

Date: August 6, 2019

Case: Oral Argument - Docket No. FD 36299



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SURFACE TRANSPORTATION BOARD DECISION

DOCKET NO. FD 36299

SOO LINE RAILROAD COMPANY -- PETITION FOR DECLARATORY

ORDER AND PRELIMINARY INJUNCTION -- INTERCHANGE

WITH CANADIAN NATIONAL

ORAL ARGUMENT

Tuesday, August 6, 2019

10:00 a.m.

James Webb Memorial Auditorium

NASA Building

300 E Street, S.W.

Washington, DC

1 PARTICIPANTS:

2 SURFACE TRANSPORTATION BOARD

3 ANN BEGEMAN, CHAIRMAN

4 PATRICK FUCHS, VICE CHAIRMAN

5 MARTIN OBERMAN, BOARD MEMBER

6

7 DAVID RIFKIND, STINSON LLP

8 CHARLES WEBSTER, CANADIAN PACIFIC

9 NICHOLAS WALKER, GENERAL MANAGER, OPERATIONS,

10 CANADIAN PACIFIC RAILWAY

11 RAYMOND ATKINS, SIDLEY AUSTIN LLP

12 MATTHEW WARREN, SIDLEY AUSTIN LLP

13 AARON REINKE, TRUSTEE, VILLAGE OF BARTLETT

14 SCOTT SKRYCKI, ASSISTANT VILLAGE ADMINISTRATOR,

15 VILLAGE OF BARTLETT

16 WILLIAM ALBRITTON, GENERAL MANAGER, CN

17

18

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20

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22

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

2 (10:00 a.m.)

3 CHAIRMAN BEGEMAN: Good morning. Today we
4 will hear oral argument in Docket Number FD 36299.

5 This case involves a Petition for Declaratory Order
6 and Preliminary Injunction filed by Soo Line
7 Railroad Company, doing business as Canadian Pacific,
8 arising from the termination of an Interchange
9 Agreement with Wisconsin Central Ltd., doing business
10 as Canadian National, in the Chicago Terminal Area.

11 I will cover a few procedural matters
12 before we begin. Each party is asked to make a short
13 statement of its argument, and counsel should be
14 prepared to answer questions from the Board Members
15 at any time during your allotted time.

16 Any PowerPoint presentation or other
17 document aides using materials previously placed in
18 the record will be made part of today's transcript.

19 CP and CN will each have 20 minutes of
20 argument time, and the Village of Bartlett will have
21 10 minutes, as it requested. The lectern is equipped
22 with lights and a timer which will guide you

1 regarding your allotted time. Two minutes before
2 your allotted time expires, a yellow light will
3 appear. When you see the red light, your time has
4 expired and you will need to conclude your remarks.

5 As the party filing the Request for
6 Declaratory Order and Injunctive Relief, CP will open
7 and has reserved 5 minutes for rebuttal. CN will
8 then have its 20 minutes, and then we will hear from
9 the Village of Bartlett.

10 I ask everyone to please silence your
11 cellphones. We will now begin with Canadian Pacific.

12 MR. RIFKIND: Chair Begeman, Vice Chair
13 Fuchs, Member Oberman, my name is David Rifkind. I
14 represent Soo Line Railroad Company, doing business
15 as Canadian Pacific. With me at counsel's table is
16 Charles Webster. Charlie is CP Senior Counsel U.S.
17 I would also like to introduce, behind Vice Chair
18 Fuchs, is Nick Walker. Nick is CP's General Manager,
19 U.S. Operations East. In this capacity, Nick is
20 responsible for the critical and fragile Chicago
21 Terminal area. I would also like to introduce Ariel
22 Giordano who is the Director of Federal and State

1 Government Affairs for CP.

2 And I want to thank the Board for this
3 opportunity to appear before you to address this very
4 important issue to CP.

5 For nearly a decade, by mutual agreement
6 and for mutual benefit, CP and CN have been the
7 interchanging in the Chicago area at Spaulding where
8 the two railroads have a direct physical connection.

9 Now, CN wants to eliminate permanently
10 Spaulding as an interchange location, and it wants to
11 do this so it can run more trains on its mainline,
12 and it wants CP to subsidize this change.

13 Pursuant to 49 U.S.C. 10742, CN has a
14 statutory obligation to provide proper and reasonable
15 interchange facilities. As the Board stated in the
16 Reading Blue Mountain case, this obligation is
17 compulsory. For railroads that have direct physical
18 connections, as CN and CP do here, interchange
19 location is normally where they meet. However, CN
20 can also satisfy its obligation by designating a
21 point on its line and providing CP with a free route
22 to get to that point.

1 The interchange location, however, cannot
2 be unusual, cannot be unreasonable, cannot be
3 impossible, and it cannot require CP to do the work
4 that is properly that of CN.

5 CN has proposed two interchange locations
6 to replace Spaulding. It first designated Kirk Yard-
7 -Yes?

8 VICE CHAIRMAN FUCHS: Would you agree that
9 for CN as the receiving carrier designating Kirk,
10 that CP has the burden of proof on the standard that
11 you just mentioned?

12 MR. RIFKIND: So CP has the burden of
13 proof to show that the designated location is
14 unreasonable, impossible, unusual, or requires it to
15 do the work of CN, yes.

16 So it first designated Kirk Yard, but it
17 is now asking the Board to compel CP to go to
18 Clearing Yard. Neither location--

19 BOARD MEMBER OBERMAN: Mr. Rifkind?

20 MR. RIFKIND: Yes?

21 BOARD MEMBER OBERMAN: Let me ask you a
22 procedural question, if I could. The only thing

1 that's pending in front of us that I'm aware of,
2 formally by pleading, are your petitions for
3 declaratory order and for preliminary injunction. And
4 the only relief that you're asking for is to declare
5 Kirk unreasonable, and to enjoin CN from ceasing the
6 Spaulding operation. Is that correct?

7 MR. RIFKIND: That's correct.

8 BOARD MEMBER OBERMAN: So under the state
9 of the pleadings, can you tell us if you think we
10 have the power, without somebody filing an amended
11 pleading, to order anything other than those two
12 things?

13 MR. RIFKIND: I think the Board has broad
14 powers to fashion a remedy, but I would say that we
15 haven't fully briefed the other issues.

16 BOARD MEMBER OBERMAN: Well we may have
17 the power, but don't we have to do it based on a
18 pleading that's in front of us rather than just
19 inventing something out of thin air?

20 MR. RIFKIND: I think that would be
21 appropriate.

22 BOARD MEMBER OBERMAN: So that if you or

1 CN want us to do something else, do you have to file
2 an amended pleading? Or what would you say,
3 procedurally, would be the appropriate--

4 MR. RIFKIND: If we seek different relief
5 than we're seeking today, then it would be
6 appropriate for us to file an amended pleading, and
7 to brief the issues so that you have the full
8 evidentiary record.

9 BOARD MEMBER OBERMAN: In your view, what
10 are we to make of all these letters saying, well,
11 Clearing's okay, but make the other guy pay for it?
12 Do you think under the current state of the
13 pleadings we could grant such relief to either party?

14 MR. RIFKIND: Well, I think you can't
15 force us to go to Clearing, period.

16 BOARD MEMBER OBERMAN: Aside from that, do
17 you think we--whether we could or couldn't legally
18 give you the substantive remedy, do you think
19 procedurally we could even entertain such a remedy
20 under the current state of the pleadings? That's
21 what I'm trying to find out from you, and I would ask
22 CN to address it, as well.

1 MR. RIFKIND: I think under the current
2 state of the pleadings, there is evidence in the
3 record that would allow you to conform your decision
4 to the evidence that was presented. The state of the
5 pleadings I think are sufficient for you to give the
6 power--the relief that's being sought here today,
7 which is--

8 BOARD MEMBER OBERMAN: Well, the relief
9 you're seeking?

10 MR. RIFKIND: Right.

11 BOARD MEMBER OBERMAN: Under the current
12 state of the pleadings, could we order the
13 interchange to take place at Clearing.

14 MR. RIFKIND: I don't believe so.

15 CHAIRMAN BEGEMAN: If I could ask you a
16 question? When CN speaks, and from the docket so
17 far, they talk at length about the fact that they do
18 the lion's share of the work for this interchange
19 switching. Do you disagree with that, with their
20 view?

21 MR. RIFKIND: Oh, absolutely.

22 CHAIRMAN BEGEMAN: You disagree, that

1 they're not doing the lion's share of the work?

2 MR. RIFKIND: No. We both have our network
3 that is designed the way we've designed it.

4 CHAIRMAN BEGEMAN: I'm talking about this
5 particular switch at Spaulding, which takes them all
6 the way to Kirk Yard and bring it back.

7 MR. RIFKIND: So in order to do the work,
8 CP has to send a crew from Bensenville Yard, 18 miles
9 to Spaulding, where it's boxed--

10 CHAIRMAN BEGEMAN: I know, but that's not
11 84 miles.

12 MR. RIFKIND: That is not 84 miles, but
13 CN, our understanding, first of all, is not traveling
14 84 miles to Spaulding. Their crews are coming out of
15 Joliet, which is only 19 miles away. And--

16 CHAIRMAN BEGEMAN: But I think they said
17 they block and switch at Kirk Yard, and then bring it
18 back.

19 MR. RIFKIND: And we sometimes block and
20 switch things in St. Paul, but that doesn't mean
21 we're doing CN's work for it. You know, those are
22 operational choices that we as a railroad make, and

1 we're not responsible for the operational choices
2 that CN makes.

3 CHAIRMAN BEGEMAN: I mean, procedurally
4 aside, I'm just going to keep asking a few questions,
5 but one of CN's suggestions has been that they could
6 bring your cars to Bensenville at their own cost. Am
7 I correct that that was one of your recommended
8 proposals? So at that point, why couldn't they just
9 pick up their cars at Bensenville, instead of then
10 having to have you bring them somewhere else?

11 MR. RIFKIND: That is a good question. If
12 I can just have a moment here?

13 CHAIRMAN BEGEMAN: Sure.
14 (Pause.)

15 MR. RIFKIND: Alright, so the Harbor is
16 bringing CN's cars. CN is not bringing its cars.

17 CHAIRMAN BEGEMAN: Right. But the
18 proposal was that they would--so why couldn't Harbor
19 then just move--

20 MR. RIFKIND: Well, Harbor could, but then
21 someone would still have to pay the switch fee. But
22 Clearing is preferable over the Harbor, and

1 Spaulding is preferable over Clearing.

2 CHAIRMAN BEGEMAN: And at some point in
3 the--I'd like you to put in the record, both parties,
4 what the fees are that are at issue that neither of
5 you want to pay.

6 MR. RIFKIND: We can do that under seal.

7 CHAIRMAN BEGEMAN: Yes.

8 MR. RIFKIND: That would be fine.
9 Otherwise, we have competition issues.

10 VICE CHAIRMAN FUCHS: Just a couple of
11 questions. Can you just clarify from CP's
12 perspective whether or not delivery to Bensenville is
13 better than delivery to Spaulding? Is delivery to
14 Bensenville better than delivery to Spaulding for you
15 all, of CP bound cars?

16 MR. RIFKIND: Yeah, I mean in some respects
17 it is, but in some respects, no. It's more
18 predictable when we control when these cars arrive
19 from Spaulding. It is also better to keep these cars
20 out of the Chicago Terminal generally because the
21 Chicago Terminal is often congested, and the time
22 period--you know, for us to get the cars to Spaulding

1 is usually a day shorter than it would take to get it
2 from CN over the Harbor.

3 VICE CHAIRMAN FUCHS: From when CN
4 delivers CP-bound cars to Spaulding, does CP then
5 take it to Bensenville?

6 MR. RIFKIND: So--I'm sorry? Can you ask
7 that again?

8 VICE CHAIRMAN FUCHS: Does CP take the
9 cars that CN delivers, when CP is the receiving
10 carrier, does CP take it to Bensenville?

11 MR. RIFKIND: Yes.

12 VICE CHAIRMAN FUCHS: So why wouldn't
13 going to Bensenville be better? Just straight to
14 Bensenville? If you have Spaulding, you've got to
15 take it Bensenville anyway. Why wouldn't going
16 directly to Bensenville be better?

17 MR. RIFKIND: If CN brought the cars
18 directly to Bensenville, that would be fine, if it
19 didn't congest the terminal. But putting the cars
20 into the terminal will add another day--

21 VICE CHAIRMAN FUCHS: But you guys are
22 already putting the cars in the terminal from

1 Spaulding, right? Is there a difference in the
2 tracks that would be used? Or--

3 MR. RIFKIND: Well, we're not really
4 putting them--I mean, they're coming into
5 Bensenville, but then they're going out onto our
6 line--

7 VICE CHAIRMAN FUCHS: So it's a different
8 set of tracks that they would come into Bensenville?

9 MR. RIFKIND: -- out. They're not going
10 through the heart of downtown.

11 VICE CHAIRMAN FUCHS: I've got you. But--
12 I see. So going through the heart of downtown would
13 be, instead of kind of doing the western route, would
14 be worse for CP's operations, generally, you think?

15 MR. RIFKIND: Well, we wouldn't be going
16 through the heart of downtown. The Harbor would be.

17 VICE CHAIRMAN FUCHS: Right.

18 MR. RIFKIND: And so it's additional cars
19 on the Harbor.

20 VICE CHAIRMAN FUCHS: And if you got--if
21 you all were--in order for the receiving point to be
22 Bensenville, if you were to designate it, is it your

1 view I think from response to the Chairman's
2 questions is that you run into the same problem that
3 you all are saying is the problem with Clearing,
4 which is that CN would have to exercise trackage
5 rights, or an intervening switching carrier, and under
6 the BN case that's not allowed?

7 MR. RIFKIND: Well, if we were to insist,
8 you're saying?

9 VICE CHAIRMAN FUCHS: Yeah. Yes.

10 MR. RIFKIND: We can't insist that CN use
11 an intermediate switch carrier, for the reasons you
12 stated.

13 BOARD MEMBER OBERMAN: I'm going to follow
14 up on that question. Currently, as I understand it,
15 CP--would CP locomotives deliver cars from
16 Bensenville to Spaulding? Or do you use--is that
17 how--

18 MR. RIFKIND: We use our own locomotives,
19 our own crew.

20 BOARD MEMBER OBERMAN: And the CN cars
21 that are coming back to CP are brought back from
22 Spaulding?

1 MR. RIFKIND: By that same crew.

2 BOARD MEMBER OBERMAN: By the same crew.

3 That's how it works now?

4 MR. RIFKIND: Correct.

5 BOARD MEMBER OBERMAN: And the tracks that
6 you use are owned by Metra?

7 MR. RIFKIND: They're owned by Metra, but
8 they're our mainline, yes.

9 BOARD MEMBER OBERMAN: Well, they're
10 dispatched by CP, but you pay Metra trackage rights,
11 trackage fees, do you not?

12 MR. RIFKIND: No, we don't.

13 BOARD MEMBER OBERMAN: You have free use
14 of the track?

15 MR. RIFKIND: We have free use of the
16 mainline tracks. That was part of the transaction--
17 when Metra acquired the mainline in bankruptcy, that
18 was part of that transaction.

19 BOARD MEMBER OBERMAN: Just another great
20 deal that the Bankruptcy Trustee made for Metra?

21 (Laughter.)

22 MR. RIFKIND: I can't comment on that.

1 BOARD MEMBER OBERMAN: I can.

2 (Laughter.)

3 BOARD MEMBER OBERMAN: So I'm having
4 trouble understanding. So when CN made an offer to
5 deliver its traffic to Bensenville, it was going to
6 use those same tracks?

7 MR. RIFKIND: No. CN's offer to deliver
8 to Bensenville is utilizing the Harbor, the Indiana
9 Harbor.

10 BOARD MEMBER OBERMAN: Different tracks?

11 MR. RIFKIND: Different tracks altogether.
12 They go right through downtown to get to Bensenville.
13 They come across town to Bensenville.

14 BOARD MEMBER OBERMAN: So why--I'm still
15 not clear. If you're not paying anything to use
16 Metra's tracks, why can't you just do the switching
17 in the Bensenville pickup and delivery and do the
18 switching there?

19 MR. RIFKIND: Well, CN--

20 BOARD MEMBER OBERMAN: You're receiving
21 cars.

22 MR. RIFKIND: We are receiving cars, and

1 we could--we could receive cars there, and we've
2 offered to receive cars there. But our preference is
3 to be at Spaulding, and we're concerned that if
4 Spaulding goes away and there's congestion in the
5 Chicago Terminal, then we've got no way to relieve
6 that congestion.

7 BOARD MEMBER OBERMAN: When you say
8 "congestion in the Chicago Terminal," I mean
9 Bensenville is a far larger yard than Spaulding.
10 You're saying you don't have room to switch cars
11 inside Bensenville through CN without--

12 MR. RIFKIND: No, what I'm saying is, if
13 Chicago is starting to seize up, it's seizing up on
14 the Harbor, or it's seizing up in Clearing, the
15 answer to--

16 BOARD MEMBER OBERMAN: When you say
17 "seizing up," what do you mean?

18 MR. RIFKIND: So there is congestion in
19 Chicago. Chicago has a green, yellow, and red light
20 system to tell them when things are getting too
21 congested, it's getting inefficient and we need to be
22 keeping cars, or taking cars out of Chicago in order

1 to restore fluidity.

2 And so when it hits yellow, we have
3 agreements with other railroads to--how to react
4 then. And when it hits red, we have other
5 agreements, other steps we take which involve getting
6 cars, or keeping cars out of the terminal until we
7 can restore fluidity.

8 BOARD MEMBER OBERMAN: What does that have
9 to do with Bensenville?

10 MR. RIFKIND: What it has to do with is in
11 order to get the cars from CN to Bensenville, they
12 have to go through the Harbor. So if the Harbor is
13 suffering problems, you don't want those cars at the
14 Harbor. You'd want those cars to stay out of the
15 Chicago terminal, to come around, if I can, to the
16 exhibit (off-mike), and so in order to get from Kirk,
17 which is down here in Gary, Indiana, down here--
18 sorry.

19 VICE CHAIRMAN FUCHS: Hey, David, you can
20 use the mike. We actually have the map in our
21 binders, so we're good.

22 MR. RIFKIND: So in order to get to Kirk,

1 you have to come across through the Harbor Yard--

2 VICE CHAIRMAN FUCHS: David, so for
3 Clearing, for Clearing where CN proposed, you were
4 already using Clearing for hazmat and some non-hazmat
5 cars, right?

6 MR. RIFKIND: Right.

7 VICE CHAIRMAN FUCHS: How many cars do you
8 use Clearing for, would you say, on a given day?

9 MR. RIFKIND: I don't--it's a little under
10 200.

11 VICE CHAIRMAN FUCHS: Okay, so and then
12 what about the Harbor? For Harbor to Bensenville,
13 how many do you use?

14 MR. RIFKIND: Well it wouldn't be use
15 using it--

16 VICE CHAIRMAN FUCHS: Well how many do you
17 receive in Bensenville via the Harbor?

18 MR. RIFKIND: Sixty seven--

19 VICE CHAIRMAN FUCHS: So you are saying,
20 if I'm hearing you, that the reason why, you know,
21 going through the heart of Chicago is possibly worse
22 than using Spaulding going on the Western, is

1 because the potential congestion through the heart of
2 Chicago. At the same time, you use that heart of
3 Chicago for five times as much traffic for Clearing
4 and, if I heard you, like about double as much for
5 the Harbor. So, you know, why should we take at face
6 value that you guys are very averse to using the
7 heart of Chicago when you use 300 cars for the heart
8 of Chicago, and on Spaulding you use about 40--35 to
9 50?

10 MR. RIFKIND: So many of those cars we
11 don't have a choice. We don't have--like we do with
12 CN, a direct physical interchange. So in those
13 instances, we have to put in the Harbor at Clearing
14 in order to get it to our partner.

15 VICE CHAIRMAN FUCHS: Is your hazmat
16 traffic meaningfully slower?

17 MR. RIFKIND: Well then the other issue is
18 hazmat. TIH/PIH requires a positive handoff. So
19 leaving it at a yard in Spaulding is not a positive
20 handoff.

21 VICE CHAIRMAN FUCHS: Right. I've got
22 'cha. But is it traversing through Clearing

1 meaningfully slower than the non-hazmat that uses
2 Spaulding? Outside of its characteristics as hazmat,
3 and some additional precautions, is the actual time
4 it traverses the track meaningfully slower?

5 MR. RIFKIND: It's about a day.

6 VICE CHAIRMAN FUCHS: A day slower?

7 MR. RIFKIND: Yes.

8 BOARD MEMBER OBERMAN: I'm still--I'd like
9 to get back in. I have a couple of other areas that
10 I wanted to pursue.

11 I still don't understand why this back and
12 forth, what CN proposes can't take place over the
13 Metra Line, which you don't pay for? Why can't you
14 pick it up--

15 MR. RIFKIND: Well, that's how we do it.
16 But that's how we do it today. We take it over the
17 Metra Line to Spaulding. Get off at the Spaulding
18 junction. We have interchange tracks that we provide
19 there. We spot our cars. Then we go over to CN's
20 interchange tracks, pull theirs, and go back onto the
21 CP Metra Mainline.

22 BOARD MEMBER OBERMAN: And how would CN's

1 proposal of delivering cars to Bensenville, where
2 would that action take place?

3 MR. RIFKIND: Through the Harbor. So it
4 wouldn't be on the Metra Mainline.

5 BOARD MEMBER OBERMAN: Does that line run
6 parallel to the Metra Line over to Bensenville?

7 MR. RIFKIND: No, no.

8 BOARD MEMBER OBERMAN: So where does it
9 go?

10 MR. WEBSTER: It comes up through Franklin
11 Park, Your Honor. It would make a left-hand turn at
12 B-12, and then come into the east end of Bensenville,
13 Your Honor.

14 MR. RIFKIND: That was Charles Webster.

15 BOARD MEMBER OBERMAN: I heard it. I
16 think it's in the record. I appreciate that. So how
17 much farther is that than using the Metra tracks?

18 MR. WEBSTER: I believe--I'm not--you
19 know, I'm not entirely--I don't think I understand
20 the question, to be honest.

21 BOARD MEMBER OBERMAN: Well, it's 14 miles
22 now between Spaulding and Bensenville? How far?

1 MR. WEBSTER: It's about 17 miles.

2 BOARD MEMBER OBERMAN: Is this a longer
3 route to take the Harbor tracks?

4 MR. WEBSTER: Well the CN is bringing that
5 traffic from--

6 BOARD MEMBER OBERMAN: The proposal
7 they're making to deliver cars to you at Bensenville.

8 MR. WEBSTER: I believe--I believe CN
9 would give those cars to the Harbor at Blue Island.

10 BOARD MEMBER OBERMAN: And pay the Harbor?

11 MR. WEBSTER: And pay the Harbor to take--
12 to take the Interchange traffic that's coming to CP
13 from Blue Island on the Harbor through the city to
14 Bensenville Yard.

15 BOARD MEMBER OBERMAN: Does CN not have a
16 right to use those Metra tracks?

17 MR. WEBSTER: No, they do not. And those
18 Metra tracks that you're referring to are--come out
19 of Bensenville Yard on the west. Spaulding is to the
20 west of Bensenville. And so that trackage wouldn't
21 be implicated in CN's delivery via the Harbor to us
22 in the proposal.

1 BOARD MEMBER OBERMAN: But if--alright,
2 let me shift gears here a little. No one has
3 suggested an interchange at Rondout, which I
4 understand has sidings and tracks that were once used
5 for interchange. Why is that?

6 MR. RIFKIND: Rondout is further away I
7 think from--

8 BOARD MEMBER OBERMAN: It's not 84 miles.

9 MR. RIFKIND: It's not 84 miles. You
10 know, we would be willing to explore that option, but
11 CN has not been interested in it, is my
12 understanding.

13 MR. WEBSTER: In all frankness, Mr.
14 Oberman, that would be more difficult for CN.

15 BOARD MEMBER OBERMAN: Because?

16 MR. WEBSTER: Of its location. I mean,
17 if--I don't want to speak for CN, but--

18 BOARD MEMBER OBERMAN: We'll ask CN why,
19 but no one's suggested it in this proceeding.

20 MR. WEBSTER: No. It is the other point
21 of direct physical contact of our two systems in
22 Chicago.

1 BOARD MEMBER OBERMAN: Let me shift here
2 for a minute, because there's an aspect of the paper
3 that I find a little bit troubling.

4 In your Petition, you state that CP runs
5 no trains there--to Kirk--or near there, and does not
6 have a route there. The verified statement from CN
7 directly contradicts that and says, according to Mr.
8 Albritton, CP operates a minimum of one daily train
9 in each direction past Kirk Yard on an NS Track which
10 is 100 yards from Kirk. Which strikes me as being,
11 quote, "near there."

12 How do you reconcile those two statements?

13 MR. RIFKIND: So we operate pursuant to
14 Michigan Trackage Rights Agreement on NS.
15 We're limited in the number of trains. We're limited
16 where we can get on and off. And so we might as well
17 be 100 miles away, or 1,000 miles away from Kirk
18 because we have no way from getting from those tracks
19 to Kirk. We don't have our own line over there. We
20 don't have trackage rights to get to Kirk. We can't
21 exit the Michigan Trackage Rights NS Line.

22 BOARD MEMBER OBERMAN: Well when CN says

1 that it would willingly give CP operating rights over
2 CN's track that connects to Kirk to the NS, is that
3 wrong?

4 MR. RIFKIND: I can't speak for whether NS
5 would be willing to--

6 BOARD MEMBER OBERMAN: No, but physically-
7 -

8 MR. RIFKIND: --I mean, CN would be
9 willing to. I can tell you that NS has not, will
10 not--we're in litigation with NS over the Michigan
11 Trackage Rights. It is not an option. And on top of
12 that, we are already, I believe, using those trackage
13 rights at capacity for the allowable number of
14 trains.

15 BOARD MEMBER OBERMAN: I accept that
16 description, but I think that's a little inconsistent
17 with a statement in a pleading that says it runs no
18 trains near there. I would appreciate a little more
19 explanation, if you're going to make a statement like
20 that to the Board, so we have a better picture. I
21 mean, it may or may not be practical, and that's
22 something to explore, but I find that a little

1 troubling to have two directly contradictory
2 statements.

3 MR. RIFKIND: Well it's not--I don't
4 believe it's contradictory. I mean, we are on
5 someone else's line. We have no rights--

6 BOARD MEMBER OBERMAN: No, you didn't say
7 you didn't have a line. What you said was you run no
8 trains near there. You do run trains near there.

9 VICE CHAIRMAN FUCHS: And the trains you
10 run there, does the traffic originate--not originate
11 ultimately, but does it come from Bensenville? Do
12 those trains come from Bensenville that you're using
13 NS trackage rights for?

14 MR. RIFKIND: No.

15 VICE CHAIRMAN FUCHS: Where do they--

16 MR. RIFKIND: Those trains come from, is
17 it Gibson Yard?

18 MR. WEBSTER: No, those trains come from
19 Bensenville. The westbounds originate in Ontario.

20 VICE CHAIRMAN FUCHS: So just to follow up
21 on Marty's point, not to say that this is advisable
22 or even I think, David, to your point, I think you

1 made in a filing, is under the BN case that if they
2 were to designate that point, you couldn't be
3 compelled to use NS trackage rights?

4 MR. RIFKIND: That's true.

5 VICE CHAIRMAN FUCHS: But putting that
6 aside, if you wanted to, is there anything, just from
7 a feasibility--again, not advisability standpoint--
8 from a feasibility standpoint of you taking the
9 traffic in Bensenville and adding it to the train
10 that leaves in Bensenville and going to Kirk Yard?
11 Just from a pure feasibility standpoint, not even,
12 like I said, an advisability or whether or not it's
13 worth it to you?

14 MR. RIFKIND: We don't have rights to do
15 that.

16 VICE CHAIRMAN FUCHS: Under the NS
17 Trackage Rights, you--

18 MR. RIFKIND: Under the NS Trackage
19 Rights, we do not have rights--

20 VICE CHAIRMAN FUCHS: You could not add a
21 train, or add cars--

22 MR. RIFKIND: Right. We have overhead

1 trackage rights that are very specific about how and
2 what--

3 VICE CHAIRMAN FUCHS: You can't even add
4 cars to an existing train?

5 MR. RIFKIND: We could add cars to
6 existing trains, but we couldn't get them off the
7 existing train. It would fly right by, you know,
8 Kirk. And we could wave, but we couldn't stop--

9 VICE CHAIRMAN FUCHS: Even if CN gave you-
10 -even if they gave you that 100 yard and come back,
11 you couldn't do that?

12 MR. RIFKIND: Could not do that.

13 MR. WEBSTER: Not without NS's agreement
14 to amend the Michigan Trackage Rights Agreement,
15 which, Commissioner, the Norfolk Southern is suing us
16 right now in the Northern District of Indiana
17 Federal Court in Northern Indiana to terminate that
18 agreement.

19 CHAIRMAN BEGEMAN: Are there situations
20 throughout your network where you're the receiving
21 carrier and you have agreements on where things are
22 switched?

1 MR. RIFKIND: Absolutely. Spaulding is
2 one. We're the receiving carrier at Spaulding, as
3 well as the delivering carrier.

4 CHAIRMAN BEGEMAN: I'm not talking about
5 agreements with CN, but other carriers.

6 MR. RIFKIND: Absolutely.

7 CHAIRMAN BEGEMAN: And is it your position
8 that those other carriers can dictate whether or not
9 you can make a change in those locations?

10 MR. RIFKIND: No. It would be our
11 position that we have, as the receiving carrier, the
12 right--

13 CHAIRMAN BEGEMAN: But if they object to
14 your making the change?

15 MR. RIFKIND: If they object. I mean, in
16 the first instance interchange location should be by
17 mutual agreement. But if they object and we are
18 insistent that our choice is proper, then the answer
19 is to come to you and resolve the dispute.

20 CHAIRMAN BEGEMAN: And yet this would be
21 the first time I think that the Board will ever have
22 had to be making decisions on where traffic is

1 interchanged, and that will be a new--you know, I
2 was hoping I wouldn't have to make decisions like
3 that, with other things that are pending, but if
4 that's what the railroads want us to do, start making
5 interchange decisions on behalf of the railroads, I
6 guess we can pull that Band-Aid off.

7 MR. RIFKIND: And our preference would be
8 to reach a mutual agreement--

9 CHAIRMAN BEGEMAN: And where are the seven
10 locations that you switched prior to this agreement
11 eight years ago?

12 MR. RIFKIND: So there were a number--I
13 don't know that I know them all, but Hawthorne Yard,
14 Glenn Yard, I believe--

15 CHAIRMAN BEGEMAN: And so should we go
16 back to--I mean if Spaulding simply doesn't work for
17 CN, should we go back to what it as eight years ago?

18 MR. RIFKIND: So the reason that we
19 consolidated at Spaulding--

20 CHAIRMAN BEGEMAN: Which is CN's location.

21 MR. RIFKIND: Right, which is CN's location, was
22 because when CN acquired the EJ&E that

1 gave us an opportunity to get rid of these seven
2 other locations that were not very good for any of
3 us, and to take the cars out of the Chicago Terminal
4 area.

5 CHAIRMAN BEGEMAN: Right. But now it's no
6 longer good for CN?

7 MR. RIFKIND: That's for CN to argue--

8 CHAIRMAN BEGEMAN: My last question. What
9 do you expect the Board to do, based on what has been
10 filed and just like you want your way?

11 MR. RIFKIND: Well, what I expect the
12 Board to say is that CN--

13 CHAIRMAN BEGEMAN: No one is forced to do,
14 not--

15 MR. RIFKIND: Right, it's just that CN
16 continued to use Spaulding as an interchange
17 location, unless and until they designate an
18 alternative location as a reasonable, not unusual,
19 not impossible, and doesn't require us to do their
20 work for them.

21 CHAIRMAN BEGEMAN: Well you're a receiving
22 carrier, technically, as well.

1 MR. RIFKIND: Yeah, so we designated
2 Spaulding. If they want to bring it to Bensenville
3 while we still continue to interchange Spaulding--

4 CHAIRMAN BEGEMAN: But isn't Spaulding
5 technically CN's location?

6 MR. RIFKIND: It's both.

7 CHAIRMAN BEGEMAN: It's both?

8 MR. RIFKIND: Yeah, so at the Spaulding
9 Interchange there are CP tracks, Metra tracks but
10 CP--

11 CHAIRMAN BEGEMAN: So you could designate
12 Spaulding to be the receiving carrier for your stuff,
13 and CN can designate Kirk Yard to be the receiving
14 carrier for their things?

15 MR. RIFKIND: Right, and just to be clear--
16 --to be clear, we haven't designated Bensenville.
17 We've designated Spaulding. We want to maintain the
18 status quo. CN has proposed that they bring our
19 stuff to Bensenville. That's up to them, if they
20 would like to do that.

21 CHAIRMAN BEGEMAN: That's not what I was
22 asking.

1 MR. RIFKIND: I'm sorry.

2 CHAIRMAN BEGEMAN: No, what I was asking
3 is, because you're the receiving carrier, can you--
4 you can say Spaulding is where we want to receive,
5 and CN can say we want to receive our cars at Kirk
6 Yard?

7 MR. RIFKIND: Well, I disagree with the
8 second aspect of it. So, subject to requirements
9 that it not be unreasonable, and not require us to do
10 their work for them. If Kirk met that requirement,
11 which it doesn't, then they could designate Kirk.
12 But Kirk clearly is unreasonable and we've never
13 viewed Kirk as a serious proposal. We always viewed
14 it as a proposal to try to get us to go to Clearing.

15 BOARD MEMBER OBERMAN: I have a couple
16 more questions. If CN designated Rondout, would
17 you find that reasonable?

18 MR. RIFKIND: Yes. I mean it's where we
19 meet. And there are tracks there.

20 BOARD MEMBER OBERMAN: One other area I'm
21 a little concerned about. Your statement from
22 Mister--your verified statement, I've forgotten the

1 name of the--Walker--

2 MR. RIFKIND: Mr. Walker, sitting right
3 next to you.

4 BOARD MEMBER OBERMAN: Yes. I just
5 couldn't call up his name, sorry. States: I have
6 received no complaints from the public or from local
7 officials regarding any of our trains. The Village
8 sent us a letter saying they've complained numerous
9 times to CP, and then Nat Gudenkoff, the president of
10 the Chamber of Commerce, says the same thing
11 specifically about CP. So I mean how can you file a
12 sworn statement saying you got no complaints, when
13 we're sitting right here with the people who are
14 complaining?

15 MR. RIFKIND: Well, so--thank you for that
16 question, because I did want to address this. First
17 of all, you'll notice that in none of the assertions
18 that complaints have been submitted has anyone
19 indicated when they were submitted, or to whom, other
20 than a broad, "Well, we've submitted numerous
21 complaints to CP."

22 Well since CP, and since Mr. Walker has

1 been on his job, and has moved all of the
2 interchanging to 3:00 a.m. in the morning when no one
3 is taking their kids of work--

4 VICE CHAIRMAN FUCHS: But isn't CN's
5 contention not just that there's a possibility that
6 someone is driving through in the middle of the
7 night, but that because their mainline is blocked in
8 the middle of the night, and because they have Metra
9 rush hour traffic, it condenses the amount of
10 capacity their mainline has for other operations that
11 could take place in the middle of the night, and
12 therefore some of the blockages that happen during
13 the day are a direct result of the fact that the
14 mainline is occupied in the middle of the night?

15 MR. RIFKIND: You know, CN chooses to do
16 their switching in peak travel times because that's
17 the way CN is running its railroad. That's their
18 choice. CN chooses to run more trains on--more and
19 more trains--

20 VICE CHAIRMAN FUCHS: Do you disagree with
21 their contention that if Spaulding were clear, they
22 could run some trains in the middle of the night and

1 therefore reduce the number of trains that they
2 operate during the day? So even if it's true that
3 people are really concerned about daytime switch--or
4 daytime blockages, it would still help them?

5 MR. RIFKIND: I do disagree with that.
6 Because what you're going to see, and what CN has
7 told you, you will see in other proceedings, are more
8 and more mainline trains. In the Barrington
9 proceeding, a forecast of another five trains through
10 the fourth quarter 2020. They're running, you know,
11 sometimes as many as 30 trains a day through
12 Spaulding.

13 So --you know, on the other hand, we
14 empathize with the notion that they want to operate
15 more mainline trains. We all do. You know, we all
16 want fluid track. But they have to balance that
17 obligation against their obligation to provide
18 adequate interchange facilities.

19 Now one of the things they could do, but
20 they don't want to because it costs money, is they
21 could reconfigure their tracks at Spaulding. That
22 would eliminate, or at least greatly mitigate, the

1 conflict that they have with their mainline, as well
2 as greatly reduce the blockages. But they don't want
3 to do that because that would cost them money.

4 It would be easier for them to have us go
5 to Clearing and for us to pay for it. But our
6 obligation is not to subsidize their capacity
7 improvements, or to pay for their statutory
8 obligation to provide an interchange facility. And
9 if we did, then there are several other railroads out
10 here who are very interested in this, because they
11 would love to eliminate the cost of their interchange
12 facilities that they're required to provide and force
13 the delivering carrier to pay to take those cars into
14 the Chicago Terminal.

15 So there will be--and we're not just
16 talking Spaulding. We're talking a sea change in how
17 interchange is conducted, if you compel us to go to
18 Clearing.

19 BOARD MEMBER OBERMAN: Mr. Rifkind, I just
20 didn't want to leave this topic. The statement that
21 Mr. Walker made was unqualified, saying "I have
22 received no complaints." In the future when you're

1 litigating in front of this Board, I would appreciate
2 candor, which required you to say, if that's what you
3 mean, that since you started switching in the middle
4 of the night you've received no complaints about the
5 midnight switching, as opposed to a blanket statement
6 which I find to be somewhat misleading, until I read
7 the statements from the Chamber of Commerce and
8 Bartlett. We're going to ask them about it, as well
9 as Vice Chairman Fuchs' observation that these are
10 not on different planets. They all inter-relate. I
11 just think it's misleading.

12 MR. RIFKIND: With all due respect, Mr.
13 Walker has received no complaints from the City of
14 Bartlett. And that is a true statement of fact--

15 BOARD MEMBER OBERMAN: From the public?
16 Or from local officials? I mean that's parsing.
17 Isn't that parsing?

18 MR. RIFKIND: No. I'm not trying to parse
19 at all. You know--

20 BOARD MEMBER OBERMAN: Somebody else did
21 at some other time, but I didn't hear about it.

22 MR. RIFKIND: Well we've looked--you know,

1 we did a search. Mr. Walker looked to see if there
2 were complaints, and we found none. And we --

3 BOARD MEMBER OBERMAN: Are you telling us
4 that the City of Bartlett and the Chamber of Commerce
5 are fudging when they write us a letter and say we've
6 complained to CP many times?

7 MR. RIFKIND: They may have, but it was
8 years ago. And, you know, quite likely they did at
9 some point, because we switched to the middle of the
10 night, as we represented, but I don't believe we--we
11 certainly were not trying to mislead. And I don't
12 believe we were misleading, but, you know, we're not
13 getting the calls that CN gets, or CN apparently
14 gets.

15 BOARD MEMBER OBERMAN: Bartlett is here.
16 We can hear their point of view on it.

17 VICE CHAIRMAN FUCHS: I have a few more
18 questions.

19 The reasonableness standard, you know a
20 lot is made in the filings about these blocked
21 crossings. Just conceptually, in your opinion should
22 the Board consider broader impacts on the community

1 in blocked crossings as they're assessing what is a
2 reasonable interchange?

3 Is that even something we should be
4 thinking about for reasonableness, is the effects on
5 the community?

6 MR. RIFKIND: Well, I -- so this situation
7 is replicated across the country. There's certainly
8 lots of interchange facilities, lots of grade
9 crossings, thousands, tens of thousands even, where
10 blocked crossings are an issue, and there's a tension
11 between railroading and the community. And I think
12 it's incumbent on the railroads on the one hand to
13 try to do what they can in the zone of reason to
14 co-exist.

15 But I don't think that the Board should
16 get involved in determining community by community,
17 because that's what--

18 VICE CHAIRMAN FUCHS: But we're here, and
19 we have a--you know, under 10742, you know, if we're
20 going to enforce it, you know, we have to look at
21 what's reasonable. So I take your point that there
22 are a lot of blocked crossings, and there are a lot

1 of interchange points. But if we are considering
2 something under 10742, should we even factor in
3 effects of an interchange point on anybody but the
4 railroads?

5 MR. RIFKIND: I think that would be a
6 dangerous path for the Board to go down.

7 VICE CHAIRMAN FUCHS: Okay. And then can
8 we kind of hone in on the switching, or the fees for
9 Clearing? Because I think, you know, it started
10 getting--the negotiations started narrowing, I think,
11 based on what I see in the letters, towards just who
12 pays those fees.

13 MR. RIFKIND: Right.

14 VICE CHAIRMAN FUCHS: And in CN's filing
15 they said the fees are basically--there's switching
16 fees to Bensenville, the trackage fees, trackage
17 rights fees, and then fees to the BRC generally.
18 Can you maybe just provide a little bit more clarity?
19 When people talk about the fees for using Clearing,
20 you know, can you provide a little bit more clarity
21 on the money at stake and, you know, where the fees
22 come from?

1 MR. RIFKIND: Sure. So to reach Clearing,
2 first of all, we have to operate over the BRC's line
3 for about I think it's 14 miles or so. You know, we
4 either pay trackage fees, if we're not going to
5 Clearing, or we pay them as switch--per-car switch
6 fees, which includes--

7 VICE CHAIRMAN FUCHS: It's more likely in
8 this case if Clearing were--

9 MR. RIFKIND: Right. And in this instance
10 we would be paying a per-car switch fee to Clearing,
11 which would incorporate all their costs.

12 VICE CHAIRMAN FUCHS: All their costs. So
13 it should be a per-car switch fee?

14 MR. RIFKIND: Yes.

15 VICE CHAIRMAN FUCHS: And that's what's at
16 issue?

17 MR. RIFKIND: Um-hmm.

18 VICE CHAIRMAN FUCHS: And who pays that.
19 Okay.

20 MR. RIFKIND: So right now, as the
21 delivering carrier the BRC would charge us, unless
22 there's an agreement to charge CN.

1 VICE CHAIRMAN FUCHS: I know I'm treading
2 on tough territory here, but--so feel free to send it
3 back--but how much annually are we talking about
4 here?

5 MR. RIFKIND: We're talking between
6 three-quarters of a million and a million.

7 VICE CHAIRMAN FUCHS: A million dollars in
8 switch fees. Okay. To get to Bensenville. And have
9 you--

10 MR. RIFKIND: At current volume.

11 VICE CHAIRMAN FUCHS: At current volume.
12 And have you done--

13 MR. RIFKIND: At current rates. BRC
14 negotiates every--

15 VICE CHAIRMAN FUCHS: Understood. I mean,
16 you know--understood. So let's say a million dollars
17 for a round number. Have you all done an analysis of
18 how much Kirk would cost?

19 MR. RIFKIND: We haven't done an analysis
20 of that--

21 VICE CHAIRMAN FUCHS: Can you ballpark it?
22 Adding an additional crew? I think you said there

1 were taxi fees, you know, this type of thing. I
2 mean, for taxi fees would you say \$200?

3 MR. RIFKIND: \$165--

4 VICE CHAIRMAN FUCHS: So what about the
5 cost of the additional crew? Have you done an
6 analysis of how much Kirk will cost, ballpark?

7 MR. RIFKIND: It would be at least two
8 crews, possibly three in the winter depending on how
9 long it takes to get around.

10 VICE CHAIRMAN FUCHS: Okay, now what does
11 interchanging at Spaulding cost you? Because you
12 have to switch, right, from--it's you all doing the
13 switch, right, from Bensenville to Spaulding. How
14 much does that cost you?

15 MR. RIFKIND: Well, it's one assignment and
16 19 miles of locomotive operating costs. I don't--

17 VICE CHAIRMAN FUCHS: Right. How
18 different is it--because you all are incurring that
19 cost right now.

20 MR. RIFKIND: We are incurring that cost.

21 VICE CHAIRMAN FUCHS: And you all don't
22 want to incur the million dollar cost, right?

1 MR. RIFKIND: Absolutely not.

2 VICE CHAIRMAN FUCHS: So incurring the
3 million dollar cost, you could then deduct your cost
4 for Spaulding, right?

5 MR. RIFKIND: Um--

6 VICE CHAIRMAN FUCHS: I mean because
7 you're not going to have those costs anymore.

8 MR. RIFKIND: Well not necessarily--

9 VICE CHAIRMAN FUCHS: Why not?

10 MR. RIFKIND: Because we have an
11 8,000-foot limit for trains going into Clearing. We
12 have two that go into Clearing each day. Those 30
13 cars that are now coming from CN that would have been
14 at Spaulding may on occasion push us over the limit
15 where we have to now go for three trains, in which
16 case we're laying on an extra crew and an extra
17 locomotive.

18 VICE CHAIRMAN FUCHS: Okay. So it's
19 beyond just the per-car switch fee. There's this
20 possibility of extra fees in some circumstances.

21 MR. RIFKIND: Right--not "possibility."
22 Probability that it will happen.

1 MR. WEBSTER: Just a minute, David. Not
2 extra fee. Yes, there would be extra fees for the
3 additional cars, but, if I can elaborate here?

4 VICE CHAIRMAN FUCHS: Yes, please.

5 MR. WEBSTER: We have a train every day
6 that goes from Bensenville to Clearing. Let's say on
7 average it has 185 cars.

8 VICE CHAIRMAN FUCHS: Your train?

9 MR. WEBSTER: Our train. So under CN's
10 proposal, we would be adding the 30 cars for them at
11 Spaulding onto this additional train.

12 Now if we go over, I think it's 200 cars,
13 then we run into the 8,000-foot train length
14 limitation at BRC. And if that happens, then we
15 would either have to roll the traffic, or add--put it
16 on an additional train.

17 VICE CHAIRMAN FUCHS: But I thought BRC
18 was--you were doing per-car switch fees for BRC, so I
19 thought BRC was doing the switching.

20 MR. WEBSTER: They are.

21 MR. RIFKIND: They're doing the switching.
22 We have to get--

1 VICE CHAIRMAN FUCHS: It's your train.

2 MR. RIFKIND: Right.

3 VICE CHAIRMAN FUCHS: You're doing the
4 switching for that train?

5 MR. RIFKIND: Right. We take the cars,
6 two trains a day, from Bensenville to Clearing Yard
7 where we deposit them, and Clearing then takes those
8 cars--

9 VICE CHAIRMAN FUCHS: And processes them.

10 MR. RIFKIND: --and processes them and
11 delivers them to CN.

12 VICE CHAIRMAN FUCHS: I see.

13 MR. WEBSTER: For the various carriers in
14 the terminal.

15 VICE CHAIRMAN FUCHS: I see. So what
16 would be the additional cost, then, if you game out
17 that scenario?

18 MR. WEBSTER: There's a potential
19 additional cost to us of an additional train start,
20 and an additional train crew.

21 VICE CHAIRMAN FUCHS: So if you were to
22 annualize that, what--

1 MR. WEBSTER: Due to the 8,000-foot train
2 length limitation at BRC.

3 VICE CHAIRMAN FUCHS: Right. But what
4 does that mean, from a monetary perspective? You
5 know, so it's not just the million dollars. It's
6 plus this, right?

7 MR. WEBSTER: Yes.

8 VICE CHAIRMAN FUCHS: So a ballpark price?

9 MR. WEBSTER: That depends on our traffic
10 levels. It depends on--there's a seasonality to it.
11 You know, grain season is coming up. Nick, can you--
12 are you comfortable, Nick, with addressing it?

13 MR. WALKER: \$4,800 a day.

14 MR. WEBSTER: Well that's his train crew
15 costs, and his locomotive costs per day, but I can't
16 give you the number of days because this is going to
17 vary. There's a variability to it.

18 VICE CHAIRMAN FUCHS: Alright, switching
19 gears for a second, you all have a number of
20 interchange points throughout the country. What's
21 the farthest you travel on someone else's track to
22 interchange?

1 (Pause.)

2 Do you have--if you assume that--how
3 often--let me ask it another way. Are there many
4 instances where you connect with another carrier but
5 you travel on their tracks further than the initial--
6 further than the first feasible interchange
7 connection point?

8 MR. RIFKIND: So I am not aware of any,
9 but, you know, I'd be happy to supplement the record,
10 if that would help.

11 VICE CHAIRMAN FUCHS: Suffice to say that
12 there is no interchange with an existing carrier that
13 is at all close to what the 84 miles--

14 MR. RIFKIND: Oh, absolutely not.

15 VICE CHAIRMAN FUCHS: You can say that
16 with confidence, that there's no interchange that you
17 have--can you even think of something that goes over
18 50 miles?

19 MR. RIFKIND: No.

20 MR. WEBSTER: I'm not aware of any, but we
21 will have a look.

22 VICE CHAIRMAN FUCHS: I have one more

1 question. CN makes a lot in their filings about, you
2 know, the amount of work, right? And they do the
3 blocking classification. Can you just explain to me
4 why they do the blocking and classification for both
5 CN-bound and CP-bound? That's the way I understand
6 their filing. Can you explain to me why? Is that a
7 misunderstanding?

8 MR. RIFKIND: I think it is.

9 VICE CHAIRMAN FUCHS: Do you all do
10 blocking--

11 MR. RIFKIND: We block and classify our
12 cars at Bensenville.

13 VICE CHAIRMAN FUCHS: Okay.

14 MR. RIFKIND: We pull from Spaulding and
15 then we decide where they're going.

16 VICE CHAIRMAN FUCHS: So in that sense, if
17 you were to try and look at how much blocking and
18 classification work goes on, would you say that the
19 amount of work is roughly similar?

20 MR. RIFKIND: Yeah, depending on the
21 volume of the cars. They have a little bit more
22 volume in terms of what they're delivering--

1 VICE CHAIRMAN FUCHS: (Speaking
2 simultaneously).

3 MR. RIFKIND: --a little bit more of the
4 blocking classification for--in Bensenville.

5 VICE CHAIRMAN FUCHS: Okay, thanks.

6 BOARD MEMBER OBERMAN: A couple of
7 follow-ups on Clearing. Is it CP's position that
8 under the case law and the statute CN does not have
9 the legal right to designate Clearing as a receiving
10 yard?

11 MR. RIFKIND: That's correct. The--

12 BOARD MEMBER OBERMAN: Because it's not
13 connecting?

14 MR. RIFKIND: Right. But it is not a
15 location that is on CN's line, and it's not on our
16 line--

17 BOARD MEMBER OBERMAN: So does that differ
18 from the Burlington Northern case?

19 MR. RIFKIND: So the Burlington Northern
20 is interesting that it involved an intermediate
21 switch carrier, BN and the B&O didn't have a direct
22 physical connection, right? So what BN was trying to

1 do in that case, because it didn't want to have to
2 pay the switch charge for the terminal carrier, is to
3 create a fiction of a direct physical connection,
4 which would have shifted the costs to the receiving
5 carrier.

6 BOARD MEMBER OBERMAN: So are you saying
7 that Burlington Northern only applies where there is
8 no direct physical connection? And in this case you
9 have at least two, at Rondout and Kirk. So
10 Burlington Northern is irrelevant?

11 MR. RIFKIND: I wouldn't say Burlington
12 Northern is irrelevant. There are several
13 propositions that are articulated in Burlington
14 Northern that are entirely relevant, including the
15 notion that you cannot create a fiction of a direct
16 connection for trackage rights.

17 BOARD MEMBER OBERMAN: I understand that,
18 but Spaulding is not a direct connection--

19 MR. RIFKIND: Spaulding is a direct
20 connection.

21 BOARD MEMBER OBERMAN: Through what track?

22 MR. RIFKIND: Through the CP Metra

1 Mainline and the EJ&E Mainline. They cross at, right
2 at Spaulding.

3 BOARD MEMBER OBERMAN: Well you don't own
4 that Metra line. Are you saying the right to
5 dispatch it makes a direct connection?

6 MR. RIFKIND: No, that's our Mainline. So
7 we don't own it, but it is a joint line, and we
8 dispatch it. We control it. That's our main line.

9 BOARD MEMBER OBERMAN: Well I understand
10 you use it as a mainline, but the statute talks about
11 connecting railroads. What's the definition of
12 "connecting"?

13 MR. RIFKIND: Well the definition of
14 "connecting" is actually a little bit different. The
15 definition of connecting is when two railroads
16 participate in a joint rate, they are connecting
17 railroads whether they meet or not. The definition
18 of having a physical connection is that, you know,
19 our line, our system where we operate connects,
20 crosses somewhere physically with the other railroad
21 system. And that's what we have here.

22 BOARD MEMBER OBERMAN: So you're saying

1 it's for purposes of interchange Spaulding is an
2 equal status to Rondout and Kirk?

3 MR. RIFKIND: For purposes of--

4 BOARD MEMBER OBERMAN: In terms of being a
5 designated receiving area?

6 MR. RIFKIND: Spaulding is equal status to
7 Rondout. It is not equal status to Kirk.

8 BOARD MEMBER OBERMAN: No, in terms of
9 owner--of connection, the connection--

10 MR. RIFKIND: Right, we don't connect at
11 Kirk. We have no connection at Kirk. We have no way
12 of getting to Kirk.

13 BOARD MEMBER OBERMAN: Other than CN's
14 line, you can.

15 MR. RIFKIND: But that's not a connection.
16 That's--we don't meet there. We're not directly
17 physically connected. We'd have to get on CN's line
18 for 84 miles.

19 BOARD MEMBER OBERMAN: Well are you saying
20 then that Kirk has no greater status in this dispute
21 than Clearing?

22 MR. RIFKIND: Well, for different reasons.

1 BOARD MEMBER OBERMAN: Forget the distance
2 for a minute. I'm talking about the connection part.
3 You're saying that Kirk is no more connected to CP
4 than Clearing is?

5 MR. RIFKIND: I would say that's true.
6 They're not connected. We have no connection to
7 Kirk, and no connect to the Clearing. We would have
8 to operate on someone else's railroad to get there.

9 VICE CHAIRMAN FUCHS: The difference,
10 though, is--I think you're articulating it well, but
11 I think the difference is that because under the
12 cases, the whole idea of trackage rights are a
13 voluntary exercise of them.

14 MR. RIFKIND: Right.

15 VICE CHAIRMAN FUCHS: And the key
16 difference between Kirk and Clearing is Clearing
17 would be a voluntary exercise of your traffic
18 rights, which as the receiving carrier you don't have
19 to do.

20 MR. RIFKIND: Right.

21 VICE CHAIRMAN FUCHS: Under your
22 interpretation of the cases, and whereas CN is an

1 exercise of basically giving you trackage rights, so
2 it's consistent with the whole voluntary nature of
3 trackage rights. And so from that standpoint,
4 there's no conflict between those two ideas.

5 MR. RIFKIND: Well, right, although I
6 would say with Kirk, given--

7 VICE CHAIRMAN FUCHS: That's a different
8 question. The question is about the reasonableness
9 of Kirk, not about whether--like you're saying that
10 Clearing is eliminated because of a legal standard on
11 the voluntary exercise of trackage rights. You're
12 saying Kirk is eliminated on the legal standard of
13 reasonableness.

14 MR. RIFKIND: Correct. That's correct.
15 That's right.

16 BOARD MEMBER OBERMAN: Is the current
17 ownership of BRC where it was the last time numbers
18 were given to the Board, where your railroad owns
19 8.33 percent and CN owns effectively 16.66 percent?

20 MR. RIFKIND: That sounds about right.

21 BOARD MEMBER OBERMAN: You have said in
22 your letters that you're willing to interchange in

1 Clearing if CN pays. Is that right?

2 MR. RIFKIND: As part of a larger
3 agreement, yes.

4 BOARD MEMBER OBERMAN: But you've also
5 said that it's bad to interchange at Clearing because
6 of the congestion.

7 MR. RIFKIND: We have said that.

8 BOARD MEMBER OBERMAN: So all we're
9 talking about is price, now, not congestion. Is that
10 a fair statement from CP's position?

11 MR. RIFKIND: No, it's not a fair
12 statement.

13 BOARD MEMBER OBERMAN: Then why do you say
14 you're willing to interchange there if CN pays for
15 it?

16 MR. RIFKIND: One of the conditions that
17 we would want as part of a comprehensive agreement is
18 to preserve Spaulding so that if there's a problem
19 with Clearing that becomes impractical, we have a
20 relief valve, somewhere we can go.

21 BOARD MEMBER OBERMAN: Is that alternative
22 relief valve in anything you've put in writing here?

1 I haven't seen that. I might have missed it.

2 MR. RIFKIND: Well, now, I think--let me
3 just say that this points to the issues you raised
4 earlier, which is that a lot of the Clearing issue is
5 not actually set up in the pleadings appropriately.
6 Because when CN designated an alternative location,
7 they designated Kirk. And that's what we addressed
8 our pleading towards, and we didn't negotiate
9 Clearing to the Board or in our pleadings with the
10 Board. You don't have a full picture, certainly, of
11 the discussions that have gone on. Some of it is
12 confidential because it occurred in the
13 Board-sponsored mediation.

14 BOARD MEMBER OBERMAN: Well I'm just
15 trying to pierce through CP's statements that
16 Clearing is a bad idea because of congestion, but if
17 the price is right we will do it. Am I incorrect in
18 understanding your position that way?

19 MR. RIFKIND: We will--CP has been willing
20 to engage in a compromise that has to include one,
21 yes--

22 BOARD MEMBER OBERMAN: So is the answer to

1 my question that it's all about the money?

2 MR. RIFKIND: No, that's not what we're
3 saying. It's a compromise. We actually believe that
4 we're a healthier system, that it's in the interest
5 of the network for us to stay at Spaulding. Our
6 preference is to be at Spaulding, and we'd like to
7 preserve Spaulding as an option.

8 BOARD MEMBER OBERMAN: But if CN said to
9 you right now, fine, do Clearing. We'll pay for it.
10 You'd do it?

11 MR. RIFKIND: We'd still have to talk
12 about Spaulding.

13 BOARD MEMBER OBERMAN: Why not--

14 MR. RIFKIND: And we'd have to talk about,
15 you know, making the economics permanent because--

16 BOARD MEMBER OBERMAN: Well I didn't see
17 it in your papers, so you're adding a new twist.

18 MR. RIFKIND: Well, like I said, we're not
19 negotiating in our papers to the Board; we're
20 negotiating with CN.

21 BOARD MEMBER OBERMAN: Well, but you're
22 telling us what your position was, and at one point

1 you said Clearing was acceptable.

2 MR. RIFKIND: No, I'm telling you what our
3 position is. And our position is, and always has
4 been, that if we are to agree it has to be part of a
5 global agreement. That agreement has to address such
6 things as what happens if in six months or a year
7 from now CN says, you know what, we don't want to pay
8 for Clearing anymore. We're terminating this
9 agreement.

10 Well at that point, they would say, and by
11 the way, we ripped up those tracks at Spaulding.
12 They're no longer available. Then we're in a very
13 different situation. We're not going to put
14 ourselves in--

15 BOARD MEMBER OBERMAN: How about--Rondout
16 as a safety valve?

17 MR. RIFKIND: It's certainly something we
18 could discuss, but that's for negotiation with the
19 parties and it hasn't been negotiated.

20 BOARD MEMBER OBERMAN: One more thing. In
21 trying to devise--and I'm not sure we have the
22 pleadings in front of us, necessarily, or even the

1 authority, but I'm open to hearing from the parties
2 about it--but in trying to devise a equitable
3 apportionment of this, since CN owns--between CN and
4 CP, CN owns two-thirds of your combined interest in
5 BRC, and you own one-third of it, how would you react
6 to splitting the costs that way with CN paying
7 two-thirds and you're paying one-third?

8

9 MR. RIFKIND: We don't--my reaction would
10 be that would not be a workable solution.

11 BOARD MEMBER OBERMAN: You don't want to
12 pay any part of it?

13 MR. RIFKIND: Look, CN wants to improve
14 its network. It wants to increase its revenues. We
15 get that. We shouldn't be paying for it, though.

16 VICE CHAIRMAN FUCHS: A couple of things.
17 One is, I think, to follow up on Marty's point about
18 Rondout, you said earlier that that's worse--I
19 think, Charlie, you said it's worse for CN?

20 MR. WEBSTER: That's my--yes.

21 VICE CHAIRMAN FUCHS: So isn't--I'm happy
22 to let CN speak for CN, but that's your perception?

1 MR. WEBSTER: That's my perception. And
2 Mr. Albritton could answer that.

3 VICE CHAIRMAN FUCHS: So if you are
4 confident in the legal analysis that you can't, you
5 know, CN can't force the voluntary exercise of
6 trackage rights, then the default position would be
7 that it has to be where there's a connection, right?
8 If there's a connection, Rondout's the connection?

9 MR. WEBSTER: Yes.

10 VICE CHAIRMAN FUCHS: That's what it would
11 have to be?

12 MR. WEBSTER: Yes.

13 VICE CHAIRMAN FUCHS: So why isn't that
14 your safety valve for the Spaulding situation?
15 Because if they--if CN took out Spaulding, if they
16 basically, the legal term, jerked you around for
17 Clearing, why isn't the disincentive for that that
18 they might have to go to an even worse interchange
19 point with Rondout?

20 MR. WEBSTER: Well I think what we would
21 end up with is a position where they say, well,
22 Rondout is not available, either.

1 MR. RIFKIND: It doesn't work. Why
2 doesn't it work?

3 MR. WEBSTER: Well for the same reasons
4 they'd say Spaulding doesn't work. They would say--

5 VICE CHAIRMAN FUCHS: Right, but you all
6 would say that's our only place in that area where we
7 connect, and therefore as the receiving carrier we
8 have the right, and therefore that's what they would
9 use.

10 MR. WEBSTER: Right, but that's a fight
11 that we're having--that we don't want to have
12 tomorrow, right? That's why we would insist on an
13 agreement that addresses this now before we're--

14 VICE CHAIRMAN FUCHS: But is it a fight
15 you think you could win?

16 MR. WEBSTER: I think it's a fight we
17 should win, under the law, at least as it's currently
18 stated.

19 VICE CHAIRMAN FUCHS: Okay.

20 BOARD MEMBER OBERMAN: I just want, just
21 for the record, Mr. Rifkind, to be clear, in your May
22 6 letter to the Board you state: "CP has offered as a

1 compromise to interchange at Clearing, but only if CN
2 assumes responsibilities for the trackage rights fees
3 that CP would incur."

4 There's no qualification in that letter
5 about Spaulding, or Rondout, or anything else. So
6 are you telling us now, so we're clear, that that
7 statement as stated without qualification is no
8 longer operative? Is that fair? Is that what you
9 want us to understand?

10 MR. RIFKIND: Well, I think what we
11 represented to you was kind of what the basic issue
12 was, the central issue. We did not --

13 BOARD MEMBER OBERMAN: Well are you--

14 MR. RIFKIND: --list down for you all of
15 our terms and conditions, but in any agreement there
16 are lots of details to be worked out.

17 BOARD MEMBER OBERMAN: So you're saying,
18 assuming the Board had the authority or the power to
19 issue such an order, that wouldn't be agreeable to
20 you if it said nothing more than that?

21 MR. RIFKIND: It would not be agreeable to
22 us. And as we noted in some of our submissions to

1 the Board, there's been no request that we be forced
2 to Clearing.

3 BOARD MEMBER OBERMAN: I'm well aware of
4 that. I really just have to emphasize that clarity
5 in communications and candor to this Board would be
6 greatly appreciated. And I say that to everybody.

7 MR. RIFKIND: We understand that, and we
8 believe that--and we make every effort to continue to
9 be candid.

10 VICE CHAIRMAN FUCHS: One last one for me.
11 The non-hazmat traffic that you've brought to
12 Clearing, why did you bring it to Clearing? For
13 instance, that went--

14 MR. RIFKIND: So there are instances where
15 customers will specifically request that we take
16 their traffic over Clearing.

17 VICE CHAIRMAN FUCHS: Why is that?

18 MR. RIFKIND: I think usually it has
19 something to do with how the traffic is blocked at
20 origin. And so--

21 VICE CHAIRMAN FUCHS: So is it fair to say
22 that every time that you brought non-hazmat traffic

1 to Clearing, it was at a customer request?

2 MR. RIFKIND: I can't speak to every time,
3 but it would either be a TIH or a customer request,
4 or perhaps on the off-occasion when there was some
5 exigent circumstance.

6 VICE CHAIRMAN FUCHS: I see. Charlie?

7 MR. WEBSTER: Well, I mean I think it's
8 been--it turns out it's blocked in where it's
9 destined. Nick, can you address this? I mean, I
10 want to be clear.

11 MR. WALKER: You have the occasional basis
12 where train masters err delivery areas, or err in
13 delivery cars, so it's a car for instance BRC, but it
14 could be CSX, BNSF, a variety of different things,
15 then you have an error. So it goes to the Belt. And
16 if I deliver something to CN in error, they'll
17 deliver it back to me, et cetera. So there are train
18 masters, or people who make mistakes, and we'll have
19 a car or two that go into a location in which we
20 have a agreement on how we get that car back and to
21 the customer.

22 VICE CHAIRMAN FUCHS: I see. But there's

1 never an independent business region that you take it
2 to Clearing? There's never an independent business
3 reason that you take it to Clearing?

4 MR. WALKER: Just the PIH or TIH.

5 CHAIRMAN BEGEMAN: That will conclude your
6 20 minutes.

7 (Laughter.)

8 MR. RIFKIND: Thank you.

9 MR. WEBSTER: Thank you.

10 MR. WALKER: Thank you.

11 (Pause.)

12 CHAIRMAN BEGEMAN: Please proceed.

13 MR. WARREN: Good morning. Matt Warren on
14 behalf of Canadian National. CN has a statutory
15 right to decide where it wishes to receive
16 interchange traffic so long as that designation
17 doesn't impose unusual, unreasonable, or impossible
18 operating hazards on the delivering railroad.

19 Here, CN's decision to cancel the
20 Spaulding Interchange and designate either Kirk Yard
21 or the existing CP-CN interchange at Clearing
22 doesn't--plainly passes that test. Because it's not

1 going to impose any unusual, unreasonable, or
2 impossible operating hazards to ask CP to deliver
3 cars to Clearing under the exact same terms and the
4 exact same conditions as it does so today.

5 It similarly isn't unusual or unreasonable
6 to ask for, as an alternative, a reciprocal
7 arrangement in which CP delivers cars to CN's yard,
8 and CN in turn delivers cars back to Bensenville.
9 Clearing is what we're talking about today because
10 that's where the negotiations were when--at the time
11 that this case was brought. While the designation
12 had been for Kirk, it was very clear in the letters,
13 as Vice Chair Fuchs pointed out, that at the time
14 that CP filed its case Clearing was what--where they
15 were negotiating a solution. So I'm going to focus
16 there today, but CN's position is that both Kirk and
17 Clearing are well within its broad discretion to
18 designate an interchange facility.

19 But I think I'd like to start by talking
20 about something that I think is undisputed--

21 CHAIRMAN BEGEMAN: I need to interrupt.

22 MR. WARREN: Go right ahead.

1 CHAIRMAN BEGEMAN: How is it that
2 Clearing--it's not a connecting line, so underneath
3 the statute?

4 MR. WARREN: Well, let's look at the
5 statute. So the statute 10742 says that, you know,
6 railroads are required to provide reasonable, proper,
7 and equal facilities that are within its power to
8 provide. The statute does not say that a rail
9 carrier is required to designate the facility on its
10 line. It says facilities that are within its power
11 to provide. And I think if you look through the case
12 law, I mean there's nothing in the statute. And if
13 you look at the case law, even the BN case that is I
14 think CP's only case that they cited for the--

15 CHAIRMAN BEGEMAN: But if you keep
16 reading, it says that "are within its power to
17 provide for the interchange of traffic between and
18 for receiving, forwarding, and delivering of
19 passengers and property to and from its respective
20 line and a connecting line of another rail carrier.

21 MR. WARREN: Right. And that's the
22 function of the Belt Railway, is to, you know,

1 facilitate interchange of traffic between its, you
2 know, owning Class I carriers. That's the function
3 of switch carriers all over the country.

4 So it's--

5 CHAIRMAN BEGEMAN: So it's your position
6 that the lines don't have to cross? So Rondout and
7 Spaulding are not the only options where CP and CN
8 cross paths?

9 MR. WARREN: Yes. Yeah, I mean I think
10 that's the only reasonable reading of the statute.
11 Because the statute does not say that a railroad may
12 only designate a facility on its line.

13 VICE CHAIRMAN FUCHS: Wasn't that the
14 exact issue, though, in the BN case? Where you had
15 B&O and you had the B&O CT and B&O had trackage
16 rights, and BN wanted to say that that was a
17 connection? And didn't the circuit court explicitly
18 say that that wasn't the case?

19 MR. WARREN: Well, I--I think the BN case,
20 the facts were flipped. So I think--

21 VICE CHAIRMAN FUCHS: Right.

22 MR. WARREN: And I think that's something

1 that's not pointed out by CP. But the BN case is a
2 case about whether or not a delivering carrier could
3 force the receiving carrier to exercise its trackage
4 rights to create a direct--

5 VICE CHAIRMAN FUCHS: But those were
6 non-contiguous railroads, right?

7 MR. WARREN: They were non-contiguous
8 railroads. However, the court didn't make--you know,
9 there's nowhere in the decision where the court
10 suggests that the fact that the railroads are not
11 contiguous is the essential factor in--

12 VICE CHAIRMAN FUCHS: Well, but they did
13 say that they didn't want to do anything to disrupt
14 the voluntary nature of trackage rights. In other
15 words, the court was very clear to say, I think on
16 multiple occasions, that they did not want to force
17 somebody to exercise trackage rights. And I'm just--
18 you know, the bare fact that the sole owner also holds
19 trackage rights over the intervening carrier presents
20 no reason to vary from the general rule announced in
21 Grand Trunk Western given the nonmandatory character
22 of trackage rights. And none of these decisions is

1 contrary to the principle announced by the ICC Review
2 Board. And it goes on and on and says: An instance
3 where the agency or reviewing court has found a
4 potential direct interchange based on a service under
5 a trackage rights agreement, the finding had been
6 premised on the trackage rights' holder's voluntary
7 acquiescence in the arrangement.

8 I mean, the entire decision is just
9 voluntary, voluntary, voluntary, and you can't force
10 someone to voluntarily exercise trackage rights.

11 MR. WARREN: Yeah, so I think--I think
12 that the fundamental--the bedrock of BN, that it is a
13 case where you have a delivering carrier trying to
14 force the receiving carrier to do something. So I
15 think that's important to keep in mind.

16 But also, I want to push on the notion
17 that trackage rights can never--you know, are always
18 voluntary in all circumstances. That's not the law.
19 If a rail carrier serves a shipper via trackage
20 rights, the shipper makes a request for service, the
21 railroad can't say I'm not going to serve you. I
22 don't feel like exercising my trackage rights.

1 You know, that's not--now I think--and I
2 think even if you actually read further down, while
3 we're talking about BN, later on in the decision, you
4 know, I'm looking at page--

5 VICE CHAIRMAN FUCHS: Well isn't the whole
6 point, though, that's where the non-contiguous
7 matters, is because then, you know, it's not that
8 they're not going to serve you, it's that they want
9 to serve you through--you know, where their points
10 are contiguous.

11 MR. WARREN: So I think that--

12 VICE CHAIRMAN FUCHS: Let me ask it
13 another way. Let me ask it another way. I know the
14 case law here is sparse, but can you cite any case of
15 an instance where the Board forced the use of
16 trackage rights in a way that we're talking about
17 here? I know the case law is sparse, but is there
18 any decision that says: Hey, listen, these trackage
19 rights form that direct connection and therefore this
20 interchanging must use those trackage rights?

21 MR. WARREN: I can't, but we do have a
22 sample size of one, when we're talking about the

1 Board. We have the Reading case. I would point out
2 that CP doesn't have any cases on the other side,
3 either. And I think that, you know, what we do have,
4 and that does bind the Board, is the statute. And
5 there's nothing in the statute that suggests that
6 identifying a switching carrier that is in fact
7 co-owned by both railroads is somehow a violation--

8 VICE CHAIRMAN FUCHS: Well why does the
9 co-ownership matter? Because in the B&O-CT, that was
10 100 percent owned by the B&O, and that made no
11 difference. So why does the co-ownership matter?

12 MR. WARREN: Well, I think the
13 co-ownership matters because I think CP's position is
14 that that's exactly what matters, is that it has to
15 be a point that is on CN's lines. That otherwise it
16 violates 10742 for CN to designate anywhere that's
17 not on its lines. So I think it's relevant to point
18 out that the Belt is actually co-owned by CN, and the
19 reason that CN and CP and CSX and BNSF and UP all
20 co-own the Belt is to effectuate interchange. These
21 are owning carriers that have rights, and those
22 rights include the ability to use the Belt for

1 switching arrangements.

2 So I think to say that all of those
3 arrangements are violating 10742, the railroads
4 don't have the ability to designate there, I don't
5 think is something that's consistent with the
6 statute.

7 BOARD MEMBER OBERMAN: Well just following
8 up on the statute, the statute says that it can
9 designate a place that has the power to provide. Is
10 it your contention that CN's 16.66 percent ownership
11 gives it the power to provide a receiving area at
12 Clearing, using the words of the statute?

13 MR. WARREN: Yeah, I think--I think that
14 CN--I think that all--I think that, you know, all
15 railroads have varying shares. I think as an owning
16 carrier, CN does have the ability to use the Belt for
17 interchange. And I think--

18 BOARD MEMBER OBERMAN: So to use it--

19 MR. WARREN: --today.

20 BOARD MEMBER OBERMAN: I didn't say to use
21 it. It says "to provide" it. In other words, does--
22 I mean, I don't know what your agreement says with

1 the Belt. I don't even know if it's public. But is
2 there something in that agreement which says if we
3 want to tell some delivering carrier to deliver our
4 stuff to Clearing, get out of the way everybody else
5 and make room for our deliveries? Do you have that
6 authority? It's not like you own the yard.

7 MR. WARREN: I, I think that as an owner
8 CN has the ability to enter into the Belt. I don't
9 know that the agreement says CN has the authority to
10 compel other carriers to enter into the Belt. I
11 don't think the agreement is that detailed. But I
12 think that what's important is that this is actually
13 what the railroads are doing right now. So I don't
14 think it's a question about CN's ability--CN's
15 authority to, you know, receive interchange traffic
16 at Clearing because that's what it's doing right now.

17 BOARD MEMBER OBERMAN: Well the statutory
18 language is "power to provide," and it's not been
19 addressed in any of the pleadings. I'd like to see
20 that addressed maybe based on the agreement. But I
21 find it somewhat problematical and, as Patrick says,
22 there's really much interpretation of the statute.

1 I have another question about the statute.
2 And it may be that I'm just the new kid on the block
3 so I don't understand it, but the statute says that a
4 carrier--it doesn't say a receiving carrier, it just
5 says a carrier--shall provide facilities. And then
6 it says: For receiving, forwarding.

7 The case law I've read, and all the
8 pleadings talk about the receiving carrier doing the
9 designating. Why is it under the statute that the
10 forwarding carrier doesn't have the statutory
11 authority to designate a place to deliver the traffic
12 to?

13 MR. WARREN: I think that's--while there's
14 not a lot of case law, one of the principles that has
15 come through, and I think the Reading case repeats
16 this, which is coming out of some of the older ICC
17 cases, is that the custom is that the receiving
18 carrier has the right to designate interchange
19 facilities. That's not something--you could imagine
20 a different timeline where that provision had been--
21 that language that goes, as far as I know, all the
22 way back to 1887, could have been interpreted

1 differently. But I think that the rule has been
2 built up by the ICC and the Board that the receiving
3 carrier has the right to designate a reasonable
4 point.

5 BOARD MEMBER OBERMAN: Is there any Board
6 or ICC decision which says we're construing the
7 statute to read out the word "forwarding"? Because
8 that's basically what you're saying; that based on
9 custom, it's only receiving and not forwarding, even
10 though the statute says forwarding.

11 MR. WARREN: I--I am--

12 BOARD MEMBER OBERMAN: I'm not normally
13 known as a strict constructionist, but I have a hard
14 time taking a word out of the statute.

15 MR. WARREN: Yeah, I think that--I don't
16 believe that there is any case that parses the
17 statute that way.

18 BOARD MEMBER OBERMAN: Do you think if
19 this Board said that a forwarding carrier has the
20 statutory right to designate a place to deliver
21 traffic to that that would be overturned by a court
22 on the basis of custom?

1 MR. WARREN: I don't think it would be on
2 the basis of custom. I think in that situation where
3 the Board would be effectively overturning precedent,
4 the Board would need to give grounds for doing that.
5 And I think the Board should be--

6 BOARD MEMBER OBERMAN: Can you cite some
7 precedent to me that says the statute only means
8 receiving and not forwarding?

9 MR. WARREN: No, I can't. And I don't
10 believe that exists.

11 BOARD MEMBER OBERMAN: Well then how would
12 we be overturning precedent if there isn't any? If
13 it's a case of first impression?

14 MR. WARREN: Well you would be overturning
15 the--you know, some of the statements of the law in
16 Reading, and going back to New York and Kansas City.

17 BOARD MEMBER OBERMAN: I found nothing in
18 any case law that says this statute only applies to
19 receivers. So I don't know what language we'd be
20 overturning, if you can cite it--that's why I asked
21 you the question. I may be missing the point here.

22 MR. WARREN: No, I don't think so. I

1 think the statute absolutely does apply to
2 forwarders. You know, I don't think that a railroad
3 can say I'm not--of course it may be relevant here--a
4 railroad cannot say, you know, I am not going to
5 deliver to your designated interchange point because
6 I don't like it, unless they have authority from the
7 Board that the designation is unreasonable. Because
8 I think that does impose--you know, that does impose
9 reciprocal obligations. But I think that the way the
10 statute has been interpreted is that--maybe it's out
11 of statutory interpretation--is that the receiving
12 carrier is the one that has the right in the first
13 instance to designate a point to receive traffic.

14 BOARD MEMBER OBERMAN: Oh, I would like to
15 see any law that you can cite to me from any
16 authority that's decided the issue that holds that
17 point. I'm not saying it doesn't exist, but no one
18 has cited it here. I haven't seen it, and to be
19 honest, I've asked within all of our very
20 knowledgeable people at the Board and nobody's been
21 able to answer that question, which is why I'm
22 wondering and why I'm asking it, except that it's a

1 word that is right in the statute. I have a hard
2 time reading it out.

3 VICE CHAIR FUCHS: And would you say that
4 in the RBMN case that, you know, not only does the
5 Board cite--you know, I think, New York, which cites
6 Kansas City, but the reason why there is that
7 receiving carrier right is, just from an overarching
8 policy standpoint--I think Marty raised an
9 interesting point on the statute--but on the
10 overarching policy standpoint, it's because we want
11 to facilitate private-sector solutions.

12 And so having each receiving carrier have
13 the right is a way to bring folks together. Is that
14 an overarching policy reason why, separate from the
15 exact statutory language, whether that might be a
16 good idea for receiving carriers to have that right?

17 MR. WARREN: Yes, I think that's
18 absolutely right. I think that there's a solid
19 policy justification for having--you know, not
20 having every single interchange decision be a pure
21 reasonableness decision up to the Board. That's not
22 the way the Board has interpreted, you know, these

1 aspects of its jurisdiction.

2 You know, the question is whether or not
3 the designation made by the receiving carrier is
4 something that imposes an unusual, unreasonable, or
5 impossible operating hazard.

6 CHAIRMAN BEGEMAN: Matt, at length in your
7 filings you talk about the lion's share of the work,
8 and everything that you have to do in order to
9 provide CP its deliveries, et cetera. Why did you
10 enter into the agreement eight years ago?

11 MR. WARREN: Well, I wasn't doing this
12 then. I think eight years ago it might have worked.
13 But, you know, the Board--

14 CHAIRMAN BEGEMAN: It went all the way to
15 Kirk Yard, 84 miles. I mean the distance hasn't
16 changed.

17 MR. WARREN: I think it may have been
18 better than the arrangements before, but, you know,
19 operating over the line over time I think, you know,
20 this has caused real issues.

21 And one thing that hasn't been addressed
22 yet, but I'd like to touch on, is that it's not

1 really disputed that the interchange at Spaulding
2 takes hours. It takes hours every day. It takes
3 hours every time.

4 CHAIRMAN BEGEMAN: And one of the
5 questions I had, if the location were moved to
6 anywhere else, would that eliminate all the
7 crossing--all of the blockages?

8 MR. WARREN: Yes.

9 CHAIRMAN BEGEMAN: That we're talking
10 about--

11 MR. WARREN: Now, it's just--

12 CHAIRMAN BEGEMAN: --at Spaulding?

13 MR. WARREN: Yes. So CN does no switching
14 at Spaulding other than interchange switching. It--

15 CHAIRMAN BEGEMAN: With CP?

16 MR. WARREN: With CP. If the interchange
17 is moved out of Spaulding, CN will not do any more
18 switching at Spaulding. That doesn't mean a train
19 will never be forced to stop there for some other
20 reason, and that's really what this whole thing is
21 about. And because it takes hours every night--CP
22 said it takes them an average of two-and-a-half

1 hours, which is a reasonable--

2 CHAIRMAN BEGEMAN: So CN in another
3 proceeding before us, and you're not, I believe,
4 directly involved in it but I need to ask it as the
5 party, talks at length about what they are doing, I
6 think it's called "the Sutton Project," and it
7 basically goes in the area just right around
8 Spaulding and north. The investments that CN is
9 incurring to make things more efficient, et cetera.
10 So why not--what could be done at Spaulding--if the
11 Board were to say, no, you need to continue to do
12 your interchanges there, what type of investments
13 would be required for you to make it more efficient
14 for operations? Has that ever been discussed?

15 MR. WARREN: Not much. So that project
16 ends this year--

17 CHAIRMAN BEGEMAN: Tell us about what--

18 MR. WARREN: --so the issue with Spaulding
19 and, you know, we've gone into it in detail in our
20 papers, is that not only is CN's line single tracked,
21 right there, so are all interchange operations going
22 back and forth, you can see the map that I think

1 both we and CP have in our filings, you can see that
2 that we connecting the CP-CN interchange tracks has to
3 go over the CN mainline. So while the interchange
4 operations are going back and forth, back and forth
5 for hours every night, sometimes for many hours, and
6 Mr. Albritton's verified statement pointed out that
7 the one night that we went out there to take pictures
8 and sort of document a typical day of interchange
9 operations, you know, CN finished in 90 minutes,
10 which is pretty good, as efficient as they get, and
11 CP got there at 10:10 p.m. and didn't leave until
12 almost 5:00 in the morning.

13 So this is--and during that whole period,
14 you have a number of times where Bartlett Road is
15 going to be regularly blocked by the trains coming
16 back and forth, and the mainline is blocked.

17 CHAIRMAN BEGEMAN: You are sort of losing
18 me. I mean, can you add some sidings, or do any type
19 of infrastructure investment at the Spaulding Yard to
20 make it more efficient?

21 MR. WARREN: So I'm not an engineer. I
22 think that there are issues there with physical

1 geography to create problems that make that
2 difficult. And in any circumstances, that would be
3 something that would take several years to implement.
4 And that would do absolutely nothing about the grade
5 crossing blockages.

6 Even if you could imagine that, you know,
7 CN could acquire the property to put in a second
8 mainline so trains would keep going, which would be a
9 massive investment that would require rebuilding the
10 interlockings, rebuilding the diamonds. There's been
11 no proposal put on the table for how that would be
12 done.

13 CHAIRMAN BEGEMAN: One of the things I
14 find interesting, and I appreciate your sensitivity
15 to the blockings and for the community, the village,
16 et cetera, but the Board has not been inundated by
17 calls from that community, unlike being inundated by
18 calls and actually filings from other communities
19 which are actually involved in the other proceeding I'm
20 talking about. So I guess I'm kind of curious to
21 know like why your focus is on Spaulding rather than
22 on communities that have more complaints to you

1 directly.

2 MR. WARREN: Well I think that if you are
3 talking about other communities on the J, then those
4 communities are in fact impacted by this. Because,
5 you know, one of the issues, and Vice Chair Fuchs
6 touched on this, is that because so much time is
7 occupied on the line for these interchange
8 operations, even if it's the middle of the night,
9 that is tying up capacity that can't be used to move
10 trains.

11 CHAIRMAN BEGEMAN: But the Board, as you--
12 I mean, I'm aware of it, as you all are, that the
13 Board spent roughly 10 years of oversight over the
14 EJ&E, which was unprecedented, requiring monthly
15 reports, and quarterly reports. So I appreciate that
16 you want to be fluid. That was the message that the
17 Board gave you when it approved the EJ&E--all before
18 our time. So I want you to be as fluid on that line
19 as possible, but at the same time I don't want other
20 carriers' operations to be hit unnecessarily and take
21 a bigger hit.

22 So why you haven't worked this out--I

1 mean, as Mr. Oberman said, it's clearly all about
2 money.

3 MR. WARREN: Well, so a couple of things.
4 One, you know, you referenced the EJ&E proceeding.
5 You know, as we pointed out in our papers, from that
6 reporting you can see that 70 percent of the
7 interchange block--the grade crossing blockages on
8 the three affected lines, you know, were due to
9 interchange operations over a two-year period, as
10 recent as we got.

11 So as far as--

12 CHAIRMAN BEGEMAN: Actually, why did you
13 stop at, I think it was 2016?

14 MR. WARREN: Because that was where the
15 data was available that the Board already had. So I
16 do think that, you know, I think--I wasn't involved--

17 CHAIRMAN BEGEMAN: So it's changed quite a
18 bit since 2016?

19 MR. WARREN: Well I don't think things
20 have changed. The volumes on this line haven't
21 changed significantly. CP put in a lot of evidence
22 that interchange volumes haven't really changed very

1 much. Overall train volumes haven't changed. So
2 it's possible that that 70 percent number is
3 different. But whether it's 70 percent, or 80
4 percent, or 60 percent, because of--you know, there's
5 really no disagreement that a substantial number of
6 blockages are happening, you know, both on the grade
7 crossings and on the mainline every single day
8 because of interchange operations.

9 CHAIRMAN BEGEMAN: So my last question is:
10 So if Spaulding were no longer the interchange, so
11 it's not just Spaulding crossings that would no
12 longer be blocked, but who all would be--what
13 crossings would be alleviated?

14 MR. WARREN: Well, I think that what
15 you're doing because, you know--I mean, it's a
16 bottleneck. So if interchange operations are
17 happening at Spaulding, trains can't get through and
18 they have to be held all the way down the J, all the
19 way up the J. So, you know, other communities the
20 Board may hear a lot more from, like Barrington on, For
21 example, trains may be held up and down the line,
22 particularly since there's some variability here.

1 You know, sometimes it takes 90 minutes; sometimes it
2 takes, you know, 5 hours. And, you know, that is
3 essentially, you know, forcing all traffic to stop on
4 the J until it's clear. So it does affect the
5 fluidity up and down the line.

6 BOARD MEMBER OBERMAN: I'd like to follow
7 up on a few points raised by the Chairman.

8 CP says that when you sought the Board's
9 approval for the acquisition of the EJ&E, one of the
10 representations you made was that it would result in
11 less use of the Clearing Yard. Do you agree with
12 that? I didn't go back and read the pleadings, but
13 I take CP's citation accurately. Do you?

14 MR. WARREN: Yes, that's correct.

15 BOARD MEMBER OBERMAN: And so when you
16 acquired the EJ&E, is that when you acquired Kirk?

17 MR. WARREN: Yes

18 BOARD MEMBER OBERMAN: So at that time,
19 you knew what you were acquiring and that's when
20 Spaulding--it was part of that whole plan when you
21 acquired EJ&E that you were going to consolidate the
22 seven interchange sites at Spaulding?

1 MR. WARREN: Correct.

2 BOARD MEMBER OBERMAN: Or was it later?

3 MR. WARREN: I believe that it all
4 happened--that it was all happening at the same time.

5 BOARD MEMBER OBERMAN: So the volume, you
6 say, has pretty much stayed the same. That's what CP
7 says. This was eight years ago. You say you've
8 started these negotiations a year ago, right?

9 MR. WARREN: Yeah.

10 BOARD MEMBER OBERMAN: Or you contacted CP
11 and said we want to change.

12 MR. WARREN: Yes.

13 BOARD MEMBER OBERMAN: So in the seven
14 years between the time you started using Spaulding
15 for interchange and last year, when did you discover this
16 was a problem?

17 MR. WARREN: I think over the last few
18 years that CN has just realized that, as it's been
19 looking for ways, in responding to calls to improve
20 fluidity on the J, they identified this as a
21 bottleneck and something that needed to be changed.
22 And while it is true that these were the arrangements

1 that were put into place shortly after EJ&E, the
2 Board specifically rejected calls in the EJ&E
3 transaction for a condition that would require CN to
4 keep all of its interchange locations in the same
5 place without mutual consent. The Board said no,
6 that that would be anticompetitive and it would
7 eliminate CN's ability to make changes in the future.

8 BOARD MEMBER OBERMAN: I'm just trying to
9 figure out what precipitated this. Eight years, or
10 seven years seems like a long time for a railroad
11 operator to figure out there's a problem. If there
12 was a problem, wouldn't you have known it seven years
13 ago, or six years ago?

14 And what I'm really trying to get at is
15 the real reason that's precipitating this change. Is
16 it that it took you seven years to figure out there
17 was a problem? Or is it something else that CN now
18 wants to do with its railroad--which I'm not
19 suggesting is illegitimate, I'd just like to get the
20 actual motivation for this.

21 MR. WARREN: So all I can say is what I
22 know from my discussions with CN, which is that this

1 is something that they've realized over the last
2 several years that Spaulding, you know, was causing
3 issues.

4 But I would say that I think the Board
5 made this clear in Reading, the Board's role here is
6 not to figure out whether or not CN has valid
7 business reasons for the change that it's proposing.
8 You know, CN does not have the burden here. It is CP
9 that has the burden here.

10 BOARD MEMBER OBERMAN: I'm not suggesting
11 that. What I am suggesting is, I'd like to, just as
12 I suggested to the previous party, I'd like to have
13 candor here. They suggest that the reason you've
14 made--you want to make this change now has nothing to
15 do with the problems, but has to do with the fact
16 that you want to start running even more trains on
17 the EJ&E, which is something Barrington brought to
18 our attention a few weeks ago.

19 So I'm not saying whether that's a valid
20 or not a valid decision. I am saying I'd like to
21 have candor here as to what's going on.

22 MR. WARREN: Yes. Well, and you can have

1 candor from me right now because I have had specific
2 discussions with CN about this. CN has no plans to
3 change the number of trains it is running over the J
4 based on the Board's decision here. That is not what
5 is motivating this decision. This is a decision
6 about fluidity. And I would note that CP doesn't
7 really cite anything. They cite a study that was,
8 you know, produced in Barrington, which actually
9 said that CN was producing what was expected to be
10 lower volume growth over the J than it had previously
11 anticipated. So that's something that CP has thrown
12 out there, but they don't have any evidence for it--

13 BOARD MEMBER OBERMAN: Well, they have--

14 MR. WARREN: --that is not why we are
15 doing this. We are not doing this because there's a
16 secret plan to run a bunch of trains. We're doing
17 this because the line is tied up and we can't get the
18 trains that we currently have, and other trains that
19 we do think are coming because volume growth is
20 happening and, you know, we've got to be ready--ready
21 for, you know, organic volume growth when it comes.

22 But there's not a bunch of trains that CN

1 has in its back pocket that it's trying to shove
2 across the line.

3 BOARD MEMBER OBERMAN: I think both CP and
4 Barrington cited the filing with the Corps of
5 Engineers about adding nine trains. So it wasn't
6 something they made up.

7 MR. WARREN: And I believe that's the
8 volume projections that have now gone down. But
9 that's not what's motivating this decision.

10 BOARD MEMBER OBERMAN: Well I accept you
11 saying that it's not motivating them, but you are not
12 saying that you're not planning to increase the
13 volume of trains? You're not saying that?

14 MR. WARREN: I am saying that CN is not
15 planning to change the volume of trains on this line
16 as a result of the Board's decision. That is not--
17 you know, and I do--

18 BOARD MEMBER OBERMAN: You qualify it by
19 saying "as a result of the Board's decision." Are
20 you planning to increase the number of trains on this
21 line? I guess we can decide what the motivation is,
22 if we think it's relevant. You may be right, it's

1 not; I'd just like to get the facts. Are you
2 planning to increase the number of trains on this
3 line?

4 MR. WARREN: I think that, you know, CN
5 can--you know, I'm being cautious because I don't
6 want to bind CN for all time, because I don't think
7 that CN, you know, needs to be bound for all time.
8 You know, I think that if CN had the obligation--

9 BOARD MEMBER OBERMAN: Let me qualify the
10 question. I'm not asking you to bind it for all
11 time. As of today, are you planning to increase more
12 trains?

13 MR. WARREN: No. CN does not have, you
14 know, any plans to increase trains over the line.
15 Yes.

16 BOARD MEMBER OBERMAN: Alright, let me
17 shift gears here for a minute. In your--I think you
18 signed the letter of July 12th--yes--you have a
19 discussion, one of your July 12th letters, of the
20 Burlington case. The way I read your argument is
21 that, I want to see if I read it correctly, is that
22 your contention is that Burlington stands for the

1 proposition that the Board can require the delivering
2 railroad to pay the trackage costs for an
3 intermediate railroad in a fact situation like what
4 appeared in Burlington. Is that your contention that
5 that's what that case stands for?

6 MR. WARREN: I--I think so. The only--my
7 only quibble is that I think that what the case
8 stands for is not so much that the Board can compel,
9 but that it's not unreasonable for a carrier to, you
10 know, to ask for deliveries to an intermediate
11 switching carrier under circumstances where that
12 means that the delivering carrier pays.

13 BOARD MEMBER OBERMAN: Well, but the only
14 thing that has the delivering carrier paying is the
15 custom that we were talking about before.

16 MR. WARREN: Correct. And I think--I
17 think in the Burlington case there was evidence there
18 that the switch--there was evidence that prevailing--
19 again, prevailing customs in Chicago were that the
20 delivering carrier was paying the intermediate
21 switching fees.

22 BOARD MEMBER OBERMAN: Yeah. I'm trying

1 to figure out where "custom" becomes law. And that's
2 why I asked the question. So do you contend that we
3 have the authority to tell--well let me ask it this
4 way.

5 Is it your contention that we have the
6 authority to designate Clearing as the interchange,
7 and to say to CP you pay the entire trackage rights?

8 MR. WARREN: I think what the Board would
9 have authority--the Board doesn't designate anything.
10 What the Board would say is that CP has not shown
11 that CN violated the statute by saying that it wants
12 to accept cars at Clearing where carriers are already
13 accepting those cars under the terms of today. So
14 the Board does not need to issue an affirmative order
15 saying that we designate Clearing, or we designate
16 Kirk. The Board, you know, the only way the Board,
17 you know, would act here to affect the interchange
18 arrangements would be if the Board comes in and says,
19 yes, CP is correct that CN has violated the statute
20 and therefore this designation is unlawful.

21 Otherwise, CP has responsibility under
22 10742, as a forwarding carrier, to comply with CN's,

1 you know, designation of where it wants to receive
2 interchange traffic.

3 BOARD MEMBER OBERMAN: The effect of the
4 Board saying that CN has the statutory authority to
5 designate Clearing means that we would, in effect,
6 which is I think the way you're reading Burlington,
7 requires CP to pay the trackage costs, or switching
8 costs, wouldn't it?

9 MR. WARREN: Yes.

10 BOARD MEMBER OBERMAN: Let me ask you the
11 pleading question I asked of Mr. Rifkind. Do you
12 think under the current state of the pleadings in
13 this case we have the authority--I don't mean
14 ultimate authority, but based on what's been asked of
15 us--to issue an order now declaring Clearing to be
16 reasonable under 10742? Or do you think you have to
17 file your own cross-complaint, or an amendment, or
18 something?

19 MR. WARREN: I don't think we have any
20 obligation to file any kind of a complaint here. We
21 have designated Kirk and we've designated Clearing,
22 and it's CP's burden to obtain an order from the

1 Board.

2 BOARD MEMBER OBERMAN: Well at the time CP
3 filed it's case, you had only designated Kirk. So
4 they asked for a declaratory order that that's
5 unreasonable. Do you think now we could issue an
6 order saying Clearing is also unreasonable, based on
7 the pleadings? Or reasonable, either way? Because
8 the only thing we know about the designation is the
9 letters back and forth. Do you think those are
10 pleadings?

11 MR. WARREN: I think those are pleadings.
12 You know, this is what I would say. This is what I
13 think the Board has the authority to do now, and
14 should do now based on the record. You know, the
15 Board should deny CP's request for a preliminary
16 injunction.

17 So there is no question here that there is
18 no irreparable harm. You know, CP actually came in
19 as one of the many letters in this case came in on
20 May 6th, and said as an alternative to our request
21 for an injunction for interchange at Spaulding we
22 want you, Board, to order CN to pay the costs at

1 Clearing, you know, until further order of the Board.

2 BOARD MEMBER OBERMAN: I understand that.

3 I asked that question.

4 MR. WARREN: You did. And CN in that, you
5 know, and I think the other July 12th letter we
6 filed, too, to try to separate them, CN has accepted
7 that offer. Now that's incredibly generous, I
8 think, because money damages by definition aren't
9 irreparable harm. So, you know, who is paying the
10 fees at Clearing is never something that could
11 justify an injunction. But CN is willing to accept
12 the very terms that CN itself laid out, as you
13 pointed out in your back-and-forth. CP, you know,
14 may be trying to waffle on that, but I think the
15 Board--

16 BOARD MEMBER OBERMAN: You heard CP say
17 that's not their offer. Their offer--

18 MR. WARREN: You know, I did hear them say
19 that. I also saw the letters that are in the record
20 where, you know, CP's VP of Operations said that they
21 are willing to go to Clearing so long as CN pays. I
22 saw the verified statement where CN--apologies, CP

1 said that delivering to Clearing is acceptable so
2 long as CN pays. And I saw their May 6th letter in
3 which they said as an alternative to the injunction
4 for continued interchange at Spaulding,
5 alternatively the Board--you know, if the Board needs
6 to order CN to pay our fees at Clearing.

7 So now they're saying that that's not--
8 that they have issues with that. But at some point
9 the Board needs to decide the preliminary injunction
10 and let this interchange be moved out of Spaulding.

11 BOARD MEMBER OBERMAN: Do you, going back
12 to the state of the pleadings, don't you think this
13 is more than a formality? If CN formally designated
14 Clearing, and CP wanted a declaratory order that
15 Clearing was or was not reasonable, don't you think
16 the rest of the industry should be on notice, just as
17 Bartlett had a right to come in here and say this is
18 either good or bad for us? Might not other railroads
19 in the Chicago Terminal want to come in here and say,
20 no, no, Clearing is a bad idea. It's going to cause
21 congestion and screw up our operations, too? And
22 there's been no notice of that, and no ability for

1 anybody else to be heard.

2 So that's one of the reasons I asked the
3 question of whether as a matter of procedure we
4 should just plow ahead on something that's not really
5 in the declaratory petition.

6 MR. WARREN: I mean, I think that the -- I
7 do think that the industry has been on notice from
8 CN's very first filing in this case in response to
9 the preliminary injunction that explained that
10 Clearing is actually where the compromise that the
11 parties seem to have settled on--

12 BOARD MEMBER OBERMAN: You think all--just
13 one final question. Do you think all of the other
14 railroad lawyers out there could read these letters
15 and say we'd better dip our toe in this proceeding,
16 based on these informal letters? Is that the way
17 the practice works?

18 MR. WARREN: Well, I mean I think this
19 happened before the letters. I mean, this is--this
20 is--now it's not--I agree, it is not in the Petition
21 for a Declaratory Order. That is correct. You
22 know, it's sort of buried there in the verified

1 statement. But the Declaratory Order is focused on
2 Kirk. But I do think that our pleadings have made it
3 pretty clear that, you know, that Clearing is--you
4 know, that that--we are--what we're asking the Board
5 to ratify is, you know, our, you know, the compromise
6 that we've already--that we thought we were very
7 close to reaching with CP, which was a compromise
8 where CN would take 100 percent of the costs for
9 delivering cars directly to CP at Bensenville. And
10 then essentially split the costs for getting them
11 back to Kirk.

12 BOARD MEMBER OBERMAN: You can't--you have
13 no ability to use that Metra CP line to go to
14 Bensenville for the straight shot, rather than going
15 all the way to Franklin Park?

16 MR. WARREN: I'm going to phone a friend.
17 Yes, no, no. So, so, I think--I think it was
18 accurate, you know, during CP's argument to say that
19 as a practical matter the cars could go to
20 Bensenville, CN will take them partway. They will
21 give them to the Harbor Belt, and then CN will pay
22 those switch fees to take them up to CP's yard.

1 CHAIRMAN BEGEMAN: Could you repeat what
2 you said, for the record?

3 MR. ALBRITTON: I said that CN does not
4 have operating rights across--CN does not have rights
5 to run across Metra Main at Spaulding. Bill
6 Albritton.

7 CHAIRMAN BEGEMAN: I interrupted both of
8 my colleagues. I just have a quick question. We're
9 hearing a lot about Kirk Yard. There's Spaulding.
10 Now suddenly there was Clearing Yard. Before
11 Clearing Yard, there was Glenn Yard, which has been
12 taken off the table. What happened to Glenn Yard? It
13 seems like you're--

14 MR. WARREN: So I think we did address--I
15 think we explained in one of our pleadings that Glenn
16 Yard--

17 CHAIRMAN BEGEMAN: No longer has capacity.
18 Why did it before, and now it doesn't?

19 MR. WARREN: Yeah, and one of the reasons--
20 -I mean you can look at this map. There's, you know,
21 yards all over the place. One of the reasons we're
22 talking about Clearing, we've narrowed down to

1 Clearing, is because that's what CP indicated was the
2 most acceptable to it, with the sole issue of we want
3 CN to pay 100 percent of the costs.

4 So that's why we're talking about
5 Clearing. There may be, you know, other potential
6 interchange points out there. You know, I think
7 Rondout is far to the north and would not really
8 work from CN's perspective. But in general, the
9 reason we're talking about Clearing is because
10 Clearing is the place where, you know, CP has said,
11 as quoted many times in our pleadings, that it is
12 willing to take its cars to Clearing, and that that's
13 acceptable.

14 And the other thing I do want to make sure
15 is out there, we are talking about, in the context of
16 Clearing Yard, and in the context of the Belt
17 Railway, really a tiny amount of traffic. We're
18 talking about, you know, the average cars that CP
19 delivers to CN at Spaulding every day is about 30
20 cars. So, you know, well less than half a train.

21 As was explained in detail, CP is already
22 running trains into the Belt to Clearing, two a day.

1 Some days, it might be able to fit the cars to the
2 train. Some days it won't. But on the days it
3 won't, it's a complete wash. It's not any additional,
4 you know, it's not any additional cost for them
5 because every day they don't have to run the train to
6 Spaulding anymore. Because CN will be delivering
7 cars directly up to Bensenville. So they will lose
8 that job every single day.

9 Now on some days it will be a wash,
10 because they'll maybe need to run an additional train
11 down to Clearing, but on other days it's just a bonus
12 because they get to pack the trains onto the back of
13 a--

14 BOARD MEMBER OBERMAN: They say they don't
15 pay to make that run to Spaulding. They don't pay
16 Metra--it's a wash.

17 MR. WARREN: Yeah, they don't pay Metra.
18 So to be clear, what is a wash is the discussion
19 about is crew and locomotive costs. Crew and
20 locomotive costs under the arrangement that CN has
21 put on the table, which we think is a compromise that
22 goes way past 50 percent, you know, CP would have, we

1 believe, you know, without having great insight into
2 their operations, but just looking at it
3 objectively, they are going to have less crew and
4 locomotive costs because instead of having to have a
5 job every day, they will only occasionally need to be
6 running an extra train.

7 So some of those days, that won't happen.
8 And those cars that are coming into the Belt, that
9 switching fee isn't for nothing. You know, it's
10 going to be significantly less work for them to come
11 in with a train. They come in. They drop it. The
12 Belt can hump it to block it. You know, the Belt can-
13 -you know, you handle that piece of the work, as
14 opposed to at Spaulding where, as we've documented,
15 often even these relatively small number of trains,
16 because the yards are so small there, have to get
17 broken and put in the cut here, and put in the cut
18 there, and put in the cut there, and time needs to be
19 taken with them.

20 VICE CHAIRMAN FUCHS: And I want quickly
21 touch on the Chicago congestion issue, because I
22 think it's an issue that all of us take seriously.

1 You know, I think I saw that Clearing Yard moves
2 about 9,000 cars a day. So would it be fair to say
3 that if these cars were added to Clearing Yard, we're
4 talking about a less than 1 percent increase in the
5 overall volume of traffic that goes into Clearing
6 Yard?

7 MR. WARREN: I think I can do that math,
8 so, yes.

9 VICE CHAIRMAN FUCHS: Okay, but what I
10 mean by the 9,000, it's not to say that all 9,000
11 come in and out, correct?

12 MR. WARREN: I think that's right. And I
13 don't know if that 9,000--I don't know if that's the
14 amount that are in Clearing Yard. I think I thought
15 Clearing was more in the couple thousand, two
16 thousand range.

17 VICE CHAIRMAN FUCHS: Okay.

18 MR. WARREN: But regardless, in the
19 context of the Belt at Clearing, this is a blip.

20 VICE CHAIRMAN FUCHS: I was going to ask
21 that. So on the tracks that come into Clearing on
22 the route that CP would be using, or I guess how

1 many--there's CP traffic, but how much other traffic
2 is there? I guess, what percentage of traffic are
3 we talking about, assuming that there was another
4 train added? How many trains are coming into
5 Clearing on that route?

6 MR. WARREN: I don't have that
7 information. But I do know that whatever the number
8 of trains is, what we are talking about is, on some
9 days there will be one more.

10 VICE CHAIRMAN FUCHS: Okay. And I just
11 want to--because, Matt, you mentioned the sample
12 size, and I just want to make sure that we get it
13 absolutely clear on the record. I think on your May
14 20th filing, you said for RBMN that the Board did
15 not hesitate to order a carrier to deliver
16 interchange traffic to the receiving carrier
17 designated interchange point, despite the delivering
18 carrier's protest that those deliveries required it
19 to operate 30 miles over the receiving carrier's own
20 tracks.

21 But wouldn't it be more fair, more
22 accurate to say that the Board didn't order anything?

1 It just said that NS didn't meet its burden of
2 proof, mostly because NS was focused on whether or
3 not it needed to consent?

4 MR. WARREN: Yes. I think that's more
5 accurate. I mean, there is some language at the end
6 of the Reading case instructing both carriers to
7 comply with their 10742 obligations. But I think
8 it's accurate to say that that case was a case
9 holding that the petitioner didn't meet its burden,
10 as opposed to one where the Board itself undertook to
11 order an interchange.

12 VICE CHAIRMAN FUCHS: And it's a little
13 bit different because, you know, in that case the
14 receiving carrier had built out their infrastructure
15 for this purpose in collaboration I think with NS,
16 NS actually went by there. Whereas, you know, CP
17 doesn't go by Kirk. And they were under discussions
18 for that point. And of course it was a shorter
19 distance.

20 Would you say it's fair to say that those
21 are all distinguishing factors from the Kirk Yard
22 case? Not to say that I'm asking to say Kirk's

1 unreasonable, but just to say those are
2 distinguishing factors.

3 MR. WARREN: I think so. They do go very
4 near Kirk. I think they don't--you know, and
5 obviously they go to Clearing. I think the other
6 real distinction here is that in the Reading case
7 there were no allegations or suggestions that the
8 existing interchange point was problematic. It was
9 just a pure situation in which the short line said,
10 you know, I don't want to interchange here. I want
11 to interchange here instead.

12 So you didn't have--you did not have, you
13 know, them coming and say I expect what's consistent
14 with what they've filed in this case about the issues
15 this creates for them. And you don't have any of the
16 mainline blockages that we've detailed.

17 VICE CHAIRMAN FUCHS: And I want to pick
18 up on--I appreciate that. I want to pick up on
19 Marty's textualist reading of 10742 where he--you
20 know, and he mentions the lines about receiving,
21 forwarding, and delivering of passengers and
22 property.

1 But, you know, in terms of if we're trying
2 to figure out what the statutory connection is to the
3 right of the receiving carrier, are we right to focus
4 on "that are within its power"? In other words, is
5 that really what we're talking about, the receiving
6 carrier, if it's within its power? So if something
7 weren't in its power--you know, that's where the
8 receiving carrier gets that right?

9 MR. WARREN: Yeah, I think that's right.
10 And I mean the statute goes back, you know, to the
11 Interstate Commerce Act, and I think the original
12 motivation was at the time there were concerns that,
13 I think it says in the legislative history about, you
14 know, how carriers were freezing out other carriers.
15 They would basically say I'm going to interchange
16 with you and not with you. And Congress said, no,
17 you've got to interchange with everybody

18 And I think "within power to provide" is,
19 you know, a reasonable--

20 CHAIRMAN BEGEMAN: Help me out here,
21 though. How is it that you have the power to
22 designate a third-party railroad?

1 MR. WARREN: Well, I --

2 CHAIRMAN BEGEMAN: I'm not convinced.

3 MR. WARREN: I think that we have--it's
4 within our power. It's not a third-party railroad,
5 because it's a railroad that we own. So we have the
6 right to go there and to use it. And I think if the
7 Board were to hold that--

8 CHAIRMAN BEGEMAN: Well all the carriers
9 own it, or most--

10 MR. WARREN: Well, not all--

11 CHAIRMAN BEGEMAN: I know not all of them.

12 MR. WARREN: So, you know, some other
13 carrier trying to come up with some -- you know, KCS
14 is not an owner. KCS, you could say that's not
15 within our power to go there.

16 VICE CHAIRMAN FUCHS: So you think the
17 ownership is the decisive factor?

18 MR. WARREN: Well, I think the ownership
19 is the decisive factor because that is what gives CN
20 the rights. Now I think in another situation you
21 could have a short line where a railroad decided
22 that, you know, for its business purposes it wanted

1 to reach an agreement with the short line to accept
2 interchange traffic. I think that would be within
3 the railroad's power to provide, and another railroad
4 couldn't say unless it could prove some other bounds
5 of unreasonability that you're not being reasonable
6 because you're not literally identified--you're not
7 literally asking us to put the cars on track that you
8 own, but instead are saying actually I've made an
9 agreement for you to put the cars right here.

10 BOARD MEMBER OBERMAN: If you had an
11 agreement with that yard, then it would, quote, under
12 the contract have the power to provide the facility.
13 That's why I asked you about your agreement with the
14 BRC.

15 I mean, you sound like all of the owners,
16 even though you have varying percentages, have joint
17 and several custody of this property and full use of
18 it. If that's true, that would be one thing. But I
19 don't know that. That's not in the record, and so I
20 think it is, as the Chairman said, a third-party
21 railroad for the moment. It's a separate corporate
22 entity. You're not trying to pierce the corporate

1 veil here, are you?

2 MR. WARREN: No. No, I think that's
3 right, that it's a separate corporate entity. But,
4 you know, I do believe that all owning railroads, you
5 know, have similar rights that don't depend upon
6 their percentage of ownership.

7 VICE CHAIRMAN FUCHS: And you--so you all
8 do not have trackage rights to Clearing Yard to
9 Bensenville, right?

10 MR. WARREN: To--

11 VICE CHAIRMAN FUCHS: Clearing to
12 Bensenville.

13 MR. WARREN: Yes, CN has the ability to
14 get to Clearing, for sure--

15 VICE CHAIRMAN FUCHS: No. Can you go from
16 Clearing--I get that you can do the IHB route. Can
17 you go from Clearing to Bensenville?

18 MR. WARREN: I don't believe we would
19 have--we could get there. I don't think that we
20 could do over the route that CP would take.

21 VICE CHAIRMAN FUCHS: And so that line,
22 it's not your line. It's a respective line in a

1 connecting line of another carrier, so it's not your
2 line. And it's not really CP's line, either, right?
3 I mean, so does that matter--

4 MR. WARREN: But I think the statute is
5 about providing interchange between your line and
6 their line. So it's coming--you know, traffic is
7 coming from CP's lines to CN's lines, or vice versa.

8 VICE CHAIRMAN FUCHS: And it's within the
9 power to provide. And so I'm just looking at a
10 separate BNSF case, actually, and it's the BNSF
11 TP&W case. And that's where the Board has, on page
12 10 of that case--and I don't know if you have that
13 with you or not; I don't mean to spring it on you, by
14 any means--

15 MR. WARREN: I don't believe I do.

16 VICE CHAIRMAN FUCHS: Well I'll just
17 quickly mention what is interesting. Because you
18 kind of mentioned that the power to provide is key I
19 think to the receiving carrier's right, or a key
20 part of the statute generally, and the Board has a
21 little discussion on, you know, what's within the
22 power to provide.

1 And one of the things--so basically I
2 think what happened in that case is that there was a
3 connection between BNSF and the TP&W, and there was
4 this bridge. And my understanding is the bridge just
5 went away, got destroyed or something, and it was
6 never replaced, right?

7 So the only connection between those two
8 was over the P&PU, I believe. And I just want to
9 kind of touch on this line and get your reaction to
10 it, because it strikes me as not particularly
11 helpful to your point.

12 When the TP&W Bridge was intact, there was
13 such a direct physical connection, and BN was
14 obligated to provide TP&W with free direct
15 interchange via that route, which BN did until the
16 TP&W Bridge was destroyed.

17 And, you know, I think during that time
18 there was also a connection over a third-party
19 carrier. Does that to you show that the Board viewed
20 at the time, and has viewed, that if there is a
21 direct connection between the carriers that that
22 basically gets primacy? And that's the obligation

1 that a carrier would have?

2 MR. WARREN: I don't think so, in part
3 because we are in some ways grasping at straws from
4 the very few cases that have been decided here. And
5 I don't think that it's consistent with the general--
6 with either the statute or the way that two railroads
7 typically interchange traffic to say that things have
8 to be right at the interchange point. If there's a
9 direct connection, that's it. It doesn't matter what
10 problems it causes for anybody else, it has to happen
11 there.

12 So I think that in cases where--I think it
13 becomes dangerous to, you know, try to pull out facts
14 from cases that weren't actually addressing that
15 issue.

16 VICE CHAIRMAN FUCHS: I appreciate that.
17 But isn't it also dangerous to--you know, there's
18 trackage rights agreements everywhere in the country
19 at all times, right? And in voluntary negotiated
20 agreements the Board, you know, is really hesitant to
21 insert itself in. You know, in terms of
22 interchanges, every case shows that the Board just

1 wishes that the parties came to resolution, as we
2 wish here today. And, you know, one of the things
3 that may be dangerous about the position that under
4 10742 that a carrier has to voluntarily exercise
5 its trackage rights agreements is that could be very
6 disruptive to all the trackage rights agreements
7 throughout the country in that, you know, what's to
8 stop all the receiving carriers in all these
9 different arrangements to say, listen, we've been
10 interchanging at this point, but I'm going to want to
11 interchange at this point and you have to use your
12 trackage rights that you've negotiated under
13 completely separate pretenses.

14 Doesn't that disrupt all the voluntary
15 negotiations of those previous trackage rights
16 agreements?

17 MR. WARREN: I think when the Board
18 decides what is reasonable, and its practice is
19 typically to be very focused on the particular
20 facts and circumstances before it, for example, in
21 their unreasonableness practices cases.

22 So I don't think that the Board, you know,

1 would, however it decides this case, be setting forth
2 a rule of law that trackage rights can never be used,
3 or trackage rights can always be used. It would be
4 making a ruling based on the facts here, and the
5 facts here show that Clearing is not something that
6 CN pulled out of a hat. Clearing is where the
7 parties are interchanging today.

8 They are already interchanging almost
9 every day significant volumes of cars going into
10 Clearing. And, you know, the proposal to move the
11 interchange point from a place where it's causing
12 clear problems to Clearing is a reasonable one,
13 particularly since, you know, if CN has the ability
14 to go to Kirk instead. So Clearing is the
15 compromise.

16 VICE CHAIRMAN FUCHS: But don't you agree
17 that the older BN case, that the language is very
18 clear that the exercise of trackage rights is
19 voluntary? Right? I mean, would you concede that?

20 MR. WARREN: I think that that--I don't
21 believe that that is really essential to the court's
22 holding. I do agree that that appears there, but I

1 think the context--you have to remember what the
2 context of that case was, which was a situation where
3 a delivering carrier was saying I don't like the way
4 the receiving carrier wants to receive traffic at the
5 intermediate switching yard. I want them to use
6 their trackage rights to make a direct interchange.

7 VICE CHAIRMAN FUCHS: Right.

8 MR. WARREN: And the court said, no, we're
9 not going to make them do that. And I think, you
10 know--

11 VICE CHAIRMAN FUCHS: But they said that
12 because they don't want to mandate people to use
13 their trackage rights. And here, you're asking us to
14 mandate people using their trackage rights.

15 MR. WARREN: See, I'm going to disagree
16 with you. I don't think--I think if you go further
17 down in the decision, you know, 193, so the--you
18 know, they address a final argument, which they say
19 petitioner's final argument is that even if there's
20 not a direct interchange by trackage rights, you
21 know, the B&O has the power to establish such an
22 interchange and therefore has the obligation to do

1 so. And the court doesn't then say, well that's
2 ridiculous because nobody could ever compel someone
3 to use trackage rights.

4 What the court says is, oh, we would be
5 inclined to credit this argument if petitioner could
6 show that the current interchange facilities
7 available were unreasonable and improper or unequal.
8 So the court is not holding that trackage rights
9 agreements, you know, that it is simply impossible to
10 ever compel a voluntary exercise of trackage rights
11 agreements. It's holding under the facts here,
12 under the facts here, we--

13 VICE CHAIRMAN FUCHS: No, it's holding--go
14 on.

15 MR. WARREN: --then and that--

16 VICE CHAIRMAN FUCHS: The reason why they
17 get there is because it's noncontiguous, right? If
18 it was contiguous, do you think the court would even
19 address this within the power to provide?

20 MR. WARREN: I think it's hard--I don't
21 know. We're speculating about a decision 25 years
22 ago.

1 VICE CHAIRMAN FUCHS: Right.

2 MR. WARREN: So I think that it is true
3 that under the facts here it was that the railroads
4 were noncontiguous, but I don't think that that means
5 that we can assume that had the railroads been
6 contiguous the entire case would have been decided
7 differently. Because fundamentally it is a case
8 about when a carrier has the power to provide two or
9 more options for interchanging traffic, each of which
10 is independently reasonable, that receiving carrier
11 gets to pick which way it wants to receive.

12 So I think that's the fundamental holding
13 of the case.

14 BOARD MEMBER OBERMAN: Just to follow up a
15 couple of points. So following up on Patrick's
16 raising the question about the precedent, if we order
17 Clearing, you seem to be suggesting that if the Board
18 based its decision on the peculiar facts here that it
19 wouldn't establish--it wouldn't open up all of these
20 Pandora's boxes of other trackage rights agreements
21 around the country. Is that essentially what you're
22 saying, right?

1 MR. WARREN: I think it would depend on
2 how the Board wrote the decision, but I think that,
3 yes, the Board needs to address the particular
4 circumstances here and its decision would be based on
5 those facts.

6 BOARD MEMBER OBERMAN: So would one of the
7 bases for finding that Clearing--that (a) you had the
8 power under 10742 to designate Clearing, and that
9 Clearing is a reasonable place. Given the facts of
10 this case, would that turn at least in part on the
11 problems of blocking roads in Spaulding?

12 MR. WARREN: Yes. I think that's
13 absolutely something that the Board can consider as
14 it considers what's reasonable. And particularly
15 whether it's reasonable to continue to force CN to
16 receive traffic at Spaulding.

17 BOARD MEMBER OBERMAN: Right. Well, I
18 just wonder if you should be careful what you ask
19 for, as to how much weight we should put on road
20 blockages in communities in issuing orders about
21 track usage, because the people at Barrington haven't
22 given up. And I don't think the people in Elsdon are

1 going to give up, either, in the future. So I'm
2 trying to figure out, you know, how far you want us
3 to go on this.

4 MR. WARREN: So, you know, I'll actually
5 quote counsel for CP. I think, you know, he said
6 it's incumbent on railroads to do what they can. So
7 this is a case about CN trying to do what it can. It
8 cannot make every community on the J happy. That's
9 not possible--

10 BOARD MEMBER OBERMAN: Well it can, if
11 money were no object.

12 MR. WARREN: Well I'm not sure even if
13 money were no object everyone would be happy. But I
14 do--but this is a situation where you have
15 interchange operations happening in the middle of the
16 community that are not only causing issues for that
17 community, but are causing issues for the fluidity of
18 the entire rail line. If those move to a yard,
19 that's going to make things better. It's not going
20 to make it perfect. It doesn't mean that, you know,
21 folks aren't going to, you know, keep calling to
22 report concerns about grade crossings, and that

1 railroads are going to try to deal with them, but
2 this is a concrete step that CN is trying to take,
3 and it should be allowed to take it.

4 BOARD MEMBER OBERMAN: So a couple of
5 other questions. Are you now giving up on Kirk and
6 focusing all your efforts on Clearing?

7 MR. WARREN: I think we are--I wouldn't
8 say that we're giving up on Kirk. Because I think
9 that Kirk--you know, I think that as a--we understand
10 that between Kirk and Clearing that CP would prefer
11 Clearing. And Clearing is fine with CN. So for that
12 reason we aren't pressing Kirk. We're not going to
13 withdraw the designation of Clearing and say, ha, ha,
14 you have to go to Kirk.

15 I think that that is--but--so I do think
16 that it's important for the Board to recognize that
17 Kirk is in fact a reasonable designation because that
18 may be a way to cut through some of the
19 complications about deciding about who is responsible
20 for paying the fees. Because if Kirk is reasonable,
21 then clearly a compromise that's designed basically
22 to cut that movement in half and make it so much

1 easier for CP to get its cars down to Kirk is
2 something that's reasonable.

3 BOARD MEMBER OBERMAN: Well is there any
4 situation you're aware of where the Board has
5 directed traffic to be driven 84 miles to be
6 interchanged? Is there any case where you had an
7 84-mile difference that the Board has found
8 reasonable?

9 MR. WARREN: I don't think so. But again
10 we've got a sample size of one.

11 VICE CHAIRMAN FUCHS: Well let me ask
12 this, then. Is there any interchange point where CN
13 goes 84 miles, or even over 50 miles on anyone else's
14 track?

15 MR. WARREN: So--

16 VICE CHAIRMAN FUCHS: I mean=

17 MR. WARREN: --I think there are
18 situations, I mean I think we go a pretty fair
19 distance to get to interchange traffic in
20 Minneapolis. I don't have the number in my head
21 about how far--

22 VICE CHAIRMAN FUCHS: Do you pass any

1 other potential interchange points?

2 MR. WARREN: Well I don't know that
3 we're--

4 VICE CHAIRMAN FUCHS: What I'm getting at
5 is you're asking us to consider Kirk to be
6 reasonable, and almost all the interchange points are
7 negotiated in the market. Has the market ever said,
8 listen, what we are voluntarily negotiating is to go
9 over 50 miles on your track and pass an area where we
10 could have interchanged? Has the market ever come to
11 that solution?

12 MR. WARREN: I think that typically when
13 there are market solutions, railroads would do things
14 like settle on a Clearing. And I would like to point
15 out, this is exactly the movement that CN is going to
16 be making to CP. CN is going to go just as far,
17 point to the map, is going to be going just as far to
18 get cars to Bensenville.

19 VICE CHAIRMAN FUCHS: But you're not going
20 to operate past --

21 BOARD MEMBER OBERMAN: 84 miles?

22 MR. WARREN: The total distance--

1 VICE CHAIRMAN FUCHS: But that's on your
2 line, not--

3 MR. WARREN: It's over our line, but that
4 doesn't change the operational facts, that we've got
5 to go--I mean, it takes--you know, right now it takes
6 CN three crews to--

7 VICE CHAIRMAN FUCHS: But it does matter.
8 It does matter, because what you're asking CP to do
9 is go past an existing interchange point. And you're
10 not going past an existing interchange point. And
11 so, you know, I understand that from your
12 perspective Clearing might be a better solution, but
13 it is at least relevant if you can't point out any
14 other instance that's analogous to Kirk through
15 voluntary negotiation. And then the Board is going
16 to come in and say it's reasonable when there's no
17 such other instance.

18 MR. WARREN: Well I don't have that with
19 me now. And again, you know, this might be a
20 situation where, you know, we're in some ways
21 constrained by the pleadings. We were in the middle
22 of negotiations, got hit with a preliminary

1 injunction--

2 VICE CHAIRMAN FUCHS: But you then--

3 MR. WARREN: --which we then responded to.

4 Just a moment. Which we then responded to. So it
5 may be that there are--you know, this is a record
6 that's not been assembled in an ideal way because,
7 you know, the case has developed. We've paused
8 everything for mediation. There have been letters
9 going back and forth. There are complicated issues
10 that, you know, got treated very quickly and
11 probably didn't get briefed in full.

12 The one thing that we would ask the Board
13 to do is to deny the preliminary injunction and allow
14 us to move the interchange to Clearing, and CN will
15 pay in the interim, depending on the final Board
16 decision.

17 VICE CHAIRMAN FUCHS: But I want to focus
18 on Kirk for a second, because I totally appreciate
19 that--everything you just said about the record, and
20 I agree. I will just say that you have your experts
21 here. So you all can speak to every interchange
22 point that CN has, okay? So maybe it's unfair to ask

1 you the entire market for the entire road entry, but
2 you can speak to CN.

3 Does CN pass an interchange point and go
4 more than 50 miles on anyone else's track? And does
5 anyone do that on your track, on CN's track?

6 MR. WARREN: Do we know?

7 MR. ALBRITTON: Not that I know of.

8 VICE CHAIRMAN FUCHS: So you're asking the
9 Board to say that something's reasonable that exists
10 nowhere on CN's network?

11 MR. WARREN: I think we're asking the
12 Board to say that it's reasonable to accept an
13 arrangement where we are going to be doing 50 percent
14 of the work and CP will be doing 50 percent of the
15 work. Because we are--we are not proposing
16 everything has to happen on our network--

17 VICE CHAIRMAN FUCHS: I haven't seen an
18 analysis of the 50 percent of the work, because they
19 do blocking and classification at Bensenville, too,
20 right? So I guess I haven't seen it definitely
21 proven that it's 50 percent of the overall work, even
22 if you set aside the issue that it's on your track

1 that you're traveling over to get to Spaulding,
2 whereas CP would be, again, on your track.

3 So I guess CP put forward that they're
4 doing work in Bensenville. Have you looked at how
5 much work CP is doing, and how much work you're
6 doing, and, you know, and actually scored out that
7 it's 50 percent? Or, you know, that it would be 50
8 percent? Or how is that determined?

9 MR. WARREN: So we don't have visibility
10 into CP's work, but what I can tell you is that, you
11 know, right now, you know, CN essentially takes three
12 crews to interchange at Spaulding. So one to get
13 from Kirk to Joliet. One to go up, do the
14 interchange, come back. And then one to bring it
15 back.

16 But when I'm saying 50 percent, it's not
17 50 percent now or anywhere close to it. Fifty
18 percent, I think the Board can say that if CN has
19 responsibility for taking cars from Kirk to
20 Bensenville, and CP has responsibility for bringing
21 cars from Bensenville to Kirk, that's 50 percent.

22 Now that doesn't mean that the costs will

1 be equal, but that's roughly 50 percent. And if, as
2 we propose, CN will still carry 100 percent of the
3 cost to take cars from Kirk to Bensenville, and CN
4 will split the cost of bringing those cars back to
5 Kirk by meeting in the middle at Clearing, a move
6 that's going to require CN to expend train and loco
7 resources, and that's going to require CN to pay
8 out-of-pocket trackage rights expenses. That is more
9 than 50 percent.

10 Do I know what the number is? I don't
11 know. I don't know. We don't have that kind of
12 record. I don't think the Board, you know,
13 necessarily needs that evidence. But if it wants it,
14 if the Board wants additional pleadings and
15 additional evidence, we're not going to object to
16 that. But the Board needs to deny the preliminary
17 injunction motion that's been sitting out there for
18 over three months and let us take the deal that CP
19 itself put on the table on May 6th, and said
20 alternatively to our preliminary injunction, have CN
21 pay the cost. We will pay the costs. Just let us
22 move the interchange point.

1 BOARD MEMBER OBERMAN: I have a couple of
2 questions I'd like to follow up on.

3 What's wrong with Rondout?

4 MR. WARREN: So we haven't identified
5 Rondout. Rondout is even further to the north--

6 BOARD MEMBER OBERMAN: How far?

7 MR. WARREN: I don't have the numbers on
8 top of my--off the top of my head, but if--

9 BOARD MEMBER OBERMAN: Well it's not
10 farther than Clearing, is it?

11 MR. WARREN: Oh, it's farther than
12 Clearing, yes.

13 BOARD MEMBER OBERMAN: Well it's certainly
14 not as far as Kirk.

15 MR. WARREN: I think it's much farther
16 from Kirk than Spaulding is. So I don't--so, I'll
17 pick this up to make it a little easier, so, you
18 know, I mean Clearing, as you can see (indicating),
19 Clearing is halfway. Clearing is right in the middle
20 between Bensenville. Rondout is all the way up here
21 (indicating). So a move to Rondout is requiring CN
22 to do this, to interchange traffic. It hasn't been

1 part of the discussion, so I don't think it's before
2 the Board right now.

3 BOARD MEMBER OBERMAN: So is all the
4 traffic bound for CN coming through Kirk? It's not
5 coming from the north? Is that what you're saying?

6 MR. WARREN: I--I--I don't know how the
7 traffic--yes. Yes, my witness Albritton, who knows
8 much more than I do, yes.

9 BOARD MEMBER OBERMAN: All the traffic
10 going to CP comes through Kirk. And do you block it
11 there?

12 MR. WARREN: Yes.

13 BOARD MEMBER OBERMAN: Okay. So that is
14 the reason that you don't like Rondout, because
15 you've got to go from Kirk all the way to Rondout?

16 MR. WARREN: Yes.

17 BOARD MEMBER OBERMAN: Otherwise,
18 physically does Rondout work as a place to
19 interchange?

20 MR. WARREN: I -- yes. Yes, I think it
21 would. And again--

22 BOARD MEMBER OBERMAN: And can you get all

1 the way from Kirk to Rondout on your own track?

2 MR. WARREN: Yes.

3 BOARD MEMBER OBERMAN: So Rondout--it
4 would seem that Rondout and Spaulding are the only
5 two places where there's a direct connection. Is
6 that right?

7 MR. WARREN: I think that's right. And
8 while it's interesting to talk about Rondout, I
9 would--you know, what's before the Board are the
10 designations that CN has made. And I do think that
11 one of the issues with Rondout is that you are going
12 to be increasing transit time I think substantially
13 for CN--

14 BOARD MEMBER OBERMAN: I'm not sure
15 Clearing is before the Board, as I raised earlier.
16 And I'm--we're not giving our final votes here, but
17 I'm not persuaded yet about the state of the
18 pleadings. I find it troublesome to do anything
19 other than what, either grant or deny the specific
20 relief that's before us based on the state of the
21 pleadings. But I may be wrong.

22 One other question. What's your reaction

1 to the idea of splitting the BRC trackage, or
2 switching fees based on the two-to-one pro rata
3 ownership that both railroads have in the BRC?

4 MR. WARREN: I don't know if there is a--
5 you know, I don't know that there's a direct linkage
6 between ownership shares and, you know, a reasonable
7 split of the costs.

8 BOARD MEMBER OBERMAN: So if you owned--
9 suppose the only owners of BRC were you and CP, and
10 you owned two-thirds of it, and CP owned one-third of
11 it, I mean it seems to me that's fairly close to the
12 Kirk situation where you're saying: Use our tracks
13 for free. Here, you'd be saying use our tracks, or
14 the two-thirds of it that we own, or at least between
15 the two of us, for free because we'll pay it. That's
16 what sort of generated in my reason for asking you
17 this question. But would you agree to that? Where
18 you paid two-thirds of the trackage rights if CP paid
19 a third to go to Clearing?

20 MR. WARREN: I can't speak as to whether
21 CN would agree to that right now.

22 BOARD MEMBER OBERMAN: Well that's not

1 unreasonable, just to spring it on you today, but I
2 just throw it out as an idea.

3 VICE CHAIRMAN FUCHS: Can I--on the
4 preliminary injunction question, to make sure I
5 understand it, are you saying that if the Board
6 thought that we didn't have, or the authority of the
7 case law suggests that we can't require CP to go to
8 Clearing, okay? And let's say we thought it was more
9 likely than not that Kirk was unreasonable. If you
10 stipulated those two things, are you saying that even
11 then we should deny the preliminary injunction and
12 allow Kirk to proceed because CP could recover any
13 economic loss from that?

14 MR. WARREN: Well I think, a couple of
15 responses. One, I think irreparable harm is written
16 in the statute. The Board has to find irreparable
17 harm. So money, by definition, isn't irreparable
18 harm. And I do think that, regardless of the state
19 of pleadings on other issues, as for the preliminary
20 injunction, the pleadings are complete and the
21 pleadings are pretty clear that there is--that CN is
22 willing to, you know, agree to move to Clearing as

1 opposed to Kirk. And that CP has said that that's an
2 alternative that is acceptable to it.

3 VICE CHAIRMAN FUCHS: But I guess what I'm
4 saying, though, is even--just on the preliminary
5 injunction question, though--even if we thought that
6 CP connects--or we mandate the voluntary exercise of
7 trackage rights, and even if we kind of had an
8 inclination, even though the state of the pleadings
9 aren't such that we would say that Kirk is
10 unreasonable, even under that circumstance, we should
11 deny the preliminary injunction? Is that what you're
12 saying?

13 MR. WARREN: Yes. Because--because
14 there's no--there's no irreparable harm. And more
15 than that, CP said as an alternative to the
16 preliminary injunction it was requesting to
17 interchange at Spaulding, then CN should be required
18 to pay the Clearing fees. And CN is offering now to,
19 as we made clear in the--in I think our July 12th
20 letter, CN will take that deal. CN will pay.

21 And CP says, well, you know, there might
22 be other things we need to worry about. You know,

1 one thing that I do want to make very clear for the
2 record--this is I think very clear in our pleading--
3 CN will not do anything to the tracks at Spaulding
4 while this proceeding is pending.

5 So there's no--so that is very clear in
6 our preliminary injunction response, and I'll say it
7 again for the record. So that's not a reason to have
8 an injunction. CN is not going to tear up any tracks
9 at Spaulding while this proceeding is ongoing.

10 VICE CHAIRMAN FUCHS: And so I'd like to
11 get CP to respond to that, eventually.

12 BOARD MEMBER OBERMAN: On that exact
13 point, so you're saying--you've anticipated my
14 question--if the Board were to promptly deny the
15 preliminary injunction, taking everything else under
16 advisement, perhaps even waiting for additional
17 pleadings to be filed, CN will not remove any
18 Spaulding tracks, at least until we decide the case?

19 Is that what you're saying?

20 MR. WARREN: Yes, that--Yes. And I think
21 we'd said that in our preliminary injunction
22 response, and I'll say it again now.

1 BOARD MEMBER OBERMAN: And if we were to
2 decide that Clearing is the place to go, would CN
3 also be willing to preserve all the tracks at
4 Spaulding for the safety valve that CP talks about
5 may be needed? Indefinitely, in other words?

6 MR. WARREN: Indefinitely? I think I--I
7 don't want to--I want to be careful about binding CN
8 for all time. But, you know, I do think that CN is
9 typically not in the business of ripping out tracks
10 that could be used even at a place that's not an
11 active interchange that could be used, you know--I
12 think if the price for moving--

13 BOARD MEMBER OBERMAN: I can see it is in
14 the business of ripping out tracks--

15 MR. WARREN: But--

16 BOARD MEMBER OBERMAN: --is in the
17 business of having torn up tracks around the country,
18 but that's a different point.

19 MR. WARREN: But not around this region.
20 And I do think that if the Board were to place on a
21 condition of CN's--you know, of being able to
22 exercise its right to move to Clearing, that some

1 interchange facilities be--either remain at
2 Spaulding, or that CN have the ability to, you know,
3 have the responsibility of establishing those
4 facilities in the future, you know, I don't--I don't
5 want to bind CN right now, but I don't think that
6 would be something that CN would be--

7 BOARD MEMBER OBERMAN: And are you saying
8 that if we deny the injunction, you start
9 interchanging at Clearing, we ultimately decide that
10 only Spaulding is reasonable, you would reinstate the
11 status quo ante?

12 MR. WARREN: CN will comply with the
13 orders of the Board.

14 VICE CHAIRMAN FUCHS: I want to make sure
15 that everybody gets a full opportunity, but if I
16 could actually just get CP to just quickly respond. I
17 think it's an important question on the preliminary
18 injunction. Or do we want to wait for that? We'll
19 wait, okay. Thanks.

20 CHAIRMAN BEGEMAN: Thank you for your 20
21 minutes of argument time. Our third panel, please.

22 (Pause.)

1 Okay, we'll get started. Mr. Reinke and
2 Mr. Skrycki, thank you.

3 MR. REINKE: Thank you. Good afternoon,
4 ladies and gentlemen. My name is Aaron Reinke and
5 I'm a Village Trustee for the Village of Bartlett,
6 Illinois. I have here with me my colleague, Scott
7 Skrycki, the Assistant Village Administrator for the
8 Village.

9 We both have grown up--we were born and
10 raised in the Bartlett area. Scott has been with the
11 Village for 18 years. I was first elected to office
12 in April of 2013. We're here today, this afternoon,
13 to urge you to deny the preliminary injunction and to
14 demonstrate to you just what an unreasonable and
15 hazardous interchange Spaulding is for our community.

16 So the Village of Bartlett is, if you can
17 imagine, is generally, I would characterize it as a
18 rectangle. And that rectangle straddles three
19 counties--Cook, DuPage, and Kane. We are
20 approximately 30 miles outside of the City of
21 Chicago. We have 42,000 residents. And although we
22 have 42,000 residents, we view ourselves as a bedroom

1 community. Like any Town USA. And so we have all of
2 those sort of amenities that you would anticipate.

3 We have restaurants, and medical
4 facilities, and two Starbucks, and two hardware
5 stores. But geographically we are divided by the
6 rail line that we're talking about today. The west
7 side of town is cut off from the east side of town.
8 On the west side of town there's roughly 1,300
9 residences there. So we're talking several thousand
10 people.

11 There are five major residential
12 subdivisions on the west side of town. We have a
13 major commercial-industrial park. So in many
14 respects, we are a divided community by virtue of
15 these rail lines.

16 All of our fire stations are located on
17 the east side of the tracks. The newest station
18 number three was constructed well before CN purchased
19 the rail lines, and so we didn't have to take into
20 consideration the volume of traffic and the stopped
21 trains.

22 The police department is located on the

1 east side. Every restaurant, every medical facility,
2 most of the offices are all located on the east side.
3 And so you have this division.

4 So bridging this divide are three
5 roadways. And we've only really heard about two of
6 them today: Spaulding, West Bartlett Road, and
7 Stearns Road. These roads play a vital role in our
8 community.

9 Spaulding Road is located adjacent to the
10 Amber Grove Subdivision. This is somebody's
11 backyard. And we hear this all the time from our
12 constituents. So all the interchanging operations
13 are taking place near a residential subdivision.
14 That intersection handles about 1,650 vehicles both
15 commercial and residential every single day.

16 (Off-microphone question.)

17 MR. REINKE: Spaulding, sir. So the
18 second intersection is West Bartlett Road, and that
19 runs through vital commercial areas and also
20 residential. There is a residential subdivision that
21 is also located adjacent to that intersection, and
22 that would be Lakewood. And that intersection

1 handles 10,400 commercial and residential vehicles
2 every day. Bartlett's western-most fire station
3 number three is located about a block from that
4 crossing.

5 And finally, we have the largest roadway
6 which is Stearns Road that runs through, again,
7 residential, commercial, and a lot of public lands
8 and utility areas. And that intersection handles
9 18,900 vehicles per day.

10 So because these three grade crossings are
11 relatively close to one another, it is entirely
12 possible that when a train blocks one intersection,
13 it may block two or three. We have had complaints
14 about all three being blocked.

15 And so whether it's a fire truck or an
16 ambulance, or one of us--and it's happened to me; I
17 know it's happened to Scott--that we decide that
18 we're going to pull a U-turn and try to bypass the
19 stopped train, it's entirely possible that we'll be
20 stymied at one of the adjacent intersections.

21 So with that, I'd like to invite Scott to
22 talk a little bit more about the complaints that we

1 have received.

2 MR. SKRYCKI: Thank you for the
3 opportunity. This is one of the top complaints we
4 get. And as Village officials, we understand NIMBY and
5 it's not a product of an NIMBY. It is a product of the
6 data that CN and CP has provided for you.

7 First, the travel on Spaulding Road, West
8 Bartlett, and Stearns are commonly interrupted by the
9 trains at all hours of the day and night.

10 Second, the trains are stopped at all the
11 grade crossings.

12 As far as our fire department is
13 concerned, I mean there are some bone-chilling facts
14 about the fact that a fire can double in size in
15 every minute. And also in addition to that, in 10
16 minutes a fire becomes 512 times larger. In the
17 event of--

18 CHAIRMAN BEGEMAN: Scott, can I interrupt
19 just for a quick question?

20 MR. SKRYCKI: Yes.

21 CHAIRMAN BEGEMAN: You said "all hours of
22 the day and night"?

1 MR. SKRYCKI: Yes.

2 CHAIRMAN BEGEMAN: One of the things that
3 CP has talked about is that they do their
4 interchanges only at night.

5 MR. SKRYCKI: Right.

6 CHAIRMAN BEGEMAN: But you're still
7 hearing complaints about other CN trains that are
8 blocking, but that don't have anything to do with CP?
9 Is that what you're telling us?

10 MR. SKRYCKI: I don't think as far as the
11 Village of Bartlett is concerned we want to concede
12 the point that it's just at night. Yes, that's in
13 the data that CP provided, but we do have train
14 issues through the day and night. That's absolutely
15 positive, yes. Whether that's--

16 CHAIRMAN BEGEMAN: Could they be CP?

17 MR. SKRYCKI: Whether that's for a
18 different issue or not, I'm not aware of.

19 CHAIRMAN BEGEMAN: Okay, well maybe CP can
20 talk about that in their--

21 MR. SKRYCKI: Just a couple of other
22 facts. Like I said, in minute 10 a fire becomes 512

1 times larger. I think, you know, the Village is not
2 naive enough to the fact that we would come before
3 you today based on one intersection being blocked.
4 That's a natural occurrence in commerce. But like
5 Trustee Reinke stated, the fact of the matter is it's
6 not about one track.

7 We are not here to talk to you about
8 Spaulding Road. What happens is, two tracks are
9 blocked on a regular basis simultaneously. And what does
10 the community do? And what do people do when
11 they're stalled at a track? They make a U-turn and
12 go to another one. So that leaves all three tracks
13 in our community that are jeopardized by the
14 blockage.

15 So it's not Spaulding Road. That's not
16 what we're here to talk about. It's all three--all
17 three train intersections in the community, which is
18 vital to all of our arterial roads. And I think, as
19 you see, 206 residents have filed comments with the
20 STB. I won't take you through those. I would just
21 ask that you read them. A lot of people with
22 illnesses. A lady was giving birth, actually, who

1 testified.

2 And I think I want to address a few of the
3 points that CP made based on complaints. No, we
4 have not complained to Mr. Walker before we were
5 aware of this case. We didn't know who Mr. Walker
6 was. But we have complained. And we've complained
7 several times. So I want that in the record that we
8 have complained to CP.

9 Now as far as the complaints, we're
10 talking about the lion's share of the work. CN
11 handles 99 percent, 100 percent of the lion's share
12 of complaints. As far as being a good neighbor and
13 communications are concerned, CN has given us their
14 information to put on our website. They put their
15 complaint hotline number on all the intersections.
16 So our residents are accustomed to talking to CN. CN
17 has gone as far as talking to our residents.

18 As far as CP is concerned, there has been
19 no outreach to the community. They have been shadows
20 in the night. No pun intended. But as far as being
21 a good neighbor on communications, that's part of the
22 reason why they haven't had a lot of complaints from

1 us.

2 And also, our residents are just used to
3 it. We started this battle in 2008 when EJ&E was
4 purchased. So a lot of it has been just the fact
5 that we're used to the issues. So I think it's
6 important for the Board to understand that it's not
7 about one intersection hurt community, it's about all
8 of our arterial roadways.

9 And as far as--I mean that's really the
10 crux of our argument. It's not one. It's three,
11 which in turn is the entire community.

12 VICE CHAIRMAN FUCHS: On the evening
13 issue, I think there's been discussion about how
14 potentially even the evening blockages can then spill
15 over to the day because that jams up the track
16 capacity during the night. But just on the evening
17 issue, do you have a sense of what the volume of
18 traffic is at night? I mean, we see these traffic
19 counts, but have you--you know, anything you can
20 provide on the magnitude of traffic at night, and how
21 often, you know, the specific complaints that you've
22 gotten for the evening blockages?

1 MR. SKRYCKI: As far as the night-time
2 traffic?

3 VICE CHAIRMAN FUCHS: Yeah.

4 MR. SKRYCKI: No, we don't have the data
5 on that. But we do have the data that the comments
6 provided us in the amount of 9-1-1 calls that are at
7 those intersections, yeah. But as far as
8 delineating night-time traffic from day-time traffic,
9 no, I can't provide that. But I can tell you that
10 our Police Department and our emergency operations
11 and our Fire Departments and our ambulance are 24
12 hours, and a lot does happen at night.

13 BOARD MEMBER OBERMAN: I have a couple of
14 follow-up questions on points that you've made.
15 Specifically, when you say that you have made
16 complaints to CP, I'd like to drill down on that.

17 I take it you didn't call Mr. Wallace, but
18 have you personally made complaints?

19 MR. SKRYCKI: I have. I have. It has
20 been several years and, if I may, one of the issues
21 that I think maybe we weren't progressive enough on
22 is the fact that Canadian National is so open and so

1 communicative with us that I feel as though they may
2 have acted as a liaison to our issues. And we have
3 used them as a complaint place.

4 BOARD MEMBER OBERMAN: Who have you
5 complained to at CP? Who have you spoken with?

6 MR. SKRYCKI: I would have to check. I
7 would say my last correspondence directly, myself,
8 with CP has been about four or five years. But I can
9 certainly try to dig that up, absolutely.

10 BOARD MEMBER OBERMAN: Well, because
11 they're suggesting that after they moved to late at
12 night and early in the morning switching, or
13 interchanging, they have not generated any complaints
14 directly to CP. Is that a fair statement on their
15 part?

16 MR. REINKE: I wouldn't say so at all. I
17 have residents in that Lakewood Subdivision contact
18 me and say there was a train parked out in my
19 backyard at the intersection for hours last night.
20 And it's incredibly frustrating because--

21 BOARD MEMBER OBERMAN: In the middle of
22 the night, you mean?

1 MR. REINKE: In the middle of the night.

2 BOARD MEMBER OBERMAN: And have you then
3 relayed those complaints to CP?

4 MR. REINKE: We've relayed those to CN,
5 because they're available.

6 BOARD MEMBER OBERMAN: Alright. Other
7 than complaints about parking trains in the middle of
8 the night, the blockages, have you identified CP
9 trains blocking the intersections during the day, up
10 to current times?

11 MR. REINKE: I don't know that we've done
12 that. I don't know how we would do that,
13 logistically.

14 BOARD MEMBER OBERMAN: Well, I mean you
15 might see a CP locomotive out there.

16 MR. SKRYCKI: Sir, I'll say this. When we
17 have an emergency situation, whether it be the
18 ambulance or the police side of our community, and we
19 need to get people from A to B, or we need to call a
20 different community for mutual aid, the last thing
21 that our emergency services are worried about is
22 identifying who in particular is on that train.

1 BOARD MEMBER OBERMAN: No, no, I
2 understand that. But, you know, there's a dispute
3 going on here, which to the extent we're going to
4 resolve it, the question is: Is the blockage of the
5 intersections that is understandably causing
6 problems, caused by the fact that CP is interchanging
7 in the middle of the night? Or is it caused by CN's
8 use of the tracks during the day? Because I think if
9 we're going to take it into account, we have to
10 figure out who to take it into account for.

11 So that's why--and CP says it's not our
12 trains during the day. And I just wonder if you have
13 any evidence or facts to contradict that, or to
14 enlighten us on that?

15 MR. REINKE: If it's one block at night
16 and it's an ambulance or a fire truck, I think that
17 matters. I understand it's not the data that you're
18 looking for, but in response to my constituents it
19 matters to them.

20 BOARD MEMBER OBERMAN: I don't disagree
21 with that. But I don't think the STB is going to be
22 in a position to make sure no ambulance is ever

1 blocked, ever. Obviously every time it happens,
2 it's bad. But in terms of the magnitude of it, and
3 identifying whether it's the interchanging that's
4 causing the problem or CN's use of the line since it
5 acquired the EJ&E, that seems to be a distinction.

6 Now CN is telling us because they can't
7 run trains through in the middle of the night because
8 they interchange, they're then blocking the tracks
9 more during the day. At least that's what I took
10 away from the discussion. And I just wondered if
11 you--if you can shed any light on that.

12 One reason I ask that, it sounds to me as
13 though if all the interchanging stopped there, you
14 would still have problems. Or do you think all your
15 problems would go away?

16 MR. REINKE: Well I think--I think it's a
17 challenge having busy railroad tracks through our
18 community. However, I think it's a completely
19 different ball game when the train is moving. And I
20 notice a difference, a dichotomy in the complaints.
21 There's people who complain just about the constant
22 trains. And then there's people who complain about

1 parked trains. And I hear from the fire district, I
2 hear from the police department about the stopped
3 trains.

4 BOARD MEMBER OBERMAN: Well that's the
5 question. Are trains stopped at these intersections
6 during the day?

7 MR. REINKE: Yes.

8 BOARD MEMBER OBERMAN: For--in your
9 experience, I mean, what kind of time periods are we
10 talking about?

11 MR. SKRYCKI: It varies. There's not a
12 lot of consistency. As far as emergency services are
13 concerned, when we see a freight train that's going
14 through at a normal pace, with normal train traffic,
15 how a train is supposed to operate, as emergency
16 services we're able to have an understanding. When a
17 train is stalled, and stopped, we don't know what to
18 do. That's the crux of one of these major issues.

19 MR. REINKE: And it would seem, based on
20 the complaints that I have received, that these
21 stoppages during the day are perhaps shorter than the
22 stoppages at night. So it's not unusual to get, as

1 somebody who works in the evening, or hear from the
2 emergency services that we've got a stoppage 10, 20,
3 30 minutes at night versus--

4 BOARD MEMBER OBERMAN: "At night" being
5 2:00 in the morning? Or Nine o'clock at night?

6 MR. REINKE: After sundown. So that would
7 vary based on, you know, the season. But evening
8 time.

9 BOARD MEMBER OBERMAN: Do you keep any
10 documentation of how often an ambulance or fire truck
11 is stopped at the intersection? I mean, you must
12 have if it results in somebody's being injured or a
13 house burning to the ground.

14 MR. SKRYCKI: Whether we keep
15 documentation in terms of stopped? When a train is
16 moving at a normal pace versus when it's stopped
17 because the train is stalled?

18 BOARD MEMBER OBERMAN: Either way. I mean
19 it would be I think informative. At least one
20 railroad here is telling us to take into account the
21 burden on your city. If we're going to take it into
22 account, I'd like to know what we're talking about,

1 and who is responsible. If there's a way to
2 delineate it, maybe by time of day, if you're not
3 identifying locomotives. And I'm not saying the
4 ambulance driver should get out and run 100 yards
5 down and see which color locomotive is on the end.
6 But by time of day, that might give us some more
7 information. If you have it, I think it would be
8 useful to supply it to us.

9 MR. REINKE: I think we can work with the
10 other local governmental entities and get some data
11 together for the STB to consider.

12 BOARD MEMBER OBERMAN: But you--I want to
13 make sure you focus on the problem that's raised
14 here. CP says it's only there between 10:00 at night
15 and 4:00 in the morning, or something like that.
16 All other blockages are caused by CN. I'd sort of
17 like to get to the bottom of that, if you can help
18 us.

19 MR. SKRYCKI: And I just want to drive one
20 point home, and I don't mean to be repetitive to the
21 STB or take up any more of your time, but I think the
22 point is valid that you would have a hard time going

1 by community, by community, by community. But this
2 problem that we're having isn't one track.

3 I understand that you can't relieve
4 community by community because of one track. But the
5 fact of the matter is, if you look at the
6 geographical perspective for the Village of Bartlett,
7 and you look at the distance in between tracks, you
8 can arguably say that it's disruptive to two. And if
9 it's disruptive to two out of the three, what do
10 people do when they sit there for an hour, whether
11 it's day or night, they turn around and go to the
12 third track, or the second track.

13 So all of the tracks, like I said, day or
14 night, night for the purpose of this argument, is
15 disrupted. So a whole community is disrupted. It's
16 not just one track.

17 BOARD MEMBER OBERMAN: One final question.
18 What is the history, if any, of your seeking funds
19 from the counties, from the state, and/or from the
20 railroads to build at least one overpass, or
21 underpass, whatever would work, so you'd at least
22 have one route for emergency vehicles?

1 MR. REINKE: We are currently in the
2 process of preliminary studies on an overpass. The
3 board has made that a priority. I'm not quite sure
4 how familiar you are with the fiscal statement of
5 Illinois--

6 BOARD MEMBER OBERMAN: I'm somewhat
7 familiar with it. I contribute to trying to bail it
8 out.

9 (Laughter.)

10 MR. REINKE: And we certainly appreciate
11 it. And I don't mean to be flippant, but, yeah, I
12 don't anticipate seeing a lot of relief from the
13 counties or the state. Certainly the Federal
14 Government, we'd welcome a partnership with them to
15 resolve it. Do you have any specific -- okay.

16 MR. SKRYCKI: I mean certainly the Village
17 has budgeted for an initial phase one study of an
18 overpass or underpass. But I mean we've looked at
19 some of the comparables. I think Barrington does
20 way more complex. I heard Barrington mentioned. But
21 I'm pretty sure their overpass plan is in excess of
22 20 years and \$50 million. So I mean you can see it's

1 a cumbersome process.

2 BOARD MEMBER OBERMAN: I was also
3 wondering whether in the past, when the EJ&E purchase
4 came up, whether you had raised any of those issues
5 at the time of the acquisition.

6 MR. REINKE: I think that there was a
7 study at that time, and I want to say it was maybe
8 \$25- to \$30 million at that time.

9 BOARD MEMBER OBERMAN: You should have
10 grabbed it. It was cheap. Thank you.

11 VICE CHAIRMAN FUCHS: Just a quick follow
12 up on that. I see the distances here. And from the,
13 basically the Spaulding grade crossing to the Stearns
14 grade crossing, it's roughly 10,000 feet? Is that
15 accurate? Does a couple of miles sound right to you?

16 MR. SKRYCKI: That's correct, with West
17 Bartlett in the middle there.

18 VICE CHAIRMAN FUCHS: Okay. Can you
19 explain to me just one more time how Stearns becomes
20 blocked?

21 MR. SKRYCKI: No, it's not--I'm sorry.
22 I'll provide clarity to that.

1 VICE CHAIRMAN FUCHS: Yeah.

2 MR. SKRYCKI: It becomes blocked in the
3 essence of congestion. Because what happens is, when
4 you have a train that's stuck at night between
5 Spaulding and West Bartlett, what people do is
6 they'll make a U-turn going to the third track,
7 creating gridlock congestion for that particular
8 track.

9 Another thing that happens is, if those
10 two are blocked within the same time frame, or
11 simultaneously, and residents will turn around and go
12 toward the Stearns Road crossing, sometimes they'll
13 encounter that same train that they saw previously
14 that were at the other intersections.

15 So I'm not going to say all three are
16 blocked simultaneously, but the blocking of one or
17 two creates gridlock simultaneously for our residents
18 and emergency services.

19 VICE CHAIRMAN FUCHS: I've gotcha. But
20 for the evening blockages, Stearns, because there's a
21 lower amount of traffic, for the evening blockages
22 Stearns remains--there's no gridlock problem at

1 Stearns for the evening--understanding that you can't
2 get across, for the evening blockage you can't get
3 across West Bartlett and you can't get across
4 Spaulding because of the blockage, but you could
5 still take Stearns. Not to say that's a good
6 situation, but just to make sure I understand--
7 because you're not going to have enough traffic to
8 generate gridlock in the middle of the night.

9 MR. REINKE: And one of the things I've
10 heard is, I've heard reports that Spaulding is not
11 blocked, but both Stearns and West Bartlett are.

12 VICE CHAIRMAN FUCHS: Oh, is that right?

13 MR. REINKE: So I don't -- and, you know,
14 in terms of railroad operations, I wouldn't
15 understand how that would operate. But I have
16 received those complaints.

17 VICE CHAIRMAN FUCHS: And just so I -- and
18 you receive those complaints for the middle of the
19 night? Or just generally?

20 MR. REINKE: The middle of the night.

21 VICE CHAIRMAN FUCHS: Really?

22 MR. REINKE: The middle of the night.

1 Because you're more able to perform a U-turn in the
2 middle of the night, given the volumes, and then try
3 another intersection.

4 VICE CHAIRMAN FUCHS: Right. And so
5 someone maybe was going on West Bartlett, took a
6 U-turn, went down Stearns, and then encountered a
7 blockage at Stearns. For whatever reason, somebody
8 then advanced to the Spaulding grade crossing?

9 MR. REINKE: Correct.

10 VICE CHAIRMAN FUCHS: So even if --
11 because I was looking at where a lot of your
12 emergency services are, and even if, like your
13 police department wanted to go down Main and go to
14 Stearns, there's no guarantee that Stearns would be
15 open?

16 MR. REINKE: Correct.

17 BOARD MEMBER OBERMAN: One very quick
18 follow up on the complaint issue. Are you telling us
19 that there's no way for you to effectively
20 communicate with CP? I mean, if you pick up the
21 phone, they don't talk to you? They don't answer?
22 What happens?

1 MR. SKRYCKI: We complained to CP several
2 years ago. Again, I don't know the details of that
3 exact conversation. But we did complain. But as far
4 as changes in operation, as far as hey, you know, you
5 can call us here, there's absolutely none of that.

6 And perhaps I need to be more proactive.
7 But the fact of the matter is, one of the parties
8 here has been extremely proactive in communicating
9 with us--

10 BOARD MEMBER OBERMAN: They initiated
11 communications to you?

12 MR. SKRYCKI: What's that?

13 BOARD MEMBER OBERMAN: CN initiates
14 communication?

15 MR. SKRYCKI: Absolutely.

16 BOARD MEMBER OBERMAN: And you never hear
17 from CP?

18 MR. SKRYCKI: No.

19 CHAIRMAN BEGEMAN: Although--and I may be
20 wrong on this, but as I understood it during the
21 transaction, the community and CN cut a deal, as did
22 CN cut deals with a lot of different communities,

1 not all of them, but--and that's probably what
2 initiated your--

3 MR. SKRYCKI: I mean that was in 2008.
4 And this is in 2019. And I talk to CN on a regular
5 basis, separately from the purchase--the acquisition
6 of the EJ&E, regarding separate and different
7 issues.

8 CHAIRMAN BEGEMAN: And how is it that you
9 knew about this proceeding.

10 MR. SKRYCKI: We were notified by Canadian
11 National.

12 BOARD MEMBER OBERMAN: When you've
13 communicated with CN, have you asked them to take
14 your concerns to CP? Or you just--because you said
15 you assumed they were an intermediary, but I mean
16 have you said would you please call up the CP people?
17 They don't talk to us, but they might talk to you?
18 I mean, how does that--I'm trying to figure out if
19 you're just being stonewalled, or you're just--
20 what's going on here?

21 MR. REINKE: Well regardless of whether
22 we're being stonewalled, I think alternative avenues

1 of communication would be welcome. And since we're
2 all here, I think we can connect today. So I won't
3 comment on whether we're being stonewalled. But once
4 those avenues are opened, you are going to get the
5 same volume of complaints that I get at the grocery
6 store, my daughter's dance class. So CP will
7 definitely hear about it.

8 BOARD MEMBER OBERMAN: Thank you.

9 CHAIRMAN BEGEMAN: Thank you again. And
10 we will now turn back to CP for five minutes of
11 rebuttal.

12 And one or two things I'd like for you to
13 talk about, which is the injunctive relief and how
14 it's not just about money, because that would not
15 qualify. And also I'd like you to talk about
16 whether or not it is your position that CN can
17 designate a third-party rail yard as the receiving
18 yard based on what the statute says.

19 I understand you can agree to it, but I
20 want to know whether or not that's something that the
21 Board could impose.

22 MR. RIFKIND: Alright, so beginning with

1 irreparable harm, so right now we have a very smooth
2 functioning interchange at Spaulding. And we're
3 being asked to go to Clearing, which is--you know, we
4 can voluntarily agree to, as you said, but--

5 CHAIRMAN BEGEMAN: How is it smooth and
6 functioning based on what CN is saying, and what the
7 community is saying?

8 MR. RIFKIND: Well from our perspective,
9 you know, nothing has changed at Spaulding since we
10 started interchanging at Spaulding. And what I heard
11 CN say, is their train volumes haven't changed.

12 Now in 2012, there was an agreement
13 between the Village of Bartlett and CN in which the
14 Village of Bartlett said their concerns about
15 interchange at West Bartlett, at Spaulding, had been
16 addressed. And set out a procedure to address any
17 future concerns.

18 CHAIRMAN BEGEMAN: And I agree that CN did
19 say that volumes hadn't changed, but in their letter
20 to the Board, or what's from, I think it was Mr.
21 Corey, what's in the record, it says that the
22 volumes have outgrown the facilities at the location.

1 So there's a sort of disconnect between what was
2 said.

3 MR. RIFKIND: Well so the interchange
4 volumes, we put in evidence in the record that show
5 that the interchange volumes, if anything, have
6 softened. They have not outgrown the facility. And
7 if they have outgrown the facility, then lengthen the
8 tracks. That would be the answer, not kick us out.

9 So, so interchange volumes haven't
10 changed. We've been told train volumes haven't
11 changed, but I think that's not exactly correct. So
12 if--and we've switched our operations to 3:00 a.m.
13 You know, we arrive somewhere after 10:00, and we
14 leave at 4:00.

15 So sometimes we leave after 4:00, if CN
16 dispatches of their mainline doesn't let us out. But
17 most of them, we're just sitting there waiting to get
18 out of the facility.

19 We've been doing this for eight-and-a-half
20 years. And, you know, we understand that CN now
21 would like to balance, you know--to operate more
22 efficiently on their mainline, but it doesn't excuse

1 their obligation to provide an interchange facility,
2 which isn't satisfied by providing Clearing. They're
3 not providing Clearing. They're asking us to provide
4 Clearing on our nickel. That's not providing an
5 interchange facility. That's out-sourcing.

6 So if we're--so we lose a smooth
7 functioning interchange facility, and we exchange it
8 for Clearing where we have to pay.

9 VICE CHAIRMAN FUCHS: But that's--but you
10 said on your nickel and you have to pay, but how does
11 it go beyond economic loss? Or how does it go beyond
12 monetary loss?

13 MR. RIFKIND: Well, if--if--to begin with,
14 our customers have to pay in the form of now they've
15 got an extra day of transit time to get across
16 Chicago. So we're serving our customers less well.
17 We're less competitive overall. So it does affect
18 our competitive stature.

19 And then on top of that, you know, things
20 might be fine on a sunny day in July, but, you know,
21 when grain season starts, you know, things might not
22 be so fine at Clearing. And if that happens, then

1 we've got more delay, more congestion--

2 VICE CHAIRMAN FUCHS: On your day point,
3 on your additional day point, if we were to ask the
4 parties for evidence, because there is traffic that
5 goes from Bensenville to Clearing to Kirk, right?

6 MR. RIFKIND: Right.

7 VICE CHAIRMAN FUCHS: And there's traffic
8 that goes from Bensenville to Spaulding to Kirk. If
9 we were to look at the transit times, is that in fact
10 what we would see the average transit time
11 difference, if we asked the parties for evidence on
12 that point?

13 MR. RIFKIND: I believe so. I've got no
14 reason to think differently, but that's my
15 understanding of what the evidence would show.

16 VICE CHAIRMAN FUCHS: And I'd like--when
17 CN gets a chance, I'd like CN's perspective on
18 whether or not there would be an average day
19 difference.

20 BOARD MEMBER OBERMAN: I just want to
21 follow up on the irreparable harm aspect, because I'm
22 still having trouble, Mr. Rifkind, with the

1 representations that you could use Clearing, even
2 with your qualification.

3 If you're saying that in addition to the
4 fee, trackage fee or switching fee part, it is going
5 to--I'll just paraphrase--damage your good will, or
6 your customer relations, or perhaps even lose
7 customers who don't want to wait the extra day if
8 they can get some other way? Is that--if you had to
9 go to Clearing.

10 But from what I'm hearing and
11 extrapolating from, if CN said we'll pay the 100
12 percent of the cost to Clearing, we'll keep
13 Spaulding operable for any safety involved
14 requirements, you would use Clearing? You're still
15 going to have the same damaged relationship with your
16 customers if you worked out that deal today.

17 MR. RIFKIND: I will tell you, there has
18 been some second-guessing internally as to whether we
19 should have made the offer that we made, or the
20 proposal. And what we did was do it in the spirit of
21 compromise, trying to address CN's concerns. Maybe
22 we shouldn't have.

1 BOARD MEMBER OBERMAN: Well I understand
2 that, but, you know, we're sitting here with a fairly
3 well-defined U.S. jurisprudence requirement of
4 irreparable harm. And it seems to me to be an
5 equivocal showing to come in here and say we made the
6 offer, now some of our people are second-guessing it?
7 I mean, irreparable harm usually is pretty clear,
8 and it's not weighing and balancing whether you
9 should compromise yourself out of irreparable harm.

10 I'm just having trouble with that part of
11 it. I'm not saying that, you know, there are many
12 other issues about Clearing, but I'm having trouble
13 with that part of it.

14 MR. RIFKIND: And I understand that. But
15 I would say to hold CP's willingness to reach a
16 compromise against it undermines what this Board
17 would like to see, which is for railroads to work
18 things out between themselves. If you hold this
19 against CP, the next time we have--we want to reach a
20 compromise, we're not going to put it out on the
21 table for fear that it will come back--

22 BOARD MEMBER OBERMAN: Well it's one thing

1 to have settlement negotiations which generally
2 aren't public. It's another thing to file papers
3 with the Board saying we were willing to do this.
4 That's I think the great distinction. I couldn't
5 agree with you more that I think all three of us--and
6 I think the history of this Board has been to
7 encourage where at all possible parties to work
8 things out without our having to intervene and tell
9 you how to run your business. That is something I
10 think we all would prefer.

11 But we can only go by what you file with
12 us. And once you file something with us, unless you
13 say it was a mistake of fact, which you're not
14 saying, you're just saying it's a reweighing of it,
15 I'm having trouble with the "irreparable" part of it,
16 whether you're otherwise being reasonable in saying,
17 no, it really wasn't a great idea.

18 That's not necessarily an invalid
19 observation for you to make, but you're asking us to
20 say it's going to damage your customers if you do
21 that. And therefore you should get an injunction.
22 And I'm having a little trouble with that.

1 MR. RIFKIND: Well let me switch it
2 around, because I don't think that what CN is asking
3 you to do is different. What they're really asking
4 for is to enjoin CP to go to Clearing.

5 VICE CHAIRMAN FUCHS: Well that's actually
6 what I wanted to--the designation right now is Kirk,
7 right? Haven't they designated Kirk? The question
8 is Kirk?

9 MR. RIFKIND: Right.

10 VICE CHAIRMAN FUCHS: So you might say
11 that, hey, listen, Clearing is going to cause this
12 congestion and additional transit time, and all that.
13 But it's a tougher argument that Kirk would cause
14 that, right? Because they're already going on Kirk,
15 and now you go on Kirk. Why isn't CP transit to Kirk
16 just a question of who pays for the crew and the
17 locomotives to go to Kirk, and that ultimately being
18 a monetary issue?

19 MR. RIFKIND: That's a good question. You
20 know, there are calculable costs and incalculable
21 costs of going to Kirk.

22 VICE CHAIRMAN FUCHS: It's the same amount

1 of--you know, it's the same distance. It's the same
2 number of people. Same number of locomotives. And
3 so even if we thought we had no power to order you
4 all to exercise your voluntary trackage rights to
5 Clearing, right, and let's just say the Board agreed
6 with you. And let's also say that we agreed with you
7 that it would be pretty likely that we would think
8 that Kirk was just too far, and that's unreasonable.

9 MR. RIFKIND: Right.

10 VICE CHAIRMAN FUCHS: And so we agreed--if
11 the Board agreed with your broader points on that, it
12 still wouldn't change the fact that we ought to deny
13 your preliminary injunction and actually fully, you
14 know, address that issue through more pleadings and
15 set Kirk. Because whatever your costs were to Kirk
16 would not be irreparable.

17 MR. RIFKIND: Let me address that. When
18 we go, if we were to go to Kirk, it would take two,
19 three crews to get there and back. That would erode
20 CP's crew base. CP would have to hire more people--

21 VICE CHAIRMAN FUCHS: How many people does
22 CP--how many T&E crew does CP have in the Chicago

1 area?

2 MR. RIFKIND: Can I phone a friend? Mr.
3 Walker?

4 MR. WALKER: 104.

5 VICE CHAIRMAN FUCHS: So two more a day?

6 MR. RIFKIND: Two more a day, three a day
7 in the winter, maybe more in the winter.

8 VICE CHAIRMAN FUCHS: How many T&E crew
9 does CP have overall?

10 MR. RIFKIND: In the U.S.?

11 VICE CHAIRMAN FUCHS: Yeah. So I mean
12 we're talking about two percent of your Chicago crew
13 base, and I would guess a very, very small portion of
14 your overall crew base. And the contention is the
15 irreparable harm would be cause of the erosion of the
16 crew base?

17 MR. RIFKIND: Well it would erode the crew
18 base. There's no question about that. It would--

19 VICE CHAIRMAN FUCHS: But you can hire
20 more crew, right?

21 MR. RIFKIND: We could hire more crew.
22 But now you're getting, you know, harder and harder

1 to calculate our damages.

2 MR. WEBSTER: It takes six months to
3 qualify a conductor.

4 VICE CHAIRMAN FUCHS: You have no access
5 to any crew that you could allocate to the area? And
6 there's nothing that--you guys would run out of T&E
7 crew if you had to run to Kirk?

8 MR. RIFKIND: We might have an excess crew
9 today. In grain season we might be pressed. You
10 know, it's hard to predict--

11 VICE CHAIRMAN FUCHS: Do you have any T&E
12 crew on furlough right now?

13 MR. RIFKIND: Not that I'm aware of. Mr.
14 Webster says no.

15 VICE CHAIRMAN FUCHS: Do you have any T&E
16 crew that aren't working full time in the entire
17 enterprise?

18 MR. WEBSTER: No.

19 MR. RIFKIND: The answer is no.

20 MR. WEBSTER: Not in the states. And the
21 erosion of crew base is also an issue that's--it's
22 not something that should be thought of, I don't

1 think, as something that's constant. So it varies in
2 particular with the weather. If you recall, the
3 winter of 2013 and 2014, and then--

4 VICE CHAIRMAN FUCHS: I recall, but here's
5 the thing. If demand were to pick up and you all had
6 to run an extra train a day, anywhere in your
7 network, it wouldn't take six months to qualify a
8 new crew. And you'd be able to meet that in demand.
9 And so it's tough--you know, you're asking us to say,
10 like CP's demand changes all the time. I think your
11 volume grew over the past quarter. And somehow you
12 can continually run these additional trains to meet
13 additional demand. But the one time that you have to
14 go to Kirk, your T&E crew, I mean you just can't do
15 it?

16 MR. RIFKIND: I'm not saying that we
17 couldn't do it. What I'm saying is it makes us less
18 able to meet demand elsewhere. So while we are
19 nimble and we are able to throw on a crew and meet
20 our customers' needs, our reserve, our capacity is
21 for our customers, not to serve another railroad's--
22 you know, to do another railroad's work for it.

1 MR. WEBSTER: Just for clarity, if I may?

2 VICE CHAIRMAN FUCHS: Yes.

3 MR. WEBSTER: Commissioner Fuchs, I
4 believe that the reason that we were willing to
5 compromise at Clearing is because operationally Mr.
6 Albritton and Mr. Walker know that us taking their
7 traffic to Clearing is way more efficient than going
8 to Kirk.

9 VICE CHAIRMAN FUCHS: And I appreciate
10 that, and I also appreciate that you all had--you
11 know, that there was an indication of willingness and
12 discussion on that for a more efficient solution. So
13 I appreciate that.

14 I am only merely getting at the issue that
15 if you all were to go to Kirk, whether or not that
16 would be economic harm to you all, but whether or not
17 it would be a monetary loss, but whether or not that
18 monetary loss would be, your overall economic harm
19 would be irreparable.

20 So to the extent that you had to hire
21 additional T&E crew, and spend more resources, and
22 let's say you prevailed and that Kirk was

1 unreasonable, whether or not you all could, you know,
2 whether or not CN could reimburse you for that.

3 And you're saying that they couldn't
4 because there's pressures of erosion of the train crew
5 base?

6 MR. RIFKIND: What I'm saying is that at
7 that point we're talking about incalculable losses.
8 We'd be--how would we determine, you know, what
9 training costs CN should bear, or termination costs
10 for the next six months we bring on a crew, we hire
11 new crews because we've brought on these other--
12 because we're moving CN's traffic, and then CN stops
13 requiring us to go to Kirk, or the Board stops
14 requiring us to Kirk.

15 So we've ramped up. We've got those
16 costs. And now we've got to terminate employees
17 because we don't have the work for them when it goes
18 away. Those are costs that we're not going to
19 recover in damages.

20 So that is the definition of irreparable
21 harm.

22 BOARD MEMBER OBERMAN: Are you saying you

1 can't measure -- it's the difficulty of proof? Is
2 that what you're saying?

3 MR. RIFKIND: Yeah, I'm saying it would be
4 very difficult to allocate the specific costs to the
5 CN service.

6 BOARD MEMBER OBERMAN: I'm assuming that
7 if we actually granted CN's request, ultimately found
8 against Kirk Yard, you'd still nevertheless come back
9 here trying to make that case, the one you just said
10 you couldn't make?

11 MR. RIFKIND: I might try to make it. I
12 think it would be very difficult for me.

13 BOARD MEMBER OBERMAN: Let me ask--I was
14 going to shift gears.

15 VICE CHAIRMAN FUCHS: I was just going to
16 say that, you know, I think what you're putting
17 forward is I guess a standard that in any instance
18 where we're looking at issues involving carriers and
19 irreparable harm, that any time they have to add any
20 T&E crew then that is something that is irreparable
21 harm? I mean, why wouldn't--is that basically the
22 contention? That any time a road has to add T&E

1 crew, that that is something that could not possibly
2 be reimbursed?

3 MR. RIFKIND: I think that it depends on a
4 case-by-case basis. I'm not prepared to say any--

5 VICE CHAIRMAN FUCHS: --crew be able to be
6 reimbursed?

7 MR. RIFKIND: I couldn't begin to
8 hypothesize. I think it would be difficult.

9 VICE CHAIRMAN FUCHS: It's just, you know,
10 it's kind of eye-opening that you all have had
11 increases in volume, and that's great, and, you know,
12 but just one additional train is just--you have so
13 little slack in your T&E crew, that one additional
14 train is just something that--not to say that it
15 won't cost you all money, but just even bringing on
16 that crew could not even possibly be monetized?

17 MR. RIFKIND: First of all, we're not
18 talking about "a crew." We're talking about
19 several, and we don't know how many--

20 VICE CHAIRMAN FUCHS: Well one train a
21 day, I should say, right?

22 MR. RIFKIND: One train a day, two, three,

1 more crews? I don't know. It depends on the health
2 of Chicago, on CN's dispatching. You know, we would
3 be at CN's mercy for dispatching.

4 So, one, I don't know how many crews we're
5 talking about here, but it's more than one crew. And
6 it may be more than two. And, you know, the question
7 is not how much we would be harmed, but whether it's-
8 -whether some portion of that harm would be
9 incalculable. And I submit some portion would be.

10 BOARD MEMBER OBERMAN: Just a few
11 follow-ups here. CN is suggesting that if we deny
12 the preliminary injunction and you go to Clearing,
13 they will pay the entire trackage rights pending the
14 outcome of the rest of the case as to whether we
15 determine Clearing to be reasonable, in which case it
16 would be their position that they'd stop paying and
17 you'd start paying. Is that the way you understand
18 it?

19 MR. RIFKIND: No, that's not my
20 understanding. My understanding is that if you were
21 to rule that Clearing was an appropriate location for
22 interchange, that they would seek reimbursement from

1 CP. And that's what--

2 BOARD MEMBER OBERMAN: From what they pay-

3 -

4 MR. RIFKIND: Right. So in fact --

5 BOARD MEMBER OBERMAN: So they would--I

6 understand.

7 MR. RIFKIND: Their proposal does not
8 constitute an acceptance of any offer. There was no
9 offer on the table at that time because we had, you
10 know, gone through multiple rejections and multiple
11 negotiations. But having said that, even if there
12 was an offer on the table, even if you could construe
13 what we said as an offer, they submitted an
14 acceptance with conditions. Which is, in contract
15 law terms, rejection and counter-offer.

16 BOARD MEMBER OBERMAN: Just to be clear,
17 do you contend that if we had the power to declare
18 Clearing acceptable, we also have the power to decide
19 who pays the fee for your CN permanently? Or do you
20 think we don't have that power?

21 MR. RIFKIND: I don't think you have the
22 power to declare Clearing acceptable, to compel us to

1 go to Clearing. And therefore I don't think you have
2 the power to--you have the power to say if CP
3 voluntarily agrees, we agree that CN should pay.

4 But--

5 BOARD MEMBER OBERMAN: You're saying we
6 don't have the power to order CN to pay? Or we don't
7 have the power to order you to pay?

8 MR. RIFKIND: That's correct. You don't
9 have the power to order us to go to Clearing under
10 well-settled D.C. Circuit precedent, and Supreme
11 Court precedent that that D.C. Circuit case was
12 based on.

13 BOARD MEMBER OBERMAN: If we were to try
14 to fashion some interim conditions while the
15 suitability of Clearing was being litigated, or Kirk,
16 for that matter, would CP prefer on an interim basis
17 to go to Clearing, or go to Kirk, while the case is
18 pending? Or would you care?

19 MR. RIFKIND: You know, Clearing would be
20 the answer. But, you know, Kirk would be a disaster
21 for us.

22 BOARD MEMBER OBERMAN: And one final--

1 well, a couple of final points. There was this CN
2 contention, going back to the blockages in Bartlett,
3 that even if you're interchanging in the middle of
4 the night, the interchanging there results in a lot
5 of daytime blockages. Do you have a response to
6 that?

7 MR. RIFKIND: I do. I mean I think, first
8 of all, it depends on speculation, right? It depends
9 on how many trains CN is running through its
10 mainline, not on anything CP is doing, or anything CN
11 is doing, in terms of interchange.

12 And there are certain things that could be
13 done at that intersection that would make interchange
14 more efficient both from CN's perspective and from
15 CP's perspective, and would alleviate the mainline
16 blockage we believe, and it would alleviate much of
17 the blocked crossings issues.

18 BOARD MEMBER OBERMAN: And what are those
19 things?

20 MR. RIFKIND: So there are various side
21 tracks right now that are primarily on the west side
22 of CN's mainline. With a few changes, straightening

1 out some switches, they could move their mainline
2 over to one of those side tracks and thereby creating
3 another side track on the east side of their
4 mainline. And with a few changes at the wye, or, I'm
5 sorry, the eastern wye that goes to the Metra
6 mainline and the western wye that goes between the CP
7 interchange tracks and currently goes on the
8 mainline, CN mainline before it goes to the CN
9 interchange tracks, if you straightened out that wye,
10 you would create a much more efficient interchange.

11 BOARD MEMBER OBERMAN: Is CP willing to
12 share any of that cost to resolve this?

13 MR. RIFKIND: The obligation is on CN to
14 provide the interchange facilities. This does us no
15 good in terms of--

16 BOARD MEMBER OBERMAN: No, if you knew you
17 could keep that as the interchange, would you be
18 willing to absorb any part of that cost? And how
19 much cost are we talking about?

20 MR. RIFKIND: I think we're talking
21 somewhere between \$6- and \$10 million. What CN's
22 talking about paying for the Harbor, and us paying

1 for the Belt. The other probably is somewhere
2 between \$1.5- and \$2 million a year. So, you know, I
3 think--

4 BOARD MEMBER OBERMAN: In seven years you
5 get your money back.

6 MR. RIFKIND: CN gets its money back.
7 This is all for CN's benefit. It's not for our
8 benefit.

9 BOARD MEMBER OBERMAN: Well, the
10 interchange is for your benefit since you would like
11 to keep interchanging there.

12 MR. RIFKIND: Right, but there's statutory
13 obligation to provide it.

14 BOARD MEMBER OBERMAN: We're talking about
15 you're the one who raised compromise. Have you had
16 any discussion with CN about that approach? Or
17 unless you don't want to reveal--

18 MR. RIFKIND: Yeah, that was discussed in
19 many of the--anything discussed in mediation, we're
20 barred from raising here.

21 BOARD MEMBER OBERMAN: I have one other
22 question, but before I get to it, can we assume that

1 as a result of this hearing you and the folks at
2 Bartlett are going to become best friends, and you'll
3 talk to them if you have any type of discussion like
4 that to resolve the problems?

5 MR. RIFKIND: Let me address that, because
6 I feel like CP was unfairly skewered in that.

7 BOARD MEMBER OBERMAN: Take the
8 opportunity.

9 MR. RIFKIND: So--so EJ&E is not a CP
10 mainline. It's CN's mainline. And CN, when it
11 bought the EJ&E entered into this agreement in 2012 to
12 serve as--to undertake certain interactions with the
13 community.

14 CP is not going through the village. It's
15 not its mainline. It shouldn't be posting things on
16 CN's mainline. And it is no secret that we have a
17 website, and that website tells you exactly how to
18 get in touch with CP if you have an issue.

19 And we frequently reach out to communities
20 that we operate through. Now I also want to correct
21 the record, because we went back and we did another
22 search to find if we had any complaints. And we

1 found one complaint, but it was about a CN train. It
2 wasn't about a CP train.

3 So, you know, we--

4 BOARD MEMBER OBERMAN: Well whatever the
5 past was, how about establishing a new friendship
6 here going forward?

7 MR. RIFKIND: We're happy--

8 BOARD MEMBER OBERMAN: Reaching out to
9 these folks so there's more communication. If
10 nothing else, so everybody knows who is doing what.
11 And if you do enter into some kind of discussion to
12 reshape the tracks to make the interchange more
13 fluid, if that's an approach, to include Bartlett in
14 the planning to make sure when you say this will
15 alleviate a lot of the blockages, let them have a
16 say. Or at least input as to whether it really will
17 alleviate blockage. Is that a fair request?

18 MR. RIFKIND: That is an absolutely fair
19 request. Every day we interact with the communities.
20 Mr. Giordano could tell you much about it.

21 CHAIRMAN BEGEMAN: I would like to chime
22 in so that Mr. Skrycki and Mr. Reinke know that we

1 also have a Rail Customer and Public Assistance
2 Office. We will make sure you have their phone
3 number. You can call them, and they will be as
4 helpful to you as possible. And if they need to
5 connect you with CP, they will do that as well. And
6 they can serve as an intermediary, if people get
7 angry at each other. But we want to be as helpful as
8 possible, and I am confident that Mr. Rifkind and Mr.
9 Webster will also give you their personal cellphones.

10 BOARD MEMBER OBERMAN: As I have
11 frequently reminded people, I started life as an
12 Alderman, and I know where these people are coming
13 from.

14 I have one other question. I -- was going
15 back over my notes. Am I wrong that CP pays Metra
16 some kind of a flat remuneration for using that line?
17 It's not a--I asked you if there was a trackage
18 rights' agreement. When I went back and looked at my
19 information--

20 MR. WEBSTER: There is a trackage rights
21 agreement, Mr. Oberman. And it's extensive. It
22 covers--

1 BOARD MEMBER OBERMAN: And there's some
2 payment involved?

3 MR. WEBSTER: There is a separate
4 agreement with respect to who maintains what. We
5 dispatch for them. And--but, no, we don't pay a
6 trackage rights fee. We're not paying--

7 BOARD MEMBER OBERMAN: But you pay a fee
8 of some kind, do you not, for the right to use that
9 line?

10 MR. WEBSTER: No, it's--

11 BOARD MEMBER OBERMAN: Let me--

12 MR. WEBSTER: --not in the sense that
13 we're talking about here.

14 BOARD MEMBER OBERMAN: Well, in some sense
15 you pay something for some purpose. But let me ask
16 you to do this. Could you get the specifics of
17 whatever payment is made to the Board that's under
18 seal?

19 MR. WEBSTER: Yes.

20 BOARD MEMBER OBERMAN: Because the
21 question is, it's my understanding that something is
22 paid. What's relevant here I think, if it's relevant

1 at all, is whether if you stopped interchanging there
2 you'd pay less or more, or how that would change. So
3 I'd like to know what those facts are.

4 MR. WEBSTER: I'll be happy to do that.
5 It wouldn't change. If the interchange were to go
6 away, our relationship with Metra would be unchanged.

7 BOARD MEMBER OBERMAN: Well I'd like to
8 know what the dollars are, if there are dollars, and
9 how it works.

10 VICE CHAIRMAN FUCHS: I have a few quick
11 additional questions. I'm not asking to reveal what
12 you put forward in mediation, but just your position
13 now. Is the CP position now that under no
14 circumstances would you ever contribute to any of the
15 fees for Clearing?

16 MR. RIFKIND: Yes. That is our position.

17 VICE CHAIRMAN FUCHS: Okay. So this
18 two-thirds/one-third, you will never agree to
19 one-third? Or two-thirds, or whatever?

20 MR. RIFKIND: No, we--

21 VICE CHAIRMAN FUCHS: Okay. Alright, and
22 then I asked you about transit times, about you'd be

1 comfortable putting into evidence something that
2 indicates that one day the transit time difference,
3 at least when you're in control of the journey, and
4 just quick turning to CN, you would have no issue
5 with providing evidence that sheds light on the
6 transit times from Bensenville to Clearing to Kirk,
7 as opposed to from Bensenville to Spaulding to Kirk?
8 Would you have any issue with--if the Board asked to
9 provide evidence on that account? There would be no
10 issue in coming up with that evidence?

11 MR. WARREN: Well, I don't believe there
12 would be an issue in coming up with that evidence
13 (off-microphone).

14 So I don't believe that CN would have any
15 issue providing that evidence. I know that CN would
16 certainly be willing to provide whatever evidence the
17 Board asks, and I think that that would be the kind
18 of data that probably could be developed.

19 VICE CHAIRMAN FUCHS: And just as a
20 hypothetical, if the Board were to deny the
21 injunction, the request for an injunction, and as a
22 result there was no--for the pendency of the case, I

1 guess there would be no interchange at Spaulding,
2 would CN be willing to provide evidence about the
3 effects of the actual, the measurable effects of no
4 longer having an interchange at Spaulding, on the
5 blockage of crossing at Spaulding?

6 In other words, both for the evening and
7 the daytime, let's say for example during the
8 pendency of the case, you were either interchanging
9 at Kirk or doing the Clearing-Bensenville solution,
10 you know, we would be able to observe in real time
11 what effect it had not only in the evening but in the
12 daytime. Would you all be comfortable providing that
13 type of crossing information?

14 MR. WARREN: Yes. CN is comfortable
15 providing whatever information--

16 VICE CHAIRMAN FUCHS: We'd like to see the
17 live data.

18 MR. WARREN: And I don't want to make any
19 promises about what data is available, or what it
20 would show, but there will not be any unwillingness
21 to provide further data.

22 VICE CHAIRMAN FUCHS: And I'll let people

1 who know what the process ought to be a little bit
2 better--

3 BOARD MEMBER OBERMAN: Let me just
4 interject. I would say to the folks from Bartlett,
5 if that is what happens--and that's a big "if", we
6 don't know what we're going to do--I would ask you to
7 do your own measurement. Trust, but verify, as to
8 the impact of any change, to be helpful.

9 VICE CHAIRMAN FUCHS: And I want to give
10 CN just a brief opportunity to respond, too, because
11 I think it's one of the core questions before us on
12 the economic harm and the incalculability of adding
13 train crew. I don't know if you could just briefly
14 respond to that, understanding that it's not exactly
15 how we set up the arguments, but if you could,
16 because I think it's an important point.

17 MR. WARREN: I'd be happy to. I mean,
18 it's not really addressed in our papers because I
19 don't actually believe that this was one of the
20 irreparable harms that CP pointed out in its
21 Petition, which is I think is a reason not to pay it-
22 -for the Board not to base its decision on it.

1 I don't think it's incalculable. I'm
2 going to say a dirty word, but in SAC cases it's
3 pretty common for parties to agree on training costs
4 for hypothetical railroads of thousands of T&E
5 crews. I don't understand why it would be so hard to
6 calculate training costs for two or three crews.
7 That seems like data that's pretty easy to put your
8 hands on. And if it's the kind of loss that CP wants
9 to recover, I don't think that's--that seems to be
10 classic economic harm. If they are able to prevail
11 and demonstrate to the Board that they are entitled
12 to it, I think they would be able to calculate it.

13 BOARD MEMBER OBERMAN: So if we end up
14 litigating that question, you won't object to their
15 evidence as speculative?

16 MR. WARREN: I can't say that I won't
17 object to speculative, but if they come in, you know,
18 and say it's a million each, then I would say no.
19 But I think railroads are--I think they keep pretty
20 good records of how much it costs to train an
21 employee. It's obviously an important cost. I don't
22 think it's impossible to calculate.

1 BOARD MEMBER OBERMAN: I'd like to just go
2 back to one other thing to see if there's any data
3 out there. When you said that they're ways of redesign
4 for \$6- to \$10 million, the whole operation there,
5 that would alleviate blocked crossings, has there
6 been any traffic studies to--I mean, \$6- to \$10
7 million is a lot cheaper than \$150 million overpass,
8 or whatever it might cost in today's dollars. And I
9 don't know that Bartlett is going to pay for it,
10 either. But I'm just wondering if that expenditure
11 of money really would solve the problem, and is there
12 any traffic study to show why it would?

13 MR. RIFKIND: Well so first of all, it
14 would mitigate the problem.

15 BOARD MEMBER OBERMAN: It would mitigate
16 it.

17 MR. RIFKIND: I think it's really
18 important to note that there are two--well, there are
19 three causes of blocked crossings other than the
20 interchange operations. So one is, you're moving
21 trains, your through trains on the mainline.

22 Another is when those through trains have

1 to wait until the Metra line is clear and they can
2 roll on.

3 And the third--

4 BOARD MEMBER OBERMAN: Not much. Metra is
5 going 79 miles an hour.

6 MR. RIFKIND: Well, if you look at the
7 data that the CN provided to the Board in the EJ&E
8 proceeding, there are a significant number of
9 instances where the blocked crossings for more than
10 10 minutes were attributable to waiting for a window
11 to cross Metra.

12 So Metra may be going fast. That doesn't
13 mean that there's a window to move a 130-car train
14 through it, opening up any time soon. In fact, there
15 are windows when we can't operate across Metra.

16 BOARD MEMBER OBERMAN: I just want, if
17 there is any information to support--any data to
18 support the level of mitigation, I agree with you
19 that without an overpass you're not going to
20 completely eliminate interruptions, but it would be
21 interesting to see on a comparative basis what that
22 would be. If you have it, and can supply it.

1 MR. RIFKIND: What we've done is we've
2 worked through the engineering. We haven't done any
3 traffic studies. We're just trying to propose--

4 BOARD MEMBER OBERMAN: But you need some
5 basis for saying that it would mitigate the
6 situation--

7 MR. RIFKIND: Oh, yes--

8 BOARD MEMBER OBERMAN: --so whatever
9 you've got there--

10 MR. RIFKIND: --it would mitigate the
11 situation because it would minimize the number of
12 times we have to cross, or CN has to go on its
13 mainline. It would minimize the amount of time that
14 either of us would be blocking any of the roads that
15 cross the interchange.

16 Now I want to be clear here--

17 BOARD MEMBER OBERMAN: Yeah, can I just
18 ask? Matt, have you seen these plans? Do you
19 agree?

20 MR. WARREN: No, we haven't seen these
21 plans. So, and I don't know if the \$6- to \$10
22 million was ever mentioned. This is the first time I

1 remember hearing it. And I don't want to reveal
2 anything that was discussed in mediation, but I don't
3 think I'm going to too far to say that this topic was
4 raised, but we've seen no plans. We've seen no
5 studies. And we don't believe that this--not having
6 seen it, I can't say--but it doesn't sound like this
7 would do anything for grade crossing blockages. It
8 sounds like this is a plan we haven't seen that
9 theoretically would reduce mainline blockages.

10 BOARD MEMBER OBERMAN: Well, I think it
11 would be based on Mr. Rifkind's representation. It
12 would seem to me productive to see if the two
13 railroads could sit down and decide what the facts
14 are, even if you aren't going to agree on doing it or
15 paying for it. But whether the solution would
16 actually alleviate any part of the problem.

17 MR. WARREN: Well if they've prepared a
18 study that we haven't seen, it would be great to see
19 it.

20 MR. RIFKIND: We're happy to share. I'd
21 like to make a couple of things clear about the
22 blocked crossings issue. First of all, there was a

1 third cause of blocked crossings that is unrelated
2 to interchange. And that's when CN brings its train
3 on from its Munger Road access onto the EJ&E. It pulls
4 up, blocks crossings, and pulls down.

5 Now Stearns, CP never blocks Stearns Road.
6 We just don't. Spaulding, I looked through 11 months
7 of data, those available from the "Way back Machine"
8 and other sources for CN. There were two instances
9 in that entire 11 months where Spaulding was blocked
10 for more than 10 minutes due to CP interchange.

11 So CP is not generally blocking Spaulding
12 for extended periods of time. And when it's blocking
13 West Bartlett, doing it at 3:00 in the morning, it's
14 willing to cut the train if it sees an emergency
15 vehicle. But during that time, Spaulding and Stearns
16 are both open.

17 MR. WARREN: I know we're--if I could just
18 say one thing quickly. We have never--I think the
19 position seems to be that grade crossing blockages
20 aren't CP's fault if there's not a CP locomotive on
21 it. I think as we try to make pretty clear, many of
22 the blocked crossings are by CN trains that are being

1 forced to perform interchange.

2 So, you know, you can't say it's not CP's
3 fault; it has nothing to do with interchange if it's
4 a CN train. I mean, these are--you know, these
5 stopped, you know, train blockage is 70 percent of
6 the blockages over 10 minutes are due to interchange
7 operations. And a lot of those are CN trains. But
8 that doesn't mean that they're any less attributable
9 to interchange operations.

10 MR. REINKE: I would just like to add on
11 behalf of the Village of Bartlett, we're not privy to
12 any of this data. The data that I have, that we
13 have, is referenced in the pleadings before this
14 case. I inquired further. I wasn't able to get that
15 information. So I would love to take the various
16 parties' data and analyze it, and be able to
17 determine whether it's consistent with our
18 observations. But otherwise, I think it's incredibly
19 challenging to ask all of our EMS people, our police
20 officers, and our residents to go take a look at the
21 name on the locomotive.

22 That doesn't mean that we're not willing

1 to do it. I know we absolutely need to do it for
2 you. But I would expect that the railroads would
3 share that data with us.

4 VICE CHAIRMAN FUCHS: I appreciate that.
5 Thank you. The clarification of CN's position,
6 briefly, I asked CP if their position was: Under no
7 circumstances would they ever pay any of the BRC
8 fees. Is that CN's position?

9 Or--I'm not asking your position in
10 mediation, but your position currently, would CN ever
11 pay a portion of the BRC fees, if you had the
12 Bensenville to Clearing solution?

13 MR. WARREN: I don't want to reveal
14 anything that was discussed in mediation, but I think
15 that the most important issue for CN is to be able to
16 move the interchange points out. And I think CN
17 would--you know, I don't think CN has drawn any line
18 in the sand there. CN doesn't believe it is
19 obligated, given the fact that it's taking 100
20 percent of the costs, including the out-of-pocket
21 switching fees to get traffic up to CP at
22 Bensenville, and thinks that it's reasonable to split

1 the fees to get the traffic back at Clearing. But
2 we're not drawing any line in the sand.

3 CHAIRMAN BEGEMAN: Alright, thank you all
4 for your participation--

5 MR. RIFKIND: Could I just add one--

6 CHAIRMAN BEGEMAN: You can, but I would
7 like to just leave you with the thought of I think
8 you should think long and hard about perhaps having
9 another round of mediation.

10 MR. RIFKIND: I'd just like to cover a
11 couple of points, if I may. One is the
12 representation that CN won't do anything to the
13 tracks. That's what concerns us. Because in six
14 months, or eight months, or ten months, those tracks
15 are going to be unusable. They are not going to
16 maintain them. They may not rip them out. So we
17 will be looking at a very different set of facts.
18 The status quo will not be the same, if we have to go
19 to Clearing.

20 CHAIRMAN BEGEMAN: So now you know how the
21 shippers feel.

22 BOARD MEMBER OBERMAN: I would just like

1 to say before we leave that I really appreciate all
2 of you standing up there and withstanding the three,
3 almost four hours of intensive questioning. You were
4 prepared, and I appreciate it, personally, and I'm
5 sure the rest of us do.

6 VICE CHAIRMAN FUCHS: Likewise, yes. Very
7 much appreciated.

8 MR. RIFKIND: Thank you for the
9 opportunity.

10 (Whereupon, at 1:44 p.m., Tuesday, August
11 6, 2019, the hearing in the above-entitled matter was
12 adjourned.)

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