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June 23, 2023
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Date: May 10, 2023

Case: Decision - Docket No. NOR 42178



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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42178

HEARING ON NAVAJO TRANSITIONAL ENERGY COMPANY, LLC-EX

PARTE PETITION FOR EMERGENCY SERVICE ORDER

PUBLIC HEARING

Wednesday, May 10, 2023

9:30 a.m.

James E. Webb Memorial Auditorium of the National
Aeronautics and Space Administration

300 E Street, S.W.

Washington, D.C.

Board Members:

Martin Oberman-Chairman

Michelle Schultz

Patrick Fuchs

Robert Primus

Karen Hedlund

1 Participants:
2 Timothy Strafford BNSF
3 Anthony LaRocca BNSF
4 Andrew Kolesar NTEC
5 Frank Pergolizzi NTEC
6 Daniel Jaffe NTEC
7 Adam Weiskittel BNSF
8 Vern Lund NTEC
9 Matt Babcock NTEC
10 Tim McLaughlin NTEC
11 Farah Lawler BNSF
12 Matthew Garland BNSF

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

2 9:45 a.m.

3 CHAIRMAN OBERMAN: We are going to go on
4 the record. Good morning. Welcome everybody. I
5 have a few preliminary matters to cover, and then
6 we're going to get right into it. First of all the
7 Board had asked in setting this hearing, not only for
8 the attorneys to be present, but for each party to
9 bring with you representatives of your clients who
10 have actual knowledge of factual matters to be able
11 to answer questions, and I see there are a number of
12 people here, and in a moment we'll ask you to
13 identify yourself for the record.

14 But I'm sure you all had to travel from
15 some distance, and the Board appreciates the fact
16 that you have responded to our requests, and that
17 you're here. This is a oral argument on the ex
18 parte petition for emergency service and/or temporary
19 injunction, filed by Navajo Transitional Energy
20 Company against BNSF, Docket Number NOR 42178.

21 This session is open to the public, but it
22 is not being, as we have tried to do in prior

1 hearings before this Board in the last couple of
2 years, it is not being streamed for the reason that
3 we anticipate that during the hearing there will be
4 references to what one party or the other may contend
5 is confidential, or proprietary information.

6 And we have found in the past,
7 particularly in the Gulf Coast hearing, that every
8 time a reference to the confidential information was
9 made, there was about a 10 minute loss of time while
10 the electronic forces figured out how to separate
11 people out there in the ether.

12 And this hearing is going to be one day,
13 and it's going to end today at 3:30. And we didn't
14 want to lose all of that time. So it is a public
15 hearing, and the public and media, and anybody else
16 are invited to be here. But if and when we get to
17 confidential or proprietary information, we'll simply
18 ask the people who are not authorized to witness it,
19 to step out of the room.

20 And I would ask, I think we did ask
21 informally, for counsel to, before we start, identify
22 all of the people who are allowed to be in the room,

1 and have them sit in some identifiable place, so that
2 we can then say easily, if you're not in one of the
3 expensive seats please step out. So have you done
4 that? Are all your people in the front row here? Is
5 that fair to say?

6 So, and the second row? So could all the
7 people who are allowed to stay in for confidential
8 information raise your hand, so I have a sense of
9 where you are? Okay. So, I think we have an easy
10 facilitation.

11 MR. STRAFFORD: Mr. Chairman?

12 CHAIRMAN OBERMAN: Yes.

13 MR. STRAFFORD: Just to clarify. We're
14 talking about confidential information. Mr.
15 Chairman, to clarify, when we're talking about
16 confidential information you've identified
17 information that is both NTEC's information, or
18 BNSF's information, is confidential, and so
19 representatives from NTEC and BNSF could stay in that
20 conversation.

21 There is a possibility that we could
22 identify highly confidential information, and that

1 would be limited to outside counsel, or outside
2 consultants.

3 CHAIRMAN OBERMAN: When we get there raise
4 the issue.

5 MR. STRAFFORD: Absolutely.

6 CHAIRMAN OBERMAN: We do have a court
7 reporter. This matter will be fully transcribed, and
8 before it is posted for public consumption, there
9 will obviously be a process for redactions in which
10 you all have some opportunity to weigh in on
11 proposed redactions. We'll take care of that, staff,
12 and we'll work with you after the hearing to take
13 care of that.

14 I want to address how I think we ought to
15 handle the exchange of information here most
16 expeditiously. I anticipate, based on my own
17 preparation, and discussions I've had with
18 individual Board members, that there will be -- that
19 the Board has a lot of questions about what's in the
20 record. That's one of the reasons why we are having
21 the hearing, and you both submitted at our direction
22 supplemental filings, which we appreciate, by the

1 way.

2 There was a lot more information there
3 than in the initial filings, but there's still
4 questions. This is not, for counsel familiar with
5 our procedures, a hearing on the record under the
6 statute, there's not sworn testimony and
7 cross-examination. However, I do anticipate that
8 when a Board member has a question, there may be many
9 times when counsel can answer the question, which
10 would be fine.

11 But I anticipate it's very likely that
12 there will be times when the representative of the
13 client really it's going to be more complex, and you
14 don't want to get into a game of telephone tag and
15 whispering to counsel, and then whispering back and
16 forth. So, I would anticipate that it would be more,
17 and we'll facilitate completing the hearing if member
18 or the client just addresses the Board directly.

19 If that happens, we had other hearings
20 like this. The Board is going to assume that if a
21 member of one of the parties addresses this Board as
22 an official government agency, that whatever they say

1 is material that the Board can rely on in evaluating
2 how to dispose of this matter. If the opposing -- if
3 a representative from one party says something that
4 the other party says well that's not correct, you'll
5 have an opportunity for your person to address the
6 Board, and say well so and so said X, we think it's
7 not X.

8 In addition, because it's possible,
9 although you all seem to be fairly well prepared,
10 that a member, a client of a party may say something
11 to the Board that you weren't anticipating. At the
12 end of the day if you feel the need for it, we'll set
13 a very short time for you to file some verified
14 statement, or some document saying no, no, what we
15 heard at the hearing is not the case.

16 So, you'll have a chance to simultaneously
17 rebut anything that came out of the hearing that you
18 think was a surprise. I can't think of a better
19 procedure for us to get the facts that the Board
20 believes it needs to get to, to resolve this matter
21 one way or the other. And so, that is my suggested
22 procedure.

1 I do want to ask counsel if any of you
2 have an objection to proceeding in that fashion
3 today?

4 MR. STRAFFORD: No sir.

5 CHAIRMAN OBERMAN: Okay. Well one zero.
6 All right. Well I do think it will be an expeditious
7 way to proceed with this matter. So, as I have said
8 at the pre-trial, we're going to give NTEC a chance
9 to open their presentation. We're going to allow 45
10 minutes for a presentation, and 45 minutes to BN, and
11 then some time for rebuttal.

12 I anticipate analogous to an appellate
13 argument, you're not going to get through your 45
14 minutes without questions, so we're not going to hold
15 you to the strict 45 minutes. But in order, that's
16 why we've allowed the hearing for roughly five and a
17 half, six hours. But we are going to get done today.

18 So, feel free to make whatever
19 presentation you want. We'll try to let you at least
20 finish your thought. I can't guarantee it before we
21 butt in, and that could apply to any of us. So, and
22 we will aim for a lunch break somewhere around 12:30.

1 Obviously, if anybody needs a -- and we'll take a
2 break or two in between then. We're not going to sit
3 here for three hours uninterruptedly, but if anybody
4 needs a break just say so. This is not a, you know,
5 star chamber.

6 We're going to be professional about it.
7 So with that, does anybody from the Board want to add
8 anything? Okay. Mr. Jaffe are you the opening
9 person here?

10 MR. JAFFE: Indeed I am. Thank you Mr.
11 Chairman.

12 CHAIRMAN OBERMAN: All right. Proceed.

13 MR. JAFFEE: Thank you Mr. Chairman,
14 Members of the Board. Mr. Chairman, you did ask at
15 the outset here for us to identify who amongst our
16 NTEC personnel have -- are here today, so before I
17 get into the crux of our argument, I'd like to take a
18 minute and let you know whose here and ready to
19 answer your questions.

20 So, to my left here is Mr. Vern Lund, who
21 is the CEO of NTEC, and as you know he submitted a
22 short statement in the supplemental filing of last

1 Friday, and he's, you know, prepared to answer
2 questions related to that, as well as the operations
3 of NTEC generally, and recent visits that he's made
4 to Asia.

5 And then just next to Mr. Lund, we have
6 Mr. Babcock, who is the Vice President of Sales and
7 Marketing for NTEC. And as you know, he has
8 submitted two verified statements in this proceeding
9 as obviously ready, willing and able to answer what
10 will probably be many questions for him about that.

11 And then to his left we have Mr. Tim
12 McLaughlin, who is the Chairman of the board at NTEC,
13 their Board of Directors, and was instrumental in the
14 creation of NTEC, and their long-term vision and
15 strategy is available to, you know, answer some
16 questions if he absolutely needs to. We relate it to
17 sort of who is NTEC, what is NTEC, what do they do.

18 And then my co-counsel Mr. Pergolizzi, is
19 also here. And then I'm really pleased, members of
20 the Board.

21 CHAIRMAN OBERMAN: I just want to say your
22 full name for the record too?

1 MR. JAFFE: Oh yes. My name is Dan Jaffe.
2 I'm from the Law Firm of Slover and Loftus here on
3 behalf of NTEC. But most importantly, members of the
4 Board, I just wanted to tell you that, and to stress
5 to Board and really to BNSF too, how important this
6 issue is to NTEC. We are very pleased to say that
7 today we are joined by the President of the great
8 Navajo Nation, President Nygren, who is kindly here
9 today, at least for a little while before he has many
10 meetings that he'll be off to around Washington.

11 CHAIRMAN OBERMAN: Can I ask you to give
12 us the spelling of the name, because the transcript
13 will need that.

14 MR. JAFFE: Yes. I have it. It's
15 N-Y-G-R-E-N.

16 CHAIRMAN OBERMAN: Thank you.

17 MR. JAFFE: So, we can lay this out pretty
18 straightforward I believe. We're here today because
19 NTEC needs the Board's help. You know through our
20 filings that we have come to ask for an emergency
21 service order, and that service order request, 29
22 trains in June of 2023, obviously for next month.

1 And at this point obviously, since it's an emergency
2 service order, and the initial time is 30 days,
3 that's the time period it covers.

4 Alternatively, we've asked potentially for
5 injunctive relief. We believe that at least for the
6 for purposes of today's hearing, it's certainly an
7 emergency service order that will get this into a
8 proper position where at least to the extent that
9 we're considering further complaint, that we can
10 start moving on that as well.

11 But the bottom line is BNSF's service to
12 NTEC has declined significantly over the past 14
13 months. And in our view, you know, that creates
14 under the statute, a failure of traffic movement that
15 results in emergency situations. That's plainly
16 having an adverse effect on NTEC. And I would say to
17 the Board, the public, I mean not only is NTEC in a
18 meaningful and direct way the public. It's
19 contemplated.

20 But the truth is, is you've seen three
21 other filings come in since we provided the
22 supplemental filing on Friday, from three other

1 shippers in this corridor. And the themes of those
2 filings are exactly the same, which is they are
3 deeply concerned about the service they're receiving,
4 the service they will receive, and how BNSF is
5 approaching the service that they're getting.

6 CHAIRMAN OBERMAN: Do you want to identify
7 the three?

8 MR. JAFFE: Sure. I'm happy to do that.
9 So, that was Global, which is the signal peak mine.
10 Yesterday late we had a filing from Arch, and then we
11 also had a filing from it would have been coal coming
12 from the Absaloka mine, which is a property of the
13 Crow Nation.

14 And when you look at our filing, or even
15 the other folks' filing, what you see is the same,
16 which is BNSF has decided how they are going to serve
17 the traffic in this lane. They have decided all of
18 the resources that they are going to apply to it,
19 and they have decided for better or for worse, that
20 they will pick the winners and losers in this market.

21 And we have submitted, and I believe it's
22 plain, is that BNSF's common carrier obligation here

1 is not one in which substantial reductions in service
2 are an acceptable position to be in month after month
3 after month after month, when there is a known
4 market that requires its service.

5 But even before that because the Board did
6 ask additional questions about really what happened
7 in 2020, when we go back to that we see that NTEC had
8 a contractor in that period, and the same thing
9 happened. So while BNSF has made some arguments here
10 about how it would like contract shippers to be
11 treated, versus common carrier shippers to be
12 treated, the truth is, is it doesn't really matter
13 what you have in the form of an agreement or an
14 arrangement with BNSF, they conduct the traffic the
15 way they see fit at the time.

16 And their motives, whatever they may be,
17 are irrelevant to the sense that we have here a
18 reasonable common carrier request, and it's not being
19 fulfilled. So, we believe we've met the
20 requirements for either an emergency service order,
21 or an injunction, frankly, as Mr. Lund and Mr.
22 Babcock explained in significant detail in their

1 filings about the irreparable harms that NTEC
2 believes it is facing, as well as all of the other
3 service issues that have gone on, and all of the
4 process that they've been through to try to come to
5 an arrangement with BNSF, to right the ship, and we
6 haven't gotten there.

7 And interestingly, and I think critically
8 really for the Board, is that you know, BNSF's
9 filings, statements, et cetera that they have
10 presented to you in this case, they really
11 conclusively prove why the Board should grant NTEC's
12 request here because when you look at it, BNSF admits
13 that it has the sole discretion to determine its
14 common carrier obligation to NTEC.

15 Now, you say obviously on Friday they've
16 come back and say well wait a minute, wait a minute,
17 we think we took that language out, but as I'll
18 explain if we had time, the truth is they haven't
19 done that. They provided a supplemental update to
20 the price, which coincidentally was another four
21 percent on top of a rate that was already right at
22 the jurisdictional threshold.

1 But in addition, when you look through it,
2 it's self-evident that it didn't cancel the primary
3 tariff. It certainly didn't cancel the sole
4 discretion language, and as a practical matter, and
5 in fact, well I could put a slide up. I'll put it
6 up a little later, but what we have is we went back
7 and did a little poking around with respect to the
8 arguments that they made that this was just some
9 contract holdover.

10 And the truth is that's all discretion
11 language that we had in our 2022 contract, which was
12 incorporated, and we have in our tariff. It's in
13 BNSF's primary coal tariff 90068. It's right there,
14 the current version 2023, 2022 version, and the
15 version we found going all the way back to 2008.

16 So, it's not new, it's not some random
17 holdover, and indeed additional research indicated
18 that there are at least two other tariffs that we
19 uncovered that also have the same language in it for
20 coal shippers.

21 CHAIRMAN OBERMAN: Could you elaborate? I
22 didn't follow in your brief, or in your filing, what

1 your contention is that the replaced version of the
2 tariff for NTEC.

3 MR. JAFFE: Yeah.

4 CHAIRMAN OBERMAN: You contend even though
5 the words aren't in the replacement, they didn't
6 effectively remove the words. I didn't follow your
7 argument on that. Could you elaborate on it?

8 MR. JAFFE: Absolutely. So, the primary
9 tariff that they publish for us on December 29, 2022
10 for the service that we are in right now, has the
11 sole discretion language in it, okay. And then at
12 the end of March here they presented an updated rate
13 sheet to us, which we included in our filing.

14 And in the rate sheet there are a couple
15 of things that are in there. One, it never
16 explicitly cancels any other form of the tariff, and
17 as is required by the regulations, you have to
18 notify the recipient of any material changes that you
19 made to the tariff. It doesn't cancel those. And
20 indeed, there's a change index, and that is not one
21 of the changes.

22 So that was the point that we were making

1 there that it hasn't been removed. Now --

2 CHAIRMAN OBERMAN: Do you contend that the
3 removal of the language doesn't sufficiently notify
4 you that there's been a change. Is that your
5 argument?

6 MR. JAFFE: Correct, because if you look
7 at the document itself you can see there are a
8 variety of -- there's a few boilerplate items, but
9 when you compare it to the original item, you could
10 see that the original item is far more complete, and
11 is more consistent with the common carrier request
12 that we made. And in addition, as I say, when you
13 look at a change index, that's not one of the changes
14 they list. The change they list is --

15 CHAIRMAN OBERMAN: Well is it really worth
16 arguing about it in their papers in this case? I
17 would regard their statement that that language is
18 not in there as a judicial admission that it's not in
19 there, at least as of now. Maybe, on March 27, but
20 why are we still arguing about it, they're contending
21 the language.

22 I have some questions about that language

1 for BN, but on the question of whether it's there or
2 not, they still have not. Isn't that binding on them
3 at this point?

4 MR. JAFFE: Well, one would hope that it's
5 binding, but of course they can change these terms on
6 20 days-notice.

7 CHAIRMAN OBERMAN: Well that's different.
8 They could change that.

9 MR. JAFFE: So that's a problem.

10 CHAIRMAN OBERMAN: But even if they sent
11 you the papers you think they should send, they could
12 still change it on 20 days-notice.

13 MR. JAFFE: Of course. Of course. We
14 continue of course, to say it's an unreasonable
15 practice doing so.

16 CHAIRMAN OBERMAN: That's a separate
17 issue.

18 MR. JAFFE: Sure. Okay. But in any
19 event, regardless of the words, the actions are the
20 same. The actions are exactly the same, whether the
21 sole discretion language is in there or not, they
22 made it plain through the balance of the filings that

1 they will act in their sole discretion as to how to
2 handle this traffic, how to prioritize this traffic,
3 and where any given shipper will be in the pecking
4 order on any given day.

5 Which of course, on a day to day basis
6 sure, you can figure that out. You've got to figure
7 that out, but as a practical matter what they've said
8 here to the Board is the common carrier obligation is
9 one that we'll get to it when we get to it. So, in
10 addition to all of that, BNSF's filings effectively
11 admit our point that they're openly discriminating
12 against NTEC's traffic.

13 They did it in 2022, even when we had a
14 contract, and they're doing it again. And indeed,
15 there's an implication in the Arch filing that they
16 may have experienced the same situation last year
17 under their whatever common carrier tariff they had,
18 which I haven't seen, so I can't comment in any
19 detail, but it only came in last night.

20 But obviously, there is an implication in
21 that filing as well. BNSF also admits, frankly, that
22 the approach that they took suggesting that we have

1 -- are asking for a lot of extra service. And it
2 isn't really what we've done because in the
3 supplemental filing, BNSF recognizes that if you use
4 the 2022 figures, for our traffic, sure it looks like
5 maybe we want more service than we might otherwise
6 have expected under our common carrier request.

7 However, they also acknowledge effectively
8 that that is a benchmark that they have selected that
9 they admit. NTEC may not be in agreement with, and
10 therefore it is, you know, once again a take on it
11 that is very narrow and specific to BNSF's view of
12 its appropriate service obligation, which they say
13 was 2022 numbers. And obviously --

14 CHAIRMAN OBERMAN: Let me ask you a
15 question.

16 MR. JAFFE: Sure.

17 CHAIRMAN OBERMAN: I don't hear BN
18 conceding that they breached their 2022 contract, but
19 I do see letters, do I not, from BN, and other
20 testimony from your side saying they acknowledge they
21 weren't providing the service that they thought they
22 should be providing, you requested.

1 So there's some acknowledgement of that
2 without getting into the concession that they've
3 breached the contract. Is that an accurate statement
4 as you understand BN's interaction with your
5 clients?

6 MR. JAFFE: Yes. And indeed, I think if
7 you were to ask Mr. Babcock, and I might invite him
8 to talk to you about this. There was a line on the
9 calendar in which the information and approach and
10 statements from BNSF changed from yeah, you know,
11 we're not meeting your goals. We're really, you
12 know, we're trying to work on it maybe in the third
13 quarter, or fourth quarter we'll do a little better.

14 Incidentally that's the same thing we just
15 heard in the most recent statement that maybe in the
16 third quarter or the fourth quarter we'll do a little
17 better, so that's another year gone by. But in April
18 and early May of 2022, that position completely
19 changed from yeah, we're not doing that well, to but
20 we don't have any obligation.

21 And so, you know, the tenure and tone
22 change. And really, you know, and we believe, and in

1 many respects that's how we got here at this point
2 because it was laid out in stark words for them where
3 they stood. And incidentally, those words came, you
4 know, straight from the top, from you know, the
5 President or the CEO, and the CMO of BNSF, directly
6 to the two gentlemen who are sitting to my left.

7 And so, regardless, you know, BNSF also
8 effectively admits that, you know, it can and should,
9 will, pick the winners and losers in the market.
10 Most disturbingly to us, they've also shown that
11 they're going to pit shippers against each other. I
12 think obviously, they have made a claim here.

13 We have a limited resource. If I help one
14 person, I can't help another person. But at some
15 point that's not practical. If, as a common carrier,
16 it's not a situation where the you know, total
17 production that you can make available, total service
18 that you can make available can be, you know, forever
19 constrained, or restrained, especially in the
20 instances where the decisions as to how to approach
21 that were ones that we're choosing.

22 I mean BNSF points out itself that the

1 service issues that it says it's having are its own,
2 or were generated on its own. There are not any
3 major significant external forces. True, there is an
4 uptick in the export coal market, okay. But they've
5 known about that for some time. They've dealt with
6 it for some time. They went quite hard in 2021. And
7 in fact, in 2022 they still did because, and here
8 maybe if we can get the slides up.

9 I don't know if I can just follow them.
10 I'm not sure. Well, if you go to our first slide, I
11 think you'd have some copies of that I hope. Oh very
12 good, thank you. So, you know, if you look at our
13 first slide here you can see that, you know, our
14 numbers went down significantly in 2022.

15 But if you go forward, and I think I can
16 do this now. Can I?

17 CHAIRMAN OBERMAN: What is that 2016
18 drop-off about?

19 MR. JAFFE: I'll let Mr. Babcock answer
20 you on that one.

21 MR. BABCOCK: Yeah. In 2016 we saw a
22 significant decline in energy demand, and it was a

1 market cycle. We had a very strong super cycle. It
2 was occurring globally for energy, really started to
3 cool down, and we had significant over supply.
4 Producers globally were making too much fuel, too
5 much energy, and as well we had the decline, a sharp
6 decline in energy demand.

7 So we reached out to the BNSF We reached
8 out to our business partners in Asia, made sure that
9 there were no obligations that we would miss, or that
10 we would fail to provide. Our business partners in
11 Asia felt confident that they had the energy that
12 they needed to keep the lights on, and keep their
13 power plants running, so it was a mutual decision
14 that we had with our business partners.

15 We made an arrangement with the BNSF to be
16 able to temporarily exit the market until it came
17 back, but it was a mutual decision. We all got
18 together and decided that was the best thing for the
19 business.

20 CHAIRMAN OBERMAN: All right. But Dan, do
21 you have hard copies of these slides because we can't
22 -- I don't think any Board member -- well let me say

1 this. I have new glasses, but I can't read that in
2 the back.

3 MR. JAFFE: I hear you. Well I don't have
4 -- I did not bring a whole stack of these. So if we
5 can we'll get those. But let me just say I only
6 wanted to point out one thing on here, frankly, which
7 is that in the one chart I have up there on the
8 right what it shows is that the green bar is a 6
9 percent increase from the total number of export
10 trains from January through the comparison of 2021,
11 2022, January through August.

12 CHAIRMAN OBERMAN: Of 2022?

13 MR. JAFFE: Right. So I'm sorry, yeah
14 that's correct. 2021 volumes are on the left, and
15 2022 is on the right. And what it shows there, sorry
16 -- what it shows there is that for that time period
17 there was a 6 percent increase in the total number of
18 trains, but NTEC's volume of trains went down 30
19 percent, so that's all I was showing there.

20 And incidentally, the reason why it's
21 January through August is that Westshore had a
22 strike in September, so the numbers are hard to level

1 up.

2 CHAIRMAN OBERMAN: Well what's the red
3 bar?

4 MR. JAFFE: The red bar is the other
5 non-NTEC track. So where we're down 30 percent,
6 they're up 31 percent I think it is, for other
7 non-NTEC traffic in that time period. So as I was
8 saying though in terms of the sort of pitting other
9 shippers against each other, you know, it was very
10 disturbing to us, frankly, to read the filings from
11 other shippers because what you see is that everyone
12 is afraid.

13 And being afraid is nowhere to be with
14 your common carrier because, and I think all of you
15 can appreciate this. That you know, they are a
16 significant form of utility to the commerce of the
17 United States, and not just this business, but
18 certainly, absolutely key to this business,
19 especially since they also control the cars that run
20 on this lane.

21 And if I might sort of draw a parallel, if
22 I were your electric utility, and I said to you well,

1 you know, for 2022 in your important industrial plant
2 that I've known about for years, we might be
3 flickering the lights a little bit. And on the other
4 hand if you don't want us to flicker the lights, we'd
5 like you to sign a contract that says please don't
6 flicker my lights, except, and you can see in the
7 contract drafts that we've provided to you as
8 exhibits in the supplemental.

9 If I still flicker the lights there's
10 really no consequence for me flickering the lights.
11 And I sort of draw this box as well, which is that if
12 we had imagined for a moment there were no service
13 issue in 2022, but NTEC and BNSF hadn't agreed on
14 commercial terms for a new contract. If we had then
15 said well, we'd really like to go with common carrier
16 because we think the rates you're offering exceed the
17 maximum reasonableness, maybe we want to go to the
18 STB, and challenge them.

19 If I had come in three months after that
20 and said geez' you know, we didn't reach a deal with
21 BNSF, but they just cut my service by 40 percent, you
22 would be scratching your head, and we would too. So,

1 the position that BNSF has put all of these shippers
2 in, not just us, but we're the ones who are here, is
3 that you know, there is a real concern that there
4 will be no way to plan your business, no way to
5 execute that business, and there will be millions of
6 dollars in revenues lost, irreparable harms to
7 relationships, and quite frankly, and I think Mr.
8 McLaughlin can get into this if need be, you know,
9 how this affects the Navajo Nation directly and
10 indirectly, so there are some real consequences.

11 CHAIRMAN OBERMAN: Aren't the other three
12 filers just saying don't grant NTEC's request,
13 because that will decrease our service. If NTEC goes
14 away then they're not uncertain. That's the way I
15 read it. Is that wrong?

16 MR. JAFFE: I disagree in one respect,
17 which is they say in there while I'm worried that if
18 NTEC gets some trains, I won't get those trains. But
19 the truth is that they may not get the trains anyway.

20 CHAIRMAN OBERMAN: But they're not saying
21 that?

22 MR. JAFFE: They're not saying at this

1 minute because they may know what next month looks
2 like, or the month after, but as NTEC learned
3 directly, having an arrangement doesn't mean that
4 that's how it's going to go. And they had an
5 arrangement. They were shipping coal, and then they
6 weren't. And so, I think everyone has the same fear,
7 they're just concerned that it may go one way or the
8 other.

9 And while I understand BNSF's concern that
10 you know, it could be complicated, and you know, if
11 the Board gives the service order, it might make it
12 more complicated. Well, those are the inevitable
13 results of not having, you know, committed your
14 resources and having extended periods of a less than
15 adequate service.

16 And so, and also I'd say that to the
17 extent that anyone is worried on the flip side I'd
18 say, you know, at the moment we've asked for an
19 emergency service order, and an injunction for a
20 defined period of time, at least for the moment. So,
21 I mean there isn't this notion that there might be a
22 few more trains here or there, that might completely

1 throw everything off is a little bit of a difficult
2 pill to swallow, indeed looking at BNSF's filing
3 that they presented in the supplemental, and looking
4 at Mr. Garland's statement for example.

5 It reads like, you know, we're actively
6 working to get things done there, but there isn't
7 anything in there that suggests point blank that, you
8 know, a few more trains here, automatically means
9 somebody else's trains are reduced, or you know,
10 availability of crew in Everett doesn't mean that
11 there isn't an availability of crew in Spokane, or
12 somewhere else.

13 It's troubling in a lot of ways for us
14 because again, NTEC doesn't know how to plan their
15 business if that's where things are. So the other
16 thing that is really, really hard to deal with here
17 besides sort of pitting everyone against each other,
18 is that you know, in the end BNSF, you know, admits
19 that it's effectively, that it's really not
20 necessarily providing the common carrier service that
21 we are expecting, and apparently from Arch's filing
22 not the common carrier service they were expecting

1 last year either.

2 And yeah, BNSF makes it clear that it will
3 gladly sign up anybody else to ship on this route.
4 And I would say that we agreed that there ought to be
5 availability for people who want to participate in
6 this market. But at the same time, it's also clear
7 that you can't make contract commitments endlessly
8 that inhibit your ability to provide common carrier
9 service. I mean it's there in the statute.

10 So, you know, I think on that perspective
11 we think that's pretty straightforward. BNSF, you
12 know, also admits it still hasn't figured out its
13 service issues, and it sounds like they probably
14 won't have them figured out any time soon. And you
15 know, BNSF effectively admits that anyone that won't
16 acquiesce to their particular form of contract,
17 price, or service terms, you know, can effectively be
18 de-marketed.

19 And really, and perhaps most egregiously
20 is that no matter which way you do it with them
21 there's no consequences when they don't bring the
22 service because all of the forms that they have now

1 effectively insulate them from, you know, any
2 consequences based on the way they have either their
3 contract set up, or their common carrier tariffs,
4 unless -- and this is a big one, unless the sharp eye
5 of the Board or a court is upon them.

6 But most shippers are not in that
7 position, or are too afraid because without BNSF, or
8 any other carrier who is probably their sole provider
9 for bulk commodities anyway, it's very dangerous.
10 And one last thing I'll just add. You know, BNSF's
11 omissions also speak as loudly as their words because
12 in the end BNSF has yet to suggest any consistent
13 level of service that it actually thinks they can
14 provide to NTEC.

15 And there's nothing in there that has it,
16 that suggests that. They still offer no real defense
17 of sole discretion, whether it's in or out.

18 CHAIRMAN OBERMAN: Let me ask you a
19 question. What level -- what number of trains per
20 month, in your client's contention the common carrier
21 obligation requires BN to provide?

22 MR. JAFFE: Sure. Well that's an

1 excellent question, and I think I would like to
2 actually ask Mr. Babcock to talk to you a little bit
3 about that, not from the legal perspective, but from
4 the fact perspective.

5 CHAIRMAN OBERMAN: Well I would like both.

6 MR. JAFFE: Sure.

7 CHAIRMAN OBERMAN: Because the facts are
8 important. The facts make the law. We were all
9 taught, but I have to have some idea of what the law
10 is in your view.

11 MR. JAFFE: Of course. Sure.

12 CHAIRMAN OBERMAN: You proceed the way you
13 want to proceed.

14 MR. JAFFE: I'll let Matt tell you a
15 little bit about how we'd have -- how we got to the
16 29 train number because I think that's very important
17 in understanding why that's in there. I don't think
18 your microphone is on.

19 MR. BABCOCK: No. I think -- did I turn it
20 on yeah. Obviously, it's the energy market is a
21 market with a lot of participants, and you have to
22 take a look at both the supply and demand side, and

1 calculate what it is that you -- how you can
2 participate, how you can compete, and so that's the
3 first element as we're taking a look at what our
4 customers are demanding, both in the short-term
5 opportunities as well as the long-term.

6 And so, the numbers we've constructed have
7 you know, aligned with that 29 to 30 train count per
8 month, but we also have a configuration of vessels,
9 when we look at vessels we have 10 to 12 trains to
10 hit a cape size vessel, which is a very large vessel,
11 and about five to six trains to be able to fully load
12 a panamax vessel.

13 So you look at our outlook for the months
14 ahead. We know that we have demand in the
15 international markets, and the sea borne market, it's
16 about a billion tons a year that traded in that
17 market. So we know we have the demand there, and
18 then we look to align that with the configuration of
19 vessels that we can align to load at the port in any
20 given month, so it's not just a, you know, look, you
21 know.

22 CHAIRMAN OBERMAN: You're answering the

1 question of what the market wants you to sell. My
2 question is vis-a-vis the railroad, what is the
3 common carrier obligation, if you have the
4 contention, to me it's a legal question, although
5 fact based.

6 MR. BABCOCK: Sure. I defer to Dan on
7 that.

8 CHAIRMAN OBERMAN: Suppose the demand were
9 10 billion tons a year, and you needed 1,000 trains a
10 month? I mean does the common carrier obligation
11 require that? That's what I'm trying to get at.

12 MR. JAFFE: Sure. Of course. I
13 understand. As you know Mr. Chairman the question of
14 that is a factor one. A fact-driven question, right?
15 It has to be a reasonable request, and we believe
16 that the request that we have made is entirely
17 consistent with the standards in the sense that one,
18 this is service that we have received in the past.

19 Two, it is generally consistent with all
20 of the information that was provided to BNSF on
21 November 1, 2022, when we made the request for a
22 common carrier rate. It details exactly what tons we

1 were looking to move. BNSF asked no further
2 questions, made no objections, and eventually
3 published -- first gave us a rate on November 14, and
4 then published the full common carrier tariff on
5 December 29th.

6 And we believe that currently, anyway,
7 that based on the traffic levels that were within the
8 realm of history, obviously as Matt has mentioned,
9 the market's very sum, from year to year, but no
10 surprises to the volumes, and Mr. Babcock can explain
11 in addition to that, that you know, this is a market
12 that NTEC, and its prior owner of the Spring Creek
13 mine, Cloud Peak, had been developing for more than
14 15 years to come to these numbers that we have, to
15 make it a competitive force in the export market
16 coming from Spring Creek, and ultimately Signal Peak
17 followed along with them as well.

18 And so, these volumes are no surprise, no
19 shock, and they are consistent with the reasonable
20 request that we had made. And of course --

21 CHAIRMAN OBERMAN: Well let me ask you
22 this question. You've talked about the market

1 informing how many trains you need. Does the
2 capacity of the railroad to move the trains relate to
3 whether your request is reasonable?

4 MR. JAFFE: There of course, is some
5 element that would make a request potentially
6 unreasonable. And by that you gave the perfect
7 example. What if I said I need 1,000 trains? Well,
8 you know, that's not reasonable in the sense that for
9 several reasons.

10 One, there's no context for that number
11 whatsoever, right? Two, it is inconsistent with the
12 resources and services that the shipper already knows
13 to be available, but at the same time we believe that
14 it has to be a reasonable request, and a request that
15 is consistent with your long-term traffic patterns,
16 and the long-term plans that have been expressed to
17 the carrier, and to which the carrier has not
18 objected is one that is reasonable.

19 CHAIRMAN OBERMAN: Let me just pursue this
20 just for a minute, just so I could finish this line
21 of questioning, and actually Robert and Karen had a
22 question, and I'll shift to you because I want to

1 ferret out to the extent of where this goes. So,
2 you seem to be saying Dan, a couple of things.

3 One is the reasonableness of the request
4 can be judged at least in part on the history of the
5 relationship?

6 MR. JAFFE: Yes.

7 CHAIRMAN OBERMAN: So, it doesn't -- I
8 don't think it's the facts of this case, but if you
9 had a brand new shipper who never shipped before we
10 wouldn't be able to look at that factor to decide
11 what the common carrier obligation requires because
12 there wouldn't be a history.

13 You know, one of the reasons why I'm
14 asking this question, and I think this case presents
15 a challenge to the Board to figure out in a case
16 specific situation what the common carrier requires,
17 and there is not a lot of case law on this, which is
18 one of the reasons of this oral argument to try to
19 ferret what it means and how we're supposed to make
20 a determination of whether it's been complied with in
21 this case.

22 The second thing you said is that BN

1 didn't object. Let's assume they concede that point
2 for sake of discussion. If you had asked for a
3 thousand trains a month, and BN had thrown your
4 request in the waste basket and said I'm not even
5 going to talk to these folks, that wouldn't be an
6 objection either if communicated to you, but it
7 wouldn't immediately bring in a thousand trains a
8 month as a requirement for the common carrier.

9 So it can't -- it seems to me that the
10 failure to object by itself determined that it's
11 okay.

12 MR. JAFFE: Oh, I think the failure to
13 object is extremely important Mr. Chairman.

14 CHAIRMAN OBERMAN: Is it determinative in
15 your view?

16 MR. JAFFE: Well it wouldn't be 100
17 percent determinative for one reason, that operating
18 circumstances could always change after somebody
19 publishes its point.

20 CHAIRMAN OBERMAN: Assuming constant, and
21 there's no blizzards and so forth, just talking about
22 the fundamental capacity of the railroad. In your

1 view the failure to object may not be the sole
2 factor, but it's a powerful factor. Is that what
3 you're telling us?

4 MR. JAFFE: It's certainly a powerful
5 factor, and indeed historically we have seen when
6 certain common carrier requests were made to BNSF, in
7 particular, when a shipper was looking to ship, when
8 a contract was about to expire for example. So,
9 let's say we had a contract that was going to expire
10 December 31, and in you know, August the shipper came
11 and said I'd like a common carrier rate for January
12 1, we're involved in a case with BNSF where they
13 wouldn't do that.

14 They said they wouldn't, and if you recall
15 to the Court of Appeals, and so on, the Court of
16 Appeals even agreed. They don't have to give it to
17 you too far in advance and so on, but the notion of
18 objecting is certainly there. And in this case I
19 might add, I think there's probably a good reason why
20 they really didn't object anyway, which is this
21 really wasn't new or different.

22 We moved it from one box to another box,

1 the volume of service that we had asked for for 2022
2 was the same buying service we asked for in 2023, and
3 I don't know if BNSF gave it a lot of consideration,
4 or didn't, but it's certainly the case.

5 CHAIRMAN OBERMAN: Well I'd like to get
6 into that, but to just take your answer to a step
7 further, supposed you had said we want 29 trains a
8 month, and they said we object.

9 MR. JAFFE: Right.

10 CHAIRMAN OBERMAN: Your average, your
11 actual average was 25 over the last number of years.
12 We object to anything more than 25. Is that
13 sufficient then to lower the common carrier
14 obligation to 25?

15 MR. JAFFE: Well so, I think the way that
16 would go would be as follows since they have the
17 unfettered power to at least in the first instance
18 establish the rates and service terms that they are
19 willing to offer, that's entirely in their
20 discretion. If they have detected it and come back
21 and said we'll give you 25, and published it, we
22 would have had two choices at that point.

1 We could have said yeah, you know, okay
2 we're going to proceed, and if we could get more
3 that's great, and if we can't well they offered what
4 they offered, or we could have come to the Board and
5 said we don't think that the rates and service terms
6 that they published are reasonable.

7 CHAIRMAN OBERMAN: Well, but you're not
8 answering my question. My question is how many
9 trains given the facts here, did the common carrier
10 obligation require, and you said, well when you
11 asked for 29 they didn't object, and 29 was not
12 inconsistent with the history, that made 29 the
13 number required. That's the way I took your answer.

14 Now I'm asking if they did object, and
15 they said well the actual average was only 25. Let's
16 assume, I haven't added them up, but let's assume
17 that. As a matter of law. That's what I'm trying
18 to get at here.

19 MR. JAFFE: No. I understand your point.

20 CHAIRMAN OBERMAN: Does that mean that the
21 common carrier obligation now only requires 25 trains
22 because they objected? You're putting a lot of

1 weight on the objection, and I'm trying to ferret
2 out how far that goes.

3 MR. JAFFE: My answer to that is no. My
4 answer is it not conclusive. If they object and say
5 25 it's not conclusive as to what the common carrier
6 obligation is.

7 CHAIRMAN OBERMAN: And if they don't
8 object it's also not conclusive?

9 MR. JAFFE: Correct.

10 CHAIRMAN OBERMAN: It's just a factor for
11 us to take into account.

12 MR. JAFFE: Well yes, and let me add to
13 that right now in particular, since we're here on a
14 more narrow question about relief for a temporary
15 period of time, some of the questions you're asking
16 are short of the existential common carrier
17 questions, that can also be fully addressed and
18 briefed in the complaint case.

19 CHAIRMAN OBERMAN: They can but on the
20 injunction side we have to decide the likelihood of
21 success.

22 MR. JAFFE: Correct.

1 CHAIRMAN OBERMAN: And therefore, we have
2 to get into what the legal duties these folks have
3 that we may hold them to. Let me shift over because
4 Karen had a question, and then Robert, and then you
5 can go back to your presentation. Karen, I'm sorry?

6 VICE CHAIRMAN HEDLUND: Going to your
7 chart it would appear that in 2020, 2021 and 2022,
8 what's going on here is that some of the shipments to
9 you have been allocated by BNSF to other carriers.
10 Assuming, for say argument, and we'll get into this
11 later with BNSF that they have limited capacity.

12 On what basis should consistent with the
13 common carrier obligations should BNSF be allocating
14 its resources among its customers? You have said
15 they're picking winners and losers. I think we'll
16 get into later as to maybe what the actual basis of
17 that is, but I just want your view as to how the
18 common carrier obligation bears on the obligation of
19 the carrier when they have limited, some kind of
20 limit on their resources?

21 MR. JAFFE: Sure. Well, as a practical
22 matter, some of the older cases that are out there

1 when things were more heavily regulated had
2 allocation schemes in particular. But the general
3 notion is that there is supposed to be some fairness
4 if you must allocate in a time of constrained
5 resources.

6 But, I have to say that I understand your
7 question, Commissioner Hedlund, but the premise is
8 problematic for me because we are not necessarily
9 looking at a situation where the constraints
10 described would prohibit BNSF from providing the
11 service to NTEC, or effectively providing the service
12 that they may or may not have committed to since I
13 don't have them in front of me, other shippers.

14 And, I think that that narrative is
15 troubling to me because if we accept the premise that
16 these constraints are all encompassing, or are
17 unsolvable or unworkable, then we have a problem
18 where the railroad will remain sort of forever in
19 charge of the economics of all of the market
20 participants.

21 And BNSF's issues that they described
22 themselves, are internal issues, and not external

1 issues. And I'll just give one example. There's a
2 discussion in here about availability of appropriate
3 coal sets to put into service. First, I'll say that
4 I'll speak for Matt here just for a moment while I
5 let him talk about it, that in prior conversations
6 sets had never been a big discussion with BNSF.

7 Occasionally, they did mention the crew
8 issue last year. But just by way of example Matt's
9 team is getting regular calls about, "Do you want to
10 take a coal set from us?" Because domestic market is
11 slumped a bit, due to lower natural gas prices, and
12 there are multiple market participants who are
13 offering coal cars to them, and I assume the same
14 were available to BNSF if that were one of their
15 constraints. Matt do you want to?

16 CHAIRMAN OBERMAN: When you say
17 occasionally can you put a number on that?

18 MR. BABCOCK: We've been evaluating other
19 alternatives. Obviously, we've noted in some of our
20 statements that we're looking at the Canadian Pacific
21 route to get to Westshore as well. So, really over
22 the you know, during this period we've stayed very

1 close in touch with both people who lease railcars,
2 as well as our customers.

3 You know, we ship over 50 million tons per
4 year, and our customers have significant amounts of
5 rail sets as well as what the BNSF uses to provide
6 railcar service. So we have a good finger on that
7 pulse in understanding what rail sets are available,
8 and we've had a couple of leases that we've been
9 evaluating over the last couple of months here to use
10 for some other lanes, as well as in the CP service as
11 well.

12 So the railcars seem to be available. And
13 I know BN will address their thoughts on their own
14 railcar pool, but we certainly see railcars available
15 if we were to go private.

16 CHAIRMAN OBERMAN: Were you told by BN you
17 needed more sets last year?

18 MR. BABCOCK: Last year really the
19 communication was that the constrained point was
20 crews, it was people. It was getting people hired.

21 CHAIRMAN OBERMAN: So you didn't -- you
22 weren't out looking for train sets last year?

1 MR. BABCOCK: No.

2 CHAIRMAN OBERMAN: Okay.

3 MR. BABCOCK: We offered to do that, but
4 no, last year we weren't actively looking to --

5 MR. LUND: We offered that
6 in 2022, and we were told that that's wasn't an
7 issue.

8 MR. JAFFE: And I'll add to that. I can
9 tell you that these are all -- BNSF commits its own
10 sets to this service for all the shippers. There are
11 no private cars that I'm aware of in this service.
12 That's correct.

13 VICE CHAIRMAN HEDLUND: Let me just go
14 back to this question of allocation. Do you have any
15 sense of why BNSF was taking cars and getting them to
16 other customers in the PRB as opposed to you? Was it
17 because, you know, they don't like dealing with
18 uppity indigenous, or did they have other economic
19 reasons? And I apologize for that.

20 MR. JAFFE: Without -- so I think that I
21 cannot spend on all of BNSF's reasons, or give you a
22 hard number because, and this is key, I don't have

1 their other contracts. I don't know what they
2 committed to in, you know, in terms of the numbers,
3 or what the economics were for them.

4 What was self-evidence from Ms. Farmer's
5 letter to the then President of the Navajo Nation was
6 that they believed that BNSF's view was they had
7 other obligations that they thought were more
8 important to their business.

9 VICE CHAIRMAN HEDLUND: By more important,
10 more economically beneficial? Is that?

11 MR. JAFFE: Well, let me make sure that
12 I'm -- yes, but let me make sure that I am saying
13 this exactly as it was said because I don't want to
14 misquote CEO's. Exhibit 2, okay, let me just go to
15 the exhibit here. Oh thanks. Okay.

16 So Ms. Farmer says I disagree with your
17 characterization that BNSF is favoring other
18 customers over NTEC during this period of service
19 challenges, BNSF has been committed to honoring
20 obligations relative to customer contractor's terms,
21 including any committed volumes.

22 But again, if we too have a contract, we

1 had a requirements contract for 2022 up to 5.5
2 million tons, which only in May of 2022, did BNSF
3 suddenly take the position that in fact they really
4 didn't have any obligation that that 2022 deal was
5 maybe a price list at best.

6 VICE CHAIRMAN HEDLUND: So you read our
7 comment about --

8 CHAIRMAN OBERMAN: How many times?

9 MR. JAFFE: 5.5 million. And I actually
10 note, just to be clear for a minute, I note that
11 neither party actually included the 2022 contract.
12 We do apologize for that oversight, and we've
13 actually brought some copies if the Board needs it.

14 And I really think that that moment in
15 time was a key one. It's one that I know Matt and
16 Vern can speak to directly because it really impacted
17 them that day. They came out of that meeting I think
18 startled.

19 MR. LUND: Sure. I had two conversations
20 with CEO Katie Farmer. The first was via
21 videoconference, and it was the first time that we
22 had met each other, so it was a very pleasant call,

1 but it was a call that was set up because of this
2 dramatic change in service, and Matt's group being
3 told that from Todd Carter, Jessie McCabe, that BNSF
4 had no obligation to provide any level of service.

5 So I wanted to make sure that that was
6 truly BNSF's position. So the first video call was
7 just an introduction. Talked about the challenges,
8 and asked for a response from Ms. Farmer. The
9 response continued to come back through Matt's group
10 that it didn't seem like that was the position that
11 they were taking, so we scheduled a face to face
12 meeting in Fort Worth.

13 Matt and I were present, Katie Farmer was
14 present, as was Steve Bobb. And during that meeting
15 become very apparent based on the reception we
16 received that yes that was very much their position,
17 that they felt that they had no obligation to provide
18 any level of service.

19 BOARD MEMBER PRIMUS: Did either Ms.
20 Farmer or Matt state that in that meeting?

21 MR. LUND: Yes. And I believe it's stated
22 right in the letter that she sent back to the

1 President of Navajo Nation. Let me just close that
2 out. Okay.

3 CHAIRMAN OBERMAN: Karen? I'm sorry
4 Robert, Karen were you finished?

5 VICE CHAIRMAN HEDLUND: No. Dan, you
6 mentioned a letter where they said something about
7 committed amounts relative to other customers?

8 MR. JAFFE: Yeah. Well I was referring to
9 President Farmer's, or CEO Farmer's letter.

10 VICE CHAIRMAN HEDLUND: Would you repeat
11 that? What you said about committed amounts?

12 MR. JAFFE: Yes. She said that BNSF, or
13 she said -- let me say the whole thing again. She
14 says I disagree with your characterization that BNSF
15 is favoring other customers over NTEC. And this
16 letter was back to the President of the Navajo
17 Nation.

18 During this period of service challenges
19 BNSF has been committed to honoring obligations
20 relative to customer contract terms, including any
21 committed volumes.

22 VICE CHAIRMAN HEDLUND: What is your

1 understanding of what she meant by committed volumes?

2 MR. JAFFE: Well, so at this point based
3 on the filings that BNSF has made and particularly
4 the supplemental filing from Friday, what I take that
5 to mean is that their position now is that the only
6 -- the pecking order of contracts is if I have a
7 contract with you that where the shipper has a
8 minimum volume, that will be number one.

9 If I have -- and NTEC had a requirements
10 contract that the 5.5 million, well then that
11 necessarily had to be somewhere down below that. And
12 then if I have a common carrier obligation it's down
13 below that, and you know, if anything else happens in
14 between we'll figure it out. But I really want to
15 draw, and this is really key too is that even if you
16 have a contract with a minimum volume, you can look
17 in the drafts that BNSF sent us that are in the
18 exhibits from ourselves.

19 And now when you look carefully at it,
20 it's not the railroad that has the commitment.

21 VICE CHAIRMAN HEDLUND: Right. The
22 shipper has them.

1 MR. JAFFE: It's the shipper that has the
2 minimum volume commitment. The railroad's provision
3 with respect to service is they use commercially
4 reasonable efforts, okay. That's not terrible, but
5 if at least in the example that we were being offered
6 from BNSF, and told we had to take, if you were going
7 down that direction, if they don't deliver, they give
8 themselves a year to make up the tons, and if they
9 don't make up the tons in a year, nothing happens.

10 But that's not useful. It's not useful in
11 this particular market. It's set up -- not to get
12 into the gory details, but it's set up a lot more
13 like the sort of typical utility arrangement, where
14 you have a rolling coal stock pile, you know, this is
15 a situation that BNSF is well aware of, where you're
16 loading vessels.

17 There's people coming. There's
18 arrangements that are made. Getting it six months
19 later is not necessarily going to be helpful, and
20 never getting it is less helpful. And of course, I
21 was just handed this note here, obviously we don't
22 have discovery . I don't know what the other

1 contracts look like.

2 I think it wouldn't be an unreasonable
3 guess to assume that maybe in some instance BNSF's
4 arrangements, particularly any new ones, or
5 amendments, as opposed to just an existing contract
6 may have had some more favorable revenue outcome for
7 BNSF versus NTEC, but I don't know.

8 And certainly in this case where with our
9 common carrier tariff, BNSF set the price, and
10 they've already raised the price. So I'm not really
11 sure why we're still at the bottom. I have nothing
12 else, Mr. Chairman, if you have more questions of
13 course.

14 CHAIRMAN OBERMAN: Well I do, but you
15 know, others do too. Robert?

16 BOARD MEMBER PRIMUS: And mine's a very, I
17 just have two hopefully very basic questions. So
18 when NTEC made that request for 29 trains back in
19 November did BNSF tell you, affirm, that they could
20 do it, or not do it, specifically, or did they just
21 not respond?

22 MR. JAFFE: No. They didn't affirm one

1 way or the other. They didn't affirm, or decline.

2 Am I correct Matt? Can you confirm that?

3 MR. LUND: But they provided the rate to
4 do it.

5 BOARD MEMBER PRIMUS: But they didn't say
6 specifically that they could do that, or they
7 couldn't do it. They just gave you the rate?

8 MR. JAFFE: Right. They did not
9 specifically say, and there were two instances right?
10 First they gave us a rate, and then they gave us the
11 full language of the tariff about a month later, that
12 was December 29th. So we got a rate in November,
13 then the full tariff in December, but no as to your
14 question, they didn't say one way or the other.

15 BOARD MEMBER PRIMUS: And any other
16 negotiations or back and forth with BNSF in prior
17 years. In setting a number, was there ever any
18 conversation about whether they could take that
19 number or not? So are you saying what happened in
20 November I guess what I'm getting at is that
21 inconsistent with what generally happened before?

22 MR. BABCOCK: I would say, you know,

1 there's always unpredictability. I mean we've had
2 weather events here in the United States that have
3 been very extreme, both in the east, and in the west.
4 There's all kinds of things that can disrupt that.
5 But I think for the most part up to -- this is has
6 been so shocking for us, and a shock to the system
7 because I really think up to this point we've had a
8 very good business partner in BNSF. A very
9 predictable, business partner.

10 We've received good service. This hasn't
11 been something whereas we've signed the agreements,
12 we've looked at each other, at least us looking at
13 the BNSF and saying wonder if they can do it this
14 year. As long as the weather holds out, and we have,
15 you know, they typically find a way to provide
16 service.

17 So I think this was a real departure from
18 the norm. It was a departure for the partnership.
19 We pioneered this business. Spring Creek line was in
20 the 90's, putting, you know, test opportunities out
21 there to get this U.S. coal into the international
22 markets, long before the other large competitor was

1 even producing it.

2 In 2008, we started the business together.

3 We had to focus --

4 CHAIRMAN OBERMAN: In the 1990's, is that
5 what you're saying?

6 MR. BABCOCK: In the late 1990's, and
7 there's been many predecessor owners of these various
8 assets. So this has been a walk together. We
9 visited Asia together promoting both the world class
10 freight infrastructure that we have here in the
11 United States, as well as the world class mining.
12 So, we all expected this growth to occur in 2020's.
13 We didn't expect a pandemic in 2020, we didn't expect
14 to have our service curtailed in 2022.

15 But, we certainly expected the growth, and
16 we expected the BNSF to deliver every year.

17 BOARD MEMBER PRIMUS: So, just going back
18 to my question though.

19 MR. JAFFE: I'm sorry. Actually, maybe I
20 could add one thing to that.

21 BOARD MEMBER PRIMUS: Okay.

22 MR. JAFFE: Just to help you perhaps,

1 which is while he didn't say specifically with
2 respect to the tariff, we had a contract offer that
3 we were also considering at the same time with
4 similar volumes that we had asked for. I mean we had
5 come into the contract negotiations asking for the
6 same volume, and BNSF, you know, as long as we were
7 willing to release, waive our claims, was ready to
8 sign a contract.

9 And one of the things that we had actually
10 asked for near the end was to change our minimum
11 volume requirement a little bit as you'll see in the
12 drafts because we have this problem where we believe
13 that if BNSF has a service issue, unfortunately this
14 is what 2022 got them thinking, that BNSF has a
15 service issue and they don't ship the tons that we
16 expect them to for any reason, that they'll come
17 looking for liquidated damages for not meeting the
18 minimums because even though BNSF made this mention
19 about how, you know, we've tried to help them out and
20 cutting commercially reasonable things when
21 liquidated damages were in the mix like in 2020.

22 And I'd also mention that well, they had

1 also declared force majeure, there was a lot of back
2 and forth. It wasn't just, you know, as simple as
3 all that, and BNSF does acknowledge for example, that
4 in 2019, when NTEC took over the Cloud Peak
5 contracts, which it didn't have to do coming out of
6 bankruptcy, they also made some payments -- NTEC did,
7 to make up for shortfalls that Cloud Peak had had.

8 So, you know, as a practical matter there
9 are a lot of issues there, but my only point being at
10 the end of 2023, BNSF was ready to sign a contract
11 with similar volumes.

12 BOARD MEMBER PRIMUS: Thank you for that.
13 My last point or question is, and you had stated
14 before that in talking to BNSF last year they said
15 the problem was crews. When did it become also car
16 availability?

17 MR. BABCOCK: Up until this statement that
18 the BNSF had made recently, that was not on the radar
19 for us in terms of that being one of the constraining
20 factors. As they tried to do the CP route back in
21 February, they did indicate that they didn't want to
22 have a train set in the CP route anymore.

1 We moved about six times, we moved a train
2 set with the BNSF provided train set to the West
3 Shore on the Canadian Pacific line, but other than
4 that, that was not ever discussed as a significant
5 constraint for the railroad. It really was just
6 getting the crews in place.

7 BOARD MEMBER PRIMUS: So, when you brought
8 that issue up with moving along CP, was that the
9 first time they talked about not having enough cars
10 available?

11 MR. BABCOCK: As far as I'm aware of yes,
12 and again our line of conversation just remained
13 heavily on their hiring processes, how successful
14 they were with that, we weren't really informed that
15 there was any concerns about power locomotives, or
16 train sets.

17 BOARD MEMBER PRIMUS: And how many train
18 sets did you move along CP's route?

19 MR. BABCOCK: It was a total of six.

20 BOARD MEMBER PRIMUS: Thank you.

21 MR. BABCOCK: Yeah.

22 CHAIRMAN OBERMAN: You're done Robert?

1 BOARD MEMBER PRIMUS: Yeah.

2 CHAIRMAN OBERMAN: Dan, I have a number of
3 things I'd like to clear up. Well of course we're
4 not litigating the contract claims that are pending
5 in federal court.

6 MR. JAFFE: Of course.

7 CHAIRMAN OBERMAN: Both sides have talked
8 about the 2022 contract at length. You've referred
9 to it this morning. Your reference to it being a
10 retirements contract I believe is the first time I've
11 seen that word mentioned in any papers, I thought it
12 may be in there and I missed it.

13 And we didn't have the contract, and I
14 have been somewhat mystified about that contract in
15 trying to go through the how we got from there to
16 here. It is of historical relevance I think to the
17 issue that's before us today. So, is it NTEC's
18 contention that the 2022 contract is a requirements
19 contract up to 5.5 million tons annually? Is that
20 your position?

21 MR. JAFFE: Correct.

22 CHAIRMAN OBERMAN: For the record to be

1 clear, and perhaps for those who didn't have the
2 advantage of taking a contracts course first year of
3 law school, would you tell the Board what you
4 understand a requirements contract -- this
5 requirements contract to actually mean, at least as
6 far as NTEC is concerned?

7 MR. JAFFE: Yes. In this instance it
8 means that we were required to ship, well we were to
9 ship 100 percent of our requirements up to 5.5
10 million tons, and the language here adds 100 percent
11 of the coal shipped to Roberts bank, and I don't
12 think I'm telling you anything particularly unusual
13 here. It's in the complaints, that NTEC also will
14 provide for planning purposes, non-binding estimates
15 of tons quarterly, et cetera.

16 The tons will be reasonably prorated
17 during the calendar year, and the maximum amount of
18 the annual volume is up to 5.5 million. So, as you
19 read the contract, NTEC was required to use only BN,
20 and of course there isn't anybody else anyway, but to
21 use only BN for any coal that it was going to ship to
22 Westshore.

1 MR. JAFFE: That's correct.

2 CHAIRMAN OBERMAN: And was BN required to
3 accept what you offered to them up to 5.5 million
4 tons as you understand it?

5 MR. JAFFE: Yes. That's our -- that's the
6 way we understand it.

7 CHAIRMAN OBERMAN: That's your contention.

8 MR. JAFFE: That's correct.

9 CHAIRMAN OBERMAN: Sorry. And the way you
10 understand the issues there, and I'm going to give BN
11 a chance. I'm going to talk to them about it when
12 it's their turn. Your contention of the contention
13 between the parties is that you think is that BN's
14 position is you were required to send them all of
15 your tons, but they weren't required to accept them
16 if you did send them. Is that your contention of
17 what the lawsuit is about?

18 MR. JAFFE: In part, yes.

19 CHAIRMAN OBERMAN: Okay. And I just want
20 to understand, so there's nothing other than a cap of
21 5.5 million of tons about a number of trains per
22 month or anything like that?

1 MR. JAFFE: Right. And if it might help
2 you, I know I said we have these copies, and I can
3 hand it, but.

4 CHAIRMAN OBERMAN: Well I'm not going to
5 look at it right now, but if you would supply them to
6 us.

7 MR. JAFFE: Yes. Of course, and we'll
8 draw your attention in particular to the couple of
9 provisions that are key in your consideration.

10 CHAIRMAN OBERMAN: Now according to your
11 pleadings, you were prepared to accept the 2023
12 contract as proffered by BN in some late -- it was
13 the fall of 2022.

14 MR. JAFFE: Straight into December.

15 CHAIRMAN OBERMAN: All right. Except for
16 this waiver issue of prior claims. But on the levels
17 of coal being shipped your client was agreeable?

18 MR. JAFFE: Yes. That's correct.

19 CHAIRMAN OBERMAN: Then you don't say what
20 that is, but Mr. Garland says that the contract to
21 which BN was prepared to agree, and that NTEC had
22 agreed to, and I will read from Mr. Garland's sworn

1 statement, if I get the right glasses on.

2 At the bottom of page 22, "NTEC and BN had
3 agreed upon a minimum tonnage commitment for 2023 of
4 4.2 million tons, which amounts to 350,000 tons per
5 month." Using my iPhone at 15,000 tons of train,
6 that's 23 trains. Is that what the agreement was to
7 that extent for 2023?

8 MR. JAFFE: So just to be clear, if you
9 look at the actual contract drafts, which we gave
10 you, the minimum of volume that was described for
11 2023, which mind you is our requirements, not BNSF's
12 requirement, and I'll let Matt talk about how they
13 got to that 4.2 million, was the 4.2 million, but
14 that was only the minimum, and they were well aware
15 that we were looking to ship 5.5 million tons where
16 possible. Go ahead Matt.

17 MR. BABCOCK: Yeah. The maximum in that
18 agreement was 6 million tons.

19 CHAIRMAN OBERMAN: No, but here's my
20 question. You agreed to a minimum of 23 trains a
21 month.

22 MR. JAFFE: No. We agreed that at the

1 absolutely minimum, just to be clear, the absolute
2 minimum, what we would sell, ship, 4.2 million tons.
3 That did not mean that we agreed that that was all
4 BNSF might ship.

5 CHAIRMAN OBERMAN: But my question, I
6 understand what you're saying.

7 MR. JAFFE: Sure. Fair enough.

8 CHAIRMAN OBERMAN: Did BN agree to move 23
9 trains a month?

10 MR. JAFFE: Yes.

11 CHAIRMAN OBERMAN: That was kind of a
12 leading question, but it doesn't make much sense to
13 me for BN to insist that you guarantee them 23 trains
14 a month if they didn't have the capacity to move 23
15 trains a month. Is that?

16 MR. JAFFE: I would agree.

17 CHAIRMAN OBERMAN: All right. Just to be
18 clear, Mr. Babcock, were you the person in that
19 negotiation?

20 MR. BABCOCK: I was one of the people in
21 the negotiation.

22 CHAIRMAN OBERMAN: Did BN tell you if you

1 commit to 23 trains a month will we have enough
2 capacity to move 23 trains a month?

3 MR. BABCOCK: They're not usually that
4 explicit in these negotiations. We certainly, they
5 certainly showed confidence that they felt like they
6 could move our demand for 2023, and we got a maximum
7 set at 6 million because we all wanted to get the
8 maximum for the year. We really pushed hard saying
9 why are we going to be on the hook for a higher
10 minimum volume when you haven't demonstrated that
11 your performances to that level?

12 So we did negotiate the 4.2 million, but
13 we all anticipated reaching, well at least we
14 anticipated reaching the 5.5 or even 6.

15 CHAIRMAN OBERMAN: Well Mr. Garland, I
16 assume is here, and he can be prepared because he's
17 going to get the same questions.

18 MR. BABCOCK: Certainly.

19 CHAIRMAN OBERMAN: I want to be clear on
20 this. He filed a sworn statement. "NTEC and BN had
21 agreed upon a minimum tonnage commitment for 2023 of
22 4.2 million tons." You didn't attach the contract.

1 You didn't say it was a one-sided commitment. I read
2 it as being a commitment for both people. We're
3 going to move a minimum of 23 trains a month. And
4 now, you've just described the conversation. Did BN
5 say, "you guys make the commitment, but don't count
6 on it?"

7 We may not be there for 23? We don't have
8 the -- here's the real question. Did they say, "we
9 don't have enough capacity to move 23 trains a month
10 if you live up to your minimum commitment?" Was
11 there any words to that effect?

12 MR. BABCOCK: Yeah. And I don't want to
13 mischaracterize anything that they communicated, but
14 we certainly expected them to fulfill what we had
15 negotiated, and are negotiating in that agreement.

16 CHAIRMAN OBERMAN: I didn't ask you what
17 was in your head. I asked you what they said to you.

18 MR. BABCOCK: No. They did not.

19 CHAIRMAN OBERMAN: Okay. Because I'm
20 trying to figure out what the common carrier
21 obligation how it applies to the capacity of this
22 railroad, and I'm trying to figure out what the

1 capacity of this railroad is, and we're going to get
2 to it before the day is out I hope. That's why I
3 asked the question. Yes, sir?

4 MR. PERGOLIZZI: If I could add, they did
5 tell you what they were capable of. They committed
6 to a six, they offered a 6 million ton maximum, and
7 had the parties signed that contract, the law
8 provides we have a reasonable expectation that they
9 would have the resources in good faith to hit the
10 maximum tonnage that they committed to ship, so that
11 the contract has a minimum obligation, but it also
12 shows that they were committing to ship up to six
13 million tons.

14 CHAIRMAN OBERMAN: Are you saying that the
15 way you read -- this wasn't signed, but the draft, to
16 have a good faith and fair dealing commitment to take
17 up to 6 million tons?

18 MR. PERGOLIZZI: Absolutely, and same for
19 2022. That was a requirements contract up to 5.5
20 million that they signed willingly.

21 CHAIRMAN OBERMAN: Okay. I got it. And
22 we're going to hear BN's position on that as I said

1 before the day is out. And then, would all the
2 answers be the same because Mr. Garland says later
3 that the parties agreed to a 5.5 million for 2024?
4 Is the answer the same?

5 MR. JAFFE: The answer is the same.

6 MR. VUND: And if I could add, the only
7 reason why you see the 4.2 in 2023 was because it was
8 stated we had concerns on their ability. We didn't
9 want to have to pay liquidated damages to a 5.5
10 because what's happened to us now with the other
11 contract that just concluded because of their service
12 failures we weren't allowed to reach that threshold,
13 and then have to turn around and pay liquidated
14 damages on something.

15 CHAIRMAN OBERMAN: I understand.

16 MR. LUND: So that's the only reason why
17 the 4.2 is in there.

18 CHAIRMAN OBERMAN: Well whatever reason it
19 was.

20 MR. LUND: It's there.

21 CHAIRMAN OBERMAN: It reflects the
22 capacity of -- my question goes to.

1 MR. LUND: Well it would have been higher.
2 Right. And I think Frank has said, you know, hit
3 your both the top and the bottom.

4 CHAIRMAN OBERMAN: And I'm really focused
5 for the moment on any facts in this record that will
6 tell us what is the capacity of that line to move
7 trains.

8 MR. JAFFE: Yes.

9 CHAIRMAN OBERMAN: That's what I'm getting
10 at. We already rejected the idea that they can move
11 1,000 trains a month. I'm guessing even BN won't say
12 the number is zero, and I'm trying to figure out
13 where it is between zero and 1,000.

14 MR. PERGOLIZZI: And we would suggest that
15 the fact that they would offer to sign a contract in
16 November of 2022, and commit to a maximum of 6
17 million tons, that should be an indication of their
18 capacity.

19 CHAIRMAN OBERMAN: Okay. I understand. I
20 want to shift gears here for a moment. You've got
21 two legal theories you're pursuing under emergency
22 service under 111.23 and preliminary injunction.

1 Let's take them one at a time.

2 Under 111.23 the standard seems to be
3 transporting traffic, "in a manner that properly
4 serves the public." " The Board may to promote
5 commerce, and service to the public, enter such an
6 order," What is the contention of NTEC about how the
7 emergency service order that you are asking for
8 serves the public?

9 MR. JAFFE: Well first all, we believe the
10 phrase public itself should be read broadly because
11 in adopting the emergency service rules, part of the
12 concern there, as the Board has reflected a couple of
13 times, that there ought to be means for individual
14 shippers to come, and to ask for service, emergency
15 service orders, and so by somewhat by definition, a
16 shipper is the public.

17 But here, in addition, we believe we have
18 several far ranging applications to the public right?
19 One is that, you know, there is a direct impact on
20 the Navajo Nation. There are other contracts and
21 arrangements in place that BNSF actually points out
22 as well, same here for us, issues with contracts with

1 Westshore, contracts with other customers, and of
2 course vessel loadings, and other things that are all
3 interrelated with the public.

4 And indeed, I think this is a time when I
5 might actually ask Tim to tell you a little bit more
6 about how that affects them in that context, but I'll
7 also add that the standard that BNSF points out when
8 we refer to, example, for Foster Farms, or maybe the
9 Hasa case, those are you know, there they say well,
10 you know, there's sort of a broader, public interest.

11 Well, first I'd suggest to you our public
12 interest is broad, and I'll be happy to let Tim talk
13 to that if you'd like, Tim.

14 MR. MCLAUGHLIN: If I may Chairman.

15 CHAIRMAN OBERMAN: I've had a request that
16 we take a quick break, bathroom break.

17 MR. MCLAUGHLIN: Sure.

18 CHAIRMAN OBERMAN: If you wouldn't mind,
19 but don't lose your thought. If you're me, you'll
20 write it down, so you won't forget. Let's take a
21 very, very short bathroom break. Come back at 11:25.
22 We've got a lot of territory to cover.

1 (Break 11:16 a.m. - 11:28 a.m.)

2 CHAIRMAN OBERMAN: Back on the record. By
3 the way I forgot to tell the assemblage that this
4 hearing is being Zoomed internally, so Board staff
5 can chime in, but it's not electrically we're not out
6 in the ether, it's only public in this room. Sir,
7 you had a -- yes.

8 MR. MCLAUGHLIN: Thank you Chairman. And
9 members of the Board, thank you for your time today,
10 and your efforts here to help us resolve our issues.
11 My name is Tim McLaughlin. I'm the NTEC Board
12 Chairman. I've been with the company since since the
13 company was created in 2013. We've seen this company
14 come from nothing to where it is today, which is a
15 key player in the nation's -- not only the Navajo
16 Nations, but the United States and the world
17 economy.

18 I was asked to briefly describe who we
19 are, who NTEC is. I think it's helpful to
20 emphatically and clearly state what we are not.
21 We're not simply some private company in this case
22 seeking preferential, or special treatment here. We

1 are -- NTEC is different. NTEC is a company owned,
2 formed and owned by the Navajo Nation government.

3 The Navajo Nation government is 100
4 percent the sole shareholder of NTEC. As a Board
5 member I report to the Navajo Nation government on an
6 annual basis. They are who we work for, and that is
7 important because it distinguishes us from a lot of
8 other companies out there. I don't know of another
9 company like us, the size of us, like us here in the
10 United States.

11 You were talking about the standard
12 properly serves the public. I think it's helpful to
13 understand what NTEC does with the public, with the
14 Navajo Nation. When NTEC was created by the Navajo
15 Nation government it was created for the purpose of
16 ensuring the Navajo Nation's economic prosperity.
17 There's two purposes -- generate revenue, grow jobs.

18 As an example, in 2022, we talked about a
19 lot last year, our total economic impact on the
20 nation, Navajo Nation, was north of 124 million
21 dollars. We provide a substantial number of
22 scholarships to kids going to college. We provide a

1 robust community benefit program where we sponsor a
2 number of community events, community projects.

3 Everything from installing solar panels to
4 people who don't have electricity, which is hard for
5 some people to fathom, but yes, there are a quite a
6 few folks out in Navajo that don't have electricity.
7 Everything from selling and electrifying their
8 homes, to providing a heating program, where we
9 provide coal so folks could heat their homes.

10 You know this is another hard thing for
11 most folks to buy, but there are a lot of people out
12 there who are Navajo, whose sole source of heat is
13 burning coal, or wood. We help provide for them,
14 for Navajos doing that. I think what I want to make
15 abundantly clear is that any harm to NTEC --
16 financial harm to NTEC is harm ultimately felt on the
17 Navajo Nation, and the Navajo Nation people.

18 Navajo Nation membership is north of
19 400,000 members. The number of Navajos living on a
20 Navajo Nation are on the reservation is north of
21 200,000 members. So in the United States, there are
22 over 500 tribes. One-third of those tribes, tribal

1 members living on reservations reside on Navajo
2 Nation, so we're talking about a substantial number
3 of folks who live on the Navajo Nation.

4 Living in an area where the unemployment
5 rate touches 50 percent, living in an area where the
6 poverty level -- the federal poverty level, 35
7 percent of the population lives below that federal
8 poverty level. This company impacts those members,
9 provides for the Navajo Nation. We provide almost a
10 third of the Navajo Nation's operating budget.

11 This is how the government runs itself.

12 CHAIRMAN OBERMAN: What does it operate?

13 MR. MCCLAUGHLIN: The government. Pre K,
14 Senior Care, you name it. Whatever governments
15 provide, that's what the Navajo Nation government
16 provides, and we provide a third of the Navajo
17 Nation's operating fund. So this is more than just a
18 simple energy company.

19 It's not your typical energy company. Now
20 we had an obligation to the Navajo people. We
21 provide back to the Navajo people, and we serve
22 Navajo people.

1 CHAIRMAN OBERMAN: So, it's fair for us to
2 understand what you're saying is that the owner of
3 this company is providing governmental services to
4 200,000 people?

5 MR. MCLAUGHLIN: Absolutely.

6 CHAIRMAN OBERMAN: Okay.

7 MR. MCLAUGHLIN: Well those are just the
8 folks living on the reservation. They provide
9 services to folks who live in major metropolitan
10 areas surrounding the nation as well, Phoenix,
11 Albuquerque, LA, you name it.

12 CHAIRMAN OBERMAN: All right. Thank you.

13 MR. MCLAUGHLIN: Absolutely.

14 CHAIRMAN OBERMAN: And did you want to add
15 something Dan, because I'm going to have some further
16 questions.

17 MR. JAFFE: Okay. Yeah. Two items on
18 that. One of course is and the export of coal
19 business is a very important part of the overall
20 revenues of NTEC, as well, contrary to some
21 suggestions that oh, it's just a domestic coal
22 operator. That is not true. The export of coal is

1 very important, that's why they work tirelessly on
2 developing those relationships, and being able to
3 market that business.

4 And one last item of course, just general
5 public interest is that at least for Spring Creek,
6 all of the coal that is mined there is also royalty
7 bearing for other, you know, general purposes.

8 CHAIRMAN OBERMAN: Royalty bearing for?

9 MR. JAFFE: Yeah. To the United States,
10 et cetera. Yeah.

11 CHAIRMAN OBERMAN: All right. Oh, I'm
12 sorry go ahead.

13 MR. MCLAUGHLIN: Chairman, if I may, just
14 add, your advice to write things down before break
15 was helpful. I looked at my notes and I missed the
16 point that is important, so I appreciate your tip.

17 CHAIRMAN OBERMAN: You're not quite where
18 I am, but I see it a little grayer.

19 MR. MCLAUGHLIN: There's a little bit of
20 gray sir, yes. We'll go back to harm to NTEC, is
21 harm to the Navajo Nation. If you go back again, we
22 talked a lot about 2022, because it is nothing small.

1 The company faced losses of north of 120 million,
2 150 million dollars last year.

3 That's money that would have otherwise
4 gone back to serve those programs that I just talked
5 about, scholarships, community benefits. It also
6 would go back to the Nation in reinvestment for
7 projects on the Navajo Nation. We also -- not are we
8 only the third largest coal producers in the United
9 States, but we own a major helium operation, that
10 operates on Navajo.

11 Losing that money from 2022, we were
12 unable to reinvest that in the helium operation back
13 on Navajo, that employs Navajos, that gives money
14 back to the Navajo Nation and royalties and taxes.
15 The impacts are pretty large. And I think one final
16 point that I have here in my notes is that again,
17 going back to harm to NTEC, you know, harm now, this
18 matters, because harm now is felt immediately.

19 The ramifications of the harm we
20 experience now can't be resolved two years down the
21 road, you know, if we litigate again and have some
22 damage settlement, or win some damages a couple years

1 from now. The harm is already done.

2 CHAIRMAN OBERMAN: Just for the record I'm
3 going to understand the point about what you lost
4 last year, as perhaps relating to the exacerbation
5 that might be suffered by harm this year. We can't
6 -- there's nothing before us about losses you
7 suffered under your contract. You're obviously in
8 litigation. You're not asking us for relief under
9 that, nor do I know that we could give it. It's a
10 contract claim.

11 But, if you are saying that having lost
12 money last year you're asking us to accept that, I
13 don't know that BN agrees. If you lose more money
14 this year because of your common carrier claim, it's
15 even worse. Is that a fair way to understand it?

16 MR. MCCLAUGHLIN: Absolutely. It just
17 compounds. Thank you Chairman.

18 CHAIRMAN OBERMAN: Robert?

19 BOARD MEMBER PRIMUS: Thanks Marty. Just
20 to follow-up on that. So you were saying that you
21 provide 124 million like in scholarships and other
22 benefits, is that annually?

1 MR. MCCLAUGHLIN: That's the total
2 economic impact. A portion of that is scholarships.
3 A portion of that is donations and contributions to
4 the community benefits programs, and also to our
5 community heating program. And those are just three
6 of the easiest apples to pick so to speak.

7 BOARD MEMBER PRIMUS: I know, I'm just
8 trying to -- so do you have an idea of what NTEC's
9 total revenue, including helium, and everything else,
10 because you said you lost 120 million last year, and
11 you said that you dole out 124 million in those
12 items, so it's coming from a larger pot. What's the
13 overall revenue, annual revenue last year for NTEC?

14 MR. MCLAUGHLIN: That's a question I will
15 defer to Matt or Vern. Vern do you want to take
16 that?

17 MR. LUND: You're asking for the
18 consolidated revenue of the company?

19 BOARD MEMBER PRIMUS: Correct, correct.

20 MR. LUND: North of 1.3 billion.

21 CHAIRMAN OBERMAN: Karen?

22 VICE CHAIRMAN HEDLUND: (Off mic).

1 MR. MCLAUGHLIN: If I may quickly touch on
2 that coming from a high level. I believe the treaty
3 was 1868. I'm not going to argue over dates with
4 you. But I believe there's a provision. The treaty
5 is relevant because there's a provision in the
6 treaty, and I don't have the treaty right in front of
7 me, so I can't point to exactly the section that
8 you're looking at.

9 But there's a provision that provides that
10 the United States will ensure the prosperity of the
11 Navajo Nation. And I believe that's the exact
12 language. And so here, the reason that was raised,
13 the Surface Transportation Board is a federal agency.
14 Federal agencies have a trust responsibility and
15 trust duty to Indian tribes.

16 That duty stems from something typically,
17 in this case the duty stems from the treaty. So in
18 this case it's unique in a sense that the Board
19 arguably also has a trust duty to ensure that the
20 Navajo Nation, and its enterprise are treated fairly.
21 We're not asking for special, preferential, better
22 treatment than others, just treat us fair.

1 VICE CHAIRMAN HEDLUND: How does that
2 relate to the carrier obligation?

3 MR. JAFFE: Well, obviously, treaties have
4 a special place in law that generally are overlays on
5 statutes, and so I think inherent in that is that the
6 Board, you know, consider whether or not in this
7 common carrier obligation question, if the Navajo
8 Nation is being treated fairly in accordance with the
9 treaty, you know.

10 CHAIRMAN OBERMAN: Patrick?

11 BOARD MEMBER FUCHS: Thanks. Would you
12 agree that under 111.23 there has to be a showing of
13 an emergency?

14 MR. JAFFE: Yes.

15 BOARD MEMBER FUCHS: Could you summarize
16 what you view to be the emergency situation that
17 needs to be remedied in June?

18 MR. JAFFE: Sure. The emergency situation
19 is that during the period in which NTEC has already
20 sustained significant surface deterioration per the
21 statute as well, we were being informed that we were
22 about to see a 40 percent cut in the traffic. And by

1 the way, that's 16 trains that we initially put in
2 there, and now BNSF miraculously, luckily found six
3 more trains supposedly for June, which you know, is
4 obviously a good development, not a bad development.

5 But that 16 number is actually up a little
6 bit because it started at 13, if I remember that
7 correctly. Right Matt? It started at 13 for June,
8 and then went to 16. But either way the number was a
9 drastic drop, and in our view, you know, that was
10 creating an emergency situation for NTEC to be sure
11 because I mean we have commitments that we were busy
12 making, attempting to make, existing ones, and we
13 have all sorts of contracts and coordination that
14 have to happen.

15 And this created an emergency service
16 situation in our view.

17 BOARD MEMBER FUCHS: Can you summarize
18 what the emergency was? I understand that you view
19 the 16 as creating an emergency, but what was the
20 specific emergency?

21 MR. JAFFE: Well the specific emergency is
22 the drastic reduction in trains was having

1 significant economic impacts, reputational impacts,
2 and also you know, even the potential of not being
3 able to fulfill existing contracts.

4 BOARD MEMBER FUCHS: Okay. And with the
5 new offer of 22.

6 MR. JAFFE: Yes.

7 BOARD MEMBER FUCHS: Does that meet what
8 you have contracted out currently? And if this gets
9 into confidential information let me know, but if
10 BNSF were to deliver 22 in June, is that more or less
11 than what you have currently contracted out?

12 MR. JAFFE: I don't think -- I'm not going
13 to delve into the exact number directly, possibility
14 for confidentiality, but again, we also had well,
15 maybe Matt can better address the exact combination
16 of contract items, but the up shot is I believe the
17 answer is no.

18 BOARD MEMBER FUCHS: Well I think you put
19 in your supplemental, and I actually don't think it
20 is designated as confidential in response to question
21 one.

22 MR. JAFFE: Yeah. What page are you on?

1 BOARD MEMBER FUCHS: I'm on page 7 of the
2 supplemental.

3 MR. JAFFE: Okay.

4 BOARD MEMBER FUCHS: And I don't see
5 brackets, so I'm going to start reading it, but if
6 this is just stop me.

7 MR. JAFFE: Go ahead.

8 BOARD MEMBER FUCHS: Okay. All right, it
9 says, "NTEC has 395,000 tons of coal under contract
10 for delivery to Westshore in June." And so, if that
11 is the case, that seems to me pretty close to 22
12 trains. I mean is that a fair assessment if we just
13 do 395, and Marty, I think the number you were using
14 was 15,000 that gets to 26 trains, but I know that
15 the tariff had seemed to provide that there could be
16 a certain length minimum that you could potentially
17 run slightly longer trains.

18 Is there a feasible way that 22 trains
19 could meet the current tonnage that you're under
20 contract for?

21 MR. JAFFE: I'll let Matt answer that.

22 MR. BABCOCK: The short answer is no.

1 Okay. But I would also just I think we
2 oversimplified it by just looking at sometimes the
3 trains per month. We need a steady cadence of that
4 specific 29 per month, both to load what's in the
5 current month, as well as the months ahead.

6 BOARD MEMBER FUCHS: Right. Understanding
7 that you've used 16 as creating an emergency, having
8 22 trains does that mitigate an emergency situation,
9 understanding your contention that it still creates a
10 common carrier violation, but I'm trying to separate
11 what you view as creating an emergency, versus what
12 you view as creating a common carrier obligation
13 violation?

14 And are those numbers -- another way of
15 asking it is are those numbers the same, that
16 whatever number of trains violates the common carrier
17 obligation, Marty I think you were probing that, is
18 that the same number of trains that also, you know,
19 the failure to provide creates an emergency?

20 MR. JAFFE: Yeah. And that's a good
21 question. So, I think our answer to that is yes, we
22 still have an emergency situation. And let me add to

1 that. You know, one of the big complications that
2 Mr. Babcock discusses in his statement, with respect
3 to June is that, you know, NTEC has contracts
4 available, interest it could sign today, and it's
5 afraid to sign because then they'll be left holding
6 the bag.

7 So the short answer is you know, not only
8 does the 22 not really solve the problem, but it also
9 deprives us from participating in the peak season, so
10 I'll just add that on to that.

11 BOARD MEMBER FUCHS: It strikes me that
12 many of the concerns that you are raising create an
13 emergency, are also the same concerns, you know, just
14 about overall damages on a common carrier obligation,
15 so how is the Board to differentiate an emergency
16 service situation as you describe it what the
17 emergency is, versus the typical complaint that we
18 get under common carrier obligation?

19 You know, things about you know, the lost
20 ability to invest, reputational damage. Those are
21 not -- I would think not uncommon complaints,
22 uncommon harms that somebody identifies when they

1 view their receipt of service to be inadequate. So
2 how do we stop the Board from declaring anything that
3 might start to look like a common carrier obligation
4 violation from constituting an emergency in the
5 moment?

6 MR. JAFFE: Well again, I couldn't
7 possibly describe every scenario that you have there
8 because as you know it's a fact intensive scenario.
9 However, and I'll come back to Tim's point, I think
10 in terms of how we are viewing the situation, both
11 today, notwithstanding you know, it's the 22 trains,
12 the exact number? It is the overarching problem that
13 has created the emergency. It's ongoing, and it's
14 been persistent, and we've only recently been under
15 the common carrier obligation, so we, you know,
16 before that we wouldn't have been able to come here,
17 although we did come to the Office of Public
18 Assistance, and got nowhere with that.

19 And so, I come back to Tim's points that,
20 you know, these are meaningful today and now, and so,
21 but in terms of, you know, I have no practical way of
22 telling you every fact situation that might delineate

1 that, although I would say, I would say that, you
2 know, part of that is if there is a concern as BNSF
3 suggested, suddenly everyone is going to flood the
4 STB with litigation.

5 BOARD MEMBER FUCHS: Right.

6 MR. JAFFE: Let me say I have been doing
7 this a very long time. I have yet to meet a single
8 shipper who I've worked with who wants to come to an
9 agency, any agency, or the STB to ask for help. The
10 circumstances here, just like they were with Hasa, or
11 Foster Farms, are distinguishable situations.

12 BOARD MEMBER FUCHS: I want to just dwell
13 on that for a second. For Foster Farms, I guess in
14 one instance we found emergency, and one instance we
15 didn't say. In Foster Farms there was a concern
16 about animals being slaughtered imminently. In Hasa,
17 I don't think we cited a specific statute. I don't
18 think we actually cited 111.23 in that case,
19 unfortunately for the clarity of the record.

20 But, at least at the time there was a
21 concern about drinking water, and I guess to some
22 extent clean water generally for other purposes.

1 Those two fact patterns seem different than the realm
2 of economic harm that you're describing in
3 contractual relationships in that realm.

4 There is a connection directly to health
5 within that month, and not even downstream, but
6 within that month. So, you know, to the extent that
7 revenues are deprived for a budget, perhaps revenues
8 could be made up for it at a later time if you
9 succeed on the merits.

10 So I guess, what is the closest case in
11 which there wasn't that drinking water/slaughter type
12 of component, but more in the economic realm
13 immediately. Again, I understand that the economic
14 funds are eventually put to use of public purposes,
15 and you know, I think you described that clearly, and
16 I think there's more for us to learn about about
17 that.

18 But, what is the closest analog case that
19 doesn't extend for the month of June into that realm?

20 MR. JAFFE: Sure. That's a great
21 question. So I'd like to start and answer that two
22 ways. Okay. I'd like to take a look at the Foster

1 Farms case for an example.

2 BOARD MEMBER FUCHS: Yeah.

3 MR. JAFFE: We, as I like to call that,
4 are your chickens dying standard, okay? Now the
5 issue with that if you actually if we delve into
6 Foster Farms more, yes. There was a threat to
7 livestock. Now, I could turn that around easily and
8 say, livestock has a known value. A chicken is worth
9 X. If some chicken dies, well okay, you'll get paid
10 for it.

11 You'll go get some more chickens, or
12 you'll breed some more chickens, or you'll get your
13 feed whenever you get it. And in fact, the number of
14 chickens there sounded like a lot. I even was like
15 wow, that's a lot of chickens, a million chickens.
16 It turns out that's about .3 percent of the total
17 number of chickens that were raised and slaughtered
18 in California in 2021, and on a nationwide basis it's
19 not even a 100th of a percent, of 9 billion
20 chickens.

21 But was it important? Absolutely. Was
22 the service, emergency service order there important?

1 Absolutely. In the drinking water scenario. Oh, and
2 by the way, and I go back to Foster for just a
3 moment. In Foster, unlike here, they at least had
4 some alternative feed. It wasn't enough feed, but
5 they could at least get some alternative feed.

6 Here, they have zero. It's BNSF's way or
7 the highway with this one, there's no in between.
8 And in Hasa, you know obviously we had a threat to
9 drinking water. That was part of it. There was a
10 lot of other purification pieces that it was using,
11 and some of those were issues about how the
12 sequencing was being done, or how the trains had to
13 be allocated.

14 Yes, it was a problem, although it was a
15 40 percent drop in service, just like here. And
16 there were real public impacts, and we believe as Tim
17 was explaining, there are real public impacts. And
18 then, I would say one of our closest ones, closer to
19 what you're saying, where there was injunctive
20 relief, and it wasn't the emergency service relief,
21 it was the Central Valley case.

22 Because there, we had a problem where they

1 were still going to get service, but the prepayment
2 terms that the railroad was pushing made it -- put
3 them in a position where they could not afford to get
4 unit trains anymore, right, so they were going to be
5 manifest service at best, and the Board acted in two
6 regards there, right?

7 The first was they said well, you said,
8 hey, the prepayment terms. Yeah, usually you can add
9 those, you know, usually we're okay with that, but
10 this is a situation where the prepayment terms you
11 intend to impose are manifestly going to change the
12 actual service available to them, and this is a real
13 concern for all of these farmers in this local area.
14 Okay? Much like here.

15 You know, we have it's not the broadest
16 case ever, but it's there. There's a public interest
17 that goes beyond the case. And so, the Board in that
18 instance went ahead and issued an injunction that
19 preserved that unit train service by forestalling
20 the prepayment obligation there.

21 And so I think, you know, that's another
22 example where it's somewhat I think that one is even

1 a little closer to ours, in terms of being
2 effectively just a change in service that was having
3 a material impact on how the business was run. So I
4 think those are some close examples. And I think
5 Frank had something to add.

6 MR. PERGOLIZZI: Yeah. Just to add to
7 that, 40 percent decrease in trains in June is going
8 to affect revenue now, and it's going to affect the
9 monies that are available for the general fund that
10 the nation uses now. Getting damages a year from now
11 isn't going to replace the services that are lost
12 because of that lost funding.

13 And I'd add also that miraculously in
14 August -- I'm sorry on April 19th, verified
15 statements were filed saying that BNSF could not
16 possibly come up with additional trains a day after
17 your hearing prehearing argument they found six
18 trains, so now the number is up to 22. We don't know
19 if they'll actually provide those trains in June.

20 We don't know whether the number in July
21 will go back to 16, but again, the most important
22 point from an emergency standpoint is we're looking

1 at the Navajo Fund being at risk again in 2023, like
2 it was in 2022.

3 BOARD MEMBER FUCHS: For a second, I had a
4 different question I wanted to follow-up, but when
5 you say the Navajo Fund being at risk, if there are
6 22 trains in June that puts the Navajo Fund at risk.
7 That's your contention?

8 MR. MCLAUGHLIN: No. I wouldn't say that.
9 I think we're talking about the Navajo Nation's
10 general fund, and I think that's where you're getting
11 at.

12 BOARD MEMBER FUCHS: Yeah.

13 MR. MCLAUGHLIN: That's contributed from a
14 different operation. I think what you lose
15 immediately is you lose money that would otherwise go
16 to NTEC, that NTEC would then use for scholarships,
17 community benefits and support of the programs, not
18 money that goes directly into the nation's general
19 fund.

20 BOARD MEMBER FUCHS: And if NTEC for 22
21 versus 29, that lost revenue for NTEC is immediately
22 going to affect their scholarship distribution?

1 MR. MCLAUGHLIN: It is going to
2 immediately reflect as a company our ability, and
3 ability to issue particular scholarships, or a
4 quantity of scholarships. It's going to immediately
5 affect our ability to reinvest in businesses on the
6 Nation to generate more revenue and jobs on the
7 Nation.

8 Those impacts are real. Did your
9 scholarship numbers go down when service suffered in
10 2022. Did they go down?

11 MR. LUND: Not in 2022.

12 CHAIRMAN OBERMAN: Turn on the microphone
13 please.

14 MR. LUND: Sure. One of the bigger
15 impacts in 2022 as Tim referenced, the investment we
16 made in helium, and that investment is providing
17 additional revenue, direct revenue to the Navajo
18 Nation general fund through additional royalties.
19 When it impacts the financial health of the company
20 the company can no longer make investments.

21 Every well you install is over 5 million
22 dollars. So the impact of the number of wells we

1 could put in service last year, which had a direct
2 impact on the amount of royalties paid to the Navajo
3 Nation. It was roughly 1.5 million.

4 BOARD MEMBER FUCHS: I appreciate that.
5 One other question, and then so I think to bring it
6 back to I think Marty's initial question, which I
7 thought was very helpful, the mic -- I'm sure I'll
8 make that mistake later. So, I think and for some of
9 the factors, at least to judge the reasonableness of
10 the request, which I guess maybe could be
11 differentiated from the adequacy of service after the
12 request is given.

13 But just in assessing the reasonableness
14 of the request you identified factors including sort
15 of demonstrated history, a key component of that is
16 what they've done in the past. I think your evidence
17 that you had put forward is hey, 2021, there might be
18 some factors that create a more certain capacity on
19 the line, but there's 29 trains, 30 trains delivered
20 in 2021, you know, what they've offered.

21 There's some demonstrated capacity that
22 they can do this. Another is that you clearly

1 specified it in your request. A third, is that there
2 was no objection, there were no further questions,
3 and then there was an issuance of rates that show
4 some acceptability of the request that bears on its
5 reasonableness and he said is an important factor.

6 And sort of implicit in your filing, and
7 maybe you've said it explicitly is the timeframe by
8 which you made the request in which, you know, the
9 service would start. So for example, if there was a
10 particular constraint on crews or train sets, which
11 is I think what they put forward in their
12 supplemental, BNSF at least had some time to take
13 action in order to meet your request, so that the
14 advance notice of the request might play some role in
15 the reasonableness of the request.

16 Is it fair to take that as an implication
17 that there was some advanced timing that you provided
18 to BNSF in terms of your request?

19 MR. JAFFE: Well, it is true that they had
20 been well aware of NTEC's plans for a long time. I
21 mean Matt can walk you through all of the many times
22 they had described that, both from the contract

1 negotiations, and then eventually when we did ask for
2 the common carrier obligation.

3 Whether or not, you know, in any given
4 circumstance it is essential that wouldn't have lots
5 of preplanning time is in my view, it's not an issue
6 here. They knew about it. It's plenty of time. But
7 I'd even say, you know, if we've run into the
8 situation where if you got a contract, BNSF doesn't
9 want to get into the common carrier discussion with
10 you before, you know, maybe about 90 days before the
11 contract expires.

12 So, you know, even if you want to it may
13 not work. But here, we definitely did, and we
14 definitely think that's an important factor.

15 BOARD MEMBER FUCHS: So it's your view the
16 constraint that would have been valid at some time
17 was crews, or I don't want to say valid. What is
18 your view of the constraint for why BNSF cannot
19 provide 29 trains?

20 MR. JAFFE: My view is very simple, it's
21 that BNSF made an election about how to handle its
22 staffing in an economic downturn that rendered it

1 unable to provide common carrier service upon
2 reasonable request. That's it.

3 BOARD MEMBER FUCHS: There's no problem
4 with the Westshore terminal loading and unloading
5 capacity?

6 MR. JAFFE: No. And indeed Matt could go
7 on ad nauseam about Westshore, but as Ms. Lawler
8 points out in her statement, it's a big facility.
9 Its approximate capacity is about 33 million tons of
10 throughput a year, which BNSF is only, you know,
11 some of that, but currently it's running at about 20
12 is that right, it's about 20 million?

13 MR. BABCOCK: Somewhere between 20 and 25.

14 MR. JAFFE: Yeah, somewhere between 20 and
15 25 million. There's room in Westshore. There's
16 never been an issue with Westshore, in terms of
17 NTEC's arrangements with them, or the volume that
18 they intended to ship Westshore, I believe the
19 attitude was bring it on.

20 BOARD MEMBER FUCHS: There seems to be
21 obviously, a track capacity at Bellingham given
22 current operations? And do you agree with that?

1 MR. JAFFE: I'm sorry could you say that
2 again?

3 BOARD MEMBER FUCHS: There seems to be
4 track capacity, sufficient track capacity on the BN.

5 MR. JAFFE: To my knowledge there's
6 sufficient track capacity. I mean I haven't sat
7 there with the BNSF traffic tapes, and operating as
8 we sit there, but you know, and maybe Matt you
9 wanted to speak to this. You know, Matt, and his
10 team had several -- are much more familiar with the
11 exact operation because they track the trains day in
12 and day out, and both Matt and his basically number
13 two person are former railroad folks.

14 Matt with the NS and his person who works
15 with him Jason, was with the BNSF, and I think
16 they're pretty well aware of what those situations
17 are.

18 MR. BABCOCK: Yeah. When you look at
19 their challenges, there can be constraint points. It
20 can be at the port, it can be at the mine, it can be
21 on the railway. Currently, the constraint point
22 we're dealing with is the railroad, and we're not

1 hearing Westshore being part of that challenge right
2 now.

3 BOARD MEMBER FUCHS: But with the
4 railroad, you don't -- you find there to be your
5 assessment on what your understanding historical
6 levels, current traffic levels, the issue on the
7 railroad is not track capacity. So you've previously
8 argued today that it's not availability of train
9 sets, given what's happened in the market.

10 Is, do you think that they have a crew
11 constraint?

12 MR. BABCOCK: That's what I understand. I
13 know the BNSF is the subject matter expert on that.
14 That's what we believe has been communicated to us,
15 as it's primarily been crews, and then as Dan has
16 mentioned there's just a choice, and prioritizing and
17 choosing who gets the service.

18 BOARD MEMBER FUCHS: So, that kind of gets
19 me back to the emergency service order question. Is
20 you know, without making a particular finding, if it
21 is true that the primary constraint that BNSF faces
22 to meet 29 in June is crews. Does that create a

1 situation that other shippers have identified that
2 because of the existing crew constraint, 29 trains
3 for you means a reduction in service, or worse
4 service for somebody else?

5 And I only -- so that those companies face
6 some consequences, and I just want to separate that
7 of course, from you talk in your filings about how
8 this isn't a zero sum game. And the whole notion of
9 the Board taking action to address inadequate
10 service to create incentives so that carriers have an
11 incentive to have more crew over the long time, over
12 the long period.

13 And you might argue, you know, we had an
14 April meeting with BNSF in 2022. We got an email
15 about crews in June. They had a year to have enough
16 crews. But the situation we face for June 23 is they
17 have a certain number of crews, and they have a
18 certain amount of requests from a variety of
19 shippers.

20 And how does an emergency service order
21 situation not hurt other members of the public such
22 that you know, if sort of we face the zero sum game

1 for June that we might not for a standard case
2 setting incentives for longer term.

3 MR. JAFFE: Okay. I'll address that.
4 Well first, let me just point out that
5 notwithstanding whatever capacity constraint they say
6 they have with respect to the crews, it is not
7 stopping them from signing up more business. So, I
8 just can't put two and two together with that. I
9 cannot answer for BNSF how it has chosen to allocate
10 all crews in that area.

11 Indeed, and even when I read their filing
12 closely it suggests to me that yes there is, they say
13 they have an issue in Everett. There's even a
14 mention that in BNSF's reply filing that when they
15 use an Everett crew for this movement, there could be
16 some issue, or some trade off. They don't say they
17 always use an Everett crew, it's somewhat unclear.

18 There are several crew bases nearby. I
19 don't really know how they're managing it, and in the
20 grand scheme of things that's exactly the thing that
21 NTEC doesn't have to figure out for them. And yes,
22 if you sat and did a, you know, had an opportunity

1 for a full record for every single thing that we
2 might consider here, or could in the complaint
3 process, you could delve into all of those things.

4 It would probably cost a lot of money to
5 do it, but you could do it. But for this particular
6 purpose, I haven't seen one thing in here that says I
7 can't do it. They keep saying I'm going to hurt
8 somebody else, but they never say that, you know,
9 they really can't do this, and the truth is that if
10 this notion they're trying to pit us against each
11 other is the wrong basis to look at it at all.

12 BOARD MEMBER FUCHS: I appreciate that.
13 Thank you.

14 MR. JAFFE: Yep.

15 CHAIRMAN OBERMAN: So, I'm going to finish
16 up here with NTEC before we break for lunch. They've
17 gone into some of the area I wanted to go into
18 because we talked about the emergency service count
19 so to speak. I want to talk about the preliminary
20 injunction count.

21 We've pretty much explored the likelihood
22 of success one way or the other on the common carrier

1 to the extent you can deal with it. We haven't dealt
2 with BN yet. I don't have any further questions on
3 that.

4 On the irreparable harm standard, do I
5 take it that one of NTEC's contentions are the kind
6 of harm to the Navajo Nation that Mr. McLaughlin was
7 talking about, the immediate loss of some
8 governmental services? Is that part of the
9 irreparable harm we should think about in terms of
10 the preliminary injunction?

11 MR. JAFFE: Yes.

12 CHAIRMAN OBERMAN: And recently when we
13 were talking about the immediate effects of loss of
14 trains in June there was discussion of loss of
15 scholarship money that I'm trying to figure out
16 what's irreparable about it. Are we talking about
17 students who are not going to be in school right now,
18 and are going to miss out on some period because they
19 don't have a scholarship money.

20 Secondly, we talked about loss of job
21 creations, so does it mean there are going to be more
22 unemployed people this summer on the Navajo Nation

1 because of the inability to invest in job creating
2 businesses? And what else are we talking about
3 because I think Mr. McLaughlin earlier mentioned that
4 the funding for the Navajo Nation includes schools,
5 pre-schools, schools, benefits for jobless people.

6 I mean what else should we be considering
7 here that from a human point of view it doesn't do
8 you much good to get a damage award two or three
9 years from now as Mr. McLaughlin said. Have we
10 explored all of the -- I'd like to hear more
11 specifics about the government services that won't
12 happen.

13 MR. MCLAUGHLIN: I think I need to clarify
14 to certainly NTEC provides the Navajo Nation with a
15 third of its operating budget on an annual basis.
16 I'm not comfortable saying to you that because we
17 receive 16 trains in June, we're going to cut pre-K
18 on Navajo Nation. I don't think that's correct.

19 I think what's more correct, and what you
20 should really consider, the Board should consider and
21 respectfully consider, is the immediate impact is
22 NTEC's ability to currently reinvest in various

1 programs on Navajo.

2 CHAIRMAN OBERMAN: What are the programs
3 that won't be invested in?

4 MR. MCLAUGHLIN: Mr. Lund talked about our
5 helium business. It would be developing more wells.
6 You develop more business, it's more jobs, more
7 revenue, that's what we're talking about here. It's
8 that ability to reinvest in operations back on
9 Navajo.

10 CHAIRMAN OBERMAN: And that the proceeds
11 of those investments can't be made up in the future?

12 MR. MCLAUGHLIN: Well I mean dollar in
13 hand is worth more than a couple dollars later down
14 the road.

15 MR. LUND: And I guess what I would point
16 to when you talk about the reputation of NTEC, and
17 the export business.

18 CHAIRMAN OBERMAN: I wanted to get to
19 that. I was going to separate out. I wanted to see
20 if we had explored the full impact on the people in
21 the Navajo Nation. That's where I was focused. So
22 let's explore that fully if we have, then I wanted to

1 move on to the other aspects.

2 MR. MCLAUGHLIN: Hopefully I'm clear in my
3 answer that I just gave. And I'll stick with that.

4 MR. JAFFE: And let me add to that Mr.
5 Chairman, to the extent you're considering
6 irreparable harm in the context of an injunction,
7 that could be longer than 30 days. So some of these
8 situations, you know, may not completely manifest in
9 30 days, but when cumulative over some period of an
10 injunction, or even an extension of an emergency
11 service order could be very significant.

12 So I think if we frame it up around that,
13 perhaps that makes it easier to describe, like Vern
14 could describe with respect to the --

15 CHAIRMAN OBERMAN: Well I think that is a
16 good point. I think we got lost on focusing on 22
17 trains in June. Preliminary injunction you're asking
18 for would extend further presumably, until the case
19 is decided, anyway, so I don't know if that sheds
20 different, creates additional remedial hardships,
21 that's what I'm pursuing here on human beings, who
22 rely on the government service that's provided by the

1 Navajo Nation, so is there more that you want to add
2 on that point?

3 MR. MCLAUGHLIN: I don't have any thoughts
4 unless my co-counsel and colleagues want to add
5 something.

6 CHAIRMAN OBERMAN: All right. So let's --
7 I'm sorry go ahead.

8 MR. JAFFE: And just to clarify on that, I
9 think Tim, that you don't have anything to add in
10 addition to the items that you described before. I
11 mean he had a significant description there.

12 CHAIRMAN OBERMAN: Karen?

13 VICE CHAIRMAN HEDLUND: Thank you. In
14 your pleadings you say furthermore, monetary damages
15 will not replace the export coal volumes that were
16 not available for sale due to BNSF's refusal to
17 provide common carrier sale and reasonable request.

18 MR. LUND: And that's where I was, excuse
19 me, trying to go earlier.

20 VICE CHAIRMAN HEDLUND: But why wouldn't
21 you be able to make a claim for monetary damages for
22 lost business?

1 MR. LUND: How do you quantify that? And
2 I say that because if you look back in 2022 what
3 happened? And at the time when this drastic change
4 in service took place we had over 4.6 million tons
5 under contract, and our vessel sat in port for
6 extended periods of time, 45 days, 50 days.

7 We had the demurrage penalties over 15
8 million dollars. When we traveled to Asia in
9 February, and met with Japanese customers, the whole
10 conversation -- the vast majority of the
11 conversation was on train service. We hear you have
12 a train problem. And so, we had to sit there and
13 defend and answer questions on our reputation, and
14 our ability to deliver because we look at what U.S.
15 plays in the global seaboard market, there's roughly
16 a billion tons that move. The U.S. is 50 million.

17 If we would have got all the service we're
18 5 million tons. It's a small piece. People aren't
19 coming to NTEC because of price. They can go
20 somewhere else because of price. They're coming
21 because of reliability. And last year that
22 reputation was significantly damaged.

1 In May we had 4.6 million tons under
2 contract. In our submittals we talk about what we
3 have under contract over the next two months, which
4 is significantly less. Why don't we have more under
5 right now? Because if they cut our trains and we
6 can't deliver, we may not get back into that market
7 because we are struggling right now in
8 re-establishing our credibility in that market
9 because of what took place.

10 And how does that then fall into what
11 Chairman McLaughlin said is that's the financial
12 health of NTEC. The export business is over a third
13 of the revenue. So when you take a significant
14 financial hit in that segment of your business, it
15 has an overall impact on the financial health of the
16 company.

17 Where that financial health is directed is
18 to your sole shareholder, which is the Navajo Nation.

19 CHAIRMAN OBERMAN: So I want to explore a
20 little more because as I read the case law, maybe
21 this is for Dan, but anybody who you want to
22 enlighten us on this, there's a discussion in some

1 cases about economic loss that is un-addressable, and
2 I have to say I am projecting from my own experience
3 over the last 50 years of trying to prove damages in
4 various kinds of cases.

5 And we're not a court, but what kind of
6 evidence is allowed to go to a jury to measure
7 damages? And that's why I'm thinking about it. I'm
8 going to ask this question of BN as well. You seem
9 to be saying Mr. Lund, and then Dan you may want to
10 join us, that the fact that you will be harmed you
11 think you could establish by what you've learned in
12 Asia.

13 Proving the amount is challenging. Is
14 that what you're trying to tell us?

15 MR. LUND: Correct.

16 CHAIRMAN OBERMAN: And let's take the
17 first part. You've had customers say we're concerned
18 about your reliability?

19 MR. LUND: Yes.

20 CHAIRMAN OBERMAN: Was there anything
21 concrete, who said what to whom is my next question
22 if there was, that said you know what, we're going to

1 contract with Global, or somebody else this year, or
2 next month because you can't tell us how many trains
3 you're going to be able to deliver. We're going
4 someplace else. Did anybody say that?

5 MR. LUND: We had discussions, prior
6 discussions with a customer that talked about a
7 long-term agreement for the majority of their needs
8 for NTEC to supply a majority of their needs.
9 During that visit they told us they had significant
10 concerns on entering into an agreement of that
11 magnitude with us because of what took place in 2022.

12 CHAIRMAN OBERMAN: And did they not enter
13 into that agreement?

14 MR. LUND: We are not in agreement today.

15 CHAIRMAN OBERMAN: And was it your
16 understanding if you had been able to say to them
17 well, I can depend on BN to get us 29 trains a month,
18 they would have said oh, well then that's fine? I
19 mean I'm trying to measure the causal connection
20 here, can you enlighten us on that?

21 MR. LUND: I can't sit here today and say
22 that, no. But what I can tell you is that during

1 those discussions, and they mentioned their concern
2 in entering that agreement, we spent a lot of time
3 talking about common carrier. Why are you on a
4 common carrier? And we had to talk about the
5 contract, and how we were struggling to get a
6 contract.

7 And had to assure them under a common
8 carrier service arrangement we would still get
9 service. And so, for 20-30 minutes we talked about a
10 common carrier, and what that means because that was
11 new to them as well. They hadn't dealt with a
12 customer in the U.S. that was using a common carrier.

13 So we had to explain all that, and we
14 assured them that we would still get service, that
15 there was an obligation to provide service. And now
16 all of a sudden, the same thing is happening under
17 the common carrier that it's getting cut, and so back
18 to the reputational side of it, if we get
19 dramatically reduced in our train count, and can no
20 longer deliver to our customers, then again our
21 reputation is damaged because once again NTEC could
22 not deliver. We are not a reliable customer.

1 CHAIRMAN OBERMAN: And are you saying,
2 well did you have a contract with this customer
3 before?

4 MR. LUND: Yes.

5 CHAIRMAN OBERMAN: So this was a
6 discussion about a renewal?

7 MR. LUND: Yes.

8 CHAIRMAN OBERMAN: Was there more than one
9 involved in the raising the uncertainty of a common
10 carrier reliability?

11 MR. LUND: The customers?

12 CHAIRMAN OBERMAN: Yes?

13 MR. LUND: Only the one customer brought
14 up common carrier. All three that we visited with on
15 that trip questioned our ability to provide reliable
16 service, but only one had read the news on the common
17 carrier.

18 CHAIRMAN OBERMAN: Did the other two raise
19 the question about whether they were going to be
20 willing to renew their contracts with you, or did
21 they renew them?

22 MR. LUND: We have spots and -- but no

1 long-term agreement.

2 CHAIRMAN OBERMAN: Was that because of
3 your inability to assure them of train delivery, not
4 getting the long-term?

5 MR. LUND: They didn't say that
6 specifically, but I would say yes, that their
7 concerns and our ability to be a reliable provider is
8 something that they're weighing as they make a
9 decision on who they buy coal from.

10 MR. JAFFE: I think -- do you want to add
11 to that Matt?

12 MR. BABCOCK: Yeah. Just as additional
13 color in general, this is the theme of every visit we
14 have made for the past year of having to discuss, and
15 normally it's bragging about how we have the best
16 freight, you know, class railroads in the entire
17 world. And being proud of that, and showing the
18 reliability.

19 You know, we've had to dig in deep with
20 all of our customers, and we have long-term
21 customers, all of the five major state owned Korean
22 Jenkos all rely on our product. And so this is a

1 conversation we have to have again and again as to
2 why is it that the railroad's performing this way?
3 When is it going to get better?

4 What are you doing to ensure that you can
5 be reliable on the future? So that's impacting every
6 single commercial discussion we're having with our
7 customers in Asia.

8 MR. JAFFE: And correct me if I'm wrong
9 there Matt, one of the other things that you've been
10 hearing from them is why are the other guys' trains
11 getting loaded.

12 CHAIRMAN OBERMAN: Well that was my next
13 question, are they telling you that the other
14 shippers are not?

15 MR. BABCOCK: And that was -- absolutely.
16 That was probably the most disconcerting, you know,
17 conversations we had when people would say well you
18 know, this railroad problem exists, but it only
19 exists for you. The other customers aren't having an
20 issue with it, or at least one other customer wasn't
21 having an issue with it.

22 CHAIRMAN OBERMAN: Was that Global?

1 MR. BABCOCK: Correct.

2 CHAIRMAN OBERMAN: What impact would this
3 have if on your reputation a year from now, suppose
4 the crew problems are over a year from now, and BN is
5 not being resistant. Do you have any way of telling
6 us whether the reputational harm will carry over to a
7 time when maybe there's sufficient service?

8 MR. BABCOCK: That would be highly
9 speculative. I mean we're taking this day by day
10 right now, trying to preserve those relationships,
11 calm the fears of our customers, and continue to
12 serve them. Our customers are very important to us.

13 We want to make sure they're happy. We
14 want to make sure that they're served the way they
15 need to be, but I can't really speculate. I would
16 assume if this continues it will be, at some point we
17 will get to a point where it becomes very difficult
18 to continue to do business in Asia.

19 MR. LUND: And I will just add again our
20 customers in Japan and Korea aren't coming to us on
21 price, they're coming to us on reliability. And
22 again, the U.S. and NTEC play such a small

1 percentage in the overall Global sea borne market,
2 that if they have a concern on reliability they're
3 going elsewhere.

4 MR. JAFFE: And correct me if I'm wrong,
5 Matt, I mean some of these relationships took years
6 to build so that they would ship with you in the
7 first place.

8 MR. BABCOCK: Yeah, that's correct. And
9 one of the customers that Vern had, you know, had
10 discussed, was one that took you know, five or six
11 years of us spending a lot of time, due diligent
12 together, getting to know each other, getting to
13 trust each other.

14 So these relationships really are built on
15 trust, and having done business for such a long time,
16 again was why we're here, it's why it's frustrating.
17 We feel like we owe this to our company as well as to
18 the nation, as well as to our customers, to make sure
19 that we can continue what we've been doing for many,
20 many years.

21 CHAIRMAN OBERMAN: And I take it Dan, you
22 would tell us that if you don't get relief from this

1 Board, and a year from now you're trying the case on
2 damages, it would be hard for you to put in evidence
3 that we could sink our teeth into. Is that what
4 you're telling us?

5 MR. JAFFE: Yes.

6 CHAIRMAN OBERMAN: Okay. I had -- sure,
7 go ahead Karen.

8 VICE CHAIRMAN HEDLUND: So is what you're
9 saying is that the customers we were talking about
10 were from Japan are telling you that reliability is
11 important because if they are expecting a million
12 tons and they don't get it, the customers are saying
13 if they're expecting a million tons and don't get it,
14 I assume these are utilities that they won't have
15 enough coal to keep the lights on.

16 MR. BABCOCK: Exactly, and they have a
17 fiduciary responsibility as well to make sure they
18 procure fuel, the fuel necessary to provide basic
19 services in those countries, so it is important to
20 them. And the business partner they select is
21 important.

22 CHAIRMAN OBERMAN: I'm sorry, go ahead

1 Patrick.

2 BOARD MEMBER FUCHS: On the question of
3 reputation, can you provide the closest analog case
4 in this type of economic realm where kind of
5 reputation was seen as constituting irreparable harm?
6 A lot of the research that we've done suggests that
7 it's most common in the trademark, or patent arena
8 where reputation is seen as -- what's the closest
9 case on the reputation point for you?

10 MR. JAFFE: So I wasn't necessarily
11 thinking about it in exactly the same context, but I
12 believe we cited, and I apologize if I don't have the
13 site right in front of me pinpoint. That the 7th
14 Circuit case example where we had reputational harm
15 from I believe it was you know, a key employee,
16 trying to open their own shop, was trying to steal
17 business, or something along those lines.

18 And the court was like, well you know, it
19 isn't the case where you have to say for certain that
20 this attaches to that, but it's playing that the
21 reputational harms here are ones that are, you know,
22 challenging to quantify, and it goes essentially to

1 who are you and what do you do, and can I trust you?

2 CHAIRMAN OBERMAN: One final area, which
3 I want to do quickly because we're going to run out
4 of time for BN. And we are going to break for lunch.
5 I'm not clear on why, what the situation is with
6 using the CP connection, CP/KCS connection to either
7 mitigate your contract losses from last year, which
8 are not before us, or to at least alleviate some, if
9 not all of the irreparable loss here. Can you?

10 MR. JAFFE: Yeah. I'll address a little
11 bit of that just as a general proposition, and then
12 I'm sure Matt has some specific details. One of the
13 things with that of course, is that you know, at this
14 point the way the service is structured, come hell or
15 high water, BNSF will originate the traffic. Okay.

16 And currently, the way BNSF is on the six
17 trains that they did move, again they were BNSF's, so
18 BNSF has to be okay with moving those over. In
19 addition, I understand that as a practical matter,
20 you know, CP is not in a position to move a great
21 many trains, it might only be a couple of trains on
22 any regular basis.

1 CHAIRMAN OBERMAN: Why not? Do they have
2 a capacity problem?

3 MR. JAFFE: Well, go ahead.

4 MR. BABCOCK: We have continued to discuss
5 that alternative with the CP, and even early on when
6 we stopped receiving service, it was you know, we
7 looked at any transportation alternative, but
8 obviously we're a captive shipper, and the CP
9 wouldn't be taking on new business, and they would
10 need to ramp up for that.

11 But we've had very good conversations with
12 them, really the constraint point was whether or not
13 BNSF could originate it, and make the move happen.

14 CHAIRMAN OBERMAN: Very specifically, well
15 go ahead.

16 MR. JAFFE: Oh I'm sorry. I was going to
17 add one thing to that, which is to our knowledge at
18 this time, despite what BNSF mentioned in their
19 filing, because they talked a little bit about it's
20 kind of inefficient, this, that and it wasn't
21 necessarily a preferred way to do this, nor had we
22 asked for CP's service.

1 And one of the reasons that we didn't ask
2 for it was that back on February 17, Jason Plett, who
3 is the manager of logistics who works for Matt, was
4 informed by BNSF that they would no longer ship
5 export trains by the CP, and they would realign the
6 set to move BNSF direct, although it wasn't
7 necessarily specifically in NTEC service, and
8 apparently they cited four reasons.

9 Difficulty, properly stripe the lining,
10 marshaling the cars for interchange, billing and
11 interchange issues between the two roads, moving on
12 BNSF would be better for NTEC because BNSF
13 controlled the move. We were a little incredulous on
14 that one, but okay.

15 And moving BNSF direct would be
16 financially beneficial to NTEC, and I'm not 100
17 percent positive, but it might have been slightly
18 more expensive.

19 CHAIRMAN OBERMAN: Is that in the record
20 Dan?

21 MR. JAFFE: Well no, this is something we
22 only -- I brought this with me. It's not in the

1 record yet because we hadn't expected quite as much
2 exposition from BNSF about CP because of the
3 decision.

4 CHAIRMAN OBERMAN: I ask you to file that.

5 MR. JAFFE: Yeah. We'll happily get that
6 to you.

7 CHAIRMAN OBERMAN: You've read it to us,
8 it should be in the record.

9 MR. JAFFE: Yes. Absolutely.

10 MR. BABCOCK: And a really quick comment to
11 that. That February communication we received was
12 the trigger point when we started to go out into the
13 market looking for private sets that we could then
14 run in this lane. We've had continuous conversation
15 with CP to get a rail agreement in place, so we could
16 use that as an alternative.

17 And then I believe it was late last week
18 BNSF did reach out and say that they potentially had
19 a train set or two that they could put in that
20 service. So we're working on that, but it's had
21 some --

22 CHAIRMAN OBERMAN: Let me just be very

1 specific. When BN said you were only going to get 16
2 trains in June, was there any discussion about saying
3 well how about giving us 13 more trains to go up to
4 CP, on top of the 16, and was that available?
5 Assuming CP could take it?

6 MR. BABCOCK: That wasn't an alternative
7 that was available in the short term. It's something
8 that we're still trying to build.

9 CHAIRMAN OBERMAN: Well did you ask BN
10 does it make a difference if you give us the 13 more
11 trains to go up to CP? Would that make a difference?

12 MR. BABCOCK: Well I think with the
13 February 17th communication where they said they
14 didn't want to provide the equipment for it, was a
15 very clear signal that they were not capable of doing
16 that.

17 CHAIRMAN OBERMAN: Well would that
18 transportation involve Everett crews, as I look at
19 the map.

20 MR. BABCOCK: Right.

21 CHAIRMAN OBERMAN: So I'm trying to figure
22 out if that's the problem for BN, why they couldn't

1 send more trains up to CP, but they said they
2 couldn't. I take it.

3 MR. BABCOCK: Certainly. And that's
4 something that we can certainly clarify as they've
5 had an opportunity to share how they feel about that
6 move as well. We're interested in it.

7 CHAIRMAN OBERMAN: We may learn about it
8 today.

9 MR. BABCOCK: Yes sir.

10 MR. JAFFE: I do notice the Chairman, Mr.
11 Chairman, as you pointed out though that since the
12 pre-argument conference that you held, it is plain to
13 us that the sharp eye of the Board is needed here.
14 And you know, I'll sort of I'll kind of finish where
15 I started, unless you assume the Board may have more
16 questions, I'll sort of finish where I started, which
17 is you know, we need your help, and I hope that the
18 evidence you've heard here today explains, you know,
19 why that is, and of course we're happy to answer any
20 more questions.

21 CHAIRMAN OBERMAN: All right. I just have
22 one follow-up, and then I think there are a couple

1 other Board members. If BN said tomorrow we'll give
2 you 29 trains, and CP said we can take 29 trains,
3 would you do it? Is there any reason not to do it?

4 MR. BABCOCK: I think we'd have to
5 evaluate the economics, and make sure everything
6 aligns with what we're trying to achieve, but
7 certainly we're looking at any solution that can be
8 provided here.

9 CHAIRMAN OBERMAN: Is the rate markedly
10 different by going that route? I mean you're 50 to
11 \$100.00 now, as I understand it. I mean is that?

12 MR. JAFFE: I don't know that we know what
13 exactly the rate would be because BNSF would have to
14 get sort of do that, and CP would do that. But
15 assuming that you know, it wasn't outrageous your
16 answer would be yes, right?

17 CHAIRMAN OBERMAN: I mean you don't care
18 ultimately if trains get on the ship which route they
19 take?

20 MR. BABCOCK: Absolutely. A train that
21 shows up at Spring Creek mine, as a train shows up at
22 Spring Creek mine, how BN or the railroads choose to

1 deliver it as long as it ends up at the terminal is
2 good for us.

3 CHAIRMAN OBERMAN: BN hasn't said they'll
4 do that, and so far CP doesn't seem to have the
5 capacity. Is that where we are?

6 MR. JAFFE: That's correct, Mr. Chairman.

7 CHAIRMAN OBERMAN: Okay. Robert, do you
8 have something? Okay. Michelle?

9 BOARD MEMBER SCHULTZ: You'd spoken
10 briefly about your conversation with a customer in
11 Japan, and their questions about the predictability
12 of the rail service, and their concerns.

13 In terms of trying to frame this with
14 regard to irreparable harm, wouldn't your competitors
15 also be similarly situated with the challenges on the
16 current network?

17 MR. LUND: The constraints of BNSF? Yes.
18 They should be. We should all be on that line, but
19 they weren't having the same impacts that we were
20 having, as shown on the graph, their service actually
21 went up.

22 And in terms of vessel wait time, and

1 that's something that our customers watch very
2 closely, because they're expecting those vessels to
3 be loaded and turn back around, and significant
4 penalties that are assessed to us if we do not get
5 that vessel loaded in a quick manner.

6 And so they saw our vessels sit there for
7 extended days, while our competitors vessels were
8 immediately filled and turned back around. And so
9 even prior to our meetings in February, our
10 customers were asking that question of us. Why? Why
11 is it taking your vessel so long to get loaded?

12 If I send a vessel to your competitor it's
13 loaded immediately and turned back around.

14 BOARD MEMBER SCHULTZ: Thank you.

15 CHAIRMAN OBERMAN: All right. We are
16 going to break for lunch. We will be back here at
17 1:05. I'll just admonish you this, unrelated to this
18 case, other than it's pending here, we have just
19 learned that the other emergency service case that
20 was filed last week against Amtrak was settled this
21 morning, and they filed something.

22 A word to the wise, go out over lunch and

1 settle this one. But we'll be back at 1:05 to either
2 hear the settlement, or proceed with BN. Thank you.

3 (Lunch break 12:35 p.m. - 1:12 p.m.)

4 CHAIRMAN OBERMAN: All right. Let us get
5 back on the record. We don't have a formal resting,
6 but I think NTEC was done with their presentation,
7 there will be opportunities to answer further
8 questions, and of course some rebuttal if there's
9 time. But at this point it's turning it over to BN.
10 Tim, who's in the lead here?

11 MR. WEISKITTEL: Thank you Mr. Chairman.
12 My name is Adam Weiskittel. I am Associate General
13 Counsel for operations at BNSF. I'm joined by Tim
14 Strafford and Tony LaRocca from Steptoe and Johnson
15 here in D.C. And per the Board's request we have two
16 other representatives from BNSF with us today who
17 have personal knowledge, thank you, of the facts
18 involved in this situation.

19 And back here we have Mr. Matt Garland,
20 who is our Vice President of Transportation. He is
21 responsible for the movement of trains across our
22 network. All of our train crews and dispatchers

1 report up to Mr. Garland. He also appeared for us in
2 the service hearing last April.

3 And then next to over here, at the other
4 end we have Ms. Lawler, Farah Lawler. She is our
5 Vice President of Industrial Products Marketing. Her
6 group is responsible for our relationships with our
7 coal customers, including with NTEC, and she was
8 involved in a lot of the discussions last year that
9 have already been referenced.

10 So, to the extent that we can answer
11 questions, we're happy to have them.

12 CHAIRMAN OBERMAN: I'm wondering if they
13 could move chairs up to the table, so we can
14 facilitate them speaking to us. All right. Proceed.

15 MR. WEISKITTEL: Okay. Thank you Mr.
16 Chairman. So, Tim's going to walk us through our
17 legal argument, but I want to start with a couple of
18 comments on behalf of BNSF. The first, and most
19 important, which is that BNSF greatly values our
20 relationship with NTEC, and we want it to grow.

21 They have been a good customer of ours for
22 three and a half years. We hope that that

1 relationship continues well into the future. We're
2 here talking about export business, but we have both
3 the domestic and export relationship with NTEC. We
4 serve all four of their mines, and we move NTEC coal
5 to about 50 different domestic destinations.

6 In fact, in any given year about 90 to 95
7 percent of NTEC's coal that we move is actually
8 domestic coal, not export coal. The fact that we are
9 in two disputes at the moment, one in federal court
10 in Montana, and one here does not change our view
11 about the value of the relationship, and the
12 long-term growth we hope to see with NTEC.

13 Our goal with NTEC and with all of our
14 customers is that we move as much of their freight as
15 possible, so they can maximize their market
16 opportunities. We absolutely understand that our
17 success depends entirely upon our customer's success.

18 The second point I'd like to raise is that
19 the emergency service and injunctive relief that NTEC
20 has asked for here, we believe that would be bad
21 precedent for our customers, and frankly for the
22 Board. These are extraordinary remedies. We

1 believe, as Mr. Strafford will lay out, that they're
2 not warranted under these particular facts.

3 We're absolutely committed to honoring our
4 common carrier obligation. We believe we've done
5 that here. And we'll get into how we think about
6 that. Mr. Strafford will get into that. NTEC is
7 getting the same amount of coal this year as a common
8 carrier shipper as they have on average throughout
9 the life of our relationship.

10 And in 23, compared to 22, they're getting
11 significantly more coal as a common carrier shipper.
12 NTEC is seeking an order that would give it much
13 more. We understand that. Our other customers want
14 more coal from us and more service right now as
15 well.

16 You've seen the letters filed by Global,
17 by the Crow Tribe, and also by Arch. They all oppose
18 the request for emergency service or injunctive
19 relief, and we would urge the Board to give those
20 opinions great weight. We have a concern that if
21 under these sorts of circumstances the Board were to
22 signal to shippers that they can get a regulatory

1 thumb on the scale for a market advantage, that would
2 be troubling precedent that would interest a lot of
3 shippers in asking the Board for that relief.

4 As we've laid out in our filings,
5 intervention here by the Board we believe will cause
6 problems and harm to our other customers, and we also
7 think it would be inconsistent with Congress's
8 direction that this Board not intervene unless it's
9 absolutely necessary.

10 And the last thing I mentioned, we
11 unfortunately did not have the time as we were speed
12 eating over lunch to have any serious settlement
13 conversations, Mr. Chairman, but we absolutely
14 remain willing to work towards mutually beneficial
15 solutions here.

16 It was mentioned that there were
17 conversations with the RCPA staff. We were happy to
18 participate in those last year. We stood ready to
19 participate in those earlier this year. NTEC
20 ultimately decided to choose a different path, but
21 we'd be happy to do that again if we think -- if the
22 Board thinks there's any value in that.

1 Similarly, if perhaps more formal, Board
2 sponsored mediation, felt like it would be a value,
3 we would absolutely participate in that as well. One
4 other thing, during the ex parte 770 proceeding we
5 participated in the biweekly calls with Board staff
6 to talk about our service.

7 We felt those were pretty useful, so that
8 we could update staff on how our service was going,
9 and answer any questions they have. If this
10 proceeding has caused concerns at the Board about
11 how our export coal service is going, we'd be happy
12 to replicate something like that, so that you guys
13 could stay informed about how we're doing.

14 And then last, I hope it goes without
15 saying that we were -- NTEC has been a long-term good
16 customer of ours. We thought we were close to having
17 a contract signed last year. We were disappointed
18 that we didn't get there, but we're always happy to
19 go back and restart those negotiations if NTEC is
20 interested in doing that.

21 BOARD MEMBER PRIMUS: Can I just make a
22 quick question. Thank you. Real quick. So speaking

1 on, touching on the negotiations and contracts
2 because I know you have a number of people here today
3 answering those questions. Any reason by Steve Bobb,
4 he's the Chief Marketing Officer, he's the one who is
5 going to be you know, making these deals with NTEC
6 and others, is there any reason why he's not here to
7 answer?

8 MR. WEISKITTEL: I think that we
9 interpreted the request from the Board as the people
10 that were most intimately familiar, and had personal
11 first-hand knowledge of the negotiations, and the
12 facts, and that's why we brought Ms. Lawler. She has
13 been more involved than Mr. Bobb.

14 BOARD MEMBER PRIMUS: So, but he's sort of
15 you know, the guy who makes the engines run in terms
16 of that marketing in terms of going, but he's not,
17 you didn't think, you know, in terms of the
18 negotiations, and my understanding he's intimately
19 involved with a lot of this. You didn't think it
20 was worth him coming?

21 MR. WEISKITTEL: I wouldn't characterize
22 it that way. I would say we didn't think that that's

1 what the Board had asked for. And as you'll see, Ms.
2 Lawler was the person that was doing a lot of these
3 actual communications, emails, phone calls, I don't
4 think Mr. Bobb was nearly as personally involved as
5 Ms. Lawler, so that's why we brought her.

6 BOARD MEMBER PRIMUS: Okay.

7 MR. WEISKITTEL: With that I'll turn it
8 over to Tim.

9 MR. STRAFFORD: Thanks Adam. Good
10 afternoon Chairman Oberman, Vice Chair Hedlund,
11 Members of the Board, my name is Tim Strafford, I'm
12 here representing BNSF Railway Company.

13 Before I get started, there's been a lot
14 of discussion already today about contracts and
15 contract negotiations, and we're happy to answer any
16 questions the Board has, with regard to any specific
17 contracts, or contract negotiations. We'd ask to go
18 into confidential session, at least from BNSF's
19 perspective, but again we're happy to answer any
20 questions the Board has.

21 CHAIRMAN OBERMAN: Including contracts
22 with NTEC?

1 MR. STRAFFORD: Yes. And what I mean by
2 confidential is NTEC is certainly eligible to stay,
3 as are our in-house BNSF folks. Just not members of
4 the public.

5 CHAIRMAN OBERMAN: I understand, but it's
6 one at a time apparently still. I thought we had
7 solved that problem. If NTEC is okay with discussing
8 that contract, as they were, to some degree this
9 morning, that toothpaste is out of the tube. I can
10 understand Global, or other contracts, but.

11 MR. STRAFFORD: There were certainly some
12 aspects of that contract and negotiations that was
13 discussed. There's probably a lot more to it that we
14 think is sort of commercially confidential,
15 especially as there's representatives from our other
16 customers here as well.

17 CHAIRMAN OBERMAN: Good. Let's see where
18 we go. If we go just over the same territory, I
19 don't see any need to suppress something that's
20 already been discussed, but you'll tell us.

21 MR. STRAFFORD: Absolutely. And our
22 intent is to proceed in a public fashion. The narrow

1 legal question before the Board today is this: Does
2 NTEC present a situation that requires the Board to
3 take immediate action to protect the public or
4 prevent irreparable harm? The answer to that
5 question is no. NTEC alleges that the volume of
6 service that BNSF is providing NTEC to transport
7 coal from the bottom of a basin to a port near
8 Vancouver, British Columbia for export to Asia, falls
9 below a minimum required by the common carrier
10 obligation.

11 BNSF strenuously denies this, and we'll
12 discuss why, but the Board need not address this
13 allegation today. In essence, NTEC wants additional
14 committed service volumes to meet a currently hot
15 export market, but the purpose of the emergency
16 service provisions is not to advantage competitors in
17 the marketplace, it's to protect the American public
18 from an immediate harm.

19 Notwithstanding market opportunities, NTEC
20 walked away from contract negotiations with BNSF,
21 decided to pursue litigation in federal court, and
22 become a common carrier shipper. NTEC now wants the

1 Board to impose on BNSF the equivalent of forward
2 looking commitments to guarantee minimum values
3 through the guise of an emergency service order.

4 That is NTEC seeks to impose a contract
5 level of service for what NTEC admits are peak
6 volumes, with no corresponding obligations on their
7 part, to actually move the traffic. If the price of
8 coal in Asia falls, NTEC will be able to walk away
9 from this traffic with no obligations. Next slide
10 please.

11 My presentation is organized into four
12 parts. First, I will discuss why there is no
13 emergency situation here warranting an emergency
14 service order. Second, I will show how NTEC has not
15 met the Board standards for preliminary injunction
16 because it has not shown irreparable harm.

17 Third, the request for injunctive relief
18 also fails because the requested relief would cause
19 harm to others. While the Board need not reach the
20 question of likelihood of success on the merits to
21 conclude that a preliminary injunction is not
22 warranted. The last section of my presentation

1 explains why NTEC will not succeed on the merits of
2 its complaint.

3 CHAIRMAN OBERMAN: Tim, let me ask you a
4 question. Do you accept that we're guided by court
5 guidance on preliminary injunctions to use a sliding
6 scale, that if there is a strong showing on one of
7 the four criteria, that you're going to have a
8 weaker showing on the others. Do you accept that as
9 the law that guides us?

10 MR. STRAFFOD: I do Chairman. The Board
11 is not strictly obligated.

12 CHAIRMAN OBERMAN: So, when you say you
13 don't have to get to the likelihood of success on the
14 merits, it seems to me if we're going to slide, we've
15 got to figure out if you have a very high degree of
16 chance of success with the merits, or more difficulty
17 irreparable harm showing, or vice versa. We have to
18 balance those, so don't we have to consider all of
19 it?

20 MR. STRAFFORD: I think the three other
21 prongs strongly counsel against a preliminary
22 injunction, and so even if you believed that NTEC

1 was likely to succeed on the merits, you need not
2 enter an injunction, but certainly you have the
3 ability to consider it.

4 CHAIRMAN OBERMAN: Well that's all I'm
5 saying. You said we don't have to get to the success
6 on the merits. The way I read the law we've got to
7 look at all the things so we can decide how to weigh
8 it. Do you agree with that?

9 MR. STRAFFORD: Certainly you have to
10 determine whether or not the four factors are met,
11 and you would have to do some thinking about the
12 likelihood of success on the merits. As I
13 indicated, we believe that the showings under the
14 first or the other three prongs are significant
15 enough that you don't really need to spend a lot of
16 time with the likelihood of success.

17 CHAIRMAN OBERMAN: Just to speed things
18 up, Dan, do you also agree that we should consider
19 this on a so-called sliding scale basis?

20 MR. JAFFE: I'm sorry could you restate
21 that again Mr. Chair?

22 CHAIRMAN OBERMAN: Yes. In dealing with

1 preliminary injunctions, courts have talked about
2 looking at all the factors involved that if one is
3 very strong, you might still issue an injunction,
4 even if one of the others is weaker, or visa versa.
5 Do you agree that that's the way we ought to consider
6 the various criteria for preliminary injunction?

7 MR. JAFFE: Yes. I mean obviously in any
8 given circumstance there may be a need to weigh one
9 more heavily than another, but certainly all may
10 matter.

11 CHAIRMAN OBERMAN: I just want to see if
12 at least on the legal standards here we're on the
13 same page. Thank you.

14 BOARD MEMBER FUCHS: I do want to point
15 out that at least in the 2022 case, the D.C. Circuit
16 suggested that while courts have done that at times
17 in the past, there was at least attention with other
18 Supreme Court precedent that suggests that some of
19 the factors are to be applied without any
20 qualification, or without any reference to the
21 strength of argument and other factors, and so to be
22 clear, BNSF agrees that the strength -- because I

1 think the sliding scale term might not be readily --
2 I just want to make sure everybody is using the same
3 terminology. You all agree that if the Board were to
4 determine that NTEC has a strong case on the merits,
5 that we should take a lighter touch to irreparable
6 harm, or we should have a lower standard for
7 irreparable harm.

8 You all agree with that proposition
9 specifically?

10 MR. STRAFFORD: No. I don't think we do.

11 MR. LAROCCA: May I just jump in. My own
12 views, and we addressed this in some cases at page 29
13 of our original filing. I think the cases show that
14 you have to look at each factor, you have to. That's
15 required.

16 CHAIRMAN OBERMAN: You have to look at
17 each factor, then we can weigh them.

18 MR. LAROCCA: Exactly. And you have to
19 weigh them, but there are certain things that would
20 have to be found regardless of the strength of other
21 factors. There are certain things that you would
22 have to conclude in order to issue an injunction.

1 For example, it would not be appropriate if you found
2 there was a strong likelihood of success.

3 It would not be appropriate to issue an
4 injunction that harmed other parties. That would not
5 be appropriate. There's not a sliding scale at that
6 point. That kind of weighing would not be
7 appropriate.

8 CHAIRMAN OBERMAN: Well you don't think
9 that's the amount of harm to other parties is
10 something to take into account?

11 MR. LAROCCA: Yes. Of course it is.

12 CHAIRMAN OBERMAN: All right, well that's
13 all we're talking about here is that if you have a
14 very strong showing on one factor you can have a
15 showing, but a lighter one on another factor. You
16 know, if you had massive irreparable harm, but only a
17 51 chance of winning, a lot of courts will say well
18 let's call it the status quo.

19 But if you have a 99 percent chance on
20 winning on the merits, but a 52 percent chance of
21 showing irreparable harm, a lot of courts would say
22 why are we wasting our time. You're eventually

1 going to win, let's issue the injunction. That's all
2 we're talking about here. We all agree with that
3 proposition?

4 MR. LAROCCA: I certainly agree. Yeah.

5 CHAIRMAN OBERMAN: That's all we're trying
6 to get at here. Okay.

7 MR. STRAFFORD: So, next slide please.
8 First I'll begin with the fact there's no emergency
9 here necessitating immediate actions to protect the
10 public. NTEC has moved a substantial volume of coal
11 as a common carrier shipper in 2023. In the first
12 four months of the year NTEC has moved over 1.2
13 million tons of coal for export at Westshore
14 Terminals.

15 As shown on the slide, NTEC has averaged
16 311,503 tons of coal in 2023. That volume is
17 consistent with the average monthly volumes NTEC has
18 shipped since it acquired the Spring Creek mine out
19 of bankruptcy in 2019. That's what the chart shows.

20 Doing some quick math,
21 that's approximately 20.5 trains a month. Next slide
22 please. In fact, NTEC is actually shipping a higher

1 volume of coal, as a common carrier shipper in 2023
2 then they were under their expired contract. BNSF
3 recognizes that NTEC may not view 2022 as an
4 appropriate baseline, but the significant increase in
5 average monthly volumes belies the suggestion that
6 an emergency exists.

7 CHAIRMAN OBERMAN: As I look at your
8 chart, and as I counted them up in your original
9 filing, there's at least 15 months since 2020 that BN
10 has moved more than 311,000 tons. So, aren't we
11 supposed to take a look at an average that may have
12 had some unusual low points, or are we supposed to
13 take a look at the trends, or do you care?

14 MR. STRAFFORD: I think as well, but I
15 think it depends on what you're looking at. Average
16 monthly tonnage of coal is useful for a general sense
17 of the transportation, however, as you note, monthly
18 tonnages vary significantly, and there's significant
19 volatility in terms of the monthly tonnages. Adam
20 did you want to?

21 MR. WEISKITTEL: Yeah, Mr. Chairman, I'd
22 just add one thing. I mean the request that NTEC has

1 made here in the emergency service, the 438,625 tons
2 a month, that seems to be teed off of their 2021
3 volumes, which was their highest volume year.

4 It seems to me like that's
5 one relevant factor, but another relevant factor are
6 the other years, and they haven't been talking a lot
7 about the year before that where they had a
8 significantly lower volume year, through their own
9 choice, not because of BNSF's service. So when you
10 think about --

11 CHAIRMAN OBERMAN: Well they say in 2022
12 the low volume was by BN, not by their choice. Their
13 whole case in 2022 is they offered you volumes, and
14 you didn't pick them up. Isn't that right?

15 MR. WEISKITTEL: That's true. That's the
16 key.

17 CHAIRMAN OBERMAN: We're not deciding the
18 contract case.

19 MR. WEISKITTEL: Agreed.

20 CHAIRMAN OBERMAN: But the facts, I think,
21 I haven't heard that they're in dispute, that they
22 offered you coal, and you couldn't pick it up. So,

1 to factor in as an average, something that is lowered
2 by your admitted, and it's in your own letters from
3 Ms. Farmer and others, you know, we know we haven't
4 done as well as we'd like to.

5 To then lower the average based on your
6 conduct seems to me a little bit disingenuous. What
7 am I missing?

8 MR. WEISKITTEL: Well my point is that
9 first of all, you're absolutely right, that is a
10 contract issue that they have filed a lawsuit in
11 Montana.

12 CHAIRMAN OBERMAN: But the facts of
13 whether they offered the coal, you couldn't pick it
14 up. I'm just looking at the factual history of how
15 much coal is being carried.

16 MR. WEISKITTEL: Yes.

17 CHAIRMAN OBERMAN: And the low numbers in
18 2022 I think it's not in dispute, or at least in
19 significant part determined by the fact that you
20 weren't providing the trains that they asked for.
21 Isn't that right?

22 MR. WEISKITTEL: Yeah. We don't deny in

1 any way that we did not move as much under that
2 contract as they would have liked, we just dispute
3 that that was a breach of that contract.

4 CHAIRMAN OBERMAN: No. I understand.
5 It's not as much as they would like, as much as they
6 offered, and said I've got coal here, please pick it
7 up. And as I understand it, you couldn't pick up all
8 the coal they offered. Am I missing some facts here
9 in 2022?

10 MR. WEISKITTEL: No. I think that's a
11 fair remark.

12 CHAIRMAN OBERMAN: All right. So then
13 when you say I'm going to take these low monthly
14 averages of numbers in 2022, and I'm going to prepare
15 a chart that says oh, we're now higher than the
16 average, the average of which was lowered by your
17 2022 performance, that strikes me as a little
18 disingenuous. That's all I'm getting at. Am I
19 missing something?

20 MR. WEISKITTEL: Mr. Chairman, well the
21 point I was trying to get to is if you're stepping
22 back and looking at the type of service that we have

1 an obligation to provide now as a common carrier.

2 CHAIRMAN OBERMAN: All I'm looking at now
3 is the historical pattern. That's what you're trying
4 to tell me. They haven't got to the obligation yet.
5 Tim started out with this chart saying that we're
6 moving more traffic this year than the historical
7 average. And that historical average was lowered
8 because of your service in 2022. As a matter of
9 fact, the number of trains, tons of coal. That's all
10 I'm asking.

11 I'm not asking whether you breached your
12 contract. Am I right?

13 MR. STRAFFORD: You're right in that the
14 second chart shows 2022. But the first chart we
15 started with was the monthly average going back to
16 2019.

17 CHAIRMAN OBERMAN: It may be, but 2022 is
18 in the average.

19 MR. STRAFFORD: Of course it is.

20 CHAIRMAN OBERMAN: So if you took out 2022,
21 where you've admitted that you weren't taking as much
22 coal as they offered, and had ready to load into your

1 trains, then your numbers would be much higher. So,
2 somehow you're suggesting that you're providing them
3 with an average service they've asked for is
4 misleading. That's all I'm reacting to.

5 I find it actually disingenuous on your
6 part to try to suggest to us in the chart that's up
7 there now that they're doing better than they did in
8 2022, and somehow therefore they shouldn't complain,
9 when the facts are that they didn't do as well in
10 2022 as they had coal to ship. That's all I'm trying
11 to say.

12 BOARD MEMBER FUCHS: And Marty, if I could
13 just add on for that to a second. I just want to be
14 clear for the record. It's my understanding that Ms.
15 Farmer's note wasn't that we are not where NTEC would
16 like, her note says clearly no, we are not where we
17 need to be.

18 So, I don't think her note expresses an
19 assessment of NTEC's preferences, it seems to more
20 accurately access a universal perspective of where
21 BNSF needs to be.

22 CHAIRMAN OBERMAN: No. That's the point

1 -- that's another way of getting at the point I was
2 asking about.

3 BOARD MEMBER FUCHS: Yeah.

4 CHAIRMAN OBERMAN: Thank you Patrick.

5 MR. WEISKITTEL: Yeah. And I think what
6 Ms. Farmer was recognizing there is something we said
7 to you guys on multiple occasions, which we know that
8 for all of our customers last year we were not
9 providing the level of service that they wanted,
10 NTEC.

11 BOARD MEMBER FUCHS: Again Adam, it's not
12 what they wanted, it's where we are not where we need
13 to be. She's not assessing their preferences, she's
14 making a statement of where BNSF needs to be. I just
15 want to be clear. She doesn't -- there's no
16 reference in the sentence you're referring to, she's
17 not saying we are not where NTEC wants us to be. I
18 just want to be clear because it's a semantic
19 difference, but I think it has some importance.

20 MR. LAROCCA: Mr. Chairman, in terms of
21 historical trends and data, there's a chart in Ms.
22 Lawler's -- is this the original verified statement?

1 MS. LAWLER: I believe so.

2 MR. LAROCCA: Original verified statement
3 at page 12.

4 CHAIRMAN OBERMAN: Hold on a minute.

5 MR. LAROCCA: Her statement, which shows
6 the 2011 to 2021 Spring Creek average.

7 CHAIRMAN OBERMAN: Page 11 I have.

8 MR. LAROCCA: Page 12, Spring Creek export
9 tons moved, do you see that? Okay. The 2011 through
10 2021 average number is there. And that number I
11 haven't done the arithmetic to see how it compares to
12 this, but my expectation is it's pretty close.

13 CHAIRMAN OBERMAN: Actually it's 70,000
14 tons a month less.

15 MR. LAROCCA: Okay.

16 CHAIRMAN OBERMAN: Yeah. And more
17 according to that chart the average was 830,000 and
18 in 2023 311,000, so you're --

19 MR. LAROCCA: Close, but close. I mean
20 and I'm just responding to the question because I
21 understand where you're coming from in terms of the
22 2022 experience, but there are other ways of looking

1 at the averages over these years. That's my only
2 point.

3 CHAIRMAN OBERMAN: I'm sorry. Say that
4 last point again?

5 MR. LAROCCA: I was saying that I
6 understand where your question is coming from about
7 comparing to 2022, but that's not the only data that
8 gives you a sense of what the expectations in the
9 market has been over a long period of time.

10 And all I'm saying is that what the
11 current experience is consistent with a long-term
12 average. But I also, I think it's worth just looking
13 at the first number on that chart because that
14 number is included in the average as well, the 2021
15 number. That was an extraordinary year. It was
16 unrepresentative, and our people can talk to you
17 about that, the reasons why 2021 was such an unusual
18 year.

19 I'm not even going to tell you about how
20 unusual it was for me in my house for a whole year
21 with my mask on, but it was an unusual year for the
22 tonnage. And that's in there too. It's an average,

1 and so I recognize and understand your concern about
2 2022, and how it's being used.

3 But there is plenty of data here that puts
4 it all into perspective.

5 CHAIRMAN OBERMAN: Yeah, but the chart
6 that I'm being handed is comparing 2023 to 2022.

7 MR. LAROCCA: Yes.

8 CHAIRMAN OBERMAN: All right.

9 MR. LAROCCA: And this is an emergency
10 service proceeding, and that's --

11 CHAIRMAN OBERMAN: You're trying to
12 convince us that 311,000 is great compared to 257,000
13 last year. Why else would you put this up on the
14 screen? That's all I'm saying, it might be
15 misleading to see.

16 MR. STRAFFORD: So, I think we've explored
17 this slide. The Board has asked NTEC to clarify the
18 legal standard under which it is seeking the
19 emergency service order, and while it remains
20 somewhat unclear based on their citation to the
21 regulations, regardless of the standard, NTEC does
22 not justify its request because it is not alleging

1 public harms, it's alleging private harms.

2 Next slide. In adopting the regulation
3 that NTEC quotes, the Board noted in Ex Parte 628
4 that these rules are designed only to address serious
5 ongoing service disruptions. They're not intended to
6 anticipate problems that have not yet occurred, and
7 might not occur.

8 Nor are they meant for situations where
9 service is adequate, but simply not up to the level
10 that a particular shipper or connecting carrier might
11 desire.

12 CHAIRMAN OBERMAN: Well what rule are you
13 talking about Tim? I thought they were under 11123?

14 MR. STRAFFORD: They are. Their
15 supplemental filing against referenced the language
16 of 1146.

17 CHAIRMAN OBERMAN: Are we deciding this
18 case under 1146?

19 MR. STRAFFORD: We are not.

20 CHAIRMAN OBERMAN: 11123.

21 MR. STRAFFORD: Correct. But to the
22 extent they continue to cite the language of 1146.

1 We just want to make clear that those rules have
2 these limitations.

3 CHAIRMAN OBERMAN: Dan, do you want us to
4 grant relief under 1146 or 11123?

5 MR. JAFFE: Well it's 11123, sir. I
6 think, perhaps he's referring in our filing to the
7 implementing section of the CFR that was adopted as
8 part of that, but the primary standard is that of
9 the statute.

10 MR. STRAFFORD: This language from the
11 Board is consistent with the language of Section
12 11123, and does not suggest that every claim that a
13 carrier is not meeting its common carrier obligation
14 rises to the level in the emergency service order.
15 While harms to individual customers can occur,
16 violations of the common carrier obligation, those
17 private harms can be remedied by the Board's normal
18 processes.

19 In contrast, Section 11123 deals with
20 harms to the public. Congress could have used the
21 phrase common carrier obligation, or used the phrase
22 to alleviate a violation of Section 11101, if it

1 intended the emergency service standards to remedy
2 alleged harms to individual customers, but it didn't.

3 Instead the language focuses on the
4 public. NTEC cites a laundry list of cases involving
5 emergency service orders in their May 5th filing, but
6 none of the cases cited support their request here.
7 Of the cases cited, many are denials of emergency
8 service requests. Some are alternative service cases
9 dealing with another carrier, others deal with
10 situations where a carrier was going out of business,
11 and a shipper was faced with no service at all.

12 But no cases deal with shippers who are
13 seeking significant increases in the volume of the
14 service they were receiving. Next slide. NTEC's
15 other claims lack merit. Let me take a moment to
16 address the issue of retaliation raised by NTEC.

17 NTEC suggests that BNSF is retaliating
18 against NTEC because NTEC did not sign a contract.
19 But NTEC's filing makes clear that the parties were
20 engaged in contract negotiations, and they could not
21 reach a deal on the economics. NTEC questioned the
22 common carrier rate. BNSF established one, and then

1 moved more traffic under that rate in 2023 than it
2 moved under the contract in 2022, and similar volumes
3 was moved over the lifetime of their relationship.

4 CHAIRMAN OBERMAN: Tim, I want to go back
5 to your exegesis on 11123. The statute isn't
6 limited to service to the public. It's in there. It
7 says if -- creates an emergency situation of such
8 magnitude, so they have a substantial adverse effect
9 on shippers, or on rail service in a region of the
10 United States, or that has adverse impact on the
11 public.

12 So it's not just -- when you say what
13 Congress did limit just an adverse impact on it,
14 agreed?

15 MR. STRAFFORD: No. Not agreed. That
16 particular phrase reference to the public is what was
17 discussed this morning. The other phrases you go
18 through emergency situation of such magnitude as to
19 have substantial adverse effects on shippers,
20 plural, or on rail service in a region of the United
21 States, or at a rail carrier.

22 All of those, or, but all of those

1 situations deal with harms greater than an individual
2 shipper.

3 CHAIRMAN OBERMAN: Do you think one
4 shipper can only get an emergency service order if
5 they show harm to two shippers because of the word
6 plural there? Is that what you're saying?

7 MR. STRAFFORD: I think this entire
8 section is dealing with situations where the Board
9 can intervene and order service without following its
10 normal processes, in significant situations. There
11 could be, theoretically, a harm to an individual
12 shipper that rises to the level of emergency service,
13 an emergency situation with regards to the public,
14 however --

15 CHAIRMAN OBERMAN: No. Without regard to
16 the public. It doesn't say "and the public," it says
17 "or the public."

18 MR. STRAFFORD: It says "magnitude as to
19 have substantial adverse affect on shippers, or on a
20 rail service in a region of the United States."

21 CHAIRMAN OBERMAN: Right.

22 MR. STRAFFORD: Or, or in a matter that

1 properly serves the public, so that's --

2 CHAIRMAN OBERMAN: Right. Or. Let's go
3 on.

4 MR. STRAFFORD: I was going to address the
5 issued raised by NTEC regarding retaliation. NTEC
6 suggested BNSF is retaliating against NTEC because
7 NTEC did not sign a contract, but the facts don't
8 support this. NTEC requested a common carrier rate,
9 BNSF established one, and then moved more traffic
10 under the rate in 23 than it moved in 22, and similar
11 volumes as it's moved over the lifetime of their
12 relationship.

13 BNSF also established an alternate rate
14 and route to a connecting carrier, which they had no
15 regulatory obligation to do, and moved traffic via
16 that route. BNSF has also added trains for NTEC
17 where it could, including for June, and eliminated
18 the language in the pricing authority that NTEC
19 objected to.

20 That brings me to the so-called sole
21 discretion language. NTEC's focus on the sole
22 discretion language in the original version of the

1 common carrier pricing authority is a red herring.
2 BNSF is not here today to defend that language. It
3 is not in the current pricing authority. BNSF has
4 always recognized it has a common carrier obligation
5 imposed by law, and overseen by this Board.

6 As noted earlier, the language is a relic
7 of NTEC's contract, and in no way indicated that BNSF
8 sought to limit or avoid its common carrier
9 obligation. Next slide.

10 BOARD MEMBER PRIMUS: Hey Tim, let me ask
11 you a question on the retaliation aspect. Now you're
12 saying that BNSF did not, and you're saying it showed
13 it did not by coming up with these six trains, and
14 adding these six trains in June. Is that correct?

15 MR. STRAFFORD: I'm saying that's one of
16 the signs to think about. I'm saying that's one of
17 the signs that they're not retaliating.

18 BOARD MEMBER PRIMUS: Okay. Is this, now
19 it's been insinuated that these six trains came out
20 after the preliminary, were those six trains planned
21 before that, or what happened to cause those six
22 trains to suddenly appear?

1 MR. STRAFFORD: So, the six trains that
2 were added, that was because we had another customer,
3 I won't name them, that was intending to enter the
4 market, and use their trains and their ability to do
5 that got pushed a month, so we went through our
6 process of figuring out the best way to allocate that
7 capacity, and we ended up giving six additional
8 trains to NTEC as a result.

9 CHAIRMAN OBERMAN: As you sit here today,
10 if that customer comes back in July, going back down
11 to 16 for NTEC in July.

12 MR. WEISKITTEL: We've given NTEC
13 forecasts for July. We think we gave them this
14 forecast with the intent to meet them.

15 CHAIRMAN OBERMAN: So what did you give
16 them for July?

17 MR. WEISKITTEL: July was 20 trains.

18 CHAIRMAN OBERMAN: 20 trains. How about
19 August?

20 MS. LAWLER: Sixty to 90 day guidance, so
21 we hadn't given that guidance yet.

22 BOARD MEMBER PRIMUS: So why the reduction

1 in two trains? They have 22 now, so why the cut
2 back?

3 MS. LAWLER: Why the cut back to the 20
4 instead of 16?

5 BOARD MEMBER PRIMUS: Correct. No, from
6 22 to 20 I mean. Why the reduction?

7 MS. LAWLER: Yeah, so I think as our crews
8 improved at the back half of the year that also gives
9 us a little bit more capacity, and then also just
10 allocation amongst the other customers in the market,
11 because we had that other customer that got pushed
12 in July.

13 BOARD MEMBER FUCHS: To your point, how
14 can you offer 22, and then give guidance for 20? I
15 just -- that doesn't make sense to me either. I
16 thought you offered them 22 after the --

17 MS. LAWLER: I'm sorry that was June.

18 BOARD MEMBER FUCHS: No. I know. But then
19 you're going to go lower in the next month?

20 MR. WEISKITTEL: Yeah, so, so the reason
21 as I said for the getting up to the 22 was because we
22 had that shipper that pushed forward into the year.

1 I think that shipper coming back to us, a new shipper
2 in the market, that wants to enter this lane will be
3 some -- will have some sort of an impact on our
4 ability to give NTEC.

5 BOARD MEMBER FUCHS: I see.

6 MR. WEISKITTEL: Volumes in July or in
7 August, and then to Farah's point, and as Mr. Garland
8 put in his verified statement, we do think that for
9 example, our crew issues will improve over the
10 course of the end of the year, and so we think that
11 those numbers will increase.

12 BOARD MEMBER FUCHS: Thank you.

13 BOARD MEMBER PRIMUS: It seems a little --
14 thanks Patrick. It seems a little just kind of
15 backwards to me that first you don't have crews, then
16 this new group comes in who wants to do business, and
17 you have six crews available to them. And so, now
18 you're saying that they don't want the service yet,
19 so you sign those six crews to NTEC.

20 And in July you're saying oh wait, they
21 may come back, so we're going to take four of those
22 and put them back to the new service, and keep two

1 with, you know, keep those two there. It just seems
2 that there is an inconsistency in terms of crew.
3 You're saying the crew is going to be online later
4 this year, but this is crew in June and July.

5 Somehow you came up with six crew, six
6 crew that you had. You didn't have before, but now
7 all of a sudden you had for a new customer, when
8 you're saying that there's capacity issues, and
9 there's crew issues, six appear, and then all of a
10 sudden you're taking some away to answer that new
11 business, but currently you're saying okay, but we
12 still got to cut you back, but we'll get you back
13 later on if crews show up later in the year.

14 And you know, it seems a bit foggy to me
15 that how these things are suddenly on the scene and
16 juggling themselves in front of us. I don't think --
17 I just don't see the math in that.

18 MR. WEISKITTEL: Well, you know we listed
19 in our filings in Mr. Garland's verified statement
20 all of the factors that impact our service in this
21 lane, crew is being one of them. I don't think that
22 it was -- I think this sort of highlights one of the

1 points we've been making, which is for example, if
2 the Board were to order an increase in the amount of
3 allocation to NTEC, it's going to have to come from
4 somewhere at the moment, given the crew resource
5 issues and the other issues we have.

6 So I don't know that it was that we found
7 new crews. I think it was just a question of how
8 they were being allocated. And we didn't feel
9 comfortable telling you this.

10 BOARD MEMBER PRIMUS: I'm sorry. I
11 understand. So you're either taking them from
12 someplace else, or you're bringing new crews on.
13 You're bringing new crews on, or you're going to
14 have this crew capacity, it just seems that it's
15 still a little confusing how you're telling them if
16 you don't have crews, their existing product -- but
17 now all of a sudden you've got six crews to take on
18 new business, not their business, new business.

19 I mean you take it away and give it to
20 them, you're saying these guys aren't ready. Then
21 you come back in July, and say oh, but we're going to
22 have to cut you two, because they may be back online.

1 I mean to me are you certain in July that they're
2 going to be back online? Are you committed to this
3 new business?

4 MR. WEISKITTEL: Yeah, so this new
5 business, which I think we've said in our filings,
6 this is the Crow Tribe. And we have been talking
7 with them for probably at least a year about them
8 trying to enter this market. Initially, they thought
9 they were going to be able to have some vessel
10 capacity they could use in June.

11 It turns out that pushed into July, so
12 this was just how we, with the existing finite set of
13 resources we have, how did we try and serve that new
14 customer that was coming to us. We didn't feel like
15 we could say no entirely to a new customer that
16 didn't feel appropriate to us.

17 VICE CHAIRMAN HEDLUND: Yeah, NTEC has
18 said, and I want to talk about the implications of
19 this. Ms. Lawler told us during the December 17,
20 2022 phone conversation to discuss the proposed 23
21 contract terms, if we were to decline BNSF contract
22 terms for 2023, BNSF might not be able to continue

1 serving NTEC.

2 In such a circumstance Ms. Lawler told us
3 that BNSF may elect to sign up other shippers for
4 coal export service, and thus may render itself
5 incapable of providing rail service to NTEC. So, is
6 what she was saying, is the position she was taking,
7 is that if you have assuming you've got some limited
8 capacity due to limitation on crews, or whatever, and
9 you are free to sign up contracts with other people,
10 even if it exhausts your capability to serve NTEC
11 under a common carrier rate.

12 That seems to be what she said.

13 MR. STRAFFORD: Vice-Chair I apologize, I
14 was anticipating your question going in a different
15 direction regarding those negotiations, and I was
16 going to talk about confidentiality, but you went a
17 different direction that didn't implicate
18 confidentiality at all, but I'm going to have to ask
19 you to repeat the question. I apologize.

20 VICE CHAIRMAN HEDLUND: I'm just trying to
21 avoid.

22 MR. STRAFFORD: No. I appreciate that.

1 VICE CHAIRMAN HEDLUND: This is what was
2 in NTEC's brief.

3 CHAIRMAN OBERMAN: Where are you at Karen?

4 VICE CHAIRMAN HEDLUND: I wrote this in my
5 notes. I'll find it.

6 CHAIRMAN OBERMAN: Okay. Go ahead.

7 VICE CHAIRMAN HEDLUND: But this is a
8 quote. I carved it out from them. Ms. Lawler told
9 us during December 17, 2022 phone conversation, which
10 had been scheduled to discuss NTEC's objections to
11 BNSF's proposed 2023 contract terms, that if we were
12 to decline BNSF's onerous contract terms for 2023,
13 which among other things included the 11th hour
14 addition of a provision that would have required NTEC
15 to waive all claims regarding poor 2022 BNSF service,
16 BNSF might not be able to continue serving NTEC. In
17 such a circumstance, Ms. Lawler told us that BNSF may
18 elect to sign up other shippers for coal export
19 service, and thus may render itself incapable of
20 providing rail service to NTEC. This goes to
21 allocation, but also your sense of responsibility
22 under the common carrier rule to a non-contract

1 customer.

2 Can you just shut-off a non-contract
3 customer to take on other business? It seems to be
4 Ms. Lawler's understanding of the law. She may not
5 be correct on that, but that's at least how she
6 stated it.

7 MR. STRAFFORD: So, I'll address the legal
8 question, but I think you read from NTEC's brief a
9 statement made by their witness regarding their
10 recollection of the telephone conversation, so I
11 think there is a number of factual assertions in that
12 sort of explanation that we would dispute. But as to
13 the question regarding legal obligation, regarding
14 contract traffic, we have a long exposition in our
15 papers and also in the presentation about how the
16 common carrier obligation interacts with contract
17 provisions.

18 And the short answer to your question is
19 that a common carrier cannot shut-off completely its
20 service to customers regarding to if they satisfy
21 contract obligations. That's pretty clear from the
22 Committee report. However, the statute is also

1 clear that common carriers can give priority and
2 honor the commitments they've made in contracts.

3 VICE CHAIRMAN HEDLUND: But not to the
4 detriment of the common carrier obligation. So, we
5 have to figure out where that is.

6 MR. STRAFFORD: Absolutely, and I do, I
7 have extensive materials on that. We can get there
8 now if you would like, or?

9 CHAIRMAN OBERMAN: Actually, I'd like to
10 get that now, Tim. You wrote in your brief, and now
11 you have it in this folder, you cite the Committee
12 report, which to me is only something we ought to
13 look at if we determine that the statute is
14 ambiguous. You don't argue that the statute's
15 ambiguous, so I'm not sure why you're giving us a
16 Committee report. Do you think the statute is
17 ambiguous?

18 MR. STRAFFORD: We were trying to be
19 responsive to your request.

20 CHAIRMAN OBERMAN: That's not my question.
21 I can't take into account intrinsic evidence, I don't
22 believe, until I find that the statute is ambiguous.

1 Are you contending that it's ambiguous?

2 MR. STRAFFORD: I am not specifically
3 contending that it's ambiguous. However, based on
4 questions at the pre-conference hearing it was clear
5 the Board had questions about what the language of
6 the statute meant. To that extent, and the Board has
7 not opined on what that language means as well.

8 CHAIRMAN OBERMAN: Yes, but you're asking
9 me to take into account something that normally
10 courts say we shouldn't look at unless we find the
11 statute to be ambiguous. So, just because I asked a
12 question, doesn't mean you're supposed to give me
13 inadmissible material.

14 MR. LAROCCA: Mr. Chairman, a court has a
15 certain set of rules and procedures. An agency has a
16 different set, and the responsibility of the agency
17 is to do what Congress has told it, and to try to
18 figure out what they think Congress told them to do.

19 CHAIRMAN OBERMAN: You don't think courts
20 are supposed to, when they're considering statutes,
21 they're supposed to do what Congress tells them to
22 do?

1 MR. LAROCCA: I have some disagreements
2 with the courts on occasion.

3 CHAIRMAN OBERMAN: I do too.

4 MR. LAROCCA: But I think the agency is
5 responsible to try to figure out what Congress wants.

6 CHAIRMAN OBERMAN: All right. Well let's
7 assume for sake of discussion we should think about
8 the Committee report. Are you asking us to read into
9 the statute the word casual, which doesn't appear in
10 the statute?

11 MR. LAROCCA: No.

12 CHAIRMAN OBERMAN: Then why are we talking
13 about casual traffic?

14 VICE CHAIRMAN HEDLUND: Another question
15 is NTEC a casual customer?

16 CHAIRMAN OBERMAN: Well that was my next
17 question, thank you.

18 MR. STRAFFORD: So, the Committee report
19 refers to casual requesters of service. And so, we
20 can only read the text of what they've written, and
21 understand that they've suggested that a shipper who
22 has come to a railroad making a request for common

1 carrier service.

2 CHAIRMAN OBERMAN: But you think that the
3 Committee says all common carrier requests are casual
4 by definition?

5 MR. STRAFFORD: Well I think the Committee
6 was saying three things. I think they were
7 articulating that ICCTA was not changing the priority
8 of contracts. I think they were also saying that it
9 is possible for a common carrier to enter into a
10 contract, and they use the end phrase all, or
11 virtually all of this capacity to tie up capacity,
12 and render commitments as being unreasonable, and
13 therefore not entitled to that priority.

14 CHAIRMAN OBERMAN: You didn't answer my
15 question. Was the Committee report telling us that
16 all common carrier requests for service are by
17 definition casual? I take it you just told Karen
18 that you didn't think NTEC was a casual requester.

19 MR. STRAFFORD: I don't think I said that.

20 CHAIRMAN OBERMAN: All right. Are you
21 contending that NTEC is a "casual requester" under
22 the Committee report?

1 MR. STRAFFORD: I think NTEC is a
2 requester of common carrier service.

3 CHAIRMAN OBERMAN: Casual, that's my
4 question, Tim.

5 MR. STRAFFORD: I'm saying that -- and I
6 said to answer your original question that I'm not
7 asking you to read the word casual into the statute.

8 CHAIRMAN OBERMAN: All right, so can we
9 agree that there's no reason for us to think about
10 whether NTEC is a casual requester or not, to decide
11 this case?

12 MR. STRAFFORD: I think we can agree on
13 that, yes.

14 CHAIRMAN OBERMAN: All right. Well then I
15 don't know why this is in the book. But I want to
16 get to the common carrier obligation because I think
17 it goes right to the heart of this case. So I have a
18 few questions, Tim, on this subject, any of you
19 obviously feel free to weigh in.

20 I asked Mr. Jaffe if he could tell us how
21 many trains were required to be provided under the
22 common carrier doctrine, given the facts of this

1 case, and the record will show how he chose to handle
2 that. I ask you the same question, but I want to
3 embellish on it this way. Could we agree that if a
4 shipper comes to a railroad and makes a request for a
5 level of volume of shipments, that it is within the
6 railroad's capacity to deliver at least to that
7 extent the railroad has a common carrier obligation
8 to fulfill that request, because it has the capacity
9 to do so. Can we agree on that?

10 MR. STRAFFORD: When you say the railroad
11 has the capacity to do that.

12 CHAIRMAN OBERMAN: Yes.

13 MR. STRAFFORD: Do you mean if there were
14 no other shippers?

15 CHAIRMAN OBERMAN: No. I mean given the
16 facts of the case shipper A shows up and says I want
17 to ship X cars a day, or X cars a week, and the
18 railroad has the capacity to do it, does the common
19 carrier doctrine obligate them to accept that at a
20 reasonable price?

21 MR. STRAFFORD: The common carrier
22 obligation obligates the railroad to provide service,

1 to quote a rate, and provide service.

2 CHAIRMAN OBERMAN: How much is my question?

3 MR. STRAFFORD: Sure. And I understand
4 the desire to have a formula bright line test.

5 CHAIRMAN OBERMAN: No. I'm sorry sir, I
6 am not asking you about a formula or a bright line
7 test. I am asking you in a factual situation in
8 which a shipper shows up and says I am requesting X
9 volume of service, and the railroad has the capacity
10 all things considered. Other customers, locomotives,
11 how much track is there?

12 Could we agree? Whatever some higher
13 level might be required under the common carrier
14 doctrine, that's a hypothetical.

15 MR. STRAFFORD: Right.

16 CHAIRMAN OBERMAN: In the actual situation
17 where the railroad has the capacity to carry the
18 volume requested by the shipper, could we agree that
19 the common carrier doctrine at least obligates the
20 railroad to provide that much service?

21 MR. STRAFFORD: So, understanding your
22 question to be did the railroad have the capacity to

1 provide the service, and there's no reason preventing
2 them from doing that. Do they have to provide the
3 service. I think the answer is yes.

4 CHAIRMAN OBERMAN: Well, if you're reading
5 into my question, the word capacity it has no reason
6 not to provide it. I don't know what other reason
7 there might be. That's really my question.

8 MR. STRAFFORD: Okay. I'm just trying to
9 not agree to something that I'm not fully
10 understanding.

11 CHAIRMAN OBERMAN: Well when I say
12 capacity you talk about capacity in your papers. You
13 say there's limited capacity. If there's no limits
14 on your capacity, whether they come from crew,
15 track, other shippers. At the level that's being
16 asked for, then the common carrier obligations says
17 well you have to provide at least that much service
18 if you've got the capacity to handle it. Is that a
19 fair understanding to your sense?

20 MR. STRAFFORD: I think that's fair.

21 CHAIRMAN OBERMAN: Did you have a
22 question? Okay. Now next question, if the shipper

1 comes to the railroad and says I'd like an additional
2 amount of service in the future that may be beyond
3 the railroad's capacity today. Is there any
4 obligation under the common carrier doctrine for the
5 railroad to meet a shipper's request for growth in
6 the future? One month, six months, a year, whatever
7 is reasonable given the facts?

8 MR. STRAFFORD: I'm not aware of any
9 authority that obligates a common carrier to agree to
10 grow future volumes. Now that said, common carriers
11 have economic incentives obviously to move as much
12 traffic as they can. And they have an obligation
13 when they've held out to provide a service to provide
14 that service.

15 CHAIRMAN OBERMAN: So, it's your position
16 that if shipper A is shipping ten cars a week on the
17 railroad, and the railroad is able to handle it, and
18 the shipper comes to the railroad and says you know,
19 we'd like to add a production line to our factory,
20 and a year from now we want to ship 20 cars a week,
21 and we're giving you a year's notice.

22 The common carrier doctrine does not

1 obligate the railroad to find the capacity to take
2 that growth a year from now.

3 MR. STRAFFORD: I'm not aware of any
4 authority that requires that, no. We're going down a
5 road of hypotheticals now.

6 CHAIRMAN OBERMAN: No, we're not. We're
7 going to get to this case. I'm trying to understand
8 BN's view of its obligations under the common carrier
9 doctrine. When you say you're not aware of any
10 authority that requires it, there's a lot about the
11 common carrier doctrine that's never been litigated,
12 but we have a statute, and we have a common law
13 history which tells us we're trying to figure out
14 what it does require here, and are you saying it does
15 not require?

16 The doctrine does not require a railroad
17 to provide for growth, at least of reasonable amount
18 of growth from the shipper?

19 MR. STRAFFORD: I'm not taking a position
20 on that one way or the other.

21 CHAIRMAN OBERMAN: All right.

22 MR. LAROCCA: May I?

1 CHAIRMAN OBERMAN: Yes.

2 MR. LAROCCA: Because I find this to be a
3 fascinating subject, and I actually appreciate your
4 thoughtful inquiry into it because --

5 CHAIRMAN OBERMAN: Any time somebody finds
6 anything I say fascinating, I'm going to defer to
7 your comment.

8 MR. LAROCCA: Well I'd like to pause at a
9 hypothetical because it's very difficult to address
10 these things in the abstract. Let's say there's a
11 line that serves the shipper, it goes over a creek or
12 a river, and the amount of traffic that it can
13 handle over that bridge, over the river is limited.

14 The shipper wants to expand. The shipper
15 wants to build another plant and says I'd like to
16 grow. And I think to put your question into that
17 context, the question is the common carrier
18 obligated to go in and build a second bridge in order
19 to serve that, and I do not believe that that's the
20 case.

21 I'm not saying that I'm dismissing your
22 inquiry on that question, out of hand, I'm just

1 saying there are clear cases where I think the answer
2 is no.

3 CHAIRMAN OBERMAN: I think that's to my way
4 of thinking, and I'm trying to put some concrete
5 substance to it. The word reasonable is, to use a
6 railroad term, it has to carry a lot of freight here.
7 And I would think that the hypothetical you pose
8 would require the tribunal to decide whether building
9 another bridge is reasonable.

10 And it would require the railroad to build
11 another bridge, the question is, is that reasonable?
12 And I think you have to know the facts of the case to
13 answer that question. I don't think it's always
14 unreasonable, and pretty clearly it's likely not to
15 be always reasonable. But to me there is a tension
16 here, and if I look at all the other mandates that
17 this Board has to follow particularly about
18 providing a robust system of transportation, and
19 growing the U.S. economy, and those aren't the exact
20 words in the RTP, but there is a lot of that in
21 there.

22 The notion that there's no requirement on

1 carriers to handle reasonable requests for increased
2 service would be contrary to what the Congress had in
3 mind, as a general proposition. And I'm trying to
4 get some specifics.

5 MR. LAROCCA: I think the reason, I think
6 the focus on reasonable is a very good one.

7 CHAIRMAN OBERMAN: All right. Let me -- I
8 want to get to this question, and you can dispense
9 with it Tim, perhaps quickly. You had this word
10 "sole discretion" in your original tariff, and then
11 you took it out. Is there any difference in BN's
12 obligation to provide service to NTEC between the one
13 that had the word "sole discretion" in it, and the
14 ones that don't -- the one that doesn't have the word
15 "sole discretion" in it.

16 What's the significance of taking the
17 words out?

18 MR. STRAFFORD: No. There's no
19 difference.

20 CHAIRMAN OBERMAN: No difference. All
21 right. No, no, I have some follow-up on this. So
22 now, I read Ms. Lawler's verified statement that in

1 the fall of 2022, I don't remember the month, the
2 parties agreed on a minimum commitment of 4.2 million
3 tons for the year 2023, or 350,000 per month, which
4 is 23 trains.

5 And that BN wanted NTEC to agree to a
6 higher minimum going forward, and ultimately the
7 parties agreed on a minimum of 5.5 million tons for
8 2024, but it was only going to be --

9 MR. WEISKITTEL: Is this confidential?

10 CHAIRMAN OBERMAN: It was discussed, it
11 came out in a prior discussion, which is 30 trains.
12 And on those points the parties had agreed, and then
13 it fell apart because of the other disagreements that
14 we've gone into. But in terms of volume of trains,
15 both BN and NTEC had agreed on 23 trains a month for
16 2023, and 2024, I'm sorry 30 trains for 2024. That's
17 what Ms. Lawler says in her verified statement. Let
18 me make sure we're on the same.

19 MR. WEISKITTEL: Yeah. So the weight of
20 that sequence unfolding, and I wanted to use this as
21 a chance because it was stated repeatedly this
22 morning that there was a desire expressed by NTEC to

1 move 5.5 million tons in 2023, and we simply never
2 responded to that, or never said that that was --

3 CHAIRMAN OBERMAN: Oh, the contract
4 negotiations. Ms. Lawler's position, not NTEC's
5 position.

6 MR. WEISKITTEL: Yeah. I'm about to get
7 there.

8 CHAIRMAN OBERMAN: Okay.

9 MR. WEISKITTEL: And so, what you see in
10 the course of the contract negotiation, and we have
11 all sorts of correspondence on this, we have not put
12 it into the record just because we didn't know it was
13 going to be such a focus, but we'd be happy to do
14 that.

15 What you see in the course of the contract
16 negotiations is that number of 4.2 million tons
17 replaces that 5.5 million, and it starts -- that
18 number first pops up in about mid-October, so.

19 CHAIRMAN OBERMAN: I would ask you how you
20 got there. I'm actually asking that you got to a
21 point that BN and NTEC agreed on a minimum number of
22 trains for 23 trains a month, and a minimum number in

1 2024 of 30 trains a month. Is that correct, Ms.
2 Lawler?

3 MS. LAWLER: So, the second year hadn't
4 been decided. NTEC had an ask of 4 million tons
5 minimum, with up to 6 million tons in the second
6 year.

7 CHAIRMAN OBERMAN: Well if NTEC may not
8 have agreed to it, but BN agreed to it. BN,
9 according to your statement insisted on it. You say
10 if --

11 MS. LAWLER: We were looking for 5.5
12 million tons in 2023 for 2024, that's right.

13 CHAIRMAN OBERMAN: Well you actually say
14 on page 24, BN agreed to reduce the term to two
15 years, but wanted to maintain 5.5 million.

16 MS. LAWLER: That's correct. Yes. I was
17 just saying NTEC's position.

18 CHAIRMAN OBERMAN: So, BN's position is
19 that it was ready to sign an agreement for 23 trains
20 a month in 2023, and 24 trains a month, I'm sorry, 30
21 trains a month in 2024. Is that correct Ms. Lawler?

22 MS. LAWLER: Correct.

1 CHAIRMAN OBERMAN: And can this Board rely
2 on the fact that BN would not be prepared to sign a
3 contract to for the shipper to provide 23 trains a
4 month, and then 30 trains a month if BN knew that it
5 didn't have the capacity to provide those trains? Is
6 that a fair statement?

7 MR. WEISKITTEL: So let me, I'll answer
8 that Mr. Chairman. I think it's fair to say,
9 absolutely fair to say that we would not enter into a
10 contract we had not believed we could satisfy the
11 terms of.

12 CHAIRMAN OBERMAN: So, if we are trying to
13 determine what is the capacity of BN from the point
14 of view of late 2022 to provide trains to NTEC,
15 whether it was contract or common carrier,
16 physically the railroad had the capacity to provide
17 23 trains a month for 2023, and 30 trains a month for
18 2024. But as you said, you wouldn't have signed the
19 contract.

20 MR. STRAFFORD: Just to be clear though,
21 were you talking about our annual tonnage about the
22 commitments?

1 CHAIRMAN OBERMAN: Well the verified
2 statement talks about monthly's, 350,000 a month, and
3 then 5.5 million. You weren't going to be 5.5
4 million in July, and nothing in the other months,
5 it's spread out over time. Maybe it's not exactly
6 the same every month, but the average would have
7 been, and I don't hear NTEC saying it has to be
8 exactly 29 every month.

9 It could be 28 and 30, or 26 and 33, we
10 all understand the variability in rail service. So,
11 the physical capacity of Burlington Northern from the
12 point of view of late 2022 is that the railroad had
13 the capacity to provide that many trains to NTEC,
14 correct, Ms. Lawler?

15 MS. LAWLER: That's correct.

16 MR. STRAFFORD: Mr. Chairman, may I add
17 something to that, just I think it's helpful.

18 CHAIRMAN OBERMAN: Please do.

19 MR. STRAFFORD: I absolutely agree with
20 that. And if you look at the volume, the monthly
21 volume of tons that we moved this year, we're
22 tracking about 90 percent of hitting that 4.2

1 million.

2 CHAIRMAN OBERMAN: Until we've got to June
3 and now July.

4 MR. STRAFFORD: No the average through
5 that we've done thus far this year, and --

6 CHAIRMAN OBERMAN: No assurance going
7 forward. That's why we're here.

8 MR. STRAFFORD: Understood, but if our
9 volumes are able to increase like we anticipate.

10 CHAIRMAN OBERMAN: If.

11 MR. STRAFFORD: Of course, for the end of
12 the year we think we're going to hit that 4.2 million
13 ton number.

14 CHAIRMAN OBERMAN: Well I'm going to just
15 step out on a limb and say that when you said BN
16 wouldn't sign a contract it didn't believe it could
17 meet, that there wasn't much "if" in Ms. Lawler's
18 mind in being prepared to sign this contract if NTEC
19 had wanted to sign it at those volumes. Is that
20 fair? Yes?

21 MR. STRAFFORD: Yes.

22 CHAIRMAN OBERMAN: All right. So now I

1 want to get back to my original thought on trying to
2 measure the common carrier doctrine, the obligations.
3 And I'm not asking because I don't know that it's
4 metaphysically possible to say what is a bright line
5 number in all situations for all common carriers.

6 But we agreed a few minutes ago that if a
7 carrier has the capacity to provide the volume that's
8 requested, the request has to be honored if it's a
9 reasonable request because it's within your capacity
10 obviously subject to the price that you set. It
11 seems to me then that we have established that you
12 had the capacity to provide 23 trains in 2023 and 30
13 in 2024, and I am having a hard time coming to the
14 conclusion that in this case on these facts, the
15 common carrier doctrine doesn't require you to
16 provide that many trains to NTEC for 2023 and 2024.

17 Now if you tell me that there was an
18 earthquake and your railroad went out of business,
19 that's something else, but I haven't heard that. And
20 I haven't heard that the crew shortage somehow
21 disappeared after Ms. Lawler was prepared to sign
22 this contract. So tell me why we shouldn't hold that

1 on the common carrier part of this lawsuit, or this
2 petition, the doctrine doesn't require you to
3 provide the 23 and 30 trains that you admit that you
4 have the capacity to provide.

5 MR. STRAFFORD: If the predicate you
6 established at the beginning doesn't hold.

7 CHAIRMAN OBERMAN: Which is?

8 MR. STRAFFORD: Which was if the railroad
9 has the capacity to provide the service. Now what you
10 try to establish is that BNSF had the belief in the
11 end of 2022, regarding its annual capacity for 2023
12 and 2024, and we've confirmed about what that amount
13 was. However, that does not mean that the railroad
14 had the capacity in any particular month after that,
15 making any particular level of service, therefore, a
16 default violation of the common carrier obligation.

17 CHAIRMAN OBERMAN: Well, suppose this
18 Board ordered you to provide 4.2 million tons for the
19 entire year of 2023, you figure out which months to
20 provide it in. We could agree on that capacity
21 could we not, since you just said that was the case?

22 MR. WEISKITTEL: Mr. Chairman, if the

1 Board orders us to do that we will implement that
2 order. I think the question would be what would be
3 the consequences for other shippers if at some point
4 something changed, and we couldn't handle all of that
5 any more.

6 CHAIRMAN OBERMAN: Well it was implicit in
7 my -- I thought it was actually explicit in my
8 question of Ms. Lawler about the capacity of BN. I
9 didn't hear Ms. Lawler say, and I invite her to say
10 it if I got it wrong, that when she was prepared to
11 sign a contract for 4.2 million tons in 2023, it was
12 going to be at the expense of your other customers.

13 You wouldn't have signed that contract
14 with NTEC if it meant shafting the other customers
15 would it? Ms. Lawler, can you answer that question?

16 MS. LAWLER: Sure. So I mean also just to
17 kind of go back on your question earlier to kind of
18 clean up the verified statement that you had
19 mentioned. I mean I think the conversation was you
20 know, without a commitment there's no guarantee those
21 tons will be there because it is a market that a lot
22 of players want to enter, so I did want to just kind

1 of clear that up as well.

2 But no, we wouldn't have signed a contract
3 that we didn't think we could fulfill.

4 CHAIRMAN OBERMAN: And that wouldn't come
5 at the cost of your other customers. When you said
6 you had the capacity to carry 4.2 million tons in
7 2023, you weren't thinking well Global is going to be
8 in the tank if I sign this contract, that wasn't the
9 plan, was it?

10 MS. LAWLER: Correct.

11 CHAIRMAN OBERMAN: Okay. Now since you
12 were prepared to sign that contract in the four or
13 five months since then, I think you were ready to
14 sign up until December when they pulled the plug
15 right?

16 MS. LAWLER: Correct.

17 CHAIRMAN OBERMAN: So that's only four and
18 a half months ago. Anything happen to the BN network
19 in the last four months that decreased your capacity?

20 MR. GARLAND: Yeah. I would say from a
21 capacity standpoint the first three months of this
22 year have been very challenging, and it was really

1 related to weather. And so we had massive storms in
2 the Powder River Basin that impacted our ability to
3 move some coal sets. We can address crew shortages
4 and the things we're doing around that later, but I
5 would say that that was unexpected.

6 A little bit even more severe than we have
7 seen in recent history.

8 CHAIRMAN OBERMAN: Mr. Garland, you're
9 saying that when Ms. Lawler was prepared to sign a
10 contract in December, she wasn't taking into the
11 account the potential for winter weather in Wyoming?

12 MR. GARLAND: I think she was. And Farah
13 and I have multiple conversations about these types
14 of scenarios, and we actually plan for additional
15 locomotives, additional resources, and we actually
16 take our count and somewhat massage it through the
17 year, and I think you're seeing that. As a result in
18 April, where we are delivering 27 coal sets per month
19 right now.

20 CHAIRMAN OBERMAN: Right. So, for the
21 rest of the year you don't have a -- yeah, the
22 weather in Wyoming in the winter isn't affecting your

1 ability to deliver trains for the rest of the year?

2 MR. GARLAND: But you were just asking the
3 last four months what changed.

4 CHAIRMAN OBERMAN: No, well no, I'm sorry.
5 Maybe my question wasn't clear. Has anything
6 happened in the last four months to change your
7 year-long capacity?

8 MR. GARLAND: Correct.

9 CHAIRMAN OBERMAN: Nor to change your
10 capacity for next year. Nothing has happened since
11 December to reduce the capacity of the railroad in
12 2024?

13 MR. GARLAND: That's correct.

14 CHAIRMAN OBERMAN: Robert, did you have a
15 question?

16 BOARD MEMBER FUCHS: Marty, changing
17 gears.

18 CHAIRMAN OBERMAN: I have one more, a
19 couple questions on this line and then.

20 BOARD MEMBER FUCHS: I have one that's
21 related, but you can.

22 CHAIRMAN OBERMAN: All right. Let me just

1 finish this thought, and then -- well go ahead
2 Patrick, and I'll come back to it. I've used up
3 enough time.

4 BOARD MEMBER FUCHS: Well I'm sort of
5 asking the inverse. Was it, and do let me know, this
6 is a little bit of a different take I think than what
7 has been presented in terms of the contract
8 negotiation, so I trust either party will let me know
9 if this is confidential, requires confidential
10 information. Is it your understanding in December
11 that NTEC could have lived with the service level of
12 23 trains?

13 In other words, although they would have
14 wanted more, that they would have found no cause for
15 complaint if they received 23?

16 MR. WEISKITTEL: I mean under the same
17 logic we've talked about they were prepared to sign
18 that contract.

19 BOARD MEMBER FUCHS: So, is it your view
20 that it should bear on the Board's analysis of what
21 is an emergency? If BNSF is currently offering 22
22 trains, and NTEC through the same negotiations could

1 have accepted 23 trains, in your view does that
2 undermine NTEC's case for an emergency because
3 clearly 23 wouldn't have constituted an emergency
4 situation to them?

5 MR. WEISKITTEL: So, this question of
6 where you draw the line that the Chairman's
7 exploring, we've been thinking about that ourselves,
8 and trying to figure out what is the right level of
9 service in 2023. We've thought about a number of
10 things, probably number one on the list was what we
11 anticipated NTEC had desired, which the last data
12 point we had on that was the 4.2 million tons for
13 2023.

14 I will tell you it's been difficult for us
15 to think about this a little bit because we've been
16 in this market for 15 years, and in the export market
17 over that entire time we've had customers that are
18 all in contracts. This is we now had four months, we
19 have a shipper that's in common carrier service, so
20 it's a little bit, it's different than for example
21 our ag markets that are traditionally all in common
22 carrier service because they want the versatility of

1 that.

2 This has been a different market, so this
3 is a new question we've been facing. And I think
4 where we tried to land at is what did we believe that
5 they were expecting based on our conversations last
6 year, and then how did that match up against their
7 historical volumes, and we felt very good about where
8 we are compared to those two data points.

9 BOARD MEMBER FUCHS: Did you understand
10 NTEC to suggest at any point during the negotiations
11 that a level of 4.2 would have caused some of the
12 harms that have been alleged? Did you understand
13 NTEC in the negotiation to ever represent that if
14 they just had a level of 4.2 million for the year
15 that it would result in any of the harms that have
16 been alleged on this record?

17 MS. LAWLER: I don't think so. I mean it
18 was clearly stated as a minimum, so I think that was
19 clear to both parties.

20 BOARD MEMBER FUCHS: I certainly will ask
21 you, and when we get a chance to wrap up.

22 CHAIRMAN OBERMAN: So NTEC is here now

1 asking for 29 trains a month. Six more trains that
2 we've all just agreed Burlington Northern has the
3 capacity to provide at least over the course of the
4 year. Six more trains a month by my count is one
5 train every five days, fair enough?

6 Mr. Garland has said in his verified
7 statements that if this Board enters an order
8 requiring BN to move 29 trains a month to NTEC, and
9 I'm not going to read it all, but a parade of
10 horribles will ensue. There's going to be back-ups
11 in yards, Ag shippers are going to be harmed, other
12 coal shippers are going to be harmed right? I mean
13 there's a whole list of horribles, correct?

14 That's one of your contentions here why we
15 shouldn't enter the order.

16 MR. WEISKITTEL: Correct. And we would
17 also cite you to the letters that are of the
18 customers.

19 CHAIRMAN OBERMAN: Well I understand. But
20 since you've already said you have the capacity to
21 move 23, are you telling me that the burden to
22 Burlington Northern Santa Fe cannot add one train

1 every five days to this region without causing all
2 these other cascading events? One train every five
3 days is going to put you over the edge? Is that your
4 contention?

5 MR. GARLAND: So I think it's a little bit
6 more complex than that, and I think we need to
7 discuss the amount of available equipment that's in
8 the current market. Today is the first time that I
9 heard that there could be additional sets that could
10 be placed in service.

11 I think that's a factor that we have to
12 consider. Clearly, we want to move more right? I
13 mean this is it's good business for us. NTEC's a
14 very valued customer. We understand the concerns.
15 We want to grow this business, and we want to grow it
16 as fast as possible.

17 We've been on an aggressive hiring spree
18 over the last 14 months. I think if you, you know,
19 you read through the statement in terms of what
20 happened in the history, and how we got here
21 specifically at Everett. We have done a lot of
22 different things to increase our hiring plan,

1 specific to this location, added hiring incentives,
2 delaying retirements, doing everything we can think
3 of to try and get more qualified candidates in the
4 door.

5 And we're doing that. We think we've
6 found the right amount. The pipeline continues to
7 grow. We're confident the third and fourth quarter
8 that we're going to have the right amount of crews
9 continue to increase the amount of business that we
10 can put through this portion of the network.

11 But I think there is a discussion that
12 needs to be had on the availability of additional
13 equipment.

14 BOARD MEMBER PRIMUS: I was going to say
15 we just talked about you just added six new sets.

16 MR. GARLAND: No. We did not.

17 MR. WEISKITTEL: They were not added, they
18 were reallocated.

19 BOARD MEMBER PRIMUS: But they hadn't
20 started their service yet. You just said to me
21 earlier that it was a new customer that hasn't
22 started their -- they deferred their service to July.

1 That's what you just told, that's what you said,
2 right?

3 MR. WEISKITTEL: Correct. The point I was
4 trying to make is someone was saying we had added
5 people, added crews, or added sets, and my point was
6 we were going to be able to serve this new customer,
7 but it was not through adding things, it was through
8 reallocating things.

9 BOARD MEMBER PRIMUS: Reallocating because
10 you're going to take, you added to NTEC, so you took
11 them from someplace didn't you?

12 MS. LAWLER: It's because the Crow Tribe
13 pushed their shipment into July.

14 BOARD MEMBER PRIMUS: You're saying that's
15 new, right? So they pushed it off. So, where did
16 the six come from? Where did the train sets come
17 from?

18 MS. LAWLER: Yeah. There was no new train
19 sets added, it was just pushed into a different
20 month, and so that made more capacity available for
21 NTEC during that June month.

22 BOARD MEMBER PRIMUS: I'm confused because

1 in the beginning you told me this is a new company
2 that's coming online, and that you're going to give
3 them six -- that they had six sets, but they deferred
4 to July to start. You didn't say you took them from
5 the Crow, you said it was a new company, or a new
6 entity.

7 You named the entity, so they weren't
8 coming online yet, so you took those six and you put
9 them on -- gave them to NTEC.

10 MR. WEISKITTEL: Yeah, and so I apologize
11 as I've caused confusion. So one little nuance, six
12 trains in the month is not the same as six sets.
13 Sets move multiple times, so it's --

14 BOARD MEMBER PRIMUS: I understand. You
15 know, he's talking about crews, and the next thing
16 you know you're talking about well we don't have
17 cars, you know, for coming online. It seems like the
18 goal line keeps moving, you know. Like I said, it's
19 Armageddon if we add one train set every five days.
20 If that's your position right now, you guys are in a
21 lot worse trouble than I thought.

22 And so, we have to get to the bottom of

1 how this is setting up, you know, that you guys can't
2 handle this capacity, you know, you talk about in
3 December that if they sign a contract we can handle
4 23 cars, 23 trains, but then you go down to 16, and
5 then you say oh, we found 6. I mean that's a whole
6 lot of BS about, you know, your commitment to
7 capacity and commitment to your customer.

8 If they were to sign that contract going
9 down to 16, where does that leave you? And it's the
10 issue here is that somebody isn't being on the up and
11 up about why this isn't moving forward. You know, it
12 seems absolutely beyond me, and I'm not speaking for
13 everybody else here, how a group of professionals at
14 BNSF can't figure this out where somehow a train
15 every five days somehow is going to blow up your
16 entire system.

17 I don't believe that, and I don't believe
18 how that's all on crews, and it's all on cars, and
19 I'm throwing that out there because I'm trying to
20 make sense of it, and right now it doesn't make
21 sense. So help me figure this out.

22 MR. GARLAND: It's a fair question, and I

1 think it's an excellent one. I think us jumping
2 around from point to point is probably not helpful,
3 and I think us segmenting the discussion, and going
4 through let's talk about equipment, and then what we
5 need to do is we need to talk about crews, and the
6 availability of them, and then we need to talk about
7 if there was an order that increased the amount of
8 trains that would be required to go through Everett
9 to West Shore in British Columbia, then there could
10 be a concern that we're going to have to pick from
11 one shipper, and give them to another because there
12 is finite capacity at this point.

13 So, if I will suggest to help clarify
14 this, maybe we start with the discussion on set and
15 equipment, and then we can have a discussion on
16 crews, and the availability of them, and then talk
17 about on top of that what could potentially happen if
18 there was an order to go up to let's say 29 tomorrow.

19 CHAIRMAN OBERMAN: Well, we're trying to
20 take this, my mind is trying to take this one step at
21 a time. I thought we painfully, well not painfully,
22 but we got to the point where there was no problem in

1 having a 23 train capacity because everybody just
2 agreed that that was the way BN looked at it.

3 So, I take it, despite the language in
4 your verified statement, Mr. Garland, there would be
5 no parade of horrors if it was only 23 trains a
6 month on average because that's what BN knew it could
7 handle.

8 MR. GARLAND: That is correct.

9 CHAIRMAN OBERMAN: All right. So now
10 we're talking about adding one train every five days
11 to get to 29, and that is to quote Robert is "going
12 to sink the whole system." That just does not make
13 sense to me. Apparently, it doesn't make sense to
14 Robert either. I don't know how you can't adjust to
15 find one train every five days without tanking
16 everybody else.

17 MR. GARLAND: So, I would say one train
18 every five days is not going to tank our system. We
19 are in much better position than we were last year,
20 and that is not what we were trying to communicate.
21 What we were trying to communicate in my statement,
22 or I was trying to communicate, is that if we went,

1 you know, 40 percent higher than what we're doing
2 right now there is major concern because we would
3 have to in effect pick winners and losers.

4 CHAIRMAN OBERMAN: When you said where you
5 are right now, the right now that I was starting from
6 was a determination by BN four months ago that you
7 could handle 23. Adding six to 23, not a 40 percent
8 increase.

9 MR. GARLAND: Correct.

10 CHAIRMAN OBERMAN: It's one every five
11 days, and you said that wouldn't tank the system.
12 So, what's the problem?

13 MR. GARLAND: That is correct. I was not
14 aware of what the Board would be looking at in terms
15 of number of increase. If you're asking about one
16 train every five days, that is something that
17 obviously we need to discuss internally, and just
18 make sure that --

19 CHAIRMAN OBERMAN: That's one train every
20 five days over 23. That's all we're asking for. So,
21 I can't speak for the Board, but I don't think we
22 were entertaining the possibility of giving NTEC way

1 more than they asked for, or anymore than they asked
2 for. There's a big question whether we're going to
3 give them anything that they asked for, but nobody
4 here is suggesting that there's anything more than 29
5 trains a month at stake here.

6 I think we have now established that BN
7 could actually handle 29 trains a month, not
8 precisely every month, but averaged out over the
9 year. Have we established that?

10 MR. GARLAND: I don't think we have, no.
11 23 trains a month is what we have committed to, and
12 that is what we are going to achieve this year.

13 CHAIRMAN OBERMAN: But you also said that
14 one more every five days on top of that would not
15 tank the system.

16 MR. GARLAND: Right. But we would be at
17 that point forced to choose if we go from 23 to 29,
18 and I fully understand it's only that one additional
19 train every five days, but there are additional
20 complications that come with that in terms of the
21 number of sets that we have available to use.

22 That's one of the things we have to

1 consider.

2 CHAIRMAN OBERMAN: You can't find one more
3 set every five days without taking it away from
4 somebody else?

5 MR. GARLAND: That is correct.

6 CHAIRMAN OBERMAN: Well let me just ask
7 just a follow-up on that point, but Michelle had a
8 question. In your papers you say you have 25 train
9 sets for this -- 20 to 25 train sets in export
10 service, that's what you said. Page 10 of your
11 statement. Is that right Mr. Garland? No? Page 10
12 is that right?

13 MR. GARLAND: That's correct.

14 CHAIRMAN OBERMAN: 20 to 25 sets in export
15 service. Would I be right that those trains make
16 somewhere between four and five turns a month?

17 MR. GARLAND: I would have to validate
18 that in terms of trains per month on export coal.

19 CHAIRMAN OBERMAN: It's only what?

20 MS. LAWLER: Two to three trains per
21 month.

22 CHAIRMAN OBERMAN: Is that a decrease from

1 what you previously were running?

2 MS. LAWLER: From what time?

3 CHAIRMAN OBERMAN: At any time over the
4 last ten years, has the number of trains per month
5 gone down?

6 MS. LAWLER: I mean I don't have that data
7 in front of me right now.

8 CHAIRMAN OBERMAN: Well for how many years
9 have you been turning them two to three times a
10 month?

11 MR. WEISKITTEL: I don't think we have
12 that information, but we're happy to supplement.

13 CHAIRMAN OBERMAN: All right. All right.

14 BOARD MEMBER SCHULTZ: I think you stated
15 that you prepared to dedicate 20 trains per month for
16 July. I just wondered if you could speak to if you
17 were ready to enter into a contract for 23 trains per
18 month, why only the 20 for July?

19 MR. WEISKITTEL: So, just yes, thank you
20 for the question. So for clarity, the contracts that
21 we have historically had, and that we were preparing
22 to enter into did not mandate a specific tonnage per

1 month or a specific number of trains. They spoke in
2 terms of annual numbers, and then there's a
3 nomination process along with that.

4 So that's why you see fluctuation across
5 the year in the number of tons we move in any given
6 month, and so when we say we could have -- what I've
7 been careful to say we would have been ready to
8 commit to 4.2 million tons for the year. You get
9 there with a little bit of variability month over
10 month.

11 BOARD MEMBER FUCHS: I'm trying to, and I
12 know Matt you offered to take it step by step from
13 the capacity constraints, and I appreciate that. If
14 we just maybe start with the train sets, and you've
15 heard a lot about crew over the last year and a half,
16 but can you summarize why there would be a train set
17 capacity problem to achieve the level that the
18 Chairman was describing?

19 I'm thinking in particular, and you'll
20 have to correct me if I'm wrong on this, but I was
21 sort of under the understanding that natural gas
22 prices were quite high in 2022, and I'm also under

1 the understanding that thus far in 2023 when you look
2 at all the utilities, which I'm just talking broadly,
3 and look at monthly coal deliveries by year, the 2023
4 coal delivery was about, you know, it was
5 significantly less I would say than 2022 of the same
6 time, and it was less than even later in 2022.

7 So, if natural gas prices are coming down,
8 and monthly coal deliveries are coming down, why is
9 it that there would be a tougher constraint on train
10 sets?

11 MS. LAWLER: So, about 80 to 82 percent of
12 the train sets are private train sets first of all.
13 There's also different track types of train sets on
14 this case. Westshore can take where we dump train
15 sets, so it's very specific. And when we do have
16 plant outages and things like that, or softening
17 volumes, we actually do flex sets that are our sets
18 to Westshore. Is that helpful?

19 MR. WEISKITTEL: And let me add something
20 on that if you don't mind. So, first of all, we did
21 add cars last year, we had 1,700 cars, and then the
22 year before we stopped turning cars back, so we've

1 been trying to address this issue. I think one of
2 the things that I hope is responsive to your question
3 is if you look at the export market, it's been a
4 stronger market in the last decade, certainly than
5 the domestic coal market, which is on a structural
6 decline.

7 We lost 30 percent of our volume in our
8 domestic coal service over the last 10 years. You
9 think about a railcar, a rotary dumped railcar, which
10 is the type of car here that has a 30 to 40 year
11 useful life. There's not a lot of people that are
12 necessarily interested in making that investment when
13 they don't know what the coal market is going to look
14 like over that time.

15 It's been, as you guys know, it's been a
16 commodity that's been disfavored by policymakers.
17 The Prime Minister of Canada has already said that he
18 wants to end exports of coal by 2030. So these
19 things all factor into people that are thinking about
20 making investments in sets for this type of service.

21 BOARD MEMBER FUCHS: It seems to me it
22 would also factor into the availability of train sets

1 in the present, so you know, maybe can you describe
2 more fully what the market for train sets looks like
3 in light of the percentage that was probably held,
4 and the availability of road and the like, and why
5 BNSF can't successfully acquire the additional train
6 sets in that market.

7 MS. LAWLER: Yeah. Like I mentioned, no
8 one is building new sets right now given the reasons
9 that Adam mentioned. Most of them are privately
10 owned, but like I said.

11 BOARD MEMBER FUCHS: For existing ones
12 though it seems that there's quite a few, and if
13 demand is going down it would seem like there would
14 be more available, and so why wouldn't the holders
15 of those train sets be amenable to transaction?

16 MR. WEISKITTEL: And you could speak to
17 that more, but I would say that you know, we heard
18 this morning that there's a possibility that there
19 are folks that own sets that are interested in
20 letting other people use them. I don't know that we
21 had heard that before, that's something we're happy
22 and excited to talk about.

1 So if NTEC has a line on sets that we were
2 not previously aware of, you know, we're happy to
3 talk to them about maybe getting them into --

4 BOARD MEMBER FUCHS: Can you describe
5 BNSF's activities this year.

6 MS. LAWLER: We have not been able to
7 locate any train sets other than the ones that we had
8 that we flexed from domestic.

9 BOARD MEMBER FUCHS: What do you do? What
10 do you do to locate train sets? What have you done?

11 MS. LAWLER: What do we do to locate train
12 sets?

13 BOARD MEMBER FUCHS: Yeah. You said you
14 haven't been able to locate train sets. What does
15 that look like to try to locate a train set?

16 MS. LAWLER: I mean certainly we talk to
17 customers, talk to the manufacturers, the lessors,
18 things like that.

19 BOARD MEMBER FUCHS: So you would of the
20 82 percent of the people that hold train sets, you
21 talk to them and say hey, do you have any more that
22 are available?

1 MS. LAWLER: We would always have those
2 conversations, yes.

3 BOARD MEMBER FUCHS: And you had them this
4 year?

5 MS. LAWLER: Correct.

6 BOARD MEMBER FUCHS: Who have you had them
7 with? Each of your customers that have train sets?
8 I mean there's no customer that has excess train
9 sets?

10 MS. LAWLER: Not this specific rotary
11 type.

12 BOARD MEMBER FUCHS: Okay.

13 MS. LAWLER: The ones that we have talked
14 to, we have flex movement into the service for
15 exports.

16 BOARD MEMBER FUCHS: Okay. So am I to
17 understand that there aren't any -- there's not
18 anybody, you serve a very large percentage of the
19 market, there's not anybody that you all serve that
20 you are aware of that has any excess rotary cars, or
21 that has a willingness to sell, or to lease, or
22 however the transaction would be structured, any

1 rotary cars in order to meet NTEC's demand?

2 MS. LAWLER: We're not aware of that.

3 But, as Adam mentioned, we'd be willing to have those
4 conversations if we were able to.

5 BOARD MEMBER FUCHS: If NTEC were to
6 present such an opportunity would that alleviate this
7 portion of the capacity problem that, or at least
8 capacity concern that you all established from going
9 from 23 to 29?

10 MS. LAWLER: We would still have some crew
11 constraint in the near term.

12 BOARD MEMBER FUCHS: Right.

13 MS. LAWLER: But that solves, and then we
14 had --

15 BOARD MEMBER FUCHS: How many train sets
16 would NTEC have to bring to your attention to solve
17 that problem?

18 MS. LAWLER: Well it depends on what we --
19 same as the gap, if we talked about one every five
20 days, or yeah one every five days we'd probably need
21 about two sets.

22 BOARD MEMBER FUCHS: Two sets?

1 MS. LAWLER: Two to three sets for the
2 terms.

3 BOARD MEMBER FUCHS: So you would need
4 NTEC to come to you and say I've found two or three
5 dedicated train sets for this service?

6 MS. LAWLER: Correct.

7 BOARD MEMBER FUCHS: Okay. And what about
8 for crew? How many more crew would you need to go
9 from 23 to 29? Let me actually take a step back.
10 Maybe that broad question might -- why don't you
11 answer how you want.

12 MR. WEISKITTEL: Okay. I'll do my best to
13 answer that. I mean this is a largely -- it's a math
14 calculation, it's a math exercise, and so I would to
15 get a finite number I'd probably need to come back to
16 Patrick and just really get into the detail on it.
17 I mean, and that's why we're running this, in
18 essence, the same amount of sets in January that we
19 are today, but we've been able to increase the number
20 of loadings because our velocity has increased.

21 And that helps us turn our assets quicker.

22 CHAIRMAN OBERMAN: Well turning assets

1 part, based on what Ms. Lawler says, it's taking a
2 week for the trains to get out there and a week for
3 them to get back, that's twice a month. Is that how
4 long it takes the train to get there?

5 MR. GARLAND: We need data on the trips
6 per month, we owe you that data, so we'll get back
7 and look at that.

8 CHAIRMAN OBERMAN: Because I think you're
9 right about the math, getting one more train every
10 five days, that is a very tiny increase of velocity
11 right?

12 MR. GARLAND: There are other complexities
13 to this as well. I mean there's the negotiation with
14 Westshore on vessels moving.

15 CHAIRMAN OBERMAN: Westshore. Doesn't
16 Westshore -- we didn't get into this, you or
17 somebody say in your verified statements that to me
18 you were setting up a straw man that said well NTEC
19 is asking for so many trains, we're going to have to
20 take them there whether there's vessels or not.

21 As I understand the system, and I don't
22 hear NTEC saying anything other than that, Westshore

1 basically controls the loading and unloading of
2 trains?

3 MR. GARLAND: That is correct.

4 CHAIRMAN OBERMAN: So they tell you we've
5 got a vessel for an NTEC shipment, bring the train
6 in. I don't think NTEC -- Dan you can speak up
7 there. You're not asking BN to run your trains up to
8 Westshore and then have them sit there if there's no
9 ships, are you? That's not part of your petition is
10 it?

11 MR. JAFFE: No. And keep in mind too with
12 respect to all of the Westshore servers that
13 Westshore has capacity to take our trains. They're
14 running about, you know, 60, 66 percent of their
15 capacity, and Matt can tell you far more than I can.

16 CHAIRMAN OBERMAN: Well.

17 MR. JAFFE: But our understanding is it's
18 not an issue.

19 CHAIRMAN OBERMAN: Conception, do you
20 agree with that Mr. Garland?

21 MR. GARLAND: Yes. When I was articulating
22 my verified statement was that there are

1 complexities, and Westshore is one of the
2 complexities when you look at transporting from the
3 mine to Westshore. And that is in terms of the
4 number of slots that we can get in per day that were
5 granted.

6 The vessel unloading schedules, the type
7 of coal, Westshore's desire to go from either
8 directly from train to ship versus going to pile, and
9 then from pile to ship, so all of that takes
10 negotiation. All of that takes a lot of
11 coordination, and so that's what I was saying that if
12 there was something that happens and we do get in a
13 situation where we have multiple different trains
14 that are now on the Northwest division, we can't just
15 artificially go from three to six in one day.

16 CHAIRMAN OBERMAN: I don't think anybody
17 is saying go to three to six in one day. If we
18 entered an order that said provide NTEC with 29
19 trains a month on the average, and deliver them
20 subject to Westshore's ability to unload them on
21 ships, that would solve that problem wouldn't it?
22 You wouldn't be required to take a train if there was

1 no ship there?

2 If that was the nature of our order, then
3 the problem you've just articulated goes away.

4 MR. GARLAND: I'm not sure I fully
5 understood that, but if I heard you correctly, if
6 there is no ship, and we've loaded additional
7 trains, that is now staging capacity on the
8 Northwest.

9 CHAIRMAN OBERMAN: No, no, that's -- I
10 said the opposite. I said if our -- if we determined
11 to issue an order in this case, BN, bring NTEC the 29
12 trains they've asked for, but you only have to bring
13 them and take them to Westshore subject to the
14 Westshore terminals ordering them the way they always
15 do, then you wouldn't have any problem right?

16 They couldn't -- if Westshore couldn't
17 take the train you wouldn't have to move it.

18 MR. GARLAND: Yeah. If complexities
19 around Westshore didn't exist, then that probably
20 goes away.

21 CHAIRMAN OBERMAN: The problem goes away.
22 But I don't hear NTEC asking for anything other than

1 that. Am I right?

2 MR. JAFFE: That is correct.

3 CHAIRMAN OBERMAN: I'm trying to strip
4 this case down to the issues that we have to decide.
5 We've gotten rid of a bunch of them here this
6 afternoon. I want to get it down to the nub. We
7 have a limited amount of time, and we are going to
8 have to decide this case one way or the other.

9 MR. STRAFFORD: So Mr. Chairman, I
10 understand you have sort of eliminated some of the
11 complexity at Westshore in your mind with that
12 question, right? But I do want to bring it back to
13 the conversation around --

14 CHAIRMAN OBERMAN: Westshore is not in
15 front of us, and we don't have any jurisdiction over
16 Westshore.

17 MR. STRAFFORD: Correct.

18 CHAIRMAN OBERMAN: And everybody seems to
19 agree that the rotation of these trains ultimately is
20 determined by Westshore, and whether those are
21 shipped there because Westshore handles the loading
22 of the ships.

1 MR. STRAFFORD: No disagreement.

2 CHAIRMAN OBERMAN: Okay. So that's that
3 in this case.

4 MR. STRAFFORD: But I did want to bring
5 back the conversation around train sets and crews.

6 CHAIRMAN OBERMAN: Yes. I'm fine. We you
7 guys done?

8 BOARD MEMBER FUCHS: I'd like to hear a
9 little bit more about crews if?

10 CHAIRMAN OBERMAN: Yeah, no, no, I do too,
11 but were you done with this issue because I -- okay,
12 proceed.

13 MR. STRAFFORD: So I'll sort of set the
14 framework around train sets and crews, and then maybe
15 Adam or Matt can address the actual facts around the
16 crew situation. But I do want to sort of take away
17 the straw man of sort of that certain number of
18 additional trains will sort of destroy the BNSF
19 system. That is not our position.

20 We're just trying to make clear that the
21 Board understands that currently there are finite
22 resources regarding crews and train sets, which means

1 that if we shift them to service for NTEC, that means
2 they were being shifted away from somebody else. And
3 that's the point of those two points.

4 CHAIRMAN OBERMAN: But are we talking
5 about shifting only trains above and beyond the 23
6 minimum that you were willing to agree to last
7 December? I thought we had established that?

8 MR. STRAFFORD: The point that we're
9 trying to make is that there is a pie. There's a
10 finite amount of resources. And what we're talking
11 about is the allocation of that pie.

12 CHAIRMAN OBERMAN: The pie includes, I
13 thought, 23 trains a month from BN's point of view,
14 that doesn't require smaller pieces of pie for
15 everybody else, correct?

16 MR. LAROCCA: I think that's true. I
17 think --

18 CHAIRMAN OBERMAN: Well that's what your
19 co-counsel said.

20 MR. LAROCCA: The 23 trains comes from
21 December, and it was a forecast of the year coming.
22 It did not include the possibility of additional

1 shippers coming on that are going to be requesting
2 service, so yes, at that time BNSF I believe, and Ms.
3 Lawler can explain, understood that it could dedicate
4 the equivalent of the 23 trains as long as we're
5 recognizing that that's not really the right way of
6 thinking about it, but it's a sort of a shortcut,
7 shorthand.

8 They could dedicate that much capacity to
9 NTEC, but that was not considering the possibility of
10 additional shippers seeking service. Now, we're in
11 May. We have other shippers who are asking for
12 service, including the Crow Tribe, and that is a
13 factor that interferes with the assumption that you
14 would just have 23 trains a day now. In December we
15 were allocating that capacity.

16 Now, if you were to force us to do
17 something like that, you're going to take away trains
18 from other shippers.

19 CHAIRMAN OBERMAN: Well Mr. LaRocca, are
20 you telling me that the people at BN, including these
21 fine people here, go to work every day planning for
22 one customer with the assumption that you're never

1 going to get a new customer?

2 Actually, if they do, I wouldn't be
3 surprised, because I think the Class I railroads are
4 not providing growth service to this country.

5 MR. LAROCCA: This is --

6 CHAIRMAN OBERMAN: I don't think that Ms.
7 Lawler goes to work every day saying I'm never going
8 to get another customer, so I can commit to 23 trains
9 in this one. That's inconceivable to me, but if
10 that's what you're telling me the way BN works.

11 BOARD MEMBER PRIMUS: Well Marty, I think
12 that's the way the network works because there's no
13 growth, there's no volume, and there's no growth, you
14 know.

15 CHAIRMAN OBERMAN: That really doesn't
16 make any sense that Ms. Lawler could sign a contract
17 in December for 23 trains. A new customer shows up
18 next June and says you're out of the box, I just
19 signed a contract for 23 trains.

20 BOARD MEMBER FUCHS: But if I could add,
21 Marty, the Crow Tribe's letter if I have it correct,
22 they requested BNSF service in July 2022. So, if

1 BNSF is making a projection in December 2022, I
2 don't -- it's true that BNSF said that they wouldn't
3 be able to come online until 2023, but BNSF would
4 have had the information about a new customer when
5 they made the projection of 23 to NTEC.

6 So, I don't understand why the Crow Tribe
7 would all of a sudden validate the 23 shortcut, the
8 23 trains per month forecast.

9 MR. WEISKITTEL: So, just to be absolutely
10 clear, that's correct. The Crow had been in
11 discussions with us since last year. And their
12 shipments haven't materialized yet, so that certainly
13 was not something that we did not have knowledge of
14 at the time that we were talking to NTEC.

15 BOARD MEMBER FUCHS: So who had the new
16 customers that you had no knowledge of in December of
17 2022?

18 MR. WEISKITTEL: No. I think the point is
19 there may be others. That's the point that was being
20 made, but also here's another variable.

21 BOARD MEMBER FUCHS: I don't think that
22 was the point that was being made, Adam. I think the

1 point -- well there was a very specific point that
2 was made about the Crow Tribe, and there being a new
3 customer that come online, and that undermining the
4 23 train projection, and that's the point I
5 understood. Are you meaning a different point?

6 MR. LAROCCA: My point is in December when
7 BNSF was looking at the possibility of committing to
8 a 4.2 million tons, they were assuming that they
9 could do that and accommodate additional traffic.
10 That was not tying up their full capacity.

11 BOARD MEMBER FUCHS: Right.

12 MR. LAROCCA: And that was the assumption
13 at the time. Since then, things have developed as
14 they do differently from any particular expectation,
15 not necessarily exceedingly different, but
16 differently, and now in some months BNSF is able to
17 serve 27, in some months fewer than that.

18 That's the variability, and they're
19 working around the demands that are being put on them
20 by other shippers, or the requests that are being put
21 on them by other shippers, and that's why the 23 when
22 it is different today than what it was in December

1 when they were looking at the full year coming
2 forward.

3 CHAIRMAN OBERMAN: Well suppose we just
4 talk about 4.2 million tons for the year. You know,
5 I don't hear NTEC declaring bankruptcy if it's 20
6 trains this month, and 26 next month. They need to
7 deliver 4.2 million tons a year to their customers
8 over there, and as long as it isn't wildly in
9 variation I assume that's the way the business runs.
10 Is that correct?

11 MR. JAFFE: Yes, yes, Mr. Chairman.

12 CHAIRMAN OBERMAN: You know, there's a
13 lot, we wasted a lot of time here today setting up
14 straw men and knocking them down, and we're happy to
15 hear you, what you want to hear, but honest to God
16 we're wasting time on arguments that don't have to do
17 with what this case is about.

18 I think we've established, thanks to
19 Patrick for reminding us, that you knew about Crow a
20 year ago, so that couldn't have affected -- Ms.
21 Lawler is nodding her head, understanding that you
22 can commit to 4.2 million, and your statement says

1 350,000 a month.

2 That's 23 a month. Everybody understands
3 you could have a few trains a month variation. So
4 let's stick with the program here. And so, to me it
5 is a given, based on this record so far, that BN has
6 the capacity to ship 4.2 million tons of coal this
7 year for NTEC, and 5.5 million next year.

8 If that's still being contested I'd like
9 to hear about it, and I'd like to know what the
10 evidence is that supports it.

11 MR. WEISKITTEL: Mr. Chairman, I would
12 certainly agree as we've said multiple times here,
13 that was our expectation for 2023, and I think I said
14 earlier if you look at the path that we're on, the
15 actual deliveries that we've made thus far, and then
16 you assume a slight increase based on hopefully
17 improving our crew situation, we'll get there.

18 2023 was an active conversation that was
19 still ongoing with NTEC. In fact, NTEC wanted the
20 ability to go as low as four and as high as six. And
21 there's a lot of things that would have gone into
22 that, so I take your point on 2023. 2024 is a little

1 bit into the future.

2 CHAIRMAN OBERMAN: Well I don't know. In
3 December you were willing to commit to 5.5 million
4 tons, but in order to move this case ahead are you
5 telling me that you can't sit down with NTEC and
6 figure out how to finish out their year at the levels
7 they need, and that you agree you can provide without
8 our having to order it?

9 MR. WEISKITTEL: Mr. Chairman, we're
10 absolutely happy to have this conversation, as I
11 indicated at the beginning. We're happy to do it.
12 This is just for clarification by the way, the 5.5,
13 we said the 5.5.

14 CHAIRMAN OBERMAN: Is for 2024, that's
15 what Ms. Lawler's agreement was.

16 MR. WEISKITTEL: Thank you, sorry.

17 CHAIRMAN OBERMAN: So, you know, you told
18 them 16, you know, they've got a business to plan
19 just like you do. You tell them 16, what are they
20 supposed to tell their customers in Japan and Korea?
21 And in July you're now telling him you weren't going
22 to go to 22, but now they're down to 20, so that's

1 three below the level you promised last -- you were
2 able to promise, you didn't promise it because there
3 was no contract in December.

4 In August and September and October,
5 November, December are up for grabs. The
6 uncertainty, I think, is not allowing them to run
7 their business. Now, I don't hear anybody saying you
8 have to guarantee it month by month, but to give them
9 the assurance that by the end of the year you'll move
10 their 4.2 million tons would get rid of this case,
11 and I don't know what we're arguing about because
12 you're telling us you have the capacity to do it. So
13 why are we here?

14 MR. WEISKITTEL: Mr. Chairman, like I
15 said, we're happy to have that conversation. I would
16 just point out that's a significantly lower number
17 than they've come to the Board and asked for, so
18 that's the gap we need to close.

19 CHAIRMAN OBERMAN: It's the number they
20 were willing to agree to in December, but for the
21 other contract terms, so they'd like more. And I
22 don't know that their common carrier obligation

1 doesn't require you to do more if you have the
2 capacity, but and I don't know what the Board might
3 order.

4 I'm just trying to see how much we can
5 agree on, and then we can argue about what's in
6 dispute, which strikes me as one train every five
7 days, and I don't know what the Board will do with
8 that. But I'm going to make an observation, if Mr.
9 Jaffe wants to comment on it he can, and if he
10 doesn't want to commit to it that's fine too.

11 But I'm guessing that a month ago if you
12 had stepped out with NTEC and said that we will
13 guarantee you 23 trains a month we wouldn't have a
14 case filed. They might say we'll take that and
15 let's do better. But you told them 16 trains, which
16 is a touch more than half of what they need to
17 fulfill their contracts. That doesn't give them any
18 leeway.

19 And it wasn't until Friday when you filed
20 their supplemental papers that that 16 jumped to 22.
21 What were they supposed to do? So, I don't know.
22 Dan, did you want to jump in here? I've spoke for

1 you. I didn't mean to.

2 MR. JAFFE: Thank you Mr. Chairman. I
3 think certainly NTEC would have been pleased to
4 discuss any consistent service at the sort of
5 threshold that you're discussing. We would clarify,
6 and I know that you got it in there, I think
7 Commissioner Fuchs was headed that way, was that the
8 4.2 million was our minimum. The maximum volume was
9 6 million, and we had told them we were going to do
10 5.5, which is how to we get to our 29 now.

11 And I know that that's in that little mix
12 there, but we did want to just make sure that we
13 clarified that. Right, and we assumed that they
14 wouldn't have agreed to six as a maximum without
15 some thought that they had the capacity, but.

16 CHAIRMAN OBERMAN: My interpretation of
17 the record is that when they offered you 16 trains
18 that pushed you over the edge.

19 MR. JAFFE: I think that that is a fair
20 assessment.

21 CHAIRMAN OBERMAN: You know, we hear from
22 shippers all the time who are not getting the service

1 they want or need, but there aren't any other
2 emergency service petitions. It's only when people
3 get pushed to the edge that they finally show up
4 here, and that's my interpretation of your
5 contention.

6 I'm not telling you I've accepted it, but
7 that's the case I heard you put on. And for the life
8 of me I don't know why you and BN got there, based on
9 the discussion we're having now. I think we need a
10 break. It's ten after 3:00, ten minutes. We'll
11 convene by that clock at 3:20.

12 (Break 3:07 p.m. - 3:23 p.m.)

13 CHAIRMAN OBERMAN: We are
14 back on the record. I think some way or another Tim,
15 we're in the middle of your case, so proceed.

16 MR. STRAFFORD: Are we still on the same
17 timeframe that we were discussing? I mean are we
18 also against a hard stop?

19 CHAIRMAN OBERMAN: No. I think we have a
20 little bit more time. I'm sorry. I think we can
21 extend this for a bit, at least until 4:00 - 4:15,
22 somewhere in there.

1 MR. STRAFFORD: Fantastic.

2 CHAIRMAN OBERMAN: So yeah, I'm sorry. I
3 probably left you in a state of -- well I wouldn't
4 say panic. Tim doesn't get panicked, but realizing
5 you were only at five minutes left, that wasn't fair.
6 We had talked among ourselves that we could extend
7 this a little bit, so I'm sorry. Go ahead.

8 MR. STRAFFORD: We've covered most of the
9 issues I think I wanted to address today. I'm happy
10 to answer any other questions if you've got specific
11 topics you'd like to cover, but if not I would just
12 conclude -- I think you probably --

13 CHAIRMAN OBERMAN: Well, I have some
14 questions if I could. I think other Board members
15 and we haven't gotten into these. As I read the
16 papers, and you know, the Board obviously is well
17 aware of crew issues systemwide in all the Class 1's.
18 We had hearings on it for the last year, including
19 ones involving BN, and we have your reporting, your
20 770 reporting, and so forth.

21 As I understand BN's position here, BN
22 contends that a crew shortage at Everett, and only at

1 Everett is a factor leading to concern about the
2 level of service. Is that right, Tim?

3 MR. STRAFFORD: That's right. With regard
4 to NTEC's service it's localized.

5 CHAIRMAN OBERMAN: It's just at Everett.
6 Here's what I'm concerned about, among other things,
7 about the crew. In the papers I think it was Mr.
8 Garland's verified statement that sometime in the
9 fall of 2021, I couldn't get exactly what month,
10 because of Canada's vaccination policy of the 93
11 workers at Everett, 21 chose to stop going into
12 Canada. What month was that Mr. Garland? Ballpark?

13 MR. GARLAND: So that was essentially in
14 September. I think somewhere in that time in the
15 fall.

16 CHAIRMAN OBERMAN: All right. So, and
17 those 93 were they all T&E, or were they yard men, or
18 car men or what were they?

19 MR. GARLAND: Yeah. They were -- yeah,
20 engineers, conductors.

21 CHAIRMAN OBERMAN: Okay. So the whole 93
22 consists of T&E?

1 MR. GARLAND: Correct.

2 CHAIRMAN OBERMAN: But then you said that
3 in April of 2022, which coincidentally was at the
4 time of our urgent issues of service hearings, BN
5 started offering incentives to try to get people back
6 there. Correct?

7 MR. GARLAND: Correct.

8 CHAIRMAN OBERMAN: So I'm a little
9 distressed, aside from this case, but it certainly
10 was related centrally, you've made it central to this
11 case. If you knew you had lost 21 out of 90, which
12 is I don't know, close to 30 percent, well 25
13 percent, why did you start offering incentives to get
14 people to replace those 21 for seven months, eight
15 months? What were you doing? What was going on
16 there?

17 MR. GARLAND: Well we were. We were
18 trying to incentivize locations where we had surplus
19 to incentivize them to go to the northwest division.
20 And I would have to go back and look at the dates.
21 We've had so many different incentive programs. We
22 found that just trying to incentivize employees from

1 different parts of the system to go to the northwest
2 was not effective, for whatever reason.

3 CHAIRMAN OBERMAN: But what you said on
4 page 12 is that you said implementing hiring
5 incentives in April of 2022, which leads me to
6 conclude that you didn't implement hiring incentives
7 for the previous seven months after these 21 folks
8 left. You know, from a question of the common
9 carrier obligation, and capacity, and Tim, rightfully
10 in the exchange he and I had, talked about you know,
11 what are the other extenuating circumstances.

12 If BN was not acting reasonably and trying
13 to overcome crew shortages, does that still excuse
14 you for not having enough capacity to meet the common
15 carrier obligation?

16 MR. GARLAND: I think we --

17 CHAIRMAN OBERMAN: And I think it's a
18 legal question, and you can comment on it.

19 MR. GARLAND: I'd like to just comment on
20 the, you know, we can talk about the reasonableness
21 of it with counsel, but these situations were unique,
22 and something that we had never encountered before in

1 generations possibly ever, in terms of new laws being
2 enacted where employees chose to exercise seniority
3 because they didn't all want to get vaccinated.

4 And it happened relatively quickly, and I
5 think we were trying to understand how to react to it
6 because they were exercising their seniority within
7 the greater Seattle complex, and so if that
8 vaccination law changed, and we had the assumption
9 they would flow back pretty quickly.

10 For whatever reason they didn't, and then
11 at that point we had to really layer on transfers,
12 hiring incentives, hiring bonuses, you know. I
13 remember commenting, and we had discussion back in
14 April at the service hearing, and your comment to me
15 was you need to do whatever it takes, and I took that
16 very seriously, and we have.

17 And we've ramped up our hiring incentives
18 and gone from starting at \$5,000.00. We found that,
19 you know, that didn't respond, so we went to 10, then
20 15, then 20, and we found that that was the right
21 amount to start getting a pipeline of employees in
22 the door. Again, some of these things are pretty

1 unprecedented, especially with the labor market and
2 the greater Seattle area, it's just been one of those
3 really difficult locations, but I think the
4 vaccination dynamic made it even that more difficult.

5 CHAIRMAN OBERMAN: Well despite my
6 repeated protestations that I don't know how to run a
7 railroad, I would have hoped that BN would have
8 figured out seven months earlier what they needed to
9 do to incent employees, rather than waiting to hear
10 something that I, or another Board member said at the
11 April hearings.

12 I do -- I have said, I'm sure I did say in
13 April because I say it all the time. Do what you
14 have to do. But I would think a sophisticated
15 corporation like BN didn't need me to tell them to
16 do what they have to do you've got business out
17 there. I just find it to be a problematic part of
18 this case that to the extent crew shortages is an
19 issue.

20 And I am sure you were right, this idea of
21 a vaccination requirement is itself unique relative
22 to a pandemic, which is also somewhat unique. I'm

1 sympathetic to that being something unexpected, but
2 then it doesn't take much to figure out what to do
3 about it, it would seem to me.

4 So that, and then you say that 20,000 was
5 the right number, but you also say that only 73
6 percent of the -- you were only at a 73 percent level
7 as I understand it, of the 93 by last October. Is
8 that right? Since last October.

9 MR. GARLAND: Are you talking about the
10 retention rate of new employees?

11 CHAIRMAN OBERMAN: No. You say on page
12 12, "Since October of last year average system
13 headcount has returned to 91 percent of BN's
14 pre-pandemic headcount, but at Everett and Inter Bay
15 it's only been 73 percent." So I'd take that to mean
16 73 percent of the 93 who were there, which would be
17 68 people. That was -- is that today? You still
18 only have 68 people there?

19 MR. GARLAND: Our Everett Inter Bay
20 headcount right now has come off a low of about let's
21 call it 260-ish. We're about 300, we need to get
22 back in that 350 range. We have a strong pipeline of

1 employees coming in. I think what that was
2 referencing was that our overall system headcount has
3 come back to 91 percent, while Everett in relation
4 there's only a 73 percent, and I think that's a
5 dynamic that I was talking about earlier, with just
6 the hiring and staffing challenges in the greater
7 Seattle area.

8 CHAIRMAN OBERMAN: But earlier you had
9 only talked about 93 T&E people, so how many T&E
10 people are there if you have 73 percent from 93, that
11 would be 68, but have you hired more T&E
12 proportionately to the other shortages or?

13 MR. GARLAND: Yeah, so when I was
14 referencing the 300 amount, that's Everett and Inter
15 Bay combined, that's yards, that's road employees,
16 that's all in. When I was talking about the 90 or
17 so employees in the, you know, 30 percent that left
18 because of vaccination, that was only the employees
19 working in the Canada, which is the next move that we
20 have to do to get to a sure.

21 CHAIRMAN OBERMAN: Right. So how many are
22 there? There were 93. How many are there today?

1 MR. GARLAND: In the pool?

2 CHAIRMAN OBERMAN: For the people who --

3 MR. GARLAND: In relation to that.

4 CHAIRMAN OBERMAN: Yeah. It was 93, how
5 many are now there?

6 MR. GARLAND: I can take that as a
7 follow-up and get back to you on that specific
8 number.

9 CHAIRMAN OBERMAN: I mean I took it to
10 mean that when you were talking about crew shortages
11 at Everett impacting moving NTEC's coal, and you
12 cited the loss of 21 people, those are the crew
13 shortages you wanted us to take into account.

14 MR. GARLAND: Correct.

15 CHAIRMAN OBERMAN: So that's the number
16 that I would like to know where it stands today. And
17 I have to say if it isn't substantially close to
18 that, even after you've -- this is now a year and
19 what eight months after these first folks left
20 because of the vaccination, and BN couldn't replace
21 all 21 in a year and a half? That would be
22 problematic, but I don't want to guess. I'd like to

1 know what the number is.

2 That was the only question I had about
3 crew. I have some questions about Global -- which I
4 assume are going to be proprietary. But before we do
5 that, other Board members may have questions.

6 BOARD MEMBER PRIMUS: Thanks Marty. So at
7 Everett before the pandemic, well during the
8 pandemic, how many people did you furlough in that
9 area?

10 MR. GARLAND: So it looks like I'm just
11 going to relate it to the chart on page 12 if you
12 look at that. You can see the dip that occurred
13 right at the point, at the height of the pandemic, or
14 when essentially everything shut down. I could kind
15 of guess on the chart, but it looks like right
16 around 100 or so with what appears is that we
17 recalled coming out of that, and then we had a pretty
18 solid success rate getting back pretty close towards
19 normal.

20 BOARD MEMBER PRIMUS: And so, did you as
21 an area, did you furlough anybody any place else in
22 this region, and were there problems with people

1 coming back?

2 MR. GARLAND: Not the extent that we saw
3 in the Everett Inter Bay Seattle complex. But yes, I
4 would say generally. We talked about that last year
5 a little bit, the recall rate that we started
6 recalling from furloughs was fairly successful at the
7 onset, and then as we got later and later into the
8 recall from furlough, that's when we became less
9 successful.

10 BOARD MEMBER PRIMUS: Okay. So are you
11 right now, in terms of I call it sort of the dog
12 track, the other loop in the area that we're doing,
13 are you taking crews from any other places to utilize
14 for this, for the operations now?

15 MR. GARLAND: We are. Just related to,
16 you know, I would say the northern region, our coal
17 network, parts of the Ag world, and as successful as
18 we can be into this area, we have about 200
19 employees that we've moved off the south region to
20 the north, and that's on a temporary transfer type
21 agreement.

22 BOARD MEMBER PRIMUS: Okay. As you guys

1 alluded to the fact that, you know, you have new
2 customers in a probation, that's going to be coming
3 online, potential others, I can't assume it's just
4 one customer that you guys are adding on, but and you
5 look at the growth of potentially NTEC, what they're
6 asking, you know, how many crews do you need?

7 MR. GARLAND: Yeah, I think back to the
8 Chairman's question. I think we are aggressively
9 hiring. We think that by the third and fourth
10 quarter of this year that we're going to have enough
11 supply to be able to provide the service that we've
12 committed to.

13 BOARD MEMBER PRIMUS: So what's that
14 number? And what is that? Is that current service,
15 or is that looking at growth because again, you guys
16 have all said that you want to grow, and so adding
17 this you know, new growth, if you want to hopefully
18 in the future take more traffic from NTEC, and what
19 does that number look like?

20 Is that number at the end of the year
21 crews that can handle service today, or is that crews
22 that you anticipating handling today and the

1 additional growth?

2 MR. GARLAND: So just rough numbers.
3 We're targeting just for the Pacific Northwest around
4 300, and we've hired 188, probably close to 200 by
5 this point there in the first four months of
6 training, so we are making progress towards it.

7 BOARD MEMBER PRIMUS: Towards what? So
8 like what's?

9 MR. GARLAND: Towards getting to our
10 target.

11 BOARD MEMBER PRIMUS: Do you have it?
12 What's the goal? What's the target?

13 MR. GARLAND: So the target I would just
14 say in the northwest area would be about 300.

15 BOARD MEMBER PRIMUS: Okay. And with that
16 300 again, will that satisfy current demand, or is
17 that something that is going to satisfy, is that just
18 going to address service capacity? So if you have to
19 grow, at the end of this year let's say you do sign
20 NTEC to 2024 numbers, and you're up to 30 because
21 again, right now you say you can't handle that, but
22 you sign them up and they say hey, let's do it.

1 You sign them up to 30 next year. Will
2 that number satisfy that?

3 MR. GARLAND: That's exactly where we're
4 heading, and you know, not related to just this
5 specific example, but just in terms of surge
6 capacity. If you look at what we're doing on the
7 southern region of our network, right now we could
8 probably have the ability to furlough about 500
9 employees based on the volume we're seeing.

10 We're not doing that because we know that
11 there could be demand in the future, and we're
12 protecting against that. And so, that's something
13 we're carefully considering, and so we're looking at
14 a station level every single week to look at what the
15 forecasted demand is, what the new opportunities are.

16 We can show that we're staffed
17 appropriate, or have enough employees in the pipeline
18 to come into that. I mean we clearly don't want to
19 have 40 people sitting around not doing anything.
20 That's not how we run an efficient network, but we do
21 understand that there needs to be some level of flex
22 to be able to surge to take into account either

1 weather or weather disruptions on the network.

2 BOARD MEMBER PRIMUS: I think we've
3 learned over the last three years that you know,
4 having 40 people available is a lot better than
5 having to hire 40 people. I mean you're, like Marty
6 just said, you know, you guys are still struggling
7 three years, two years later to get those numbers up,
8 and I think that's also the problem, you know,
9 currently because that you know, damages your
10 capacity, you know.

11 Those furloughs, and those people leaving,
12 and your inability to bring those back on quickly,
13 you know, that holds down your capacity, and your
14 ability to grow, and it puts a strain on you and on
15 your customers as well, so thanks Marty.

16 MR. GARLAND: And we have taken steps to
17 address that, and we're continuing to spend millions
18 of dollars in incentives. We've offered additional
19 incentives for a delayed retirement, so that our
20 folks we're trying to retain them longer. We're
21 delaying vacations, we're paying folks, if they defer
22 it they can get a large bonus with that, so there

1 are, you know, in order of magnitude, probably 90
2 different actions we're taking around that to make
3 sure that we're staffed appropriately for now, and in
4 the future.

5 CHAIRMAN OBERMAN: Any other questions or
6 issues?

7 VICE CHAIRMAN HEDLUND: Well I would like
8 to make just an observation, and if necessary we
9 might go into this in more detail if we get into a
10 confidential section, but just so you guys
11 understand kind of some of things that are bothering
12 me. This chart is bothering me.

13 We're not here to decide whether you did
14 the right thing in allocating your resources to NTEC
15 in 2022. But clearly, what this seems to suggest is
16 that you took available resources, allocated them
17 away from NTEC to other customers, and maybe then
18 some.

19 CHAIRMAN OBERMAN: What page are you on?

20 VICE CHAIRMAN HEDLUND: This was from
21 NTEC's --

22 CHAIRMAN OBERMAN: NTEC or?

1 VICE CHAIRMAN HEDLUND: NTEC. This is
2 NTEC, here. That's from this morning.

3 CHAIRMAN OBERMAN: Okay. Thanks.

4 VICE CHAIRMAN HEDLUND: Comparing 2021 to
5 2022. But this afternoon we've been hearing some
6 chatter and concern about crews, about availability
7 of cars, about generally concern about constrained
8 resources. And I am concerned about in the event you
9 have constrained resources, that you believe that
10 it's okay to short a common carrier customer before
11 you short any of your contract customers.

12 And if you want to discuss that, the
13 propriety of doing that, or whether you are in fact
14 doing that, I'd be happy to hear more about that, but
15 that's what I'm concerned about. You've got a
16 customer that's in a weaker contractual position
17 potentially vis-a-vis that dragged you all in here
18 today.

19 And I'm just not sure that you can
20 prejudice a common carrier customer if you are
21 relative to any other contract customers in the event
22 you have a resource problem.

1 MR. WEISKITTEL: So, maybe I can address
2 that, your second question.

3 VICE CHAIRMAN HEDLUND: Right.

4 MR. WEISKITTEL: So, we have every
5 intention of not doing that. We did not believe that
6 we've done that. Again, I'll start with something
7 that I mentioned before. This is new territory for
8 us in 23, it's the first time we've had a common
9 carrier shipper. We got to the allocation capacity,
10 so to speak, by thinking about their historical
11 volumes, by thinking about what we thought they
12 wanted -- they told us they wanted last year.

13 And we tried to honor that, even though
14 they shifted to common carrier. We recognize that
15 the law speaks to priority of contracts, but it
16 speaks to that in the reasonableness, under the
17 umbrella of reasonableness right? So we have no
18 intention of saying that in the future we can
19 extinguish our common carrier service in this lane
20 because someone is unwilling to sign a contract.
21 That's not our intent.

22 And I think we've tried to demonstrate

1 that through our actions in the amount of services
2 we've given them so far this year.

3 VICE CHAIRMAN HEDLUND: Yet if your
4 service may result in their inability to continue to
5 access the market. You don't have to comment on
6 that.

7 CHAIRMAN OBERMAN: I did have a couple of
8 questions about Global, about Global's contract
9 specifically. So, if we need to, you don't want me
10 to ask those questions in public. Well let me ask
11 this question. What if I ask the questions, and then
12 you tell me if you don't want to answer them in
13 public, or you think I shouldn't even ask them? I'm
14 happy to defer to your wish on that.

15 MR. STRAFFORD: It probably would be just
16 more efficient just to do it all in a private
17 session.

18 CHAIRMAN OBERMAN: Okay. All right. So,
19 will all the people who are authorized to hear these
20 questions raise their hand again? On Global. All
21 right. So will everybody else just step out into the
22 hall for this, it isn't going to take more than five

1 or ten minutes, then come back in, and I think we'll
2 (off mic).

3 Yeah if they want, if they have. (off
4 mic.) Okay. Everybody has exited who is supposed
5 to.

6 MR. STRAFFORD: It's a dangerous question.

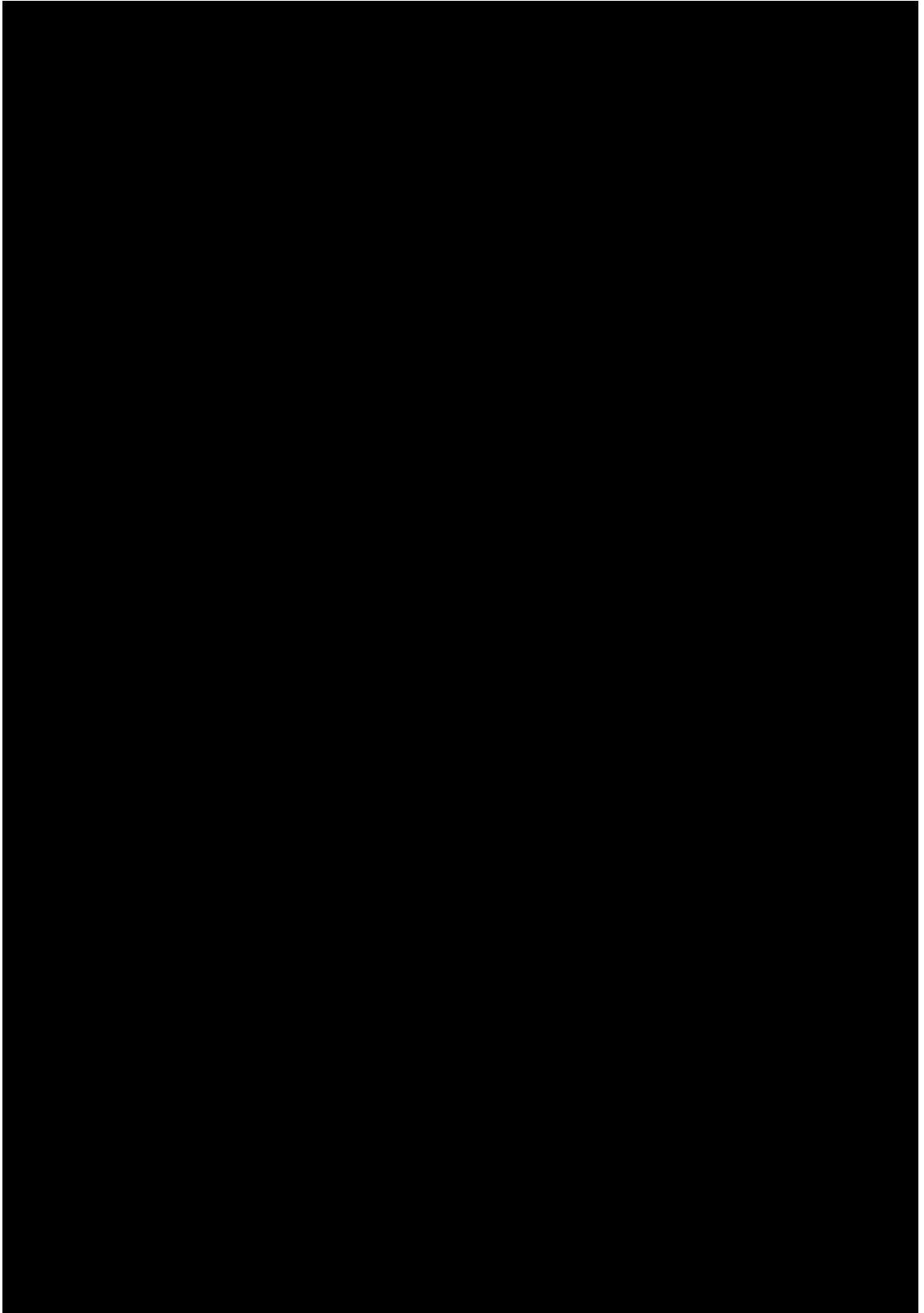
7 CHAIRMAN OBERMAN: (off mic.)

8 MR. STRAFFORD: Yes sir.

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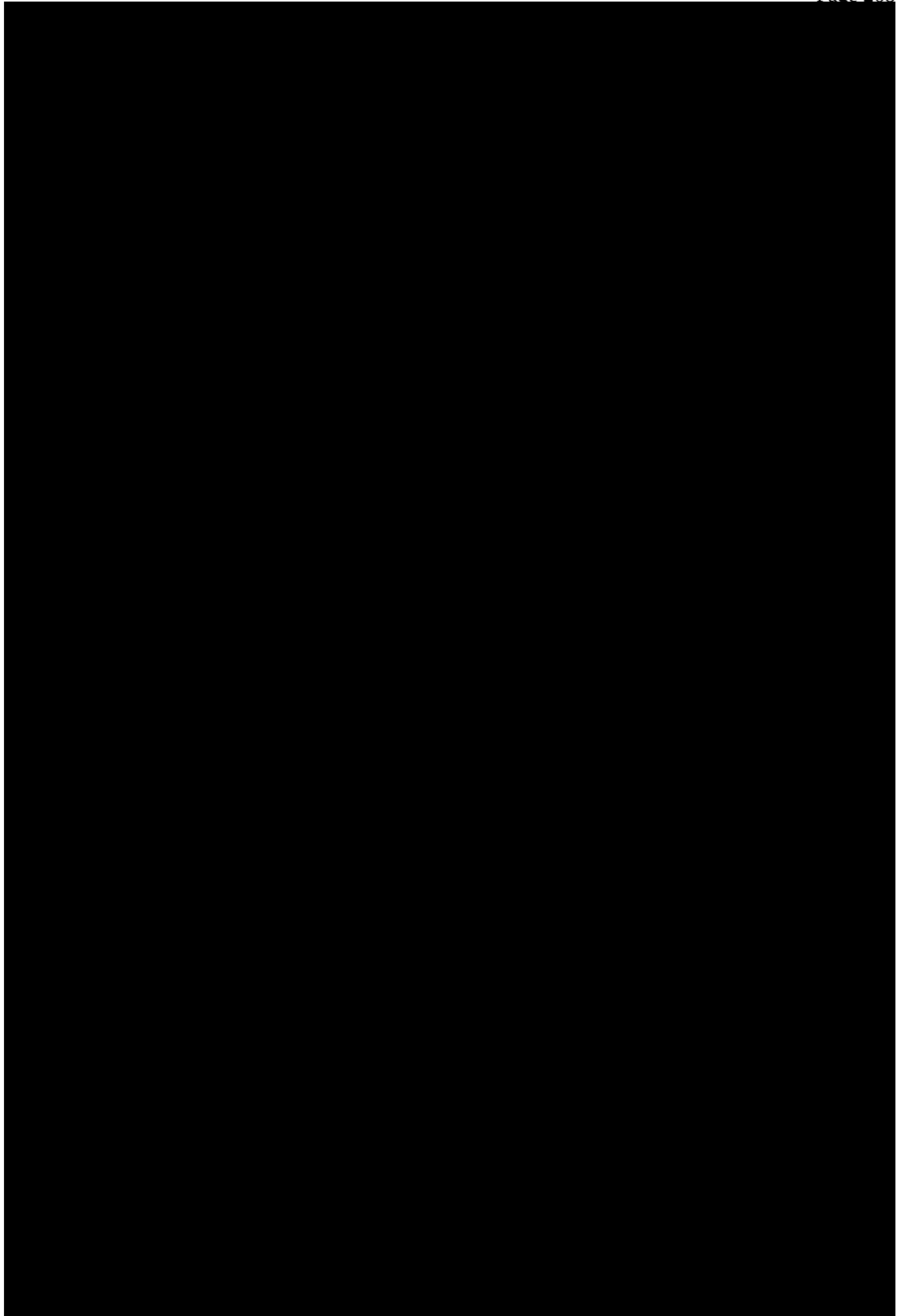
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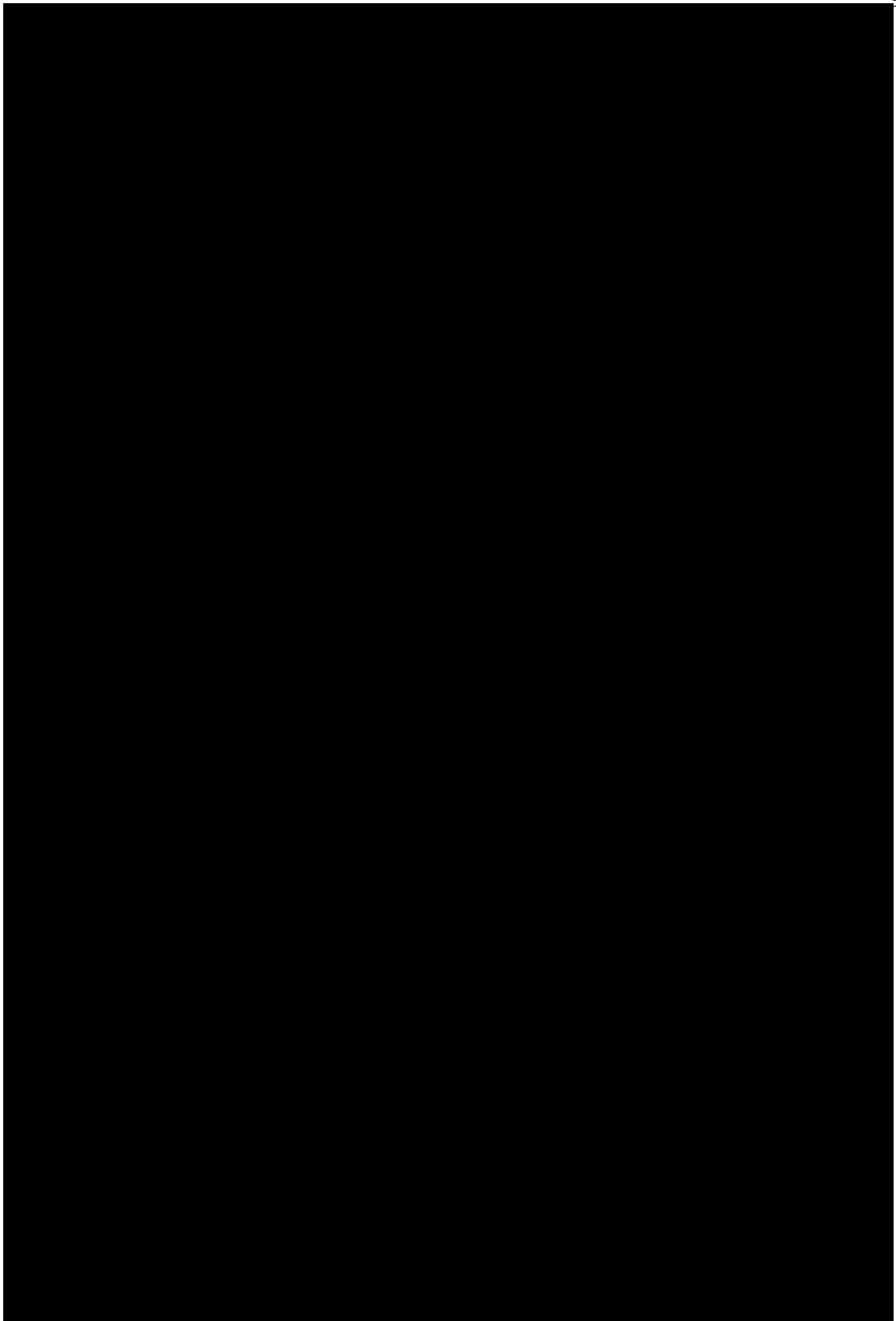
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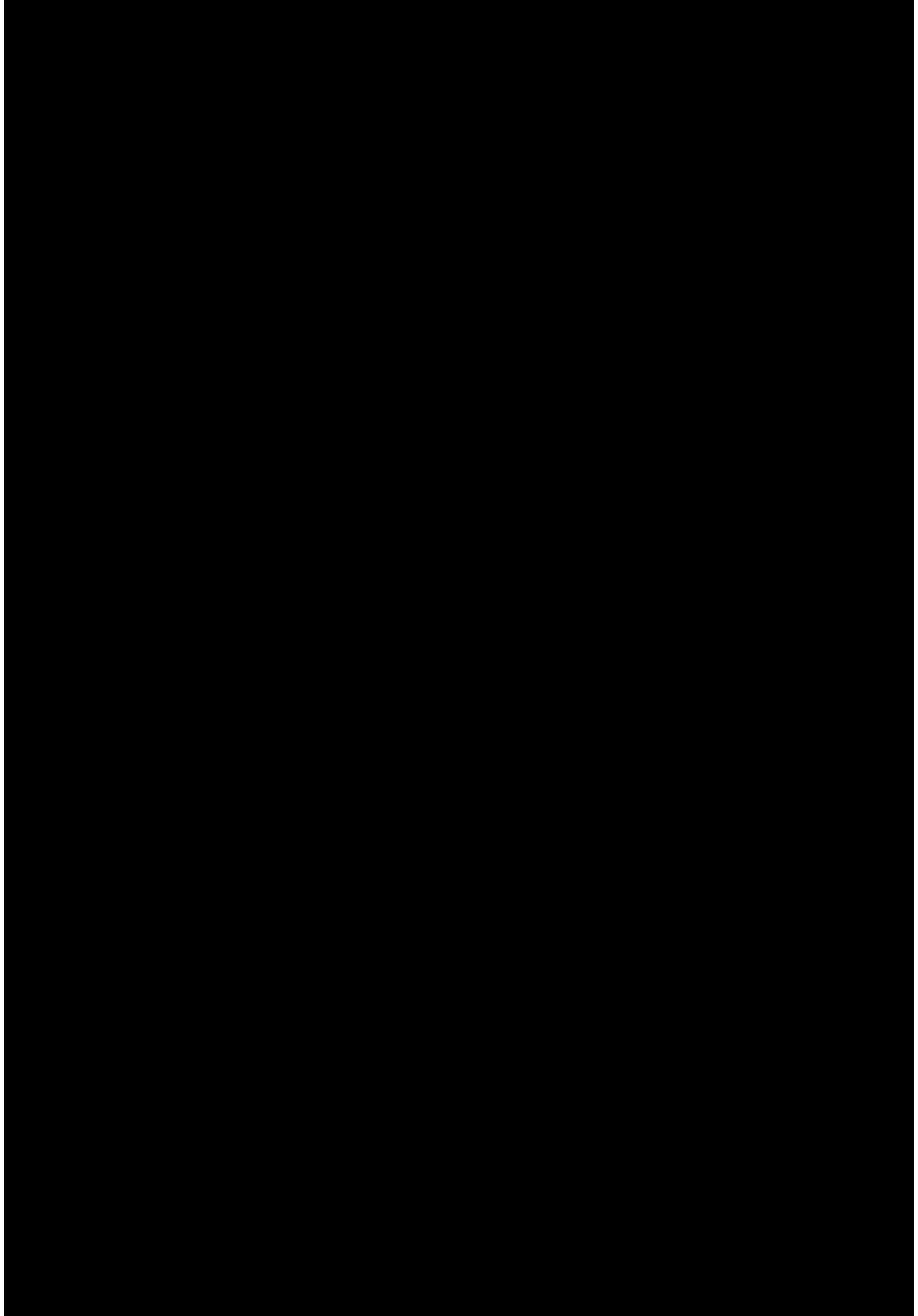
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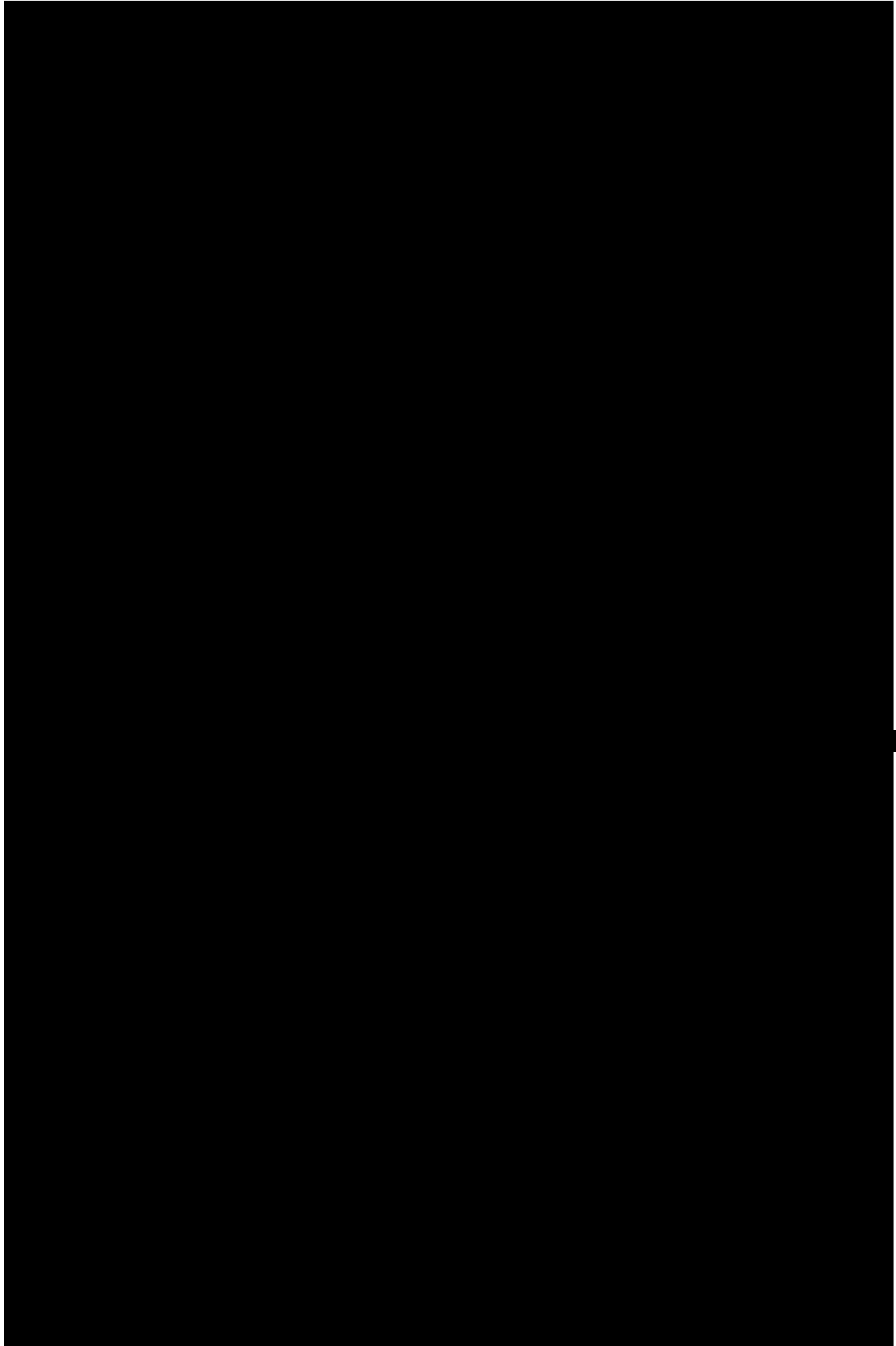
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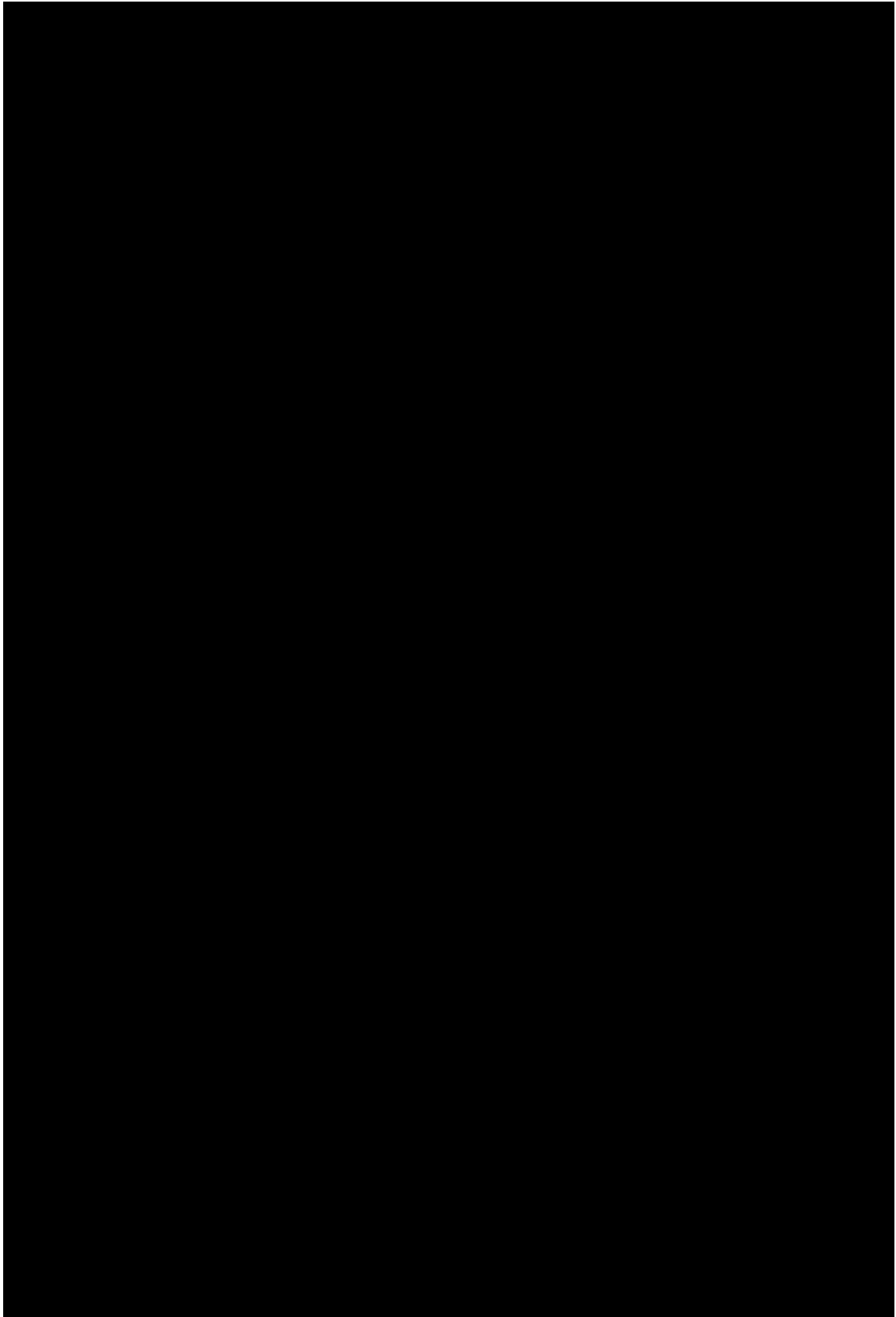
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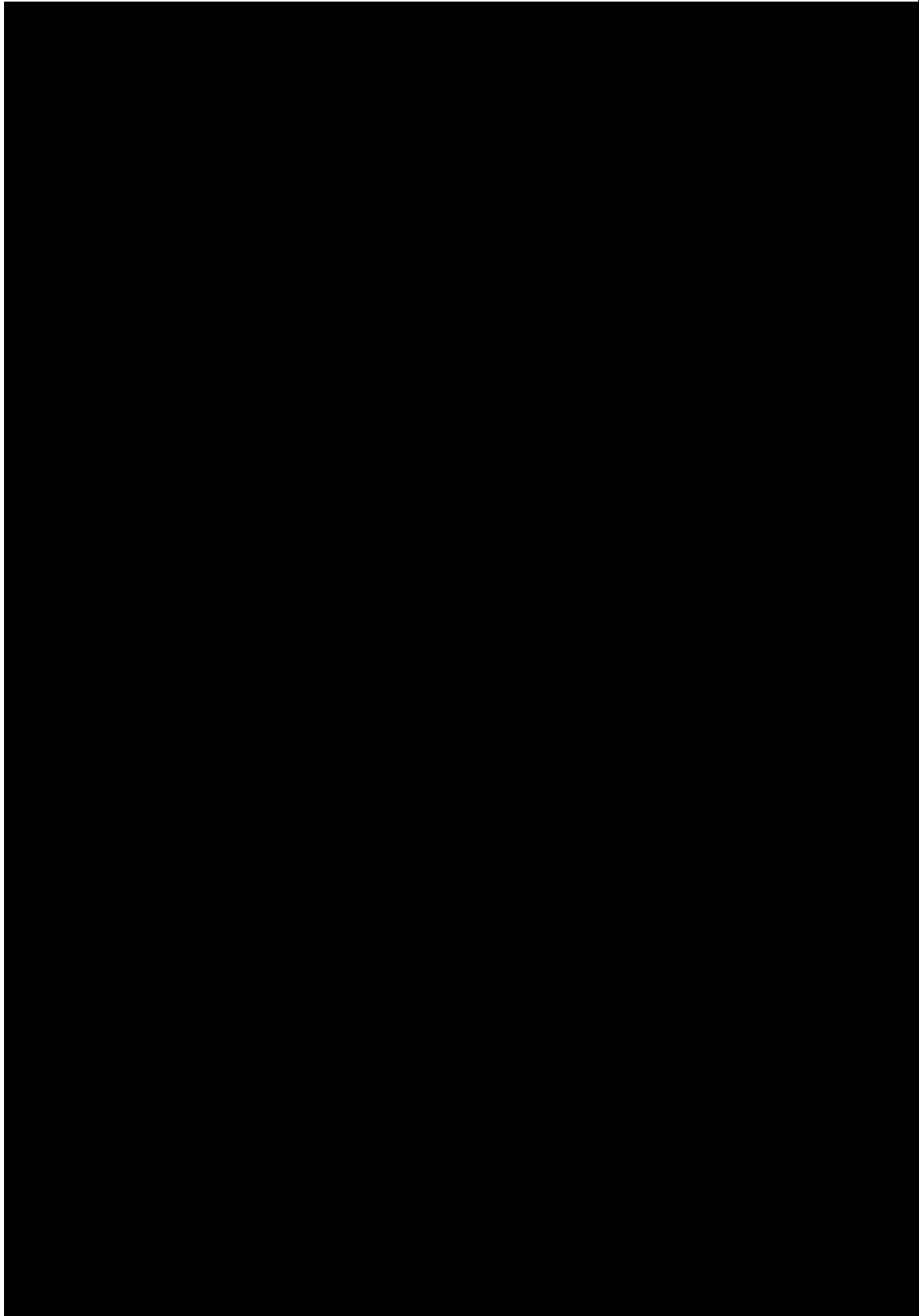
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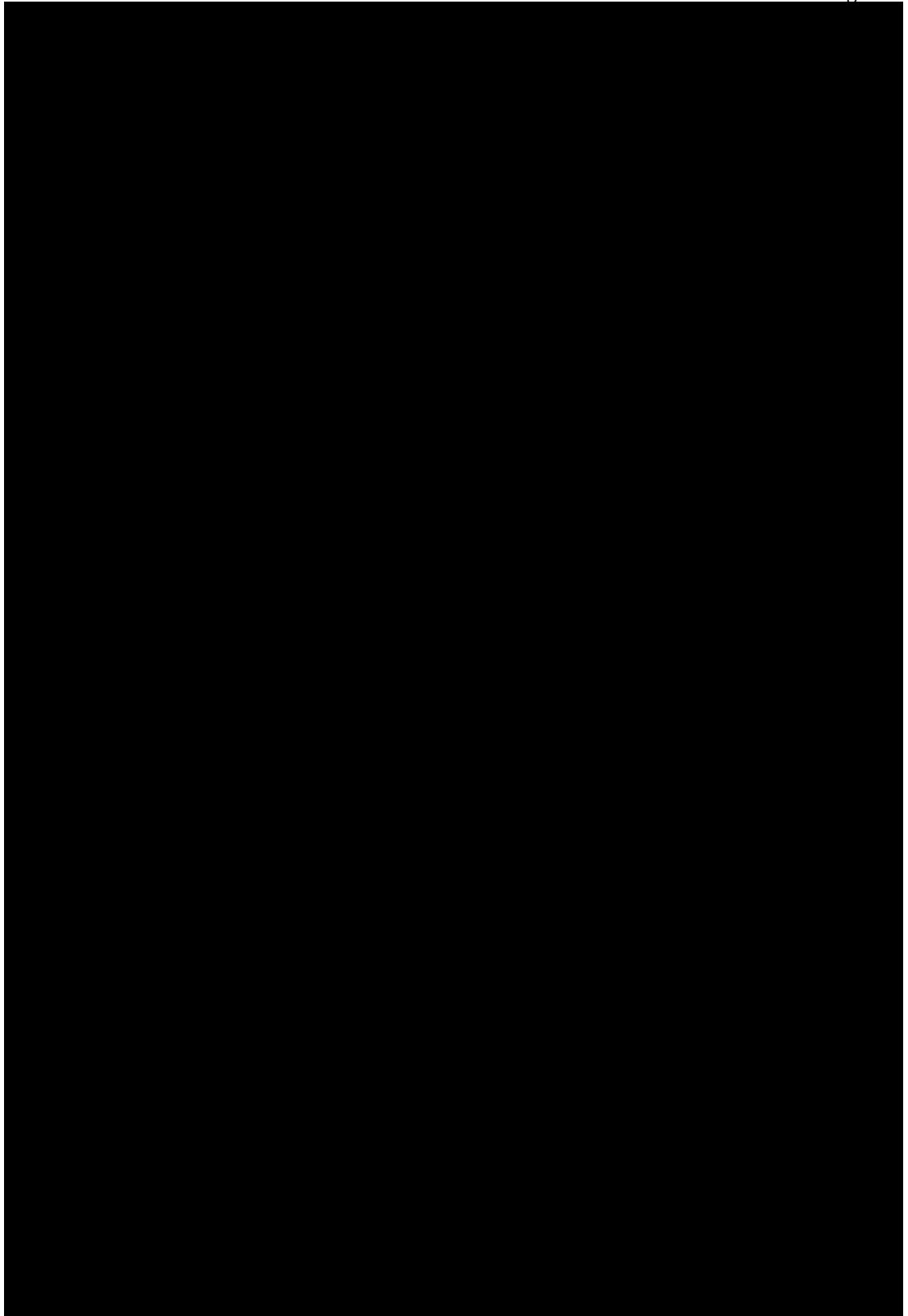
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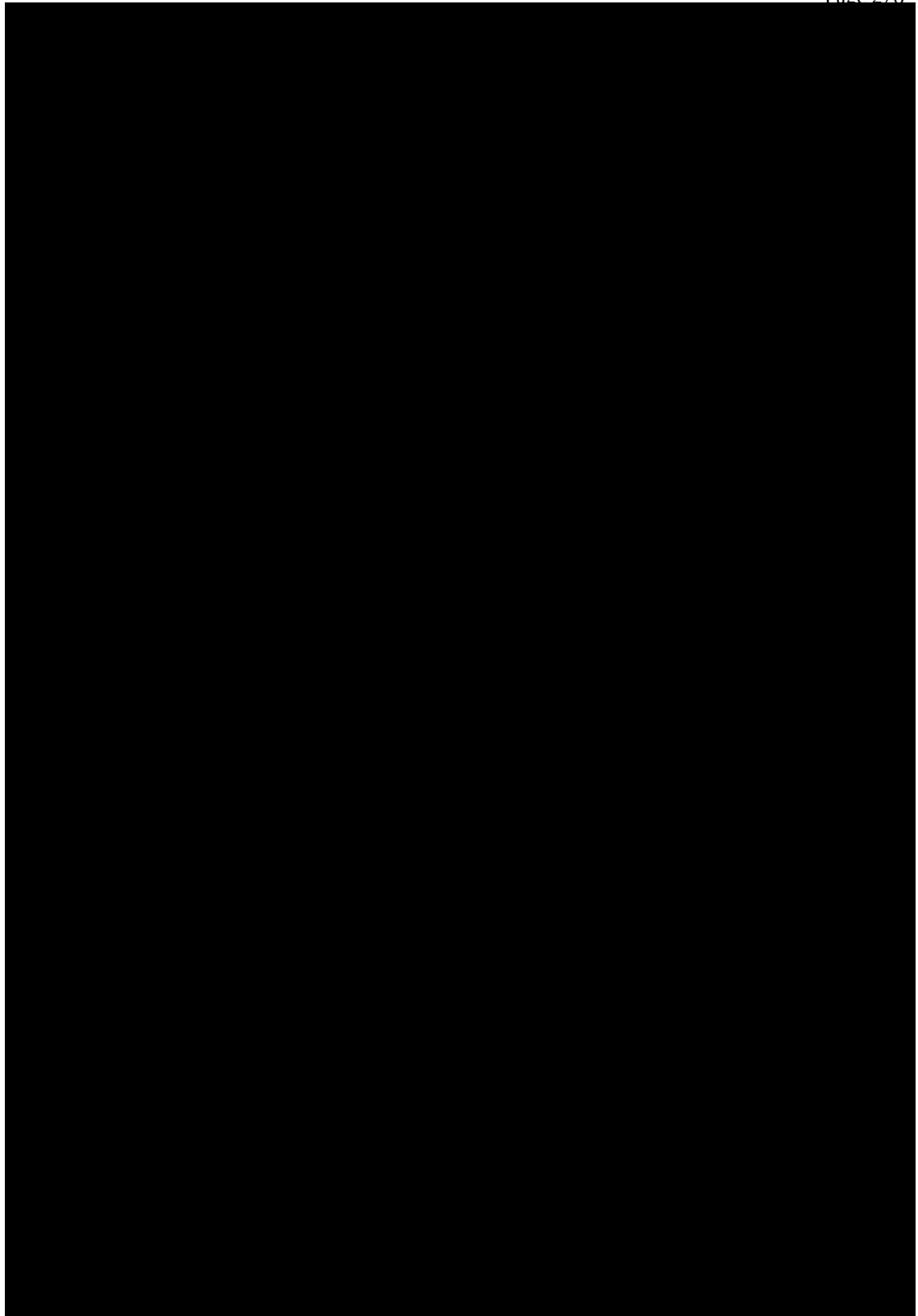
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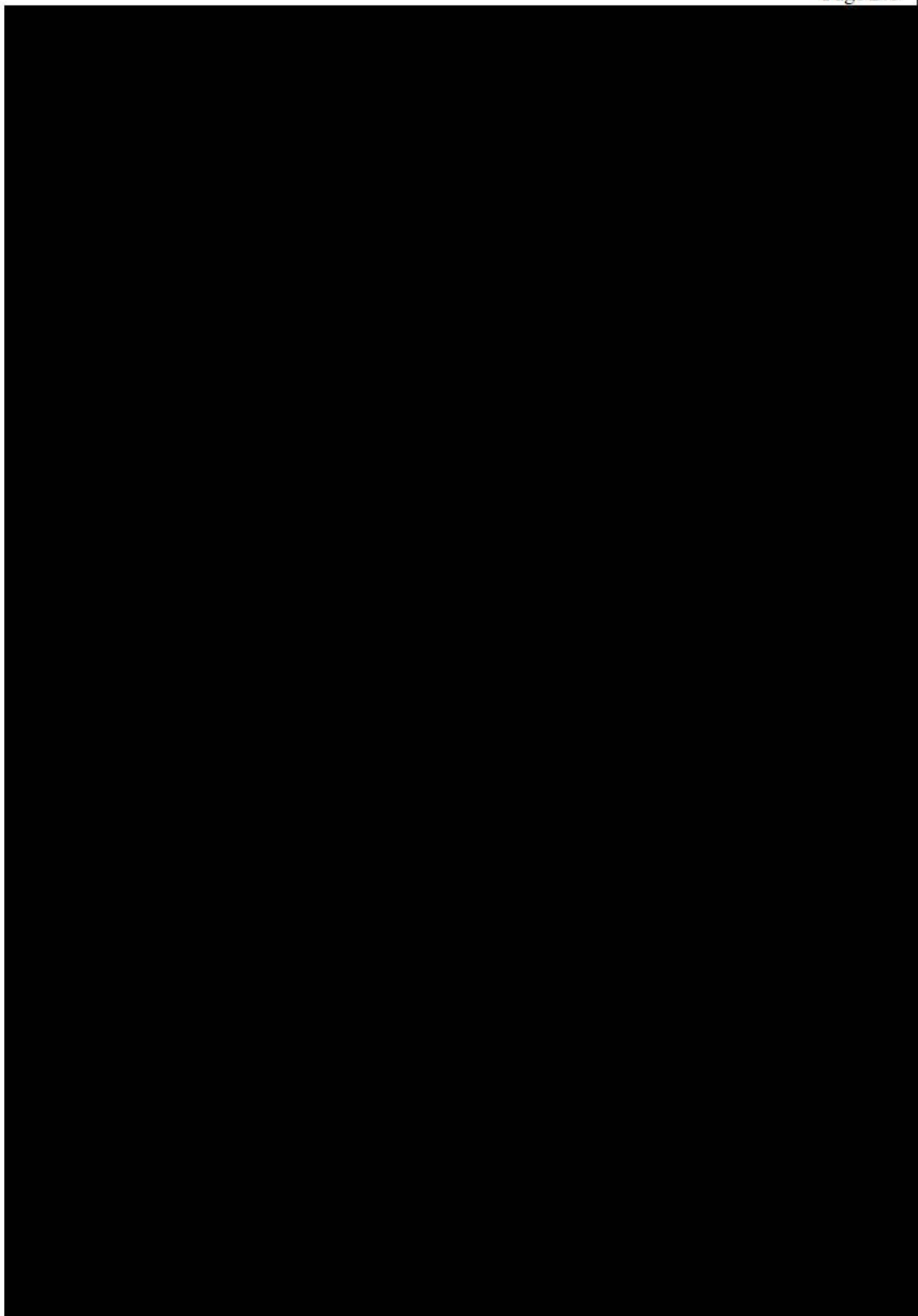
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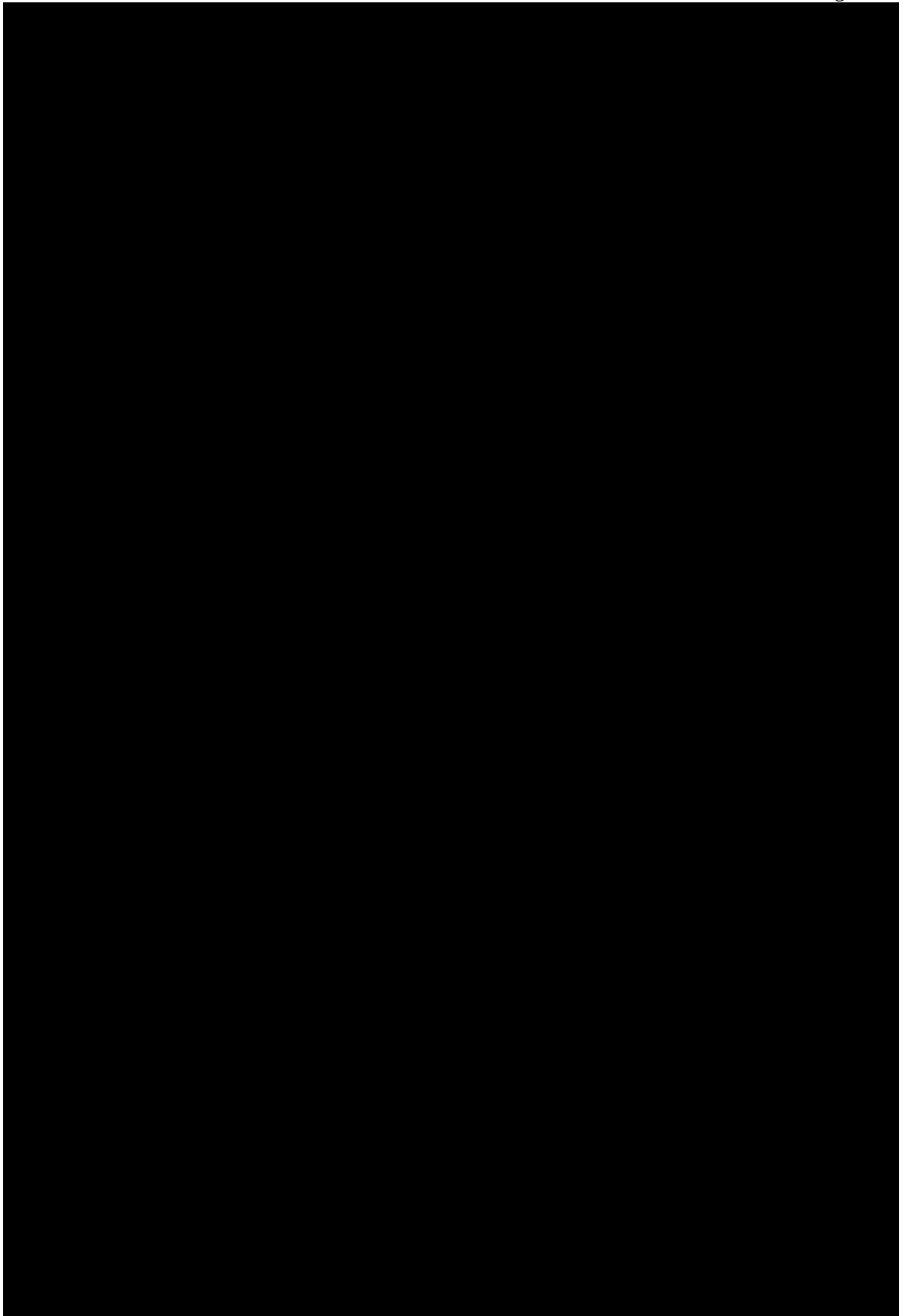
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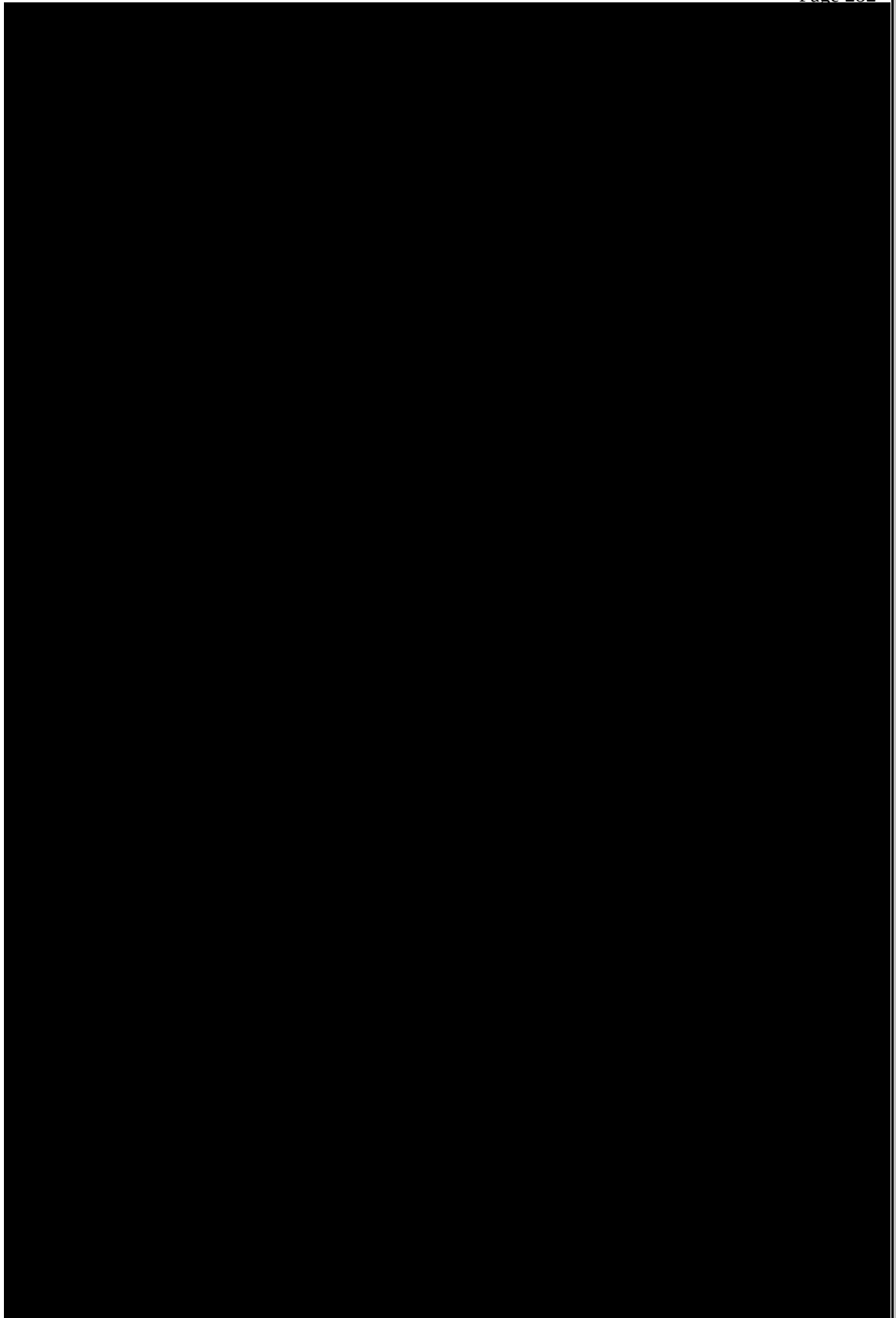
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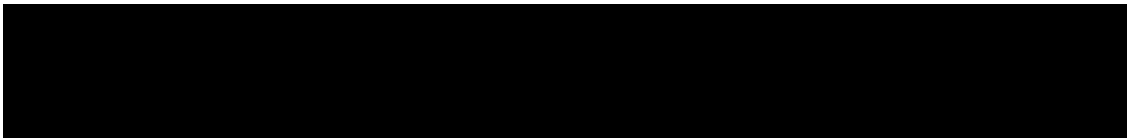
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CHAIRMAN OBERMAN: Yeah. It will be part of the record. All right. Can we call the public back in such as it is? A small public. Shrinking public. Dan, while they're coming back in you don't have a lot of time, but if you do have to -- I did want to give you the last word, just to make sure. Tim are you done?

MR. STRAFFORD: Yes.

CHAIRMAN OBERMAN: Thank you.

MR. JAFFE: Well Mr. Chairman and Members of the Board. We want to thank you very much for your time today, and the extra time today, and the thought and attention that you've devoted to this very important mission for NTEC, and I think the only question that we had, which we assume the Board will tell us here in a moment, is when will the record close?

We have a couple things that we owe you. We'd like to get it to you today, and obviously, you know, we're keenly interested in closing the record

1 for you guys, and for us, as fast as we can. That's
2 it.

3 BOARD MEMBER FUCHS: Dan, did you feel you
4 had an opportunity to respond to my question that I
5 asked BNSF about the emergency relative to 23, and
6 that sort of thing? Do you feel you've responded to
7 that and the other question?

8 MR. JAFFE: Well, now boy, you're really
9 testing me here aren't you.

10 BOARD MEMBER FUCHS: We're at the end of
11 the day, and I just want to make sure everybody had a
12 fair opportunity.

13 MR. JAFFE: Yeah. You want me to just do
14 it? Yeah. Go ahead. Frank remembers, so he's going
15 to.

16 MR. PERGOLIZZI: I think if I recall the
17 question, you were comparing -- we were asking
18 whether we would still have an emergency if the issue
19 was going from 22 to 23 trains, and the only point
20 that I would add or clarify there is that in our
21 view, BNSF represented in the contract negotiations
22 that they could take up to 6 million tons.

1 And so, really we reasonably had an
2 expectation that they had the capacity to transport
3 the 29 trains per month because they shouldn't have
4 agreed to a maximum that they couldn't handle
5 either.

6 BOARD MEMBER FUCHS: Understood. And I
7 think what I was driving at is the fact, well I don't
8 know if it's a fact, but the contention that you all
9 could accept a minimum of 23. Does that bear on the
10 analysis of whether or not BNSF's current offer of 22
11 for June no longer constitutes an emergency, or does
12 not constitute an emergency because you were willing
13 to sign a contract with the minimum of 23?

14 MR. PERGOLIZZI: It shouldn't because
15 remember, that minimum was on us. It's not the
16 minimum that they had to transport. They were
17 entering an agreement where they agreed to transport
18 a minimum of 4.2 up to a maximum of 6, but we have
19 the right to ask for up to 6.

20 BOARD MEMBER FUCHS: Right. But is it
21 suggestive of an overall minimum market that you can
22 accept?

1 MR. PERGOLIZZI: No.

2 BOARD MEMBER FUCHS: Okay.

3 MR. JAFFE: Regardless, as I think Mr.
4 Chairman you came around to, we had sort of at least
5 a baseline that we understood from BNSF, and the
6 question that you were dealing with was you know,
7 where do those last trains fit in? Obviously, I
8 believe we've heard plenty of evidence here today
9 that it's probably possible and doable, and
10 regardless, we're very.

11 BOARD MEMBER FUCHS: Did you ever take the
12 position of negotiations that anything below 23, or
13 anything below would constitute a bad situation, or
14 say that, you know, that this is the minimum that we
15 need. Did you take a position about your own
16 minimum, or that whether or not you hit that 23 mark
17 would still constitute a sort of dire situation?

18 MR. JAFFE: I would have to doublecheck
19 100 percent with Matt, but my understanding is no.
20 That our position from the get go, right from August
21 was that we were looking for, you know, in the
22 neighborhood of five and a half million tons, under

1 whatever this new arrangement was going to be, and
2 indeed right up you know to December, we hadn't
3 changed that view.

4 It was always the same. It was the same
5 thing that we asked for in the common carrier tariff
6 service in November, and so, the answer to that is
7 yes. And I wanted to add one last thing. It's in
8 the record, but just to clarify we actually signed
9 the contract. We took the one clause out, the
10 objectionable clause, signed the contracts, sent it
11 back to BNSF.

12 So, we, you know, we were ready to
13 proceed. I wouldn't say that they were thrilled or
14 happy or whatever, but they were ready to proceed,
15 and I just wanted to clarify that because there was
16 some suggestion it was just an economic term issue.
17 Well if that one clause was the economic term issue,
18 okay, but otherwise, you know, we said no after they
19 did not counter sign. That's all.

20 CHAIRMAN OBERMAN: To be fair in terms of
21 contract law, you're signing that contract, I take it
22 as an indication of the volumes that you were

1 committed to because you're taking out a clause as an
2 affect to counteroffer, so you weren't signing the
3 contract, you were signing one you supplemented.

4 MR. JAFFE: Absolutely. I understand your
5 point.

6 CHAIRMAN OBERMAN: But I was only focusing
7 on all of it as it related to capacity and volumes,
8 because it seems to me, and it's been pretty well
9 established that that tells us about capacity and
10 volumes.

11 Let me ask this. I have a question about
12 relief, but was there any other rebuttal you wanted
13 to make in the next 45 seconds?

14 MR. JAFFE: No. No, sir.

15 CHAIRMAN OBERMAN: I'll give you a minute
16 if you really needed it. In terms of the relief you
17 are seeking, you know, from the date of your initial
18 pleading the facts have changed slightly because BN
19 is saying for June they're now offering 22 trains,
20 and we learned -- I learned today for the first time
21 they're only offering 20 for July, and beyond that
22 there's no number on the table.

1 If we were to decide in NTEC's favor on
2 any of the legal bases that you've alleged, and that
3 is not a foregone conclusion, would it be fair to say
4 thinking in terms of applying an equitable solution
5 to this, you're not here saying we either want 29
6 trains or none. I take it if there was some number
7 greater than 16 and less than 29, it would provide
8 some -- you would still regard that as providing some
9 meaningful relief. The more the better. Is that a
10 fair way to understand it?

11 MR. JAFFE: Of course. I think that's
12 correct. There's probably a floor in there that
13 would be really, really painful, like 16, but I mean
14 yes, and --

15 CHAIRMAN OBERMAN: I'm not asking you to
16 concede your request.

17 MR. JAFFE: No, of course not.

18 CHAIRMAN OBERMAN: To 29 trains, but it
19 isn't an all or nothing I take it.

20 MR. JAFFE: And it's not an all or
21 nothing, and I think consistency would be, you know,
22 one of the real serious benefits to planning their

1 business as well. And I don't want to speak for
2 them in every regard, as to you know, how they would
3 do that. I would bring them back up if you really
4 want, but I think equitable relief of the kind you
5 are talking about would be very welcome.

6 CHAIRMAN OBERMAN: The way I have
7 understood your situation is that you are trying to
8 satisfy customers in Asia. And you need an area of
9 relief that causes you not to lose the customer, and
10 there is some number that you're saying you have
11 reason to believe that would cause you to lose the
12 customer. I take it to mean there's some number that
13 may not be 29 that would enable you to keep the
14 customer, but not make quite as much profit as you'd
15 like. Is that a fair way to think about it?

16 MR. JAFFE: Yes. Yes. I mean I'm not
17 saying something contrary to their thoughts, but the
18 answer to your question is yes.

19 CHAIRMAN OBERMAN: The reason I'm asking
20 is that I want to make sure that if we would decide
21 to grant relief, it's meaningful relief.

22 MR. JAFFE: Of course.

1 CHAIRMAN OBERMAN: And not relief that
2 doesn't do you any good, and I realize that this is
3 to take Tim's phrase, there's not a bright line
4 number, but there's some numbers that's important,
5 and I think we have the evidence we need on that.

6 As to any follow-up, I am going to
7 recommend to the Board, it's up to the Board, that we
8 give the parties until close of business Monday, if
9 you -- there's a few things that you say you're going
10 to give to us, but there may be things that you have
11 notes on that you want to respond to the other side,
12 or just embellish something you said, or clarify.

13 Let's have everything in by five o'clock
14 on Monday, which is the 15th of May, and otherwise we
15 will take this under advisement. Tim?

16 MR. STRAFFORD: Is there any chance that
17 we would have access to a transcript between now and
18 then?

19 CHAIRMAN OBERMAN: There's the court
20 reporter. He's in the business of providing
21 transcripts, negotiate with him. The -- what? No
22 he'll do it overnight if you pay him enough. I'm not

1 making a deal for him, but that's every court
2 reporter I've ever dealt with, so obviously for the
3 moment I think we only ended up with a very limited
4 redaction part, but until that happens don't
5 disseminate the transcript beyond the people who can
6 see it.

7 It is now 4:17 by the clock on the wall,
8 which means that you have 43 minutes before you all
9 turn into pumpkins. Make a deal and get rid of this
10 case. All right. The Board thanks you all for your
11 participation, your travel to Washington, and we'll
12 be in touch. Thank you.

13 (Whereupon, the Surface Transportation
14 Board Hearing adjourned, at 4:17 p.m.)

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CERTIFICATE OF COURT REPORTER

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

LARRY FLOWERS

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