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

Friday, October 7, 2022

11:33 a.m.

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

The above-entitled matter came on,
pursuant to notice, at 11:33 a.m., Chairman Martin
Oberman presiding.

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

2 CHAIRMAN OBERMAN: All right good morning
3 everyone, and welcome to the reconvened hearing on
4 the proposed merger between Union Pacific and Kansas
5 City Southern. Docket 36500. We were in the middle
6 -- beyond the middle of CP/KCS rebuttal yesterday.
7 We are going to finish today. We have a hard stop at
8 2:00 p.m. eastern, so with that David proceed.

9 MR. MEYER: Thank you, Chairman. We were
10 well past the middle, at least of our planned
11 presentation, and obviously at any time if the Board
12 has questions as yesterday we're happy to take any
13 question on any subject.

14 But when we left off yesterday we were
15 talking about the competitive constraints that will
16 continue to apply within Mexico for traffic to and
17 from Mexico that will give the applicants, CP KC
18 incentives to preserve efficient interline line routes
19 that shippers prefer, and one of the major sets of
20 constraints there is the ability of the shippers to
21 choose other options to put their containers on the
22 highway, to you know choose other rail options, FXE

1 and Mexico.

2 And we wanted to continue that
3 conversation really right where we left off. I
4 recall at the end of yesterday afternoon I pointed
5 out a comment by Union Pacific's Lance Fricks about
6 the ability of Union Pacific to truck intermodal
7 traffic up to Laredo, put it on their trains in
8 Laredo, and take it across their network in the
9 United States.

10 We have our next slide is a visual
11 depiction of the ability of trucks to handle traffic
12 between Mexico and the United States, and I think I
13 had asked Mr. Ottensmeyer to describe from his
14 experience in the Mexican U.S. transportation markets
15 how he sees this.

16 MR. OTTENSMEYER: Okay. Thank you David
17 and good morning again Chairman Oberman and members
18 of the Board. Can you hear me okay?

19 CHAIRMAN OBERMAN: Yes.

20 MR. OTTENSMEYER: Okay. Well there's a
21 phrase goes a picture tells a thousand words. This
22 is more like a picture telling five million words.

1 You can see the data on the lower table on the lower
2 right of this chart. As I recall Member Fuchs I
3 believe it was in his questioning of one of the
4 panels, I believe it was BNSF to ask the question two or three
5 times, would you agree there is competitive traffic
6 over the Laredo gateway?

7 You've all probably seen this photo, or a
8 version of it before. There is indeed competitive
9 traffic over Laredo gateway. It is a very
10 competitive market. It is a large market. It is a
11 growing market, and it is dominated by truck, and you
12 can see the rail versus truck market share. I won't
13 spend a lot of time. I think the chart speaks for
14 itself, and you can see the KCS actual, or total
15 market share.

16 This is a hugely competitive market. We
17 have invested heavily in Mexico on both sides of the
18 border to develop what we think is a first-class
19 intermodal network, our ramps in Mexico, very similar
20 to the quality and technology that's used in the
21 United States, and we're very proud of the fact that
22 we built a first-class intermodal network, and are

1 chipping away at this market.

2 Some of our customers have referred to
3 this Mexico cross border truck to rail conversion
4 opportunity as the last frontier in North America for
5 truck to rail conversion. So the point of all of
6 this again, look at the market shares on the last
7 line. A little bit of growth over the years. The market
8 has grwon, our annual traffic, our cross border traffic has grown,
9 but we still have barely 3 and a half percent of the
10 total market.

11 And it is an extremely competitive market.
12 Moving on I'll go --

13 BOARD MEMBER PRIMUS: Pat, Pat I'm sorry,
14 this is Robert. On that same graph so can you
15 explain to me I mean from 2005 to 2021 you guys have
16 jumped .3 percent. I mean what's the -- what do you
17 see as sort of the barriers to growing more in those
18 years? And you talked about you built that
19 intermodal facilities and others from across the
20 freight lines. I mean what's the catch on that.

21 MR. OTTENSMEYER: You know it's service,
22 it's capacity, it's you know we are a wholesaler in

1 the intermodal business, so that means that we are
2 not dealing in most cases directly with the end
3 customer, the cargo owner. Our customers are the
4 IMC companies.

5 And so we need our customers to commit
6 capacity to that market. There are still barriers
7 and I'll say beliefs and biases about the cross
8 border market that we are slowly trying to break
9 down, and I'll tell you, yes I'll state it the way I
10 have stated it many times. If you fly over Laredo,
11 Texas you will see millions of square feet of
12 distribution, warehouses, cross docks, break bulk
13 facilities.

14 It's a warehousing and freight handling,
15 it's a very big business in Laredo, Texas. If you
16 think about what is actually consumed in Laredo, and
17 what is actually manufactured in Laredo, it's
18 disproportionately large compared to Laredo as an end
19 market.

20 There are still a lot of shippers that
21 have lived off the Laredo model. This worked well
22 for them, but it's basically truck in and out of

1 Laredo, put it in a warehouse, take it to a cross
2 dock or distribution center, and then reload a truck
3 to take it to a destination in Mexico. And as we
4 know anytime you add handling to freight you add cost
5 and you add time, but it just has taken awhile to get
6 shippers comfortable with shifting to rail.

7 As we have success, as we add capacity on
8 both sides of the border, as we reach new markets
9 with the proposed combination with CP, I think we
10 will be able to see further improvement in our
11 ability to take market share off the roads, and
12 advance that truck to rail competition, or that truck
13 to rail conversion.

14 MR. BROOKS: Member Primus, John Brooks
15 here if I can maybe jump in Pat. Like I can tell you
16 as we did our analysis on what we thought this truck
17 conversion versus rail to rail conversion would look
18 like for CP KC I can tell you we started off I would
19 say heavily weighted towards the whole notion of just
20 creating this other option versus UP and BN and the
21 existing carriers.

22 And because of that shippers would want to

1 diversify their book, and we would be a natural
2 winner in part of that diversification. I can tell
3 you since that, although we still believe ultimately
4 shippers want more options, and they're going to use
5 CP KC because of our service and reach that we will
6 add to the marketplace, that they only enjoy via
7 those other carriers today.

8 The amount of truck conversion above and
9 beyond that we've since been able to identify in
10 working with these customers, well to the point of
11 the statistics here are staggering. I do believe
12 over time diversity, just you know rail to rail
13 conversion is going to be less of our success, and I
14 think road to rail is going to be a bigger piece of
15 the pie.

16 And again I think that excitement stems,
17 and you heard it from a few of the shippers that
18 spoke. Masternardi in the produce area, as Pat said
19 it's kind of like a new frontier in some of these
20 areas where I think the dry bulk goods have been just
21 sort of a natural area for the rails to go after.

22 But there's these whole other scope of

1 areas, the refrigerated area, and heated area in
2 particular that's kind of a new frontier of
3 opportunity. And frankly, we can do that
4 conversion. We do it well today across Canada, and
5 not even really impact again the volumes that our
6 competitors haul in those same lanes.

7 CHAIRMAN OBERMAN: I'd like to jump in
8 here. I'd like to break down some of the terminology
9 here to make sure I understand it. First of all the
10 picture we're looking at are these trucks coming in
11 from the U.S. to Mexico, or vice versa?

12 MR. OTTENSMEYER: Vice versa. This is
13 Mexican trucks going into the U.S.

14 CHAIRMAN OBERMAN: All right. So they're
15 coming into Laredo, so when you say truck to truck
16 conversion, so I gather that some of the material in
17 these trucks is going to a place in Laredo, which is
18 sort of the end of that transit. They're going to be
19 manufactured into something else before they leave
20 Laredo, is that right?

21 MR. OTTENSMEYER: not really. I mean
22 again there's this --

1 CHAIRMAN OBERMAN: I thought that was what
2 you were saying.

3 MR. OTTENSMEYER: No, no. Most of it
4 would go into a warehouse a cross dock, obviously
5 some of it goes cross border to places in the upper
6 Midwest and east coast and southeast. Laredo is not
7 a huge manufacturing -- yeah.

8 CHAIRMAN OBERMAN: So it's going to be
9 transloaded into some other kind of container?

10 MR. OTTENSMEYER: It can be transloaded
11 into some other kind of container. It could be
12 mixed, for example some of the large retailers that
13 use distribution facilities in U.S. or Mexico to
14 serve markets in the other country, but I know they
15 do this in some cases with our customers and cargo
16 owners.

17 They'll take a truckload of widgets, same
18 type of product to Laredo, and then they'll break it
19 into another truck with dozens or hundreds of other
20 widgets, and then they'll move it directly to a store
21 or distribution center in Mexico. So that it may not
22 be.

1 CHAIRMAN OBERMAN: So wait, it's coming
2 from Mexico transloaded in Laredo and then back to
3 Mexico?

4 MR. OTTENSMEYER: No, no, no, transloaded
5 into the U.S. or really both ways in that example.
6 So there are you know distribution companies that
7 move truckload of freight, a truckload of widget A
8 into Mexico, and then mix it with lots of other
9 products and move it direct to a regional
10 distribution center, or perhaps even a store location
11 with dozens of different products.

12 CHAIRMAN OBERMAN: Are you saying that
13 there are people who make widgets in the United
14 States. They truck them to Mexico to be transloaded
15 in Mexico, and then sent back to the United States?

16 MR. OTTENSMEYER: No. that does happen in
17 the auto business, you've probably seen the studies
18 over time that because of NAFTA, and because of some
19 of the preferences in the auto parts and auto
20 business, that you know, products will move back and
21 forth across the border multiple times before they
22 are in a final finished product.

1 MR. CREEL: And Chairman Oberman I can --
2 this is Keith. That's a perfect example. You may
3 have a fender or a hood per se that's stamped, at a
4 stamping plant in the U.S. that's trucked to the
5 Mexican manufacturing facility.

6 It could be Chevrolet, could be Ford,
7 could be Honda, then that fender becomes a car, then
8 that finished vehicle gets shipped by rail or by sea,
9 or by truck back into U.S. markets and consumption
10 areas.

11 That's not uncommon. That's very common,
12 and there's one opportunity that's developed in
13 anticipation of, and hope of the single line service
14 that we're going to provide where a U.S.
15 manufacturer they built, or are in the process of
16 building a manufacturing facility in Mexico near
17 Monterey that will produce a key component to operate
18 this piece of machinery that then after being
19 produced in Monterey, at their factory has to be
20 shipped to Iowa to be assembled with the final
21 product that they manufacture and sell for U.S.
22 consumption and U.S. use.

1 In the absence of our transaction the
2 default mode for that would be truck. If our
3 transaction is approved then a natural supply chain
4 in April will be a direct single line haul from
5 Monterey. It will be trucked in to the intermodal
6 terminal, loaded on the train. We'll take it into
7 the closet intermodal location, which in this case
8 likely would be Kansas City, de-ramp it, and then
9 it's trucked the final mile to the manufacturer
10 facility.

11 CHAIRMAN OBERMAN: Well I'm trying to get
12 a sense of because I didn't quite understand the
13 truck to truck and rail to rail conversions that Pat
14 was talking about. So the truck to truck I take it
15 is where a truck comes in to Laredo and is broken
16 down and then repackaged with other widgets and sent
17 on by truck.

18 MR. CREEL: That's correct.

19 CHAIRMAN OBERMAN: And what's the rail to
20 rail conversion going on in Laredo? That's where
21 you're interchanging with UP?

22 MR. CREEL: Correct.

1 MR. MEYER: Chair if I may step in. I
2 think what Mr. Brooks was describing as the rail to
3 rail opportunities, he was talking about
4 opportunities for CPKC to grow its traffic base.

5 CHAIRMAN OBERMAN: I thought Pat was
6 talking about as to the existing traffic that some of
7 it is rail to rail, and I'm just trying to understand
8 what that was.

9 MR. CREEL: The rail to rail is a good
10 example, Chairman Oberman, today again let's go to
11 the same terminal in Monterey. An intermodal
12 customer might load a container that would go to
13 Laredo, KCSM, interchange to UP. UP would haul it to
14 Chicago, it would de-ramp in Chicago and go to the
15 ultimate customer.

16 So our opportunity, we can handle like
17 cradle to grave. It would come in at the same ramp,
18 which is a KCSM intermodal terminal near Monterey.
19 It would load a CPKC train in this example, and it
20 would go straight to Chicago. It would be a single
21 line move. There would be no interchange. There
22 would be one carrier to hold accountable from cradle

1 to grave for the service.

2 CHAIRMAN OBERMAN: You know one of the
3 things that concerns me I'm looking at this chart,
4 which is directly related to the merger, although I
5 do have a follow-up question, is that the intermodal
6 traffic has grown by 50 percent in the last 16 years
7 total, but KCS's market share has only grown by 10
8 percent.

9 And you know my understanding is that
10 that's not atypical for the growth and intermodal
11 nationwide and how much rail has been picking up of
12 that growth, and I'm wondering why as it has grown,
13 the fact that KCS hasn't been able to grow
14 proportionately with the growth in overall traffic.

15 MR. OTTENSMEYER: I think if you look at
16 the top line Chairman Oberman, and see the total size
17 of the market growth, you know if you look at our
18 problem, what we described when we were announcing
19 public earnings and results. Our cross border
20 intermodal growth just looking at growth of KCS's own
21 traffic has consistently grown in the low to mid
22 teens, I call it 12 to 15 percent.

1 CHAIRMAN OBERMAN: you mean at Laredo?

2 MR. OTTENSMEYER: At Laredo, and that is
3 the way we measure that it's KCS on both sides of the
4 border, so it's KCSM to KCSR vice versa. It does not
5 include that 15 percent, 12-15 percent growth would
6 not include traffic that we interchange with Union
7 Pacific at the border. So if you've seen --

8 CHAIRMAN OBERMAN: The 508,000 rail
9 containers is both you and what you interchange with
10 UP?

11 MR. OTTENSMEYER: It would include that.
12 This data I believe is -- yes, yes it would, yes.

13 CHAIRMAN OBERMAN: I'm sorry do you know
14 what the breakdown is of that 508? Well you're 9
15 percent is 9 percent of the national market it sounds
16 like. Is that right?

17 MR. OTTENSMEYER: Laredo is yeah, actually
18 I'm sorry yes. It's 9 percent of the Laredo market
19 and 3.4 percent of all gateways, including Eagle Pass
20 and all of the other options that if you remember the
21 map that I showed yesterday over the other gateways
22 that we don't serve.

1 CHAIRMAN OBERMAN: Well and now I'm
2 confused. The -- says Laredo market 9 percent. That
3 means KCS is handling 9 percent of the rail
4 containers that are coming through Laredo.

5 MR. OTTENSMEYER: That would be all of us
6 and Union Pacific at Laredo. So the Laredo market
7 share would be the total of all containers, all
8 railroads.

9 CHAIRMAN OBERMAN: Oh I see. And that's a
10 number that's 508,000?

11 MR. OTTENSMEYER: Yeah, yeah.

12 CHAIRMAN OBERMAN: 508,000, 508,000
13 containers.

14 MR. OTTENSMEYER: 508,000 off of a total
15 market of 5.6 million.

16 MR. OTTENSMEYER: So Laredo total units
17 includes truck and rail, 5.6 million, 5.1 million
18 trucks, and 508,000 moving on rail.

19 CHAIRMAN OBERMAN: 9 percent is how
20 much Laredo market moves on rail versus truck, and
21 KCS has 3.4 percent of the total Laredo market.

22 MR. OTTENSMEYER: no. Laredo rail -- the

1 total Laredo market is 5.6 is where you include the
2 trucked and --

3 CHAIRMAN OBERMAN: You have 3.4 percent of
4 all the containers, rail and truck together.

5 MR. MEYER: All gateway.

6 MR. OTTENSMEYER: All gateway. There are
7 15 million truck and rail containers moving across
8 the border both ways all gateways from the U.S. to
9 Mexico.

10 CHAIRMAN OBERMAN: Oh, I see okay.

11 MR. OTTENSMEYER: Of that 15 million for
12 example, would include Eagle Pass, which we showed on
13 the map yesterday of looking at the alternative
14 routings is very competitive with Laredo.

15 CHAIRMAN OBERMAN: All gateways refers to
16 all Mexican gateways?

17 MR. OTTENSMEYER: All rail gateways yes.
18 All rail gateways on the U.S. Mexico border.

19 CHAIRMAN OBERMAN: And what I'm trying to
20 figure out is --

21 MR. OTTENSMEYER: I'm sorry. That 15
22 million would include trucks. That 15 million would

1 be all gateways between the U.S. Mexico border, rail
2 and truck.

3 CHAIRMAN OBERMAN: All right. And of that
4 15 million we know that 508,000 of it is on rail to
5 Laredo. How much is it on rail through the other
6 gateways?

7 MR. OTTENSMEYER: I don't have that
8 number off the top of my head. We'll get it before
9 we finish this session.

10 CHAIRMAN OBERMAN: All right. Because the
11 question is, is BN you know claims it doesn't get
12 much use out of Laredo, and is BN being foreclosed
13 from rail container traffic from Mexico beyond what
14 it should be? So in order to answer that question
15 from these numbers you'd have to know how much rail
16 container traffic there is at the other Mexican
17 gateways, and this chart doesn't have that number,
18 correct?

19 MR. MEYER: Chair Oberman if I may
20 interject, I think actually the answer to the
21 question of whether the BNSF could be foreclosed has
22 nothing to do with where its traffic is today.

1 CHAIRMAN OBERMAN: The starting point
2 though, I'd like to know what the chair of --

3 MR. MEYER: No, and absolutely we can get
4 you the answer to that question, but I want to if I
5 may, direct your attention back to the discussion we
6 had about BN's choices, right. So you saw in the BN
7 presentation that bar graph that showed their grain
8 traffic at Laredo, and then you saw the spike upward
9 in their intermodal traffic at Laredo.

10 BNSF and KCS entered into an agreement,
11 notwithstanding all of these incentives to foreclose
12 that we heard about, and some of this -- some of the
13 intermodal traffic that BNSF brought to Laredo under
14 that agreement is intermodal traffic going to up the
15 alliance ramp on the BNSF. The alliance ramp is in
16 Dallas. KCS has a direct single line route to
17 Dallas.

18 So notwithstanding all of the incentives
19 you've heard about, KCS did a deal with BNSF over
20 Laredo and Robstown for BNSF's intermodal traffic
21 going to Dallas, BNSF has chosen to move its traffic
22 from other gateways. They came from I believe,

1 although I'm not certain of this, and Mr. Ottensmeyer
2 may know more, I'm sure he does, from El Paso.

3 They had a service over El Paso. They may
4 have also had a service over Eagle Pass that I don't
5 know. So the question about whether they're
6 foreclosed isn't how much traffic do they have at
7 Eagle Pass today, it's that they've demonstrated that
8 they can have traffic at other gateways tomorrow.

9 And if you look at the confidential
10 document that was referenced in the presentation last
11 week, that is a three page analysis of BNSF's
12 options, you will see that the right way to look at
13 this is not where are they today, but where can they
14 be tomorrow.

15 CHAIRMAN OBERMAN: Well it may be, but I'd
16 like to know where they are today as a starting point so
17 I can understand how the market share is now, at
18 least since the Tex-Mex deal.

19 MR. MEYER: Understood.

20 CHAIRMAN OBERMAN: You know what happened,
21 I think you're suggesting I thought David, you seem
22 to be suggesting that how BN has behaved in the last

1 16 years will tell us something about their
2 potential for traffic in the future, so I think
3 that's some sense of where we're starting at and.

4 MR. MEYER: Absolutely, but all I'm
5 suggesting is that there's no one litmus test.

6 CHAIRMAN OBERMAN: No. I'm saying --

7 MR. MEYER: In the options we looked both
8 at where the traffic has shifted, and in the grain
9 markets you know it has absolutely shifted to Eagle
10 Pass for BNSF. If you look at intermodal BNSF had
11 intermodal options over El Paso. They may well have
12 them today, but they did a deal with KCS that brought
13 the traffic to Laredo in this service notwithstanding
14 that KCS has its own route to serve the Dallas
15 market.

16 CHAIRMAN OBERMAN: I understand that. So
17 anyway it would just be helpful I think as follow-up
18 on Pat's use of this chart to break it down a little
19 more.

20 MR. OTTENSMEYER: And I do have Chairman
21 Oberman, I have a couple of data points here. It may
22 not be completely satisfy your question, but in 2021

1 over Eagle Pass there were 334,000 containers north.
2 And by the way may I also point out this is only
3 northbound truck and container traffic. This is from
4 the U.S. Department of Transportation measuring, data
5 measuring imports into the U.S.

6 So this is only northbound. It's only one
7 way of the move, but.

8 CHAIRMAN OBERMAN: Are those rail
9 containers Pat, or all containers.

10 MR. OTTENSMEYER: Those are rail
11 containers over Eagle Pass 334,000.

12 CHAIRMAN OBERMAN: And that would have to
13 be all BN, they're the only people who use that.

14 MR. OTTENSMEYER: It could be BN and UP.

15 CHAIRMAN OBERMAN: Okay. So should I
16 compare that to the 508,000 rail containers that are
17 going over?

18 MR. OTTENSMEYER: Yes.

19 CHAIRMAN OBERMAN: But we don't know how
20 much of the 334 is rail?

21 MR. OTTENSMEYER: No that's rail, that is.

22 CHAIRMAN OBERMAN: It's all rail, okay?

1 MR. OTTENSMEYER: I don't know how many
2 trucks there are over Eagle Pass, but that would be
3 all rail containers over Eagle Pass.

4 CHAIRMAN OBERMAN: All right. And is it
5 your contention that a shipper will in Mexico let's
6 say the northbound traffic, in Mexico can pick and
7 choose between Laredo and Eagle Pass? Are they
8 competitive in that sense, or does it depend where
9 they're going?

10 MR. OTTENSMEYER: They're you know if you
11 remember the map going back into yesterday, the
12 routes are very competitive. You know we showed a
13 couple of different routing options from Monterey to
14 Chicago where the Eagle Pass routes were extremely
15 competitive with Laredo. Again this wasn't on the
16 map, but I do have data here from the central region
17 in Mexico.

18 What you'll see in a minute is where a lot
19 of the auto and auto parts move, depending on where
20 that triangle area is deep into Mexico called the
21 Bajio region around places like Guero Plateau, and
22 you'll see on the auto plant map in a minute I've got

1 the mileages UP with Ferromex over Eagle Pass is
2 2,370 miles. CPKC will be 2,337 miles, almost
3 identical mileage from this area.

4 CHAIRMAN OBERMAN: From where to where?

5 MR. OTTENSMEYER: From this central
6 Mexico, I don't have the current -- look at Silao,
7 look at Celaya, down where a lot of the auto
8 production is in Mexico to Chicago. So UP Ferromex
9 route over Eagle Pass and the CPKC routes are within
10 45 miles of each other, 2,370 on the UP FXE, 2,337 on
11 the CKPC.

12 CHAIRMAN OBERMAN: Okay. All right.
13 Let's proceed.

14 MR. OTTENSMEYER: So yeah, just picking up
15 on this again, just looking at the auto plants, and
16 you can see some of the talking points on the left.
17 We directly serve 10 auto plants, or 14 I'm sorry, 14
18 auto plants. FXC serves 16. I'll point out the two
19 kind of in the center of this map on the dotted line,
20 those plants are actually on the KCS at a place
21 called San Luis photo C.

22 Yeah there you go. There's a GM plant and

1 a BMW plant that they do technically have access to
2 through trackage rights in Mexico. And in addition
3 to the rail competition, particularly in Central
4 Mexico, and even up around the Monterey area for
5 autos, finished vehicles, there's a large number of
6 finished vehicles that move out of Mexico going to
7 the ports of Vera Cruz, Manzanillo, Lazaro Cardenas,
8 which is not shown on this map, that's on our
9 network, and Tampico, Altamira, that are then
10 transloaded onto vessels that go all around the
11 world, but primarily to the East Coast of the United
12 States.

13 And just a point of reference based on
14 2021 financial data KCS handled about 85,000 carloads
15 of finished vehicles and Ferromex reported 131,000
16 carloads of finished vehicles, so they actually have
17 a bigger share of that market than we do.

18 CHAIRMAN OBERMAN: Are you saying Pat it's
19 faster for finished automobiles manufactured down
20 there in Central Mexico to get on a ship and go I
21 assume to the Panama Canal to the east coast than it
22 is to go on rail?

1 MR. OTTENSMEYER: No, sir they wouldn't go
2 through the Panama Canal. They would go directly to
3 the east coast. They would already be on the other
4 side, so.

5 CHAIRMAN OBERMAN: Oh, oh, oh, I thought
6 you were on the west coast port, I see. They're on
7 the Gulf side.

8 MR. OTTENSMEYER: No, the west coast -- we
9 have actually moved vehicles from deep into Mexico
10 via Lazaro Cardenas to the Pacific Northwest, and
11 west coast of North America, but most of those
12 vehicles that go to the west coast of Mexico would go
13 to South America, or Asian markets, via Tampico.

14 Vera Cruz is the largest automobile port
15 in Mexico. I think over a million finished vehicles,
16 and a large number of those go to the east coast of
17 the United States.

18 CHAIRMAN OBERMAN: I see. I couldn't see
19 the Gulf ports before but I see it.

20 MR. OTTENSMEYER: Yeah.

21 CHAIRMAN OBERMAN: Okay. Go ahead.

22 MR. OTTENSMEYER: And then we'll back up.

1 The grain markets, I think it's the -- there we go,
2 again grain markets and you can see here the total
3 rail Laredo gateway is 38 percent if you look at the
4 column on the far right. Ferromex actually has
5 because of their larger network in some of the more
6 agricultural areas of Mexico, they have 38 shuttle
7 loading facilities according to their website, 38
8 shuttle loading facilities on the Ferromex network.

9 We have 14, and they handle roughly three
10 times as many carloads of grain than as we do between
11 the U.S. and Mexico, mostly U.S. grain exported into
12 Mexico.

13 So just again a few data points to kind of
14 highlight kinds of a few of the comments, the facts
15 about the Mexican market and how competitive those
16 markets are for rail at the various border crossings
17 with the U.S.

18 BOARD MEMBER FUCHS: And just very briefly
19 jump back to intermodal. You know BNSF put up a
20 graph that showed intermodal markedly increasing from
21 December 2016 to the present at a pretty
22 consistent clip. And you know I wonder, and it

1 seemed to me David you were contending that a lot of
2 that intermodal shifted from BNSF's other rail
3 gateways to Laredo.

4 Did I interpret your filing correctly to
5 say that in the midst of that shift BNSF had sort of
6 no documentary I guess contemporaneous evidence
7 indicating that they were being squeezed by
8 monopolous during that trip to intermodal.

9 MR. MEYER: I mean there's no evidence in
10 the record at all that BNSF or anyone else has been
11 squeezed by KCSM ever on any traffic. There was a set
12 of commercial negotiations between BNSF and KCSM, and
13 I think you heard Mr. Ottensmeyer say last week that,
14 or perhaps you didn't hear him say it, maybe he said
15 it to me that KCS had been taking the initiative,
16 trying to get more traffic to the Laredo gateway from
17 BNSF, and through these negotiations that contract
18 was reached, and traffic is moving.

19 I think it's simply a matter of KCS
20 wanting to build traffic with its partners as well as
21 with a single line -- just as CPKC will after the transaction.

22 BOARD MEMBER FUCHS: Thank you.

1 MR. MEYER: So I think you've heard a lot
2 from us now on the competitive constraints that will
3 affect what will bear on CPKC's incentives to
4 continue to support efficient rail line options,
5 whether they're at Laredo or Robstown, or anywhere
6 else on the network. But I wanted to highlight a
7 feature of Mexican regulation that may have been
8 overlooked in the discussion so far. If you could
9 put up the next slide please, thank you.

10 So remember the theory that UP and BNSF
11 are espousing about how CPKC would manipulate the
12 Mexican rate factor between -- we give an example
13 here of a point in Mexico, Interpuerto, I just
14 picked one, and Laredo. The same would be true if
15 this were a Robstown move on BNSF, or a Laredo move
16 going to UP.

17 And then I just want to highlight one of
18 the features of Mexican regulation that bears
19 directly on the theory that UP and BNSF are
20 espousing. So the theory is right, they'll raise
21 this Mexican rate through the roof, and then give it
22 back to the shipper on our single line service to

1 Chicago for example.

2 And UP, or BNSF will be squeezed. I just
3 want to underscore you know, first observation of
4 that is you never see in any of their examples them
5 even lowering their division by a dollar. They want
6 to keep their entire division that they have today
7 100 percent. That's what really this is all about
8 probably.

9 But setting that aside for the moment, you
10 know, so the story is this all happens on the
11 Interpuerto Chicago lane. It's competition there and
12 it's KCS or CPKC making the decision to manipulate
13 the rate on the Interpuerto to Chicago traffic.
14 We've shown you why we have competitive restraints
15 that would keep us from doing that.

16 We don't want to lose the traffic, whether
17 it's to the highways or the Eagle Pass Gateway, or to
18 the El Paso Gateway, or to vessels or anywhere else,
19 but consider the effect of Mexican regulation. What
20 Mexican regulations says about discrimination is
21 that the Mexican railroad for traffic in Mexico
22 cannot discriminate.

1 The traffic in Mexico is the Interpuerto
2 to Laredo segment. That Rule 11 rate for movement on
3 KCSM is what is subject to the anti-discrimination
4 principle. So for the similar traffic to what's
5 going to Chicago that may be going to Omaha, or
6 Denver, or Portland, or Long Beach, or anywhere
7 served by UP or BNSF's western networks where CPKC
8 won't go.

9 If CPKC tried to manipulate the Mexican
10 rate upward, it wouldn't be able to discriminate, so
11 we would have to raise its rates on all that other
12 traffic too. And it would have absolutely no
13 incentive to do so. And that's yet another
14 constraint on this theoretical and very hypothetical
15 mechanism that UP and BNSF are describing.

16 CHAIRMAN OBERMAN: David, let me ask you a
17 question. When you say they have no incentive to do
18 so, if they are -- these places in Mexico are sole
19 served, and they've got to get to Laredo to
20 interchange, with BN or UP going west, I mean what's
21 the shipper to do about it if KCSM raises its rates?
22 What's the shipper's alternative?

1 MR. MEYER: I think that the basic
2 economic principle here, and I think it's a real
3 world principle, is that whatever constraints KCSM
4 faces for traffic going to Portland, whether it's
5 Interpuerto or anywhere else, going to the Laredo
6 gateway and then going to Portland, or going to
7 Denver.

8 KCSM faces a set of constraints. A
9 hypothetical where the shipper is solely served and
10 has no option, maybe there are relatively few
11 competitive constraints. In a situation where there
12 are other options, the highways, FXC, et cetera,
13 there would be more options.

14 The point is that this transaction isn't
15 affecting any of those movements, and so whatever
16 KCSM -- presumably KCSM is charging whatever it
17 thinks the market will support. And if it could
18 raise with sensible and you know consistent if it was its
19 strategies of growing traffic and supporting traffic,
20 et cetera, making earning profits, it would raise
21 that rate today if it could.

22 The point is that in order to --

1 CHAIRMAN OBERMAN: The U.S. section of it
2 is not an incentive for all this other traffic is CP,
3 KCS doesn't go there.

4 ME. MEYER: So if KCSM in order to support
5 this thesis of making UP uncompetitive over Laredo,
6 it had to raise rates on a whole bunch of traffic
7 where it knows that if it raised rates it's going to
8 lose to other options. It would be shooting itself
9 in the foot. That's the point.

10 MR. OTTENSMEYER: Hey David if I could
11 interject here a minute. Could you go back to the
12 auto map for just a second, and a different example.
13 If you look at the center of that map go back to San
14 Luiz Photo C, that's the location of Interpuerto
15 which is our intermodal ramp in San Bernadine. (Feedback issue)

16 Okay. So look at those two. The blue is
17 I believe General Motors in the red, and the yellow
18 is BMW. What's not shown on this map is our line
19 from San Luiz Photo C to the left, to the west to a
20 place called Aquascalientes. We connect with
21 ferromex at Aquascalientes.

22 Under the Mexico rate regulations and rail

1 regulations, we would be obligated to commit a rate
2 and offer serve from Interpuerto to Aguascalientes.
3 And then that would connect those customers to the
4 Ferromex route that then can move to border
5 crossings with the BN and the UP.

6 CHAIRMAN OBERMAN: Got it.

7 MR. MEYER: Thank you. So I'm
8 transitioning now to address the remedies that UP and
9 BSNF have proposed. I think that we've talked about
10 the fact that there's no competitive harm that would
11 be a necessary predicate for any remedy.

12 I think in addition to that considering
13 the anti-competitive, and other pernicious
14 consequences of the remedies that UP and BNSF have
15 proposed, ought to demonstrate that trying to
16 regulate here in the way they've suggested would be
17 affirmatively harmful to the public interest.

18 I think the descriptions that I heard from
19 BNSF in particular, but also from the other advocates
20 for some kind of mileage prorate remedy, to me to my
21 ear, made those proposals sound even worse than they
22 were before those advocates came before you. They

1 are explaining in detail what they had in mind.

2 But let me step back and give some history
3 about the starting with this I-5 agreement that BNSF
4 has pointed to. BNSF last week suggested that you
5 know in connection with this proceeding here in 2021
6 and 2022, it sort of woke up and thought what a great
7 idea it would be to suggest the I-5 agreement as a
8 way to protect us over the Laredo gateway.

9 Well this I-5 agreement has some history
10 in KCS, Tex-Mex TFM matters going all the way back to
11 2003. BNSF and UP were both active participants in
12 that merger case, and Union Pacific proposed exactly
13 what BNSF is proposing now, exactly. This is Union
14 Pacific's comments filed in August of 2003.

15 What were they asking for? An agreement
16 modeled on the I-5 agreement to implement the goal of
17 preserving the Laredo gateway on commercially
18 reasonable terms. Their witness attached the I-5
19 agreement. BNSF was right there along with them.
20 There's nothing new about this. The STB, the Board
21 in its wisdom rejected this, and didn't even give it
22 the benefit of all of the reasons why this wasn't a

1 good idea.

2 Instead the Board concluded that there was
3 no competitive harm that would support any condition,
4 and all that the Board did was held KCS to its
5 commitments regarding keeping the gateway open.

6 I think a little bit more history about
7 where the I-5 agreement came from may also be
8 helpful. It's sometimes described as if it were a
9 condition imposed by the Board to remedy a vertical
10 merger competitive harm situation. That is just not
11 the case.

12 This is Union Pacific's testimony in 2003
13 explaining where the I-5 proportion rate agreement
14 came from, underscore agreement. It was an agreement
15 between Union Pacific and BNSF, and it was entered
16 into because Union Pacific, as part of an overall
17 settlement agreement was reaching with BNSF, was
18 asked by BNSF to convey to BNSF a former UP line in
19 Northern California.

20 That had nothing to do with solving
21 competitive problems in a merger case. It was just
22 something BNSF wanted as the price of the broader

1 settlement agreement. BNSF, as a result of that got
2 a single line route between the Pacific Northwest and
3 Southern California, connecting those two nodes of
4 BSF's network, the Santa Fe lines in the south and the
5 old Burlington northern lines in the north.

6 Southern Pacific, which UP was acquiring,
7 had a line and unit that had always traversed the
8 north south lane to Portland, Oregon. So Southern
9 Pacific already connected the Pacific Northwest with
10 the Southwest, but there were certain customers
11 solely served up in the BNSF in places like
12 Washington State that Southern Pacific and Burlington
13 Northern used to have an interline rate relationship
14 to serve.

15 And what Union Pacific wanted was to keep
16 that traffic, or at least have a chance of keeping
17 that traffic. So in order to sell the line to BNSF,
18 Union Pacific insisted that BNSF provide this rate
19 quoting authority for Union Pacific to quote rates to
20 those BNSF served customers in Washington State.

21 That was the commercial trade for whatever
22 reason those parties back in 1996 or so cited that

1 the way to do this was set up a matrix, actually
2 quite complicated, that it used the single line
3 rates of BNSF and gave a mileage prorate factor to UP
4 north of Portland. That was their decision for
5 commercial reasons to implement this trade where both
6 railroads were getting something new.

7 And in fact this feature of the settlement
8 agreement was offered as a procompetitive enhancement
9 in the context of the merger case. Nothing to do
10 with solving a competitive problem, a procompetitive
11 enhancement. That's what they argued.

12 So I think it's appropriate to start in
13 our evaluation about the effects of the I-5 agreement
14 as a condition here, just to understand that there's
15 no history of the Board thinking that this was a good
16 idea to solve vertical competitive issues.

17 That's just not at all what the I-5
18 agreement was about. Now Member Hedlund last week
19 asked some very good questions about the implications
20 of the UP and BNSF remedy proposals for Mexican
21 regulation. And I want to point out, or I want to
22 try and walk you through how we see the implications

1 of both of those proposals for Mexican regulation.

2 So let's start with the UP approach.

3 The UP approach is a little bit different
4 from the BNSF approach, primarily with respect to who
5 initially, which party initially receives the rate
6 factor that is a mileage prorate of the single line
7 rate. Under BNSF's proposal BNSF gets the factor,
8 and then BNSF quotes a through rate.

9 Under the UP proposal the shipper gets a
10 Rule 11 rate, but then UP adds their rate to and
11 deals with the shipper. Those are differences, but
12 if you think about the UP approach the rate solely
13 within Mexico, the Rule 11 rate is exactly what's
14 regulated by the condition proposal that UP is
15 making.

16 Take a single line rate that KCSM is
17 offering from a place like Interpuerto to Chicago,
18 you do the math and you say okay, you know X percent
19 of miles is Interpuerto to Laredo, multiply the
20 single line rate times X percent of miles and you get
21 a number of dollars that is what KCSM must charge for
22 the transportation solely within Mexico. That is

1 regulating in Mexico, pure and simple.

2 BNSF approach, Mr. Nober tried to say well
3 it's actually not really because it's going to be a
4 through rate, and the Board always had jurisdiction
5 over through rates. Well in the BNSF proposal the
6 rate factor that BNSF has given, in other words the
7 rate that KCSM is agreeing, or would be forced to
8 accept as part of a through rate is going to be
9 capped at the same mileage prorated you know times
10 the single line rate.

11 That's going to be regulating the rate
12 factor for traffic solely within Mexico. Mr. Nober's
13 point was that the Board has regulated single line
14 through rates, at least the U.S. portion in the past,
15 and so maybe it would be okay here.

16 I don't think we need to debate that
17 proposition very deeply in order to recognize that
18 that's not the end of the story. Both of these
19 approaches wouldn't just regulate the rate charged on
20 traffic moving from whether it's Interpuerto or any
21 other point to Chicago.

22 Remember the diagram I showed you a few

1 minutes ago. As soon as you say that KCSM has to get
2 BNSF a rate, a factor, capped at this mileage
3 pro-rate between Interpuerto and Laredo, you're also
4 telling KCSM that it can't discriminate against other
5 traffic going to other places, even if it's
6 unaffected by the CP/KCS transaction, so remember
7 traffic going to Denver, or traffic going to
8 Portland, or traffic going to Los Angeles. This
9 mechanism would be regulating the rate, even if it's
10 a Rule 11 rate that KCSM is offering to another
11 shipper for that traffic.

12 This would be regulating that rate factor
13 in a way that I think is very much directly within
14 the abbot of Mexican regulation over KCSM's
15 transportation. I hope that helps to frame a little
16 bit the answer to the question Member Hedlund asked
17 last week.

18 So you know we spent a fair amount of time
19 talking about the incentives that UP and BNSF have
20 here to put forward an anti-competitive proposal of
21 the sort that's being presented. Their interest is
22 clearly in protecting themselves from competition,

1 protecting themselves from having to negotiate over
2 airline rates, and then have we've shown with hard
3 data, that on day one the application of this
4 mechanism wouldn't just preserve existed rates, it
5 would require that ACS reduce its rates for the
6 benefits of UP and BNSF.

7 It's not reduce its rates for shippers, but
8 reduce its share of the interline overall through
9 rate subsidizing UP and BNSF, and providing them
10 frankly with a windfall that has nothing to do with
11 this transaction.

12 One of the interesting questions is why do
13 the shipper associates seem to adopt a similar
14 perspective? I think that's a bit hard to explain,
15 but my take on this is that there are probably
16 several overlapping explanations for the position of
17 the two shipper, or the handful of shipper
18 organizations that have come forward.

19 Notice that you haven't heard from actual
20 shippers about whether they're actually concerned
21 about any of the kind of foreclosure arguments that
22 UP and BNSF are making. To the extent you've

1 heard from shippers, you've heard that they want
2 single line rates. They want to see this new option
3 created, and in Bartlett's context very specifically,
4 they've never seen a sign of gateways being shut down
5 over Laredo, contrary to the theory that all of these
6 parties would suggest.

7 I think there are probably you know
8 several explanations. Number one, remember this rat
9 tail diagram that Mr. Moreno put up on the screen.
10 This is the standard rat tail diagram that every
11 advocate for rate regulation has put forward in the
12 context of regulating rates, regulating bottleneck
13 rates keeping gateways open really since the
14 beginning of regulatory time.

15 There's no secret if you read the comments
16 of the shipper organizations their interest, their
17 first interest, before they get to the preserving,
18 actual preserving gateways affected by the
19 transaction. Before they get there what they say the
20 Board ought to do is force all gateways open. Have
21 completely open access across the rail network, and
22 you know I'm not sure I fully understand why they

1 think that would be a good idea.

2 I personally think that that ignores the
3 history of railroads becoming more efficient over you
4 know driving traffic to the efficient gateways and
5 building their services and investing around those
6 efficient nodes on the networks, the history of rail
7 mergers, and the history of the rail network would
8 suggest that that's really what has been in the
9 interest of most shippers, but we can leave that
10 debate for another time.

11 That's not really a merger debate, and I
12 don't think the position of the shipper associations is
13 really about this merger. They have a long-standing
14 interest in number one, just sort of revisiting the
15 Board's bottle neck ratemaking rules, which aren't
16 made up by the Board, they're really statutory and
17 the Board has interpreted the statutory framework in
18 the bottleneck cases.

19 That is what it is. Alternatively, and
20 this may be the other thesis for why the shippers are
21 here, the shipper organizations, excuse me, is that
22 they have been fighting a fight before the Board for

1 many decades to try and simplify rate regulation, and
2 unfortunately for us CPKC is a current target of
3 opportunity, and merger conditioning power is they
4 perceive as relatively broad, so they come forward to
5 try and find a way to at least some simple metric
6 that's applies to some rate somewhere. Might as well
7 start somewhere.

8 I frankly think they haven't really
9 thought it through, and the consequences of what
10 they're asking for from an economic standpoint and a
11 practical standpoint, sometimes it is impact on the
12 single line services, and freedoms that CPKC ought to
13 have in order to serve all customers better.

14 But I would point to a third explanation,
15 which is I really urge the Board to look carefully at
16 what Mr. McBride said in his presentation. He jumped
17 in to talk about what the Board really ought to do,
18 and he talked about he pointed to the regulation of
19 the natural gas industry by FERC.

20 And what he was talking about was various
21 aspects of FERC regulation in the natural gas
22 industry. Also I think there are analogs in

1 the electric power industry where you know in the
2 context of electrons and natural gas molecules, which
3 you know very different from moving railcars across a
4 rail network and we could get into a very long discussion of
5 all the ways that's so.

6 But in the context of this
7 undifferentiated natural gas molecules and
8 electrons, and then evaluating issues in the
9 industry related to natural monopolies and vertical
10 integration and the issues of that sort.

11 There has been regulation of a general
12 form that involves an unbundling obligation where a
13 vertically integrated party is required to treat its
14 affiliate, that's either upstream or downstream as
15 if it were independent, and have that affiliate
16 ignore the fact that it has you know a financial
17 relationship with the upstream or downstream partner,
18 and to just treat all connecting whether it's
19 pipelines or you know generating plants, or what have
20 you completely neutrally.

21 That's what Mr. McBride is talking about.
22 That's what he wants. He wants every railroad to

1 just treat every connecting node, every partner,
2 and every connecting node completely neutrally even if
3 it's their own network across a gateway, or across an
4 interchange border or across a terminal.

5 So the consequences of that in the
6 railroad industry I submit are well established.
7 It's an entirely anti-competitive outcome, and we know
8 that because it's been tried in the past and it has
9 been rejected after experience. So this is exactly
10 what the DT & I conditions required.

11 When the Board -- the ICC many decades
12 ago, it posed them as a standard protective condition
13 for all mergers that were going to effect you know
14 the potential flows of traffic across gateways and
15 they did it to protect, to sort of freeze in place
16 the traffic opportunities for every connecting
17 railroad. I don't really know all the reasons why
18 the Board thought that was a good idea, but I think
19 the impetus was to make sure those carriers could
20 stay viable, and not lose commercial opportunities.

21 But scroll forward to the early 1980's,
22 and not just the ICC, the Department of Justice, the

1 railroads, and shippers all came to the conclusion
2 that these DT&I conditions, were throttling from
3 competition. They were preventing railroads from
4 offering single line rate that favored the efficient
5 single line route that drove traffic to efficient
6 gateways that supported new investment and new
7 services because the railroad was required to treat
8 every connecting railroad as if it was itself.

9 Everyone had to be just unbundled. It's
10 exactly what Mr. McBride wants to return to, and
11 the history shows that that is a terrible idea. It
12 would defeat the purpose of this new single line
13 opportunities that CPKC would bring to the market,
14 and it would defeat the transaction, and it would
15 deprive shippers and the public interest of the
16 benefits it would bring.

17 I'm going to hand the microphone over to
18 Bob Majure just to offer some perspectives on these
19 vertical competition issues so called from an
20 economic perspective in light of what he heard last
21 week.

22 CHAIRMAN OBERMAN: Let me interject here

1 for a second David, and I don't want to cut anybody
2 off, but we've got about an hour and a half to go,
3 and you've got a few other issues to deal with, so if
4 Dr. Majure has covered points in his written
5 submissions we don't need to hear it, but if you want
6 him to address us, go ahead. I just don't want to
7 run out of time on the other issues.

8 MR. MEYER: I think you know I would ask
9 him, and I think he understands this already that
10 what he's really going to try to do is highlight you
11 know how what he heard last week fits into the
12 points that we've been making.

13 DR. MAJURE: Yes thank you. And I wanted
14 to start with what you heard from BNSF's
15 economists and from UP's lawyers. It was a
16 characterization of our argument as a well-known
17 theory. And that's part of an attempt to portray the
18 Board's past decisions as unfounded in modern
19 economics.

20 That's not right. What we said last week,
21 and what we've said throughout this proceeding is
22 that modern economic theory is embodied in the

1 vertical merger deadlines, and those identified
2 two elements, incentive and authority. We've used two
3 hypotheticals to illustrate these two elements, and
4 we do that by taking the extreme cases of -- one of
5 those extreme cases is when we assume that the
6 ability to influence markets is as extreme as UP and
7 BNSF's economists are presuming.

8 That extreme case is the one that is
9 described as the one lump theory. I don't think
10 we're trying to say that this hypothetical describes
11 most shippers, or even that it fully describes any
12 shipper. So in that sense I would say they're
13 correct that it's not depicting what really happens
14 for most shippers, but what I disagree with is the
15 implication that it's not useful for understanding
16 the importance of incentive and ability.

17 And you also heard that UP's economist
18 replaces these terms of incentive and ability with
19 means and motive. And I wanted to speak a little bit
20 about that because I think that's a very bad
21 metaphor. It suggests that the decision making that
22 we're trying to model is something we're seeking in

1 KCS, they're trying to commit a crime, or do
2 something else that we would think of as abhorrent
3 behavior.

4 The incentive and ability come out of what
5 the economists consider the very standard analysis of
6 how we model ordinary decision making by firms. And
7 we economists don't live in a world of saints and
8 sinners. We just assume that the right way to
9 describe how firms are going to make decisions,
10 whoever is in charge, is that they're going to try
11 and maximize their profits subject to the constraints
12 that they face.

13 And in that framework which we
14 consistently apply to decision making, it means that
15 if you're going to predict a change in behavior,
16 going to predict something like a merger is going to
17 cause foreclosure then you have -- that is only going
18 to be a consistent prediction if incentive or ability
19 are changing because of the merger.

20 And what that means is that well let me
21 back up and say this is the same model that we use,
22 that I use, that any economist would use in talking

1 about the pro competitive reasons for a merger. The
2 incentives apply to provide better service is
3 connected by this merger with the ability to offer
4 single line service. That's the foundation for why
5 we predict a pro competitive effect.

6 It's the same incentive and ability
7 framework. The same profit maximization underpinning
8 that drives the analysis. But applying this
9 consistent framework to the question of whether there
10 would be any incentive or ability that would lead to
11 foreclosure let's us interpret the facts pre-merger,
12 or from a previous merger like KCSTFM in a way that I
13 think has a lot of power for cutting through a lot of
14 the alternatives.

15 And so with that in mind I wanted to talk
16 about this example, which Mr. Nober presented. And
17 in doing so he was describing a situation that is a
18 theory of how the behavior might change. And if you
19 remember he talked about a situation with the
20 competitive situation it generated in market price
21 of \$1,000.00 with a division of \$600.00 to railroad
22 A or B, and \$400.00 on the Mexican segment, the

1 part in red.

2 And he said if we can go to the next
3 slide, a merger happens and that allows the division
4 on the Mexican segment to go to \$500.00 for both A
5 and B, what he didn't label is that the shipper on
6 railroad B would now be paying \$1,100.00. And this
7 is where we start to break the consistency part of an
8 economic period because whatever railroad B, whatever
9 competitive pressures had driven railroad B to be
10 offering \$1,000.00 to that shipper is still going to
11 be there.

12 And assuming that BNSF, or sorry
13 Railroad B is going to pass on the full \$600.00 that
14 they used to earn is just breaking that consistency of
15 the assumption. What would really happen is that
16 Railroad B would be subject to the same competitive
17 pressures, they'd change their division, and so then
18 instead of earning \$600.00 here, they would earn
19 \$500.00, and the shipper would get the \$1,000.00
20 that's at the consistent application of the
21 competitive pressures would suggest.

22 So if we go back to where this started,

1 and return to the next slide we see the set up from
2 the example. And if you look at that now with this
3 fact in mind if the divisions would adjust, on the
4 next slide I've adjusted -- I've indicated what the
5 margin is that carrier B might earn.

6 And BNSF happens to report publicly at 34
7 percent margins, so that's how much it I code in
8 Mr. Nober's example. But it could be any profit
9 margin. The theory requires there be some profit
10 margin for there to be the incentive to try and win
11 this traffic. So whatever that profit margin is, as
12 the railroad with the Mexican segment, without a
13 merger raises the price, let's go to the next slide.

14 That would -- so let's take that same
15 \$500.00 new price that Mr. Nober was talking about.
16 It's going to be a reallocation of the profit that
17 carrier B used to be earning to the railroad in
18 Mexico. So without a merger that railroad could have
19 been earning more profit. It could have been earning
20 a bigger share of the profit that railroad B was
21 earning, and the profit that railroad A was earning,
22 if the assumptions are correct underlying this

1 ability that they have to just raise the rates like
2 this.

3 That just raises the question in my mind
4 as an economist of why weren't they already doing
5 this? Why were they not earning this money before
6 they ever had a merger? They weren't maximizing
7 their profits, or they actually have some constraints
8 on what they could do. And they really cannot raise
9 that price by \$500.00.

10 They can't raise it without a merger.
11 They can't raise it with a merger. That's the kind
12 of consistent application of the theory that makes
13 all the things you just heard about all the
14 constraints that KCSM faces, the competition from
15 trucks, the competition from ships, the competition
16 with other railroads in Mexico.

17 All of that is relevant in exactly this
18 question of do they actually have this ability to
19 raise prices at all? Now I want to be clear I'm
20 using the logic of basic economic principles applied
21 here. We used a little bit of the example where the
22 hypothetical of the one monopoly theorem, but we're

1 not relying on a presumption to get to this, we're
2 just recognizing the facts.

3 And the facts here are that there's never
4 been any instance where one of these end to end
5 railroad mergers is generated for closure. This is
6 -- it's not a presumption to recognize that fact.
7 It's not dependent on some outdated theory or
8 approach to economics, it's just the normal
9 application of economics to these facts that
10 generates the prediction quite confidently that
11 there's no likelihood of an anti-competitive
12 vertical foreclosure in this instance.

13 Now you did hear UP's lawyer claiming
14 that their economist had proven that some kind of
15 foreclosure was likely just because there's
16 uncertainty in this industry, and a claim that he
17 did a model to the data in the industry. Now my
18 reply report talks about that. It explains why
19 that's not right. I haven't seen anything more from
20 their economist on this.

21 But what I wanted to make clear to the
22 Board is that the model does not really depend on

1 uncertainty. Model depends on an assumption that
2 railroads are limited in making interline agreements
3 to posted prices. That they have no more information
4 about what the shippers want than a grocery store
5 setting the price of bread on a spin in the aisles.

6 That's not how it's done. There's
7 negotiation between the shipper and the railroads,
8 and between the railroads involved in an interline
9 movement. If you don't model that, if you instead
10 assume this very limited form of pricing it binds
11 what the railroads can do in an interline movement.

12 Instead of reflecting the complexities of
13 this arrangement between all three parties, then you
14 get a tension that drives this model. But that
15 tension doesn't fit the reality of the railroad
16 industry. It also doesn't -- the model also doesn't
17 fit this reality of the railroad industry in a way
18 that it allows for a pro-competitive effect. It has
19 one mechanism to do that, which is its technically
20 called the elimination of double marginalization.

21 That's not the creation of single line
22 service. So the models assumes a way, the one way

1 that a railroad merger, an end to end railroad merger
2 has historically been seen to actually have
3 pro-competitive effects, and it assumes, or it allows
4 for pro-competitive only in a way that doesn't really
5 apply to the railroad industry.

6 So to really explain why this is critical,
7 the last thing you heard from them was that this
8 model had been fit to data, and the data that it was
9 actually fit to, you heard an example, is the share
10 that CP earns, movements to Chicago for example. The
11 model uses that share to identify how much a customer
12 would like, or how many customers would choose that
13 product if it doesn't change.

14 So by assuming that it cannot change is
15 actually getting the importance of this back that he
16 says fits the rail industry exactly backwards. Now I
17 also wanted to speak a little bit about the proposed
18 remedies, you know. In terms of the remedies to this
19 non-problem, I think the most telling fact is that
20 the railroads happily endorse positions of certain
21 shipper organizations, and support regulation they
22 would ordinary see as bad for their ability to

1 compete.

2 That's not just an opportunity to enjoy
3 some irony, unfortunately it's economically
4 consistent with a sincere belief that this sort of
5 regulation wouldn't impede competition. It makes
6 economic sense that UP would be happy to see CPKC
7 competitively handicapped with this sort of
8 regulation, and likewise that BNSF and CN would be
9 happy to see CPKC's competitiveness handicapped.

10 If the regulation is only on CPKC then UP
11 and BNSF are free to absorb all the discount of
12 Mexican divisions. A dynamic I don't think the
13 associations have considered. As I showed last week
14 the asymmetrically applying this regulation would
15 amount to a subsidy of CPKC's competitors to be paid
16 for out of CPKC's Mexican rates, and would discourage
17 competitive pricing by CPKC.

18 It's not a step toward a better future for
19 shippers. And UP tried to say that this would be
20 only known by shippers right, they're the only ones
21 who would know what this division in Mexico would be
22 after the regulation, which is entirely predictable

1 what the effect of the regulation is going to be, and
2 you would expect that they would incorporate that
3 into the divisions that they offer.;

4 And so if I think about this not as
5 pricing cereal on a -- bread on a supermarket aisle,
6 but instead it's a negotiation. I would fully expect
7 that UP would just anticipate exactly what the
8 effect of what the regulation is going to be, mark up
9 their division by about that much, and interact with
10 the shipper in a negotiation that gets back to the
11 same kind of until they get back to the same kind of
12 pressure they were feeling before that determined
13 what the rate was going to be.

14 So at the exact same rate or pain point
15 for the shipper, UP will have absorbed all of the
16 benefit of the effect this might have on divisions.
17 They don't need to know what it is. They need to
18 know what it's likely to do, and then engage in
19 negotiations to get there.

20 So the other part of this they made was
21 that they claim that UPP, the upper pricing pressure
22 that I was identifying with the regulatory scheme

1 they have in mind, was inconsistent with the one law.
2 And as I've said that's not really relevant. That's
3 not the argument that we're relying on in analyzing
4 the foreclosure incentives.

5 But I think what they maybe meant to be
6 arguing was to ask a question that Member Fuchs
7 has been asking a lot of people. How can the price
8 go up on competitive traffic? And I want to be
9 clear that in what I was presenting last week I was
10 not predicting that -- I was not trying to work
11 through the entirety of the price setting.

12 I was modeling the impetus to change
13 competitive behavior, the upward pricing pressure.
14 And the tax means that CPKC's response to competitive
15 pressure would start at a higher point. And I'm not
16 trying to model out all the factors that apply to
17 pricing of specific commodities from that point, but
18 eventually it would hit where they would have to ask
19 if new single line service, or the discounts they
20 could have offered to win business with that service
21 are worth the consequence of this task, and subsidy
22 system would impose.

1 And all along the way before that point
2 they're going to face the upward pricing pressure,
3 which is going to be a disincentive to offering
4 shippers more. It's going to be a dampening of the
5 competitive opportunities of this merger. BNSF's
6 economists noted that there's some decrease in the
7 amount of the tax as single line rates decrease.

8 But that's like arguing that you would
9 choose to earn less income because taxes are higher
10 at higher income levels. It's not the full picture
11 of how a tax works. Finally I wanted to note that
12 BNSF's proposal, they described it as market based,
13 and they really defended that on the basis of how
14 complicated it could be.

15 But what they described is that it could
16 have different grids for different commodities or for
17 changes in services. What they didn't describe was
18 who's going to be responsible for making all those
19 changes to keep it consistent with market outcomes?

20 It's a regulation imposed in a merger
21 condition, rather than a commercially negotiated
22 agreement between two railroads. The terms would be

1 set by the Board, and any flexibility would mean a
2 new proceeding to adjust every tiny detail whenever
3 a change in the market makes that flexibility
4 necessary.

5 And there are a lot of details. This I-5
6 proper rate agreement is a complex agreement. It's a
7 56 page documents. It has an example in it of how
8 one of the grids would work. It has almost 2,000
9 cells. That's like 80 rows to accommodate 31
10 different combinations with car types and car owners,
11 24 columns to accommodate differences in commodities.

12 It has a really complex process built into
13 it. That's just one of the many cells that would be
14 needed -- many grids that would be needed to
15 accommodate different origin and destination fares.
16 At the end of the day the only thing that's going to
17 be market based about a proposal like this is that
18 it's going to tie the rate they want to have
19 regulated, the division in Mexico, to a rate that
20 CPKC wants to set competitively, this single line
21 service.

22 And that's exactly what I've modeled and

1 what I've described before as creating that tax
2 system. And that's really at the end of the day
3 what's going to happen with either one of these
4 proposals is that it's going to amount to the tax and
5 subsidy system that disincentivizes competition and
6 competitive pressure, and that's how you ought to be
7 interpreting this, despite what you've heard from
8 their economist.

9 MR. MEYER: Thank you very much. And I
10 wanted to highlight one point that went by pretty
11 quickly in what Bob was saying about the work that
12 Union Pacific's economist did in this case. And he
13 didn't show up last week, don't know why. But what
14 Bob was pointing out was the so-called analysis, or
15 study, or whatever UP wants to call it that suggested
16 that there would be foreclosure.

17 What it did was it said is CPKC going to
18 have to foreclose in order to attract traffic to its
19 network, given what we know today about what percent
20 of shippers choose CP/KCS options today. And so if
21 you assume that CP/KCS interline options what are going to
22 be in the market tomorrow, and you ask how does CPKC

1 get from almost zero percent market share for
2 intermodal, or automotive traffic going to Chicago to
3 some higher number?

4 Well it must be foreclosure. That's just
5 assuming away the merger. The merger is going to
6 create a better product that will attract that
7 traffic. That's how the market share goes up, not
8 foreclosure. And so I think there's just you know it
9 all falls apart. It's a house of cards that collapses
10 once you understand the transaction is actually
11 going to be improving the alternatives available.

12 So I want to transition now to talk about
13 the commitment we've made and how it fits into this.
14 You know I think what I would suggest that the Board
15 ought to do when it evaluates these issues, is
16 conclude as the Board did in 2004, that there's no
17 competitive harm to remedy. That no condition is
18 needed period.

19 We do accept that the Board will see that
20 we've made commitments around this issue, and we
21 accept that the Board will hold us to those
22 commitments, and we are prepared to talk about

1 in more detail some of the questions the Board asked
2 us last week about exactly how we see our commitments
3 playing out with individual shippers who you know, if
4 ever, have a concern about a gateway option having
5 been taken away. And we'd be happy to discuss that.

6 But the primary thrust of what I want to
7 bring to the Board's attention now is that you know
8 we are -- as we said in our application, in Mr.
9 Brook's original testimony, and in our entire
10 discussion around this issue, we have no interest in
11 forcing the Board to be the adjudicator of last
12 resort on whether or not we would live up to our
13 commitment.

14 You know we are going to live up to our
15 commitment. KCS will remain bound by its agreement
16 with NITL to arbitrate these kind of disputes to
17 the extent they relate to the KCS Tex-Mex TNM
18 transaction, and the additional commitment we're now
19 making, and I'm communicating here, is that we are
20 prepared to arbitrate claims about allegations of
21 Gateway closure with our shippers.

22 So if a shipper, you know, armed with the

1 full access to transparent information that we've
2 already discussed have a concern that we've taken
3 away an option that they had before, the merger is
4 the reason for it, and that we shut that down in some
5 way through commercially unreasonable action, whether
6 it's on service, you know, we no longer support
7 service over the gateway, or whether it was on rates
8 because we've manipulated the rate factor upward to
9 make an interline option non-viable with that kind of
10 claim.

11 We would arbitrate with that customer.
12 And our first -- our preference of course we would
13 have a conversation with that customer, and we'd work
14 it out, but if we can't work it out we would agree to
15 arbitrate. Some of the basic principles --

16 BOARD MEMBER SCHULTZ: David? You're
17 actually touching upon an issue that I had a question
18 about the other day. Since time seems to be of the
19 essence, I'm not sure if this opportunity is going
20 to present itself again. With regard to the NITL
21 agreement, the language that's contained within that
22 agreement in my view is somewhat vague as it relates

1 to disputes arising under the agreement with respect
2 to matters within Mexico.

3 MR. MEYER: Yes. Yes I'll address that.

4 BOARD MEMBER SCHULTZ: Okay. Okay yeah, I
5 was seeking to get some clarification on that.

6 MR. MEYER: So in the KCS Tex-Mex
7 transaction, the agreement that was worked out
8 between KCS and NITL in that case had specific -- I
9 don't know you know if it's accurate to describe it
10 as a carve out, but it specifically addressed ways in
11 which Mexican rates would or would not be covered by
12 the potential arbitration about the commercial
13 reasonableness of those rates.

14 That is what it is. That's the KCS NITL
15 agreement. We're not changing that. It stays the
16 way it is. With respect to our arbitration
17 commitment what we're describing is an arbitration
18 process. It would cover assertions that the Laredo
19 gateway was closed by virtue of CPKC's commercially
20 unreasonable rate or service on the Mexican portion
21 of an interline move over Laredo as an example. We're
22 not carving that out.

1 BOARD MEMBER SCHULTZ: Okay. Perhaps in a
2 follow-up. So I think if I understood you correctly,
3 the language of the NITL agreement will remain as
4 is. Are you intending to adopt that exact language
5 as it relates to arbitration?

6 MR. MEYER: So what we're proposing to do
7 is to to adopt the language as it relates to the
8 procedures for arbitration, but not as it relates to
9 the question of whether the arbitrator can address a
10 Mexican rate factor. So we will put in front of you
11 the exact language that we are proposing, and it will
12 be very familiar. And if you have in mind the
13 paragraph of NITL agreement that refers in the last
14 sentence to this carve out I've mentioned, that last
15 sentence won't be in the language that we're
16 proposing.

17 BOARD MEMBER SCHULTZ: Is that paragraph
18 six by any chance?

19 MR. MEYER: it may be. I don't have it in
20 front of me right now. I think there are two
21 paragraphs that interact in that agreement.

22 BOARD MEMBER SCHULTZ: I think what you're

1 saying is that if we're on the same paragraph and
2 that's the question, the final sentence would be out,
3 but also you're intending to submit that language to
4 the Board, and we'll be able to review that.

5 MR. MEYER: Well so yes. Absolutely. And
6 what I would just to kind of go back to where I
7 started, you know we are going to clarify our
8 commitment. It will be our commitment. You know
9 it's not a proposal for the Board's further condition
10 crafting, it will be the commitment that we are
11 making that will implement the commitment we've
12 already made actually, just as a mechanism for
13 adjudicating these issues rather than having the only
14 recourse be to the Board if there's a disagreement.

15 BOARD MEMBER SCHULTZ: Understood.

16 MR. MEYER: To review just to be clear
17 about some of what we're proposing, you know, we are
18 proposing to have the question of whether we have
19 acted in a manner that closed a gateway through a
20 commercially unreasonable conduct, whether it's rate
21 or service related. And so that's the what the
22 arbitrator would be asked to decide.

1 We would apply a safe harbor that would
2 cover existing rates, so you know if the complaint is
3 that an existing rate is commercially unreasonable,
4 that's not covered by our commitment. The merger is
5 not affecting existing rates that if they stay where
6 they are, or they go up by less than inflation,
7 whether it's Mexican inflation or U.S. inflation,
8 that's what we mean by applicable.

9 Then there just won't be an ability of an
10 arbitrator to say we acted in a commercially
11 unreasonable way. If they go up above that level
12 then you know then and the shipper thinks that we
13 acted in a manner that was commercially unreasonable,
14 and they bring that to us and we can't resolve it and
15 it goes to arbitration, the question for the
16 arbitrator would be did we act in a commercially
17 unreasonable way that closed the gateway?

18 And in that context the arbitrator then
19 would decide yes or no. We are not going to give the
20 arbitrator the ability to prescribe the rate we must
21 charge. It would be then incumbent upon us to go
22 adjust and fix the problem that our conduct had

1 created.

2 BOARD MEMBER SCHULTZ: One more question
3 David does your arbitration commitment extend to
4 commitments that are wholly within Mexico?

5 MR. MEYER: No. No, so a movement wholly
6 within Mexico -- well let me back up. Maybe, so if
7 we're talking about an origin and destination pair
8 wholly within Mexico the answer is no because none of
9 that traffic would in any way be affected by the
10 transaction. There's no way in which CP could
11 participate in any of that traffic.

12 There's no way CP, the combination would
13 change any of the dynamics of the way KCSM would
14 handle traffic wholly within Mexico. If your
15 question was would it cover the rate factor, or the
16 Rule 11 rate that we would be offering that was
17 entirely within Mexico, so you know, from Interpuerto
18 to Laredo example, right?

19 For an interchange with Union Pacific as
20 you know to go beyond, yeah we cover that.

21 CHAIRMAN OBERMAN: Let me interject here a
22 couple of points. We can I just learned, go at least

1 until 2:30.

2 MR. MEYER: Chair Oberman we've just
3 lost your audio.

4 CHAIRMAN OBERMAN: Sorry. We can continue
5 to 2:30, but David we're going to have to move more
6 quickly, we're never going to make it by 2:30. We
7 really have to finish today. I just have one
8 question -- two questions on your arbitration
9 proposal. Has anybody agreed to this, or is this
10 something you're offering?

11 MR. MEYER: Without disclosing the
12 specifics we undertook to offer this kind of -- or a
13 form of arbitration remedy with a variety of parties,
14 and there was not interest. But we are making the
15 commitment to respond to the Board's interest in not
16 being you know in a position to address these issues
17 if it's not necessarily for that.

18 CHAIRMAN OBERMAN: You're saying that
19 you're making an open ended offer if we put it into
20 the conditions, if we approve the merger, and someone
21 who up to now has said no, I'm not interested came
22 forward and said I want to arbitrate, you'd be

1 willing to do it?

2 MR. MEYER: Right. So you know every
3 arbitration requires an agreement to arbitrate. You
4 know that's what is well established, and what we are
5 going to be putting out there is essentially our end
6 of that agreement, and we won't revoke our offer.
7 Anyone who wants to take us up on the offer will have
8 the necessary agreement to put this in front of an
9 arbitrator.

10 CHAIRMAN OBERMAN: Got it. The other
11 question I have is that the things that you would not
12 cover by arbitration you would indicate, I don't want
13 to list all the points you said would not be
14 covered, existing rates and so forth. Do you see any
15 mechanism for a person to challenge those rates
16 through any other mechanism?

17 In other words the arbitration offer
18 doesn't foreclose somebody using some other available
19 mechanism if they can meet whatever their tests are.

20 MR. MEYER: I would say the principle of
21 the CP/KCS merger proposal we're putting in front of
22 the Board is no foreclosure anywhere. No. we're not

1 suggesting that we're creating any kind of exclusive
2 route for challenging a subset of rates. I mean
3 whatever mechanisms are available to a customer, or
4 anyone else to challenge a KCS rate factor today, or
5 CP rate today, none of that changes as a result of
6 the merger.

7 And one way you know, one way as to
8 certain categories of rate challenge options that we
9 are making a commitment not to use your term
10 foreclose, is in that bottleneck rate issue that we
11 talked about, which is you know related but different
12 from this gateway.

13 But no, there's nothing exclusive about
14 that. If they want to go to the Board, or to the
15 Mexican authorities, or what have you as to an
16 existing rate, or a new rate, nothing about this
17 takes that away.

18 CHAIRMAN OBERMAN: All right. And the
19 arbitration commitment applies to all gateways, not
20 just Laredo, is that right?

21 MR. MEYERS: It applies to anywhere,
22 anywhere. Any interchange point or you know gateways

1 and interchange points are used somewhat
2 interchangeably. It applies to any interline option
3 that as to which the transaction is giving a combined
4 company a single line, or longer haul than --

5 CHAIRMAN OBERMAN: I'm going to suggest
6 that in your final brief you make this extremely
7 explicit as to what it covers, where it covers, and
8 what it doesn't cover, so we can evaluate it because
9 we're doing this somewhat hurriedly, and the number
10 of aspects of this that I could imagine having
11 questions on which I can't even think about, so and
12 it also would take up the rest of the time.

13 But it's pretty important. And this is a
14 concept, and what you're saying I gather is to sort
15 of summarize your position, the applicants reject the
16 proportional rate idea entirely. You're not
17 suggesting any other formula for measuring gateways,
18 you're just saying, you're agreeing to the commercially reasonable
19 standard, and to the extent anybody wants to know
20 what that means you're willing to submit it to an
21 arbitrator to figure it out in a particular case.
22 That's the way I understand it.

1 MR. MEYER: That's a fair summary.

2 CHAIRMAN OBERMAN: Yeah, okay. All right.
3 If there are any other? Patrick?

4 BOARD MEMBER FUCHS: Yeah. Very quickly
5 just so I can get at you know the definition question. I
6 think the reason you all need to have the definition
7 structure like that as opposed to providing a list is
8 because it's not going to be just a list of
9 locations because if KCS or CP goes through one of
10 those locations, but can already go origin to
11 destination today, then that is not covered by this
12 agreement.

13 It is only the routes in which they will
14 be newly single line or longer, right? That's why
15 it's a little bit more complex than just providing a
16 list of 11 or 15 places because then you have to go
17 origin to destination pair by shipper.

18 MR. MEYER: Exactly. And you know
19 remember I showed that chart relating to the Mexican
20 regulation issue. You know just to take an example
21 right? So there is interline traffic, and I'm not
22 representing that there currently is interline

1 traffic in any of these pairs, I'm sure there is, but
2 I'm not certain of it. From Interpuerto through
3 Laredo to Los Angeles.

4 Our commitment doesn't cover that, it just
5 doesn't. We have no extended haul, no new single
6 line service to Los Angeles, the transaction is
7 totally unrelated, even though it's Laredo. But
8 Laredo Chicago? Yes. We go to Chicago, KCS doesn't,
9 so we'll be extending the ability of combined company
10 on that route, and so our commitment would apply to
11 that gateway for that traffic.

12 BOARD MEMBER FUCHS: I would say just
13 consistent with Marty's point, the Chairman's point,
14 and also Vice Chairman's good questions. I too would
15 like you all to really clearly specify the new
16 shipper versus new shipment issue because I heard two
17 different terms in the response in which to me could
18 mean different things, right?

19 Because you could have an existing shipper
20 that may have new shipments, or you can have a newly
21 located shipper that never saw you know an interline
22 rate with two separate quotes, and so they have no

1 experience with that past, so I would just encourage
2 you all to put that in your final brief with clarity.

3 And also I think I was following the
4 discussion about Mexico. I think I understand, but
5 to the Vice Chairman's point I think the last
6 sentence in Section 6 of the NITL agreement in Tex-Mex
7 you know it is a little bit unclear. So if you
8 can sharpen that, that would be great.

9 MR. MEYER: Points very well taken, and
10 you know I have experience, Mr. Mullins and I
11 were exchanging correspondence about that precise
12 NITL agreement at the time, and he and I had a
13 disagreement about what it ought to say, and I think
14 I'm going to prevail on this one. That sentence is
15 coming out.

16 BOARD MEMBER FUCHS: Okay.

17 CHAIRMAN OBERMAN: All right.

18 MR. MEYER: So let me move past vertical
19 competition issues now, and there really are just a
20 handful of things we wanted to cover with the Board
21 in the remaining time we have. There are just a few
22 issues that came up last week that we wanted to come

1 back to.

2 And if we could put the next slide up.

3 The first of those is the issues around the TIH
4 tariff, the CP TIH tariff. I really just want to
5 highlight a handful of key points. First of all it's
6 absolutely not a competitive issue. CP and KCS don't
7 compete for TIH traffic today. This is not an issue
8 of competition going away, and therefore now the
9 constraints on KCS changing its tariff disappear and
10 that lack of competition will support the change.
11 This is entirely the kind of discretionary change
12 that any railroad, any seller in a marketplace would
13 make.

14 And you know if CP decides to change KCS's
15 TIH tariff you know that's the kind of marketplace
16 change that could happen at any time. Really what I
17 think is clear from the comments that we heard,
18 particularly from Mr. McBride is that this is a
19 complaint, another complaint about pre-existing
20 issues.

21 Mr. McBride made clear his belief that
22 CP's tariff is flat out illegal. You know it's been

1 in the marketplace for a number of years. And I want
2 to underscore it's not at all -- that tariff is not
3 at all designed to de-market traffic. CP handles a
4 lot of TIH traffic, and others on this call can speak
5 to that if you're interested.

6 And what the CP tariff is, is it's a
7 starting place for what ends up happening, which is
8 negotiation with customers around the issues of
9 insurance and indemnity and responsibility for
10 potentially catastrophic consequences that aren't the
11 cause of CP. If it's the cause of CP's negligence,
12 or CP's behavior, you know, none of this issue
13 applies at all.

14 It's really just a question of you know
15 who bears responsibility for potential consequences
16 that may be a motorcyclist driving into the side of a
17 train and causing a derailment, you know, on a dark
18 night, or on a frozen road. And you know nothing to
19 do with CP. Why would the TIH release occur in that
20 circumstance? It's because there was a TIH shipment,
21 and who's responsible for that? Well the shipper is
22 responsible for that.

1 That's really all this is about. But
2 coming back to the point about Mr. McBride's position
3 that it's flat out illegal points to Agrium's
4 challenge to the raid and talks about you know what
5 he views use as a very well crafted Agrium complaint.
6 Well CP resolved that complaint with Agrium.

7 Agrium isn't here before the Board
8 complaining about CP's TIH tariff as it applies to
9 them. I think really the notion of regulating CPKC's
10 TIH tariff setting merely because CP and KCS are
11 coming together to form a single network it is not
12 supported by any merger related harm for one, but
13 second, would be a terrible idea.

14 You know first of all if the issue really
15 is that CP's tariff is illegal, there's nothing about
16 the transaction that will preclude anyone, including
17 Mr. McBride and his clients from challenging the
18 tariff. The merger is not changing that. You know
19 CP's tariff is in the United States now, and has not
20 been subject to challenge since that Agrium case that
21 he described.

22 But second, you know, freezing KCS's

1 tariff at where it is today, and requiring CPKC
2 unique among all railroads as to all tariff
3 provisions, to come before the Board to ask
4 permission to make a change of any kind would be just
5 another slice of regulation that would be uniquely
6 imposed on CPKC really for no reason here.

7 You know we do recognize the concerns that
8 have been raised by certain TIH shippers, Bear as a
9 receiver of TIH commodities was among them. And we
10 engaged with Bear. We tried to engage with others,
11 and Bear understood that a reasonable approach was
12 what we are proposing, which is that we would as to
13 the KCS network, not apply a change to KCS's tariff
14 without providing three years notice.

15 And the three years notice was worked out
16 between us and Bear, it wasn't our position of a
17 period, and the three year notice would provide an
18 opportunity for a couple of things. It would
19 provide an opportunity mostly for shippers to adjust
20 and find other options, other shipping options.

21 Bear's facility in Kansas City was the one
22 at issue and there were lots of shipping options to

1 Kansas City, but also you know, to provide an
2 opportunity if someone wanted to challenge the
3 proposed change, to go challenge it during that,
4 that three year notice period.

5 As we've said we are perfectly happy to
6 make that arrangement available to all TIH shippers
7 served by the KCS network today. We would say it
8 would be a three year notice provision that is
9 conditional. It is conditional on one thing, which
10 is that the shipper would use the safest available
11 equipment for the handling of their traffic on the
12 CPKC network.

13 I think you have heard from a number of
14 witnesses over the past week and a half that CPKC is
15 very keenly focused on safety. It is a leader in the
16 industry on safety, and we think that's the right
17 thing to do.

18 If there are no questions about that I'm
19 going to now turn to a handful of what I would call
20 grabs by other Class One railroads, or attempted
21 grabs by other Class One railroads that I think are
22 completely unrelated to this transaction.

1 BOARD MEMBER SHULTZ: David, just one
2 quick question, before you move off of that.

3 MR. MEYER: Yes.

4 BOARD MEMBER SHULTZ: And you probably
5 just said this, but existing customers of KCS will
6 have three years before the new tariff will apply to
7 them?

8 MR. MEYER: So the three years is from the
9 time that CPKC sends notice of its intention to
10 change the KCS graph applicable to the former KCS
11 part of the network.

12 BOARD MEMBER SCHULTZ: Okay.

13 MR. MEYER: And so if that notice is
14 send on you know the control date you know day one,
15 then it would be three years from day one.

16 BOARD MEMBER SCHULTZ: Okay.

17 MR. MEYER: But KCS tariff would continue
18 to apply during that period provided that the shipper
19 was offering its traffic in the safest available
20 equipment.

21 BOARD MEMBER SCHULTZ: Okay thank you.

22 MR. MEYER: Okay. So I think I start and

1 I may almost finish with the biggest grab of all here
2 which is the Canadian National divestiture proposal.
3 And I really wanted to address in a very focused way
4 just a handful of things that were said last week. I
5 think the record on this is ample for the Board to
6 decide that there's zero basis for granting the
7 divestiture that CN wants.

8 Not only is there no competitive harm to
9 solve, but CN's proposed solution would be -- would
10 harm the transaction and the benefits it will bring,
11 and also harm existing KCS shippers who already have
12 single line service over Kansas City, through Kansas
13 City on the KCS network to places like Mexico, and
14 would now become served by CN service to Kansas City
15 with a haulage rate connecting to the KCS or the CPKC
16 network if the transaction were to go forward with a
17 divestiture.

18 But let me start where counsel for CN
19 started, which is with the law. And with respect
20 they've got it wrong. They suggest that when
21 Congress amended ICCTA to say that among the things
22 the Board could impose as conditions in a merger

1 case, or the divestiture of parallel tracks, they
2 suggested that somehow Congress was saying to the
3 Board here, anytime the public interest might support
4 the idea of giving another railroad a line, you can
5 -- are free to do it without having to find that a
6 condition to a merger is supported by a harm caused by
7 the merger.

8 The structure of what Congress did belies
9 that. This is what Congress did. Congress added
10 the second sentence to 11324C. The first sentence
11 continues to say the Board shall approve and
12 authorize a transaction when it finds a transaction
13 is consistent with the public interest.

14 The second sentence simply confirms that
15 when the Board concludes that there is merger harm to
16 address, and the Board's consistent precedent, which
17 we shared with the Board in our prior filings,
18 and I'm sure we'll remind the Board again
19 in our brief, although very briefly, makes clear that
20 in order to impose conditions like trackage rights,
21 or divestitures, or anything else, the Board must
22 first find that there is a merger related harm, and

1 that conditions are narrowly targeted at solving the
2 harm, and that the conditions don't cause other
3 harms.

4 And when Congress made clear that the
5 Board had the power to divest, to order the
6 divestiture of parallel lines, it was simply
7 confirming that the Board had in its toolkit when a
8 condition was warranted, such a tool. And the fact
9 that Congress included the reference to the granting
10 of trackage rights in that sentence I think makes
11 that abundantly clear.

12 It was always clear that the Board had the
13 authority to order trackage rights, and it had done
14 so repeatedly like UPSP in Santa Fe. UPMP and WP and almost
15 every merger before there was no doubt about that
16 authority. The question was when? And when is
17 governed by the Board's precedent.

18 And it's only way of showing the merger
19 would create harm. The second point I'd like to
20 address is this question that was asked of counsel
21 for CN, you know what's your best case showing that
22 the Board will find competitive harm associated with

1 a future reduction in competition? And I'll give
2 them credit, counsel for CN did the best he could and
3 pointed to the best example being CN/IC.

4 Let's talk about that example. What was
5 going on in CN/IC? So, Canadian National was
6 acquiring the Illinois Central. In connection with
7 the transaction the applicants entered an agreement
8 with Kansas City Southern that would give Kansas City
9 Southern access by a haulage to a large cluster of
10 chemical facilities located in Geismar, Louisiana.

11 Prior to that agreement Kansas City
12 Southern was already pursuing a building. That work
13 on that building was in progress. When KCS built
14 into this cluster of chemical facilities, it would
15 have had access to six chemical plants. Six, sorry.
16 What CN proposed to do was to give KCS access by a
17 haulage to three of those plants.

18 Those three plants would have their
19 competitive options increased from one to two, but
20 really it was two to two because KCS was already
21 building into those plants. The three others --
22 weren't going to be covered by the haulage agreement.

1 But since the haulage agreement was being put in
2 place, there wasn't going to be a building.

3 So for those three plants what the Board
4 did was they said they are going to suffer
5 effectively a two to one reduction in their options.

6 CHAIRMAN OBERMAN: Hello?

7 BOARD MEMBER SCHULTZ: Looks like he
8 dropped off.

9 CHAIRMAN OBERMAN: Hello?

10 MR. MEYER: I think my device just died
11 for some reason.

12 CHAIRMAN OBERMAN: Oh, okay. Can everybody
13 else hear? Yeah? Okay. Go ahead.

14 MR. MEYER: I apologize, my device died.
15 Can you hear me now?

16 BOARD MEMBER SCHULTZ: Yeah.

17 MR. MEYER: Bear with me. Can you hear me
18 now?

19 CHAIRMAN OBERMAN: Yes.

20 MR. MEYER: Okay. My apologies. I think
21 I had a power failure on my device.

22 BOARD MEMBER FUCHS: Your laptop doesn't

1 have eight days of battery life?

2 MR. MEYER: No. This was my iPad and it
3 was connected to an outlet that's in a drawer
4 underneath this table, and somehow the power cord
5 came loose inside.

6 BOARD MEMBER FUCHS: I'm just kidding.

7 MR. MEYER: No, I understand. Well and I
8 hope you don't mean by eight days the hearing is
9 going to continue for another two. So in any event,
10 so going back to this Geismar example, it was very
11 straightforward in CN/IC. The building would have
12 given all six shippers two options. The merger
13 agreement was taking the option away for three.

14 It was very imminent and concrete, and so
15 the Board said no, you have to extend haulage as a
16 condition. You have to extend haulage to those other
17 three. Again, two fundamental differentiating
18 features associated with this example.

19 Number one, concrete two to one
20 competitive harm that was the predicate for any
21 condition at all. That's completely absent here.
22 Number two, narrowly targeted relief even if you

1 accept what CN is saying, all that would be warranted
2 is somehow preserving, preserving the possibility of
3 some venture between CPKC and CN to take 80,000
4 trucks off the highway.

5 Now, there's no evidence that was ever
6 going to happen pre-merger, but that option is not
7 going away. As you've heard from Mr. Primus. If
8 there really is this -- to go out and find another
9 80,000 trucks that can be taken off the highway and
10 operated over the CPKC network, we would have every
11 incentive to work with CN. Even though it's CN over
12 whatever gateway makes sense, over whatever route
13 makes sense in order to achieve that outcome. So
14 zero predicate for the Board to intervene in this
15 case to grant any relief at all related to this line.

16 But in addition to that --

17 CHAIRMAN OBERMAN: David, I have had a
18 couple of questions about these 80,000 trucks. Do
19 you, or any of your railroad clients here, CP/KCS,
20 have an understanding of where these 80,000 truck
21 movements are today that would go on the line that CN wants
22 to acquire?

1 MR. MEYERS: One thing I'll say that the
2 client might not be fully privy to is there is some
3 assessment of some of the work that was done by the
4 CN witnesses that a great deal of stoicism about the
5 reality of the opportunity that CN is describing, but
6 I think it's really the experts here are the folks.
7 I mean.

8 CHAIRMAN OBERMAN: So do any of your
9 witnesses here can enlighten us on where these 80,000
10 trucks are going to come from, and what I don't have
11 a sense of one way or the other is whether these are
12 different trucks than the 64,000 that you say are
13 going to move to rail if this merger is approved.

14 MR. MEYER: So I don't --

15 BOARD MEMBER FUCHS: David?

16 MR. MEYER: Yeah just one second, I just
17 want to orient one thing. So the 80,000 trucks are
18 not the 64,000 trucks. They're a different 80,000
19 trucks. And we you know, our assessment
20 analytically of what they're saying is that you know
21 really what they're identifying is trucks that BNSF
22 intermodal service and Norfolk Southern intermodal

1 service, and Union Pacific intermodal service are
2 already be carrying if they are truly rail,
3 accessible to truck to rail diversion. But John --

4 CHAIRMAN OBERMAN: Are you saying -- David
5 are you saying that your position that the 80,000
6 trucks are not on the highway now, they're on the UP
7 or BN and they just move to this line?

8 MR. MEYER: No. No that's not our
9 position. Our position is that we don't see this
10 opportunity that the end yes is there, as likely to
11 be a real opportunity to get trucks off the highway
12 because if there were those opportunities, highly
13 services, single line route of Union Pacific, BNSF
14 and Norfolk Southern, UP and BNSF Kansas City to
15 Chicago, Norfolk Southern has a straight arrow route
16 to Detroit.

17 If there were the potential for well-developed intermodal
18 service to take trucks off the highway we would
19 expect that most of that is already on those
20 intermodal routes, and the remaining trucks -- there
21 are a lot of trucks out there. We're not saying
22 there's no opportunity. The remaining trucks out

1 there probably aren't readily susceptible to a forth
2 new intermodal taking them off the highway, that's
3 our point.

4 And but if there were an opportunity. If
5 that opportunity were real, what we're saying is we
6 would have every incentive to take advantage of our
7 route, the route to Springfield if it could be made
8 into the super highway that CN suggests, and somehow
9 newly -- 2,000 trucks.

10 CHAIRMAN OBERMAN: Well are you saying
11 there are two questions. Are you saying that if the
12 market was there, you know, CN criticized you, your
13 clients for not planning to invest in the
14 Springfield line to bring the speed up to where it
15 would have to be to carry intermodal, be competitive
16 for intermodal. Are you saying that if the market
17 were there CP/KCS would make the same improvements in
18 the Springfield line that CN is suggesting?

19 MR. CREEL: Chairman Oberman this is Keith
20 speaking. I have made a commitment myself to CN that if the
21 market were there. We certainly have demonstrated there's
22 an avenue to create a joint venture here that we'd be

1 willing to participate in, so we certainly made that
2 clear to Canadian National.

3 You know Canadian National's position has
4 been they want ownership, completely disregarding the
5 public interest harms that would be created, the
6 unintended consequences of considering that because
7 the clearly don't understand what our plans are to
8 realize the public interest benefits overall of our
9 transaction which were founded on our ability to
10 optimize the terminal at IFG which they've stated
11 would be necessary for them to effectively take over
12 half of to create their own terminal.

13 It shows a lack of understanding. It
14 shows a lack for care and concern for our overall
15 transactions, stuff like interest benefits. And the
16 second very compelling point that I would make is
17 their ability, or their willingness to be able to
18 provide the service it would take to in their
19 solution, host Canadian Pacific business as well as
20 their business.

21 They suggested that we'd see no difference
22 in service, that our grain customers would be treated

1 the same. Well I'd go back to there's what you say,
2 and there's what you do. And I would look at a very
3 real comparison to how they've hosted other partners
4 in transit, namely Amtrak, and I think this is
5 extremely relevant to sort of separate the wheat from
6 the chaff of the misrepresentations because we're
7 seeing to realize this aspirational goal of taking
8 80,000 trucks off the railway.

9 They're going to run it down the same
10 railroad south of Chicago, which they showed in their
11 presentation, which by the way showed no intentions
12 to invest in, over the former IC railroad going south.
13 Now this is the same line where they host Amtrak
14 going south out of Chicago.

15 And if I remember correctly their attorney
16 was very proud of the best in class service they give
17 one of those trains, which is the train number 59,
18 the Spirit of New Orleans. It may very well get
19 great service, but what about the trains that they
20 run to the University of Illinois?

21 This is representative of Amtrak's
22 scorecard on host railroad delays over the last two

1 years. I'll draw attention to the Board bottom line
2 is Canadian Pacific performance, and we proudly said
3 we've earned the right by what we've done, not by
4 what we've said. We're the best in class. That's an
5 A plus performance, and it's sustainable and it's
6 consistent.

7 Now I'll draw attention to the Red Line,
8 that's Canadian National's performance. To me this
9 is a true measure of what type of hospitality CN
10 extends to those that they host. And I would draw
11 attention to the time period when Canadian National
12 was effectively pursuing the STB's support of their
13 trust application.

14 They actually improved their service quite
15 a bit, but I would draw a correlation to the time
16 when the STB denied their trust. It didn't serve
17 public interest and their behavior after that. And
18 that's when you see a very dramatic I would say
19 reversal or mean to their normal way of handling
20 their host responsibilities.

21 And I see 10, 11 months of the worst
22 post-performance that they've given Amtrak in that

1 timespan. That is not the kind of service that I
2 want to expose my customers to, and that's why our
3 customers, which have testified in these proceedings,
4 not only do not want the complexity of an
5 interchange, unnecessarily interjected in their single
6 line move, but the real scare of that type of
7 hospitality that CN has demonstrated may extend to
8 their host railroads.

9 MR. MEYER: And Chairman Oberman --

10 CHAIRMAN OBERMAN: Keith, and I appreciate
11 that, and I mean no criticism, but the question I had
12 posed, maybe you answered it. I asked about whether
13 the traffic warranted, you were prepared to make
14 the investments in this Springfield line that CN
15 claims you're not.

16 And you answered by saying you have talked
17 to CN about a joint venture. Did you mean to
18 indicate that the only way you would pick up this
19 idea that there's all this traffic, intermodal
20 traffic would be if you did it with a joint venture
21 that you wouldn't do it alone.

22 MR. CREEL: I told Canadian National that

1 should there be a business there to take these trucks
2 off the road that we'd be happy to entertain a joint
3 venture. We would handle our side of the railroad
4 from Springfield to Kansas City. They would handle
5 their side of the railroad from Springfield to
6 Chicago.

7 We were not obviously interested in
8 divesting the railroad, but we certainly would do a
9 joint opportunity.

10 CHAIRMAN OBERMAN: But did that mean also
11 Keith that you would have to make the improvements in
12 the KC to Springfield section to increase the speed?

13 MR. CREEL: Absolutely we have to, yes
14 Chairman Oberman.

15 CHAIRMAN OBERMAN: Is there some way, and
16 maybe this because it's a hypothetical maybe it's not
17 possible. Is there some way to account for your
18 willingness. I realize you can't make it a -- buy a
19 pig in a poke, or make an agreement you don't know
20 the terms of. Is there some way to write into an
21 approval order an openness to that negotiation?
22 Maybe I should really direct that to David as maybe

1 something to think about.

2 MR. CREEL: Yeah I would leave that Chairman Oberman
3 to David's legal abilities to memorialize that commitment.

4 CHAIRMAN OBERMAN: Yeah. I don't want to
5 put you through the requirement of answering you
6 know, shooting from the hip unless you thought about
7 it, but to the extent there is a willingness I think
8 it would be a plus to know that the possibility
9 remains without committing you to a blind agreement
10 that you don't know.

11 MR. MEYER: One of the things I would say
12 Chairman is I hope I'm back up on my device now, is
13 that we'll certainly consider or look at you know to
14 what extent we can memorialize such an openness. But
15 you know to some extent what I would suggest to you
16 and to the other members is that nothing about this
17 transaction changes the law of economics.

18 And what Mr. Creel is really saying is
19 that there's an economic opportunity because there
20 are 80,000 trucks that can be taken off the highway,
21 and it would be a business case shown that would
22 generate profits for both partners. There are going

1 to be incentives for CPKC to keep all of those
2 opportunities available for its potential growth.

3 And so I don't think we need to be writing
4 into an approval order all of the things that will
5 drive CPKC's quest for growth in serving its customer
6 over the course of its future. That's the structure
7 of the business. That's the marketplace. That's
8 everything that we've pointed to in support of the
9 transaction. With that said we'll look at whether
10 there's something to be said about that.

11 CHAIRMAN OBERMAN: In relation to the next
12 question I had you know there was a back and forth,
13 which I recently re-examined just to make sure my
14 memory was clear. But I thought there was some
15 inconsistency in CN's argument that this is a
16 parallel line, but then the public interest is served
17 because they will take those 80,000 trucks to places
18 where CP doesn't go, which struck me that it wasn't a
19 parallel line.

20 I wonder if Keith or anybody wants to comment on
21 that. Do you agree that the 80,000 trucks that would
22 go from Kansas City to Springfield and then up not

1 all the way to Chicago, I guess they're suggesting around Chicago,
2 is a route that you don't currently serve directly I mean.

3 MR. CREEL: Yeah. Chairman Oberman my
4 understanding of my network and theirs is quite deep.
5 Obviously I don't know these exact business
6 opportunities they might be suggesting, but I think
7 those are aspirational statements. Our rail serves the
8 same markets. The line share at least, and I would
9 be willing to go through the detail, but I just don't
10 understand those aspirational statements they made.

11 CHAIRMAN OBERMAN: Okay.

12 MR. BROOKS: If I can only add Chairman
13 Oberman that what I heard was there's a significant,
14 and the more my team investigates that you know if
15 there is an opportunity for trucks off the road it's
16 from maybe that Ontario, Southern Ontario region
17 down into there.

18 But I can tell you with 100 percent
19 confidence, the 64,000 trucks that we're eluding to
20 are completely different than these. By my count
21 between St. Louis and in Kansas City there's an
22 existing 12, either intermodal ramps, or auto ramps

1 that are on all the other carriers serving those
2 markets today.

3 We just haven't seen in the discussions
4 with our customers that as being sort of low-hanging
5 fruit in terms of initial opportunity. Now I tell
6 you this though, and I mentioned it in my testimony
7 last week.

8 The development opportunities for the IFG
9 terminal, there is an opportunity with those specific
10 customers that would flow, and it is moving truck
11 today up through that corridor back towards Chicago.
12 So certainly not suggesting there's not a truck
13 market there that we can go after, I just haven't
14 seen 80,000.

15 MR. OTTENSMEYER: Chairman Oberman if I
16 can introduce a little historical perspective I will
17 say, and a lot of this detail is included in Mr. Naatz
18 verified statement. We have engaged multiple times
19 with CN over the years when I was in the Chief
20 Marketing Officer role, and then Mike Naatz as well to
21 explore those opportunities, exact same markets.

22 And the bottom line is there was never a

1 justification. I mean even the investment to connect
2 ourselves with CN at Cockrell. I think we also
3 talked about limitations in the trackage, or the
4 rights that we have that we have to move over the
5 Union Pacific to move that direction.

6 And Mr. Naatz referred to this July 2019
7 communication with a representative of Canadian
8 National, named Ms. Rhonda Anderson where they
9 basically said that they were going to remove the
10 service from -- and this is a quote from an email
11 that we received, "Remove the service from the
12 Cockrell interchange, volumes are small and from what
13 I can see neither of us is doing a bang up job of
14 pulling." That was in July of 2019.

15 CHAIRMAN OBERMAN: So is that an indirect
16 or part of a response Pat to the suggestion that CN
17 had been in discussions about the use of this
18 Springfield line and somehow this merger cut them
19 off.

20 MR. OTTENSMEYER: No sir, that was purely
21 on an interline basis.

22 CHAIRMAN OBERMAN: I see, okay. That did

1 it. So are you saying they never approached you
2 about buying the Springfield line?

3 MR. OTTENSMEYER: That is correct. They
4 never approached us about buying the Springfield
5 line.

6 CHAIRMAN OBERMAN: Okay. I'm not -- thank
7 you.

8 MR. MEYER: But Chairman I just have two
9 further quick points to make about the -- what I call
10 really the St. Louis line because ultimately that's
11 what CN wants to force CPKC to sell. The
12 Springfield interchange is almost non-existent.
13 They're trying to make something out of nothing here
14 where there's no competition over that route today at
15 all.

16 And what they want is even if you were to
17 accept the idea of preserving this you know one train
18 a day of intermodal traffic in each direction, which
19 is all they say they want to do, what a divestiture
20 would do would be massively overreaching. And recall
21 in the focus of the discussion by the counsel for CN
22 and their witnesses, a lot of what they were talking

1 about was traffic between Chicago and St. Louis.

2 CN already gets to St. Louis. So if
3 you're talking about parallel lines that's one place
4 to look. They just want to shift their traffic to
5 St. Louis over a different route. It has nothing to
6 do with competition between Kansas City and Chicago.
7 They also talked about you know traffic to Memphis.
8 Again, they have all these grand ideas about what
9 they would do if they could buy this line in a fire
10 sale ordered by the Board.

11 But it has nothing to do with any link to
12 any harm caused by this transaction. When you
13 examine the allegations that CN makes about the
14 so-called competition that they want to preserve,
15 it's competition that has never existed. They admit
16 that. It's all about the future.

17 But when they talk about when would that
18 competition ever have come into existence in the
19 future, what they point to, the only thing they point
20 to is their interest in acquiring KCS that the Board
21 is very familiar with last year when they wanted to
22 talk about the Springfield Speedway as a new merger

1 specific benefit.

2 Well you know as I think the Board knows,
3 in order to be a merger specific benefit, it's a
4 benefit that would only have come into existence
5 because of the merger. So they were telling the
6 public and the Board that the Springfield Speedway
7 was only going to happen with a CN merger with KCS,
8 that's number one.

9 Number two, in the discovery record in
10 this case, and we shared it with the Board. It's
11 highly confidential. I won't describe it in any
12 detail, but all CN's interest in acquiring this
13 line, or acquiring the rights on this line arose in
14 the context of an acquisition by somebody of Kansas
15 City Southern.

16 And then you remember what counsel for CN
17 said. It's right here in the red box. The only way
18 this was going to happen was you've got to have
19 ownership. So what they're talking about isn't
20 something that was going to occur without the CP
21 merger, or in the ordinary course. It was only going
22 to occur with a CN participation in an acquisition of

1 Kansas City Southern.

2 And so there's absolutely nothing about
3 this transaction that changes any future world that
4 was going to occur that needs to be preserved. This
5 transaction is achieving public interest benefits
6 associated with the entire case history.

7 Their transaction would vastly overreach
8 and harm those benefits, notwithstanding their
9 claims about haulage for no reason, for no reason
10 whatsoever, especially given that the law of
11 economics, and the economic incentives that CPKC
12 would have to invest along with CN if those
13 investments would have the business case Mr. Creel
14 described, leave the Board in a position where
15 there's frankly any divestiture order here at all
16 would exceed the Board's authority.

17 CHAIRMAN OBERMAN: Thank you David. On a
18 personal note I would just say that I was born and
19 raised in Springfield, so I like calling it the
20 Springfield line, but that's okay.

21 MR. MEYER: And as you see we lapse into
22 CN's terminology from time to time as we have on this

1 slide, but I think it really is important to remember
2 that as part of KCS's system, and you know absent the
3 CN gambit this line really is there to serve St.
4 Louis Gateway, and to serve the online shippers
5 particularly for traffic that they want to send onto
6 the rest of the KCS network, and so disrupting that
7 would be counter productive.

8 CHAIRMAN OBERMAN: I understand the point,
9 so.

10 MR. MEYER: Next, I will state just two
11 words about the Norfolk Southern trackage rights
12 proposals here. I really don't think there's much
13 more for us to say. You didn't hear anything from
14 Norfolk Southern last week that ought to suggest that
15 this is anything other than a Norfolk Southern desire
16 to get a contract right that they didn't negotiate
17 back in 2006 over the portion of what used to be
18 called the Meridian Speedway west of Shreveport that
19 they acquired certain rights, they have certain
20 contractual protections with respect to traffic
21 moving east of the Wiley terminal.

22 Those contractual protections stay in

1 place as a result of the merger. We don't affect any
2 of that. They just want to rewrite that contract,
3 and that would be inappropriate here.

4 CHAIRMAN OBERMAN: David can you shed any
5 light? I couldn't get a straight answer, quite
6 frankly, from NS's witnesses, on what is the
7 difference if they got the condition that they're
8 seeking now between that and the contract rights they
9 have, one would give them trackage -- if they got the
10 condition they'd have trackage rights, but they
11 already have a contractual right to have haulage
12 rights. What's the motivation here? What's the
13 difference? If you understand.

14 MR. MEYER: I don't want to speak to the
15 motivation. I think under the existing agreement
16 just to level set of exactly what rights we're
17 talking about right? So everything about Norfolk Southern's
18 request is contingent on two thing happening. The
19 first thing it's contingent on is Norfolk Southern
20 choosing to exercise its option to buy the Wiley
21 intermodal terminal.

22 If they don't buy the Wiley intermodal

1 terminal, exercise that option, everything goes away.

2 All of the contractual rights they're talking about,
3 and all of the conditions that they're asking for.

4 The second thing that would have to happen is that
5 there would be a major service failure. I may have
6 not quoted that defined term accurately, and that is
7 defined under the existing contractual agreements
8 that govern the relationship between KCS on that for
9 the entire Meridian Speedway.

10 Between Wiley and Shreveport, if they buy
11 the Wiley intermodal terminal okay, they are entitled
12 to haulage for a certain category of traffic between
13 Wiley and Shreveport. And then they already have
14 haulage east of Shreveport to Meridian for certain
15 traffic. In the case of a major service standard
16 failure under the agreements, my understanding is,
17 from Shreveport to Meridian their haulage would
18 convert to trackage rights that's what they
19 negotiated.

20 But under the existing agreements if
21 you're in a world post of Wiley acquisition, and they
22 have haulage rights from Dallas to Shreveport, those

1 rights don't convert from haulage to trackage. I
2 think the main reason why they would like to convert
3 them you know in the case of a major service standard
4 failure to trackage rights has nothing to do with
5 operations or protecting service.

6 I think it has everything to do with the
7 economic terms that they're proposing. The haulage
8 terms have one rate. The trackage rights terms
9 they proposed have a much lower rate and we work
10 through the math in Mr. Simmon's reply verified
11 statement.

12 CHAIRMAN OBERMAN: So the whole reason for
13 the condition is that trackage rights would be
14 cheaper than the haulage rights they already have, is
15 that what you're saying?

16 MR. CREEL: Chairman Oberman as an
17 operating officer you hit the nail on the head. When
18 faced with the alternative, do you want haulage or
19 trackage? You want trackage because it costs less,
20 and you want trackage because you have your crews
21 handling your train, so it's a matter of control and
22 cost, and that's exactly what their motivation is

1 from my professional assessment.

2 CHAIRMAN OBERMAN: All right. Thank you.

3 MR MEYER: I do not think this record
4 needs anymore words about the other eastern
5 railroads, so I'll move past that and just address a
6 few --

7 CHAIRMAN OBERMAN: I agree with you.

8 MR. MEYER: Thank you.

9 UNIDENTIFIED SPEAKER: And I agree with
10 you too.

11 MR. MEYER: I think I'll hand the
12 microphone over to Mr. Clements who will address a
13 few environmental issues.

14 MR. CLEMENTS: Yeah and I'll attempt to be
15 brief.

16 CHAIRMAN OBERMAN: Let me just say David
17 in this proceeding I'm not sure you need to address
18 the environmental issues.

19 MR. CLEMENTS: I'll be very brief Chair.

20 CHAIRMAN OBERMAN: I'm sorry.

21 MR. CLEMENTS: I'll just be very brief.
22 We heard some commentary about Houston. All I'll do

1 is point everybody to first the top ten crossings
2 with complaints. We heard from somebody from Ward 5.
3 The only one in the top ten that has crossing
4 complaints today is Lockwood Drive, that's within
5 Ward 5.

6 And I just want to note that Lockwood
7 Drive from yesterday's video was one of the bridges
8 that went overhead just west of Englewood Yard, and
9 so it's grade separated on the route that the CPKC
10 traffic would work, or would take through Houston and
11 none of the top offenders in Houston are at grade on
12 the primary route that CP/KCS takes through Houston.

13 And I just wanted to quickly summarize the
14 finding in the Draft EIS is that none of the
15 crossings, 44 that we would go across in Houston had
16 a demonstration that there was a decrease in the
17 safety and no changes in terms of a reduction to the
18 level of service on any of the crossings in Houston.
19 So I just want to quickly summarize that, and then
20 say that we were listening though.

21 We understand the concerns of communities,
22 and I just want to augment a little bit what we have

1 had on the record in terms of commitments in the
2 Draft EIS. And in terms of listening I want to say
3 in response to what we've heard, and this first one
4 is just easy to say, but I think we've demonstrated,
5 we've reached agreements with many communities.

6 In Houston we're committed to being a good
7 community partner in Houston like we are everywhere
8 else on our network. And as part of that commitment
9 we're happy to undertake a regular cadence of meetings
10 with the communities that our traffic goes through on
11 trackage rates. We're not going to take the position
12 that they're just trackage rates, and that's UP's
13 sort of water to carry.

14 We will be present in those communities.
15 We, CP, would meet with those communities on a
16 regular basis. We'd be happy if Union Pacific, or
17 Burlington Northern both want to join us, but we'll be
18 present in the community. And importantly if
19 there's demonstrated merger impacts to communities,
20 we will work with those communities to address the
21 concerns that they raise that are specifically
22 related to the merger.

1 The other area where there was some
2 commentary, you heard from the coalition of the
3 communities west of Bensenville, and I just want to
4 put on the table what we're willing to do and
5 recognize around those communities, and this is you
6 know we'll continue to work with the coalition in
7 trying to reach an agreement, but if we're unable to
8 reach an agreement we have some commitments we're
9 willing to make relative to those communities as
10 well.

11 First off I would summarize it as there
12 are some quiet zones, but we would make sure that we
13 meet the FRA standards and have a quiet zone that
14 extends all the way from Bensenville out to the end
15 of the coalition, and then I'll just remind the Board
16 that we've already reached agreements after that with
17 Hampshire and Pingree Road, so you would have a
18 continuous quiet zone until you get west of Pingree
19 Road through the western suburbs.

20 We would also you heard the commentary
21 of emergency response. We would work to pay and
22 install a system to deliver notification to the

1 emergency dispatch centers and responders about
2 blocked crossings. We've also heard about the public
3 and the impacts that it may have on mobility, and we
4 would work to install ITS interconnected, it's called --
5 that puts warning signs on the roads.

6 So you're going down a road and you're
7 about to take a turn onto a road that crosses the
8 railway and the gates are down, you can be notified
9 of that, and make the decision to continue straight
10 and potentially use an alternative route.

11 And finally to address the issue of gate
12 down time, and the solution we're proposing is not
13 necessarily freight traffic, but it would reduce
14 eight down time and there's you know up to 58
15 metrics on this section of the railroad. We would at
16 our cost work with Metra to install PTC tie-in at
17 anywhere where there's a Metra station immediately
18 adjacent to an at-gate crossing, so that when a train
19 stationary, loading the passengers the gates could go up,
20 when the engineer attempts to depart the gates would go
21 back down and protect the crossing.

22 And we think all of those speak to the

1 kind of concerns we heard, and also speak to what was
2 in the Draft EIS. And again, if we can't reach an
3 agreement we would be willing to be held to those
4 commitments for betterments in the community.

5 So that's all I have to add to the record
6 on environmental.

7 VICE CHAIRMAN PRIMUS: Well let me just
8 say this. You know, and I appreciate the issues you
9 just brought up and some of the concerns. I know
10 this is not the environmental side of the coin. So
11 but yeah, there are other places that are also going
12 to be impacted. I hope you know strong consideration
13 is given there.

14 I know Marty and I were in the Davenport
15 area, and I know that you apparently reached a deal
16 with the mayor of Davenport. There are a number of
17 other communities there again high impact. You know
18 unlike Houston they did trip the threshold. They're
19 going from 8 to potentially 21 trains, so that is an
20 issue. So I know that you gave lists that this is
21 not the right place to do it, but since you opened it
22 up I just want to make sure that you know those

1 considerations are being made throughout the entire
2 line, not just you know, again Chicago and Houston.

3 Houston was not really all about the
4 crossings. They are just about also the
5 consideration that you know their community going
6 from you know 45 trains to 51 trains, which I don't
7 know if any of us on this call live in a community
8 where you have that going on in their community, so
9 you know in terms of the environmental there is an
10 issue there.

11 But anyway, since it was said, you brought
12 it up, I just figured I'd bring that up as well,
13 thank you.

14 MR. CLEMENTS: Appreciate it Member
15 Primus, and I just want to reiterate that when I say
16 we'll be a good community partner, the practice we
17 describe in Houston is the practice we live in Iowa
18 today. We lived it before the transaction, and we'll
19 live it afterwards.

20 And we've reached multiple agreements in
21 Iowa, not just Davenport, Bettendorf, Muscatine,
22 Clinton, Le Claire, and so I think we are active and

1 will continue to be active in that area of the world
2 as well.

3 BOARD MEMBER FUCHS: If I could add, and
4 this perhaps goes without saying, and to pick-up on
5 Member Primus's point about the ongoing OEA process.
6 I would ask that you all submit any environmental
7 commitment in writing as voluntary environmental
8 mitigation within our OEA process.

9 It probably goes without saying, but for a
10 complete record I think that's necessary.

11 MR. CLEMENTS: We will do, thank you.

12 CHAIRMAN OBERMAN: I'm glad you said that
13 Patrick. I was going to ask you Mr. Clements if
14 these suggestions you have made about what you're
15 willing to offer the Chicago area, was that part of
16 any effort by you to negotiate with these
17 communities, and they haven't reached an agreement,
18 or is this just something you're offering now.

19 MR. CLEMENTS: Yes Chairman Oberman, we're
20 not under settlement privilege in relation to
21 discussions with the coalition, and we have tabled
22 all of these as measures we would reach an agreement

1 with the coalition on, and have not been able to
2 reach an agreement to date.

3 CHAIRMAN OBERMAN: Okay. I just was
4 curious of what effort had been made. Okay. David?

5 MR. MEYER: Where I thought we'd go next
6 just to set the stage, and then I'll hand it back to Mr.
7 Clements. You know we've addressed we think all of
8 the meaningful substantive issues that have been
9 raised at the hearing, and tried to respond to what
10 we heard.

11 At this point I think what we have in mind
12 is reviewing, stepping back, taking stock as to where
13 we stand now with respect to the commitments, and you
14 know conditions that we have indicated we are
15 prepared to accept, and just review both of those. I
16 think we have to get -- absolutely what I heard the
17 Board say that you want to hear from us in our brief
18 as specific a set of language as we can.

19 I expect that will be an appendix to our
20 brief that will address in the 30 pages, but Mr.
21 Clements will walk through just to summarize the full
22 breadth of what we have committed to across the entire

1 proceeding, including with the augmented discussion
2 that we've had over the last couple of days, so
3 James.

4 MR. CLEMENTS: Yeah, and I think in the
5 interest of time I'll try to go on this first slide
6 very quickly. These are commitments that we had
7 previously made. We outlined in our presentation
8 last week, so not to go very deep in them, but again
9 we stand behind these ones.

10 If we go to the next page these are the
11 commitments around Metra just to summarize and as
12 David has said we will put more detail behind these
13 when we submit our written comments, but I'll
14 highlight and reiterate the new ones that we hadn't
15 made previously that came up in our testimony here,
16 and we'll report our monthly on-time performance and
17 delays due to freight train interference relative to
18 Metra operations.

19 We're committed to working collaboratively
20 to develop a mutually agreed RTC model for all of
21 the Metra operations in Chicago land on CP lines, or
22 on joint lines, and we will continue our quarterly

1 reviews.

2 And to respond to the concern that people
3 don't understand where freight is going in the
4 future, robust discussion of what we see as future
5 freight demands on the Metra lines in Chicago land.

6 Additional commitments that have come up
7 over the course of the last day is we committed to
8 providing additional specific metrics around
9 operations as they affect Houston and the Chicago area.
10 We've committed to collaboration in the Metra area,
11 and also in engagement with the UP and BNSF to ensure
12 that the Houston complex is well understood, and all
13 the appropriate plans are in place for successful
14 operations there.

15 What came up early in the discussions was
16 a question around reciprocal switching, and again we
17 will outline it, but we are going to make a
18 commitment about not reducing reciprocal switching
19 across our U.S. network for both the CP and KCS.

20 We talked today about our commitments on
21 keeping gateways open on commercial and reasonable
22 terms, and as we've discussed we've augmented that

1 commitment. We recognize the concern about just
2 having recourse back to the STB over the Mexican
3 regulator, and we've introduced the idea of
4 arbitration to efficiently deal with disputes and
5 determine whether we've closed a gateway.

6 And then we will outline our additional
7 environmental commitments, and we will put that on
8 the record on the environmental hearing as well.

9 CHAIRMAN OBERMAN: Would you be more
10 explicit on the reciprocal switching commitment
11 you're making?

12 MR. CLEMENTS: Yeah, what we're saying in
13 terms of reciprocal switching commitment, and we'll
14 put this in writing, is that we will not initiate any
15 closure of a reciprocal switching agreement across
16 the U.S. And I use the word initiate very carefully
17 because there is reciprocity in reciprocal switching.

18 And if another party chooses to initiate a
19 closure, and then that then disadvantages us because
20 we otherwise through this commitment would have to
21 continue to switch one way, and there's no
22 reciprocity. We would evaluate that. I'm not saying

1 we would eliminate it, but we would want the right if
2 we felt it was let's say retaliatory for CP/KCS
3 merger, how we would respond.

4 So we don't want our hands tied. We don't
5 want our competitors to be able to force us in a box.
6 But we, CPKC will not initiate any of those closures
7 at anywhere where there's reciprocal switching today
8 anywhere on the CP or KCS network in the U.S.

9 CHAIRMAN OBERMAN: You're not offering any
10 new reciprocal switching or anything that doesn't
11 exist?

12 MR. CLEMENTS: No we are not.

13 CHAIRMAN OBERMAN: Okay.

14 MR. CLEMENTS: Sorry Patrick.

15 BOARD MEMBER FUCHS: I would just like to
16 make a blanket note on some of the commitments. You
17 know obviously some of the larger shippers will be
18 following this closely, and of course our trade
19 organizations to communicate to a broader group of
20 shippers.

21 But I'm wondering if you all might address
22 in the course of documenting your commitments, what

1 your communication plan is to shippers that might be
2 affected by the commitments to make sure that for
3 those that might not read hundreds of pages of Board
4 material, that they know what their rights are.

5 MR. CLEMENTS: Absolutely.

6 MR. MEYER: Excellent.

7 MR. CLEMENTS: We've -- Member Fuchs in
8 John's reply verified statement in our five pillars,
9 but we will put some precision around that.

10 MR. MEYER: Excellent suggestion, thank
11 you. And I don't want to belabor this, but I think
12 you know James' point of reciprocal switching is an
13 excellent one. The last thing we want to do through
14 our commitments, or through Board you know, imposing
15 a condition requiring us to honor our commitments or create
16 an incentive for other railroads to take down reciprocal
17 arrangements that exist today.

18 You know as soon as they're free to act
19 unilaterally without us being able to respond there
20 may be an incentive for that to happen. We certainly
21 don't want that to happen. We will keep ours up as
22 long as others don't take theirs down, in cases

1 where's there's a reciprocal relationship.

2 So before we close I just wanted to offer
3 one last comment about process from here to the
4 brief. We all understand from your Order that we
5 have a 30 page brief due on the 20th of October.

6 We'll be working hard to make sure that
7 that filing by us addresses all the things that we
8 heard you ask us to address as well as trying to
9 cover in a very concise way all of the reasons why
10 approval without further conditions is the
11 appropriate course for the Board to take in this
12 transaction to allow the public interest benefits
13 that we've described to come to fruition.

14 But I wanted to comment on a few remarks
15 that I may have misheard, misunderstood over the
16 course of last week that may have been interpreted as
17 suggesting that other parties should be considering
18 filing new evidence in their brief. You know if
19 other parties have new evidence on any issue in the
20 case, whatever it is, we think that the time has come
21 to disallow any such evidence.

22 We've had a process that's gone on for

1 more than a year, or almost a year since we filed our
2 application last October. Parties have had
3 extraordinary opportunities to submit evidence in
4 the record to support the positions they've taken in
5 this case, the relief that they're seeking in this
6 case.

7 You know if UP hasn't come forward with
8 evidence of foreclosure of Laredo to now, I don't
9 think a submission by Union Pacific purporting to
10 claim new, make new allegations at this point would
11 be in any way productive to the Board's decision
12 making, and it would deprive applicants of their
13 rights to respond to that evidence, which you know in
14 light of their incentives to support their case would
15 be entitled to no credibility in the first place.

16 You know all of these parties took the
17 positions they took, and they made the filings that
18 they made, and they had ample opportunity to support
19 them, and so we ought to be at this point in the
20 briefs, looking at the record as it exists now
21 through these hearings, commenting on that,
22 addressing the legal framework and the standards for

1 the Board's decision making, and there is just no
2 room for more evidence in this case.

3 And by the same token you know I think it
4 would also be inappropriate for us to hear from other
5 parties about new condition proposals, you know, if
6 Union Pacific and BNSF put forward their incredibly
7 anti-competitive and misguided approaches for
8 regulating rates over the Laredo Gateway, or the
9 Robstown Gateway, if they decide to come up with some
10 new idea at this point and put it in their brief it
11 should be stricken and disregarded.

12 We would have no opportunity to address
13 those ideas. I think we already know that there aren't
14 any good ideas out there. Union Pacific I know has
15 been looking for ideas to protect itself at Laredo
16 for almost 20 years. They've come up with their best
17 option here, and it's anti-competitive.

18 But the time is over for new condition
19 proposals because we won't have any opportunity to
20 respond, and I think it would be not conducive to
21 appropriate deliberation and decision making by the
22 Board to have those shoe horned into the briefs as

1 the final word. The final word is by virtue of the
2 Board's long-standing precedent and authority for
3 applicants.

4 But we're not going to have a chance to
5 file a reply to all of the briefs that we hear, and
6 that's okay, as long as the briefs that we hear are
7 parties commenting only on the record as it exists
8 today.

9 The condition requests that have been
10 made, whether they're good or bad, whether they serve
11 the public interest, whether they're necessary, and
12 the evidence in the record today. And with that I'd
13 like to turn it over to Mr. Creel.

14 MR. CREEL: Thank you for those comments
15 and clarifications Dave, and let me say this to
16 close. You know, Chairman Oberman, Members Primus,
17 Hedlund, Schultz, Fuchs, on behalf of the 20,000
18 strong team of railroaders between KCS and Canadian
19 Pacific, and obviously a whole cast of supporting
20 contributors much like all of our regulatory team, et
21 cetera.

22 I want to thank you for the care and

1 concern, the attention that you've given to our
2 merger application, and your pursuit to determine if
3 this proposed merger truly serves the public interest
4 and creates a stronger North American rail network.
5 I can tell you I've known from the very beginning
6 that this is a Board that takes that responsibility
7 seriously more so than any that I've worked in in the
8 three decades that I've served this industry.

9 And we said from the start that this is a
10 perfect merger. It's one that serves all
11 stakeholders, pro-competitive, pro-growth, pro-job
12 creation, pro-investment, pro-environment. But with
13 that said we've also known that the opposition would
14 be strong, especially from those that are threatened
15 the most by the competition that if approved this
16 merger will create.

17 We knew they would fight hard, and they
18 have. But that said our resolve has not been
19 deterred. I've said from the beginning as well that
20 the truth matters, and I've known that if it was
21 heard and understood that the truth would lead based
22 on the facts that it represents to the right

1 conclusion, not only for our aspirations to put these
2 two companies together, to create all these benefits
3 for the public's interest, but in the end would make
4 its case.

5 We knew that was job number one. We've been
6 committed to that from the beginning, and I commend
7 the Board for allowing a process for all
8 voices to be heard. The truthful voices as well as
9 the fictional voices. I would suggest that this
10 process these last six days of testimony have allowed
11 that opportunity, and I'm confident that the Board's
12 review, once it's said and done, based on the truth,
13 and based on the facts that our merger uniquely
14 represents it will lead to the outcome that we
15 desire.

16 That said, the decision obviously is in
17 your hands, and I trust that that commitment and that
18 resolve, and that responsibility is in good hands.
19 And as we look back on this as I look to the future,
20 I'm confident that history will show that this Board
21 has taken that responsibility seriously, and history
22 will reflect that should the Board come to the

1 conclusion that I believe the facts will lead you to,
2 that you've got it right, and that we've gotten it
3 right.

4 And that these public interest benefits
5 will be created. So with that said again I'll finish
6 where I started. Thank you, thank you for your
7 commitment, thank you for your professionalism, and
8 thank you for your willingness to allow the truth to be
9 heard.

10 CHAIRMAN OBERMAN: Thank you Keith. I
11 have a few closing observations, and other members of
12 the Board may want to join in. First I'd like to say
13 with all due respect to David and my own career as a
14 practicing lawyer, I'm very impressed with your
15 stepping up to the plate to make the closing
16 argument, and stepping up as you have throughout
17 these hearings, and to you know assert the interests
18 that you're promoting on behalf of your company.

19 It's an impressive willingness on your
20 part to take responsibility. I have a couple of
21 observations substantively, and then procedurally,
22 some matters I was going to address David that you

1 had raised. But one, I have been impressed. I think
2 other Board members have been impressed with what
3 I'll generously describe as ironic among some of the
4 positions we have heard, and I would invite all of
5 the carriers who have been in the course of this
6 proceeding have asked for relief related to traffic,
7 which is now exempt on the theory that competition is
8 sufficient to protect shippers of exempt traffic.

9 The people who have asked for relief with
10 regard to exempt traffic may want to reconsider and
11 revisit the comments that they have filed in our
12 ongoing 704 proceeding. I heard a lot of things
13 differently during the course of these hearings than
14 I've seen in those comments.

15 On a similar note I would invite all of
16 the carriers who are urging that we adopt a
17 proportional rate structure for these gateways,
18 something in which I have not formed any conclusion,
19 to inform us of whether if proportional rates are such a
20 good idea in this proceeding, are they a good idea
21 for your gateways as well, and would you be willing
22 to offer up the same option for other carriers who

1 use your gateways.

2 On the procedural notions I think David
3 you have generally stated it correctly, the final
4 briefs are intended to be argument based on the
5 evidence in the record. I would not foreclose any
6 participant who feels compelled to offer some new
7 evidence on the grounds that they've been surprised
8 to make such a case, but it better be a pretty strong
9 case.

10 I think you have stated it correctly,
11 we're not in the business of receiving new evidence.
12 But without knowing any argument that somebody may
13 wish to make to us I wouldn't prejudge the outcome.

14 Finally, I would say this about the 30
15 page limit. We set that limit a long time ago. This
16 proceeding has involved a great deal of complexity,
17 and in the interest of having a full presentation,
18 particularly with all of the discussion we've had
19 with regard to CP/KCS about specifying conditions
20 that you're willing to concede.

21 If there is a need to go beyond the 30
22 page limit, we are open to people asking for

1 additional space. But if you ask for additional
2 pages you need to make a compelling reason of why you
3 need the additional pages.

4 And I'm not suggesting somebody could file
5 a 500 page brief, but if you need to go in a modest
6 way beyond the 30 pages to make sure we have a full
7 exposition of your positions, you may ask us for
8 that, and we'll try to be sensible about it as we
9 always have been.

10 But the record is already quite extensive
11 in this case, and the Board members and staff have
12 quite a bit to grapple with in order to reach a
13 conclusion. Anyway, nevertheless I recognize that
14 30 pages may be an arbitrary limit for some
15 participants, but that is not an invitation to open
16 the door. So with that I think that was all I had to
17 conclude with. Is there any other Board member who
18 wanted to make any statements or observations before
19 we conclude? Okay. I'm sure I -- yes, go ahead
20 Patrick.

21 BOARD MEMBER FUCHS: I think you wanted to
22 address our staff as well.

1 CHAIRMAN OBERMAN: Yes. Well I was going
2 to say that I think this is where you were going
3 Patrick, and I was going to wait until the final
4 remarks. I wanted to compliment all of the
5 stakeholders and participants who addressed the
6 Board. It's quite a bit of undertaking. There's
7 been some sharp back and forth questioning.

8 We have our own views about the merits and
9 demerits of some of the positions, but I think a
10 great deal of work and preparation has gone into this
11 case. It's the first major merger that any of us
12 have experienced obviously, and that most of the
13 Board staff have dealt with. So I think I really
14 want to compliment the industry for those
15 presentations.

16 But I really want to make sure that the
17 public and the participants understand the tremendous
18 amount of work that has been undertaken by Board
19 staff. Thousands and thousands of pages, documents,
20 datapoints, have been carefully scrutinized,
21 analyzed, questioned, it's ongoing. And the staff
22 has really risen to the occasion, challenged in a way

1 that I don't think most of them have been challenged
2 over the years, kept us up to date as much as
3 possible with our ongoing obligations as a Board.

4 And so we just couldn't do this work
5 without staff, and we certainly couldn't bring this
6 case to a conclusion one way or the other without
7 what will be a tremendous continuing staff effort
8 until a decision is written and voted on by this
9 Board. So I think all of us on the Board really
10 commend the staff for that work.

11 I couldn't begin to name everybody, but I
12 think they all know who they are. So with that I
13 think we can conclude unless anybody else on the
14 Board would like to add anything.

15 BOARD MEMBER FUCHS: Marty I would just
16 like to echo your remarks about the practitioners,
17 witnesses and especially our staff and the herculean
18 efforts that went into making this a productive
19 hearing, thank you.

20 CHAIRMAN OBERMAN: Yeah. I don't think
21 anybody who isn't there with the staff can begin to
22 appreciate the effort that this kind of a case

1 requires, all of our cases, as well.

2 BOARD MEMBER HEDLUND: And Marty I want to
3 just thank you personally for your getting us through
4 these proceedings with great skill and impartiality.

5 CHAIRMAN OBERMAN: Well thank you Karen.
6 I'll accept.

7 BOARD MEMBER SCHULTZ: I'll echo Karen's
8 comments and Patrick's comments and of course Marty
9 your comments as well. Thank you to all of the
10 parties as well as the stakeholders for the time and
11 professionalism with which everyone presented to the
12 Board. Your thoroughness was greatly appreciated,
13 and of course thank you to staff as well for your
14 time, especially for scheduling additional days on
15 such short notice.

16 CHAIRMAN OBERMAN: All right. With that
17 this portion of the hearing has come to a conclusion,
18 and we will close it. And all the rest of the record
19 remains subject to the existing scheduling which you
20 are all aware of. Thank you very much and have a
21 well-deserved good weekend.

22 (Whereupon the proceeding concluded at

1 2:32 p.m.)

2 CERTIFICATE OF COURT REPORTER

3

4 I, LARRY FLOWERS, Court Reporter, do hereby certify
5 that that the testimony contained herein is a true
6 record of the testimony given by said witness, and I
7 further certify that I am neither attorney nor
8 counsel for, related to, or employed by any of the
9 parties to the action in which this statment is
10 taken; and, further, that I am not a relative or an
11 employee of any attorney or counsel employed by the
12 parties hereto, or financially interested in the
13 action.

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17 LARRY FLOWERS

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