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SERVICE DATE – OCTOBER 23, 2026

SURFACE TRANSPORTATION BOARD

Docket No. FD 36873

UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY
—CONTROL—
NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN
RAILWAY COMPANY

ORDER REDESIGNATING AS PUBLIC SWARS VIDEO RECORDING,
HOLDING IN ABEYANCE UP’S SUBPOENAS OF BERKSHIRE,
GRANTING IN PART IAIS AND METRA’S
MOTION TO RECALL KATHERINE NOVAK FOR DEPOSITION, AND
GRANTING CN’S MOTION TO WITHDRAW REQUEST FOR RELIEF

Decision No. 43

Decided: October 23, 2026

Discovery is before the undersigned pursuant to a ruling by the Surface Transportation Board. See Decision (Aug. 28, 2025). The undersigned conducted a discovery conference on October 16, 2026. This decision memorializes the rulings made at that conference and announces rulings on issues that were reserved for further review.

The Surface Transportation Board regulations provide for broad discovery. These regulations provide that “[p]arties may obtain discovery under this subpart regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.” 49 C.F.R. § 1114.21(a)(1). The Board has recognized that this regulation allows for broad discovery. See Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 7), FD 36500, slip op. at 4 (Aug. 2, 2021) (acknowledging authority to seek material relevant to subject matter of proceeding under 49 C.F.R. § 1114.21 and interpreting scope of relevance in discovery “[b]roadly”). An order may be entered for good cause and which justice requires, to protect from “annoyance, embarrassment, oppression, or undue burden or expense, or to prevent the raising of the issues untimely or inappropriate to the proceeding.” 49 C.F.R. § 1114.21(c). Protective orders may include that discovery not be had or that discovery be had only on specified conditions. 49 C.F.R. § 1114.21(c)(1)-(2).

I. CPKC’s Motion to Redesignate SWARS Video as Public

On October 6, 2026, CPKC filed a letter motion to redesignate as public the March 2026 talk of UP’s CEO, Jim Vena, at the Southwest Association of Rail Shippers (“SWARS”) Annual Conference. (CPKC Letter Motion, Oct. 6, 2026.) Ultimately, UP produced during discovery a

video of Mr. Vena’s keynote address that UP designated as “Confidential” under the Protective Order in this proceeding. (See *id.* at 1 & Ex. C.) CPKC argued that the video does not contain any Confidential Information and requested that the video be redesignated as “public.” (*Id.* at 2.)

In short, the “Confidential” designation allows parties who have executed the “Undertaking” to the Protective Order to use the video only in this proceeding. (See Decision No. 1, Appx. & Appx. A, Protective Order.) With a “Confidential” designation, the video’s contents cannot be disclosed publicly without violating the Protective Order. (See, e.g., *id.* at Appx. ¶¶ 7, 11.) Under the Protective Order, “Confidential Information” is defined as:

traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost workpapers), the identification of shippers and receivers in conjunction with shipper-specific or other traffic data, the confidential terms of contracts with shippers, confidential financial and cost data, and other confidential or **proprietary business information**.

Decision No. 1, Appx. ¶ 1(b) (STB served Aug. 5, 2025) (emphasis added).

CPKC argued that Mr. Vena’s keynote address at the SWARS conference was a public event. (CPKC Letter Motion 2, Oct. 6, 2026.) Approximately 900 people attended the SWARS conference. (*Id.* at 2 & n.4.) Alternatively, CPKC argued that if there were a confidentiality concern, that would need to be weighed against the public’s interest in disclosure. (*Id.* at 2.) In turn, CPKC argued that “[f]acts related to potential influence on ‘stakeholder participation’” are relevant to the Board’s analysis and that stakeholders who provide information important to the Board’s analysis “must be able to do so without concerns that their commercial relationships—including, as applicable, rates and service—will be negatively affected because of their participation.” (*Id.* (citing Decision No. 28, 4 (STB served, July 22, 2026)).)

UP opposed CPKC’s motion by letter, dated October 13, 2026. (UP Oppn., Oct. 13, 2026.) UP argued the video of Mr. Vena’s address is proprietary business information, because UP “produced” the video recording. (See *id.* at 1.) UP argued it paid for the recording to be created, owns the copy in its possession, and is entitled to determine the video’s dissemination. (*Id.*) UP argued that “proprietary information” includes “[i]nformation in which the owner has a protectable interest.” (*Id.* (citing Black’s Law Dictionary (11th ed. 2019)).)

CPKC’s motion was supported by the Alliance for Chemical Distribution, American Chemistry Council, American Fuel & Petrochemical Manufacturers, The National Industrial Transportation League, and The Fertilizer Institute, which collectively are called the “Joint Shipper Associations” (JSA). (JSA Supp. Letter, Oct. 9, 2026.) The JSA argued that the Protective Order does not shield the contents of the video, because Mr. Vena spoke at public event and addressed among others, UP’s competitors. (See *id.* at 1 & Ex. A.) The JSA also argued that UP’s argument confuses ownership with confidentiality. (*Id.* at 2.)

The JSA’s final argument was that the public interest favors disclosure. (*Id.* at 1-3.) U.S. Senator Tammy Baldwin reported to the Board that at the March SWARS conference, Mr. Vena

“issued a thinly veiled threat to raise rates for customers who did not publicly support the merger.” (Letter from U.S. Senator Baldwin, July 17, 2026.) The Board acknowledged Senator Baldwin’s letter and explained that:

The Board expects all parties to agency proceedings to refrain from statements or conduct that could deter public participation or potentially influence interested persons to provide information or views that do not reflect their own judgment. The Board will not tolerate retaliation and will ensure that its processes are fair, transparent, and open to all stakeholders.

Decision No. 28, 4 (STB served July 22, 2026).

The JSA argued the video bears directly on the Board’s and Senator Baldwin’s concerns about whether shippers can participate freely in this proceeding. (JSA Supp. Letter 3, Oct. 9, 2026.) The JSA claims that on October 6, 2026, UP’s head of marketing and sales reportedly told customers and the public that a “customer who has stayed quiet, or who has taken a neutral position publicly, is not a customer who opposes this transaction.” (See id. (citing Kenny Rocker, Union Pacific, Silence Is Not Opposition (Oct. 6, 2026), <https://www.up-nstranscontinental.com/letters/rocker-customer-support/>)).) The JSA explained that shippers that have not filed a Notice of Intent to Participate are not “parties,” and cannot view the video (JSA Supp. Letter 3, Oct. 9, 2026), because they cannot execute the Undertaking to the Protective Order in this proceeding. The JSA argued that UP is publicly stating that “silence is not opposition” while using the Protective Order to hide Mr. Vena’s remarks that may explain that silence. (Id.)

UP argued that CPKC conflated the SWARS conference event with the video recording. (UP Oppn. 2, Oct. 13, 2026.) UP argued that whether SWARS attendees (who paid a fee) heard Mr. Vena’s talk in person “says nothing about the status” of the video, and there was no livestream or other “widespread public dissemination.” (Id. at 1 & n.3.) UP argued that the video’s production has only been compelled through discovery in this proceeding. (Id. (citing Norfolk S. Corp.—Acquisition of Control—Norfolk & Portsmouth Belt Line R.R., FD 36836, slip op. at 2 (STB served Aug. 27, 2025)).)

UP stated the Confidential designation preserves every party’s ability to use the video in this proceeding. (UP Oppn. 2, Oct. 13, 2026.) UP compared the Confidential designation with the “Highly Confidential” designation regarding the expanded number of people with whom Confidential Information may be shared under the Protective Order. (See id.) UP argued that nothing prevents any party from participating, because any non-party shipper may still file a statement with any position, but only “participating” shippers who file the Undertaking to the Protective Order “will have full access to the video.” (Id.)

In arguing against redesignating the video, UP stated that CPKC “failed to identify any legitimate basis to allow dissemination” of the video that it claims is confidential outside this proceeding. (Id. at 3.) UP stated the Protective Order is to prevent its competitors from using the excerpts or clips of the video outside this proceeding. (Id.) UP argued that the Protective Order is designed to prevent this type of harm. (See id.)

The general rule is that information is public. However, the Protective Order provides exceptions and shields “confidential or proprietary business information” from the public’s view, like traffic data, confidential terms in contracts, and cost data. Decision No. 1, Appx. ¶ 1(b). UP’s CEO, Mr. Vena delivered a “Railroad Executive Keynote Address.” (JSA Supp. Letter, Ex. A, Oct. 9, 2026.) Even if the SWARS conference was ticketed, it was attended by almost 900 people, (see CPKC Letter Motion 2 & n.2, Oct. 6, 2026), including UP’s competitors. (See JSA Supp. Letter, Ex. A, Oct. 9, 2026.) The SWARS conference was a public event.

If there were any confidential or proprietary business information contained within Mr. Vena’s Railroad Executive Keynote Address, by sharing that information publicly, that confidentiality no longer exists. The information is now public. The Protective Order cannot shield the contents of the video.

UP argued that the video recording itself, and not its contents, of Mr. Vena’s keynote address is confidential, because UP produced and owns that video recording. UP did not argue copyright protection of the video. (See UP Oppn., Oct. 13, 2026.) I was not told that other video or audio recordings were restricted at the SWARS conference.¹ (See, e.g., JSA Supp. Letter, Ex. A, Oct. 9, 2026.) Instead, at the very end of the video, just after Mr. Vena’s remarks conclude, a QR code is displayed on the screen reminding attendees to download the SWARS App to participate in Q&As, surveys, and connect with other attendees. (CPKC Letter Motion, Ex. C-1 at 0:56, Oct. 6, 2026.) The next slide is a reminder to attendees to “Please silence your phone THANK YOU!” (Id. at 1:00.) Thus, the information available to me demonstrates that an attendee would have had their phones handy at Mr. Vena’s talk. Any attendee could have made their own recording (audio or video) of Mr. Vena’s keynote address without restriction. What matters is that the attendees had the authority to make such a recording, not whether any did.

UP argued that it owns the recording, because it paid for it, produced it, and has the right to disseminate it. But the proper inquiry is, is the recording “confidential or proprietary business information” under the Protective Order.

Let me consider a pure hypothetical.² Prior to the CPKC merger several years ago, at a conference about railroads, including to its competitors, a Canadian Pacific executive gave an address talking about the future of railroads. A slide was shown: Mergers – Good. It had a graphic of a traffic stoplight, with the green light lit. The second slide showed: No Mergers – Bad. Its graphic was a traffic stoplight with the red light lit. The third and final slide: Merger with Conditions – Maybe. Its graphic had the yellow traffic light lit. Still following the hypothetical, UP requests the video recording of the now CPKC executive’s speech in discovery, but CPKC claims that the video recording is “Confidential,” because it paid for the recording of the speech. UP personnel attended the speech. They know its contents. They want to show the

¹ For example, performances that prohibit recording have a notice in the program and signs are usually posted at the entrance of the venue. The most restrictive means of prohibiting recording involves screening individuals for recording devices and collecting telephones.

² I know of no such video or speech. This is an absurdly simplistic analogy.

Board that CPKC thinks that mergers are good and support UP's position in this proceeding unequivocally. But CPKC claims proprietary information over the video recording of the speech, because it was recorded and then never shared after the event. Is the video "Confidential"?

Just paying for and owning the video is not enough. There must be a confidential business interest, as the other categories of the Protective Order demonstrate, like traffic data, confidential contract terms, or cost data. A party cannot shield from public view any information that may be harmful to its case by claiming it is confidential. It must have a confidential business nexus. Ownership is not enough.

UP cites Norfolk S. Corp.—Acquisition of Control—Norfolk & Portsmouth Belt Line R.R., (NPBL) FD 36836 (STB served Aug. 27, 2025), for the proposition that the video recording has not been shared publicly. I authored that order. In the NPBL proceeding, CSXT requested my review of NS's "highly confidential" designation of discovery documents that CSXT argued should be "public." Id. at 2. The documents were previously produced in a federal litigation and designated either "confidential" or "confidential—attorneys' eyes only" pursuant to the protective order in the federal litigation. Id. I explained that the movant, CSXT, had not demonstrated that the documents were made public since the federal litigation, id., so the documents did not lose their original designation by being made public. Moreover, I explained that even NS's public summary of the documents showed that the Highly Confidential designation was appropriate. Id. at 3. For example, the Highly Confidential designation applied to shipper-specific rate or cost data. Id. Therefore, I denied the motion to redesignate in that proceeding under those facts. Id. But the NPBL request to redesignation had a different set of facts.

UP has not demonstrated that the Protective Order's "confidential or proprietary business information" protection applies to the video recording. UP has not pointed to the business interest that it seeks to protect. If UP wanted to protect its interest in the video recording, it would have copyrighted it. It would have restricted recording at the event. But it did not. The Confidential designation is not appropriate for the video or its contents.

Even if UP were correct and the Confidential designation were appropriate, I find that the public's interest weighs in favor of redesignating the video recording as public. UP argued that parties may execute the Undertaking and view the video recording. Agreed. But only parties may do so. This is not like the NPBL proceeding where CSXT argued that its anticompetitive argument needed to be public through the documents. See NPBL, FD 36836, slip op. at 2 (STB served Aug. 27, 2025.) I found that CSXT could properly present its case to the Board even if the documents were designated "Highly Confidential." Id. Here, as the JSA stated, it cannot reveal the contents of the video or Mr. Vena's speech to shippers to see if they want to file comments as non-parties without violating the Protective Order. The Board has an interest in all comments, particularly in this proceeding where the Board's merits consideration includes whether the proposed transaction is in the public interest. Thus, the public's interest weighs in favor of the public designation.

UP argued that if the video is designated as public, it can be used in any manner,

including excerpts. The remedy is for the entire video to be designated as public. The general legal principle is called the “rule of completeness.” If someone takes a snippet or excerpt out of context, then the entire exchange or video should be provided for context.

UP shall provide the video without the “Confidential” designation by October 30, 2026. No party (or person who has signed the Undertaking) shall use the video for any purpose in violation of the “Confidential” designation until UP provides the video without the “Confidential” designation. This enables UP to appeal this order to the Board, if it chooses (without letting the cat out of the bag).

II. UP’s Motion to Subpoena Berkshire Hathaway, Inc.

On October 8, 2026, UP filed its letter motion to subpoena Berkshire Hathaway, Inc. (“Berkshire”), BNSF’s corporate parent. (UP Letter Motion, Oct. 8, 2026.) UP seeks a subpoena to produce documents in response to UP’s First Set of Request for Production, dated September 14, 2026, and for depositions of Berkshire’s CEO, Gregory Abel, and retired Chairman, Warren Buffett. (Id. at 1.) UP argues the discovery is relevant to “the competitive and downstream effects of the Proposed Transaction” and to test public statements made by Mr. Abel and Mr. Buffett. (Id. at 2.) UP also seeks discovery about a meeting that was attended by Mr. Abel, Mr. Buffett, and CSX’s CEO. (See id. at 3.)

Non-party Berkshire opposed UP’s motion for subpoenas, by letter dated October 13, 2026. (Berkshire Oppn., Oct. 13, 2026.) Berkshire opposed the requested subpoenas for depositions and discovery requests. (See id. at 1.) Berkshire argued the requested subpoenas sought information that was irrelevant, overly broad, or already in the public domain. (Id.)

BNSF filed a letter about UP’s motion on October 13, 2026. (BNSF Letter, Oct. 13, 2026.) BNSF stated that UP has served discovery and document requests upon BNSF and other non-applicant railroads to which BNSF and the non-applicant railroads are responding and producing documents. (See id. at 1.) UP will depose executives of BNSF and other non-applicant railroads. (See id. at 1.)

By the time of the discovery conference, UP’s written requests had not been narrowed; however, counsel for UP argued that it only sought certain categories of documents. UP’s counsel requested that I enter the subpoenas as written. As written, the document requests are overly broad and encompass much more than what UP admittedly seeks.

As I viewed it, Berkshire did not indicate that it was unwilling to participate in discovery. Instead, it indicated that it needed time because counsel was just retained on the matter, and the document subpoenas were irrelevant and overly broad. (See Berkshire Oppn. 1, 5, Oct. 13, 2026; UP Letter Motion, Ex. E, 2, Oct. 8, 2026.)

Therefore, I required UP to send to Berkshire a set of narrowed (or reframed) document

requests.³ UP's document requests need to be narrowed to seek precisely what UP wants from Berkshire. Moreover, UP's document requests should be tailored to Berkshire (and not BNSF), particularly to request documents that UP cannot obtain elsewhere. Once Berkshire receives UP's narrowed request for documents, then Berkshire should review it to determine what if any documents Berkshire is willing to produce and object or respond according. Then UP and Berkshire should meet and confer in an attempt to resolve any remaining issues. Therefore, UP's motion for a subpoena duces tecum (for document production) is held in abeyance.

UP's request for subpoenas for depositions is likewise held in abeyance. Again, BNSF stated that it is producing documents in discovery. CSX will also produce documents about the meeting with Mr. Abel and Mr. Buffett and CSX's CEO. Moreover, CSX's CEO will be deposed; however, the deposition of CSX's CEO has not been scheduled yet. Accordingly, I held UP's request for subpoenas for depositions for Mr. Abel and Mr. Buffett in abeyance for UP and Berkshire to meet and confer.⁴

III. Motion to Recall UP Witness Katherine Novak

At issue here is the request by Iowa Interstate Railroad, LLC (IAIS) and Metra (Northern Illinois Transit Authority's commuter rail division)⁵ to recall UP's witness, Katherine Novak, for additional deposition testimony. Under the STB's rules, which have been memorialized here in the Order Setting Discovery Guidelines, absent agreement, the deposition of a fact witness is limited to one day of seven hours. Decision No. 24, C.2.c (June 18, 2026). Each witness shall be deposed no more than one time except upon a showing of good cause, e.g., failure to timely produce the witness's documents or respond to other discovery requests. See id. at C.2.b.i.

IAIS and Metra requested that UP witness, Katherine Novak, be recalled for deposition. (IAIS/Metra Letter Motion, Oct. 9, 2026.) IAIS and Metra argued that Ms. Novak's deposition

³ Berkshire wanted UP to serve a new set of document requests. UP did not want to do that, likely because that is essentially starting over. UP argued that its subpoenas as written should be issued, which I declined to do. To cut to the chase, this solution essentially requires UP and Berkshire to meet and confer with my input memorialized here.

To be clear, only document requests are appropriate for a non-party subpoena duces tecum (not discovery requests akin to an interrogatory). See 49 U.S.C. § 1321(d)(1) (a non-party may be subpoenaed for a deposition, to produce documents, or both). I have no authority to subpoena interrogatory responses from a non-party. See id.

⁴ If this request is renewed before me, it is my inclination that UP must demonstrate more than Mr. Abel or Mr. Buffett should tell their respective side of the Berkshire/CSX meeting or that each corresponding public statement should be tested. In short, how is each of these things proportional to the proceeding? In other words, in this monumental proceeding, the information sought from these proposed non-party deponents must be significant.

⁵ The Letter Motion was also submitted by Foresight Energy, LLC (Foresight). (See Oct. 8, 2026.) However, at the discovery conference, counsel explained that Foresight was not seeking relief, because Ms. Novak was excused near the end of Foresight's questioning. Thus, I am not including Foresight in this discussion.

was “abruptly, unilaterally[,] and unreasonably terminated on September 24, 2026” and requested that Ms. Novak be recalled “to complete” her deposition. (Id. at 1.) Ms. Novak completed Verified Statements in this proceeding concerning Applicants’ plans for resolving 2-to-1 shipper concerns and is UP’s principal sponsor of the Committed Gateway Pricing (CGP) program. (See id. at 1.) Ms. Novak also has management responsibilities for UP regarding interline rail movements and coordination of passenger rail operations. (Id.)

IAIS and Metra explained that they understood that they would be last to question Ms. Novak according to the “emerging pattern for depositions” (i.e., counsel who were physically present would question first, followed by counsel appearing remotely). (IAIS/Metra Letter Motion 1, Oct. 9, 2026.) IAIS and Metra argued that “Ms. Novak repeatedly responded to questions with requests for repetition for further explanation, and many answers initially were evasive, not responsive or vague and required rephrasing, revision and/or follow-up by the examining attorney.” (Id.) IAIS and Metra, however, complained that nearly 50% of the questions asked received objections from UP’s counsel. (Id.) IAIS and Metra argued that UP’s counsel employed “speaking objections” that coached the witness how to answer. (See id.)

During Ms. Novak’s deposition, counsel for UP invoked the seven-hour time limit and terminated the deposition. (IAIS/Metra Letter Motion 4, Oct. 8, 2026.) IAIS and Metra requested that Ms. Novak’s deposition be completed due to the number of objections and large number of follow-ups, and that less than an additional hour was needed to complete the deposition. (See id.) UP’s counsel disagreed.

On October 13, 2026, UP filed its letter in opposition to the motion to recall Ms. Novak. (UP Oppn., Oct. 13, 2026.) UP argued that IAIS’s and Metra’s counsel did not request additional time until the seven-hour deposition time had already expired. (Id. at 1.) UP noted that the noticing parties are responsible for allocating examination time. (See id.) UP also argued that IAIS and Metra’s argument was undercut by the questioning by co-counsel, which did not preserve the allocation of time for IAIS and Metra and asked questions outside Ms. Novak’s personal knowledge. (See id. at 3-4.)

UP argued that objections must be noted on the record, and thus, be included in the recorded time. (UP Oppn. 2, Oct. 13, 2026 (citing Fed. R. Civ. P. 30(c)(2)).) Further, UP argued that objections to deposition questions must be stated on the record or are waived.

While UP opposed the motion, at the discovery conference, UP offered to make Ms. Novak available for thirty minutes remotely.

I reviewed the objections made by UP’s counsel. The objections were not excessive or speaking objections. The objections state that an objection has been made and state the legal basis or bases. Because this was the basis of IAIS and Metra’s motion, I considered denying the motion. Even though IAIS, Metra, and Foresight all share counsel, I considered that IAIS, as its own party, with its own interests (specifically CGP program), did not have the opportunity to question Ms. Novak.

I understand that counsel may have been probing to find out if Ms. Novak had additional knowledge or attempting to discover additional witnesses. Unfortunately, the seven-hour deposition time is limited. The number of parties participating in depositions has grown. Importantly, the parties who wish to participate must get their time to ask the questions that matter to each of them as each party builds the record.

As I cautioned at the discovery conference, counsel must craft their deposition questions carefully, for the sake of efficiency and the other participating counsel.

While the parties questioning the witness have the right to participate (if they have followed the procedures in the Order Setting Discovery Guidelines, among other things), the party defending the deposition has the right to set forth objections. Finally, the witness has the right to complete the deposition and be excused.

Considering all these things, I granted, in part, IAIS and Metra's motion. Ms. Novak will be recalled for deposition for a total of **thirty minutes remotely** by counsel for IAIS and Metra on a date and time to be coordinated with counsel for UP. Other counsel may attend remotely but may not ask any additional questions. Thirty minutes is sufficient, because counsel for IAIS and Metra can review the deposition draft transcript and plan the remainder of the questioning of Ms. Novak well in advance of her recalled deposition.

IV. CN's Motion Regarding Deposition Allocation of Time

On October 14, 2026, CN filed a motion for relief regarding allocation of time at depositions. (CN Letter Motion, Oct. 14, 2026.) On October 15, 2026, and before the discovery conference, CN notified me that it reached a tentative agreement with BNSF, CPKC, and CSXT about how to manage allocation of time at depositions going forward. (CN Letter Update, October 15, 2026.) Thus, CN moved to withdraw its motion without prejudice. (See id.)

CN's request to withdraw its motion is granted. Accordingly, CN's motion regarding the deposition allocation of time (requesting declaratory relief) is denied without prejudice.

It is ordered:

1. CPKC's Motion to Redesignate the SWARS Video Recording is granted.
 - a. UP shall provide the video recording without the "Confidential" designation by October 30, 2026.
 - b. No party (or other person who has signed the Undertaking) shall use the video in violation of the Confidential designation prior to UP providing the video without the "Confidential" designation.

2. IAIS and Metra's motion to recall Katherine Novak for deposition is granted in part.
3. UP's request for subpoenas of Berkshire is held in abeyance.
4. CN's request to withdraw its motion is granted. Accordingly, CN's motion regarding the deposition allocation of time (requesting declaratory relief) is denied without prejudice.
5. This decision is effective on the date of service.

By the Board, Jenifer J. Soulikias, Administrative Law Judge.