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SURFACE TRANSPORTATION BOARD

HEARING ON CSX/PAN AM MERGER

APPLICATION REVIEW

DOCKET NO. FD 36472 et al

PUBLIC HEARING

Friday, January 14, 2022 -- Day Two

9:30 a.m.

Via Zoom

The above-entitled matter came on, pursuant to notice, at 9:30 a.m., Chairman Martin Oberman presiding.

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

2 9:30 a.m.

3 CHAIRMAN OBERMAN: Good morning everyone.
4 I hope everybody is on. We are starting. It is 9:35
5 Eastern Time. And welcome to the second day of
6 hearings on the applications of CSXT and others to
7 acquire Pan Am Railways and the other various
8 requests we have received as a part of this whole
9 proceeding. I'm not going to take that I think
10 everybody knows what they are.

11 And before we begin, which we're going to
12 do promptly, we have the couple of reminders.
13 Remember to turn your cell phones off. Remember to
14 keep yourself muted and off camera except when your
15 panel is up for presentation. And I just want to
16 take a moment to give a shout out to the IT team that
17 has put this virtual hearing together, and
18 particularly to Matt Cross who I think is our
19 principal director and producer, or whatever the
20 title is.

21 But to me yesterday went remarkably
22 smoothly from the technical and virtual point of

1 view. I think we're all pleasantly not surprised,
2 but delighted that this is working so well, so great
3 work, keep it up. It will be another good day. We
4 were going to begin with Panel V this morning, but I
5 see we have been joined by Senator O'Connor from
6 Massachusetts, who was unable to stay as long as we
7 needed him to stay. I assume he had other important
8 obligations.

9 So I think with respect to Senator
10 O'Connor, I'm going to ask him to step up first and
11 make his remarks, and then we'll go into Panel V, so
12 we don't keep the Senator waiting another day or
13 however long this hearing is going to last. So with
14 everybody's permission I'm going to call on Senator
15 O'Connor. Hearing no objection you're on.

16 SENATOR O'CONNOR: Thank you so much, and
17 I appreciate the consideration of being taken out of
18 order. Good morning everybody, and thank you for
19 having me. I'm here to testify in support of the CSX
20 Transportation's application to the Surface
21 Transportation Board to acquire Pan Am Systems and
22 its subsidiaries.

1 As the Senator for portions of the
2 Plymouth and Norfolk Counties in Massachusetts, I
3 believe that in this acquisition the interest of my
4 constituents on the south shore will be met. Many
5 of my constituents, especially with the expansion of
6 the Greenbush Commuter Rail and other commuter rail
7 services in my district, really utilize this form of
8 transportation to get to and from Boston.

9 And this proposal, in my opinion, opens
10 doors to enhancing that commuter experience, as well
11 as the infrastructure itself. While Pan Am has
12 served Massachusetts well, an approved merger would
13 mean we can implement CSX's best practices to make
14 freight and passenger rail more efficient, safe, and
15 competitive.

16 CSX's strong record of efficiency and
17 compatibility with passenger rail services will
18 significantly benefit residents and businesses here
19 on the south shore. And over the next five years I
20 was encouraged by CSX's plan to inject a lot of
21 capital into Pan Am's existing network to upgrade and
22 modernize the infrastructure where I think that Pan

1 Am may lack the resources to do quite the investment
2 that CSX has laid out.

3 These investments will allow for increased
4 competitiveness, better quality of service, and much
5 needed maintenance on the rail network. CSX has
6 achieved the 93.6 contract on time performance level
7 in its interoperability with passenger rail, and they
8 plan to increase the track speeds from 25, excuse me
9 225 from 10 miles an hour, which I think will just
10 streamline the entire rail transportation process in
11 the region.

12 For the reasons that I've stated, I
13 respectfully request and appreciate your review of
14 this application, and I would hope that upon review
15 you would potentially see a favorable opportunity
16 for this to go through. Again, I thank you for the
17 opportunity to be able to be taken out of order, and
18 I wish everybody the best as you continue the second
19 day of this public hearing, and for everyone have a
20 great weekend as well.

21 CHAIRMAN OBERMAN: Thank you much Senator.
22 I appreciate your time and commitment to come and

1 speak to us. Does anybody have questions? Karen
2 Hedlund. Unmute your Karen.

3 BOARD MEMBER HEDLUND: I did. Senator,
4 thank you very much. I just wanted to note for the
5 rest of the panelists that Plymouth County is the
6 most historic part of the Commonwealth of
7 Massachusetts, which is where I lived -- not in
8 Plymouth County. I lived in Cambridge for five
9 years, but you might wonder what the colonists would
10 have thought about where we are today.

11 SENATOR O'CONNOR: I'm sure they would be
12 very surprised in many aspects, both good and bad.

13 BOARD MEMBER HEDLUND: Thank you.

14 CHAIRMAN OBERMAN: You may suggest that
15 Paul Revere could have taken the train to warn
16 everybody? Anyone else have questions for Senator
17 O'Connor? All right. Senator thank you very much,
18 much appreciate it. Let us then move right into
19 Panel V, so everybody knows who this is. It consists
20 of the National Rail Passenger Corporation which we
21 all know and love as Amtrak.

22 Dennis Newman, the Commonwealth of

1 Massachusetts DOT, and the MBTA represented by Robert
2 Wimbish, and CP, represented by James Clements and
3 David Meyer. So if you will all step up to the
4 plate we will begin with Dennis.

5 MR. NEWMAN: Thank you very much.

6 Chairman Oberman, Vice Chairman Primus, Board members
7 Fuchs, Hedlund and Schultz, good morning to all. My
8 name is Dennis Newman, and I am Amtrak's Executive
9 Vice President of Strategy and Planning. I
10 appreciate the opportunity to appear before you today
11 to talk about Amtrak's position on CSX's proposed
12 acquisition of Pan Am.

13 So in the comments and final brief Amtrak
14 submitted, we asked the Board to impose seven
15 conditions on the acquisition if it approved it.
16 Those conditions were intended to ensure that on time
17 performance of Amtrak trains on Pan Am and Pan Am
18 Southern lines, and on CSX's Albany to Worcester line
19 was not degraded as a result of the merger.

20 That the merger would not inhibit the
21 addition, expansion and improvement of Amtrak
22 services, and that CSX would fulfill its statutory

1 and contractual obligations to Amtrak, and adhere to
2 the representations about Amtrak's services that it
3 has made in this proceeding.

4 Now late Wednesday CSX submitted a letter
5 to the Board from its counsel. The letter requested
6 that the Board impose as conditions on its approval
7 of the Pan Am acquisition, six of the seven
8 conditions Amtrak has requested. Amtrak is gratified
9 by CSX's agreement to these conditions.

10 It sets the stage for advancing the long
11 held vision of Amtrak and its state partners to
12 expand and improve Amtrak's service in Northern New
13 England, and along the east/west corridor from Boston
14 to Albany. Thanks to the Biden Administration and
15 the funding Congress has recently provided for
16 investment in inner city passenger rail, that vision
17 is no longer just a dream.

18 Amtrak is committed to making it a
19 reality, and in doing so with the cooperation and
20 collaboration of CSX, which it has committed to in
21 this proceeding. Now the other condition Amtrak
22 requested, condition number six, was that Amtrak be

1 allowed to operate the Albany, New York to
2 Pittsfield, Massachusetts, Berkshire Flyer over a 40
3 mile segment of CSX's Albany to Worcester line, and
4 permitting these Amtrak trains to change hands at the
5 Pittsfield station on track one.

6 The Berkshire Flyer is proposed as a
7 seasonable two day a week extension of an existing
8 Amtrak train that would provide an alternative to
9 driving for weekend visitors to the Berkshires. CSX
10 did not agree to imposition of the Berkshire Flyer
11 condition, and rather it appended to its letter to
12 the Board a letter from Mr. Foote indicating that CSX
13 would allow operation of the Berkshire Flyer in 2022
14 on weekends between Memorial Day and Columbus Day,
15 but that CSX would require a commitment for a 1,000
16 foot station track at Pittsfield.

17 Now Amtrak welcomes CSX's proposal to
18 allow for operation of the Berkshire Flyer. As the
19 letter from Mr. Foote indicates, Amtrak and CSX would
20 need to agree upon terms for the initial operation of
21 the Berkshire Flyer in 2022 or 2023 as a special
22 train.

1 Amtrak will also need to evaluate,
2 together with the services sponsored, the
3 Massachusetts Department of Transportation, CSX's
4 request for a commitment to construction of an
5 additional track at Pittsfield for sustained
6 operation of the service, and the operating plan and
7 costs associated with CSX's proposal.

8 Now in particular, we will need CSX to
9 explain why it believes capital investment is
10 necessary for Amtrak to operate 80 passenger trains a
11 year over a 40 miles segment of CSX's Albany to
12 Worcester line, when CSX has agreed to allow Norfolk
13 Southern to operate 730 nearly two mile long trains a
14 year over the entire 160 mile line without any
15 capital investment or capacity stake.

16 But we already reached out to CSX's NRTC
17 officer, CSX's designated point of contact, to gather
18 additional information regarding CSX's proposal for
19 the Berkshire Flyer. Now we hope that it will be
20 possible for Amtrak and CSX to expeditiously reach an
21 agreement that will enable the operation of the
22 Berkshire Flyer, and make it unnecessary for the

1 Board to take further action to address Amtrak's
2 proposed condition.

3 We will advise the Board if an agreement
4 is reached. Now if Amtrak and CSX can reach such an
5 agreement promptly, Amtrak is prepared to withdraw
6 its opposition to CSX through this proposed
7 acquisition of Pan Am.

8 I would like to briefly address three
9 things CSX's representatives said during their
10 presentations. First, we were surprised to hear Mr.
11 Foote raise safety as a major concern in the Gulf
12 Coast matter, but we will address that contention in
13 more detail in the Gulf Coast proceeding.

14 Second, CSX's claim that it had achieved
15 over 90 percent on time performance on Amtrak routes
16 is based upon a provision in CSX's contract with
17 Amtrak that determines eligibility for incentive
18 payments.

19 It is not based on actual on time
20 performance, or the customer experience, and it has
21 no relationship to the on time performance metric FRA
22 adopted in its recent rulemaking under Section 207 of

1 the Passenger Rail Investment and Improvement Act.
2 That metric is customer on time performance -- the
3 percentage of customers who arrive at their
4 destination on schedule within an allowance.

5 Of the routes Amtrak operates over CSX,
6 the majority -- about 60 percent, did not meet the
7 statutory standard of 80 percent on time performance
8 under the Section 207 metric for the past two
9 consecutive quarters.

10 And then finally Mr. Boychuk's statement
11 that the planned installation of positive train
12 control on the route of Amtrak's downeaster would not
13 have happened "but for CSX's acquisition of Pan Am,"
14 is incorrect. Amtrak had been actively planning for
15 the installation of PTC on the Pan Am portion of the
16 downeaster route before CSX announced its intention
17 to acquire Pan Am.

18 And Amtrak, not CSX, will primarily be
19 funding the installation cost. I also wanted to
20 clarify one aspect of the letter CSX sent to the
21 Board on Wednesday. In CSX's letter it asked the
22 Board to impose the six Amtrak requested conditions,

1 "as the conditions relate to the PAR system and the
2 existing CSXT network."

3 The definition of PAR system in CSX's
4 amended and supplemented application does not include
5 Pan Am Southern. Pan Am Southern is the operator of
6 rail lines impacted by the acquisition over which
7 Amtrak operates, and a party to this proceeding. Pan
8 Am Southern and all of CSX, including any rail line
9 CSX might acquire in the future, should of course, be
10 subject to these conditions, and that is what Amtrak
11 requested, and CSX offered no reason for any
12 modification.

13 So let me close by saying that we are
14 grateful for President Biden's affirmation of
15 Amtrak's rights as expressed in his July executive
16 order, for the Board's recognition of the importance
17 of Amtrak's services, for the U.S. Department of
18 Transportation support as expressed in its filings,
19 and for CSX's commitment to ensuring that Amtrak's
20 existing and future services are not harmed by the
21 proposed acquisition.

22 I thank you for your time, and I'd be

1 happy to answer any questions you may have.

2 CHAIRMAN OBERMAN: Do the Board members
3 have any questions?

4 VICE CHAIRMAN PRIMUS: I just want to say
5 Dennis good morning, and thank you for clarifying the
6 on time performance about issue that CSX raised
7 yesterday. I was a little bit surprised as well in
8 that description. With respect to the Berkshire
9 Flyer and the additional track that's being
10 requested by CSX, what do you think is the
11 explanation behind it, or what do you think the
12 reasoning is behind that?

13 MR. NEWMAN: Well I mean we really need to
14 get into it and understand. I mean we think that we
15 really ought to be able to operate particularly,
16 we're only talking about two trips per week, and only
17 seasonally, that we should be able to operate without
18 causing any issues and problems. So we will discuss
19 that with CSX and really kind of understand from
20 their perspective why they think that's required.

21 VICE CHAIRMAN PRIMUS: How many trains
22 pass through its field on a normal day, Amtrak

1 trains?

2 MR. NEWMAN: Amtrak trains? We would
3 really just be our Lakeshore Limited, so one each
4 way.

5 VICE CHAIRMAN PRIMUS: And so they haven't
6 required them to have a 1,900 foot track for the
7 Lakeshore Limited?

8 MR. NEWMAN: We have not needed an extra
9 station track there.

10 VICE CHAIRMAN PRIMUS: Okay, all right.
11 Thank you.

12 MR. NEWMAN: Thank you.

13 VICE CHAIRMAN PRIMUS: Marty you're muted.

14 CHAIRMAN OBERMAN: Dennis do you
15 understand why -- what the logistical explanation is
16 from CSX why they want you to build another track?

17 MR. NEWMAN: We really -- we haven't had
18 that conversation with them to really get into the
19 details, so.

20 CHAIRMAN OBERMAN: Okay. Karen you have a
21 question, you're muted.

22 BOARD MEMBER HEDLUND: Yes. Mr. Newman

1 one of the conditions that CSX appears to have agreed
2 to is that they will commit to operate in good faith
3 with Amtrak and other parties for the addition,
4 expansion, and modification of existing inner city
5 passenger rail services.

6 Your Amtrak's vision for new service
7 across the country, which was announced last year,
8 includes new and additional service in Massachusetts,
9 along the line you currently operate from Albany to
10 Boston. And some additional service up to Concord,
11 and then up to New Hampshire. Could you talk a
12 little bit more about what specifically new services,
13 or additional services you were planning or
14 contemplating in addition to what you have
15 specifically discussed with respect to the Berkshire
16 Flyer with CSX?

17 MR. NEWMAN: Well thank you for the
18 question. And the routes that we outlined in the
19 Amtrak connect submission are the ones that we are
20 looking to be able to expand to in the near future,
21 so really all of those particular ones you just
22 cited. So we are interested in establishing service

1 between Boston and Concord for instance.

2 We're interested in expanding frequency on
3 the downeaster. We want to add service between
4 Boston and Albany as well as being able to add
5 service on the inland route that would connect
6 Worcester to New York, and Hartford to Boston for
7 instance. So each of those is one of the routes that
8 we would like to be able to institute.

9 BOARD MEMBER HEDLUND: And would those be
10 state supported service, or an extension of your
11 intercity passenger lines?

12 MR. NEWMAN: Those would largely be state
13 supported service in almost each, in probably pretty
14 much each case those would be.

15 BOARD MEMBER HEDLUND: And have you had
16 discussions with the Commonwealth about your plans?

17 MR. NEWMAN: We have been discussing with
18 the Commonwealth, and we will be, yeah we continue to
19 have those discussions as their plans develop, and
20 then we coordinate with them so that we are really
21 moving in sync.

22 BOARD MEMBER HEDLUND: And have you had

1 any discussions about those plans with CSX?

2 MR. NEWMAN: We have made requests to CSX,
3 but the detailed discussions we have really are to
4 come.

5 BOARD MEMBER HEDLUND: Thank you.

6 MR. NEWMAN: Thank you.

7 CHAIRMAN OBERMAN: Just -- do you have a
8 question Patrick?

9 BOARD MEMBER FUCHS: Yes Marty, but go
10 ahead.

11 CHAIRMAN OBERMAN: No, no, go ahead. I'll
12 wait until you finish.

13 BOARD MEMBER FUCHS: Thanks very much for
14 being here Dennis. Just a couple quick questions.
15 First is could you kind of sharpen your focus on what
16 is the exact causal element, what is caused by the
17 merger in terms of detriments, Amtrak? You document
18 in the record some of your past experiences with CSX
19 and their history in working with you. Are there
20 other elements of the transaction that you feel would
21 have a negative effect on passenger rail, and could
22 you describe those a bit more fully?

1 MR. NEWMAN: Yes, thank you for the
2 question. And to the extent that there is then more
3 you know, more traffic on the routes that we would be
4 operating passenger trains over, that is then you
5 know potential -- it could potentially have impact on
6 the performance, the on time performance of passenger
7 trains. And so that is one of the concerns, and
8 that's why one of the conditions that we had sought
9 was that we would -- that there would not be
10 detrimental impact on the performance of Amtrak
11 trains along these lines.

12 And then obviously you know we do have our
13 concern about our ability to obtain the access that
14 we need for expanding services on these lines as
15 well.

16 BOARD MEMBER FUCHS: Could you compare
17 your relations with CSX compared to what you
18 anticipate the outcomes to be in the absence of the
19 transaction from a relationship standpoint?

20 MR. NEWMAN: I mean we certainly are
21 hopeful that we will be able to work cooperatively
22 with CSX to make the kind of enhancements and

1 improvements that we need, so from that standpoint I
2 mean we look to work with them before the
3 transaction. We look to work with them after the
4 transaction as well.

5 BOARD MEMBER FUCHS: I guess what I'm
6 asking is you know in the absence of the transaction.
7 So if you were to compare you know what the
8 likelihood is of say expanding service, et cetera, if
9 CSX were not to step in. Is it your contention that
10 likelihood would be higher?

11 MR. NEWMAN: I would yeah, given our past
12 experience I would certainly have the concern that it
13 would be higher without the transaction than with.
14 However, the you know, the conditions that we have
15 asked include the requirement to work cooperatively
16 with us in good faith to you know to make those kinds
17 of improvements.

18 BOARD MEMBER FUCHS: You heard CSX
19 yesterday hold up the Virginia example as instructive
20 in terms of the possibilities of collaboration
21 between Amtrak and CSX. Should we factor that
22 example in evaluating kind of your history

1 contention?

2 MR. NEWMAN: That is an example where
3 there is going to be you know that will result in an
4 increase in passenger service. Much of that
5 transaction was between the Commonwealth and CSX.
6 Amtrak was a participant with the Commonwealth in a
7 transaction between us and them.

8 BOARD MEMBER FUCHS: And then so just kind
9 of switching to precedent. You know Amtrak in its
10 brief cites a few different cases, and I'm wondering
11 Dennis, can you provide any example in a minor
12 significant transaction, which are the transactions
13 subject to Subsection D-11 324, and can you provide
14 any examples where the agency has imposed a passenger
15 rail condition?

16 MR. NEWMAN: I could not cite that for
17 you, but I could get back to you on that as I check
18 with our team Member Fuchs.

19 BOARD MEMBER FUCHS: Okay. Has the Board
20 in the past indicated that the focus on Subsection D
21 might counsel against imposing a passenger rail
22 condition?

1 MR. NEWMAN: I do not know. I'm sorry.

2 BOARD MEMBER FUCHS: Counsel?

3 MR. NEWMAN: No.

4 BOARD MEMBER FUCHS: So you know one of
5 the things that stands out to me and some of our
6 precedent, is in the METRA DME case, which is also a
7 significant transaction, the Board indicated that the
8 focus of Subsection D, which is again what this
9 transaction is subject to, the focus is competition.
10 And use that as part of its rationale for denying the
11 passenger rail condition. And there are other
12 instances in these types of transactions where the
13 Board has declined to impose passenger rail
14 conditions.

15 And so I guess I'm sort of wondering the
16 weight that we should give that precedent, as well as
17 how we should evaluate the underlying reason.

18 MR. NEWMAN: Well I am not a lawyer, so
19 you know I don't know that I'm qualified to comment
20 on what weight the Board should apply. I think that
21 the conditions that we are asking for are in the
22 public interest, and that the public interest of

1 expanding passenger rail service, and being able to
2 bring the benefits of that passenger rail service and
3 continue the benefits, the performance of delivering
4 passengers on time, and making sure that that is not
5 harmed by the transaction.

6 And I think there is more detail in our
7 Amtrak filings with regard to our position.

8 BOARD MEMBER FUCHS: And Marty I have got
9 a couple quick follow-ups, I appreciate your
10 indulgence.

11 CHAIRMAN OBERMAN: No go ahead.

12 BOARD MEMBER FUCHS: To what extent could
13 some of these issues be resolved via Amtrak's
14 existing contracts with CSX, or contracts that would
15 emerge after the transaction?

16 MR. NEWMAN: You know we have contractual
17 rights, but we have, and you know they certainly have
18 some ability to get us the outcomes that we really
19 need and seek. But it certainly has been the case
20 that in the past our contractual rights have been
21 difficult to enforce, and you know so by themselves
22 they've not necessarily produced the improvements and

1 outcomes.

2 We always start with a -- from the premise
3 that we would want to work together and collaborate
4 to be able to obtain improvements and benefits, but
5 that has not always proven to be sufficient, and
6 that's part of the reason for the, for instance, the
7 FRA rulemaking on time performance metrics and
8 standards.

9 BOARD MEMBER FUCHS: Well I want to get to
10 that, but you know another part that I'm sort of
11 wondering about is the other aspect of the Board's
12 denial of the passenger rail conditions in DME and
13 METRA was that these issues could be worked out
14 through existing contracts, and the Board indicated
15 great reluctance via mergers to insert itself into
16 issues that were covered, or partially covered by
17 contracts.

18 And that's in the Subsection D context,
19 but even more broadly in a Subsection C, the major
20 merger context, the Board via its major merger
21 rules, as well as the 95 case indicated a great
22 reluctance to adjudicate contract issues, or things

1 that could be worked out in contract, in the context
2 of a merger. And I guess I'm wondering whether or
3 not you have any views on that precedent
4 specifically?

5 MR. NEWMAN: I do not have a view on the
6 precedent specifically. You know I do think we have
7 discussion in our filings with regard to our views on
8 the matter, but I do think that the need for the you
9 know, both the future performance and the ability to
10 expand passenger rail, is as you said in the public
11 interest, and is a matter that I think is pertinent.

12 BOARD MEMBER FUCHS: Last question from me
13 is you know I think Dennis you quite rightly
14 identified that the Board has other authorities in
15 24308, including you know governing Amtrak's access
16 rights, and the Board's ability to set reasonable
17 terms and compensation.

18 The Board has the authority to order
19 additional trains, which of course we are working on
20 adjudicating right now between you and the CSX and
21 NS, and the Board has authority to enforce on time
22 performance via the FRA standards, which is what you

1 specifically mentioned.

2 So I guess in thinking about how the Board
3 has not typically pursued passenger rail conditions
4 in these types of transactions, and against the
5 backdrop of the Board's very broad authority over
6 passenger rail across the country to make these
7 types of judgments, I'm wondering whether or not you
8 have any views as to whether or not these types of
9 complex access issues and additional train issues, on
10 time performance issues would be better resolved, and
11 the public interest would be better advanced if the
12 Board considered them more intensively with more
13 evidence through those authorities as we are today.

14 MR. NEWMAN: Well I mean I do think that
15 there is a benefit, and there is a need for the Board
16 to be involved in such issues. As we have had a
17 history of having less success and moving forward
18 with and obtaining the benefits, and the rights that
19 we have, and so --

20 BOARD MEMBER FUCHS: But Dennis, sorry to
21 jump in, but part of the issue there was that for a
22 brief period of time -- well not so brief, the

1 Board's ability to enforce on time performance was
2 seen as enforcing an unconstitutional provision.
3 That's no longer the case. You know the DC Circuit
4 fixed that in a way, and so now the Board, and the
5 FRA has you know finalized its rules you know, and so
6 now the Board does have the authority to address on
7 time performance issues.

8 And we've long had the authority to
9 address reasonable terms and compensation, and in
10 fact we have a case right now as you know between the
11 -- . So you know those cases involve a good bit of
12 evidence where we can you know evaluate things like
13 what are the infrastructure needs? What are the
14 effects on freight transportation?

15 You know what should be the schedules, et
16 cetera, and so I guess given that the Board now has
17 authority to address a number of the behaviors that
18 you are concerned about in the record, I guess I'm
19 wondering why it can't be properly addressed in those
20 more robust contacts?

21 MR. NEWMAN: Well I think those more
22 robust contacts are helpful and appropriate. And I

1 think to be able though to be able to not end up in a
2 situation where we must resort to that, I think can
3 you know, can be more expeditious and really achieve
4 the ends that are needed.

5 I mean the tools that you mentioned, the
6 ability to have the Board review and take action I
7 the case of on time performance is definitely
8 something that we appreciate, and we think that that
9 is a very great, very proper role for the Board, and
10 I would expect that that would something that we
11 would see the Board getting involved in.

12 BOARD MEMBER FUCHS: Dennis, do you think
13 the Board has enough evidence on the record to decide
14 what infrastructure is appropriate here for expansion
15 of service, what are the impacts on freight, et
16 cetera? Do you think the record provides that type
17 of evidence for the Board to make a good decision on
18 that from?

19 MR. NEWMAN: Well I think I would leave it
20 to the Board to decide whether it is sufficient.

21 BOARD MEMBER FUCHS: What evidence --
22 yeah.

1 MR. NEWMAN: I think that the you know
2 from our standpoint if we're talking about something
3 specific like the Berkshire Flyer, you know where the
4 condition for actually approving the Berkshire Flyer
5 seems that it is there should be some evidence that
6 that is problematic, that it could not be just
7 approved.

8 BOARD MEMBER FUCHS: Well sorry, and I
9 appreciate my colleague's indulgence here, and I'll
10 really will wrap up my questions, but isn't it true
11 though that the Board precedent is that the
12 proponents of a condition have the burden?

13 MR. NEWMAN: I believe that is --

14 BOARD MEMBER FUCHS: Isn't the burden on
15 you to advance that evidence as opposed to CSX to
16 prove the negative?

17 MR. NEWMAN: I think we do know that there
18 are going to be, I mean, CSX has agreed to allow
19 additional Norfolk Southern trains onto this route,
20 and so we know that there will be impacts there, and
21 so we are -- we certainly have some concern about
22 what those impacts would be on our performance.

1 BOARD MEMBER FUCHS: I appreciate it, and
2 thank you Dennis for bearing with me, and thank you
3 to my colleagues, and I just want to I guess close by
4 saying that you know I very much appreciate the
5 importance of passenger rail within our national
6 transportation system, so I really appreciate you
7 being here, and for your remarks.

8 MR. NEWMAN: Thank you member Fuchs.

9 CHAIRMAN OBERMAN: Karen, you're up.

10 BOARD MEMBER HEDLUND: Thank you. I've
11 got kind of a follow-up question, or point. The way
12 you describe what you were asking for in terms of
13 cooperating with Amtrak for expansion in intercity
14 passenger rail service, you also say, "including, but
15 not limited to service over the southern route," and
16 this is important, "and that CSX commits to sharing
17 data with Amtrak, and that CSX cannot use traffic
18 projections that differ from those provided in this
19 proceeding."

20 So I gather what this would imply is that
21 if you wanted to expand service, and CSX said well we
22 can do that, but only if you put in X amount of

1 infrastructure that those discussions have to be
2 based on the projections they're making today, not
3 what it looks like at the time that you may be having
4 these discussions, and if their traffic actually goes
5 up well above what they're projecting today, that the
6 import of this is that they couldn't make you pay for
7 anything more than what would otherwise have been
8 required to accommodate the projections that they are
9 making in this proceeding.

10 Do I have that correct? And do you
11 understand if CSX understands that?

12 MR. NEWMAN: Well thank you for the
13 question Member Hedlund, and I don't know what CSX
14 understands with regard to that. Our concern is that
15 the, you know the projections, first of all that
16 there be transparency about what we're looking at on
17 any given line, and appropriate sharing of data.

18 But we are looking for consistency with
19 what's being presented at this proceeding with the
20 kind of data that then we would be looking at in the
21 future so that there is some connection with the
22 views, or the forecasts that are being presented now,

1 being represented now with what the situation would
2 then be represented to be when it comes time to
3 hopefully add passenger trains.

4 BOARD MEMBER HEDLUND: All right. I'm a
5 graduate of all the service outcome agreements
6 negotiated in connection with the grants, so I have a
7 pretty high degree of sensitivity of what those
8 negotiations feel like.

9 MR. NEWMAN: Yes thank you.

10 CHAIRMAN OBERMAN: Were you done Karen?

11 BOARD MEMBER HEDLUND: Yeah I'm done.

12 CHAIRMAN OBERMAN: Robert.

13 VICE CHAIRMAN PRIMUS: So Dennis I want to
14 get back to some of the following up on what Patrick
15 said, the conditioning. Because there's some on the
16 Board that believe that precedent and what was set in
17 the past as it relates to Subsection D, and the
18 authority of the Board to set conditions is not
19 limited to what was done in the past, and the Courts
20 have indicated so in recent decisions.

21 And so I want to ask you, you know, you
22 put forward those conditions to this transaction.

1 You know state your reasoning as to why, and why it's
2 important to the transaction as to why these
3 conditions needed to move forward.

4 MR. NEWMAN: Thank you Vice Chairman
5 Primus. We believe that it's important that these
6 conditions exist you know because they do help to
7 ensure that the ability for passenger rail to be
8 operated on time, and with good performance, so that
9 we can deliver to the traveling public, and to our
10 passengers you know the promise of service that we
11 aim to make so that we can deliver them to their
12 destinations on time.

13 In addition, that we are able to make
14 expansions and enhancements to passenger rail
15 service, which provides mobility benefits and
16 provides the also environmental benefits in the way
17 of reduced emissions, but taking cars off the road.
18 And that we have seen you know both from the -- in
19 the past, our ability to be effective, or be
20 successful at being able to you know exercise and
21 have our rights enforced has been a challenge.

22 And also that you know we expect that

1 there would be effects in terms of the you know, the
2 volume of traffic on these routes that would have an
3 impact on our ability, and on the willingness of the
4 host to move forward and make the appropriate
5 improvements. So I think those are the reasons why
6 we think that these conditions really are needed to
7 be able to deliver those benefits.

8 In addition, you know there has been
9 significant public investment in you know, in
10 existing infrastructure, and we think that past
11 investment should be also protected.

12 VICE CHAIRMAN PRIMUS: And I think
13 actually you had mentioned also past relationships
14 like the one in Virginia should be considered. Are
15 there other relationships as well, maybe adverse,
16 that we need to take into account as to how the
17 relationship between freight and passenger rail
18 existence in the operations, and it's effect on the
19 public interest?

20 MR. NEWMAN: Well I mean certainly the
21 history of our attempts to add service and I mean as
22 others today raise, another proceeding where we are

1 looking to add service down the Gulf Coast, and that
2 has been you know a challenge that has led us to
3 actually you know need to resort to the STB. That's
4 one example.

5 Generally, our moves to try to increase
6 passenger rail service are met with resistance and
7 difficulty. And for on time performance the you
8 know, we certainly have had large challenges in
9 being able to have our trains you know always get the
10 appropriate preference that we have the rights to,
11 and to be able to deliver our customers on time, and
12 being able to make you know really kind of compel the
13 performance that's necessary in our long distance
14 trains, you know, our customer on time performance
15 hovers around 50 percent or less.

16 So half of our passengers are not able to
17 get to their destinations on time. So we certainly
18 had seen significant amount of adverse experience,
19 both with on time performance and with our ability to
20 obtain access under reasonable conditions.

21 VICE CHAIRMAN PRIMUS: So you're saying
22 that the conditions you put forward you proposed were

1 not just specific to Amtrak, but to the public
2 interest and the help of that rail network in that
3 effective region?

4 MR. NEWMAN: Yes.

5 VICE CHAIRMAN PRIMUS: And so do you think
6 that it is the job of the Board to address that
7 public interest region, that public interest concern,
8 through any act that they're able to including
9 conditions, to bring about a balance and fairness to
10 that transaction, and share that to the network?

11 MR. NEWMAN: I do. I think that it is an
12 appropriate consideration for the Board to take into
13 account.

14 VICE CHAIRMAN PRIMUS: Okay. Do you think
15 it's within our power to do so?

16 MR. NEWMAN: I will leave it to the Board
17 to decide that. Again, I'm not a lawyer, but I
18 believe so.

19 VICE CHAIRMAN PRIMUS: Well I believe so
20 too, and I believe that we've had cases in the past,
21 and former Boards have decided that. I think we
22 still have the flexibility, and we have the

1 discretion to do that moving forward, so you know I
2 appreciate you know you bringing those concerns up
3 because I think it is important to the success of
4 this proposed merger. Thank you.

5 MR. NEWMAN: Thank you.

6 CHAIRMAN OBERMAN: Dennis I just want to
7 be clear on the record as to what's agreed and what's
8 not agreed. The filing we received on Wednesday says
9 that CSX agrees to conditions 1 through 5 and 7, as
10 they relate to PAR. So are you and CSX in agreement
11 at least as far as that goes?

12 MR. NEWMAN: Well --

13 CHAIRMAN OBERMAN: I'm trying to dissect
14 this. I want to know what's agreed to, and what
15 isn't agreed to.

16 MR. NEWMAN: Yes well the -- what, you
17 know really our knowledge of what's agreed to is the
18 letter that was sent to the Board, so.

19 CHAIRMAN OBERMAN: Do you mean this came
20 without a discussion with you before they sent it?

21 MR. NEWMAN: Yes.

22 CHAIRMAN OBERMAN: Well you read the

1 letter, so at least in terms of what Amtrak is
2 seeking as with regards to the PAR system, it sounds
3 like at least 1 through 5 and 7 you got what you
4 asked for. Is that as you understand it?

5 MR. NEWMAN: I think that yes, that is why
6 as I had said we were very gratified by CSX's more
7 letter.

8 CHAIRMAN OBERMAN: So there's agreement on
9 that. What you're saying is you asked for the
10 conditions to apply to PAS as well and they have not
11 committed to as far as you can tell.

12 MR. NEWMAN: Correct. And that is really
13 still a question for us is why there's a carve out.

14 CHAIRMAN OBERMAN: Okay. And as to
15 condition 6 relating to the Berkshire Flyer, but for
16 the condition of 1,000 there -- a precondition of
17 1,000 foot track, would that be acceptable to you
18 the one year experiment?

19 MR. NEWMAN: Yeah. That would be, I mean
20 that's why we hope to be able to work that out, but
21 yes, being able to move forward again in consultation
22 with Massachusetts Department of Transportation, but

1 that is our aim is, you know, we were very hopeful in
2 what we saw from CSX in that regard, so I think
3 there's some detail for us to work out, but we think
4 that there's you know there's a good forward movement
5 there.

6 CHAIRMAN OBERMAN: All right. So going
7 forward are you -- do you have any discussions, or
8 interactions planned with CSX to iron out what's not
9 agreed to at this point?

10 MR. NEWMAN: That is our intention.

11 CHAIRMAN OBERMAN: Well you know it's our
12 preference, there's been a lot of agreements made by
13 various parties to this proceeding to work out
14 differences, and to agree to conditions. A whole
15 slew of them have come in over the last two or three
16 weeks, including this one as far as it goes, so I am
17 going to encourage you, and I'm sure that our CSX
18 friends are listening in, and we're going to talk to
19 them later today to get in a room and work this out.

20 We would much prefer this all be done by
21 agreement. I think wherever Board members are coming
22 from, I think we all agree that it is better if

1 parties work these conditions out by agreement. So
2 I'm going to encourage, and I am sure that my friend
3 Jim Foote is listening, that as soon as possible, and
4 before this record closes, you iron these things out,
5 otherwise we'll have to act one way or the other.

6 MR. NEWMAN: Thank you yes.

7 CHAIRMAN OBERMAN: Are there any other
8 questions for Dennis? Dennis why don't you sit tight
9 because you're on the same panel with the next two
10 speakers, and so there may be some interaction there.
11 You're still on, although you can turn your mic off
12 if you want.

13 MR. NEWMAN: Thank you Chairman Oberman.
14 Thank you all the Board members.

15 CHAIRMAN OBERMAN: With that I'm going to
16 call -- thank you Dennis. And I call up Mr. Wimbish,
17 Robert Wimbish.

18 MR. WIMBISH: Good morning. Before I go
19 into my presentation, I want to make sure that I am
20 being seen and heard. I know there were some
21 technical issues that way yesterday.

22 CHAIRMAN OBERMAN: Yeah right now I can

1 see you fine.

2 MR. WIMBISH: Okay.

3 CHAIRMAN OBERMAN: I am going to absent
4 myself for about two minutes. I'm going to hand the
5 gavel over to Robert while you're speaking, but I
6 will be back momentarily, but in case something needs
7 to be done Robert you're in charge.

8 VICE CHAIRMAN PRIMUS: That sounds like
9 trouble.

10 CHAIRMAN OBERMAN: So your job is to avoid
11 trouble.

12 MR. WIMBISH: Well I don't aim to start
13 any. Good morning Chairman Oberman as you depart,
14 Vice Chairman Primus, Commissioners Fuchs, Schultz,
15 and also welcome to the Surface Transportation Board
16 Commissioner Hedlund. My name is Rob Wimbish. I'm
17 with the law firm of Fletcher and Sippel in Chicago.
18 Now I am participating in today's hearing on behalf
19 of the Commonwealth of Massachusetts Department of
20 Transportation, or Mass DOT, and Mass DOT's
21 concurrently supervised agency in Massachusetts Bay
22 Transportation Authority, which is also referred to

1 in this presentation as MBTA, it is also known simply
2 as the T.

3 For purposes of today's presentation I
4 will refer to Mass DOT and MBTA collectively as the
5 Commonwealth. Mass DOT oversees highways, rail and
6 transit, aeronautics and transportation licensing and
7 registration for the Commonwealth of Massachusetts.
8 It's mission is to deliver excellent customer service
9 to people traveling in and throughout Massachusetts
10 by providing safe, reliable, robust, and resilient
11 transportation infrastructure.

12 Mass DOT works to provide a transportation
13 system, which can strengthen the state's economy and
14 improve the quality of life for all. Mass DOT,
15 excuse me, owns various railroad lines in
16 Massachusetts which support passenger and freight
17 railroad service.

18 MBTA is one of the oldest public transit
19 systems in the United States. It is also the largest
20 transit system in Massachusetts. MBTA provides
21 subway, bus, commuter rail, ferry and paratransit
22 service to eastern Massachusetts and parts of Rhode

1 Island. As this record reflects, MBTA also owns
2 various railroad lines in Massachusetts over which
3 commuter rail service, and in many cases also
4 railroad freight service is provided.

5 Nearing the extent of the proposed
6 railroad transactions within the borders of
7 Massachusetts it is no surprise that the
8 Commonwealth would be very interested in the proposed
9 railroad consolidation, and it's impact on all
10 railroad transportation services.

11 It would be easy, but unwise, to focus
12 strictly upon the freight transportation elements of
13 the transactions, as those transactions respective
14 freight service impacts have been presented here by
15 CSX Transportation, Norfolk Southern Railway Company,
16 Pittsburg and Shawmut Railroad, also known as
17 Berkshire Eastern, and all other aligned with those
18 railroads.

19 Rather for reasons I will offer in this
20 presentation, the Commonwealth urges this Board also
21 to consider very carefully how the various
22 interrelated railroad transactions that are the

1 subject of these proceedings bear first upon the
2 Commonwealth's extensive railroad transportation
3 infrastructure holdings, also upon publicly provided
4 commuter rail service in the greater Boston area.

5 And finally, upon publicly supported
6 intercity railroad passenger service in
7 Massachusetts, and throughout New England. The
8 interrelated transactions presented for your
9 consideration, approval and conditioning authority
10 offer opportunities for private freight service, and
11 for public stakeholders interested in such freight
12 service to be sure.

13 But the Commonwealth respectfully submits
14 that the public interest is unlikely to be fully, or
15 adequately against, or protected for that matter as
16 its appropriate public, private measures. Or in the
17 absence of such voluntary measures the Board's
18 exercise of its conditioning authority as requested
19 by the Commonwealth in its past filings.

20 To be clear however, the Commonwealth has
21 not opposed the transactions that are encompassed by
22 the various filings in this docket, and it does not

1 oppose them now. Those transactions stand to deliver
2 important transportation benefits for certain
3 shippers and traffic flows, and they stand to benefit
4 the applicants and those carriers aligned with them
5 here.

6 But those same transactions warrant that
7 the applicants ensure, and not just generally assure
8 that the hundreds of miles of Commonwealth owned
9 railroad infrastructure, that the applicants and the
10 aligned carriers will operate, are currently in
11 proper physical condition, and that they will be
12 maintained accordingly going forward.

13 The applicants must also ensure that their
14 proposed transactions will not result in deteriorated
15 MBTA commuter rail service for the applicants and
16 aligned carriers will share track with MBTA commuter
17 trains, particularly in the face of future operating
18 uncertainties and anticipated freight and commuter
19 rail traffic growth.

20 And the applicants must ensure that the
21 proposed transaction is not merely sustaining
22 intercity railroad passenger service status quo, but

1 rather facilitate and promise Amtrak services in New
2 England. It appears from very recent developments
3 that at least some of our conditions targeting
4 intercity passenger rail service have been addressed,
5 and I will address that briefly in the discussion
6 following.

7 The conditions that the Commonwealth has
8 requested that this Board impose as part of its
9 approval of the transactions will ensure that the
10 public generally, and not just the freight shipping
11 public, will see the benefits of the stronger and
12 more engaged platform railroad presence in
13 Massachusetts and throughout the regions served today
14 by CSXT and Pan Am Railways.

15 Those conditions are carefully designed to
16 maintain the Commonwealth's extensive railroad
17 infrastructure holdings, protect MBTA's innovative
18 and growing commuter rail operations over the lines
19 that are the subject of these proceedings, and to the
20 extent that they may remain necessary, enhanced
21 intercity -- that is Amtrak, passenger rail service
22 options, while preserving the freight transportation

1 benefits that CSXT and others engaged in these
2 proposed transactions help to deliver.

3 The Commonwealth has been engaged in an
4 ongoing dialogue with the applicants, particularly
5 CSXT toward a written accord on the Commonwealth's
6 three general objectives. That dialogue has been
7 positive, and indeed we are seeing substantial
8 progress for key Commonwealth objectives,
9 particularly with respect to the applicant's
10 commitment to expanding Amtrak service, and keeping
11 with regional and Commonwealth plans.

12 For example, CSXT recently has advised the
13 Board, as the Board is aware, that it has reached an
14 accord with Amtrak, accommodating Amtrak's requested
15 conditions, including that it will agree
16 conditionally to host a new Amtrak pilot service, the
17 seasonal Berkshire Flyer between New York City and
18 Pittsfield, Massachusetts.

19 We are encouraged by such recent positive
20 developments. We acknowledge the recent CSX and
21 Amtrak agreement, and we are actively reviewing that
22 very agreement, and we are hopeful that this recently

1 announced agreement and corresponding CSXT filing
2 from late yesterday, adequately address our concerns
3 and interests in post transactions, intercity
4 passenger, third rail passenger service.

5 Discussions with respect to the condition
6 and upkeep of Commonwealth owned railroad
7 infrastructure currently maintained and operated over
8 per agreement by Pan Am Railways, and Pan Am
9 Southern, have also been constructive. But these
10 discussions have fallen short of the Commonwealth's
11 proactive objectives.

12 Specifically, the Commonwealth has urged a
13 post transactions assessment of Commonwealth owned
14 railroad infrastructure currently operated by Pan Am
15 Railways and Pan Am Southern. As a proactive joint
16 undertaking embodied in the Commonwealth's third
17 enumerated condition, would be a constructive and
18 beneficial first step in CSXT's expanded relationship
19 with the Commonwealth and its various stakeholders.

20 Indeed, the applicants have not impressed
21 upon the Commonwealth that its proposal is overly
22 burdensome or unfair, but rather that in the

1 applicant's view such an infrastructure review is
2 unnecessary given their promises and assurances on
3 the record. Because such an infrastructure review
4 would benefit all involved however, the Commonwealth
5 looks to this Board to facility such an exercise by
6 way of its conditioning power if needed.

7 Finally, but easily as important because
8 the infrastructure upkeep and intercity passenger
9 service issues addressed previously, not more so, the
10 Commonwealth urges this Board to consider appropriate
11 conditions to protect MBTA's extensive commuter rail
12 services where such services would share tracks with
13 freight trains operating in the future by CSXT,
14 Norfolk Southern, or Berkshire and Eastern, or all
15 three, as would be the case on the Willows to Ayer
16 track segment, also traversed by MBTA's Fitchburg
17 line service.

18 We are told that the proposed transactions
19 will benefit MBTA commuter service. That is a
20 welcome assurance, but we have seen no proof that
21 will be necessarily so, and we have been assured
22 that CSX's expanded freight operations, and those of

1 Norfolk Southern and Berkshire and Eastern, also will
2 not impair MBTA commuter rail operations.

3 But those assurances conflict with MBTA's
4 extensive knowledge of the railroad lines involved
5 and the challenges associated with balancing freight
6 and commuter rail service needs. And while we
7 recognize that CSXT has experience in operating in
8 commuter rail territory elsewhere, and on a more
9 limited scale presently in the MBTA service area.
10 CSXT has not yet learned the intricacies and
11 challenges of the railroad lines over which it will
12 operate following implementation of proposed
13 transactions.

14 The Commonwealth has proposed here again,
15 a proactive mechanism for dealing with potential
16 commuter rail service harm, both by shifting train
17 dispatching, and by developing contingent
18 infrastructure enhancement in the face of future
19 disruptions should it occur.

20 The applicants have thus far resisted
21 such proposals on assurances that no such harms will
22 be befall MBTA commuter rail service. On that topic

1 we do appreciate CSXT's particular efforts to
2 demonstrate to the Commonwealth why it believes MBTA
3 service will not suffer from freight train service
4 delays.

5 Those meetings have proven helpful, but
6 they have also revealed CSXT isn't in complete
7 understanding of the complexities of operations, for
8 example on the Willows to Ayer segment. And so,
9 while the Commonwealth appreciates the assurances
10 that the applicants have extended, those assurances
11 by themselves serve little purpose if and when post
12 transactions, freight train operations do begin to
13 interfere with MBTA commuter trains.

14 This Board and the Commonwealth know very
15 well that Class 1 optimism is no substitute for
16 well-conditioned contingency plans, particularly
17 where such contingency planning would include
18 expanded infrastructure.

19 In that regard, the Commonwealth's request
20 conditions to protect MBTA service, including
21 transferring the dispatching to MBTA, as set forth in
22 enumerated conditions one and two, are a far better

1 measure than would be a re-opening of this proceeding
2 under which this Board could be called upon to
3 ascertain what has gone wrong, what to do about it,
4 and how quickly appropriate corrective measures can
5 be implemented.

6 And here also the Commonwealth's requested
7 conditions, which undeniably protect the public
8 interest, are neither intrusive nor unduly
9 burdensome. They would not stand in the way of
10 further freight service benefits that the applicants
11 and the railroads aligned with them hope to deliver.

12 Rather, we believe that such conditions
13 would be the logical next step in the Commonwealth's
14 dialogue with CSXT in particular. To be clear once
15 again, the Commonwealth has not opposed the
16 application or the related transactions, but the
17 Commonwealth also recognizes that the proposed
18 transactions as currently structured, and without
19 appropriate protective measures, threaten distinct
20 elements of the public interest, particularly for
21 example elements of the public interest that's
22 spelled out in President Biden's Executive Order

1 Number 14036.

2 We appreciate in particular, CSXT's
3 engagement and ongoing dialogue to the Commonwealth,
4 although such an engagement is also to be expected,
5 given CSXT's anticipated, expanded regional
6 footprint.

7 But the Commonwealth respectfully submits
8 that this Board can and should use its conditioning
9 authority to assist in bridging current gaps in this
10 dialogue, as described previously, by directing CSXT
11 to work with the Commonwealth to engage in more
12 proactive measures, rather than falling back entirely
13 upon confident freight railroad assurances of future
14 events and circumstances.

15 The Commonwealth appreciates the Board's
16 time, and consideration of the Commonwealth's
17 comments, and request for conditions. Thank you.

18 VICE CHAIRMAN PRIMUS: Thanks Robert,
19 appreciate it. Marty's back so there you go.

20 CHAIRMAN OBERMAN: I am back, but Robert I
21 assume you have some questions so go ahead.

22 VICE CHAIRMAN PRIMUS: I'll wait.

1 CHAIRMAN OBERMAN: All right.

2 VICE CHAIRMAN PRIMUS: If someone else
3 has, happy to wait.

4 CHAIRMAN OBERMAN: Anybody else want to go
5 forward?

6 BOARD MEMBER FUCHS: Marty why don't you
7 go?

8 CHAIRMAN OBERMAN: All I would say Robert
9 is what I've said to Dennis, that you know we'd like
10 these conditions worked out. It sounds like progress
11 has been made from your point of view as well, but
12 you're not quite there yet. Is that a fair
13 statement?

14 MR. WIMBISH: I think it's a very fair
15 statement. I think we've remained engaged even to
16 this moment in a dialogue with CSX, and we continue
17 to make progress. We're hopeful that in the not too
18 distant future you will receive yet another filing
19 from CSX that indicates that we have resolved our
20 differences. We have not yet done that.

21 Obviously, one of the reasons is that on a
22 number of these issues, CSXT remains confident that

1 some sort of a definitive written agreement is not
2 needed, but I do think that there is still a pathway
3 to reaching the Court.

4 CHAIRMAN OBERMAN: Well I will just
5 reiterate that I always think the parties are better
6 off if they right things out themselves rather than
7 requiring us to right them for you because you may
8 not like it.

9 MR. WIMBISH: Right. And we're not asking
10 you to be clear in our conditions. We haven't asked
11 you to specifically right out what those agreements
12 contain, but some of them are simply asking for the
13 Board to facilitate working toward an agreement.

14 CHAIRMAN OBERMAN: I think that the --
15 listen there's obviously, and you can hear it in the
16 questioning here, some discussion and debate about
17 our -- the propriety of our entering conditions on
18 a transaction of this nature relating to passenger.
19 There are obviously public interest aspects to it as
20 have been discussed, there are other precedents as
21 raised by Patrick, and we're not afraid I think as an
22 institute to weigh into this area one way or the

1 other, but if things can be worked out by agreement
2 then we don't have to weigh in.

3 So I think we'd almost prefer that that
4 happen, but let me switch it to Patrick who had a
5 question.

6 BOARD MEMBER FUCHS: Thanks so much Marty.
7 Actually let's stay on this issue for a minute.
8 Could you summarize the evidence in the record that
9 would allow the Board to make an informed decision
10 about whether or not a shift in dispatching
11 responsibilities would lead to overall better
12 outcomes for the rail network, freight and passenger?

13 MR. WIMBISH: I think there's probably two
14 elements of that. The first one is the evidence that
15 you have on the record that CSX typically dispatches
16 its lines from Jacksonville, although it has
17 committed here for as I think the term was the
18 indefinite future, to continue to dispatch these
19 lines in Billerica. I think that's one piece of the
20 evidence there.

21 I think the other piece of evidence that
22 is implicit in this is that -- and there's another

1 piece of evidence here which is that MBTA is a
2 predominant user in terms of the number of trains
3 operated over a variety of these lines, even though
4 CSX in some limited instances expects to see some
5 freight traffic increases that potentially over time
6 could increase the amount of train activity on these
7 lines.

8 One of the issues that's implicit in the
9 record here is whether or not CSX or the Commonwealth
10 would be the better administrator of the overall
11 public interest in these, if you look at how both of
12 those entities would possibly make decisions with
13 respect to dispatching and accommodating each other's
14 trains.

15 BOARD MEMBER FUCHS: So one is the
16 geographic location of the dispatching, and the other
17 is sort of an intuitive assessment.

18 MR. WIMBISH: I think part of it is more
19 than intuitive, that is the that the record also
20 reflects as it has, and as we pointed out, and as
21 others have noted that MBTA is the predominant user
22 of most of these lines on the train count basis.

1 BOARD MEMBER FUCHS: Are there other
2 instances where dispatching in the general northeast
3 region is conducted by an entity that is not the
4 predominant user?

5 MR. WIMBISH: I'm sorry could you repeat
6 the question please?

7 BOARD MEMBER FUCHS: Are there other
8 instances, or to what extent is dispatching in the
9 region for passenger rail in particular, conducted by
10 entities that say don't have the highest train
11 counts? Thinking in particularly of Amtrak right?
12 Amtrak is it correct to say, and maybe Dennis you can
13 weigh in, that Amtrak has dispatching
14 responsibilities on some lines where it doesn't have
15 the highest train count?

16 MR. WIMBISH: I do not know --

17 MR. NEWMAN: That is true, we do have --
18 it's train lines that we own.

19 BOARD MEMBER FUCHS: So I guess I'm sort
20 of wondering whether or not it would have been
21 appropriate for MBTA to submit some sort of hard
22 evidence that train count share improves dispatching

1 performance for all users. You know you have the
2 Amtrak example where Amtrak is not the predominant
3 user, and has dispatching responsibilities, and you
4 could potentially compare that to commuter rail
5 performance with dispatching.

6 You could also you know provide evidence
7 of other freight railroads, CSX included, and their
8 dispatching performance is for all users versus
9 dispatching of the predominant user. And I guess
10 one of the things that I totally hear you on the
11 intuitive or implicit nature of the claim, but none
12 of the actual hard evidence about what's going on in
13 the rail network was presented in the record,
14 including on some lines that MBTA is using. Is that
15 a fair assessment?

16 So you didn't for example, look at any
17 other lines where you're the majority user and
18 someone else dispatches, and provide any evidence
19 about what's going on on those lines?

20 MR. WIMBISH: no we did not. And our
21 argument is largely predicated on the policy
22 considerations that I think again are pretty well

1 understood in this particular case that you can
2 compare the approach to CSX dispatching to the
3 approach for MBTA dispatching, and one of the things
4 that I suspect you know is that MBTA does dispatch
5 operations onto the lines. Whether or not those
6 contain freight operations on them, but one of the
7 distinction is of course is if you have CSX
8 dispatching those lines, and I don't mean that
9 there's any nefarious considerations here, just in
10 terms of the priority analysis on this one.

11 While we've had good experiences with CSX,
12 CSX is clearly its mandate is to maintain a fluid
13 freight transportation system first and foremost. It
14 doesn't have a specific mandate. It may have some
15 obligations under contract to accommodate MBTA
16 commuter rail service.

17 By comparison if you consider MBTA
18 dispatching, MBTA would be looking at all of the
19 stakeholders involved. That is the fluidity of
20 freight transportation and passenger transportation
21 on those lines. And so I think that there is a more
22 kind of holistic take on what MBTA would be looking

1 at, and how it could best balance those competing
2 interests here.

3 BOARD MEMBER FUCHS: I appreciate you know
4 kind of the implicit point for sure Robert, and I
5 appreciate you making it. Would you, you know, I
6 asked Dennis this earlier, but you would agree that
7 Board precedent sets out that parties requesting
8 conditions have the burden to show they're necessary?

9 MR. WIMBISH: I do agree with that.

10 BOARD MEMBER FUCHS: And you know in terms
11 of the policy considerations do you think that the
12 Board has -- do you think that the implicit or
13 intuitive argument is sufficient for the Board to
14 have confidence that you've met your burden, that
15 dispatching under MBTA would be better than under CSX
16 when you've provided no data about dispatching
17 performance?

18 MR. WIMBISH: I do.

19 BOARD MEMBER FUCHS: Well I can switch
20 gears then to the standard. Robert can you give your
21 assessment of how the DM&E Metra precedent should
22 factor into our decision making? The way I read that

1 case is that the Board denied the requested
2 conditions by Metro commuter railroad for two
3 reasons. One is the focus of D is competition, and
4 the other being that the issues could potentially be
5 worked out by contract.

6 And CSX contends in the record that it's
7 stepping into existing contractual relationships. So
8 is it appropriate for the Board to look to that
9 precedent to guide its decision making in this area?

10 MR. WIMBISH: I think it's appropriate for
11 the Board to look at all of its precedent, not just
12 the CP DM&E case. There's kind of a couple of
13 elements to your question here Commissioner Fuchs,
14 and I want to take them both on separately. Let me
15 start with the 11324D discussion, because I know it's
16 been one that's been a recurring issue for you, and I
17 understand and appreciate that.

18 And I want to point out that my
19 perspective on 11324D is that while it is the
20 standard for approval, it is not necessarily the only
21 basis for the Board's conditioning authority and
22 Surface Transportation Board proceedings in minor or

1 significant transactions, and the fact there's other
2 precedent, I'll point out just briefly, that supports
3 that proposition.

4 So let's start with D and then we can talk
5 about the precedent if you'd like with respect to CP
6 DM&E, what I think it stands for because I think they
7 kind of correlate to each other, and of course have a
8 connection.

9 The first one is -- and let's just take a
10 look at it this way. If as I think you may have
11 general posited, I don't want to put any words in
12 your mouth, but if as I understand it you're
13 suggesting that 11324D says the only thing that the
14 Surface Transportation Board can look at in a minor
15 or a significant transaction are competitive impacts.

16 And make a determination as to whether or
17 not the Board should approve a transaction based on
18 that competitive impacts analysis. I submit to you
19 that when you are looking at commuter rail or
20 passenger rail impacts, which obviously are not
21 central to, or even directly involved in those
22 competitions.

1 That competition analysis, excuse me, that
2 if you do that with the logical extension of that
3 here would be -- and I know these are not the facts,
4 but I think you have to think about what the logical
5 extension of that kind of a strict application of
6 this is the only thing that matters, if -- and I'm
7 not saying that you're suggesting that's the case
8 either, but if you were then it seems to me that
9 under the circumstances here if we were to change
10 the hypothetical a bit we'd be looking at a situation
11 under a hypothetical, or perhaps -- and thank
12 goodness they're not doing this, CSX would say here's
13 our transaction.

14 It's procompetitive, it yields a bunch of
15 public benefits, particularly in the transportation
16 world, and it is highly procompetitive. Now that
17 said, this same transaction will have definitive and
18 clear adverse impacts on passenger transportation
19 throughout the Commonwealth. Again, I know this is
20 the hypothetical.

21 And by the way there is nothing you can do
22 about it Board. Nothing you can do about it because

1 11324D is the only element of the standard, and it is
2 your only condition authority here. So it seems to
3 me there's a danger in that. Now that's just sort of
4 the logical element of that, but the other part of
5 it, it seems to me, is that the Congressional mandate
6 in 11324D is about focusing on the transportation --
7 I mean the competition issues in those transactions,
8 not to the exclusion of other STB conditioning
9 authority because we know, and this is where I'll
10 transition into your discussion of the CP DM&E.

11 And I have listened to you, and I agree
12 with you that that case number one, was determined on
13 its facts and circumstances, and I don't read that
14 case as being a categorical determination that
15 passenger train impacts are simply unavailable, I
16 mean cannot be mitigated under appropriate
17 circumstances. It was a reluctance to get into
18 those, and the fallback there of course was to resort
19 to contracts where those contracts existed.

20 And indeed those contracts do exist in
21 that particular case between Metras and the merger
22 applicants there, particularly CP. So that's one of

1 the things I'd point out. Finally, if you're going
2 to point to the CP DM&E case it seems to me you'll
3 also have to look at the CN EJ&E case.

4 And if you remember in that particular
5 case one of the issues that was litigated was the
6 Board's imposition of conditions on overpasses.
7 You're probably familiar with that. The argument in
8 that case on appeal was whether or not the Board had
9 the authority, again under the assertion that 11324D
10 controlled whether the Board had authority to impose
11 overpass conditions since they had nothing to do with
12 mitigating any competitive impacts.

13 And the Court upheld the Surface
14 Transportation Board's authority to impose those
15 conditions in that particular case to address
16 transportation issues that were not tied to freight
17 competition. So I'm hoping that I'm just giving you
18 my perspective for number one, the dangers of
19 focusing exclusively on 11324D under hypotheticals
20 where there would be clear and demonstrable adverse
21 impacts, and saying you can't do anything about it,
22 and the notion that the STB's precedent, and for that

1 matter, Court of Appeals precedent, supports the
2 proposition that the Board's reach of it's
3 mitigation conditions, or its conditioning power goes
4 beyond the limited scope of 11324D.

5 BOARD MEMBER FUCHS: Robert thank you very
6 much for that discussion. I think for the efficiency
7 of the hearing, it might make sense to revisit
8 standard issue after CP's testimony if you'll hang
9 on, and that was we can kind of because I think some
10 of the issues that we would discuss would apply to
11 both of you, and so we can maybe have a discussion in
12 that regard.

13 I will observe that I think that you've
14 described the countervailing precedent, and the
15 countervailing points accurately. I think that
16 Metras said that the primary focus is competition.
17 It did not make a clear categorical statement ruling
18 out passenger rail conditions. I think it could be
19 read to be a bit of a non-sequitur if it doesn't
20 suggest that you know.

21 MR. WIMBISH: Right.

22 BOARD MEMBER FUCHS: But it's not clear

1 and explicit, and I do agree that the built variance
2 in the context of the DC Circuit, and the context of
3 environmental conditions suggested the Board had
4 public interest authority that wasn't constrained by
5 the approvals standard. So I wanted to continue this
6 discussion, but I think you've accurately stated the
7 precedent.

8 MR. WIMBISH: I appreciate that.

9 CHAIRMAN OBERMAN: So do I Robert for what
10 it's worth. So I think it's very helpful. This is
11 the subject of what you know this Board considered in
12 recent times very intensely, and it's an ongoing
13 consideration. Any other questions for Mr. Wimbish?

14 VICE CHAIRMAN PRIMUS: I did, don't now.

15 CHAIRMAN OBERMAN: Okay.

16 VICE CHAIRMAN PRIMUS: He satisfied them,
17 and I appreciate his comments, and I actually join
18 you Marty in agreeing with his assessment, so thank
19 you.

20 CHAIRMAN OBERMAN: All right. Why don't
21 we move forward to CP and Mr. Clements and Mr. Meyer,
22 and the other two panelists as Patrick suggested stay

1 onboard with us.

2 MR. MEYER: Good morning Chairman Oberman.
3 Good morning fellow Commissioners. It's David Meyer.
4 I don't see James Clements yet. I don't know if he's
5 on. James could you?

6 MR. CLEMENTS: Yes I've joined Mr. Meyer.

7 MR. MEYER: Thank you. Okay excellent.
8 Well I'm going to attempt to share my screen for the
9 PowerPoint presentation that we have to accompany our
10 remarks. So bear with me for a moment.

11 Could everyone see that? Is the Canadian
12 Pacific presentation visible?

13 MR. CLEMENTS: Yes.

14 MR. MEYER: Excellent. James I'm going to
15 turn it over to you to get our presentation.

16 MR. CLEMENTS: Yes. Thank you David, and
17 thank you Mr. Chair, and fellow STB members for
18 giving us the opportunity to make a few brief remarks
19 this morning. I'm James Clements, the Senior Vice
20 President of Strategic Planning and Technology
21 Transformation at CP. I've been with CP for about 27
22 years in a variety of roles, including a car

1 management finance marketing sales and corporate
2 strategy type roles.

3 If I go to the next page here David, what
4 I thought I would mention at the start of the
5 presentation is that we see the Pan Am Southern as an
6 important link for CP to access the New England
7 markets in the Boston area, the Pan Am Railway, and
8 also other short line connections in New England,
9 like the Providence of Worcester, and the New England
10 Central. In that corridor we can haul several
11 thousand carloads a year in what I would describe as
12 a normalized non-COVID year.

13 We're certainly seeing a little bit of
14 decline as a result of changing traffic patterns in
15 the last couple years, and we use the Pan Am Southern
16 as a critical connection, and we see it as a
17 competitive alternative in the market versus the CSX
18 route into many of those same markets.

19 One comment I will make we have, and this
20 was in some of our evidence looked at alternatives in
21 terms of we could go as this map shows, over the top
22 to Bangor and North Maine Junction Interchange with

1 Pan Am Railway, and have that traffic move.

2 So that is a very circuitous route.

3 There's also a couple of options involving the
4 Vermont Railway, or potentially even other G&W lines
5 where we would connect in Sherbrooke, Quebec. And
6 again there's either weight limitations, or wrote
7 inefficiency concerns that we think would make those
8 very limited viability in terms of competitive
9 alternatives to the market.

10 So David if you move to the next slide,
11 this shows why we see this one as such a critical
12 connection, and it's directly parallel to the CSX.
13 It's called the southern route in our evidence.
14 Before I go into too much more detail on Pan Am
15 Southern, I just want to make the observation that
16 the Pan Am Railway portion of this transaction we
17 have not sought any conditions, we haven't raised any
18 concerns.

19 We certainly expect as Jamie Boychuk and
20 others observed yesterday, that you know in Maine and
21 into St. John and other areas, this end to end
22 combination with the CSX Route will certainly be a

1 competitor for us up in that area, and we believe
2 that with CSX when they invest and operate it they're
3 a good operator, and there will be some benefits
4 around the Pan Am Railway transaction.

5 So we have no concerns, comments, or
6 anything to put on the record relative to that. All
7 of our comments here are going to be around the Pan
8 Am Southern. And what we see as a potential to
9 change the competitive dynamic east/west between our
10 connection and New England Boston markets.

11 The Pan Am Southern today as you've heard
12 is a route that goes across into Boston. It connects
13 with CP and Norfolk Southern at Mechanicville, also
14 the CSX at Rotterdam Junction, and it's been
15 described as you know good grade and efficient
16 route.

17 The CSX themselves were described that
18 there are some operational advantages to that route
19 for traffic into the New England area. It also today
20 is a viable, and productive intermodal and automotive
21 route into Boston, and by Ayer, and has a service
22 level associated with that that meets the needs of

1 all the shippers in the market.

2 And certainly the owners today have the
3 incentive to invest. We can see that with you know
4 the effort that was made to repair the Hoosac Tunnel
5 after the partial collapse that occurred a couple
6 years ago. And so with all of this is what positions
7 it effectively as a competitive alternative to the
8 CSX in the market.

9 You know David next slide. When we look
10 at it, and I want to talk a little bit about history.
11 The reason that the joint venture was formed, and why
12 NS engaged with Pan Am Railway to create the Pan Am
13 Southern, was specifically to create and strengthen
14 the ability for the NS and other shippers to compete
15 against the CSX into the Boston market.

16 And in particular, and I think Mr. Mullins
17 yesterday acknowledged this, one of the focuses was
18 intermodal and automotive. As you can see in the
19 statements, the 87 and a half million dollars that
20 was flowing to both enhancements to the corridor
21 itself, as well as the creation of facilities at
22 Mechanicville and Ayer to handle automotive and

1 intermodal traffic that is being made by the joint
2 venture.

3 And so you know one of the concerns as you
4 look forward is that this traffic, the very traffic
5 that was designed to attract this capital investment
6 is being moved off of the line. I know that it's
7 been alleged that it's low margin, but it is the
8 traffic that has had incentive -- the
9 recapitalization of the line.

10 So I just wanted to go through that. Now
11 when you start to talk about the change, so that
12 we've got this big competitive line, and we start to
13 look at what the incentives are today, and where the
14 incentives are going. I think it's undeniable that
15 the incentives that the new ownership structure has
16 are different than the incentives that today Pan Am
17 Railways and Norfolk Southern have.

18 You know the first one is that, and most
19 importantly, the CSX is becoming kind of folder, you
20 almost have like a two to one and a half kind of
21 combination here, and CSX is going to have
22 considerable power in the boardroom now as a result

1 of that change.

2 And I want to comment a little bit. The
3 analogy was made around Conrail and that the CSX, and
4 the NS have been able to compete effectively as a
5 result of the Conrail shared asset areas that were
6 created in that carve out transaction. And I think
7 it's important to note that transaction was almost
8 the reverse of what we're contemplating here.
9 Conrail was a single carrier that had you know their
10 operations in many of these areas with very limited
11 competition.

12 And by creating the shared asset areas you
13 are actually introducing the competitive, alternative
14 that never existed prior to the transaction that was
15 being proposed. In this one what's happening is
16 there are two competitors, and in fact you're
17 reducing the competition.

18 And what's being said you know is we can
19 do it in Conrail, and by having the same structure
20 here it's going to help mitigate the impacts here,
21 and I just don't see necessarily the parallel to
22 Conrail when you're looking at the current situation

1 that we have today on the left-hand side of this
2 slide.

3 The other piece I didn't know already is
4 that Pan Am posed creating an intermodal and
5 automotive service today, and when you're maintaining
6 the line to have the speed, and you know lack of
7 small orders and efficiency across the line for the
8 intermodal service, you sort of by nature lift the
9 quality of the infrastructure so that you can provide
10 a better service on the manifest traffic, and
11 undoubtedly the traffic that we interchange with Pan
12 Am is entirely what I would call manifest carload
13 boxcar type traffic.

14 But you're now removing that traffic, so
15 the incentive to maintain it up to the highest
16 standards to serve the most service sensitive traffic
17 then is gone, which can have a longer term impact of
18 the level of investment to maintain the manifest
19 service in the area.

20 Again, what we have here we talked about
21 the Pan Am subsidiary is competing with CSX, and now
22 you're putting the CSX in, and they have come up with

1 this solution with the Berkshire and Eastern, and you
2 know what I would agree with everybody's
3 observation, Genesee and Wyoming is a quality
4 operator, it has done a great job across many of
5 their properties.

6 But I will observe that they are let's
7 call it the dominant alternative operator in the New
8 England area, with the New England Central Providence
9 and Worcester and many of their holdings.

10 And then today Pan Am Railway interlines
11 with both the CSX and PAS. We agree that the new
12 single line route will attract traffic, and in fact
13 the CSX has made a commitment that some of that
14 traffic they will route over Pan Am Southern in the
15 short term as one of their undertakings to compensate
16 for the change in traffic flows with the removal of
17 the intermodal. Again, that's a temporary flow.

18 We think the incentive is to use the
19 efficient single line route that CSX is creating for
20 much of that PAR traffic, and that as your commitment
21 expires, that may well change the traffic flows. We
22 provided some analysis on what we think the change in

1 gross miles are, both as a result of the intermodal,
2 and in the longer term with the expiring of the CSX
3 commitment. So again that is also another fact that
4 changes incentives in terms of how the Pan Am
5 Southern is also going to take.

6 Slide 6 please David. When we start
7 talking with competition, this isn't just anecdotes
8 from CP, and not supported. The participants
9 themselves, the CSX filed directly an
10 acknowledgement that in the absence of any conditions
11 that the impact of this transaction could have, or
12 could have harm on the competitive environment, and
13 that they created a series of agreements to try and
14 mitigate that risk of harm.

15 And really what is at issue, and we will
16 get into our commitments at the end of my remarks, is
17 whether those undertakings are sufficient to protect
18 from the competitive harm. And I want to
19 acknowledge that many of these undertakings are
20 short-term. I think it's a redacted, I don't know
21 the number of years in some of these commitments.

22 And I think it was Jamie Boychuk in the

1 discussion yesterday around the business case, and
2 the acknowledgement was this isn't about the first
3 five years, this is a fifth year or 100th year
4 transaction, and that there's going to be a long-term
5 view that is going to be taken by the acquirer.

6 And so when we look at the commitments one
7 of the concerns is the term as it affects the gate
8 that we interchange with in the context of a
9 transaction structure being proposed is contemplated
10 to be 50 or 100 years. In terms of the evidence
11 David, the next page, I'll skim through this one
12 fairly quickly.

13 The Department of Justice has also said
14 this arrangement is likely to diminish competition
15 between CSX and Pan Am Southern on these parallel
16 routes, so again we're not the only ones, we're not
17 making this up. On the DOJ I just want to be very
18 clear we are not supportive of the idea of
19 divestiture. We're not advocating for the idea of
20 divestiture.

21 When we look at the conditioning powers
22 that the Board has we believe that there are

1 appropriate conditions that can be put on this
2 transaction in order to allow the public benefits on
3 things like the double stack competitive service that
4 the NS will get into Boston, or the single line kind
5 of CSX route into Maine and other parts of New
6 England that are good as a result of this
7 transaction, and the replacement from what we've
8 heard of the parent Pan Am may also have some
9 benefits.

10 So what we're seeking is the Board to use
11 their conditioning powers to effectively protect the
12 competitive alternatives in the market for carriers
13 like CP and the shippers. David, I'm going to hand
14 over the next few slides to you to continue the
15 discussion on 11324, and other aspects of the Board's
16 mandate. You're muted.

17 MR. MEYER: Can you hear me now? Okay.
18 Thank you James. There's been a lot of discussion in
19 the past two days about the legal standard applicable
20 here to the Board's review of this transaction. I'll
21 be brief perhaps we'll have a discussion of this in
22 more detail.

1 We think that under 11324D, which is the
2 governing provision for the control transaction here,
3 that the Board does have authority to impose
4 conditions designed to avoid significant competitive
5 harm from the transaction. There are two parts, as
6 Commissioner Fuchs observed yesterday, there are two
7 parts to this.

8 One is the question of whether there is a
9 competitive harm to be avoided, we can talk about
10 that in more detail. James I think has addressed it
11 well. The second part is whether if there's
12 competitive harm can conditions be imposed,
13 notwithstanding that if one tallied up the aggregate
14 competitive benefits from the transaction, and
15 weighed them against the aggregate competitive harm
16 with an unconditioned transaction, would the balance
17 kick towards net harm?

18 And we think the Board has resolved that
19 question in its interpretation of the statute in the
20 Messina Line case. And we also think there's a
21 reasonable interpretation of the statute from the
22 Messina Line case that would allow for conditions

1 under those circumstances. Here you know there is
2 clearly an 11324D focus on avoiding, or on
3 competitive consequences of the transaction. Our
4 request for conditions and our examination of the
5 consequences of the transaction if unconditioned, is
6 very much in line with that focus on competition.

7 So we're operating within the target zone
8 of Section D, and if you look at the Board's powers
9 in a significant transaction, it's also clear from
10 the statute not in the D-2 language, but in the first
11 part of D, that the Board does have authority, just
12 as in any case to condition a transaction. It makes
13 imminent sense in a case like this one to find that
14 there's a harm, and to eliminate that harm if the
15 conditions that eliminate that harm do not also
16 eliminate the procompetitive benefits of the
17 transaction.

18 And here the conditions we're proposing do
19 no harm, do not diminish in any way the ability for
20 applicants to carry out the parts of the transaction
21 that they have pointed to that have public benefits
22 as James has outlined.

1 Now there was discussion about how the
2 language in 11324D tracks the Clayton Act yesterday,
3 and I think that's a very astute observation. I have
4 an anti-trust background in my career, including
5 service at the anti-trust division as the Chief Civil
6 Enforcement Official, and so I have a lot of
7 knowledge of how the Clayton Section 7 standard
8 works, and is intended to work in merger cases.

9 And I think the approach to examination of
10 competitive harm that I've just discussed is very
11 much in line with how the Clayton Act would be
12 applied in a merger outside of the railroad
13 industry. In that kind of contest were there a
14 transaction that was offered by the proponents to be
15 net procompetitive, you know, an example is say two
16 grocery store chains proposing to combine where
17 there are 100 stores being combined across some
18 region of the country.

19 You know there may be tremendous net
20 benefits to that transaction, but in a couple of
21 markets you know, two, three, four, five, you know it
22 may be that the stores overlap very directly, and

1 there are very few other competitors in that local
2 market. The way in which the Federal Trade
3 Commission, or the Department of Justice would
4 approach that transaction would be to seek either
5 divestitures, or other relief with respect to those
6 specific overlaps in specific markets.

7 In other words fix those harms, and let
8 the balance of the transaction go forward. That kind
9 of approach happens every year in numerous
10 transactions. It's how Section 7 would be applied,
11 and I think that's the appropriate lens for which to
12 examine the transaction such as this one where there
13 are harms, likely and substantial harms, and we can
14 talk about that if you wish, that can be eliminated
15 with conditions that do not prevent the benefits of
16 the transaction from being implemented.

17 There is in addition I think in this
18 transaction, an additional basis for conditions.
19 It's an issue that hasn't been discussed in the
20 papers or the briefing today, so it occurred to me
21 as I was reading the briefs of the applicants, and
22 thinking back to the Pan Am Southern formation case.

1 In that case the applicants sought not
2 just approval under 11324 or 11323, excuse me, but
3 also approval under the Pooling Statute. And the
4 reason they sought that approval was because by
5 putting Pan Am Railway, and Norfolk Southern into the
6 joint control relationship, and then appointing
7 Springfield Terminal to operate and earn the
8 revenues, and then split the revenues that were
9 earned from the traffic on the line between Norfolk
10 Southern and Pan Am, there was a question whether, or
11 a belief by the applicants, that that may be treated
12 as a pooling of some part of their earnings to which
13 the Pooling Statute applies.

14 The Pooling Statute says that that pooling
15 cannot occur without Board approval, and it says that
16 the Board should consider whether there's an
17 anti-competitive effect, and that the Board may
18 impose conditions on the pool, unlike 324D that's a
19 clearly unrestricted scope for potential conditions.

20 Now in the Pan Am Southern case as the
21 Board may remember, it rejected that the application
22 for pooling authority because essentially the Board

1 found that it wasn't required, that there was not a
2 relationship between Norfolk Southern and Pan Am,
3 that would otherwise have been a competitive
4 relationship. They were essentially end to end
5 partners, and under longstanding Board precedent, an
6 arrangement between end to end connecting carriers
7 that allows them to cooperate is not treated as
8 pooling because there's not you know, because the
9 competitive relationship is a necessary element.

10 Well that won't be the case anymore with
11 CSX brought into Pan Am. And so with respect you
12 know it appears that in order to go forward with this
13 transaction, it may be necessary for a pooling to be
14 approved. CP has no objection to that approval, but
15 we know that the statute makes clear that there's
16 unrestricted authority to impose conditions, and to
17 address the competitive consequences.

18 Now I'm happy to answer additional
19 questions now about the legal standard and the legal
20 issues in the case, but I'm also happy to hand it
21 over to James, and then we can come back to it at
22 the Board's discretion.

1 CHAIRMAN OBERMAN: David, Patrick has some
2 questions. This is an area he's focused on, so why
3 don't we do that now. I think that would be more
4 efficient, Patrick if you want to go ahead.

5 BOARD MEMBER FUCHS: Absolutely. Thanks
6 Marty very much. David, would you agree with the
7 proposition that the Board's authority to condition
8 is at least -- is constrained by at least part of the
9 approval authority in Subsection D?

10 MR. MEYER: Certainly its authority under
11 11324 is constrained by you know those statutory
12 requirements. We completely agree with the idea that
13 the Board needs to comport its review of the
14 transaction with the standards set forth in the
15 statute, its precedent is very important for the
16 guidance of parties, and you know adherence, or
17 reasonable expectations about how a transaction would
18 be reviewed, so I think we agree with that
19 proposition yes.

20 BOARD MEMBER FUCHS: So in other words you
21 believe that the Board cannot impose a condition at
22 least on a competition related matter unless it finds

1 likelihood and substantiality?

2 MR. MEYER: That's right. That is we think
3 that finding -- in order to impose a condition, and
4 this is true whether it's a minor, significant, or
5 major transaction, in order to impose a condition the
6 statute and the Board precedent I think would say
7 that you must find that there's actually a
8 competitive harm that needs to be addressed that's
9 transaction related, that's not pre-existing, it's
10 not a matter of you know a complaint about
11 contractual arrangement.

12 There's been discussion in prior panels
13 about certain issues, certain kinds of issues that
14 may not rise to the level of transaction related
15 harm, or competitive harm that warrants a condition.
16 So we completely agree.

17 BOARD MEMBER FUCHS: But then isn't it
18 true that in subsection D transactions the Board
19 specifically evaluates things for likely or
20 substantial, but in Subsection C transactions, the
21 Board doesn't use that language.

22 MR. MEYER: Well the statute doesn't use

1 that language, but I think if you look at the Board
2 precedent, essentially there is a similar, if not the
3 same concept and standard that is applied to examine
4 whether there is actually a competitive harm. The
5 Clayton Act analogy may be apt again here, you know
6 in Section 7 of the Clayton Act the language is you
7 know substantial lessening of competition.

8 And the Courts have interpreted that you
9 know to mean essentially what 11324D means, but by
10 the same token in major transactions when the Board
11 examines whether competition would be harmed, it
12 adopts a similar analysis to ask is this really a
13 competitive harm that's coming from the merger? Is
14 it likely? And is it significant enough for us to
15 remedy?

16 BOARD MEMBER FUCHS: It's your view that
17 let's say under the new rules for mergers. It's your
18 view that the new rules for the major merger adopted
19 a Clayton Act standard, the competition?

20 MR. MEYER: Well that's introducing I
21 think there may be two layers to that question Mr.
22 Fuchs. You know one is the question whether there's

1 a competitive harm that warrants imposing
2 conditions. Separately, you know there is a broader
3 conditioning authority under a major merger case than
4 just competitive issues right?

5 And so I think a way of looking at the new
6 rules is that they are tapping into that broader
7 authority of the Board to ensure that the transaction
8 will be in the public interest, and there are a host
9 of issues that the Board pointed to in its adoption
10 of the new rules that are public interest concerns,
11 and you know collectively they led the Board to
12 conclude for example, that there needs to be an
13 enhancement of competition.

14 That is a different standard than what we
15 are focused on here.

16 BOARD MEMBER FUCHS: So if the Board has a
17 broader conditioning standard under C than D, as you
18 described, what can't the Board condition under D
19 that it can under C, and why?

20 MR. MEYER: Well you know we don't have a
21 position on this issue in this case, but I think you
22 know for example, our position here in this case

1 would not require the Board to find that it has any
2 authority under D to condition the transaction to
3 protect passage of rail interests. Now again we
4 don't have a dog in that hunt so to speak on this
5 issue, but you know I think to find that the kinds of
6 conditions address the competition that we're urging
7 here are warranted under D, you would not need to
8 conclude that you have any authority to impose.

9 BOARD MEMBER FUCHS: I understand, but I
10 just want to make sure that I understand the point.
11 Can you maybe give a concrete example of something we
12 could condition under C, but we can't under D, and
13 why? Just so I understand your claim that C has
14 broader authority.

15 MR. MEYER: Well I think you could under C
16 impose conditions that are designed to guard against
17 transaction related harm to passenger rail service.

18 BOARD MEMBER FUCHS: But we can't under D?

19 MR. MEYER: Well I think what I'm saying
20 is I understand the interpretation of D that would
21 say you can't. We don't really have a position here
22 that you can't, but I understand that there's a

1 distinction between the issues that would allow you
2 to go one way and not the other.

3 BOARD MEMBER FUCHS: And so you kind of go
4 into that Clayton Act standard is apt, and that the
5 Board should basically adopt something like a Clayton
6 Act standard when it's both evaluated in the
7 transaction, and when it's deciding on conditions.
8 Is that right?

9 MR. MEYER: Yes.

10 BOARD MEMBER FUCHS: Okay. So why do you
11 think Congress added D to it?

12 CHAIRMAN OBERMAN: Patrick can I just
13 interject for a minute because I'm trying to follow
14 this. Could one of the two of you, David I suppose,
15 state what is when Patrick says should we apply
16 something like the Clayton Act standard, could you
17 articulate that?

18 MR. MEYER: I think actually the language
19 of D-2 does a pretty good job of approximating a
20 Clayton Act standard for review of the transaction.
21 The Clayton Act itself talks about substantial
22 lessening of competition, and if D-2 talks about you

1 know the action was substantial competitive harm.

2 And you know under the Clayton Act as well
3 as under D-2, you do view that whether it's the Board
4 or a Court, would evaluate a transaction by balancing
5 the harm to competition against potential
6 procompetitive benefits from the transaction. That's
7 how the Clayton Act has been applied for a generation
8 at least.

9 So I think that's a way of thinking about
10 what a Clayton Act standard is. Commissioner Fuchs
11 to your question --

12 CHAIRMAN OBERMAN: Thank you David, and
13 Patrick I'm sorry to have interrupted, but I just
14 wanted to.

15 BOARD MEMBER FUCHS: Well I think the
16 direct answer, and David please correct me if I'm
17 wrong, but the Clayton Act says that you know maybe
18 to substantially lessen competition, or create a
19 monopoly right? And any line of commerce in any area
20 of the United States, is that right?

21 MR. MEYER: Yes.

22 BOARD MEMBER FUCHS: All right. And so

1 D-1 also says, well it says a little different, it
2 says is likely to result. There is likely to result
3 in a substantial lessening of competition, creation
4 of monopoly or a restraint in trade. So you can see
5 how the language is almost -- is very similar, is I
6 guess that's why I keep on D-1 is a Clayton Act-like
7 standard.

8 And this David I'm really glad you're here
9 with your background. You know I am certainly I'm
10 not a lawyer, I'm certainly not an anti-trust lawyer,
11 so could you educate us on I thought that under case
12 law at the time like Philadelphia National Bank and
13 Proctor and Gamble that economies weren't a defeating
14 defense for substantial lessening of competition.

15 MR. MEYER: Well so Philadelphia National
16 Bank goes back quite a ways. And it is I would
17 submit it really is not the governing law on the
18 question of how to apply Section 7 of the Clayton
19 Act. The right line of authority to examine is a
20 Supreme Court Case called U.S. versus General
21 Dynamics. And then a subsequent DC Circuit Case,
22 U.S. versus Baker Hughes.

1 In both of those cases the Courts
2 emphasized the importance of examining competition
3 not just in terms of the structural you know impact
4 on concentration statistics, but on the dynamics, the
5 competitive dynamics of the market.

6 BOARD MEMBER FUCHS: Let me ask so what
7 problem do you think that Congress was trying to
8 solve when it added D-2?

9 MR. MEYER: Well so I'm not sure that
10 Congress was trying to solve a problem that wasn't --
11 a competitive problem that wasn't already addressed
12 in the statute. In my view adding D-2 you know
13 plainly places the focus of a minor or a significant
14 transaction on competition versus other public
15 interest concern.

16 It says if the transaction is net
17 procompetitive, then don't be concerned about other
18 public interest facts that may be raised against the
19 transaction. Congress wants procompetitive
20 transactions to go forward, whether or not there are
21 other public interest concerns that might in the
22 Board's view, get in the way of that transaction.

1 I think at least that's a way of reading
2 D-2, and I think it's a reasonable way. If you look
3 at when that was adopted in the statute, the way the
4 anti-trust laws, and the deregulatory thrust of
5 Congress in the rail area, was very much on allowing
6 for transactions that did not harm competition to not
7 be burdened and impeded by concern about you know
8 other claimed public interest issues.

9 So again, you know we don't have a
10 position on the other public interest considerations
11 of the CSX Pan Am transaction, and as James said even
12 in the competitive focus we think on if you were to
13 say if we had no authority to condition the
14 transaction, you know we would still -- we would not
15 suggest that the Board block the transaction.

16 But we think clearly the Board is not
17 hamstrung to say you know we have no power to fix
18 specific concerns that we can fix without doing
19 violence to the broad event.

20 BOARD MEMBER FUCHS: So I want to posit
21 theory, but I just want to quick make sure I kind of
22 concisely summarize that. It's your view that what

1 the Congress was intending for D was that if you
2 don't find likely and substantial competitive
3 effects, the Board should move along?

4 MR. MEYER: Yes.

5 BOARD MEMBER FUCHS: Okay. And regardless
6 of you know whatever other public interest factors it
7 could dream up?

8 MR. MEYER: I think that's a fair
9 interpretation yes.

10 BOARD MEMBER FUCHS: Okay. So let me get
11 your reaction, and let me posit a theory. I think
12 that captures a good bit of what was going on at the
13 time, but you know as you may be aware in '76, before
14 our Congress put forward an expedited merger
15 procedure that wasn't really implemented.

16 And then you know this is what I alluded
17 to yesterday, the Carter Administration out of the
18 prospectus for change, had a bill, the precursor to
19 the Stagger's Act, which is what added D, that
20 thought to put everybody under the Clayton Act, all
21 mergers under the Clayton Act. And then for
22 non-mergers, other cooperative agreements, or nation

1 agreements, it would be under like a standard that
2 looks a lot like D today.

3 And there was a series of Congressional
4 hearings at the time. Donald Flexner, representing
5 the DOJ, and Bob Gallamore for FRA, Sullivan and FRA,
6 Chairman O'Neill for ICC, and the railroads. And
7 there was an extensive discussion about whether or
8 not mergers should just be under the Clayton Act as
9 you're suggesting D is today.

10 And what the railroads contended at the
11 time was because of the language of any line of
12 commerce in any market, the Clayton Act would
13 essentially put an end to mergers. And there were a
14 lot of parallel lines where the shifting of routing
15 would lead to economies that would not be possible if
16 you adopted the Clayton Act standard because you
17 would find a likely substantial lessening of
18 competition in that area, or for that line of
19 commerce.

20 And you lose all those economies, or
21 economies that could exist elsewhere. And there was
22 active discussion and questioning by what I

1 understand to be one of the chief drafters, Florio,
2 Representative Florio, at the time to the railroads,
3 to DOJ, to DOT about whether or not if you apply the
4 Clayton standard you lose a focus on the economy.

5 And he actively suggests whether or not
6 you need D-2 in order to consider the broader public
7 benefits because Clayton would be too cramped for the
8 unique characteristics of the rail industry. I also
9 agree -- so I put that out there to say that I think
10 it's hard to look at that and say the intent was just
11 to apply something very similar to Clayton, when
12 Clayton was explicitly contemplated, and not adopted.

13 And so I would also -- so that's on the
14 Clayton point. So I think that I would like you
15 maybe to disabuse me of that. And then the other is
16 on the factors point. I completely agree with you.
17 The conference report suggests that D stands for
18 limiting factors. If you look at what was going on
19 at the time, in 1978 the ICC issued a policy
20 statement that had all of these factors.

21 And the prospectus for changing the
22 partners said there's so many conflicting factors,

1 public interest factors, we need to focus on
2 competition here. And it's very clear across
3 government and other agencies that that was a
4 concerned effort to focus mergers on competition, and
5 not other public interest factors, some of which
6 include fixed charges, some of which include,
7 actually environmental impacts, and other things that
8 were in that policy statement in 1978.

9 And so the Congress also wanted to limit
10 the factors, but it didn't want to only limit the
11 factors because they had this other concern that
12 Clayton would be too cramped. But in addition to the
13 expert agency claims and other things. So I guess I
14 certainly appreciate that the Congress wanted to
15 limit factors is I guess what I'm saying.

16 And I think the way you read the statute,
17 and to not get involved in all these other public
18 interest matters, is a very reasonable and defensible
19 one, and it's hard to imagine what D stands for
20 anything if it doesn't stand for that. But I only
21 put forward that there's a lot of discussion and sort
22 of when you look at the case law at the time, there's

1 a lot of reason to suggest that if Congress just
2 wanted the Board, or I should say the ICC, or the DOJ
3 to apply Clayton, as you're suggesting is our role
4 today, it would have just done that.

5 But it didn't. And I'm wondering whether
6 or not there's significance in that.

7 MR. MEYER: So Commissioner Fuchs, a
8 couple of reactions to that, and I'll try to focus on
9 responding to your points or questions. And perhaps
10 I'll -- get a field, but I think my first
11 observation is I don't know that I have a unified
12 field theory of how the Board you know considered, or
13 Congress considered potential alterations to the
14 statutory framework you know over the last half
15 century.

16 You know I did litigate side by side with
17 Don Flexner in an anti-trust case, so you know I kind
18 of can envision him as the Department of Justice
19 representative speaking in the competitive issues.
20 He'll offer some observations about those issues, but
21 I want to say I think some of the academic you know
22 question that you're raising is sort of interesting,

1 and maybe very important in a certain context, but I
2 don't think it is actually a necessary path to decide
3 that the particular conditions that you're
4 proposing, and the consequences that you're seeking
5 to address through our conditions, are within the
6 Board's authority in discretion to address.

7 So I think I have not perhaps because of
8 that --

9 BOARD MEMBER FUCHS: I hear you, except
10 you know the first we have Amtrak and MBTA right, and
11 they're asking us to impose passenger rail
12 conditions, something that we've basically never
13 done, and you know rejected at least by pointing to D
14 right, among other reasons.

15 So I think resolving how D limits factors
16 is extremely important for adjudicating that issue
17 right?

18 MR. MEYER: I'm certainly delighted to do
19 my best to be helpful to you.

20 BOARD MEMBER FUCHS: I totally agree, and
21 you don't have tell me that. I hear you. And then
22 the other thing though is, and this is why I think

1 it's a little bit more than academic, is because you
2 all have the burden to justify your conditions. It
3 sets a Board precedent on that. I think everybody
4 has agreed with that.

5 MR. MEYER: Agreed.

6 BOARD MEMBER FUCHS: And so is the burden
7 to what standard? And if it is true that you needed
8 to look at the effect on the benefits of the
9 transaction, say for example factoring in the
10 benefits of NS trackage rights. You haven't made any
11 showing on that.

12 MR. MEYER: I disagree. I disagree.

13 BOARD MEMBER FUCHS: You made a showing on
14 the relative merits of NS tracking rights, and the
15 potential ways the conditions could jeopardize those?

16 MR. MEYER: The conditions in no way
17 affect the NS trackage right. We are fully
18 supportive of NS exercising their trackage rights.

19 BOARD MEMBER FUCHS: Well if CSX granted
20 NS trackage rights under some conditions on the
21 northern route, they would -- the Board would be
22 unjustified in considering whether or not if those

1 circumstances changes that circumstances change the
2 trackage rights should no longer be granted?

3 Because that is a voluntary measure.

4 MR. MEYER: I don't believe that any of
5 the conditions that we are seeking would require the
6 applicants to go back and renegotiate any aspects of
7 their arrangements among the three participants here.
8 James will address the specifics of what we are
9 asking him in a few moments, but we're not saying
10 that they have to relinquish or alter their plans to
11 move the double stack trains to the southern route.

12 We're not saying that they need to avoid
13 taking advantage of the single line route that CSX
14 will have established with its Pan Am railway
15 acquisition, and force traffic over the Pan Am
16 Southern, even if it were inefficient to do so. We
17 are not saying that.

18 All we're saying is that to the extent
19 that those steps and/or the you know the fundamental
20 aspect of this transaction where the evidence I would
21 submit, of the substantial effect is unavoidable is
22 that you know where the Board found in the Pan Am

1 Southern formation case that it was in the public
2 interest to enhance competition, Pan Am Southern
3 against CSX in these markets, to then have CSX
4 invited into the boardroom where they have an
5 interest in that railroad, it's you know I would
6 submit that is proof enough of an anti-competitive
7 harm.

8 If we were in a Clayton Act case.

9 BOARD MEMBER FUCHS: Right, but I think we
10 established that we're not in a Clayton Act case
11 right because the Clayton Act referred, it's you know
12 similar to D-1. D-2 was you know if my contention is
13 right that D-2 was meant to contemplate maybe
14 something broader than Clayton Act. But I think you
15 know stepping back I just want to I mean you all have
16 -- it's fair to say though that you have not weighed
17 the overall public benefits of the transaction, and
18 your contention is that your conditions have no
19 effect on the benefits of the transaction.

20 MR. MEYER: That's correct. So what I
21 would say is whether the overall competitive benefits
22 are you know one million dollars, or one billion

1 dollars, right? You know I think we would be
2 inclined to say that they likely do exceed, and they
3 may exceed. It doesn't matter to the outcome, the
4 net harm, where you just cannot condition the
5 transaction at all.

6 BOARD MEMBER FUCHS: So the Board should
7 intervene when transactions add to competition, but
8 have one aspect of them that don't add to it enough,
9 or that take away from it.

10 MR. MEYER: Well where they have an aspect
11 that will cause harm, that can be remedied without
12 reducing the net benefits of the transaction.

13 BOARD MEMBER FUCHS: Okay. And I'll wrap
14 up by saying --

15 MR. MEYER: It has active increasing net
16 benefits, but the goal isn't to increase the net
17 benefits, it's to remove the harm. And that's how
18 the Clayton Act would be applied. And to your point,
19 and there's probably a very great degree to which I
20 agree with your perspective on D versus the Clayton
21 Act, and going back to Don Flexner and the history of
22 this, you know there certainly has been over the

1 years in the Clayton Act context debate in the
2 anti-trust community about whether if the anti-trust
3 division goes to litigate in a merger case, whether a
4 Court is allowed to consider efficiencies of the
5 transaction as a counter made to the competitive
6 harm.

7 The thrust of current law I would submit,
8 you know, very strongly in favor of allowing
9 Defendants in a merger case to bring forward
10 efficiencies, to show that in fact you know when the
11 efficiencies change the incentives of the parties,
12 and a they mean the transaction is not
13 anti-competitive, that's sort of neither here nor
14 there.

15 I think being clear in the context of the
16 Interstate Commerce Act, that efficiencies are
17 important. It goes back to the you know
18 Transportation Act of 1920, and the whole thrust of
19 why the Board has a role in allowing transactions
20 that are in the public interest to go forward.

21 I think I would take your point a step
22 farther if you're looking at a major merger

1 transaction. One of the reasons why the Board was
2 created by ICCTA that it retained the authority over
3 mergers was to allow for a transaction that some
4 might regard as anti-competitive to go forward
5 because it had substantial public benefits associated
6 with improving the strength of the transportation
7 that were providing significant benefits you know
8 for example, encouraging investment in what would
9 have otherwise been a less effective competitor.

10 And a good example of that is the UPSP
11 merger. you know if you look at the way the Board
12 reviewed that merger transaction, and saw benefits
13 associated with UP taking over the SP network, and
14 remedying competitive concerns with extensive
15 trackage rights, you know, the anti-trust division
16 and the Clayton Act probably would have come to a
17 different outcome and required either a block of
18 that transaction, or some other kind of relief.

19 The Board had more authority to tailor the
20 relief to the public interest in that case, so I
21 think there is this continuity between the
22 approaches. I'm not suggesting it's exactly the

1 same. However, I would submit that you know whether
2 it's a minor transaction, significant transaction, or
3 a major transaction, when you're asking is there a
4 harm that ought to be considered as a harm, or a
5 potential remedy, the basic approach is to examine it
6 like you would in an anti-trust case, and ask is
7 competition going to be reduced, is it likely, and is
8 it substantial.

9 And here kind of circling back to that
10 question you know, unless you're prepared to say that
11 the competition that Springfield terminal provides
12 against CSX is not substantial, allowing CSX to be on
13 the Board of Pan Am Southern is clearly a substantial
14 competitive harm.

15 BOARD MEMBER FUCHS: I want to quick wrap
16 up, and I want to thank you for the robust
17 discussion, as well as my colleagues for allowing me
18 to explore this issue. It's of importance to me,
19 and we discussed it at length in many other cases,
20 and one in particular.

21 So I really do appreciate it. I want to
22 extend my appreciation of my colleagues. I'll kind

1 of wrap it up by saying you know, and get your
2 reaction to it, do you agree with the proposition
3 that the Board should only impose a condition if it
4 could withhold approval on the transaction?

5 So the 7th Circuit -- so immediately after
6 D there was a case that the ICC had, that said we
7 should only impose conditions in a transaction if we
8 could withhold approval, and that decision was upheld
9 by the 7th Circuit. And then there's another case in
10 a major merger, where the D.C. Circuit said we reject
11 the notion that the Board has broader authority to
12 impose conditions than it has to deny approval,
13 basically is what it said. So I guess I'm asking
14 you does the Board have broader authority to impose
15 conditions than it does to deny a transaction?

16 MR. MEYER: Well two points. So if we're
17 focused just on 11324, so not looking at the Pooling
18 Statute, which is a separate point that may apply
19 here. I think I'm not sure that there is a
20 discontinuity between the point about withholding
21 approval, and imposing conditions.

22 In the sense that you know it really it

1 begs the question could the Board withhold approval
2 if there were a competitive harm that was not
3 necessary to go along with the benefits that are
4 included in the calculus of whether there are net
5 benefits.

6 You could end up with this circular debate
7 about.

8 BOARD MEMBER FUCHS: Right.

9 MR. MEYER: Do the benefits, you have to
10 take the harm with the benefits to get the benefits.
11 I think it goes back to the way in which the
12 anti-trust agency put a value on competitive harm.
13 You know if you could carve off the harm without
14 doing harm to the transaction, without doing harm to
15 the benefits from the transaction, then you do so.

16 If you would blow up the transaction as
17 part of doing that?

18 BOARD MEMBER FUCHS: So I mean to
19 summarize though you basically say yes, the Board can
20 impose conditions even if it could not deny the
21 transaction on that basis?

22 MR. MEYER: What I'm resisting is the hard

1 conclusion that the Board could not deny approval
2 under circumstances where there were harms that
3 weren't connected to the benefits.

4 BOARD MEMBER FUCHS: I guess I'm missing
5 the distinction. You know I guess so we look at D-1
6 and D-2 to decide whether or not we can deny the
7 transaction. If we conclude that just based on the
8 transaction as presented, non-condition, we can't
9 deny it. We can still impose conditions, and that is
10 true under both C and D.

11 So if we look at a subsection C
12 transaction, it's the same situation where we
13 conclude we can't disapprove it as it presented. In
14 both instances we can go beyond our authority to
15 deny in order to impose conditions.

16 MR. MEYER: So I think where I think we
17 may agree is that if you assume that the Board has
18 reached that conclusion, that it cannot deny the
19 transaction, then if there is a good argument that
20 you cannot condition it. However, where I think we
21 may be not 100 percent aligned is to conclude that
22 the Board cannot deny a transaction just because you

1 may look at the way in which the parties have chosen
2 to structure the transaction, and you know because of
3 the way they package certain assets together into a
4 transaction, they may have a very procompetitive, you
5 know, five elements of the transaction, but they've
6 chosen to add in something that's blatantly
7 anti-competitive in order to force the Board to
8 approve that under D.

9 I think that the Board probably has more
10 latitude than your question may be suggested to reach
11 out and say no, you can't include this blatantly
12 anti-competitive aspect just because you've chosen to
13 do those five elements of the transaction. Now if
14 that were the case that the only way to get the five
15 elements --

16 BOARD MEMBER FUCHS: So when the Congress
17 tells us that we shall approve the transaction if it
18 meets those criteria's it doesn't really mean you
19 shall approve the transaction. It means we should
20 approve the transaction as we design it?

21 MR. MEYER: I don't think I would
22 necessarily ascribe to that characterization of

1 Congress's statement in D-2. I think I would be
2 inclined to go back to you know where it appears to
3 me that Congress was coming from was the focus was to
4 put the you know, starting point with D-2 is we want
5 to make sure that you are not going off and denying
6 transactions on the basis of issues that aren't
7 competition issues.

8 And when you're examining a competition
9 issue we want to make sure that you're also
10 considering potential benefits associated,
11 competitive benefits associated with the transaction.
12 That's completely consistent with the focus on
13 competition, and it's also completely consistent with
14 our focus here in this transaction.

15 BOARD MEMBER FUCHS: I will only note, and
16 I'll wrap up here. I will only note that D-2 doesn't
17 include the word competitive benefits right, it says
18 public interest in meeting significant transportation
19 needs, so it's you know.

20 MR. MEYER: Fair, fair.

21 BOARD MEMBER FUCHS: All right. But I'll
22 leave it at that. There's also I'll actually just

1 leave it at that, but Dave I really do appreciate the
2 discussion very much, and again thanks for my
3 colleagues.

4 MR. MEYER: Sure thing.

5 CHAIRMAN OBERMAN: Thank Patrick and David
6 both, that was extraordinarily enlightening, and I
7 have a few questions. We have been going for a
8 little over two hours. I wonder if this would be an
9 appropriate place to take a short break. And then I
10 have, I'd like to follow-up David with tying down a
11 little bit of this discussion which was far ranging
12 as it might apply to this case.

13 I will say I don't have any sense of being
14 able to discuss this on the same playing field as you
15 and Patrick, in the terms of expertise in both
16 legislative history and anti-trust law. The last
17 time I looked at anti-trust law was when I borrowed a
18 classmate's notes to take the exam in 1969, and did
19 better than him.

20 But other than that I don't know anything
21 about anti-trust laws, other than what hit the Board.
22 So I have a few more questions. So let's break.

1 It's 11:50. I think what might be gone if it's okay
2 with the Board, we come back in 10 minutes, finish
3 this panel, and then break for lunch. Does that
4 sound like a plan for everybody?

5 MR. MEYER: Sounds good thank you.

6 CHAIRMAN OBERMAN: All right. We'll see
7 you at noon sharp.

8 (Break)

9 CHAIRMAN OBERMAN: All right everybody. I
10 think we are back in session, and I had a little bit
11 of a follow-up David, to this extremely important area of
12 discussion. A couple of points. You know as I was
13 listening to this, and staring at D-2, which I have
14 stared at off and on since I've been on the Board, I
15 thought it was interesting that whatever the intent
16 of Congress was to focus on competition, as Patrick
17 pointed out there at end, D-2 says that we're
18 supposed to weigh anti-competitive against the public
19 interest, and meeting significant transportation
20 needs.

21 It doesn't say in meeting the public
22 interest and procompetitive impacts. It doesn't say

1 significant freight transportation needs. It doesn't
2 distinguish between freight and passenger. So if
3 that if a proposed transaction is not meeting
4 significant transportation needs, including
5 passenger, then we're supposed to take that into
6 account in the weighing part of D-2. Is that not a
7 fair rating?

8 I know you're not here on the passenger
9 side David, but you are a resident expert, so I'm
10 going to take a --

11 MR. MEYER: And Robert Wimbish is here
12 right?

13 CHAIRMAN OBERMAN: Yeah. And he can weigh
14 in on that too.

15 MR. MEYER: Well I think that I'm not
16 sure. When I look at the language of D-2, and it
17 speaks to whether there are anti-competitive facts
18 that outweigh public interest benefits. It appears
19 to be suggesting that the nature of the harms that
20 may outweigh benefits is to be measured in terms of
21 competitive harms. At least that's --

22 CHAIRMAN OBERMAN: The harms are supposed

1 to be measured on the competitive side, but the
2 benefits aren't limited to competitive. The benefits
3 are talking about significant transportation needs,
4 which could be competition, could be passenger
5 service, could mean better freight service, could
6 mean -- they chose a broad term.

7 MR. MEYER: And I think apropos with my
8 observations about the preservation of the Board's
9 authority with the mergers, et al, in the mid-90's in
10 ICCTA, you know I do think Congress has long had the
11 view that you may be uniquely in the railroad
12 industry, of all industries in the country, but there
13 is a desire to make sure that anti-trust law doesn't
14 stand in the way.

15 And it can narrow mind an application in
16 anti-trust law, it doesn't stand in the way of
17 transactions that may be vital to improve the
18 railroad. And whether you view the Union Pacific,
19 Southern Pacific merger as an example, or not. I
20 worked on that case. I thought that was a very
21 procompetitive transaction. But certainly a case the
22 Department of Justice strongly disagreed with that

1 conclusion.

2 But the Board by reserving to get the
3 Congress by reserving to the STB the authority to say
4 you can approve that transaction if it's in the
5 public interest, notwithstanding some
6 anti-competitive facts that may or may not be found,
7 that they you know allowed for the Board to have
8 latitude to serve the interest, the public and
9 transportation needs without being hamstrung by the
10 potential for anti-competitive effects.

11 But I think none of that debate, whether
12 you can or can't weigh certain types of effects
13 against other types of effects, in my view limits the
14 Board's authority to excise anti-competitive harm
15 that's not inextricable to the beneficial aspects of
16 the transaction.

17 BOARD MEMBER FUCHS: Marty you're
18 suggesting you only reach that though if you first
19 find, and maybe you would first make an
20 anti-competitive fact finding.

21 MR. MEYER: I think you have to make an
22 anti-competitive fact finding relating to that which

1 you will excise yes.

2 CHAIRMAN OBERMAN: Yes.

3 MR. MEYER: But I don't think you need to
4 take, you don't need to take unnecessary
5 anti-competitive harms along with the benefits just
6 because they've been latched onto the transaction.

7 CHAIRMAN OBERMAN: You're saying as I take
8 it, that competition is the focus of the sole
9 discussion. If a transaction has anti-competitive
10 effects that can be excised by conditioning without
11 harming the transaction, we're supposed to do it.

12 MR. MEYER: That's our view.

13 CHAIRMAN OBERMAN: Yep, yep, so that's
14 what I want to get to. I want to see if I understand
15 this, and I don't know if maybe this is for James as
16 well if he was going to get to it, but let me ask you
17 David, and then if we should await further
18 exploration of this until James makes his further
19 comments, I'm happy to do that.

20 As I understand it right now CP, with no
21 transactions as of today, CP is comfortable with the
22 current situation. It's access to PAS, it's access

1 to New England and so forth, and you don't want that
2 diminished. Is that a fair summary of where CP is
3 in this deal?

4 MR. MEYER: I'll let James speak to that.

5 MR. CLEMENTS: Yes that's correct.

6 CHAIRMAN OBERMAN: Okay. So your concerns
7 are, that without some conditions or promises by CSX,
8 and I want to go into that, your current situation
9 could be diminished, and your ability to compete in
10 New England could be diminished, and therefore it
11 comes in under this whole discussion of
12 anti-competitive effects of the transaction. Is that
13 a fair understanding of why we're talking about this?

14 MR. CLEMENTS: Yes, that's exactly
15 correct.

16 CHAIRMAN OBERMAN: All right. So
17 yesterday I had a robust discussion with the CSX
18 team, which I assume you listened to about their
19 promises to keep all gateways open, to keep them open
20 on non- -- pricing, or equalized pricing. I cited as
21 an example, a current PAR PAS tariff, that relates to
22 Mechanicville, Hoosac Junction, and Rotterdam, and I

1 thought we had a very clear promise by Mr. Foote that
2 he was going to close no gateways, physically or
3 financially.

4 Did you -- first of all were you both on
5 listening to that interchange?

6 MR. MEYER: Yes I heard that interchange.

7 CHAIRMAN OBERMAN: All right. So and you
8 know CSX has said any promise they've made to us they
9 agreed can be a condition of this transaction. So
10 let's take it to there. Was that discussion, if it
11 was properly written out to cover PAR and PAS, did
12 that satisfy that, at least one of the conditions
13 you're asking for?

14 MR. CLEMENTS: Yes. So there's two
15 components. I would say that that condition, the way
16 I understood the conversation addresses what we would
17 call the neutral access over PAS and to PAR, and also
18 as you discussed over reverse flows that are coming
19 out. So that is --

20 CHAIRMAN OBERMAN: That's part of it. And
21 I realize you have some other concerns, but just on
22 the access part, and your ability to get in there and

1 compete by having access.

2 MR. CLEMENTS: Commercial access.

3 CHAIRMAN OBERMAN: Yeah. Because you know
4 I didn't ask Mr. Foote about this, but I thought that
5 I remembered this. I just didn't remember it
6 yesterday. The page that you put up on the screen I
7 thought covered this as broadly as possible because
8 the statement made by CSX that you had up there said
9 through a series of agreements with NSR GW CSXT has
10 structured the proposed transaction was the other
11 thing, to eliminate any risk of competitive harm
12 relating to these two parallel routes.

13 So he and I talked yesterday about
14 competitive access up and down the main, you know,
15 the line as it runs up to Bangor and so forth. This
16 language specifically covers any risk of competitive
17 harm to the two roughly parallel routes, and that's
18 where your focus is, your access to PAS right?

19 If we put into a condition specifically
20 keeping those gateways open at Mechanicville,
21 Rotterdam and Hoosac Junction, that part would
22 eliminate "any risk of potential harm," we're all on

1 the same page there?

2 MR. CLEMENTS: We're -- on the commercial
3 side we are, but we think that being competitive is
4 also a function of the service that you get into the
5 market. We are not satisfied that the service is
6 adequately addressed at this point in time.

7 CHAIRMAN OBERMAN: All right and I agree,
8 I was just focusing for the moment on access. And so
9 that is what I wanted to deal with. I want to hear
10 you are also concerned, I know you are concerned
11 about the condition of the CSX line, whether there's
12 enough incentive to keep it up from an investment
13 view. You talked about service, and I gather you
14 want to deal with that directly in further
15 presentations, so I think I'll hold my questions on
16 those aspects of what you're asking for until you've
17 been able to -- I think you want to explain it in
18 more detail right?

19 MR. CLEMENTS: Yeah. I'll maybe go
20 through it very quickly at this point.

21 CHAIRMAN OBERMAN: Okay. But I don't want
22 to cut you off. I didn't want to do it piecemeal I'd

1 rather let you make your presentation, then we can
2 come back. Before we do that, do any other Board
3 members want to weigh in? Patrick on David's
4 intellectual exchange? And I don't mean to say it's
5 not practical, it's practical as well as
6 intellectual. Do any of the Board members want to
7 weigh in on that, or shall we let Mr. Clements go
8 forward?

9 VICE CHAIRMAN PRIMUS: I just wondered
10 Marty, I just make it run through just the 11322, you
11 know, in terms of why they believe that to be
12 applicable here, and how it relates to their
13 assertion that you know that the harm it would cause,
14 well the remedy it would produce, you know over the
15 CSX taking over 50 percent of PAS.

16 So David if you could just go over that
17 just a little bit I'd appreciate that.

18 CHAIRMAN OBERMAN: I think that's a good
19 point Robert, in fact I'm glad you raised it, because
20 I'm not sure what pooling means in this context, and
21 maybe David could put some flesh on that.

22 MR. MEYER: Sure, and again yeah this

1 observation in our presentation today that builds
2 primarily on the original formation of the Pan Am
3 Southern and the applicant's view with Norfolk
4 Southern and Pan Am's view at the time that approval
5 under the Pooling Statute was in fact required to
6 allow for the two of them as joint owners of --
7 becoming joint owners of Pan Am Southern, therefore
8 sharing in the profits from the rail operations on
9 Pan Am Southern through you know to be operated by
10 Springfield Terminal, generating revenues that would
11 be allocated back to the owners.

12 They assessed the situation and thought we
13 need a pooling authority. And you know the Board
14 disagreed because they weren't otherwise competitors,
15 but perhaps let's go back to the beginning of the
16 analysis and understanding why they thought that they
17 may need pooling authority, and you'll understand I
18 think why pooling authority, Pooling Statute arguably
19 does apply here.

20 In fact I would suggest this may be a
21 textbook case of pooling in the rail industry. It's
22 a relatively little used authority in recent times

1 because major railroads avoid sharing revenues with
2 folks that they compete with. And the Board is very
3 clear that it really doesn't apply when there are end
4 to end vertical arrangements for example, or traffic
5 rights.

6 But if you're actually sharing, depending
7 how you read from the statute, if you are a rail
8 carrier within the jurisdiction of the Board, you may
9 not "pool or divide traffic or services for any part
10 of their earnings without the approval of the Board."
11 And you know the Board may approve pooling if it
12 would be in the interest of better service, if it
13 will not unreasonably restrain competition.

14 So the Board has the authority to approve
15 the kind of arrangement here between CSX and Norfolk
16 Southern if the arrangement will improve service, the
17 public, or the economy of operation, and not
18 unreasonably restrain competition.

19 CHAIRMAN OBERMAN: Let me translate that
20 to make sure. I think I understand what you're
21 saying, I just didn't understand the word pooling
22 before. So if the deal goes through, Norfolk

1 Southern and CSX will each own 50 percent of PAS, and
2 get 50 percent of the profits. That's pooling? Is
3 that what you're saying?

4 MR. MEYER: you know I have not analyzed
5 you know in depth exactly how the flow is to the
6 owner, but it certainly appears to me that as 50
7 percent owners in an enterprise, in the LLC that's
8 generating a certain amount of revenues from the rail
9 operations of the LLC, whether they're conducted by
10 B&E, or some other operator, you know if that's two
11 competitors with you know parallel lines coming
12 together to share in the revenues from the competing
13 line, I think that is a textbook case of what the
14 pooling statute was designed to address.

15 CHAIRMAN OBERMAN: All right. And then
16 you're saying that under that statute there's an even
17 broader conditioning authority, so if we just take
18 this situation we have been told that one of the
19 pluses of Pan Am is that at last the way, or PAS, the
20 way PAS has functioned, is that it's neutral to all
21 comers. So it has these tariffs that allow CSX, NS,
22 CP, anybody else to access the PAS line on exactly

1 the same terms, so that the shipper then or
2 receiver, has several competitive options.

3 And that's the way it's been run now. It
4 sounds to me like you're saying if we allow CSX to
5 come in and replace -- to come in as a 50 percent
6 holder replacing Pan Am, now there's pooling there
7 between CSX and NS, we can condition that by saying
8 you can't reduce all those competitive options that
9 have been in place prior to your coming in as a 50
10 percent owner. That's one kind of condition we could
11 impose by keeping these gateways open on equalized
12 pricing.

13 That's your point about the conditioning
14 authority under 322?

15 MR. MEYER: If the Board so chooses two
16 points to there I would suggest, and James may want
17 to chime in on the merits. But point one is I think
18 if the Board concludes that there is pooling here, I
19 think the statute is pretty clear that the Board's
20 ability to impose conditions is not limited in the
21 way -- in whatever way 11324 D-2 is limited.

22 CHAIRMAN OBERMAN: Yeah and that's under

1 B.

2 MR. MEYER: Yeah this is 11322-B correct.

3 CHAIRMAN OBERMAN: There's no limitation,
4 it just says they impose conditions governing the
5 pooling or division.

6 MR. MEYER: Correct.

7 CHAIRMAN OBERMAN: Okay.

8 MR. MEYER: The second -- and maybe I have
9 three observations, one of which goes back to
10 Commissioner Primus's question. But my second
11 observation is to the way in which you've described
12 the condition is probably different and broader than
13 what we suggest is warranted. We're not looking for
14 a condition that freezes rates, or requires
15 necessarily requires that Pan Am Southern treat every
16 condition and go on its way.

17 We're not trying to rigidify the way in
18 which Pan Am Southern operates in the market, and
19 approaches the market. We're just trying to preserve
20 the incentives that exist today for Pan Am Southern
21 to cooperate in an effective and interested way in
22 building traffic and interchange with Canadian

1 Pacific.

2 And we think, as James has said, that the
3 way in which we heard the commitment being expressed
4 yesterday, and there are various points in the papers
5 that the applicants have submitted about the gateway
6 condition, keeping gateways open on commercially
7 reasonable terms. And specifically now, be clear
8 that that doesn't apply only to the Pan Am railway
9 gateways, such as the connection with Pan Am Southern
10 at Ayer, but also applies to the transaction
11 participants as a whole, and to the Mechanicville
12 Gateway, the Pan Am Southern for traffic to Pan Am
13 Southern, and then across Pan Am Southern to Pan Am
14 Railway.

15 We think that's now clear on the record.
16 To the extent it is clear on the record we think that
17 commitment keeping the gateway open on commercial and
18 reasonable terms is an adequate reflection of what we
19 were seeking, without going so far as to say there's
20 necessarily the equalization, or other specific, you
21 know freezes of how Pan Am Southern approaches the
22 marketplace.

1 CHAIRMAN OBERMAN: I'm sorry Robert go
2 ahead.

3 VICE CHAIRMAN PRIMUS: I'm sorry Marty,
4 just staying on that David, so were you suggesting,
5 or saying that the potential there for you know a
6 joint venture between CSXT and Norfolk Southern you
7 know at Pan Am Southern would harm you in a sense it
8 would tend to direct more traffic.

9 You know the gateways would remain open,
10 but in terms of the direction of the traffic would be
11 more towards -- geared towards in essence CSXT
12 because they of course stand to benefit from that.

13 MR. MEYER: I don't think that's the
14 thrust of the argument we're making. I think the
15 thrust is not that there's an incentive to divert
16 traffic away from us. I think the concern that we
17 have is that because of you know, and I'll try and
18 connect to this to the Pooling Statute, but the same
19 analysis applies under 11224.

20 That is James indicated in his chart about
21 changing incentives. To us the centerpiece of what
22 causes the harm is has nothing to do with the Pan Am

1 Railway part of the transaction, it has to do with
2 CSX acquiring the Pan Am Southern interest that used
3 to be owned by Pan Am. The bringing CSX into the
4 ownership of the LLC and the boardroom.

5 Now I think under the analysis that the
6 applicants presented to the Board a stage where Pan
7 Am Southern was formed about pooling, I think that is
8 simultaneously a control issue, and I think and a
9 pooling issue in the 11322. So again, the question
10 is what about that causes competitive harm.

11 We're not saying it causes harm to us.
12 What we're saying is Pan Am Southern's incentive and
13 ability, and the investments and service levels there
14 they go along with the incentive, to compete against
15 CSX are reduced by the fact that CSX is there as a 50
16 percent owner in the Board room with no incentive to
17 compete against itself.

18 Now you know we've heard CSX point out
19 that when we have a great interest in interchanging
20 traffic with Pan Am Southern with a number two
21 interchange partner. I would submit of course they
22 are. They're one of the two eastern railroads. Of

1 course they're going to have interchange traffic with
2 Pan Am Southern. We understand that.

3 But they don't have an incentive. They
4 have an incentive to terminate and originate traffic
5 that's local, and bring it over to the CSX system for
6 sure, and we're not suggesting that that goes away,
7 but when you look at Pan Am Southern's role as part
8 of a through line that competes against CSXT long
9 haul routes, that incentive goes away.

10 And that's where you know I think we heard
11 a number of colloquies with the applicants about
12 scenarios that it wouldn't be hard to come up with
13 scenarios where there were particular investments you
14 know needed at Pan Am Southern, and there would be a
15 very different view that CSX would have about whether
16 to invest to maintain service levels, or adjust the
17 service design on the railroad, or some other
18 decision where you know the motivation for the
19 investment for the change would be to either compete
20 better against CSX, or to maintain the ability to
21 compete effectively against CSX.

22 And you know Norfolk Southern may have a

1 view that it would want to make the investment. CSX
2 would not have incentive to make that investment. We
3 just want to make sure that the situation is
4 protected by enforceable positions in perpetuity.
5 Again this is a generational transaction, or a
6 multi-generational transaction as the applicants have
7 pointed out, and so that the service levels, the
8 investments, aren't as a result of introducing CSX as
9 an owner, and an influencer is not going to be to
10 diminish what would otherwise have been a competitive
11 service route that competes against CSX's service
12 route. It's really as simple as that.

13 VICE CHAIRMAN PRIMUS: Okay. I appreciate
14 it, and I'm going to have to untangle it because it
15 almost sounds similar to how I'm saying it. I know
16 you're saying it's not exactly, but if they're making
17 improvements, and doing things that are going to
18 advantage CSX to that, and like you said the long
19 haul traffic as its results on your side is not
20 benefitting from that.

21 You know it sounds not necessarily that
22 they're drawing away, but what you're saying you're

1 not going to gain from those improvements and
2 enhancements.

3 MR. MEYER: I think maybe I'm trying to
4 suggest to differentiate a future between the way you
5 framed it and the way I framed it is to think of it
6 this way. Today if you're a shipper moving you know
7 traffic from the Midwest to Boston. There are two
8 through routes. There may be a number of ways to get
9 to the west end of New England.

10 VICE CHAIRMAN PRIMUS: Right, right.

11 MR. MEYER: Either Albany or
12 Mechanicville. You might choose NS. You might
13 choose CSX. You might choose CP. Today in order to
14 get to Boston there are two routes. There's the Pan
15 Am Southern and there's the CSX. The competition
16 between Pan Am Southern and CSX disciplines the
17 competitive outcomes for the overall right of
18 competition.

19 So shippers not CP, but the shippers
20 benefit from more competition for service levels,
21 more competition in rate levels, terms, everything
22 else, and that's why we like competition.

1 Competition is good. After the transaction CSX is in
2 the driver's -- not necessarily in the driver's seat,
3 but can influence how good an option that Pan Am
4 Southern route is. And the less good the Pan Am
5 Southern route is, the less competition there is
6 between the two, and the less discipline there is for
7 rates and service levels.

8 VICE CHAIRMAN PRIMUS: Right.

9 MR. MEYER: The traffic moving to Boston.
10 We and our shippers benefit from there being
11 competition between those two routes so that there
12 are two competitive routes. We understand that we're
13 not going to win all the traffic west of
14 Mechanicville, and we in fact interchange traffic
15 with CSX as well on these routes.

16 But overall the marketplace has benefited
17 a lot, and we get carried along with that by there
18 being these two competitive alternatives, and we're
19 concerned that the transaction diminishes the quality
20 of one of those two, or could diminish it, or likely
21 would if unconditioned, diminish the quality of one
22 of those two routes, making competition not function

1 as it does today.

2 VICE CHAIRMAN PRIMUS: Thank you.

3 CHAIRMAN OBERMAN: David, I wanted to
4 follow-up. Thank you Robert, I think that discussion
5 was also helpful and enlightening us here. I want to
6 get back to this question of the access points
7 because that really is a concern of mine.

8 I wasn't asking, and I don't think anybody
9 was suggesting that the absolute amount of an
10 interchange fee be frozen in perpetuity. Nobody
11 suggests that. The commitment that I understood they
12 were making is that whatever levels those were they
13 would be equalized for all, so they wouldn't charge
14 you a different interchange fee than they'd charge NS
15 coming in, or somebody else. It's the same under the
16 PAS route, so that the competitive options would
17 remain what they are today as I understand it under
18 PAS's operation.

19 Now you've referred to their commitment to
20 charge commercially reasonable access rates. Is that
21 a term of ours in your view? How is that defined
22 commercially? How do we know what's commercially

1 reasonable?

2 MR. MEYER: Well I'll speak briefly on the
3 use of that phrase in Board precedent, and maybe
4 James can address what it means to him from a
5 commercial perspective. You know in merger
6 transactions for some decades now the Board has
7 imposed conditions for maybe another way to put it is
8 required that applicants honor representations for
9 commitments relating to keeping gateways open on
10 commercially reasonable terms.

11 And you know when I think there's been not
12 very much debate about what precisely those terms
13 mean, but there has been a great deal of debate,
14 which I think led several decades ago to a very
15 strong conclusion, and I think really binding
16 precedent in the Board, that in the context of end to
17 end transactions.

18 We're not in an end to end transaction
19 here. This Pan Am Southern issue that we're talking
20 about is a horizontal competitive issue, so it's a
21 different kind of fish. But in end to end
22 transactions where the issue has been preserving

1 gateway access, you know preserving the viability of
2 existing intra-lying routes between merging partners,
3 or between a merging partner and a non-merging
4 partner where there's a new single line route that
5 may be available that you know it's been very I
6 think, clearly established that what it means to keep
7 a gateway open is first of all that they do not --
8 and we've heard Mr. Foote say this yesterday.

9 We do not close it physically, so you
10 still continue to go to the gateway. You continue to
11 interchange traffic there, and in order to keep it
12 open physically I think you know you don't degrade
13 the service level so much that it becomes you know,
14 not a viable point of interchange for whatever was
15 the pre-existing connection.

16 Of course that has to be dependent on
17 traffic levels, whether there's a demand for it, you
18 know, nothing should be frozen. But then on the
19 rates side of the economic terms you know also, as
20 Mr. Foote said yesterday, and I think he said he was
21 the inventor of this approach in the CNWC case, and
22 that may be thinking back I can't think of a case

1 that used this terminology before then, so I take him
2 at his word there.

3 The aspect that involves commercial and
4 reasonable terms is you know that you could keep a
5 gateway open physically, but if you raise the rate
6 factor between the interchange point and the
7 destination, or the origin and the interchange point
8 so much that it becomes economically non-viable for
9 someone to construct a through route using that
10 interchange, well then you've made it -- you've
11 respectively closed it. That's the idea.

12 But defining where that what it means to
13 have a rate level that's too high, commercially
14 unreasonable, is impossible to do in the abstract in
15 my opinion. The Board has considered and talked at
16 great length about how important it is not to impose
17 conditions of the kind that once upon a time were
18 mandatory merger cases. You may have heard of the
19 DP&I conditions which imposed great equalization, and
20 other rigid protections of connecting carriers that
21 prevented merging parties from taking advantage of
22 single line efficiencies, and pricing to the market.

1 It eliminated the possibility of
2 differential pricing and so forth. Those were in the
3 1980's found by the Board of the ICC correctly to be
4 anti-competitive, and counterproductive to allowing
5 for a transportation network that was characterized
6 by market based pricing, and flexible competition by
7 railroads against trucks, against the rail
8 competitors, against other modes, you know,
9 considering market factors across the board.

10 So I think the Board has clearly said that
11 commercially reasonable terms does not mean freezing
12 rates, does not mean equalizing rates across
13 gateways, or across all destinations. It preserves
14 the ability to price to the market. It just it says
15 that there is an outer limit on what can be done that
16 would prevent a connecting carrier from providing an
17 economically viable offer using the interlining route
18 that previously had handled traffic over that
19 gateway.

20 CHAIRMAN OBERMAN: So well let me see if I
21 can understand it in this situation. As you
22 understand it if we look at other parts of PAR, we

1 are looking at those charts and bringing propane in
2 from Sarnia up through Bangor. After this
3 transaction CSX will be able to offer a single line
4 rate that it couldn't offer before.

5 And single line rates tend to be more
6 advantageous to the shipper than an interchange rate
7 right?

8 MR. MEYER: Yes.

9 CHAIRMAN OBERMAN: And you're saying that
10 neither you, nor prior Boards are suggesting that
11 somehow we don't allow CSX to get the benefit of its
12 acquisition by offering a lower single line rate
13 where it can.

14 MR. MEYER: Absolutely correct.

15 CHAIRMAN OBERMAN: Okay. So I understand
16 that enough, and I don't know that anybody was
17 asking, but it sounded like it in my questioning that
18 that is not what I was focused on. I was focused on
19 exactly what you're talking about here, and I'm still
20 focused on it.

21 On PAS is it your understanding that if
22 CSX wants to ship traffic on PAS it's not a single

1 line rate because PAS is a separate entity. So they
2 would still be interchanging with it as they do now?

3 MR. MEYER: Well you know I think that
4 that's right. I think that there may be ways in
5 which the parties could structure their relationship
6 such that you know they may conceivably grant CSX
7 haulage rights in which case it may be more
8 equivalent to a single line rate. And I'm not close
9 enough to the specifics of this transaction you know
10 as to that aspect of the commercial relationship to
11 be able to say one way or the other whether perhaps
12 there may even be an aspect of that already present
13 in their intentions, I don't know.

14 CHAIRMAN OBERMAN: Well aren't they
15 telling us, and maybe we can clear this up when we
16 talk to them again today. I thought it was clear,
17 that B&E is going to operate this railroad
18 independently. It's going to be in charge of
19 pricing, so when either CP or CSX approached B&E and
20 they want to interchange some place as they do now,
21 rather down in Mechanicville, they're like dealing
22 with an independent railroad.

1 It's not going to be CSX dealing with
2 itself. Is that what they're trying to tell us?

3 MR. MEYER: Well I think they've told us
4 that as to CP that is correct. As to CSX, I think
5 what I heard yesterday was that the B&E pricing
6 authority has exceptions for arrangements that
7 already exist between NS and Pan Am Southern for
8 haulage rights, and I believe they were also
9 referring to arrangements as part of this transaction
10 involving CSX's commitment, temporary commitment, to
11 route certain traffic over Pan Am Southern.

12 But I'm not sure. I don't have the
13 recollection as to precisely what the financial
14 arrangements were with that CSX traffic with the PAS.
15 As a general proposition I think our view would be
16 given the long run you know after this short-term
17 arrangement, we have if you look at the traffic data,
18 and you also look at the investment CSX has made in
19 its own line, the southern route, how it connects to
20 its yard at Selkirk, you know Albany. You
21 know I think, and James can speak to this, that our
22 expectation would be that CSX wouldn't be interlining

1 traffic over Pan Am Southern, it would running
2 traffic on its service route, the southern corridor,
3 and so there probably won't be a long-term CSX Pan Am
4 Southern interline rate to think about as a
5 benchmark to what is a commercially useable rate if
6 that was your proffer.

7 CHAIRMAN OBERMAN: So I understand two
8 things David from what we heard yesterday. One is
9 there is some local traffic on Pan Am Southern that
10 CSX serves now, which would go on indefinitely as
11 long as those local customers are there, so.

12 MR. MEYER: That's right. I was thinking
13 of traffic, I was thinking of other traffic that was
14 going to be overhead traffic.

15 CHAIRMAN OBERMAN: All right. So you have
16 that traffic. That's going to stay, and that is
17 traffic -- let's just take them one at a time because
18 I think now if we're going to get into this, and
19 we're going to talk about conditioning, we better be
20 very specific, that's all, so we don't run into a
21 situation that we don't know what we -- we all have a
22 different view of what we missed.

1 So as I understand it if we start with the
2 local traffic that is there now, which CSX says will
3 always be there as long as there's local customers
4 there, it's the only way they can get there. Today
5 that traffic is interchanged I think at Rotterdam, if
6 it's coming from the west by CSX, and they pay a
7 tariff, interchange tariff, and based on the tariff I
8 looked at the charge to CSX is the same as the charge
9 would be if CP were bringing that same traffic in at
10 Mechanicville, tariff rates, even though they are --

11 MR. CLEMENTS: Mr. Chair.

12 CHAIRMAN OBERMAN: Yes.

13 MR. CLEMENTS: One comment. My only thing
14 is the vast majority of the traffic that we
15 interchange today is not interchanged onto the tariff
16 rate. It's on the basis of a negotiated division of
17 revenue that we would put together in conjunction
18 with the PAS. So I don't know how much traffic moves
19 on that tariff.

20 And then I agree the local traffic will
21 always be there. The question is in the longer term
22 will they optimize the operation to serve the local

1 traffic, rather than potentially maintain through
2 option all the way over the PAR, in terms of how you
3 organize it.

4 And so I'm not saying that people are
5 going to do that tomorrow morning after the approval,
6 but as you think of those incentives, and look at it
7 over time the question is will the nature of that
8 operation follow that infrastructure, be much more
9 oriented towards providing adequate service through
10 the local rather than the right service for the
11 longer.

12 CHAIRMAN OBERMAN: And I appreciate that.
13 NS service is obviously important. But let's just
14 stick with the access costs for the moment just so we
15 can fully understand that. Would it be accurate if
16 either of you on the so-called equalized tariffs that
17 they at least set the terms for sort of a base for
18 you to then negotiate your own contract rate for your
19 access, so you have some bargaining power that you
20 either could go with the tariff, or you can get a
21 better deal on a contract rate.

22 Either way you have equal chance to get on

1 the PAS with the other carriers coming into the
2 system like CSX and NS.

3 MR. CLEMENTS: Yeah and again what we've
4 heard from as you described, the tariffs and the
5 other commitments, we do think the representations
6 that are made as conditions of the transaction, all
7 of them, both what was represented yesterday as well
8 as their recent submission does put us on a
9 commercial footing that would allow the PAS to
10 provide a competitive alternate.

11 CHAIRMAN OBERMAN: Well I guess one
12 question, getting back to this definition of
13 commercially reasonable, they could raise everybody's
14 rates other than their own, to a level that's not
15 commercially reasonable, and foreclose anybody from
16 using PAS, other than themselves, in theory if it
17 weren't constrained in some way. Other than a
18 regular rate cases thing right?

19 MR. CLEMENTS: Correct.

20 CHAIRMAN OBERMAN: So would it be accurate
21 I guess is more of a question for David, or either of
22 you, when you say commercially reasonable rates that

1 could be imposed as a condition of a merger is that a
2 different rate measurement that how you might
3 measure a rate in a rate case challenge?

4 MR. MEYER: Yes. I think it is. It's not
5 -- I think I can state pretty categorically that I've
6 never thought of what a commercially usable rate
7 ceiling might be as determined by what would the
8 application of the Board's, you know,
9 unreasonableness standards dictate.

10 Among other things you know you wouldn't
11 ask the question as a predicate to examining a rate
12 level whether there was market power. They wouldn't
13 ask the question whether you know, what would a SAC
14 rate constraint be, or you know what is you know 180
15 RVC as a threshold.

16 None of those questions really are germane
17 to the question of what is a commercial reasonable
18 rate. The commercial reasonable rate you know that
19 standard may be higher or lower. You know it's a
20 different inquiry as to whether it allows for that
21 route to remain competitively viable.

22 You know the one thing I'd say though is

1 it's important in this case to think you know when we
2 say that the commitment to a commercially reasonable
3 rate is one that is valuable and important in this
4 case, you know, you have to remember in this case,
5 this is not an end to end case, this is a horizontal
6 case.

7 And so what we're trying to protect
8 against is the different incentive that exists at Pan
9 Am Southern with respect to maintaining Pan Am
10 Southern as a competitive viable long-term
11 alternative for all shippers and all connected
12 railroads. And so --

13 BOARD MEMBER SCHULTZ: Could I just ask a
14 quick question?

15 MR. MEYER: Certainly.

16 BOARD MEMBER SCHULTZ: I'm sorry to
17 interrupt the line of questioning, but you know I
18 believe that CSX has actually characterized the
19 transaction as end to end, although I'm not 100
20 percent sure on that right now. And you were
21 describing it as horizontal, and I wondered if you
22 could just perhaps go over with a little bit of

1 specificity as to why you believe it's horizontal.

2 MR. MEYER: Sure. Maybe I'll use this
3 map, which is built on a map that the applicants have
4 used to describe the transaction, and I think the way
5 would answer it is to say the overall transaction
6 that's being proposed here has both end to end
7 features, and horizontal features. The part that
8 involves combining the blue route, which is CSX's
9 system that ends near Worcester, Mass with the red,
10 which is the Pan Am Railway that starts near
11 Worcester, Mass and heads up to Ayer across track and
12 drives into New Hampshire and into Maine.

13 You know that's an end to end transaction.
14 That will create new single line routes for traffic
15 from Maine onto the CSX Network. CSX has described
16 the benefits of doing that. We agree with that.
17 That's the end to end part of this transaction. The
18 part of this transaction that's not end to end is
19 combining the green, which is Pan Am Southern, with
20 the blue.

21 Now it's not being combined outright, it's
22 not a merger between the two, but that's where CSX,

1 today CSX has no relationship to the Pan Am Southern
2 other than as a competitor, and the second map we
3 show the blue again, and the green again. The green
4 is the Pan Am Southern, this is what we call the
5 Hoosac Tunnel Route between the Albany area, so
6 Rotterdam Junction is near where Mechanicville is
7 shown on the map, so the route goes across northern
8 Massachusetts to Ayer, Mass near Boston, and connects
9 with the Pan Am Railway, but also serves the Boston
10 and Metropolitan area, and eastern Massachusetts,
11 southern New England.

12 CSX's southern route does exactly the same
13 thing in direct competition with that route, and that
14 is a horizontal competitive issue, so those two are
15 competitors today, and with no ownership
16 relationship, or overlapping directors, or any
17 entanglement of that sort, with the transaction that
18 will no longer be the case, CSX will be the half
19 owner -- it will be the 100 percent owner of the blue
20 line, and a 50 percent owner of the green line, and
21 that's what reduces horizontal competition.

22 Competition that's head to head today will

1 be diminished.

2 BOARD MEMBER SCHULTZ: Thank you.

3 CHAIRMAN OBERMAN: Patrick do you want to
4 --

5 BOARD MEMBER FUCHS: Following up on
6 Michelle's very good question. Is it fair to say
7 that CP is focused very much on a specific definition
8 of intermodal competition, and does not provide
9 evidence on product competition, geographic
10 competition, or intermodal competition?

11 MR. MEYER: We're certainly focused on
12 preserving the rail to rail competition that exists.
13 I think to answer your question there's no doubt that
14 for you know any given carload or container load of
15 traffic that runs on one of these two rail routes,
16 that if you were doing an analysis in a rate case for
17 example, of whether there were other competitive
18 influences on that particular flow of traffic, you
19 know you would need to consider things like --

20 BOARD MEMBER FUCHS: I appreciate that,
21 but you've mentioned horizontal merger. Isn't the
22 case under horizontal mergers that you have to define

1 a product market and a geographic market, and also
2 under our DMIR precedent you look at the broader
3 transportation market, so that includes intermodal.
4 And I guess whether or not it's CP's view that
5 parties can carry the burden, and requesting a
6 condition without addressing product competition,
7 geographic competition or truck competition.

8 MR. MEYER: Well I think the answer is you
9 know again the question is you know are there circumstances
10 where you can carry your burden without a thorough
11 investigation of all of those potential forms of
12 competition? I think yes there are. And this may be
13 one of those cases.

14 Now there are also I'm sure, other would
15 be hypotheticals.

16 BOARD MEMBER FUCHS: Real quick on that
17 point though. Under a traditional horizontal merger
18 guideline type analysis, you have to address product
19 and geographic competition.

20 MR. MEYER: But so this may be somewhat
21 metaphysical, but I would think yes, in a merger
22 analysis under the Clayton Act for example, you would

1 typically although there is a trend in the
2 anti-trust world away from this towards direct
3 examination of competitive facts. But typically yes,
4 you could find a market, and you ask the question you
5 know in a case of a multi-products firm, so both of
6 these rail lines carry a lot of different traffic.

7 Some of that traffic may be highly truck
8 competitive where if you shut down the rail line
9 tomorrow there would be no effect on competition
10 because trucks are a perfect substitute, and so
11 there's no competitive effect from either getting rid
12 of the rail lines all together, or combining them.
13 None of that matters to competition for maybe some of
14 the traffic on those lines.

15 For other traffic on the line you know
16 rail may clearly be a better transportation solution
17 that trucks or a barge, or geographic competition and
18 so forth.

19 BOARD MEMBER FUCHS: But CP hasn't
20 provided any information or data to help the Board
21 identify that.

22 MR. MEYER: I think that that's correct in

1 this case. We have not done a movement by movement
2 competitive analysis, or provided economic expert
3 testimony. However, I would submit that in a case
4 where we're examining you know significantly parallel
5 rail routes that are recognized by the applicants as
6 effectively the only two rail routes serving flows of
7 traffic in a corridor, and diverse flows of traffic
8 in a corridor.

9 The Board can take notice of the fact that
10 there's going to be traffic, significant volumes of
11 traffic in those kinds of corridors where having rail
12 to rail competition is in fact improving the
13 competitive equilibrium relative to a world where
14 there's no rail to rail competition. It just isn't
15 -- we know enough to know.

16 I think the Board certainly knows enough
17 to know that getting rid of rail competition serving
18 New England would deteriorate the competitive
19 options, but also the results of you know it would
20 result in higher rates, worse economic terms, and
21 reduced incentives to provide good service for a lot
22 of that traffic. Not all of it, you know, in a lot

1 of cases the driver will be truck competition,
2 absolutely.

3 BOARD MEMBER FUCHS: You haven't told us
4 how much of it has truck competition. Yeah based on
5 the record you presented you couldn't say whether or
6 not it's 100 percent, 90 percent, 80 percent.

7 MR. MEYER: I think that that -- James may
8 have an informed view based on his knowledge of the
9 types of traffic that CP participates in, so I'll
10 suggest perhaps if he answers that question.

11 MR. CLEMENTS: Unfortunately David, I
12 don't have a deeply informed view of the competitive
13 dynamics.

14 CHAIRMAN OBERMAN: Let me jump in here for
15 a minute if I could Patrick if you don't mind. In
16 this case, and I realized that these are important
17 policy considerations as a general proposition. But
18 I think David what you're saying, I'm going to say it
19 differently. In this case where the applicant has
20 come in and told us at the very outset in their own
21 application to see the competitive problems of our
22 buying in half of PAS.

1 And we're going to tell you before anybody
2 has even asked us for relief, we're going to twist
3 ourselves into a pretzel to avoid anti-competitive
4 impacts. We're going to have B&E come in, we're
5 going to have them control pricing. We're going to
6 subject ourselves to arbitration on capital
7 investments. We're even willing to put a fiduciary
8 who controls the decisions rather than us. They came
9 in and told us that this whole thing was
10 anti-competitive if something isn't done to restrain
11 it.

12 And they made all these promises about
13 open access and so forth. So I'm not sure on the
14 state of this record we're powerless to act unless
15 CP, or somebody comes in with an economic analysis of
16 how much of this is truck competitive and so forth.
17 It could if you had an applicant coming in saying
18 there's no anti-competitive effects, and somebody
19 like CP wants to say oh yes there is.

20 They have some obligation to make a
21 factual record. But here you have a concession from
22 the applicant that there's an anti-competitive

1 effect, and the only thing we're trying to figure
2 out is how to make sure their promises are carried
3 out. I don't see the need in this case unless I'm
4 missing something to inform the factual record as a
5 basis for us to figure out how to make sure if we're
6 going to approve this transaction, there are
7 competitive protections here.

8 Which David, I'm not trying to argue your
9 case for you, but I am trying to articulate this so
10 we can move ahead. Is that a fair way to think about
11 it?

12 MR. MEYER: I think that is a fair way to
13 think about it in this case, and I also think in
14 addition to the applicant on recognition of the
15 competition between these two lines, and you know we
16 could also look back to one of the transaction
17 participants, or excuse me, two out of three of them,
18 pointing out exactly the same competitive
19 relationship when Pan Am Southern was formed.

20 I also think beyond that I think it is you
21 know absolutely within the Board's authority here on
22 the record that we have about the competitive

1 relationship between these lines, and knowing what
2 the applicants have said, which is the truth, that
3 this is a transaction forever. You know, the
4 ownership of these lines, the competitive
5 relationship between these lines is
6 multi-generational.

7 And so if there's you know regardless of
8 whether you know 10 percent of the carloads, or 50
9 percent of the carloads, or 80 percent of the
10 carloads on these two routes, you know, a benefit
11 from rail to rail competition rather than other
12 potential constraints, like geographic competition
13 and truck competition, over the next hundred years if
14 there isn't going to be competition between the two
15 routes, we know I think with a certainty, that the
16 environment -- transportation environment will be
17 less competitive, and that is part of the competition
18 that the Board has authority to remedy.

19 CHAIRMAN OBERMAN: Aren't you also saying
20 David, and I was thinking about this when Patrick was
21 focused on the current state of competition, which is
22 -- and I don't mean it's just as important, but just

1 for the reason you said I was thinking that neither
2 CP, NS, or anybody else can tell us today how you
3 might use these lines if you have access to them over
4 the next 100 years.

5 The nature of freight may change. Traffic
6 which doesn't exist today may come in tomorrow that
7 there are customers there that want to use your
8 service. And so we're trying to talk about
9 preserving a rail line for the long-term and not just
10 talk about a current anti-trust case I guess. So I
11 think that's what you were saying that this could be
12 a permanent diminution of competition if it isn't
13 protected.

14 MR. MEYER: Absolutely, and you know again
15 in this case where we have horizontal competitive
16 alternatives that have been active, they've been
17 invested in for exactly that purpose, the Board has
18 approved transactions for exactly that reason, for
19 the applicant to recognize the need to preserve
20 competition.

21 In this case we don't need to you know
22 over generalize. In this case I think there's just

1 no doubt that preserving the competitive world with
2 this route is well within the Board's authority on
3 this route here to preserve.

4 CHAIRMAN OBERMAN: Patrick were you
5 finished? All right. I wanted to go back to the
6 commercially reasonable question David, and if this
7 isn't fair to challenge you at this setting, and if
8 you're not prepared tell me so. But I have been
9 trying to think through in the future. Let's assume
10 we give those transactions, and we say what Mr. Foote
11 and I were talking about yesterday, our conditions
12 here with you agreed to that access will remain open
13 at every access point.

14 And as we were talking about, equalize
15 rates which have to -- and I guess to me that's part
16 of the same thing commercially, which has to be
17 commercially reasonable. And the day comes when you
18 get a rate to interchange at Mechanicville which you
19 think is not commercially reasonable. What happens?
20 You come into the Board, and ask us, tell us that it
21 could be ten years from now, they're violating a
22 condition.

1 And the violation is that here is a rate,
2 and it's not commercially reasonable. How would you
3 prove that to us?

4 MR. MEYER: Well I think I again, I would
5 echo what others have said at this hearing because I
6 think the first thing that would happen is if a
7 condition were imposed requiring that rates be such
8 to preserve the commercial reasonableness and keep
9 the gate wide open, the first conversation would be
10 with transaction participants. And to try to
11 understand how they thought that a particular rate,
12 or approach to ratemaking was consistent with this
13 obligation that they have, and there would be a
14 negotiation.

15 And that negotiation may not involve us.
16 It may involve our shippers directly, the applicants
17 or the transaction participants. And I would
18 actually expect that that would be an important part,
19 maybe the dominant part of implementing a condition.
20 Disputes might avoid the Board all together.

21 CHAIRMAN OBERMAN: Well I don't disagree.
22 I mean have said repeatedly, I said it yesterday,

1 I've said it since I've been on the Board, we much
2 prefer people to resolve these things themselves, and
3 hopefully set the right terms, incentives will be to
4 do that. I guess I was implicit in my question.

5 I'm assuming that private negotiations
6 have failed, then when?

7 MR. MEYER: Right. Well then I think you
8 know it's probably quite impossible to be too
9 specific in a hypothetical future scenario, but I
10 think the basic idea could be you know here are the
11 commercial terms being offered by the transaction
12 participants that in our judgment they are not
13 commercially reasonable. Why? Because they don't
14 allow for an interchange between CP and
15 Mechanicville, or traffic going across the Pan Am
16 Southern to be competitive in the market.

17 And in this particular case probably it
18 would be an examination of what are the factors there
19 on whether that rate, you know, is justified by you
20 know market conditions, marketplace changes, rather
21 than being explained by the diminution and the
22 incentives to preserve the competitiveness of that

1 route arising from CSX's role in this transaction,
2 and NS's diminished change incentives because of its
3 new access to the southern routes.

4 We have no illusions about that kind of
5 inquiry being a simple one, or a mechanical one
6 because there isn't a way in our view, there is not a
7 way to you know impose a condition that it's a simple
8 formula. But we do think that having the condition
9 imposed that allows for the kind of inquiry that
10 we're talking about, is whether then the competitive
11 viability of this region then is affected by the
12 transaction in a negative way, it will create the
13 counterweight to the kinds of you know stats that
14 might otherwise cause the harm of diminishing its
15 effectiveness.

16 You know I don't think I can be complete
17 in saying that without saying obviously there needs
18 to be protection on the actual physical capabilities
19 of the route not being degraded in the transaction,
20 and the changes beginning to allude to that.

21 CHAIRMAN OBERMAN: I know we're going to
22 get to that. So just to finish this point, and then

1 maybe we should let James move on, or we'll never get
2 done. It sounds to be David like you are saying
3 whether commercially reasonable is an actual fine
4 term of art, it is a concept that is well understood
5 in the railroad industry that can be proved by custom
6 and practice, by railroad economists one way or the
7 other on a very case specific basis. Is that a fair
8 way to think about it?

9 MR. MEYER: I think so yes.

10 CHAIRMAN OBERMAN: You know I think if we
11 move in this direction I would hope we never have to
12 decide such a case, but we have to have some idea of
13 what the case would look like if we're going to take
14 up CSX on its offer to say it will agree to
15 commercially reasonable rates, which they offered, so
16 they must have an idea what they're offering as well.

17 It would be hard for them to say they
18 can't understand what it means since they are the
19 ones that introduced the term into this proceeding.
20 But they'll have a chance to talk to us about it
21 later today. So why don't we, unless our Board
22 members want to jump in, why don't we let James get

1 to where he's been trying to get for the last hour,
2 and then we will finish this presentation.

3 MR. CLEMENTS: I think we're here.

4 CHAIRMAN OBERMAN: Okay.

5 MR. CLEMENTS: No problem, and I think
6 it's been a good discussion. I'm not going to
7 belabor the first bullet on here. I think that's
8 been the focus of the discussion, but given that we
9 feel that there is competitive harm, what do we need
10 to protect it.

11 And at a high level it's maintaining the
12 competitive viability of the route. This is, as we
13 discussed, both a competitive basis, and then also
14 the physical infrastructure and the service that runs
15 on the infrastructure. We think that you can
16 preserve this environment and do so without having
17 any impact on the benefits of this transaction, and
18 what the applicants are trying to achieve.

19 As we discussed you know, the single line
20 haul, the other benefits that NS gets, we're not
21 asking for any changes to any of that. It is just a
22 condition, a set of conditions that allow the

1 competitiveness of the Pan Am Southern route in
2 parallel to the CSX route to be maintained as we go
3 forward. So David I'll move to the next page, to
4 specifically talk to our ask.

5 And you know the very first one you've
6 observed that there's a number of representations Mr.
7 Chair, and there's been a number of commitments made,
8 both verbally and in the submission around
9 maintaining that we would ask that those conditions
10 are, or those recommendations are you know upheld
11 through condition on the transaction.

12 CHAIRMAN OBERMAN: Let me just say that I
13 believe it's clear on CSX's papers that they have
14 volunteered before we asked them one question. That
15 they consent to every representation being made a
16 condition.

17 MR. CLEMENTS: Yep.

18 CHAIRMAN OBERMAN: That's one of the
19 things we're engaged in here is making sure we know
20 what those representations are, but that's very
21 important. So I think there's no disagreement on the
22 concept in your bullet point one.

1 MR. CLEMENTS: Yes. And in bullet point
2 two we would agree that based on everything that
3 we've heard that these commercially reasonable terms
4 have been agreed to with CSX in the public record.
5 So number two I think is well talked about.

6 The next two, one is around maintaining
7 the physical condition of the route at a standard
8 that's consistent with what it is the maintain that
9 today. We think that the pre-transaction railroad is
10 maintained the way it is so that it's a competitive
11 tool as we've described, by removing things like the
12 premium intermodal traffic with a highly service
13 sensitive intermodal traffic. We do change the
14 incentives, even for the other half owners, and we
15 want because of that change, the physical condition
16 maintained.

17 And then finally you could have a very
18 nice railroad if you don't run any traffic over it,
19 it's easy to maintain it, or don't provide any
20 service on it. And so we're looking for through
21 traffic service levels that are consistent with what
22 we're seeing today. And I looked at this one and we

1 see you know the B&E made representations that
2 they're there to compete, and they have every
3 incentive to look after service.

4 We heard the Norfolk Southern talk about
5 them having every incentive to move traffic on this
6 line. And so we look at this, and partly why they
7 brought that over, they have those incentives, then I
8 would call the sleeves under their vest. If they
9 consented to do it then it's easy enough, and it's
10 not onerous, and not a burden on the transaction to
11 let us have the understanding that over the long-term
12 we're going to have the service we need.

13 I'd also acknowledge, and we understand
14 you know the rail business, but if traffic changes,
15 that this isn't an absolute commitment. You've got
16 to look at what's commercially reasonable around the
17 service levels, and if there's a change in the
18 overall service volumes, then they need to be able to
19 maintain an efficient operation, but they also need
20 to do it in a way that addresses the needs of the
21 shippers on the line in a way that they would have
22 under those same volume levels if the effects and the

1 relationship in this merger hadn't happened.

2 If they continued to be Pan Am independent
3 of CSX. And so that's the last condition that we're
4 looking for.

5 CHAIRMAN OBERMAN: All right. James, let
6 me ask you a couple of questions because maybe it's a
7 Canadian phrase. This is the first time in this case
8 I've ever heard the phrase sleeves out of the vest.
9 I'm not entirely sure what it means. It sounds like
10 it means no problem, but here's what I'd like to get
11 out here.

12 In terms of insurance the maintenance of a
13 condition of the track, of the infrastructure, that's
14 what you're talking about. It almost leaves a tunnel
15 itself aside, we heard yesterday that was 300 million
16 dollars. But how would you -- maybe this is a
17 question for David as well. How would you phrase it?

18 As I understand it, and I'm not on top of
19 these. I'm sure Karen is an expert in this, there
20 are different classes of track that the FRA sets
21 forth, and that this PAS line meets certain
22 standards as to freight, speeds and so forth. And I

1 don't know what those are, but you're talking about
2 the present condition is at least minimally
3 acceptable if that were to stay that way forever. Is
4 that a way?

5 I'm trying to figure out how you would
6 write a condition? It strikes me as problematic to
7 say you've got to spend enough money. Who knows what
8 enough money is. Would it be more suitable, and
9 would it accomplish what you are trying to
10 accomplish? I'm not saying we would do it, but just
11 to understand what you're asking.

12 If we wrote a condition that said you must
13 maintain the entire route, to at least the standards,
14 the FRA standards that satisfies today. Would that
15 solve bullet point three for you?

16 MR. CLEMENTS: Yeah. We're not seeking
17 the prescription on a capital program. You know
18 capital can be lumpy. The description of an FRA
19 class of track, and you know all track has some slow
20 orders. I would say you know the slow order
21 condition that you have today, however many minutes
22 of you know delay or you know, or experience due to a

1 slow order.

2 A slow order is where due to an emergent
3 maintenance situation, let's say you have a couple of
4 ties, or you know some ballasts that you need to go
5 in and you know run the tamper, and then you can
6 speed up again. That happens on every railroad all
7 the time.

8 So we acknowledge that you know they're
9 going to have a few delays out there, and what we
10 just go on is if you have 20 minutes of delay today
11 it degrades, and you have an hour of like five years
12 from now.

13 CHAIRMAN OBERMAN: All right so let me go
14 to bullet point four. How do we make that concrete?
15 I'm not 100 percent sure how you would define what
16 you're asking. I understand the concept, but I don't
17 know.

18 MR. CLEMENTS: You know I would define it
19 in two specific ways. If traffic levels are
20 maintained, the level of the frequency of service is
21 the same, and the transit time is the same
22 consistency. If you have the quality of

1 infrastructure, but then it would come from that.

2 The then second part I would look at is if
3 you have a change in traffic level, there's been many
4 even a consolidated, where you're running four days a
5 week you run three days a week. I would look at a
6 test on something like the average transit time in
7 those lower volumes are consistent with the average
8 transit time that was experienced let's say
9 pre-COVID, 2018, 2019.

10 And on average you're still delivering a
11 service, even if you have you know spikes because you
12 have less frequent train service.

13 CHAIRMAN OBERMAN: Well let me, I want to
14 reduce this to its simplest form and make sure my
15 simple brain can understand it. Right now you
16 interchange traffic at Mechanicville, so after the
17 transaction you're going to drop off cars at
18 Mechanicville, and a B&E locomotive is going to take
19 those cars over to Ayer, right?

20 MR. CLEMENTS: Yep.

21 CHAIRMAN OBERMAN: And what you want to
22 make sure is that B&E has enough locomotives and

1 crews to take them there on at least the same
2 frequency that they do now.

3 MR. CLEMENTS: Yeah so if that takes --

4 CHAIRMAN OBERMAN: Is that what we're
5 talking about here?

6 MR. CLEMENTS: Yes. That's exactly. So
7 if it takes on average 36 hours to get to Ayer now,
8 it would take 36 hours in the future. We don't --
9 and that's how we would phrase it. We're not
10 looking to say you have to run this train service.
11 You have to run you know this schedule, or anything
12 like that. We get that there's some variability and
13 some operational flexibility they need to run an
14 efficient railroad.

15 They can run an efficient railroad just
16 keep the transit consistent with where it is now.

17 CHAIRMAN OBERMAN: Has anybody at CP been
18 in touch with the CSX or B&E folks, G&W folks to try
19 to negotiate these conditions, and have we talked
20 about them, do they find them acceptable? You know
21 they made a number of representations that they have
22 ever interest of running a line as least as well as

1 it's being run now.

2 So if that's what sleeves out of the vest
3 means, then they shouldn't have any resistance to
4 this. Have you asked them?

5 MR. CLEMENTS: We have. We have had
6 discussions. And I would expect that we're going to
7 continue to try and resolve this, you know we've
8 heard your sort of urging on that front. The
9 service side has been one that is more let's say
10 complicated than the commercial side.

11 CHAIRMAN OBERMAN: Well one of the things
12 I was going to ask, it would be much better if it
13 were done jointly than unilaterally, is that your
14 very excellent counsel come up with more specific
15 language of the kind that might be appropriate in a
16 Board conditioning order, not to do our work for us.

17 We have had those lawyers too, but so we
18 know with more precision what you're asking for, then
19 we can judge it. Whether we have the power to do it,
20 and whether if we have the wisdom. Whether it's
21 wise. But the concepts you're stating here are quite
22 clear, but as lawyers know translating those into

1 legal reinforceable language can sometimes be a
2 challenge.

3 It would be better if you did it by
4 agreement. And I'm sure CSX would prefer to do it by
5 agreement rather than have us ultimately order them
6 to do something that they don't find practical, so I
7 would encourage that effort to be done, and to be
8 done quickly, so we can move ahead.

9 We have a statutory schedule as you know.

10 MR. CLEMENTS: We will both, you know,
11 work to reach agreement with the applicants, and we
12 will draft some post kind of structure for your
13 consideration.

14 CHAIRMAN OBERMAN: Yeah I have -- let me
15 ask this. I know Patrick wanted to make some
16 remarks. Before we get to that. Yeah before we even
17 get to that I just wanted to find out from a timing
18 point of view, other than questions, or remarks that
19 we may have, David are you and James finished? What
20 are the other things you were going to direct your
21 attention to?

22 MR. MEYER: I think we're finished.

1 CHAIRMAN OBERMAN: Okay. So let's try, we
2 were going to try to break for lunch, so see if we
3 can finish up with this panel, and then break for
4 lunch. Michelle you had -- you had some questions.

5 BOARD MEMBER SCHULTZ: Yeah thank you.
6 You mentioned earlier that you're requesting
7 conditions to help both CP and the shippers. Have
8 any shippers stated in this record that they want
9 such conditions, or have otherwise opposed this
10 transaction?

11 MR. MEYER: I think there has been the
12 comments from ACC that were referenced yesterday that
13 had expressed concerns about this aspect, the aspect
14 of the transaction that we've been describing, the
15 Pan Am Southern CSX relationship. So I think the
16 answer is yes there have been concerns.

17 CHAIRMAN OBERMAN: Michelle was -- did you
18 have more?

19 BOARD MEMBER SCHULTZ: I think that ACC
20 just asked for adherence to representation, is that
21 correct?

22 MR. MEYER: You know I'd have to go back

1 and look at their specific submission it's not just
2 front of mind. But you know as I recall the thrust
3 of what they were worried about was that you know
4 essentially the CSX's role with respect to Pan Am
5 Southern.

6 BOARD MEMBER SCHULTZ: Thank you.

7 CHAIRMAN OBERMAN: Were you done Michelle?

8 BOARD MEMBER SCHULTZ: I am. I think
9 Patrick has a couple questions.

10 CHAIRMAN OBERMAN: Yeah okay. I didn't
11 want to interrupt is all. All right Patrick. I have
12 some more questions Patrick did you want to go last
13 or?

14 BOARD MEMBER FUCHS: I just only have
15 concluding remarks, but Robert please.

16 VICE CHAIRMAN PRIMUS: I just had a
17 follow-up if you don't mind. And just on the line,
18 so with these bullet points that you have up now
19 talking about you know preserving the competition
20 conditions, you didn't mention you know what we were
21 talking about earlier. We spend a lot of time
22 talking the pooling, and you know PAS and CSXT owning

1 50 percent of PAS going forward should this
2 transaction be consummated.

3 I mean do you have a recommendation, or
4 any sort of language pertaining to that particular
5 portion of the transaction? A recommendation?

6 MR. CLEMENTS: We're not recommending any
7 change for that proposed ownership. We're saying
8 that these competition preserving conditions are
9 required because of it. So and I guess I'm not the
10 lawyer, but David I'll do this anyway. Why we
11 pointed at pooling was more to say that given that
12 there is the potential that there's a pooling
13 relationship here, it allows you to be able to impose
14 these conditions even if you felt under you know
15 11324 D-1 and 2, that that may have restricted your
16 ability.

17 The pooling provision would still continue
18 to preserve your ability to put these competition
19 preserving conditions on the transaction.

20 VICE CHAIRMAN PRIMUS: Okay. I was a
21 little confused. I thought the fact of also bringing
22 up pooling would suggest that the idea itself of CSXT

1 taking over Pan Am Southern warranted that condition
2 to sort of be tripped, and for us to act in that
3 manner too. But you're saying that's not the case.

4 MR. CLEMENTS: I'm trying to be clear.
5 Two things, on pooling itself we would not have any
6 objections to you know an approval of a pooling
7 arrangement in the event that the transactions
8 proposed are approved, but then where we were going
9 with pooling is that even if you felt you were
10 limited in terms of your powers under the 11324
11 conditions, that the pooling provision 11322 would
12 give you the authority to impose these conditions on
13 the transactions.

14 So again we do want these conditions as
15 part of the transaction, whichever way is appropriate
16 to come to the determination and application that
17 there's two different routes that you can still get
18 to the same place.

19 VICE CHAIRMAN PRIMUS: Thank you.

20 CHAIRMAN OBERMAN: I do have another area
21 that I wanted to get into.

22 BOARD MEMBER FUCHS: Was Karen, Karen?

1 BOARD MEMBER HEDLUND: Yeah. I just have
2 a quick question.

3 CHAIRMAN OBERMAN: Oh I'm sorry Karen, I
4 didn't see you.

5 BOARD MEMBER HEDLUND: That's all right.

6 CHAIRMAN OBERMAN: Go ahead.

7 BOARD MEMBER HEDLUND: With respect to the
8 physical condition of the track and other
9 infrastructure, are you aware of any places where the
10 track might be out of compliance with FRA standards?

11 MR. CLEMENTS: No. We're not aware of the
12 current specific condition of any location on the
13 track. Overall this route has been maintained a
14 level that it has been effective in providing
15 competition into the new railroad.

16 BOARD MEMBER HEDLUND: Okay. You know we
17 would just want to when you negotiate you know the
18 wording of that provision about maintenance that
19 you're not freezing the maintenance at some level
20 that does not meet FRA standards.

21 MR. CLEMENTS: Appreciate it thank you.

22 CHAIRMAN OBERMAN: Were you done Karen?

1 BOARD MEMBER HEDLUND: I'm finished.

2 CHAIRMAN OBERMAN: Yeah okay. There's
3 another area at the risk of prolonging this a little
4 bit before we break for lunch, but I feel constrained
5 to at least inquire about it. And that has to do
6 with the divestiture argument for the conditions in
7 lieu of divestiture. First, I'm wondering, and I
8 guess this is really probably for David, maybe it's
9 for James.

10 The proposals that have been made for how
11 PAS will function with B&E as the operator in this
12 management committee and so forth and so on, do you
13 have any comments pro or con, or any at all about A,
14 the idea that if they can't agree on capital
15 investments they'll submit to an arbitrator.

16 And if we don't like that they will agree
17 to hire a fiduciary to come in and make other capital
18 investment decisions. Do you have any comments on
19 the wisdom of those ideas?

20 MR. MEYER: James, do you want to comment?
21 My perspective is that that dialogue of yesterday,
22 and the potential role of CSX in that decision

1 making, you know, we don't think much of the
2 fiduciary arguments. I think it's fair to say. But
3 it illustrates exactly what we're concerned about,
4 that there could be situations where Pan Am Southern
5 ends up in a different place in terms of the kinds of
6 investments that get made, the kinds of service that
7 gets structured.

8 The delays in addressing market
9 opportunities what have you, then it would have been
10 had there not been this transaction. And if -- we
11 recognize that the transaction is a whole, and that
12 it's not, we agree with the applicants that it
13 probably is not in the world of possibility to divest
14 CSX from Pan Am Southern while having the good
15 aspects of the transaction go forward, and so that's
16 why.

17 CHAIRMAN OBERMAN: Say that again David.
18 You're not --

19 MR. MEYER: We agree with CSX and the
20 other transaction participants that ordering a
21 fundamental change in the transaction risks all of
22 the good aspects of the transaction along with the

1 bad aspects of the transaction. That's why we are
2 focused on trying to solve for the bad aspects only.

3 CHAIRMAN OBERMAN: So are you saying that
4 if we could craft conditions in accordance with the
5 bullet points that James has here, and particularly
6 if everybody agreed on them, which I actually think
7 we -- everybody is, at least the concept, that that
8 would offset the need to have this fiduciary come in
9 and decide whether to spend money on the track?

10 MR. MEYER: I think we think yes because
11 it would mean that decision making at Pan Am Southern
12 would have to be adhering to the principles that
13 preserve, effectively preserve the incentive
14 structure that exists today.

15 CHAIRMAN OBERMAN: And what about the 300
16 million dollars to improve the depth or the height,
17 or whatever you want to call it of the Hoosac Tunnel.
18 Do you have any thoughts about whether that will ever
19 get done, and whether it's less likely to get done if
20 this transaction goes through?

21 MR. CLEMENTS: You know would the
22 applicants be held to have to do that you know based

1 on the competitiveness that this provides in the
2 market today. You think the line does its job? Do
3 I have an opinion? I think two things. The movement
4 of an intermodal train pair, or the intermodal
5 business, the one train pair to the CSX certainly
6 suggests that there's no immediate reason why anybody
7 would want to spend that money.

8 You then speculate as you outgrow the
9 capacity of the 9,000 foot train whenever that may
10 be, that they would then return the incentive.
11 Obviously if you had more traffic, it would be more
12 likely to happen. So I think this transaction does
13 extend further into the future the possibility of the
14 tunnel seeing a double stack investment.

15 CHAIRMAN OBERMAN: Well I take it CP is
16 not proposing that we try to deal with that capital
17 investment in an order on this decision.

18 MR. CLEMENTS: We are not proposing that
19 at all.

20 CHAIRMAN OBERMAN: Yeah.

21 MR. CLEMENTS: We're not looking for
22 anything new, or anything that increases

1 competitiveness. We want to be left in the position
2 we are currently in the absence of this transaction.

3 CHAIRMAN OBERMAN: You don't want
4 competition diminished?

5 MR. CLEMENTS: Correct.

6 CHAIRMAN OBERMAN: Just a final, I'm just
7 curious about it if you don't want to comment on it
8 because you're not arguing for divestiture, but we
9 were told about the history that 15 years ago, or 12
10 years ago you were invited in by NS, and chose not to
11 join. You had different management at the time, so
12 it may have something to do with it.

13 And you have this very intriguing footnote
14 which many of us at the Board have read more than
15 once. I assume you wrote it David. Footnote six in
16 your last brief saying well you're not arguing for
17 divestiture, you'd be interested in buying a line.
18 Is that what we're supposed to? Do you want to sort
19 of comment on the overall interest, or lack thereof
20 in CP buying 50 percent of this line?

21 MR. CLEMENTS: Yeah. So I can comment on
22 that, and you know as the CSX mentioned there's a

1 difference between the interest in preserving the
2 route versus the interest in owning the route on
3 that basis. Our concern today from what we
4 understand of the structures that the NS, and I think
5 it was referenced in discussions yesterday, the
6 Norfolk Southern is part of the joint venture, does
7 have certain rights.

8 The parties have indicated that they've
9 agreed that the NS wouldn't exercise those rights in
10 relation to the CSX acquisition of 50 percent. You
11 know certainly the NS rights would be a concern, and
12 you know we'd have to understand where we stood
13 relative to those engaging the interest as to whether
14 there was you know a business case that was
15 justified.

16 We're also as you are well aware, very
17 busy, and involved and making significant investments
18 elsewhere on the network.

19 CHAIRMAN OBERMAN: I noticed that James.

20 MR. CLEMENTS: So as a priority, and as a
21 focus at this point in time you know we're probably
22 busy elsewhere.

1 CHAIRMAN OBERMAN: But can you comment on
2 the dynamic of 12 years ago, or is it not worth
3 taking up time since its ancient history. Because
4 several of us are puzzled about what this line is
5 worth, and what 50 percent of it. We can't figure
6 out why you didn't join in initially with NS.

7 MR. CLEMENTS: Do you know I have no
8 specific knowledge of the situation 12 or 15 years
9 ago, so unfortunately I can't comment.

10 CHAIRMAN OBERMAN: All right. Yeah and
11 it's probably not worth us to waste the time on it.
12 I will and I think Patrick wants to make some final
13 remarks here, but before he does I just wanted to
14 make one observation in response to the question
15 Michelle raised which caused me to think about this.

16 We are going to hear from shipper panels
17 later today so we can ask them directly. I think
18 most of them are supporting the transaction. It does
19 occur to me when you read everything that was filed
20 by CSX, and what it volunteered, it could well be
21 that the shipping community looked at all the
22 promises that CSX has made, the ones that we're

1 talking about here today included, and concluded that
2 overall if the promises were kept, shippers would be
3 fine, and there was no need for them to go out and
4 spend their own money and hire counsel to join in
5 because CSX's promises were protecting shippers.

6 That may be why we haven't heard any
7 negatives because they think they're getting their
8 competition protected. That's assume these get
9 translated into conditions. You know it's always
10 speculative about why a witness shows up, or doesn't
11 show up, but that might be an explanation it just
12 occurred to me. That was all I had.

13 Patrick do you want to take us to lunch
14 hour?

15 BOARD MEMBER FUCHS: Thank you, and I'll
16 try and be quick. I really do appreciate the
17 questions of my colleagues. I think it was a really
18 useful discussion. I have to say I am troubled by a
19 few things I've heard today, and I just want to run
20 through them. The first is you know I think this
21 notion that the applicants conceded likely and
22 substantial, is not quite in the record.

1 They conceded that they were doing things
2 to address the possibility of competitive concerns,
3 and Mr. Chairman as you rightly pointed out, we are
4 going to consider the transaction including
5 settlements and volunteering mitigation, so I think
6 to evaluate that D-1 standard likely and substantial
7 should be after those agreements.

8 And so I don't think the mere fact that
9 they came to the table should be held against them as
10 conceding D-1, and I think that that has the
11 potential to have a chilling effect on the overall
12 thrust that we've been emphasizing, or the thrust of
13 the Board to encourage parties to come together.

14 If parties felt that coming to the table
15 meant they conceded important legal standards, we
16 should perhaps think about what the ramifications of
17 that would be. The second is that Norfolk Southern
18 is the beneficiary of the trackage rights. And they
19 seem to evince concern that their trackage rights are
20 in jeopardy if CSX is meant to do additional things
21 on the northern route.

22 In fact, you know I'm sure that Norfolk

1 Southern in some ways would like CSX to do things on
2 the northern route, and so you know CP claims that
3 there will be no effect on NS trackage rights, or any
4 affect whatsoever from CSX if we impose these
5 conditions that might compromise the benefits of the
6 transaction. I just wanted to point out that we
7 heard testimony yesterday from Hub Group and others
8 about the benefits of those NS trackage rights, and
9 the beneficiary of those trackage rights is concerns.

10 So in some ways in order to believe CP's claim
11 about NS trackage rights you have to not believe NS
12 itself, the beneficiary. Third is Mr. Meyer seemed
13 to suggest that under D the Board could impose
14 conditions, even if it couldn't withhold approval,
15 and you know I think that you know the 7th Circuit
16 has confirmed, has upheld a decision which the Board
17 said they shouldn't do that, the D.C. Circuit in a
18 major merger said that withholding approval and
19 conditioning is basically the equivalent.

20 And I think it's worthwhile to look at the
21 text of D, which says the Board shall approve the
22 application -- the application, unless the two

1 criteria of D are met, and not only likely
2 substantial, but also that those anti-competitive
3 effects outweigh the benefits. It doesn't say a
4 transaction with conditions for example, so I think
5 you can look to a precedent and the text, the Board
6 shall approve, if not for those two conditions.

7 And then lastly, looking across the panel
8 we heard testimony from Mr. Newman and Mr. Wimbish
9 about how the Board's conditioning authority is
10 totally unconstrained, it's public interest. Public
11 interest just like in major mergers. That's what
12 you know Barrington suggested. That is what you know
13 the case is, you know, often times major merger cases
14 that are cited in those briefs put forward that D
15 conditioning authority and C conditioning authority
16 are equivalent.

17 CP's contention is that they're not
18 equivalent. Mr. Meyers said that the C authority is
19 broader than the conditioning authority under D, and
20 suggested that the focus should be competitive
21 effects, limiting the focus on other things that
22 suggest that perhaps we shouldn't wade into areas

1 such as passenger rail.

2 And I think of course that is a reasonable
3 reading of the statute, and I think there's a
4 tension. I don't think those views sit side by side.
5 And the Board has not yet resolved that tension.
6 And I don't think because I think we're at risk of
7 basically applying a double standard. You know, a
8 conditioning authority, that is a public interest
9 because we may not be limited by the approval
10 authority, and a commissioning standard that borrows
11 part of the approval authority.

12 And I don't think we can have it both
13 ways, or at least we need to think about doing a
14 better job resolving that tension explicitly, and I
15 think the differences in opinion on the Board's
16 conditioning authority presented today call on the
17 Board to resolve that tension. So I just wanted to
18 make those concluding observations because I think
19 that there are some real concerns raised in the
20 testimony.

21 CHAIRMAN OBERMAN: Well let me Patrick,
22 I'm going to take my prerogative to respond to a

1 little bit before we break for lunch. I have not
2 meant to suggest by anything I said, nor do I hear it
3 from any of the participants on either side, or
4 coming from any direction, whether it's the applicant
5 or others, that CSX has conceded a D-1 or D-2
6 standard.

7 I think it's quite clear that as a factual
8 matter, they ought to do their papers, they have
9 conceded competitive concerns if they don't make the
10 promises they've made, whether they got to the point
11 of getting to a D-1 standard or not, they haven't
12 said. My view is that if all of this is done by
13 agreement we don't have to resolve that tension in
14 this case.

15 And you know my penchant in deciding
16 cases, which I learned in law school is we can only
17 decide what we have to decide, and save the tough
18 decisions for the case where people are at odds and
19 forced to decide, because that's a better factual way
20 to do it.

21 So the tension you point to is astute, and
22 still may be, there still may be among Board members

1 if we ever get to a case where we have to decide it.
2 But this whole proceeding has struck me as one that
3 is heading towards working these things out by
4 agreement. And we've made quite a bit of progress.
5 There's some remaining parts that we may have to
6 resolve, but if the parties can keep us from
7 resolving it I think we'll all be better off, and
8 move ahead with a transaction, which you know, would
9 appear to have many, many benefits, and the negatives
10 either eliminated, or minimized, and that seems to be
11 the goal.

12 So but I wanted to comment specifically on
13 your observation. We don't want to disincentivize
14 applicants coming in and trying to ameliorate the
15 problems. I don't think we're doing that because we
16 haven't yet, we may have to, but we haven't said, or
17 even observed that CSX has conceded some statutory
18 standards has been breached.

19 So I wanted to make that point on the
20 record.

21 BOARD MEMBER FUCHS: I appreciate that
22 very much.

1 CHAIRMAN OBERMAN: Yeah. I would like to
2 break for lunch, and I would like to finish this
3 panel. Has everybody on the panel said everything
4 they need to say? And have all the Board members
5 done everything they need to do with this panel so we
6 can finish with it? Okay. Good. It's been a really
7 robust discussion from all fronts. I think we've
8 learned a lot yesterday, we've learned even more this
9 morning.

10 It is 1:42. Let's break for 30 minutes
11 which brings us back at 2:12. And we're going to
12 finish this today I hope. So we may be, well
13 hopefully we'll go through this afternoon's panels
14 pretty quickly, and then get back to the applicants.
15 So we will see you at 2:12, thank you all.

16 (Lunch Break)

17 CHAIRMAN OBERMAN: Everybody we are back.
18 We are one minute late which I don't like to be
19 because we have a lot to do. I'm going to
20 immediately call on our next -- the Maine Department
21 of Transportation, Nathan Mouton, the New Hampshire
22 Department of Transportation, Patrick Herlihy, and

1 Islington Creek Neighborhood in Portsmouth, Thomas
2 Hiney.

3 Are they here?

4 MR. HERLIHY: Yes sir Mr. Chairman.

5 CHAIRMAN OBERMAN: All right. So I called
6 on Mr. Moulton first because that's the order they're
7 listed for me, but if he's not present.

8 MR. MOULTON: I am sir.

9 CHAIRMAN OBERMAN: There you are. All
10 right you're first, go for it.

11 MR. MOULTON: Very good. Good afternoon
12 Chairman Oberman, Members of the Board, my name is
13 Nate Moulton. I'm the Director of the Office of
14 Freight and Passenger Services, the State of Maine
15 Department of Transportation. In my role here I
16 oversee transportation policy and operations across
17 multiple modes, including rail, to the benefit of
18 Maine citizens and Maine businesses.

19 Additionally, I am the Department's
20 liaison to the Northern New England Passenger Rail
21 Authority who is on a later panel, who provides
22 oversight of the Amtrak Downeaster passenger rail

1 service between Brunswick, Maine and Boston,
2 Massachusetts, and runs over some of the PAR in
3 question.

4 The NNEPRA's Executive Director, Patricia
5 Quinn, again will be speaking a little later this
6 afternoon, and let me start by thanking the Board to
7 have this brief opportunity, and I will be brief, to
8 help move this along. I do want to note the State of
9 Maine has a long history of working closely with our
10 railroad partners and operators within the state.

11 We also by default sometimes become
12 railroad owners of lines that are up for abandonment
13 that we feel are key to Maine businesses, and working
14 through and with the Surface Transportation Board,
15 have been able to purchase and then lease back to
16 private sector entities that operate on our behalf.

17 Generally after putting some capital in
18 that to put them in a state of good repair, and back
19 in a fairly good operating condition. Additionally,
20 we work closely with the railroad and customers of
21 the railroads on our industrial rail access program,
22 which provides funding up to 50 percent to provide

1 access to the railroads, where someone abutting the
2 railroad might not have current access or has access,
3 but it needs to be expanded or improved. So we work
4 in that way both with the railroads and shippers
5 within the state.

6 We have also participated with both state
7 and federal discretionary funds with railroad
8 partners in regards to improvements in yards, in
9 interchanges, as well as main line improvements. We
10 believe the dollars invested in partnering with the
11 private railroads, and even on private infrastructure
12 is good for the state, and good for our
13 transportation system.

14 So I'm here today to once again reiterate
15 the strong support the state of Maine has for this
16 proposed transaction. Following on the letter from
17 Maine Governor Janet Mills, back in July of 2021,
18 which the Board has on file. We are fully behind
19 this, we think on PAR the benefits, especially for
20 the State of Maine outweigh any of the smaller issues
21 that have been brought up, and I understand why for
22 certain states, or certain entities they may have

1 issues that they want to see looked at as part of
2 this.

3 But again, overall PAR for the State of
4 Maine, we are in significant support for this
5 transaction. We think it will bring substantial
6 benefits to the state, and the Maine businesses who
7 rely on rail currently to deliver freight also
8 attract new rail freight users within Maine. I think
9 it's extremely important to once again highlight -- a
10 lot of people have talked about it, but particularly
11 here in Maine.

12 We are not aware of any shippers within
13 the state who oppose this transaction, and most have
14 expressed a great deal of optimism and excitement
15 around this transaction. This is foundational to the
16 state support to this transaction, it's listening to
17 those shippers and noting their strong support for
18 this. And I see several of them have submitted
19 letters of support as part of the record.

20 Additionally, I think at least one Cold
21 Spring testified yesterday and a couple more who do
22 business in Maine I think are testifying on an

1 upcoming panel. So I think that's very important.
2 When we talk to businesses in Maine, transportation
3 generally is one of the top two concerns as far as
4 doing business, and challenges of doing business in
5 Maine.

6 In particular rail, and rail freight are
7 brought up as challenges, and we get a lot of
8 feedback that the rail system needs to be more
9 competitive, and it's been talked about a great deal
10 by all parties here, and it's nice to see everybody
11 kind of agrees. Here in Maine this transaction is
12 going to provide more competition, a stronger lane,
13 the current PAR lane will be improved. It will be
14 safer, and we'll have better technology, we'll have
15 better service, more efficient locomotives, all those
16 types of things that folks have talked about, and we
17 think that has great potential to help the State of
18 Maine and Maine shippers.

19 Additionally, you know the improvements
20 that's been talked about in relation to the
21 Downeaster passenger rail service is very important
22 as well. Again I won't dive too deep into that at

1 this point.

2 We want to note when the proposed
3 transaction was announced DOT was very quick to reach
4 out to CSX, and as well as our shippers and other
5 railroad partners and begin a dialogue, initial
6 questions, concerns that we had, or others had around
7 the transaction. For the State of Maine we found CSX
8 to be very responsive, a willing partner, and started
9 conversations early and often with us with ongoing
10 cooperation between the parties.

11 And we were able to negotiate a settlement
12 agreement that again the Board has. I believe it's
13 dated June 16 of 2021. That's been filed, and with
14 the agreement between both CSX and Maine DOT, that
15 that be made part of a condition of approval, this
16 transaction, along with CSX's stated some of the
17 other guarantees, and things that they negotiated and
18 brought to the table in regard to you know the
19 existing gateway and other things along those lines.

20 I don't want to overlook those. Those are
21 important, but again we think with what's been
22 negotiated, and what's been asked, or to be made part

1 of the record we are comfortable from our
2 perspective that again the positives far outweigh any
3 negatives in this transaction.

4 The PAR line is very important to the
5 State of Maine. It is our biggest gateway for rail
6 freight. It is the one that's closest to the east
7 coast and a great deal of freight from Maine already
8 goes down this corridor, along with a lot of freight
9 is trucked out of Maine and reloaded at locations
10 like Ayer and Barbers and things like that and put on
11 trains of the Class 1's.

12 We believe strong as you, Mr. Chairman of
13 the Board pointed out during this transaction along
14 with the other Board members, we echo your comments,
15 the importance of competition. We believe the strong
16 competition between our railroad operators, as well
17 as creating more competition for trucking is good for
18 Maine business, good for the environment, and we look
19 forward to CSX keeping their commitments on existing
20 gateways, and keeping them open on reasonable terms,
21 along with the infrastructure and service
22 improvements that have been promised.

1 If and when they follow through on will
2 have a significant impact on Maine for the long-term.
3 I want to just again talk a little bit having watched
4 some of the discussion yesterday. On the propane
5 discussion, something like that is very important to
6 us. We do get a lot of inbound propane here to
7 Maine, and it's competition is great on that because
8 we have several good lanes, both from the Canadian
9 railways, as well as across the PAR line, and so
10 having another stronger lane that only helps.

11 When it gets cold like it's going to the
12 next few days up here in Maine, parts of Maine won't
13 get above zero, things get tight, and then we have a
14 big snowstorm coming right behind it. So it's
15 important to have multiple lanes, multiple sources of
16 that in case one of the lanes becomes jammed, or
17 there's a strike, or there is something else that may
18 happen.

19 So their redundancy in that competition is
20 very important. Likewise, outbound forest products,
21 which is king for the State of Maine as far as
22 outbound products, is very important to have multiple

1 lanes, the ability to move that product on rail long
2 distances to keep our Maine producers competitive.

3 We can do it on trucks for truck dominant,
4 and if we're going to grow business and continue to
5 have kind of some have a little bit of renaissance in
6 some of our paper making, in regard to box boards,
7 and some of those other types of products as the
8 companies pivot, as well as some of our saw mills and
9 wood forest products.

10 So we look forward to this transaction,
11 hoping to continue to grow those, and encouraging
12 those companies to continue to invest in Maine. And
13 with that I'll close, and again thank you for the
14 opportunity, and happy to take any questions.

15 CHAIRMAN OBERMAN: Mr. Moulton thank you
16 much for taking the time to talk to use. At the risk
17 of handing you a softball, it's fair to say that from
18 the State of Maine's point of view, and by the way
19 you should know, I'm sure you do, that the phrase
20 State of Maine gets thrown around inside the STB on a
21 regular basis because of the famous precedent.

22 You see CSX's acquisition of Pan Am with

1 CSX's resources as a plus for your state, but it
2 seems to me that as good as it may be for CSX to be
3 operating up there, it is in the state's public
4 interest to make sure that all the other carriers
5 that currently have access to the gateways continue
6 to have that access. That's equally important to you
7 would you say?

8 MR. MOULTON: Yes absolutely.

9 CHAIRMAN OBERMAN: And it would be a loss
10 to the state's economy if those access points were
11 somehow limited or closed off.

12 MR. MOULTON: If that was not there we
13 would you know, we would be less supportive, or not
14 nearly supportive, or against this. And I'll use a
15 quick example, and I know we're short on time, and it
16 goes back to the STB, the statements involved in
17 purchasing some lines in the northern part of Maine
18 which became in around 2010, became the Maine
19 Northern Railway. We leased it back to the New
20 Brunswick and Maine Railway.

21 It had 23 shippers, very low volume at the
22 time. It's grown four times since that period of

1 time, mainly due to good service by that short line.
2 At that time we had no Class 1's in the state, we had
3 poor connections, poor relations in the Class 1.
4 Today we have a very good connection with the CN at
5 the border in northern Maine.

6 We now have the CP operating through the
7 state in a very good connection. We have the CP up
8 the Maine Northern, and once, and if this transaction
9 is completed we will have a direct connection to the
10 same short line, who acts as a haulage carrier to
11 CSX, so what a turn of events for those lines that
12 had no Class 1 connections around their last leg.

13 Now turned around we're seeing significant
14 growth, and we'll have access to three Class 1's
15 through their short line. We would not want to see
16 that change.

17 CHAIRMAN OBERMAN: Good. Thank you. Much
18 appreciated. Any questions by any Board members?
19 Okay. We'll move ahead. Patrick Herlihy from New
20 Hampshire DOT.

21 MR. HERLIHY: Thank you Mr. Chairman and
22 members of the Board. For the record my name is

1 Patrick Herlihy, and I'm the Director of Aeronautics,
2 Rail and Transit for the New Hampshire Department of
3 Transportation. I'd like to thank you for the
4 opportunity to come before you today in support of
5 the acquisition of Pan Am Railways by CSX.

6 The State of New Hampshire, similar to
7 Maine, we own six active rail lines hosting four
8 freight lines and two tourist excursion lines, and we
9 are very excited by the opportunity to have a Class 1
10 railroad operating in the state. And not just the
11 Department, but the Governor, and team members of the
12 legislature, of our legislature, are also excited by
13 this opportunity.

14 This transaction would be beneficial to
15 New Hampshire because it would provide a continuous
16 single line rail service as we've heard on numerous
17 occasions over the last two days, and provide
18 additional resources to improve and market the line,
19 with the potential to bring additional freight
20 service to New England markets.

21 The ability to create more opportunity for
22 freight service in New Hampshire would take

1 additional trucks off the road which would be
2 beneficial for both the economy and the environment.
3 The Department has had numerous discussions with
4 representatives from CSX during this process, and we
5 anticipate that as a result of the acquisition CSX
6 will bring the necessary financial resources to the
7 table for much needed infrastructure improvements
8 throughout Pan Am's rail network, operating in New
9 Hampshire.

10 You saw an example of that yesterday with
11 the Hillsboro Branch, the picture that CSX put up of
12 the Hillsboro Branch Line and the condition that that
13 was in, and we are looking forward to having some
14 improvements done on that line in the future. We are
15 also encouraged by CSX's commitment to honor all
16 agreements currently in place with various shippers
17 and interchange partners, as well as the trackage
18 rights agreement already in place between the MBTA
19 and Pan Am for passenger rail service on the New
20 England Maine line in New Hampshire.

21 One of those interchange partners, New
22 Hampshire North Coast Railroad, has submitted a

1 letter of support for this acquisition, and the
2 Milford Bennington Railroad which partially operates
3 on the host railroad, has also submitted a letter of
4 support. And as Mr. Moulton said in Maine there have
5 been no shippers in New Hampshire that have come out
6 in opposition of this acquisition.

7 The Department also looks forward to
8 working with CSX on our road, bridge, and railroad
9 crossing projects where we need that timely railroad
10 coordination, and they have committed to working
11 with us on those projects in a timely manner. And
12 with that that's the end of my testimony, thank you.
13 You're muted sir.

14 CHAIRMAN OBERMAN: Thank you Mr. Herlihy.
15 Short and sweet, appreciate it. Any questions by
16 Board members? All right. Finally Thomas Hiney,
17 Islington Creek neighborhood.

18 MR. HINEY: Thank you. Can you hear me
19 all right.

20 CHAIRMAN OBERMAN: Yes.

21 MR. HINEY: Excellent. Okay. I just want
22 to thank you Chairman Oberman, Vice Chairman Primus,

1 and the distinguished Board members for taking the
2 time to allow us to speak today. Before I get going
3 a couple of things that I just wanted to go back to
4 yesterday that I thought were pertinent to what we're
5 doing. We're going to shift gears a little bit here
6 in the discussions, but coming at you from a local
7 community group. Some of the impacts that we see as
8 being neighbors to the railroad.

9 But what I thought was interesting, and I
10 think we need to keep in mind as we go through this
11 process is some of the comments made by Mass State
12 Rep. John Barrett yesterday afternoon, and his
13 comments in trying to deal with the current operator,
14 and obviously the passion and the frustration that he
15 expressed during his comments.

16 We could echo that. We're not going to
17 get into our issues that we're having, we're more
18 interested in talking to you about the process, but
19 that is the playbook that we are -- have seen here
20 when dealing with the operator, the current operator
21 which would be Pan Am, and as we're looking to
22 possible solutions as neighbors, we get that kind of

1 throwback, and it really goes to pre-emption.

2 We have pre-emption therefore we can do
3 what we need to do to move forward, move our
4 interests forward without taking into effect concerns
5 from the neighborhood. I also want to point out the
6 comments from CSX Chairman Foote in his opening
7 statement where he recognizes Islington Creek. We
8 appreciate that, and just want to let you know and
9 confirm they have reached out to us as a group, and
10 we look forward to speaking to them further. And
11 really, this is why we're here today, is to make sure
12 we're able to move forward in these areas.

13 Okay. So Islington Creek, just to give
14 you a little bit of background who we are. We're a
15 neighborhood in Portsmouth, New Hampshire.
16 Portsmouth, New Hampshire is a port city. We're very
17 proud of the port, the work that's done, and
18 certainly the manufacturers and such that are in this
19 area, and certainly some of those being serviced by
20 the railroad.

21 We're a quiet neighborhood, we're attached
22 right to downtown, and you know so highly residential

1 and high density. We recognize that hey, the train
2 activities go back here into the mid-1800's, and
3 certainly this switching yard that we have here.
4 And we feel that's very important, that anything we
5 ask of the railroad that we take into consideration
6 that we have customers that need to be serviced.

7 We have interstate commerce that needs to
8 take place, and we've spent a lot of time from our
9 perspective as we move forward and try to have
10 discussions with the railroad about these issues.
11 We recognize the strategic importance of the
12 railroad, and the freight system and how important
13 that is to the economy, not just nationally, but
14 certainly here locally on the sea coast, and
15 certainly to their customer base up on the Piscataqua
16 River.

17 Again our concern is how do we talk? And
18 this is where I think it's important for the Board as
19 a community group, how do we have discussions on a
20 consistent basis with a railroad in issues that are
21 impacting us when we're dealing with pre-emption, and
22 how do we balance that scale?

1 And so that's why we're really here today.
2 As you know pre-emption removes the jurisdiction from
3 local control for state municipalities, and our
4 concern here is how do we build up, what do we have
5 within the organization of the STB to level that
6 field, to give us an outlet to be able to voice our
7 concerns, and work in a proactive way with our
8 neighbors, the railroad.

9 Typical tools aren't relevant in regards
10 to us as a neighborhood group where we can go to our
11 city managers and to work through the process. So we
12 lose that touchpoint. And what fills that void? And
13 so what happens to us as a group is we lose
14 confidence, lack of confidence in being heard and
15 understood as to why certain disruptions are taking
16 place.

17 You know we can see this consistently you
18 know across different communities where issues come
19 up in discussions. How can these discussions
20 consistently be had okay. When we look at your
21 website for instance, we look at your charge, and the
22 agency has jurisdiction over rail rate, practice,

1 service issues, rail reconstruction transactions,
2 including mergers, line sales construction, line
3 abandonment period.

4 Now community is not mentioned in this
5 charge at all. Perhaps it's tied in under practice,
6 but again as we look through and try to find a
7 department to work with we get into the public
8 assistance, office of the public assistance, and then
9 a group that has informal advisory where we finally
10 get some community you know touchpoints, some focus
11 on community efforts, or dealing with concerns.

12 So you know we talk about competition. We
13 talk about interstate, the importance of interstate
14 commerce, this is all to drive business, drive the
15 economy for the citizens. Our concern is hey, the
16 citizens and the municipalities need a place at the
17 table when we have issues. We don't need to go, we
18 don't want to see ourselves or others go through the
19 process we have had to in this particular case, to
20 get to this point where we're having discussions, or
21 having input into what could be done to work
22 together to try to mitigate some of the issues okay.

1 And that's what we're really concerned
2 about. In our case, and just let me go through the
3 process of we had issues, we contacted the operator
4 for possible relief, had some possible solutions that
5 we pushed forward, that we felt knowing the
6 operation, knowing the customer base, knowing what
7 they had for assets on the ground that we felt could
8 help the situation. We were never able to get to the
9 next step of having a discussion with the operator.

10 In fact, when we laid this information out
11 to them they responded basically with pre-emption and
12 a case saying hey, this is what -- we don't need to
13 go further down this road, this is not a
14 jurisdiction. We're not going to have this
15 discussion. And I think it's important that we go
16 ahead and have some robust procedures in place so
17 that other communities don't have to go through the
18 work that we've had to do just to get to this point.

19 And the key here too, and it's very
20 important from our standpoint. We're not looking for
21 litigation. We are looking for solutions, working
22 outside in a non-litigious manner with an operator to

1 go ahead and talk about issues that are occurring as
2 the business grows. Hopefully, I know there's been a
3 lot of talk about that, and what we can do to work
4 together to perhaps mitigate some of the impacts.
5 Okay.

6 What we're asking today is to the STB is a
7 number of things, and to be totally honest with you
8 I'm not even sure that this is an area that can be
9 considered based on your jurisdiction, but a
10 condition of the merger to protect us, to make sure
11 that we can have -- we're not looking for decisions
12 to be made. All that we want to make sure happens is
13 that we can have a good faith discussion with the
14 operator, regardless of who it is, whether it's Pan
15 Am or CSX in this particular case.

16 And that's really what we're looking for
17 is how do we go ahead and do that, and how do we
18 protect it? And that's why we ask you as a condition
19 because we don't feel that the current structure
20 supports continued discussion here that we put this
21 into the merger as a condition to protect us as we
22 move forward.

1 And as we do that, that it works through
2 the RCPA as an arbiter or what have you, to help us
3 if we do need to get to that point to go ahead and do
4 that.

5 In closing, this has been a journey for
6 us. We started with specific complaints I guess you
7 would call them, or areas that we were looking at
8 mitigation. That never took place. Those
9 discussions didn't get very far because we came up
10 against the pre-emption and the toolbox that the
11 particular operator uses in these cases to push us
12 aside.

13 So the effort has been significant to get
14 to this point, and I think it's critical as we move
15 forward that not only to the Islington Creek, but for
16 future municipalities and municipality groups that
17 there is a place, or some structure in place where we
18 can quickly voice these opinions, and/or have these
19 discussions.

20 And that's really where I wanted to close.
21 If you have questions I'm more than happy to take
22 them.

1 CHAIRMAN OBERMAN: Well Mr. Hiney thank
2 you, and I think we all appreciate your taking the
3 time to talk to us, and what appears to be a fair
4 amount of frustration on the part of your
5 neighborhood association organization, which I am
6 intimately familiar, at least in my bailiwick in
7 Chicago.

8 I'm going to make a few observations.
9 One, I would hope that our Overdeck office is
10 responsive and able to help. It sounds like they
11 have been, they always are, and provide whatever
12 assistance they can. It would be difficult for me to
13 comment on the substance of whatever claims of
14 pre-emption have been thrown at you because I don't
15 know precisely what issues you were raising, and I
16 wouldn't comment on the substance of them anyway
17 because it might be a matter that comes in front of
18 us.

19 I will make a couple of observations, and
20 this is not to cast any negative comment towards CSX,
21 but all of the railroads rely on the pre-emption
22 doctrine when they can. I'm not sure that will

1 change much here although I don't know what the
2 issues are. And I can tell you that while there are
3 some very strong pre-emption statutes that govern us,
4 and govern the railroad industry which we have to
5 follow, questions of pre-emption are often
6 extraordinarily complex and subtle.

7 The Board has a number of pre-emption
8 cases, have since I've been on the Board. We have
9 some pending now which generate a great deal of
10 debate. So it is not obvious at the beginning of any
11 discussion that something is subject to pre-emption,
12 even though the local railroad person may throw the
13 term around to try to make it go away, or at least
14 spend money you don't have to hire a lawyer to fight
15 it.

16 It's frustrating, and I hope you will
17 bring those issues to our attention. The doctrine of
18 pre-emption should not be used as a heavy hand on a
19 neighbor organization's legitimate concerns to at
20 least talk to the railroad. And all I would say on
21 this at this hearing, not knowing precisely what your
22 issues are, is that I always encourage discussion,

1 and I would very much encourage the CSX folks to sit
2 down with you.

3 You know our experience with CSX when
4 problems do come up, mostly from the shippers, not
5 from neighboring groups, is that they do try to
6 respond and sit down and work things out. I think
7 they have a good attitude in that respect. I am sure
8 they're listening, so I'm going to invite somebody
9 from CSX to send you a proper contact information so
10 that the two of you can sit down.

11 Doesn't that sound like it's the kind of
12 thing that would be a condition in a Board, and I
13 don't want to pre-judge it, but I sure want to
14 encourage the two of you to meet and get together and
15 work out your problems. I am a strong believer in
16 that.

17 If I were an alderman, and the alderman in
18 your neighborhood I'd make sure it happens, but I'm
19 past that part. But I've done it many, many times,
20 including with railroads by the way in my own -- we
21 had a railroad that ran through my ward 40 years
22 ago, so I had some experience with that.

1 So I don't know if that gives you any
2 comfort, but I can hear the frustration in you voice
3 of trying to deal with a large organization.

4 MR. HINEY: Yeah and just to be fair to
5 CSX they have reached out. I wanted to make sure
6 that that was clear. That's a little bit of a breath
7 of fresh air. We want that to continue, and look
8 forward to that. And again, we're just a local
9 neighborhood trying to work our way through this
10 process. Your group, the RCPA, once I realized that
11 they were there, have been very responsive in
12 regards to phone calls, those types of things. Not
13 most people know that it exists, outside of the
14 industry. I can tell you that based on discussions
15 we've had with the municipality, keeping them up to
16 speed.

17 CHAIRMAN OBERMAN: Yeah. Our whole agency
18 as we all know to hear some people say it, Railway Age
19 Magazine called us that sleepy little agency last
20 summer, and I have yet to find anybody at the Board
21 who's gotten a decent night's sleep since I became
22 Chairman. So we're not a sleepy agency, but we aren't

1 well-known.

2 I just did hear by the way from Janie
3 Sheng who is the director of OPAGAC and she said
4 she well remembers your contacting the office, and
5 that Pan Am didn't accept the invitation to try to
6 sit down, but I am sure Jim Foote will accept that
7 invitation because he's listening right now, and I
8 know Jim well. So let's see.

9 MR. HINEY: They've already proactively
10 got into that, so thank you very much Mr. Chairman.

11 CHAIRMAN OBERMAN: Well that's great. And
12 we stand ready and hopefully to help make sure that
13 conversation continues. Any questions by any Board
14 members for Mr. Hiney? Okay. Thank you.

15 MR. HINEY: Thank you.

16 CHAIRMAN OBERMAN: Much appreciate your
17 taking the time to be here with us.

18 MR. HINEY: Thank you much.

19 CHAIRMAN OBERMAN: All right. So let us
20 move on to Panel Number VII. These are shippers. So
21 let me call out the names in order. I think
22 everybody is here. Hopefully if they're not they'll

1 be here soon. Bob Lefebvre of Eastern Propane Gas;
2 Hillel Weisel from Fabian Oil; Marjorie Shansky on
3 behalf of Frost Bridge Associates; Charles Giroux,
4 Mid States Packaging, and two people who I hope are
5 here today who were not able to stick around
6 yesterday, Seth Hankowski from All States Asphalt,
7 and Sarah Cohen from Blue Triton Brands, Poland
8 Springs.

9 So if those folks are with us let us start
10 with Mr. Lefebvre.

11 MR. LEFEBVRE: Good afternoon. Thank you
12 Mr. Chairman. Thank you Board members for allowing
13 me to speak today in favor of CSX purchase of Pan Am.
14 A quick bio, my name is Bob Lefebvre, Vice President
15 here at Eastern Propane and Oil, located in
16 Rochester, New Hampshire.

17 I've been employed with Eastern for 35
18 years. Eastern is family owned and operated, and has
19 been since 1932. Currently we serve 93,000 customers
20 within five New England states. As part of Eastern
21 Supply infrastructure it owns and operates one of New
22 England's biggest rail facilities which services 24

1 locations scattered throughout New England to service
2 those customers.

3 We work closely with our short line NH,
4 and also with Pan Am, and have done so well over 35
5 years. In my opinion, and again this is in my
6 opinion. If things don't change we will see, we will
7 continue to see diminished service and ability to
8 utilize rail as a viable transportation source.

9 If service by rail diminishes, that would
10 leave Eastern, and companies like Eastern, with less
11 options to fill their supply hubs. If we understand
12 the infrastructure of how energy is brought into New
13 England, there are three possible areas in which that
14 can happen.

15 We can do it in New York by the pipeline.
16 We can import it through two import terminals, one
17 located in Providence, Rhode Island, and another one
18 is located in Newington, New Hampshire. Again let me
19 reiterate that. Import terminals. And the last, but
20 not least is domestic rail product. It's imperative
21 in my opinion again that we allow this to go through.
22 This has to happen.

1 Again my history with Pan Am goes back to
2 the B&M days if people can remember those days. We
3 were excited then when Pan Am took over that line.
4 They increased service. And we expect the same will
5 happen with the purchase -- CSX purchase of Pan Am.
6 We will see the increase service consistent, ratable
7 delivery that we need on a continuous basis daily in
8 order to keep the trucks filled, in order to make the
9 deliveries to the consumers, to the hospitals, to the
10 manufacturers and everybody in between.

11 Propane, as you know, is a green product.
12 It's only going to continue to grow in its volume,
13 and we need a strong infrastructure here in New
14 England to be able to handle that additional growth.
15 I'm standing here today, or sitting here today in
16 front of you throwing my support 100 percent, and so
17 is the company's position, that we need this to move
18 forward.

19 There was a question posed yesterday by
20 one of the members to a member of the CSX team that
21 said what keeps you up at night? Well as a shipper
22 and a consumer, I'll tell you what keeps me up at

1 night, wondering if I'm going to receive my rail the
2 next day. And it's vital that we do receive that
3 steady service. If not, we can't fill the trucks.

4 Those trucks need to roll every day to
5 make those deliveries. We do not have the capacity
6 to wait on the rail. We need those cars. So what
7 happens? So we got our supply needs based on what we
8 project the rail can handle. And in this case we
9 are being hamstrung. We are not utilizing our
10 facility to its 100 percent potential.

11 We feel CSX will allow us to continue to
12 bring in domestic product which will only benefit our
13 consumers with cheaper product. Again let me
14 reiterate. We operate in Rochester, New Hampshire.
15 It's about 100 miles from Selkirk, give or take. The
16 import terminals -- we pay a premium for that. We're
17 bringing that from overseas.

18 Again the best option for consumers is a
19 strong rail system to bring this product into the New
20 England market. And with that being said Eastern
21 Propane, myself wholeheartedly are behind CSX
22 purchasing Pan Am. And with that I'll answer any

1 questions you have. Thank you.

2 CHAIRMAN OBERMAN: Yes. I take it you
3 were listening in. I think I mispronounced your name
4 Bob how do you pronounce it?

5 MR. LEFEBVRE: Lefebvre, very French,
6 Quebec.

7 CHAIRMAN OBERMAN: Yeah I read all the
8 letters that were there, so I apologize.

9 MR. LEFEBVRE: Yes.

10 CHAIRMAN OBERMAN: You heard the
11 discussion yesterday that I was having with the
12 representatives of CSX as we talked about the propane
13 supply coming in from various rail sources?

14 MR. LEFEBVRE: That's correct.

15 CHAIRMAN OBERMAN: Yeah. So does your
16 company rely on those competitive options today about
17 various ways you can obtain your propane, either up
18 through Bangor, or through Selkirk or Mechanicville
19 or however it gets to you.

20 MR. LEFEBVRE: So we try our best to
21 utilize other lines to come in, but I will be upfront
22 and honest with you. A lot of our product is coming

1 in from the shale area of Pennsylvania, Ohio. We
2 also get it in from Sarnia. We bring product in from
3 Calgary. Calgary we use CP down through New York and
4 Selkirk, so yes to answer your question Mr. Chairman,
5 yes we do use other avenues.

6 But I will say this, that we use CSX for
7 three-quarters of what we bring into ours. Why?
8 It's a direct route. It's the quickest shipping
9 route for us to use CSX. CSX has provided
10 outstanding service. We track our cars every day
11 from origin every switching yard, we know exactly
12 where they are every day, and we watch these cars
13 move, and they move consistently across the CSX
14 line. I will be remiss if I said to you it's perfect
15 service. It is not. There are times where there are
16 hold-ups, and we understand that, but they're not
17 consistent on a basis where we would object.

18 But once they come into New England the
19 transit times don't. This is what we're up against,
20 and again because of the terms of those cars, the
21 suppliers of the midstream companies that we deal
22 with have to charge a greater amount to turn those

1 cars. So let me just give you a for instance.

2 If we can turn the car in two weeks, the
3 cost is this. If it takes us 30 days the cost is
4 this, and that's what's happening to us right now.
5 It's happening and it's taking 30 days to turn a car
6 which typically should turn, they should arrive to us
7 within seven to ten days. We unload it and it should
8 go back to them in seven to ten days.

9 We know that's achievable, and with CSX's
10 help it will be achievable.

11 CHAIRMAN OBERMAN: Well and is the reason
12 for the slow turns now the service you're getting
13 from Pan Am?

14 MR. LEFEBVRE: It's the congestion. And I
15 know I've heard a lot of discussions with passenger
16 trains. I've been at this a long time. Pan Am, they
17 provide outstanding service to us. I mean to the
18 point in the early days that they would actually take
19 a train and a crew, and go get some cars for us if we
20 so needed it. They would do that.

21 They can't do that any longer. I feel
22 like our service started to diminish when the

1 Downeaster came onboard, and the corridor in which we
2 are located. Why? That Downeaster needs to run up
3 and down that track a couple times a day. So that
4 doesn't leave Pan Am the ability to run up and down
5 that track during the course of the day. So what do
6 they do? They run trains. They run full trains from
7 Massachusetts, Provenance Station, Deerfield, up to
8 Portland, to Rigby Yard.

9 They stage it and they put them there.
10 And sometimes our cars will sit there in Rigby in
11 Portland for an additional three, four, five days.
12 And if something happens from the Portland Yard to
13 where we make the hand-off to NHN, it becomes
14 congested.

15 We ship cars ratably, almost daily, three,
16 four, five, six cars a day. This time of year it
17 might be ten to twelve. There are times that there
18 are 60 plus cars sitting in Rigby waiting to come to
19 our facility. Do the math. 30,000 gallons in each
20 one of those railcars. That's a lot of gallons that
21 are sitting, that we need turned. Again, I'm not
22 laying blame on Pan Am, they're doing what they can.

1 Again, I felt like service started to diminish when
2 that Downeaster started to use NA line.

3 CHAIRMAN OBERMAN: Well it sounds like I
4 don't hear the Downeaster going away.

5 MR. LEFEBVRE: No I don't either, but our
6 hope is that some infrastructure money will be put in
7 so they can put side tracks in, so they can bypass
8 each other. That's our hope. I mean again, and I
9 guess I can't say this enough. And if I get animated
10 and excited it's because this opportunity that's
11 presenting itself here today is going to allow a
12 company like ourselves to utilize our facility in a
13 manner in which we built it.

14 It's going to allow our consumers to enjoy
15 pricing that is favorable without us having to go to
16 the overseas market and bring in that premium
17 product. So yes, yes Mr. Chairman. You're
18 absolutely right. The Downeaster is not going away,
19 but our hope is that they can have at least a bypass
20 rail that they can pull aside to let the train go by,
21 and continue to service their customers during the
22 course of the day instead of having to do it at night

1 because that's what's happening now.

2 CHAIRMAN OBERMAN: So it's your hope that
3 CSX will invest in a siding that will allow this to
4 happen? Or I mean I'm trying to relate to why you
5 think CSX coming in will avoid the problem if it's an
6 infrastructure problem?

7 MR. LEFEBVRE: Based on conversations they
8 understand the challenges, being a Class 1 railroad.
9 I think they understand those challenges, and they
10 probably have work arounds and the capital to create
11 those work arounds. Maybe they increase the tonnage
12 on the track so you can move when they're coming back
13 south after they stage them in Rigby, to come back
14 south maybe they can pull more cars back instead of
15 using just one engine and one crew, maybe they can
16 put three engines and a few more crews to pull those
17 cars down in a greater capacity than what's happening
18 now.

19 So there would be other options that we
20 don't have now.

21 CHAIRMAN OBERMAN: All right. Has CSX
22 made any commitments along those lines to you?

1 MR. LEFEBVRE: They have not. They have
2 not no.

3 CHAIRMAN OBERMAN: I want to get back to
4 the competitive options aspect of this. You say that
5 most of your purchases come through CSX, but do you
6 see it as important to your ability to negotiate for
7 the best prices to be able to have those other
8 options, bargaining tools?

9 MR. LEFEBVRE: Oh absolutely. It's
10 imperative, it's imperative because again year to
11 year the infrastructure in the propane world changes,
12 and I can go back many, many, many years. Sarnia was
13 a main hub. Western Canada product was a main hub.
14 Most of the product coming into New England in those
15 days would come in from CN and CP.

16 They'd come down and SLR would pick them
17 up, and then Pan Am would pick them up from there.
18 But yes, I do feel that we need that to keep New
19 England open, those other avenues open to allow that
20 competitive advantage, absolutely. It's got to be
21 those checks and balances, so yes, I'm fully
22 supportive.

1 CHAIRMAN OBERMAN: You're talking about to
2 summarize as much as you love CSX you love that
3 competition too.

4 MR. LEFEBVRE: I think that's in all of us
5 isn't it.

6 CHAIRMAN OBERMAN: You know what after
7 I've been at the Board for two years I don't know.

8 MR. LEFEBVRE: I understand.

9 CHAIRMAN OBERMAN: No but I very much
10 appreciate it. I don't want to dominate it, do any
11 other Board members have any questions? All right.
12 Well thank you very much for your patience.

13 MR. LEFEBVRE: Well thank you.

14 CHAIRMAN OBERMAN: You know it's really
15 helpful always to put these broad concepts in the
16 statute we've been talking about and so forth into
17 the hands of a real world person.

18 MR. LEFEBVRE: Exactly.

19 CHAIRMAN OBERMAN: Who needs to function
20 under those statutes, so thank you.

21 MR. LEFEBVRE: And then so is the
22 consumer, so we need to think of that aspect as well,

1 so the stronger that we can build the infrastructure
2 the better off everyone.

3 CHAIRMAN OBERMAN: Yes.

4 MR. LEFEBVRE: So thank you again to all
5 of you and you have a wonderful weekend. Thank you
6 so much.

7 CHAIRMAN OBERMAN: Thank you so much. All
8 right. Mr. Weisel.

9 MR. WEISEL: Weisel, good afternoon.

10 CHAIRMAN OBERMAN: Weisel, thank you sir.

11 MR. WEISEL: Mr. Chairman, members of the
12 Board, thank you very much for letting me speak. I
13 don't know if I can say much more than Bob, he really
14 he wrapped up the best possible picture for support
15 of this transaction that the propane industry could
16 report. You know as far as Mr. Moulton from Maine DOT
17 is concerned, you know Fabian Oil is working closely
18 with DOT on our current project here in Waterville,
19 and we do mirror his support for this transaction.

20 And I can probably just say that my
21 comments are going to seem trivial to the last couple
22 days of the testimony, you know the anti-trust and

1 competitive nature of this transaction, but I think
2 they're no less important. I want to speak to just
3 briefly you know the boots on the ground, and what we
4 feel the benefits of this transaction will mean both
5 to consumers, suppliers, and the jobs created and
6 maintained in Maine.

7 Fabian made a commitment to bring propane
8 to central Maine. You know we support trucking, we
9 operate a large fleet, but we really can't depend on
10 trucking growing demands here in Maine to grow in
11 population. And you know the prior testimony spoke
12 to trucking as an alternative, but it's no longer a
13 viable alternative, and I think rail is the absolute
14 necessity to keep up with what we need.

15 If you look at the current landscape in
16 trucking there is quite a bit of a crisis in
17 trucking, you know, all over the country. We'd be in
18 trouble without rail. Without investment and
19 improvement and increasing rail in Maine we won't
20 meet the demand inclusive of trucking. The equipment
21 and the driver's operating, they're just getting
22 harder and harder to find.

1 With that said, the rail is a far safer
2 means of transporting the volume of product we're
3 looking to transport over the distances we're trying
4 to transport it. It's more economical and efficient,
5 and we need to increase and improve our rail system.
6 Fabian has a decades long commitment and investment
7 to improve central Maine's rail infrastructure.

8 What we're doing is not something we can
9 decide one day to roll up and move it down the road.
10 What we're building will remain for future
11 generations as long as rail operations continue, and
12 here in Maine I'd like to just add that propane is
13 not a discretionary product. It is cold up here.
14 It's a necessity of life so to speak up in Maine to
15 keep people warm.

16 We don't see currently commercially viable
17 alternative to propane and fuel oil at this time.
18 And what we want to accomplish with this project, and
19 what this project will help us do is improve
20 security of supply, ability to meet growing demands,
21 protect the residents of Maine and those who work
22 here.

1 What CSX we feel, and maybe the optimism
2 in me is getting the best of it, but you know the
3 capital investment that we think and feel that CSX
4 will put into the system, they'll add stability,
5 streamline logistics, more direct and efficient
6 communications, and most importantly safety. Our
7 product has you know people look at it in one way and
8 it is a very safe product, but we want to improve
9 the rail system and add greater savings, and CSX is
10 going to do that for us.

11 And I don't really have a lot more to say.
12 I think that Bob summed up the industry opinion of
13 this in the northeast, but I think it's critical that
14 we support this transaction, for improving the rail
15 system of the northeast, especially up in Maine.
16 Thank you for your time. I appreciate it. If
17 there's any questions I'm more than happy to help
18 you.

19 CHAIRMAN OBERMAN: Just a couple Mr.
20 Weisel. You're located where in Maine?

21 MR. WEISEL: So our company is located in
22 central Maine in Oakland, Maine. The rail terminal

1 that we are currently constructing is in Watertown.

2 CHAIRMAN OBERMAN: All right. And the
3 company is Fabian Oil, but it sounds like your
4 product, or one of your main products is propane?

5 MR. WEISEL: So Fabian is a multi-product
6 company, but our retail or energy division is propane
7 and oil. That would be the main focus of our
8 business. We do have a gasoline and C store
9 business as well.

10 CHAIRMAN OBERMAN: Would you echo Mr.
11 Lefebvre's opinion that keeping these options for
12 getting propane to different carriers through the
13 exchange is imperative for you to be able to
14 negotiate your best prices?

15 MR. WEISEL: I think options are always
16 important you know, regardless of what products means
17 of transportation we're talking about. I would also
18 add that stability and security supply and logistics
19 is critical for continued and improved means of
20 transportation.

21 So yeah, it's important to have the
22 competitive nature, but it's also important to have

1 somebody to rely on who is going to get the product
2 to us to deliver to people in critical times of
3 need. I mean you know right now we're barely going
4 to push zero degrees tomorrow at the high, and the
5 product needs to be there.

6 CHAIRMAN OBERMAN: Yes. But do you rely
7 on the fact that those gateways have been open to
8 allow you to negotiate better with whoever is
9 supplying it?

10 MR. WEISEL: I think -- well first of all
11 let me just add, we don't have, currently have an
12 operating rail terminal here. This is the first.
13 This will be the first one here in the Waterville, or
14 the mid Maine section, central Maine, so I can't
15 really comment on it. My experience in Connecticut
16 I've been dealing with Pan Am Southern for eight or
17 ten years before I moved up to Maine.

18 It was always important to yes, to have
19 channels and negotiate how you brought it into the
20 short line, but I think it's also important to rely
21 on service as well. They're equally important.

22 CHAIRMAN OBERMAN: Yeah, okay. It's

1 warmer in Connecticut. I went to school there.

2 MR. WEISEL: I'm getting used to it up
3 here in Maine. It's as they say up here in Maine
4 it's chilly.

5 CHAIRMAN OBERMAN: Come to Chicago. All
6 right. Thank you very much for your observations.

7 MR. WEISEL: My pleasure. Thank you very
8 much.

9 CHAIRMAN OBERMAN: Do any of the other
10 Board members have any questions? Okay. Moving
11 along.

12 BOARD MEMBER HEDLUND: I do Mr. Chairman.

13 CHAIRMAN OBERMAN: Oh I'm sorry Karen.

14 BOARD MEMBER HEDLUND: Just one question.

15 CHAIRMAN OBERMAN: Go right ahead.

16 BOARD MEMBER HEDLUND: I just read that
17 there was a train that derailed in Biddeford, Maine a
18 couple days ago, overturned in two propane tanks, but
19 it looks like it was quickly contained. How often do
20 propane trains derail up there in Maine? Is that a
21 frequent occurrence or?

22 MR. WEISEL: So I will tell you I have

1 been here -- I've only been here since March, and
2 those are the first -- that is the first occurrence
3 and the only two cars I know of that have derailed.
4 In Connecticut we did have some derailments from time
5 to time. We never had while I was there for the time
6 that I was operating a terminal, overturned cars.

7 Most of the time it was you know a wheel
8 skips a track and you have to put it back on. This
9 one you know, and luckily these were two cars that
10 overturned. There were minor leaks, it was
11 contained, and I think it was an hour and a half that
12 the incident was contained.

13 BOARD MEMBER HEDLUND: That's good to
14 know. Thank you.

15 CHAIRMAN OBERMAN: Thank you. Any other
16 questions? Okay. We will move along to Marjorie
17 Shansky.

18 MS. SHANSKY: Thank you. Good afternoon
19 Mr. Chairman and ladies and gentlemen of the Board.
20 I'm Attorney Marjorie Shansky here in Connecticut
21 where it's warmer than Maine, but not this weekend.
22 And we appreciate the opportunity to participate in

1 this public hearing. I'm here on behalf of Todd
2 Perry who is facilities manager at Frost Bridge.

3 Frost Bridge has a place of business in
4 Watertown, Connecticut, and for a number of years
5 Frost Bridge has operated pursuant to a permit issued
6 by the State of Connecticut for solid waste volume
7 reduction facility. The facility is a critical
8 resource and an important participant, pardon me, in
9 implementing the state's solid waste management plan.

10 In its operation the facility relies both
11 on truck and rail service, with rail service
12 accounting for approximately two-thirds of the
13 material transported, which is in excess of 100,000
14 tons of solid waste annually. Currently, Frost
15 Bridge is served by the Naugatuck Railroad Company
16 from the facility to Waterbury.

17 Pan Am Southern continues to transport
18 from Waterbury to Hartford, and Springfield over
19 Amtrak rail around the north of Albany, New York to
20 Rotterdam Junction, New York at which point CSX
21 takes over to the remaining route to the final
22 destination in Lordstown, Ohio.

1 There are inefficiencies associated with
2 this itinerary from an operational perspective.
3 Frost Bridge is supportive of the proposed merger
4 resulting in CSX having control of the routing and
5 transport from Waterbury forward for the operation
6 for a number of reasons. The upgrade of track to
7 Class 1 will result in significant improvements in
8 efficiency moving material, including a reduction in
9 travel time between the facility and its Ohio
10 destination.

11 This efficiency will in turn result in
12 Frost Bridge's ability to sort and transfer
13 additional material at the facility which benefits
14 not only Frost Bridge, but the State of Connecticut
15 in its significant efforts to manage solid waste.

16 Millions of dollars of private money will
17 be used to perform the system upgrades, and that
18 represents a significant public benefit.
19 Modernization as others have said, of the rail
20 system will enhance service consistency, reliability,
21 and safety. And finally on average railroads are
22 three to four times more fuel efficient than trucks.

1 That means that moving material by rail
2 instead of trucks lowers greenhouse gas emissions by
3 up to 75 percent on average. With the increased
4 efficiency associated with CSX's operation of Frost
5 Bridge's rail transport from Waterbury forward, Frost
6 Bridge can increase its reliance on rail, and
7 eliminate an additional 1,000 to 1,500 truck trips to
8 Ohio from the facility annually, with the resulting
9 reduction in greenhouse gas emissions.

10 In summary, Frost Bridge recognizes and
11 supports enthusiastically the proposed merger as a
12 means of improving our local, state and national
13 response management and control of solid waste and
14 increased recycling, and we appreciate very much the
15 opportunity to have participated this afternoon.
16 Thank you.

17 CHAIRMAN OBERMAN: Thank you very much for
18 coming to talk to us. I'm just a little curious
19 where -- what is it that going to facilitate your
20 moving more freight on rail once CSX takes over this
21 transaction goes ahead? I'm not quite clear. Is it
22 because you can ship more carloads because the track

1 will be of a higher caliber, or?

2 MS. SHANSKY: Correct.

3 CHAIRMAN OBERMAN: Is that the reason?

4 MS. SHANSKY: That is a very significant
5 reason.

6 CHAIRMAN OBERMAN: Yes okay. And you're
7 counting on that. And where is the track that you're
8 talking about that needs to be upgraded? Is it on
9 the north/south route?

10 MS. SHANSKY: It is well, it happens to be
11 in part from Waterbury to Hartford, but and more
12 particular than that I'm afraid I can't be. I am
13 speaking for Mr. Perry, but I'm not Mr. Perry. But
14 if you like I can find that out and add it to your
15 record which I know is remaining open.

16 CHAIRMAN OBERMAN: Yeah. Well it might be
17 helpful. I'm just trying to picture the map. You go
18 directly north/south up to the Pan Am Southern and
19 then over to Rotterdam right?

20 MS. SHANSKY: Correct.

21 CHAIRMAN OBERMAN: So it's the north/south
22 part which is problematic as you understand it.

1 MS. SHANSKY: As I understand it, but
2 again I would be very happy to verify that.

3 CHAIRMAN OBERMAN: All right. And I take
4 it that for your purposes the only way you can get to
5 your destination in Ohio is on CSX. Once you've got
6 to PAS you don't have any other options to get to
7 Ohio.

8 MS. SHANSKY: As I understand it that is
9 correct.

10 CHAIRMAN OBERMAN: Yep okay. All right.
11 Thank you. Thank you very much. Does anyone else
12 have questions? All right. Much appreciate it.

13 MS. SHANSKY: Thank you.

14 CHAIRMAN OBERMAN: Tell Mr. Perry you did
15 an admirable job.

16 MS. SHANSKY: I appreciate it.

17 CHAIRMAN OBERMAN: Okay. Next up Charles
18 Giroux. So I'm not sure Mr. Giroux is --

19 MR. GIROUX: Hi.

20 CHAIRMAN OBERMAN: Is he here?

21 MR. GIROUX: Can you hear me?

22 CHAIRMAN OBERMAN: Yes I can hear.

1 MR. GIROUX: I'm here.

2 CHAIRMAN OBERMAN: There you are. Go for
3 it.

4 MR. GIROUX: All right. Thank you
5 everybody for listening. I own Mid-States Packaging
6 and Distribution. We have locations in Portland, in
7 Ayer, in Leominster, in Fitchburg, and on the G&W we
8 have location in Worcester, Mass as well as Auburn,
9 Mass.

10 We run distribution and transload services
11 for the plastic and chemical industry as well as
12 paper in our distribution center in Ayer. We are in
13 full support of the CSX taking over the operation.
14 We think that the investment that they'll bring in
15 will be significant and add to a reduction in the
16 amount of inventory that needs to be kept on the rail
17 to the service. A lot of the materials that we
18 handle are quite expensive where cars can run
19 upwards of \$200,000.00 per railcar. So every day we
20 can reduce that transit time means that less
21 inventory needs to be carried.

22 As I said you know we do the trucking, and

1 on the last mile, and we want to try to get the goods
2 and materials that go to the manufacturing sector to
3 them as efficiently as possible. And as I said we're
4 in support of this, and any questions?

5 CHAIRMAN OBERMAN: Yes. So I'm as you can
6 tell I am curious about the network aspects of each
7 person who's speaking to us. So what carriers are
8 you using now in your business operation?

9 MR. GIROUX: We use both NS and CSX, as
10 well as G&W in Worcester in our Auburn locations. So
11 we touch all of them.

12 CHAIRMAN OBERMAN: And the G&W, do they
13 then interconnect with other Class 1's, or where do
14 they go to?

15 MR. GIROUX: They connect up in Gardner
16 with the NS, and they connect in Worcester with CSX.
17 So right now today our location in Auburn and
18 Worcester can get serviced by both and avoid the
19 entire Pan Am system, and then our locations in Maine
20 as well as Ayer and Fitchburg and Leominster are
21 serviced by Pan Am Southern, and ST.

22 CHAIRMAN OBERMAN: And so for your business

1 I take it if this deal goes through, some -- a
2 meaningful amount of your business is going to
3 continue to need Pan Am Southern.

4 MR. GIROUX: Yes. I don't see any way it
5 really can't. I don't think that there's enough
6 facilities to handle not using the Pan Am system,
7 especially up in Maine.

8 CHAIRMAN OBERMAN: Up in Maine, but what
9 about it sounds like you use Pan Am Southern, the
10 Patriot route as well for some of your travel.

11 MR. GIROUX: We use Pan Am Southern for
12 our warehouse in Ayer, as well as our Leominster and
13 Fitchburg locations, and then we use the G&W for our
14 Auburn and Worcester locations.

15 CHAIRMAN OBERMAN: Where is that Pan Am
16 Southern traffic going?

17 MR. GIROUX: It's coming in from the Gulf
18 Coast of Texas.

19 CHAIRMAN OBERMAN: Oh. You use it mostly
20 for incoming, is that what you're saying?

21 MR. GIROUX: Yeah. We don't do any
22 outbound shipments. We just deliver it to the local

1 manufacturers nearby.

2 CHAIRMAN OBERMAN: So the traffic that
3 comes in from the Gulf Coast, is it coming from
4 places that are sole served by CSX, or do you have
5 options?

6 MR. GIROUX: No. Most of them are on the
7 western part of the United States so that they can go
8 through either gateway, either an NS gateway, or a
9 CSX gateway, so they do have the option. The
10 general, it's UP or BN is generally the origin
11 railroad, so they can come through the gates.

12 CHAIRMAN OBERMAN: So, because I was
13 trying to understand if you receive materials both
14 through the Rotterdam interchange and the
15 Mechanicville interchange or?

16 MR. GIROUX: Yes we do. Selkirk and from
17 Mechanicville. So we do get both. We get them from
18 NS as well as we get them from CSX.

19 CHAIRMAN OBERMAN: All right. So both of
20 those interchanges are important to you.

21 MR. GIROUX: Correct.

22 CHAIRMAN OBERMAN: Yeah okay. All right.

1 Thank you very much. Anybody else have any
2 questions? Much appreciated. Thank you sir.

3 MR. GIROUX: Thank you, thank you.

4 CHAIRMAN OBERMAN: All right. Next up is
5 Seth Hankowski who I hope was able to join us. He
6 wasn't able to stick around yesterday. Is he here?
7 Oh well apparently he's not. If he comes in later
8 we'll try to get him in. And I had previously said I
9 thought Sarah Cohen who couldn't stay yesterday was
10 also going to speak today, but I understand she is
11 not here today.

12 So if that is the case that ends Panel
13 VII. Does anybody feel like we need a break, or
14 should we try to go right into Panel VIII and see if
15 we could get through that before we break, it's a
16 short panel. Hearing no objection that's what we're
17 going to do.

18 The next panel is Northern New England
19 Passenger Rail Authority, Patricia Quinn; New
20 Hampshire Central Railroad Edward Jeffrey, and
21 Lewiston-Auburn Railroad, Jonathan LaBonte. Okay.
22 Is Patricia Quinn here?

1 MS. QUINN: Yes I am. Good afternoon.

2 CHAIRMAN OBERMAN: Oh there you are, okay.
3 Go for it.

4 MS. QUINN: All right. Well thank you
5 very much for this opportunity Chairman Oberman, and
6 members of the Committee. My name is Patricia Quinn,
7 and I am the Executive Director of the Northern New
8 England Passenger Rail Authority, referred to as
9 NEPRA. NEPRA was created by the Maine state
10 legislature in 1995, and is the state sponsor of the
11 Amtrak Downeaster interstate passenger rail service.
12 The Downeaster makes five round trips every day along
13 the 143 mile corridor between Brunswick, Maine and
14 Boston, Massachusetts, serving 12 station communities
15 in three states.

16 Since its launch in December of 2001, the
17 Downeaster has transported more than 8.2 million
18 riders, the equivalent of 674 million passenger
19 miles. In Maine and New Hampshire, the Downeaster
20 operates over rail lines owned and operated by Pan Am
21 Railways, and then the track we operate on in
22 Massachusetts is owned by the MBTA.

1 For more than two decades NNEPRA's
2 negotiated and collaborated with Pan Am Railways to
3 plan and manage over 130 million dollars of public
4 and railroad infrastructure, safety and maintenance
5 projects in Maine and New Hampshire, and these have
6 been funded by state and federal funding partners.

7 The capital we have invested in have
8 rehabilitated 106 miles of track and signals and
9 replacing stick rail with continuously -- rail.
10 We've restored or replaced more than 10 miles of
11 double track. We've replaced over 150,000 ties, and
12 refurbished more than 50 grade crossings.

13 We have an annual maintenance program that
14 supplements Pan Am's limited resources to address
15 more routine repairs and deficiencies that impact the
16 reliability of all trains, like degraded track
17 components, surfacing and crossing panels,
18 vegetation management, and drainage issues that but
19 for our involvement would probably not be addressed.

20 This public private partnership has
21 resulted in both public and private benefits. These
22 projects have been necessary to initiate, sustain and

1 improve and grow Downeaster service. We have been
2 able to reduce our travel time, increase frequency,
3 expand the service reach of the service, and we
4 reached and exceeded our ridership goals
5 pre-pandemic.

6 And this has all been accomplished while
7 improving safety, supporting private development in
8 and around our station communities. But these
9 projects have not had any impact, negative impact on
10 freight, but have actually contributed positively to
11 the efficient movement of freight.

12 And in fact, because of these investments,
13 much of the maximum authorized speed for freight has
14 increased from 10 to 25 miles an hour up to 40 miles
15 an hour on the segment on which we operate. Over the
16 past year CSX has worked collaboratively with us to
17 learn more about the Downeaster service, about our
18 business relations, and our goals and priorities.
19 And they've committed to support the success and
20 growth of the Downeaster service.

21 They're going to do this by fulfilling
22 their obligations to Amtrak to reliably accommodate

1 and dispatch Downeaster trains and collaborate on the
2 installation of a positive control system on the
3 corridor of Maine and New Hampshire which will be
4 funded by Amtrak, as well as the operation and
5 maintenance of that system.

6 CSX is committed to abide by our agreement
7 with Pan Am to extend six more miles of double track
8 at a frequency, and build a second passenger platform
9 in Wells, Maine. This project is funded primarily
10 through the Christy grant that was just awarded to us
11 not too long ago.

12 And CSX is committed to cooperate with us
13 on future Downeaster enhancement projects, including
14 those to relocate Portland station, to add a new
15 Maine station, increase frequency and reduce travel
16 time. The pledge that CSX has made to adequately
17 maintain the railroad, and invest in infrastructure
18 improvements that improve the efficiency of freight
19 operations really creates new and exciting
20 opportunities for both freight and passenger
21 customers.

22 NNEPRA supports this proposed transaction

1 subject to the letter agreement that we have with CSX
2 dated August 3, which I believe you have a copy, and
3 looks forward to a robust and productive partnership
4 with CSX that's focused on preserving and protecting
5 the public interest and the public investments that
6 have been made in this corridor to sustain and expand
7 a thriving and quality passenger rail service.

8 We also hope to leverage resources to
9 achieve strategic and mutually benefit objectives,
10 and partner to develop a strong and modern railroad
11 network that supports the safe, efficient and
12 reliable movement of people and goods throughout our
13 region, protects our environment, and strengthens our
14 economy. Thank you very much, and I'm happy to
15 answer any questions.

16 CHAIRMAN OBERMAN: Karen had a question.

17 BOARD MEMBER HEDLUND: Ms. Quinn it's
18 great to see you again, and I first of all just want
19 to congratulate you on the terrific work that you
20 have done with NNEPRA. I do recall from my time at
21 FRA working on one of the early grants from the
22 Recovery Act that we had some frustrations with your

1 host railroad, and certainly you've done a great job
2 since then and I wish you the best in working with
3 CSX.

4 MS. QUINN: Thank you very much.
5 Appreciate that.

6 BOARD MEMBER FUCHS: I'd like to briefly
7 echo Karen in commending Patricia for everything.

8 CHAIRMAN OBERMAN: Thank you. Robert did
9 you want to?

10 VICE CHAIRMAN PRIMUS: I'll jump on that
11 bandwagon and comment Patricia as well, but I also
12 have a question. So one of your predecessors who
13 spoke on a panel previously up from Maine and that
14 shipper had voiced some concern by saying -- I don't
15 know if you heard that or not, that since the
16 Downeaster started you know there's been a slowdown
17 of freight traffic.

18 He seemed to attribute that to the
19 Downeaster. And one of the things I'd like to hear
20 is you know this transaction, a lot of it is talking
21 about from the freight side, and there's also that
22 concern about you know how it's going to impact

1 passenger rail. I know you've been talking to CSX
2 about you know working together.

3 You know how do you see going forward you
4 know the Downeaster playing a role, continuing to
5 play a vital role in passenger rail while also
6 partnering with CSX as they seek to grow on the
7 freight side?

8 MS. QUINN: Well again I think that you
9 know the investments that we've made because of
10 passenger rail it really has had a positive impact on
11 the movement of freight, so I was a little bit -- I
12 was disappointed to hear those comments, but anyway
13 we have worked with CSX, and you know double track is
14 something that we obviously support.

15 I mean this section of railroad there's a
16 lot of signal track out there, which is why we just
17 finished a four mile siding extension. We have a six
18 mile siding extension that we're doing to improve the
19 reliability so we can all get around each other. And
20 again we've invested a lot of resources, a lot of it
21 has been in kind of maintaining some of that status
22 quo which I've heard others talk about.

1 And what I'm really hopeful for is that
2 with CSX's resources, that we can really focus our
3 efforts on leveraging you know the resources that are
4 available to do some bigger things that really
5 benefit the railroad in a bigger way, like more
6 double track. Like the installation of the positive
7 train control that Amtrak has gotten funding for.

8 So I think that there are really some
9 important and key investments that are really on the
10 horizon that can really be a game changer and help us
11 grow, and also support freight. You know we're an
12 agency that was formed by the Maine State
13 Legislature, so the economy of our region and our
14 state is as important to us, not just passenger rail,
15 and so the movement of all of the freight and the
16 passenger is something that we've supported all
17 along. That's why we've been able to have such a
18 robust relationship with Pan Am because it was never
19 you know a benefit but for passenger rail, or just
20 for freight.

21 These are benefits that -- these are
22 improvements that benefit the system, and you know I

1 know it's an old cliché , but all ships rise.

2 Sometimes go up with the rising tide.

3 VICE CHAIRMAN PRIMUS: I agree. I agree.

4 Last question. Do you foresee continued growth on
5 your line in terms of potential more trains, or are
6 you sort of set in where you are right now in terms
7 of the number of trains that you run up and down the
8 line?

9 MS. QUINN: Well right now they operate
10 the five, and then once this Wells project is done,
11 and positive train controls installed we'll go to the
12 sixth, which will be an inbound commute into
13 Portland, or another run.

14 We are I think looking forward. I mean
15 obviously as we get through this pandemic, but you
16 know the service really reaches such a wide variety
17 of riders, and people travel for such a wide variety
18 of reasons in connecting the rural communities of
19 Maine to the economic center of New England and
20 beyond is critically important. So I think that our
21 hope is to grow in the future, and that's why we have
22 CSX through our agreement to leave that door open,

1 and they've agreed to do so.

2 VICE CHAIRMAN PRIMUS: Thank you.

3 CHAIRMAN OBERMAN: Any other questions?

4 Thank you much Patricia. I will say that it does
5 sound to me like it's not really the Downeaster, but
6 it's the need for more infrastructure that may
7 alleviate whatever Mr. Lefebvre's concerns were about
8 getting the propane when he needs it.

9 I have experienced over the last eight
10 years many complaints from passengers about freight
11 delays, but I have never had a freight shipper
12 complain to me about passenger delays, so that's a
13 new one, but it sounds to me that between you and him
14 and CSX this is going to get improved, at least
15 that's the hope. I much appreciate your time.

16 MS. QUINN: Thank you.

17 CHAIRMAN OBERMAN: Particularly since it's
18 1 degree up there and we need the propane. Mr.
19 Jeffrey, Edward Jeffrey. Is he here? New Hampshire
20 Central Railroad. Have we lost Mr. Jeffrey? Okay.
21 Apparently he was not able to join us today. If he
22 does we'll call on him when he gets here. Jonathan

1 LaBonte, Lewiston-Auburn Railroad.

2 MR. LABONTE: Good afternoon.

3 VICE CHAIRMAN PRIMUS: We can hear you.

4 MR. LABONTE: All right, all right, that
5 long silence. Thank you very much. Members of the
6 Board on behalf of the Board of Directors and
7 shareholders of the Lewiston-Auburn Railroad Company
8 I want to thank you for the opportunity to offer
9 testimony today in support of the proposed
10 acquisition of Pan Am and associated companies by
11 CSX.

12 My name is Jonathan Labonte. I serve as
13 the President of LARC. I previously served for six
14 years as the Mayor of Auburn, Maine. For context,
15 let me introduce you to LARC and the scope of our
16 work in Maine. We were chartered by the Maine
17 Legislature in 1872. LARC is a private railroad
18 company whose shares are owned entirely by the cities
19 of Lewiston and Auburn.

20 Our primary charge 150 years ago this year
21 was to construct a 5.5 mile rail corridor from the
22 textile mill district on the Androscoggin River in

1 Lewiston, to an interchange with the Grand Trunk
2 Railway which ran from Portland, Maine to Montreal,
3 Quebec.

4 Upon completion of construction our line
5 was leased to the Grand Trunk, and later the Canadian
6 National. At present the lease is held by the Saint
7 Lawrence Atlantic Railroad, the SLAR. A Genesee and
8 Wyoming short line that's worked very well with us on
9 business development, and we maintain a strong
10 relationship with their management team.

11 As industrial and distribution activity
12 shifted over time the sections of LARC saw a shift in
13 their demand. Today the active corridor is 3 and 1/2
14 miles of the original, with a termination at U.S.
15 Route 202 on the eastern end, and Lewiston Junction
16 on the SLAR to the west.

17 While no direct connection exists between
18 LARC and Pan-Am's rail system in Maine, we've been
19 active supporters of investments in Danville Junction
20 in Auburn, which is an interchange between the SLAR
21 and Pan Am. Even with those shifts in economic
22 activity we have remained focus on industrial and

1 distribution growth strategies in our region.

2 In 1994 in a partnership with SLAR, Maine
3 DOT, and the Federal Highway Administration, one of
4 the first investments of congestion mitigation, air
5 quality funds in rail infrastructure occurred and led
6 to the construction of the intermodal facility which
7 currently exists in Auburn.

8 That total investment at the time was a
9 little over 5 million dollars, and the location grew
10 from no intermodal traffic before the early 1990's to
11 a peak of about 15,000 containers a year. The goal
12 which was achieved was to reduce long haul trucking
13 and it did lead to growth in multiple trucking
14 employment.

15 20 years later in 2014 we completed the
16 nearly one mile addition to our LARC owned network
17 with a total investment of over 3 millions dollars,
18 and a project known as the Rangely Branch we built a
19 new line that connected to our main line, and out of
20 the SLAR.

21 That project alone opened up hundreds of
22 additional acres for industrial and commercial

1 development to be served by rail. LARC and our
2 shareholders, the cities of Lewiston and Auburn, have
3 maintained the steadfast commitment to secure
4 industrial, commercial and distribution investment.
5 For a state that is known by the moniker Vacation
6 Land, and certainly Patricia who just spoke, a number
7 of her riders are those who are coming to vacation
8 and enjoy time along the coast.

9 A number of regions of Maine still retain
10 strategic policies to support growth that relies on
11 access to quality, efficient and reliable freight
12 rail service to be competitive in a global economy.
13 Lewis and Auburn is definitely one of those regions.
14 In the City of Auburn approximately 800 acres of land
15 zoned to benefit from access to freight rail services
16 exists along the LARC active rail corridor, along the
17 Pan Am corridor proposed for acquisition by CSX,
18 another nearly 500 acres is zoned for industrial and
19 commercial use that would directly benefit from
20 improved freight rail access.

21 Through our recent planning process
22 concluded in 2019, a partnership between LARC and

1 Maine DOT, we looked at freight business development
2 opportunities that could be proactively pursued going
3 forward. We're working with our city owners to look
4 at strategies to advance that.

5 With the proposed acquisition of Pan Am's
6 asset by CSX, LARC sees a partner committed to
7 growing freight rail opportunities for existing
8 businesses, and collaboratively cultivating emerging
9 opportunities along with us. We recognize that our
10 region is positioned to benefit significantly from
11 having connections to two competing Class 1
12 railroads.

13 In addition to the SLAR connecting to the
14 Canadian National Railway, they of course would also
15 connect to CSX, and that access to key markets
16 throughout the eastern United States we see as
17 creating a competitive advantage for our region to
18 secure further private investing.

19 LARC and our shareholders have sustained
20 our commitment to the role our assets and communities
21 can play in supporting the distribution of raw
22 materials and finished products to serve our region,

1 our state, and the northeastern U.S. As we
2 collectively seek to reduce carbon emissions in the
3 battle against climate change, rail and intermodal
4 opportunities must be a priority.

5 We urge the Surface Transportation Board
6 to support our economic development's future through
7 its approval of the acquisition pending here. And I
8 thank you for your time.

9 CHAIRMAN OBERMAN: Thank you very much.
10 Does anybody have any questions? Okay. I take it
11 that you -- well I think you've spoken very well I'm
12 not going to extend it further because we've got a
13 lot more territory to cover, but I much appreciate
14 your coming in Mr. LaBonte thank you much.

15 All right. Should we take it's quarter to
16 four, should we go to the next panel and then take a
17 break? Sound good? Okay. Everybody agrees. Okay.
18 The next panel are the following: Worcester Regional
19 Chamber of Commerce, Timothy Murray; Western
20 Massachusetts Economic Development, Richard Sullivan;
21 Around the Corner Capital, Dr. M.K. Dorsey; Capital
22 Policy Analytics Group Ike Brannon, and GFI Partners

1 Steven Goodman.

2 So if those folks are here, I'm not sure
3 they're all present but lets begin with Mr. Murray.

4 MR. MURRAY: Mr. Chairman I apologize, I
5 just literally got out of my suit that I've been in
6 the last couple of days in preparation for my
7 testimony, so I'm in the car with my wife and kids
8 and I'm headed north, hope we get a little skiing in
9 this weekend.

10 CHAIRMAN OBERMAN: Let me say this, I'm
11 very impressed, and I think it's awesome that you're
12 able to do your job and head towards skiing at the
13 same time, so it's great, go for it.

14 MR. MURRAY: Yeah. Well first off that
15 was 25 years ago this month that I got sworn in as
16 Worcester City Council, and one of the main focuses
17 of my campaign and my time as City Council and then
18 five years later as Mayor of Worcester was focusing
19 on the expansion of commuter rail between Worcester
20 and Boston.

21 You know if you grow up in Worcester, part
22 of our landscape and the sounds and the rhythms of

1 the city are very much a part -- rail is very much a
2 part of that, both freight rail and commuter rail.
3 But you know over the years commuter rail atrophied,
4 and one of the focuses that I had was to try to
5 expand the number of commuter rail trains between
6 Worcester and Boston from what was then six to a more
7 robust number.

8 And you know through that process and
9 effort, both as City Counselor, as Mayor and then
10 later as Lieutenant Governor, to realize that goal we
11 had to create a level of communication and
12 collaboration you know with CSX. And you know in my
13 current role as President and CEO of the Worcester
14 Regional Chamber of Commerce, we represent 2,000
15 businesses, it's the largest chamber in New England,
16 35 cities and towns, and in that geographic area
17 we've got a number of railroads of different sizes
18 and scopes in terms of what their role is.

19 So in terms of our regional economy
20 freight rail is extremely important. And so you know
21 I mention that because I've had experience in a
22 number of different roles in working with CSX and

1 with Pan Am and other railroads. In 2012, the
2 Surface Transportation Board signed off on a historic
3 acquisition here in the Commonwealth, and I would
4 probably say in New England, when we acquired track
5 from CSX in all different parts of Massachusetts.

6 And one of the individuals who was going
7 to testify Rick Sullivan, was a member of the Patrick
8 Murray administration, and I think he was part of
9 that process and understands the size and scope of
10 that acquisition. It was a long negotiation, at
11 times a hard negotiation, but the CSX team was always
12 seated at the table, always showed good faith, always
13 were willing to engage in that back and forth that is
14 so critical if you're going to move complicated,
15 difficult issues forward.

16 And that acquisition of track also
17 involved some very detailed operational agreements
18 and financial commitments of significant amounts of
19 money, both from the Commonwealth and from CSX, in
20 terms of the modernization of infrastructure, as well
21 as significantly upgrading operational functions on
22 some of the issues that we talked about dispatching,

1 signalization, et cetera.

2 And so you know working with CSX you know
3 you find a committed partner, and that has been my
4 experience throughout my time in government, and
5 throughout the chamber. And you know I think the
6 last figure I heard, and it's maybe a few years old,
7 so I'm not sure exactly how accurate it is, but
8 nearly 30 percent of all freight rail you know, and
9 it goes passes in and out of New England, and it goes
10 through Worcester and/or central Mass.

11 And on CSX that historic agreement, and we
12 acquired the tracks, one of the major things that
13 took place as a result of that was a significant, I
14 think 25 acre expansion to the CSX intermodal hub in
15 the City of Worcester. They spent over 125 million
16 dollars in modernizing, upgrading the intermodal hub,
17 with a lot of interaction with neighbors, business
18 groups, municipal and state officials, and you know
19 I'm not going to say everything went perfect, but it
20 went extremely well all things considered, and again
21 they were responsive to issues large and small.

22 In Worcester right now we've been able to

1 as a result of that acquisition, as a result of the
2 operational agreements, we've gone from six commuter
3 rail trains to 20 plus between Worcester and Boston.
4 We have seen an expansion in freight rail activity in
5 the region, and that has created jobs.

6 And I don't you know say with this
7 hyperbole, but it's no coincidence that with the
8 expansion of both commuter and freight rail in our
9 region, the City of Worcester is I think the fastest
10 growing large size city in New England. We are
11 having an economic resurgence like you know we have
12 not seen in a long time.

13 And I would dare suggest that it's because
14 of this -- a major factor in this was the
15 collaborative agreement that took place that allowed
16 both the more efficient use of the rail in the way
17 that complemented CSX and freight rail and commuter
18 rail. And I can tell you from my experience with Pan
19 Am, and I'm not going to necessarily expound upon it
20 to the extent that Representative Barrett, you know a
21 former colleague of mine, as a Mayor, or the
22 gentlemen from Portsmouth.

1 But CSX I can tell you first-hand their
2 infrastructure in Worcester and throughout central
3 Massachusetts is crumbling. I would argue that parts
4 of it are unsafe. I mean when you talk about some of
5 their track over the Wachusett Reservoir which serves
6 the MRWA and communities all in Eastern Mass as a
7 water source.

8 So I think it's extremely important that
9 we see a company that's capitalized and has a record
10 of collaboration with the Commonwealth and others
11 that to take ownership of that. I've had a chance to
12 read the Commonwealth's brief, you know, and hear the
13 testimony from their counsel, Bob Wimbish, and I'd
14 just say that you know having reading that brief I
15 understand and respect a lot of the concerns that the
16 Commonwealth has.

17 But even since that brief was submitted on
18 January 8, we know that CSX has continued to try to
19 work and has reached agreement on a number of the
20 things that the MBTA and the Mass DOT expressed
21 concerns about. So I you know, based upon a 25 year
22 track record, really believed that almost every one

1 of those items that they listed can and will be
2 worked through in good faith by the CSX team.

3 And you know I had a chance over the last
4 couple of days to read the bio's of the Board, and
5 appreciate you know your work Chairman as a member of
6 the Alder Board in Chicago, and I'm out of elective
7 office, but I still get calls you know on issues
8 large and small from former constituents, and
9 sometimes on occasion relating to CSX, and they're
10 every bit as responsive now as they were back then.

11 And as I mentioned you know I think all of
12 the members of the Board can appreciate you know
13 policy is only as good as your personnel. And the
14 personnel that CSX has on the ground in New England,
15 whether it be Maurice O'Connell the regional Vice
16 President, you know whether it be their business
17 development people, Curt Miles, and others. I always
18 have found them to be extremely responsive, not only
19 to the calls from us, but when you put them in touch
20 with an end user, or a neighborhood group, or a
21 business.

22 You know they always correspond and get

1 back, and usually you can find a way to satisfy those
2 needs. You know no one bats 1,000, but they have a
3 great track record. And so I just want to say you
4 know this has been a great interesting couple of days
5 for me, it reminds me of a lot of the work that I
6 have been involved with over 25 years on rail issues.

7 Having gone to law school I also as you
8 mentioned Chairman Oberman, it reminded me of the
9 elements of law school, and some of the conversations
10 that have been taking place. But you know I think it
11 was one of the Board members mentioned you know at
12 the end of the day what's the public interest you
13 know I would argue that you know the relationship
14 that we see, and the track record that we've seen
15 with CSX has been in the public interest, both from a
16 transportation usage and efficiency point of view,
17 certainly from an economic development point of view,
18 and I would argue from an environmental point of view
19 as well.

20 And I have great confident you know that
21 the work they can do in acquiring the Pan Am assets
22 and rail is going to benefit the Commonwealth. And

1 I'll just end on two pieces. The Vice Chair you know
2 mentioned you know in the first day, yesterday about
3 some of the concerns in eastern Mass, and eastern
4 Mass is the economic engine, but the growth and
5 expansion of rail, both from a freight and commuter
6 rail, has the opportunity to really be an economic
7 engine for parts of western Mass and northern
8 Worcester County.

9 And Senator Hinds talked about some of
10 the population loss in western Mass, and I know Rick
11 Sullivan can speak with expertise on some of that.
12 But by having more utilization of the rail from a
13 freight and commuter rail passage, along that route
14 to Patriot corridor, that utilization in Springfield,
15 that will use Barber's Crossing north up to Ayer is
16 going to create economic opportunities that are going
17 to be helpful to those communities, you know and help
18 them to maintain and grow population.

19 So you know I was happy to do this, and
20 look forward to hopefully a positive outcome here
21 because we think it will be good for not only central
22 Massachusetts and the City of Worcester, but for the

1 entire Commonwealth.

2 VICE CHAIRMAN PRIMUS: Marty, just real
3 quick.

4 CHAIRMAN OBERMAN: Go ahead.

5 VICE CHAIRMAN PRIMUS: Tim I don't know if
6 you remember or not, but you know I've had that
7 meeting for eastern Mass having spent 20 years with
8 Mike Capuano or so, I hope you won't hold that against
9 me, but you know I recognize and I want to say that
10 you know I was there working you know with Mike you
11 know when you were working you know in the Lieutenant
12 Governor's you know, as Lieutenant Governor, working
13 on these things.

14 And we recognize, and I still recognize
15 here now on the Board, the importance of growth out
16 to the west you know. My concern yesterday and even
17 still today is just to make sure that there's that
18 balance between the two because I recognize the
19 growth that's happening, and not in just Worcester,
20 but beyond, the need for that growth, and the
21 importance for economic development to be strong, and
22 to be strong in both strong as well, freight as well

1 as passenger rail.

2 MR. MURRAY: Thank you for that. I
3 appreciate your work and your previous role with
4 Capuano. Really the whole Mass delegation was
5 part of that process in our negotiations with CSX.
6 I joke with people that you know former U.S. Senator
7 John Kerry helped facilitate and mediate some of
8 those negotiations between the Commonwealth and CSX.

9 And I said it was probably his best
10 training before he became Secretary of State, and
11 some good faith negotiations that have gotten us to a
12 good place, and so thank you, and I know the
13 subcommittee that Congressman Capuano chaired at the
14 time also a leverage point as we've had those
15 negotiations.

16 VICE CHAIRMAN PRIMUS: Thanks Tim. Enjoy
17 the skiing. Marty you're muted.

18 CHAIRMAN OBERMAN: Thank you Tim. I think
19 Tim at one point you mentioned something about
20 crumbling rail. I assume you meant to refer to part
21 of the Pan Am line.

22 MR. MURRAY: Yeah you know, we saw the

1 pictures you know, and the comparison of the Pan Am
2 infrastructure with the CSX infrastructure. I can
3 point to, you know if anyone is in Worcester at some
4 point, happy to point out the drive along from
5 Barber's Crossing north. And the rail in Clinton,
6 Mass.

7 I mean Pan Am's infrastructure I think is
8 concerning, and it should be concerning in terms of
9 where it's current state is, and it's in desperate
10 need of reinvestment. And we've had, and I have seen
11 and witnessed first-hand when CSX makes its
12 investments in infrastructure they're first rate and
13 done well.

14 We have one of the most efficient
15 intermodal rail yards in the country here, and as I
16 said it was 25 acre expansion in the middle of the
17 City of Worcester, as well as a complete redo of the
18 facility, and it is first-class, efficient, quieter,
19 but it was done in a way that really tried to address
20 the infrastructure issues of the city and the
21 neighborhoods, and again there's sometimes issues
22 that come up from time to time, but it was done

1 right.

2 And to me that is what communities and
3 neighbors want, and they've got a track record of
4 trying to do it the right way. And from a safety
5 point of view I know it was a previous question by
6 one of the Board members about the propane you know
7 turn over falling up to Maine, you know the railcar
8 with a couple propane tanks. You know again I'm
9 concerned about Pan Am's existing infrastructure
10 right now.

11 CHAIRMAN OBERMAN: All right. Thank you
12 very much. Any other questions for Tim? Tim be
13 safe, don't fall down.

14 MR. MURRAY: Thank you for your time and
15 through process.

16 CHAIRMAN OBERMAN: No thank you. Much
17 appreciate your taking all this time out of the
18 family, say hello to the rest of the family and enjoy
19 yourselves.

20 MR. MURRAY: Will do.

21 CHAIRMAN OBERMAN: Okay. Take care. Is
22 Richard Sullivan here from Western Mass Economic

1 Development? Okay. We don't see him on the screen.
2 Let's go to Dr. M.K. Dorsey from Around the Corner
3 Capital.

4 DR. DORSEY: Good afternoon Chairman
5 Oberman, Vice Chairman Primus, distinguished members
6 of the Board, ladies and gentlemen. Thank you for
7 the opportunity this afternoon to offer testimony for
8 today's proceedings regarding the proposed merger
9 between CSXT and Pan Am Railways.

10 This acquisition will have a significant
11 impact on a multitude of interest and parties across
12 the New England region. Accordingly it's critical
13 that the Board carefully consider the testimony of
14 the stakeholders partaking in this hearing as you
15 have been over the past day and a half now.

16 Our firm invests in many ESG,
17 environmental, social, good governments, commodities
18 and assets. I'm a 16 year New Hampshire resident and
19 a former White River Junction resident. And thus,
20 all too familiar with some of the shortfalls and
21 limits of regional rail. Many that were just
22 mentioned by Tim, from consideration personal use and

1 too much engagement.

2 I will say that many of my comments today
3 can also be found in an op-ed that I wrote in the
4 Vermont newspaper that was published last November
5 titled, "Railroad Merger Charts a Clear Track to the
6 Environmental Gains and Carbon Neutrality." With
7 that offered, I'll continue.

8 Protecting our environment and reducing
9 climate change inducing emissions is a complex, yet
10 urgent issue. Like most complex problems there will
11 rarely be a silver bullet, or a one size fits all
12 solution. We can seek incremental changes in the
13 short-run that produce major breakthroughs over
14 longer periods.

15 Sometimes incremental environmental
16 victories are hiding from us in plain sight. Every
17 year trucks, ships, planes and trains move over a
18 billion tons of cargo around the world, while
19 freight transportation keeps the global economy
20 moving. It's essential and unavoidable. It's also a
21 heavy driver of polluting emissions according to
22 several of my colleagues down at MIT freight

1 transportation accounts for about 8 percent of global
2 carbon emissions.

3 However, curtailing freight transportation
4 isn't an option for an increasingly interconnected
5 world. Nevertheless, we can do much more to ensure
6 our transportation infrastructure is as modern,
7 reliable and ecologically efficient as possible. Now
8 for example we should encourage more goods to ship by
9 rail instead of by truck. This will drastically help
10 reduce emissions, and the data is in on this.

11 I think you all are aware. According to
12 the EPA in particular, while freight railroads
13 account for about 40 percent of U.S. freight being
14 shipped across our country, U.S. freight railroads
15 account for only about just under 2 percent, 1.9
16 percent of U.S. transport related greenhouse gas
17 emissions, and only account for less than a percent,
18 0.5 percent of the total U.S. greenhouse gas
19 emissions because of their higher fuel economy.

20 Today as we consider the situation in New
21 England, the proposed merger of CSXT and Pan Am is an
22 important opportunity that can bring about big

1 positive environmental and economic changes quickly,
2 without breaking the bank or disrupting supply
3 chains. Trains are the most fuel efficient land-base
4 mode of transportation, three to four more times
5 efficient than trucks on average.

6 Moving freight by rail instead of by
7 trucks actually lowers greenhouse gas emissions, up
8 to 75 percent on average according to folks, some of
9 my friends out at the Texas Transportation Institute
10 on a recent study they did on urban mobility. U.S.
11 freight railroads on average move one ton in freight
12 more than 400 miles per gallon of fuel.

13 However, some publicly available CSXT data
14 indicates that the firm is doing about one ton of
15 freight more than 500 miles on a single gallon of
16 fuel. Now that was discussed actually yesterday if
17 you all recall.

18 Further one it's remarkable and notable
19 that CSXT invest in emission reducing technologies
20 including idle mitigation energy management software,
21 some which we saw yesterday. CSXT's trains are able
22 to reduce emissions by using advanced software to

1 shut down diesel engines when possible, and
2 automatically restart them when necessary.

3 These ecological and social bona fides
4 stands in stark contrast to many of the locomotives
5 being used by Pan Am today. Pan Am's locomotives
6 average age is more than 40 years old. Replacing Pan
7 Am's aging fleet with newer, high horsepower, more
8 efficient locomotives from CSXT will able us to
9 operate the fuel locomotives that are currently being
10 used while simultaneously improving fuel economy.

11 These are all compelling reasons that give
12 me hope that the Board will approve this merger as a
13 way to improve and upgrade the rail network in the
14 region, and more broadly help address the important
15 issue of rising greenhouse gas emissions that imperil
16 our climate and threaten the environment. Thank you
17 for our consideration, much appreciated.

18 CHAIRMAN OBERMAN: Thank you Dr. Dorsey.
19 Are there any questions?

20 BOARD MEMBER FUCHS: Question for Dr.
21 Dorsey. From an environmental standpoint you
22 mentioned the benefits in terms of greenhouse gases.

1 Would you also put forward that the environmental
2 benefits extend to things like particular matter and
3 nitrogen oxide and other pollutants?

4 DR. DORSEY: Absolutely. And I would say
5 they not only extend abstractly to the environment,
6 but there are a whole host of sort of co-benefits
7 socially as well beyond ecosystems per se. So
8 checking greenhouse gas emissions, or inducing
9 greenhouse gas emissions also has upside implications
10 for reducing other forms of pollution, air pollution,
11 and other forms of pollution, water pollution and
12 many others, so indeed.

13 BOARD MEMBER FUCHS: Thank you.

14 DR. DORSEY: Thank you.

15 CHAIRMAN OBERMAN: Okay thank you. Any
16 other questions for Dr. Dorsey? All right. Thank
17 you very much Dr. Dorsey. Appreciate you making the
18 effort.

19 DR. DORSEY: Thank you.

20 CHAIRMAN OBERMAN: And not only
21 testifying, but writing your op-eds, and being out
22 there to affect public opinion. Much appreciated.

1 DR. DORSEY: Thank you Chairman. Thank
2 you.

3 CHAIRMAN OBERMAN: Ike Brannon? Mr.
4 Brannon here? I don't hear from him. Steven
5 Goodman, namesake of the late great Chicago.

6 MR. GOODMAN: The musician, yes.

7 CHAIRMAN OBERMAN: Musician.

8 MR. GOODMAN: Appropriate song too given
9 the -- yes.

10 CHAIRMAN OBERMAN: The Disappearing
11 Railroad Blues huh?

12 MR. GOODMAN: Yes.

13 CHAIRMAN OBERMAN: All right Mr. Goodman
14 you're on.

15 MR. GOODMAN: Thank you Mr. Chairman,
16 members of the Board. Good afternoon. My name is
17 Steve Goodman. I am the Manager of GFI Partners.
18 We're a New England based industrial developer.
19 Since 2010 GFI has developed over 2 million square
20 feet of rail service facilities in the New England
21 market.

22 As warehouse and distribution strategies

1 are changing, rail served facilities are playing an
2 increasingly and important role in maximizing
3 delivery, efficiencies in minimizing impacts of over
4 the road trucking. Currently we are seeing increased
5 demand from freight users looking for modern
6 warehouses with access to well-served rail.

7 So I'm here to strongly support the CSX
8 acquisition of the Pan Am Network. A couple of the
9 many reasons are the creation of a single line
10 service which we've heard so much about, which is a
11 big plus for our tenants. It will allow better
12 access to national markets, improve service, both
13 consistency and reliability, and as Tim had talked
14 about you know there's a needed investment in
15 infrastructure which we think CSX will be well suited
16 to do. We think this will provide -- open up new
17 parcels for development which in turn can create
18 significant tax revenues, job creation for local
19 communities, and allow us to create additional you
20 know rail serve facilities which I started with which
21 are so needed in this market.

22 Really that's really all I have to say.

1 You know as a developer on these lines we think that
2 the investment by CSX into some of this older
3 infrastructure will help us create you know the
4 modern distribution facilities that the market is
5 craving right now.

6 CHAIRMAN OBERMAN: Mr. Goodman just a
7 couple of questions. You are a developer of
8 industrial parks as I understand it?

9 MR. GOODMAN: That's correct sir.

10 CHAIRMAN OBERMAN: Yeah, and so are your
11 tenants now rail users in any of your parks?

12 MR. GOODMAN: Yes, yeah, yes.

13 CHAIRMAN OBERMAN: Can you tell us where
14 that is?

15 MR. GOODMAN: So we have facilities on
16 both the Pan Am or in Devens in their Devens, Mass on
17 the Pan Am Track. We have land in Ayer, Mass on the
18 Pan Am Southern. We have facilities in Worcester,
19 Mass that are on the G&W to name a few.

20 CHAIRMAN OBERMAN: And what type of
21 shippers or receivers? What kind of commodities are
22 we talking about?

1 MR. GOODMAN: Yeah so you know we kind of
2 have a little bit of a lot, for example Chuck Giroux
3 from Mid-State is in one of our buildings who spoke
4 earlier. We have paper, big paper product coming out
5 of Maine, which is located in Devens. We have a rail
6 serve facility in Worcester which is on G&W track
7 that brings wine from the Gallo wine from California.

8 We have their warehouse. Hood McQuesten,
9 which is a large lumber supplier. Their northeast
10 facility is in one of our buildings on Pan Am
11 Southern track.

12 CHAIRMAN OBERMAN: Let me ask this. To
13 your knowledge do these shippers and receivers rely
14 on different carriers to interchange with Pan Am now?

15 MR. GOODMAN: Absolutely yes. So you know
16 the ability to have you know both the tier one to
17 negotiate rate you know having access to both the NS
18 and the CSX is you know in our experience, has been
19 important to our tenants to make sure that their
20 costs are competitively bid.

21 CHAIRMAN OBERMAN: So keeping these
22 interchange points and access points open that we've

1 been talking about as you see it is important to your
2 tenants being able to continue to get competitive
3 rates.

4 MR. GOODMAN: From our point of view very
5 important yes.

6 CHAIRMAN OBERMAN: Is it one of the
7 selling points when you do industrial develop to say
8 look we have rail access to various carriers that
9 interconnect with the national network?

10 MR. GOODMAN: Yes. It's always been
11 important and even now it's so hard to find good you
12 know land that you know one of the things we see as
13 really important here is the investment in
14 infrastructure. There's a lot of land that we think
15 will be accessible if we could convince our tenants
16 that you know the service would be predictable.

17 CHAIRMAN OBERMAN: All right. Any other
18 -- appreciate that, any other questions for Mr.
19 Goodman? All right. Well we will do our best to
20 keep the railroads from disappearing Mr. Goodman,
21 that's part of our assignment.

22 MR. GOODMAN: Thank you so much.

1 CHAIRMAN OBERMAN: And Patrick and I by
2 the way on our first field trip took the City of New
3 Orleans for a ways so.

4 MR. GOODMAN: Oh nice.

5 CHAIRMAN OBERMAN: Yeah, and it almost did
6 disappear on us. All right. Thank you very much. I
7 much appreciate you taking the time. I understand
8 Mr. Brannon has been able to join us, so if he's --

9 MR. BRANNON: I'm here.

10 CHAIRMAN OBERMAN: Okay good for you.

11 MR. BRANNON: Great, thanks. Thanks for
12 the opportunity to attend and participate. And
13 Chairman Oberman is a Fellow Central Illinoian, and
14 it's good to see one of our own running the STB, so
15 way to go.

16 So my name is Ike Brannon. I'm a Ph.D.
17 economist who's published articles in academic and
18 public policy publications related to logistics
19 freight rail, and various other transportation
20 issues. I'm currently a Senior Fellow at the Jack
21 Kemp Foundation in Washington, D.C. and I also serve
22 as an officer of a non-profit dedicated to reducing

1 road congestion called Parking Reform.

2 Before my current positions I was an
3 economist at the Office of Management and Budget, the
4 U.S. Treasury, and the House Energy and Commerce
5 Committee. I believe that the proposed merger
6 between CSX and Pan Am Railways would bring benefits
7 to both the U.S. economy, and especially to the
8 environment. Consolidation would certainly improve
9 rail service in the northeast, and increase the
10 quality of goods shipped by rail which will in turn
11 reduce road congestion, particularly emissions and
12 greenhouse gases.

13 There's no reason to think that this
14 merger will result in materially higher market
15 concentration where the prices will increase for
16 northeast shippers. Opposition to the merger appears
17 to be motivated by a colloquial interest, and the
18 costs procuring them would vastly outweigh the public
19 benefits.

20 First I'd want to point out that a merger
21 between the two rails would not change the
22 competitive balance in the rail industry in the

1 northeast in any discernable way. CSX does not
2 currently have tracks in places like where Pan Am
3 operates, so it's merely expanding its network, not
4 eliminating it.

5 By being a part of a larger network
6 northeast shippers will be able to get better
7 service, there will be more customers they can ship
8 to directly which tends to be quicker and less
9 expensive, and more efficient to do as well. This
10 transaction will allow CSX to take advantage of
11 economies of scale and operating the network, and by
12 extending the northeast it will acquire more
13 customers that can benefit from their network and
14 resources.

15 The merger would increase the capacity of
16 the current Pan Am Rail Network which would have a
17 positive effect for New England, being integrated
18 with the largest CSX Rail Network, and allow it to
19 expand how much trains can operate in carrying the
20 region, and being part of a larger, better company
21 will undoubtedly boost investment in maintaining
22 tracks and expanding capacity.

1 Besides benefitting shippers, New England
2 residents will benefit from expanded training
3 capacity because it will reduce the number of trucks
4 operating in New England as Dr. Dorsey pointed out
5 in his testimony. Fewer trucks means that there
6 should be less congestion on the area's road, which
7 would mean less smog, less particulate pollution, and
8 fewer emissions of greenhouse gas.

9 By reducing transportation costs, it's a
10 benefit for society and helps firms reach customers
11 faster and less expensively, saving them and their
12 customers money. That's why to me it's puzzling that
13 several governmental bodies -- by no means all of
14 them, oppose the merger. And one objection I know
15 has to deal with the Pan Am dispatch office it would
16 like to see its functions fold into and integrated
17 into CSX's broader dispatching operation.

18 Holding up such a merger benefits an
19 entire region over such colloquial interest could
20 effectively force New England shippers to pay more
21 and accept an inferior service for the sake of
22 relatively small number of jobs and a more efficient

1 and robust train transport system, one that will
2 surely create more jobs and boost wages in the region
3 while at the same time providing additional benefits
4 to shippers and residents across New England.

5 The objection of Amtrak and its supporters
6 want guarantees that passenger rail access would be
7 unaffected by the merger are also misplaced. It's
8 unclear how blocking the merger would help Amtrak,
9 but doing so will result in more goods being
10 transported by truck, as would their demands for
11 passenger rail, priority and the combined rail network.

12 Shifting goods from rail to truck could
13 accommodate the passenger rail route makes no
14 economic or environmental sense. Amtrak's opposition
15 is even more puzzling when we see that other
16 passenger rail focused entities in the region have
17 been publicly supportive of the transaction because
18 of the expected upgrades to the rail network will
19 singularly lead to improved passenger rail
20 performance for everyone of the status quo.

21 I just want to observe that the Biden
22 Administration is opposed, will delay a wide number

1 of mergers in the last year for reasons that
2 economics and I submit etiology, but I fail to see
3 how either precept can explain its apparently
4 opposition to this merger in a competitive landscape
5 in the northeast rail would remain unaffected.

6 The benefits of the transaction and the
7 jobs created will be a positive impact to the
8 environment, and the benefits that will accrue to
9 shippers in the region who stand to gain from an
10 improved and expanded network should be obvious.
11 Objecting to this merger would amount to the
12 government rejecting its explicit economic agenda
13 combating climate change, expanding economic
14 opportunities for slower growing regions in the
15 country for narrow short-term interests. Thank you.

16 CHAIRMAN OBERMAN: Thank you Mr. Brannon.
17 I just have a couple of questions. You're -- what is
18 your business? I can see the name of it.

19 MR. BRANNON: So I'm a scholar. That's
20 what I am, so researcher at the Jack Kemp Foundation
21 who does research, and a lot of it has to do with
22 economic development and pollution yeah.

1 CHAIRMAN OBERMAN: Do you have any
2 background in consulting in the railroad industry, or
3 are you coming here with the general economic
4 expertise? I'm trying to?

5 MR. BRANNON: Yeah that's right. So I've
6 written a bunch on rail as part of my job as a
7 scholar, but I don't have any yeah, I don't have any
8 consultancies going on with this.

9 CHAIRMAN OBERMAN: Yeah. But you've done
10 work on the rail industry before?

11 MR. BRANNON: We publish yeah. So I write
12 with a former colleague of mine Michael Gorman, we've
13 written a lot on rail. And in general we've written
14 a lot about congestion issues in the country, and as
15 you know rail has a lot to do with road congestion.

16 CHAIRMAN OBERMAN: Yes. Oh no I much
17 appreciate that. I'm just wondering in talking about
18 the competitive landscape, you didn't comment on the
19 issue that we've been talking about a lot today, and
20 I wonder from your point of view if you put any
21 importance on not diminishing the existing
22 competitive options for various short lines and

1 shippers in New England, by virtue of this merger in
2 terms of keeping these gateways open and that whole
3 discussion we've been having the last couple days.
4 Do you put any value on keeping those options from
5 going way?

6 MR. BRANNON: I realize there is a cost to
7 some of these options going away, but I think they
8 are more than outweighed by the ability of more firms
9 in New England being able to have easy access, and be
10 integrators of part of a Class 1 railway.

11 CHAIRMAN OBERMAN: But you understand that
12 CSX seems to be telling us they aren't going to have
13 these open gateways go away. They want to maintain
14 them. Do you think that's an important part of the
15 overall transaction because it does preserve
16 existing competitive options from other carriers.

17 MR. BRANNON: You know I'm working, Mike
18 Gorman and I are working on another paper looking at
19 reciprocal shipping options, so I'm going to reserve
20 my comment on that until we finish that paper. We
21 will submit that paper when we submit it to an
22 academic journal. We'll share it with the STB.

1 CHAIRMAN OBERMAN: Well let me tell you
2 this, you know, we have a hearing on reciprocal
3 switching in two months, so we can use all the
4 expertise and advice we can get.

5 MR. BRANNON: We're hoping, we're actually
6 hoping to have a draft of that ready for that.

7 CHAIRMAN OBERMAN: That'd be great. But I
8 was sort of focused more on just the existing gateway
9 issue that we have now up and down the Pan Am system
10 and the PAS system, and all the discussion we've had
11 about keeping those gateways that already exist open
12 so that other carriers can -- so that shippers have
13 competitive options.

14 MR. BRANNON: You know I just think that
15 comes at a very high cost if it means that it makes
16 it more difficult for CSX to do scheduling and
17 reduced their capacity. It comes with a cost, and I
18 think that that's something that has to be
19 acknowledged.

20 CHAIRMAN OBERMAN: Yeah. They don't seem
21 to be suggesting that it's a cost. That's why I ask
22 so. It doesn't seem to be a problem, but let me end

1 it there. I know that Patrick has some questions
2 too.

3 BOARD MEMBER FUCHS: Very quick you
4 mentioned I think you were referring to the DOJ when
5 you referred to opposition to the transaction. Is it
6 more fair to characterize the DOJ as proposing
7 remedies to competitive concerns rather than taking a
8 stand on the overall merits of the transaction?

9 In other words do you read the DOJ filing
10 as saying that the added benefits are greater than
11 the benefits, or more just a particular view on
12 anti-competitive events.

13 MR. BRANNON: So I was speaking more
14 broadly right, I think in the last 12 months you know
15 I can't remember a time where it's been so difficult
16 for any kind of merger to happen.

17 BOARD MEMBER FUCHS: But to be clear the
18 DOJ does not say in its filing that the Board should
19 deny this merger.

20 MR. BRANNON: Right.

21 BOARD MEMBER FUCHS: I just wanted to get
22 clarify on that point.

1 MR. BRANNON: Right.

2 BOARD MEMBER FUCHS: Thank you.

3 CHAIRMAN OBERMAN: All right. Any other
4 questions for Mr. Brannon? Okay. Thank you very
5 much Mr. Brannon.

6 MR. BRANNON: Thank you so much.

7 CHAIRMAN OBERMAN: I think we all look
8 forward to your reciprocal switching paper. Well I
9 do, I don't know if anybody else does, but I do.

10 MR. BRANNON: Thank you. I'll make it
11 scintillating for you.

12 CHAIRMAN OBERMAN: Yeah. Everything I
13 read here is scintillating, thank you. So with that
14 it is 4:24. I'm sorry before we end this panel just
15 to be thorough did Richard Sullivan, was he able to
16 join us? Okay. So I think we are going to end this
17 panel.

18 It is now 4:25, and we have to get to the
19 applicants, but because it's been a long day we're
20 going to take a ten minute break sharp. We'll be
21 back at 4:35, and we're going to try to finish this
22 up as quickly as possible, but there are some I'm

1 sure there are issues that need to be closed, and
2 there are I'm sure further comments from the
3 applicants. We will see you all in ten minutes,
4 thank you.

5 (Break)

6 CHAIRMAN OBERMAN: Folks we're reconvening
7 for the final lap. We're going to finish this today.
8 And I understand there are some travel commitments,
9 but the people are going to stay with us while
10 they're in transit. Tim Murray led the way. It can
11 be done. So let us reconvene, and get our applicants
12 back up here for rebuttal, and then I think there
13 will undoubtedly be some further questioning.

14 Are the CSX, B&E and NS teams onboard?

15 MR. FOOTE: Yes sir Mr. Chairman, CSX is
16 ready to roll.

17 CHAIRMAN OBERMAN: All right Jim, you're
18 on.

19 MR. FOOTE: Okay great. Well thank you
20 Mr. Chairman and Board members for the opportunity to
21 summarize why this proposed merger between CSX and
22 Pan Am is good for rail shippers, passenger rail

1 customers, the environment, the national
2 transportation network, and the public at large.

3 I hope that we have been able to show you
4 our enthusiasm and optimism about this transaction,
5 and how it will transform the New England Rail
6 Network for the better. You heard from our
7 customers, our short line partners, local
8 communities, elected representatives, and state
9 agencies that are excited to see a modernized Pan Am.

10 They recognize that an upgrade to the Pan
11 Am Network is sorely needed. Becoming a part of CSX
12 and the Class 1 Railroad Network is going to bring
13 them tremendous benefits, and they have told you they
14 want this transaction to go forward.

15 We explained that CSX will upgrade and
16 modernize the Pan Am operations, elevating the
17 networks potential, and maximizing its efficiency.
18 We have already identified a number of capital
19 projects totaling more than 100 million dollars.
20 We've provided you a map showing the numerous
21 projects that have already been identified that will
22 bring the Pan Am Network up to Class 1 railroad

1 standards.

2 These upgrades will benefit all rail user,
3 freight and passenger alike. We have broad
4 experience working with passenger services and how to
5 coordinate freight and passenger operations to
6 ensure safe and consistent service. We have partners
7 with several local and regional passenger agencies
8 across our network.

9 Nothing about this transaction will have a
10 negative effect on existing passenger service, and
11 the operating and safety improvements that we will
12 make will only result in improvements to existing
13 passenger rail service. We have also pledged to work
14 with passenger agencies to explore future
15 opportunities.

16 Pan Am's shippers will benefit from CSX's
17 customer service, greater schedule reliability and
18 greater transparency about their shipments. New
19 seamless single line service will provide shippers
20 with low-cost, environmental friendly rail service
21 with truck like reliability, so they can reach a
22 wider customer base over an expanded territory.

1 You heard directly how excited shippers
2 are to be part of a larger network that will give
3 them access to new market opportunities. You heard
4 from Genesee and Wyoming. After their presentation I
5 think the Board knows why CSX and NS chose them as
6 the operators of PAS. They have enormous operational
7 expertise and will make PAS a better rail carrier,
8 and will ensure the continued viability of PAS as an
9 independent rail route into New England.

10 You heard from NS. The party that would
11 be the most natural source of opposition, and they
12 vigorously support this transaction as it is
13 currently structured. You heard how we have
14 negotiated with interested stakeholders, and these
15 agreements along with the transaction overall will
16 lead to a restructured rail network in New England to
17 make it stronger, more resilient, and more reliable.

18 This is the result of numerous
19 negotiations and settlement agreements, and we know
20 that the Board values the ability of stakeholders to
21 work things out through negotiations, so do we. We
22 also heard some concerns by a handful of interests.

1 And I'd like to respond to the few parties who
2 continue to have concerns regarding the transaction.

3 First, Canadian Pacific. We share the
4 Board's preference to have these concerns worked out
5 between the parties so that the Board doesn't need to
6 impose conditions and we've attempted to do that
7 here. CSX and NS are in agreement on nearly all the
8 conditions outlined by CP today and CP knows that,
9 yet CP won't come to an agreement with us. It seems
10 to me that there is something else that is driving
11 their position in this case.

12 Second, we appreciate the working
13 relationships we've established with the Commonwealth
14 of Massachusetts. And as they have acknowledged in
15 their hearing testimony, we have made a number of
16 commitments that include strengthening the reservoir
17 and supporting the Berkshire Flyer.

18 My letter on the Berkshire Flyer was
19 clear. Amtrak can begin the special train in 2022.
20 Without the 1,000 foot station track, but we need a
21 commitment on that track long-term. We're also
22 committed to continuing meaningful discussions on

1 additional proposals for commuter routes.

2 Third, with respect to Amtrak in addition
3 to supporting the Berkshire Flyer, CSX has agreed to
4 Amtrak's remaining conditions. Finally, the legal
5 standard is focused on competitive effects, and we
6 have demonstrated to the Board that the structure of
7 this transaction ensures there will be no adverse
8 competitive effects.

9 We've shown how competition actually will
10 be enhanced by this transaction, and even if you
11 found there to be anti-competitive effects, the legal
12 standard requires approval if the public benefits
13 outweigh those effects. This hearing showed you the
14 extent and strength of the abundant public benefits.
15 I hope that this two day hearing has served to inform
16 you about why this transaction as structured, which
17 clearly meets the legal standard for approval, will
18 revitalize rail service in New England.

19 Thank you Mr. Chairman, Vice Chairman, and
20 Board members for your strong interest in this
21 important transaction. Upon your approval we can get
22 to work revitalizing the New England Rail Network.

1 CHAIRMAN OBERMAN: Jim thank you very
2 much. Let me say at the outset I think this two days
3 of hearings beginning with you and your team's
4 presentations have been exceptionally productive and
5 enlightening, and have moved the ball forward towards
6 our responsively figuring out what to do with your
7 application.

8 So I really congratulate you and everyone
9 who has participated in this hearing. I think there
10 are a few matters that need some clarification from
11 my point of view, and perhaps from other Board
12 members that they can weigh in.

13 So I'd like to deal with those. I
14 actually think that the record is already pretty
15 solid on the issues that I have raised as a concern,
16 but in going over the proceedings from yesterday I
17 think -- and some of the things that have been said
18 by Amtrak and CP, I think there's some things that
19 need to be clarified which I'd like to do.

20 So first of all you indicated in your
21 comments just now that it was your goal to try to
22 reach agreements with as many people as possible,

1 many interests, to avoid the Board imposing
2 conditions.

3 As a general matter you know that is my
4 view to encourage private agreement, but just so the
5 record is clear it's my understanding that it's CSX's
6 position from the papers you first filed, that once
7 you work out agreements, then you expect and
8 actually want the Board to impose those as
9 conditions, but based on the agreements. That's
10 really what you're talking about right, so we're on
11 the same page.

12 MR. FOOTE: Yes.

13 CHAIRMAN OBERMAN: Yeah okay. Because you
14 said instead of conditions, but the conditions we've
15 been working hard.

16 MR. FOOTE: Yeah the negotiated
17 conditions.

18 CHAIRMAN OBERMAN: Yes right, that's I
19 think we all agree that's better, but they're still
20 going to end up being conditions because you may not
21 be there some day and neither will I when the
22 conditions may need to be reformed.

1 So with that in mind I wanted to cover, I
2 don't think we need to spend as much time on it as we
3 did yesterday, but you and I had a very vigorous
4 discussion, a very productive one in which you were
5 very affirmative about maintaining all existing
6 avenues of competition in terms of open gateways and
7 equalized rates and so forth.

8 And I realize that it may have been my own
9 phraseology that I am not clear. I think the intent
10 was clear, but I'd like to put it on the record that
11 the commitment to keep all gateways open to have
12 commercially reasonable interchange rates, to have
13 equalized rates for all carriers, so one isn't
14 disadvantaged versus the other, applies to all of the
15 interchange places on the Pan Am system, but also on
16 the PAS system.

17 And I think sometimes that discussion got
18 morphed together. Is that a fair way to state it?

19 MR. FOOTE: Well I think what we were
20 talking about yesterday, and I think what you were
21 talking about with CP today related to the PAR, let's
22 just call one PAR one PAS to keep it easy.

1 CHAIRMAN OBERMAN: Okay. I think
2 yesterday we were talking about both, but that's what
3 I wanted to be clear on.

4 MR. FOOTE: Well yeah there was two things
5 yesterday that kind of got intermixed together. I
6 think you pulled out a PAS tariff and then we were
7 talking about a PAS tariff that had equalized,
8 basically pull at the same rate whether it's going to
9 the CP interchange, or the CSX interchange.

10 CHAIRMAN OBERMAN: Right.

11 MR. FOOTE: They used to have a blanket
12 tariff.

13 CHAIRMAN OBERMAN: But let's be clear.
14 Let's clarify that today.

15 MR. FOOTE: Yes. And so and then that
16 kind of morphed into the conversation about propane
17 moving from Sarnia into New England versus you know
18 the Appalachian region into New England, and then we
19 started talking about gateways.

20 And yes, our commitment, which we said
21 yesterday, our commitment is to the extent -- I guess
22 to the extent that we can commit, like I said it's

1 the best way to say it, to the extent that we can
2 commit because PAS you've got CSX, you've got NS,
3 we've kind of ceded pricing responsibility to Genesee
4 and Wyoming.

5 So you have to kind of deal with them
6 separately. To the extent that we can commit, and
7 that would obviously be the case on PAR, I think it's
8 been kind of a standard for the last 20 years since
9 the Central transaction as a started to guarantee
10 gateways open, which mean physically open, and
11 economically open.

12 And those guarantees really don't go to
13 the railroads, those are guarantees to the shippers.
14 So when the shipper's out shopping for rates and he
15 wants to use different alternative carriers to find
16 out what's going to be the most economic rate from
17 what source, he has all of his options that he had
18 available before.

19 So if there were a rate
20 existing today to a gateway that PAR has quoted to a
21 customer, it's our commitment that we will be -- we
22 will continue to quote a competitive reasonable rate

1 that doesn't economically close that gateway.

2 CHAIRMAN OBERMAN: Okay. And I thought
3 that was clear on the record and in your papers
4 yesterday for PAR.

5 MR. FOOTE: And I think you had the exact
6 -- a very similar conversation today with the
7 representative from the Canadian Pacific where yes, I
8 think you came out exactly in the same place with the
9 crystal clarity on that.

10 CHAIRMAN OBERMAN: Yeah.

11 MR. FOOTE: The question as it relates to
12 the PAS, and then we were talking yesterday about the
13 tariff, and the fact that PAS had a tariff, and when
14 they raised the tariff they seemed to raise it
15 uniformly up and down. It doesn't make any
16 difference to the railroad gateway, they have kind of
17 parity between the east, the west, and whatever it
18 is.

19 I think in that circumstance, and counsel
20 can correct me if I'm wrong, I think we have a
21 relationship there where we and NS had ceded to, we
22 had given the B&E the commercial responsibility for

1 quoting rates in that area, and first of all whether
2 it's PAR or PAS, if there's a rate that's in effect
3 today that's in a contract for whatever and moving
4 freight, we're going to honor those rates.

5 That's a binding commitment on our part.
6 So we would bind the -- we would honor those rates
7 that are in existence, then in the future would not
8 do something unreasonable or detrimental to the
9 customer that would economically close that rate. On
10 the PAS --

11 CHAIRMAN OBERMAN: Jim, just to use the
12 phraseology we've been using it would not be
13 commercially unreasonable right?

14 MR. FOOTE: That's correct.

15 CHAIRMAN OBERMAN: Yeah, sorry. That's
16 okay go ahead.

17 MR. FOOTE: And then on the PAS because we
18 have given the B&E, because we have stepped back out
19 of the commercial arrangements, the pricing for the
20 service, B&E would set that rate, and they would set
21 that rate. They're incentivized to make sure they
22 don't do something stupid that would close the

1 gateway to PAS, and so they would grow the business.

2 So I guess there's a slight nuance with
3 PAS only because I can't make that same level of
4 commitment.

5 CHAIRMAN OBERMAN: Yeah, but maybe we can
6 solve that problem right now because B&E and NS are
7 there.

8 MR. LAROCCA: And Mr. Chairman let me
9 point out one other aspect of PAS. One of the very
10 important elements of the settlement agreement and
11 the term sheet was to ensure that pricing would be
12 done on a non-discriminatory basis. That is one of
13 the fundamental -- that is I should say the
14 foundation of the pricing responsibility and
15 requirement that B&E is obligated by contract to
16 follow.

17 Non-discrimination is very similar to what
18 you're talking about here. That means that if a
19 product is coming in to PAS from one carrier, a
20 non-discrimination rate setting requirement means
21 that other carriers bringing that in to use PAS for
22 the same movement cannot be discriminated against.

1 So they can't, so there would be no way under the
2 contract for PAS to favor either of its owners, or
3 any other individual carrier. They've got to be
4 non-discriminatory.

5 CHAIRMAN OBERMAN: Well I understand that,
6 but the settlement agreement between NS and CSX, so
7 there are other carriers that come in there primarily
8 CP, and I think what we wanted to make sure, and I
9 thought it was in your papers, and I guess I wouldn't
10 say very similar. I would say identical to an open
11 gateways on commercially reasonable rates in
12 perpetuity for all carriers, and that would include
13 CP.

14 MR. LAROCCA: Absolutely.

15 CHAIRMAN OBERMAN: But now I think for our
16 record because I think Jim is right they're dealing
17 with different corporate entities can we hear an amen
18 from B&E and NS that are sitting right there that
19 they are committed? That PAS is going to operate in
20 perpetuity, you know, of course B&E might not be
21 there in perpetuity, they have a term limit of
22 contract to this non-discriminatory policy.

1 MR. WALSH: Absolutely. On behalf of B&E
2 it is embedded in our contract that we cannot favor
3 any carrier over another, so that means that we can
4 treat you know CP no different than CSX nor NS. You
5 know any different from there are existing agreements
6 in place, but from going --

7 CHAIRMAN OBERMAN: That's a permanent
8 commitment going forward.

9 MR. WALSH: That is embedded in our
10 agreement as operator yes.

11 CHAIRMAN OBERMAN: All right.

12 MR. WALSH: If we do not adhere to that we
13 can be terminated.

14 CHAIRMAN OBERMAN: Yeah. But you know it
15 could also end up being a condition by agreement that
16 can be enforced by us, that's what I'm.

17 MR. WALSH: Oh absolutely sorry, and I
18 would just ask to make sure with outside counsel that
19 I stated that correctly.

20 CHAIRMAN OBERMAN: Sounds good to me.
21 Bill Mullins are you onboard?

22 MR. MULLINS: Yes sir.

1 CHAIRMAN OBERMAN: Pardon?

2 MR. MULLINS: On behalf of Norfolk
3 Southern I would say that we don't believe that an
4 actual Board imposed condition is necessary because
5 of all the reasons that have been expressed,
6 especially the fact that B&E already has a
7 contractual obligation to be neutral.

8 That in effect is an open gateway
9 commitment, so you don't need to impose that, and it
10 does require three parties to agree to that
11 commitment -- B&E, Norfolk Southern, and CSX, and
12 actually there's a fourth party, CP. And I think
13 what concerns us, and Norfolk Southern is always
14 willing to sit down and discuss these issues with CP.

15 We couldn't agree with you more Mr.
16 Chairman, that it's best to resolve these things in
17 negotiations, and not have them be Board imposed
18 conditions. And in that sense, we've actually made
19 a proposal to CP. We being NS and PAS, we've not
20 heard back on that, and we would like to sit down
21 with CP, want to have fruitful negotiations with CP.

22 But you know talking about your issue with

1 it's great to have negotiations, well if one side
2 feels like what they're going to get is being imposed
3 by the Board, then they don't have to give anything
4 because they're going to get it for free from the
5 Board, they have no incentive to negotiate.

6 So like for example in the CP interest,
7 they're not offering to give any rate commitments of
8 their own. They're not offering to keep their
9 gateway and interchange open. They're not offering
10 to seek to give us Pan Am Southern service standards.
11 They're not offering to give us volume commitments.

12 They're not offering to give us maintain
13 their lines in a shape, and yet we depend on that
14 traffic just as much as they depend on theirs. So
15 it's a two way street, and if one side feels like
16 they get all the leverage because they're going to
17 get it from the Board, they have no incentive to
18 negotiate.

19 CHAIRMAN OBERMAN: Well Bill let me just
20 say a couple of things. Number one, I was going off
21 of the promise that the principal applicant here, CSX
22 made that whatever representations it made, or

1 whatever agreement it worked out, it asked the Board
2 to pose those as conditions of any approval we might
3 give.

4 And I'm not here to mediate between you
5 and CP, at least in this public hearing. But there
6 is a difference. You and B&E and CSX are all asking
7 us to approve something. CP's not asking us for
8 anything other than to be protected. So they're in
9 somewhat of a different position.

10 But as a matter of philosophy do you know
11 I have been saying, at least since I showed up in
12 this business, that everything that promotes more
13 openness, and more competition is good for the
14 public, is good for the industry, so you won't get
15 any fundamental disagreement with me.

16 But on this specific point it is important
17 going forward to articulate for PAS what Jim has just
18 articulated for the rest of the PAR system, what Tony
19 LaRocca has reiterated, and what B&E has reiterated,
20 NS -- can I just get you to say from NS's point of
21 view you want PAS to do that?

22 MR. MULLINS: I will commit to you Mr.

1 Chairman on behalf of NS that we will sit down with
2 CP and discuss this in good faith negotiations.

3 CHAIRMAN OBERMAN: Are you going to stand
4 -- you know that really leaves it open. We're trying
5 to close the record here. Is NS going to object to
6 the Board imposing a condition that all the gateways
7 on PAS are open at equalized rates and so forth,
8 commercially reasonable terms going forward?

9 MR. MULLINS: At this stage I couldn't say
10 that. You know I haven't spoken to the client about
11 that, but I would say that that is a subject that we
12 should negotiate. That is a subject that you know
13 hopefully we can reach agreement. As you said, we
14 support your goal to reach agreement.

15 As you said you're not here to mediate or
16 negotiate in the context of this record, and I would
17 also add that CP is asking for something to be
18 imposed on Norfolk Southern. They're asking it to be
19 imposed on Norfolk Southern, and they're asking for
20 something that is more than what they have now.

21 CHAIRMAN OBERMAN: I don't know that
22 that's true. As I understood it at least in terms of

1 the open gateways, as I understand it PAS has been
2 operated that way from the beginning. It has tariffs
3 that are open and of equalized rates, so the one
4 thing I hear CP asking for, more importantly I think
5 you hear me asking for it, is that the current level
6 of competitive options available not be diminished,
7 and if that isn't done by agreement goes right to
8 11324-D.

9 MR. MULLINS: And I think Mr. Chairman
10 that we exactly share that goal, which is why -- and
11 again remember, we're the party that actually shares
12 your entire goal of keeping the Pan Am Southern
13 system competitive to the CSX system. You know your
14 comments, all the shippers, you're questioning the
15 shipper about the importance of choice. It is
16 important to have that choice.

17 And the railroad that wants that choice
18 the most is Norfolk Southern, and it's because of
19 that that we negotiated very careful agreements, very
20 complex agreements, and as part of that agreement to
21 share, to go precisely to your point, as part of that
22 agreement made B&E commit to neutral,

1 non-discriminatory pricing. That is contractually
2 put in there.

3 The Board can put that in as a condition
4 you know because they're adopting that agreement. So
5 I don't know what more is needed because B&E is
6 already agreeing to be a neutral non-discriminatory
7 price maker.

8 CHAIRMAN OBERMAN: The only thing that's
9 needed is that Jim Foote just said he could only
10 speak for CSX, and you're 50 percent owner, so I just
11 wanted to hear it from you. But you just said, so I
12 think we're on the same page.

13 MR. LAROCCA: Yes. And let me reiterate
14 that we're all on the same page. We have asked you
15 to impose as a condition of approval the NS
16 settlement agreement. We specifically asked that
17 that be established as a condition. An element of
18 the NS settlement agreement is the non-discriminatory
19 pricing requirement for B&E as the operator.

20 So by imposing that settlement you are in
21 fact establishing that as a requirement.

22 MR. DENTON: And Mr. Chairman if I might

1 add here.

2 CHAIRMAN OBERMAN: Go ahead Peter.

3 MR. DENTON: Yeah the tradition of these
4 open gateways commitments are related to mergers
5 right, of rail networks, and eliminating any
6 potential vertical competition issues as maybe Dr.
7 Reishus can talk about. But they're really about
8 railroad mergers.

9 And in the past context this is not a
10 merger. CSX is not merging with PAS. There aren't
11 any gateways that could even potentially be closed as
12 a result of the transaction. And what we've done as
13 Tony and others have mentioned, is in trying these
14 non-discriminatory principals in the settlement
15 agreement which we're asking you to impose as a
16 condition.

17 I just think that the gateways concept is
18 not necessarily apropos to the PAS network, whereas
19 it absolutely is for the PAR.

20 CHAIRMAN OBERMAN: Well I think it appears
21 to me to be that it is apropos because at least three
22 gateways that are used right now in PAS at

1 Mechanicville, Hoosac Junction and Rotterdam, and I
2 thought the whole -- one of the bases of this
3 transaction is that those gateways would remain as
4 open in going forward as they have been in the past.

5 MR. FOOTE: And I think the essence of our
6 agreement with B&E was to ensure that that was the
7 case.

8 CHAIRMAN OBERMAN: Well I just hear Bill
9 having some kind of a reservation here, and then --

10 MR. FOOTE: All he said was we ensured
11 that there would be equal treatment at the gateways,
12 and forget about this is designed to protect the
13 shippers, so that the shippers get equal treatment
14 when they want to use different carriers, so that a
15 shipper going to any gateway using a different
16 railroad would be treated equally.

17 CHAIRMAN OBERMAN: Yeah.

18 MR. FOOTE: And B&E is contractually bound
19 by the agreement to do that, and we're asking you to
20 impose the agreement.

21 CHAIRMAN OBERMAN: In perpetuity right?

22 MR. FOOTE: Well unless -- the NS

1 settlement, the agreement yes.

2 MR. DENTON: From which the G&W operating
3 agreement and the whole issue derives from, so yes.
4 That's absolutely right.

5 CHAIRMAN OBERMAN: Yeah. But G&W may not
6 be there in perpetuity, but the commitment has to be
7 there in perpetuity.

8 MR. DENTON: The commitment is with
9 respect to how PAS will be operated.

10 CHAIRMAN OBERMAN: Yes. Whether it's G&W
11 or somebody else in the future.

12 MR. LAROCCA: Well a change in operator
13 would have to be approved Mr. Chairman, so you don't
14 really have to worry about that. If there's an issue
15 down the road and you'll have another shot at it.

16 CHAIRMAN OBERMAN: Well I may, but I'd
17 like to get solid now so we can -- if all we're doing
18 is replacing G&W someday, we don't have to relitigate
19 this issue on where the Board would stand. So I
20 think as I understand it the commitment is I think as
21 Peter just said, is to how PAS will be operated
22 regardless of who the operator is. Is that a fair

1 statement Tony?

2 MR. LAROCCA: Well that certainly is the
3 intention of the NS settlement agreement that this
4 was not a link to B&E necessarily. It was linked to
5 the purpose of establishing a neutral operator for
6 PAS. So yes, this was intended to be part of the
7 restructuring arrangement.

8 CHAIRMAN OBERMAN: Well you know since
9 I've gotten to the Board, and Patrick and I joined in
10 talking to the rail law transportation group, it's
11 been our obligation that over the 140 years there
12 have been times when orders of the Board have been
13 drafted with some ambiguity.

14 And it's a mission that Patrick and I
15 started, and I'm pretty sure our other three members
16 will join with us, of having as much clarity in our
17 orders as possible. And if I seem to be pushing the
18 specifics of this it's because I want to have an
19 order, assuming we're going to approve this, and
20 that's still up in the air. That leaves nothing, as
21 little of a doubt as a human language, as the English
22 language will allow us in terms of precision. So

1 that is the reason I'm pushing this. It's a
2 penchant of mine, and I'm pretty sure I speak for
3 Patrick.

4 But I think we have resolved this issue in
5 terms of the openness that Jim and I had a very
6 productive discussion on yesterday, really applying
7 not only to PAR, but to PAS. And if anybody thinks
8 that those aren't going to be open in the same way I
9 want them to tell me right now, and if not I'd like
10 to move on to a couple of other matters that need
11 clarification.

12 Hearing none I want to go to other matters
13 that were raised by CP this morning, and this goes
14 beyond the pricing and the open access part. You
15 heard them talk about having some assurance that the
16 level of maintenance of the PAS infrastructure and
17 the service availability not be diminished as a
18 result of the acquisition.

19 What I heard consistently yesterday from
20 everybody on this team that's here now, CSX, NS and
21 B&E, is a very strong statement to the Board that
22 that's the plan to keep PAS at least as viable as it

1 is today if not in fact planning to have improvements
2 on it, and to make sure, and as B&E has emphasized
3 they want to grow the business, so it's hard to see
4 B&E saying we're going to reduce the frequency of our
5 service, that would not be consistent with growing
6 the business.

7 So I'd like to explore whether the
8 reaction to the idea of writing into conditions some
9 agreement that PAS will be maintained at least at its
10 current level or better, and that service frequency
11 will not be diminished. Does somebody want to
12 respond to that what CP was talking about this
13 morning?

14 MR. FOOTE: Well I'm not sure what CP's
15 talking about, so you know maybe you can help me on
16 occasion. You know as NS just articulated you know,
17 we've tried to have a conversation with them about
18 exactly what they want, and it's been a difficult
19 thing to do. So you heard the Hub Group talk about
20 the service on the line, so you know I guess that's
21 what they want.

22 CHAIRMAN OBERMAN: Let's take it apart a

1 little bit Jim. In response to one of my questions I
2 asked are they talking about some commitment by your
3 team, I'm just going to say your team because it's a
4 three part group here to at least keep the PAS line
5 up to its current FRA standards or better.

6 I hear you say that's your plan anyway.
7 So if a condition were made that specifically would
8 you have any objection to it?

9 MR. FOOTE: Well again you know it's not
10 for me, CSX unilaterally, to commit to three parties.

11 CHAIRMAN OBERMAN: Well let's say you
12 wanted it, I've got a hold of three people here, and
13 that's why we're here. So from CSX's point of view
14 is there any reason from your 50 percent of the cost
15 of maintaining that line ultimately, is that a
16 condition that you would find acceptable?

17 MR. LARocca: Mr. Chairman let me point
18 out that Mr. Clemens provided quite a bit of clarity
19 and qualification as to what he was interested in. I
20 wrote down the words not looking for rigid or
21 inflexible requirements, and I think that's critical.
22 That is critical.

1 Our intention is to provide better
2 service. That's what we intend. An inflexible
3 requirement, all that does is it imposes costs. It
4 imposes costs on PAS that are going to have to be
5 borne by PAS shippers. That's not something that's
6 going to improve the viability of PAS. It might
7 improve other competitive scenarios, but it does not
8 improve the competitiveness of PAS if it's done
9 without flexibility.

10 And I heard Mr. Clements talk about
11 flexibility.

12 CHAIRMAN OBERMAN: What's inflexible about
13 maintaining the quality of the track then up to
14 whatever its current standards are? What's
15 inflexible about that? You've got you would be hard
16 pressed to say you have a plan to come in here and
17 let the PAS right-of-way deteriorate.

18 MR. LAROCCA: Two years ago Mr. Oberman I
19 did not see anything. I did not expect to be in my
20 house for two full years behind this computer screen.
21 I did not expect that. But things happen, and the
22 network is very fluid. And there needs to be

1 flexibility.

2 You cannot establish absolute rules. You
3 have to approach them with flexibility, and indeed a
4 whole history of the rail network and common carriage
5 is a principle of reasonableness. There has to be
6 some flexibility.

7 VICE CHAIRMAN PRIMUS: But Tony --

8 CHAIRMAN OBERMAN: One at a time. Robert?

9 VICE CHAIRMAN PRIMUS: I mean I don't
10 understand you know where you're coming from Tony in
11 that respect. I mean they're not asking to be rigid
12 at all. They're just saying that the request is
13 that you maintain what's already there. I take
14 that's the same thing with Marty. No one is asking
15 that it need be better, or improvements, or that
16 thereof.

17 My question to you guys yesterday was you
18 know do you look in the future to continue to utilize
19 the entire network? I questioned that north/south
20 east/west thing. You said well we are going to
21 continue doing that. And to do that at the very
22 least in my estimation you have to maintain you know

1 what you already have.

2 No one is saying you do anything better.

3 No one said to fix the tunnel, no one said to do
4 those things. You know we're saying to FRA standards
5 continue to operate, you know past the way you've
6 been operating it. I don't think that's inflexible.
7 Not at all.

8 I don't think there's anything to that
9 suggests that we're telling you to do something any
10 different than you're already doing.

11 MR. FOOTE: Well again I go back to this
12 in Norfolk Southern they very strongly yesterday
13 talked about the importance of that line. The need
14 for their main line into Boston to be viable, how
15 important it was to them. We have talked about how
16 as the second largest user of that line, how
17 important it was to us, and the critical nature of
18 that line.

19 You heard the customers telling you how
20 important that line was, that there's no way that CSX
21 can run around, and you know whatever conspiracy
22 theory seems to be in vogue and how we're going to do

1 this. They're on the line, they need the service,
2 they get the traffic from the west coast. You know
3 they want optionality. Do you think that it's you
4 know CP gets treated differently?

5 Does CP run their own? Is CP thinking
6 when they run their own train over to their
7 customers? There are few cars that they move on this
8 line go on the same train where the CSX freight
9 and the Norfolk Southern freight, intermixed into the
10 same train.

11 They get the same level of service. They
12 get the same transit times. They get the same
13 everything. They're --

14 VICE CHAIRMAN PRIMUS: Actually Jim I
15 think you're making Marty and I's point is that
16 you're saying that hey, I don't know why you've been
17 bringing this up because you're running on the same
18 track and doing the exact same thing. I guess what
19 I'm saying is it sounds like almost like this
20 condition is a throw away for them because it's like
21 you are going to maintain, it is maintained.

22 MR. FOOTE: We the largest users of the

1 track will -- all we're saying is yes, we're
2 maintaining the track, and we'll make sure that the
3 service is there, but it shouldn't be artificially
4 imposed at some arbitrary standard because for the
5 one or two cars that CP wants to move on the track.
6 Where did that come from?

7 CHAIRMAN OBERMAN: Jim you know there's
8 more than CP involved here. I think we forget this.
9 If CP never showed up we have an obligation to the
10 public's interest to preserve competitive options in
11 the rail network, and the only reason that we are
12 here talking about conditions is because we acquire
13 of half of the railroads as a competing line.

14 And so that is presented issues, some
15 raised by DOJ, some raised by others, some urging
16 what was described by somebody as a radical remedy of
17 requiring divestiture. And I think what we've been
18 engaged in for the last two days is a very detailed
19 effort to see if we can accomplish everything that
20 would need to be accomplished in terms of competitive
21 options without going to divestiture.

22 So that's why we're talking about it, but

1 I sort of share what Robert just said you know it's
2 like you know it's like people saying the only reason
3 I'm not getting the vaccine is that you made me do
4 it, otherwise I would have gotten it, you know, it's
5 kind of strange approach to not be willing to commit
6 legally.

7 But one you say you're totally committed
8 to doing anyway. But let me go to Karen because she
9 wanted to speak up here a minute a go before we you
10 know.

11 BOARD MEMBER HEDLUND: Yeah it goes to this
12 point that the concern is that, and you may call this
13 a conspiracy theory, but at some point in the future
14 CSX decides it doesn't need the PAS route, and maybe
15 Norfolk Southern doesn't need it either, and you
16 could close down the route and the availability of it
17 just by withdrawing funds for maintenance.

18 So I think that both CP and various
19 members of the Board are concerned that that does not
20 happen. That this alternative route isn't made
21 unavailable basically by agreement between CSX and
22 Norfolk Southern to simply withdraw funds, because

1 it's not in their individual interest to keep it
2 open.

3 MR. MULLINS: Member Hedlund can I address
4 that please?

5 BOARD MEMBER HEDLUND: Yes.

6 MR. MULLINS: I think as I testified to
7 yesterday we've invested 400 million dollars into
8 this line and into this area. I cannot imagine a
9 scenario where NS would say we're walking away from
10 that because we're happy we have two trains over on
11 the CSX line.

12 It's just not going to happen. This is
13 why we carefully negotiated a complex set of
14 agreements that protect our interests, that we are
15 not the party that is coming in to ask for approval.
16 It's CSX coming in to ask for 50 percent approval to
17 buy Pan Am Southern.

18 For us there's no change except for who
19 our partner is going to be. We shared the concern as
20 to who that partner was going to be, so we negotiated
21 these exact protections that you've articulated, and
22 the Chairman has articulated, and others have

1 articulated that you don't want to see that Pan Am
2 Southern line go away.

3 In contrast to this negotiation where we
4 put skin in the game, we've had 400 million dollars.
5 CP's done nothing, no commitments, they're not saying
6 how important that line is. They have their own
7 lines up into the northeast market. It is not to
8 CP's interest. It's to CP's interest to impose costs
9 on us, so that their own lines could be benefitted.
10 That's number one.

11 Number two, CP hasn't made a case. They
12 haven't made a case that the conditions that they
13 wanted are backed by the record. They haven't put in
14 any statements, no verified statements, no rate
15 studies, no diversion studies, no economist study.
16 There is no record on which the Board would legally
17 be able to impose these conditions because they have
18 not shown that this transaction as presented to you
19 is likely and substantially going to lessen
20 competition.

21 BOARD MEMBER FUCHS: I'm sorry Karen.

22 CHAIRMAN OBERMAN: Go ahead Patrick.

1 BOARD MEMBER FUCHS: I do want to make an
2 observation which is in my view the Board does not
3 have a responsibility. It does not have the
4 obligation to maintain all rail lines open, all
5 options open at all times. I think the whole reason
6 why we are under the Stagger's Act structure is
7 because the ICC prevented railroads from adjusting to
8 economic circumstances, including when lines become
9 uneconomical.

10 And what I'm hearing from applicants is
11 you cannot predict in perpetuity every possible twist
12 and turn of the economy, some of which can be quite
13 severe. We have seen commodities come and go. We've
14 seen a spike in frac sand in Wisconsin only to come back
15 down.

16 We see secular trends in coal. All of
17 these things change the economic proposition of lines.
18 And I think to obligate applicants to maintain a line
19 forever with all the economic changes that could
20 happen over time is something that is exactly the
21 type of thing that the Stagger's Act was designed to
22 avoid.

1 And so I just want to make a point that it
2 is important that the Board keep opening competitive
3 options. It is not the Board's job to keep open
4 uneconomical competitive options, and we don't know
5 whether or not this could become uneconomical.

6 I would also add that for unforeseen
7 scenarios in the distant future, unlike the DOJ, well
8 in a different way than the DOJ, the Board has tools
9 at its disposal to protect shippers. Parties will
10 have a common carrier obligation. Parties will have
11 a statutory obligation for reasonable rates and
12 reasonable practices.

13 It is not as though if unforeseen
14 scenarios happen in the distant future, or if future
15 agreements are not as strong as we might hope today,
16 it is not as though the Board under current law is
17 powerless to address those circumstances. So I think
18 it is important to note that what we may be
19 discussing here is a perpetual obligation to commit
20 railroads to potentially money losing lines.

21 CHAIRMAN OBERMAN: Go ahead Karen.

22 BOARD MEMBER HEDLUND: So we should look

1 at this on the assumption that sometime in the future
2 the PAS line may go away because economic
3 circumstances change.

4 BOARD MEMBER FUCHS: I am saying that no,
5 I'm not saying that. I'm saying that the requirement
6 that is being discussed is that the railroads would
7 have to continue to maintain a line to a certain
8 standard even if economic circumstances change. So
9 if all the traffic on this line went away, say there
10 was massive advancement in automation, in dynamic
11 block, in energy usage that completely changed rail
12 routing in this country -- there was complete changes
13 in commodity markets.

14 There's economic shifts 25 years from now.
15 What we are discussing is a requirement that these
16 companies continue to pour money into a line that is
17 not used potentially, and in the unlikely event that,
18 so that's the first thing.

19 The second thing is we are ignoring the
20 economic incentive, and I think that the parties are
21 telling us that the economic incentive they have to
22 maintain the line. CSX is going to use this line for

1 economic reasons. In addition to the costs that
2 Bill mentioned, NS is going to use the line for
3 economic reasons.

4 Their trackage rights over the CSX are not
5 unlimited. And so in fact a good portion of their
6 traffic is going to continue to use the lines. So I
7 say that even as economic circumstances change there
8 will still be that economic incentive that they will
9 have in addition.

10 So I don't think it's necessarily that we
11 should analyze as though it's going away. I think
12 that we should think about the possibility of what
13 would happen if it did.

14 BOARD MEMBER HEDLUND: You know if they
15 wanted to abandon the line they just come to the STB
16 and ask for abandonment.

17 BOARD MEMBER FUCHS: That's exactly one of
18 the protections that would be in place. Exactly.
19 That parties wanted to come in for there would be
20 potentially first of all there would be processes in
21 place. If something were economic parties would be
22 required to continue service at reasonable rates and

1 reasonable practices, and in some circumstances the
2 Board has authorities for people to step in for
3 economic lines that parties for whatever reason are
4 not fulfilling their obligations on.

5 So again the Board has statutory
6 protections for the types of scenarios in the distant
7 future.

8 CHAIRMAN OBERMAN: Well that would be true
9 wouldn't it Patrick, even if we impose the condition
10 that they shouldn't let the quality of the line
11 deteriorate from present day. They could always come
12 in and ask for abandonment.

13 BOARD MEMBER HEDLUND: That's my point.

14 MR. FOOTE: Mr. Chairman again trying to I
15 guess move along the CP mediation here. We've
16 already guaranteed them a rate. We guaranteed them
17 that we won't discriminate against them. We
18 guaranteed them this, that and the other thing.
19 They're guaranteed a right to run on, to get on our
20 train as I said earlier.

21 This is not like it's a CP train, an NS
22 train, a CSX train, this is a mixed train where it

1 would be moving for multiple accounts.

2 CHAIRMAN OBERMAN: We're talking about PAS
3 Jim right?

4 MR. FOOTE: Yes, well that's any railroad.
5 Any railroad. When a car shows up for interchange if
6 the customer wants to move that route we interchange,
7 so if CP shows up they've got a guaranteed rate, and
8 they show up with a car for interchange that's going
9 through a local PAS destination, or it's bridging
10 across, it just gets switched like everybody else's
11 cars onto the train and it goes.

12 They're not discriminated against in any
13 way shape or form. And if we upgrade it to FRA
14 standards so it's three, so that it's upgraded
15 significantly because we have worked our butts off to
16 grow the business on the line, and it justifies the
17 capital investment, then so be it. They get to go on
18 the faster railroad.

19 If the traffic for some reason diminishes,
20 then we would make the appropriate level of
21 investment, probably close to what's there today, and
22 the train would move at a different speed. Their

1 cars move in the same train with ours. They are in
2 no way shape or form discriminated against by moving
3 their freight over that line.

4 VICE CHAIRMAN PRIMUS: Well I guess Jim
5 from my perspective I agree with you wholeheartedly
6 on that. I guess from my perspective I just want to
7 say that you know this condition probably is probably
8 in my mind doesn't make sense. I mean so to add it
9 on because hey, it's still going to be on the same
10 train.

11 It's still going to move the same speed as
12 you're saying and get to the same destination no
13 different than any other car. So they're not --

14 MR. FOOTE: We can't refuse to accept the
15 car at interchange.

16 VICE CHAIRMAN PRIMUS: Yeah that's what
17 I'm saying. I mean they didn't ask you to improve it
18 to FRA like level 3. All they said was you know just
19 keep it the same way, keep it going, and that's good
20 enough. You know like I said I think we're going
21 around in circles on it.

22 MR. FOOTE: Again the big thing here

1 maintain an open gateway was a protection for
2 shippers so that they did not lose competitive
3 options being able to route traffic on an interline
4 basis. Today they have an option to go CP PAS and
5 CSX PAS, and that we would somehow raise the rate for
6 the interchange for CP and economically close the
7 gateway.

8 And so to protect the shipper, not CP, to
9 protect the shipper so they always have their
10 shipping options, we said we won't do that. And
11 that's been the norm for 20 years. So.

12 VICE CHAIRMAN PRIMUS: I don't think
13 anybody disagrees.

14 MR. FOOTE: Right. So and they're not
15 discriminated against in any way, shape or form by
16 saying that we have to have some magical FRA standard
17 to maintain the railroad, or they're dissatisfied.
18 This is just craziness.

19 VICE CHAIRMAN PRIMUS: I would say this
20 and then I'm done because I think we do need to move
21 on. I don't want you guys any longer than we have
22 to. I think I agree with you as I said before, and I

1 don't think they're setting any higher standard, and
2 you've got to jump through more hoops.

3 They're just saying hey if you just keep
4 status quo we're just good. And I don't have a
5 problem with that because you're not asking for it .
6 Just keep status quo. So however you're doing it
7 keep doing it, that's all they're saying. And I
8 don't see how you know that to me is a problem
9 because you can come back and say hey, we've got to
10 stop that.

11 And that's fine too. They didn't say you
12 couldn't come back and say hey we have to do this we
13 have to do that. They just said hey going forward
14 you know we'd like you to keep where it is for right
15 now. And you guys could come back, and you're free
16 to come back and say we're going to change.

17 They didn't say you can't change. Now
18 other people said in perpetuity. I didn't hear that.

19 MR. FOOTE: I think we're talking about
20 imposing a condition to the transaction that's going
21 to maintain, that's going to require us, and I guess
22 the question, the way it's been presented to me today

1 will I agree to an artificial level of capital
2 investment in a line in perpetuity to satisfy CP when
3 CP doesn't want to negotiate anyway.

4 VICE CHAIRMAN PRIMUS: I didn't hear them
5 say in perpetuity. And I didn't hear them say that
6 there's got to be a set amount. All that I heard
7 them say was what I read was they want to continue at
8 the same pace that you guys are going now. They
9 didn't say that you had to raise it. They didn't say
10 you had to spend the same, didn't say you had to go
11 on forever.

12 What they're saying is with this deal
13 there it's not like okay we signed the deal and then
14 all of a sudden we start cutting back. Correct me if
15 I'm wrong, but I didn't hear a limit.

16 CHAIRMAN OBERMAN: Bill hold on a minute
17 Patrick.

18 BOARD MEMBER FUCHS: I do want applicants
19 to -- the applicants have an answer to that question
20 whether or not.

21 I don't think CP set a limit one way or the other did
22 they?

1 MR. MULLINS. No. I would argue this
2 purely as a pure legal matter that if you're putting
3 on a condition that says maintain status quo, I guess
4 it's the definition of what's the word status quo.

5 The status quo allows the current partners
6 of PAS to either increase investment or decrease
7 investment, to increase maintenance, decrease
8 maintenance. If the status quo means that we have
9 the complete flexibility to change the FRA
10 classification of the line to make it better, to make
11 it worse, if that's what the definition of status quo
12 is, which is the status quo today. We have that
13 flexibility. I guess then that's not a problem.

14 BOARD MEMBER FUCHS: I want to come back
15 Marty if I could, if I want to come back because
16 you'll help me understand the point that Karen made,
17 and I just want to clarify, or put forward what I
18 think about it. Just the whole notion that the party
19 could come back for an abandonment.

20 There is a gap between where the line is
21 today and where traffic would need to be for it to be
22 abandoned. And so if traffic gets to a point in that

1 gap, and it's got to be here we would be forcing the
2 parties to operate uneconomically even if they could
3 by reducing capital investment, make it an economical
4 line so it didn't have to be abandoned.

5 So an uneconomical line, it's not a
6 binary, uncomfortable concept. And railroads can
7 demand and scale down investment when it doesn't, and
8 I hate to see that if that the choice is between
9 maintaining something uneconomical up until the point
10 that it has to go away. There's an ocean between
11 where it is and abandonment. That's the only point I
12 wanted to make.

13 MR. MULLINS: Yeah and can I make two more
14 legal points. One, such a condition is not narrowly
15 tailored, that's number one. Precisely for the
16 reasons that Member Fuchs just said. Number two is
17 you would be imposing a condition on Norfolk
18 Southern. We are a non-applicant party.

19 You do not have the legal authority to
20 impose a condition on a non-applicant party such as
21 Norfolk Southern. And so I would caution you as a
22 legal matter if you try to impose a condition that

1 would require that you are imposing a condition on a
2 50 percent owner who is not an applicant in this
3 proceeding.

4 That you do not have the legal authority
5 to do.

6 DR. REISHUS: And I'd like to make an
7 economic point to Mr. Fuchs, that the imposition of
8 some arbitrary level, specific the current level in
9 perpetuity can readily be anti-competitive, can raise
10 costs, does not allow the railroad to adjust the
11 service quality to the traffic. If you report the
12 railroad to basically maintain the railroad to a
13 level greater than the service calls for, that
14 actually is anti-competitive, it's harmful for
15 shippers.

16 Things have changed a lot in the railroad
17 industry over the years I've looked at it, and you
18 know there's been a revival, but you could imagine
19 that the LPG and you know a world with carbon
20 limitations, LPG disappears as an important
21 commodity.

22 Limestone you know for paper making can

1 disappear as an important commodity. You can see
2 shifts in traffic on this line that would cause
3 either more investment or less investment for it to
4 be economically efficient, and imposing artificial
5 conditions over long periods of time you know can be
6 both anti-competitive and economically inefficient.
7 And that was the lessons of the Stagger's Act.

8 CHAIRMAN OBERMAN: I appreciate what
9 you're saying. I do think we need to move on. Let
10 me just make this observation. This discussion, I
11 know it began by CP this morning, but it really is
12 and CP just focused our attention on it. It is not
13 unique to CP. If CP wasn't here I think we'd be
14 having the same discussion.

15 The applicant came in and said we
16 recognize that by taking a 50 percent ownership in a
17 competing line there are concerns about incentives
18 relating to competition. And in response to the DOJ
19 has come in and said if you're concerned about PAS
20 having the same incentive to keep this line up then
21 we suggest A, that we will go into arbitration about
22 the level of investment.

1 Nobody likes that. And the applicant said
2 and if you don't like that we'll appoint a fiduciary
3 to make all the investment decisions on PAS. People
4 like that even less. So I am interested in this
5 discussion, although I think we beat it to death. In
6 the context of how do we substitute independence for
7 this concern about a change in the incentive because
8 of a change in the ownership?

9 So it could be, and we have to deliberate
10 on this, and I do not know where even I would be,
11 much less where the other four members would be, but
12 you have given us PAS to deal with this concern about
13 how to keep the viability up of PAS over the long
14 run.

15 So if you appointed a fiduciary, I find
16 that somewhat awkward, presumably that fiduciary
17 would take into account the concerns that I think
18 Patrick has very reasonably raised about how the
19 markets may change in terms of what to do with this
20 line, but at least there would be a self-interested
21 decision versus a competing line. So maybe that is
22 the way to go if we can't get agreement on some kind

1 of conditions.

2 So I would invite everybody who's at the
3 table and CP, and everybody else to try to come to
4 grips with how we ensure that there isn't this kind
5 of conflict of interest going forward, and what's the
6 best path forward.

7 As I said I would much rather it be
8 something that everybody could agree to, and I'm sure
9 CP is still listening, and Bill I don't -- I'm not
10 going to as I said, negotiate an agreement, but if CP
11 wants to accomplish something maybe they'll be
12 motivated to come to the table.

13 Whether we will impose a condition that's
14 not by agreement I can't tell you today. There's
15 obviously some sentiment for at least coping with
16 this problem. But I think we ought to keep the
17 context in, and while I appreciate very much what Jim
18 said, I for one, and I don't think anybody else on
19 the Board is raising these issues as some kind of a
20 sock to CP.

21 What I am raising these issues in terms of
22 the public interest of having that line stay viable

1 and competitive. I heard a lot from a lot of
2 speakers today, including the two potential owners of
3 the line about the importance of this line. So we're
4 not talking about the STB trying to keep a line open
5 that's more abundant, it's the opposite.

6 But the incentive are changing if this
7 deal goes through. So I think we should move on.
8 There are a couple of other fine points on this that
9 I wanted to cover. Jim in particular I'm very
10 impressed by what you said about the Berkshire Flyer.

11 MR. FOOTE: Yes sir.

12 CHAIRMAN OBERMAN: I'm looking at your
13 letter of January 10, and I just want to be clear if
14 you're willing to engage in this one year limited
15 experiment putting that train on there this year for
16 this limited time period, even without the 1,000 foot
17 track being built.

18 But what I thought I heard you say is you
19 want a commitment from Amtrak to build the 1,000 foot
20 track in the future, or you only want a commitment
21 from them to being at least willing to consider.
22 What are the preconditions to your putting the

1 Berkshire Flyer into operation solely this year for
2 Memorial Day to Columbus Day as you said?

3 MR. FOOTE: Well first of all let's make
4 sure we understand why we need a 1,000 foot track.

5 CHAIRMAN OBERMAN: I'm not debating
6 whether you need it. I just want to get your
7 position.

8 MR. FOOTE: Otherwise they have to park
9 their train on the main line.

10 CHAIRMAN OBERMAN: Yeah I understand.

11 MR. FOOTE: So and then they still don't
12 have any of the arrangements made in New York and all
13 this to actually do this. So what we have said was
14 if you want to do it we do it without deciding for
15 now, park your train on the main line, we'll figure
16 out a way around it.

17 And if you decide then to go forward
18 because this is a test case on their part.

19 CHAIRMAN OBERMAN: Got it.

20 MR. FOOTE: This is not our kind of
21 limiting what they can do. This is a test case on
22 their part. And if they decide to make this a

1 permanent service then they'll have to put the 1,000
2 foot siding in to park the train on when they take
3 people on, take people off, and switch ends of the
4 train and do all that, so.

5 CHAIRMAN OBERMAN: unless as a result of
6 this experiment both of you come to the conclusion
7 that maybe it doesn't need it. Is that a fair
8 statement?

9 MR. FOOTE: We'll we don't decide whether
10 it's needed or not. This is the work of the
11 ingenious marketing strategy of who knows who.

12 CHAIRMAN OBERMAN: I just want to, I
13 understand, and I'm not questioning the validity of
14 your concern about the 1,000 foot track. I just want
15 to make clear because it sounds like you and Amtrak
16 are not apart on this, but I don't want any
17 uncertainty going forward.

18 So if tomorrow Amtrak says as to the 1,000
19 foot track we aren't committing one way or another.
20 We want this year's experiment you'll do the
21 experiment for one year.

22 MR. FOOTE: Yes, yes, sir.

1 CHAIRMAN OBERMAN: Okay. And as to
2 whether to go forward in any future years that's open
3 to this whether Amtrak and you can work out the 1,000
4 foot track, or any other alternative.

5 MR. FOOTE: Yes, and I assume it's became
6 they want to make sure you know from a marketing
7 standpoint that this is a viable service or not, and
8 at the end of the year I guess they will know, or at
9 the end of the season. We've already decided where
10 the track goes, and you know how we're going to put
11 it in, and it's going to need a crossover, and you
12 know, we're all ready to go.

13 I assume it's because they don't want to
14 lay out the money for siding if they don't know
15 whether or not the service is going to be permanent
16 or not.

17 CHAIRMAN OBERMAN: Makes sense. I wanted
18 to get this clear as you just clarified. The second
19 thing that I thought I was clear on, but I've gone
20 back and reread the letter and Amtrak raised that
21 question of uncertainty. The letter that was filed
22 on the 12th by Tony says that CSX agrees to the

1 request that we impose this condition as conditions
2 one through five and seven as requested by Amtrak, as
3 they relate to the PAR system, and the existing CSXT
4 network.

5 I guess I read system to include PAS. I
6 don't know if that's true or not. Amtrak has asked
7 that it in fact these conditions include PAS and PAR,
8 the lingo gets confusing, so can we have some
9 clarification on that.

10 MR. DENTON: Absolutely. Mr. Chairman
11 this is Peter Denton. So the issue here is that
12 we've agreed on behalf of CSX with respect to the PAR
13 system which CSX will own and integrate into our CSX
14 system, and CSX's.

15 At this time we simply can't obligate at
16 Norfolk Southern in order to make a similar
17 commitment to the Pan Am Southern Network. We're
18 certainly willing to have those conversations, but
19 given the kind of late breaking nature of these
20 commitments we wanted to make sure that we were able
21 to do so with respect to CSX with the PAR system.

22 CHAIRMAN OBERMAN: Will you commit to

1 supporting, implementing those conditions on the PAS
2 system to the extent you have anything to say about
3 it i.e. CSX has anything to say about it?

4 MR. DENTON: Right, that's right. We
5 would commit to taking that same commitment and
6 working within PAS to effectuate those. And frankly
7 we're going to have a conversation with Norfolk
8 Southern about this when we have an opportunity.

9 CHAIRMAN OBERMAN: Can you have that
10 conversation before the record closes?

11 MR. DENTON: Sure, yes.

12 CHAIRMAN OBERMAN: I mean I think if we're
13 going to try to make progress in the passenger rail
14 area and not invoke a lengthy legal debate about our
15 conditioning authority, you can work it out that
16 would be good. They have the letter apply to PAS as
17 well as to PAR system, that's really what we're
18 focused on, and I don't think Amtrak asked for
19 anything more than what you said in your letter, they
20 just wanted it to apply to everything.

21 MR. DENTON: Agreed.

22 CHAIRMAN OBERMAN: So --

1 VICE CHAIRMAN PRIMUS: And Marty I would
2 second that. Also hope is that again the party,
3 Norfolk Southern too would agree to sit down and make
4 sure of that since they're a part of PAS to hammer
5 that out.

6 MR. MULLINS: Mr. Vice Chairman I can
7 absolutely commit to you that we are more than
8 willing to sit down and have good faith negotiations
9 and discussions on this.

10 VICE CHAIRMAN PRIMUS: Thanks Bill.

11 MR. MULLINS: Um-hmm.

12 CHAIRMAN OBERMAN: All right. Is there,
13 so first of all Jim, Matt, Bill, do you have anything
14 more to say to us by means of rebuttal?

15 MR. MULLINS: The only thing I'd have to
16 say is I owe Member Fuchs an explanation on transit
17 times, and I would say that the Hub representative,
18 Mr. Paperiello I believe, he knows his business
19 extremely well so the filet toupee operation adds a
20 day or two each way to the train, so by moving these
21 trains that's the types of savings that you are going
22 to have, and that was entirely consistent with what

1 he said. So that's the only thing I think I owed on
2 this record.

3 And I have just appreciated the
4 opportunity and we will definitely sit down Mr.
5 Chairman, Vice Chairman and the members, commit to
6 that on behalf of NS. And I thank you for the
7 opportunity to appear.

8 CHAIRMAN OBERMAN: The only thing I would
9 say Bill is that I hope some day somebody comes up
10 with a 300 million dollars that I never have to hear
11 filet and toupee again, because I find it a very
12 disturbing phrase.

13 MR. MULLINS: Yes agreed.

14 CHAIRMAN OBERMAN: So is there anybody
15 else on your team, and of the three of you that need
16 to say anything? And is there anybody else on the
17 Board who wants to say anything at this moment?

18 VICE CHAIRMAN PRIMUS: I just want to
19 thank you know all three groups. I think everyone
20 made a great presentation. I appreciated the back
21 and forth. I think as Marty said we did learn a lot.
22 I learned a lot certainly. It's my maiden voyage

1 with these hearings, and so I appreciate everybody's
2 time and indulgence with the questions, thank you.

3 CHAIRMAN OBERMAN: All right. I'm going
4 to if I could indulge people here, and I know Bill's
5 trying to get out of here, but there's so many
6 things, and my desk is so filled with notes. I would
7 like to take a 10 minute recess just to make sure
8 that tomorrow morning I don't say oh my goodness, I
9 forgot to ask one more question.

10 Can I invite everybody else to do the same
11 thing. We'll come back into session and probably
12 close this hearing with the understand I think, I
13 can't remember the date we said the record was going
14 to stay open until the 21st I believe, which gives
15 people time to get some of these agreements done if
16 nothing else.

17 So let's do that. If that's comfortable I
18 see people nodding, it is 5:49. We will come back at
19 5:59 and hopefully close this hearing. Thank you
20 very much.

21 (Break)

22 CHAIRMAN OBERMAN: All right we are back

1 on the record. I for one have no further questions,
2 and if no other Board member has any further
3 questions, or no member of the team of Foote,
4 Mullins and Walsh, new law firm, has anything to say
5 I think we can wrap this up.

6 MR. MULLINS: We would just thank the
7 Board for all our time today.

8 CHAIRMAN OBERMAN: Well let me say this.
9 I'll take the lead on this, but I'm sure each Board
10 member will want to say a few things. I want to
11 thank everybody for their participation. This has
12 been a very intense two days. I hate to say it, but
13 I think you can all anticipate that this is the way
14 this Board operates. We are through, intense, we
15 want to get to the bottom of every issue, and you
16 have all been very responsible, and thorough in
17 responding to us.

18 So I for one appreciate it. I
19 congratulate everybody who has participated in this
20 hearing, and once I think other Board members have
21 their final say here we'll close this hearing. And I
22 am right that we will keep the record open until

1 January 21. If anybody discovers something that they
2 feel needs really just needs to be corrected, or to
3 respond to something new that you hadn't heard
4 before, but really we don't want anymore new
5 arguments.

6 With that Michelle it looks like you are
7 seeking to be recognized. And I didn't want to cut
8 you off if you had another question.

9 BOARD MEMBER SCHULTZ: It's not a question
10 Marty. I'm sorry to have jumped in.

11 CHAIRMAN OBERMAN: No, no that's okay.

12 BOARD MEMBER SCHULTZ: I just wanted to
13 echo your comments on this of the presentations of
14 all the parties, and thank you for all the hard work
15 that's gone into this. But I did want to take the
16 opportunity to underscore what I believe Chairman
17 Oberman said, and so has Member Fuchs, which is that
18 I too agree that the best outcome for the network
19 will be if the parties themselves can actually hammer
20 out the terms of an agreement in this instance.

21 CHAIRMAN OBERMAN: Thank you Michelle. Do
22 other Board members have any closing remarks? Karen?

1 BOARD MEMBER HEDLUND: I want to thank you
2 all for the extraordinary level of discussion today.
3 It was enormously enlightening and intellectually
4 stimulating. You know this is the reason I wanted to
5 join this Board, and so I just want to thank you for
6 everybody's efforts today, the Chairman and my fellow
7 Board members, but also all the participants. It was
8 just a real extraordinary experience, so thank you.

9 CHAIRMAN OBERMAN: Karen I'm glad to hear
10 you say that because I was afraid you were going to
11 come on and say you were going to ask the Senate for
12 a recount. All right.

13 VICE CHAIRMAN PRIMUS: Hey Marty I do want
14 to come back and say I know I thanked the
15 participants for their time and attention, and it was
16 a great and intense two days, but I think none of it
17 would be possible without the team, you know at the
18 STB.

19 Matt, I want to thank you for doing that.
20 You know we share all the IT people for making I mean
21 we didn't have one glitch. I'm really happy, you
22 know proud of that, you know. Our teams attorney

1 adviser Elizabeth you know on my team and others who
2 helped prep us and get us ready.

3 You know all the people who are on camera,
4 I mean even folks on the other side, you know, all
5 their teams as well. It was a well oiled machine on
6 both sides. I think it went well, and you know and
7 especially I'll leave the best for last. Marty I
8 think you did a fantastic job of moderating and
9 keeping us you know in line and keeping us from going
10 off the rails, and yes I used a pun.

11 But it's been an honor to be able to be a
12 part of this hearing and I want to thank you for your
13 leadership you know and chairing and bring it
14 forward, so thank you.

15 CHAIRMAN OBERMAN: Thank you. Much
16 appreciated. Patrick you're going to get the last
17 word.

18 BOARD MEMBER FUCHS: No I'll leave that to
19 you Marty. But my colleagues said it extremely well,
20 so I'll just say excellent testimony. I want to
21 especially recognize the witnesses that had to adjust
22 their schedules as a result of the inquiries, much

1 appreciated, and value everybody's input.

2 And I do want to thank my colleagues for
3 the wonderful questions. Staff and IT were
4 phenomenal for throughout the two days, my attorney
5 advisor Lisa Novins was excellent as always, and Mr.
6 Chairman you've pledged transparency, openness and
7 rigorous debate when you took the gavel, and I think
8 you've fulfilled that the last two days, so great job
9 to everybody.

10 CHAIRMAN OBERMAN: Thank you much, and I
11 will close by saying there are too, it's like the
12 Academy Awards, there are too many staff people and
13 support people to thank and naming them all we'd be
14 here for another hour. But I'm going to single out
15 Adam Kress.

16 If you think I'm a tough questioner it's
17 only because Adam told me what to ask, not entirely,
18 we worked on it together, but he has worked vitally,
19 and I'd like to single him out. But really
20 everybody, you have no idea all of you out there in
21 Zoom land the amount of work that our staff has put
22 in leading up to the hearing and over the last two

1 days, and we couldn't function without you. They're
2 fantastic.

3 So thank you all. This hearing is closed,
4 have a good weekend.

5 (Whereupon the hearing adjourned at 6:06
6 p.m.)

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