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Case: Proposed CP/KCS Merger



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SURFACE TRANSPORTATION BOARD
Hearing on the Proposed CP/KCS Merger
Docket No. FD 36500
REMOTE PUBLIC HEARING

Thursday, October 6, 2022

10:00 a.m.

Surface Transportation Board
395 E Street, S.W.
Washington, DC

The above-entitled matter came on,
pursuant to notice, at 10:00 a.m., Chairman Martin
Oberman presiding.

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

2 CHAIRMAN OBERMAN: Good morning everyone,
3 and welcome to the sixth day of hearings on the
4 proposed merger between CP and KCS, Docket 36500. A
5 couple of introductory remarks and observations
6 before we get underway. Number one, before we get to
7 CP/KCS's rebuttal case, we have one witness who
8 because of our own modifying the schedule to
9 accommodate people was unable to testify before this
10 morning, and so we're going to hear him first.

11 It's a very short presentation, and then
12 we will move right into CP/KCS. I have noted some
13 observation out there in commentary land about how
14 long these hearings are taking, but I'd like to
15 re-emphasize that this Board is committed to as much
16 openness and transparency in our process as possible.
17 We had a large number of interested persons who
18 wished to be heard.

19 It was not my view that any of them should
20 be cut -off, and that we are a public agency. This
21 is a transaction which could affect the entire
22 country, or a good part of the country. And it's

1 our duty as a public agency to hear from people. And
2 if it took us six days to adequately hear from
3 people, then that's what it takes.

4 Democracy as they say is sometimes messy,
5 but this is our process and our commitment, so I
6 would never cut people off who want to be heard
7 particularly on something as significant as this
8 proposed merger. So, with that we will continue in
9 that vein, and we will conduct this hearing to its
10 fullest extent until we have the information we need,
11 until everybody who needs to be heard is heard from.
12 We are not going to open it up of course beyond the
13 people who've already asked to be heard and have
14 testified.

15 So, with that our first witness today will
16 be Rob Ritchie from Ingredion. Rob are you there?

17 MR. RITCHIE: I am. Can you hear me,
18 okay?

19 CHAIRMAN OBERMAN: Yes.

20 MR. RITCHIE: Great. Well good morning,
21 everyone, and good morning, Mr. Chairman. Thank you
22 for the opportunity to speak with you today. As

1 mentioned, my name is Rob Ritchie. I'm the Regional
2 President for our Mexican, U.S. Canada sweetener
3 industrial business, concentrates in global core
4 strategy for Ingredion, Incorporated.

5 I'm here today to express Ingredion's
6 support for this CP/KCS combination, which we believe
7 will enhance competition, provided expanded supply
8 chain options, including expanded single line
9 service, and drive other operating efficiencies for
10 Ingredion.

11 Ingredion is a global ingredient solution
12 company making sweeteners, starches, and unique
13 ingredients from plant sources such as corn, tapioca,
14 rice, sago and potato. Ingredion innovates for
15 almost 60 industry sectors, spanning more than 40
16 countries.

17 In North America we have plants and
18 facilities in the United States, Canada and Mexico.
19 One of our key assets is located in the Chicago area,
20 in Bedford Park, Illinois. The facility in Bedford
21 Park, also known as Argo, brings in significant
22 amounts of corn for processing and starch sweeteners

1 and other foods and industrial ingredients.

2 Our experience with CP over the past five
3 years has been that the company is a very
4 customer centric supplier, focused on innovation to
5 assist us in getting our product to our customers
6 more reliably. The Argo facility is served by
7 multiple rail carriers, and CP must continuously
8 complete for Ingredion's business, which it does
9 successfully and effectively.

10 We fully expect that this competition will
11 continue post transaction. Efforts to connect
12 Ingredion directly to the CP origination elevator
13 network have been welcomed, and sign of CP's
14 collaborative approach to growing our business. CP's
15 longer grain train model supports one of Ingredion's
16 core principles, which is operational excellence.

17 We also ship finished starch and
18 sweeteners on CP from our Argo facility and primarily
19 in private cars. CP's operational focus helps us to
20 reduce ingredient's wheat costs by shipping longer
21 trains at faster speeds with tighter car cycles. We
22 are impressed that CP's strong focus on safety and

1 importance of safe sustainability.

2 The drive for sustainability is a key
3 tenant for Ingredion, and our goals are specific and
4 aggressive in this area. We recognize CP as a like
5 minded organization, and we're excited to see CP's
6 safety and sustainability efforts roll out to a
7 larger rail network.

8 We believe it is important that the Board
9 support improved freight arteries serving the vital
10 Chicago region. CP has provided us with good
11 service, but it's reach is limited today as its lines
12 only go as far south as Kansas City. Currently, for
13 Ingredion, shipments to destinations beyond Kansas
14 City and the U.S. and Canada, CP must interline with
15 other railroads.

16 We know from experience that a single line
17 rail service options are far superior. KCS and CP
18 have had a cooperative relationship in the past, and
19 CP/KCS joint routes are among our transportation
20 options. However, as separate companies they have
21 not been able to offer the kind of seamless, single
22 line service most needed from our transportation

1 providers.

2 Therefore, this transaction will improve
3 Ingredion's transportation options to the
4 marketplace. Ingredion also has an extensive
5 Ingredion ingredient manufacturing in Mexico, with
6 facilities served by KCSM at San Juan Del Rio and Tlalnepantla and --
7 . These facilities combined receive upwards of
8 18,000 railcars per year of U.S. corn.

9 Origination optionality for that corn is a
10 key factor for this, particularly when there are crop
11 production challenges in regions where the corn
12 typically originates. The extended single line haul
13 reach that will be created with a combined CP/KC into
14 corn production regions into Iowa and Minnesota, will
15 create supplies chain diversity and efficiency that
16 could potentially be beneficial to our model.

17 From our perspective the transaction
18 promises to provide improved service options and
19 transportation competition in the markets we serve.
20 CP has a proven record of accomplishment for
21 operational excellence, and we expect that to
22 continue with the seamless integration of the CP/KC.

1 We're excited about the transaction because it will
2 enable a combined CP/KC to provide new, more
3 efficient and reliable sales service options.

4 Ingredion will benefit from this
5 strengthened competition between CP/KC and other
6 large rail carriers, and trucks that service our
7 markets. For these reasons, Ingredion, Incorporated
8 is voicing strong support for the combination of CP
9 and KCS. We respectfully urge the STB to approve
10 CP's acquisition of KCS as swiftly as possible so
11 that we and other stakeholders can realize the
12 end-to-end benefits of the new CP/KCS. That would
13 conclude my comments.

14 CHAIRMAN OBERMAN: Thank you Mr. Ritchie.
15 Appreciate it. Are there any questions for Mr.
16 Ritchie?

17 BOARD MEMBER HEDLUND: I have one. Mr.
18 Ritchie you mentioned your facilities in Mexico, and
19 the advantage that KCS/CP would have gotten that
20 product north of the border. Do you currently
21 interchange with any other railroads at the border?
22 At the Mexican border, in particularly in Laredo?

1 MR. RITCHIE: Specifically, right now
2 it's with KCS only, so it would be specifically with
3 the KCS.

4 BOARD MEMBER HEDLUND: Thank you.

5 MR. RITCHIE: You're welcome.

6 CHAIRMAN OBERMAN: Any other questions?
7 All right. Mr. Ritchie, appreciate it, and
8 appreciate your forbearance and willingness to stick
9 it out and provide us with your views when you
10 could, and I happy with --

11 MR. RITCHIE: Enjoy the rest of your day.

12 CHAIRMAN OBERMAN: All right. Well, I'm
13 sure it will be very, very pleasant, so thank you.
14 All right. With that we are going to begin CP's
15 reply or rebuttal, I'm not sure which we properly
16 call it, and that is the last presentation for these
17 public hearings.

18 I do want to say by way of scheduling we
19 will be breaking at noon Eastern for one hour, so I
20 think we will be able to go for the next hour and 20
21 minutes without a break unless somebody absolutely
22 needs one, they'll let me know, and then we will

1 reconvene at 1:00 Eastern, and keep going until we
2 finish.

3 So, I have the following people listed. I
4 see that you all seem to be gathered in the same
5 place. You can tell me that but let me read off the
6 names to see if everybody who says they're going to
7 be present is here. Keith Creel, Pat Ottensmeyer,
8 John Brooks, James Clements, Raymond Elphick, John
9 Orr, Robert Majure, David Meyer and is everybody
10 present?

11 MR. MEYER: Not everybody is present.
12 Good morning, Mr. Chairman. Just a quick logistical
13 note on our end. Mr. Orr is in another location in
14 Boston where he is attending a program that he could
15 not be released from during the case. He will have
16 availability, it may line up with your break, between
17 I think it's 12:15 Eastern and 1:15 Eastern, and then
18 he'll be available after 2:40 if we're continuing
19 after 2:40.

20 We've structured our presentation to not
21 require his presence, so when we get to the issues
22 that he's familiar with, particularly the shared

1 lines in Texas, and other operational issues you know
2 we'll proceed and hope that it lines up with his
3 availability, but he will be joining us for periods
4 of time, and we'll be able to answer questions.

5 CHAIRMAN OBERMAN: So, for the record
6 David, John Orr is not online right now.

7 MR. MEYER: That is my understanding.

8 CHAIRMAN OBERMAN: All right. So, when,
9 if and when he shows up, just so that the court
10 reporter has a record, we should note for the record
11 that somebody else is appearing. But all of the
12 other names that I read off are present?

13 MR. MEYER: Here.

14 CHAIRMAN OBERMAN: All right. And I think
15 our court reporter has a question.

16 COURT REPORTER: Yes, excuse me, I can't
17 see your faces, so if you would do me a favor and
18 please let me know who you are when you're speaking
19 so I have the right name with the right
20 presentation.

21 MR. MEYER: We will certainly try to do
22 our best to remember to do that, and we will not

1 object if you ask us and remind us on those occasions
2 where we forget.

3 COURT REPORTER: All right, thank you.

4 CHAIRMAN OBERMAN: It does look like a
5 very large roundtable. I assume that it's symbolic
6 of your commitment to an inegalitarian operation.
7 So, do you want to start off David?

8 MR. MEYER: I may, if I may make just one
9 other logistical note before we start, and that is
10 because of the remote location, and the logistics
11 associated with that, we haven't been able to get
12 each of you members a binder containing our slides.
13 And so, we are going to do our best to you know, cast
14 I think is the right technical term, the slides into
15 this visual screen at the appropriate time.

16 But what we're going to try to do, and our
17 goal today really is not so much to present to you,
18 as to have a conversation about the issues that
19 you're interested in exploring further. So, when we
20 put up a slide, unfortunately it makes the view of us
21 and our view of you go away for the most part.

22 So, there may be times when you put up a

1 slide and you take it down so that we can continue
2 the interaction, but if there's a slide you want us
3 to put back up just let us know, and we'll go find it
4 and put it back up on the screen.

5 CHAIRMAN OBERMAN: All right.

6 MR. OTTENSMEYER: Just one David, I don't
7 think he mentioned Bill Mullins.

8 CHAIRMAN OBERMAN: No, I did Pat.

9 MR. OTTENSMEYER: Okay.

10 CHAIRMAN OBERMAN: I did mention Bill, but
11 Bill seems to be one of those who is off the screen.

12 MR. MEYER: We do have a couple of views
13 of the table. There's one on the right side, and
14 there you see Bill, and there's one on the left side
15 that includes Dr. Majure. And I think we can pan out
16 if necessary.

17 CHAIRMAN OBERMAN: All right.

18 MR. MEYER: We'll play it by ear as we go.

19 CHAIRMAN OBERMAN: All right. Well, I can
20 see that everybody is there, so that would seem to
21 work David pretty well.

22 MR. MEYER: Excellent. And with that I'll

1 hand it to Mr. Creel.

2 MR. CREEL: Okay. Good morning, and we're
3 honored and eager to have this opportunity again this
4 morning to be back before the Board to answer
5 questions, number one that you've raised previously
6 with us, as well as those that get developed today,
7 and also to respond to what we've heard from other
8 witnesses during the testimony that's occurred over
9 the past week.

10 And Chairman Oberman I'd like to echo your
11 comments and the Board's comments relative to the
12 process itself that were made Tuesday morning and
13 again this morning. We are extremely pleased that
14 the Board has taken the time to engage with each of
15 the hearing participants to probe the areas of
16 interest, and/or concern, and the responsive to what
17 we've heard at the time that we have with the Board
18 today.

19 So having sat through the previous five
20 days of testimony I can tell you that I'm even more
21 excited about our transaction and the opportunities
22 that it will create for all stakeholders. And I'm

1 even more confident than I ever have been that the
2 arguments made against it by our rivals have no
3 merit. The truth matters.

4 And I saw the Board's thorough process to
5 allow it to be heard. That said, we have listened
6 carefully, and in our presentation today we will
7 outline what we're prepared to do to address the
8 remaining concerns. David will walk you through the
9 framework in our presentation and some of the legal
10 issues that were raised, and my team and I will jump
11 in to address the specific topics and respond to the
12 Board's questions throughout our rebuttal today.

13 MR. MEYER: Okay. Thank you, Keith. So
14 almost everything you've heard from the condition
15 seekers and the other commenters over the course of
16 these hearings is extensively and fully addressed in
17 detail in not only the application, but the July
18 12th rebuttal filing, and the other submissions we've
19 made on the record in this case.

20 One of the things we'd like to do is
21 commend that record to you. We can tell from your
22 questions that you and your staff have poured over it

1 carefully. I think the answers to almost every
2 question ultimately are found in that record. We're
3 going to do our best to speak to them, and to explain
4 where those facts are, and how they line up with the
5 arguments that have been made.

6 Our goal today as Mr. Creel indicated, is
7 to try and hit the highlights of the topics that have
8 been raised during the past week and respond as
9 specifically as we can to the points we've heard, and
10 the questions that the Board Members had of others,
11 and how those questions were dealt with by others.

12 We think it's really important here that
13 the Board look at the facts as Mr. Creel said, the
14 facts matter, and not be misled by some of the
15 rhetoric by some of our opponents. So let me start
16 by giving you a brief roadmap of how we're planning
17 to proceed today, so the topics we're trying to
18 address in the order, so that you'll have an idea of
19 what's coming and when.

20 Obviously, we're delighted to respond to
21 any questions you have at any time, so we're not
22 going to dictate any kind of order. It's your time

1 with us. But we're planning to start with what we
2 heard about the benefits of the transaction,
3 including from the shippers that we heard from this
4 morning, again.

5 Second, we're going to address the issues
6 that have been raised relating to our service, and
7 alleged operational impacts, which we see as closely
8 intertwined I think, and again, I said this last
9 week, but we're only going to succeed if the service
10 we provide is good, and we think the operational
11 impacts that folks fear creates a self-defeating
12 situation even for our own plan's benefits.

13 But where we're going to start is to talk
14 about the planning that went into the applicant, and
15 to the service design. Talk a bit about our general
16 service assurance related commitments. Then we're
17 going to dive in and focus on Chicago. And then
18 we're going to dive in and focus on Texas. Shared
19 lines in Texas and Houston, in particular.

20 After that we plan to address the vertical
21 competitive issues that were discussed last week, and
22 a little bit on Monday, particularly around Laredo,

1 but you know the issue, the gateway issue is to some
2 extent a general one. We're going to explain the
3 merits of the -- of our view of the merits of those
4 issues, and we think that's the place to start and
5 end frankly, that there's no evidence, no case made
6 that there's going to be likely competitive harm from
7 the transaction.

8 And as a result of that there's just no
9 occasion for any condition. Now we're not walking
10 away from our gateway preservation commitment, not at
11 all. We offer that as a reassurance to stakeholders.
12 It's just part of our commitment about what we're
13 going to be about.

14 We're also going to spend a little bit of
15 time talking further about the anti-competitive
16 nature of the proposals at BNSF, UP and you heard
17 from the shipper groups had put forward regarding
18 mileage pro-rate regulation.

19 Four, we're going to spend a few minutes
20 addressing the TIH tariff issues that Mr. McBride
21 discussed on Monday, and particularly the desire to
22 roll back the tariff that he says is already illegal

1 that CP has in the marketplace.

2 Fifth, we're going to address some of the
3 requests by Class 1 railroads in this case that we
4 think truly have no relationship to the issues in the
5 case at all and are really only examples of
6 competitors using this proceeding for I think the
7 word I would use is grabs, for rights or assets that
8 they covet, but they didn't acquire at the
9 marketplace.

10 So, we'll spend some time with CN's
11 divestiture proposal. And then we'll spend a very
12 little bit of time talking about Norfolk Southern's
13 trackage right requests. And then finally, we'll
14 address some of the environmental comments I think
15 you've heard over the course of the week,
16 particularly as they regarded the area around
17 Chicago, and the Houston area.

18 And you'll hear from Mr. Clements about
19 that. And then at the very end we'll wrap up by
20 trying to summarize once all of the commitments we've
21 made in this case that we think are those that we
22 would accept conditions. We don't think conditions

1 are necessary for this transaction to be in the
2 public interest, not at all, but we are certainly
3 willing to live up to our promises. So with that
4 I'll turn it over to Mr. Creel.

5 MR. CREEL: Okay thank you David. Before
6 we dive in I think it's important that we set the
7 record straight on the severity via -- that enter the
8 Class 1's railroads, suggested to the Board last
9 week, suggesting that they were at the proceedings
10 only because somehow we at CP or KCS didn't do what
11 was required which, in their view, was to come down
12 with our hat in hand, and negotiate acceptable
13 concessions by their definition.

14 And I can tell you we take offense to
15 that. We've engaged reasonably the reasons we've not
16 made more commitments or entered more agreements
17 addressing the concerns of straight boards. The same
18 reason why conditions, beyond those that we will
19 explain that we're willing to accept, which we'll
20 elaborate on, are not warranted.

21 The record does not support the concerns.
22 Addressing them would affirmatively harm the public

1 interest by interfering with our competition and our
2 investment. This is about competition, not giving
3 into competitors seeking protection that are
4 unwilling, and I would argue in some cases, perhaps
5 not even equipped to complete.

6 MR. MEYER: Okay. Thank you for that.
7 So, I'm going to start with benefits. If we could
8 cue the next slide. Just to review briefly. I don't
9 want to belabor it. You heard from a number of
10 stakeholders at these hearings who are real shippers
11 in the marketplace, who are creating the kind of
12 competition and single line service that the
13 transaction will unlock.

14 Current themes, the same themes from all
15 of them, covering a wide array of commodities, a wide
16 array of geographies. I speak not only to the quest
17 for the benefits of the transaction, but they
18 validate their experience with CP living up to its
19 promises, as Mr. Irving explained in regard to its
20 recent -- CP's recent CMQ application.

21 These benefits will support investment,
22 provide better service, allow shippers to reach more

1 markets, support economic growth, all of the things
2 in our case you heard echoed by the shipper
3 testimony.

4 What did we hear from the adversaries? We
5 heard from the adversaries with some of the same.
6 They all want something out of this transaction, but
7 they acknowledge, you heard from BNSF that single
8 line competition is stronger competition.
9 Transactions create single line benefits. They know
10 this from their own experience of course, in merger
11 after merger.

12 They have to acknowledge it. Our
13 application and our supporting materials, or rebuttal
14 materials in July withdrew some of those
15 acknowledgements. CN and NS, both last week made
16 clear that what you need in order to align interests
17 to support investment is ownership right?

18 So being separate companies doesn't work
19 to unlock the kind of investment that we're planning.
20 We heard it directly from Canadian National and
21 Norfolk Southern. Many of those same railroads
22 compliment Canadian Pacific as a great operator, and

1 a railroad that does what it promises.

2 And then finally we heard from
3 Commissioner Bensell of the Maritime Commission. He
4 has a certain perspective about the role of Canadian
5 investment imports, and what U.S. ports need to do
6 to step up, and we understand that, and we appreciate
7 that and we're of course not going to stand in the
8 way of any efforts by U.S. ports to do a better job
9 of competing in the marketplace.

10 But I think what came through to me was
11 what he said about the ability of the west coast
12 ports to handle more traffic. What he said was it's
13 just not there. That to me underscores the value to
14 the U.S. public interests of our improved
15 transportation link between -- and the U.S. Midwest,
16 which will allow U.S. consumers to bypass congestion
17 and have another alternative, and another pipeline
18 for important import commerce.

19 All of these benefits that you've heard
20 about have a direct nexus to the U.S. public
21 interest. Member Hedlund you asked a very good
22 question last week about what percentage of our

1 anticipated new traffic arises from the transaction
2 involves movements to or from the United States as
3 distinct from movements from Mexico and Canada. And
4 the answer is on this slide, and it's over 90 percent
5 in every case. So, there are three categories of
6 traffic gains that we anticipate, so the first
7 category on the slide is traffic shifting from one
8 rail route to a CP/KC railroad, or a longer CP/KC
9 railroad.

10 In 93 percent of those cases that's
11 traffic to or from the United States. Another group
12 of traffic opportunities that was testified to in the
13 application principally by the CP and KCS marketing
14 witnesses, Mr. Laubach and Mr. Naatz, and then the
15 Board echoed in their rebuttal verified statement are
16 new growth opportunities, traffic that's not
17 currently moving in identifying new destination
18 payers as we're generating new traffic, new lanes by
19 developing new better alternatives.

20 98 percent of those opportunities that
21 you've identified involve traffic that either
22 originates in the United States or terminates in the

1 United States. And then finally we anticipate
2 taking trucks off the highway and attracting trucks
3 onto our intermodal services, our new intermodal
4 services.

5 100 percent of our anticipated gains there
6 involve traffic that's moving to or from the United
7 States. But turning to the next slide I just want to
8 emphasize that the U.S. public interest has benefited
9 by 100 percent of the traffic gains that we
10 anticipated that the transaction would generate, even
11 if it happens to be attracting traffic that's moving
12 between Mexico and Canada, and just passing through
13 the United States.

14 And why is that? Because those gains will
15 reflect and support a more competitive North American
16 rail ecosystem. It will support a stronger CP/KC
17 network, the investment in a more robust
18 infrastructure by CP/KC. Those trains will generate
19 new jobs, locomotive engineers and the other
20 employees who support that traffic will be U.S.
21 employees in most cases.

22 Obviously there will be employees in

1 Mexico and Canada as well. That traffic, if there
2 were trucks taken off the highways that are moving
3 between Mexico and the United States, well those
4 trucks won't be clogging U.S. highways. It's a U.S.
5 public benefit.

6 All of this will support USMCA trade
7 agreement, and continent-wide economic development.
8 And wherever that economic development occurs it's
9 good for the U.S. economy and U.S. consumers, and the
10 North American supply chain and its resiliency. So,
11 I think the right perspective here is that everything
12 that we're going to be doing to create a more
13 competitive rail network is in the United States,
14 it's a citizen of the United States, it's a
15 participant of the United States, transportation
16 ecosystem.

17 Everything that touches that is in the
18 U.S. public interest. But I want to flip to the next
19 slide here and just emphasize a point. We heard a
20 little bit of criticism from some of our fellow
21 railroads about our benefits being private revenue
22 gains, and that's just not the case. Sure, the

1 revenue that we gain has a private benefit associated
2 with it.

3 It is an additional revenue that goes into
4 the company, but that revenue both reflects and
5 supports public interest benefits. It reflects them
6 because the reason we're gaining that revenue is by
7 competing more effectively and offering better
8 options to customers than they have today.

9 All of those revenue gains are a measure,
10 one way of measuring the fact that we will be
11 competing more strongly and bringing benefits to
12 customers. That's all in the public interest.
13 There's another respect though in which everyone
14 benefits from this. It's not just the shippers who
15 move their traffic over the CP/KC routes, it's all
16 the shippers in all of the markets that we're going
17 to be serving because what we're going to be doing is
18 sparking a competitive response by the other
19 railroads, and the other transportation providers in
20 all of those markets.

21 By us competing more strongly, even if we
22 don't win, even if we don't gain revenue in any

1 particular lane, shippers, customers of the
2 railroads, customers of the trucks will benefit
3 because everyone is going to have to sharpen their
4 pencils and do better and provide better service and
5 lower rates, and all the things that shippers desire.

6 So then turning to the next slide, I just
7 want to make a note about the fact that as we see it,
8 the competitive response to CP/KC has already begun.
9 Mr. Chairman, you mentioned this episode in last
10 week's remarks that you had Union Pacific in front of
11 you. And I think you described this as retaliation.
12 It's not exactly how we see it.

13 We don't see it as retaliation so much as
14 a reflection of two things. First, it's a reflection
15 of the fact that Class 1's understand that CP/KC
16 coming on the scene with stronger, competitive
17 options is going to require them to adjust, make
18 changes. This is the kind of marketplace response we
19 may not have asked for, but we understand.

20 It's UP seeing that it's going to need to
21 be sharpening its own pencils and doing things
22 differently. The other thing, unfortunately, that

1 this episode reflects in my opinion, relates to a
2 separate issue in this case. But it's pretty obvious
3 that the same competitors who want us to retain every
4 single option that they benefit from today, are
5 perfectly willing to take down options for customers
6 themselves.

7 So, customers aren't going to have access
8 to the empty boxes moving in interchange from Mexico
9 onto CP routes in Canada, across the UP system and on
10 the CP routes in Canada, or on to KCS in the United
11 States, and across the CP routes in Canada.

12 We're not saying that's a problem, but
13 it's an interesting inconsistency with the desire of
14 UP and BNSF in particular, that every single option
15 needs to be preserved for them to participate in all
16 of these markets.

17 CHAIRMAN OBERMAN: David? David?

18 MR. MEYER: Yes sir?

19 CHAIRMAN OBERMAN: I would only make one
20 observation. Reflecting on my previous musings that
21 perhaps the STB ought to ban the use of euphemisms in
22 our hearings, you're referring to this as an

1 interesting -- what did you just say was an
2 interesting development.

3 MR. MEYER: Inconsistency I believe.

4 CHAIRMAN OBERMAN: Interesting
5 inconsistency falls under my potential ban on
6 euphemisms but go ahead.

7 MR. MEYER: I stand corrected. So that's
8 where I will transition to the discussion that we
9 want to have about a planning that we undertook with
10 respect to not only the operating plan, but all of
11 the ordinary course work that we're doing to plan for
12 this transaction.

13 There were some issues raised over the
14 course of the week, and Mr. Elphick and Mr. Clements
15 will address them.

16 MR. CLEMENTS: Yeah, thank you David, and
17 I'd start by saying that you know the criticism,
18 really there's no issue around what we've done in
19 terms of the planning and the economic data that
20 we've supplied. We've endeavored in all of our
21 working papers, and everything that we had submitted
22 to give a reliable accounting and estimate of what

1 the impact of the transaction would be.

2 I know that Canadian National raised some
3 issues that I would describe as immaterial and minor
4 in terms of the methodology, you know, particularly
5 criticize the rate at which the benefits would accrue
6 in year one, and what that mean relative to the
7 operating ratio and other factors related to the
8 combined CP/KC.

9 And the first thing I'd just comment on is
10 that when you looked at the benefits that were
11 described in the CNIC, they had a similar profile in
12 terms of how the benefits on the operating expenses
13 reductions would accrue, and when they would accrue.
14 So, we're not putting something out there that is
15 unprecedented or unusual.

16 Our modeling is consistent with how we
17 would see other transactions in the past generate
18 benefits. And I want to refer if I can briefly to a
19 slide that Mr. Elphick had shown previously,
20 outlining a train pair, 174-175, Cassandra if you can
21 put it up. And what I'd want to note relative to
22 this is that we described in this particular case

1 before a reduction in the number of intermedia
2 handlings at various yards, you know Sanchez, and
3 Shreveport, and Kansas City, as we move from an
4 interline service today where we can't optimize the
5 train design.

6 And we go into a single line train that is
7 moving from the origin to the destination
8 efficiently. And when you look at all those work
9 centers what we're doing is changing how fast cars
10 move, how fast locomotives move, what people are
11 doing on the ground in terms of having to switch cars
12 and handle cars.

13 And all of that is money and expense. And
14 when we introduce the new combined service, and we do
15 have plans to put on our operating plan in place
16 early on, we're not going to make changes to the
17 systems as I've said before, but we will have an
18 integrated operating plan, that's why the expenses
19 start to come out in year one. And the number that
20 we've expressed is what we think the benefits will be
21 through the course of the first year.

22 And so, I don't think there's anything

1 unrealistic there, and the numbers that we provided
2 have been built on thorough planning that Ray and
3 everybody had done in terms of how the operating plan
4 would work, how it would flow the traffic that we
5 see happening, and then those associated benefits.

6 What we would then do, and we have talked
7 about employment gains, and I think this is important
8 to know, is we would redeploy those resources to
9 enable the growth, enable the synergies. So, if you
10 hadn't been able to achieve those benefits, we would
11 have more employment growth, but we will be reusing
12 the locomotives that we free up by being more
13 efficient in the use of that, we'll be having the
14 people that we freed up using our crews more
15 efficiently to crew the new trains that we're putting
16 on the network. So that's where we see the
17 challenges in the CN.

18 MR. CREEL: If I could as well on that,
19 comment to that. There's another area of I think
20 false aspersions that seem to be suggesting that
21 we're not investing in the infrastructure to be able
22 to accommodate this growth that we're going to

1 compete for. They failed to consider or mention that
2 we have committed, and this is in our proceeding, to
3 maintain the level of capital that we spend today at
4 CP.

5 UNIDENTIFIED SPEAKER: The Court Reporter
6 is waving to us.

7 COURT REPORTER: I'm very sorry sir, but I
8 need each of you please to say who you are before you
9 start to speak. I want to make sure I have the right
10 person, giving the right presentation.

11 UNIDENTIFIED SPEAKER: We appreciate the
12 reminder. That's Mr. Creel.

13 COURT REPORTER: Yeah. I know it's
14 awkward, but if you could just say who you are before
15 you start speaking. I can't see your faces, and that
16 will help me a lot.

17 MR. CREEL: Okay thank you. This is
18 Keith, and I will endeavor to do that. So, picking
19 back up the point that I was making, in our filings
20 we have committed to maintain the level of capital
21 that we spent today at Canadian Pacific, which is at
22 an all-time high.

1 Matched by KCS's level of capital, is we
2 moved forward to invest in this infrastructure. The
3 key point being within that spend that spend today,
4 just in CP's alone, we have an ongoing investment of
5 proper cars -- this was mentioned last week in
6 testimony, which is annually exceeds 100 million
7 dollars, as well as locomotive overhaul capital
8 spend, both of which when we come together the
9 hoppers will be completed this year, so that makes
10 that 100 plus million dollars available.

11 The overhauls will not be needed because
12 we have a surplus of locomotives that we will inherit
13 with the purchase of ACS combining the two entities
14 together. So those two alone represent an additional
15 200 plus of incremental capital that will be invested
16 into the infrastructure to accommodate this growth.

17 So again, the facts matter, and the facts
18 were not represented clearly or accurately with the
19 Board last week.

20 BOARD MEMBER HEDLUND: Well Mr. Creel, go
21 ahead Robert.

22 BOARD MEMBER PRIMUS: I'm sorry Karen.

1 Keith, just to follow-up on that, and I'm not
2 challenging that those numbers. I think for me,
3 again I'm not speaking for anyone else on the Board.
4 If there's any concern that I have it's in the
5 potential areas, choke point areas of Chicago and
6 Houston where you don't have control of the
7 infrastructure.

8 You're going over other lines and other
9 lanes, and so it's going to have to be you know a
10 partnership of that construction again. You're
11 building the second bridge at Laredo, and you are
12 controlling that. But moving through Houston you
13 know once you get in there you don't have control of
14 that infrastructure, and I think for me some of the
15 concerns that I have are in those areas where it's
16 already congestion, and we already have problems.

17 So, I'm not thinking you know what they're
18 saying. I understand that you know your counter to
19 that argument I think for me it's in those areas that
20 I see some concern, and what's going to happen if
21 there's not a partnership in that infrastructure
22 development.

1 MR. CREEL: Member Primus, your comments
2 are well said, it's certainly understood. I can tell
3 you that partnership is the key word. We have in
4 Chicago partnered and contributed to create. We've
5 invested tens of millions of dollars so that the
6 overall Chicago infrastructure would benefit when it
7 comes specific to some of Metra's concerns, which
8 they shared last week.

9 Later in our rebuttal we'll explain what
10 we're willing to do to further our partnership to
11 support needed investment. And then when it comes to
12 Houston, we're taking the same approach. There is a
13 mechanism that exists today that has worked in
14 partnership with the KCS and has participated in for
15 the last 16 years.

16 We certainly insist on and intend on
17 actively participating in that in a go forward basis
18 to pay our fair share. We're not coming to town to
19 impose our needs on our partnership. We're coming to
20 town to carry out --

21 BOARD MEMBER HEDLUND: Mr. Ottensmeyer, in
22 the Houston Beaumont area there was a recent study

1 done called the Houston Beaumont freight rail study
2 that suggested a series of both short-term and
3 long-term projects. I think most of those are on UP
4 or BNSF, but the report noted you didn't even
5 participate in the study. Why was that?

6 MR. OTTENSMEYER: I don't know the answer
7 to that question. I don't know if we were invited to
8 participate, or not since I don't recall the scope of
9 the study, where the boundaries were in terms of the
10 infrastructure that was studied. I don't know if Mr.
11 Elphick, do you?

12 BOARD MEMBER HEDLUND: Mr. Creel if
13 Houston were to adopt something, or like create which
14 I would note was an initiative started by this Board,
15 by our former Chairman Linda Morgan, of Happy Memory,
16 would you even though you don't own the
17 infrastructure, you do have trackage rights through
18 Houston, would you participate in such a
19 collaborative effort?

20 MR. CREEL: Member Hedlund we would be
21 happy to participate in a unique, combined effort
22 that allows all uses of that asset to benefit.

1 BOARD MEMBER HEDLUND: Thank you.

2 MR. MEYER: Thank you. Thank you for
3 those questions, and we will be absolutely focusing a
4 lot of attention on Chicago and Houston concerns that
5 were raised, and we have I think some very
6 educational material. My infamous part of the
7 presentation, so we'll be back to those areas, you
8 can count on that.

9 I think the takeaway from what Mr.
10 Clements was saying in his first point is we're not
11 going to be stripping the railroad of the assets and
12 resources necessary for us to grow and succeed.
13 That is not the case at all. We're doing everything
14 that we need to do to plan carefully for growing, and
15 I think that comes through in all the materials in
16 this case.

17 We also heard from Canadian National in
18 particular, a pitch that we be required to go back to
19 the drawing board and refile in some form a service
20 assurance plan in compliance with the merger rules.
21 Frankly, I think this is a pretty transparent
22 attempt by CN having previously asked the Board to

1 require us to do that, to come back and get a do
2 over, and interpose additional delay in this process.

3 There's one thing that Canadian National
4 has tried to do over the last two years, it's to
5 prevent our transaction from coming into the
6 marketplace and competing with them. We understand
7 the covet some assets that KCS has. They weren't
8 able to acquire them in the marketplace. This
9 proceeding is not the place to give them another try
10 at that.

11 But with respect to the service assurance
12 plan in particular, I just wanted to review some of
13 this was put up on the screen in the slides of the
14 Canadian National presentation, but this is what we
15 said we would do. This is our filing back in April
16 of last year.

17 I know it's been a long time. We were
18 responding to the requests of all the Class 1's
19 except for CSX to apply the new merger rules to us.
20 CN has among those seeking that really. What we said
21 was it wouldn't be appropriate in this case to apply
22 the new rules.

1 We said we were going to be provided all
2 of the information the Board needed to address the
3 public interest implication of our transaction, every
4 application in a major merger case had always
5 required that applicants do that, and this case was
6 no different, and we said so.

7 But we also made clear that that didn't
8 mean that we were going to go ahead and comply with
9 the new merger rules anyway while we were
10 simultaneously asking to be relieved from the burdens
11 associated with that. We weren't. On the service
12 assurance plan point, and that's the second
13 highlighted passage hereon this slide, this is what
14 we said.

15 We would provide the Board the information
16 that the Board needed to satisfy itself that we,
17 applicants, had carefully planned for the integration
18 of these railroads. We've done that, and we will
19 implement measures to monitor and adjust service
20 levels during the integration process, so that
21 shipper service levels are safeguarded.

22 We've explained in detail in both Mr.

1 Clements and Mr. Brooks verified statements, as well
2 as in the operating plan how we're going to go about
3 approaching that. And then we said all under
4 appropriate Board oversight of course, and we have
5 stood behind that. We have accepted up to five years
6 of Board oversight, which would be coupled with a lot
7 of reporting by us of our progress in implementing
8 the benefits, and in providing service levels,
9 operating metrics.

10 We'll talk more about those details, and
11 certainly happy to talk about them now if you wish,
12 but we've done all of these things. We have
13 demonstrated that the implementation of this
14 transaction isn't going to cause a disruption.
15 That's what service assurance plans are for. They
16 were put in place because of the experience in two
17 cases, and you heard our opponents refer to these
18 same cases, UPSP and Conrail.

19 They referred to them as if they are --
20 those cases are generic mergers. They were not
21 generic mergers. Union Pacific, Southern Pacific
22 combination took two largely parallel networks that

1 spanned almost the entire southwestern United States,
2 south central states and the southwest, with
3 crisscrossing and parallel lines, and had to stitch
4 all of those lines together.

5 Almost every terminal across the west had
6 significant integration by Union Pacific and Southern
7 Pacific to combine you know work into an SP yard, or
8 into a Missouri Pacific Union Pacific yard, or
9 completely restructure operating patterns to have
10 directionally run single direction lines where the SP
11 line would be north, and the UP line would be south,
12 or vice-versa.

13 There was an extraordinary amount of work,
14 and on top of that Union Pacific, Southern Pacific
15 went into that merger with Southern Pacific in a very
16 fragile state. Southern Pacific was not performing
17 well, it was weak. It had not been investing in its
18 infrastructure.

19 Maplewood Yard in Houston was a basket
20 case, and as soon as traffic was pushed into that
21 yard it collapsed, and that was the Houston service
22 precedent. Nothing like that, nothing like that is

1 going to happen in this case, and there's nothing
2 like that for us to plan for.

3 We start with two railroads that connect
4 at one point, and on day two they're going to connect
5 at one point, but it's not going to be an
6 interchange. It's going to be the same trains, the
7 same traffic, the same operations, and there just
8 isn't any special calamity for us to prepare to
9 remedy.

10 I think the Conrail case, the other
11 example that was given is equally inapplicable, and
12 there were difficulties that Conrail had. It wasn't
13 Conrail that had them, it was Norfolk Southern and
14 CSX, so on day one you know the Conrail network was
15 split into two parts, with all kinds of new
16 connections between Conrail systems and Norfolk
17 Southern systems, so all of a sudden, a Conrail car
18 became Norfolk Southern car around certain parts of
19 Conrail, and Conrail car became a CSX car in other
20 parts of Conrail.

21 And all of those systems had to be
22 perfectly constructed, and work perfectly in order

1 for that integration to go smoothly. Well, it didn't
2 as it turned out, and cars got lost, and the service
3 suffered, and sure like more service assurance
4 planning associated with the transaction like that
5 was something that the Board in 2001 saw as required
6 if there was going to be another major merger.

7 We don't do anything like that as Mr.
8 Clements has explained. All the systems stay in
9 place, and then they are methodically and diligently
10 cut over as everything is ready.

11 MR. CLEMENTS: David this is James.

12 MR. MEYER: James jump in for a minute.

13 MR. CLEMENTS: Yeah. James Clements here.
14 I'm going to jump in. And the other piece that I
15 think CN suggested led to some of the problems in UP
16 and SP, was arrogance. They described that as the
17 root cause. And I can tell you we don't come into
18 this transaction with any arrogance.

19 We know we have a big merger to put
20 together. We have to do it right, and we take that
21 seriously, and we're not thinking we're like God's
22 gift to railroading, and it's just going to go well

1 because we show up. We're doing a ton of planning,
2 and when I want to say a ton of planning, the kind of
3 scope that we've got going on in the planning,
4 working with the KCS as we are allowed to prepare for
5 the integration.

6 We have over 1,000 people that have
7 contributed to the process of planning for this
8 integration to start if we have approval. And within
9 that we have set up a dedicated, integration
10 management office. We have provided dedicated
11 resources into that office of very knowledgeable
12 skilled and experienced people.

13 We have 167 different projects in flight
14 that are getting us prepared to be able to start to
15 put the companies together in the event that we get
16 approval. And we have a diligent process within that
17 to track the progress on those projects, to track
18 where they're regular green. And that process goes
19 all the way up to the senior executive.

20 Mr. Creel participates in a review every
21 two weeks. We got through all the details of all
22 those projects, and so there is comprehensive detail

1 the process that underlies all of our planning. And
2 I want to say this is what's called an ordinary
3 course. We have people that are very focused on
4 getting this done, and there has been some suggestion
5 that we should be filing a whole bunch of information
6 about what the integration management office is doing
7 and reporting out.

8 And you know I respectfully submit that
9 what we need is the team focused on the integration
10 planning, and we don't need people writing a whole
11 bunch of pleadings and reports and everything to file
12 in the proceeding to move this forward. And as
13 David has said, it's not like UPSP or Conrail. When
14 you look at the growth profile, we're talking about
15 something like two to four trains a year of growth
16 that's related to this synergy.

17 That when you look at the scope of the
18 hundreds of trains that both KCS and CP run today, is
19 not a step function major redesigning and rewiring of
20 the network. It's not loading it up in you know huge
21 ways that are going to cause yards to fail, or
22 anything like that.

1 And so, you know we think we're well
2 positioned for that, and we have certainly dedicated
3 a ton of resource to it. And the other thing I want
4 to mention is we are engaging with our shippers, and
5 we're being transparent with our shippers. Last week
6 we had what we called the Customer Advisory Council.

7 We had many shippers from different
8 commodity groups, and different geographies in
9 Calgary meeting with the team, and one of the
10 sessions we did with them was how do you want us to
11 proceed with the integration in the event that we get
12 to control the combined CP/KC?

13 And the summary of some of the output is
14 put operations first. CP is best in class and
15 operations, and we want you to remain that way. They
16 said you need to communicate, and we're committed to
17 communicating transparently with our customers about
18 how we're doing and where we're going with the
19 integration. And then they all said you have to pace
20 yourself. Do not try to do everything on day one.
21 Have a consistent and prolonged schedule.

22 And so that's from our customers. And

1 that's exactly what I told the Board last week is our
2 plan, and so we're aligned with our customers. We're
3 listening to our customers, and we're involving them
4 in how we are, and how should we move forward with
5 the integration planning for this property.

6 MR. CREEL: And James if I could, this is
7 Keith. I want to add one more comment to that for a
8 bit more color to close this point out. Experience
9 and leadership matters in these regards. To me it
10 was a bit ironic and disingenuous to sit there last
11 week and listen to the Canadian National commenters
12 suggest that we don't have the experience, and we
13 don't have the ability to integrate these two
14 railroads without jeopardizing ourselves to the
15 catastrophic memories of the CN, or I'm sorry of the
16 SPUP combination, as well as the continental carve
17 out.

18 I can tell you from experience being an
19 operating officer, during those two combinations, on
20 the ground working, experiencing the service
21 disruptions, it wasn't pleasant. It wasn't pleasant
22 for the operating officers of these railways across

1 this station, it wasn't pleasant for the customer.

2 Fast forward to a senior leadership
3 position at Canadian National, speaking from
4 experience, every successful transaction integration
5 that is in CN's recent history, that goes back to
6 CNIC, CNWC, CNEJ&E and CNBC rail, there was only one
7 person in that room last week providing testimony
8 that had a leadership role in integrating those
9 accommodations, and he's sitting in Bensenville
10 speaking to you this morning.

11 He wasn't sitting at the table
12 representing Canadian National. And I say that not
13 with any arrogance, but with humility to say that
14 experience matters, which is why I'm so confident
15 that the planning that we're doing will make the
16 difference to make sure that we deliver on our
17 commitments, as well as Mr. Clements, as humble as he
18 is.

19 His history with Canadian Pacific before I
20 became a part of the CP family, also includes
21 successful integrations with the purchase of the DM&E
22 railway, and together with the purchase of the CMQ

1 with he and I together leading the integrations.
2 That combination will have a material impact to a
3 different outcome when we put these two railways
4 together.

5 MR. CLEMENTS: Thank you Keith. This is
6 James again. And I just want to move on a little bit
7 to we talked about data reporting. I'll put up our
8 pillar three again around what we've committed to
9 doing. And as we've said we're going to be
10 transparent. We're happy to report a number of
11 metrics, and I just want to put a little bit of meat
12 on the bones here, and then adding a bit around
13 what's new.

14 As we've said before we're committed to
15 continuing to report the scope of metrics for both CP
16 and KCS networks that were described and required in
17 EP 724 and 770. And this is the important piece here
18 is this is regardless of whether those proceedings
19 continue to require those reporting requirements or
20 not.

21 We will continue them through the entire
22 oversight period that is required by the Board. And

1 there were some concerns that were raised by specific
2 commenters, and we will augment those requirements of
3 720 and 770. We'll commit to providing transparency
4 in terms of how we're performing on key corridors,
5 that's the Laredo corridor from the border north to
6 both St. Paul and Chicago.

7 And we also heard some concerns around the
8 Meridian Speedway. We're happy to report metrics in
9 terms of performance on the Meridian Speedway. Some
10 of the key yards, and I will agree all of these key
11 yards are in the existing reporting, but we will
12 ensure that all of the key operating yards have
13 metrics reported on them.

14 And then importantly, and you've already
15 raised some questions today about this around Chicago
16 and then Houston. We will develop and report
17 performance metrics in terms of transit times and
18 other details over the Metra and UP portions, so if
19 you want to flip to the next slide. What we would
20 propose for both of those geographies, there was
21 concerns raised about train lengths, train counts,
22 we'll be transparent on that.

1 We think transit time is also important in
2 terms of the transparency of how the operations in
3 question are reported, so we'll provide that. And
4 then finally with specifically around Metra, and not
5 just limited to the Milwaukee District West where
6 we're adding eight trains west of Bensenville, we
7 provide visibility to CP's performance on how its
8 freight operations is interacting with the Metra
9 trains, and report anywhere where our freight trains
10 have caused a delay, whether or not they ultimately
11 trigger a Metra train to go beyond the six-minute
12 window or not.

13 And so, those are some additional
14 reporting requirements and transparency that we're
15 committed to, to address concerns that we've heard
16 from other participants.

17 MR. MEYER: Thank you James. This is
18 David again.

19 CHAIRMAN OBERMAN: David, I have a couple
20 of questions here. I'm looking at your rebuttal or
21 reply filing, where you list the five pillars. And
22 so, I'd note with interest what Mr. Clements was just

1 suggesting here under pillar three, which is more
2 detail than is actually in your pleading.

3 MR. MEYER: Yes.

4 CHAIRMAN OBERMAN: Which I assume results
5 from you're having more time to reflect on what we've
6 heard from other railroads. And I was going to ask
7 this question anyway, and you may be dealing with
8 other parts of it in this presentation. So, you may
9 want to embellish your answer.

10 But and I'm going to ask this question
11 being fully cognizant of the fact that we determined
12 to apply the so-called old rules, and so the question
13 about having a service plan that meets the new rules'
14 requirements is not part of my question. You did
15 say that we would have all the information we needed
16 to make a decision on this.

17 And you have provided us with a lot of
18 information, but as I read the five pillars, and the
19 descriptions of them in your rebuttal pleading. Not
20 to question the good faith of the representations,
21 but the lawyer in me is saying there's a lot of nice
22 language in there, but it's not precise enough for

1 somebody to come in and say well they didn't meet
2 this condition.

3 And so I'm pleased to see what Mr.
4 Clements was just representing in some more detail in
5 so-called pillar three. And I'd like to hear, not
6 necessarily today unless you're prepared to talk
7 about it, but at least in your final briefs, I'd like
8 you to put to use his terms, I know it's a term I've
9 used in other contexts. A little more meat on the
10 bones of the five pillars in more precise language
11 that allows us to measure CP's compliance with its
12 representations, and more importantly allows other
13 stakeholders to measure, and then to bring an alleged
14 non-compliance to our attention in a way that we know
15 what you're talking about.

16 You know for example, you know, number two
17 we will proactively monitor our own performance to
18 identify areas requiring adjustments. That's very
19 good management concept, but I don't know how to
20 enforce it proactively monitoring language. It's a
21 little too general.

22 So, to the extent your own representations

1 in this area can be crafted into conditions that are
2 measurable and enforceable, that would be very
3 helpful to see at least what you're offering. You
4 may or may not agree, but I can't quarrel with most
5 of the platitudes in this language. It's all great
6 and what Keith is saying today is impressive, and
7 it's much, you know, much of that is backed up by his
8 own history, and the history of the railroad, but
9 we've got to look at this going forward, so that's a
10 concern of mine.

11 MR. MEYER: Chairman Oberman if I may
12 David, David speaking. So, first thing I'd say is I
13 think if you look at the reply verified statement, or
14 rebuttal verified statement of John Brooks, you'll
15 see a discussion of some of the pillars and go into
16 more detail than was in our lawyers narrative for the
17 pillars themselves.

18 Probably not enough to satisfy the desire
19 that you just articulated, but I want to address that
20 right now, and we of course can think about how else
21 to address it to you in the brief. But so I commend
22 you, John's more developed explanation of how he sees

1 those pillars working.

2 But I really would caution the Board about
3 the desire to have sort of detailed specific metrics
4 associated with each and every potential customer
5 circumstance on the railroad. It's just not possible
6 realistically to say for any given customer today
7 that's served in a certain way by certain train
8 operations, certain origins and destinations, with
9 certain you know other impacts from elsewhere in the
10 network and you know seasonality and weather, and
11 all the things that go into railroading, to come up
12 with a precise set of you know for this shipper
13 they're going to get exactly this exactly in these
14 circumstances with no change in this, that or the
15 other operational metric.

16 It's just not realistic. So, what we're
17 suggesting is not to try and get hyper detailed, you
18 know rigid way, we're proposing a broad commitment
19 that we're going to do the things that we say we're
20 going to do. We are going to support shippers
21 service, we are going to be transparent with them
22 about changes, so forth and so on.

1 Every shipper's circumstance is likely to
2 be somewhat different, you know, large shippers,
3 small shippers, grain shippers, chemical shippers,
4 intermodal shippers, across a lot of geography. And
5 if there's a problem, and we're going to report a
6 lot of metrics and a lot of data, but these shippers
7 also are part of an ecosystem in a transportation
8 marketplace where they know what's going on.

9 They're going to be able to come to us,
10 and we're going to be very proactive about engaging
11 with them. We're prepared to mediate service
12 disputes. If they think the merger caused some
13 problem for them that's inconsistent with one of
14 these metrics, we'll mediate that at the very least.

15 And ultimately, we're going to have up to
16 five years of oversight. And I've lived through
17 oversight proceedings. I don't you know necessarily
18 think anyone looks forward to them, but there's no
19 reason for anyone to think that a problem that we
20 create, that a shipper experiences, we don't think
21 we'll be doing this right, but if the shipper
22 experiences a problem, we're going to fully expect

1 them to bring that to the Board attention as part of
2 oversight.

3 And then we can solve the problem, and we
4 can address how to solve the problem, and obviously
5 address whether there really was a problem. In the
6 context of all the facts that relate to that
7 shipper's circumstance. But trying in advance to
8 specify exactly what every shipper and every
9 circumstance is going to receive, and if they don't
10 receive it then they have an instant claim.

11 You know, not only is that I think an
12 effort that would inherently fail, it would also
13 overly legitify the railroad. So, you heard just to
14 take an example, you've heard from the shipper
15 associations a desire to impose on us a rigid 30 day
16 advance notice requirement for any change in the
17 service that they receive at their shipper facility.

18 We're certainly going to try and be
19 proactive and transparent about all the things that
20 you know we might do, not whether they're merger
21 related or not, associated with our service at our
22 shipper facility, but if we can't make a change

1 without waiting 30 days, we're going to have a very
2 rigid network that could create all kinds of
3 problems.

4 So, the other thing I'd say about the idea
5 of coming up with a very precise matrix of which
6 violations trigger what relief, is that's not even
7 what's required by a service assurance plan. That's
8 not what the Board said in its regulations under the
9 new rules. They just said go plan and tell shippers
10 what you're going to do when you cause a problem at a
11 terminal, or when you over congest a line, or when
12 you, you know, can't deliver their cars because you
13 can't find them because your systems had failed.

14 That's the kind of thing service assurance
15 plans are designed to do. It wasn't designed to say
16 to every shipper on the railroad, you know here's
17 your sort of bill of particulars, and if you see
18 these two things happening you can collect this money
19 from us. That's just not even under the new rules,
20 what a service assurance plan is attempting to
21 accomplish, in my view.

22 But we will absolutely you know think

1 about -- think further about whether there's more
2 particularity we can provide around all of these
3 pillars, but we think the flexibility of them, and
4 the generality of them is frankly a feature, not a
5 bug because we are making broad commitments. We
6 won't be shutting out any shipper who thinks that our
7 transaction has caused a service problem for them,
8 whatever the circumstances are, and we can address
9 them on those facts, on those circumstances, and find
10 the right solution for that shipper in the right
11 circumstances.

12 CHAIRMAN OBERMAN: I appreciate what
13 you're saying David, but to a large extent you were
14 shooting down a straw man that I wasn't raising. I'm
15 not inquiring about a hyper detailed commitment for
16 shippers. I don't disagree with your concerns about
17 that.

18 I think there's some place between what
19 you've submitted so far, and hyper detail where you
20 could make something more specific. I am thinking
21 about this. Look, if everybody was a saint, we
22 wouldn't need any of these plans because there would

1 be no problem. So, the only reason we need something
2 written down as to what your representations are, and
3 what we might include as a condition, is when it
4 can't get otherwise solved that somebody seeks relief
5 from us. We know what we're enforcing. That's my
6 concern.

7 So, I'd like you to take your very
8 excellent legal mind when you in your final brief,
9 examine each of your pillars and they're good. You
10 know, I don't have any quarrel with the general
11 concept in the pillars, but to -- and I have to
12 confess I haven't re-examined Mr. Brooks verified
13 statement, so it's not in my head as I sit here.
14 Maybe there's more detail in there, but I don't know
15 that you're representing whatever is in Mr. Brooks
16 verified statement is something you would find
17 acceptable as conditioning by the Board.

18 So, what I want you to do is to be very
19 specific as to the conditions regarding service that
20 you're offering to be in any order which might
21 approve the merger. As far as you feel you can go in
22 a practical sense, we'll then make some judgments

1 obviously if we think that's enough, or do we have to
2 put more in it. But my own, and I'm only speaking
3 for myself, not the other four, reaction to your
4 rebuttal is that the concepts are admirable.

5 CP's management record, I think Keith made
6 very valid points. You know, if we knew all of these
7 people were going to be presiding over this for the
8 indefinite future that gives some comfort, but you
9 know our job is to put something on paper that
10 everybody can live with for the long term. So that's
11 what I'm encouraging because if you don't do that
12 then the challenge will be for us and our staff to
13 try to do it for you if we think more is needed.

14 And I'd rather see your best efforts
15 beyond what you've already put in, then our trying to
16 write some language, which will turn out to be a non
17 sequitur, or something that doesn't deal with the
18 reality of your railroad. You know it better than we
19 do, but I think we need you know, put yourself on the
20 other side of the fence if you were trying to enforce
21 one of these conditions, you know, where would you
22 find the frustration of saying well what did they

1 really commit to? That's what I'm concerned about.

2 But not hyper detail. I don't think
3 anybody thinks that a merger condition says what day
4 you have to serve some particular shipper on your
5 line. Nobody is suggesting that.

6 MR. MEYER: So, Mr. Chairman, at least
7 speaking for myself, and I think speaking for the
8 applicants, the message is very much received, and
9 rather than brainstorm on the fly here.

10 CHAIRMAN OBERMAN: No. That's why I
11 suggest you do this in your final brief. I think it
12 requires a little more thought. It requires me to go
13 back to look at Mr. Brooks statement, and I'm not
14 going to do that while we're sitting here.

15 MR. MEYER: I appreciate that. And I do
16 want to say one other thing about this, and I don't
17 want it to be misinterpreted at all. You know, I'm
18 certainly not suggesting that we're in the slightest
19 backing away from our arguments. We're not at all,
20 and I think we'd probably be --

21 CHAIRMAN OBERMAN: I didn't hear that.
22 No, I didn't hear you were suggesting that either.

1 MR. MEYER: Probably be able to come
2 forward with some more specificity. I can't make any
3 promises, but we'll do our best. But the other point
4 I do want to make, and this point has really more
5 resonance when we come to another set of commitments
6 that we've made, and we'll talk about them later in
7 the presentation regarding gateways.

8 But a starting point here really in the
9 Board's evaluation in this transaction is to ask are
10 we going to create a public interest arm that
11 requires a remedy, right? That's where conditions
12 come into play. We've made commitments to reassure
13 everyone that we're all about improving service and
14 improving competition right, but you have to ask
15 yourself is there anything about this transaction
16 that we're proposing that will create a likely harm
17 to service?

18 The answer is absolutely not, and we'll
19 explain all the reasons why not, but the very first
20 reason, like right there a flashing light, a flashing
21 green light, I think. I don't -- maybe I'm getting
22 railroad signaling all screwed up, is nobody in this

1 transaction, nobody in this proceeding, nobody in the
2 North American Rail Network is going to have a
3 stronger set of incentives to make sure that our
4 service measures up because the very driver of the
5 transaction is to attract more traffic from
6 customers.

7 There's no way we achieve that if not only
8 do we not provide service that brings new traffic to
9 us, but if we provide service that drives our
10 existing traffic away. And I think you know Mr.
11 Creel and others can speak to that much better than I
12 can. But if the Board starts with the question is
13 there anything about this transaction that's going to
14 lead to a harm to rail service, I think the only way
15 to answer that question on the record, and we'll
16 talk more about Houston and Chicago and other places
17 for sure, and we have more specific things about
18 those areas.

19 But as a general proposition there's just
20 no predicate to think that we're going to cause any
21 service problems. There just isn't.

22 CHAIRMAN OBERMAN: Well David, I don't

1 disagree with you in terms of the structure of it,
2 and what would appear to be in the CP/KCS obvious
3 self-interest in terms of what the incentives are.
4 I would only reflect in a broad sense that I would
5 think everything you just said would apply to every
6 Class 1 railroad in terms of what their incentives
7 are, and without belaboring this hearing. It's no
8 secret that I don't see it. And the truth is if you
9 sent it at the outset, if you look back at this
10 year's problems, CP and KCS have not been railroads
11 that have brought, caused us to have those emergency
12 hearings.

13 So, your record at least this year is
14 positive contrasting to the others, but I am thinking
15 about the overall network, and that's not to
16 challenge or undermine the intentions or good faith
17 of your clients. I guess I would just leave it by
18 saying I think it would be in your interest to give
19 us as much specificity as you think you are
20 comfortable with in terms of how to best operate your
21 railroad.

22 That would be the measuring stick, and you

1 know, we will obviously seriously consider where you
2 think those conditions should stop in terms of
3 specificity. I think you can do more. That's my
4 sense of it. If you think I'm wrong, then you'll
5 tell me that in your brief. But I just think you
6 should put in the effort before we do.

7 MR. MEYER: And as I said Mr. Chairman,
8 David again, I was not meaning to back away from what
9 -- message received, and we'll certainly do that. I
10 just wanted to perhaps you know orient us around what
11 ultimately is what we're trying to solve for is to
12 answer the question is the transaction in the public
13 interest, and you know, conditions. You know
14 conditions are warranted where there is a real likely
15 public interest harm that can be avoided through some
16 requirement published by the Board.

17 And I think here there's not a need for
18 the Board to regulate our service, specifically you
19 know, in a way different from what other railroads
20 realize. But with that said we've made commitments
21 because we believe strongly in the mission of this
22 transaction, and we'll go back you know as we prepare

1 our brief and think about how much more specificity,
2 we can provide about that.

3 CHAIRMAN OBERMAN: I will say this David,
4 that as I think about this proposed merger, and our
5 task of ruling on it, and I think this is consistent
6 with what you're saying. To me the whole is greater
7 than the sum of the parts, or at least it ought to
8 be, and therefore any specific pillar of your five
9 pillars are other drilling down on those conditions
10 are important in terms of measuring whether they
11 contribute to the whole being greater than the sum of
12 the parts. Is that a fair way to think about it in
13 your view?

14 MR. MEYER: Well, I certainly think the
15 Board ought to look at the whole of our transaction
16 in evaluating whether it's in the public interest. I
17 agree with that completely. I don't think our
18 service commitments frankly are remotely required to
19 conclude that our transaction is in the public
20 interest. We've made our commitments because we
21 wanted to respond to the nature reaction of many in
22 the rail shipper community that you know merger

1 equals scary and bad.

2 And so we want to reassure folks that we
3 aren't the Conrail case. We aren't the UPSP case.
4 We're planning carefully. We're going to be mindful.
5 We're going to be proactive; we're going to be
6 transparent with our customers. All the things that
7 Mr. Brooks and Mr. Clements and Mr. Creel can say
8 much better than I.

9 And so, we wanted to like reassure and
10 underscore, but we're not relying on the regulatory
11 obligation to have good service as what makes our
12 transaction in the public interest. It's in the
13 public interest because we're going to be able to
14 provide better service and compete with that better
15 serviced in the North American Rail Network, and
16 that's going to drive more traffic and support
17 investment, and it's a virtuous cycle. That's what
18 makes it in the public interest.

19 CHAIRMAN OBERMAN: Well, I think if that's
20 carried out I think you're right. But of course, if
21 we could always rely on a virtual cycle we could just
22 go out of business, so it's just a bad idea some

1 days.

2 MR. MEYER: Frankly, Chairman, you'd have
3 plenty of problems that would arise in the rail
4 industry where the argument about a virtuous cycle
5 would not be applicable. In this particular case we
6 think it is, but we also understand the importance of
7 probing, and we understand the importance of making
8 sure that our commitment is as clear as it can be,
9 and so we'll take another look.

10 CHAIRMAN OBERMAN: I think Patrick has
11 some questions. I'll hand it over to him.

12 BOARD MEMBER FUCHS: I appreciate it
13 Marty, and I'll pick up right where you left off. I
14 do want to acknowledge that applicants' additional
15 reporting commitments in my view fill in some of the
16 gaps that might be in 770 and 724, particularly
17 around transit times and the Metra train, so I want
18 to acknowledge that that has a synchronicity with
19 some of the concerns we've heard on this record, and
20 I think that's positive.

21 I also want to say Mr. Chairman I agree
22 with you that you know I don't think that we'd be

1 looking for something hyper detailed, and I think
2 that there's broad agreement on that. I do wonder as
3 I'm thinking about transit times, and perhaps some of
4 the other metrics, whether or not they can continue
5 to be reported in aggregate, but whether or not it
6 would factor in kind of customer before and after.

7 By that I mean -- so, you know, and it
8 could be for a broad base of customers you know that
9 have traffic that go through Houston or go through
10 Chicago. Because if we just report overall transit
11 time on the CP/KC without some sort of baseline,
12 we're going to be affected by traffic mix and other
13 factors.

14 So, I do wonder whether or not there's a
15 way to think about transit times on a relative basis,
16 understanding that it would be still reported in
17 aggregate. And as I say that I say that
18 acknowledging that there is great heterogeneity on
19 the rail network. There are complexities. Sometimes
20 there's a rate service trade off.

21 You all might have a longer transit time,
22 but there might be a different rate that is

1 associated with a particular transit time. And
2 there's complexity on the network in terms of the
3 things that could go wrong that might for any given
4 period, make transit times appear longer than they
5 would be you know otherwise.

6 So anyway, I say that to say something to
7 think about as you are flushing out the concept of
8 transit times is allowing us to think in aggregate
9 about how a customer is treated before and after the
10 transaction. And then I guess another point I would
11 make in addition to kind of the gaps and the hyper
12 detail is I think I have a personal preference to
13 keep things from the Board going forward. And that
14 includes issues that might come up in terms of merger
15 enforcement, particularly if things aren't fully
16 flushed out, it sort of leaves open questions that I
17 think we could do better to resolve right now.

18 And so, what I have in mind in particular,
19 is for you all to examine the Tex-Mex transaction,
20 the KCS NIT League agreement, which spoke to service.
21 And what you all committed to -- what KCS committed
22 to in that case if I'm not mistaken, is basically

1 establishing sort of a baseline service level in
2 aggregate. Not hyper individualized, but in
3 aggregate.

4 And if you all fell below the baseline
5 that you all established. And this is how I read it
6 working. You all can correct me if you have a
7 different understanding. If you all fell below a
8 certain aggregate level, you would automatically
9 submit to the Board a corrective action plan,
10 including addressing, including whether or not the
11 reason you fell below was not your fault.

12 So in particular in that agreement, you
13 mentioned that a very significant portion of the
14 transit is on the Union Pacific, so you would address
15 whether or not you believe that Union Pacific was at
16 fault. You may address whether or not you feel
17 weather is at fault, et cetera, but it's automatic
18 and self-enforcing.

19 And you all come to us with what you're
20 going to do instead of the Board getting a complaint
21 and telling you what to do. And there's a certain
22 alignment with how the Neches Board approaches service

1 recovery plans in this most recent about service
2 problems more broadly on the network.

3 There's a certain alignment there that may
4 be appealing to my fellow members. So, I basically
5 you know to summarize, would say take a look at
6 whether or not you can think about transit times at
7 the customer level, while reporting in aggregate.
8 And take a look at Tex-Mex, and whether or not
9 there's a framework there for service reporting and
10 corrective action that might provide an additional
11 level of insurance to those that are concerned.

12 MR. MEYER: Member Fuchs, thank you very
13 much for those thoughts. I think those are excellent
14 ideas for us to consider. I'm not going to say we
15 haven't you know had ideas in the same ballpark
16 swirling in our heads from time to time in this
17 proceeding, and thinking about all of this, but I
18 think we could absolutely take those notions to heart
19 and do our best to incorporate something like what
20 you are describing as best we can.

21 No doubt that in you know in some form or
22 fashion, you know, in the oversight process, you know

1 the kind of outcomes that would lead to metric
2 changes that you're describing would end up being
3 aired in some form, you know, as a result of
4 complaints, or because we brought them to your
5 attention anyway.

6 So you know there's complete alignment
7 with the spirit of what we're trying to accomplish
8 here, and so let's as I said, we will go back to the
9 -- I'm not going to say back to the drawing board.
10 We're going to go back to the office and think hard
11 about what we can come forward this.

12 BOARD MEMBERS FUCHS: That's great, thank
13 you.

14 MR. OTTENSMEYER: This is Pat Ottensmeyer
15 just to pass the circle back to Member Hedlund's
16 question. I have been able to confirm with both our
17 operating people and government affairs people that
18 we were not invited or asked to participate in the
19 most recent tech stock study. We did participate in
20 2013's study, not the 2020 or 21 study.

21 And it appears that the only east of KCS
22 owned track that was covered by the study was the --

1 River Bridge east of Houston, which we will talk
2 about extensively later on in this discussion.

3 CHAIRMAN OBERMAN: All right. Thank you,
4 Pat.

5 BOARD MEMBER HEDLUND: Thank you very
6 much. And are we going to take a break now Mr.
7 Chairman?

8 CHAIRMAN OBERMAN: Right now. That's what
9 I was about to say.

10 BOARD MEMBER HEDLUND: Thank you.

11 CHAIRMAN OBERMAN: We are going to break
12 for one hour. We will be back at 1:00 Eastern, thank
13 you all.

14 (Break.)

15 CHAIRMAN OBERMAN: All right we are going
16 to reconvene, and I'm only going to say this very
17 briefly. We have a hard stop at 5:30 eastern, so we
18 really need to finish. So, I admonish everybody
19 involved, but having said that I don't want to short
20 circuit either the applicant, or the Board Members
21 with questions. So let us just be efficient, as
22 efficient as we can. David you're one.

1 MR. MEYER: Thank you very much Chairman.
2 The break came right at the transition between the
3 issues we were discussing before the break, and
4 Chicago. We want to make three broad points today in
5 response to the concerns you heard raised by Metra
6 and the Chicago Coalition last week.

7 First, all of these concerns about Chicago
8 really start with the Marquette subdivision. That's
9 that line that connects Kansas City through Sabula
10 Junction, Iowa with St. Paul and the Twin Cities.

11 Mr. Elphick will explain that these
12 concerns about the Marquette subdivision really are a
13 red herring in this case. We are not going to detour
14 or move trains off of the Marquette subdivision into
15 Chicago and invert the coalition unities or Metra.

16 Once the record is understood about that,
17 we can focus on Chicago and understand the facts of
18 changes that will come from the transaction. As
19 we'll explain, there's ample capacity for us to
20 operate along with Metra on these tracks without
21 causing adverse impact for Metra operations.

22 And third, we are committed to

1 constructive engagement with Metra. But and we will
2 speak to exactly what kind of constructive engagement
3 we intend to undertake. But a forced shift of
4 dispatching and other forced changes in the
5 contractual arrangements between CP and Metra are not
6 warranted and would harm the public interest.

7 So those are the three points we're going
8 to focus on in response to the concern you heard last
9 week. Fundamentally there's no harm that will be
10 caused by the transaction that warrants the
11 imposition of conditions with respect to our Chicago
12 operations. We will speak to the commitments that
13 we're making that I would hope would provide
14 reassurance to Metra and the Board that that will be
15 the case.

16 So, I'll turn it over to Ray Elphick, and
17 he'll begin with a map that I think you saw last week
18 of the Marquette subdivision. This is the map we put
19 up on the screen last week to orient you as to where
20 the Marquette subdivision is. As I said between
21 Sabula Junction and River Junction. This is along
22 the Mississippi River and serves the traffic moving

1 between Kansas City and the Twin Cities.

2 MR. ELPHICK: Thank you. So Ray is
3 speaking. You've seen this slide before as David
4 said. We discussed the flow of traffic west of
5 Bensenville, and the split of traffic at Sabula
6 Junction. So, traffic will move from St. Paul at the
7 top of the graph, through River Junction onto the
8 Marquette subdivision and into Kansas City, and
9 vice-versa.

10 The other arrow notes traffic moving to or
11 from Kansas City up to Sabula Junction, and then east
12 of Bensenville Yard in Chicago. Okay. Again, you
13 can see that our Marquette subdivision starting at
14 River Junction and running south to Sabula Junction.
15 This section is 161 miles long. It is the most
16 direct and shortest route for freight traffic that
17 needs to move from St. Paul to Kansas City.

18 The route from River Junction to
19 Milwaukee, Chicago, and then across to Sabula
20 Junction, these 413 miles, or 250 miles longer than
21 the River Junction to Sabula route. CP would never
22 route a freight train from St. Paul to Kansas City

1 via Milwaukee to Chicago, except in the event of an
2 unlikely emergency.

3 It doesn't make sense operationally or
4 commercially to go the extra 252 miles wasting crews,
5 locomotives, wearing out track, not to mention having
6 much longer transit. This would erode CP/KC's
7 competitive edge. It will put to waste all of the
8 capital investments that we have plans for the
9 merger, growth on the Marquette subdivision.

10 So, let's look at capacity on the
11 Marquette subdivision. That's been the focus on
12 Metra's comments. You've heard that the Marquette
13 subdivision can't be further extended. We are
14 certain that the Marquette will have capacity for
15 growth. Looking at the right map again, from River
16 Junction at the top of the map to Sabula Junction in
17 the bottom, I've noted all of the sitings this time.

18 The ones in the yellow boxes are merger
19 related. So, starting at River Junction at the top,
20 there's one of the proposed merger related sitings to
21 be build at Brownsville, followed by existing sitings
22 at Canes and Harper's Ferry, the next citing is

1 Eckards. You could work your way south and see all
2 of the proposed new merger related and existing
3 sittings.

4 Criticism was also put forth the capacity
5 of the Marquette subdivision can't be further
6 expanded, and that is simply wrong. In addition to
7 the capacity projects that I've mentioned, the state
8 of protected growth, there are other capital projects
9 that we can deploy if growth exceeds our expectation.

10 For example, I've shown three green stars
11 along the track which would represent other locations
12 CP could build additional sittings. This list is not
13 exhaustive. It's simply a list of contingent capital
14 projects that could add capacity should it be
15 required.

16 The green star at the bottom near Sabula
17 Junction is a siting that actually is already built
18 today, and it's used for the storage of cars. And as
19 we speak today, we're adding CTC the switches, and
20 therefore have the potential to rapidly deploy use of
21 that siting when the CTC is complete.

22 So, I'd like to just say that you can see

1 that a lot of existing merger related and future
2 potential infrastructure projects on the Marquette
3 subdivision. Of course, we plan capital to be brought
4 on in advance of the anticipated volume growth. To
5 illustrate capacity relative to the traffic volume on
6 the Marquette subdivision, we present the two graphs
7 on the left.

8 The top one is looking to capacity
9 projects north of Marquette Junction, and the bottom
10 one for capacity projects south of Marquette. We
11 split the data this way given the different train
12 counts on each of the segments. The north segment
13 will see fewer trains that move south, reflecting
14 trains coming from the west of Marquette.

15 Okay, so inside the solid gray bars then
16 is the kind of trains we anticipate by year for each
17 of the three years subsequent to the transaction.
18 I've also included the year five volume, which
19 includes organic growth. Above each gray bar is two
20 lines. The green line represents sustainable
21 capacity, and the top blue line represents maximum
22 capacity.

1 As you can see, we are planning to add
2 capacity to stay ahead of the protected growth.
3 Looking at the top graph for the north portion of the
4 Marquette subdivision, for example in year one you
5 could see that we have sustainable capacity for 11
6 trains. That capacity is sufficient for the
7 projected volume of 7.46 trains in year one, and the
8 8.26 trains in year two.

9 Looking out to year three where we project
10 10.66 trains, we will be building the Brownsville
11 subdivision starting in year two for completion in
12 year three that will raise the sustainable capacity
13 to 14.4 in time for the growth. That same pattern
14 can be seen in the bottom graph reflecting the south
15 segment.

16 We have noted that in year one the train
17 count is at 65 percent of the sustainable capacity
18 line. That 65 percent though is not an indictment on
19 our capacity to run well. It is what we monitor
20 though to ensure we are planning capital proactively.
21 Nonetheless, even though the volume is perfectly
22 management at sustainable capacity to ensure that we

1 have extra room, we have made the decision to
2 accelerate the Bell View siting project for
3 completion in year one, rather than year two.

4 By year five on the right of the same
5 graph, which includes organic growth, we anticipate
6 17.97 train on the capacity, with the additional
7 track will produce a maximum capacity of 32 trains.
8 As we do in normal course, we will be constantly
9 monitoring the traffic levels as they materialize and
10 have the ability to adjust our capital projects
11 accordingly.

12 Now I would like to turn to Metra. And
13 Metra's consultants provided an RTC analysis --

14 CHAIRMAN OBERMAN: Before you leave that,
15 on your earlier slide you have a number of siting
16 projects shown south of Sabula Junction. Are those
17 notes relative to this capacity?

18 MR. ELPHICK: No. I was strictly speaking
19 to the Marquette subdivision here because of Metra's
20 thesis that that subdivision will be under capacity,
21 and therefore trains would route via Chicago.

22 CHAIRMAN OBERMAN: Well will those other

1 sitings have any beneficial impact on the Marquette
2 subdivision?

3 MR. ELPHICK: Yeah. That's a very, very
4 good question. Even in the simulation that was
5 completed, the siting south of Sabula Junction are
6 very important to setting up the meets and the
7 capacity on the Marquette subdivision. You know
8 we're doing sitings all the way down through Kansas
9 City, and all the way to Texas, so I have just chosen
10 to show those ones here to discuss the Metra
11 simulation.

12 CHAIRMAN OBERMAN: The other question is
13 based on your construction schedule, and I realize
14 you're giving us you know your best projections of
15 what will happen once these sitings are added. But
16 in the real world we're not going to know how things
17 perform until the sitings are actually up and in
18 operation, is that a fair statement?

19 MR. ELPHICK: That is a fair statement
20 yes.

21 CHAIRMAN OBERMAN: So, and the only reason
22 I asked is that we're going to be pretty close to the

1 end of the five year proposed oversight before we
2 really know how well things are functioning on this
3 subdivision, and whether or not it does relate to
4 Metra. If you're a skeptic on Metra's side, you're
5 not going to know until three and a half, four years
6 from now, or close to five.

7 MR. MEYER: Well Chairman, if we could go
8 to the slide that shows the phase in of the traffic,
9 and the phase in of the capacity. You know year five
10 is shown here not as a year in which anything is
11 changing because of the merger, but just to
12 illustrate that with the organic growth that occurs
13 you know in expanded economic activity in the
14 economy.

15 You know, all the things that would happen
16 without the merger, Mr. Elphick was illustrating that
17 as you go out past year three, we're not going to see
18 anything impinging on anything. So, with respect to
19 your question about timing, Metra and other
20 stakeholders will see traffic begin to come on the
21 railroad during the course of year one, which would
22 be presumably you know during most of 2023, and into

1 the beginning of 2024.

2 They'd see you know that's the first year
3 of oversight. They'd see the same thing happening
4 over the course of year two, the beginning of 2025,
5 if I've got my numbers right. And then you know by
6 the end of year three we anticipate that the merger
7 related traffic route would have been achieved, so
8 that would be 2026, early 2026. Now the oversight
9 that we've been discussing could continue up to five
10 years.

11 And obviously, if there's a problem in
12 year five, you know, it would be certainly within its
13 rights to extend oversight, and we would not fight
14 that if there were a basis for it. But there would
15 be at least two years of that oversight period during
16 which you would be examining essentially a steady
17 state, you know, post merger environment.

18 CHAIRMAN OBERMAN: Well, let's move on.
19 It's you know how the railroad may modify its own
20 traffic patterns and so forth could change as you
21 build these sitings, and so you may want flexibility
22 to make modifications. And it's my sense in the

1 railroad business that it takes some years for
2 traffic to settle into a post merger pattern, and
3 you're all seeing how it really works.

4 It just occurs to me that you're bumping
5 right up against that five-year period, but I take
6 what you said David, about extending it, something I
7 want to think about in this context. Thank you. So,
8 let's keep going.

9 MR. ELPHICK: So, Metra's consultants
10 provided an RTC analysis, covering not only the
11 Marquette subdivision, which we just looked at, but
12 the other lines between River Junction, Chicago, and
13 Sabula Junction. I'm going to start by saying it was
14 difficult to hear Metra's consultants critique CP
15 regarding a primitive modeling of not having provided
16 all the data requested by Metra, and then providing a
17 mountain of data within a short timeframe to react.

18 To start, our process for managing capital
19 is strong. We use a variety of models, tools and
20 measures to assess capacity, depending on the
21 circumstances. I think our track record for
22 performance speaks for itself, and we don't take

1 lightly the baseless criticisms that were leveled.

2 Any allegation that Metra is not provided
3 the information that we needed to conduct a study is
4 false. CP was transparent and responsive to their
5 request for information throughout. I personally
6 listened to a call 10 months ago with my team,
7 checking to see that Metra's consultants have what
8 they required.

9 In fact, Metra's consultant was told that
10 our track charts, giving their age, may not reflect
11 all of the capacity additions. And so, we had
12 suggested the use of time tables and GIS data, which
13 is more complete and correct, and frankly modern.
14 All of this was provided by us in discovery.

15 Metra's consultants made numerous errors
16 in their work, and to be clear, we did not submit a
17 CP RTC model. Rather, as stated in my verified
18 statement, we looked at Metra's RTC model and saw
19 that it was filled with the errors. On the Marquette
20 subdivision I asked the team just to correct the key
21 errors and doing that we were able to make the
22 subdivision run successfully.

1 On the Elgin subdivision I asked the team
2 to go far more deeply into their model to see if it
3 reflected CP's operations and correlated to what we
4 know to be true. So I can summarize I would say the
5 four major types of errors we discovered in their
6 model. The larger list is set out in my reply
7 verified statement.

8 On the infrastructure there were 27
9 errors, 3 major examples include missing important
10 sittings, turning 23 miles of double track into single
11 track, missing crossovers, all of that affecting
12 capacity. The next two, delays and randomization,
13 they go hand and glove. Modeling is there to help
14 you potentially identify delays.

15 As standard practice, you don't hard code
16 delays as Metra's consultant had done. They should
17 have used the randomization feature, which throws
18 randomness into the network, and then let the model
19 calculate the delay. Those delays would then tell
20 you if you have a scheduling issue, or a capacity
21 issue. By hard coding their delays into the model,
22 their consultants artificially compounded the

1 challenge that simulation had to find a solution from
2 a dispatching perspective.

3 The last one is priority settings. It's
4 the crux of railroading. Metra misprioritized the
5 freight trains. A bulk train would have a higher
6 priority for example than the local train, or an
7 intermodal train would have a higher priority than a
8 manifest train, and a passenger train would have a
9 higher priority than all of those.

10 And because Metra's consultant got those
11 priorities wrong, the model did not prioritize the
12 train performance the way we would dispatch it in
13 reality. So, to be frank on this item, my read is
14 their consultants just assumed the issue was track
15 capacity on the Marquette, and not their modeling in
16 place.

17 BOARD MEMBER FUCHS: If I could jump in on
18 the priority question?

19 MR. ELPHICK: Yes.

20 BOARD MEMBER FUCHS: How much, or to what
21 extent did Metra's selection of priority differ from
22 the default priorities in the RTC software?

1 MR. ELPHICK: I think Metra in one of
2 their responses just didn't pay a lot of attention to
3 the priorities, so it's not that there's a default
4 setting, it's just that they didn't set for a freight
5 operation.

6 BOARD MEMBER FUCHS: Okay.

7 MR. MEYER: So, I think just to bridge to
8 the next sub-point within this Chicago discussion,
9 you know, I think that the first point we've made is
10 that there's just absolutely no foundation to the
11 idea that we would need to route trains through
12 Chicago and Milwaukee, rather than across from
13 Marquette subdivision, or that we wouldn't do that.

14 And in fact, we have as you've heard,
15 actually committed not to do that because it wouldn't
16 make any sense for us either. The next I think
17 foundational fact to understanding that we want to
18 touch on is this confusion bout where in Chicago are
19 we going to cause an increase in freight traffic?

20 We've tried to be very clear that the only
21 place that we are going to increase the number of
22 freight trains is west of Bensenville Yard on that

1 line that was referred to either as the Milwaukee
2 District West by Metra, or the Elkin subdivision on
3 the CP railroad that it goes from Bensenville Yard to
4 the west.

5 That's where the eight new freight trains
6 are going to be. They're not coming in all at once.
7 You know this is phased in over three years. The
8 traffic on those trains, on those new trains will be
9 they won't disappear as folks have suggested, it will
10 be going into the Bensenville intermodal terminal, it
11 will go into on a ramp facility at Bensenville, or it
12 will go onto other trains that will take it you know
13 either east of Bensenville through Chicago to places
14 like Detroit and Eastern Canada, or connections to
15 other railroads.

16 And as Mr. Elphick will now explain you
17 know none of those -- that train activity is to
18 Bensenville will go up, and there is ample room on
19 the existing trains for the incremental traffic that
20 will be coming from the merger.

21 MR. ELPHICK: Thank you. To address the
22 comment about operations then in Bensenville, or east

1 of Bensenville, we'll discuss what the commenters
2 have put forward in this proceeding. So first as
3 stated, and contrary to the assertions there are no
4 additional trains planned east of Bensenville.

5 And I'm going to talk about three parts of
6 the operations. The first being in Schiller. The
7 second being our operations towards the IHB, or the
8 Indiana Harbor Belt, and then our operations towards
9 the Belt Railway, BRC. So, to help us understand
10 CP's operations in these locations let's look at the
11 map of the area.

12 So, looking at the map on the far right
13 you will see a box that outlines the tracks around
14 Bensenville Yard. Bensenville Yard is at the bottom
15 left of the box. To the east of it are tracks
16 leading to Schiller Park, and to B-12, the town of
17 B-12, and ultimately you can go across all the way to
18 Tower 85.

19 You can see the IHB line connect at B-12,
20 and you can see just near A-5 you can see the
21 connection to the BRC. So, to start again, as David
22 said, there's no change in the operating plan as it

1 pertains to Schiller operations. At Schiller Park,
2 at CPS and operates in the world of compound and in
3 intermodal terminals. The transfer runs daily
4 between Bensenville and Schiller.

5 This is a local service with no change in
6 frequency from the transaction. Though the
7 automotive compound at Schiller is on plan to close
8 at the end of this year. This traffic will move to
9 CP's new automotive compound just outside our window
10 here in Chicago. And the construction to complete
11 that is well underway.

12 So, turning back to the intermodal then,
13 an intermodal train is designed to run daily out of
14 Schiller, straight down the IHB, with a reverse train
15 routing on the IHB back to Schiller. I note we will
16 ultimately also move into Bensenville Yard as well.

17 In the meantime, this intermodal train in
18 Schiller is running small today, and the traffic
19 anticipated by the merger will return this train to
20 productivity levels we've seen in the past, but it's
21 still well below CSX and what they permit on their
22 network. Those two trains do cross the Diamond at

1 B-12, running across Metra's tracks, but they're
2 timed to avoid peak operations.

3 I'd like you to look at little more
4 closely at Bensenville's connection on the left, the
5 IHB, and that's the gray that she's highlighting, at
6 Tower B-12. CP runs trains and transfers out of
7 Bensenville to both UP's proviso yard and the IHB.
8 These do not interact in any way with Metra's
9 operations. There are two tracks there which run
10 directly out of Bensenville to the IHB.

11 Looking further east on the diagram, you
12 can see the connection to the BRC, by -- Junction,
13 that's also engraved further down the track. CP
14 trains, the BRC, take a short distance run on track
15 three to Galewood Yard. They first wait for a clear
16 path or slot by the BRC to Galewood Yard, which
17 affects the yard itself acts as a fourth track clear
18 of Metra's operation.

19 Again, we do not anticipate any increase
20 in trains to BRC. So, as I said earlier, the
21 Bensenville reconfiguration project will relocate the
22 automotive compound this year from Schiller Park to

1 Bensenville, and we are here today looking at this
2 yard and the work that's underway, and we do plan to
3 move the intermodal very soon into Bensenville Yard.

4 MR. CELEMENTS: And Ray, could I just jump
5 in for a minute on this one. This is James speaking.
6 In the discussions one of the things that came up was
7 this idea that there was misreported, or non-reported
8 data on a segment, and if you look on the map from
9 B-12 up to Schiller Park, 2.3 miles. And I just
10 wanted to talk to that.

11 As you've heard Ray say, there is no
12 incremental trains, there's nothing changing on that
13 part, but also importantly what Ray has described is
14 that at the completion of the expansion of the
15 Bensenville Yard, there will be no traffic going to
16 Schiller. Our intention is to have all the autos
17 that would need to go to Schiller today unloaded here
18 in Bensenville Yard.

19 And the intermodal expansion that we will
20 complete in Bensenville, will handle all the
21 intermodal traffic. So, you won't be transferring
22 any work, sort of cargo over to Schiller to be

1 loaded on to that train that then crosses the BRC.

2 And so, we didn't build this into the model in terms
3 of reduction in trains, but that train today that
4 crosses right across Metra from Schiller Park, is now
5 going in the future, once we're done with the work in
6 Bensenville, going to take that avoiding route out to
7 the IHB, and go straight down and never even
8 interfere with Metra.

9 Never move up to Schiller Park Yard on the
10 CN operation. And so there really is no data to
11 report on that 2.3 miles because we're ultimately
12 going to have no traffic.

13 MR. ELPHICK: Thanks James. The final
14 comment that I would like to make is that CP has
15 stood by its commitment of 35.2 million towards the
16 Create Project. We're currently investing 5.5
17 million towards that over the next two years towards
18 the 75th Street project, and we still have 2.2
19 million outstanding in that on top of that waiting
20 for the next projects.

21 One of the projects that we did do was
22 install five new crossovers just to the east of this

1 yard here, which provided both ourselves and Metra
2 with a lot of flexibility of the east end of that
3 yard, so unless there's questions, I'll turn it over
4 to you David.

5 MR. MEYER: So, the dropping, the
6 crossovers you're describing, that was in that triple
7 track segment east of Bensenville on the slide that
8 you had up just a moment ago?

9 MR. ELPHICK: That's correct.

10 MR. MEYER: That was a Create Project?

11 MR. ELPHICK: That was a Create Project.

12 BOARD MEMBER HEDLUND: Is there a current
13 project in Franklin Park that's applying for rate
14 separation money? Are you aware of that?

15 MR. ELPHICK: I'm not aware, no.

16 BOARD MEMBER HEDLUND: Okay. Something
17 that I think would be helpful when you file your
18 final brief, I mean the track charts are interesting,
19 and easy to follow. But I think it would be also
20 helpful to get a Google map look at the area because
21 it's only -- I just pulled up Google, and that's
22 where you get a better idea of what is really going

1 on, and where Bensenville is, and that it's sitting
2 underneath O'Hare Airport and so forth.

3 So, if you would do that, that would
4 certainly help me.

5 MR. MEYER: If we could indulge the Board
6 to have a map appendix to our brief, we would be more
7 than happy to include visual aids of that sort that
8 will help tell the story, thank you.

9 So, picking up from where Mr. Elphick left
10 off with regard to the impact of the transaction on
11 the Chicago terminal more broadly, and then I want to
12 come back and say a few words about the impact on
13 Metra's operation more directly. You know one of the
14 things we've said you know from the beginning in the
15 application is that if anything, the long run impact
16 of the transaction on the Chicago terminal is to take
17 some of the pressure off of interchange at that
18 terminal, and the overall load in the terminal.

19 You know we will have a new north, south
20 route that we believe will be very attractive, and
21 for certain traffic, you know, it's not easy to pick
22 this up in traffic analysis, in a traffic study, but

1 you know over time certain bulk traffic that would
2 otherwise get interchanged in Chicago between CP and
3 other carriers going to the Gulf, the Union Pacific,
4 I almost said Illinois Central, Chicago, Canadian
5 National and others, you know might end up going by
6 our single line route, and bypass Chicago entirely.

7 And in the illustration of that, if we
8 could show the next slide, was actually in the slides
9 presented by Richardson last week. You know this is
10 an example of their actual move where they -- you
11 could advance the slide to maybe animation here, I'm
12 not sure. My printed version shows their current
13 route.

14 I guess not, well let's go back to that
15 slide. If you remember the slide from last week, it
16 was this map, but it also showed the current route
17 that they use today, which is over CP from Tolley in
18 North Dakota, through Milwaukee to Chicago, and then
19 there's an interchange with the Union Pacific, and
20 Union Pacific takes their traffic to their facility
21 in East St. Louis.

22 And what they're excited about regarding

1 the transaction, at least as I heard them last week,
2 is the opportunity to explore and use the single line
3 route that would be via CP/KC's network, CP network
4 to Kansas City, the Kansas City Southern Springfield
5 St. Louis line, to East St. Louis.

6 Now, you notice on this map where that
7 traffic would not go. It would not burden the
8 Chicago terminal at all. It wouldn't cross any Metra
9 tracks. It wouldn't affect the overall you know
10 terminal load, and demand in the Chicago area. But
11 we think that's a plus for the Chicago terminal in
12 the long run, and I think that's an important thing
13 to consider about this transaction. Now --

14 CHAIRMAN OBERMAN: David, how many trains
15 would you anticipate would avoid Chicago by taking
16 that route?

17 MR. MEYER: I think I would defer to
18 others, but you know when we did the traffic study we
19 identify -- we don't identify a train number
20 reduction on the current route for the Milwaukee and
21 Chicago. We identify no change at all, as a result
22 of our traffic examination.

1 And I think part of what Richardson is
2 saying is that there is other traffic that may not
3 show up in the scope of a traffic study that will
4 have new options, and new potential to avoid Chicago.
5 So, we don't have an estimate of a specific number
6 at this time, but I think pointing to it more as an
7 illustration of the ability to bypass the Chicago
8 terminal that doesn't exist today.

9 MR. BROOKS: David, if I can jump in.
10 It's John Brooks here. So to turn it over with this
11 example, out of the North Dakota area, and
12 specifically Tolley. So, Richardson purchased that
13 Tolley facility that you see on the map.

14 CHAIRMAN OBERMAN: Can we put the map back
15 up so I could see what you're talking about?

16 MR. BROOKS: Yeah. So, if you see in the
17 upper left corner Tolley, North Dakota. So,
18 Richardson purchased that grain elevator facility,
19 and they also purchased the largest North American
20 durum mill that's in St. Louis. And in any given year
21 that St. Louis market, not only for milling wheat,
22 but also for loading barges to go on the Mississippi

1 River for ultimate export, CP has done let's say
2 anywhere from 10,000 to 25,000 cars a year out,
3 depending on market conditions, out to that route.

4 So, in a good year you might see -- do the
5 math on that, but you might see 150 to 200 trains
6 that would no longer traverse through that Chicago
7 area. I might also add we think there's a fairly
8 significant market opportunity for automobiles that
9 currently route up and interchange in that Chicago
10 market. And then potentially would traverse up into
11 the Western U.S., but also up in the western portion
12 of Canada that would then route to us by Kansas City
13 up that river, ultimately up through that Tolley line
14 and up into Canada.

15 CHAIRMAN OBERMAN: Okay. Thank you.

16 MR. MEYER: Thank you. So, turning back
17 to the specific allegations and concerns you heard
18 from Metra in their extensive filing to the record,
19 since I think it was March when they filed their
20 comments, and as recently as last week when you heard
21 from them directly, I think I wanted to say a few
22 words about that.

1 The first is I wanted to address Metra's
2 math. Yeah, so when they talk about the load of
3 additional trains on the lines that they share, they
4 express fears about that being a very high number of
5 additional trains. And the way they get to that
6 number, we've covered this already, but just to review. Is
7 they're adding six trains from the Marquette
8 subdivision that they're worried about being rerouted
9 over the Elgin subdivision and as well as the
10 Milwaukee district north line, which is the Chicago
11 and Milwaukee subdivision.

12 They also talk about this one additional
13 train that they think we missed. We didn't miss any
14 additional train, there wasn't an additional
15 train, I think they were just confused by
16 something that was said in the original operating
17 plan that they misinterpreted it. The fact is there will
18 be 11 total trains as a result of the transaction
19 related increase. And that's all there would be.
20 And it's eight additional trains, that's all there is
21 coming through the merger.

22 And that's only western Bensenville as Mr.

1 Elphick explained. So now once you understand that I
2 think it's easy to see that what Metra's really
3 complaining about in this case isn't so much finding
4 room for eight additional trains. They're really
5 complaining about a lot of things that have --
6 really are a part of the pre-merger landscape.

7 They're complaining about what they claim
8 is bad CP dispatching, lots of delays to their trains
9 as a result of CP's, frankly you know I think that
10 they even accuse us of being incompetent dispatchers.
11 And they complain about the contract that they have,
12 they complain about a lot of things, but none of it
13 is related to the merger first of all.

14 But second of all none of it is true. So just
15 to focus in on one aspect that Metra made a big deal
16 of. And do you remember we said last week looking at
17 hard data from Metra, that less than 1 percent of
18 Milwaukee District west Metra trains are delayed by
19 CP freight trains.

20 More than 99 percent are not delayed by CP
21 freight trains. Well, what was their response to
22 that? Well Mr. Godfrey, their chief dispatcher came

1 in front of you and said it's not 1 percent, its 15
2 percent. That was untrue. If I listened to them, I
3 thought it was intending to say we got it wrong, it's
4 not 1 percent, it's 15 percent. That's actually not
5 what he even said. It was the impression he tried to
6 leave.

7 He didn't question the less than 1 percent
8 number. What he said is that of all the delays to
9 Metra trains, 15 percent of those delays are caused
10 by CP freight trains. That means 85 percent of all
11 of the delays to Metra trains are not caused by CP
12 freight trains.

13 CP has nothing to do with those delays,
14 and those delays aren't going away not matter how
15 good the dispatching is for CP freight trains. I
16 think understanding what I think is sort of a shell
17 game that Metra is trying to play here, is important
18 in realizing there's just absolutely no truth to
19 their suggestion that we handle their trains poorly.

20 And once you understand that it's also
21 easy to see, and turning to the next slide, this is
22 the streamline diagram, and Mr. Chairman I apologize,

1 I would love to have the time to -- I love these
2 diagrams, and I would love to have the time to help
3 you understand exactly how to read them because
4 they're fabulous. I was in Turkey a week ago, in a
5 rural train station that happened to be a dispatching
6 office as well, and they had on the wall a
7 streamline diagram of the entire passenger line in
8 that part of Turkey.

9 And I love that stuff. But in any event
10 --

11 CHAIRMAN OBERMAN: Let me just interject
12 two things. You don't have enough hours today to get
13 me to understand this line. But we do have our
14 staff, you know, is experienced with this, so before
15 this case is ruled on somebody will put this into my
16 head, in a way I can understand it.

17 MR. MEYER: And I think what I'm
18 suggesting Chairman, is that once you come to
19 understand how these work you will probably love them
20 as much as the rest of us. But in any event the real
21 point I want to make here is once you understand that
22 there's just nothing to this idea that we're

1 incapable of operating a railroad sufficiently, and
2 dispatching well, and avoiding delays to Metra
3 trains.

4 You also understand that there's just no
5 issue associated with interweaving an additional
6 eight trains into the available slots across the
7 24-hour period every day. And you know the
8 streamline diagram is one good illustration of that.
9 Mr. Elphick has explained it from other perspectives.
10 The one point I wanted to make here, and I'm not sure
11 how clear it was last week, is that the Metra trains
12 that we put on this diagram aren't Metra's current
13 schedule.

14 They include all of Metra's current
15 schedule, but they also include all of Metra's
16 pre-COVID schedule. So, Metra already has substantial
17 room to grow its operation back to its pre-COVID
18 schedule without ever raising any issue about fitting
19 in with the new freight trains that we're planning to
20 operate.

21 And you know others will speak too, but we
22 are prepared to deal with Metra in a collaborative

1 way to make sure they understand how our operation is
2 unfolding, and we work together to plan ahead for
3 changes in our operation as well as theirs, so that
4 this rail line can serve the interest of both freight
5 and passenger.

6 MR. MEYER: So the other evidence that
7 Metro has put forward regarding the train delays on
8 this part of the system, on the Elgin subdivision is
9 the RTC study that Mr. Elphick has addressed with
10 respect to Marquette and with respect to some of the
11 broader issues that Metra faced when they tried to do
12 this modeling.

13 But I wanted to highlight one thing that
14 you heard last week from Metra's consultant. So you
15 recall that the way RTC came into this case was
16 Metra, in their February -- excuse me, their March
17 comments, using an RTC study to suggest that we were
18 going to radically increase the amount of delay
19 caused to Metra freight and their Metra passengers.
20 That was their first RTC study.

21 And it's aggregate result is shown in this
22 little diagram you may remember from our rebuttal

1 comments. That's the amount of additional delay that
2 they forecast initially. And then they filed
3 several other rounds of RTC evidence even after the
4 date for their comments, and you know that's been the
5 subject of a lot of back and forth in this
6 proceeding, which I won't get into on the procedural
7 side.

8 But on the substantive side, I think it
9 makes a really strong point about the care the Board
10 needs to take making policy decisions based on RTC
11 modeling. And this point has application here in
12 Chicago. I think it has application to the issues
13 that have been raised about Houston as well, and
14 we'll come back to that. And the point really came
15 in what Mr. Mulholland said, explaining that bump
16 from the blue bar on the left, to the much higher
17 delays in the second round of evidence Metra
18 submitted, and then the elimination of that and more
19 in the third round of evidence Metra submitted.

20 Now we submitted -- I think that third
21 round was on a Thursday if I recall before our
22 comments, our reply comments were due on a Monday or

1 Tuesday. If I'm misremembering the dates of the
2 week, I apologize. And what we showed is they were
3 heading in the right direction. The right answer is
4 zero. But my point isn't that.

5 My point is that what was it that caused
6 such a wild swing in the results? It was one tiny
7 little error, the transposition of a one and a two
8 after a decimal point with respect to the milepost
9 indication somewhere in the model. What did that
10 do? That caused one Metra train to sit, and other
11 Metra trains to back up behind it. And just that one
12 little thing, that one little error among what we've
13 shown are dozens and dozens of errors had this effect
14 on the results.

15 Now any time the Board is looking at an
16 RTC model that's offered to say this proves that you
17 should do X, you need to be skeptical and make sure
18 that what you're looking at has been rigorously
19 tested, and is really answering the right question,
20 and has all the right inputs.

21 And then, even then, consider it in light
22 of real world evidence about how operations actually

1 work out on the railroad. And when we look at that,
2 first I'll say, and maybe Mr. Elphick can jump in and
3 explain this. This is a synopsis of what we found
4 when we corrected Metra's model, going from the
5 current, or what Metra called the base.

6 Metra's trains are in the blue bar. The
7 aggregate amount of delay for their trains is shown
8 there, and then we went to the future case, which
9 included the merger traffic increases, and we made
10 other changes to correct the errors in Metra's
11 modeling. What we found was there was no increase in
12 Metra delays. That's what we found.

13 We're not offering this RTC as proving
14 that point, but showing that there's no basis for
15 thinking that Metra's RTC analysis proves that there
16 will be a problem. If there are no questions about
17 that I think where I want to transition now is to
18 talk about Metra's argument about circumstances
19 having changed over the last 40 years since the
20 contract that they are operating under was originally
21 negotiated.

22 And there's no doubt circumstances have

1 changed in a lot of respects, but we would submit
2 that nothing has changed about the importance of
3 having the freight railroad dispatch the lines that
4 the freight railroad shares with Metra. So we've got
5 a brief kind of chronology here, and Metra acts as if nothing
6 happened after 1982 when the Milwaukee Road trustee
7 and the Chicago's RTA entered into the agreement that
8 gave birth to Metra's right to operate over the
9 Milwaukee Road.

10 And Milwaukee was going bankrupt. It was
11 shedding its commuter operations as one of the
12 burdens that it was incapable of bearing, and so this
13 relationship was created at the beginning.
14 Milwaukee Road had always dispatched all the trains
15 on the line. It continued to do that in 1982
16 naturally.

17 Well CP became a party to this in 1985 when
18 the CP acquired this line out of the Milwaukee
19 bankruptcy, the Soo Line Milwaukee Road's successor.
20 In 1985 the trackage agreement was entered between
21 the Milwaukee trustee and the Soo Line, passing
22 along to Soo the rights and obligations associated

1 with that 1982 agreement, and Soo Line naturally
2 retained dispatching responsibility.

3 And that's where I think Metra wants you
4 to think everything ended, and they weren't even in
5 the picture, and they didn't have anything to do with
6 this, and so it's entirely unfair that they don't get
7 to renegotiate the contract because of this merger.
8 Well that's not exactly accurate.

9 In 1993 there was an amendment agreement
10 negotiated between Soo Line and Metra. It was a
11 comprehensive renegotiation of numerous aspects of
12 this agreement. It's in the record in this case, in
13 our filings. One of the things that that did was it
14 transferred maintenance responsibility from Soo Line
15 to Metra.

16 So there was careful consideration of who
17 was responsible for what in respect to this line.
18 But what it didn't do was change anything about
19 dispatching. It left dispatching with the Soo Line.
20 And that was because that was the right thing to do.
21 Now Metra, in 2003, entered into another negotiation
22 with CP regarding the admission of ICE to the joint

1 trackage.

2 CP again, retained dispatching as a result
3 of that. Now somewhere along the way Metra decided
4 it wanted to take over dispatching on this line, and
5 we know they had that interest for a very long time
6 because just a few years after this in 2008 in the
7 DM&E case, Metra came before the Board saying hey,
8 we've got a merger, let's ask for something.

9 And what they asked for was a transfer of
10 dispatching. The Board, consistent with precedent
11 across the board, declined to revise that
12 relationship based on changes in traffic and traffic
13 patterns resulting from that transaction. It should
14 reach the same -- excuse me. The Board should reach
15 the same conclusion here.

16 MR. CREEL: So David if I could, I want to
17 say a few things about that. So I want to echo --
18 and by the way this is Keith, I apologize. I've got
19 to echo some of his points about the Board getting it
20 right in 2008, and let me tell you why. No
21 different than our predecessors, my predecessors and
22 those multitude of negotiations preserving the right

1 and the responsibility to dispatch these lines.

2 And it comes down to experience, and it
3 comes down to perspective. And I can tell you with
4 30 years of experience and perspective as an
5 operating officer, the thought of Metra dispatching
6 these lines is not only a terrible idea, it's a
7 dangerous idea.

8 And the danger starts with their view.
9 Metra's view of what they dispatch is a micro beacon.
10 It's a small portion of the network that CP runs the
11 grain trains to and from Chicago on the Milwaukee
12 North Line as well as the Milwaukee West Line. If
13 you take a look at the map we'll pull up, it shows
14 their limited view. No, that's not it.

15 MR. MEYER: We replaced the slide with
16 this. This is familiar map.

17 MR. CREEL: Okay. That's fine. If you
18 take a look at this map the top line between River
19 Junction and Milwaukee pretty much where that red line
20 comes down is actually a place called Portage,
21 Wisconsin. That's where we crew our trains that
22 operate from Portage eastward towards Milwaukee, and

1 down into Chicago to 820, which is where Metra takes
2 over dispatching.

3 We take a right for the lack of better
4 term to come down to B-17 there at the dot where you
5 see Bensenville. The issue, Metra's view is isolated
6 to only 20 miles of that route. The last 20 miles of
7 that route. In practical terms that's a 178 mile run.
8 The train crew gets on duty. They have a limited
9 amount of time to operate their train to the City of
10 Chicago to deliver the train into Bensenville.

11 If there are suboptimal dispatch decisions
12 that are made in those last 20 miles, the unintended
13 consequences ripple up the railroad for a lack of
14 disability to train meets that are being made on
15 trains that are running for Chicago. The end result
16 in simple terms, we have veteran windows that we
17 protect, they're the holy grail. They have the
18 railroad. We have trains that don't make a window
19 that are in route to Chicago.

20 The crews run out of time. The trains get
21 parked on the main line. And I draw particular
22 attention to this specific main line because of the

1 service sensitivity of it. Because not only the CP
2 trains run on it running into Chicago, there are 14
3 Amtrak trains a day that run to and from the City of
4 Chicago and Milwaukee.

5 This is an area not by what I've said
6 about what we've done. We have protected again the
7 timeliness of these trains for Amtrak. So we have
8 Amtrak that's impacted if we have our train sitting
9 on the main line. We have CP that's impacted, and
10 ultimately the points that were made before you can't
11 disentangle the complexities of Chicago.

12 It is one large physical plant that all
13 users either directly or indirectly are affected by
14 when it runs. So we have to get it right. We
15 absolutely have to get it right. A dispatcher that
16 doesn't have the ability to see, the ability to
17 understand the macro view, is fundamentally put at a
18 disadvantage where they can't get it right at the
19 micro view.

20 That's exactly why we can't allow that
21 dangerous practice to exist. If you go to the next
22 slide beyond the operational dangers in the

1 unintended consequences, I'm going to speak for the
2 case for change. There is none. If you look to the
3 left on the graph you'll see Metra's dispatchers
4 performance. And I commend their performance. 94
5 percent, 95 percent, I'll draw attention to though
6 the complexity of the line they dispatched
7 interacting passenger trains and freight trains.

8 On the southwest service line the
9 complexity is defined by all passenger trains
10 interacting with one freight train. On the Rock
11 Island line we move it up to four. Now let's compare
12 it to the CP dispatch lines. In Milwaukee West, the
13 Milwaukee North, both of which similar, if not
14 exactly the same dispatching outcomes and
15 performance, but much more complicated complexities.

16 The Milwaukee West line, seven trains.
17 Four of those on B-17, three on freight, that number
18 will go up with the growth that we're talking about
19 to 11. We go to the Milwaukee North line, 11
20 freight trains, and what's not captured on that graph
21 are those 14 Amtrak trains I just mentioned as well.

22 So it's the complexity of Metra trains.

1 It's the complexity of Amtrak trains. It's the
2 complexity of freight trains. This is a recipe in a
3 complex operation that you need the experience, and
4 you have to have the macro view to get to the right
5 solutions.

6 CHAIRMAN OBERMAN: Keith, before you leave
7 this slide, my memory is, but I don't want to go by
8 my memory, that there were more Metra trains on the
9 Milwaukee lines than there were on certainly on the
10 southwest service. Do you have the number of Metra
11 trains that are interacting with these freight trains
12 because I think you need to have that too to have a
13 true comparison.

14 MR. CREEL: Chairman Oberman, I don't have
15 the exact number today. I know when it peaked the
16 number was around 60 passenger trains that ran west.
17 On the alternate we're talking about the Milwaukee
18 West Line that interact with these freight trains
19 that are shown. So it is a busy railroad, I guess is
20 the best way to say it, and the complexity between
21 mixing freight and passenger is 10 fold there
22 compared to the complexity of some of these other

1 lines, but I do --

2 CHAIRMAN OBERMAN: I don't disagree, but
3 there's also fewer Metra trains to interact with the
4 one freighted train on the southwest service
5 relatively speaking, so you have to have all of
6 those numbers to try and get some sense of a
7 comparison. That's all I'm asking.

8 MR. CREEL: That's a very good
9 observation. We'll make sure that we specify those
10 numbers in our summation as well.

11 CHAIRMAN OBERMAN: Yeah. It's I mean if
12 you want us to draw these comparisons I think we need
13 to know this.

14 MR. CREEL: Yes sir, we'll clarify that.

15 CHAIRMAN OBERMAN: Good, thank you.

16 MR. CREEL: Okay. Moving on to what about
17 a world where our freight trains didn't exist at all?
18 This is the opportunity that we're trying to capture,
19 or that Metra is suggesting they might be able to
20 capture in exchange for the risk that I've tried to
21 explain.

22 If you take away CP freight trains

1 completely from this railroad you go from 95 percent
2 to 95.8 percent. So we're taking a tremendous amount
3 of risk, and what I would argue is the most service
4 sensitive and complex rail infrastructure that North
5 America has to serve commerce, all for to me a
6 minimal, minimal gain.

7 And I'm not suggesting that one delayed
8 Metra freight train is okay. The objective to delay
9 none. But the reality from perfect world and an
10 aspirational world is what we see. 95.8 considering
11 the risk that Metra is asking us to take, and asking
12 the Board to impose. It's just a very slippery
13 slope, and a very dangerous outcome, but in the end
14 it would do detrimental damage to the entire freight
15 network and destroy public interest benefits,
16 specifically in Chicago.

17 But because of the way Chicago connects to
18 our nation, it would reverberate across the nation.
19 When Chicago is sick and history has shown, and I don't
20 think you would argue that our U.S. rail network gets
21 sick too.

22 BOARD MEMBER SCHULTZ: Keith, can I just

1 ask a question.

2 MR. CREEL: Absolutely.

3 BOARD MEMBER SCHULTZ: On that last slide
4 the difference between the on time performances, was
5 that based off of the RTC model?

6 MR. CREEL: No. That's just a theoretical
7 where we take our freight train delays out
8 completely. If you'll see on the left side the
9 orange line, that represents our percentage of their
10 delays and their overall, all time performance. So
11 if you park all the trains, take them off the lines,
12 imagine they're not there, it goes to 95.8 versus the
13 95 with our freight trains.

14 BOARD MEMBER SCHULTZ: And how did you
15 arrive at those percentages? In other words if you
16 didn't rely upon the RTC, could you maybe just speak
17 to how you reached this conclusion?

18 MR. CLEMENTS: This is James. If you look
19 we use the Metra description of 15 percent of the
20 delays attributable to the freight train
21 interference. The other 85 percent are theirs, so
22 using the 95 percent on time performance as we said,

1 theoretical, if 15 percent is freight, and then the
2 85 percent is non-freight, it's the elimination of
3 the 15 percent freight that was specified by Mr.
4 Godfrey.

5 BOARD MEMBER SCHULTZ: Okay, thank you.

6 MR. CREEL: Thank you for the question.
7 I'm moving to the next slide. The other point I
8 would make is good railroading is universal. You
9 know Mr. Godfrey and I applaud him for his comment, made
10 this quote. He said he's personally given
11 instructions to run a freight train several times
12 during rush hour because it's the right thing to do
13 for the network.

14 Well I would suggest that if it's the
15 right thing to do for Mr. Godfrey, it's the right
16 thing to do for us. And again, I applaud his
17 honesty, but I can't ignore his narrow network
18 perspective and the implications it most probably
19 would have not only Chicago network, but Canadian
20 Pacific's network.

21 So all this said, let's sort of bring this
22 to a bottom line of where my head's at on this entire

1 issue. The relationship with have with Metro is
2 important to me. It's important to our team. You
3 know I'm engaged in this personally. Quite frankly,
4 through this process I own this. I have not engaged
5 with Dewinski as I likely should have engaged.

6 So with that thought as this thing played
7 out back in January I reached out to Jim, and I went
8 downtown to have a meeting with Jim, and I wanted to
9 apologize and just frankly say at 95 percent I know
10 in his mind it's not good enough, or it can be
11 better, and we're going to be committed to doing
12 that.

13 So since that meeting taking part of the
14 feedback he gave me, and some of the criticisms that
15 I was exposed to, I challenged our team to engage
16 with Metra in a rhythm that looks like, and this is
17 what's happened since January, they interact daily on
18 trains that are delayed.

19 They did before. They will continue. On
20 a weekly level we have the most senior operating
21 officer, Mr. Tracy Miller, that runs our U.S.
22 operations, interacts with its counterparts at Metra

1 to review weekly performance. And then on a
2 quarterly basis our most senior operating officer in
3 the system, Mr. Mark Red, as well as Mr. Miller, as
4 well as the local general manager and superintendent
5 that run the Bensenville Yard, engage with their
6 counterparts in Metra for a quarterly review of
7 performance, where they have an ability to discuss
8 systemic issues, or strategic opportunities.

9 So the rhythm and the commitment is there
10 today. I would commit that that will continue. This
11 provides an opportunity for those discussions where
12 Metra might think that they don't know what CP's
13 planning to do, can be dispelled.

14 And in addition to that I can tell you I
15 reiterate what David said, we're not going to force
16 CP freight trains east of River Junction to come to
17 Chicago to get to Kansas City. It's not going to be
18 done unless we don't have another route, and to
19 fulfill our common carrier obligation in commerce,
20 and commitment to our customers.

21 We'll run it 250 miles out of route, but
22 that's a worse case scenario, only if we have no

1 other alternative. As David said, we'll not object
2 to Metra resuming its full pre-COVID schedules on
3 Metra's west lines and north lines, and as the line
4 graphs demonstrated, there's ample capacity for them
5 to be able to do that.

6 We'll work collaboratively with Metra and
7 improve real time communications about our
8 dispatching decisions, which we're doing, but
9 continue that on a daily basis, or on a minute to
10 minute basis if it's required. We'll support
11 collaborative assessments of operational changes
12 outside of peak windows when Metra needs our consent
13 to add the trains, they'll engage with us, and we'll
14 be reasonable in working out an ability to the best
15 of our ability to accommodate the request.

16 We'll also support an agreed upon
17 escalation process to avoid or resolve disputes about
18 issues that impact the performance. On a reporting
19 basis we'll report monthly real time performance and
20 delays, either freight train interference, we'll
21 continue to reach and collaborate and look at an
22 agreement on mutually agreed, an RTC models for the

1 west lines, and the north lines.

2 And Chair Oberman, that addresses your
3 concern about what about the growth beyond year
4 three? What about the growth that we know comes a
5 decade from now, or two decades from now? We are
6 more than willing to sit down with Metra today or
7 tomorrow, or a year from now, or five years from now,
8 in a very robust process where we collaboratively
9 together, perform RTC modeling, so that we get all
10 the inputs right.

11 So that we get the route outcomes, and we
12 can protect their capacity as well as our ability to
13 serve our customers on the freight side. And we'll also
14 include our quarterly reviews as I said earlier, our
15 estimates about future freight demand on the west
16 lines and the north lines.

17 MR. ELPHICK: And sorry I just want to
18 jump in if there's no more questions before we move
19 off of Chicago. There was the question about
20 Franklin Park grate separation by Member Hedlund.
21 And my understanding is that they have applied for a
22 planning grant, unrelated to the transaction for a

1 grate separation in Franklin Park, and we provided a
2 letter of support to that application.

3 CHAIRMAN OBERMAN: I have one question. I
4 want to go back to the slide. I have it up here
5 myself, about the different times that the agreements
6 between the Soo Line and Metra, were amended. And I
7 don't know who's the appropriate witness here.
8 David, I think that you were talking about this
9 slide.

10 MR. MEYER: I was.

11 CHAIRMAN OBERMAN: Yeah. I was nowhere
12 around obviously in 93 and 03. At the time of those
13 negotiations did the Soo Line put the dispatching
14 rights on the table as something to be discussed?

15 MR. MEYER: So I'm not aware that the
16 dispatching rights were with the allocation and
17 responsibility for dispatching was ever discussed.
18 But the point we were making was in 1993, and there
19 are a wide array of issues that were opened up
20 between Metra and Soo Line, including the allocation
21 of important aspects of the responsibility for these
22 lines.

1 The lines are owned by Metra. They came to
2 be owned by Metra because the physical assets were
3 excluded from Milwaukee by the sale, but the
4 Milwaukee Road sale was conditioned on this 1985
5 agreement that protected and preserved the freight
6 railroad's role with respect to those lines to
7 preserve the freight railroad's common carrier
8 obligation responsibilities.

9 And the full measure of ability to control
10 it's destiny as a freight operator. It would have
11 had to be approved by this agency had it done
12 anything different.

13 CHAIRMAN OBERMAN: Well the question I'm
14 putting is the inference I assumed you were asking us
15 to draw from this slide was that Metra at five
16 different times over the past had an opportunity to
17 negotiate it for the dispatching rights and didn't do
18 it.

19 And what I'd like to have somebody who was
20 there, if you have a history, tell us if that's a
21 correct inference because it was my impression that
22 once the trustee and bankruptcy assigned the

1 dispatching rights back in -- it's blocked out here. I
2 don't have the date in front of me.

3 MR. MEYER: 1982.

4 CHAIRMAN OBERMAN: 1982, before Metra even
5 came into existence, that was the end of it, and I
6 think for a lot of the reasons that Keith has just
7 explained, I don't think the railroad ever opened up
8 the idea that they were open to even negotiating a
9 change in traffic rights, dispatching rights, and
10 that may or I'm not offering any opinion on the
11 merits of Keith's presentation. It was persuasive.

12 But the notion that Metra had an
13 opportunity to obtain the dispatching rights and forewent
14 it, strikes me as not an accurate account of
15 history, but I wasn't there. So but I suspect David
16 that for those people who were there, if anybody from
17 Metra had raised the dispatching rights in 93 or 03,
18 they were told that was a non-starter. But I may be
19 wrong, so I don't want to go on just an assumption.

20 MR. MEYER: So Mr. Chairman, I certainly
21 wasn't attempting to imply, or to have the Board draw
22 and inference from that history that Soo Line asked

1 Metra if it wanted to dispatch the line, and Metra
2 said no. That's not what we were saying. What
3 we're saying is it isn't the case that the structure
4 of this contract as it exists today, has nothing to
5 do with Metra.

6 There was a fairly comprehensive
7 negotiation of this contract that covered all kinds
8 of issues, including allocation of basic
9 responsibilities. In this case I was pointing to the
10 maintenance responsibility you could go into the 1993
11 amended agreement -- amendment agreement, excuse me, and you can see
12 wholesale areas where it was replacing aspects of the
13 original agreement.

14 Metra and Soo Line came to the table and
15 discussed the overall relationship. We don't have
16 anyone who dates back to that period that I'm aware
17 of, who has any first-hand knowledge of exactly how
18 those negotiations were done. We're not suggesting
19 that Metra took a pass on taking over dispatch, we're
20 really not. We're just saying it plays a roll in
21 this relationship.

22 They didn't just get handed a relationship

1 they had nothing to do with by the trustee.

2 CHAIRMAN OBERMAN: Well, actually the
3 trustee made his decisions before Metra even existed.
4 So I think that cake was baked in 1982 by a person
5 who didn't know much about railroads, but that's for
6 another day. I just really only asked the question,
7 and you clarified it that of the inference I was to
8 draw from that slide because that's not in accord
9 with my understanding of how this all came to be, but
10 as I said I wasn't there.

11 So if you think it's relevant, and you
12 have some way of enlightening us on that, I would
13 invite you to do so. And I suppose Metra who are
14 listening in could say something about it in a final
15 brief, to the extent it's even relevant here, it may
16 or may not be. So go ahead, I don't want to drag
17 this on. I was ready if everybody else was, but oh
18 Patrick, you had a question.

19 BOARD MEMBER FUCHS: Very quick concluding
20 question. In your CP/KC's commitments to Metro
21 there's a bullet point about the fact that you all
22 will support an agreed upon escalation process. Mr.

1 Brooks elaborated in his verified statement about
2 when the escalation process reaches a terminus you
3 will agree to an independent mediator.

4 Should I interpret that commitment as
5 applying to this particular bullet point that you'll
6 go through an escalation process, and at the end if
7 you cannot reach agreement, you will submit to an
8 independent mediator?

9 MR. MEYER: I think if I'm following where
10 you're pointing, we've certainly with respect to both
11 Metra, and with respect to our broader commitments
12 regarding service that we are committing to an
13 escalation process for internal dispute resolution.
14 We're going to try and resolve all of these issues.

15 BOARD MEMBER FUCHS: Right.

16 MR. MEYER: Not involving formal
17 litigation processes or the Board to the extent
18 possible. That is that point. And so I think is
19 your question about a specific mediation point
20 addressed specifically to Metra, or more broadly?

21 BOARD MEMBER FUCHS: Yeah, so Mr. Brooks
22 says in his verified statement despite best

1 intentions, if a mechanism does not lead to
2 resolution, CP/KC will participate in non-binding
3 mediation with the independent dispute resolution
4 professional, with the aim of facilitating a mutually
5 acceptable resolution of the issue in a fair or
6 timely cost-effective manner.

7 The context of that I believe coming out
8 of pillar five I believe in your commitments, is
9 really about freight service disputes, and I'm
10 wondering if this bullet point in your commitments to
11 Metra is meant to represent a commitment that
12 incorporates that other commitment I think that is
13 probably -- that I interpret it is to freight
14 customers where if you cannot reach an internal
15 dispute resolution, you'll engage an independent
16 mediator, like you would a freight customer.

17 Or whether or not those are two separate
18 processes. It's really sort of trying to get a sense
19 of what the scope of your commitment described in
20 that slide is.

21 MR. MEYER: Let me say one thing and then
22 I'll hand it to Mr. Creel. You know you're correct

1 the thrust of the pillars was a customer, a freight
2 customer focus, and those are commitments we're
3 making to our customers. They're not commitments
4 we're making to other railroads, they're not
5 commitments we're making to third parties that may
6 have some you know interest that we don't
7 understand. It's to our customers.

8 That said, I think we have no difficulty
9 saying that we would be delighted to mediate a
10 dispute with Metra if one materializes.

11 MR. CREEL: I completely support Member
12 Fuchs what David just said.

13 CHAIRMAN OBERMAN: Let me on this point,
14 thank you Keith. I think it would be a good -- this
15 is another example David, where I think in your final
16 briefs you try to articulate the wording that you
17 would find acceptable in terms of a condition on this
18 subject matter to at least suggest it to us, rather
19 than have us try to draft it up, not that we're
20 committing to accepting anything that you submit, but
21 it would be more helpful for you to tackle it before
22 we do.

1 And I think that applies to across the
2 board to things that are discussed here in terms of
3 commitments and conditions.

4 MR. MEYER: We are certainly taking as
5 good a set of notes as we can, and share with you
6 them.

7 CHAIRMAN OBERMAN: Okay. And if you have
8 nothing else to do you can re-listen to the whole day
9 on YouTube over the weekend.

10 MR. MEYER: Looking forward to it.

11 CHAIRMAN OBERMAN: All right. Let's
12 proceed.

13 MR. MEYER: So if no further questions
14 about Chicago, we are planning to accompany the Board
15 to the south, to the Texas shared lines area, and
16 just as an overview let me use this slide to tell you
17 what we're planning to cover in what order. So
18 really we have three big points about the shared
19 trackage in Texas and Houston in particular.

20 Number one, as we will demonstrate to you,
21 there is no urgent problem here that demands an
22 instant solution. There is room for our measured

1 growth, and we'll explain that. Second, nonetheless
2 we affirmatively want a collaborative process, these
3 lines are more important perhaps for us than for
4 anyone. If you include the lines all the way from
5 Robstown to Beaumont.

6 We need for this part of the railroad to
7 be fluid. We want to be active participants in
8 making sure that it stays that way, and you'll hear
9 us address that. Third, and related to the second
10 point, as we'll explain the existing agreements that
11 were created in 1996 by the Board, in the rights that
12 were granted to Tex-Mex between Robstown and Beaumont
13 over the Union Pacific, and most of this line
14 includes those rights.

15 There's this segment in the middle where
16 after Tex-Mex got the rights, KCS, and after the SP I
17 think it was had abandoned, or not abandoned,
18 discontinued operation over the Wharton Branch which
19 goes between Victoria in the south and Rosenberg,
20 which is near Kendletown as shown on the map in the
21 north, and invested a lot of money to upgrade that to
22 acquire the line from Union Pacific, and then to

1 upgrade it into a KCS owned property.

2 So what you see here, other than that
3 segment in the middle is rights that were granted to
4 Tex-Mex in 1996, and we'll come back and talk about
5 where those came from and why that's relevant. But
6 what we're going to show you is that those
7 agreements that were created back then provide the
8 mechanisms that will work, not only for the sort of
9 collaboration around service that's required, but
10 also for the sharing in financial responsibility
11 associated with any infrastructure that might end up
12 being necessary, whether it's to support CS or CP/KC
13 growth, or to support UP and BNSF growth on these
14 lines.

15 It's done so for the entire time since
16 those rights were created, and those relationships in
17 those agreements will serve those interests. The
18 alternative that BNSF and UP offer is really a very
19 one sided set of conditions that they're insisting
20 upon that would give incentives to them to hold up
21 our activity, to insist that we not start competing
22 until they are satisfied, so what will that mean?

1 They'll ask for the moon? Knowing that
2 we're over a barrel. We'll have no choice. We'll
3 pay whatever it takes to get our merger started, and
4 I'm sure their price tag will be high.
5 Alternatively, they'd be just as happy if we never
6 started because they don't want the competition from
7 us to materialize. That's not a constructive path
8 for the Board to take, or for the public interest to
9 take.

10 Our incentives today, and under these
11 agreements, will be to do what's right. Will be to
12 make sure that operations are fluid, will be to make
13 sure that the collaboration is constructive. Why?
14 Because as I said our operations will depend upon it.

15 So, coming back to where we're going to
16 start with why, there's no urgent problem to be
17 resolved. And turning back to that map if I could
18 for one moment just to orient the Board. We're
19 going to start in the south, in the segment between
20 Victoria and Robstown. That's the circle in the
21 bottom of the big bubble.

22 Mr. Elphick will explain, respond, to some

1 of UP's assertions regarding capacity on that
2 segment.

3 CHAIRMAN OBERMAN: David, just wanted to
4 make sure I'm clear on something. Do I understand
5 that the trackage rights provisions that govern trains going
6 back and forth through Houston, govern
7 infrastructure needs as the needs arise?

8 MR. MEYER: Absolutely, and we'll explain
9 that in detail.

10 CHAIRMAN OBERMAN: Okay. Thank you.

11 MR. MEYER: So, first we're going to cover
12 briefly the Robstown Victoria segment. Mr. Elphick
13 will cover that. Then he'll explain our assessment,
14 and the condition is that the Neches River Bridge,
15 which has been studied extensively recently by all
16 three of the railroads that use that bridge, UP,
17 BNSF, and KCS, in 2018 and 2019.

18 And then he'll turn his attention, along
19 with Mr. Creel, and Mr. Orr if he can join us, to the
20 Houston area itself, to the City of Houston between
21 the points on the east of Houston where those two
22 lines from Beaumont come together across Houston.

1 We've heard that described as the
2 expressway across Houston, some stoplights in the
3 middle. We'll come back to that in detail, and we'll
4 follow that through to the west side of Houston. And
5 so with that let me just hand it over to Mr. Elphick.

6 MR. ELPHICK: Thank you. So Ray speaking.
7 We've heard from UP's panel that our review of
8 capacity was extremely aggressive. On the contrary,
9 CP's assessment of capacity was based on actual
10 observations, our experience, and using conservative
11 measures.

12 So I'll start as David said by looking at
13 the shared traffic to the west of Houston between
14 Robstown and Victoria. UP's Brownsville subdivision
15 runs north from Brownsville north all the way to
16 Bloomington. For our purposes today we'll be looking
17 at the portion of track, UP's ground rule
18 subdivisions, specifically the shared track from
19 Victoria to Robstown.

20 The track diagram for that segment is
21 shown at the bottom of the slide. Inside that shared
22 track section, UP pointed to the track segment

1 between Bloomington and Inari, by the red star, as it
2 had the longest between siding run time, and
3 therefore would be the next segment to require
4 capital should the train counts demand it.

5 You'll see in the box at the top left,
6 UP's statement made to you last week, that this
7 segment between Bloomington and Inari has a
8 bottleneck problem in 2022. The way their table
9 reads the segment is 1.6 trains below sustainable
10 capacity in 2022. UP used an earlier version of CP's
11 table header in their presentation taken from the
12 Alpha car or RBS.

13 It was a typographical error in that
14 table. In the header row year 2022 should have read
15 2025. This error was corrected and filed in the
16 record as an errata on August 12th. You'll see in
17 the corrected chart on the right the corrected table
18 header for the column. That's the last column at the
19 end, shows train per day at the end of 2025 versus
20 our 65 percent sustainable capacity, and that's after
21 the growth of the eight trains.

22 The UP also adjusted their formula to

1 demonstrate capacity. So we're again seeing that
2 we're aggressive. I'll address that in a moment.
3 But before doing so, I'd ask you to look at that
4 table on the right, and each of the segments there,
5 and you'll note that other than that 1.7, the
6 remaining segments all have much higher capacity with
7 the other lowest point being 6.2 trains.

8 So we're assessing that room for growth
9 ourselves across the line in considering after our
10 trains were routed, how much room is available? Well
11 the 1.7 would be a location that we would monitor
12 with UP and BN for sure. You know I'd note that
13 CP/KC's eight trains will not materialize you know
14 all in the first year.

15 It will take three years to get there.
16 But we had actually noted in the Rucker/Turner verified
17 statement from February of last -- of this year, that
18 they communicated a plan to build a siding at Lin, a
19 15,000 foot siding, so that's between in the diagram,
20 that's between again Bloomington and Inari.

21 And that would increase the capacity on
22 that segment significantly, well above the 6.2 trains

1 you know that is the next lowest watermark. As
2 recently as September 27 of this year they again
3 confirmed that that's in the plan for 2024. So I
4 just wanted to declare that we did in fact consider
5 there was a reasonable amount of room for growth in
6 the section even after three years.

7 What I would like to address my comments
8 about the 1.7, and the fact that they're declaring
9 our calculations to be aggressive. I would dare say
10 you know we are realistic and conservative. I'll
11 start by saying we used 65 percent in the formula as
12 the standard at CP. That's equivalent to not running
13 trains for a total of over eight hours a day.

14 CP uses this number to assess the harshest
15 conditions on our network, on our mountains grades
16 through the Rockies, where our operations are the
17 most challenging. The 65 percent is not aggressive.
18 By planning to operate at 65 percent, that leaves 35
19 percent that can be used if they are needed. It
20 provides flexibilities to handle other train events,
21 to accommodate search capacity, maintenance, or other
22 unforeseen issues.

1 CP has been using this process for over a
2 decade to monitor sustainable capacity, and that's
3 not the only measure we use. We use a number of
4 performance measures. We use correlations on speed,
5 you know, a number of factors. We look at varying
6 conditions on each of the subdivisions, and we're
7 always looking at this formula to understand what our
8 available capacity is.

9 But in terms of how you look at run times,
10 there's different approaches across the industry. We
11 took a conservative approach here on the segment
12 between Robstown and Bloomington to figure out the
13 run times. We calculated that using real data of
14 course, my team rode trains though, across the
15 territory, and they made observations on the trains.

16 They looked at the PTC screens, and the
17 bulletins on the trains for slow orders, and they
18 noted that the subdivision was a relatively rough
19 ride, and the track had several slow orders due to
20 the track condition. So this, coupled with our look
21 at downloads let us to put in 30 minutes when we saw
22 it to be 27 minutes.

1 It's not clear to see why these slow
2 orders are out there, but I just want to say that
3 with the slow orders removed, it would be possible to
4 do that run in 13, which is 13 miles in about 21
5 minutes, not in 30 minutes.

6 So a small change does make a difference
7 in the formula as Mr. Turner declared. It can change
8 the outcome, but if we were to take that 9 minutes
9 off our 30 minutes and use our formula, there would
10 be much more capacity than the 1.7 that's declared
11 there. So capacity --

12 CHAIRMAN OBERMAN: So what's wrong with
13 that track? And what needs to be done and how much
14 would it cost?

15 MR. ELPHICK: Yeah, I don't have the
16 answer to that question sir. It looks to be a
17 surface condition requiring surfacing, and I believe
18 they have a rail program out there as well.

19 CHAIRMAN OBERMAN: Is this UP track?

20 MR. CREEL: If I could to provide a bit of
21 color. Hopefully John Orr should be able to join and
22 hopefully soon. We may have to double back to this

1 to give you much more intimate details on this phase.

2 But effectively, this track aligns here
3 the trains that move over this track, over the
4 trackage rights piece of railroad are actually KCS
5 trains, more than 50 percent. The next largest --
6 the remaining 50 percent I guess, the best way to say
7 it is its fleetingly between BNSF and UP. So another
8 way to say it, 75 percent of the trains are actually
9 trains that compete with UP. They're BN or KCS.

10 A track speed obviously is determined by
11 the class of track, but optimizing the class of track
12 means you'd have to make sure you have the
13 maintenance rights. So if you don't have adequate
14 ties, rails, ballasts, surface conditions, tie
15 condition, whatever reason, the only way to protect
16 safe operation is to apply to get those.

17 This piece of track historically has been
18 challenged with KCS's experience for UP's, whatever
19 reason, the lack of taking the rent that KCS is
20 paying to maintain the track and track speeds to the
21 reality of the way they run it day in and day out.
22 And the danger of that, these models as we've pointed

1 out are sensitive to minutes.

2 If you bake in a slow track condition in
3 your capacity analysis, you're baking in that
4 inefficiency. And if we were to reward UP with that,
5 and to say okay, we need more capacity, disregard the
6 fact that you're not maintaining the track to its
7 potential, essentially we're adding infrastructure
8 that's not needed, and we're also rewarding that bad
9 behavior.

10 So UP would not have the incentive to
11 maintain the track to the standard that we deserve as
12 payers of rent. They as the landlord and in fact
13 they too would benefit from the service they provide
14 to their customers. So to me this is a very micro
15 example of what competition brings.

16 If UP will maintain this track to its
17 capacity and to its potential, we're going to get
18 better ride, we're going to get a better transit
19 time, UP trains will as does the BNSF trains. All
20 three of our customers will benefit from doing the
21 right thing in this particular piece of track.

22 CHAIRMAN OBERMAN: How long is this

1 stretch of track?

2 MR. CREEL: What's the total distance.

3 344 to -- it's about 100 miles, 84 miles. A little
4 less than 100 miles, 84 miles.

5 CHAIRMAN OBERMAN: Well I've previously
6 expressed my observations, and I guess that's how
7 I'll characterize them as, why railroads making
8 billions of dollars a year don't keep their track up
9 to improve service in general. Forget, you know, the
10 relationships here you know between the railroads,
11 but it affects everybody.

12 So I just I assume UP is listening to this
13 broadcast. A word to the wise UP, if there's a
14 problem with maintaining your track do something
15 about it. And if you don't think so you can tell us
16 in your final brief why CP is wrong. Go ahead.

17 MR. OTTENSMEYER: And Mr. Chairman this is
18 Pat Ottensmeyer. The KCS has spent over the last 16
19 years I suppose, 70 million over and above the total,
20 the trackage rates on capital improvements in this
21 stretch. So 70 million, I think you've heard, or
22 will hear that we spent a total of 120 million on the

1 trackage rights.

2 70 million of that has been on this
3 particular stretch. As Keith pointed out, we're the
4 main user of this. BNSF also uses this, so and it's
5 not as critical to the UP as several of the other
6 areas that they run in Texas and South Texas,
7 certainly their route to Laredo.

8 UP has to do the work on this. We pay for
9 it, on some of these specific projects. We've been
10 willing to pay for it, but UP does the work. And you
11 know I'm not dismissing at all the challenge of
12 managing a multi-billion dollar annual capital spend
13 that UP manages across the entire western two-thirds
14 of the country, but some of these projects don't
15 necessarily get to prioritization that we would like
16 for it to get.

17 CHAIRMAN OBERMAN: Well, Pat maybe I might
18 -- this should be directed to KCS. I mean if this is
19 a stretch of track that is going to be used by the
20 merged corporation, and you have the bulk of the
21 trains over there, and you have a trackage rights
22 agreement that calls for maintenance, why isn't it

1 going to be the merged corporations obligation to get
2 this track up to speed?

3 MR. MEYER: Okay. Mr. Chairman it's
4 David. If I understood your question it seems to be
5 asking the question of why wouldn't we become
6 responsible for maintenance.

7 CHAIRMAN OBERMAN: Well, whether you're
8 legally responsible, or just from a business point of
9 view, it's a problem here with capacity because of
10 the slow speeds. I mean I just found it frustrating
11 at various parts around the whole country's network
12 that railroads don't always spend money.

13 They come in and tell us -- we had this
14 come up in the Gulf Coast situation that they're slow
15 areas, there are congested areas, it's on their own
16 lines, and they don't fix them up and they want
17 somebody else to fix them up. So to me this sounds
18 like an area that whatever the legal obligation is
19 you have a self-interest in getting this track fixed
20 so it doesn't have these slow areas. Am I missing
21 something here?

22 MR. MEYER: Let me make three points in

1 response to that, and maybe the other two will have a
2 comment. So the first point I want to make is just
3 to come back to the thrust of what Mr. Elphick is
4 saying here. We're not suggesting that there's a
5 problem here and UP needs to fix it. That's not what
6 we're saying.

7 What we're saying is there is capacity for
8 the trains we intend to operate, or anticipate
9 operating over this segment. That there is already a
10 plan to add an additional siding in the one space
11 where the analysis of capacity comes close to the 65
12 percent limit. The point we're making is there are
13 opportunities for there to be even more capacity if
14 the line were maintained to its appropriate standards
15 for track speed, rather than slow order speed.

16 And just those little efforts that are
17 short term in nature, and much easier to make than
18 capital expenditures, can radically improve capacity,
19 rather than relying on longer term, or
20 infrastructure heavy investments. So that's our main
21 point.

22 The second point we would make is, and I

1 know this, it's part of our presentation more
2 generally about the Houston area. We absolutely take
3 onboard the desire and need to be very proactive
4 about making sure all of this works. We're not going
5 to sit back and hope that UP does what it's supposed
6 to do, and then complain about it if it fails.

7 We're going to be proactive in making sure
8 that everything's happening that needs to happen,
9 that's appropriate to happen, and we're going to be
10 very engaged as we said. And maybe I said there were
11 three points, but I remember only two of them, so if
12 there are others who want to comment.

13 MR. CREEL: I think the final point, the
14 third point is we can be assertive. We can be the
15 squeaky wheel, and we will, but at the end of the day
16 UP owns the track. UP owns the responsibility, and
17 they have the labor of their employees contractually
18 own the work. UP has to execute the maintenance work
19 to maintain the infrastructure.

20 They have to take their interest payment,
21 and as landlord, maintain the property to extent that
22 the benefits are for all users.

1 MR. MEYER: It was exactly the point I was
2 going to make.

3 CHAIRMAN OBERMAN: Well look, I'm only
4 making this observation. There seems to be an
5 attitude in the rail industry I've seen too often,
6 that it's okay to have this 84 miles of slow area
7 because you don't need the capacity right now. But
8 if the trains could run faster, everything in the
9 network would be better, and people would get better
10 service I would assume.

11 That's why everybody comes in and pats
12 themselves on the back when your velocities are
13 improved. So whichever railroad is responsible, I'm
14 not clear, why do we have a network where on a line
15 here that seems to be one that's particularly if the
16 merger is approved, is a very important line, where
17 we settle for slow speeds because we don't need the
18 capacity today.

19 Why shouldn't that track be improved now,
20 even before you get to a point where you need the
21 capacity? What is the business philosophy about
22 letting in language there? I really don't

1 understand it on a line which has apparently some
2 very important and a lot of traffic even now, even
3 before the merger.

4 MR. CREEL: And Chairman Oberman, I'm
5 going to agree completely with you. I would suggest
6 that it boils down to motivation and priority.

7 CHAIRMAN OBERMAN: Well if it helps us you
8 know, if the merger takes place, if it helps move
9 things along you know, I think whoever has both the
10 legal and the business obligation to deal with it
11 should deal with it, and just leave it at that.

12 MR. OTTENSMEYER: Yes. And just to
13 clarify, this is Pat again, my understanding, and I
14 don't know if John Orr has joined us yet, is that
15 because of the fact that Keith mentioned UP employees
16 own the right to this work, so we couldn't just
17 unilaterally decide to go do the work with our
18 employees or contractors.

19 We pay for it, we pay for it in the
20 trackage rights fee. We pay for it in some cases
21 discreet projects outside of that. But they have the
22 right to do the work.

1 CHAIRMAN OBERMAN: Pat, are you -- I
2 understand that. Are you saying that as the entity
3 paying for the work you don't have any position to
4 say to UP fix it, we're paying for it, do it?

5 MR. OTTENSMEYER: We do. But then we
6 don't get to determine where that project ends up on
7 their multi-billion dollar capital project.

8 CHAIRMAN OBERMAN: Well that's odd to this
9 layman's perception, maybe not out on the railroad
10 world.

11 MR. MEYER: My apologies, so David again.
12 So we would be delighted to have a broader
13 conversation about the trackage rights relationship
14 between the future of CP/KC and UP over these
15 segments. For purposes of addressing the issues that
16 have come up in this merger I think as Mr. Elphick
17 said, there just isn't a short term problem. There
18 are lots of opportunities for expanding capacity,
19 even beyond what's needed to accommodate our trains.

20 And so we just see no issue. And that's
21 not to say we're putting it to bed and ignoring it.
22 There's no urgent need for anything to hold up the

1 merger benefits, and we will be collaborative and
2 proactive going forward making sure that everything
3 that needs to get done, get done, exercising all the
4 rights that we have.

5 So Mr. Elphick is now going to, unless
6 there are other questions about this geography,
7 address the issues about the Neches River Bridge.

8 MR. ELPHICK: Thank you. So Ray speaking.
9 And Keith, I'll try not to go too quick, although
10 feeling the time pressure here a bit for the team.
11 On this track's map here you can see the Neches River
12 Bridge in the middle crossing that Neches River.
13 That's in blue.

14 So starting from the far right is KCS's
15 siding at Vidor. Moving left you can see that KCS
16 junction with UP's Lafayette subdivision, and then
17 you see a large terminal called KORF, and that's a
18 bulk receiver of crude. All three railroads went in
19 there.

20 As you continue to move along the tracks
21 you cross the Neches Bridge, and then you run into
22 Up's double track territory. Vidor Beaumont Yard,

1 and ultimately you go to the direction running on the
2 left side. So UP had noted that we had used a
3 different methodology for calculating our bridge
4 capacity here. They used the same methodology that
5 we had done on the Brownsville sub for this location,
6 and came up with a much lower rating of capacity
7 than we did.

8 We did use a different methodology because
9 we had to. This is not a typical signal track. To
10 explain CP's approach if you're looking at capacity
11 over the bridge, give me a close up here on the KCS
12 tracks. In the close up you can see the relevant
13 measure for calculating available capacity is the
14 time for each train to clear the relevant points.

15 In the single track on the top the measure
16 is a function of the time to run between the two
17 sidings and clear, and there's only one diversion
18 point as you run across. But on the bottom, in the
19 Neches River Bridge area you have multiple different
20 diverging plants, so obviously you have Lafayette
21 subdivision in the KORF terminal, and then again on
22 the other side of the bridge.

1 So we can't use the same formula. We
2 actually calculated the run times of all of the
3 different train types moving over the various
4 segments. So for example a freight train for UP from
5 the double track to the Lafayette sub takes 25
6 minutes, but an Amtrak train only takes 15 minutes on
7 the same segment. A KCS train running across from
8 over the bridge to the Vidor siding takes 30
9 minutes.

10 So we did that. We also looked at
11 maintenance. We didn't assume that the maintenance
12 work could be done in the shadow of trains, or in
13 between trains. We looked at the bridge openings.
14 We did a calculation of the time the bridge is
15 occupied during the day, and then looked at it over
16 the course of the day and calculated the remaining
17 capacity.

18 So we came up with a number of 66, and
19 that number is quite close to a study actually that
20 UP, BN and KCS jointly did where they came up with
21 the number 70, so UP's presentation that the capacity
22 is much lower, the sustainable capacity is much

1 lower, differs very much from ours.

2 Coordination here again is the most
3 critical aspect of the operation. It's shown in many
4 studies. So if you go back to the broader view, and
5 if you look from point A to point B, that's between
6 crossovers on UP's double track. You'll see that
7 there's 11,000 feet of track there, so it can fit a
8 fairly large train.

9 So this double track is critical. If the
10 train is sitting there, and blocking one of the two
11 tracks, then you're effectively single tracking. You
12 have the complexity of dealing with the track to the
13 west of there, the directional runs, they're
14 crossing trains over, you're working around the train
15 parked on that single track, and it really congests
16 the area.

17 All the parties are involved and need to
18 work together to coordinate that capacity, even
19 though it's UP's track. We also learned a lot from
20 KCS in our time out there. We were riding trains
21 again. We were sitting in the dispatch center trying
22 to learn from everyone, including KCS how it all

1 operates.

2 And it confirmed for us that there are
3 still tremendous opportunities out there. You know
4 one of my team was riding a train to the KORF
5 terminals, they were moving from the west to the
6 east, to the KORF terminal, and it got to the gate
7 and the security guard took a half hour to get out
8 and look at the driver's licenses before they were
9 allowed to back into the KORF terminal.

10 So maybe that's a one off, but all three
11 roads could get together, go to the KORF terminal,
12 and try and get pre-cleared. Try to come up with a
13 process to be faster into that terminal. That's just
14 an example of the kinds of opportunities that are out
15 there to improve coordination.

16 You know while it's not needed at this
17 time in my view, based on our capacity calculations,
18 there's are infrastructure opportunities there. I've
19 shown, or depicted on the right side KCS could extend
20 their siding to the west, and we could do that, and
21 that would shorten that run time up between the
22 double track and our siding, KC's siding.

1 So minutes matter again. We could do that
2 within two years for a cost of about 8 million
3 dollars. That's what KCS's engineers tell us.
4 There's projects we can do on the UP side. There's a
5 tremendous amount of opportunity both for
6 coordination at the Neches River Bridge, but also for
7 us to coordinate on what are the next priorities
8 there.

9 My view is this area has been studied
10 excessively, it's really just about sitting down and
11 figuring out the next steps cooperatively.

12 UNIDENTIFIED SPEAKER: You're slow today.

13 MR. ELPHICK: I think we're moving on to
14 -- okay so the next section here.

15 BOARD MEMBER HEDLUND: Excuse me, I have
16 one question.

17 MR. ELPHICK: Sure.

18 BOARD MEMBER HEDLUND: The Neches River
19 Bridge, that's a moveable bridge it goes up and down
20 and how often, how many times a day does it do that,
21 and how does that affect traffic through that area?

22 MR. ELPHICK: Yeah, UP speculated that it

1 could go up, and our research suggests that right now
2 it's setting about once a day it's going out. We
3 haven't seen evidence of it you know it going up
4 more. It's you know it takes about 20 minutes I
5 believe for it to go up and down as the barge goes
6 through.

7 BOARD MEMBER HEDLUND: Thank you.

8 MR. ELPHICK: So in a few moments here
9 we'll offer a look at Houston through a video. What
10 I'd like to do though is offer a perspective on, or
11 some context around Houston. And what is depicted in
12 this graph, or the main route for UPBN, Amtrak and
13 KCS run on.

14 This expressway as it's called, runs in
15 both directions across Houston, light blue arrows
16 again indicate the westward route, and the dark blue
17 arrows indicate the east route. UP positions the
18 operations in Houston as slow moving, measured in
19 many hours per train. UP and BN indicate this area
20 mainly serves local traffic, with some traffic never
21 leaving the Houston terminal.

22 I would note that a lot of the complexity

1 -- my first point would be is south of that
2 expressway, below the blue arrows. The local part of
3 the operations of the south is creating significant
4 handlings and train movements in and out of the
5 numerous courtyards to and from the various customers
6 in the area for sure. Just change slides there.

7 That's why John's Orr's slide from last
8 week I think is an important slide measuring the
9 total train counts in and out of Houston. The
10 overall count of trains is an indicator of the
11 overall utilization of that terminal. It provides
12 the indicator in my mind of the level of activity
13 throughout the entire complex, and particularly in
14 that area south of the east west main line.

15 This graph you know is trying to address
16 the point that was made that even one train of
17 additional capacity out there would need to be
18 studied. What you're looking at here is the
19 absolutely value of changes in trains per day, day
20 over day. So if you had 100 trains over there one
21 day and went up to 110 the next, comparing to the day
22 before it went up ten, and down five, and up ten.

1 And so the point being in the black dash
2 line, that's CP/KC's eight trains. I would suggest
3 to you that it's normal in that plant for that kind
4 of you know change day by day, day after day. Eight
5 trains is not unusual.

6 And then before we get into the video
7 here, one last kind of set up here, you know we've
8 rounded numbers here but --

9 BOARD MEMBER PRIMUS: Do you mind if I ask
10 a question question, I'm sorry.

11 MR. ELPHRICK: Sure.

12 BOARD MEMBER PRIMUS: So the eight trains,
13 do you have an idea of the average length those
14 trains will be?

15 MR. ELPHRICK: I do. You know CP/KC or
16 KCS right now is running about 7,300 feet. I think I
17 did the math, you know we're going to increase by
18 about 15 percent, so we'll be just over 8,000 feet.
19 We've been clean and clear that we're going to run
20 trains up to 10,000 feet. In this complex UP, we've
21 seen trains out there bigger than 10,000 feet.
22 12,000-14,000 feet.

1 And so we're restricted to 10,000 feet as
2 we take the trains into Mexico. There's rules around
3 train length. But the average length will be less
4 than the 10,000 feet.

5 BOARD MEMBER PRIMUS: Thank you for that.
6 Is there you know, you mentioned how UP has longer
7 trains in that area, is that a challenge to
8 operations to have UP operating longer trains,
9 because looking at some of the sidings, it means that
10 they may not fit you know if you guys were trying to
11 get around them. They may not fit in those sidings.
12 You know is there a challenge to that with UP having
13 longer trains in that area?

14 MR. CREEL: Yep, Member Primus this is
15 Keith speaking. Absolutely your observation is spot
16 on. And in our video we'll speak to some of the
17 challenges real world that have been experienced by
18 all users on the highway through Houston that are
19 trains today and tomorrow have to navigate.

20 BOARD MEMBER PRIMUS: Thank you.

21 MR. ELPHICK: Again with that one last
22 slide. There we go. Again, these are rough numbers.

1 We've rounded them up, but CP/KC will not grow all at
2 once. You know we put this on the record here. It's
3 an estimate of course, and traffic comes early, goes
4 late, but we think that it's realistic to assume that
5 year one there will be two trains going through the
6 complex.

7 And then it will back loaded. Then you'll
8 see five or six trains towards your three so. I
9 just wanted to set that context as well.

10 MR. MEYER: This is our estimate of the
11 phase in of the traffic growth and how it gets
12 handled by trains being added to the train side. So
13 it's not all at once but within the first year it's
14 the two. Within the second year we don't see
15 additional trains beyond the two. Then the third
16 year we see the balance of the additional trains
17 coming on.

18 And of course it could be two and a half
19 in year two, or something with you know grain trains
20 that you know operate less than once a day, et
21 cetera. But it's a phased approach that will give
22 everyone time to adjust going back to that saw tooth

1 slide, we don't need to go back to it, but
2 remembering it you know where we showed the daily
3 variation at least in volumes.

4 Houston is capable of handling
5 fluctuations in trains on a daily basis, this isn't
6 going to be a day to day fluctuation. It's going to
7 be a planned and methodically phased addition of
8 trains.

9 MR. ELPHICK: Okay. So we're going to
10 look at a train that traveled from Mesa Crossovers to
11 West Junction on this map. So it's a westward train.
12 It's a grain train that we used one of CP's
13 locomotive counts on the head end of a KCS grain
14 train to film. You know we have that on our trains.
15 We can download it and take a look at what the road
16 looks like.

17 So this footage goes back to August the
18 1st of this year. It's a train originating out of
19 Manitoba, Canada destined to Mexico City. It's 100
20 cars, 5,000 feet and 10,000 tons.

21 MR. MEYER: Let me just say something.
22 This is David. So I just want to make sure the Board

1 understands. So we did not stage this. This was a
2 train that was running in the ordinary course, and
3 the CP team because a CP locomotive happened to be on
4 the lead on this train, and it probably is because it
5 originated in Manitoba.

6 The CP locomotive happened to be in the
7 lead, and we realize that we had this in the system,
8 and we're able to show you how that train experienced
9 traversing this expressway, so to speak, from the
10 east, where we're going to start east of Englewood
11 Yard, move past it through downtown Houston to the
12 west end of Houston, and you know again, this was
13 just a random train experiencing random conditions on
14 August 1, 2022.

15 We're changing drivers on the video, so
16 give us a moment to share the screen. Board Members
17 can you see the view out of the locomotive windshield
18 at this point?

19 BOARD MEMBER FUCHS: Yes.

20 MR. CREEL: Okay. So this is Keith
21 speaking. I'm going to do my best to operate this
22 train to the Houston complex. I'm going to provide

1 each of the members with the video, our
2 co-conductor. So you're in the conductor seat, not
3 the engineer seat as the conductor would see it as he
4 moves west towards the town, or City of Houston.

5 CHAIRMAN OBERMAN: Is your license up to
6 date Keith?

7 MR. CREEL: Absolutely. Again, so we're
8 starting at the east side of Englewood Yard at a
9 location called Mesa, because that's the crossovers
10 there for trains to go from track one to track two.
11 That's a stub-in lead track. And again, we're
12 traveling westward. We're going to go by Tower 87,
13 Englewood Yard.

14 We're going to point to the Creosote track
15 and then continue on through Tower 26 and down to
16 West Junction.

17 MR. MEYER: So just to interject one
18 observation here. This route is the route of the
19 normal route for westbound or southbound KCS trains.
20 It is the former Southern Pacific sunset route
21 between New Orleans and Los Angeles. It became part
22 of UP, it's in the UP/SP merger. It is operated not

1 just by KCS through trains, but UP has through
2 operations to the New Orleans gateway.

3 Amtrak operates between New Orleans and
4 Los Angeles on these tracks. This is the route.
5 It's the same route for all of those three operations
6 I just described.

7 MR. CREEL: And I think to add a bit more
8 color, this is Keith speaking as well. Just to get
9 an orientation, the track to the right lane one, the
10 track that we're on lane two, the track to the left
11 where the cursor is located is actually a lane that
12 goes into the east end of Englewood Yard.

13 So we're going to proceed west now in lane
14 two. Track speed in this area is 30 miles per hour.

15 MR. ELPHICK: There's the east end of Englewood Yard. You know,
16 eight or nine 5,000 foot tracks. And if you look up
17 on the right you can see a train on track one, on
18 lane one. And I'll stop here. And then this train
19 here is actually diverging towards Settegast yard.

20 So you could see how the tracks shift to
21 the left, lane one is actually on the right. Lane
22 two will be to the left of the locomotive. We're

1 going to proceed straight through. And if you look
2 on the left you can kind of see behind the signal. I
3 mean that's a locomotive pushing the cars up the hill
4 at Englewood Yard to process over the hump.

5 MR. CREEL: And explain this as well
6 where this is going to.

7 MR. ELPHICK: Yeah that train again, that's
8 diverging and it will go north towards Settegast
9 Yard.

10 MR. CREEL: And Settegast Yard, this is Keith again
11 speaking, just for reference is where as of 2021 UP
12 shifted the intermodal work that was done previously
13 in Englewood Yard as part of their unified plan, they
14 shifted the work to Settegast Yard.

15 So the intermodal work that
16 would have been done in Englewood to the left, has
17 been shifted to Settegast, which is to the right, and
18 the diverging route where this train is headed. So
19 two different work locations in near proximity to
20 each other. Let's talk about this. So this is
21 actually the interlocker. We're at cross traffic.
22 If you take a right it goes up this track, that's

1 where that train was heading up to Settegast.

2 If you were standing on this interlock you
3 literally can look up, look north for the lack of a
4 better term, and you'll see the south end of
5 Settegast Yard.

6 MR. ELPHICK: It's a double track interlock in
7 both directions. At Tower 87. Yeah, so we're now
8 stopped alongside the main body of the yard, and
9 we're sitting on track one.

10 MR. CREEL: And let me, this is Keith
11 again speaking if I can. This is a perfect point. I
12 want to elaborate a bit on Member Primus's question.
13 So what you see to the left, these are what we call
14 receiving and departure tracks, or R and D tracks.
15 So in the trains that arrive here, outbound trains
16 would historically and typically be designed to be
17 built here.

18 So a train comes in. These tracks
19 historically, and still are today, the industry
20 standard is R and D tracks were somewhere between 6
21 and 7,000 feet long. These particular R and D
22 tracks are about 7,000 feet. And the reason they

1 were designed that way is to match the line capacity
2 on the railway.

3 So if you go to a typical traditional rail
4 network, and this was true at IC, it was true when I
5 worked at BN. It was true when I went to CN. It was
6 true when I went to CP. And I'm sure it's true at UP
7 it's the standard. Typically every 10 or 11 miles
8 you're going to have 6 to 7,000 foot siding to meet
9 train needs, and other than double track.

10 And when the arrive at terminals you have
11 adequate capacity to be able to take the train off
12 the main line, or off the through fare and to Member
13 Primus's point, yard in the terminal for the train to
14 be classified, and/or when the new train is ready to
15 depart from. That allows you to clear your
16 thoroughfare routes, your highway routes, keep them
17 free and clear so that through trains get received
18 east or west.

19 So in this case again, originally built
20 and still today, around 7,000 feet track capacity at
21 the longest length of track here in the R and D
22 tracks at Englewood Yard.

1 BOARD MEMBER PRIMUS: So I'm sorry Keith,
2 so what does that do again for the larger trains that
3 they may run. How does that affect you guys like in
4 that area?

5 MR. CREEL: Practical experience, and I
6 share this from my personal experience. I took an
7 inspection trip here Member Primus several months
8 ago. Actually at that time these two tracks that
9 were lane one, lane two, were being used to build
10 trains on. So as opposed to fitting in the departure
11 tracks, which we showed you, they're limited by
12 length. They were doubling trains out at the west
13 end of the yard, which I'll show you in a few moments
14 how the infrastructure is set up.

15 And shoving these tracks that we're on,
16 and effectively utilizing the thoroughfare as a
17 parking lot. I liken it and being here at Bensenville
18 by O'Hare, a reference was made earlier to O'Hare, I
19 can't imagine landing a plane on the runway at O'Hare
20 and taking passengers on, and taking passengers off.
21 It's just not designed that way. It's not the place
22 to do it.

1 If you do it that way I don't care how
2 much money you spend, you'll never build enough
3 runways. The use matters. That was the point that I
4 made last week. This is a shared asset. UP owns it,
5 we all have to use it. We all have to deliver
6 service depending upon it. The level of service, and
7 the velocity through the Houston terminal is
8 profoundly impacted by our ability to get this right.

9 Parking trains on this track is the
10 absolutely last thing to do operationally if you're
11 concerned about throughput and capacity in the
12 Houston terminal.

13 MR. ORR: Keith, if I could join in just
14 to add emphasis. This is John Orr. Member Primus,
15 in my reply verified statement I included a snapshot
16 from a dispatcher overview panel from the spring
17 Texas UP dispatch panel. And it was the day I was on
18 the rail, and we were rerouted under clear route.

19 We were taken 7 miles out of route because
20 you'll see in that overview all of these tracks --
21 all of them, were occupied by either standing trains
22 waiting to get into the yard, or occupied by trains

1 that were built that didn't have either a crew or
2 power.

3 And you'll see a lot of red lines denoting
4 occupying trains in that whole Houston complex in
5 that dispatch overview in my replied statement. And
6 like Keith, I observed 7 trains with power and crews
7 on top of standing cuts of cars that were being
8 built. It really gets to use. And while Keith uses
9 the analogy of an airport, I think that this is truly
10 an interstate.

11 It's like tractor trailers stopping on the
12 you know, the right hand lane, even before the exit
13 ramp, and stopping and then moving onto the exit ramp
14 and stopping, and then getting onto the exit ramp and
15 stopping, and not fitting into the parking lot in
16 whatever place they're going.

17 So it's not just the fact that these
18 trains won't fit into the arrival or departure
19 tracks, and there hasn't been appropriate timely
20 investment in the yard structure, but it's also
21 allowing these trains to go into the terminal, into
22 Houston, knowing full well they can't go anywhere and

1 localized decisions that are allowing decisions to be
2 made within an operating yard to impact and impact
3 trains that are meant to go through, and having
4 either re-routing or a cascading effect of trains
5 stopping..

6 And again, that's a very telling dispatch
7 overview that's in the replied verified statement
8 that I submitted from personal experience.

9 CHAIRMAN OBERMAN: So what's the -- are
10 you saying that they should build longer yard tracks,
11 or run shorter trains on UP?

12 MR. CREEL: Well I think there's an
13 ability to accomplish their objectives of running
14 trains and running trains efficiently. I've got a
15 bit of experience in doing this, and I'll get back to
16 my history even at Canadian Pacific. We had a desire
17 to run bigger trains in Canadian Pacific. That's
18 part of the efficiencies and the synergies and the
19 service improvements that the operating model
20 allows.

21 But you can't let your ambitions get ahead
22 of your physical plan. You have to match yard

1 capacity with main line capacity. Size of trains,
2 I'll take the St. Paul, Chairman Oberman. At St.
3 Paul at our yard, the receiving and departure
4 tracks, much like here in Houston and Englewood,
5 Dunyard is what we call it. Adjacent to our
6 receiving and departure tracks is a -- is a main line
7 as well as a BNSF main line. It parallels in towards
8 St. Paul.

9 CHAIRMAN OBERMAN: Somebody's microphone
10 is on that shouldn't be one.

11 MR. CREEL: At CP we went through an
12 extensive capital plan where we effectively invested
13 tens of millions of dollars to take those 6,000 foot
14 receiving and departure tracks and turn them into
15 10,000 foot receiving and departure tracks because we
16 knew we could not use the thoroughfares, one of which
17 we own, and one of which BN owns, that parallel the
18 yard to build big trains.

19 We had big train aspirations. It took big
20 investment to be able to realize that vision. Now
21 with that said let's go west, and I'll show you the
22 opportunity. Again rural main lanes, lane two

1 parallel in the yard to our left. We get towards the
2 end -- just stop here.

3 Okay, to the left is the series of tracks
4 that come out of the west end of Englewood Yard. So
5 if you were to process a train, build a train, depart
6 a train, those are the leads that you would by design
7 come out of, as opposed to coming out of those yards
8 because those tracks aren't long enough. You're
9 limiting factor when you run a big train now means
10 you have to pull them out directly ahead of, and line
11 up and on the track that we're on, and shove it back
12 to clear those crossovers.

13 Therefore, congesting or blocking the
14 thoroughfare route, and forcing trains when that
15 track is occupied to take the circuitous route
16 literally around Englewood Yard, the way Mr. Orr
17 described. Now the other point I'll point out as we
18 go down the track to the right, you're going to see
19 our train.

20 We call it turnout, or go through the
21 turnout into the furthest track to the right. That's
22 called the Creosote track. That particular track as

1 we sit here today is about 3,400 foot long. So the
2 dispatcher for whatever reason, as you can see the
3 track ahead of us is clear, we're taking the
4 diverging route through a 10 mile an hour turnout off
5 a 30 mile an hour track, into a 3,400 foot siding.

6 And you'll see in a moment just to come
7 out the other end in the moment, for no apparent
8 reason. So as we continue to go west I'm going to
9 pause as we slowly move to the Creosote track. And
10 again here's the Creosote track, 3,800 feet, I stand
11 corrected. It's a bit longer. But we've got a 6,000
12 foot train.

13 Now let's go here. As we proceed down the
14 Creosote track, immediately to the left -- and I said
15 this earlier.

16 BOARD MEMBER PRIMUS: Hey Keith before you
17 do it, so were you dispatched by UP to take that
18 line?

19 MR. CREEL: Absolutely.

20 BOARD MEMBER PRIMUS: Okay.

21 MR. CREEL: And I can't begin to explain
22 why we would have gone through this turnout track unless

1 there's some kind of auto dispatch mode and/or bad
2 railroading practices just programmed into people's
3 minds, and they're just repeating bad behavior. I
4 don't know.

5 As an operating officer it makes my
6 stomach hurt to think that we're wasting capacity
7 like this.

8 BOARD MEMBER PRIMUS: That's exactly what
9 I was going to ask you, and you answered you didn't
10 know. So I was going to ask you why they would do
11 that.

12 MR. CREEL: Yeah, there's no logical
13 reason for it Member Primus. To the left, as I
14 mentioned earlier, back in 2021, part of UP's unified
15 plan as I understood it, they shut down the
16 intermodal terminal which was located here, in this
17 area. I call it the field of dreams. That's UP's
18 property, that's part of Englewood Yard.

19 They took that work, they moved it back to
20 Settegast Yard, which we just passed earlier on our
21 trip on the east end of Englewood Yard. Part of
22 phase two of their plan in designing Englewood Yard,

1 phase one in 2021 they extended the actual
2 classification tracks inside of the yard, which I
3 applaud. And it gives you additional capacity within
4 your footprint.

5 However, the R and D tracks still remain
6 7,000 feet. Phase two as I understand it, is to take
7 this footprint, and to create those 10,000 foot R and
8 D tracks that would match their big train
9 aspirations. The problem is it hasn't happened. I
10 don't know why, but to suggest as Mr. Turner did last
11 week, that it's so complicated it would take multi
12 years to create capacity to handle growth in Houston
13 is just a misrepresentation of the facts as I see
14 it.

15 You could take that piece of railroad that
16 has tracking grade, and convert that with capital
17 investment into 10,000 foot trains in a matter of
18 months, not years, thereby eliminating the need to
19 park 10,000 foot trains on the thoroughfares that we
20 all depend upon to move through the complex of
21 Houston. It's not complicated.

22 All right. So we'll continue at 10 miles

1 an hour down this Creosote track, and in a moment
2 we'll be able to turnout at 10 miles an hour, and
3 eventually pick back up to track speed, which was 30
4 miles an hour had we stayed on the track we were
5 taken off of.

6 But this is an additional point. This is
7 work that's currently occurring today. So this
8 particular track, the Creosote track, part of that
9 capital program, is being extended alongside main
10 line to the right, all the way down to a point where
11 they're going to create just under a 10,000 foot
12 passing track, which again will benefit all users of
13 the physical plant in Houston.

14 So this in and of itself is supposed to be
15 done January 2023, adds additional capacity, a
16 meaningful amount of additional capacity, to get in
17 and around Englewood Yard, certainly ahead of any
18 trains that CP/KC might be bringing to this railway.

19 MR. ORR: Keith, if I could just to add
20 one point for the Board. This is John Orr once
21 again. You know we're talking about you know some
22 capacity capital projects. We're talking about a

1 number of you know things that we see as immediately
2 available that don't take a lot in railway terms, of
3 work to get finished.

4 And of course there's going to be bigger
5 ones. But there are so many small wins that
6 cumulatively add up to significant improvement on
7 capacity use. And I don't want to restate this too
8 much, but just going through a 10 mile per hour
9 turnout you're not just slowing down to 10 miles an
10 hour at the turnout, you're having to start to slow
11 down almost a mile, three quarters of a mile away
12 from that switch, so you're starting to get closer to
13 that off ramp.

14 You have to drag an entire train, an
15 entire train, whether it's 6,000 feet, 8,000 feet, or
16 whatever distance at 10 miles an hour through that
17 entire turnout, and then you have to do the same
18 thing on the other end. So absorbing almost five
19 times the time that you slow down, go through the
20 turnout, go through the next turnout, pick up speed.

21 Almost five times as long as it would
22 normally take to go that 3,000 feet. And that on its

1 own may not seem like a lot, but time after time
2 after time we're seeing that, including the slow
3 orders, and the track maintenance issues that you've
4 already heard about on the Brownsville side.

5 And as an operating officer of 38
6 years. I have a catalogue of these things already
7 understood. Looking for available funding, having
8 monthly discussions with the CFO, or having a GM come
9 to me with these suggestions and ideas because we
10 all have our boots on the ground, understanding where
11 these small wins are.

12 And I won't say it's frustrating, but it's
13 encouraging to me, to see all these small wins still
14 available to unlock capacity as we see this trip
15 progress. I'm not going to stop at every small win,
16 but please understand cumulatively, they're there for
17 the taking, and it's important to us to be able to
18 have this voice with UP because this is our primary
19 route.

20 This is our franchise going through
21 Houston, and these cumulative wins actually can
22 contribute more than a stand alone capacity project

1 because it instills discipline, it creates
2 reliability, it encourages safety and safety
3 engagement, and it does all of the things from an ESG
4 component on governance, and environment and all of
5 the things that really add up to a value proposition
6 for railroads, in addition to capacity.

7 So you know as an operating person, I get
8 really excited about the opportunities to improve.

9 MR. CREEL: This is Keith again. Your
10 point John, this specific train, this is an absolute
11 fact based on the daily load from the train, moved by
12 Englewood Yard at 12 miles an hour. And to John's
13 point, the slow speed, 12 miles an hour on 30 mile an
14 hour track, that engineer did not want to run at 12
15 miles an hour, but in order to control this train
16 safely, to slow down to take the turnout, which only
17 allows you to go 10 miles an hour, he was forced to
18 drag his train the entire length of Englewood Yard,
19 thereby essentially doubling the time it took to
20 actually make it from east end to west end of this
21 physical plan.

22 And that's going to matter. You'll hear

1 in the end of this presentation contrary to Mr.
2 Turner's allegations, that it takes hours to get from
3 through the plant. This train took much less, and I
4 would argue based on these facts, it could have been
5 a lot better than it actually was.

6 So let's proceed west. Yeah that's
7 actually the Creosote track will be extended to that creates
8 that 9,800 foot capacity track.

9 MR. ELPHICK: Yeah this is Tower
10 26, and the interlocker with the Westfell, and what
11 you're going to see up here is that we're going to
12 diverge -- just pause there.

13 It's still double track, but the tracks
14 are diverging. We're going to take this route and go
15 by the Amtrak stations.

16 BOARD MEMBER PRIMUS: John, I understand.
17 Real quick, that Tower 26, is that another you know
18 big congestion area too? I think you were pointing
19 it out on a slide earlier that someone had indicated
20 that that was a big problem in that location?

21 MR. ELPHICK: Tower 87 and Tower 26 are both
22 double track diamonds. If you're not moving swiftly

1 through them you could back up around them. I'm not
2 sure I would call it congested, but it can get
3 congested if the operation's not fluid.

4 MR. ORR: And Ray, this is John Orr.
5 Member Primus, the one thing that's very compelling
6 about this route is it's directional. So as the
7 train split it's double track, but they physically
8 you know come further apart from each other, you know
9 geographically apart. It's primarily the southbound
10 trains that are running in this lane, and you'll see
11 it later in some directional maps.

12 And you saw it when John Turner put some
13 maps up as well. So Tower 26 was a point of concern.
14 The fluidity here as you can see is important. And
15 the one thing to note as well, in Tower 26, it's
16 going to see only the southbound growth trains. It
17 won't see the north and the southbound, so while it's
18 an issue of importance to keep the trains fluid, and
19 to dispatch appropriately through the entirety of
20 this single track component of a directional run, as
21 long as the trains are running it doesn't in itself
22 present a problem.

1 MR. MEYER: Member Primus, this is David.
2 Just from my perspective listening to what I heard
3 from the UP witness, Mr. Turner, last week. You know
4 he described the route that we're looking at as this
5 expressway, you know, the interstate at both ends.
6 And that it comes downtown and it has stop lights.
7 And I think what we're trying to -- to me at least,
8 what this demonstrates is that the only stop lights
9 that really exist here is Englewood Yard, and the
10 activity around Englewood Yard.

11 And certainly the cross traffic at those
12 two interlockings. We've seen Tower 87 and Tower
13 26. Those are the two points where cross traffic
14 goes across this, but we've now come out on the west
15 end of the interstate, and I think you'll see coming
16 up there are no more intersections. It's just a
17 double track main line from here on.

18 Although as Mr. Orr pointed out, if you
19 look at the map and you see where the arrows point on
20 the map, we're in the westbound and the southbound
21 flow, so pointing you know from right to left. And
22 we're on the part of the separated double track

1 that's on the south, and if we could somehow see to
2 the right, and through some buildings I think, we'd
3 see the north and eastbound track over to the right.

4 And the two will come back together before
5 we get to a place called Eureka Junction, and then
6 continue on to West Junction. So I don't know if
7 that helps orient you again to where we are, but
8 we're in that stretch actually right near downtown
9 Houston, right near the Amtrak station.

10 This train is going to go right through
11 the station where the sunset limited stops.

12 BOARD MEMBER PRIMUS: No, I understand,
13 and I appreciate that. I was just again on the
14 diagrams and some of the testimony I heard last week
15 that you know in that area where you have the
16 interlockings at. And I don't know how much traffic
17 goes across on the other side from that, but it
18 seemed like that was sort of potentially a major
19 choke point at 87, you know, I just wanted to see if
20 that was -- just confirm that.

21 MR. CREEL: Okay. We're going to continue
22 west to the Amtrak station. Amtrak station to the

1 left. Then we'll proceed.

2 MR. ELPHICK: This is just where the main
3 lines come together, and what we were talking about,
4 so we'll continue on here. We'll go by Eureka
5 Junction, which you'll note is not a diamond. It's a
6 junction, but not a diamond. It's just a
7 progressive move between the two sets of tracks.

8 So what you're going to see as we progress
9 along here, and we could probably for the sake of
10 time let it mostly roll, is that you know again
11 there's no industry double track, you know, it's
12 definitely a thoroughfare or speedway.

13 There's Eureka Junction there. Now this
14 is basically the end of the route, or the video that
15 we took. As Keith said we went through Creosote
16 track. You know we had a good run, it was a clean
17 run without exception. Did it in 74 minutes. If you
18 could do the math on double track on 74 minutes over
19 that distance looking at the exact pockets they have
20 to fit trains, you know the maximum capacity is in
21 the neighborhood of 196 trains a day through there.
22 You know that's not sustainable.

1 Double track tend to like to think about
2 50 percent in those kinds of areas, call it 96 trains
3 a day. Our 8 trains with the other, you know, I
4 don't have UP's data, but I would suggest to you that
5 there's capacity for these trains. Our presentation
6 is really that Englewood Yard is the one area that
7 we're concerned with, and UP's plan is to extend the
8 arrival departure tracks you know would be a win for
9 all parties moving through that.

10 MR. MEYER: This is David again circling
11 back on sort of how we perceive where things stand on
12 this record, and how we are approaching Houston from
13 a service and capacity standpoint. So you know I
14 just want to make clear what we are, and we're not
15 saying here.

16 I think what you are definitely hearing us
17 say is our analytical approach to the issues in
18 Houston supported by all the analysis that Mr.
19 Elphick described, the hands on experience that Mr.
20 Orr, Mr. Creel and Mr. Elphick had explained, as well
21 as our other witnesses, shows that this expressway
22 that we just passed across has ample capacity to

1 accommodate the measured growth in our trains.

2 We are going to depend on you know Houston
3 operates fluidly for everyone, and so we're not just
4 resting on that analysis, we are committing to
5 collaboration with UP and BNSF to address everything
6 that affects all of our operations with respect to
7 Houston, so that the whole complex works for
8 everyone.

9 We are motivated to make it work, and if
10 we can go we surrender control of the slides at this
11 point. If we can go to the next slide.

12 BOARD MEMBER HEDLUND: Could you just stop
13 for one second. I have an observation, and I don't
14 know if it's correct. They put up a slide that
15 showed percentage increase over some maximum amount
16 that the four trains each way, each day, were going
17 to --

18 MR. MEYER: I can explain what that was.

19 BOARD MEMBER HEDLUND: Yeah. And but when
20 I looked at it, and thought about it, you know some
21 areas it's a 26 percent increase, other areas it's a
22 2. But my observation was that it kind of flipped

1 the script, what in fact the congestion was because
2 four trains, if it's a 2 percent increase means the
3 denominator was a much larger number.

4 And if it was 26 percent it meant the
5 existing number of trains was actually relatively
6 small. Is my analysis of that correct? I'm not a
7 mathematician. I did four years of math in high
8 school, but.

9 MR. MEYER: your reaction to that was
10 exactly the same as mine, and I think there are a
11 couple things I would say about the charts that Mr.
12 Turner put up. The first thing I'll say just as a
13 matter of process, Union Pacific up until the day
14 before yesterday I believe, regarded information on
15 the segment specific train counts of operations in
16 Houston as highly confidential.

17 It wouldn't share them even with KCS, who
18 it needs to share these lines with. So, KCS didn't
19 know the segment specific train counts that were
20 underlying the percentage increases that Mr. Turner
21 shared. We did obtain the work paper, and they were
22 willing to share that thankfully with our team here

1 for use in this proceeding.

2 But I can tell you what their calculation
3 was, which was a little bit different than what it
4 may have seemed to be, although I'm not suggesting
5 Mr. Turner misdescribed it, you know my first
6 reaction is the same as your Member Hedlund.

7 They did an analysis of the maximum number
8 of trains on each of those segments in each quarter
9 over the period of 2015 to 2019, and asked the
10 question what was the highest number of trains that
11 could be operated.

12 BOARD MEMBER HEDLUND: Right.

13 MR. MEYER: It wasn't capacity. It was
14 just what's the most we've ever seen.

15 BOARD MEMBER HEDLUND: Right.

16 MR. MEYER: On each segment. And then
17 they asked what's the maximum number of trains during
18 2019 that we saw. And in a number of the segments,
19 the number of trains running in 2019 was
20 significantly below the maximum that had been
21 experienced over the prior period okay, and they only
22 looked at this expressway. They didn't look at the

1 Houston complex as a whole.

2 And what they were saying is on certain
3 segments if you add in the eight trains, certain
4 parts of this, like the portion from West Junction we
5 just saw from West Junction and Eureka where there's
6 no yards, there's no local service, it's a double
7 track, and you know I think Mr. Elphick would say
8 hundreds of trains could operate there every day.

9 What they're saying is our eight trains
10 are 33 percent of the most number of trains that they
11 have seen since 2015. But there's plenty of room for
12 that increase on that segment. In other areas right,
13 if you look at you see smaller percentage increases,
14 what they're saying is that since the highest number
15 of trains that have fluidly operated over those
16 segments we've actually seen in 2019 the number of
17 trains come down.

18 And so when you add our trains to the
19 number -- the 2019 maximums, they're only coming a
20 little bit above, or maybe not even up to the level
21 of previous fluid operations. So that's what that
22 analysis is showing. I think what Mr. Elphick is

1 saying with respect to this double track expressway,
2 is if you just look at this as a double track
3 expressway, and set aside for a moment the cross
4 traffic and the Englewood arrivals and departures,
5 there's room for hundreds of trains.

6 We're not saying that we should set aside
7 those other things, those are part of the real world,
8 and we know it, and we're certainly going to deal
9 with it. But that's where you get to the
10 perspective of the right way to look at this isn't
11 the number of trains on the expressway, it's the
12 overall load of traffic in and out of Englewood Yard,
13 and crossing the expressway that tells you the whole
14 picture of whether we're pushing up against some kind
15 of limit on Houston capacity.

16 And that's where that yellow diagram that
17 Mr. Orr offered last week, and Mr. Elphick reviewed a
18 short while ago comes into play. That's not a
19 precise capacity analysis. It's just a perspective
20 that we are below the level of activity in the
21 Houston complex that leads to things like trains
22 crossing at Tower 26 or Tower 87. It leads to trains

1 in and out of Englewood Yard, et cetera.

2 We're below the level that was experienced
3 in 2016, and well below the level that's been
4 acknowledged to be -- it's a fluid operation for the
5 terminal. So where does that bring us?

6 BOARD MEMBER HEDLUND: Yeah. Well one
7 thing I would note is that the Englewood Yard was
8 apparently studied as solutions to the problem in
9 that Houston Beaumont freight rail study.

10 MR. MEYER: And I think as Mr. Creel
11 pointed out, you know, Union Pacific is a very
12 capable railroad, and they have I'm sure very
13 carefully studied all the things that need to be done
14 to implement what they announced in 2020 or 2019, the
15 Unified Plan 2020.

16 They said a lot of things about it in
17 their earnings calls over that period of time very
18 publicly. You know, one of the focal points of what
19 they were doing with their plan according to their
20 public statements, was to focus in this Houston area,
21 in the southeastern Texas southern region of Union
22 Pacific, they were shutting down various operations,

1 and bringing work into Houston, and building longer
2 trains.

3 And one of the things they did was they
4 shut down the hump at Pine Bluff, Arkansas, and they
5 said they were moving classification activity into
6 Englewood Yard. Another thing they said they were
7 doing was they were shutting down their plan to
8 build another classification yard at Brazos, which is
9 sort of not too far from Texas A&M in the triangle
10 between Austin and Houston.

11 And again, that was ultimately putting
12 more pressure on the Houston complex. They knew they
13 were doing that, and they also knew they were
14 planning to run longer trains. And I have every
15 confidence that they had immaculate and tremendous
16 plans about all the things that they needed to do to
17 put that operation in place.

18 Mr. Creel described one of the things that
19 we know they were planning to do, which was to build
20 long arrival and departure tracks in Englewood Yard.
21 We don't think that has to happen in order to avoid a
22 meltdown at Houston. We're not saying that.

1 But there is huge opportunity to improve
2 the capacity of the terminal and this expressway if
3 that project goes forward, and it's not the kind of
4 project that requires the very long lead times of the
5 sort that Mr. Turner was describing.

6 BOARD MEMBER HEDLUND: Thank you.

7 MR. MEYER: So where does this leave us?
8 It leaves us --

9 UNIDENTIFIED SPEAKER: Excuse me Mr.
10 Chairman, when we get to a convenient stopping point
11 I could use a five or six minute break.

12 CHAIRMAN OBERMAN: Well we've been going a
13 long time, and I will tell you we only have about two
14 more hours to go.

15 UNIDENTIFIED SPEAKER: Yes.

16 CHAIRMAN OBERMAN: So I don't know how
17 much longer your presentation is going to take, and
18 of course we have questions. But let's make it, can
19 we make it five minutes sharp?

20 MR. MEYER: We'll be ready in less than
21 five minutes.

22 CHAIRMAN OBERMAN: All right. We'll be

1 back here at 3:40 Eastern. Thank you.

2 (Break)

3 CHAIRMAN OBERMAN: All right. Are we
4 back?

5 UNIDENTIFIED SPEAKER: We're here.

6 CHAIRMAN OBERMAN: Everybody here?

7 MR. MEYER: Ready to go.

8 CHAIRMAN OBERMAN: Is the reporter ready?
9 All right. Okay David.

10 MR. MEYER: Okay. So if I could go to the
11 next slide. So we've been talking about the
12 collaboration that we think is vitally important for
13 us, and something we seek out. We're not at all
14 trying to resist. We've actually if you could go to
15 the slide before this.

16 One point we'd make is you know in the
17 trackage rights agreements themselves is a mechanism
18 that it was established back in 1996 between Tex-Mex
19 and the Union Pacific. There is this joint service
20 committee concept. You know we think this provides a
21 pre-established and factual pathway for us to engage
22 in extensive collaboration with UP.

1 And we are as you will see in the next
2 slide, if you turn there, we are committing to
3 collaborate with both UP and BNSF, not only regarding
4 the kind of reporting we've talked about, about
5 Metra's regarding Houston, but also a commitment to
6 work with them extensively you know, and fully, and
7 transparently with regard to everything that needs to
8 be done in and around Houston.

9 You know and one of the key points I would
10 make about that is our commitment of course. You
11 know we can only control what we do. We're not
12 committing to work magic and achieve things that
13 can't be achieved if they won't come to the table and
14 share transparently with us things like their plans
15 for operation change, their traffic volume plans.

16 Obviously this would all be handled in an
17 appropriately confidential way. But you know we are
18 100 percent committed to being a full participant in
19 that kind of collaboration, make sure that Houston
20 remains fluid and is improved if possible, going
21 forward into the future.

22 Turning to the next slide I think just a

1 quick note. You know one of the foundations for that
2 kind of collaboration that I want the Board to take
3 note of, and Member Hedlund mentioned this you know.
4 We also mentioned the you know, as to the Neches River
5 Bridge, there's been extensive study about the rail
6 network around Houston.

7 Not a need here as a result of this
8 transaction to spool up an entirely new set of
9 analyses from the ground up. There's a ton of
10 knowledge that all of these railroads have
11 accumulated about the steps, both simple and more
12 long-term, and perhaps more complex that could be
13 taken to continue for the Houston rail infrastructure
14 over time.

15 And what I'm trying to communicate, and
16 others here may echo it, is as I said, we are
17 committed to being a full participant in this kind of
18 collaboration, getting our trains across Texas will
19 be vital to the success of CPKC, and we have the
20 strongest interest of all stakeholders to make sure
21 this works.

22 Now let me review briefly the question

1 that came up last week in a fair amount of detail
2 about compensation. Who pays for all of this
3 infrastructure? And first of all, we're not so sure
4 there is all of this infrastructure that needs to be
5 added right now, or that is directly connected to our
6 merger traffic as we've said.

7 But setting that question aside you know,
8 we certainly anticipate that over time there will be
9 infrastructure added on these lines, and we're going
10 to pay our share. And the appropriate mechanism we
11 believe for handling all of that is under the
12 existing framework of the existing trackage rights,
13 which you heard a lot about from the BNSF lawyer.

14 You didn't hear as much from UP, even
15 though UP is our trackage rights landlord, BNSF is
16 worried that they're going to end up footing the
17 bill. But let me explain how these trackage rights
18 work. First of all, where did they come from? I
19 mentioned they came from conditions imposed on Union
20 Pacific in the UP/SP merger.

21 Trackage rights were granted to Tex-Mex
22 from Beaumont all the way to Robstown permitting

1 Tex-Mex to gain a connection to the Kansas City
2 Southern at Beaumont. Those conditions were designed
3 to ensure that competition was preserved and
4 strengthened.

5 This transaction furthers that goal of
6 course, as has Kansas City Southern's growth since
7 1996 using these trackage rights. There's this
8 question that has been raised about whether the
9 trackage rights contemplate this kind of step
10 function of growth. Well, there's been a lot of
11 growth over the years for a lot of reasons, by all of
12 the carriers using all of the lines around Houston,
13 Texas.

14 And these trackage rights agreements were
15 intended, explicitly intended by the Board to allow
16 Tex-Mex to gain additional traffic. The whole idea
17 behind them was to let Tex-Mex grow. So
18 foundationally, the organic provisions of this
19 agreement were designed to accommodate how to deal
20 with issues about adding the capacity necessary,
21 doing the things necessary to support growth.

22 Next slide please. One thing I want to

1 call your attention to in the agreements is that the
2 agreements contemplated that Tex-Mex might merge with
3 other rail carriers. There is an assignment clause
4 in the Tex-Mex terms that explicitly makes automatic
5 that the purchaser of substantially all of Tex-Mex's
6 rail properties, or in this for now, KCS's rail
7 properties, would become a tenant of UP, entitled to
8 all of these trackage rights.

9 It wasn't a mystery that Tex-Mex might
10 some day be subsumed in a broader rail system, or
11 that KCS might be subsumed there by a broader system.
12 And of course, that kind of transaction means merger
13 related growth, next.

14 You know we've reviewed some of this with
15 you before. All of these trackage rights agreements
16 are in the record. I think these are attachments to
17 the reply verified statement of Mr. Simmons, but just
18 to review a couple of key points right?

19 The responsibility, there is a
20 responsibility placed on the owner to make the
21 necessary changes and additions to the joint
22 trackage to accommodate the traffic of owner and

1 user, while maintaining existing service standards,
2 including transit times.

3 So that provision is there, nothing needs
4 to change about it to accommodate all of the traffic
5 of CP/KC that may come from any source whatsoever.
6 Just as the same provision applies with respect to
7 Union Pacific's traffic, or Burlington Northern Santa Fe's
8 traffic.

9 I want to highlight the bubble on the
10 bottom. We're not -- KCS is not really appropriately
11 thought of as a tenant, even though this is very much
12 a landlord, tenant relationship as trackage rights
13 are. But Kansas City Southern is given rights to
14 the trackage, equal to the rights that the owner has
15 to the trackage.

16 Union Pacific certainly doesn't have any
17 restrictions on all the ways it might grow its
18 traffic on these lines, nor does Kansas City
19 Southern. Next slide please. So let's talk a bit
20 about how funding occurs for additions and
21 betterments that are the responsibility of Union
22 Pacific to make to support all the traffic.

1 Obviously it's a collaborative exercise,
2 and there may be some, you know there's certainly a
3 role for KCS and for CP/KC in the relationship. But
4 there's also covered by these agreements, a very
5 specific set of requirements regarding how to pay for
6 additions and betterments.

7 BNSF was trying to suggest that KCS wants
8 all of the infrastructure added for free. That's
9 just not true.

10 MR. MEYER: So the way if you look
11 carefully at the words of this contract, we're really
12 not asking the Board to decide how the contract
13 should be interpreted, and I'll point out there's an
14 arbitration clause in this contract, so if there's a
15 dispute with Union Pacific about who should pay for a
16 particular project and, or how much CP/KC should pay
17 for a particular future project, or what have you, it
18 would be arbitrated.

19 It wouldn't need to come back to the
20 Board. But there's a GTM, a gross ton mile
21 calculation of how many GTMs does KCS operate over
22 the track during a particular period. As KCS grows,

1 its GTMs grow. And it pays more. As it pays more
2 and new additions are made to accommodate that
3 growth, along with growth of UP and any other growth,
4 KCS would be paying more money towards the capital
5 associated with that infrastructure.

6 That's the way the contract reads, and if
7 you have a question about whether that's a position
8 that KCS or CP/KC would be taking that doesn't have
9 grounding in the text of the statute, I would suggest
10 read the contract carefully, it's pretty clear. But
11 it is true as BNSF pointed out that disputes arose
12 between KCS and UP about how to fund capital, to go
13 back to the prior one, about how to fund past
14 improvements.

15 And as Mr. Ottensmeyer pointed out, KCS
16 has in fact paid Union Pacific more than 100 million
17 dollars towards additions and betterments made to
18 expand capacity on the joint track that KCS uses in
19 Texas. But the real question that came up I think
20 last week that we heard, was well what about a
21 situation where the only reason we'd be making this
22 addition, making this investment, is because of

1 CP/KC's needs.

2 Well the contract specifically calls out
3 that scenario. If you look at Section 5B right under
4 i, not Roman I, little i. If the change is for the
5 sole benefit of one party, that party shall be solely
6 responsible for the entire cost and expense. So we
7 already have a contract that contemplates a
8 determination being made about whether a particular
9 addition is solely for the benefit of CP/KC.

10 If it is under the contract CP/KC would be
11 obligated to pay 100 percent. If there's a dispute
12 about that, it could be arbitrated. This is --

13 CHAIRMAN OBERMAN: What is the mechanism
14 for determining whether it's for their sole benefit?
15 The gross ton miles?

16 MR. MEYER: I don't think the contract
17 says anything more than that to ask the question
18 whether the party, whether there is a party for whom
19 the change is solely benefitting, and so if it's
20 something that is only needed and only used by CP/KC,
21 CP/KC would pay for it. Now I think --

22 CHAIRMAN OBERMAN: Well you know based on

1 the video we saw the suggestion that the yard tracks
2 aren't long enough to build trains on for UP, and it
3 would benefit the through movement of KCS's trains, I
4 could see a big debate on putting longer yard tracks
5 in as Keith was suggesting as to who benefits, or
6 whether both benefit.

7 So if you have that situation, how does that
8 dispute get resolved as to whose benefit it's for?

9 MR. MEYER: Well I think so a couple of
10 observations about that particular issue. First of
11 all I think the yard tracks aren't part of the joint
12 trackage. It's UP's yard, it's not covered by that.
13 I believe it's not covered by the trackage rights
14 agreement. The second point though I made is to my
15 earlier point about the unified plan 2022 and Mr.
16 Creel's point about Union Pacific's phased plan to
17 expand the yard tracks.

18 This was UP's plan to add yard tracks
19 completely independent of the transaction. Now there
20 may be a benefit to the operations of all users in
21 Houston for UP not to park its yarding trains on the
22 main line, but there's no principal of you know

1 trackage rights compensation that would say the
2 trackage rights tenants ought to pay for Union
3 Pacific to get its yard and trains off of the main
4 line.

5 CHAIRMAN OBERMAN: I'm a little stumped
6 David. You know if the problem that we were just
7 looking at, this Creosote tracks and so forth, slow
8 speeds, is caused by UP's inadequate yard track
9 length, and no plans to increase the yard tracks are
10 unrelated to the merger, then are you saying that if
11 this causes the slow movements of the Houston
12 terminal for everybody including KCS, there's nothing
13 for us to do about it. Is that the conclusion?

14 MR. MEYER: No. I don't think I'm saying
15 that. That's certainly not the conclusion that I'm
16 asking you to reach. I think let me try and organize
17 the way I'm thinking about it, and perhaps I'm
18 missing a bit of your question. So one part of the
19 question that I'm trying to address, and that I think
20 is part of your question is there's a trackage rights
21 relationship between Union Pacific and KCS today, CP/KCS
22 in the future if we are allowed to merge.

1 And within the scope of that trackage
2 rights relationship there may be a question of what
3 rights and obligations do the two have with respect
4 to maintaining service standards on this line that is
5 part of the joint trackage. So there is an
6 obligation to maintain service standards on that
7 line.

8 That's Union Pacific's obligation. If
9 additions and betterments are needed to the joint
10 trackage to support that, like a siding, a double
11 track, whatever, that's where this set of provisions
12 I've briefly covered with you would come into play,
13 and there would be an obligation if KCS or CP/KC
14 benefits from the expansion of capacity, whether that
15 was because UP added trains, and so you need double
16 track, and so you know we all benefit, so we all pay
17 because UP grew.

18 Or if we grow, and then we all pay because
19 we grew. It's handled the same way, and it's handled
20 under the contract. If there's something
21 specifically necessary only because of one party's
22 activity, and it's only benefiting them to add a

1 particular track or what have you, well that's where
2 this provision comes in the terms of sharing.

3 I think the issue about you know what
4 obligations might UP have to expand its yard tracks
5 in Englewood Yard. We're not asking the Board to
6 decide that UP has a contractual obligation to
7 expand its yard tracks in Englewood Yard. You know
8 if they do, then we'll certainly have an interest in
9 pursuing that, if they don't pursue that project on
10 their own.

11 If they don't, they don't. And then the
12 question is you know whose responsibility ought it be
13 to maintain the service standards on the joint
14 trackage if there's some other way to maintain the
15 service standards on the joint trackage, well then
16 you know that's all that would be required. It may
17 not be necessary to expand the yard tracks in
18 Englewood Yard. So I'm not suggesting --

19 CHAIRMAN OBERMAN: Where I'm stumped
20 David, is that Keith just showed us all this
21 expansion space that UP has to expand the yard tracks
22 at Englewood, and that would avoid these slow

1 movements through the terminal.

2 And if that's the way to solve the problem
3 it sounds like the trackage rights agreements
4 wouldn't apply, as you point out, don't apply to yard
5 tracks, but if UP says we don't want to spend the
6 money, so just keep going at 10 miles an hour over
7 the Creosote track, is there a remedy?

8 MR. MEYER: Well, so I want to unpack that
9 question just a little bit. I think let me try to
10 answer it bottom line first. I think there is a
11 remedy. I think the remedy is ultimately a
12 contractual remedy that UP has an obligation to
13 support the service standards on the joint trackage
14 via additions of betterments to the joint trackage.

15 And you know, we don't think that there is
16 an issue with respect to this particular stretch of
17 track after you expand the Creosote track, and then
18 you know assuming that there is appropriate use of
19 the track to support the operation of everyone. We
20 don't think that -- our starting point would be, we
21 don't think that it is necessary as a precondition to
22 our trains fitting on this track, or the merger in

1 Houston working, for Union Pacific to go build any
2 particular yard tracks.

3 We are identifying that as an opportunity
4 to assist in adding capacity across the complex as a
5 whole, and something UP had planned to do in any
6 event. But on your remedy point, ultimately, you
7 know ultimately yes. We have contractual rights to
8 maintain service standards on the joint trackage to
9 accommodate all the traffic of the owner, and all of
10 the users.

11 And we would need to work through that
12 obviously if there were a dispute about what was
13 necessary to do that, and ultimately that dispute
14 would be subject to arbitration under the contracts.

15 CHAIRMAN OBERMAN: So you're saying if it
16 came down to a dispute between CP/KCS and UP over how
17 to move traffic more fluidly through this terminal,
18 and that the solution to it involved expanding the
19 yard tracks, that is a matter -- it sounds like
20 you're saying is covered by your contractual
21 remedies, and is not something that you think should
22 be part of any merger order that we might issue. Is

1 that a fair statement?

2 MR. MEYER: I think that is a fair
3 statement. That's correct. And the only other thing
4 I would say in partial exception to what I said about
5 including something like that in a merger condition,
6 and remember what I said about the collaboration that
7 we are committing to with respect to making Houston
8 work, the Board I believe, doesn't likely have
9 authority expressly to order Union Pacific, or BNSF
10 to do anything as a condition to our merger.

11 However, the Board certainly could make
12 our obligation contingent on their full involvement
13 in the collaborative process that we're talking
14 about. And that would be an incentive for them to
15 come to the table, and be as collaborative as we
16 intend to be.

17 CHAIRMAN OBERMAN: Let me ask one other
18 question.

19 BOARD MEMBER HEDLUND: And then I have one.

20 CHAIRMAN OBERMAN: Yeah, I don't want to
21 cut people short, but I'm getting pessimistic about
22 finishing today. But I asked UP and BN when they

1 talked about the fact that their through trains go
2 around Houston, at least that's what they said. If
3 there was a physical way for the CP/KCS through
4 trains to go around Houston, perhaps trade off some
5 existing trackage rights for new trackage rights.

6 Can anybody in this panel shed any light
7 on that? Is that something physically that's even
8 possible?

9 MR. MEYER: We have a slide for that
10 Chairman.

11 CHAIRMAN OBERMAN: Okay. All right.
12 Karen had a question.

13 BOARD MEMBER HEDLUND: Yeah. In terms of
14 an expense that would be shared between the parties I
15 note there is a 12 month look back. And were the
16 other parties essentially insinuating that if an
17 improvement is required because of the step change
18 increase in traffic, that provision isn't fair
19 because it would be based on the prior split between
20 the parties of their traffic.

21 MR. MEYER: So, a couple thoughts about
22 that. First of all --

1 BOARD MEMBER HEDLUND: And then I have one
2 more, yeah.

3 MR. MEYER: Yeah. I think this was
4 largely the argument of the BNSF lawyer, and I think
5 they've got a misunderstanding about how all of this
6 works. So the contribution to a fund if you will
7 that pays for these additions and betterments, is
8 through this GTN rate that increases as traffic
9 increases.

10 So as soon as traffic increases, KCS or
11 CP/KC pays more, and that payment you know is the
12 fund of the investment that would be made. It's not
13 -- the contract is not designed, other than in these
14 situations where 100 percent is responsibility of
15 CP/KC. The contract is not designed to say write us
16 a check. You've got 100 million dollar project,
17 writes the check for whatever your percentage share
18 was and we call it a day.

19 It's as soon as the traffic increases
20 we're paying the landlord. And notice our
21 relationship is with Union Pacific, so BNSF is not
22 talking about our contract. They're talking about

1 their arrangement with UP, whatever that is. As far
2 as we understand a BNSF -- a KCS train is treated as
3 a UP train for purposes of BNSF's relationship with
4 UP.

5 So if our trains go up, CP/KC trains go up
6 on trackage that BNSF is using, their share goes
7 down. So I think there's a little bit of a
8 misunderstanding about how these contracts would
9 operate. We are not going to saddle anyone with any
10 obligation that doesn't already exist to support
11 growth in the capacity of these lines. We're going
12 to pay our share according to our GTS.

13 BOARD MEMBER HEDLUND: I understand that,
14 and I want to move on. We are not here to talk about
15 the environmental impacts. I did note from your
16 movie that you go through a lot of grade crossings,
17 and one concern I have is that if there is an impasse
18 between you and UP, one of the effects may be that
19 there's more blocked grade crossings, or they're
20 blocked for a longer period of time.

21 So that the costs are being off loaded
22 really onto the neighborhoods. And again, I realize

1 we are not here to discuss you know the impact on the
2 neighborhoods, but a concern I would have is that as
3 you have today there would continue to be an impasse.
4 You would be going 10 miles an hour, they wouldn't be
5 building anything, and the people in the neighborhood
6 would be the ones who are suffering.

7 So I would certainly hope that you and UP
8 could come to a quick resolution of any issues
9 related to your what they call step growth on this
10 line. Thank you.

11 MR. MEYER: Mr. Clements will address it
12 in a few minutes some points directly responsive to
13 your observation about grade crossings in Houston.
14 And one thing I would say is you know I'm going to be
15 -- I'm going to try to resist borrowing the phrase
16 step growth. I think one of the things we showed
17 you, and I called it the saw tooth chart, is adding 8
18 trains to across Houston isn't really a step change
19 in Houston's overall rail activity.

20 It's just well within the range of
21 variation on a day to day basis. We're not saying
22 that we're not adding trains, and all of the things

1 that come with them. We're not suggesting that those
2 don't raise important issues to be considered. But I
3 think it's not really accurate to say that we're
4 making any kind of quantum, or fundamental change in
5 rail activity in Houston, especially in Houston,
6 which sees so many trains.

7 And then remember Mr. Elphick's point
8 right at the beginning we talked about Houston. All
9 the complexity, and all of the real burden of the
10 Houston complex. Not all, that's an overstatement,
11 but the real focus of the complexity is not on this
12 east/west expressway so to speak.

13 It's south of there. It's over by the
14 ship channels, where the PTRC is. It's where the
15 east belt and the west belt are, and they're serving
16 yards and shippers clustered all through that area.
17 We're operating over the north of it on what used to
18 be the Southern Pacific Los Angeles to New Orleans
19 main line.

20 And when Mr. Clements comes back to
21 Houston to take for a minute about environmental
22 issues, he'll point out that the grade crossings that

1 create the greatest concern in Houston, of them,
2 none of them are on this route.

3 So I'd like to come back to your question
4 Mr. Chairman about bypass around Houston, and we did
5 give that some thought, and in this math I'll let Ray
6 or Mr. Creel speak to the details.

7 BOARD MEMBER SCHULTZ: Could I just ask a
8 quick question?

9 MR. MEYER: Of course.

10 BOARD MEMBER SCHULTZ: I think you
11 mentioned that it's clear that the Board would not
12 have jurisdiction to impose a condition on either UP
13 or BN, and that the terms of the trackage rights
14 agreement controls with regard to who pays for what,
15 so I just I guess David going back to you know, a
16 reference to collaboration.

17 I was wondering if maybe you could just
18 repeat again, specifically, what you think the Board
19 should do, if anything, with regard to this issue?

20 MR. MEYER: Sure. Well where I would
21 start is to say you know if I had my druthers I would
22 say the Board doesn't need to do anything. You know

1 we've made the commitments we've made, we're going to
2 honor those commitments. There's no need for a Board
3 imposed condition to address issues that are not
4 problems for the public interest here.

5 If the Board wishes to impose a condition
6 requiring us to honor or commitment to collaborate
7 with Union Pacific and BNSF with respect to Houston
8 operations we understand that. And what I'm saying, I
9 think, about that issue is what we don't want the
10 Board to do is to make our commitment to collaborate
11 with them into a hammer that they use against us,
12 rather than an opportunity for mutual collaboration
13 with them.

14 And so a way, if the Board were interested
15 in ensuring that the collaboration wasn't a one-way
16 street, a way for the Board to do that without
17 reaching out to order them to do anything, is to
18 make clear that our obligation to them under the
19 condition you're imposing, only kicks in if they are
20 reciprocating in the collaboration. Does that help?

21 BOARD MEMBER SCHULTZ: Yeah. That's
22 helpful, thank you.

1 CHAIRMAN OBERMAN: In other words, you
2 want us to tell everybody to play nicely in the
3 sandbox.

4 MR. MEYER: Or at least not tell us to be
5 the only ones trying to be nice.

6 CHAIRMAN OBERMAN: Got it. Go ahead.

7 MR. MEYER: Okay. I think I was through
8 most of the trackage rights points I was trying to
9 make. You know, I wanted to come to this point that
10 you raised just now Chairman, about an alternative to
11 Houston. And you know this is when we assess the
12 situation we think, you know, there is an opportunity
13 potentially, for a meaningful number of trains that
14 would be CP/KC through trains moving between Mexico
15 and north of Houston that wouldn't require any work,
16 you know, by plan, wouldn't work between Laredo and
17 Shreveport or Texarkana to use an alternative route
18 if CP/KC had rights over that route.

19 That route would be Union Pacific's main
20 line north of Laredo through San Antonio and Austin,
21 and on up to Texarkana or Shreveport. And I believe
22 part of that line up towards Texarkana, or maybe

1 right at Texarkana is directionally operated.

2 And I don't think we are completely
3 certain exactly how you would accomplish that route.
4 But you know if UP for example, were you know,
5 seriously concerned about a Houston meltdown, you
6 know I don't think anyone is seriously concerned
7 about a Houston meltdown here. That's rhetoric that
8 we would hope that people would not be swayed by.

9 But if they were there's an opportunity to
10 move you know in year three you know up to seven to
11 eight of the CP/KC trains. And some of those would
12 be existing trains, some of those would be new
13 trains, but the kinds of trains that wouldn't have to
14 stop anywhere between Laredo and Texarkana to do work
15 on the CP/KC network that could relieve a problem at
16 Houston that was either temporary or transitory, or
17 unexpected by operating through San Antonio and Austin on
18 this main line route.

19 I think this is the same main line that
20 Union Pacific uses to bring its auto and intermodal
21 traffic to Chicago. It connects back up to the
22 Kansas City Southern at Texarkana, and/or

1 Shreveport. You know it's not set up to operate this
2 way today. We don't have rights there.

3 We're not asking the Board to impose
4 rights over Union Pacific. I don't think the Board
5 would have authority to do that, but you know if
6 there were a serious concern -- a sincere concern
7 about Houston, a way to address that could be to work
8 out an alternative for a certain number of trains to
9 get this route.

10 CHAIRMAN OBERMAN: The only question I
11 have David, is the -- I don't know where all the
12 CP/KCS trains are going to and from. Could all of
13 the trains that now go through Houston use this
14 bypass, or do some of them still have to go through
15 Houston because of where they're headed?

16 MR. MEYER: So not all of them could, so
17 in the margin we note that of the traffic that KCS
18 handles today, we think about three to four a day
19 don't require work along the way between Laredo and
20 north of Shreveport. So all these trains that we're
21 talking about would be trains that are moving between
22 north of Shreveport and south of Laredo.

1 CHAIRMAN OBERMAN: Well do you have
2 business where these trains have to stop between
3 Laredo and Shreveport on the line that goes through
4 Houston? That's what I was trying to find out.

5 MR. MEYER: For the 3 to 4 existing trains
6 and the 7 to 8 trains, you know at the end of the
7 year 3, after the transaction, those would be the
8 trains that wouldn't have to stop along the way.

9 So they wouldn't be picking up blocks, you
10 know, at Kendleton, or otherwise doing work. One
11 thing I'm not sure the Board is fully aware of this,
12 and I didn't mention it when I was describing the
13 trackage rights agreements. You know, KCS's
14 trackage rights allow KCS to handle traffic to and
15 from Houston if that traffic is coming from Mexico,
16 is using the original Tex-Mex line between Laredo and
17 Corpus Christi.

18 If the traffic is not using that original
19 line, and it's you know take Houston Chemicals
20 traffic for example, KCS is not allowed to use the UP
21 trackage rights east of Houston, north of Houston, to
22 handle any of that traffic. So very few of the -- or

1 relatively few of the KCS trains stop at Houston to
2 pick up, or you know to do work because KCS doesn't
3 have the right to compete for Houston traffic.

4 MR. ORR: David, if I could just clarify
5 and add a little color. It's John Orr for the
6 record. Mr. Chairman, two points. First, in
7 2016-2017, when UP was doing extensive work on the
8 Beaumont, we used this route that is in the yellow
9 from Laredo to Texarkana as the detour route in
10 collaboration with UP.

11 We did it at a very high cost to KC
12 because it was treated as a detour, and it was very
13 unfavorable conditions. But as a good partner we
14 absorbed the costs, allowed UP to be more structured
15 in their construction plans, and get the Beaumont up
16 and running.

17 So it has been done before, and yes there
18 are a number of trains that go through Houston that
19 are either going to Beaumont, or Lake Charles that
20 would not be good candidates for this to be done on a
21 full scale all terrain basis.

22 CHAIRMAN OBERMAN: Have you had any

1 discussions with UP in connection with this merger to
2 provide for this alternative to relieve some of the
3 pressure on Houston if needed?

4 MR. MEYER: Mr. Chairman, I can jump in to
5 say I don't -- I'm not going to speak for commercial
6 discussions, but we would not be able to disclose any
7 such discussions if they were had.

8 CHAIRMAN OBERMAN: Okay. Well it just
9 seems to me when I'm hearing about congestion and a
10 dense city terminal, not only from the transportation
11 part, but from the community's part, if there's a way
12 that's feasible that works, that doesn't ruin anybody
13 else's network, and alleviate some of that pressure,
14 I think it's responsible corporate citizens would
15 take a look at it. Let me put it that way, and I
16 hear what you're saying David.

17 We should move on I think unless Board
18 Members have questions.

19 MR. MEYER: Okay. So basically at the end
20 of my discussion of the contract, one other minor
21 point that came up last week I'll just quickly touch.
22 You know there was a suggestion that UP/SP agreements

1 and you know "good merger policy" in air quotes somehow required
2 that the merging parties bear 100 percent of the
3 costs associated with their merger.

4 And I think that that is another
5 misunderstanding of history, and misunderstanding of
6 the facts. So what was BNSF talking about? What
7 they were talking about in UP/SP was the costs
8 associated with linking the UP and the SP network
9 together with new connecting traffic. UP of course
10 paid to do that. That's 100 percent, that was what
11 their merger was combining those networks.

12 As UP grew traffic across lines that they
13 were going to be sharing with BNSF under the trackage
14 rights, UP didn't pay 100 percent of the capital
15 associated with that. That was shared according to
16 the trackage rights agreements. I would note by the
17 same token, when Tex-Mex obtained trackage rights in
18 the same merger, there were connections required
19 between Tex-Mex's line, and the UP line at for
20 example Robstown, and the same principle applied.

21 Tex-Mex paid 100 percent of those
22 connecting tracks. That has nothing to do with

1 growth over time after the "implementation of the quote
2 merger". And if you look back over time you know,
3 across mergers that have occurred in the industry
4 over decades, you know every merging party is going
5 to have trackage rights agreements in various places
6 across their network where they're operating over
7 track owned by others that the rail network is -- I
8 don't want to say riddled, but I'll use that word
9 because I don't have another in my mind, with these
10 arrangements.

11 And there's never been a principle that if
12 you grow because of a merger, suddenly you're the
13 sole responsible party under those trackage rights
14 arrangements. It's always just handled under the
15 trackage rights agreement. So I think BNSF's
16 argument is not well taken when the facts are
17 examined.

18 So why is the UP and BNSF condition
19 something that we think is bad policy, and contrary
20 to the public interest? It's because as I pointed
21 out at the beginning, if they're armed with a
22 condition that they're seeking for us not to run a

1 single additional carload, or train, if they think
2 there will be an impact on them in Houston.

3 Before we go to them, we stand up an RTC
4 analysis, we reach complete agreement on the output
5 of that, we identify capital, they are satisfied that
6 we identified the right capital. They've designed
7 the capital. They've put it fully in place in
8 operation in the ground, and we fully paid for it 100
9 percent. Until then we don't compete with them at
10 all.

11 That gives them a veto that, and gives
12 them tremendous incentive to do nothing but hold us
13 up to keep us from competing, or to come up with a
14 laundry list of things they want us to pay for
15 because they know that we have no choice but to sign
16 at the dotted line because we have no other choice.

17 We think it would be a terrible result for
18 the public interest benefits that we're looking to
19 raise information. And Mr. Creel has a few words
20 about this.

21 MR. CREEL: This is Keith again. The only
22 thing I would add to David's comments, I mean simply

1 said for BN and UP to be given what they're asking
2 for it's a one-way street. It puts us in a position
3 that we wouldn't be able to compete. It would be a
4 road to foreclosure of competition. If they were
5 given that they would have every incentive in the
6 world to never agree to infrastructure that might be
7 needed in order for us to be able to compete in this
8 lane.

9 MR. MEYER: So we had the slide, maybe to
10 inject just a little bit of levity, but I think we're
11 definitely serious about the consequences of this.
12 It really would be the equivalent of putting on the
13 welcome to Houston sign, a competitors apply within
14 sign. You know, come ask us if you should be allowed
15 to compete, and that's not the kind of incentive or
16 holdup ability that UP and BNS ought to have with
17 respect to Houston or anywhere else on this network.

18 So with that we were going to transition
19 to address the vertical conversation issues that were
20 raised, principally by Union Pacific and BNSF,
21 although we've heard some echoes of it earlier in
22 the week by representative shipper associations. I

1 wanted to begin by level setting a bit. You know a
2 lot of the presentations proceed from the premise
3 that of course there's a competition problem, and the
4 debate here ought to be how to design the right
5 regulatory remedy to solve a proven problem.

6 That's certainly what I heard when I
7 listened to the BNSF and UP representatives. Every
8 time you press them, or even the shipper association
9 witnesses for that matter. Every time you press them
10 to provide evidence of likely foreclosure, or actual
11 competitive harm, they came back to the same answer.

12 "Well applicants acknowledge it because
13 they made this commitment." Let me be very clear. We
14 don't acknowledge that there's a vertical competitive
15 problem with this merger. There's no likely
16 competitive harm of any kind, horizontal or vertical,
17 and we can walk you through all the reasons why.

18 We have made a commitment in line with the
19 commitments that have been made in minor, significant
20 transactions since 2000 because when folks look at
21 vertical mergers, they ask are we going to lose
22 access to gateway options? And we know what our

1 intentions are, and so we've made a commitment not to
2 close gateways, and not to take away bottleneck
3 regulatory options that exist today.

4 But our commitments aren't a ticket to
5 then take those commitments as proof of a problem,
6 and then put design on top of the commitments of
7 regulatory remedy that gets imposed upon us. The
8 first question the Board has to ask is, is there a
9 competitive problem that requires a condition at all?

10 So let's talk a little bit about what
11 folks said on this issue. You heard a lot from Mr.
12 --

13 BOARD MEMBER HEDLUND: Could I interrupt
14 for just a second because I want to help set the
15 stage on this.

16 MR. MEYER: Certainly.

17 BOARD MEMBER HEDLUND: And some of you --
18 this may make some of you uncomfortable, but I think
19 we've got to get it out here. I want to read you
20 something first. Two years ago before this merger
21 was proposed, Mr. Ottensmeyer gave an interview to
22 Railway Edge about the company.

1 I think it was the year Pat you were made
2 Railroader of the Year by them. And this is what you
3 said. "Because of our size where we're located, the
4 strategy of developing service options with our
5 connecting carriers and our partners in the railroad
6 industry is very important.

7 I also think a really important part of
8 our value proposition to our customers is that
9 independence. If you're not a company building a new
10 plant in Central Mexico, and you want service options
11 to both railroads in the east, we're happy to do it.
12 If you want service options to both railroads in
13 Canada, we're happy to do it. I think we are more
14 valuable to our customers because of our ability and
15 our willingness to do that.

16 If we were part of a bigger network it
17 might not be so easy." So thinking about that where
18 we sit today Pat, or Keith, do you have any comment
19 on what Pat said two years ago?

20 MR. OTTENSMEYER: Yes, Member Hedlund. I
21 will be happy to comment. We worked hard, and I
22 think if you look at some of the data, particularly

1 in a few business units, intermodal comes to mind.
2 The vast majority of our cross border network today,
3 and for the past several years has interchanged at
4 Laredo, and/or Robstown, which you know is less than
5 100 miles away from Laredo on the bigger networks
6 because we don't have that reach.

7 So we developed a strategy around working
8 with our interline partners. The merger transaction
9 in our case, we talked about this last week, was
10 started by a catalyst that we weren't seeking at the
11 time, but I think if you look at the commitments
12 that have been made, the nature of this transaction
13 being purely end to end commitments to keep gateways
14 open, that a lot of those statements will still be
15 true.

16 There are markets that CP/KC is not going
17 to have access to. We will certainly have access to
18 some very large and growing markets that are very
19 interesting, and are the basis of our revenue
20 synergy projections. And we know because you've
21 heard from customers, and I think you well understand
22 the concept of single line service versus interline

1 service.

2 We know that our customers are interested
3 in having new interline options, particularly to and
4 from Mexico and the Great Lakes. We know that. We
5 did the best we could with the interline options. We
6 interchange a lot of traffic at the border.

7 We're going to be able to offer customers
8 a new option and the commitment that we've talked
9 about and described in this case for open gateways
10 tells me that the traffic that we do interchange, and
11 there's a fair amount of it at the border that goes
12 to markets that CP/KC will not serve.

13 Or for whatever reason, customers that
14 might still want to use interchange options that the
15 open gateway commitment will protect that business.

16 BOARD MEMBER HEDLUND: So what you're
17 saying is that you will continue to have an economic
18 incentive to be true to your word on keeping those
19 gateways open? The economic incentive will remain
20 with respect to markets that the combined companies
21 do not serve.

22 MR. OTTENSMEYER: Yes. I believe that

1 will be the case. The merger is about growth. We
2 don't want to start off by going in the hole and
3 losing a lot of traffic, particularly if you look at
4 traffic that moves from deep into Mexico, that
5 interchanges at Robstown, that's a nice decent length
6 of haul for the combined network.

7 And if it's for whatever reason, if it's a
8 geographic limitation, or other considerations,
9 contractual limitations, I would think we would have
10 an economic incentive to keep that business, yes.

11 BOARD MEMBER HEDLUND: Thank you.

12 MR. MEYER: If I may, if there are other
13 questions, happy to address them. But I think our
14 presentation on this subject goes directly to that
15 last point, which is the incentive we will have is
16 well recognized in economics, it's recognized as
17 precedent in the KCS/Tex-Mex decision that former
18 Commissioner Nober did a very good job of writing and
19 understanding, and I'm not so sure that Mr. Nober
20 actually recalls what he decided back then.

21 And we'll cover that. But more
22 importantly, more importantly, the record in this

1 case shows that --

2 CHAIRMAN OBERMAN: David, in defense of
3 Mr. Nober, I can't remember what I decided last week.
4 Go ahead.

5 MR. MEYER: I'm actually sure that Mr.
6 Nober needs no defense. But if we can go to the next
7 slide, let's just start quickly with the argument
8 that you heard that the STB missed it, the Board
9 missed it in 2004 when it decided the case Tex-Mex
10 decision.

11 Nothing could be further from the truth.
12 If you look at these are some excerpts from that
13 decision, and I commend to you to review the
14 decision. But I also commend to you as I'll walk you
15 through for just a few minutes after this, to review
16 the record that led to the decision where all of the
17 same arguments that are being made today were made
18 then.

19 So this is a decision right? It focuses
20 on the fact that what this was all about, UP and BNSF
21 both coming to the Board, talking about Laredo and
22 Robstown, and the fear that KCS with control of TFM

1 and Tex-Mex would force a bunch of traffic to
2 inefficient routes north of the border.

3 The Board analyzed that as a competitive
4 matter in great depth. They concluded that it was
5 not a competitive harm. That there was not a showing
6 that any condition was necessary to remedy any
7 competitive harm. Ultimately, it was a concern about
8 protecting divisions, a share of revenue that UP and
9 BNSF wanted to preserve on the interline traffic that
10 would continue to flow.

11 I commend to you that decision. And some
12 of what you've heard from the Union Pacific
13 representative last week was oh well, that's because
14 this transaction really this KCS/Tex-Mex transaction
15 had very little impact, it was so small, this was not
16 -- it was never going to have this effect.

17 Well that's not what Union Pacific told
18 the Board in 2003 in this proceeding. If you go to
19 the next slide. Well I'm sorry we went out of order.
20 Let me set this up. This is just an illustration,
21 this next -- sorry about this, the next slide this is
22 an illustration.

1 Okay. I apologize. The slide I'm looking
2 for, so the slide from Tex-Mex shows you how the
3 Board addressed the issues. The next slide I think
4 that came up showed the matrix. That was taken
5 directly from UP's testimony in the case. It's
6 exactly the kind of example that you heard Mr. Nober
7 walk you through last week of the mechanism by which
8 KCS would manipulate rates south and north of the
9 border in order to exact this foreclosure.

10 It was exactly the same theory as
11 reflected in that slide. And then I wanted to show
12 you, and perhaps we have somehow dropped the slide out of this
13 presentation, but it was an argument made by Mr.
14 Rosenthal about you know 1 percent of traffic
15 diversions of UP traffic. Union Pacific's argument
16 in the case at the time in 2003 in their reply
17 comments, or actually their additional comments.

18 There was a long period of hiatus in that
19 proceeding while there were questions about whether
20 the transaction would go forward. So Union Pacific
21 had filed comments, and then filed supplemental
22 comments. And in those supplemental comments I

1 believe I had the quote here. This is what Union
2 Pacific said, and if we could find the slide we'll
3 put it up.

4 But this is what Union Pacific said.
5 These were filed September 30 of 2004 summarizing the
6 record. "In its August 2003 comments UP
7 demonstrated that KCS's acquisition of TFM would have
8 significant anti-competitive facts for huge volumes
9 of cross border traffic moving between the United
10 States and Mexico via the Laredo gateway.

11 KCS competes with UP for a majority of the
12 Laredo cross border traffic via its own network, as
13 well as in cooperation with its interline partners.
14 UP certainly didn't regard KCS Tex-Mex as a nothing
15 burger, and trying to reinvent that record, and what
16 was shown to the Board, and what was adjudicated by
17 the Board in 2003-2004 bears examination. I commend
18 the Board to that record.

19 What we know is the Board got it right.
20 And we know that from the history of the period since
21 the transaction. That when repeatedly asked by
22 members of where is the evidence of foreclosure, why

1 haven't we heard it before if all of this horrible
2 foreclosure happened because of this transaction.
3 The answer was always with one exception that I'll
4 get to, we have no evidence.

5 We can go to I think it's the next slide.
6 Maybe it was the previous slide. So individual
7 shippers, individual shippers have testified here
8 affirmatively, that the options over gateways were
9 always kept open. We heard Bartlett express that
10 precisely. They have options for ways to get to
11 Mexico from their facilities in Council Bluffs, Iowa.

12 Those options have always been available.
13 Why did they ship on KCS? Because they've always
14 chosen KCS because of its single line service, its
15 good service, and its good rates. There are no
16 shippers coming here to complain about foreclosure,
17 having lost options.

18 Instead we have railroads coming here to
19 complain that they fear a commercial disadvantage, or
20 fear new competition. When you ask the
21 representative of Nitely, ACC and TFI, Mr. Moreno, he
22 gave essentially the same answer that Mr. Rosenfeld

1 gave on behalf of Union Pacific. It's just there's
2 no evidence. It's impossible to know. No one will
3 ever know.

4 In my experience, sophisticated parties
5 like these are fully capable of developing evidence
6 of a real competitive problem if that problem exists.
7 I submit that problem doesn't exist, that's why
8 there's no evidence.

9 And that brings me to BNSF. BNSF took a
10 different path in this proceeding. After 17 years of
11 doing nothing to complain or raise issues about
12 foreclosure, BNSF saw this proceeding as an
13 opportunity to come forward and get some relief that
14 it wanted, and it now has a frame that all the way
15 back in 2006 it was foreclosed.

16 Let's examine that evidence. You can go
17 two slides from here. Actually three slides. So
18 first of all I listened to Mr. Nober, and what he
19 said to the Board in plain terms was we did not know
20 in 2006 that Tex-Mex raised its rate on grain traffic
21 between Robstown and Laredo.

22 Had we known, surely we would have come to

1 you, but we didn't know. There's no transparency.
2 Well the facts are to the contrary. BNSF was well
3 aware of Tex-Mex's rates on grain traffic in
4 2006-2007. Mr. Nober may be confused about what
5 discovery in this case discloses that. It was
6 discovery from BNSF to us of BNSF's internal
7 documents from 2006-2007. I won't describe them in
8 any more detail than that, but we will be filing
9 these with the highly confidential version of this
10 presentation when we file it.

11 The Bates numbers are referenced below.
12 BNSF had no lack of awareness of Tex-Mex's rates in
13 2006-2007. Now as Mr. Ottensmeyer will explain, and
14 we've all really already explained, those rates weren't
15 commercially unreasonable rates. There were reasons
16 why Tex-Mex took its rate up, it's in the record,
17 extensively.

18 What did BNSF do about it? They were well
19 aware of it. What did they do about it? They
20 certainly didn't come to us, or come to the Board
21 claiming that anyone violated an obligation to -- or
22 a commitment, excuse me, to offer commercially

1 reasonable rates, and not close the Robstown gateway.

2 Instead what BNSF did, and again, fully in
3 the record, is it shifted its grain traffic from the
4 Laredo gateway to the Eagle Pass gateway.

5 CHAIRMAN OBERMAN: David, what does HC
6 stand for on this slide?

7 MR. MEYER: Highly confidential.

8 CHAIRMAN OBERMAN: Oh I see. Okay. Thank
9 you.

10 MR. MEYER: So Mr. Hirsch, on behalf of
11 BNSF said oh, no, no, we didn't shift any traffic, it
12 was totally different traffic. Let's go to the next
13 slide. You don't have to look very far under the
14 hood to see that that's not exactly right. I'm sorry
15 these are out of order. We'll go one more.

16 So this is the response to your question
17 Chair Oberman, you know Mr. Hirsch said it's totally
18 different kinds of traffic, to totally different
19 destinations. You only have to look back at the
20 verified statement of Mr. Hirsch in this proceeding
21 to see the words he's using. BNSF shifted traffic
22 from the Laredo gateway to the Eagle Pass gateway.

1 That's what BNSF did in 2006-2007.

2 That's what we've shown in the record is
3 the sum total of BNSF's foreclosure model. Let's
4 briefly address this question of transparency that
5 BNSF raised a great deal last week. So BNSF
6 actually lays out the answer to the question about
7 transparency.

8 They said in their submissions to the
9 Board, that they don't have transparency, i.e. a
10 competitor. BNSF doesn't have full transparency.
11 What they pointed out in their testimony is the
12 reality that there is transparency, the transparency
13 is to the shipper. This is what BNSF said. We
14 understand that KCSM quotes Rule 11 rates for the
15 Mexican portion of BNSF, KCS, KCSM routings.

16 So what do Rule 11 rates mean? I think
17 the Board is fully aware that a Rule 11 rate is a
18 rate that goes from one interline partner for the
19 movement for example, from an origin to a gateway,
20 where the customers knows what that interline carrier
21 is willing to charge, or willing to accept in return
22 for handling the traffic from the origin to the

1 gateway.;

2 The customer knows everything about that.
3 And then that customer can go get a rate for the
4 other side of the gateway, and the customer will be
5 fully informed about which one of those two carriers
6 is not fully supporting an interline route because of
7 the level of its rate.

8 It knows everything it needs to know to
9 assess whether the rate in this case, on KCSM in
10 Mexico, has somehow been manipulated upward in a way
11 that closes the gateway. There is no lack of
12 transparency here. The Rule 11 rate obligation, or
13 the Rule 11 rate mechanism, excuse me, will ensure
14 that.

15 One other example was given a couple of
16 days ago by --

17 CHAIRMAN OBERMAN: David, before you leave
18 this point, if the transparency reveals to the
19 customer that CP/KCS is manipulating the Mexican side
20 of the rate, what's the customer's relief?

21 MR. MEYER: So I'm going to violate my own
22 advice to everyone on this team, and ask if you would

1 indulge my coming back to that question in a few
2 minutes. We have a number of points we want to make
3 about exactly how this commitment we've made about
4 commercially reasonable terms, and keeping gateways
5 open would function.

6 And I think we'll go through it very
7 quickly, if I may indulge, but otherwise I'll answer
8 your question now.

9 CHAIRMAN OBERMAN: No, no, no, I'd rather
10 you proceed, put your case on the way it's you know
11 most logical to you. We could do that. But let me
12 take this moment to say what I think we all probably
13 were anticipating. We are not going to be able to
14 finish this in the next 45 minutes. We will know
15 very shortly, but it is my anticipation that we will
16 have the needed court reporter and Zoom operator to
17 resume tomorrow morning at about 11:30 Eastern.

18 We will not go all day. We will go about
19 two and a half hours at maximum if we need it. I
20 don't know that we'll need that much, but I only say
21 that now David. I don't want you to rush thinking
22 you have to finish your whole case in 45 minutes, and

1 I don't want Board members to refrain from asking
2 needed questions. There's just too much at stake
3 here.

4 So I hope everybody on our end I think is
5 available. I hope you will all be available on your
6 end. We need to get this finished. So with that
7 David go proceed.

8 MR. MEYER: Many thanks Chairman, and so
9 maybe I will slow down just a touch, but before we
10 left the review of the evidence put forward of
11 foreclosure, I wanted to touch what Mr. McBride had
12 to say on Tuesday. He mentioned a situation that he
13 was describing the UP/CNW merger, in fact he was
14 describing something that happened several years
15 subsequent to that, and it was Union Pacific had a
16 contract with a shipper in America, involving the
17 movement of coal from the Powder River Basin to
18 Sergeant Bluff I believe.

19 Sergeant Bluff is in Nebraska, but I may
20 have that wrong. Thank you John. And you know he
21 gave it as an example where you know UP didn't quote
22 a bottleneck rate. Well this case actually

1 interestingly enough, is the Mid American case that
2 is one of the three cases that the Board addressed in
3 its consolidated bottleneck case ruling back in the
4 late 90's.

5 And what happened there wasn't anything to
6 do with a commercially unreasonable rate being
7 offered as a result of a merger. What it was, was
8 Union Pacific under the statutory framework for
9 interline pricing and ratemaking, was a single line
10 carrier between Powder River Basin and Sergeant Bluff
11 as a result of the UP/CNW merger.

12 And formerly there had been an
13 interchange, I believe, between CNW and BNSF,
14 somewhere in the Omaha Council Bluffs area. And the
15 shipper wanted to get a rate from UP for the segment,
16 the bottleneck segment, former CNW bottleneck segment
17 between Omaha, Council Bluffs and Sergeant Bluff.

18 That was what Mr. McBride was describing. UP
19 exercising its rights as the Board ended up deciding,
20 under the ratemaking standards applicable, refused to
21 quote a bottleneck rate. And the Board said that was
22 correct, UP did not have to quote a bottleneck rate

1 because it had a single line between the Powder River
2 Basin and the destination.

3 And you know as the Board knows, you know,
4 in that circumstance, and absent some merger related
5 condition, in that circumstance, a single line
6 carrier is entitled to decline that request. And
7 there is recourse if it's an inefficient single line
8 route that the carrier is trying to force upon the
9 shipper.

10 That's standard Board precedent. This is
11 a situation that cannot arise in this case. It
12 cannot arise in this case because we have committed,
13 and would accept a condition requiring, that we not
14 create new regulatory bottlenecks. So if this
15 situation described our merger, the bottleneck
16 segment between Sergeant Bluff and Council Bluffs,
17 that's the bottleneck segment, and the connecting
18 carrier is you know between Omaha Council Bluffs and
19 the Powder River Basin.

20 We are going to quote a separately
21 challengeable Rule 11 rate to the extent that we
22 would have been required to do so absent the merger.

1 That's our commitment. We're not creating any
2 bottleneck period. So this situation, interesting
3 historical interlude in the case, it's just not
4 applicable to our transaction. So let me move --

5 CHAIRMAN OBERMAN: David, I'm a little
6 uncertain about how far this commitment goes. So
7 today since CP ends at Kansas City, and KCS picks up
8 there, it can't be a bottleneck because there's no
9 through line. So are you saying that in that
10 particular gateway this commitment will apply that
11 there won't be any refusal of "separate Rule 11
12 rates"?

13 MR. MEYER: So it's not just Kansas City.

14 CHARIMAN OBERMAN: No I know, but I'm
15 asking specific, I'm trying to understand your
16 qualification about no new bottlenecks. I'm trying
17 to figure out where you have bottlenecks now.

18 MR. MEYER: So I actually don't know where
19 we have bottlenecks today. You know the bottleneck
20 rubric is describing a situation where there's a
21 solely served customer at one end or the other of the
22 route, right, and then there's a bottleneck segment,

1 i.e. there's only one railroad that serves a segment
2 from the origin and destination to some gateway.

3 It's you know, the connecting point to
4 other railroads. And you know I haven't done the
5 homework to go figure out where today those
6 bottleneck segments exist on the CP or KCS system.

7 But what we're saying is if there's a
8 situation where today right, there's the ability of
9 the shipper served by that bottleneck segment, has no
10 rail option other than CP or KCS on that segment, who
11 has the ability to get a rate for that segment from
12 CP or KCS that can be challenged under the Board's
13 regulatory processes.

14 And would lose the ability to do that by
15 virtue of the fact that we would have merged, gotten
16 a single line, and would be absent this commitment,
17 able to say under the Board's regulatory framework,
18 you can't get the bottleneck rate from us because
19 we're going to give you the overall working to
20 destination rate. In that situation we would not
21 assert the fact that we had merged to avoid the
22 obligation to quote the rate. That's what we're

1 saying.

2 Wherever that occurred, that situation
3 would occur, that's what we're saying.

4 CHAIRMAN OBERMAN: But it sounds like you
5 are also saying to be clear, and since CP is a longer
6 railroad, and we'll use them as an example, but it
7 could be KCS, that if you have a place now where CP
8 is not required to quote a separate Rule 11 rate, and
9 the origin to destination isn't changed because of
10 this merger, you're not going to lift the bottleneck
11 rights you have there, you're going to hold on to
12 them.

13 MR. MEYER: That is correct. That is
14 correct. We don't think there should be -- there's
15 no basis for making any change to how the law would
16 apply in those situations.

17 CHAIRMAN OBERMAN: Okay. It would be has
18 anybody bothered to put together how many places the
19 new commitment will apply, and how many places the
20 existing bottlenecks will stay in place on your
21 networks.

22 MR. MEYER: Again, I think the answer to

1 that is no. You know we have made no effort to do
2 that, we've made a commitment that would apply in any
3 case where you know it's really, it would be use
4 interposing a defense to a request for a rate quote.

5 Right we'd say we don't have an obligation
6 to quote a particular rate because of the fact that
7 we now have a single line. There may be innumerable,
8 you know, possible, origin destination pairs where
9 that theoretically could arise. We're going to you
10 know, we're going to stand by our commitment with
11 respect to whichever ones end up materializing in the
12 real world.

13 It may be that we would in the ordinary
14 course of Mr. Brooks making offers to customers never
15 refused, on any basis, to quote these rates. We
16 don't know. But what we're saying is --

17 CHAIRMAN OBERMAN: No I understand, but
18 there's the question.

19 MR. MEYER: A basis for avoiding
20 challenges.

21 CHAIRMAN OBERMAN: The question is where
22 you have the right to refuse to quote rates. I

1 understand you might for business reasons not
2 exercise those rights. You know this question came
3 up last week with regard to wanting to find what were
4 gateways, and I think Keith had said any place you
5 interchange now you're going to keep open, and I'm
6 not sure everybody in this industry has the same
7 understanding of the semantics of gateways and
8 interchanges.

9 And I had suggested to the other railroads
10 who wanted to make sure that these open gateways were
11 going to be maintained that they submit a list. So
12 everybody knew what we were talking about, and I
13 think I'm not sure if I suggested the same to you,
14 but rather than having some definition, to me it
15 would be a much more reliable to actually identify
16 all of these places.

17 And unless it's not reasonably possible,
18 just thinking for myself, in your final papers, I
19 would like to have some understanding of the
20 magnitude of this bottleneck commitment you're
21 making, where it will apply, and where you don't view
22 the merger as creating some new opportunity for a

1 bottleneck. I'm not sure.

2 Because as you said David, there's a wide
3 variety of origins and destinations, and there might
4 be some debate about whether you meant that or not, I
5 would at least like to have a more concrete
6 understanding of it.

7 MR. MEYER: So we're happy to try to
8 provide a better understanding of the scope of -- I
9 think we're really thinking, talking about two
10 somewhat separate.

11 CHAIRMAN OBERMAN: Yes we are. They're
12 separate points, but they're related I think.

13 MR. MEYER: Yes. There is certainly some
14 relationship, and I you know, I think what I really
15 want to do is underscore that. I don't think it's
16 going to be useful or constructive to identify every
17 interchange point where potentially bottleneck
18 traffic interchanges with another carrier, and
19 cataloguing those across the entire network of both
20 railroads.

21 Because the simple answer is again, a
22 shipper is going to know. They used to get a rate

1 from KCS to a gateway, and they could challenge that
2 rate if they wanted to get a rule on a rate from
3 them, and if they hear CP/KC say well no, we're no
4 longer going to give you that because we now go all
5 the way to the destination. Red flag. That's a
6 violation of our commitment, okay?

7 And wherever that is. And you know we can
8 certainly go try and assemble a list of every
9 interchange point in the entire network where that's
10 theoretically possible, but I'm not sure it's going
11 to inform anyone of anything, frankly.

12 CHAIRMAN OBERMAN: Well take a look at it.
13 I have no idea. Maybe I'm asking you for something
14 that's way beyond reason, and if you think that's the
15 case you'll be able to persuade me, but.

16 MR. MEYER: The question of the somewhat
17 separate question of our commitment to keep gateways
18 open, on commercially reasonable terms, right, these
19 are we're talking about gateways where there are
20 currently you know efficient, and I say efficient
21 not as a limitation, but to reflect that you know there are
22 places where interline service is actively used

1 today, and therefore shippers have chosen these
2 options, and I view that.

3 We view that as an indication of those
4 options efficiencies, so again we're not trying to
5 limit it. You know we are certainly going to take a
6 look at being more complete in our catalogue of which
7 gateways we're talking about. But Mr. Brooks has
8 done a little bit of homework, and I think he'd give
9 you an idea of where the lion's share of the
10 interline traffic that we're talking about that may
11 be.

12 If I could use the phrase, affected by the
13 transaction, not to acknowledge a harm, but just to
14 say that over these gateways there is interline
15 traffic moving that as to which CP/KC will have a
16 longer, or single line haul as a result of the
17 transaction.

18 And this is the list of the gateways that
19 account for the lion's share of that traffic. Again,
20 we're not saying these are the only places. We're
21 not trying to be limiting here, but Mr. Brooks.

22 MR. BROOKS: Yeah, Chairman Oberman, if I

1 could just expand a little bit. I think maybe that
2 just that in simpler terms than our lawyer is, we
3 tried to do this in a fashion where we wrote it to
4 allow any gateways, as long as they're efficient and used
5 regularly by our shippers, would qualify for this
6 preservation.

7 So with not attempting to exclude
8 anything, but clearly when we look at what could fit
9 into this realm, and what moves today, and what we
10 believe will move tomorrow, it really kind of boils
11 down to I'd say the majority, the vast majority of
12 the traffic, would hit on one of these 11 gateways
13 that have the yellow dot on them.

14 BOARD MEMBER SCHULTZ: Can I ask a quick
15 question here? Does this commitment apply to new
16 shippers, to new movements, or just existing?

17 MR. BROOKS: Yeah, it will apply to new
18 shipments. It would be shipments that again would be
19 affected by this transaction that would go over those
20 gateways.

21 MR. MEYER: All right. So we're not going
22 to insist that it be a shipper who actually moved

1 itself by a specific prior option. If there are
2 other shippers that would have availed themselves of
3 that service and that option in the past, there may
4 be a question of -- there may be some questions
5 raised by the fact that a shipper was new, and had
6 never used an interline option as to whether it was a
7 real option to them perhaps. But we're not trying for
8 exclude that potential.

9 CHAIRMAN OBERMAN: All right. Go ahead
10 David.

11 MR. MEYER: We do have some other I think
12 fairly important things to say about the scope and
13 application of this commitment that we've made, but
14 perhaps in the next 25 minutes or so that we have
15 today, I'll back up a bit on this foreclosure
16 question.

17 And complete the discussion that we
18 were having about the merits of concern, and so I
19 talked to you about a lack of evidence of foreclosure
20 in the past. The experience that we've had we've
21 seen in the marketplace following the KCS,
22 Tex-Mex/TFM transaction, and the you know lack of

1 evidence from all the other mergers that have
2 occurred in the industry over the years, that
3 extended single line service across broader
4 geographies and the like.

5 You know I mentioned briefly the record
6 evidence of the Tex-Mex rate increase. I think Mr.
7 Ottensmeyer may want to add just a few words about
8 that.

9 MR. OTTENSMEYER: Sure. And actually in
10 the interest of time here, I'm going to refer to Mr.
11 Nance's verified statement, Table 1 and Table 2,
12 where he lays out the revenue variable cost, of the move
13 from Robstown to Laredo and Corpus to Laredo.

14 But really Robstown to Laredo would have
15 been the route that would have impacted BNSF as they
16 described. And you can see based on Table 2 is
17 actually the 2005 RBC calculation based on -- so this
18 would have been immediately after giving effect to
19 the rate increase. The truth is the rate that was
20 offered by Tex-Mex was below variable cost using this
21 methodology and giving effect to the rate increase to
22 \$525.00.

1 We had a revenue variable cost calculated
2 at 121 percent, so I think that sheds a little more
3 light on why there haven't been any rate complaints
4 in the last 17 years. And then over that period of
5 time.

6 CHAIRMAN OBERMAN: Pat, whose statement
7 were you referring to? I didn't hear the name of the
8 person.

9 MR. OTTENSMEYER: Mike Nance, the chief
10 marketing officer for KCS.

11 CHAIRMAN OBERMAN: This Table is not in
12 the presentation you handed us up last week.

13 MR. OTTENSMEYER: That's correct. It is
14 not.

15 CHAIRMAN OBERMAN: I don't have it in
16 front of me. I was looking for it, okay, thank you.

17 MR. OTTENSMEYER: And then just to finish
18 the thought I had we also calculated today based on
19 rate increases that have taken place since 2005,
20 which have been fairly modest, and that RBC
21 calculation to Robstown is now at 114 percent. So I
22 think under any definition of the term these are not

1 rates that would be unreasonable, and they certainly
2 have been necessary for us to support the capital
3 that is required to provide the service. Back to you
4 David, or?

5 MR. MEYER: Thank you, thank you Mr.
6 Ottensmeyer. So I recall the evidence was BNSF
7 shifted its traffic to the Eagle Pass Gateway. I
8 think that shift underscores just one of the many
9 important constraints on CP/KC's pricing, just as
10 they are today on KCS's pricing, that will be
11 unaffected by the transaction.

12 And ultimately, going back to the question
13 that was framed I think well by Member Hedlund, is
14 why we won't have any economic incentive to, quote, foreclose
15 interline options. The result of foreclosing would
16 be to encourage the kinds of shifts that BNSF
17 undertook to encourage trucks going onto the highway,
18 and remember Mr. Hirsch made it very clear that as to
19 intermodal traffic those trucks will be on the
20 highway within an hour.

21 Well if they're on the highway in an hour,
22 that means they're not generating any revenue for

1 KCSM or CP/KC, so our incentives will be to support
2 these efficient interline options.

3 CHAIRMAN OBERMAN: David, before you leave
4 the BN transferring its traffic to Eagle Pass, I
5 thought the verified statement you cited, I
6 understand why you cited it, I would have done
7 the same, but it's a little if I were in your shoes,
8 but it's a little vague, it's that it shifted its
9 traffic.

10 There was a lot of traffic we talked about
11 those. Grain traffic, and then BN talked about other
12 traffic. Are you contending that BN shifted all of
13 the traffic that previously went through Laredo to
14 Eagle? There was no traffic it couldn't shift and
15 didn't shift to Eagle Pass? And what is the evidence
16 for that other than that one in my view, vaguely
17 written sentence, its traffic.

18 MR. MEYER: Well so, a couple ways that
19 I'd like to try to answer that question for you, and
20 I think the first place I would start is with a
21 direct answer. No. We're not saying that every
22 carload that BNSF, every movement that was handled by

1 BNSF and interline service with KCS that moved over the
2 Laredo Gateway.

3 BNSF picked up and moved over the Eagle
4 Pass. BNSF continued to handle traffic over the
5 Laredo Gateway. What I'd like to do, you know, but a
6 lot of traffic to Eagle Pass. What we were taking
7 on, we were starting with BNSF's contention as they
8 framed it. Their contention was Tex-Mex raised this
9 rate for grain traffic between Robstown and Laredo.

10 And because of that we couldn't compete.
11 Okay? That's what they said. We were shut out.
12 When you look at the facts, first of all you start
13 with why did KCS raise the grain rate on Tex-Mex
14 between Robstown and Laredo? It wasn't to foreclose
15 anyone. It wasn't to close a gateway, it was to stop
16 hemorrhaging, that's number one.

17 But number two you look at what happened
18 to volumes of traffic moving over Laredo, we're talking grain
19 traffic. This is where BNSF is starting with its
20 argument about the foreclosure. It's all about this
21 rate increase. It's grain rate. So where did the
22 grain traffic go?

1 Well, a couple of things, and Dr. Majure
2 perhaps can address this in more detail based on the
3 more granular analysis he did, but a whole bunch of
4 things are going on at the same time. Number one,
5 BNSF is making a concerted effort to move traffic
6 from its grain origins into Mexico destinations.
7 Remember, BNSF doesn't just serve Mexican
8 destinations, they serve Pacific Northwest
9 destinations, they serve Gulf destinations, they
10 serve the entire west.

11 BNSF's grain marketers are making a
12 concerted effort that to the extent that Mexico is a
13 destination option they're offering on their network,
14 they're moving that traffic over the Eagle Pass
15 Gateway into Mexico to Mexican destinations. Bring
16 grain to a destination in Mexico to serve Mexican
17 industry, there's a lot of ways to serve Mexican
18 industry with grain being supplied.

19 And they include the FXE, and Mr.
20 Ottensmeyer can address that in more detail. So
21 those are the facts right? It's grain volumes
22 shifted, and that's what Mr. Hirsch acknowledged.

1 But the other thing is other things were going on
2 too, right?

3 There was a decline in grain volumes
4 overall that proceeded the quote unquote "alleged foreclosure."
5 Those declines in grain overall are clearly not
6 causally related to the KCS transaction, and yet BNSF
7 was claiming that their bar graph proves their case.

8 What their bar graph does is focuses on
9 Laredo, ignores the exogenous factors that were
10 affecting grain volumes, and ignores Eagle Pass. And
11 I need to add not just Eagle Pass but El Paso. So
12 you know if you look at BNSF's network, this is very
13 different from Union Pacific.

14 If you look at BNSF's network and ask how
15 do you reach parts of Mexico that are well-served by
16 the FXE, and if you could bring up the slide please.
17 So look, a map of the Mexican rail network, and in
18 red is KCSM, and in blue it's FXE.

19 And you'll see that FXE reaches down into
20 the heart of Mexico, that Mexico City roughly where
21 the blue line intersects the green line. The green
22 line I think is Ferrosur, which is an affiliate of

1 FXE, so those two are really one network. The blue
2 line also crosses over to Monterrey, and down to Veracruz.
3 Most of the major destinations or origins in
4 Mexico are served, or servable by both of these
5 networks.

6 But the point I was making about BNSF's
7 network, and I'm sorry that the BNSF network isn't
8 shown north of the border here. This is the map I
9 came with. We've been talking about Laredo and
10 Eagle Pass. They're really quite close together.
11 From Eagle Pass, BNSF and UP can access the essential
12 Texas rail network of both of them by heading east to
13 San Antonio from Eagle Pass, whereas at Laredo, UP
14 heads north to San Antonio.

15 Come together in San Antonio where the two
16 lines cross, and then it's the equivalent to having
17 come through Laredo. But for the BNSF network, it
18 looks like it's way out of the way in Mexico, but if
19 you go to El Paso, El Paso is right there, and you
20 go north from El Paso, only go a short distance into
21 New Mexico, and you're at a place called Belen,
22 B-E-L-E-N.

1 BNSF has a yard, a big yard there, big
2 terminal, and that's where BNSF's southern Transcon
3 crosses New Mexico. From Belen to Chicago on the
4 southern Transcon is, you know, it's what I think of
5 as a rocket ship. You know it's double or triple
6 packed the entire way, and it's the fastest rail to
7 Mexico. No offense to my client, or to Union
8 Pacific, which I know is very proud of its
9 intermodal service as well.

10 The southern Transcon is highly efficient,
11 a highly efficient artery, super high capacity, super
12 high speed. So if what you want to do is get to
13 Mexico fast, it may be slower in Mexico, but it's
14 fast to that point where you're almost in Mexico.

15 CHAIRMAN OBERMAN: David, it
16 wasn't a rocket ship last summer when they embargoed
17 it, but that's a separate story, go ahead.

18 MR. MEYER: Well I think that was southern
19 California, Member, but point well taken. So my
20 point was to say engaging with the facts about this
21 shift of traffic to Eagle Pass, we're talking about
22 grain traffic and taking on BNSF's allegations of

1 foreclosure on their terms. It just doesn't hold up
2 to the facts.

3 Now we're not saying that there weren't
4 shifts of traffic from BNSF, KCSM or excuse me, BNSF,
5 Tex-Mex, TFM routes to KCS, KCSM single line routes.
6 We're not saying that there weren't shifts of traffic
7 from UP TFM routes over Laredo, to KCSM routes.

8 We're not saying that. In fact, we think
9 there were. We think the evidence shows that. But
10 as Dr. Majure pointed out last week, and in his
11 analysis and into the record in this case, there are
12 reasons why that shift occurred, and the best
13 description of the reasons why that shift occurred, I
14 would submit, came out of the mouth of the Bartlett
15 witness.

16 Again, Bartlett has a facility in Council
17 Bluffs, Iowa. Council Bluffs to Mexico is BNSF to
18 Eagle Pass, BNSF to Robstown to KCS, KCSM, or it's UP
19 to Laredo, UP to Eagle Pass, or UP to Brownsville, or
20 it's KCS, KCSM.

21 From Bartlett's perspective all of these
22 options are available to us today, and have been

1 since the KCS/Tex-Mex merger, and why is it that that
2 traffic moves on KCS, KCSM? Because they've chosen
3 to send it there. And why? Because of all of the
4 things that KCS, KCSM single line route provides to
5 the shipper, the shipper makes the choice.

6 We expect -- this is why we expect to
7 attract traffic to our single line routes. Not
8 because we're going to close down the other ones, but
9 because we're going to improve ours, and compete.
10 That's the whole premise of this transaction. So you
11 would expect to see that in the factual record, and
12 you wouldn't expect to see all of BNSF's traffic get
13 dumped and moved over to Eagle Pass because KCS won
14 something. That's the point.

15 CHAIRMAN OBERMAN: So are you saying
16 David, that just taking all those examples you gave
17 from Bartlett that KCS, KCSM offers a shorter transit
18 time, a more dependable service, or both, or what are
19 you saying?

20 MR. MEYER: I would defer to my KCS
21 colleagues to address the specific advantages that
22 they offered to Bartlett.

1 MR. ELPHICK: I think that is the case of
2 Bartlett is our largest cross border shipper. They
3 have developed, they've invested and done their part
4 invested in facilities in Mexico to build a really
5 solid business in Mexico.

6 They understand Mexico very well. But
7 it's because of the fact that virtually all the
8 business that we handled originates and terminates on
9 the KCS network, and we truly have a partnership
10 there. I don't know if it would be helpful just to
11 put a picture in front of you to go to the -- I think
12 it's two slides out that shows what Mr. Meyer
13 described, the various options.

14 I think there were some questions about
15 this the other day looking at the various options
16 that Mr. Meyer described. So you can see the rail
17 miles from Laredo and Eagle Pass to Monterey, so on
18 the first chart on the left. So it is a longer route
19 from Eagle Pass to Monterey via rail, but your
20 question Mr. Chairman the other day to Mr. Hirsch,
21 and I think this is from the transcript that if you
22 will bear with me, I thought I had here.

1 Oh yes, your question was why can't you go
2 into Mexico on Eagle Pass down to FXE and turn east
3 and interchange and get right into the golden
4 triangle. Why does that not work? And Mr. Hirsch's
5 reply was well, there's as you know, different
6 quality of the tracks in Mexico.

7 So I think to -- I prefer that be quoted
8 from Mr. Hirsch. I didn't want to say anything
9 negative about our competitor in Mexico here, but it
10 is the efficiency of that route. It's the way we
11 manage our flow of traffic over the bridge, because
12 we have not only the IT, but the other resources, the
13 capital alignment on both sides of the border.

14 And there is no doubt that we feel that
15 that gives us a differentiated network versus the
16 other options in Mexico, which in all cases, at all
17 the other gateways, requires interchange between two
18 independent railways.

19 CHAIRMAN OBERMAN: I'm glad you cited that
20 because I was going to ask you the same question, so
21 you beat me to the punch. Thank you.

22 MR. ELPHICK: I think if I may just to

1 elaborate a little bit on this map, Mr. Hirsch
2 commented that Eagle Pass and Laredo really served
3 completely different markets. You can see, and I
4 don't have this data in the slide, but can certainly
5 provide it if interested.

6 But looking at what's happened over the
7 last 17 years since 2005, traffic at all gateways has
8 grown, no doubt about that. 336,000 carloads in
9 2005, rail carloads at all gateways, to 484 in 2021.
10 Laredo market share has fallen from 59 percent to 51
11 percent.

12 Eagle Pass market share has grown from 7
13 percent to 33 percent. So there has been, I think
14 Mr. Majure used the phrase that I particularly like,
15 a deliberate choice of gateways on the part of our rail
16 competitors, and to some extent customers, and Eagle
17 Pass has in fact grown quite a bit over that last 17
18 years.

19 MR. MEYER: And I think Dr. Majure has a
20 comment about his data analysis in this case that
21 goes directly to this reference point.

22 DR. MAJURE: Yes. And speaking about the

1 grain traffic in particular, the BNSF witnesses did
2 provide annual data about their shipments of grain
3 over Eagle Pass and Laredo, and without getting into
4 the confidential information about that I can say
5 that you know if you look at my reply verified
6 statement on this, I examined that data.

7 I examined what happens with their grain
8 traffic over time. And there is a clear -- it's
9 consistent with a common shock affecting their
10 traffic both at Laredo and Eagle Pass in the time
11 period they're talking about this price effect going
12 into place.

13 And a common shock means just their
14 business of doing grain into Mexico was affected
15 because the price increase would only have affected
16 the Laredo traffic, part of the grain traffic. So
17 the fact that we see this shock happening on both is
18 telling me that this isn't the reason that their
19 traffic was falling off at Laredo.

20 Their traffic was falling off at both
21 gateways. Looking at the data as well, I see that
22 the timing of exactly when and how their grain traffic

1 moves between -- or the balance of their grain
2 traffic moves between Laredo and Eagle Pass, does not
3 seem to be correlated with when the price increase
4 would have happened.

5 So I don't see anything in their grain
6 traffic data that is actually supportive of the idea
7 that they were foreclosed, or couldn't operate here.
8 It all seems consistent with other things were going
9 on.

10 MR. ORR: And Mr. Chairman, if I could
11 just add in some of the feedback from the grain
12 structure as we've improved our cross border grain
13 capabilities, some of the feedback I've had from our
14 customers is they certainly appreciate our safety
15 management standards that go across from Mexico and
16 the United States under the same leadership
17 capability of inspecting mechanical cars to the
18 standards that we would ask ourselves in the United
19 States.

20 The level of training we give to our
21 mechanical people, and those training and elements in
22 our terminals that eck out throughput through our

1 terminal, like we're doing in the United States,
2 those all contribute to the value that I heard back
3 from our customers in improving the train's grain
4 cycles.

5 But certainly, the safety and security
6 from a mechanical perspective, and the standards we
7 hold ourselves to cross border really add and
8 contribute to that value.

9 MR. MEYER: So if we just have a few
10 minutes I think before your hard stop Chairman, and I
11 thought I would use those few minutes to try to close
12 out this issue of the reason why we have the economic
13 incentive to continue to support interline options
14 for the Laredo, just like over in the gateway, but
15 focusing on Laredo because that's where the Class 1
16 attention has been levied.

17 A lot of what you've heard from them has
18 to do with the traffic they really seem to care
19 about, their intermodal traffic or their own modal
20 traffic. Member Fuchs, you made a very good point I
21 thought, that that's traffic that railroads regard as
22 highly competitive. Certainly, CP regards that

1 traffic as highly competitive.

2 It's highly competitive in a number of
3 dimensions, you know both because alternative
4 terminals serving origin regions, or destination
5 regions, are capable of competing with
6 one another, supporting a broader
7 array of rail to rail competition, and also because
8 of the inherent -- certainly for intermodal, the
9 inherent ability for trucks to compete for that
10 traffic.

11 Now we had in our prior presentation, we
12 pointed out how BNSF saw its intermodal business, and
13 the potential ways in which they would adapt if KCS
14 became a less cooperative partner, there are highly
15 confidential documents that are included in that
16 presentation that I think are worth a read.

17 But we also have a view from Union
18 Pacific, and this was offered publicly at an earnings
19 call in which Mr. Fritz, the CEO, participated. And
20 he made the very astute observation that with
21 respect to UP's network, they have an intermodal
22 terminal right there at the border in Laredo, Texas.

1 And that terminal is capable of receiving trucks from
2 Mexico.

3 And so the way Union Pacific sees the
4 intermodal world, they inherently have an ability to
5 replace an uncooperative KCSM, were there ever to be
6 one, and again we are highly incentivized not to be
7 an uncooperative partner, but they can replace an
8 uncooperative KCS, or CPKC in Mexico, with trucking
9 to their intermodal ramp in Laredo were that to be in
10 their economic interest.

11 These are just examples of the ways in
12 which CPKC is going to have every incentive to
13 continue to support efficient interline service. I
14 think we're probably out of time now, so I'll save
15 the rest. I don't have much more on this topic
16 before we get into the meat of the Board's questions
17 about our commitment.

18 And so unless other guidance, I'll
19 probably pause there.

20 CHAIRMAN OBERMAN: Unless any other Board
21 member wants to add anything at this point, I think
22 we should recess. But let me say this to everybody,

1 including to myself. We're going to finish tomorrow
2 in two and a half hours at the most, hopefully less.
3 So we're going to convene at 11:30. Bring a snack,
4 Eastern. If we take breaks they will be no more than
5 five minutes.

6 David, I think you -- it looks to me like
7 two and a half hours should be more than ample. It's
8 not expanded.

9 MR. MEYER: I absolutely agree. We should
10 be you know I'm not going to predict well under two
11 and a half hours, but two and a half hours ought to
12 be ample.

13 CHAIRMAN OBERMAN: All right. We will
14 convene tomorrow morning at 11:30 Eastern, and we
15 will terminate at 2:00 Eastern. Thank you all, thank
16 you for your patience, and again I think this is all
17 well worthwhile, and enlightening. I think certainly
18 to the Board and to our staff and we appreciate it.
19 Thank you.

20 (Whereupon, the hearing adjourned to
21 reconvene on Friday, October 7, 2022.)
22

CERTIFICATE OF COURT REPORTER

I, GAYNELL CATHERINE, Court Reporter, do hereby
certify that that the testimony contained herein is a
true record of the testimony given by said witness,
and I further certify that I am neither attorney nor
counsel for, related to, or employed by any of the
parties to the action in which this statment is
taken; and, further, that I am not a relative or an
employee of any attorney or counsel employed by the
parties hereto, or financially interested in the
action.

GAYNELL CATHERINE

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