.

and tariffs that they are not responsible for delay.¹¹ Third, scheduled arrival times are commonplace in transportation, but few are entitled to damages when their flight, bus, train, or ferry arrives late. And few would equate a railroad's original ETA with a parcel carrier's guaranteed delivery time, especially considering freight rail's poor service reliability. Moreover, the Board can address this concern by stating in its rule that original ETA is required for demurrage purposes only and not as a transit guarantee. Railroads also are free to make similar statements in their tariffs.

Railroads also incorrectly assert that providing this information will lead to frivolous claims.¹² As explained above, this information would help rail users better evaluate a demurrage charge. Without it, rail users would not be able to identify potentially valid claims to challenge. Moreover, even if rail users begin using original ETA to challenge demurrage on shipments that do not arrive precisely on time, as CP suggests,¹³ their claims are not necessarily frivolous. If the railroad caused the shipment to arrive late, even by a day, it should not be entitled to penalize the rail user with demurrage.

CP asserts that providing this information would cause rail users to focus on challenging demurrage charges rather than avoiding them.¹⁴ This assumes that rail users would prefer incurring the time and expense of challenging demurrage charges over avoiding them in the first place. Also, this assertion overlooks the purpose of this information: to identify unavoidable

¹¹ *E.g.*, CSXT 8100 §§ 1.2.2, 7.8 (eff. Apr. 1, 2020); NS Conditions of Carriage #1-E, Rule 290(1)(c) (eff. Jan. 1, 2020); UP 1000-series Item § F(2)(e)(iii) (eff. Mar. 1, 2019).

¹² See CN Opening 9-10; CP Opening 4.

¹³ CP Opening 4.

¹⁴ CP Opening 3.

demurrage. Depriving rail users of this information would help railroads penalize rail users with demurrage charges that the users could not avoid.

In addition, CN suggests that railroads may cushion any original ETAs they have to provide.¹⁵ But a railroad will likely have difficulty addressing scrutiny of original ETAs that noticeably exceed its transit time performance. Also, this suggestion is alarming. It demonstrates that carriers are contemplating how to game the system to preserve demurrage as a profit center instead of an efficiency incentive. And it also suggests that carriers do not want to be accountable for poor service.

II. The Board should require Railroads to make certain minimum information necessary to understand demurrage charges readily accessible in one place.

The Board's proposals to require railroads to make certain minimum information necessary to understand demurrage charges and credits readily accessible to rail users in one place is a common-sense requirement. It would address existing railroad demurrage billing practices, which make understanding demurrage charges and credits burdensome by obscuring critical information for determining whether these items are appropriate. It also would provide a clear, but flexible standard for providing demurrage information.

A. Existing railroad demurrage billing practices make understanding demurrage charges burdensome.

Railroads do not make information necessary to assess demurrage charges and credits readily accessible. To the extent this information is available, it is not centrally located on their websites or in their invoices. While some of this information may be collocated on a railroad's website, rail users typically must follow multiple hyperlinks to access it. Also, railroads tend to

¹⁵ CN Opening 9-10.

provide this information on a car-specific basis, thereby requiring iterative data-gathering processes to assess a single demurrage invoice.

Railroad web tools also fail to clearly and accurately convey data relevant to demurrage. First, the information a railroad provides may differ between its web tools. For example, Union Pacific’s (“UP’s”) pipeline management tool, which UP promotes for managing dwell and preventing demurrage, and its Chargeable Events System (“CES”), which provides demurrage invoices, frequently report different values for the same facts. Second, railroad web tools do not accurately reflect operations, especially at complex facilities. For example, CN’s web tool reports cars as being constructively placed at a complex serving yard even though the cars have not been cut out of the arriving train and positioned at the yard for the switching crew to deliver. Despite rail users working with CN via email to track cars that are truly available for delivery distinct from what CN’s web system reports, CN still invoices demurrage based on the constructive placement date in its system. Third, some web tools are not updated in real time. For example, CSXT’s web tools have a two-week reporting lag for credits related to open-gate demurrage despite CSXT generating open-gate demurrage invoices weekly. This prevents rail users from reviewing demurrage charges as they are assessed, making the review burdensome.

Railroad comments do not deny these shortcomings. CSXT expressly acknowledges that rail users must gather the proposed invoicing elements under the NPRM and SNPRM—information that is minimally necessary to assess demurrage charges—from multiple locations on its website.¹⁶ And no other railroad commenter indicated that this information is available in a single location on their website. Also, while many railroads claim they make original ETA available, they acknowledge that it is available only in the sense that they provide current

¹⁶ CSXT Opening 6.

estimated times of arrival throughout the car's movement, but a rail user must search through multiple reports to find it or make a special request for it.¹⁷ In addition, several railroads do not preserve original ETA information, or only retain it for a brief period of time.

Much of the railroads' evidence that they provide user-friendly access to information fails to address the key concerns of rail users. For example, BNSF Railway Company explains in detail various tools for monitoring real-time car-movement information and car dwell at destinations.¹⁸ But its explanation fails to address how these tools assist customers when they are reviewing demurrage invoices *after* a movement. CSXT explains that it provides training on how to obtain data from its website but overlooks that no amount of training eliminates the burden of gathering information from multiple locations or the time it takes to access information behind multiple links.¹⁹ UP explains that it has taken measures to address customer complaints about the complexity of its invoices.²⁰ But according to the Joint Commenters' members, UP's invoices remain confusing compared to those of many other railroads.

By failing to make demurrage information readily accessible, railroads place unfair burdens on rail users. They prevent rail users from understanding demurrage invoices unless the users incur the time and expense of collecting basic information about the invoiced charges. They also require users to incur excessive time and expense to challenge charges that are invalid. According to Joint Commenters' members, railroads expect rail users to prove that a demurrage

¹⁷ CN Opening 8; CP Opening 5; CSXT Opening 3 n.8; BNSF Opening 16-17; UP Opening 4 n.9.

¹⁸ BNSF Opening 3-14.

¹⁹ CSXT Opening 6 n.13.

²⁰ UP Opening, V.S. of Diana Prauner 2.

charge is not appropriate.²¹ This guilty until proven innocent approach places an enormous burden on rail users, especially since much of the information necessary to satisfy the railroad is in the railroad's hands and, if the railroad makes it available, must be collected from multiple different locations on the railroad's website. In fact, Joint Commenters' have received member feedback stating that, before a railroad accepts a claim that a demurrage charge is not appropriate, the rail user typically must conduct extensive research and endure multiple rejections of the claim by the railroad.

The burden of obtaining demurrage information from railroads is especially high for rail users who experience bunching. These users typically must reconstruct the bunching event for the railroad. Moreover, where the bunching impacts an open-gate facility, rail users also must reconstruct the order that the cars arrived and the order that the carrier chose to place them because the triggering bunching event has cascading effects until the bunched cars can be cleared out of the system. At these facilities, the carrier selects the cars to deliver as bunching clears and carriers often deliver cars outside the order in which they arrived, which can lead to unnecessary demurrage charges cascading from the bunching event. Also, carriers that provide separate, non-interchangeable credits for inbound loaded cars and inbound empty cars, like UP,²² have a strong incentive to deliver bunched cars at an open-gate facility in an order that causes credits for one type of car to go unused while the other car type accrues demurrage.

The burden of obtaining demurrage information from railroads ultimately reduces railroad accountability for their role in demurrage events and for improper charges. It effectively prevents rail users from systematically auditing demurrage invoices, which reduces the

²¹ Because the value of an *individual* demurrage charge typically is low compared to the cost of bringing a case before the Board, carriers can set high burdens for claims.

²² Tariff UP 6004-C, Item 9890-X (Apr. 1, 2020).

likelihood of legitimate claims. It also discourages rail users from making claims unless an improper demurrage assessment is egregious. This limited accountability enables railroads to assess demurrage even where a demurrage charge cannot achieve its purpose of incentivizing efficient use of rail assets.

B. Requiring railroads to make certain minimum information necessary to understand demurrage charges readily available in one location is sensible.

A requirement that railroads provide rail users in a single readily-accessible location certain minimum information necessary to determine the accuracy of their demurrage charges is sensible. A basic function of invoices is to clearly show how charges were calculated, the data used to make the calculation, and any data explaining how credits were calculated. This transparency promotes proper billing, efficient resolution of errors, and better overall service.

The minimum data elements that the Board has proposed for demurrage invoices are appropriate. These data elements are the *minimum* necessary to understand a demurrage charge. Because demurrage is a charge for asset use, calculating it requires identifying the asset, when it was used, and any credits that should apply to the use. The Board's proposed data elements are critical to each of these aspects of the demurrage calculation. They include car marks of the railcar involved, which identifies the rail asset used or the railcar that used the asset. They include basic shipment data related to the use of the rail asset, which is essential for linking the use to the rail user and identifying the applicable demurrage rules. They also include all the applicable shipment events that identify when the asset use occurred (i.e., the events that start and stop the demurrage clock). And they include original ETA and date and time of interchange, which are the most reliable indicators of whether and the extent to which credits should be awarded for bunching and other delay events.

Contrary to railroad claims, a requirement to provide this data in a central location, whether it be an invoice or a downloadable machine-readable file, will not stifle innovation.²³ It would result in more innovative and efficient invoicing than the railroads' current invoicing methods, which require rail users to piece information together from both invoices and railroad websites or from multiple locations on a railroad's website. In addition, this requirement does not prescribe the format of invoices, limit how railroads can display demurrage information on their websites, or limit the tools railroads can make available on their websites for viewing and analyzing demurrage information. It also does not prohibit railroads from developing better metrics for assessing demurrage or identifying when credits are due. And it does not require railroads to provide irrelevant information, since the data elements are only required if they are applicable to the demurrage event. All it does is specify that certain minimum information about the cars on a demurrage invoice must be provided in a single location that is readily accessible to the rail user in a machine-readable format. How a carrier accomplishes that is left to its discretion.

Providing this data also will not lead to drawn out disputes over technical invoicing issues,²⁴ unless the railroad fails to correct them quickly. If a demurrage assessment is appropriate, the rail user will ultimately be responsible for it. Since disputes are costly for rail users, the likelihood that a rail user would dispute an appropriate demurrage charge over a technical invoicing issue is low. Moreover, the Board can deny such claims when it is clear that the carrier acted in good faith.

²³ CP Opening 6; CSXT Opening 4; NS Opening 1.

²⁴ See CN Opening 5; CSXT Opening 4.

A requirement to provide this data in a central location also will not result in overcluttered invoices. For example, the sample invoice CN included in its comments shows room for at least two additional columns, which appears to be all that would be necessary for CN to include the billing information that the Board proposed in the NPRM and SNPRM.²⁵

While the requirement may result in costs to configure railroad invoicing and web platforms,²⁶ this should not discourage the Board from adopting the rule. Any consideration of the rule's cost must account for the revenue railroads unfairly extract from rail users through their existing demurrage billing practices. Moreover, if railroads want to assess demurrage, requiring them provide support for their demurrage charges in a central location is fair. Also, railroads should be able to direct the penalty element of their demurrage revenue toward compliance without impacting their operations.

The Board's demurrage billing proposal to require railroads to provide in one place certain minimum information necessary for a rail user to understand demurrage charges will benefit railroads and rail users. By making demurrage invoices more understandable, this proposal promotes railroad accountability when railroads cause inefficient use of their own assets. This accountability encourages railroads to operate more reliably and efficiently, which reduces costs for railroads, allows rail users to operate leaner rail pipelines, and reduces demurrage events.

C. A vague performance-based standard is not appropriate.

The Board should reject calls for a vague performance-based standard. CN and CSXT both urge the Board to adopt a performance-based standard that merely requires railroads to

²⁵ CN Opening figure 3.

²⁶ CSXT Opening 6-8.

provide rail users access to sufficient information to understand the basis for the invoice and dispute the charges.²⁷ Under this standard, railroads could scatter this information about their websites and provide the data in a format that limits use of the data. This standard effectively is no standard at all.

This standard would make railroads the gatekeepers of the information needed to assess the validity of their demurrage charges. The initial determination of what information is necessary to understand and challenge demurrage charges and how to provide it will be made by each railroad. If the railroad fails to make sufficient information readily accessible, a legal action would need to be brought to enforce the standard. But since the standard is a performance standard, the railroad could not be ordered to make specific changes to achieve compliance.

The standard's subjective nature also discourages proceedings to enforce compliance with the standard. Filing a petition or complaint to enforce a railroad's compliance would require significant resources. And with a subjective standard, the likelihood of success would be hard to predict except in the most egregious circumstances. Thus, enforcement of this standard will be limited to egregious cases.

Also, information withheld by a railroad under this standard, even in good faith, may cause a rail user to incorrectly believe that it understands a charge or that a dispute is not warranted. For example, if a railroad does not provide any metric to identify transit delay, a rail user may incorrectly assume that bunching was a normal incidence of the transportation rather than a missed switch by the carrier. In these circumstances, the CN/CSXT performance standard would be useless.

²⁷ CN Opening 4-8; CSXT Opening 5.

The standard also would not be helpful if the railroad provided all the required information but made it practically inaccessible. The standard makes clear that railroads can provide information in any location they want and by any means they want. It thus would allow railroads to split their data among multiple locations, as they do today, which makes systematic invoice audits impractical. It also would allow railroads to provide the data in an electronic format that limits its usability, rather than in machine-readable format.

Ensuring compliance with the standard would require extensive measuring and monitoring of carrier performance by the Board. Because carriers could achieve compliance in myriad ways, the Board would need to assess each carrier's performance using a case-by-case approach. It would also need to continually monitor changes in the way each carrier provides information so that it can revise its case-by-case assessment of compliance. This places an incredible burden on the Board.

The Board's proposed rule avoids these issues with CN/CSXT's performance standard while providing railroads with flexibility to innovate. As a minimum standard, it assures that basic information necessary to understand and dispute demurrage charges will be readily accessible to rail users while allowing railroads to provide additional data and devise additional ways to convey that data. Also, by being clear and objective, the Board's proposal promotes compliance and makes enforcement easier and less burdensome. The Board's proposal thus strikes an appropriate balance between providing railroads flexibility and ensuring rail users have adequate, readily-accessible information to assess demurrage charges.

III. Railroad actions to ensure demurrage charges are accurate and warranted are not enough.

Although railroads claim they have processes in place to help ensure demurrage charges are accurate and warranted, these processes typically are not enough.

According to Joint Commenters' members, many invoicing errors arise from incorrect internal reporting by railroad crews. Railroad crews manually report various data metrics used when calculating a demurrage charge. These metrics typically relate to crew performance, such as metrics about car placement, and crews are under pressure by railroad management to report strong operating performance, especially to support railroad claims about the benefits of PSR. Thus, crews frequently report cars being available for delivery earlier than they actually are available, which results in unwarranted demurrage charges. To address this issue, railroads must employ measures to ensure accurate crew reporting.

Specific examples from certain railroads further demonstrate that railroads are not doing enough to ensure accurate and warranted demurrage charges. As explained above, CN's invoices show cars as having been constructively placed at a serving yard when the cars are not available for delivery. Although CN personnel exchange emails with rail users to keep them apprised of cars that actually are available, CN has refused to adopt an internal reporting mechanism to ensure that invoices reflect the actual data in these emails.

Feedback from Joint Commenters' members indicates that CSXT has a bunching analyzer program that can help determine whether bunching occurred and the extent to which credits should be awarded for the bunching. But CSXT does not use this program to verify the accuracy of its invoices before sending them to rail users. Instead, it uses the program only *after* a rail user has disputed an invoiced demurrage charge.

Also, as explained above, UP's web tools typically provide different values for the same facts. According to feedback from Joint Commenters' members, UP generally is unable to explain these discrepancies but tells its customer that UP's manual review process will ensure accuracy. UP should address these issues by ensuring its web tools capture correct data rather

than by asking rail users to hope that UP catches errors before it sends demurrage invoices to the rail users.

IV. Conclusion.

As explained above and in Joint Commenters' other comments in this proceeding, the Board's proposed demurrage billing requirements are necessary and appropriate to allow rail users to understand demurrage charges and identify when they are inappropriate. Joint Commenters respectfully request that the Board adopt a final demurrage billing rule consistent with their comments in this proceeding.

Respectfully submitted,

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