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SURFACE TRANSPORTATION BOARD
HEARING ON THE PROPOSED CP/KCS MERGER

Docket No. FD36500

REMOTE PUBLIC HEARING

Volume IV

Monday, October 3, 2022

9:30 a.m.

Surface Transportation Board

395 E Street S.W.

Washington, DC

The above-titled matter came on, pursuant to notice, at 1:31 p.m., Chairman Martin Oberman, presiding.

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

2 CHAIRMAN OBERMAN: Thank you, and
3 welcome everybody to the continuation of the
4 hearing on the proposed merger between Kansas City
5 Southern and Canadian Pacific, docket number
6 36500. And I will say in general we appreciate
7 everyone's patience in staying with us through
8 these hearings, which of course have extended
9 longer than we scheduled them for initially,
10 largely because of the Board questions and witness
11 answers.

12 With that we have I think sent out on
13 Friday the schedule of appearances for today and
14 tomorrow, so everybody should have a program and
15 we are ready to begin. So with that we will call
16 the first witness, Mayor Friday Ellis of Monroe,
17 Louisiana. And Mr. Mayor, we -- woop, he's not
18 available. Okay. I thought he would be available
19 today. Well, hopefully he can testify tomorrow.

20 So, that would take us to the next
21 witness, Heather Stebbings, and I see her,
22 executive director of Pacific Northwest Waterways.

1 So, Ms. Stebbings, you're on.

2 MS. STEBBINGS: Thank you. Good
3 morning -- well, good afternoon. Good morning out
4 here on the west coast. Thank you for the
5 opportunity to testify today. My name is Heather
6 Stebbings and I'm the executive director of
7 Pacific Northwest Waterways Association and we are a
8 trade group representing 150 member organizations
9 in Oregon, Washington and Idaho. Our members are
10 supports, farmers, shippers and others that support
11 efficient movement of cargo and people in and out
12 of the Pacific Northwest.

13 Our organization is opposed to the
14 merger between the Canadian Pacific and Kansas
15 City Southern Railroads. We believe it will
16 result in a shift in cargo, shipping capacity and
17 export opportunities from regions currently served
18 by the U.S. west coast ports to Canada and Mexico
19 and would cause economic harm to our regional and
20 national economy.

21 Over the last 15 years the government
22 of Canada has made it a top national priority to

1 make significant coordinated investments in its
2 west coast ports and the multimodal infrastructure
3 that supports them. These investments have
4 supported the capture of cargo market share from
5 U.S. ports.

6 In 2007 the ports of Seattle and Tacoma
7 handled 61% of the containerized cargo imported
8 through north western North America. By 2021 that
9 share had dropped to 44% while ports in western
10 Canada handled 56%.

11 In addition to diverting cargo to
12 Canada from northwest U.S. ports, the applicants
13 have made clear their intention to increase cargo
14 throughput from Mexican ports served by Kansas City
15 Southern's rail access, cargo that otherwise would
16 be handled by ports on the U.S. west coast.

17 When U.S. ports lose cargo, we lose the
18 jobs involved in handling that cargo. We estimate
19 the diversion of cargo from Puget Sound to
20 Canadian ports from 2007 onward represents a loss
21 of at least \$15B in revenue to the Washington
22 State economy and at least 72,000 in job years

1 lost. Cargo diversion from northwest ports to
2 those in Canada also has reduced ocean
3 carrier calls and importantly the supply of
4 returning empty containers that our exporters
5 depend on. This in turn increases shipping costs
6 and erodes or eliminates the competitiveness of
7 exports from states that depend on us as their
8 primary international trade gateways. Canadian and
9 Mexican ports are not viable alternatives for
10 exporters in Idaho, Montana, Washington and many
11 other parts of the country. These shippers have
12 little recourse when ocean carriers reduce service
13 to West Coast ports.

14 It is important to note that a key
15 factor in the success of the ports in Vancouver
16 and Prince Rupert has been the substantial
17 financial support they have received from the
18 federal government. For example, from 2016 to
19 2020 Canadian federal contributions to projects at
20 British Columbia ports totaled \$372M, compared to
21 \$45M for Washington State ports and 179M for the
22 ports in California and California and Washington

1 together have 30 ports handling substantial cargo
2 volumes compared with only four in British
3 Columbia. Canadian federal contributions and their
4 trade gateways have been mirrored by federal
5 investments along the entire trade corridor
6 that connects the ports to population centers in
7 the North American heartland.

8 When it comes to investments in our
9 supply chain, Canada is simply outspending us.
10 The strategies, investments and other actions
11 supporting the growth of Canadian ports and real
12 networks are commendable and offer examples the
13 U.S. should consider implementing. Our concern is
14 that the U.S. federal government has enabled this
15 success by failing to respond to Canada's efforts
16 to build more competitive trade routes and capture
17 market share from U.S. ports and railroads.

18 The primary shortcoming of U.S. policy
19 has been a lack of overarching strategy and
20 corresponding investment in freight infrastructure
21 relative to what the Canadian government has been
22 spending. Regulatory and policy issues have also

1 posed a challenge for our competitiveness. The
2 merger would greatly expand the trade corridors
3 that connect non-U.S. ports to inland regions
4 within the U.S. It would be a significant
5 milestone and a series of steps taken by public
6 and private entities in Canada that has resulted
7 in increased cargo flows and shipping services
8 through Canada at the expense of our U.S. gateway.

9 An approval of the merger would be
10 another example of the U.S. government not taking
11 seriously enough the competitive threat to our
12 ports and what the loss of cargo, ship calls and
13 ultimately what the loss of key trade routes means
14 to the national and local economies. Instead of
15 outsourcing our infrastructure, supply chains and
16 trade routes to other nations, the U.S. should
17 instead invest in U.S.-based transportation
18 infrastructure and make America's own gateways and
19 trade corridors more efficient and competitive.

20 Ultimately a decision to approve the
21 merger would result in job losses and other
22 economic harm to the nation and it is on these

1 grounds that we urge the STB to reject the merger.

2 Thank you very much for the opportunity
3 to provide comment today and I'd welcome any
4 questions.

5 CHAIRMAN OBERMAN: Do any Board members
6 have any questions for Ms. Stebbings.

7 (Hearing none.)

8 CHAIRMAN OBERMAN: I have one, Ms.
9 Stebbings.

10 I'm sure you're aware that in the most
11 recent congressional appropriations in this area
12 the money has been designated to be able to be
13 used to invest in our ports, and I'm wondering why
14 the appropriate response if this merger were to be
15 approved for all the organizations you represent
16 as well as all of us who are concerned about the
17 issues you raised is to make our ports more
18 competitive and obtain the investments that are
19 needed rather than try to limit somebody else's
20 development.

21 MS. STEBBINGS: We have been very
22 appreciate of the dollars that have been extended

1 to date and that are anticipated to be coming to
2 ports and other entities for sure, but the issue
3 is that Canada has been outspending us for 15 plus
4 years and so, we're behind the curve and it
5 continues to be a problem, especially when we look
6 at things like the regulatory process and getting
7 projects completed in a timely fashion. They have
8 just outspent us over the last number of years and
9 we've been playing a game of catch-up. That's
10 what we're doing.

11 CHAIRMAN OBERMAN: By the way, as I
12 understand it, it's not only been the Canadian
13 government but the railroads, particularly in Port
14 Rupert, CP has made some substantial investments I
15 think. So I don't think it's only the government
16 that may not be living up to its share but
17 railroad investment, well, particularly
18 intermodal it's been a concern I've raised over the
19 last year. So I think we have to look at both.
20 But I do appreciate your remarks and your taking
21 time to testify to us.

22 I think I misspoke, by the way. I

1 think it's CP is at the other port and CN's at
2 Port Rupert, but the railroads have been making
3 some of those investments.

4 Any others have questions for Ms.
5 Stebbings?

6 (Hearing none.)

7 CHAIRMAN OBERMAN: Okay, thank you very
8 much. Appreciate it.

9 MS. STEBBINGS: Thank you.

10 CHAIRMAN OBERMAN: Next is Jackie
11 Baumann, chief engineer of the City of Gonzales,
12 Louisiana.

13 MS. BAUMANN: Good evening. Good
14 afternoon. Can everyone hear me?

15 CHAIRMAN OBERMAN: Yes, we can hear
16 you.

17 MS. BAUMANN: Excellent. Thank you all
18 for the opportunity to speak this afternoon. My
19 name's Jackie Baumann. I'm the city engineer in
20 Gonzales. Gonzales is located between Baton Rouge
21 and New Orleans in southern Louisiana. I am here
22 to speak on behalf of the mayor, City Council and

1 all of the population here in Gonzales in support of this merger.
2 The City of Gonzales has been focused on
3 transportation, oriented development for many, many
4 years and we see this merger as an opportunity to
5 reinvestment in passenger rail, which our
6 community desperately needs. As you may know,
7 south Louisiana is plagued with natural disasters
8 and the railroad is an avenue that we can use to
9 evacuate people. We additionally have a
10 disadvantaged population, an elderly community
11 trying to reach the medical district in Baton
12 Rouge. We see passenger rail as another way to
13 move people to the resources that they need to get
14 to and are unable to get to today. And I will
15 close in saying the City is here in support of
16 passenger rail and this merger, not just vocally
17 but we have, as a city, invested in acquisition of
18 property near the previous passenger rail depot,
19 should it be reopened. We've also applied for and
20 received an award letter for a raise grant where
21 the City would be putting up matching funds to
22 help build station infrastructure.

1 So I just wanted to speak on behalf of
2 this merger and support that effort.

3 CHAIRMAN OBERMAN: All right. Thank
4 you very much.

5 Are there any questions for Ms.
6 Baumann?

7 (Hearing none.)

8 CHAIRMAN OBERMAN: Thank you, Ms.
9 Baumann. I appreciate your making the effort to
10 testify to us.

11 Next is -- I'm not sure of the
12 pronunciation -- Amy Koch, former majority leader
13 of the Minnesota State Senate.

14 MS. KOCH: Good afternoon, Mr. Chair
15 and members. Thank you so much more having me
16 today.

17 I'm here to express my concerns about
18 the proposed merger between CP and KCS.
19 I've got communities across my home state of Minnesota are
20 already impacted by high costs, environmental
21 factors and long waits for train crossings, and
22 this mega-merger will unfortunately make things

1 worse. For starters, the increased rail traffic
2 this merger would cause would bring more crude oil
3 through Minneapolis, Saint Paul, and other small
4 communities throughout our state,
5 especially as the Biden administration seeks to
6 limit the number of new pipelines for oil and gas
7 transport given the recently averted rail strike
8 and the havoc this would have wrecked on energy
9 supplies in the United States. If we're even more
10 reliant on rail transportation for energy
11 resources, this is unwise.

12 CP is already the largest rail shipper
13 of oil through Minnesota and now this merger will
14 increase that yield with as many as 20 more trains
15 hauling crude oil by our homes and near our
16 schools each month. Additionally, the merger will
17 result in increased train traffic of other items
18 including hazardous chemicals. This drastic
19 increase of train traffic carrying hazardous
20 materials would result in more deadly accidents as
21 evidenced by the study from the Fraser Institute.
22 That found that rail is 4.5 times more likely to

1 experience an accident transporting fuels than
2 pipelines.

3 Another consideration is the negative
4 impact this merger would have for Minnesota
5 farmers. Increased demand for fuel shipments,
6 which command higher shipping rates than farm
7 goods, would displace "ag" products and make it
8 more difficult to get food to market raising the
9 already skyrocketing price of groceries. As the
10 administration looks to reduce inflation, it would
11 be unwise to introduce further uncertainty into
12 that supply chain.

13 A U.S. Senate committee on commerce,
14 science and "transpo" recently found that busy
15 at-train grade -- at-grade train crossings have
16 significant impact on the quality of life in the
17 community and can hinder the first responder's
18 timely access to emergency services.

19 Last week this Board heard from
20 Hennepin County and the City of Mahnomen in
21 Minnesota, but in a Minnesota town like Winona
22 where train crossing wait times are already a

1 problem with 40-minute delays in some cases, the
2 50% increase in train traffic this community is
3 expected to see would be disastrous. The
4 real-life devastating consequences of such delays
5 were recently on display in Lockland, Ohio, where
6 a home, just 300 feet from the rails, sat in
7 flames for eight times longer than it should have
8 due to a train that was blocking firefighters from
9 getting to the scene. A 59-second response time
10 became eight minutes with flames doubling with
11 each passing minute.

12 There are 35 segments in the U.S.
13 network where this transaction would result in
14 traffic levels that would exceed the own -- the
15 STB's Office of Environmental Analysis own safe
16 threshold and are 26 locations that require
17 construction. All this rail through populated
18 communities would generate more traffic, more
19 delays and more opportunities for accidents.

20 CP pledged as part of this merger that
21 they would run shorter trains to cause less delay
22 and promised no trains longer than 7,100 feet.

1 But the reality is that their trains are
2 significantly longer on average. In the third
3 quarter of 2021 CP's average train length was
4 8,285 feet, or 1.5 miles long, and the railroad
5 regularly ran trains that reached or exceeded
6 12,000 feet, or over 2.25 miles.

7 There are many adverse impacts to rail
8 site communities that have yet to be acknowledged
9 to date and are still unclear even after the
10 release of the draft EIS. There also appears to
11 be minimal potential benefits for the community
12 members. This merger will not bring more
13 affordable oil, it will not benefit midwest
14 farmers that rely on trains for transporting their
15 products, and it will certainly not benefit the
16 families that will breathe in more pollutants from
17 increased rail traffic or deal with oil spills in
18 the community. It will slow down emergency
19 response times and will create traffic and as a
20 result wear and tear on the roadways.

21 I hope that the Surface Transportation
22 Board will take all of these concerns under

1 advisement when making a final decision with
2 regards to this merger.

3 Thank you for your consideration and
4 your time.

5 CHAIRMAN OBERMAN: Thank you very much.
6 Appreciate your testimony, Ms. Koch. Is it
7 "cook"?

8 MS. KOCH: "Coke," thank you.

9 CHAIRMAN OBERMAN: Koch, okay. Thank
10 you.

11 MS. KOCH: Thank you. Like the
12 trucking but no relation.

13 CHAIRMAN OBERMAN: I have a very good
14 friend in Chicago with the same spelling who
15 pronounces it "kotch". So, there are many --

16 MS. KOCH: There's many.

17 CHAIRMAN OBERMAN: Yeah. Thank you so
18 much.

19 MS. KOCH: Thanks.

20 CHAIRMAN OBERMAN: All right, next is
21 Dan Borgen, chairman and president of the USD
22 Group.

1 MR. BORGEN: Thank you, Mr. Chairman,
2 other members. I'm Dan Borgen, chairman, CEO and
3 president of the U.S.-based U.S. Development Group
4 and subsidiary entities. They are privately
5 owned. USD is the general partner and majority
6 owner of USD Partners, a New York Stock Exchange
7 listed publically traded partnership formed by USD
8 to acquire, develop and operate primarily
9 rail-centric midstream infrastructure and
10 complementary logistics solutions for crude oil,
11 biofuels and other energy-related products.

12 For purposes of these comments I will
13 use "USD," "our" and "we" generically for the USD/USDP
14 and affiliated companies individually and/or
15 collectively and appropriate for this specific
16 statement made.

17 Since its inception USDA has worked to
18 deliver sustainable, rail-centric industry
19 solutions that result in superior impacts on
20 people, society and the environment compared to
21 available alternatives. We strive to proactively
22 solve the strategic needs of our customers and

1 partners, creating flexible market access for
2 customers in significant North American growth
3 areas and key demand centers, including, without
4 limitation, western Canada, the U.S. Gulf Coast and
5 Mexico. In doing so we have developed strong
6 working relationships with most if not all the
7 Class 1 railroads based on delivering projects on
8 time and on budget that create value to the
9 railroads and our customers. We and our primary
10 contractors have an outstanding record for safety
11 and environmental compliance that we have
12 accomplished through a lot of hard work and by
13 making them a priority focus. Our operations
14 include rail car loading and unloading, storage
15 and blending and onsite tanks, inbound and
16 outbound pipeline connectivity, truck transloading
17 as well as other related logistic services. We
18 have built and are operated unit train capable of
19 origination and destination terminals with an
20 aggregate capacity of over one million barrels per
21 day and have safely handled over 420M barrels of
22 biofuels and liquid hydrocarbons from January 2006

1 through June 2022.

2 Among our other projects, USD recently
3 commenced operation of a first-of-its-kind DRUbit
4 by rail network. The DBR network begins with a
5 diluent recovery unit, or DRU, in Canada which
6 allows for the safe, environmentally friendly and
7 cost-competitive shipment of a special blend of
8 Canadian heavy crude oil called DRUbit to the U.S.
9 Gulf Coast. USD also recently commenced
10 operations at a newly-constructed DRUbit
11 receiving, blending and product shipping terminal
12 in Port Arthur, Texas.

13 Key aspects of DRUbit are its
14 sustainability story. DRUbit allows heavy
15 Canadian oil to ship nonhazardous and nonflammable
16 by rail. Compared to current Canadian heavy oil
17 shipment alternatives, from Hardisty, Alberta to the
18 U.S. Gulf Coast, DRUbit is cost competitive and
19 has significantly lower carbon intensity per
20 delivered heavy oil barrel than current pipeline
21 and rail alternatives. DRUbit allows custom
22 blending to customer specifications at

1 destination. Both ends of our DRUbit-by-rail
2 network are capable of significant expansion. We
3 are working hard to commercialize subsequent
4 phases of expansion.

5 Both CP and KCS as providing carriers have
6 been integral to the successful launch of DRUbit. USD
7 supports approval of the CP/KCS merger. The
8 transaction will provide benefits that we are
9 eager to see realized. The combined CP/KC network
10 with new single-line hauls and access to premier
11 ports on the U.S. Gulf Coast, Atlantic and
12 Pacific coast as well as to key overseas markets
13 will help us and our customers reach existing and
14 new markets more efficiently.

15 As just one example we believe the
16 merger will provide improved rail efficiency and
17 economics necessary to support further investment
18 in our DBR network encouraging growth in the use
19 of DRUbit and more sustainable, heavy Canadian
20 crude oil product group previously mentioned.
21 This should enable Canadian heavy crude currently
22 shipped by pipeline and rail in diluted form to be

1 converted to DRUbit: a nonhazardous, nonflammable
2 product.

3 With the two railroads' strong focus on
4 safety and their track record of operational
5 excellence, I expect that CP/KC will be able to
6 integrate their operations quickly and efficiently
7 to the benefit of both rail customers and other
8 stakeholders.

9 As previously stated, USD has long
10 enjoyed good relationships with many railroads
11 including a proven trusted relationship with Canadian
12 Pacific and Kansas City Southern, providing our
13 customer services that often involve rail
14 solutions for various commodities across North
15 America.

16 These services require close
17 operational collaboration and/or negotiations with
18 rail carriers. USD believes a CP/KCS combination
19 will create a transcontinental railroad with the
20 scale and reach to deliver improved levels of
21 service that will enable us, USD, and those we
22 work with to better serve our customers and

1 communities.

2 This merger will create the first North
3 American railroad connecting Canada, the United
4 States and Mexico with a single operator. We
5 anticipate that this will expand access to growing
6 markets across the United States, Mexico and
7 Canada under the United States-Mexico-Canada
8 Agreement and provide a rail option that uniquely
9 meets the intent of the USMCA.

10 From our perspective the transaction
11 promises to provide improved service options and
12 invigorate transportation, competition in the
13 markets we serve. Our experience shows us the
14 single-line rail service options are superiors of
15 transaction will be expected to yield
16 efficiencies in terms of equipment utilizations
17 to the benefit of shippers who use private rail
18 equipment.

19 The merger should improve transit
20 times, reliability and efficiencies for our
21 customers. This should strengthen competition
22 against the other larger rail carriers, pipelines

1 and trucks that serve our markets.

2 CP and KCS have had a cooperative
3 relationship in the past and CP/KCS joint routes
4 are among our transportation options today. Given
5 that a significant component of the supply chain
6 is railroad transportation, we believe that this
7 merger will improve our transportation options and
8 allow opportunities to work closely with CP/KC to
9 create more sustainable alternatives than working
10 individually with CP and KCS.

11 We have long been aware of the
12 attention of CP and KCS to safety and operational
13 effectiveness. Given this straightforward
14 network connectivity between CP and KCS and the
15 fact that CP and KCS are the two smallest U.S.
16 Class 1 railroads, we are confident that they will
17 be able to implement their transaction without the
18 service disruptions that have accompanied some
19 past rail mergers.

20 For these reasons and others, USD is
21 voicing its support for the combination of CP and
22 KCS because it will enhance competition, provide

1 expanded options and drive efficiencies for
2 customers of all sizes.

3 USD urges the STB to approve CP's
4 acquisition of KCS as swiftly as possible so that
5 these systems can be integrated and the end-to-end
6 benefits of this merger can be realized for the
7 benefit of USD customers and similarly situated
8 shippers and many public stakeholders which we are
9 eager to see.

10 Thank you again for the opportunity to
11 speak and voicing our support for this
12 transaction.

13 CHAIRMAN OBERMAN: Thank you much, Mr.
14 Borgen.

15 Any questions for Mr. Borgen?
16 (Hearing none.)

17 CHAIRMAN OBERMAN: Okay. Thank you
18 much.

19 MR. BORGEN: Thank you.

20 CHAIRMAN OBERMAN: Next witness is
21 David Trent of Canadian Forest Products.

22 Mr. Trent.

1 MR. TRENT: Good afternoon. Can you
2 hear me okay?

3 CHAIRMAN OBERMAN: Yes, sir.

4 MR. TRENT: Wonderful. Well, good
5 afternoon, Chairman Oberman and members of the
6 Board, and thank you so much for the opportunity
7 to testify today.

8 My name is David Trent and I'm here
9 representing Canfor today. Canfor is a large
10 forest products producer, headquartered in
11 Vancouver, British Columbia, Canada, with
12 operations in western Canada and the southern U.S.
13 We produce lumber, pulp and paper and energy
14 products.

15 As you're keenly aware, in the lumber
16 business and pulp and paper business, competitive
17 rail delivery is an important part of our
18 business. Our lumber rail shipment volumes to the
19 U.S. are approximately 15,000 cars annually today
20 and CP represents approximately 20% of that
21 volume. We have two locations that are directly
22 served by Canadian Pacific and we have experienced

1 reliable service at these locations. KCS provides
2 a very efficient routing in terms of cost and
3 transit to Texas, one of our largest worldwide
4 markets. We currently do not utilize this
5 efficient routing due to the lack of receivers on
6 the KCS. Most lumber receivers are on either the
7 Union Pacific or BNSF railways.

8 The CP rail and KCS networks if
9 combined will provide for a single network to
10 reach competitively our key markets in the
11 southern U.S. and specifically to Texas.

12 Canfor's present shipment volumes are
13 expected to remain unaffected by potential CP/KCS
14 network without further development of KCS
15 receivers.

16 While we remain neutral on the proposed
17 merger, we certainly welcome alternative,
18 direct efficient and competitive routings to our
19 largest market area. With further development of
20 KCS and CP opportunities in Texas, we certainly
21 could see much improved and competitive
22 enhancement and access to a key market for us. For

1 these reasons we're certainly not opposed to the
2 merger and would welcome future competitive
3 opportunities for our railways.

4 Thank you again for the opportunity to
5 testify. I'm certainly happy to take any
6 questions you or any other member of the Board may
7 have.

8 CHAIRMAN OBERMAN: Thank you, Mr.
9 Trent.

10 Any questions for Mr. Trent?
11 (Hearing none.)

12 CHAIRMAN OBERMAN: Okay.

13 MR. TRENT: Thank you very much.

14 CHAIRMAN OBERMAN: Thank you.

15 Next up, Knox Ross of the Southern Rail
16 Commission.

17 Mr. Ross.

18 MR. ROSS: Hello, Mr. Chairman.

19 CHAIRMAN OBERMAN: How are you, sir?

20 MR. ROSS: I'm great. Thank you for
21 the time.

22 I'm Knox Ross, the chairman of the

1 Southern Rail Commission and the commission is a three-state
2 compact of Mississippi, Alabama, Louisiana
3 authorized by Congress. We have worked
4 extensively with host railroads Amtrak,
5 FRA and State Partners in working to
6 bring new and improved passenger rail service to
7 our states. It is in this capacity I address you
8 today in support of the merger between Kansas City
9 Southern and Canadian Pacific.

10 The commission's principal focus is the
11 provision of robust, reliable passenger service to
12 our citizens. To that end, we have three ongoing
13 projects that are directly impacted by this
14 merger. Those are service between Baton Rouge and
15 New Orleans and the extension of the existing
16 Amtrak Crescent service from Meridian, Mississippi
17 to Dallas-Fort Worth and steadying service from
18 Baton Rouge to Shreveport, Louisiana to connect
19 these two services, if they're implemented.

20 After a part of the merger proposal
21 presented to the STB, Canadian Pacific and Amtrak,
22 in a joint filing committed to running one

1 passenger train a day with the consideration of
2 more after safety capacity upgrades and the study
3 of what is necessary to implement service between
4 Meridian and Dallas-Fort Worth with a specific
5 timeline for implementation of service once agreed
6 upon necessary improvements are made. This is a
7 radical departure of our previous host railroad
8 relationships and we have welcomed the open
9 cooperation of Canadian Pacific in our planning
10 efforts. Canadian Pacific coordinated with Amtrak
11 an inspection train of the Baton Rouge-New Orleans
12 route and has been fully cooperative with
13 Louisiana the Department of Transportation and
14 Development in working toward an initial
15 engineering study to determine what improvements
16 need to be made.

17 CP representatives attended meetings
18 with key decision makers in Washington, DC as a
19 part of our successful effort to obtain raise
20 grant funding for proposed stations in Gonzales
21 and Baton Rouge, Louisiana.

22 CP has always been extremely helpful in

1 other projects, such as a proposed grade crossing
2 separation project in Rankin County Mississippi on
3 I-20 corridor.

4 We both recognize that a successful
5 passenger rail operation must compliment and enhance
6 where possible the provision of a robust and
7 reliable freight service. We at the Commission
8 have long held that passenger service must work
9 for both Amtrak and the host railroad. Our
10 positive cooperative relationship with Canadian
11 Pacific has thus far proved that it is possible to
12 have both. Canadian Pacific maintains an 8+
13 rating with Amtrak on its current services and we
14 expect, through best efforts on both parts, that
15 we can expect the same on the services that we
16 intend to provide.

17 We are also interested in providing
18 passenger service where it has a high likelihood
19 of success. In numerous polls and studies on the
20 Baton Rouge-New Orleans corridor widespread public
21 and business support has been noted. Most
22 significantly the cities of Gonzales and Baton

1 Rouge have committed significant local investment
2 to match recently awarded raise grants construct
3 stations and the Louis Armstrong Airport is
4 actively studying construction to a stop on the
5 route as well, making the service of true
6 multimodal service.

7 On the I-20 corridor, a previous Amtrak
8 study showed that the proposed service would
9 generate significant ridership and revenue and
10 would greatly improve the financial performance of the
11 Crescent service south of Atlanta, connecting the
12 great regional hubs of Atlanta and Dallas-Fort
13 Worth. This train would also connect the
14 Evers-Jackson International Airport to our
15 Mississippi and Louisiana cities, many of which
16 are battling to maintain limited air
17 transportation service.

18 Our universities, such as Jackson
19 State, Louisiana Monroe, and Louisiana Tech see this
20 as a great opportunity to open their campuses to a
21 whole new world of potential students.

22 In previous filings with the Surface

1 Transportation Board you have seen that cities,
2 counties, parishes and economic interests along
3 the I-20 corridor have issued enthusiastic
4 resolutions in support for the merger. They see
5 not only the economic advantages of a more robust,
6 connected freight system, but they also see the
7 economic opportunity of bringing a new way of travel
8 between our cities and creating a direct
9 connection to the rest of the country for
10 commerce, education, tourism. They see this as an
11 opportunity to participate in the national economy,
12 to compete more effectively and to make their
13 quality of life better for their residents, as
14 well as move citizens out of harm's way in the
15 event of a natural disaster, such as a hurricane.

16 In summary, we support the merger of
17 Canadian Pacific and Kansas City Southern because
18 it gives our states the best opportunity to
19 preserve and enhance their existing freight rail
20 networks and it also gives us the best opportunity
21 to provide new, robust passenger service to areas
22 which desire it and in which it has a high

1 likelihood of success.

2 The Commission strongly supports the
3 merger application and encourages the STB to
4 approve the proposal.

5 Thank you all for your time and I'd be
6 happy to answer any questions you might have.

7 CHAIRMAN OBERMAN: Thank you, Mr. Ross.

8 MR. ROSS: Thank you.

9 CHAIRMAN OBERMAN: Thank you for your
10 participation and of course you're no stranger to
11 our other case.

12 MR. ROSS: Right.

13 CHAIRMAN OBERMAN: That we won't talk
14 about today but we appreciate all the effort you
15 and the Commission put on passenger rail.

16 MR. ROSS: Mr. Chairman, if you would
17 give me just 30 seconds, I wanted to mention that
18 you all have spent a lot of time during these
19 hearings talking about foreclosure and access.
20 You know, one of the things that we have
21 experienced in Mississippi over the last 40 years
22 or so, probably since the early '70s is a great

1 deal of foreclosure and lack of access, and I
2 really appreciate the Board looking at that very
3 closely, because we've got lines that right now
4 the state is trying to find ways to rebuild that
5 really have been eliminated because of paper
6 barriers, mostly. And we appreciate very much you
7 all looking at that closely.

8 CHAIRMAN OBERMAN: Thank you. This is
9 something we are concerned about. So I appreciate
10 it.

11 MR. ROSS: Thank you.

12 CHAIRMAN OBERMAN: All right, sir.

13 MR. ROSS: Thank you.

14 CHAIRMAN OBERMAN: All right, anyone
15 else have questions for Mr. Ross?

16 (Hearing none.)

17 CHAIRMAN OBERMAN: Okay.

18 MR. ROSS: Thank you.

19 CHAIRMAN OBERMAN: Thank you.

20 Next up is Sean Keenan of the Supply
21 Chain of SSAB Americas.

22 Mr. Keenan.

1 MR. KEENAN: Afternoon. I apologize,
2 after testing -- ok.

3 Good afternoon. Thank you for the
4 opportunity to speak to you today in support of
5 the Canadian Pacific/Kansas City Southern
6 combination. My name is Sean Keenan and I'm vice
7 president Supply Chain for SSAB Americas. SSAB is
8 a market-leading, north American producer of
9 quality steel plate and coil with two primary
10 production facilities and three downstream
11 processing units. Our plate mills are located in
12 Montpelier, Iowa and Mobile, Alabama. Our
13 cut-to-length processing facilities are located
14 in Toronto, Ontario, St. Paul, Minnesota and
15 Houston, Texas.

16 SSAB Americas is the most
17 geographically diverse plate producer in the
18 United States and is the largest producer and
19 supplier of heavy plate in North America with a
20 market share in excess of 30% in 2021. In 2021 we
21 shipped 2.4M short tons of finished steel. SSAB
22 maintains a strong market position in the energy

1 market, especially wind as well as heavy transport
2 customer segments. Our customers are located
3 primarily in the United States, Canada and Mexico.

4 SSAB ships steel in various railroad
5 supplied rail cars into private leased cars. The
6 CP/KCS combination will extend CP's reliable
7 service to new single-line options in North
8 America, thereby reducing the cycle time of these
9 rail cars and allowing for more efficient use of
10 all equipment. Elimination of one day of transit
11 time is estimated to increase the availability and
12 utilization of both railroad-supplied and leased
13 cars by eight to ten percent. Production of cycle
14 times will increase the level and quality of
15 service we provide to our customers and will allow
16 for the opportunity of increased volume of steel
17 to be shipped by rail. Ultimately this will lower
18 our dependency on trucks and reduce our carbon
19 footprint.

20 As an example, converting truck to rail
21 on just one rail shipment from Montpelier, Iowa,
22 Kansas City Missouri would take four trucks off

1 the road and lead to reductions in our scope three
2 emissions.

3 SSAB Americas currently has the lowest
4 carbon scope one and scope two emissions intensity
5 of any steel producer in North America and has a
6 goal to largely eliminate CO2 emissions by 2030.
7 SSAB produces steel by recycling scrap into
8 electric arc furnaces and over 70% of our raw
9 material is recycled scrap metal shipped to our
10 facilities by rail and truck. Improving the cycle
11 times on these moves and expanding the regions
12 from which material can be cost-competitively
13 sourced by rail would further allow SSAB to reduce
14 their use of trucks, which will in turn lower our
15 carbon footprint even further.

16 CP Rail has demonstrated significant
17 leadership and sustainability in the North
18 American rail industry. Their commitment to join
19 the UN Global Compact and their leadership role in
20 developing innovative locomotives that can utilize
21 clean fuel alternatives align closely with SSAB's
22 environmental and sustainability goals.

1 The combination of CP and KCS would
2 further the opportunity for SSAB to utilize CP
3 rail for single-line hauls with a fleet of
4 locomotives that will increasingly consume clean
5 burning hydrogen or other alternative fuels,
6 reducing the scope three emissions associated with
7 shipment of our raw materials and finished goods.

8 Beyond the significant environmental
9 opportunities the CP/KCS combination will provide
10 to SSAB, SSAB is looking forward to extending our
11 market reach via new efficient direct line haul
12 moves in Texas and Mexico. These market regions
13 are important destinations for SSAB as we have
14 both a significant customer base as well as one of
15 our processing facilities located in these areas.
16 The ability to ship in a more cost-effective
17 manner on a single-line haul will increase our
18 competitiveness against both domestic producers as
19 well as import options.

20 In conclusion, SSAB Americas supports
21 the CP/KCS combination because it will allow a
22 more efficient use of rail assets and therefore

1 reduce our dependence on truck and also improve
2 our access to key markets. We therefore
3 respectfully urge the Board to approve the
4 combination as quickly as possible.

5 Thank you again for this opportunity to
6 speak in support of the CP/KCS combination. I'm
7 happy to answer any questions you may have.

8 CHAIRMAN OBERMAN: All right. Thank
9 you, Mr. Keenan.

10 Are there any questions for Mr. Keenan?
11 (Hearing none.)

12 CHAIRMAN OBERMAN: All right, sir.
13 Thank you. Appreciate your input.

14 Our next witness is Mark Hovland of the
15 North Dakota Grain Dealers Association.

16 Mr. Hovland.

17 MR. HOVLAND: Yes, sir. Good
18 afternoon. Thank you, Chairman Oberman and
19 members of the Board for giving me the opportunity
20 to speak to you today. I am Mark Hovland. I'm a
21 past president and current director on the North
22 Dakota Grain Dealers Association and general

1 manager of Fessenden Co-op. The North Dakota
2 Grain Dealers is an association of over 120
3 companies that operate 250 grain elevators in
4 North Dakota. Fessenden Co-op is a farmer-owned
5 and operated local co-op in central North Dakota
6 and we have shelf-loading facilities on the CP and
7 the BN -- two on the CP and one on the BN --
8 and we are also served by a short line, the Red
9 River Valley and Western, at four of our
10 locations. Fessenden Co-op also has an edible
11 bean division that processes primarily pinto and
12 black beans with most of those beans shipped to
13 various counters and packagers throughout the U.S.
14 as well as some being exported to Mexico. There
15 again we have one location on the BN and one on
16 the CP.

17 North Dakota is a captive rail state
18 with more than 80% of North Dakota's grain
19 shipments occurring by rail. Grain production is
20 the backbone of North Dakota's economy and
21 efficient and competitive rail service is
22 essential to move grain from points of production

1 to points of consumption.

2 From our perspective, a CP/KCS
3 combination would hold the promise of new market
4 options and open some new markets to North Dakota
5 shippers. We believe that this merger would be a
6 compliment to each of the carriers' existing
7 service and support it for that reason. This deal
8 works because there are few overlaps in each
9 carrier's prospective networks and creates new
10 access to North Dakota grain shippers to ports in
11 the U.S. Gulf, Atlantic and Pacific coasts as well
12 as Mexico.

13 North Dakota being a captive rail state
14 is beholden to the two Class 1 carriers that
15 service it. Freight rates in North Dakota are
16 some of the highest in the country when compared
17 to similar hauls out of states with more freight
18 options. We feel this action will strengthen
19 competition between those carriers, which will
20 improve the economic condition for all North
21 Dakota rail shippers regardless of what carrier
22 they are on.

1 The North Dakota Grain Dealers
2 Association and Fessenden Co-op is voicing support
3 for the combination of CP and KCS because it
4 should enhance competition and provide more
5 options for our North Dakota grain shippers.

6 Thank you, and I'll take any questions.

7 CHAIRMAN OBERMAN: All right. Thank
8 you, sir.

9 Are there any questions for Mr.
10 Hovland?

11 MEMBER FUCHS: I have one.

12 CHAIRMAN OBERMAN: Yes.

13 MEMBER FUCHS: Thank you for being
14 here.

15 I'm wondering if you could elaborate on
16 what those additional options mean for you all
17 from a business perspective, whether they might
18 manifest themselves in the rates you pay or the
19 service you received.

20 MR. HOVLAND: Probably both, rates
21 and -- I think any time you have a direct route
22 somewhere and you eliminate interchange, another

1 railroad perhaps, it should simplify things and
2 hopefully save you some time and cost.

3 MEMBER FUCHS: Got it. Thank you.

4 CHAIRMAN OBERMAN: Any other questions
5 for Mr. Hovland?

6 (Hearing none.)

7 CHAIRMAN OBERMAN: All right. Thank
8 you, Mr. Hovland. Appreciate your participation.

9 MR. HOVLAND: Thanks.

10 CHAIRMAN OBERMAN: And we will now move
11 to the witnesses that were on a panel, but I'm
12 not sure if we'll virtually have to treat you that
13 way. First is, just go individually, Jeff Moreno,
14 speaking for the Joint Association which consists
15 of the American Chemistry Council, the Fertilizer
16 Institute and the NIT League.

17 Jeff...

18 MR. MORENO: Good morning. Can you
19 hear me?

20 CHAIRMAN OBERMAN: Yes, we can hear
21 you.

22 MR. MORENO: Okay, great. I also have

1 my exhibit I'm showing up on my screen I hope you
2 can see.

3 As you just mentioned I'm testifying on
4 behalf of ACC, TFI and the NIT League, and the
5 Joint Associations have requested conditions to
6 address three merger-related concerns. Our first
7 and foremost concern is the ability of the merged
8 CP/KCS to foreclose competition in the extension
9 of bottleneck segments.

10 I'll focus my testimony today on
11 cross-border movements between KCS locations in
12 the U.S. and CP locations in Canada. Such moves
13 are most at risk of competitive harm due to the
14 extensive overlapping networks of CP and CN and
15 the existence of interswitching in Canada. Our
16 competitive concerns however are not restricted to
17 just these types of cross-border moves...

18 I have put on your screen a diagram to
19 illustrate our concerns. All moves between KCS
20 locations and Canada are interline moves today.
21 KCS, as you can see, is neutral as to whether it
22 interlines with CP or CN. And note that KCS

1 interchanges with CP and CN at different
2 locations. They do not interchange at the same
3 location.

4 Post merger, most such moves, interline
5 moves could be converted to single-line CP routes.
6 The existing neutrality of KCS would be destroyed.
7 Applicants have cited to the Board's so-called
8 one-lump precedence to argue that bottlenecks are
9 not anticompetitive. That precedent relies upon
10 economic thinking from the 1980s and '90s that
11 vertical combinations will not have
12 anticompetitive consequences because the
13 pre-merger bottleneck carrier already was in a
14 position to capture the entire monopoly profit.
15 While acknowledging that this was not an absolute
16 truism, the Board's precedent established a
17 presumption in favor of the applicants that shifted
18 the burden of proof.

19 There are several independent reasons
20 why the Board should reject applicants' reliance
21 upon the one-lump presumption in this transaction.
22 First, UP and BNSF have prevented extensive

1 economic testimony to demonstrate a shift in
2 economic thinking since the Board last applied the
3 one-lump theory over two decades ago. Most
4 notably, they demonstrate that the potential for
5 competitive harm from vertical combinations is
6 broader or greater than originally touted.

7 Second, in addition to the economic
8 testimony from UP and BNSF, the Joint
9 Associations' comments demonstrate that it is
10 unrealistic and impractical to require carload
11 shippers to rebut the one-lump presumption for
12 each individual movement.

13 The one-lump precedent was established
14 in the context of unit train movements. Unlike
15 unit train shippers, who move high volumes over
16 a few lanes and often just a single lane over the
17 course of decades, carload shippers have hundreds
18 of lanes that frequently change and have much
19 lower volumes.

20 These are exactly the same factors
21 that rendered SAC rate cases impractical for car load
22 shippers in contrast to unit train shippers. In

1 addition, the one-lump presumption requires
2 shippers to rebut it for individual movements and
3 it requires evidence based on current or past
4 experience. To account for future movements is
5 impractical if not impossible. And if
6 UP and BNSF are correct about the broader impacts
7 of vertical combinations than previously assumed,
8 the inequity of requiring carload shippers to
9 rebut the one-lump presumption for every movement
10 is exacerbated.

11 Third, the one-lump presumption only
12 considered the impact of a merger upon rates while
13 ignoring any service impacts.

14 Although applicants have promised to
15 preserve the interline alternative by keeping the
16 gateways open both physically and commercially,
17 there is no objective measure to hold them to
18 their promise to maintain commercially viable
19 gateways. Therefore the Joint Associations have
20 proposed their own measure...

21 I know that at the outset that UP and
22 BNSF also have offered their own proposals. Indeed

1 the UP proposal is very similar to our own. All
2 three proposals offer a reasonable means to
3 determine whether a gateway remains open
4 commercially post merger. Our proposal would set a
5 rate for the applicants' bottleneck segment to or
6 from the gateways for any movement for which the
7 merger of the applicants creates the opportunity
8 for longer haul on their combined network than
9 either applicant would have by itself.

10 The diagram on the screen illustrates
11 how our requested condition would establish a
12 bottleneck rate. It is critical to note that this
13 condition starts with whatever rate the applicants
14 establish for their long-haul route. They have
15 complete rate setting freedom. The only
16 constraint on the long-haul rate is the current
17 statutory rate-reasonable as constraint. The
18 per-mile long-haul rate is then multiplied by the
19 distance of the bottleneck segment to get a
20 gateway rate that can be used on the interline
21 movement.

22 Now the Joint Associations have a

1 second request for conditions to mitigate
2 merger-related service disruptions. Whether or
3 not such disruptions are likely to occur is
4 outside of the shipper control but it is the
5 shippers who will suffer the most extensive harm.
6 This fact has been demonstrated most significantly
7 in the mergers of UP/SP in 1995 and the division
8 of Conrail in 2000. Although we are not
9 predicting a recurrence of those scenarios, there
10 are ample aspects of this transaction to establish
11 sufficient reasons to be cautious. The extensive
12 trackage right over which KCS operates along the
13 Gulf Coast requires careful coordination with the
14 track owner, UP, and the co-tenant, BNSF. Both of
15 those railroads have raised concerns in this
16 proceeding that the applicants are projecting
17 additional traffic over those lines without
18 additional infrastructure.

19 The Joint Association members remember
20 all too well how Houston became the epicenter of
21 the UP/SP service meltdown in 1995 and they are
22 concerned that not be allowed to happen in this

1 case while UP, BNSF and applicants toss around
2 like a hot potato responsibility for the necessary
3 infrastructure investments.

4 Therefore the Joint Associations have
5 requested conditions that are modeled upon an
6 agreement between CN and NIT League that was part
7 of CN's acquisition of the Wisconsin Central. The
8 five pillars in the applicants' service promises
9 are fine aspirational promises but they are
10 meaningless without substantive provisions for
11 enforcement and remedies.

12 The Joint Associations third and final
13 requested condition would prevent the applicants
14 from extending CP's TIH liability, indemnity and
15 insurance tariff requirements to post-merger TIH
16 movements over the pre-merger KCS network. The
17 Joint Associations' members, some of whom have
18 submitted comments on this very subject, are
19 concerned that post merger CP will impose its more
20 onerous tariff upon movements that currently are
21 governed the KCS tariff.

22 Applicants have objected to this

1 request on three grounds: first they contend that
2 the conditions would not truly address any impact
3 of the transaction, because nothing would prevent
4 KCS from choosing to adopt terms that mirrored
5 those in CP's public tariffs. But that is beside
6 the point. KCS has not expressed any such desire
7 or intent. It is solely because of this
8 transaction that the CP tariff will be extended
9 over the KCS network.

10 Second, the applicants contend that the
11 condition would in substance freeze KCS tariff
12 terms permanently in their pre-transaction state
13 which would prevent the applicants from adapting
14 the changes and conditions bearing on the risk
15 profile of TIH shipment on the CP/KCS network.
16 This concern can be easily addressed by allowing
17 applicants to petition the Board for permission to
18 modify the KCS tariff terms upon demonstrating a
19 material change to the risk profile of TIH
20 shipments on the combined network from conditions
21 existing immediately preceding the merger
22 application. The burden of proof would be on the

1 applicants to make that showing.

2 Finally, the applicants complained that
3 TIH shippers already have the right to challenge
4 the reasonableness of the CP tariff terms which is
5 a right that will continue to exist post merger
6 and that the requested condition would supplant
7 that process with a per se rule of invalidity
8 applicable uniquely to the applicants.

9 Again, that is beside the point. But
10 for this merger, there would be no need to
11 challenge the CP tariff's applicability to TIH
12 movements over the pre-merger of KCS's network.
13 That is an unreasonable burden that applicants
14 would impose upon TIH shippers as a cost of the
15 applicant's desire to merge.

16 CP is expressly on the record as saying
17 it would not transport TIH material but for its
18 common carrier obligations. Thus there is no
19 reason to believe that TIH shippers will realize
20 most of the merger benefits that the applicants
21 have promised. Instead those shippers are facing
22 the prospect of more cost or abandoning markets

1 currently served by the KCS.

2 I thank you all for your time. That
3 covers the three conditions and I'm happy to
4 receive any questions you may have.

5 CHAIRMAN OBERMAN: Does anybody have
6 questions for Jeff?

7 MEMBER SCHULTZ: I have a question.

8 CHAIRMAN OBERMAN: Go right ahead.

9 MEMBER SCHULTZ: Hi, Jeff. I wondered
10 if you could just maybe speak to a little bit of the
11 differences between the CP indemnification terms
12 and the KCS terms. And I'm certainly not
13 expecting for you to regurgitate contractual
14 language or anything like that, but just what are
15 the, you know, 30,000 foot differences, if you
16 will.

17 MR. MORENO: Yeah, the CP terms require
18 indemnification of CP for every potential cause of
19 loss except for CP's own negligence. In addition
20 CP has a \$100M insurance procurement requirement
21 on there. Whereas the KCS tariff does not have
22 any insurance requirements, and the KCS tariff is

1 more of a -- each party is responsible for its
2 own negligence and the shipper is not made
3 responsible for acts of god or third-party
4 negligence where CP does make the shipper
5 responsible.

6 MEMBER SCHULTZ: I guess just one more
7 question. With regard to that level of additional
8 insurance to the tune of 100M, do you know of any
9 members that might have difficulty obtaining that
10 level of insurance, or is that not a concern?

11 MR. MORENO: It really depends upon the
12 individual company and the size of the company,
13 but other than that I can't say it never would not
14 necessarily.

15 In many cases, these are negotiated out
16 in contracts and to the extent that the parties
17 can agree -- in some contracts the railroad will
18 allow the member to self-insure, but it's entirely
19 at the discretion of CP.

20 MEMBER SCHULTZ: Thanks, Jeff.

21 MEMBER HEDLUND: I have a question.

22 CHAIRMAN OBERMAN: Karen, go ahead.

1 MEMBER HEDLUND: Looking at your chart,
2 this assumes that both CN and CP are serving the
3 same destination, but if KCS has customers that
4 are electing CN because they go to a different
5 destination or similar direct or for some other
6 reason, if KCS sought to foreclose CN at the gateway,
7 wouldn't they run the risk of a net loss of
8 customers?

9 MR. MORENO: Would CP run the risk of a
10 net loss of customers? Is that what you're --

11 MS. HEDLUND: No, the combined KCS/CP
12 would run the risk of a net loss of customers on
13 the former KCS segment. They might go to trucks
14 or something else because the KCS/CP line wouldn't
15 meet their requirements.

16 MR. MORENO: Well, frankly the business
17 might be lost all together. I can't see it moving
18 the trucks in most cases, because for example most
19 shipments originating in KCS are going to be in
20 the southern United States and those issuing --
21 terminating in Canada are going to be much for the
22 north of the border. So trucks aren't really

1 going to be a viable option. If anything, the
2 shipper may choose not to ship to that market at
3 all.

4 MS. HEDLUND: But that results in a
5 loss of business for the combined KCS/CP?

6 MR. MORENO: If the shipper is
7 unwilling to ship on the KCS/CP single-line route,
8 that would be the case. I'm not -- I can't think
9 of a lot of situations where that would be the
10 case, however. I think the shipper would just end
11 up being forced to use the single-line route and
12 would no longer have the competitive constraint
13 that the CN interline option currently provides.

14 MS. HEDLUND: Thank you.

15 CHAIRMAN OBERMAN: Jeff, I'm wondering
16 if you could specifically distinguish your
17 bottleneck rate from the one proposed by BN and
18 UP. Is it the same concept?

19 MR. MORENO: Compared to the one
20 proposed by UP, they're nearly identical. There's
21 much more significant differences from the one
22 proposed by BN. We could support any one of

1 those. We believe the BN proposal, the I-5 prop
2 rate would be administratively far more complex to
3 apply because BN is only proposing application of
4 its proposal on Laredo cross-border traffic whereas
5 we're seeking to apply -- we and UP are seeking to
6 apply this to all gateways where there are
7 extended bottlenecks, where the merger would
8 extend the bottleneck. So trying to apply the I-5
9 prop rate proposal at that Vienna has had to all
10 of those possible gateways would be
11 administratively more complicated than applying
12 the UP proposal or our proposal.

13 They all have the common traits that
14 they are mileage prorated proposals. So however
15 you get to the -- in our case and the UP case, the
16 starting point is the UP single-line rate quote,
17 then determine on a mileage basis what the
18 per-mile rate would be and then apply that to the
19 miles to the gateway to get the gateway rating
20 proposal, a commercially reasonable gateway rate.

21 CHAIRMAN OBERMAN: So doesn't the math
22 work out the same, whichever formula you use?

1 MR. MORENO: The math would work out
2 the same -- yeah. Yeah, the key difference
3 between our proposal and BNSF is what is the base
4 starting proposal. BNSF is using some
5 aggregation or an average of a collection of
6 rates, whereas we are basing ours simply on the
7 rate, the single-line rate the applicants have
8 proposed for the specific movement for which we're
9 calculating the gateway rate.

10 CHAIRMAN OBERMAN: Run that past me
11 again.

12 MR. MORENO: Let me -- let me try the
13 next slide and see if that helps here.

14 This is a mileage prorate illustration
15 that actually comes from one of the applicant's
16 reply. This is their illustration to try to argue
17 that our proposal constitutes a tax but I think it
18 also will help address your question.

19 Let's say, using this rate that --
20 let's use column D, as in dog. Post merger the
21 single-line rate on UP -- excuse me, on CP/KC will
22 be \$2,400. The total miles of that route are

1 3,000 miles. So you calculate that on a per-mile
2 basis you divide row two, divide it by row five,
3 and you multiply that by the miles in row six, and
4 that gives you the bottleneck rate division of
5 \$800 in this example.

6 That's all there is to it. You know
7 what the applicant's single-line rate is. It's
8 \$2,400. You apply the math and you come up with
9 the \$800.

10 CHAIRMAN OBERMAN: Well, that's
11 basically a straight pro rata -- the results in
12 the pro rata, there the bottleneck is one-third of
13 the mileage, so they pay one-third of the rate.

14 MR. MORENO: Yes, that's exactly how
15 it's intended to work, and that's how the UP
16 proposal works, as well.

17 Well, but it's, by pegging it to the market
18 rate of the single-line route, we are trying to keep
19 a market-based bottleneck rate, as well.

20 CHAIRMAN OBERMAN: Is it your -- I take
21 it your contention is, in part at least, that this
22 is a way to calculate a rate that's very objective

1 and not open to challenge. It's just pure math.

2 MR. MORENO: Yes. It's very objective,
3 it's simple to apply, so it can be applied in a
4 broad-based basis.

5 And I think it's important to keep in
6 mind here, the purpose of this remedy is to
7 preserve a viable interline competitive option to
8 constrain the applicants' ability to exploit their
9 extended bottlenecks resulting from the merger.

10 CHAIRMAN OBERMAN: But other than
11 simplicity of arithmetic, what's the economic
12 justification for this division as opposed to some
13 other division?

14 MR. MORENO: This division is pegged to
15 the actual market rate that the applicants use for
16 their single-line movement. Now, and then
17 applying this on a per-mileage basis, you ensure
18 that the applicants cannot set a bottleneck
19 division that is so high as to allow them to -- as
20 to make that interline option unviable and
21 therefore no longer a constraint upon the
22 applicants' single-line option.

1 Without that competitive threat from
2 the interline option, the applicants can use their
3 new found single-line market power to exploit
4 that, to set higher rates on the single-line route
5 that otherwise would be permissible.

6 CHAIRMAN OBERMAN: But accepting the
7 notion that there has to be some limitation in
8 terms of the bottleneck concept so that there's no
9 exploitation, and the applicants talk about rates
10 that are commercially reasonable, what is the
11 economic rationale for dividing that rate this
12 way?

13 In other words, an argument I've heard
14 is that you don't spread the cost out evenly over
15 the infrastructure that's being used this way,
16 that there is a lot more proportionate
17 infrastructure on the shorter portion of the haul
18 and the costs don't have to be spread out. So
19 this doesn't make as much -- it doesn't have as
20 much economic justification.

21 How do you respond to that?

22 MR. MORENO: Well, keeping in mind that

1 the purpose of the mileage prorate is to preserve
2 a viable interline competitive constraint on the
3 applicants' single-line service, I think we need
4 to keep in mind that, if the applicants are truly
5 creating a more efficient routing as a result of
6 this merger, the interline option is unlikely to
7 ever be used except where that route is indeed the
8 more efficient route, which is probably -- which
9 is going to be the exception, not the rule here.

10 By keeping -- by using this formula to
11 keep a viable interline option rate available,
12 this constrains the pricing on the single-line
13 rate that the applicants will have. This is akin
14 to the competition for example that shippers are
15 seeking through reciprocal switching. The
16 expectation in reciprocal switching is not that
17 most of that traffic will actually be switched due
18 to competing railroads. Rather it's the fact that
19 the competitive threat from the reciprocal switch
20 will discipline the incumbent railroad's behavior.
21 Here, preserving the viability of the interline
22 option from a pricing perspective also acts as to

1 discipline the incumbent -- the long-haul
2 railroad's behavior post merger.

3 CHAIRMAN OBERMAN: The question I'm
4 asking is I'm accepting, at least for this
5 question, the importance of preserving the option,
6 you know, the option being the force that keeps
7 the rates in line, it just strikes me that this
8 isn't the only mechanism to do that, the only way
9 to calculate the rate. It is an approach that has
10 appeal for its simplicity and lack of debate,
11 because the number is simply pro rata. But have
12 you explored any other mechanism to figure out a
13 way to divide up the rate so that it has the same
14 effect.

15 MR. MORENO: Yes, given the discussions
16 that I heard among the panelists last week, there
17 seemed to be some concerns that -- by the Board
18 members that the mileage prorate does not always
19 reflect the pre-merger division of the rate
20 between the two interline carriers. And that for
21 example, in this example, where the mileage is one
22 -- the gateway miles are one-third of the total

1 miles, yet the pre-merger division is greater than
2 one-third.

3 So, if you wanted, you could simply
4 freeze the pre-merger division ratios that have a
5 more complicated implementation, however, because
6 if you do that knowledge of those ratios will,
7 depending on the circumstances, lie solely with
8 either the railroad or with the shipper, depending
9 on how the pre-merger rate was established. So
10 that's going to almost guarantee some form of
11 litigation will be required every time one wants
12 to assess the commercial reasonableness using that
13 proposal.

14 So I'll take -- to illustrate the
15 problem, if the pre-merger rate is a joint rate,
16 which is set by the origin carrier who then
17 negotiates divisions with the connecting carrier,
18 only that origin carrier is going to know what
19 proportion its division constituted pre merger.
20 Or on the flip side, if the through rate were a
21 combination of Rule 11 rates, the shipper will
22 have negotiated those with the two individual

1 carriers separately, and only that shipper is
2 going to know what the proportionality was.

3 So if you're going to freeze the
4 pre-merger proportions, then there has to be some
5 mechanism by which both parties to the
6 transaction, post merger, are going to be able to
7 obtain the information they need to know what that
8 proportionality is, and neither is going to have
9 that ability without first bringing a case and
10 obtaining discovery. So I think it becomes a
11 recipe for overloading the STB system with
12 unnecessary litigation.

13 CHAIRMAN OBERMAN: Is that the only
14 way? Are those the only two options you can think
15 of in terms of measuring what's a rate that keeps
16 the bottleneck open?

17 MR. MORENO: Yeah. I mean, the only
18 other option that has ever even been thrown out
19 there was the notion that you have a rate
20 reasonableness case. But as you discussed
21 last week, rate reasonableness and commercially
22 open are not necessarily one in the same thing,

1 and frankly bringing a rate case is even less
2 palatable than what I just described is
3 associated with freezing the current divisions.

4 CHAIRMAN OBERMAN: All right. Well,
5 I --

6 MR. MORENO: Let me offer one other
7 thing here.

8 It's a variation of the mileage prorate
9 and it's something that was used in SAC cases
10 before the average total cost method was adopted.
11 That was what was called the modified mileage
12 prorate where the movement was broken into blocks
13 of 100 miles each and the originating carrier and
14 the terminating carrier and the interchanging
15 carriers got additional pieces of that block to
16 account for their additional cost of handling the
17 traffic at an origin or destination.

18 So that's -- that's another option the
19 STB could rely upon that it has used in past
20 cases.

21 CHAIRMAN OBERMAN: All right, well I
22 would invite you, as I have the others, in your

1 final briefing, if there are other mechanisms
2 available for us to consider, assuming we were
3 going to accept the idea that it was important you
4 put some -- you know, obviously the applicants
5 have said they would keep the bottlenecks open on
6 commercially reasonable rates and I appreciate,
7 you know, the practicality involved in entering
8 that. But if you have more thought on how to deal
9 with this, other than the strict proportional
10 rate -- and I'm not saying that's acceptable or
11 not -- but I'd like to know if there are any other
12 alternatives. You know, you'll have the chance to
13 do that in the final briefs.

14 Patrick has a question for you.

15 MEMBER FUCHS: Thank you.

16 So following up on Marty's question
17 about differences between BN, UP and shippers,
18 fair to say that in comparison to BN your
19 mechanism would apply to different categories of
20 traffic?

21 In other words, are you proposing that
22 it only apply to carload traffic?

1 MR. MORENO: I guess I'm a little
2 confused by the question. To cargo traffic as
3 opposed to --

4 MEMBER FUCHS: Carload.

5 MR. MORENO: Oh, carload traffic. Our
6 members could ship primarily in carloads. That's
7 our concern and we do think that there is a unique
8 problem when it comes to carload traffic rebutting
9 the one-lump presumption.

10 We are not proposing that unit train
11 traffic be ineligible to use this, but our members
12 are principally concerned with the carload side of
13 the equation.

14 MEMBER FUCHS: Would it only apply to
15 jointly served areas today, including jointly
16 served, as you described, by interswitching?

17 MR. MORENO: It would apply to any
18 gateway where the merger of CP and KCS extends the
19 length of all of the applicants post merger.

20 MEMBER FUCHS: Is that your way of
21 trying to exclude kind of traffic patterns that
22 were in a pre-merger state?

1 MR. MORENO: Correct. This is our way
2 of trying to ensure that this condition only
3 applies to an issue created by the merger.

4 MEMBER FUCHS: I'm sure you saw on
5 Wednesday there were a number of requests for
6 clarification about what CP's/KC's open gateway
7 pledge applies to, including, you know, whether or
8 not there were short-line carriers or whether or
9 not it applies to, you know, interswitching and
10 the like...

11 Separating out kind of the proportional
12 rate mechanism, are there other aspects of their
13 commitment to quote rates that you think deserve
14 more clarity?

15 MR. MORENO: Yeah, I can't think of an
16 issue that requires greater clarity. Our main
17 concern was just making sure there's an objective,
18 enforceable remedy.

19 MEMBER FUCHS: Okay, and then I guess
20 switching to, you know, your contentions and your
21 filings about how the Board should abandon its
22 presumption, and I think, you know, there's kind

1 of a memorable passage in your filing about, you
2 know, the Board has claimed that its experienced
3 in this area, deserves the presumption but you're
4 not sure what that experience is.

5 I guess I'm wondering, can you point to
6 some examples in past mergers that you would hold
7 up as what the Board should examine in terms of
8 past vertical foreclosure that defeats the Board's
9 previous one-lump presumption?

10 MR. MORENO: In past mergers the only
11 attempts to defeat the one-lump presumption were
12 made by unit-train coal shippers, and as a result
13 they were -- I think a lot of the points they were
14 arguing are still the valid points to be made here
15 and that is the absence -- for example, the
16 absence of perfect information is one of those
17 points. And when a shipper gets Rule 11 rates
18 from the interline carriers, the bottleneck
19 carrier does not have all the information it needs
20 over the downstream carrier to set its pricing to
21 extract that full one lump. And as I think UP's
22 witness, Professor Salop, demonstrated through

1 various analyses, that lack of information does
2 allow benefits from competition to flow-through.
3 You know, and he also demonstrated that it will
4 vary significantly from shipper to shipper, from
5 commodity to commodity.

6 And the problem I have with the
7 one-lump theory as a presumption is that it simply
8 presumes there is no loss of competition for all
9 traffic, whereas I believe Professor Salop
10 demonstrates that the loss of competition can be
11 much more widespread and it's not so easily
12 predictable as can be -- that could simply be
13 rebutted by individual shippers and individual
14 moves. And when you're looking at a carload shipment
15 who's coming in and doesn't have the volume of a
16 unit train shipper, you're essentially asking,
17 requiring that carload shipper to come in, to the
18 Board, in a merger, with every possible origin
19 destination combination and try to prove that it
20 was getting the benefits of competition prior to
21 the merger and that it will lose the benefits of
22 that competition post merger. That's a Herculean

1 task and it's one that no shipper is going to
2 undertake because the cost benefit assessment
3 there just doesn't make sense.

4 MEMBER FUCHS: Right, but I guess NOW
5 we have the benefit of hindsight in these mergers,
6 and I understand your point that it is difficult
7 to disentangle, you know, the effects. But aren't
8 there gateways and movements that you can hold up
9 as examples of a merger causing vertical
10 foreclosure?

11 MR. MORENO: There may be. I frankly
12 don't have the data. I'm not sure who does. Some
13 extensive analysis would probably have to be done
14 and that data would have to be obtained from the
15 carriers who were involved in those mergers. And
16 given that those mergers were two decades ago, I
17 think there's a significant question as to whether
18 that data even exists.

19 MEMBER FUCHS: Well, what I'm
20 struggling with is -- because you're right, there
21 was extensive analyses from the carriers
22 presented, and you all present your detailed views

1 as well. What I'm struggling with is, I didn't
2 hear from the carriers. You know, they said one
3 month is outdated thinking. Well, if it's
4 outdated thinking, then the thinking would have
5 been outdated when it was applied to previous
6 Board actions, right? And, you know, every
7 shipper situation is different and there are some
8 instances whereas the thinking might hold up and
9 there may be some that it doesn't, but I've yet
10 to hear someone come forward with an example of
11 where it didn't. I didn't hear from any of the
12 carriers that, hey, here's where we vertically
13 foreclosed a gateway. You know, and so I'm hoping
14 that -- I was hoping that you might be able to.

15 And it's not just to empirically verify
16 the claim for the sake of validating your
17 arguments. It's also for -- you know, to advance
18 potential oversight that the Board could engage
19 in, you know, tell-tell signs that there is
20 vertical foreclosure going on.

21 And so, you know, so it basically
22 serves a joint purpose. So having kind of those

1 concrete examples I think would at least -- along
2 with the metrics that demonstrate that or the data
3 that demonstrate that I think would be useful.

4 MR. MORENO: I hear what you're saying.
5 I think I agree completely that it would be
6 useful. I'm just not sure how we can ever get --
7 produce that, generate that data two decades after
8 the fact.

9 MEMBER FUCHS: Understood.

10 MR. MCBRIDE: Mr. Fuchs?

11 MEMBER FUCHS: Yes.

12 MR. MCBRIDE: This is Mr. McBride. I'm
13 wondering, even though I haven't made my
14 affirmative argument yet, if I could give you an
15 example that answers the question I think you were
16 just asking?

17 MEMBER FUCHS: That'd be great.

18 MR. MCBRIDE: So, I want to go back --
19 and by the way I'm one of the guilty parties who
20 represented the coal shippers in challenging one
21 lump theory, so I'm being consistent across the
22 decades here.

1 But in UP/CNW -- a merger most people
2 don't talk about very much -- about which preceded
3 the UP/SP merger, UP/CNW was about as
4 classical a vertical merger as you could conceive
5 of, all right; direct line from the UP to Council
6 Bluffs and then another direct line from Council
7 Bluffs to Chicago, which was the CNW. And prior
8 to the UP/CNW merger, CNW was indifferent as to
9 whether UP or BNSF brought coal to Council Bluffs
10 to then be trans-shipped on CNW up to the Sergeant
11 plant -- the utility in Iowa at the time, called
12 the Sergeant -- it's at Sergeant Bluff, Iowa.
13 That's about 90 miles north of Council Bluffs. So
14 that shipper, that utility had head-to-head
15 competition between UP and BNSF prior to the
16 UP/CNW merger. Once that merger was concluded,
17 UP/CNW foreclosed BNSF from being a competitor to
18 transport coal to that Sergeant plant.

19 MEMBER FUCHS: That's a helpful
20 example.

21 Now do you have any concerns, Mike,
22 that -- if there are indeed, you know, and whether

1 or not that example, you know, continues with
2 changes in markets and other things as, you know,
3 I don't want to hold it up as something that's,
4 you know, necessarily ongoing today without
5 knowing more about the situation...

6 Do you have any concerns -- again this
7 might not necessarily be a concern for a
8 particular shipper who is directly affected by
9 CP/KC -- but do you have any concerns about
10 applying a bottleneck rule to just one carrier
11 when other carriers might have engaged in those
12 practices?

13 In other words, do you have any
14 concerns, just from a -- you know, from the
15 Board's perspective again, you might have a
16 shipper on the CP/KC that is concerned with there
17 a lot, and that is understandable, but with
18 applying a regulatory regime just to one carrier?

19 MR. MCBRIDE: Well, I don't want to
20 intrude on Jeff's time too much here, so I'll
21 invite him to speak to this, too --

22 MEMBER FUCHS: That'd be good.

1 MR. MCBRIDE: But I don't have any
2 concern for a couple of reasons. First of all,
3 the applicants have said that they will accept any
4 administratively final conditions that you adopt.
5 Second, they seemed to concede that this vertical
6 foreclosure issue is the real issue. They have a
7 different remedy. They would have us file rate
8 cases at the Board -- which by the way is ironic
9 because they accuse us of re-regulation at page
10 109 of their reply comments when it's they are who
11 are advocating endlessly complicated regulatory
12 proceedings as a remedy -- but this is a response
13 to a particular merger which presents particular
14 foreclosure issues, especially between CP and CN
15 and Canada because of interswitching. So I think
16 -- and then you heard a lot about Mexico, of
17 course, which I won't go back into. But there's
18 some unique issues in this merger. And when I get
19 to my affirmative presentation, I'll tell you a
20 little more, but I can tell you now that FERC
21 confronted this same problem 25 or 30 years ago,
22 as you may know, when it was trying to separate

1 the pipelines from the gas production function,
2 and it adopted an affiliate trading rule to bar
3 the pipelines from favoring their affiliates. And
4 discrimination is a concept that's alive and well
5 at FERC, even though it hasn't been applied by the
6 ICC or the Board for, you know, a long time. But
7 as you heard in Mexico, for example, the Mexican
8 government has an anti-discriminatory principle.
9 So if the rates have to all be the same in Mexico,
10 then what CP/KC could do would be to vertically
11 foreclose competitors in the U.S. by allocating
12 internally, you know, the cost, as BN explained to
13 you I think on an overall joint rate.

14 So if they're quoting today \$2,000 to
15 go to a destination on UP off KCS, or a
16 destination on CP, also \$2,000, and then after the
17 merger CP/KC raises the rates in Mexico to \$1,200
18 from 1,000, and internally it sets its own rates,
19 you know, at \$800, so it's still collecting 2,000,
20 then UP is either going to have to reduce its rate
21 to \$800 or lose the business. And that's the kind
22 of affiliate discrimination that FERC prohibits,

1 and it's a model that I think you should find very
2 instructive. It's worked very, very well in the
3 pipeline industry to prevent this kind of
4 discrimination that I think the joint shippers --
5 my client has adopted Jeff's joint shipper
6 comments -- UP and BN have all said is a very real
7 problem here.

8 And our proposal by the way would also
9 avoid getting into the internal divisions. You,
10 the Board -- not you personally, but the Board --
11 fought me off in the Conrail case. I was using a
12 witness by the name of Alfred Kahn and he testified
13 that he needed the internal costing data of the
14 applicants in order to demonstrate the problems
15 with the one-lump theory. The administrative law
16 judge granted my discovery request to get that.
17 The one and only time I think in the history of
18 ICC and STB merger cases, at least that I've been
19 in over the last several decades, the Board
20 overturned that ruling by the ALJ and would not
21 allow us to get into the internal costing, and you
22 generally have been reluctant to do that . So

1 once again, I think our proposal avoids that
2 problem. The applicants' proposal would launch
3 you squarely into that internal costing problem.

4 MEMBER FUCHS: Jeff?

5 MR. MORENO: Yeah, I think Mike's
6 perspective is very helpful because it goes back
7 even to before I was in law school. But the one
8 point he does make that I think is most
9 distinguishing of this merger from nearly all
10 other mergers is Canadian interswitching. The
11 fact that most origins or destinations in Canada
12 are going to have access to two rail carriers by
13 virtue of interswitching makes the scope of this
14 harm so much broader than other transactions. The
15 one and only other transaction I can think of that
16 would have been comparable to this would have been
17 the CN/IC merger, otherwise I think this is very
18 different from BN/SF, UP/SP, Conrail, et cetera.

19 MEMBER FUCHS: It's very helpful.

20 One other question on this point, and I
21 got a couple others on different points. You all
22 seem to put forward that after the Board sets a

1 framework on proportional rates that the
2 proportional rate be enforced by arbitration.
3 Could you maybe -- is that right and could you
4 elaborate on that a little bit?

5 MR. MORENO: Yeah, we put in a
6 provision that if there should be a dispute
7 between the parties in the calculation of this
8 proportional rate that it would be resolved by
9 arbitration. Frankly, because of the mathematical
10 nature of the calculation, I find it very
11 difficult to conceive of any dispute arising, but
12 we thought it was practical to have one was in
13 case of something we didn't foresee.

14 MEMBER FUCHS: I gotcha.

15 Okay, switching gears on your two other
16 points, Jeff, first is service oversight. What do
17 you think is your top specific priority that isn't
18 in the CP/KC pledge?

19 I understand that they have kind of
20 broad goals as you describe it. What is -- what
21 is your top specific aspect of service oversight
22 that you think is thus far unaddressed.

1 MR. MORENO: Well, we -- we developed
2 our request for oversight conditions based upon an
3 agreement between CN and NIT League in the
4 CN/Wisconsin Central merger, and we did this -- we
5 basically adopted wholesale with just two
6 modifications.

7 Now the applicants haven't said whether
8 they would agree to the CN/WC concept, but they
9 have specifically objected to the two
10 modifications that -- that we had. First they
11 objected to our request to provide shippers with
12 at least 30 days prior written notice of any
13 planned service changes at shipper facilities and
14 they objected to that because it would inject
15 operational rigidity and undermine CP/KC's ability
16 to compete effectively. I think the applicants
17 have misunderstood the scope of that request to
18 change because this condition merely requires the
19 courtesy of providing 30 days notice of any
20 planned service changes at shipper facilities, not
21 anywhere else in the network, but to the shipper
22 facility itself.

1 A 30-day notice requirement for such
2 operational changes that could have such dramatic
3 effect upon a shipper's operations seems to be
4 imminently reasonable and applicants have not
5 explained why or how they would be harmed if they
6 had to provide -- had to -- could not implement
7 those changes on less than thirty days notice.

8 The second change that we made to which
9 applicants object is probably more
10 substantive because it adds teeth to the CN/WC
11 agreement that previously did not exist. The
12 applicants specifically have objected to a
13 proposed service remedy if the shipper's average
14 monthly transit time is adversely affected by the
15 transaction for more than 30 days after the
16 shipper notifies CP of that effect.

17 In the CN/WC agreement, there was
18 permissive provision that CN and each individual
19 shipper were to negotiate a sliding scale of
20 charges based on CP's post-transaction performance
21 for a shipper, relative to the base service level.
22 That was totally permissive so it wasn't really a

1 condition with any particular teeth. We're
2 proposing to make it mandatory and we think it's
3 appropriate to do so here, even though it was not
4 done in CN/WC, because this is a major
5 transaction. CN/WC was a significant transaction.
6 And ultimately a permissive condition is really no
7 condition at all.

8 So I think that kind of -- those are
9 really the two main points of contention that I
10 believe we have with the applicants with respect
11 to our condition, because the applicants don't
12 really object to the other conditions that are
13 associated with the CN/WC agreement.

14 MEMBER FUCHS: That's very helpful.
15 Thank you.

16 And then I might defer my question on
17 the liability provision because I suspect Mike's
18 going to get into it in some detail, but I might,
19 Jeff, circle back to you on that.

20 MR. MORENO: Sounds good. I'll still
21 be here.

22 CHAIRMAN OBERMAN: All right. Any

1 other questions for Jeff?

2 Okay, Michael.

3 MR. MCBRIDE: Thank you, Mr. Chairman
4 and members of the Board. I hope you can hear me
5 all right. And I very much welcome Jeff remaining
6 on. I think we serve well as a panel.

7 Let me first go to the last subject
8 that Jeff addressed affirmatively and that's this
9 HAZMAT tariff issue which some of the Board
10 members have already asked about.

11 First of all, this is a merger-related
12 issue because KCS has not changed its tariff
13 language but, as Dr. Majure testified, is expected
14 if combined CP/KC would do so.

15 So, second it's evident that KCS wants
16 to compete for HAZMAT, including chlorine, whereas
17 CP does not. And the Bayer testimony, which is
18 still part of the record and which my client, the
19 Chlorine Institute, adopted and incorporated by
20 reference in its amended comments on June 9th,
21 reflects the fact that Olin, which is the largest
22 chlorine producer in north America, and Oxy, which

1 is either second or third -- and together they
2 produce over 60% of the total chlorine supply in
3 the U.S. -- will not ship to Bayer's facility in
4 Muscatine, Iowa on the CP lines because of the CP
5 tariff but are more than willing to ship to Bayer's
6 facility in Kansas City, Missouri on the KCS lines
7 solely because of this tariff language problem.

8 So this is really an anti-competitive
9 issue and is precisely the sort of thing that you
10 are supposed to ameliorate to preserve existing
11 competition. CP as Jeff I think noted but I
12 want to emphasize said in a UP petition for
13 declaratory order docket FD35504 that it would
14 not carry hazardous material but for the common
15 carrier obligation.

16 So we know what CP is doing here. CP
17 is using its tariff language to avoid having to
18 carry HAZMAT, in contravention of its common
19 carrier obligation. That's the long and short of
20 it. They have a history obviously because of the
21 terrible tragedy up at Lac-Megantic -- there was
22 another railroad that delivered but I think the

1 crude oil originated on CP -- and CP, you know, is
2 concerned about carrying hazardous material. But
3 the fact of the matter is that they have to do so.

4 And so we would ask that you order the
5 applicants, if they're going to have one tariff,
6 as apparently they say they will, according to Dr.
7 Major, to use the KCS tariff language or words to
8 that effect. As Jeff said, if they want to
9 petition to make some changes, they can petition
10 to do so, and to do that on all the traffic.

11 And to address a point that Vice
12 Chairman Schultz asked about, Jeff answered the
13 question about differences between CP and KCS. I
14 refer you, Board Member Schultz, to the Agrium
15 complaint in NOR42145 which recites a litany of
16 problems with the CP tariff language.

17 And I want to close on this issue and
18 then move to two more by reminding you that in
19 1977 in the Radioactive Materials litigation your
20 predecessor, the ICC, held that railroads had to
21 carry hazardous materials, in that case
22 radioactive materials, because, among other

1 reasons, the rail mode is the safest mode for the
2 transportation of hazardous materials. And we
3 want you to keep it that way.

4 So we would ask you to order the merger
5 parties, if their merger is approved, to use
6 tariff language that is pro-competitive not
7 anticompetitive.

8 Let me move to this representations
9 issue briefly. It turns out, Mr. Chairman, that
10 the Board frankly deviated from its prior policy
11 on this issue in the recent CSX/Pan Am merger by
12 only holding the merger applicants to their
13 on-the-record representations. In the UP/SP
14 merger the STB ordered UP to abide by all of its
15 representations. That's in decision number
16 44, 1 S.T.B. 246 and note 14. And we know it's all the
17 representations -- even though the word "all"
18 doesn't appear there; it just says "held to its
19 representations" -- because subsequently in that
20 docket, in finance docket 32760 in decisions 106
21 and 107, G3 Enterprises and BNSF jointly
22 petitioned for enforcement of a representation

1 that UP made that they felt UP was now not abiding
2 by, and the Board entertained that petition even
3 though the representation was off the record, if
4 you will, not on the record. So an off-the-record
5 and on-the-record representations really are the
6 same in terms of the effect that they have on
7 people who may stay out of a proceeding because of
8 a representation. You should allow those people
9 to come in, even if it's years from now and say,
10 "Wait a minute. The applicants told me they
11 wouldn't do such and such to me; you know, they
12 would continue to switch or they wouldn't have
13 foreclosed me at that interchange," or whatever it
14 may be, "and so I didn't come in here and
15 participate because of that representation and now
16 they're violating it"... You really I think owe
17 it to such parties to be open, just as were to G3
18 Enterprises and BNSF and UP/SP.

19 And finally, quickly on this
20 competitive interchange issue, I hope that you
21 require the applicants to provide a list of all
22 interchanges that either CP or KCS now have with

1 other railroads and to make whatever condition you
2 adopt apply at such interchanges.

3 As I was saying in the answer to some
4 of the questions, you should not allow them to
5 favor their affiliate or themselves, if you will,
6 just as FERC does not do. And I don't think you
7 want to get into endlessly regulating these
8 so-called bottleneck rates or whatever you want to
9 call them, Mr. Chairman, which is what CP and KC
10 ironically would require you to do, whereas what
11 we're suggesting -- and I think you heard BN say
12 it -- that when BN wants to quote a shipper rate
13 under their prop rate agreement with UP, they just
14 quote the rate. They don't even have to call up
15 UP. That's a commercial solution to the problem.
16 That's a perfectly administratively simple
17 approach. As Jeff said, I don't even think it
18 would lead to any disputes before the Board
19 because I don't think there ever has been one
20 brought to the Board under the UP/BNSF prop rate
21 agreement. It's practical, and I would urge you,
22 as I think Board Member Fuchs alluded to last week

1 at one point, not to let the perfect be the enemy
2 of the good. We can quibble around the margins
3 about whether this is perfect, but our proposal I
4 think is vastly superior to a re-regulatory
5 approach like that that the applicants are
6 advocating.

7 And so with that, Mr. Chairman, I'll
8 close except I want to just add one other thing.
9 You expressed some concern that the shippers might
10 be somehow offended that they were pushed off a
11 few days in the hearing and I want to assure you
12 that we took no offense whatsoever. We were happy
13 to accommodate the Board and all your staff on
14 whatever schedule worked for you.

15 So thank you very much for allowing us
16 to appear today.

17 CHAIRMAN OBERMAN: Well, I appreciate
18 that, Michael, and I just wanted to -- I was
19 hoping that all the participants would understand
20 that we were trying to juggle complex logistics
21 and weren't trying to favor or not favor any
22 particular stakeholder.

1 A couple of questions...

2 MR. MCBRIDE: Sure.

3 CHAIRMAN OBERMAN: On the question of
4 having these whatever rules apply apply to all
5 gateways or all exchanges, you know I asked the
6 other railroads not to rely on CP/KCS but to
7 provide us with a list of every gateway they were
8 aware of.

9 MR. MCBRIDE: Right.

10 CHAIRMAN OBERMAN: I would say the same
11 to the shippers, so you don't have to rely on
12 CP/KCS getting it right, intentionally or
13 unintentionally.

14 So at least as far as your clients are
15 concerned -- that's to you, Jeff, to all
16 shippers -- if you want to make sure some gateway
17 is brought to our attention or interchange -- I
18 think the applicants went further and said any
19 place where we -- there's an interchange --

20 MR. MCBRIDE: Right.

21 CHAIRMAN OBERMAN: -- we would apply
22 this promise to, make sure we have a complete

1 list. I'd rather -- if we're going to do this,
2 I'd rather define it with precision up front
3 rather than argue ten years from now whether
4 something is a gateway.

5 MR. MCBRIDE: I don't have such a list
6 but there may be consultants who do. So we'll
7 take that under advisement. I think the railroads
8 obviously have the best information on this, and
9 if UP and BN will -- and the Norfolk Southern will
10 provide -- and CN will provide these interchanges,
11 that might be the most efficient way to do it.

12 CHAIRMAN OBERMAN: Yeah, I thought so.
13 I'm sorry.

14 MR. MORENO: Mr. Chairman, I would just
15 add, I think the standard, the definition that we
16 had proposed avoids even needing to develop a
17 list. If the applicants get a longer haul as a
18 result of the merger than they had pre-merger,
19 then whatever interchange they went over that
20 grants that longer haul by definition becomes
21 applicable or subject to this condition.

22 CHAIRMAN OBERMAN: That may be right.

1 I'm just, in the interest of minimizing
2 definitions and disputes, people should feel free
3 to make sure we have everything they think should
4 be covered.

5 Michael, one other question I had for
6 you is, I'm not sure I understand what you're
7 referring to in an off-the-record representation.

8 MR. MCBRIDE: Sure.

9 CHAIRMAN OBERMAN: How would such a
10 representation come into existence?

11 MR. MCBRIDE: Sure. Great question.

12 If you go back and look at decision
13 number 106 and decision number 107 in the UP/SP
14 docket, finance docket 32760, what happened there
15 is that a railroad that you may recall came back
16 to the Board on another matter relatively recently
17 called the MET, or the Modesto and Electric
18 Traction Railroad I think is the name of it, and
19 their president wrote to the president of the
20 UP merger -- UP/SP merger was pending -- and
21 said that he had heard a lot of concerns that
22 a combined UP/SP was going to foreclose switching

1 in the MET switching district in and around
2 Modesto. And that was a private letter, off the
3 record, and he got an off-the-record reply from a
4 VP of UP saying, "Oh, no, we're not going to do
5 that." And then several years later when G3
6 Enterprises sought to have BN provide service to
7 it through switching on the MET, UP suddenly said,
8 "We're not going to abide by that."

9 Now in fairness to UP, the letter back
10 from UP referred to companies by name, including
11 Procter and Gamble, and the Procter and Gamble
12 facility was sold to G3, and that's where G3
13 thought it had the rights to switch at the same
14 facility and UP took the position that the
15 representation was limited to the name of the
16 company...

17 The merits of that dispute are not
18 what's so critical. The point is, Mr. Chairman,
19 there was an off-the-record representation made by
20 UP that G3 and BNSF later sought to enforce before
21 the Board and the Board had no difficulty
22 whatsoever in entertaining the pleadings on that

1 dispute, held oral argument about it and resolved
2 it on the merits and didn't say, "Oh, that was off
3 the record so you're not entitled to come in here
4 and seek relief."

5 CHAIRMAN OBERMAN: My recollection --
6 don't hold me to this; I don't have the Pan Am
7 decision in front of me -- is that we didn't
8 qualify where the representations were made. We
9 said something about all representations, as I
10 recall. But maybe it's the lawyer and not the
11 railroader in me, but I am troubled generating
12 litigation decades from now about something that's
13 so-called off the record.

14 I would think if any stakeholder --
15 shipper, short line anybody or other railroad --
16 has a representation that's been made to them that
17 has led them to either not oppose or be
18 comfortable with this transaction, they should put
19 it on the record, so there isn't -- so we don't
20 generate unnecessary litigation in the future or
21 we don't have the kind of definitional problems,
22 Michael, that you were talking about. Because it

1 sounds to me like what led to that dispute was a
2 letter that was written by two laymen and not by a
3 lawyer anticipating future name changes or
4 corporate transactions and so forth.

5 So I would prefer -- I'm not prejudging
6 how we might write a decision here if we approve
7 the merger -- that anybody who is relying on
8 anything, let's get it out front, because also it
9 could relate to our view of the public interest
10 and so forth.

11 MR. MCBRIDE: Well, I hear you. First
12 of all, I actually argued this same point in the
13 CSX/Pan Am merger. I argued for treating
14 on-the-record and off-the-record representations
15 the same. And as I read your decision you limited
16 the condition to on-the-record representations,
17 and I think your --

18 CHAIRMAN OBERMAN: You may be right. I
19 don't remember debating this issue in that case or
20 anybody bringing it to our attention. Maybe you
21 did and I somehow was asleep at the switch. I
22 don't recall. But it just -- you know, that's why

1 we have the record, so everybody knows what
2 everybody said, what they promised.

3 MR. MCBRIDE: Well, I think if you go
4 back and look at your decision there in the
5 CSX/Pan Am case, you'll see in the appendix where
6 you summarized parties' positions that I did in
7 fact make the argument that it should apply to
8 both on-the-record and off-the-record. The Board
9 acknowledged that. But in the decision itself it
10 appears limited to only on-the-record. And maybe
11 it's shame on me, Mr. Chairman, because I didn't
12 ask for argument time in CSX/Pan Am, but I thought
13 among other things, because of this issue, and
14 because this is a departure from what the Board
15 did in UP/SP, as I indicated earlier in decision
16 number one -- decision number 44, 1 S.T.B. at 246 and note
17 14, I think you really need to confront the fact
18 that you have two lines of precedent now.

19 And finally on your point, Mr.
20 Chairman, that you would prefer everybody to come
21 in and be on the record about these things, I
22 understand, you know, and if I were in your

1 position I might see the temptation, but the fact
2 of the matter is, Mr. Chairman, that there are a
3 lot of people out there who do not want to raise
4 their head and come in to the STB if they don't
5 feel they have to. Now, if they get a letter from
6 a vice president of a Class 1 railroad that says,
7 "Don't worry, we're not going to foreclose
8 switching in Modesto," they think they can rely on
9 that. And those kinds of representations get made
10 all the time in this business. And you know very
11 well, I think Mr. Chairman, you've heard it from a
12 lot of shippers, they just don't want to have to
13 make a litigation matter or raise a dispute at the
14 Board if they don't feel it's necessary.

15 So I think that's the unfortunate
16 reality, is that people are reluctant to come to
17 you until and unless they feel they have to.

18 CHAIRMAN OBERMAN: Well, all I would
19 say is since I entered the railroads world at
20 Metra some years ago I found it remarkable as a
21 practicing attorney how many major economic --
22 economically important decisions rest on a

1 handshake. You know, most of the time people are
2 honorable and handshakes work, but if everybody
3 was a saint they wouldn't need you and me, right?

4 MR. MCBRIDE: Or at least you.

5 CHAIRMAN OBERMAN: So, you know, I just
6 think it's better if people put things on the
7 record. But I hear what you're saying and, you
8 know, we'll take it up, assuming we get to that
9 point in this case where we talked about
10 conditions. But it just troubles me to have some
11 kind of open up -- open --

12 You know, for example, would an oral
13 representation be something we'd hold people to?
14 How would you ever prove it?

15 MR. MCBRIDE: Well, that's the point.

16 CHAIRMAN OBERMAN: Do we have to write
17 out what kind of off-the-record representations
18 we'll enforce versus those we won't? Is email
19 good enough. I mean, you know, you've got a -- it
20 just gets very murky in my way of thinking as a
21 lawyer.

22 MR. MCBRIDE: I understand, but I think

1 you're conflating two things. The last point you
2 just made is about proof. What is sufficient for
3 the shipper who wants to come in for relief or the
4 other railroad to prove their case?

5 In the case of G3 and BNSF that I
6 mentioned to you that litigated in decisions 106
7 and 107, they had the paper. They had the letters
8 back and forth. There was no issue about what the
9 representations were. If the shipper wants to do
10 this orally, they take the chance they're never
11 going to prove it.

12 But the other thing you're conflating
13 here, Mr. Chairman, I think is that merger
14 conditions are permanent. You have before you a
15 dispute, for example, involving Valero, UP, BNSF
16 and KCS. I think somebody mentioned last week
17 generally referring to that that it's been going
18 on for more than ten years. That's unfortunate but
19 the fact of the matter is these merger conditions
20 are permanent and whether it's on the record or
21 off the record or whatever it may be, the doors
22 have to remain open even decades from now to

1 enforce these conditions.

2 CHAIRMAN OBERMAN: Well, you know, I'm
3 not adverse to the notion of always trying to do
4 -- to implement fairness and justice between
5 conflicting parties. But there are rules, you
6 know, going back to the Statute of Frauds in
7 England, where the question wasn't whether you
8 could prove it; the question was whether everybody
9 was protected in some way that prohibited people
10 making phony claims or claims that might be
11 meritorious which otherwise couldn't -- couldn't
12 enforce, and of course there are a million
13 exceptions now to the Statute of Frauds. But the
14 policy and the philosophy has been around our
15 legal system for hundreds of years and it just --
16 it just troubles me, as I said, troubles the
17 lawyer in me -- maybe I should think more like a
18 railroader -- but that's another subject that I
19 actually should save for a different speech.

20 MR. MCBRIDE: Let me just make this one
21 last point. You can limit it to written
22 representations including emails instead of oral.

1 You know, that -- that would -- that would be
2 something you could think about, because at least
3 you wouldn't have the proof problems.

4 CHAIRMAN OBERMAN: Well, by the way, I
5 understand that reluctance -- I've heard it
6 repeatedly since I got to the Board -- of shippers
7 and other stakeholders to bring their problems to
8 us for fear of retaliation. If CP or KCS has sat
9 down and said, "We will make this representation
10 to you," it's hard for me to imagine that they'd
11 have trouble putting that in the record, because
12 if they wanted to penalize a shipper who got a
13 promise for putting something in the record, that
14 would lead me to think they have no intention of
15 carrying it out.

16 MR. MCBRIDE: Well, if this were --

17 CHAIRMAN OBERMAN: But they would not
18 be deterred I would think under these
19 circumstances. They don't have to open up a
20 separate litigation. They just have to inform us
21 that, "This is a promise that was made to me and
22 that's why you haven't heard from me or I'm not

1 objecting or I'm supporting it".

2 MR. MCBRIDE: Well, look at it the
3 other way, Mr. Chairman, and I hear you. But
4 here's the situation that often comes up...

5 Just like in the UP/SP situation, when
6 the president of the MET railroad wrote to the
7 president of the UP, UP apparently wanted to keep
8 the correspondence off the record, because it
9 probably didn't want to invite all kinds of
10 disputes elsewhere on the system along the same
11 lines. So it limited its representation to what
12 the switching situation would be in Modesto. And
13 I think the applicants actually have an interest
14 in not having all of their representations on the
15 record for that reason.

16 MEMBER FUCHS: Well, Marty?

17 CHAIRMAN OBERMAN: Yeah, go ahead,
18 Patrick.

19 MEMBER FUCHS: On this narrow
20 follow-up -- on this point, just a narrow
21 follow-up.

22 You know, one of the things that I

1 struggle with, and I think you alluded to it,
2 Marty, about obligation to uphold the public
3 interest, is that if we don't see the
4 representation and we in effect order it, we don't
5 really know if the representation is in the public
6 interest.

7 Some representations may well affect
8 other shippers and may well affect other entities.
9 In a crazy hypothetical, imagine if applicants
10 committed to a chlorine shipper that they will
11 sideline Amtrak trains so the chlorine shipper can
12 have better service. You know, that might be
13 something that the Board may not agree with,
14 especially given preference law, but yet we would
15 in effect order such representation.

16 Now that's not the type of
17 representation CP/KCS is giving, but that just --
18 you know, it's a hypothetical to say that some of
19 these things can have effects on others and I am a
20 bit uncomfortable ordering things that I don't
21 know the contents of.

22 So I just want you to respond to that,

1 Mike.

2 MR. MCBRIDE: Well, yeah, thank you,
3 Patrick. I appreciate that.

4 I would take you back to the UP/SP
5 situation. The applicants are not going to make
6 some crazy representation first of all, like I
7 think you've just acknowledged. But in any event
8 let's assume that there is some representation
9 that you think is contrary to public policy, and
10 it's off the record and, you know, the president
11 of XYZ Railroad or shipper gets a -- writes a
12 letter and they get a letter back, or an email
13 exchange, whatever it may be, and then years from now
14 the combined CP/KC is not abide abiding by that...
15 they would have to come in and petition to enforce
16 the representation. And you would have it in your
17 power to say, "Wait a minute. We weren't aware of
18 this, and that's contrary to public policy and
19 we're not going to do this".

20 So you get the final say in whether to
21 grant the petition for enforcement. So as I said
22 earlier, the shipper or railroad would have to put

1 on their proof. They would have the burden of
2 proof. If they persuaded you that they proved the
3 representation occurred, that it was contrary to
4 public policy, then I think you'd be within your
5 rights of saying, "We can't enforce that under the
6 statute".

7 CHAIRMAN OBERMAN: Michael, I have a
8 real problem with that. I really do.

9 We enter an order that says all
10 representations must be enforced; ten years from
11 now we said, "Oh, we changed our mind. We don't
12 -- now that we know what it is," it may or may not
13 be -- you know, that could be in the eye of the
14 beholder. It isn't so obvious. Patrick puts
15 forward a very good hypothetical but there are an
16 unlimited number of permutations and combinations.

17 I'm having a problem with it but, you
18 know, I'll take a look at it, speaking for myself.
19 I don't know about the other Board members. But
20 to say that we're going to enforce all
21 representations and then say, no, but we're
22 telling you it's not worth the paper or the

1 promise it's written on because we may change our
2 minds when you come in to enforce it, that doesn't
3 strike me as advancing the cause. And you say
4 that we don't expect people to make crazy
5 promises. I no longer have confidence in the lack
6 of craziness out there in the world with what's
7 been going on in the last few years. So to make
8 open-ended commitments strikes me as a little
9 risky.

10 MR. MCBRIDE: Well, this is precisely
11 what the Board did do in UP/SP, was to tell UP/SP
12 that they were going to have to abide by all their
13 representations, and then a dispute arose over
14 what the representation was, and G3 and BN lost.

15 So, you know, if you want to qualify it
16 by saying all representations that are consistent
17 with the public -- with the public good or public
18 interest, do that, because you are the final
19 arbiter. I have every confidence that the Board
20 will be fair if somebody comes before you and
21 proves a representation, but if you decide it's
22 not in the public interest, then, just like other

1 things people are asking you to do right now,
2 you're not going to abide by if they're not in the
3 public interest.

4 CHAIRMAN OBERMAN: All right. Patrick,
5 did you have anything further on this? I had a --
6 I want to --

7 MEMBER FUCHS: No, Marty, please.
8 Thank you for allowing me to interrupt.

9 CHAIRMAN OBERMAN: Yeah, no, no, it's
10 fine.

11 I actually wanted to shift gears,
12 Michael, if you don't mind. I have a question for
13 Jeff which I did not ask him about.

14 Jeff, could you -- we've had a lot of
15 discussion about the NIT League agreement at the
16 Tex/Mex acquisition, which is different as I
17 understand it from what you're asking for now.

18 Could you shed some light on what that
19 agreement was in terms of the bottleneck and why
20 it's not adequate at this point, or why you
21 think it's inadequate.

22 MR. MCBRIDE: Jeff, you're on mute.

1 MR. MORENO: Yeah, sorry about that.

2 I am not personally familiar with the
3 Tex-Mex agreement involving NIT League. I was not
4 involved -- I was not representing NIT League in
5 that particular situation. I was not involved in
6 the negotiations at that time. So I'm just afraid
7 I can't answer your question.

8 CHAIRMAN OBERMAN: All right, well I
9 would be interested, since you're the only person
10 speaking for NIT League in these proceedings, I
11 think -- I don't think they have appeared on their
12 own -- perhaps in your final briefing you could
13 ask NIT League to address that, because it's come
14 up several times and I am not aware of NIT League
15 coming in and regretting whatever agreement they
16 made or any of the other shippers who were relying
17 on them. Maybe they do now but I think it would
18 been enlightening to the Board to hear, you know,
19 the pros and cons of that -- that arrangement.

20 MR. MORENO: I will go back and consult
21 with Karen Booth on that and see what -- what we
22 may have in that record.

1 CHAIRMAN OBERMAN: Okay.

2 All right. Are there any other
3 questions for Michael or Jeff.

4 MEMBER FUCHS: I have one on the
5 liability provision.

6 CHAIRMAN OBERMAN: Patrick, go ahead.

7 MEMBER FUCHS: Yes. I have two parts:
8 one is one is wondering if you can respond to the
9 argument of -- that CP makes, which is well their
10 provision hasn't been found illegal, therefore,
11 and I suspect you may say, "Well, it doesn't
12 necessarily mean it's in the public interest," but
13 I would like you to respond to it.

14 But then the second part is, what does
15 a public interest analysis even look like for such
16 provision?

17 MR. MCBRIDE: So let me take a crack
18 first, if that's all right with Jeff, and he can
19 follow up.

20 That is first of all, there is a
21 history here, Board Member Fuchs, that you may be
22 aware of -- you seem to be aware of a lot of

1 things, so I'll bet you're aware of this, too --
2 and that is in the finance docket 677 and also in
3 677(1) the railroad industry came to the Board in
4 about 2007 or eight following the Graniteville,
5 South Carolina accident, you know, in which some
6 people lost their lives and lots of people were
7 hospitalized and said, "We want you to give us the
8 authority in our tariffs to be able to say, "We're
9 not going to carry chlorine or anhydrous ammonia,
10 or whatever -- whatever it is that they didn't
11 want to carry, and they said it was because they
12 could be facing a \$5B liability in such an
13 accident. That was the testimony before the Board
14 of the then general counsel of UP.

15 Needless to say, the chemical industry,
16 as well as the coal industry and others -- why coal,
17 because we use chemicals for pollution control.
18 We use anhydrous ammonia for that and even
19 use chlorine for water purification.
20 So a lot of industries push that, most notably the
21 American Chemistry Council, whose president
22 appeared, argued ferociously against allowing the

1 railroads to do that, saying it would go back on
2 -- on the, you know, unbroken law that requires
3 the railroads under the common carrier obligation
4 to carry and not be able to pick and choose or
5 foreclose what they'll carry in their tariffs.

6 And then -- so the Board decided to
7 close those proceedings without taking any action
8 as the railroads had requested.

9 Then UP in FD 35504 filed a petition for
10 declaratory order for approval of some discreet
11 tariff changes that it wanted to make, including
12 with respect to insurance, and the Board issued a
13 merits decision, said, "No, we're not going to
14 grant that relief". And then that's when CP took
15 matters into its own hands, took the law into its
16 own hands, if you will, and adopted the tariff
17 provisions that you now have before you. And
18 Agrium filed a complaint and the Agrium complaint
19 in NOR42145, as I recall, is the really thorough,
20 comprehensive analysis of how illegal the CP
21 tariff is. And CP and Agrium then settled so the
22 Board didn't have to rule on the merits.

1 But I would suggest to you, going back
2 to my first cases involving the railroads about
3 radioactive materials, the railroads have to carry
4 hazardous materials that are tendered to them in
5 compliance with all governmental obligations and
6 regulations. As long as the shipper tenders the
7 shipment in conformance with the provisions of FRA
8 or FINSA or whatever agency, including the Nuclear
9 Regulatory Commission, it may be, if the shipper's
10 shipment is in compliance, the railroads have to
11 carry. And what CP is doing here quite obviously
12 is using this HAZMAT tariff to avoid its common
13 carrier obligation, which KCS is not doing.

14 So is it illegal? Yes, it is. It just
15 hasn't been adjudicated precisely on the terms of
16 this tariff yet, but all of the cases I just
17 recited to you I think line up to say they have a
18 common carrier obligation and they're trying to
19 evade it.

20 MEMBER FUCHS: Thank you.

21 MR. MORENO: Yeah, I would add, it's
22 quite clear in the Board's precedent that Mike

1 has referred to that TIH materials are critical
2 for the public interest, and the transportation
3 of TIH materials by rail is far more preferable
4 than the alternative of transporting by truck,
5 from a public interest perspective.

6 And we have testimony in this
7 proceeding from shippers -- I believe Oxy was one
8 of them -- who pointed out that they won't ship to
9 certain locations in CP, and now we're talking
10 about expanding the impact of that CP tariff to
11 the KCS lines and potentially impacting the
12 ability and willingness to ship to an even broader
13 section of the public TIH materials.

14 So I think there's -- and the fact that
15 CP has specifically said it would not ship TIH
16 materials but for the common carrier obligation
17 certainly brings -- raises suspect to their
18 motives in their current tariff and the impacts
19 that it is having on a competitive basis, too.
20 Because the pro-competitive effects of this merger
21 are not likely to be realized by TIH shippers. In
22 fact it's going to likely be anticompetitive with

1 respect to the TIH shippers for that reason.

2 MR. MCBRIDE: Yeah, and one other
3 thing, Mr. Fuchs. Yes, it's not only Oxy but it's
4 Olin that Jeff is referring to as companies that
5 said it they wouldn't shift. And I wanted to
6 remind you that the Department of Agriculture and
7 the wheat growers association, among others, are
8 also in support of our views on this.

9 MEMBER FUCHS: Wondering if -- and you
10 all basically proposed to do the KCS tech, right?

11 MR. MCBRIDE: Yes.

12 MEMBER FUCHS: Okay, wondering if that
13 locks CP/KC into a structure that may well become
14 outdated some day, for whatever reason. You know,
15 I imagine that these tariffs don't stay constant
16 over 30 years. And wondering if -- and not urging
17 or suggesting you all or CP/KC -- but I'm
18 wondering how would you respond to changing market
19 dynamics and whether or not that leads one to
20 conclude that some sort of transition period would
21 be more appropriate.

22 MR. MCBRIDE: Well, I think Jeff

1 already made mention of the fact that this tariff
2 has been there for a while and it was I think
3 essentially the same tariff that Agrium complained
4 about. So sometimes these tariffs do stay rather
5 static, Mr. Fuchs, for the very reason that CP is
6 trying to avoid carrying these materials, so they
7 don't feel a need to make any changes.

8 But to take your question fairly and to
9 say, "Okay, what if in the future something
10 changed," Jeff also made the point -- which I
11 agree with; I just didn't repeat it -- that let
12 them come in and file a petition, just like UP did
13 in finance docket 35504, or in this docket itself
14 and say, "You know, the world has changed and we
15 need to change our tariff and here is why," and be
16 very up front about it and say, "We're willing to
17 carry these materials but we need you to approve
18 the following changes". You know, if there's an
19 insurance requirement at all, it shouldn't be
20 \$100M, but maybe it's \$1M, or whatever it may be.
21 And now maybe they'd come in five years from now
22 and say it should be \$2M. You know, something

1 like that I think, you know, you should leave the
2 door open to allow them to come in if they do
3 claim circumstances have changed.

4 MEMBER FUCHS: Thank you.

5 CHAIRMAN OBERMAN: All right. Any
6 further questions for these two witnesses?

7 (Hearing none.)

8 CHAIRMAN OBERMAN: Michael and Jeff, as
9 usual, you do a lot of homework. You enlighten
10 us. Much appreciated. And, as I said on the
11 things we asked questions about, if you want to
12 submit further ideas or argument in your final
13 briefs, obviously that's why they're here.

14 MR. MCBRIDE: Thank you very much for
15 all the time and attention, members of the Board.

16 CHAIRMAN OBERMAN: Thank you. Thank
17 you.

18 All right, surprisingly that is the
19 list of witnesses for today's session. We will
20 recess until tomorrow morning at 9:30 Eastern on
21 this same channel, and if -- I would say if Mayor
22 Ellis from Monroe, Louisiana, who I know has been

1 patiently trying to testify to us on several
2 different days, is available we will certainly fit
3 him into tomorrow's schedule whenever he's
4 available.

5 Otherwise we will begin first thing
6 with Panel D, 9:30 Eastern. Thank you all. We
7 will recess until then.

8 (Whereupon at 3:43 p.m. the hearing
9 stood in recess until Tuesday, October 4, at 9:30
10 a.m.)

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1 CERTIFICATE OF NOTARY PUBLIC

2 I, KIM M. BRANTLEY, C.S.R., the officer
3 before whom the foregoing hearing was taken, do
4 hereby, certify that the proceedings were taken by
5 me in stenotype and thereafter reduced to
6 typewriting under my direction; that said hearing
7 is a true record of the proceedings; that I am
8 neither counsel for, related to, nor employed by
9 any of the parties to the action in which this
10 hearing was taken; and, further, that I am not a
11 relative or employee of any counsel or attorney
12 employed by the parties hereto, nor financially or
13 otherwise interested in the outcome of this
14 action.

15

16

17 _____
18 KIM M. BRANTLEY, C.S.R.
19 Notary Public in and for
20 the District of Columbia

21

22

My commission expires: October 31, 2024

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