

Date: April 4, 2022

Case: Remote Public Evidentiary Hearing

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SURFACE TRANSPORTATION BOARD

REMOTE PUBLIC EVIDENTIARY HEARING FOR
"Application of the National Railroad Passenger
Corporation Under 49 U.S.C. Section 24308(e)
CSX Transportation, Inc., and Norfolk Southern
Railway Company."

VOLUME I

Monday, April 4, 2022

9:30 a.m.

Via Zoom Government

The above-entitled matter came on,
pursuant to notice, at 9:38 a.m., Chairman Martin
Oberman, presiding.

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

2 CHAIRMAN OBERMAN: Good morning, everyone.
3 Sorry for the delay, but we seem to be up and
4 running, and I hope any observers can see and hear
5 our proceedings. Thank you all for joining us for
6 this evidentiary hearing in the Amtrak Gulf Coast
7 proceeding.

8 To briefly summarize the case, Amtrak has
9 filed an application with the board under 49 U.S.C.
10 24308(e) seeking an order requiring CSX and Norfolk
11 Southern to allow Amtrak to operate two round trip
12 intercity passenger trains per day over the rail
13 line of CSX and NS between New Orleans, Louisiana,
14 and Mobile, Alabama.

15 There's been discovery in the case and the
16 board has received numerous filings, including
17 evidence and argument by Amtrak, CSX, NS, and
18 Port of Mobile. In mid-February we had a hearing in which
19 the public provided comment and then we convened a
20 pretrial conference with the parties.

21 Today's proceeding is a formal evidentiary
22 hearing on the record under 24308(e) involving the

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1 four parties.

2 Before we begin, I want to say a special
3 thank you to our IT team and other board staff who
4 have worked so hard to make sure this happens
5 successfully.

6 First, I want to go over a few procedural
7 and technical matters, and then we will get into
8 some of the substantive issues of the hearing.

9 First, as always, please silence your cell
10 phones. Turn off your cameras when you're not
11 presenting or participating in examination or
12 cross-examination, and mute yourselves in Zoom when
13 you're not speaking.

14 When you are presenting opening statements
15 or closing arguments, we had planned to have a
16 timer, but as you'll see in a few minutes, we're
17 not going to apply it on a timer at this point.

18 We will be using breakout rooms in Zoom
19 when confidential and highly confidential
20 information and evidence is presented. When it is
21 necessary to enter the breakout room, our Zoom
22 moderator, Matt Cross, will place the appropriate

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1 participants in the breakout room. There may be a
2 slight delay while this happens. I will make an
3 announcement when we have entered a confidential or
4 highly confidential session and board staff will be
5 monitoring a list of participants in those
6 sessions, but if you happen to be inadvertently
7 placed in a confidential or highly confidential
8 session and have not signed the appropriate
9 undertakings, please remove yourself from the Zoom
10 room.

11 Also, if you have multiple people together
12 in a conference room, we will rely upon the parties
13 to monitor who is permitted to remain during a
14 confidential or highly confidential portion.

15 As a reminder, to minimize our need to go
16 in and out of these breakout rooms, we ask that the
17 parties try to keep their discussion and
18 questioning of confidential or highly confidential
19 information to one session per witness, if
20 possible. I'm not going to cut you off if that
21 can't happen, however.

22 Let me also just say to the public who may

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1 be witnessing this on YouTube, when we go into
2 these confidential breakout rooms, then you will
3 not be able to see or hear what's going on because
4 of the matter -- the reason for this is that the
5 parties have filed proprietary information which is
6 allowed to be kept from public disclosure under the
7 law, and so to honor those requests, we may from
8 time to time have to leave you sitting there
9 watching an empty room until we come back. So
10 hopefully you will bear with us but understand that
11 this is legitimate protection for parties'
12 information.

13 Panelists, you will have access to the
14 chat function in Zoom, but please only use this for
15 technical questions. If you become disconnected
16 from the hearing and are not able to connect via
17 Zoom, there is a phone number you may use to call
18 in included in the hearing information you were
19 provided. If you do need to call via phone, please
20 e-mail us at Hearings@STB.gov with the phone number
21 you're calling from so we can identify you and
22 reach out to you with further instructions. You

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1 can also refer to the frequently asked questions on
2 the board's website for any further troubleshooting
3 or contact information.

4 This hearing is also being streamed on
5 YouTube and the link is available on the board's
6 website. A transcript of the public portion of the
7 hearing will be on the board's website after the
8 close of the hearing and a recording will be
9 available as well.

10 For the benefit of our court reporters,
11 please speak clearly into your microphone and
12 minimize background noise. They are welcome to
13 interject to tell us if they can't hear.

14 We plan to take an approximately 30-minute
15 break for lunch each day from about 12:30 to 1 p.m.
16 Eastern. We will also take several short breaks
17 throughout the day. And I would say to counsel if
18 any of you feel the need for a brief break, please
19 feel free to ask for one.

20 We will try to conclude each day by 5 p.m.
21 Eastern, but I would say 5 to 5:30, although we may
22 go slightly longer if it allows the parties to

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1 finish up with a witness or allows us to reach a
2 logical stopping point.

3 Now we have some preliminary matters to go
4 through.

5 First, we received a number of materials
6 from the parties as exhibits, as they were directed
7 to do, and I want to make sure that all of us, at
8 least the five board members and the parties, all
9 have the same materials. And hopefully we
10 received -- they weren't in the packages, so I was
11 a little bit lost, but we did receive cover letters
12 from counsel involving these materials. So I want
13 to go through these one by one and ask the parties
14 to confirm that we are all in sync.

15 We did receive -- we also received letters
16 dated March 30th from counsel for all of the
17 parties except the Port referring to various
18 potential objections and other aspects of the
19 exhibits, which I will cover in a couple of
20 minutes.

21 So first of all, we received three large
22 volumes, three-ring volumes that are about 6 inches

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1 thick each, that are listed as joint exhibits. Do
2 I understand that these are joint exhibits of all
3 four parties and that they are to be -- and you are
4 asking us to admit them without objection? Can I
5 hear confirmation of that?

6 MR. WARREN: Yes. Yes, Mr. Chairman.
7 Matt Warren for CSX. I think technically they are
8 already admitted because those joint exhibit
9 volumes are the prior filings of the parties in
10 this case, which I believe one of the board's prior
11 orders indicated was already admitted.

12 CHAIRMAN OBERMAN: All right. But I want
13 to make sure there are no objections.

14 MR. WARREN: Yes, of course. We have no
15 objections. CSX has no objections.

16 CHAIRMAN OBERMAN: And is that the same
17 for everybody else?

18 MS. AMUNSON: No objection.

19 CHAIRMAN OBERMAN: That was definitely a
20 no objection.

21 MR. MULLINS: No objection from Norfolk
22 Southern.

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1 CHAIRMAN OBERMAN: Amtrak? Was that you,
2 Jessica, trying to tell me something?

3 MS. AMUNSON: Jessie Amunson on behalf of
4 Amtrak.

5 CHAIRMAN OBERMAN: And the Port? Is
6 there --

7 MR. WIMBISH: No objection.

8 CHAIRMAN OBERMAN: Then I received two --
9 we received two relatively thick three-ring binders
10 that are listed as joint exhibits of CSX and NS; is
11 that correct, the total filing?

12 MR. WARREN: Yes, Mr. Chairman.

13 CHAIRMAN OBERMAN: Then I received -- and
14 it's the only one I can pick up by hand -- a
15 relatively small volume or three-ring binder from
16 Amtrak, and those are the only exhibits beyond the
17 joint exhibits, Amtrak, that you are offering?

18 MS. AMUNSON: Yes, that's correct.

19 CHAIRMAN OBERMAN: And finally I received
20 some oversized pieces of paper, about a quarter of
21 an inch thick, with no cover letter but a list, and
22 the list refers to them -- each number as a Port

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1 exhibit. So I assume these are the exhibits
2 submitted only by the Port and these are all of the
3 exhibits that the Port has in addition to the joint
4 exhibits; is that correct?

5 MR. WIMBISH: That is generally correct,
6 Mr. Chairman. There is, however -- there was one
7 of the exhibits that we sent which was in two
8 parts, 1A and Port 1B. We discovered during the
9 weekend that the maps that we sent you, while they
10 are not inaccurate, did not contain all of the
11 information that we wanted to convey in those maps.
12 We arranged yesterday evening through Mr. Poland to
13 send new electronic versions of those maps, Port 1A
14 and Port 1B, and circulated those last night.

15 CHAIRMAN OBERMAN: I don't know if I have
16 seen those, and we're going to get into objections
17 here in a moment but just on -- Robert, I can't see
18 you. Is this Robert Wimbish talking?

19 MR. WIMBISH: It's Rob, yeah.

20 CHAIRMAN OBERMAN: Is there any objection
21 from any of the parties to Mr. Wimbish's late night
22 correction of an exhibit?

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1 MR. WARREN: No, Mr. Chairman, not from
2 CSX.

3 CHAIRMAN OBERMAN: Amtrak?

4 MS. AMUNSON: Not from Amtrak.

5 CHAIRMAN OBERMAN: And NS?

6 MR. MULLINS: No objection from Norfolk
7 Southern.

8 CHAIRMAN OBERMAN: So if there are other
9 objections, we'll deal with those later, but in
10 terms of the timeliness of it, I guess we need to
11 make sure that the board members can see it, and
12 we'll worry about that later, Mr. Wimbish, when we
13 get to your part of the case and you want to offer
14 the exhibit.

15 So other than the questions -- well, I
16 want to talk about the objections for a moment. We
17 also received a joint stipulation as to uncontested
18 facts and issues, and so as to the facts part of
19 that stipulation, those facts, unless I hear
20 otherwise at this moment, will be considered as
21 having been established.

22 Third, we received a letter on March 28th

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1 from Brian Dunn, U.S. Coast Guard, which was --
2 because of the way it was filed, has already been
3 placed in the docket. We received a letter from
4 all counsel alerting us to the fact that we would
5 be getting a letter or might be, and objecting to
6 any communications with the Guard that were not in
7 writing and not placed in the docket. To my
8 knowledge -- and the staff can correct me -- I
9 don't believe there has been any communication with
10 the Coast Guard other than that letter, and unless
11 there is any objection, I would order that that
12 letter be admitted into evidence. Is there any
13 objection?

14 MR. WARREN: No objection from CSX.

15 MR. MULLINS: None from Norfolk Southern.

16 MS. AMUNSON: No objection from Amtrak.

17 MR. WIMBISH: None from the Port.

18 CHAIRMAN OBERMAN: All right. So that
19 will be admitted.

20 (Board Exhibit 1 was marked for
21 identification.)

22 CHAIRMAN OBERMAN: Fourth, and this is a

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1 matter you may have heard me refer to at the
2 outset, we received a letter from counsel for CSX
3 and NS listing Thomas Crowley to be called as a
4 hostile witness because he was no longer going to
5 be called as the witness by Amtrak.

6 Is there an objection to calling
7 Mr. Crowley as an adverse witness?

8 MR. WARREN: Mr. Chairman, if I may, we've
9 had some discussions with Amtrak since that letter
10 went in and my understanding is that Amtrak is now
11 planning on calling Mr. Crowley as a witness during
12 their case in chief, and we don't have any
13 objection to that. I'll let Jessie speak for
14 Amtrak.

15 MS. AMUNSON: That's correct,
16 Mr. Chairman. We worked it out among the parties
17 such that we would call Mr. Crowley in our case in
18 chief to give the other parties the opportunity to
19 cross-examine him as well.

20 CHAIRMAN OBERMAN: All right. Good. I
21 was going to -- we were going to have some
22 discussion about that, but that has been mooted, so

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1 we can move forward.

2 So at the outset -- now, there are some
3 other objections that were raised, and I want to
4 just comment on them in the record, because you all
5 raised them in your letters and I wasn't sure what
6 you were expecting -- how and when you were
7 expecting us to deal with them.

8 So first, in the letter dated March 30th
9 from Mr. Mullins and Mr. Warren concerning Amtrak's
10 Exhibit 6, basically you are saying that if
11 Amtrak's Exhibit 6 and the testimony of Clayton
12 Johanson get into an area which you contend was
13 part of his previous disclosures that you may
14 object. I would say on that and the other issue
15 that the time for us -- and I'm glad you raised the
16 issue to alert us to it so we could be ready for it
17 but, obviously, it cannot be ruled on in a vacuum
18 until the testimony is offered, and if you want to
19 preserve those objections, raise them at the time,
20 we'll deal with them at that time.

21 You also in the same letter say you
22 reserve the right to object to any part of an

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1 exhibit based on the context of which it is
2 offered.

3 Can you enlighten me on what you're
4 talking about?

5 MR. WARREN: I think, Mr. Chairman, there
6 could be instances where an exhibit is offered for
7 a witness that doesn't know anything about the
8 exhibit or an exhibit is being offered in some way
9 where it would be -- where we don't think it would
10 be a fair representation of the record, and I think
11 this would apply to both sides, that as exhibits
12 come in during trial, or during our evidentiary
13 hearing, I think both sides would have the ability
14 to raise objections that they think might be
15 appropriate based on the context in which the
16 exhibit is being offered.

17 CHAIRMAN OBERMAN: Well, that wouldn't go
18 to admissibility. If you aren't objecting to
19 admissibility, you might have a relevant foundation
20 question as you would say if it was raised with a
21 witness who doesn't know anything about it,
22 although I don't know why a party would do that,

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1 but, I mean, either you have an objection to the
2 admissibility or you don't. So you say generally
3 you have no prehearing objections to their exhibits
4 and you may have an objection. So I think we need
5 to know whether these are admitted at this point or
6 not. You may object to the use of an exhibit, it
7 sounds to me like what you're saying, in a context,
8 but that doesn't go to admissibility. Is that a
9 fair understanding of what your concern is?

10 MR. WARREN: I think that's generally
11 fair, Mr. Chairman, and other than Exhibit 6, which
12 you've noted, that we may have some concerns about
13 whether that demonstrative, proposed demonstrative,
14 you know, reflects analysis that wasn't actually
15 included in any of Mr. Johanson's prior verified
16 statements, but we obviously have reserved that.

17 The documents, other than the
18 demonstratives, which would not be admitted under
19 any circumstances, they would just be
20 demonstratives, I don't think we have any
21 particular objection to the admissibility of any of
22 the exhibits on Amtrak's exhibit list.

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1 CHAIRMAN OBERMAN: I wanted to clear that
2 up.

3 Next, Amtrak has raised a concern about
4 use of drone footage -- well, there are several
5 issues that are raised in Amtrak's letter of
6 March 30th from Ms. Amunson. Amtrak asked for a
7 stipulation as to some use of the drone footage,
8 which was not agreed to. I would say on that
9 matter, Amtrak, you preserved your objection to
10 that and if and when the drone footage is shown, we
11 should focus on the specifics of your concerns and
12 rule on them at that time.

13 So, again, I'm appreciative, I think the
14 board members are of being alerted to the areas
15 where there will be discussion.

16 You raised the same question -- are we
17 still on here? My screen just -- can everybody
18 hear?

19 MR. ATKINS: We can hear and see you.

20 CHAIRMAN OBERMAN: Okay. Very good. The
21 same concern was raised with certain photographs in
22 the March 30th letter. So as to both of those, I

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1 note your objections are reserved, and you should
2 raise them at the appropriate time.

3 Amtrak also raises objections to CSX/NS
4 Exhibits 172 through 266. I haven't looked at
5 those. It refers to letters submitted by
6 nonparties. I assume these are the many comments
7 we received, not all of them, but whatever ones you
8 selected from the public. Is that what those are?

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

10 CHAIRMAN OBERMAN: For what purpose are
11 you offering them?

12 MR. WARREN: I don't believe that we would
13 be intending to introduce all of them, but some of
14 them, you know, I think are relevant to the views
15 of those interested third parties and they may be
16 introduced with certain witnesses.

17 CHAIRMAN OBERMAN: All right. Then,
18 again, I think we'll reserve -- Amtrak reserved its
19 objections. We'll deal with them one at a time, if
20 you offer any of those letters, and then we'll deal
21 with their admissibility at that point.

22 And then Amtrak raises a concern referring

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1 to matters as visual aids or demonstratives.
2 Again, not unlike the point, Matt, that you just
3 raised. I think we'll try to deal with them in the
4 abstract. And we have so many maps and photographs
5 and drawings that at the time these exhibits are
6 used, the parties should identify them as to
7 whether they're intended to be demonstrative
8 exhibits or actual substantive matters and then
9 we'll deal with objections at the time.

10 So let me talk a little bit about
11 evidentiary objections. In order for this matter
12 to function, it has to determine -- as to
13 evidentiary objections, I will be ruling on those
14 objections initially. However, this is a
15 full-board proceeding; so if any board member
16 disagrees or wants to raise an issue, then the
17 board will debate it, and, if necessary, vote on
18 it. If there are no objections raised by the board
19 members, then the rulings will be deemed to be the
20 rulings of the board. So everybody knows where we
21 stand, but I see no need, unless the other board
22 members see it, to vote on every objection on

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1 evidentiary or other procedural matter that comes
2 up.

3 So with that introduction, I'm going to
4 rule that with the exception of the items
5 specifically reserved in the March 30th letters
6 from counsel for both sides is the Amtrak exhibits
7 with the exception of Exhibit 6 are admitted; and
8 the Port exhibits, including the late filed one,
9 which I haven't seen, are admitted; and the NS/CSX
10 exhibits with the exception of all of the items
11 itemized in Ms. Amunson's March 30th, 2022, letter
12 are admitted. The ones that are reserved, in those
13 letters, as I said, objections are reserved and
14 we'll deal with them at the time.

15 MR. WARREN: Mr. Chairman, if I may,
16 Amtrak's Exhibit Number 5 is a demonstrative
17 exhibit. While we don't object to it as
18 demonstrative, we would think that it falls within
19 the same reservation that Ms. Amunson raised with
20 our demonstrative exhibits; that those
21 demonstratives would not actually be admitted as
22 exhibits.

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1 CHAIRMAN OBERMAN: I will modify that
2 ruling and will reserve judgment on Exhibit 5 as
3 well.

4 MR. WARREN: Thank you.

5 CHAIRMAN OBERMAN: Otherwise, all the
6 Amtrak exhibits are admitted and the rest are
7 admitted. Thank you.

8 MS. AMUNSON: Mr. Chairman, Jessie
9 Amunson.

10 CHAIRMAN OBERMAN: Yes, Jessie.

11 MS. AMUNSON: Just briefly, in our letter
12 the objection to photos was also as to the Port
13 photos that were offered, so just to make sure that
14 that's noted as well.

15 CHAIRMAN OBERMAN: Thank you for clearing
16 that up. So are you objecting to all of the Port
17 exhibits or just the photographs?

18 MS. AMUNSON: The photographs.

19 CHAIRMAN OBERMAN: So with the exception
20 of the Port photographs, all the Port exhibits are
21 admitted, and then we'll raise those objections at
22 the time.

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1 By the way, when counsel is speaking, I
2 can't see you, and it's helpful to me if you turn
3 your cameras on when you're speaking so I can see
4 who I'm talking to.

5 MR. ATKINS: So, Chairman, this is Ray.
6 Just so you know that our feed -- our audio feed is
7 going through our witness video feed, so anytime
8 you hear counsel speaking, if you're in
9 presentation or speaker mode, it's going to show
10 probably an empty chair. We can't have two
11 different mics set up, it creates too much
12 feedback, so to see us, you're going to need to put
13 gallery mode on so you'll always have the camera
14 showing you counsel in the gallery view, but only
15 our witness, the audio is tied to our witness
16 chair.

17 CHAIRMAN OBERMAN: I just clicked on
18 gallery view.

19 MR. ATKINS: You can see me and the four
20 of us?

21 CHAIRMAN OBERMAN: I can see Rob Wimbish.

22 MR. ATKINS: There should be one for

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1 CSX/NS counsel.

2 CHAIRMAN OBERMAN: Let me see here.

3 You know what? There you go. I can see
4 you. There was a blockage across it. I see that
5 and, oh, I see Jessie. Okay.

6 MR. WIMBISH: Mr. Chairman, if I may, we
7 will have a similar central microphone for our
8 presentation as well. We have all of our witnesses
9 and counsel in the same room, but we are all
10 accessing this presentation from separate computer
11 stations and as a consequence of that, to avoid the
12 feedback issue, as counsel for CSX has pointed out,
13 Mr. Atkins has pointed out, we will be doing the
14 same thing. We will coordinate with your IT people
15 to make sure that when our opportunity for
16 presentations come, when our time has come, that
17 you see both the attorney and the witness when we
18 present. We will certainly coordinate with IT if
19 you're having difficulties with that.

20 CHAIRMAN OBERMAN: So I'm trying to come
21 into the 21st century here, let me figure this out.
22 If I want to see -- when we get into what evidence,

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1 I won't have to be in gallery review to see counsel
2 and the witness; is that what you're saying?

3 MR. ATKINS: Chairman, when we start to do
4 direct for CSX and Norfolk Southern's witness, if
5 you're in portrait view, you will always see our
6 witness and we will be in a thumbnail. Even when
7 we're talking, the video feed will always be on the
8 witness. So if you want to see us, you'll need to
9 use gallery view to see both the witness and
10 counsel while we're doing direct.

11 CHAIRMAN OBERMAN: Okay. We'll figure it
12 out. I have no idea what the YouTube folks are
13 seeing but hopefully they can see all of it.

14 Okay. So now we are going to proceed. As
15 you know, we originally set the schedule for
16 opening and closing statements for the parties. We
17 also, on March 14th, issued an order directing the
18 parties to be prepared to address five listed
19 issues at the hearing. I'm going to request that
20 counsel address those issues in their opening as
21 part of their opening statements prior to the
22 beginning of evidence, and for that reason we're

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1 not going to impose the oral argument -- opening
2 argument time limitations on you because those are
3 issues which may well need more time than you were
4 otherwise planning to address to us at your opening
5 statements. And I would also say, by the way, that
6 just because we ask you to address those issues in
7 your opening statements does not mean that you
8 cannot address them later as the topics may relate
9 to what's being litigated at the moment in a
10 hearing with witnesses and certainly in your
11 closing arguments.

12 MR. ATKINS: So --

13 CHAIRMAN OBERMAN: If I could just finish,
14 I think it would be beneficial to the board members
15 to lay out at least the parties' contentions, if
16 not a whole blown discussion of the answers to the
17 questions we posed.

18 MR. ATKINS: So, chairman Oberman, may I
19 just remind the board that we filed briefs on
20 Friday that lay out our position on all of those
21 issues, so did Amtrak, as all the parties did, the
22 Port did as well, so you have before you our full

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1 position on those legal questions. I would submit
2 that it might be more beneficial to just refer to
3 those legal documents and then we can have a robust
4 conversation about it in closing rather than for us
5 to just reiterate what we said in our briefs to the
6 board on Friday, which just to be candid, I can do
7 it, but it wasn't a part of my prepared opening
8 remarks.

9 MR. MULLINS: And, Mr. Chairman, I might
10 add that that was done with the consent of all
11 parties between a meet and confer, that we would
12 all file legal briefs and address it that way
13 rather than taking time. We can certainly take
14 time, if that is what you prefer, but it is in the
15 prehearing trial briefs.

16 CHAIRMAN OBERMAN: Well, I must confess I
17 am unaware of those filings. I don't know if the
18 other board members have read them. I see now
19 they're in the -- on our docket, but I think, like
20 most of the board members, I was pouring through
21 the vast volume of stuff you sent us and so perhaps
22 you can -- we'll read them of course, I'll read

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1 those at breaks, but, in the meantime, I think it
2 would be beneficial, if you could, give us a brief
3 summary of at least what your positions are and
4 then you don't have to go into some legal argument
5 as to how you got there, but I think we at least
6 would like to know what your contentions are.

7 MR. MULLINS: Understood.

8 CHAIRMAN OBERMAN: Let me ask the board
9 members if they would -- if that's okay with them,
10 if anyone has a different approach.

11 MEMBER PRIMUS: I'm fine, Marty.

12 VICE CHAIR SCHULTZ: Okay with me.

13 CHAIRMAN OBERMAN: All right. I'm still
14 going to give you some additional time in your
15 opening statements. We have a lot of witnesses to
16 get to to address those five issues. So with that,
17 we will begin the parties' opening statements.

18 Does CSX -- or which among CSX and NS
19 wants to begin?

20 MR. ATKINS: Chairman, this is Ray Atkins
21 on behalf of CSX. I'll begin for CSX and then Bill
22 Mullins will follow me.

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1 CHAIRMAN OBERMAN: Good.

2 MR. ATKINS: As you can see, I've just
3 switched myself into the witness chair, just so you
4 can actually see me for the presentation for no
5 difficulties. Bill will join me after we're done.

6 May I begin, Chairman Oberman?

7 CHAIRMAN OBERMAN: Please begin, Ray.

8 MR. ATKINS: Thank you. Chairman Oberman,
9 Members of the Board, Ray Atkins on behalf of CSX.

10 For over 40 years there has been an
11 established process to accommodate requests for new
12 passenger service. That process has two key
13 ingredients. The first ingredient is a robust
14 study. The study must examine the impact on
15 existing freight and passenger service.

16 As you heard last month and as this
17 hearing will make crystal clear, the rail traffic
18 controller model is the gold standard.

19 The second key ingredient is
20 collaboration. Once the model is done, the parties
21 need to work together to settle on the right
22 infrastructure solutions. We can use the RTC model

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1 to test different ideas, but you need collaboration
2 between the parties to settle on the most
3 cost-effective way to add the new passenger trains
4 without harming existing service.

5 The normal industry process here
6 completely fell apart in this case. The first
7 ingredient was tantalizingly close to being done.
8 You will hear testimony that the joint RTC study
9 was two to three months from being complete when
10 Amtrak pulled the plug. We expect Amtrak will try
11 to lay blame on the railroads and a lack of
12 transparency in the modeling inputs, but the
13 process was proceeding along a perfectly normal
14 path where all the confidential traffic information
15 was provided to Amtrak's own expert pursuant to a
16 data sharing agreement between the parties. That
17 was the entire point of identifying and retaining a
18 well-regarded independent RTC expert. But for
19 whatever reason, Amtrak made it clear that it was
20 no longer interested in the completion of that RTC
21 study, refused to let the railroads pay to finish
22 the study, and instead filed this case with the

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1 STB.

2 But the law and the record will not
3 support Amtrak's aggressive demands. And let there
4 be no doubt, Amtrak's demands are aggressive.

5 Amtrak maintains it is entitled to immediate access
6 to the Gulf Coast line without any study of the
7 impact or a single penny of infrastructure. The
8 aggressive nature of this request is best
9 illustrated by Amtrak's refusal to build a
10 dedicated station track in Mobile before it begins
11 operation. As you know, that project was
12 identified by the Gulf Coast Working Group in its
13 report to Congress as an essential project for
14 obvious reasons. Otherwise, the Amtrak trains will
15 sit on the mainline while they load and unload
16 passengers and will traverse the congested Mobile
17 terminal eight times as it goes back and forth from
18 the station to wherever it will park between trips.

19 And this aggressive demand for immediate
20 access with no study and no infrastructure cannot
21 be reconciled with the billions in public funding
22 that Congress has allocated to expand the national

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1 transportation passenger footprint. If not spent
2 here, then where? What will this hearing show?

3 Well, first, Charlie Banks from R.L.
4 Banks & Associates will talk about how the RTC
5 model creates a rigorous way to find solutions
6 needed to accommodate passenger trains, and he will
7 describe the process that CSX and NS witnesses
8 followed to develop the RTC model that is before
9 the board in this proceeding.

10 Once Charlie sets the stage, two witnesses
11 are going to transport the STB to the Gulf Coast
12 line with maps, pictures, and drone footage.
13 Mr. Ricky Johnson, the chief engineer for CSX, will
14 guide the members through the CSX portion of the
15 route. He will describe all of the complex
16 operating features of the line, which is mostly
17 mainline track with seven moveable bridges, local
18 traffic, foreign trains, hundreds of grade
19 crossings all operating between two of the most
20 important rail terminals in the region.

21 He will be followed by his counterpart
22 from Norfolk Southern to describe the particular

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1 challenges in the New Orleans gateway.

2 Once you have visited the line virtually,
3 the RTC model that Amtrak hoped to bury will fully
4 reveal itself. For CSX you will hear from Hannah
5 Rosse about the efforts she took to make sure the
6 CSX inputs were accurate. You will also hear from
7 her counterpart at Norfolk Southern.

8 Far from the disparaging claims by Amtrak
9 about our trying to manipulate the data by
10 including yard trains or foreign trains or even the
11 bridge tender movements, it will be clear that the
12 inputs are all sound and reliable and gathered by
13 two professionals with absolutely no incentive
14 other than to provide a complete and accurate
15 picture of the line.

16 Then you will hear from Mark Dingler from
17 HNTB who will walk the members through the RTC
18 model. The RTC model will show immediate harm to
19 freight service from adding four additional
20 passenger trains into this busy corridor. The
21 model is predicting a 4.5 percent decrease in
22 fluidity, which translates into 13 hours of delay

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1 per day, a 33 percent increase in delays to
2 interchange partners in New Orleans, and a
3 staggering 45 percent increase in delays to local
4 traffic around Mobile. If that were not bad
5 enough, you will have complete gridlock in 20 years
6 with only modest projected freight growth. That is
7 unreasonable impairment under any definition of the
8 word "unreasonable."

9 Third, you will hear in this hearing from
10 Larry Guthrie from R.L. Banks about the exhaustive
11 verification process we undertook to assure the
12 model was complete and accurate. In my two decades
13 of working in this industry, I have never seen an
14 RTC model where the inputs were more carefully
15 scrutinized, the model performed by a more talented
16 team of experts, or the entire process validated in
17 a more thorough and professional manner. I am
18 confident at the end of this hearing you will
19 agree.

20 This hearing will also show that Amtrak is
21 not serious about showing potential impacts of this
22 new service. It has refused to model the line

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1 using the RTC model claiming that it didn't have
2 enough time and information. Amtrak instead
3 submitted a static mathematical model by DB of the
4 capacity of the line, and we will demonstrate in
5 this hearing some serious flaws in that
6 methodology.

7 But DB's analysis is completely
8 irrelevant. They have missed the entire point of
9 this hearing. Both the RTC model and Amtrak's
10 expert conclude there is sufficient capacity on the
11 line to run four additional trains right now, but
12 the question is what is going to happen to existing
13 freight service when you add four high-speed and
14 high-priority Amtrak trains? What will be the
15 impact on existing customers? What will be the
16 impact on interchange partners? What will be the
17 impact to the Port of Mobile? Indeed what will be
18 the impact on all of the stakeholders who appeared
19 before the STB last month and asked you to be
20 careful not to harm local Alabama industries? That
21 is the only legal question presented at this
22 hearing: What is the impact and whether that

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1 impact is reasonable.

2 The mathematical exercise by Amtrak says
3 nothing on that issue. It just says there may be
4 room on the line. The RTC model can answer that
5 question about impact, can test different
6 solutions, which is why it's the gold standard used
7 by everyone.

8 And you don't need to listen to me or our
9 experts about the flaws in Amtrak's case. In a
10 stunning flip-flop, Amtrak's own witness,
11 Mr. Crowley, submitted a verified statement for a
12 different client, Metra, in the CP/KCS merger just a
13 few weeks ago that says the polar opposite of
14 everything Amtrak would want you to believe today.
15 He submitted a complete RTC model which appears to
16 have been constructed from scratch on a fast
17 procedural schedule for Metra. He explains how you
18 needed to add into the model foreign trains that do
19 not appear in the data. And he bashes mathematical
20 models of theoretical capacity and explains
21 eloquently why the RTC model is vastly superior.

22 Chairman Oberman, Members of the Board,

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1 throughout this entire proceeding you should be
2 asking yourself a simple question: Why? Why did
3 Amtrak really pull the plug on its own RTC expert?
4 Why didn't they submit a competing RTC model? It's
5 not really a mystery. Any credible RTC model would
6 have shown an impact that would have undermined
7 their demand for immediate access.

8 Finally in this hearing you will hear
9 about some infrastructure projects that would
10 address this impact. The experts will explain that
11 these projects are not about providing any kind of
12 freight benefit to the railroads, it's just about
13 making sure service does not get worse. Indeed,
14 CSX will tell you it has no incentive to propose a
15 penny more that is needed because CSX will be on
16 the hook in perpetuity to maintain, repair, and
17 replace the new infrastructure once it's built, and
18 you will hear that this Gulf Coast line is five
19 times more expensive to maintain than any other
20 part of the CSXT network in part because of how
21 often it has to be rebuilt after a tropical storm
22 or hurricane.

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1 In the end, applying the law to these
2 facts can lead to only one outcome: Denial of
3 Amtrak's demand for immediate access. But where
4 does that leave us? CSX is committed to us finding
5 a solution in good faith that works for Amtrak and
6 protects the interests of all parties. As I
7 started my opening, the two key ingredients needed
8 to accommodate a request for new service is a good
9 RTC study and then collaboration between the
10 parties. We now have the first ingredient. We
11 still lack the second.

12 The STB can fix that. After this hearing
13 is done, the STB should order board-sponsored
14 mediation. You can create a confidential
15 settlement forum for candid discussions. You can
16 assign a mediator with national credentials and a
17 reputation to help guide the parties, you can
18 invite key stakeholders to the table, and you can
19 provide your own technical STB experts so everyone
20 has confidence in the solutions.

21 Frank settlement discussions and a genuine
22 long-term solution is still within reach, but

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1 Amtrak's demands for immediate access is doomed.
2 It was doomed the moment Amtrak abandoned the
3 normal process that has been followed for decades,
4 deliberately blinded itself to the impact on the
5 line by pulling the plug on its own RTC expert, and
6 then claim the right for immediate access without
7 any idea what will happen to local customers.
8 Amtrak needs to hear that from this agency so we
9 can move beyond aggressive legal posturing and
10 beyond past grievances and find a workable
11 negotiated solution.

12 So that ends my prepared remarks. I will
13 just for a moment touch on the questions that the
14 Chairman asked at the outset. I'll break them into
15 basically two categories but refer the members to
16 our legal pleadings which are more robust, and we
17 will be happy to take all of this up, of course, in
18 closing after you've seen the presentation of all
19 the evidence.

20 The first question has to go to the
21 contract. I'm going to need to be very careful
22 here because everything about the contract is

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1 highly confidential. Those contracts cannot be
2 shared between CSX and Norfolk Southern. I will
3 just tell you, you can read it from our pleadings,
4 it is our position that those contracts are not
5 governing here. There is no agreement between the
6 parties to have this service be governed by those
7 agreements. So any question about compensation or
8 infrastructure at this point in time would have to
9 be determined in this proceeding by this board.

10 On the broader question about can the
11 board require infrastructure to be as part of a
12 board order, if you conclude that we have satisfied
13 our burden of proof, which I believe we clearly
14 have, to show unreasonable, that it is CSX's
15 position that the board does have the authority to
16 advise Amtrak about the scope of infrastructure
17 projects that it would have to build in order to
18 address that impairment and at that point in time
19 they could offer in the sense of like a declaratory
20 order that Amtrak would have a right to access once
21 those projects were complete. We think that's well
22 within the board's authority, if you are so

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1 inclined to do so, although as you can tell from my
2 ending, our recommendation would be for the board
3 to simply rule on our having carried our burden of
4 proof and then move this entire controversy into a
5 board-sponsored mediation, which I think would be
6 more productive than the board itself, but it is
7 our position that you have that authority.

8 With that, other than those broad
9 questions, I'm actually -- unless there is
10 follow-up questions, I'll defer the considerations
11 to our pleadings, which were submitted on Friday,
12 and we will, of course, address any particular
13 legal questions you have in the closing remarks.
14 And I'm going to turn it over to Mr. Mullins who is
15 going to present for Norfolk Southern.

16 CHAIRMAN OBERMAN: Before you do that,
17 Ray, I have a couple of questions for you and other
18 board members may.

19 Let me be clear on a couple of things
20 without going into confidential material.

21 Is it CSX's contention that anything to do
22 with compensation or payment for infrastructure is

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1 governed by the statute and not by your existing
2 contracts? Is that it in a nutshell?

3 MR. ATKINS: In a nutshell until
4 there's -- you need a meeting of the minds between
5 the parties in order for the contract to govern,
6 and at this point in time CSX has not yet agreed to
7 this service and, therefore, does not believe that
8 the terms of that contract govern.

9 CHAIRMAN OBERMAN: All right. Number 2,
10 when you say we have the authority, under what
11 statute section do we have the authority, in your
12 view, to order Amtrak -- and I noticed in your
13 pleadings, as I was going back over them yesterday,
14 that sometimes, at least, you refer to funding the
15 infrastructure as opposed to building it, which
16 could be a difference, but whichever, if it's
17 funding or building, under what statutory language
18 do you contend we have authority?

19 MR. ATKINS: So I would submit it's
20 under -- it depends on the findings that the board
21 issues. So I believe if you conclude that we have
22 satisfied our burden of proof to show unreasonable

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1 impairment, then I do believe that in the sense of
2 like the board issues dec orders where they
3 describe the rights of the parties, you could say
4 in that order if Amtrak builds the 14 projects that
5 have been identified by the parties, that would
6 alleviate the showing of unreasonable impairment
7 and then they would be authorized under subsection
8 E for access. So I think that's the perfectly
9 balanced statutory authority for you to issue that.
10 It would be a combination of B and your general
11 authority under the APA to clarify -- you remove
12 ambiguity and clarify the rights of the parties
13 under the statute.

14 If you were to conclude somehow, based on
15 this record, that there has been no showing of
16 unreasonable impairment, it is clear from the
17 statute that infrastructure and whatever other
18 compensation can be determined under subsection A.
19 So we believe you have the authority under one of
20 two sections and that -- so at the end of the day,
21 CSX believes you guys have the authority to provide
22 guidance to the parties about the infrastructure

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1 that is needed before they can come on the line.

2 CHAIRMAN OBERMAN: Well, it's one thing to
3 provide guidance. What I'm trying to be clear
4 about, and it's one of the reasons we asked you the
5 question, there's nothing in subsection E on its
6 face that even uses the word "infrastructure." So
7 is it CSX's contention that E can be construed --
8 it sounds like you're suggesting -- and by the way,
9 I just got a message from staff that -- and I don't
10 know how our electronic system works -- I don't
11 know if all of them but at least some of the
12 parties' pleadings that answer the question didn't
13 actually get posted until this morning even though
14 they were filed sometime Friday, and that may be
15 because of the weekend. So it's unfortunate that
16 none of us knew about these or had a chance to read
17 them before today, but that's okay. We will read
18 them.

19 But I just want to be clear, Ray, is there
20 some language in subsection E which you are relying
21 on to say we can order the infrastructure? And it
22 sounds like the kind of order you would envisage is

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1 the kind of, say, conditional order we might enter
2 in a merger, a train-ordered condition on Amtrak
3 doing X, Y, or Z? Is that the kind of order you're
4 envisaging.

5 MR. ATKINS: Honestly that's what I'm
6 envisioning. There is -- I can see every counsel
7 is looking at me. Matt may want to weigh in here.

8 CHAIRMAN OBERMAN: All the board members
9 are looking at you, too, because we're trying to
10 get educated.

11 MR. ATKINS: Just appreciate, Chairman, we
12 did a lot of preparation for this opening, and we
13 were assuming we would talk about these legal
14 questions on Wednesday when it comes up. It's not
15 that I'm not prepared.

16 So, yes, that's the way I have envisioned
17 it. There is clearly a provision in the statute in
18 E, though, that indicates that compensation can be
19 determined, but my vision for your authority is
20 that if you were to conclude, based on this record,
21 that if these 14 projects were built, that there
22 would no longer be unreasonable impairment such

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1 that they would be entitled to access, that you
2 have the authority to indicate that to Amtrak. And
3 I think it's just an inherent authority. And it's
4 no different than if Amtrak had come in here from
5 the outset in their complaint and said we're
6 willing -- we are going to build all 14 of these
7 projects, we want a board order that says once
8 completed, we are entitled to rights of this line.

9 So that is my -- that is CSX's position,
10 that you have this authority, and it's inherent in
11 your authority to deny it if they don't build any
12 of the infrastructure.

13 CHAIRMAN OBERMAN: It sounds like you're
14 suggesting that the authority isn't to order Amtrak
15 to build infrastructure. The authority is to make
16 a finding, if you're in accordance with your
17 contentions, that without the infrastructure, the
18 statutory standard will be violated so that the
19 only way to meet the statutory standard of
20 unreasonable impairment is to build the
21 infrastructure?

22 MR. ATKINS: I agree completely.

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1 CHAIRMAN OBERMAN: Is that what you're
2 saying?

3 MR. ATKINS: Yes. I agree completely.

4 CHAIRMAN OBERMAN: And you think that is
5 inherent in our powers?

6 MR. ATKINS: Yes, sir.

7 CHAIRMAN OBERMAN: Okay. The second
8 question I had --

9 MR. FUCHS: Marty, before we move on from
10 that point, it looks like Karen has a question and
11 I do as well.

12 CHAIRMAN OBERMAN: Oh. I'm sorry. Okay.
13 I was looking at my papers.

14 Karen, go ahead.

15 MEMBER HEDLUND: My question is if we find
16 that without additional infrastructure there's
17 unreasonable impairment, does that mean all we can
18 do is order all of the infrastructure that CSX and
19 NS are requesting, or do we have the ability to
20 determine that there is some lesser level of
21 infrastructure that may be appropriate that
22 relieves the unreasonable burden?

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1 CHAIRMAN OBERMAN: Ray, are you with us?

2 MR. ATKINS: I'm sorry. I muted my own
3 mic. Let me start over.

4 Member Hedlund, I think you're an
5 adjudicatory body in this context, which means you
6 get to look at the evidence and conclude what the
7 evidence demonstrates. So if there were evidence
8 in this record to demonstrate that say nine of the
9 projects was all that was necessary to assure that
10 there was no unreasonable impairment, then that
11 would be the type of order that I was talking to
12 the Chairman about that you would be able to
13 submit. But it needs to be based on the record
14 that's been developed from this case. So you're
15 going to need to know what the infrastructure
16 projects are that you've narrowed it down to,
17 you're going to need an RTC model that demonstrates
18 that with that infrastructure set that you've
19 alleviated the solutions, and then you could make a
20 lesser finding than the 14.

21 So CSX is not arguing that this 14 is some
22 sort of magic bullet or a perfect solution, but you

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1 asked us in August to come forward with a solution
2 set that would address the harm, so we came forward
3 with one. To date, to the best of my knowledge,
4 Amtrak has refused to commit to any infrastructure
5 investments whatsoever.

6 MEMBER HEDLUND: Thank you for the
7 clarification.

8 CHAIRMAN OBERMAN: Patrick?

9 MEMBER FUCHS: Ray, I would also like a
10 clarification. Is it your position that if the
11 board were to order infrastructure under either
12 subsection obviously, would the host railroads be
13 obligated to accept that infrastructure if Amtrak
14 or another party were to offer to pay for it?

15 MR. ATKINS: That's a good question. I'm
16 just thinking about it because I don't think I've
17 seen that in the papers or discussed. Let me just,
18 with a caveat, we might change our mind at the end
19 of the trial as I talk to others. I believe that
20 answer is yes, if the board were to say -- I don't
21 believe that CSX could simultaneously say that you
22 need to build extended dedicated track out of

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1 Mobile as a condition for access and then you order
2 it and then we refuse to let them build the track.
3 I'm not exactly sure where the statutory authority
4 is but that just doesn't make a great deal of
5 common sense. So if we have a refinement on my
6 answer, we'll offer it in closing.

7 MEMBER FUCHS: Thank you.

8 CHAIRMAN OBERMAN: Ray, two other
9 questions. Does the board have the authority to
10 apportion the cost of the infrastructure between
11 the railroads and Amtrak, or between the railroads
12 themselves and Amtrak?

13 MR. ATKINS: So if this moves into an A
14 case, then I would expect that the board might have
15 authority to apportion. I can't understand why
16 that would be the case since the infrastructure
17 that we proposed is designed to offset Amtrak and
18 is specifically designed to not provide a freight
19 benefit to the railroad. It's just to offset the
20 harm, the impact, from adding four passenger trains
21 onto the line.

22 I do think that if you conclude -- so I

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1 can see some authority under A for that as a
2 general matter. I just don't think the facts of
3 this case would support any kind of nonarbitrary
4 way of allocating the cost of those infrastructure
5 projects.

6 CHAIRMAN OBERMAN: That assumes -- you're
7 assuming that the board concludes that, as you
8 contend, that all of the infrastructure that fits
9 Amtrak does not benefit the freights?

10 MR. ATKINS: That is correct.

11 CHAIRMAN OBERMAN: And if we can conclude
12 otherwise, do we have the authority under E to
13 apportion? In other words, in the kind of
14 conditioning order that you said, can we include
15 those conditions that Amtrak building X and CSX
16 build Y?

17 MR. ATKINS: If it was premised on the
18 record and findings that were supported by the
19 evidence, then I think the answer is yes.

20 CHAIRMAN OBERMAN: The only other question
21 that I had was procedurally, it wasn't clear to me,
22 in your view would the board have to find that the

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1 railroads have made their prima facie case to order
2 the parties into mediation, or are you just saying
3 you want us to find that and then order you into
4 mediation? I wasn't clear.

5 MR. ATKINS: Excellent question, Chairman.
6 So we don't care which way we get into
7 board-sponsored mediation because we just think
8 that is a useful vehicle. However, based on the
9 filings in this case, I think it would be
10 tremendously helpful for some clarity from the
11 board that there is going to be unreasonable
12 impairment and that Amtrak's position is too
13 aggressive so that we can go into that mediation
14 with the understanding that we need to find a
15 solution, and that solution means finding the right
16 suite of infrastructure projects to accommodate
17 Amtrak's desires to start service but protects all
18 of those Alabama stakeholders that you heard from
19 last month.

20 So, Chairman, I don't think it's a
21 prerequisite. If the board were so inclined, you
22 could simply push us into mediation. I would

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1 actually recommend you do it right away because I
2 think time -- everyone is tired of the amount of
3 time that has lapsed, so you could easily push this
4 into board-sponsored mediation and then rule on the
5 record while we're in board-sponsored mediation.

6 And the last point I would make is CSX
7 does not want to delay this proceeding at all, so
8 although we are advocating for board-sponsored
9 mediation, we are not doing so with any desire to
10 slow down the board from reaching a determination
11 in this case.

12 CHAIRMAN OBERMAN: Could the board -- I
13 suppose then the board could also find that the
14 railroads have not made their prima facie case and
15 still order you into mediation, in your view?

16 MR. ATKINS: Well, I don't see how in this
17 record you could make that finding, but I
18 appreciate that's what you could decide.

19 CHAIRMAN OBERMAN: You realize we haven't
20 decided the case yet.

21 MR. ATKINS: Understood. You could push
22 parties into board-sponsored mediation anytime it

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1 is likely to result in a better outcome, and I
2 cannot imagine a better case than this one for
3 board-sponsored mediation.

4 CHAIRMAN OBERMAN: As we said in our order
5 Friday, I don't know that I disagree with you, but
6 it would have been nice to have had this request a
7 long time ago.

8 If you are finished, we will move forward.

9 MR. ATKINS: Thank you. I'm done. We
10 will --

11 CHAIRMAN OBERMAN: I'm sorry. Michelle
12 has a question.

13 VICE CHAIR SCHULTZ: Marty, actually just
14 to follow up on your question, with regard to the
15 possibility of apportionment of the cost related to
16 infrastructure, Ray, from your view, could that be
17 done on either subsection E or subsection A?

18 MR. ATKINS: It clearly could be done
19 under subsection A. I believe subsection E is
20 better attuned for it. If you -- if we're under
21 subsection E, you've agreed with us that we've
22 carried our burden of proof of showing unreasonable

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1 impairment; that the RTC study is the best evidence
2 of record and that what it is showing is
3 unreasonable.

4 In that case I think the path of the board
5 would be to clarify to Amtrak that they need to
6 commit to put these infrastructures in place in
7 order to alleviate that. In that circumstance, I
8 don't see how the railroad should be responsible
9 for anything, because we're the ones who
10 demonstrated unreasonable impairment.

11 If this gets kicked into a subsection A
12 case, which I think Norfolk Southern will talk to a
13 little bit more about in terms of their response is
14 just slightly nuanced different from CSX, then I
15 think apportionment would be more properly to be
16 considered when you're trying to figure out if
17 you've got a particular project and it's going to
18 cost \$100 million, should Amtrak pay for the whole
19 100 million or is there some small portion of it
20 that should be borne by the freight?

21 VICE CHAIR SCHULTZ: Thank you.

22 MR. ATKINS: Chairman, members of the

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1 board, thank you very much for the opportunity to
2 submit opening testimony, and I'm going to turn it
3 over to Bill Mullins who is going to come up and
4 take my seat so that you can see him.

5 CHAIRMAN OBERMAN: Thank you, Ray.

6 MR. MULLINS: Before I begin, Matt Cross,
7 did we fix the technical issues there in terms of
8 the feedback?

9 TECHNICIAN CROSS: We did. Yes, it's
10 better. Thank you.

11 MR. MULLINS: Okay. Thank you.

12 So Chairman Oberman and Vice Chairwoman
13 Schultz, Members Fuchs, Primus, and Hedlund, my
14 name is Bill Mullins, partner at Baker & Miller. I
15 represent Norfolk Southern Railway. I am joined
16 today by my co-counsel Dan Donahoe of Burns &
17 White. He is a very experienced trial attorney who
18 has done many trials for Norfolk Southern. It's
19 been an honor to work with him and to get to know
20 him, and I've learned a lot from his experience.
21 I'm also joined by my senior associate Crystal
22 Zorbaugh who has been an absolutely invaluable

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1 asset to the preparation of this case.

2 So, Members of the Board, this is a
3 historic occasion. It's historic in two ways. We
4 are all participating in history, and I say that
5 for two reasons. First for the format. Never
6 before in my 34 years of experience with the ICC
7 and the STB has there ever been an on-the-record
8 hearing in front of the ICC commissioners or the
9 board members. I've also polled members of the
10 transportation bar, people who have 50, 60 years of
11 experience, they do not remember any such type of
12 hearing. So you are setting history today. You're
13 making history today. We all are.

14 We're also making history today because
15 this is the first application of 24308(e) to be
16 decided by the STB. But we really shouldn't have
17 to be here today. This could have been settled
18 long ago. I say that because if you really think
19 about it and look at the history, everybody agreed
20 on the process. Every person who had an interest
21 in this proceeding had agreed on the process. The
22 Southern Rail Commission supported RTC. They've

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1 acknowledged the need for infrastructure. Indeed,
2 they were awarded a CRISI grant to help pay for the
3 infrastructure on any proposed Gulf Coast service.
4 The Gulf Coast Working Group recommended use of RTC
5 and recommended infrastructure. Amtrak, CSX, NS
6 all supported a process that used RTC knowing that
7 that would result in recommended infrastructure.
8 In fact, the RTC model was almost done. Initial
9 infrastructure was already being debated, and then
10 Amtrak withdrew and eventually filed its access
11 request. But even after Amtrak's filing, NS has
12 consistently expressed its willingness to negotiate
13 what is the proper amount of infrastructure and the
14 process for moving forward so that none of us in
15 the future have to come back to the board.

16 Indeed it was in that light that NS took
17 one more shot at attempting to resolve this and
18 asked for mediation. But, of course, Amtrak
19 rejected mediation. But this can still be resolved
20 but not until the hearing is over.

21 So here we are. But this hearing need not
22 be difficult, and it should not be contentious.

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1 There is a solution. The board in its decision
2 making should do what Amtrak refused to do and that
3 is accept the RTC model, order infrastructure to be
4 built as set out in the model in NS and CSX's
5 evidence, and grant Amtrak its access but only on
6 the condition that the RTC model infrastructure be
7 built and subject to the standard conditions that
8 freights and Amtrak have always agreed to. Why is
9 that the right decision? It is the right thing to
10 do for four reasons.

11 First, as noted, that is the process that
12 Southern Rail Commission, Gulf Coast Working Group,
13 and the parties, including Amtrak, originally
14 agreed to follow and implement.

15 Second, doing so is fully consistent with
16 the long-standing precedent and process of how the
17 parties have acted. In fact, you heard the
18 testimonies of many third parties during the
19 February hearings that RTC with infrastructure has
20 always been the model and the process of
21 negotiation in the past. And former NS and Amtrak
22 CEO Wick Moorman's testimony comes to mind as well

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1 as that of Virginia congresswoman and director of
2 rail and public transportation Thelma Drake. That
3 is the process that has always occurred. It can
4 occur again.

5 Third, granting Amtrak access with
6 infrastructure is fully within the board's legal
7 authority. As NS setout in its prehearing brief,
8 this case, in Norfolk Southern's view, was brought
9 under the wrong section. This was brought under
10 section E. We believe it should have been brought
11 under section A, but even if E is the applicable
12 statute, Norfolk Southern believes that the board
13 has the legal authority under E to impose
14 infrastructure, and if the board has doubts, the
15 board can invoke section A to authorize that
16 infrastructure. Indeed, section E even has a
17 specific reference to allowing the board to invoke
18 A to set the terms.

19 Fourth, the right thing to do to grant
20 Amtrak access with infrastructure is because the
21 facts support that, and you will hear that in
22 today's hearing.

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1 For Norfolk Southern you will hear from
2 Randy Hunt and Holly Sinkkanen. Mr. Hunt is
3 currently senior director of interline services at
4 Norfolk Southern Corporation and has more than a
5 decade's experience in working with Amtrak to
6 either introduce new service or expand existing
7 service. Mr. Hunt has worked on several Amtrak
8 projects, including projects where Amtrak agreed to
9 fund and implement \$450 million worth of
10 infrastructure. So when you hear 400 million,
11 that's not unprecedented. It's been done before.
12 It's been done as part of the negotiations. In all
13 of those projects in the past it was a negotiation,
14 and most of those projects the infrastructure was
15 put in place prior to expansion for the
16 introduction of the passenger service. In all of
17 those projects RTC was the accepted model.

18 Mr. Hunt will also address the
19 infrastructure projects required on the NS line to
20 prevent unreasonable impairment. This includes the
21 freight lead extension, which is a necessary
22 component to prevent significant and substantial

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1 disruptions in the numerous interchanges among the
2 five other Class 1 carriers that occurred in New
3 Orleans.

4 You will hear from Holly Sinkkanen. She
5 has significant experience in dispatching and
6 modeling. She will point out how Mr. Dingler's RTC
7 model, as independently verified by Mr. Banks and
8 Mr. Guthrie, followed the same RTC process that
9 Amtrak and NS have followed before. She will
10 explain the importance of not just running the
11 model but the importance of doing field studies and
12 interviews to determine what is actually happening
13 on the line. All of her data was supplied to
14 Amtrak. They had the ability to do an RTC model
15 and they should have done so. She will also note
16 that in most of our RTC projects infrastructure was
17 recommended and that without required
18 infrastructure, there would be substantial and
19 unreasonable impairment of freight operations.

20 And as noted by Mr. Atkins you will hear
21 from Mr. Banks, Charlie Banks, who has worked on
22 rail industry for 50 years, a man I have known for

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1 about 30 years. I have the greatest respect for
2 him and his firm, they have the greatest reputation
3 for integrity and calling it as it is. It's
4 because of that reputation that his firm has been
5 hired by all sides. They've been hired by
6 railroads, commuter agencies, passenger operations,
7 Amtrak, government agencies, and freight customers.

8 Part of the R.L. Banks team was Mr. Larry
9 Guthrie. He has 50 years of railroad experience
10 and has participated in somewhere between 50 and
11 100 RTC projects. R.L. Banks was specifically
12 brought in to provide an independent and
13 third-party analysis; in other words, to make sure
14 that things were being done right. They'll explain
15 how that model and its recommended infrastructure
16 was the right process and was consistent with what
17 happens in the industry. They will also confirm
18 the failure to impose infrastructure will create
19 impairments to freight service that no party could
20 call reasonable.

21 And as for Amtrak, here's what you will
22 not hear. You will not hear that they did not

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1 model or analyze any impacts on customers, local
2 traffic, the Port, the Port's rail operations, or
3 impacts to the dock workers who unload the ships.
4 They did not analyze delays to public road
5 crossings, impacts on rail employees or
6 environmental impacts. More importantly they did
7 not until the very last minute even attempt to
8 address any impacts on the interchanges that are
9 incurred in New Orleans among six railroads. They
10 won't tell you that if you even ordered access
11 tomorrow, it would take them two to three years to
12 build the \$66 million that has already been set
13 aside for the specific infrastructure and that this
14 is the exact same time it would take for the
15 railroads to build their infrastructure; so they
16 can't get on the line without infrastructure.
17 While they're building theirs, we're building ours,
18 get on the line.

19 You will not be told that Amtrak has
20 access to billions of dollars for expansion of new
21 routes in the building of the infrastructure, and
22 they will not tell you that their model has never

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1 been used for determining whether freight and
2 Amtrak can work together and is primarily used in
3 Europe for deciding whether to add passenger trains
4 to a passenger centric operation. They will not
5 tell you that failure to impose infrastructure will
6 result in the freight railroad struggling to meet
7 their on-time performance requirements while trying
8 to meet the needs of the shippers. But what you
9 will hear is that Amtrak deserves high reliability,
10 high priority, and high speed, and Amtrak should
11 not have to contribute to the infrastructure needed
12 to accommodate such demands.

13 In conclusion, this case should have and
14 still could be resolved through negotiation,
15 settlement, or board-sponsored mediation, but
16 Amtrak is not willing to do that. Why? They want
17 the precedent. They want the historic precedent.
18 And I would ask the board to be careful. Remember
19 that your decision is a story. If you impose
20 access without infrastructure, that will set a
21 precedent for the entire future, such a decision
22 will be putting the needs of Amtrak above those of

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1 the freight customers, the railroads, and their
2 employees. This the board should not do. The
3 statute allows you to impose infrastructure and NS
4 asks you to do so. Thank you.

5 CHAIRMAN OBERMAN: Thank you, Bill. I
6 have a few comments and questions.

7 First of all, I think I appreciate your
8 opening observations. I don't think I had been
9 aware that not only in recent history but
10 apparently ancient history, and it deals with both
11 yours and my time on this plant, the commission or
12 the board never actually conducted an evidentiary
13 hearing itself. I was told there wasn't much
14 precedent for this. All I can say is you have a
15 very energetic group of five people, and we were
16 very enthusiastic about fulfilling our obligation
17 to hear this case. We're aimed at trying not to
18 screw it up, and I say only partly facetiously that
19 like in any tribunal, we have to rely on the skill
20 of counsel to make sure that we don't, and that
21 applies to you Ray, Jessie, and Rob in particular.

22 I have a couple of questions. If you

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1 concluded that this case should have been brought
2 under A rather than E, why did you not file a
3 motion to dismiss?

4 MR. MULLINS: Well, we did file a motion
5 to dismiss jointly with CSX.

6 CHAIRMAN OBERMAN: But not on that basis.
7 Not on that basis as I understand it.

8 MR. MULLINS: Well, that's a long answer
9 to question that was mentioned in that original
10 filing of the motion to dismiss.

11 CHAIRMAN OBERMAN: It was in a footnote.

12 MR. MULLINS: Yes, it was in a footnote,
13 you're correct, and it was clear by that time that
14 most likely all the parties believed that E
15 applied, we continued to believe E is not the
16 applicable statute and that is why we put that in
17 the footnote of the joint filing and we continue
18 to --

19 MEMBER FUCHS: I have to jump in here,
20 Bill. Sorry. You didn't make that contention in
21 the footnote. You said it might be more suitable.
22 You didn't say one way or the other.

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1 MR. MULLINS: Well, we're making that
2 contention now and we're making that contention in
3 our pretrial brief.

4 CHAIRMAN OBERMAN: And I have a -- you
5 said that if Amtrak were going to build the
6 \$66 million of infrastructure that's been referred
7 to, it would take it as long to do that as it would
8 take the railroad to build its own infrastructure.
9 What were you referring to? What infrastructure
10 are you referring to that the railroad would build?

11 MR. MULLINS: Well, whatever
12 infrastructure you would order. I think the
13 argument is that somehow if you order us to put in
14 infrastructure or Amtrak has to pay for it in order
15 to be put in, the argument that we make is that
16 should be put in before Amtrak service begins and
17 Amtrak is saying, no, we shouldn't have to do that
18 and you should give us immediate access, but their
19 immediate access is contingent on putting on their
20 own infrastructure for which they already have
21 \$66 million for, so my simple point was that at the
22 same time they're building their infrastructure,

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1 which they cannot run without that infrastructure,
2 that we will have our infrastructure being built,
3 if you ordered it and paid for by Amtrak, so that
4 by the time the two years are up, the service can
5 begin with all infrastructure.

6 CHAIRMAN OBERMAN: Well, as I understand
7 it, the only immediate infrastructure referred to,
8 at least in the working group report, was the
9 \$5 million roughly for a station in Mobile. Would
10 that take two years? Is that what you're referring
11 to? I'm trying to figure out what you're referring
12 to.

13 MR. MULLINS: That may take two years.
14 They are not exactly sure where that's going to go.
15 There's NEPA requirements to be done. They've been
16 granted 66 million, the Southern Rail Commission
17 has through a CRISI grant and a matching, to put in
18 recommended infrastructure. I don't have a list of
19 all of what that \$66 million is dedicated to but
20 that's -- there was, I think, a storage track that
21 they needed to build, that needed to be funded. So
22 there was a CRISI grant that lays out exactly what

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1 they were going to spend that money on.

2 CHAIRMAN OBERMAN: Do you have a position
3 as to whether, if the board orders any amount of
4 infrastructure, it can also order the trains to
5 begin at a certain point and the infrastructure
6 phased in? Because in the papers there was a great
7 deal of reference to all of the projects have to be
8 built before the first train runs. I'm wondering
9 if you believe the board would have the authority
10 to phase in whatever infrastructure might be
11 ordered.

12 MR. MULLINS: I believe if it's a part --
13 Norfolk Southern would say this: If it's part of a
14 board order that it needs to be built before Amtrak
15 access, so my point is we can build that at the
16 same time that they're building theirs so that, you
17 know, the immediate access isn't really immediate
18 access, nor should it be, it should be contingent
19 on infrastructure being built.

20 But this is why it was so important that
21 we should have used a process of settlement, a
22 process of negotiation, because in those processes,

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1 as NS has done before in the past, there are proper
2 instances where you can negotiate based upon
3 certain time tables and certain contracts a phased
4 implementation, but that can't be done absent
5 consent, specific provisions about when certain
6 trains and schedules will go on, and so the board
7 doesn't really have the legal authority nor the
8 ability to impose that because they don't have the
9 facts and the evidence and they're not part of the
10 decision making.

11 CHAIRMAN OBERMAN: Well, once we hear the
12 evidence, do you think we have the authority to
13 order a phased-in infrastructure?

14 MR. MULLINS: I don't think that the
15 evidence you will hear actually goes into the
16 timing and the structure of when that
17 infrastructure would be built. We know that it
18 should be built or else we're going to be impaired
19 in our freight service. So I would say from the
20 board standpoint and the evidence that you will
21 hear and on your legal authority that it has to be
22 built before Amtrak service begins.

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1 CHAIRMAN OBERMAN: Do you have a position
2 on the board's authority to order an apportionment
3 of the cost of whatever infrastructure is ordered?

4 MR. MULLINS: I think if this becomes an A
5 case, which we believe it should have been brought
6 under A in the first place, but even if you decide
7 it under E, we think that you can then convert this
8 to an A case, and under an A case, as Mr. Atkins
9 pointed out, you do have authority if a project --
10 if the evidence shows a project is mainly or mostly
11 or entirely for the benefit of the freight
12 railroad, perhaps you have some authority, but
13 that's what would be decided and debated in the
14 context of an A case.

15 CHAIRMAN OBERMAN: I did not ask this of
16 Ray, this idea of converting this to an A case,
17 procedurally how would you envision that would
18 happen? Within the proceeding? Within this trial
19 this week? At a future date? How would that take
20 place?

21 MR. MULLINS: I think you have the ability
22 to take the evidence that is in this case and you

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1 have the ability to accept that into a record as a
2 new proceeding under an A case, then you have the
3 ability of the parties -- to ask the parties to
4 provide opening comments on whether or not this
5 record is sufficient or whether or not additional
6 information is provided, allow reply comments, and
7 then you can make a full record based upon what was
8 already developed in E, you could make that in the
9 context of A. I don't think that you have to
10 totally start over. You just take this evidence
11 and record, convert it to an A case, allow the
12 parties to provide additional statements on the
13 basis of what happens in an A case, and then issue
14 a decision.

15 CHAIRMAN OBERMAN: So you are saying that
16 we might not have to start over in terms of the
17 evidence, but in terms of procedurally, legal
18 argument, briefing, comment, replies, we would have
19 to establish a schedule for the parties to handle
20 that under A if that's what we determined to do,
21 which would involve some months extensions reaching
22 a decision, would it not?

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1 MR. MULLINS: Mr. Chairman, that is
2 correct, it would involve some months extension,
3 absolutely. It doesn't have to be lengthy. You
4 know, proper time. It doesn't have to be a
5 two-year, one-year A case because you already have
6 the evidentiary record, or most of it.

7 CHAIRMAN OBERMAN: I just have one other
8 comment I want to make. There's already been a
9 great deal of discussion and criticism by both you
10 and Ray about Amtrak's mediation position or lack
11 thereof. The board already made its views known on
12 Friday, very simply about our views about
13 mediation.

14 In my judgment -- and I speak only for
15 myself here -- I think it is in -- I don't think
16 it's inappropriate for you and Ray to have raised
17 the point, so I'm not saying that, but I think it
18 is inappropriate for the tribunal to reach a
19 decision on the evidence and on the merits based on
20 whether the parties agreed or did not agree to
21 mediate. In fact, in most courts, as you know, the
22 trial judge is not allowed to be for which party

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1 refused and offer to mediate just for that reason.
2 It's clear we already know where the parties have
3 come from, but, for the record, in evaluating the
4 evidence and reaching a decision on the merits, in
5 my judgment, either the lateness of the railroad to
6 ask for mediation or Amtrak's position that it
7 doesn't want to mediate, at least at this point,
8 should not play any role in our decision. It may
9 play a role in our decision whether to order
10 mediation in the future, but that is a separate
11 decision not on the merits of this case. So I want
12 the record to be clear.

13 I see that Karen has her hand up, and I
14 don't know if any other board member wants to
15 comment on that point. But Karen?

16 MEMBER HEDLUND: Not on that point, but,
17 Bill, you talked about Wick Moorman who has
18 obviously served on both sides of the aisle, and I
19 had the pleasure of working with him on a number of
20 NS projects for the benefit of Amtrak, the
21 Englewood flyover and the acquisition of lines in
22 Michigan.

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1 I want to go back to my notes of what
2 Mr. Moorman said at the beginning of this hearing a
3 number of weeks ago. He said with respect to RTC
4 modeling, there are a number of principles. The
5 parties must agree on assumptions and inputs; there
6 must be transparency; the model must reflect
7 existing operations; and then you add trains, to
8 determine what delays those trains might cause; and
9 then finally you analyze the impact of added
10 capacity.

11 Do you agree with those principles with
12 respect to RTC modeling?

13 MR. MULLINS: Absolutely.

14 MEMBER HEDLUND: Thank you.

15 CHAIRMAN OBERMAN: Any other board
16 members?

17 MEMBER FUCHS: Yes, Marty, I have one.

18 CHAIRMAN OBERMAN: Go ahead, Patrick.

19 MEMBER FUCHS: Bill, if the board were to
20 process it under A, would the totality of the
21 agreement between Amtrak and the host railroads be
22 subject to that proceeding?

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1 MR. MULLINS: The totality?

2 MEMBER FUCHS: So, as you know, when the
3 board has an A proceeding, the board is examining
4 all of the issues in the agreement and not cabined
5 off to say a particular question on a particular
6 segment. So if the board were to engage in an A
7 proceeding, would the entirety of the agreement be
8 called into question in that proceeding, or would
9 it be able to cabin off?

10 MR. MULLINS: Well, I think the agreements
11 would certainly come in and be part of the
12 discussion. There are provisions in the agreement,
13 without going into specifics, that provide for
14 Amtrak to get additional service. Amtrak didn't
15 invoke those agreements. So there are agreements
16 in place that govern proposed new service where
17 certain standards have to be met if you're going to
18 propose new service and there has to be an
19 agreement of the parties. If the parties can't
20 agree, you go to A.

21 So in that context, yes, the agreements
22 would be a part of that.

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1 MEMBER FUCHS: So no provision -- as you
2 know, the agreements are extensive. No provision
3 in the agreement which can pertain to multiple
4 lines would be off limits?

5 MR. MULLINS: I don't believe so, but, you
6 know, I haven't researched that, to be honest.

7 MEMBER FUCHS: And then Amtrak obviously
8 filed in March of last year, and I just want to be
9 absolutely clear on this point. Before Friday,
10 over a year since they filed, did Norfolk Southern
11 make any definitive statement in the record that
12 this should have been an A case?

13 MR. MULLINS: Before Friday?

14 MEMBER FUCHS: Yeah.

15 MR. MULLINS: No.

16 MEMBER FUCHS: And can you think of
17 another board case that was processed under a
18 certain subsection and the board took legal
19 argument about the standard and everything else
20 required to satisfy a subsection and then changed
21 course after a year?

22 MR. MULLINS: I can't think of one off the

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1 top of my head, but I believe that has occurred
2 before. Like, for example -- well, in some ways,
3 Member Fuchs, that's no different than what you do
4 when you look at whether a merger should be minor
5 or significant. You take the evidence, you look at
6 the competitive analysis, and then you convert it
7 to a significant versus a minor -- I mean, I
8 suspect that I could find a case where they've done
9 exactly what you suggested. I don't have one off
10 the top of my head, but the board has the
11 flexibility to determine how its statute should be
12 applied and how to best apply it.

13 MEMBER FUCHS: I mean, without belaboring
14 the point, minor or significant, there's a
15 determination that's met initially. Wouldn't the
16 proper analogy be that the board has made a
17 designation, no party argued for a contrary
18 designation, so suppose the board designated
19 something as minor, no party definitively argued
20 that it should be significant, the board then
21 processes and goes through the entire procedural
22 schedule and then at the hearing, after all of the

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1 evidence is submitted, a party were to come in and
2 say, no, no, no, this should have been significant,
3 and the board has never done that, right?

4 MR. MULLINS: I would say this: If that
5 occurred and the evidence showed that, in fact, the
6 competitive analysis at the end of all of the
7 pleadings showed that it was going to be highly
8 likely competitive issues, I think the board could
9 at that point convert it to significant because at
10 that point you didn't yet have the evidence. You
11 now have the evidence, you're going to hear more
12 evidence, and I think you could.

13 But let me also think -- I'm just thinking
14 off the top of my head, how is this any different
15 when we take a notice of exemption or a petition
16 for exemption? You've taken all of the evidence on
17 a petition for exemption or a notice of exemption,
18 let's say you held a notice in abeyance and you've
19 taken all these comments about the notice of
20 exemption, you decided after the time, after all of
21 the evidence is in, you've said, you know what,
22 this is inappropriate for a notice of exemption, or

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1 this is not appropriate for a petition for
2 exemption and you have converted it to an
3 application. You've done that time and time and
4 time again. How is this any different of what
5 we're suggesting?

6 CHAIRMAN OBERMAN: You know, Bill, I'm
7 going to weigh in on that question, because I think
8 Patrick has raised a very appropriate point. The
9 difference is that in the kind of case you just
10 outlined we then give the parties ample time to
11 fill out an application.

12 The concern that I have is that if you're
13 correct, that this should have been filed as an A
14 proceeding, that issue could have been focused on
15 and ruled on before the parties engaged in a year's
16 worth of litigation, RTC modeling, discovery,
17 et cetera, and at this late date, you know,
18 everybody says they want to avoid delay, you know,
19 I know Amtrak didn't start this in 2006 but Katrina
20 did, and to then say now we should convert it to an
21 A and then have a new pleading schedule does seem
22 to me a little bit different because all of the

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1 other parties litigated this for the last year
2 under the reasonable conclusion that this was
3 proceeding as an E case. And the footnote that you
4 alluded to hardly says to Amtrak we should spend
5 all of our time litigating this as an A case
6 instead as we go forward.

7 So I think if there is a difference, we're
8 not going to rule on the question now, it's an open
9 question, but there is some equities involved here.
10 In terms of the public interest of getting this
11 resolved, there definitely are problems raised by
12 your now saying we should have done this as an A
13 case all along.

14 MR. MULLINS: I can say -- Mr. Chairman, I
15 would say this in the case of the exemption
16 analysis that I just brought up. I can think of
17 many cases where there have been six months, eight
18 months of litigation over whether something should
19 be a -- you know, comments filed or whether
20 something should be a notice or a petition for
21 exemption, and after the end of, say, a six-,
22 eight-month, nine-month process the board has said,

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1 you know what, this isn't a petition for exemption,
2 go file an application. And when you go file an
3 application in that instance, there's statutory
4 requirements that then require, for example, an
5 abandonment, a whole other long four-, five-month
6 process.

7 CHAIRMAN OBERMAN: Well, I don't want to
8 belabor it.

9 MR. MULLINS: Sure, sure.

10 CHAIRMAN OBERMAN: The difference is that
11 under that scenario everybody knows they're
12 litigating whether an exemption is warranted.

13 We could have spent -- I would have hoped
14 we wouldn't have -- six months briefing whether
15 this should be A or E, everybody would have at
16 least known that's what they were litigating. They
17 haven't known that, and I'm not sure they'll
18 continue to litigate it, but we understand your
19 point.

20 MEMBER FUCHS: I do understand the point,
21 Marty, and I do also want to mention that I think
22 to my first question, you know, in terms of rolling

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1 over the evidence, it seemed to me that Bill was
2 suggesting that if no issue within the agreement is
3 off limits, it seems to me that there would be
4 significant additional evidentiary processes if it
5 were an A case, Bill, unless I'm misunderstanding
6 that.

7 MR. MULLINS: Well, certainly not on the
8 evidence. I mean, the evidence is pretty much
9 already in the record. You could have an argument
10 as to whether a certain provision of the contract
11 is met by the evidence. Of course --

12 MEMBER FUCHS: But if no part of the
13 agreement is cabined off and parties want to argue
14 over other sections of the agreement, as they do in
15 A cases, that might require additional evidence to
16 be taken, right?

17 MR. MULLINS: It might. It might, yes.

18 MEMBER FUCHS: I only wanted to make the
19 point that just rolling this over into an A case,
20 not only have we spent a year arguing for one
21 standard that no party -- no party ever suggested
22 to -- or I should say made a definitive statement

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1 to the contrary, but it's also the case that
2 converting it to an A case is not so simple because
3 A involves more issues.

4 MR. MULLINS: Can I make another
5 suggestion? And point well received, Patrick. I
6 would say this. There's also another option, one
7 that hasn't even been debated on or on the table
8 which is why doesn't the board say why don't Amtrak
9 go under the contracts? Read those agreements.
10 Amtrak has the right under those contracts to ask
11 for additional service, and then if the parties
12 don't agree, there is an arbitration provision.

13 We could have been filing motions to
14 dismiss on the basis that this should go under the
15 contracts, not A, not E, but under the contracts.

16 Now, the weakness of that from an NS
17 standpoint is that the contracts do not allow us
18 to -- it's Amtrak that is the one that has to
19 initiate, to come to us, and say we're invoking
20 provision X, Y, Z to ask for additional service,
21 and then we have to say yea or nay and agree, and
22 then if we can't, it goes to arbitration. Amtrak

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1 skipped all of that. They didn't want to go under
2 the contracts. Why did they not want to go under
3 the contracts? Because they want the historic
4 precedent of we can just get on a line whenever we
5 want and we'll deal with infrastructure later.
6 That's what they want. And I'm saying that's not
7 good policy. And I'm saying that's not something
8 you should do for the next 50 years.

9 So whether it's make them go under the
10 contracts, whether it's make them go under A, or
11 whether you use your inherent authority under E as
12 advocated by Ray Atkins, I would say it's access
13 with infrastructure.

14 MEMBER FUCHS: Thank you.

15 CHAIRMAN OBERMAN: Thank you, Bill. Are
16 there any other questions for Bill?

17 MEMBER HEDLUND: I have a comment about
18 how this maybe has all come down over the last
19 couple of years.

20 When this dispute started, I wasn't
21 entirely clear where the money was going to come
22 from. Amtrak just can't pay for this stuff out of

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1 its own pocket. And a comment that I made last
2 week at the APTA Rail Conference in Philadelphia
3 entitled Connecting American Cities is that
4 Congress has now given us \$66 billion [sic] for
5 rail, and some of that is going to go to the
6 northeast corridor that's cabined off and some of
7 it may go to entities like California High Speed
8 Rail that has its own right-of-way, but most of
9 this money is going to go on our freight railroad
10 system.

11 I was surprised that almost nobody from
12 the freight railroads was there to hear the
13 representatives of FRA talk about how it's all
14 going to be administered.

15 So I just want the parties to now keep in
16 mind that there are opportunities for funding
17 additional projects, if the board deems that they
18 should be funded, that haven't existed, but that
19 window is going to open and shut real fast.
20 There's going to be a lot of competition for that
21 money. So I think we should look for the quickest
22 resolution that we can find in this dispute so that

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1 the parties can access that money that the Congress
2 is making available.

3 Thank you.

4 MR. MULLINS: Member Hedlund, can I react
5 to that and say that I couldn't agree with you
6 more. There is money available. We don't
7 understand why the insistence -- we don't want to
8 use that money here to pay for the infrastructure,
9 and I would say one of the quickest ways to get
10 this done is to have board sponsored forced
11 mediation and let the parties hash this out.

12 CHAIRMAN OBERMAN: Let me just -- I want
13 to weigh in on this.

14 VICE CHAIR SCHULTZ: Marty?

15 CHAIRMAN OBERMAN: I'm sorry. Michelle,
16 go ahead.

17 VICE CHAIR SCHULTZ: I just had one quick
18 question. If you were following up on Karen, go
19 ahead. I didn't know if you were moving on.

20 CHAIRMAN OBERMAN: No. Go ahead.

21 VICE CHAIR SCHULTZ: Bill, just to follow
22 back up on Patrick's question, if the board were to

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1 decide this case under subsection A and the
2 agreement would come into play, would the board
3 have the authority to limit the scope of
4 consideration only to the lines at issue or would
5 it open up the contract in its entirety?

6 MR. MULLINS: It would only be the lines
7 at issue, in our opinion.

8 And I think if you go back to the Guilford
9 case in '98 and then the CN cases, it's really just
10 the line at issue and not the contracts. It's not
11 the network as a whole. It's the line at issue.

12 VICE CHAIR SCHULTZ: Thank you.

13 CHAIRMAN OBERMAN: Does any other board
14 member have a question?

15 I'm just going to make a couple of
16 observations as we go forward. We're here in a
17 proceeding under E. I would ask counsel from this
18 point forward to focus your attention on E unless
19 the board has some questions about A, but arguing
20 this should have been under E, could have been or
21 should have been under the contract are interesting
22 points, but they don't advance our ability to

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1 adjudicate the proceeding that's in front of us,
2 and it's an open question about how many late new
3 arguments that haven't been raised in the last year
4 that we should entertain at this point.

5 The only other observation I'm going to
6 make, because it keeps getting mentioned here at
7 the beginning, including by board members, is that
8 there's plenty of money. It's taxpayers' money.
9 That doesn't mean that the spigots are open. If we
10 have the authority to order infrastructure -- and
11 I'm only speaking for myself -- that we don't spend
12 the money, that's some other agency, but they may
13 well be influenced by whatever conditions we order,
14 and we shouldn't just open the spigots and say,
15 well, there's \$1.2 billion so let's build gold
16 rails along the Gulf Coast.

17 So let's just keep that in mind; that the
18 evidence in this case, when I know the parties
19 contend this, it's on what is needed to meet
20 whatever the statutory standard is, which still
21 hasn't been defined by the parties yet. The fact
22 that there's plenty of money out there, to me, is

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1 actually not even relevant. It may be relevant,
2 but it's certainly not the central issue in this
3 case.

4 So I don't want to dwell on it any longer,
5 but we have a long proceeding to go into, and I
6 think I've allowed us to get a little bit off track
7 more than I should have, and I'll take
8 responsibility for that.

9 If there are no other questions for Bill,
10 let's shift over to the Port, Rob Wimbish.

11 MR. WIMBISH: Good morning, Mr. Chairman.
12 Can you hear me?

13 CHAIRMAN OBERMAN: I can hear you.

14 MR. WIMBISH: Okay. Chairman Oberman,
15 Vice Chairman Schultz, Member Primus, Member
16 Hedlund, and Member Fuchs, the phrase I'm about to
17 use here is one I never thought I would be using
18 before this agency, but may it please the board, my
19 name is Rob Wimbish and I am here today on behalf
20 the Alabama State Port Authority and its rail
21 common carrier division Terminal Railway Alabama
22 State Docks or collectively the Port. I am joined

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1 here today by my co-counsel, Jim Helenhouse.

2 Today's hearing is indeed significant.

3 It's a significant point in the history of this
4 agency. This proceeding is unprecedented, it is of
5 potentially far-reaching significance, and perhaps,
6 most of all, it is unfortunate. Over the years
7 Amtrak and its freight carrier hosts have had their
8 moments for sure, but as a general rule they have
9 worked toward accommodations that reasonably have
10 balanced the interests of all stakeholders. And
11 here this sets along the path of triggered hard
12 feelings, immoderate posturing, and impatience that
13 underlie Amtrak's application. Such hardline,
14 winner-take-all confrontation has eclipsed the
15 principle, in our view, that we doubled effort
16 toward a collective accord is the best path to
17 advance the public interest in both interstate
18 freight commerce, and intercity passenger service.
19 Frankly, it should never have come to this. To be
20 sure, observers quickly would have noted there's
21 dialogue among Amtrak, CSX Transportation, and
22 Norfolk Southern Railway over the return of Gulf

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1 Coast passenger service got off to an admittedly
2 rocky start.

3 From there it seems that the freight
4 carriers and Amtrak have harbored very different
5 perspectives on the obstacles to a mutually
6 acceptable accommodation, but the path remained
7 open for a negotiated resolution, including under a
8 process potentially overseen by the good offices of
9 this board, be it mediation or under some other
10 format.

11 This is precisely the path that the Port
12 long has advocated for and the Port has continued
13 to urge throughout this proceeding. Unfortunately
14 that was the path not yet taken, at least not yet.

15 But Amtrak has assisted upon litigation
16 driven by impatience, retaliation, and frankly, now
17 a sense of entitlement revealing Amtrak's complete
18 disregard for railroad freight transportation and
19 in turn interstate and international supply chains.

20 Recently as this past Friday Amtrak told
21 us that it believes that it is entitled to an order
22 from this board directing CSXT and Norfolk Southern

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1 to facilitate Amtrak's Gulf Coast service even if
2 that order would impair unreasonably railroad
3 freight transportation, and in so doing Amtrak also
4 recently reiterated that it is unwilling to commit
5 to a single dollar to railroad freight service
6 protecting infrastructure. That is hardly a
7 conciliatory or reasonable gesture and it is a
8 harsh signal to all others of whom Amtrak may in
9 the future demand access for new or additional
10 train operations.

11 The Port has only ever wanted to engage in
12 constructive and fair dialogue with Amtrak and
13 other stakeholders having an interest in Amtrak's
14 service proposal. It reasonably has expected that
15 Amtrak would afford the Port's concern and
16 mitigation proposal due attention and that Amtrak
17 would be willing to explore arrangements accounting
18 for the Port's important and growing role in
19 domestic and international commerce.

20 Instead, Amtrak has made it clear that it
21 is not interested in the Port's concerns.
22 Consistent with this stance, Amtrak has insisted

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1 that the board should ignore the Port's evidence
2 and argument even if the Port were to demonstrate
3 that Amtrak's proposal would unreasonably impair
4 the Port's freight railroad operations and,
5 incidentally, the Port will demonstrate in this
6 hearing that Amtrak's proposal, if granted, would
7 unreasonably impair the Port's railroad operations.

8 It is troubling also that passenger rail
9 advocates aligned with Amtrak have falsely and
10 without basis claimed that the Port is
11 categorically opposed to Amtrak's Gulf Coast
12 service proposal despite the Port's repeated and
13 genuine explanations that it would not oppose such
14 passenger service if implemented responsibly.

15 As you may have grasped, the Port is
16 unhappy to be taking part in this hearing today.
17 It is unhappy that it has been pulled into the
18 vortex of avoidable and costly litigation.

19 By now board-sponsored mediation would
20 certainly have narrowed the issues if it did not
21 resolve this dispute entirely, but Amtrak and
22 Amtrak alone has refused this path. The Port knows

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1 that it cannot stand by when Amtrak's zero
2 infrastructure proposal would do grievous harm to
3 Port operations. The Port, for example, cannot
4 stand by when Amtrak repeatedly has expressed
5 indifference at best to the Port's concerns. It
6 cannot stand by when Amtrak repeatedly has insisted
7 that this board should simply ignore the Port, and
8 it cannot stand by when Amtrak contends that the
9 Port is not legally entitled to board protection
10 even if its railroad operations were to suffer
11 unreasonably.

12 It is for these reasons that the Port has
13 no choice but to defend itself and its interests.
14 If nothing else, the Port is buoyed by the
15 understanding that other ports, terminal railroads,
16 and short-line railroads are watching this
17 proceeding. Those same observers know that
18 appropriate board action will moderate Amtrak's
19 strategy in future cases and bend the passenger
20 carrier to constructive and conciliatory
21 engagement.

22 So the board has the present case and it

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1 will do so knowing that if Amtrak's application
2 were to be granted, this board, not CSXT, not
3 Norfolk Southern, and not Amtrak, but this board
4 will have as a consequence allowed Port railroad
5 operations to be harmed substantially, disrupting
6 supply chains, snarling international traffic, and
7 extensively delaying interline railroad shipments,
8 among other things.

9 The collected record evidence in this
10 proceeding already clearly militates in favor of
11 denying Amtrak's short-sided and draconian
12 application. Specifically, CSXT, Norfolk Southern,
13 and the Port already have demonstrated to you that
14 Amtrak's proposal would do definite and massive
15 harm to the Port's railroad operations just as it
16 would harm freight operation on other parts of the
17 affected service corridor.

18 In the evidence it will present in this
19 hearing, the Port will prove as follows: Amtrak is
20 indifferent if not hostile to the Port's concerns;
21 the Port's railroad operations are heavily
22 dependent on the CSXT corridor and Mobile,

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1 including portions of the CSXT line in Mobile
2 on which Amtrak intends to undertake eight
3 daily train movements.

4 The Port railroad operations are complex
5 and varied, and they require extensive track time
6 over CSXT lines that Amtrak now proposes to use in
7 the capacity of a first priority carrier.

8 Amtrak's proposed operations will render
9 the Port's railroad daytime cross-corridor
10 operations an impossibility, even though the Port
11 railroad is currently and by necessity a 24-hour
12 operation supporting customers, steamrollers, and
13 various connecting railroads.

14 Amtrak's own extremely limited evidence
15 dealing with the Port's railroad operations
16 actually shows that the Mobile terminal will face
17 significant congestion, a point with further
18 exploration in this hearing will reveal is far
19 more consequential than Amtrak would care openly to
20 admit. In fact, Amtrak's traffic scheduling
21 witnesses acknowledge that remedial steps including
22 additional Mobile railroad infrastructure would be

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1 advisable in the face of Amtrak's service proposal.

2 Also, the evidence offered by CSXT and
3 Norfolk Southern, most notably through its RTC
4 modeling of freight traffic impact analysis, will
5 once again demonstrate potentially catastrophic
6 Port railroad service deterioration.

7 In short, the evidence clearly will show
8 that the Port's railroad operations involving tens
9 of thousands of cargo and container movements each
10 year will be impaired unreasonably under Amtrak's
11 zero infrastructure service proposal.

12 Because Amtrak has insisted that it cannot
13 wait and it will not deviate from its current
14 demands, the board has no choice but to deny the
15 application as Amtrak has presented it. But Amtrak
16 has a choice to avert denial of its application.

17 First, it can jettison litigation in favor
18 of collaboration, mediation, and negotiation.

19 Second, if it continues to think that an
20 adversarial process is more in its interests, then
21 Amtrak can and should pursue relief under 49 U.S.C.
22 Section 24308(a), a provision that can accommodate

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1 board-imposed infrastructure unlike the current
2 proceeding.

3 There is some very limited reason for
4 hope, however. Amtrak has very recently reached
5 out to the Port asking about potential terms of an
6 agreement under which the Port might withdraw its
7 current objections. It is not clear to us whether
8 Amtrak is genuine in its outreach. There has been
9 little more to this development than a handful of
10 preliminary e-mails. Perhaps there will be more
11 progress on this front, but that seems rather
12 unlikely when Amtrak has devoted its energy to
13 litigating the issue.

14 Thank you. That concludes my opening
15 statement, but I understand that you were
16 interested in me perhaps addressing the enumerated
17 issues from the board's March 13th order, and if
18 you would like me to do that, I can proceed to do
19 that now.

20 CHAIRMAN OBERMAN: Yeah. Please do.

21 MR. WIMBISH: First of all, board members,
22 the first two questions that were posited in the

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1 March 14th order, items 1 and 2, are ones that we
2 have chosen not to address. They are not pertinent
3 to issues of relevance to the Port as they relate
4 to contract relationships among CSX, Norfolk
5 Southern, and Amtrak, and so we express no opinion
6 or view on items 1 and 2.

7 With respect to items 3 and 4, I would
8 like to respond categorically by pointing out that
9 this is a proceeding that Amtrak chose to initiate
10 under Section 24308(e) and not under section
11 24308(a). Similarly, in its order from August 6th,
12 the board initiated a proceeding that was
13 specifically under Section 24308(e). Consequently,
14 it is our position that questions regarding
15 24308(a) remedial provisions are premature in that
16 the board does not have before it a Section
17 24308(a) proceeding.

18 So categorically, with respect to sections
19 3 and 4, I would like to state, as I think the Port
20 has made clear throughout, that if these issues are
21 to be explored, that is the scope of potential
22 remedial action in the board's prescriptive

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1 authority, that presupposes a proceeding that does
2 not now exist, a proceeding under Section 24308(a).
3 But let me be clear. 24308(e) does not contain any
4 provision and does not entitle this agency and
5 historically has not entitled the Federal Railroad
6 Administration who was previously entrusted with
7 24308(e) to impose infrastructure as a condition to
8 a request for access, specifically here. Amtrak
9 has presented you with an application. That
10 application asks for access with zero
11 infrastructure. Your decision here is based on
12 Amtrak's application as presented, not on some
13 hypothetical and not on a nonexistent 24308(a)
14 proceeding.

15 That is not to say that Amtrak did not
16 initiate a proceeding under Section 24308(a) at an
17 earlier phase. It could have chosen to do so. It
18 chose not to do that because it escapes itself to a
19 position that no infrastructure is required. If
20 the board agrees, the board can order access under
21 24308(e). If it is inclined to think that
22 infrastructure is appropriate, to us that signifies

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1 that this particular application before the board
2 should be denied.

3 As to issue number 5, you've asked again
4 about sharing in costs, and I think consistent with
5 the points I've already made here, Section 24308(a)
6 is not before us, and so I think the question
7 you've asked may be premature. That is the Port's
8 position.

9 Again, I think you need to take Amtrak's
10 application as it's been presented, but for the
11 sake of preliminary discussion on the subject we
12 believe that long-standing precedent would
13 establish that if you determine that infrastructure
14 is required as a precondition for Amtrak's access
15 to these lines, if that is required as a
16 precondition, then long-standing precedent would
17 establish that Amtrak is a but-for cause for those
18 infrastructure requirements and as such Amtrak
19 should be required to fund 100 percent of those
20 infrastructure conditions that you may choose to
21 impose under a Section 24308(a) case.

22 CHAIRMAN OBERMAN: I'm sorry. Were you

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1 finished?

2 MR. WIMBISH: I am, thank you, sir.

3 CHAIRMAN OBERMAN: A couple of questions.

4 First of all, let me make an observation.

5 You opened by saying you were sorry your client had
6 to be here. I've never met a litigant who wanted
7 to be in court, so I don't think you stand in an
8 unusual position, to the extent it's like a court.
9 But I want to be clear, your position seems to be
10 very different from that offered by Mr. Atkins and
11 Mr. Mullins that we have the inherent authority
12 under E to condition and order allowing access to
13 build infrastructure. You think we do not have
14 that authority under E; our only authority is if
15 infrastructure is needed, to deny the petition,
16 presumably then Amtrak could file a new case under
17 A? Is that your position?

18 MR. WIMBISH: That is correct.

19 CHAIRMAN OBERMAN: The only other question
20 I had is that you've referred to early on that late
21 last week I think you said Amtrak announced its
22 position, at least to you, that it was entitled to

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1 access its four trains even if the evidence showed
2 unreasonable impairment. Is that what you said?

3 MR. WIMBISH: Yes, that is correct. That
4 is actually reflected in Amtrak's filing from
5 April 1st, from this past Friday. And I know you
6 haven't had an opportunity to read that yet, but it
7 is contained in their brief from April 1st.

8 CHAIRMAN OBERMAN: Well, that was my
9 question. That statement, which you contend they
10 made, that's in the record someplace?

11 MR. WIMBISH: Yes. It is in the April 1st
12 filing that Amtrak tendered. They have argued
13 there in response to -- I think it's your question
14 number 4, that even if you were to find that there
15 was unreasonable impairment, that you could
16 nevertheless order access in light of that finding
17 because the unreasonable impairment is not an
18 absolute bar to a favorable order. And Amtrak can
19 speak to this better than I can. I'm simply
20 characterizing the way I read their brief, so I
21 want to be clear about that. But they did say at
22 that point, as I read their brief, that even if

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1 there was an unreasonable impairment finding, that
2 did not preclude a favorable decision in favor of
3 Amtrak and that the impairment issues could be
4 sorted out later.

5 CHAIRMAN OBERMAN: Well, that was my
6 question. Where was that in the record, and you've
7 answered it.

8 Karen has a question.

9 MEMBER HEDLUND: I recall that in the
10 statements made that the earlier part of this
11 hearing a couple of weeks ago you or someone else
12 in the report criticized FRA for not having paid
13 any attention to the port. I also understand that
14 just about that time the Port received a
15 \$25-million grant from the Department of
16 Transportation. You don't have to respond to this
17 now, but at some point I would like to know what
18 that \$25 million is going for in terms of
19 improvements to the Port and does any of that
20 affect the rail access to the Port?

21 MR. WIMBISH: Well, Commissioner Hedlund,
22 it happens that of two of our witnesses for the

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1 proceeding, one of them is the chairman and CEO of
2 the Port, John Driscoll. We can certainly be
3 prepared to address that during his examination
4 when our turn comes.

5 MEMBER HEDLUND: Thank you.

6 CHAIRMAN OBERMAN: Any other questions
7 from any board members?

8 We have one more opening statement, and
9 we've been going a little over two hours. How is
10 our court reporter holding up?

11 THE REPORTER: I'm good. Thank you.

12 CHAIRMAN OBERMAN: How do the board
13 members feel about hearing Amtrak's opening
14 statement and then taking a break or should we take
15 a break now?

16 MEMBER FUCHS: I'm good with the opening
17 statement, Marty.

18 MEMBER PRIMUS: Me too.

19 MEMBER HEDLUND: Me too.

20 CHAIRMAN OBERMAN: Michelle?

21 VICE CHAIR SCHULTZ: I'm good, Marty.

22 CHAIRMAN OBERMAN: All right.

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1 Ms. Amunson, you are on.

2 MS. AMUNSON: Thank you, Mr. Chairman, and
3 good morning to you, Mr. Chairman, and to members
4 of the board. Jessica Ring Amunson, and I have the
5 honor of representing Amtrak in this proceeding.
6 I'm joined by my colleagues Kali Bracey and Alex
7 Trepp who will also be participating in this
8 hearing.

9 On behalf of Amtrak, at the outset, we
10 want to thank the board for its diligence and
11 thoughtfulness throughout this proceeding, and we
12 also want to very much thank your staff who have
13 worked very hard to make sure that this proceeding
14 goes off without a hitch, and we greatly appreciate
15 their efforts to work with us.

16 As you heard in their opening statements,
17 CSX, NS, and the Port have tried to turn this into
18 a case about RTC modeling and infrastructure
19 improvements. But this is fundamentally a case
20 about Congress's vision for the National Passenger
21 Rail System and whether private railroads can
22 essentially exercise veto power over that vision by

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1 making inordinate capital demands. Amtrak does not
2 believe that the private railroads should have that
3 power. Amtrak has a statutorily mandated
4 responsibility to bring passenger rail to
5 underserved communities and Amtrak has embarked on
6 a national strategy to carry out that
7 responsibility. CSX and NS want to preserve the
8 status quo, but that is not an option for Amtrak.

9 And it's important for us to just take a
10 step back for a moment and remember what Amtrak is.
11 Back in the late '60s, freight railroads were
12 losing hundreds of millions of dollars in providing
13 passenger services. Railroads were going bankrupt.
14 Congress realized something had to be done, so it
15 enacted the Rail Passenger Service Act of 1970 to,
16 quote, relieve the freight railroads of further
17 responsibility to provide passenger service. With
18 the act, Congress shifted financial responsibility
19 for providing passenger service from the freights
20 to the federal government by creating Amtrak.

21 However, there was a quid pro quo for the
22 enormous financial benefit conveyed upon the

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1 freight railroad industry. Freight railroads were
2 allowed to exit from providing passenger service
3 only on the condition that they agree to allow
4 Amtrak to operate over their lines, that Amtrak pay
5 only incremental costs for doing so, and that
6 Amtrak trains would have preference over their own
7 freight trains. CSX's and NS's predecessors
8 accepted that bargain and CSX and NS have inherited
9 it.

10 Of course Congress understood that running
11 passenger service on rail lines owned by freight
12 carriers would impact freight rail service and of
13 course Congress understood that giving Amtrak
14 preference over freight transportation would
15 sometimes cause delays to freight railroads or
16 require them to alter their own operating plans.
17 That was the whole premise of the bargain Congress
18 struck.

19 And ten years after the Rail Passenger
20 Service Act, Congress enacted new legislation to
21 emphasize that it meant what it said about the
22 obligation of the freight railroads to allow Amtrak

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1 to operate passenger service, including when Amtrak
2 wanted to run additional passenger service on
3 freight lines. That is the statute at issue here,
4 now codified at 49 U.S.C. 24308(e).

5 And if we could just pull up the House
6 report, 96839, you can see how this legislation
7 unfolded. Page 32 shows that the original
8 legislation simply said that when Amtrak notifies
9 the FRA that it's unable to reach voluntary
10 agreement with the rail carrier to operate
11 additional trains over that carrier's track, it
12 shall notify the FRA and the FRA shall order the
13 carrier to allow Amtrak to start running within
14 60 days at the fastest possible operating time.
15 There's no mention of operating -- of unreasonable
16 impairment here. Instead, it just recognizes
17 Amtrak's right to operate.

18 And the committee explained why at pages
19 20 to 21. It says that the committee, quote,
20 remains concerned about the lack of cooperation
21 private freight railroads have demonstrated toward
22 Amtrak, specifically by refusing to permit Amtrak

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1 to operate additional passenger trains on a densely
2 populated corridor. And so Congress said, quote,
3 to enable Amtrak to secure expeditious relief from
4 such intransigence, the reported bill contains a
5 provision which enables Amtrak to obtain an order
6 from the Secretary permitting the operation of
7 additional passenger trains over the lines of
8 freight railroads which have contractual agreements
9 with Amtrak.

10 The legislation then went to conference.
11 And if we can bring up House Conference Report
12 961041 and go to page 42, you can see that the
13 conferees agreed with the legislation but no doubt,
14 after some lobbying, now say that the Secretary can
15 consider whether an order would unduly impair
16 freight operation with the carrier bearing the
17 burden of showing such impairment.

18 And here is the key paragraph: The
19 Congress is concerned that in the past Amtrak's
20 efforts to add or modify service has involved
21 protracted arbitration proceedings and often
22 prompted requests by the railroads for inordinate

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1 capital improvements which are paid from
2 appropriations authorized for Amtrak's operating
3 expenses.

4 It is important that Amtrak have available
5 to it an expedited procedure for making necessary
6 modifications or additions to its operations. The
7 conferees have agreed that rather than being
8 absolutely constrained, the Secretary should have
9 discretion to take into account any serious adverse
10 impacts on a railroad's freight operations which
11 may result from additional service. However, it is
12 the purpose of this provision to insure that such
13 service may be added where no significant
14 impairment of freight operations is demonstrated.

15 And you can take that down.

16 So you can see that the default here is to
17 order that Amtrak can add trains unless the
18 freights show they will suffer serious adverse
19 impacts.

20 As the statute says, the board has
21 discretion to consider whether the service would
22 cause unreasonable impairment. What does

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1 unreasonable impairment mean? CSX and NS have told
2 you what that standard means, and we accept the
3 definition that they offer at page 14 of their
4 rebuttal brief where they say that the standard
5 they must meet is to show that the addition of
6 Amtrak service would, quote, make worse or do harm
7 to freight transportation in a manner exceeding the
8 bounds of reason or moderation. And let's take a
9 look at what they say exceeds the balance of reason
10 or moderation.

11 Primarily it's the possibility under their
12 RTC model that when Amtrak's passenger service is
13 introduced in their model, freight train speeds
14 could decrease from 14.8 miles per hour to
15 14.1 miles per hour. That is what they claim
16 exceeds the bounds of reason or moderation.

17 To meet their burden under the statute,
18 they offer the board merely a series of percentages
19 about what their RTC model says about how their
20 freight transportation hypothetically could be
21 impacted in things like modelled freight train
22 delay per 100 miles or modelled dispatching

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1 conflicts or modelled potential need for re crews.
2 But as you will hear from Mr. Tom Crowley and
3 Mr. Daniel Fapp of Peabody & Associates, those
4 percentages are much less dramatic when converted
5 into real numbers.

6 CSX and NS nonetheless repeatedly claim
7 that their freight transportation will be, quote,
8 degraded. It's unclear what they mean by this
9 degradation standard or where it comes from.
10 Again, of course, Amtrak service will have some
11 effect on their freight transportation. Again,
12 that is the whole premise of the bargain Congress
13 struck. But will Amtrak service cause the corridor
14 to grind to a halt? No. And CSX and NS admitted
15 this in their February 24th filing.

16 You will hear from Mr. Fapp and
17 Mr. Crowley about the many flaws with the RTC model
18 that CSX and NS offer here as their only evidence
19 of unreasonable impairment. But perhaps the most
20 important thing to remember is what CSX and NS say
21 about what it is their RTC model was trying to
22 achieve, and this is a quote from page 49 of their

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1 opening evidence. Their RTC model was designed to
2 come up with enough infrastructure recommendations
3 such that, quote, no aggregate freight service
4 delays would result, no schedules would be
5 adjusted, and passenger service will achieve a
6 95 percent on-time performance rate.

7 That is not a model that is trying to
8 determine unreasonable impairment. That is not a
9 model looking at whether freight transportation has
10 been harmed beyond the bounds of reason or
11 moderation. That is a model designed to gold plate
12 a railroad.

13 Even though they admit that introducing
14 Amtrak service now would not cause the corridor to
15 grind to a halt, you heard CSX and NS say it's not
16 about what happens now, it's about what might
17 happen 20 years from now. But if every time Amtrak
18 wanted to add or modify service Amtrak was required
19 to fund infrastructure to avoid all hypothetical
20 impacts on hypothetical freight traffic that
21 hypothetically might exist 20 years from today,
22 Amtrak's right and obligation to expand passenger

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1 service would be a nullity.

2 And a 20-year horizon is clearly not what
3 Congress contemplated in the statute. Congress
4 said it wanted an expedited procedure for Amtrak to
5 add service immediately. It told the board to hold
6 a hearing or explain why it wouldn't hold a hearing
7 within 30 days, and it said that after the hearing
8 the board should order that service can start
9 within 60 days. Congress said nothing about
10 looking at what happens in 20 years. Congress said
11 nothing about conditioning an order for passenger
12 service on infrastructure to mitigate hypothetical
13 future impacts. Congress said nothing about
14 requiring RTC modeling as a prerequisite to adding
15 service or indeed about requiring any type of
16 modeling. All of these are requirements that the
17 carriers have sought to engraft onto the statute,
18 but if the carriers want to amend the statute, that
19 is something that they need to take up with
20 Congress. They cannot amend the statute in this
21 proceeding. This statute is about adding Amtrak
22 service now.

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1 Infrastructure. There's been a lot of
2 talk in this proceeding about infrastructure, and
3 on this the parties are very far apart.

4 CSX and NS say Amtrak has to fund
5 \$440 million in infrastructure before Amtrak can
6 run a single train. That is certainly an
7 improvement over the position that CSX took in the
8 Gulf Coast Working Group, that it would cost at
9 least \$1.1 billion and perhaps up to \$2.3 billion
10 before a passenger train could run, but even
11 insisting on \$440 million to construct 14 different
12 projects is effectively a veto of passenger rail
13 service.

14 And I think it's important to recognize
15 what CSX and NS are really asking for here. They
16 want \$440 million in public funds to build or
17 improve infrastructure that they as private
18 companies will own. They will own that
19 infrastructure, including the longer sidings that
20 only need to be constructed because they're running
21 longer trains regardless of whether the Gulf Coast
22 service is still operating in 20 years. They want

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1 \$440 million in public funds to address the
2 potential for increased delays in places where they
3 admit they already have significant delays, and
4 they have demanded that Amtrak provide them
5 \$440 million in infrastructure for their freight
6 operations without so much as considering first
7 whether there might be lower cost operational
8 efficiencies, schedule changes, or technology
9 solutions.

10 \$440 million is about \$3 million a mile
11 for this route. If CSX spent \$3 million a mile on
12 infrastructure for its 21,000 mile network, it
13 would be spending \$63 billion rather than the
14 \$2 billion Mr. Foote told you they were spending
15 when he appeared before you last month.

16 Think about that. CSX spends \$2 billion a
17 year on infrastructure for 21,000 miles but they
18 want public funding of \$440 million for this
19 roughly 150-mile stretch. That can't be right.

20 Amtrak has shown, and as you heard
21 Mr. Atkins say here today, they have conceded that
22 there is sufficient capacity on the corridor to

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1 accommodate passenger service right now.

2 You will hear from Mr. Clayton Johanson
3 about our capacity study and where there is
4 sufficient capacity that railroads can operate
5 efficiently.

6 We believe that there have now been --
7 it's now been 16 years since Amtrak service last
8 operated. There have been six years of working
9 groups and studies. There have been three RTC
10 studies. There have been two statutes from
11 Congress exhorting the parties to find a way to get
12 this service to run, and now there is an STB
13 proceeding. Enough is enough.

14 One final word about the statute. The
15 statute charges the board with determining whether
16 there is unreasonable interference for the carriers
17 over whose line Amtrak seeks to run. As the
18 parties have stipulated, the Port is not a carrier
19 over whose line Amtrak seeks to run. Amtrak
20 certainly recognizes that the Port is an important
21 stakeholder in this proceeding, and Amtrak is
22 certainly willing to engage with the Port as an

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1 important stakeholder in this proceeding. But the
2 board is not charged under the statute with
3 determining unreasonable interference for anyone
4 other than the carriers over whose line Amtrak
5 seeks to run.

6 Amtrak also recognizes that the board has
7 heard from a lot of stakeholders in this proceeding
8 with a lot of views about what the board should do.
9 And Amtrak recognizes that the board spoke at our
10 prehearing conference about its views that it needs
11 to protect the public interest in this proceeding.
12 Here, Congress already said what was in the public
13 interest in 24308(e) and that is for Amtrak to have
14 an expeditious procedure to add passenger service
15 to overcome the intransigence of freight railroads
16 for imposing inordinate capital demands. Amtrak
17 believes that if the board follows the plain terms
18 of the statute and congressional intent, it should
19 order the Gulf Coast service to start.

20 I would be happy to address, if you would
21 like, the questions that we briefed in our Friday
22 filing.

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1 First, at the outset, it's Amtrak's
2 position that 24308(a) is not implicated in these
3 proceedings. This is a proceeding brought under
4 24308(e). 24308(e)(3) says that unless the parties
5 already have an agreement that establishes the
6 compensation for such service, the board shall
7 decide the proceeding under A. Here, the parties
8 already do have such an agreement.

9 When Amtrak initiated its outreach to both
10 CSX and NS, Amtrak proposed both a schedule for the
11 service and compensation for the service in
12 accordance with its operating agreements with both
13 CSX and NS.

14 The second point I want to make with
15 respect to our Friday filing is to make clear that
16 the parties' agreements treat infrastructure costs
17 very differently from operating costs and so the
18 costs of maintenance for infrastructure are handled
19 one way while the costs for operating
20 infrastructure are handled another way.

21 And then, finally, we would agree with
22 what Mr. Wimbish just said: 24308(e) does not give

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1 the board authority to order infrastructure.

2 And if the board has questions, we would
3 be happy to answer them.

4 CHAIRMAN OBERMAN: Thank you, Jessie.

5 Jessie, I don't know you as well as the
6 other lawyers, I hope you don't mind if I use your
7 first name. If you do --

8 MS. AMUNSON: That's fine. Thank you.

9 CHAIRMAN OBERMAN: Sure. We're going to
10 know each other pretty well after this week I
11 think. But thank you for your presentation. I do
12 have a number of questions. I'll try to take them
13 in the order that I made some notes here.

14 Is it Amtrak's position that the words
15 that ended up in the statute, "unreasonable
16 impairment," are equivalent to words you found, as
17 I've seen them in the legislative history, "serious
18 adverse impacts," and there was one other phrase
19 that you mentioned, "no significant impairment" or
20 "serious adverse impacts"? Is it Amtrak's position
21 that the statutory words "unreasonable impairment"
22 are equivalent to those words?

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1 MS. AMUNSON: We think those words
2 certainly inform the unreasonable impairment
3 standard, but, as I said, we're willing to accept
4 the unreasonable impairment that CSX and NS have
5 put forth in their brief.

6 CHAIRMAN OBERMAN: Well, they put that
7 forth in their rebuttal, as you pointed out, not in
8 their opening statement, which I noted and which
9 you noted, about no degradation at all, which seems
10 to be where they were going. We'll get into that,
11 I think, with the witnesses.

12 You know, you're the only attorney who
13 addressed the question of defining unreasonable
14 impairment, and you're then using the language from
15 CSX's rebuttal about exceeding the bounds of reason
16 or moderation? Is that -- I don't have the brief
17 open.

18 MS. AMUNSON: Yes, that's correct.

19 CHAIRMAN OBERMAN: It's a little bit
20 circular, the bounds of reason and reasonable don't
21 get me much beyond that circle. And one question
22 I'll ask you now -- and I don't want to bring the

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1 others back up here but I think should be addressed
2 as we go through the hearing -- is how are we
3 supposed to measure reasonableness in other context
4 in the law? For example, we all learned in law
5 school that negligence is measured by what a
6 reasonable person -- it used to be a reasonable man
7 but what would a reasonable person do under the
8 circumstances so you could look to other kinds of
9 behavior to measure it. So, for example, by
10 measuring reasonable impairment, are we supposed to
11 look at other rail lines, similar rail lines, all
12 rail lines, other rail lines of this carrier only,
13 that's just one possible question? But nobody has
14 addressed this as to what to put -- we've got a lot
15 of metrics, but we don't know what to put them up
16 against. Do you have a position on that?

17 MS. AMUNSON: Yes, Mr. Chairman. I think
18 that's a great point, and that is one of the points
19 that we have tried to address which is if Amtrak
20 operates -- what Amtrak is seeking to operate here
21 is two round trip passenger trips a day on a
22 freight line that has about 12 trains per day, and

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1 Amtrak operates throughout the nation much more
2 frequent passenger service on lines that have much
3 more freight service. So by comparing what Amtrak
4 is doing here to what Amtrak is doing throughout
5 the country, it's quite clear that this is not
6 unreasonable impairment of freight transportation
7 nor could it be. And you'll hear from Amtrak's
8 witness Mr. Jim Blair who will talk about Amtrak's
9 experience throughout the country in operating
10 service on far busier lines, including lines owned
11 by CSX and NS.

12 CHAIRMAN OBERMAN: Well, I think it would
13 be enlightening to compare the metrics which are
14 being put forward. I think it would be likely for
15 CSX and NS to compare them to metrics and other
16 situations and not just that you have -- we know
17 that you have a passenger service in other parts,
18 but I think they're asking us to look at the delay
19 and so forth. So I guess I'm just raising this
20 that I hope all witnesses will address themselves
21 to that analysis.

22 You said that Mr. Atkins today and in

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1 their pleadings before CSX has conceded that the
2 line can accommodate passenger service. What were
3 you referring to?

4 MS. AMUNSON: I was referring to what
5 Mr. Atkins said in talking about the DB study,
6 which is that there is sufficient capacity on the
7 line right now to operate four passenger round
8 trips. So he conceded that there is sufficient
9 capacity.

10 CHAIRMAN OBERMAN: I heard him say that
11 that was not the study that should be relied on,
12 however, because it's not an RTC study. So I
13 don't -- he conceded that there was a study, but I
14 don't think he conceded -- you said he conceded
15 that the line can accommodate passenger services.

16 MS. AMUNSON: Yes, I believe those are his
17 exact words, that the line could accommodate
18 passenger service, and I think his point was but
19 sort of at what cost. And our point is that
20 Congress gave Amtrak a right to operate passenger
21 service on freight lines. There is capacity to
22 accommodate the Amtrak service on the freight

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1 lines. What the freights want to do is not have to
2 alter a single thing that they are doing right now,
3 and that's what their RTC model is designed to do.
4 They don't consider, for example, whether they can
5 operate more efficiently, whether they can adjust a
6 schedule five minutes to better accommodate
7 passenger service. They just want to keep
8 operating exactly in the status quo. And so the
9 fact that there is sufficient capacity, the parties
10 should be able to use that capacity efficiently to
11 make sure that Amtrak service and freight service
12 can both run reliably.

13 CHAIRMAN OBERMAN: But it's fair to say
14 that -- so, just to be clear, you're not referring
15 to a pleading and whether any concession is made?
16 I just wanted for the record to know that you're
17 talking about his opening statement this morning?

18 MS. AMUNSON: Well, I believe that in
19 CSX's and NS's February 24th response to Amtrak's
20 surrebuttal they did concede that there was
21 sufficient capacity on the line to accommodate.

22 CHAIRMAN OBERMAN: All right. We'll take

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1 a look at that. I appreciate that.

2 By the same token, I don't find anything
3 in Amtrak's materials pointing out the changes in
4 scheduling or operational plans that would reduce
5 any negative impact on freight railroads. You
6 haven't submitted any such details yourself, have
7 you?

8 MS. AMUNSON: Well, you'll hear from
9 Mr. Clayton Johanson of DB about what their
10 methodology is designed to do, is to show that
11 where there is sufficient capacity you can, in
12 fact, consider things like operational changes or
13 technology changes that will allow, like I said,
14 freight and passenger service to both run reliably
15 on the line.

16 CHAIRMAN OBERMAN: I understand you're
17 saying that you can in the abstract, but in terms
18 of specific operational or technological
19 mechanisms, you haven't offered any specifics to
20 say if you do X or do Y, then the running times
21 will be better and so forth, have you?

22 MS. AMUNSON: We have always indicated a

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1 willingness to work with CSX and NS, but, no, in
2 this proceeding there's nothing that I can point to
3 specifically in the record that says adjust the
4 schedule five minutes. We've asked CSX and NS to
5 consider schedule changes and been rebuked.

6 CHAIRMAN OBERMAN: Well, I'm only asking
7 because if we're going to make a decision on this
8 record, you indicated that we shouldn't be taking
9 into account hypothetical operations 20 years in
10 the future, and I don't know how we can take into
11 account hypothetical operation -- operational
12 changes currently, if they're only hypothetical; so
13 I just wanted to be clear whether we'll see
14 anything in the record on that, and we'll let the
15 witnesses go as far as you think the record can
16 take them without objection, unless there is an
17 objection.

18 MS. AMUNSON: Certainly. You'll hear in
19 the record sort of what the line looks like right
20 now and Amtrak's past experience in operating on
21 that line and Amtrak's experience throughout the
22 country in operating on much busier freight lines

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1 with much more passenger frequencies. And so the
2 idea that this is unreasonable impairment, when you
3 compare it to Amtrak's experience nationwide, just
4 is not possible.

5 CHAIRMAN OBERMAN: All right. Next
6 question. Mr. Wimbish said -- and I haven't read
7 it. As I said, I think we just got it this
8 morning -- that in your April 1 filing you took the
9 position, or Amtrak took the position that we --
10 that it was entitled to have us order the trains on
11 the line even if unreasonable impairment is shown
12 by the railroads. Is that your position?

13 MS. AMUNSON: Our position is that the
14 plain text of the statute does not make
15 unreasonable impairment a bar to ordering service.
16 And so if we look at 49 U.S.C. 24308(e)(2), it
17 simply says the board shall consider when
18 conducting a hearing, first, whether an order would
19 impair unreasonable freight transportation of the
20 rail carrier, with the carrier having the burden of
21 demonstrating that the additional transportation --
22 freight transportation, and then second when

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1 establishing scheduled running times, the statutory
2 goal of Amtrak to implement schedules that attain a
3 system-wide average speed of at least 60 miles an
4 hour that can be adhered to with a high degree of
5 reliability and passenger comfort. So those are
6 both things that the board has to consider when
7 holding a hearing, but the statute does not
8 preclude the board from ordering service even if it
9 makes a finding of unreasonable impairment.

10 CHAIRMAN OBERMAN: So is it your position
11 that it is up to the board's discretion to
12 determine how unreasonable the impairment is before
13 we say you can't order the trains, or how are we
14 supposed to apply this? I noticed the language a
15 long time ago, and I'm glad you're addressing this
16 because no one else has, but how are we supposed to
17 apply it?

18 MS. AMUNSON: It is our position -- and I
19 want to be very clear about this with respect to
20 infrastructure costs. Amtrak's position has been
21 consistent ever since the Gulf Coast Working Group
22 report. The CSX and NS have sort of painted a

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1 caricature of Amtrak's position as saying that it
2 says that it will never spend a dime on
3 infrastructure. That's just not true.

4 What Amtrak wants is it wants to be able
5 to start service and then to have infrastructure
6 investments informed by the actual experience of
7 operating on the line rather than facing a demand
8 that it build \$444 million of infrastructure before
9 it be allowed to run a single train. So our
10 position is simply that the board should order that
11 service can start, it should recognize Amtrak's
12 commitment to working with CSX and NS to fund
13 infrastructure over time, including with the
14 \$66 million that's already dedicated for this
15 service.

16 And I guess also just referring to the
17 statute again, I want to make clear, if Amtrak
18 fails to live up to that commitment, if the board
19 orders service to start and Amtrak does not work
20 with CSX and NS to fund infrastructure over time
21 where it's demonstrated that that infrastructure is
22 needed to ensure both reliable passenger service

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1 and improve trip times and enhance efficiency,
2 et cetera, the carriers are not without recourse.
3 So 24308(c) always allows them to come to the board
4 and ask for relief if they believe that providing
5 Amtrak with preference over their lines will
6 materially lessen the quality of freight service
7 that they're able to provide. Or if on-time
8 performance becomes an issue, they can come to the
9 board under 24308(f) and ask for an investigation
10 into on-time performance and recommendations about
11 how to improve it. They're not without recourse.
12 Our position is that the board should order service
13 to start now while recognizing Amtrak's commitment
14 to fund infrastructure over time based on the
15 experience of operating on the line.

16 CHAIRMAN OBERMAN: Well, you say we can
17 recognize Amtrak's commitment, but you've taken the
18 position we do not have the authority to condition
19 your running the trains on your building
20 infrastructure even if that condition was we'll
21 build it over time, we don't have to build it all
22 before you start trains, you don't think we have

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1 any authority to make a condition like that, I take
2 it?

3 MS. AMUNSON: I want to be clear. We
4 don't think the board has the authority to order
5 Amtrak to fund infrastructure. As we said in our
6 pleading on Friday, we think that it is possible --
7 I should say at the outset we don't think that the
8 carriers have or will be able to meet their burden
9 of showing unreasonable impairment, but we think
10 that if the board were to somehow conclude
11 otherwise, it could in an order say we believe that
12 there is unreasonable impairment now but these are
13 the things that would mitigate unreasonable
14 impairment and if these things were mitigated, then
15 the service could go forward, but we don't think
16 that the board can order infrastructure to be
17 funded.

18 CHAIRMAN OBERMAN: So are you suggesting
19 the difference between an order which says without
20 X amount of infrastructure we won't allow the
21 trains to run and you can either choose to build it
22 or CSX can choose to build it or no one can choose

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1 to build it? Is that the way you understand the
2 statute?

3 MS. AMUNSON: We understand the statute to
4 be about adding service now. So we understand the
5 statute to say if no unreasonable impairment is
6 demonstrated, then Amtrak should be allowed to run
7 service. But if the board concludes otherwise, it
8 could also make findings about what might mitigate
9 that unreasonable impairment.

10 CHAIRMAN OBERMAN: Well, Ray Atkins
11 suggested it would be in the nature of a
12 declaratory order which might not order you to
13 build it but might find that without building it
14 you can't run the trains. Do you think we have the
15 power to issue that kind of an order?

16 MS. AMUNSON: We think you have the power
17 to issue an order that would set forth what Amtrak
18 could do to mitigate unreasonable impairment. But
19 to be clear, we think that the burden is not met
20 here. We think the right thing to do --

21 CHAIRMAN OBERMAN: I understand that. Let
22 me ask you this question. Your contention is, not

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1 without some justification, that the papers filed
2 by the railroads is an all or nothing, you have to
3 build 440 million in order to avoid unreasonable
4 impairment. On this record -- and I don't know how
5 the record is going to fully evolve yet -- if we
6 determine that something less than \$440 million is
7 necessary to avoid unreasonable impairment, do we
8 have the authority to condition it? In other
9 words, even if we found that CSX and NS haven't met
10 their burden, as you contend, if we find that there
11 will be an unreasonable harm to freight without
12 some infrastructure, on this state of the record,
13 do we have the authority to condition or in a
14 declaratory order say some lesser amount must be
15 built before Amtrak can start running its trains?

16 MS. AMUNSON: I'm not sure on the state of
17 this record that CSX or NS have put forth any sort
18 of priority of projects. As I said, Amtrak has
19 consistently said that there are already
20 \$66 million in capital funds allocated for the
21 service and Amtrak is willing to work with CSX and
22 NS on what their priority projects for

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1 infrastructure are.

2 CHAIRMAN OBERMAN: Do we have the
3 authority to issue an order that says don't run the
4 trains until you've committed the 66 million,
5 specifically identify projects, just
6 hypothetically?

7 MS. AMUNSON: We think that the better
8 formulation of that is to say that the service can
9 go forward; however, we expect Amtrak to live up to
10 its commitment and if not, the parties can come
11 back to the board.

12 CHAIRMAN OBERMAN: Well, here's my
13 concern -- and I'm only going to raise it because I
14 want the parties to deal with this during the
15 course of this hearing -- and that is even if we
16 determine that CSX were not to have met its burden
17 of proof, as far as the litigation finding in this
18 case because, as I believe, we are required to keep
19 our attention ultimately on the public interest, if
20 we conclude -- you're saying that Amtrak's position
21 is start the trains running and find out how much
22 interference there is with freight and then fix it

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1 later, but fixing it could take months, it could
2 take years, and, in the meantime, if no
3 infrastructure was built, there was a problem, a
4 real problem -- leaving aside the statutory
5 standard for freight -- might we not be adversely
6 impacting the public interest if we just let the
7 four trains go forward without requiring some
8 infrastructure to be built? And I would like
9 you -- and you don't have to, unless you want to,
10 address it now, but I find that to be a question
11 that we as a board have some obligation to consider
12 aside from the specific pleadings of the parties
13 because we always have to worry about the public
14 interest.

15 And so there are some meaningful arguments
16 on the other side, even if you think their
17 arguments are too much at the extreme end of the
18 spectrum, that just putting four trains on there is
19 going to be problematic if nothing is done in terms
20 of infrastructure, and that is a problematic
21 question in my mind.

22 MS. AMUNSON: So a few responses,

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1 Mr. Chair.

2 So first, I think it's important to
3 remember that their infrastructure demands are
4 based on a 20-year look ahead, and when you look at
5 their case about what actually happens when Amtrak
6 service is introduced now, the impacts are very
7 minimal, and you'll hear from our experts about
8 that. So the idea that Amtrak service can be
9 introduced now and the parties could then work
10 together on phasing in infrastructure over time,
11 that would be completely fine.

12 The alternative, of course, Mr. Chair, is
13 that delaying service yet more years while Amtrak
14 has to again try to negotiate with CSX and NS to
15 build the infrastructure that needs to get built,
16 this has already taken -- we've tried this now for
17 many, many years, and so if it is conditioned on
18 the cooperation of CSX and NS, they've shown that
19 they are not really willing to cooperate in terms
20 of building infrastructure. So we think the proper
21 framing would be order the service to be able to
22 start with recognizing Amtrak's commitment to work

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1 with the CSX and NS to phase in infrastructure over
2 time as it's demonstrated that it's needed.

3 CHAIRMAN OBERMAN: Perhaps my phrasing of
4 it was not as clear as I had intended. My question
5 is not whether we have the authority to argue to go
6 and negotiate with them. One possible outcome of
7 this hearing is that instead of ordering you to do
8 just what you've said, that could we order the
9 running of the trains conditional on specific
10 infrastructure to be built so nobody is arguing
11 about it, it's already laid out by the board, and
12 you're past and rather -- and rather than just
13 launching the trains with no infrastructure.
14 That's really the question that I find to be of
15 concern. I'll reserve judgment on whether that's
16 an appropriate answer, obviously, until we've heard
17 the evidence, but it is an issue that is certainly
18 raised by all the evidence that has been put before
19 us.

20 MS. AMUNSON: Well, as I said,
21 Mr. Chairman, the infrastructure that they want is
22 about a 20-year look ahead and --

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1 CHAIRMAN OBERMAN: You know, I'm beyond
2 that. I'm beyond the 440 million. I asked you
3 hypothetically if there was some lesser amount. So
4 I'm assuming for the sake of my question that
5 440- isn't needed but some amount is needed, in our
6 view, to avoid impairing freight in a way that's
7 unreasonable, do we have -- I guess it's just not
8 clear to me about what our authority is. You say
9 your approach it to start the trains running now
10 and see what disasters happen in the future, and
11 I'm trying to find out if it's not our obligation
12 to see, based on all of the studies that are done,
13 we can anticipate those disasters and mitigate them
14 beginning with some infrastructure. And under our
15 authority under E, that's really what I'm tying
16 this into, what our powers are.

17 MS. AMUNSON: Well, as I said, Mr. Chair,
18 we have always sought to engage CSX and NS on what
19 their priority projects are with respect to this
20 \$66 million that is already allocated for capital
21 improvements on the Gulf Coast line.

22 And if I may, Mr. Chair, I realized that I

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1 didn't directly address your question about the
2 public interest, and just for a moment I just
3 wanted to say that certainly we recognize the
4 board acts in the public interest and, in fact,
5 there are statutes that specifically charge the
6 board with taking into account the public interest.
7 This particular statute, of course, does not
8 specifically reference the public interest, but
9 that is nonetheless always a consideration for the
10 board.

11 We think, though, that Congress has spoken
12 clearly about what the public interest demands
13 here. We think that what Congress was trying to
14 get at with this statute was exactly this
15 situation: Amtrak trying to fulfill its statutory
16 mandate to bring passenger service to underserved
17 communities and being stymied by a lack of
18 cooperation and demands for inordinate capital
19 improvements from the freight railroads.

20 CHAIRMAN OBERMAN: Well, I would just say
21 this, Jessie: We've heard now from parties --
22 lawyers for all parties, but these matters are

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1 better done through negotiation and resolution, and
2 it's been years of not being resolved through
3 negotiation, and now the case has been brought to
4 us; so we're going to decide the case, unless you
5 settle it before we issue a decision. That's why
6 you're here. So all this talk about these things
7 should be negotiated, in my view, I encourage
8 people to negotiate right up until the jury comes
9 in, but that's not going to prevent this board from
10 fulfilling it's statutory obligation to decide a
11 case that's brought to us. And so what I am
12 getting at is our authority, how far it goes, to
13 decide the issues that are contested.

14 Let me ask you just one other question for
15 clarification. Mr. Atkins took the position that
16 your existing contracts with CSX does not cover
17 this line and until you reach a contract which
18 covers this line, you can't resolve this question
19 under A, as I think I understood his position. I
20 think Mr. Mullins took the position that the
21 contract does apply, their contract. You seem to
22 be saying -- well, I'm not clear on your position

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1 on that question, whether your existing contract
2 with CSX covers the issues involving the Gulf Coast
3 line.

4 MS. AMUNSON: Our existing contract
5 provides for additional or modified service and it
6 is pursuant to that provision that Amtrak had
7 always been reaching out to CSX and NS in the past.
8 It's provision 3.2. And that provision sets forth
9 that, in fact, payment for the service will be in
10 accordance with the parties' agreement. And so
11 when Amtrak reached out to CSX and NS in January of
12 2021 with respect to the schedule, Amtrak also
13 proposed payment for the service and that was,
14 again, in accordance with what is set out in the
15 parties' agreements.

16 CHAIRMAN OBERMAN: So let me see if I
17 understand it. As to the amount of payment, the
18 contract is an agreement to agree? It doesn't set
19 forth the amount of payment for this line already;
20 it's something that you would have to agree to? Is
21 that the way it works?

22 MS. AMUNSON: The agreement says that for

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1 additional or modified service, the payments shall
2 be in accordance with what is already established
3 and those are --

4 CHAIRMAN OBERMAN: Okay. So I understood.
5 And your contention is that that governs this line?

6 MS. AMUNSON: Yes.

7 CHAIRMAN OBERMAN: But we're not supposed
8 to take that into account under E?

9 MS. AMUNSON: Well, you are supposed to
10 take that into account under E. When you get to
11 (e)(3), (e)(3) says unless the parties already have
12 an agreement that covers compensation for this
13 service, then you go to A, and we're saying you
14 never get to A because the parties already do have
15 an agreement that covers compensation for this
16 service.

17 CHAIRMAN OBERMAN: Got it. I understand.
18 Did you lay this out in the brief you filed?

19 MS. AMUNSON: Yes, on Friday.

20 CHAIRMAN OBERMAN: All right. Well, I
21 think that answers the questions I had.

22 Karen has her hand up, so let's try to get

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1 through these, and then when we finish, we're going
2 to take a break.

3 Karen?

4 MEMBER HEDLUND: There's a question about
5 the statute that I've had for some time in the
6 context of this matter, and it's the language of E
7 which says when a rail carrier does not agree to
8 provide or allow Amtrak to provide for the
9 operation of additional trains over a rail line of
10 the carrier, then Amtrak can apply to the board.

11 Amtrak currently does not run service over
12 the line between New Orleans and Mobile; is that
13 correct?

14 MS. AMUNSON: That's right, although The
15 Sunset Limited is still in the contracts, I
16 believe.

17 MEMBER HEDLUND: But when you initiate
18 this service, it would not be part of the Sunset
19 Limited. My understanding is this would be a
20 state-supported service rather than part of your
21 long-distance service; is that correct?

22 MS. AMUNSON: Yes, this would be

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1 additional trains beyond The Sunset Limited.

2 MEMBER HEDLUND: So if it's not part of
3 the Sunset Limited and you're not running trains on
4 this line right now, why does this qualify as
5 additional trains? Additional to what?

6 MS. AMUNSON: Additional both to the
7 Sunset Limited service that already ran there and
8 additional to the service that Amtrak runs just on
9 all of CSX's and NS's lines. These are just
10 additional trains that Amtrak wants to run with the
11 same payment terms that are already in its
12 contracts, and that's what Section 3.2 of its
13 contract contemplates.

14 MEMBER HEDLUND: So if you wanted to run a
15 train over a line in which you have never provided
16 service, you can still access the board under
17 subsection E because it would constitute an
18 additional train?

19 MS. AMUNSON: So long as we had an
20 existing agreement with the carrier, yes, we
21 believe so.

22 MEMBER HEDLUND: But an agreement that

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1 doesn't mention that line?

2 MS. AMUNSON: An agreement that
3 contemplates additional or modified service, which
4 the contracts at issue here do.

5 MEMBER HEDLUND: Maybe we can get into --
6 I still don't understand what "additional" means,
7 and I know that Amtrak voluntarily suspended
8 service on this line after Katrina, it didn't take
9 any action to resume service for many, many years
10 because the service was unprofitable to begin with
11 and was always running late because it was part of
12 long-distance service, and now you want new service
13 for which Amtrak will not pay the full operating
14 cost and will constitute state-supported service
15 where the states actually have to pony up at least
16 part of the operating costs; so that's just the
17 point of kind of my confusion, but maybe you can
18 address that again maybe when we're talking more
19 about the existing contract because I'm confused
20 about that, and I don't know what was intended here
21 by the Congress.

22 Let me ask you one other question. If we

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1 were to simply find for the freight railroads, what
2 would you do?

3 MS. AMUNSON: If you were to find that
4 there was unreasonable impairment and, therefore,
5 Amtrak could not --

6 MEMBER HEDLUND: Say they've met their
7 burden of proof, it's unreasonable impairment, we
8 see no reason to hold for Amtrak, what would you
9 do? Do you have any other recourse other than
10 filing an appeal in the federal courts?

11 MS. AMUNSON: I haven't thought about
12 that, Member Hedlund, because we think that the
13 carriers will not meet their burden here.

14 MEMBER HEDLUND: I understand that, but, I
15 mean, a litigant usually has to figure out -- you
16 know, you have to think a couple of steps down the
17 line. You said that, you know, we can't order
18 specific infrastructure so if we can't do that,
19 then we've got to pick A or B and if we pick B,
20 what are you going to do?

21 MS. AMUNSON: Member Hedlund, I again want
22 to clarify that what we have said is the board

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1 can't order Amtrak to construct certain
2 infrastructure. We think the board can make
3 findings that -- again, we don't think the board
4 should find unreasonable impairment, but the board
5 can make findings that we have seen that there is
6 some unreasonable impairment but that unreasonable
7 impairment could be mitigated if Amtrak were to
8 fund infrastructure projects.

9 So, again, we don't think the board can
10 say, "Amtrak, you have to fund these infrastructure
11 projects" and saddle Amtrak with the responsibility
12 of funding infrastructure. The determination in
13 the end remains Amtrak's depending upon whether the
14 infrastructure projects that the board orders are
15 of an order of magnitude beyond what Amtrak is
16 willing to do in order to start the service.

17 MEMBER HEDLUND: But it's not really
18 Amtrak. It's really because it's a state-supported
19 service, you're just standing in the shoes of your
20 stakeholders; is that right?

21 MS. AMUNSON: That's right.

22 MEMBER HEDLUND: But you are saying that

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1 we could find for the railroads but say that if the
2 following infrastructure were built, setting aside
3 who builds it, you could operate, we do have the
4 ability to do that?

5 MS. AMUNSON: I believe so, yes.

6 MEMBER HEDLUND: And what you're saying is
7 that if we do that, then it's really up to you and
8 your stakeholders to decide whether you want to do
9 that at all?

10 MS. AMUNSON: Yes.

11 And one clarification, Member Hedlund.
12 You had said Amtrak didn't try to restore service a
13 while. Amtrak actually reached out as early as
14 2006 to try to restore the service, but in any
15 event...

16 MEMBER FUCHS: I'll be brief understanding
17 I might be standing in between lunch.

18 So to pick up where Karen left off, if we
19 find that the freights met their burden without
20 infrastructure, we have the ability to order
21 infrastructure and we also have the authority to
22 pick out some intermediate ground that isn't the

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1 entire freight contention for how much
2 infrastructure is needed, correct?

3 MS. AMUNSON: Yes, although I do just want
4 to again -- I know I'm being kind a stickler about
5 this when you say order infrastructure. We think
6 that the board could find that if the freights have
7 met their burden of unreasonable impairment such
8 that it could be mitigated if Amtrak were to --

9 MEMBER FUCHS: We can't direct specific
10 parties to fund certain infrastructure?

11 MS. AMUNSON: Exactly.

12 MEMBER FUCHS: But then the last question
13 I have then is but even without the direction to
14 specific parties, the constant is that freights
15 would always be obligated to accept the
16 infrastructure in their right-of-way?

17 MS. AMUNSON: I suppose it would depend on
18 how the board structured its order, but if it said
19 sort of if this following infrastructure is built,
20 then Amtrak can start the service. I -- you know,
21 I think that it goes along with Amtrak's statutory
22 right to operate the service that, yes, the

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1 freights would be obligated to accept the
2 infrastructure.

3 MEMBER FUCHS: I just want to make sure
4 that I'm absolutely clear because I saw in your
5 Friday brief that you said presumably the board
6 would order CSX and NS to cooperate. What
7 statutory authority would we be relying on?

8 MS. AMUNSON: It would be the statutory
9 authority that says that Amtrak has the right to
10 operate -- it would be sort of the whole grand
11 bargain that I talked about, that Amtrak has the
12 right to operate over freight rail lines and so if
13 a condition of operating over those freight rail
14 lines is that certain infrastructure be built, then
15 CSX and NS have the obligation to cooperate with
16 Amtrak on ensuring that that infrastructure gets
17 built.

18 MEMBER FUCHS: Isn't that right contained
19 in subsection A?

20 MS. AMUNSON: Well, as I said, we don't
21 think subsection A is implicated here because the
22 parties already have an existing agreement, so you

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1 don't get to A because we already have --

2 MEMBER FUCHS: Yes, but I guess what
3 access right are you -- where is the access right
4 found if not in A?

5 MS. AMUNSON: The access right is in -- is
6 in A, yes, but it is also just part of the whole
7 grand bargain we talked about. It's in E as well.
8 You would be ordering under E, Amtrak has the right
9 to operate additional trains.

10 MEMBER FUCHS: Okay. And so it is under E
11 that CSX and NS would be obligated to accept
12 infrastructure that would mitigate unreasonable
13 impairment?

14 MS. AMUNSON: Right.

15 MEMBER FUCHS: Okay. Thank you.

16 CHAIRMAN OBERMAN: Any other board members
17 have questions?

18 Jessie, I have one other area you dealt
19 with in your opening statement and I had a
20 follow-up question. In terms of the Port and your
21 argument that the Port is not the carrier, E talks
22 about the operation of additional trains over a

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1 rail line of the carrier and then A talks about
2 unreasonably impair freight transportation of the
3 rail carrier. So I have two questions. I've been
4 struggling with this language as well. Suppose CSX
5 entered into a trackage rights agreement with NS to
6 run all the trains over this line and CSX didn't
7 run any and that were the current state of affairs,
8 and you came in to ask for four trains a day,
9 could either NS or CSX come back and say, well,
10 we're going to show you that these trains
11 unreasonably impair the operation of the NS trains
12 using the trackage rights or would you say, no,
13 even though NS has all the freight traffic on this
14 line, it's not their line? So how would you handle
15 that situation?

16 MS. AMUNSON: We think it does talk about
17 the freight transportation of the carrier over
18 whose lines you seek to operate, but presumably CSX
19 would say that it is impairing their -- it would
20 impair their rights as well to use the line. So NS
21 would just be sort of a stand-in for CSX in that
22 context.

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1 CHAIRMAN OBERMAN: Well, in this case,
2 apparently CSX has some agreement with the Port to
3 use a part of its line, assuming it gets paid for
4 it. I don't know exactly what the relationship is.
5 But if CSX is contracting out in some way with the
6 Port to use a mile and a half or whatever it is of
7 its line, where are we supposed to draw the line as
8 to when CSX gets to say you're interfering with our
9 freight transportation, we've contracted with the
10 Port to use this part to provide freight
11 transportation? Why is that not something we
12 should be taking into account at least?

13 MS. AMUNSON: Mr. Chair, as I said, we
14 think the Port is an important stakeholder and we
15 are certainly willing to engage with them, but in
16 terms of what the statute contemplates, it's the
17 carrier over whose line Amtrak is seeking to run.
18 So it would be CSX advocating for the Port or for
19 its contracts with the Port in those instances. It
20 would not be -- the Port is not sort of
21 contemplated under the statute at least as a
22 carrier over whose lines Amtrak is seeking to run.

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1 CHAIRMAN OBERMAN: Well, I'm not sure what
2 difference it makes, but are we going to pay
3 attention to whatever problems the Port claims your
4 trains are going to cause, whether it's CSX coming
5 into this hearing saying you will interfere with
6 the operations we've contracted out to the Port and
7 in order to prove that we're going to ask the Port
8 to put on evidence, what difference would it make?
9 It just seems to me we're dancing on the head of a
10 pin here as to how much weight we're supposed to
11 put on or whether supposed to consider at all the
12 issues raised by the Port?

13 MS. AMUNSON: Mr. Chair, we raised these
14 arguments in opposition to the Port's motion to
15 intervene and the board allowed the Port to
16 intervene, and so we respect the board's decision
17 in that respect. We continue to believe that the
18 Port is not under the statute, at least an entity
19 that has the burden of showing unreasonable
20 impairment.

21 CHAIRMAN OBERMAN: Well, I guess the
22 question is -- it's a separate question, it seems

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1 to me, as to who has the burden. It may be that
2 ultimately CSX has the burden for that part of the
3 line. But do you agree that that burden could, in
4 part, be met by showing what this might do to
5 impair the Port's operations?

6 MS. AMUNSON: To the extent that that
7 impacts CSX's operations. Ultimately it's CSX's
8 operations that are at issue. CSX is the carrier
9 over whose lines Amtrak is seeking to run.

10 CHAIRMAN OBERMAN: But it talks about
11 freight transportation. It doesn't just -- isn't
12 freight transportation broad enough to encompass
13 other railroads that are allowed to use CSX's line
14 to transport freight, I guess is a better way to
15 phrase the question?

16 MS. AMUNSON: Well, it says impair
17 unreasonably freight transportation of the rail
18 carrier. So that's where freight transportation is
19 at issue.

20 CHAIRMAN OBERMAN: And CSX says, I assume,
21 maybe they'll tell us, maybe I should already know
22 and I don't, has a contract with the Port to have

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1 some freight transportation on CSX's line carried
2 out by the Port. That doesn't count as freight
3 transportation of CSX, if it's done under their
4 right to control their own line by contracting this
5 out?

6 MS. AMUNSON: So, Mr. Chair, CSX and NS in
7 their RTC model certainly accounted for many -- for
8 freight transportation other than that that is
9 directly provided by CSX and NS. They put into
10 their RTC model sort of, you know, foreign trains
11 and yard trains and other New Orleans railroads,
12 et cetera. So the board chose to give the port
13 sort of a special status in this proceeding, but we
14 don't think that the port is a recognized entity,
15 at least under the statute. The rail carrier can
16 put on whatever evidence it wants of unreasonable
17 impairment, and it can include evidence about
18 impairment to the Port, et cetera, but, in the end,
19 it's the burden on the rail carrier. We don't
20 think that the Port -- unreasonable impairment on
21 the Port itself is not really a consideration under
22 the statute.

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1 CHAIRMAN OBERMAN: Now you confused me.
2 If the CSX evidence shows that there is
3 unreasonable impairment on the Port, are we
4 supposed to ignore that evidence? That's my
5 question.

6 MS. AMUNSON: You are supposed to consider
7 the impairment of the rail carrier, which is CSX.

8 CHAIRMAN OBERMAN: I think we're going
9 around in circles. Let's get to it when we get to
10 the Port's evidence.

11 Any other questions for Jessie?

12 VICE CHAIR SCHULTZ: I have two.

13 CHAIRMAN OBERMAN: Go ahead, Michelle.

14 VICE CHAIR SCHULTZ: Jessie, what's been
15 an issue has been a lot of discussion about
16 subsection E versus subsection A, and perhaps this
17 is contained in your most recent filing, but I
18 wondered if you could speak to why Amtrak brought
19 its case pursuant to E versus A?

20 MS. AMUNSON: Because we believe it is an
21 E case. It is a case about our interests and right
22 to operate additional trains over the lines of CSX

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1 and NS in the Gulf Coast. So it's not a case about
2 where terms and compensation have to be decided.
3 Compensation for additional service is already part
4 of the parties' agreement.

5 VICE CHAIR SCHULTZ: I believe you said
6 this earlier, I believe it's also Amtrak's
7 position, then, that pursuant to E the board is not
8 then permitted to consider infrastructure; is that
9 correct?

10 MS. AMUNSON: I want to be careful about
11 the language. What I said is that the board can't
12 under E, we don't believe, order Amtrak to
13 construct certain infrastructure. What the board
14 could do is make a finding -- and, again, I want to
15 just back up and say we don't think that there is
16 unreasonable interference, but if the board were to
17 conclude otherwise, it could say we think there is
18 unreasonable interference but we further find that
19 that interference could be mitigated if the
20 following infrastructure were built. It can order
21 Amtrak to build the infrastructure, and as I said
22 to both the Chair and to Member Hedlund, and I

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1 believe also Member Fuchs that, in the end, it has
2 to be Amtrak's sort of choice whether the magnitude
3 of what the board thinks needs to be constructed is
4 something that Amtrak and its stakeholders want to
5 go forward with.

6 VICE CHAIR SCHULTZ: Thank you. And then
7 just final question: Has Amtrak done its own RTC
8 modeling?

9 MS. AMUNSON: Amtrak engaged in the 2020
10 RTC modeling which, as the board is aware, fell
11 apart because of the unwillingness of CSX and NS to
12 share basic data with Amtrak and the unwillingness
13 to deviate from an insistence on only looking at
14 what infrastructure has to be built for a 20-year
15 look ahead as opposed to for the short term, which
16 is how Amtrak does its planning. Amtrak plans sort
17 of five years out in terms of its service planning.
18 So that RTC study did not -- did not go forth.
19 Amtrak has not put forward an RTC study in this
20 case.

21 VICE CHAIR SCHULTZ: You have not done an
22 independent one is what you're saying?

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1 MS. AMUNSON: Excuse me?

2 VICE CHAIR SCHULTZ: Amtrak has not
3 conducted an independent RTC study?

4 MS. AMUNSON: And -- but let me just also
5 make sure that the board is aware that Amtrak did
6 not have the data to do an independent RTC study,
7 and you'll hear from our experts Mr. Crowley and
8 Mr. Fapp about this but, for example, you'll hear
9 that the data that was used for the RTC study is
10 all based on, for example, interviews and
11 narratives between CSX and NS personnel and their
12 field personnel. Amtrak has no way of verifying
13 that. Amtrak has no access to CSX and NS field
14 personnel to verify whether the hundreds of trains
15 that they say are operating are actually operating.
16 So Amtrak could not have done its own RTC model
17 with the data that exists.

18 VICE CHAIR SCHULTZ: In other areas of the
19 country, does Amtrak do its own independent RTC
20 modeling?

21 MS. AMUNSON: Absolutely. On the
22 Northeast corridor Amtrak -- and so I do want to

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1 make this clear too. I feel like, to some extent,
2 CSX and NS have tried to make this a case about RTC
3 modeling and whether it's the gold standard or not.
4 Amtrak is not anti-RTC modeling at large. Amtrak
5 does RTC modeling all the time on the Northeast
6 corridor, for example, when it's -- for its own
7 service planning, but when Amtrak does RTC
8 modeling, Amtrak works cooperatively with its
9 partners. They share data. They share the inputs
10 and assumptions for the RTC model. That was the
11 exact opposite of what happened with respect to the
12 2020 study. And Amtrak, with respect to the data
13 that was finally provided in this proceeding to
14 Amtrak's experts -- and let me be clear, it was
15 provided only to Amtrak's experts and attorneys.
16 Amtrak itself has no access to the data, still
17 cannot actually look at any of the data. Amtrak is
18 not able to use that data to do its own RTC study.

19 VICE CHAIR SCHULTZ: Okay. Thank you.

20 CHAIRMAN OBERMAN: I would like to just
21 follow that up with two points and then we'll break
22 for lunch.

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1 I was going to defer this until your
2 witnesses get on the stand, and you may want to
3 defer it as well, Jessie, but the question I have
4 is you've already said you did not run your own
5 model, your own study. Did you do any runs on
6 CSX's model and modify the inputs in any way?

7 MS. AMUNSON: You'll hear from Mr. Fapp
8 and Mr. Crowley about what they had available and
9 what they were able to do.

10 CHAIRMAN OBERMAN: All right. Then we'll
11 explore it with them.

12 I just want to follow up on one question
13 that Karen Hedlund asked which has puzzled me a
14 little bit. You know, I'm -- probably you too --
15 used to operating in a more formal courtroom
16 procedures with motion practice and so forth, which
17 we don't really do here. And the question on the
18 table I think -- and you don't, unless you want to,
19 need to address it now -- but when CSX and NS
20 finish putting on their case, and we have to
21 determine whether a prima facie case has been made
22 to satisfy their burden of proof, the question then

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1 is in the event that we were to hold that they had
2 made a prima facie case, I think what Karen may
3 have been addressing in part was what evidence will
4 Amtrak then go forward with to contradict that
5 prima facie case and it then becomes burden of
6 going forward on Amtrak at that point if we were to
7 so hope. And so you don't have an RTC study to
8 contradict those studies, so I assume you're going
9 to be relying on all of the other evidence that you
10 disclose. Is that a fair understanding?

11 MS. AMUNSON: Yes, Mr. Chairman. I do
12 want to just address sort of the framing that you
13 used, and we addressed this in our brief on Friday,
14 which is about the prima facie case.

15 So the statute does not contemplate any
16 sort of burden shifting here. The statute
17 contemplates that the burden remains at all times
18 on the carriers. Amtrak does not have its own
19 burden to come forth and rebut the evidence of the
20 carriers. The statute is crystal clear that it is
21 the carrier's burden to show -- to demonstrate that
22 the additional trains will impair their freight

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1 transportation. There is no talk of prima facie or
2 burden shifting.

3 So that said, we will put on our
4 witnesses, so you will hear from Mr. Crowley and
5 Mr. Fapp about the RTC modeling in this case and
6 why that RTC modeling is flawed and why it was
7 built to a standard that is not at all about
8 unreasonable impairment but is instead about sort
9 of gold plating the railroad. You'll hear from
10 Mr. Blair about how Amtrak operates nationwide in
11 numerous circumstances with much higher passenger
12 frequencies on much busier freight lines. So to
13 contend this is unreasonable impairment doesn't
14 comport at all with Amtrak's experience. And
15 Mr. Blair will also discuss the fact that the Gulf
16 Coast corridor is not at all unique.

17 And then finally you'll hear from
18 Mr. Johanson who will talk about the capacity study
19 that Amtrak conducted and that shows that there is
20 sufficient capacity on the line to add four
21 passenger trips per day and that if the railroads
22 were just willing to operate more efficiently,

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1 et cetera, and willing to sort of cooperate with
2 Amtrak on service planning, that both reliable
3 freight and passenger service could run.

4 CHAIRMAN OBERMAN: Just to be clear, I
5 wasn't suggesting -- let me state this the way I
6 see it and the other board members might disagree
7 and the parties may disagree, but I think it's
8 fair, as we go forward with this proceeding for us
9 all to proceed on some similar understanding. The
10 statute speaks of burden of proof at a hearing on
11 the record. I believe it is not contested that a
12 hearing on a record is a trial-like proceeding that
13 we're about -- that we have begun with direct
14 testimony, cross-examination, and the board
15 ultimately making a decision. There is a
16 difference between a shifting of the burden of
17 proof and a party having the burden to go forward
18 if a prima facie case is made. I know we all
19 understand that.

20 So I don't think that you're saying that
21 if we were to determine at the end of the
22 railroad's case that they've met their burden of

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1 proof that there's nothing that you can do about
2 it. Karen asked you what are you going to do about
3 it, and in my view you have the opportunity to
4 offer that would then destroy or undermine their
5 prima facie case, and that is one way you could go
6 forward. That is not a burden shifting. That is
7 to finish the trial. You may take the position at
8 the end of their case that if they haven't met
9 their burden of proof, the trial is over. We
10 haven't made that request and we're not considering
11 it at this point. But I think the question is, and
12 I think you've answered it, that if -- let me state
13 it. I want to make sure we're all on the same -- I
14 was going to say the same plane, but this is a
15 railroad case, so I won't say that. If at the end
16 of the railroads case they have met their prima
17 facie case to establish their burden of proof, then
18 the evidence that you have to contradict the
19 prima facie case is all of the evidence you've just
20 sort of generally outlined, I don't mean to limit
21 you, but whatever evidence you proffer is how
22 you're going to combat their prima facie case; is

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1 that my understanding?

2 MS. AMUNSON: Yes, I think that's correct.
3 We don't think that the board should reach a
4 decision about whether they have met their burden
5 of proof until after the board has heard all of the
6 evidence.

7 CHAIRMAN OBERMAN: Well, that is another
8 question which we can determine at the time, if any
9 party raises that issue, and you may have already
10 told us your position, so we'll see.

11 All right. Unless any other board
12 member -- Karen has her hand up. Sorry. You're
13 mute, Karen.

14 MEMBER HEDLUND: I'm sorry. And with all
15 due respect, Mr. Chairman, in fact, my question was
16 a little broader than the way that you have
17 characterized it, although I think that is a very
18 useful way of looking at the issue, and it was
19 really suggested by Jessie, your comments that if
20 the board holds for Amtrak and things get mucked
21 up, that the railroad still have the ability to
22 come back under 24308(c) and maybe (f) and maybe

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1 some other section to get relief, but if we were
2 simply to hold in favor of the railroads and if
3 it's your position that you have an agreement that
4 covers this, you do not have the ability to come
5 back and seek the assistance of the STB under A?

6 MS. AMUNSON: Member Hedlund, I haven't --
7 I would like to reserve responding until I've had
8 more time to think that through. As I said, we
9 don't think that they can meet their burden at this
10 proceeding and so --

11 MEMBER HEDLUND: I understand that. You
12 know, as you can see, we're trying to figure out
13 what our options are in dealing with this problem
14 and what we can do to solve it and meet our
15 obligations to fulfill the public interest. So I
16 would be interested in that and from all of the
17 parties I would be interested in a little more on
18 whether this contract or the two contracts you have
19 with NS and CSX do or do not apply in this case.

20 Thank you. That's all I have.

21 CHAIRMAN OBERMAN: All right. Thank you,
22 Karen, and thank you all. If we are done for the

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1 moment with the opening statements, which have
2 lasted far longer than they were scheduled for, but
3 that's okay. I think a lot of progress has been
4 made. They're over. It is 12:57. Let's recess
5 until 1:30.

6 MEMBER PRIMUS: Marty, sorry to interrupt.
7 Can I ask for a special request? Can we recess
8 until 1:40? I need a little bit of time to take
9 care of something.

10 CHAIRMAN OBERMAN: 1:40 is fine. Thank
11 you for raising that. We will reconvene at 1:40
12 and we will begin CSX's first witness.

13 Thank you all.

14 (Luncheon recess from 12:57 p.m. until
15 1:42 p.m.)

16 CHAIRMAN OBERMAN: So Matt, we are
17 delighted you're with us. And we are ready for you
18 to begin.

19 MR. WARREN: Okay. Mr. Chairman, CSX and
20 Norfolk Southern call their first witness,
21 Mr. Charlie Banks.

22 CHAIRMAN OBERMAN: I am going to be the

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1 bailiff today and swear in our witnesses.

2 Mr. Banks, I assume you've done this
3 before. Please raise your right hand.

4 Whereupon,

5 CHARLES HAROLD BANKS,
6 was called as a witness and, having first been duly
7 sworn, was examined and testified as follows:

8 CHAIRMAN OBERMAN: Matt, proceed.

9 DIRECT EXAMINATION

10 BY MR. WARREN:

11 Q. Charlie, would you please state your name
12 for the record?

13 A. Charles Harold Banks.

14 Q. And what is your profession?

15 A. Management consultant operating
16 exclusively in the rail space.

17 Q. Could you please summarize your experience
18 in the rail industry?

19 A. Yes. I am currently president of
20 R.L. Banks & Associates, Inc., named after the
21 founder, my father, Robert L. Banks, who founded
22 this consulting firm in 1956 after employment in

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1 the passenger department at the New York Central
2 Railroad.

3 My father testified before the STB and its
4 predecessor agency on dozens of occasions. He
5 loved the business, he loved the industry, and as a
6 result of his enthusiasm, I have spent my entire
7 adult life in the rail space.

8 In 1970, I was 18 years old, I started
9 working for a railroad. I ended up working in six
10 departments of five railroads in four different
11 states, as well as the District of Columbia.

12 After working for those railroads, I
13 entered federal service and worked at the United
14 States Railway Association. I had two jobs there.
15 The first was manager of capital and rehabilitation
16 expenditures. And the second, which is more
17 germane to these proceedings, I was the chief of
18 public sector purchases, with responsibility for
19 all intercity, regional and commuter rail services
20 in the Northeast and the Midwest.

21 Q. And Charlie, when you say that you work in
22 the freight space, are you only talking about

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1 freight railroads?

2 A. Mr. Warren, I said I worked exclusively in
3 the rail space, not the freight space, and that's
4 the case. We have designed our business to achieve
5 a balance. We do work for freight railroads,
6 although, frankly, more for short-lines and
7 regionals than class 1s, but we also do a lot of
8 work for passenger rail entities, operators, state
9 DOTs, state -- supporters of state intercity
10 service, and also the federal government, and
11 Amtrak for that matter.

12 Q. What lines of business does RLBA offer to
13 its passenger clients?

14 A. I would say there are two principal lines
15 of business. One of them I would characterize as
16 planning and feasibility. In that line of business
17 we perform the same kind of analysis that
18 presumably Amtrak has done in coming up with a plan
19 that is at the heart of this matter; that is to
20 say, looking at what the ridership would be, how
21 many trains should operate to respond to projected
22 ridership, what the consists of those passenger

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1 trains should be, at what stops they -- what
2 stations they should make stops, what should be the
3 size of the parking lots, et cetera, et cetera.

4 The second primary line of business in the
5 passenger area is what I would call, in contrast to
6 planning, implementation, which is generally
7 achieved through negotiation of access to shared
8 track on tracks generally owned by freight
9 railroads.

10 Q. Could you provide the board with some
11 specific examples of each of those lines of
12 business?

13 A. I would be happy to. I think a
14 particularly useful one is the work that we did on
15 behalf of the Virginia Railway Express because we
16 were hired to do both the planning feasibility work
17 as well as the implementation and negotiation.

18 So in the case of the Virginia Railway
19 Express, again, we did all of the elements that
20 normally go into feasibility study. There is a way
21 of doing it right and comprehensively. And so we
22 did all of those, and we're talking about a line on

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1 CSX which extended, I think, initially, to
2 Fredericksburg, Virginia, but has ultimately been
3 expanded further south to Spotsylvania, and also a
4 line that is on Norfolk Southern essentially to
5 Manassas, although it's been extended to Broad Run,
6 Virginia.

7 So we did all that planning work, and then
8 it took several years for the -- that work was done
9 for the Council of Governments of Greater
10 Washington, D.C. It took several years for the
11 political elements to figure out who was going to
12 do what in Northern Virginia. And two regional
13 agencies, multicounty agencies, collectively hired
14 us to help them negotiate with a predecessor
15 railroad of the current Norfolk Southern for that
16 trackage going west from D.C. in the I-66 corridor,
17 and a predecessor railroad for CSX, the Richmond,
18 Fredericksburg, and Potomac, for that portion.

19 And then from the Arlington County line,
20 shoreline of the Potomac River, across the Potomac,
21 parallel with the 14th Street Bridge, and then
22 through L'Enfant Plaza and beyond. That track at

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1 the time was controlled by Conrail, so we had to
2 negotiate track access also with Conrail.

3 And last, but not least, Amtrak then owns
4 access into Union Station and, in fact, below the
5 Capitol, I believe, and so we had to negotiate
6 access with them. We also recommended at the time
7 that VRE contract with Amtrak to operate the
8 trains, so we had yet a fifth negotiation.

9 Q. Thank you. Are there any more recent
10 projects that you can describe to the board?

11 A. Yes. We do a tremendous amount of work in
12 California, which has really been a hotbed of
13 passenger rail activity in the last few years, last
14 few decades. I'll talk about two of them.

15 There is a highway between -- a major
16 interstate, called the 5 in California, which we
17 easterners would refer to as the I-5 -- between
18 San Diego and Los Angeles. And the California
19 Department of Transportation had basically issued a
20 preliminary report saying it was going to widen the
21 highway in each direction either two or three lanes
22 between Los Angeles and San Diego. And the

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1 environment interests threatened to sue on the
2 basis of the fact that Caltrans had not followed
3 its own environmental regulations.

4 Ultimately, the parties agreed to hire a
5 consulting team to examine whether much of the
6 future demand could be handled by enhanced
7 passenger rail service. And R.L. Banks &
8 Associates was hired to use a model called RTC to
9 model the trains, the increased number of trains,
10 that would be appropriate to handle forecasted
11 increase in demand. So that's one project we did
12 recently.

13 And another recent project was done on
14 behalf of Facebook, which is now calling itself
15 Meta. Facebook's campus is in San Mateo right on
16 the edge of South San Francisco Bay on the
17 peninsula, and a lot of their employees live in the
18 East Bay because the cost of housing is much less.
19 Facebook wanted to explore the use of a railroad
20 bridge which is in reasonable shape -- would have
21 to be rehabbed -- which connects the City of Newark
22 in the East Bay with Facebook's headquarters which

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1 is literally at the shoreline, and to points
2 beyond.

3 And so, again, we were hired to do an RTC
4 analysis of running, essentially, a Facebook
5 shuttle that would connect up ultimately with
6 Caltrans. Non-Facebook employees could use it, but
7 it was essentially a Facebook shuttle.

8 Q. Have you done work for commuter-rail
9 clients?

10 A. All over the country.

11 Q. Can you give some examples?

12 A. Sure. So one example, which I think is
13 particularly germane, is we did some negotiations
14 with representatives of NS and CSX and Conrail
15 during the time that CSX and NS were dividing up
16 Conrail. So there were representatives of all
17 three railroads at the negotiating table.

18 We were working for New Jersey Transit
19 that was seeking to put in light rail service on a
20 freight track between Camden and the capital of
21 New Jersey, Trenton, on a line where we did reach a
22 successful negotiation outcome, and it's now

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1 operating as the River Line of New Jersey Transit.

2 Another example is we worked on a
3 transaction which was the largest in terms of both
4 dollars and scope. My father and I were hired by
5 Los Angeles County and, separately, San Diego
6 County and, separately, Orange County which lies
7 between them, all of whom wanted to put in commuter
8 rail service, San Diego County from the oceanside
9 in the northern part of the county south to
10 San Diego, and the other two into Los Angeles union
11 passenger terminal.

12 We realized very quickly that while it was
13 in our interest to have three clients paying us to
14 do the same thing, it wasn't in their interest.
15 And so I came up with something called the joint
16 offer where the three of us worked together, the
17 three counties, and convinced them to work together
18 and then to bring in the other two counties that
19 also wanted commuter rail service.

20 And it took six months to pull that
21 coalition together, another year and a half to
22 bring Santa Fe back to the table. But that deal

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1 also was consummated.

2 Q. Were you involved in the recent initiative
3 by the Commonwealth of Virginia to expand passenger
4 service in Northern Virginia?

5 A. I was involved, and I remain involved.
6 There are really two separate deals. There is one
7 with CSX that involves -- and, frankly, I never
8 thought this would happen -- but the extension of
9 the northeast corridor from Washington, D.C., to
10 Richmond, and the rights to operate service beyond
11 Richmond down to Petersburg and then branching off
12 from the CSX main down into North Carolina near
13 Raleigh, North Carolina. So basically the
14 beginning of the southeast high-speed rail vision.

15 And there's also a piece of that work that
16 has involved adding service -- state-supported
17 service now we're talking about -- between
18 Washington, D.C., and Roanoke, and, in fact
19 extending it south of Roanoke to a place called
20 Christiansburg, which is near Virginia Tech.

21 Q. Have you done work involving Amtrak?

22 A. Yes, we've done work both directly for

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1 Amtrak and involving Amtrak.

2 Q. Can you give an example of work you've
3 done directly for Amtrak?

4 A. Yes. In 2015, December I believe,
5 something called the FAST Act was signed into
6 law -- FAST, an acronym standing for Fix America's
7 Surface Transportation. That law required Amtrak
8 to develop a methodology to help guide
9 decisionmaking with respect to the addition or
10 subtraction of routes or additional trains or
11 stations -- in other words, guide its future growth
12 or elimination for those routes that weren't
13 working out too well.

14 We were part of a team that contributed to
15 that study.

16 Q. Can you give an example of work you've
17 done that involves Amtrak where Amtrak was not your
18 client?

19 A. Yes. The most important one, I think, the
20 most interesting one, is that in the mid/late '80s,
21 Amtrak service between Washington, D.C., and
22 Montreal was in trouble due to the fact that a

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1 short-line had reduced the speed of its tracks down
2 to 10 miles an hour for 60 miles, so it was taking
3 six hours to go 60 miles. And a competing
4 shoreline also was a tenant on that piece of track
5 and was being hurt economically by the slow speed.

6 And so they got into a big fight and the
7 short-line and R.L. Banks and Amtrak were on one
8 side and the owning short-line and, actually, the
9 Association of American Railroads was on the other
10 side. The ICC ruled in favor of our position but
11 it was appealed; in fact, it was appealed all the
12 way to the United States Supreme Court.

13 Q. Have you done any work involving the
14 Federal Railroad Administration?

15 A. Yes. In 2020 we were hired by FRA to
16 conduct an analysis of a software program, a
17 stand-alone software program, that would help FRA
18 be able to gauge the financial impacts of decisions
19 made by Amtrak to add or subtract. And we
20 currently have two contracts with FRA, one in which
21 we are the primary contractor and one in which we
22 are a subcontractor.

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1 Q. Charlie, based on the extensive experience
2 that you've just testified to, do you believe that
3 it is possible for freight railroads and passenger
4 railroads to successfully share use of a rail line?

5 A. I do. There are dozens of examples around
6 the country. I don't see how anyone could have any
7 other -- reach any other conclusion.

8 Q. So when a passenger or a commuter railroad
9 is seeking shared use of a freight line, how do
10 they ensure that that shared use is not going to
11 unreasonably impair the freight transportation on
12 the routes?

13 A. Well, the interests of passenger rail
14 development agencies and the interests of the
15 freight railroads are somewhat aligned, but the
16 interests are not completely aligned, and perhaps
17 not even particularly well aligned.

18 In the old days, we would just sit there
19 and bicker across the table at each other and get
20 extremely frustrated. But now, fortunately -- in
21 fact since at least the year 2000 -- there is a
22 mechanism, a simulation tool, that is very

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1 granular, very accurate, I would argue very
2 transparent, to allow both freight and passenger
3 interests to manifest in detail what their
4 interests are, and this simulation program will
5 spit out a variety of outcomes which the parties
6 can then focus on.

7 Q. And Charlie, which simulation program are
8 you talking about?

9 A. It's called rail traffic controller,
10 shorthand RTC.

11 Q. Could you please briefly explain what RTC
12 is?

13 A. I think the best way to understand it is
14 in three pieces. In the first piece, the modeler
15 puts in everything that is germane about the supply
16 of capacity -- think of it as infrastructure, if
17 you will. So we're talking about the number of
18 tracks, the location of tracks, the beginning and
19 end of every siding, the speed at which the trains
20 can go into those sidings, the signal system,
21 movable bridges, horizontal and vertical curvature,
22 et cetera, et cetera, any factor that will affect

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1 the supply of capacity, shorthand, infrastructure.

2 Step two is you put in the demands on that
3 infrastructure. Many of those demands are trains.
4 So you put in the -- all of this into this computer
5 model. You put in the number of trains, the
6 weight, lane, tonnage of those trains, how
7 frequently they run, when they have to run, if they
8 have to run at a particular time, things like that.

9 But it's not just trains. It's any
10 occupancy of capacity needs to be put into the
11 model to take advantage of its capabilities, and
12 that includes things like leaving cuts of cars on
13 the main line so that a local can go to conduct its
14 switching and come back and pick up the cars right
15 there off the main and proceed down to the next
16 customer, and the opposite of that, light engines
17 running around without any cars behind them because
18 the engines maybe are coming from a train and need
19 to be fueled or are going to a train, maintenance
20 of work that needs to be done out on the track so
21 that the track remains in a fair condition,
22 high-rail vehicles that are taking, for example,

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1 people who work on the movable bridges to them.

2 Any occupation goes in the second tranche.

3 The third, and final, part is running the
4 model. And the model either runs or it doesn't
5 run. If it doesn't run, you need to either add
6 infrastructure or reduce or -- change the operating
7 parameters or reduce the number of trains running
8 until it does run.

9 Q. Charlie, you testified a moment ago that
10 RTC was transparent. What did you mean by that?

11 A. It is as objective as it can be. It runs
12 on data. It produces data. People who see the
13 results can make adjustments very quickly and they
14 can make -- they can isolate the effect of any
15 individual adjustment if they want, but the
16 simulation is so powerful that one can make
17 multiple changes in a scenario as compared with the
18 previous scenario. And it, again, will be able to
19 calculate it.

20 So what I mean by transparent is you can
21 see the information that's coming in and you can
22 see the information that's going out, and if you

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1 want to slice it up into pieces, you can see the
2 individual impacts associated with making
3 individual decisions by the model.

4 Q. How does RTC compare to other planning
5 tools that might be used in the rail industry?

6 A. It is the gold standard. RTC was not
7 designed to support procedures like this,
8 litigation. It was designed to assist railroads in
9 planning how to tweak their networks so as to
10 maximize the utilization of the assets that any
11 railroad has. And as a result, it is currently
12 licensed to every class 1 railroad in the United
13 States, and has been for years.

14 Q. Approximately how many RTC simulation
15 projects have you been involved in your career?

16 A. Approximately 20. We do one or two a
17 year. I don't remember the year that we first
18 started paying our licensing fees, but one or two a
19 year is pretty average.

20 Q. And I asked you earlier about the work
21 that RLBA has done for, you know, passenger rail
22 and commuter rail and involving passenger projects.

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1 Does RLBA do work for freight shippers?

2 A. It does. Approximately a quarter of our
3 work on a five-year rolling average would be
4 related to passengers, about a quarter on behalf of
5 individual railroads, about a quarter on behalf of
6 shippers, and another quarter on behalf of
7 suppliers of both financing and equipment. So we
8 have a very broad portfolio, and it's by design.

9 Q. Has RLBA done work for freight shippers in
10 Surface Transportation Board litigation against
11 CSX?

12 A. As the STB staff would know, yes, we've
13 been on the opposite sides of, for example,
14 standalone cost cases against both CSX and Norfolk
15 Southern and at least BNSF as well.

16 Q. So how is it, Charlie, that RLBA can do so
17 much work for freight railroads, passenger
18 railroads, commuter rail interests and freight
19 shippers?

20 A. Integrity. We have an excellent
21 reputation for telling it the way it is. We've had
22 several clients literally write us letters saying

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1 thanks for telling us what we needed to hear, not
2 what we wanted to hear.

3 And the reason those clients come back to
4 us over and over again is because our process is
5 the same, our approach is the same, and our results
6 are the same regardless of who pays our invoices.

7 Q. Charlie, in Amtrak's opening statement
8 they argued that Amtrak operates all over the
9 country and they operate over lines involving CSX
10 and they operate over lines that are Norfolk
11 Southern lines. What, in your view, is different
12 about the Gulf Coast?

13 A. It is an extremely challenging territory
14 even just to operate freight trains, let alone the
15 addition of Amtrak.

16 The two gentlemen who are going to follow
17 me to the podium here will be able to provide
18 details to the members in a way that I couldn't
19 possibly, but essentially it's a combination of
20 both physical constraints and some of the
21 operational demands. Let me go through the
22 physical constraints first.

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1 I think I would start with the fact that
2 it's mostly single-track territory. There are some
3 sidings, but there are not very many sidings, and a
4 lot of them must be short because there are either
5 bodies of water that prevent the lengthening of the
6 sidings or there are grade crossings.

7 Now, the number of grade crossings per
8 mile on this particular rail line segment is not
9 much different than that ratio across the country
10 as a whole. However, those grade crossings tend to
11 be concentrated just west of Pascagoula and end up
12 making the sidings shorter and also making the
13 location of the sidings much less than ideal, which
14 constrains the corridor.

15 In addition, there are 13 movable bridges
16 that affect the capacity of the corridor. Seven of
17 them are actually on the segment, but six others
18 have ripple effects that affect the capacity of the
19 line.

20 And speaking of ripple effects,
21 New Orleans is one of the largest interchange
22 locations in our entire country. A tremendous

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1 amount of interchange is going on. And for the
2 interchange to be accomplished to and from CSX, all
3 those trains have to go over the NS line. So
4 interchange trains to and from the western carriers
5 from both NS and CSX all have to go over that one
6 single NS line.

7 It's the combination of those physical
8 constraints and the volume and complexity of the
9 interchange at New Orleans that really sets this
10 particular corridor apart.

11 Q. And, Charlie, to remove any unnecessary
12 suspense, when you refer to the two gentlemen who
13 would be talking in more detail about some of these
14 physical constraints and the combination of those
15 with the operating needs on the line, who are you
16 referring to?

17 A. I'm talking to Ricky Johnson, who --
18 representative of CSX, and Randy Hunt who will
19 provide the Norfolk Southern perspective.

20 Q. Thank you. Charlie, in your experience,
21 is there any route on Amtrak's system that has
22 this, you know, combination of complicating both

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1 physical and operational factors that you just
2 described on the Gulf Coast?

3 A. No.

4 Q. So in a situation like this one, what is
5 the best way to evaluate how Amtrak service might
6 be successfully added to this complicated route
7 without unreasonably impairing freight service?

8 A. The best, and I would say the only
9 solution that I see that is -- that minimizes
10 subjectivity is to employ RTC and then negotiate
11 over the outcomes that the RTC suggests.

12 Q. How did you come to be involved in this
13 proceeding?

14 A. We signed a contract in August of 2021.

15 Q. What were you asked to do in that
16 contract?

17 A. We were asked to audit the inputs,
18 methodologies and assumptions that were reflected
19 in a draft Gulf Coast RTC report. And when I
20 realized the nature of our assignment, I asked one
21 of my associates, Larry Guthrie, to join me in
22 heading up the RLBA contribution because Larry had

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1 headed up the section that ran RTC projects at a
2 major railroad in the United States a decade ago.

3 CHAIRMAN OBERMAN: Matt, I'm sorry to
4 interject.

5 Mr. Banks, could I just ask you to repeat,
6 because it somehow got past me, the beginning of
7 your answer, what you were asked -- I think the
8 question was what were you asked to do?

9 THE WITNESS: Certainly. We were asked to
10 audit the inputs, assumptions, and methodologies
11 manifest in a draft RTC report that had been
12 produced by a gentleman named Mark Dingler --
13 D-I-N-G-L-E-R -- an employee of HNTB.

14 CHAIRMAN OBERMAN: Thank you. Sorry to
15 interrupt.

16 MR. WARREN: No problem.

17 BY MR. WARREN:

18 Q. So Charlie, you brought in Mr. Guthrie to
19 help. What did you and Mr. Guthrie do to carry out
20 your assignment?

21 A. Well, of course, the first thing we did
22 was read the report and make a list of a couple of

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1 dozen questions that we had. Unfortunately for us,
2 the railroads had the wherewithal to recognize our
3 need, and they put together something that became
4 known as the clean team, because the purpose of the
5 clean team was to scrub all the assumptions, all
6 the inputs, and all the methodologies that went
7 into the draft report.

8 In addition, Mr. Guthrie was part of a
9 small cadre of consultants that visited the line
10 and -- paying particular attention to the major
11 choke points along the line, a multiday trip. And
12 that trip was book-ended by two, I believe,
13 multiday visits to Mr. Dingler.

14 Mr. Dingler ran the model. Mr. Guthrie
15 sat next to Mr. Dingler and asked him an exhaustive
16 list of questions that we thought were more
17 appropriate to ask Mark while sitting next to him
18 so that the model's inputs and outputs could be
19 reviewed directly there on the screen.

20 Q. Charlie, was there a point where the scope
21 of RLBA's assignment changed?

22 A. Yes. Over time we became more comfortable

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1 with everything that was being done, and we
2 essentially came to see the assignment slightly
3 differently. The assignment, as we ultimately
4 understood it, was to do everything possible to
5 ensure that the infrastructure that was manifest in
6 the model accurately reflected what was out there,
7 out on the ground, plus some improvements that I
8 believe CSX proposes to make between now and 2039,
9 which improvements were already reflected in the
10 2039 model ones, to make sure also that Amtrak's
11 service and scheduling needs were properly
12 represented in the model, and third, to make sure
13 that the freight requirements, both local and
14 switching and road trains, and all the other needs,
15 were properly represented in the model.

16 And at that point we expressed our
17 willingness to add Mr. Guthrie's name to the Gulf
18 Coast RTC report that was ultimately submitted to
19 the STB.

20 Q. And Charlie, will Mr. Guthrie be
21 testifying later in this proceeding?

22 A. I sure hope so.

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1 Q. So, Charlie, you testified earlier that
2 you've been involved in about 20 RTC models over
3 the course of your career. How would the process
4 that went into constructing what became the 2021
5 Gulf Coast RTC model -- that Mr. Guthrie and
6 Mr. Dingler, you know, into evidence in this
7 case -- how does the process that was used to
8 create that model compare with the process that
9 you've seen in previous RTC models that you've been
10 involved with?

11 A. The process was the most comprehensive,
12 most thorough, most complex, and most vetted
13 process of any project I have ever worked on, going
14 beyond RTC, even going beyond the 35 years that I
15 worked at RLBA, going back to the time when I was
16 essentially an internal consultant to three
17 railroads. This has been thoroughly vetted. If it
18 wasn't, our name would not be on it.

19 Q. What did the Gulf Coast RTC report show
20 would be the effects of granting Amtrak's request
21 for immediate passenger service with no
22 infrastructure improvements?

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1 A. Serious degradation to freight operations.

2 Q. And what did the Gulf Coast RTC report
3 show would be required to avoid that serious
4 degradation?

5 A. Well, responsive to the board's directive
6 of the summer, the team came up with a set of
7 improvements based on the feedback that the RTC
8 runs gave us, both regarding 2019 and 2039.

9 Q. Charlie, based on your experience and
10 based on the work you've done in this case, what do
11 you think is the best way for the parties to move
12 forward to evaluate how Amtrak passenger service
13 could be added to the Gulf Coast without
14 unreasonably impairing freight service?

15 A. I think it would be foolish not to take
16 advantage of the RTC model because the industry is
17 very lucky that such a model exists and can
18 essentially play a neutral role, putting in the
19 inputs, getting out outputs, multiple outputs,
20 which both sides can have similar access to, and
21 capability of working with.

22 MR. WARREN: Mr. Chairman, I have no

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1 further questions on direct.

2 CHAIRMAN OBERMAN: All right. Do I
3 assume, Matt, that -- I shouldn't make any
4 assumptions -- that NS will not -- these are joint
5 witnesses, right? So they won't have --

6 MR. WARREN: Yes. I think -- I don't have
7 Mr. Mullins or Mr. Donahoe here, but I can
8 represent that they don't have any direct
9 questions.

10 CHAIRMAN OBERMAN: Okay. So I think up
11 next is the Port.

12 Mr. Wimbish? Rob Wimbish?

13 MR. WIMBISH: The Port has no questions.

14 CHAIRMAN OBERMAN: All right.

15 Amtrak. Who is appearing? Is that you,
16 Ms. Bracey?

17 MS. BRACEY: Yes.

18 CHAIRMAN OBERMAN: Okay. You're up. Yes.

19 CROSS-EXAMINATION

20 BY MS. BRACEY:

21 Q. So Mr. Banks, you've submitted 41 verified
22 statements to the STB; is that correct?

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1 A. I don't know.

2 Q. Well, you've never submitted an RTC model
3 to the STB before; is that right?

4 A. I'm not positive, but you may well be
5 correct.

6 Q. Okay. And the RTC model is a computer
7 program; is that right?

8 A. It is a simulation program, yes, done on a
9 computer.

10 Q. Okay. And it's a model that's only as
11 good as how it's programmed; is that right?

12 A. Would you repeat that question, Counsel?
13 Sorry.

14 Q. Sorry about that. It's only as good as
15 how it's programmed. The model is only as good as
16 how it's programmed; is that right?

17 A. I would say no, that's wrong.

18 Q. You worked with Mr. Guthrie and
19 Mr. Dingler on that model, correct?

20 A. Yes.

21 Q. Did you work with anyone else?

22 A. Mr. Dingler was -- it depends, Counsel, on

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1 what exactly you are seeking. Mr. Dingler was the
2 only person who specifically operated the model.

3 Q. Okay.

4 A. Mr. Dingler -- I'm sorry. Mr. Guthrie, as
5 I alluded to in a previous answer, sat in the chair
6 next door to Mr. Dingler on several days across two
7 trips and asked specific questions and observed a
8 number of items.

9 Mr. Guthrie and I spoke before and after
10 every one of somewhere between 12 and 18 Zoom calls
11 that the clean team held, and after those calls,
12 Mr. Guthrie and I would often compare notes, and I
13 would give to Larry my thoughts, and he would
14 translate those thoughts into questions which would
15 either be addressed in the next Zoom call or, if
16 more appropriate, were saved for Mr. Dingler when
17 they met one on one.

18 Q. To whom did you report your results?

19 A. I'm sorry. I just didn't hear you. Say
20 that again.

21 Q. Sure. To whom did you report your
22 results?

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1 A. So the clean team would make
2 recommendations. Sometimes Mr. Dingler himself
3 would bring questions before the team and ask for
4 guidance. Whenever new results were available,
5 Mr. Dingler would discuss them on these clean team
6 calls. Sometimes the results were provided to us
7 in advance of the call, sometimes in the course of
8 the call.

9 Is that responsive to your question?

10 Q. Yes. Did you run prior models that caused
11 less delay?

12 A. I think that is a question that's best
13 held for Mr. Dingler.

14 Q. Are there --

15 CHAIRMAN OBERMAN: I'm sorry. Can you
16 answer the question, Mr. Banks? Do you have any
17 knowledge?

18 A. If forced to answer, I would answer I
19 don't think that there were -- that there were runs
20 that operated in obviously less delay, but I want
21 to add two caveats. One, when you make changes in
22 the model, which was the whole purpose of bringing

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1 RLBA on, you get differential results from making a
2 certain change. You make the change because it's
3 the right change to make. Okay?

4 The result could be that it's
5 advantageous -- there's less delay on NS through
6 trains, but there could be more delay on CSX local
7 trains.

8 So I just want you to understand it in the
9 context. The context is that you make the
10 changes -- at least the way I interpreted the
11 assignment, we make the changes that we think are
12 the right changes to make. We communicate them to
13 Mr. Dingler. Mr. Dingler runs the model. He comes
14 back and communicates the results.

15 Some of those results may go in one
16 direction. Some of the results may go in the
17 other. But even if the directions were such that
18 we ultimately ended up with a higher number, more
19 delay, that doesn't mean that that was the purpose
20 of it. The purpose of it -- the purpose of the
21 RLBA contribution was to produce -- oversee the
22 production of the most accurate model that we could

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1 achieve.

2 CHAIRMAN OBERMAN: Well, Mr. Banks, just
3 for the record, I'm not forcing you to answer
4 anything. I'm only suggesting that you're required
5 to answer anything that you have knowledge of. If
6 you don't know, you can tell us you don't know.

7 THE WITNESS: I don't believe there were
8 such, but now that I've introduced my caveats, I'm
9 perfectly comfortable providing the answer. Thank
10 you, sir.

11 CHAIRMAN OBERMAN: All right. Sorry to
12 interrupt, Ms. Bracey.

13 MS. BRACEY: Thank you.

14 BY MS. BRACEY:

15 Q. CSX determined the inputs for the RTC
16 model; is that correct?

17 A. It's a very complicated subject. I'm
18 going to try to give you a 30,000-foot-view answer.
19 There will be opportunities to talk to Hannah
20 Rosse, probably tomorrow at the rate we're going,
21 and talk with her specifically about the inputs.
22 You need to start somewhere, and the inputs that

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1 were provided by both CSX and Norfolk Southern are
2 central to building a strong foundation in that
3 model.

4 As one of Mr. Warren's questions alluded
5 to, we have been on the other side of the table
6 from these two class 1s, and others, and it is
7 better to have the most informed data that one can
8 get.

9 We did receive information, obviously,
10 from CSX and from Norfolk Southern, and it was our
11 job to audit that information just like it was to
12 audit the ongoing work in the model itself.

13 Q. You audited the information, but you also
14 drafted your own report; is that right?

15 A. Yes.

16 Q. Have you reviewed the prior RTC study from
17 the Gulf Coast Working Group report?

18 A. No.

19 Q. And in this case, Mr. Dingler was
20 instructed not to have any aggregate train delays
21 for the freights; is that right?

22 A. I'm not sure I understand your question.

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1 Would you mind rephrasing it?

2 Q. Sure. In this case, you were instructed
3 not to have any -- this is not rephrasing.

4 And in this case, you were instructed not
5 to have any additional train delays for the
6 freights; is that right?

7 A. I'm sorry. I'm not trying to be
8 difficult. I just don't really understand your
9 question.

10 MS. BRACEY: Withdrawn.

11 BY MS. BRACEY:

12 Q. And you were instructed not to alter the
13 schedule for the NS and CSX freight trains in your
14 model; is that correct? Or in the Dingler model;
15 is that correct?

16 A. No, that's wrong. We, in fact, received
17 no instruction of any kind. However, on our own
18 initiative, we did look to see if freight trains
19 departed at the same time as Amtrak trains. And in
20 one instance we saw -- we thought we saw that there
21 was a conflict, and so we were in the process of
22 directing Mark to remove the freight train so it

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1 won't obviously conflict with the Amtrak train when
2 we discovered, in fact, that we -- because of the
3 time zone issue, there was, in fact, no conflict.

4 Q. Okay. And so Mr. Dingler was instructed
5 to decrease -- Mr. Dingler was not instructed to
6 decrease the current inefficiencies on the CSX and
7 NS lines; is that correct?

8 A. Just one more time, please, ma'am.

9 Q. Sure. Mr. Dingler was not instructed to
10 decrease the current inefficiencies on the lines,
11 on the NS and CSX lines; is that right?

12 A. What inefficiencies are you talking about?

13 Q. The current inefficiencies on the line.

14 A. Well, I'm trying to understand, ma'am,
15 what you mean by inefficiencies.

16 Q. The failure to dispatch the trains on
17 time, the current failure to dispatch the trains on
18 time.

19 A. Are you referring to some testimony that I
20 sponsored?

21 MS. BRACEY: I'll withdraw that question.

22 BY MS. BRACEY:

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1 Q. You were instructed not to move the
2 freight schedules even five minutes; is that right?

3 A. We received no instruction whatsoever from
4 Norfolk Southern or CSX or the Port as to what --
5 as to how to dispatch trains, including departure
6 times.

7 Q. Okay. So you didn't model any operational
8 changes -- or Mr. Dingler didn't model any
9 operational changes?

10 A. I think that's a question better directed
11 to Mr. Dingler.

12 Q. Okay. Mr. Dingler didn't model any
13 structural changes?

14 A. What do you mean by structural?

15 Q. Any sort of new signals or something of
16 that type.

17 A. I can't answer that question. I suggest
18 you address that to Mr. Dingler.

19 Q. Okay. And the only thing you were
20 instructed to do was to add more infrastructure; is
21 that right?

22 A. We were not instructed to add any more

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1 infrastructure.

2 Q. Your conclusion was to add more
3 infrastructure; is that correct?

4 A. Our conclusion, collectively reached, was
5 that, in the absence of adding infrastructure,
6 Amtrak could not possibly achieve the goals that it
7 had set as far as service delivery.

8 Q. Okay. And that conclusion to add more
9 infrastructure was based on not moving a single
10 freight train and not moving the proposed schedule
11 of a single Amtrak train; is that right?

12 A. Would you please repeat that?

13 Q. Sure. And that conclusion to add more
14 infrastructure was based on not moving the schedule
15 of a single freight train and not moving the
16 proposed schedule of a single Amtrak train; is that
17 right?

18 A. It is correct.

19 Q. The RTC model has certain default
20 settings; is that right?

21 A. Yes.

22 Q. And those settings are based on the

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1 average railroad experience in the real world; is
2 that right?

3 A. I think this line of questioning is better
4 directed at Mr. Dingler than I.

5 MEMBER PRIMUS: Can we just get an answer,
6 if you don't think so one way or another, to that
7 question, please.

8 THE WITNESS: If I could hear the question
9 one more time, I'll do my best to give you an
10 answer.

11 MEMBER PRIMUS: Thank you.

12 BY MS. BRACEY:

13 Q. These default settings are based on the
14 average railroad experience in the real world; is
15 that right?

16 A. The reason I can't give the member an
17 answer is because I really am unclear about the use
18 of the word "average," and I think Mr. Dingler is
19 in better position -- he is an RTC practitioner.
20 I am really a manager of the audit process, if you
21 will, of the RTC.

22 So you're welcome to direct the question

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1 to my colleague, Mr. Guthrie, also, if you want,
2 but I think Mr. Dingler would be in the best
3 position to answer your question. Sorry. That's
4 the best I can do.

5 Q. You can adjust the RTC model default
6 settings; is that right?

7 A. Yes.

8 Q. And you can adjust the inputs; is that
9 right?

10 A. Yes.

11 Q. And one of the inputs you adjusted was
12 crew walking speed; is that right?

13 A. I believe so.

14 Q. And that is the time it takes for a crew
15 to go from the front of the train to the back of
16 the train and vice versa; is that right?

17 A. That is my understanding.

18 Q. And the setting in the RTC model is
19 3 miles per hour; is that right?

20 A. I don't know the answer to that, but you
21 will be hearing from two modelers, one representing
22 CSX and one representing Norfolk Southern, and

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1 those two modelers will be in an excellent position
2 to answer your question about why the settings were
3 adjusted, to the extent that they were adjusted.

4 Q. And just for the record, who are those
5 people?

6 A. Hannah Rosse, with two Ns -- H-A-N-N-A-H.
7 Rosse, I think it's R-O-S-S-E. And Holly,
8 H-O-L-L-Y, Sinkkanen, I think it's
9 S-A-N-K-A-N-N-E-N [sic], I believe.

10 MS. BRACEY: So this is a highly
11 confidential portion, Chairman Oberman.

12 CHAIRMAN OBERMAN: All right. Matt -- so
13 this is highly confidential, right? Okay.

14 Matt, you're on.

15 TECHNICIAN CROSS: Stand by one second. I
16 just need to remove a couple of people from the
17 list, and then I'll send you guys away.

18 CHAIRMAN OBERMAN: We don't mean it to
19 sound sinister when he says he's removing people.

20 MR. WARREN: Mr. Chairman, we also have
21 asked our two witnesses without access to the
22 highly confidential information to exit the room,

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1 and they have.

2 CHAIRMAN OBERMAN: Okay. Anybody else who
3 has to exit the physical rooms where they're
4 located?

5 MS. BRACEY: Our client has exited the
6 physical room, sir.

7 CHAIRMAN OBERMAN: Okay. Matt, you'll
8 tell me when we've moved or -- are we moved?

9 TECHNICIAN CROSS: Stand by one more
10 second.

11 All right. I'm sending you guys now. If
12 there's somebody that accidentally gets in there,
13 which I think we're pretty good, please just click
14 the "leave breakout room" button at the bottom
15 right-hand side of your screen when you get in
16 there, and it will just bring you back to the
17 general session here.

18 (Highly confidential session follows.)

19

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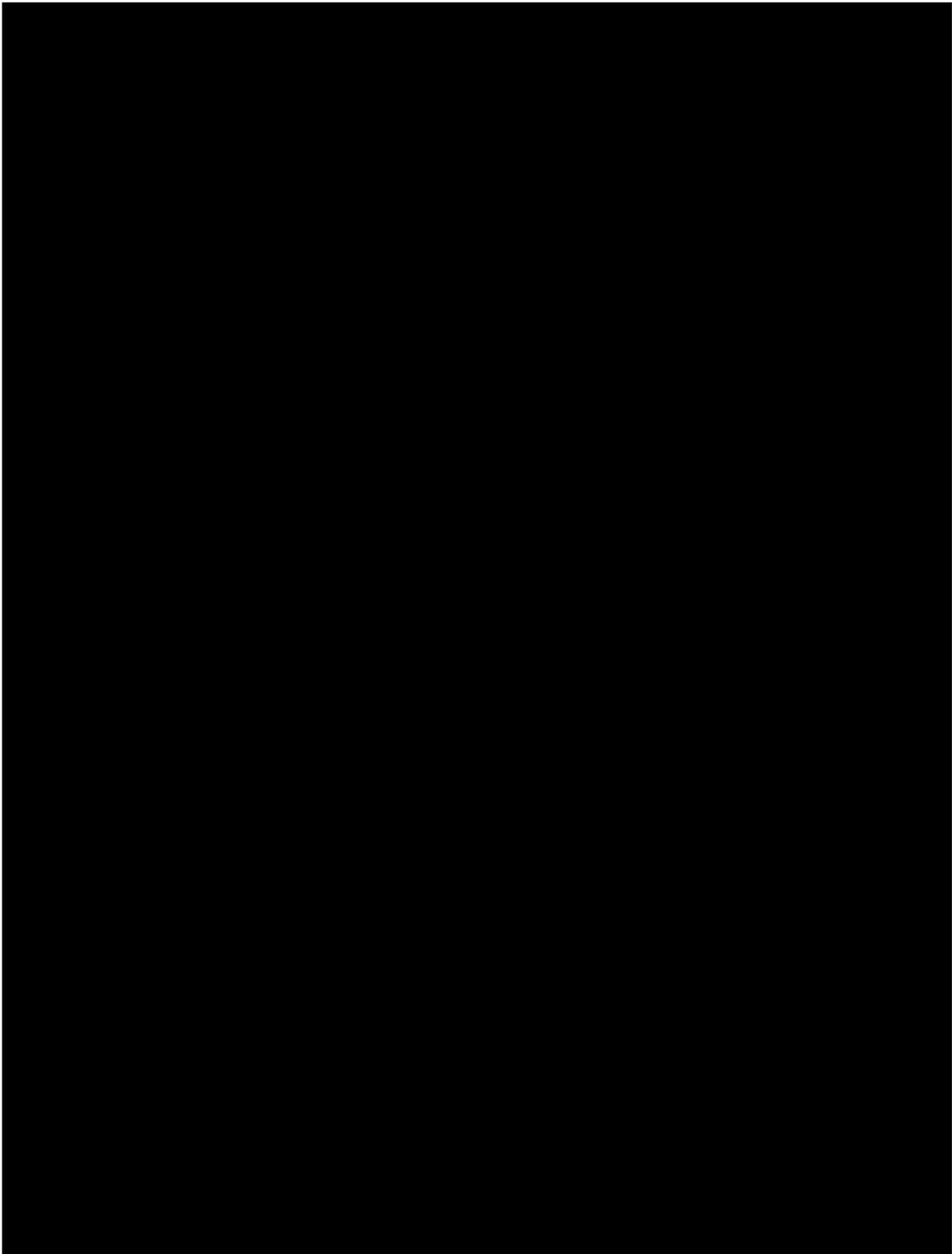
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HIGHLY CONFIDENTIAL SESSION

(Discussion of the record.)



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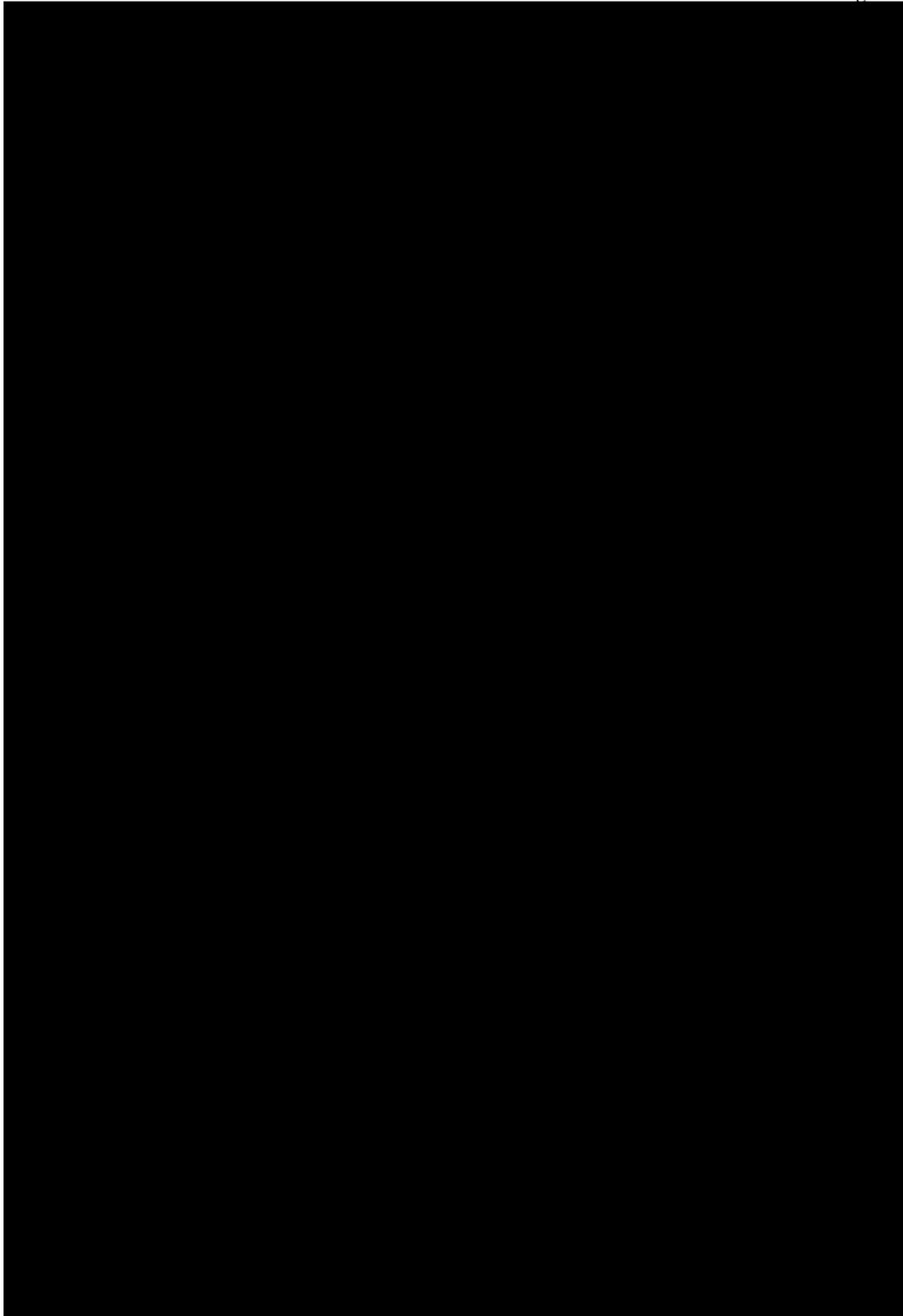
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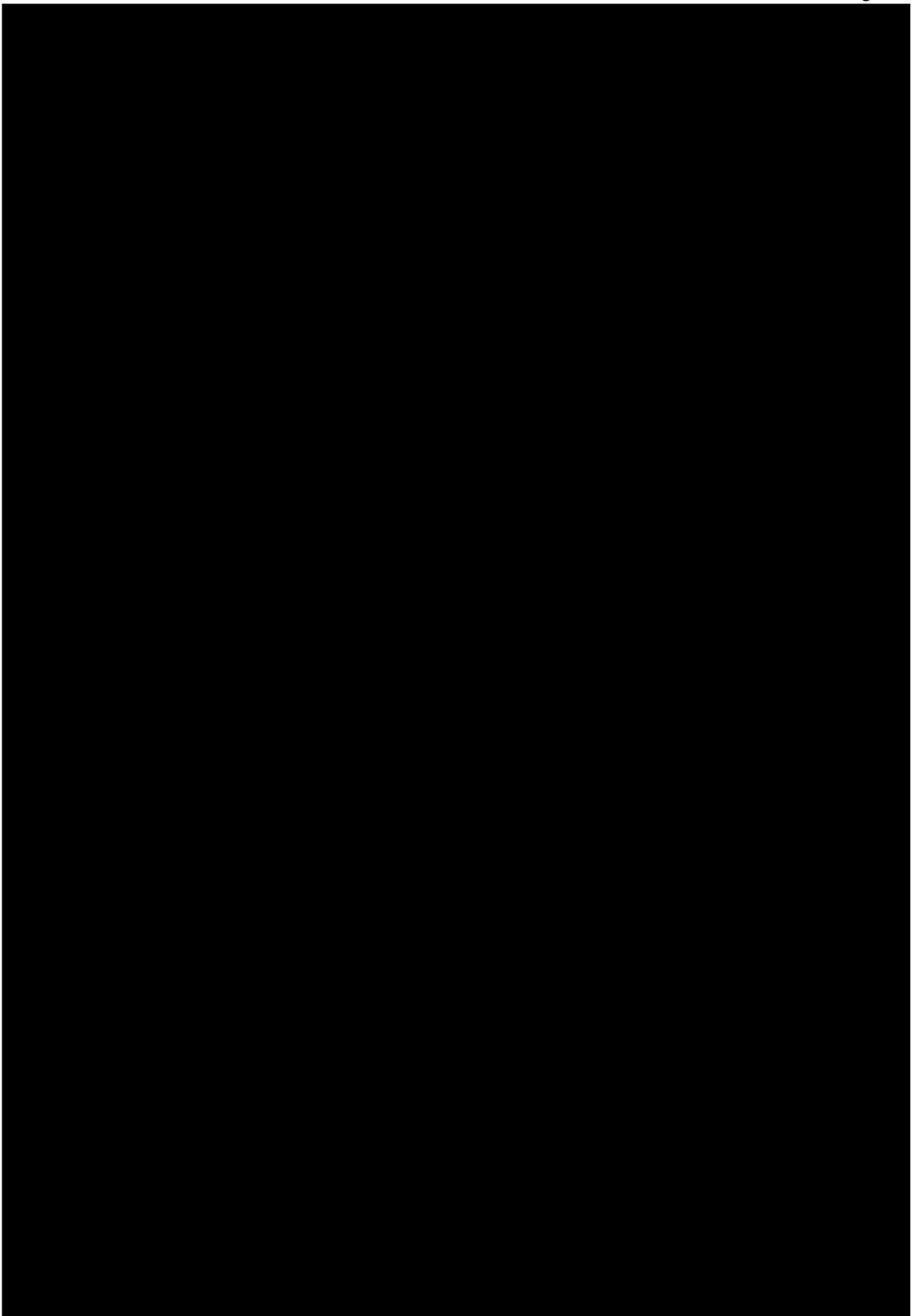
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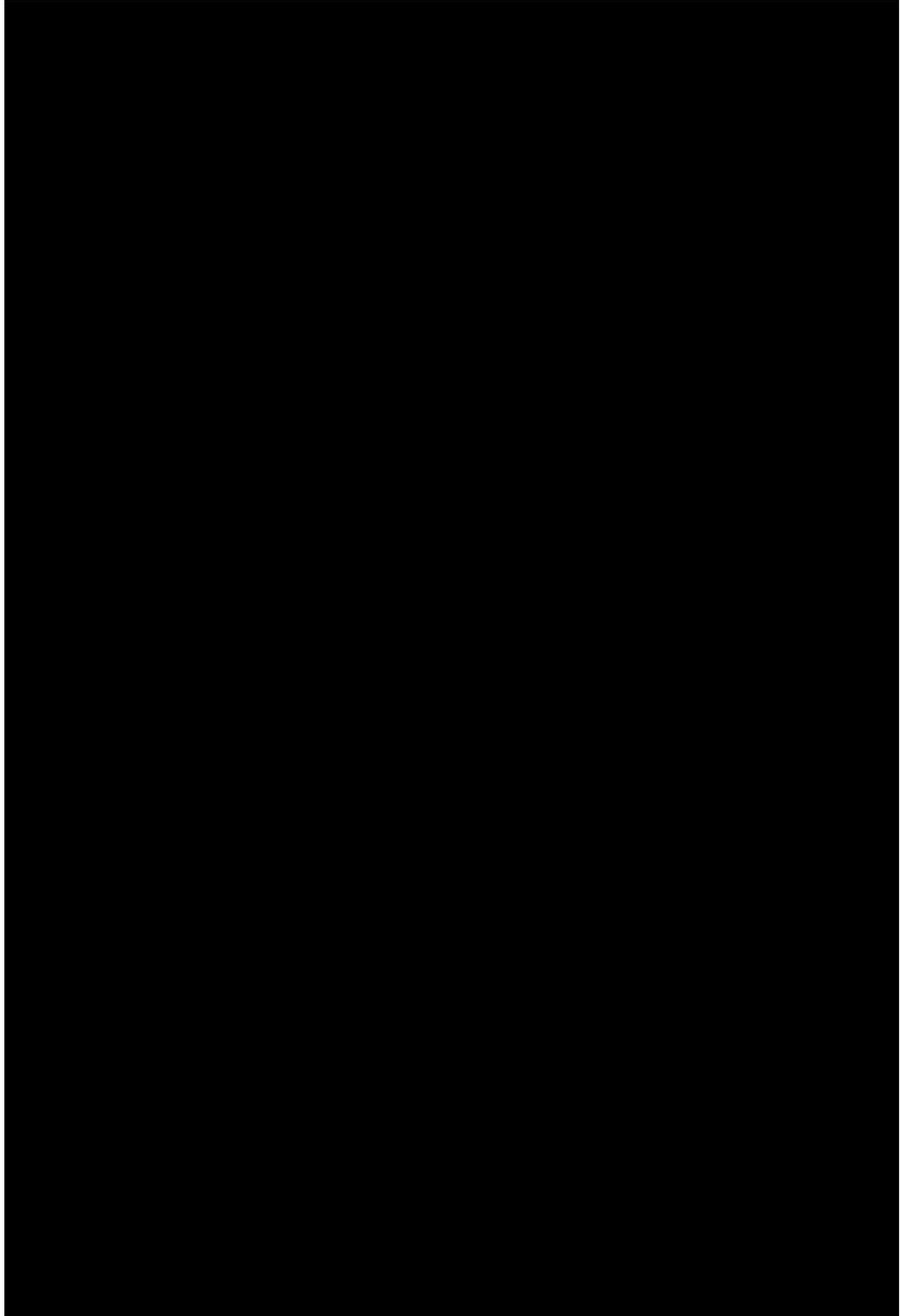


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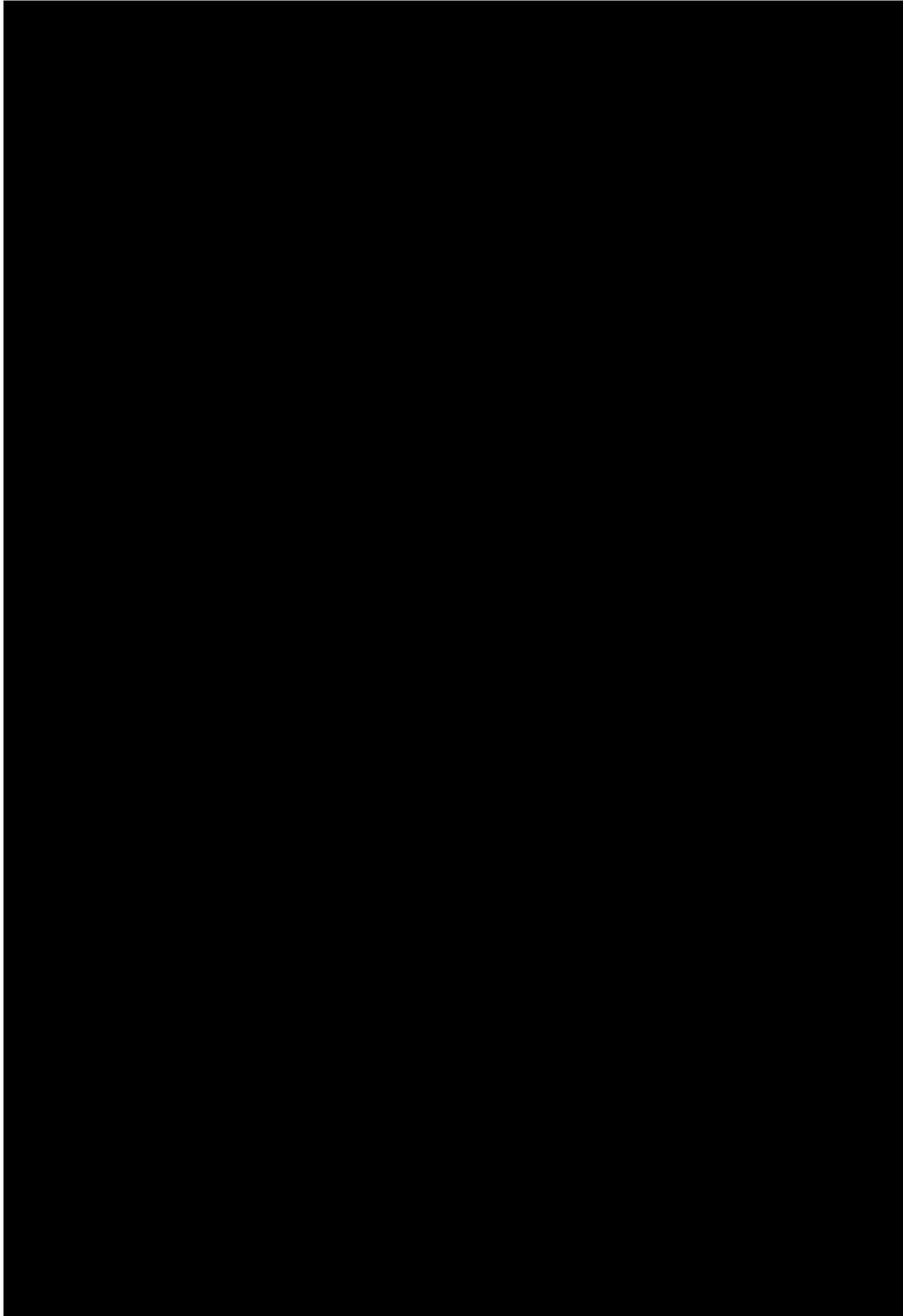
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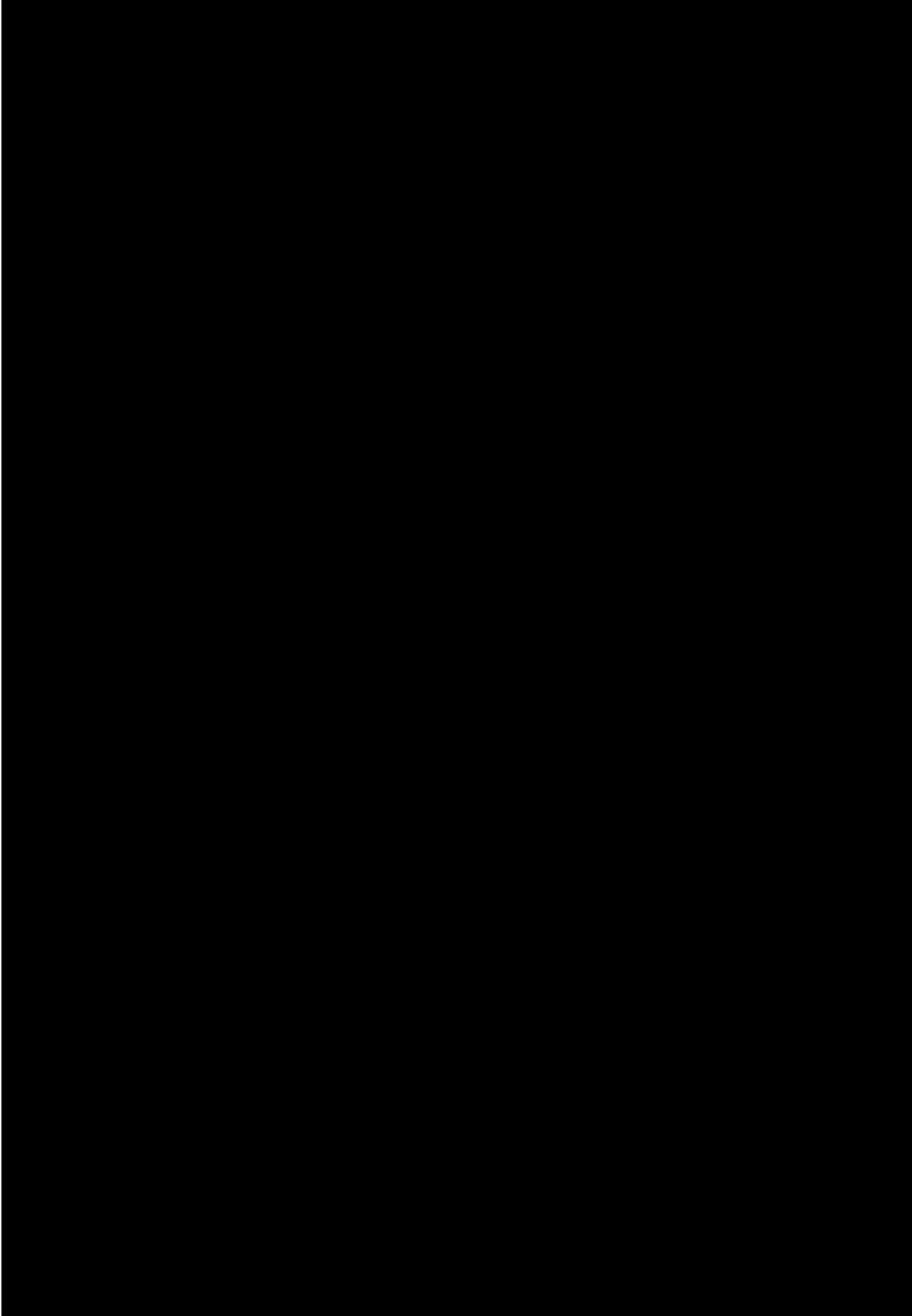
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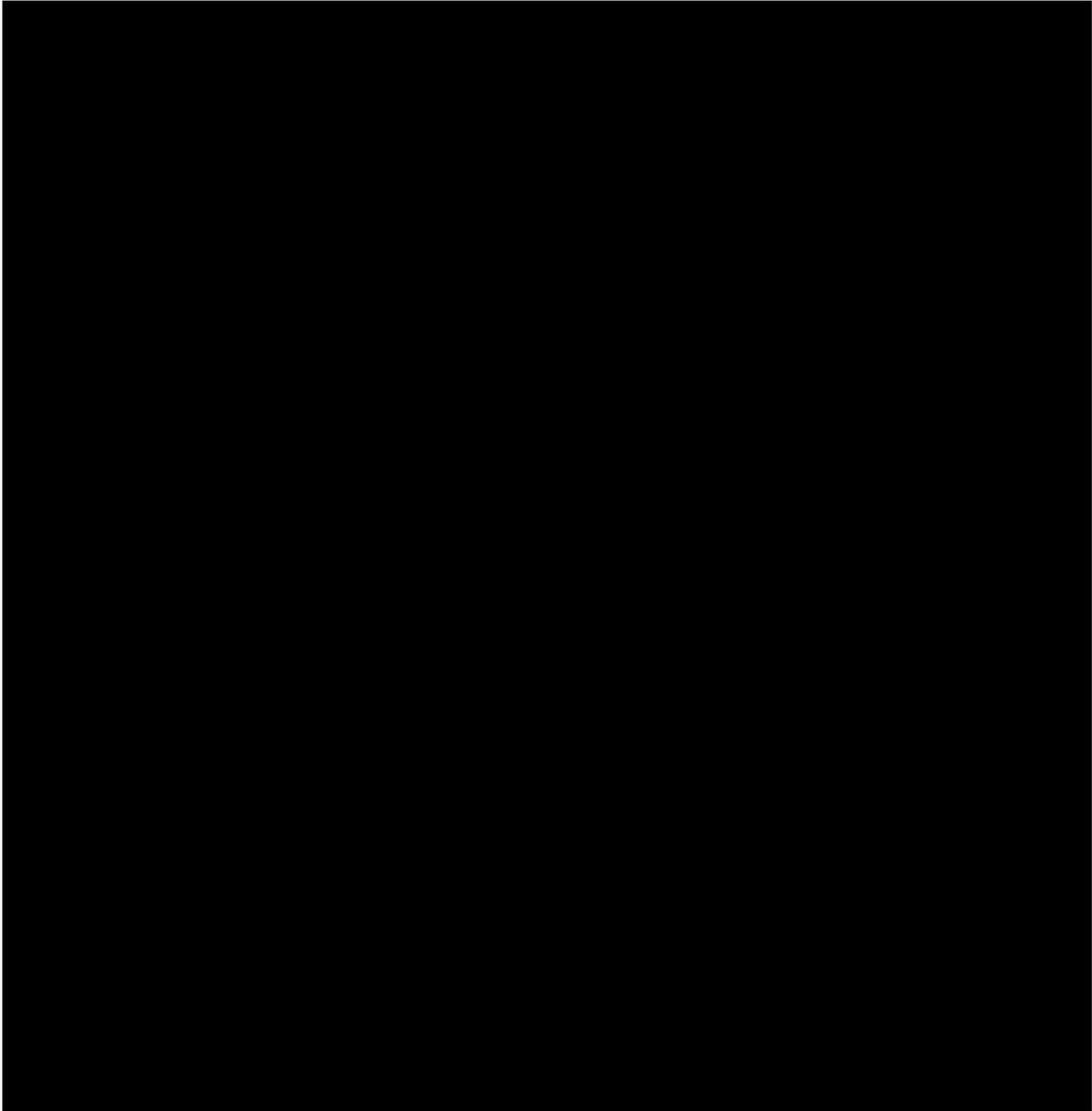
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(End of highly confidential session.)

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1 OPEN SESSION CONTINUED

2 CHAIRMAN OBERMAN: Okay. We are back, and
3 I thank all the people who may still be joining us
4 for their indulgence, but we have no other way to
5 protect the proprietary information, as I indicated
6 at the beginning of the hearing, but to take these
7 breaks. So we will proceed.

8 Ms. Bracey, you may continue.

9 CROSS-EXAMINATION

10 BY MS. BRACEY: (resumed)

11 Q. You mentioned a clean team. Who was on
12 the clean team?

13 A. The clean team included Mr. Dingler,
14 Mr. Guthrie, myself, Holly Rosse, whose name I gave
15 you earlier -- sorry, Hannah Rosse, whose name I
16 gave you earlier, Holly Sinkkanen, whose name I
17 gave you earlier, Ricky Johnson, who you will be
18 hearing from after me -- he is a CSX executive --
19 and Randy Hunt, who is a Norfolk Southern operating
20 partner -- executive.

21 There may have been others who joined
22 particular calls, but that was the call -- that was

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1 the core of the team. And because of the
2 confidential and highly confidential nature of some
3 of the numbers and the issue we just discussed
4 offline, there were lawyers to make sure that those
5 of us who had access to all the information didn't
6 violate the confidential and highly confidential
7 verifications, I guess, that we saw.

8 Q. And when you mentioned the others who may
9 have been on some of the calls who were part of the
10 clean team, did those people work for Norfolk
11 Southern and CSX?

12 A. Some of them might have been. It was --
13 but for sure there were attorneys representing
14 those railroads on the calls to keep us from
15 violating anything that we had signed.

16 Q. Okay. So you've testified that several
17 questions are better put to Mr. Dingler or
18 Mr. Guthrie. Does that mean that those questions
19 didn't -- that those issues didn't come up during
20 your audit?

21 A. No, it doesn't mean that.

22 Q. Can you please explain what it means?

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1 A. It means that those gentlemen are better
2 qualified to give you the answers to your
3 questions.

4 Q. Switching gears for a minute --

5 CHAIRMAN OBERMAN: Can I just ask a
6 question? I'm sorry to interrupt.

7 Better qualified by terms of their
8 qualifications or by their knowledge of the facts
9 of this case? Which do you mean, Mr. Banks?
10 Because I think there is an interest in all of us
11 directing questions to the people who have the
12 knowledge and not just pursuing it to find out who
13 has the knowledge. So maybe you could speed this
14 up.

15 THE WITNESS: They are what I would
16 consider practitioners of RTC modeling. I've sat
17 in the chair of the modeler before at RLBA, but I
18 didn't sit in the chair or next to the chair that
19 was controlling the model. So I thought that those
20 who had, i.e., Messrs. Dingler and Guthrie, would
21 be in a better position to answer the question.

22 Does that answer --

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1 CHAIRMAN OBERMAN: Well, you're talking in
2 terms of their familiarity with this record, not
3 their qualifications as experts in the field?

4 That's --

5 THE WITNESS: No, no, not their
6 qualifications. That has nothing to --

7 CHAIRMAN OBERMAN: Well, that's what --
8 you used the word "qualification," which threw me
9 off. I'm sorry to --

10 THE WITNESS: My mistake.

11 CHAIRMAN OBERMAN: Ms. Bracey, go ahead.

12 BY MS. BRACEY:

13 Q. So switching gears for a minute to talk a
14 little bit about operations that are modeled in the
15 RTC, throughout the day, a train may switch cars;
16 is that right?

17 A. Yes.

18 Q. And it may -- a train may change crews; is
19 that right?

20 A. Yes.

21 Q. And the switching of cars can happen on a
22 siding; is that right?

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1 A. Yes.

2 Q. And the changing of crews can happen on a
3 siding; is that right?

4 A. I suppose so.

5 Q. And the switching of cars can happen in an
6 industrial complex; is that right?

7 A. Yes.

8 Q. And the changing of crews can happen in an
9 industrial complex; is that right?

10 A. I suppose so. I would defer to the two
11 gentlemen who follow me because railroads sometimes
12 have their own operating -- every railroad has its
13 own operating rules, and the operating rules of
14 class 1 railroads are largely aligned, but they're
15 not completely aligned, so that I think that
16 question would go better to Messrs. -- the next two
17 gentlemen who are going to follow me, Mr. Johnson
18 and Mr. Hunt.

19 Q. Crew changes on the main line have the
20 effect of slowing down the model; is that right?

21 A. As compared with what?

22 Q. As compared with models where you don't

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1 have crew changes on the main line.

2 A. So if you're comparing two model runs, one
3 in which there is a crew change and one in which
4 there isn't -- is that the hypothetical you're
5 posing?

6 Q. One in which there is a crew change on the
7 main line and one in which there is not.

8 A. Well, where is the -- the one where there
9 is not, where is the crew changing? Because if
10 it's changing on a siding and you have to slow down
11 to go into a siding, I don't know that I would give
12 you the same answer. In fact, I wouldn't, because
13 if you have to slow down to go into the siding,
14 then, yes, you've -- then you're consuming time in
15 slowing down and accelerating to get back out,
16 which may or may not be the same amount of time
17 you've consumed changing crews on the main.

18 You also would need to establish whether
19 the train is going to come to a complete stop or
20 not. On some railroads, the trains don't stop when
21 the crews change. They keep going. They slow, to
22 be sure, but they don't stop.

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1 Q. Okay. You wrote in the RTC report that
2 movements of the trains are supported by the Rosse
3 and Sinkkanen rebuttal verified statements; is that
4 right?

5 A. I believe so.

6 Q. And they rely on dispatch data; is that
7 right?

8 A. Are we talking about in reference to
9 something in particular?

10 Q. Well, in their rebuttal verified
11 statement, they rely on dispatch data.

12 A. They rely on several pieces of data.
13 Dispatch data is part of that.

14 Q. Okay. And this dispatch data is confirmed
15 by field personnel; is that right?

16 A. That is my understanding.

17 Q. Okay.

18 A. You want the field personnel to verify the
19 data so that when they handed it to Mr. Dingler,
20 they could assure him that it was as accurate as
21 possible.

22 Q. And those field personnel did not provide

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1 verified statements in this case, correct?

2 A. That is my understanding.

3 Q. And those field personnel are not
4 witnesses in this proceeding?

5 A. That is also my understanding.

6 Q. And the statements of the field personnel
7 have not been provided to Amtrak; is that right?

8 A. What statements?

9 Q. The statements -- the information that
10 they provided to Ms. Rosse and Ms. Sinkkanen has
11 not been provided to Amtrak; is that right?

12 A. My understanding is there are no
13 statements. Ms. Rosse and Ms. Sinkkanen
14 interviewed the people in the field and they took
15 notes. The essence of those notes were
16 communicated to Mr. Dingler and, eventually, to
17 Mr. Guthrie. I did not understand there to be any
18 statements. I could be wrong.

19 Q. But those notes that Ms. Rosse and
20 Ms. Sinkkanen took were not provided to Amtrak; is
21 that right?

22 A. Actually, ma'am, I do not know that,

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1 because that would have been done through the
2 lawyers.

3 Q. Okay. So we're going to talk a little bit
4 about the permit file. The RTC model allows the
5 user to program maintenance windows at certain
6 locations; is that right?

7 A. That's my understanding.

8 Q. And programming maintenance windows is
9 done in one type of permit file; is that right?

10 A. Similar -- that's my understanding.

11 Q. And one type of permit file includes
12 bridge openings?

13 A. Yes.

14 Q. And another type of permit file includes
15 track failures; is that right?

16 A. It sounds logical, but I can't confirm it.
17 You should ask either Mr. Guthrie or Mr. Dingler
18 about that.

19 Q. Track failures require maintenance; is
20 that right?

21 A. Yes.

22 Q. And maintenance windows also require some

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1 degree of maintenance; is that right?

2 A. I really didn't understand your question,
3 ma'am.

4 Q. Well, windows maintenance --

5 A. Windows require maintenance? Maintenance
6 windows are put in the model to represent the
7 occupation of the track required to perform the
8 maintenance.

9 Q. And in the model, the R.L. Banks, Guthrie,
10 and Dingler model, the maintenance prevents freight
11 trains from using the track; is that right?

12 A. Yes.

13 Q. But it allows passenger trains to proceed;
14 is that right?

15 A. I believe that is correct because our
16 objective was to provide as unimpeded a path for
17 the Amtrak trains as possible because, again, the
18 objective was to replicate what we think would
19 happen in the real world. And, in the real world,
20 CSX and NS would go out of their way to schedule
21 the maintenance at a time when the Amtrak trains
22 would not be operating.

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1 Q. Sir, are you familiar with the term
2 "on-time performance"?

3 A. Yes.

4 Q. And per the FRA's regulation, Amtrak
5 trains have to meet the metric of 80 percent
6 on-time performance; is that right?

7 A. That's right.

8 Q. And an abbreviation for on-time
9 performance is OTP; is that correct?

10 A. Correct.

11 Q. And you modeled a 95 percent OTP; is that
12 right?

13 A. I'm not going to directly answer your
14 question. We didn't model any percent. We
15 chose -- the on-time performance was an output of
16 the modeling assumptions that we made with or
17 without improvements. We did not target any OTP.

18 Q. The 95 percent OTP is higher, 15 percent
19 higher, than the 80 percent required by the FRA
20 regulation; is that right?

21 A. Yes.

22 Q. And the model assumed that the 95 percent

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1 OTP in the RTC model equaled an 80 percent
2 real-world customer OTP; is that right?

3 A. Would you please repeat that?

4 Q. Sure. And the model assumed that the
5 95 percent OTP equaled an 80 percent real-world
6 customer OTP; is that right?

7 A. I would prefer not to answer that yes or
8 no, but let me give you an explanation and, if you
9 want to follow up, I'll do the best I can to
10 respond to it.

11 The model didn't assume anything. We made
12 assumptions about -- we made a whole series of
13 assumptions, quite clearly, and one of those
14 assumptions was that we would need to have a much
15 higher OTP than 80 percent in order to achieve the
16 additional OTP metric that Amtrak had communicated
17 it wanted us to achieve. You cannot set the RTC
18 for the Amtrak newly enhanced OTP metric.

19 So we had to go above 80 percent. And we
20 discussed this, I'm sure, on at least one clean
21 team call, and maybe more than one. We had to
22 agree on a percentage above 80 percent in order to

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1 make sure, have great confidence, that we would be
2 able to achieve the more demanding OTP that Amtrak
3 communicated to us they wanted us to achieve.

4 Q. And you did not rely on any studies or
5 analyses showing a 95 percent OTP would equal an
6 80 percent real-world OTP?

7 A. We did not. It was the collective
8 judgment of Mark, Larry, and Charlie. Between us,
9 we have -- I don't want to count -- 80-plus years
10 of railroad experience. And there were others on
11 the call, I'm sure, who contributed, including an
12 ex-dispatcher.

13 Q. And who was the ex-dispatcher?

14 A. It's either Holly or Hannah. I'm sorry.
15 I don't remember which one.

16 Q. So the 95 percent OTP was arbitrary; is
17 that right?

18 A. Well, you can use that word, ma'am, if you
19 want. I wouldn't use that word. We did not have a
20 scientific basis to inform us as to how much higher
21 than 80 percent we would have to go in order to
22 satisfy Amtrak as a customer. So we talked about

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1 it probably ad nauseam, and the collective
2 consensus was we better shoot high because it's an
3 extremely exacting metric.

4 Q. You used the 95 percent OTP as the basis
5 for your conclusion that 14 infrastructure projects
6 were required; is that right?

7 A. I don't really see it that way. That was
8 not the driver, stand-alone, of these projects.
9 We're trying to satisfy a lot of different
10 requirements. Amtrak requirements to be sure, but
11 we also had the requirements of our connecting
12 carriers, of our -- of the customers that the
13 locals serve, of the through trains, of the people
14 being delayed at grade crossings.

15 We had a lot of gods we had to satisfy.
16 So there's no one particular driver. I would not
17 say that the 95 percent OTP figure you keep
18 referring to was the driver of the 14 -- of any of
19 the 14 projects.

20 Q. An exhibit to your study was the Niemeyer
21 report; is that right?

22 A. Yes.

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1 Q. And the Niemeyer report contained cost
2 estimates; is that right?

3 A. Yes.

4 Q. And those cost estimates were based on the
5 results of your RTC model; is that right?

6 A. Well, let me word it this way, and if you
7 seek clarification, I'll be happy to help.

8 Mr. Niemeyer was a subcontractor to R.L.
9 Banks & Associates. The modeling effort resulted
10 in identifying a series of, if you want, pinch
11 points or particularly problematic areas. It was
12 the responsibility of the clean team to come up
13 with projects that would mitigate most of the
14 deleterious effects of adding the Amtrak trains.

15 We communicated the problems and the
16 locations of where the problems occurred on the RTC
17 model. As far as I know, Ted never saw the RTC
18 model, but we communicated to him the projects --
19 the set of projects that we thought would best
20 address the combination of problems that the RTC
21 communicated through its outputs.

22 And it was always Mr. Niemeyer's

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1 responsibility to cost out whatever projects we
2 sent to him based on his firm's prior experience in
3 determining units and, of course, applying unit
4 costs.

5 Mr. Niemeyer, by the way, and one of his
6 associates were on the same extensive visit to the
7 pinch points that I referred to during part of my
8 direct that Mr. Guthrie was also a part of. We
9 thought it was important for him to see the
10 specifics because of all of the water problems and
11 the swamp problems and grade crossing problems --
12 you can't always build things exactly where you
13 would like to and, when you can't, then things end
14 up costing more money than they otherwise would.

15 There is no substitute for seeing rail
16 lines in person, and so he did attend those, and
17 I'm sure his costs reflected that visit.

18 Q. He also could not have done his own RTC
19 model because that was not his expertise; is that
20 right?

21 A. That's correct.

22 Q. Okay. The RTC model also contains trains

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1 that are not actually trains; is that right?

2 A. Well, I would prefer not to put it that
3 way. What the RTC model does is keep track or
4 account for, if you prefer, all occupations. I
5 think I referred to this when Mr. Warren led me
6 through the step 1, step 2, step 3 issue. In
7 step 2, any occupation of the track that consumes
8 track capacity needs to be reflected in the model
9 if the model is going to accurately depict what the
10 host railroads and Amtrak are going to encounter
11 should this service be implemented.

12 It doesn't matter to the model whether
13 something is a train or not. Trains generally have
14 symbols. But if something doesn't have a symbol,
15 train symbol, that doesn't mean that it doesn't
16 occupy the track. But if you run an Amtrak train
17 into a cut of cars, there is clearly track
18 occupancy. So you should not think of it as
19 trains. It's going to, no pun intended, lead you
20 down the wrong track.

21 Q. And the trains or the parts of trains that
22 you're referring to include blocks of cars; is that

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1 right?

2 A. That is correct.

3 Q. And it would also include high-rails; is
4 that right?

5 A. High-rail vehicles and light-engine moves,
6 yes, ma'am.

7 Q. And --

8 A. And track occupations that you referred to
9 in an earlier part of your question.

10 Q. And --

11 A. Or maintenance of way -- sorry.

12 Q. No, go ahead.

13 A. Did you hear me? Maintenance of way work is
14 also a track occupation.

15 Q. Okay. And train movements, is that
16 right --

17 A. Yes.

18 Q. -- are also included? Okay.

19 And these are not represented -- the
20 blocks of cars, the high-rails and the train
21 movements are not represented in the data file; is
22 that right?

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1 A. That is a question better put to
2 Mr. Guthrie.

3 CHAIRMAN OBERMAN: Ms. Bracey, let me just
4 ask -- no intent on cutting you off -- what is your
5 estimation of how much longer you have with this
6 witness?

7 MS. BRACEY: Ten minutes.

8 CHAIRMAN OBERMAN: Say it again.

9 MS. BRACEY: Ten minutes.

10 CHAIRMAN OBERMAN: Okay. Because we're
11 getting close to a break, but I'd like to let you
12 finish. I'm not going to hold you to ten minutes.
13 I just wanted an approximation. Proceed.

14 MS. BRACEY: Thank you, sir.

15 BY MS. BRACEY:

16 Q. You counted a single train making multiple
17 movements as multiple different trains in the
18 model; is that right?

19 A. That is correct.

20 Q. And you identified 174 yard train
21 movements as individual trains; is that right?

22 A. I haven't committed that number to memory.

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1 Either Holly or Hannah are primed to answer that
2 specific question, but I understand why it was
3 done. It's difficult for me to express it
4 adroitly, but I think you will be satisfied by the
5 answer you get to that question with the following
6 witnesses.

7 Q. Well, the more trains that are in the
8 model, the more congestion there appears to be; is
9 that right?

10 A. For a given supply of capacity or
11 infrastructure, the more occupations, whether
12 they're trains or any other occupation, is going to
13 constrain the available practical capacity left.

14 Q. And that means that the model is going to
15 run more slowly if you add additional trains; is
16 that right?

17 A. Well, I'm inclined to say run the scenario
18 and let's see. There's a trade -- it's not as -- I
19 don't think I can give you a simple yes or no
20 answer. If you ran more shorter trains, there are
21 some advantages of running the shorter trains.
22 They can fit into more sidings. But there are some

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1 disadvantages because you're running more trains.

2 And it is precisely because human beings

3 can't make -- because it's a complex set of

4 equations that one would have to think through,

5 that the RTC model is such a good model to rely on

6 because it's built to answer those very what-if

7 questions.

8 Q. And based on your inclusion of trains that

9 were not in the data, your model also included more

10 trains that were foreign trains -- i.e., not CSX or

11 NS trains -- than actual CSX or NS trains; is that

12 right?

13 A. Would you please repeat that question?

14 Q. Sure.

15 A. Don't rephrase it. Just repeat it,

16 please.

17 Q. Okay. And based on your inclusion of

18 trains that were not in the data, your model also

19 included more trains that were foreign trains that

20 were not CSX or NS trains than actual CSX and NS

21 trains; is that right?

22 A. Yes, as I alluded to in an answer to one

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1 of Mr. Warren's questions, New Orleans is a very
2 large interchange point, certainly one of the five
3 largest interchanges in the United States, and
4 there's a tremendous number of trains between NS
5 and the western connecting carriers in New Orleans,
6 as well as between CSX and those same carriers.
7 And we need to reflect on the -- within the RTC,
8 the movements of those trains or we are overstating
9 the capacity, the practical capacity, available to
10 host both Amtrak trains and freight trains.

11 Q. And it is unusual to -- withdrawn.

12 There were also 140 trains that have no
13 underlying data because they were based on
14 descriptions provided by NS to the modelers; is
15 that right?

16 A. Again, I haven't committed that number to
17 memory, but I believe Holly, when she speaks on
18 behalf of NS -- she was the primary modeler who
19 provided inputs to Messrs. Dingler and Guthrie -- I
20 think she will be able to answer your question
21 about that number.

22 Q. Did you ever run the model to less than

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1 95 percent on-time performance?

2 A. I would ask Mr. Dingler that question.

3 MS. BRACEY: If I could just have a minute
4 before I finish.

5 CHAIRMAN OBERMAN: Certainly, Ms. Bracey.
6 Go ahead.

7 MS. BRACEY: I have nothing further.

8 CHAIRMAN OBERMAN: Before we begin, Matt,
9 do you have redirect and, if so, ballpark of how
10 much time you need?

11 MR. WARREN: I have exactly one question,
12 Mr. Chairman.

13 CHAIRMAN OBERMAN: Why don't we do it and
14 we'll take a break. But that's it. If you ask
15 more than one question, we're taking a break.

16 MR. WARREN: Okay.

17 REDIRECT EXAMINATION

18 BY MR. WARREN:

19 Q. Charlie, earlier, Ms. Bracey was asking
20 you to see if you could recall as many members of
21 the clean team as you could, and in your list you
22 named Ricky Johnson. Just to clarify for the

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1 record, was Ricky Johnson from CSX a member of the
2 clean team?

3 A. I can't say for sure if he was. There
4 were -- oh, I'm sorry. No. I'm sorry. There was
5 another individual who was essentially a stand-in
6 for Mr. Johnson representing CSX. The name escapes
7 me at the moment. But, no, Mr. Johnson was not.

8 MR. WARREN: Thank you. Only one
9 question.

10 CHAIRMAN OBERMAN: All right. Well done,
11 Matt. So here is the plan. We're going to take a
12 ten-minute break. We have been going for two
13 hours. I have some questions. Board members may
14 have some questions. So Mr. Banks, we'll ask you
15 to stick around.

16 And the thought occurs to me, Matt -- I'll
17 say it now while it's fresh in my mind, if you want
18 to think about this. You know, this is a
19 proceeding without depositions, and I have no
20 criticism of any counsel. Obviously, if you take
21 depositions of witnesses, then you have a much
22 better idea about where their knowledge starts and

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1 stops, and you can proceed.

2 Accordingly, Ms. Bracey did not have that
3 advantage, and so we were constantly running up
4 against questions where perhaps a different witness
5 would be better. It strikes me that, because you
6 have several witnesses who were all involved in
7 this study in one way or another, we may run into a
8 situation where some witness says, well, Mr. Banks
9 is the person who knows the answer to that
10 question, and Mr. Banks will already have
11 testified.

12 So I could anticipate the possibility --
13 I'm hoping this does not happen -- depending on the
14 importance of the question, it may -- we may find
15 ourselves in need to recall some of these people as
16 the back and forth goes because we just don't
17 have -- it shows you the advantage of having
18 thorough discovery to make trials move faster, and
19 we just don't have it.

20 So I'm just making the observation. I'm
21 not asking anyone to agree or disagree. Hopefully,
22 the problem will not arise. But I'm sympathetic to

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1 Ms. Bracey trying to plow through with a witness
2 without knowing exactly where his familiarity with
3 the case starts and stops.

4 So with that, we are at 3:42, so we will
5 reconvene at 3:52, or as close thereto as we can.

6 Thank you, all.

7 (Whereupon, a recess was taken at
8 3:42 p.m. until 3:52 p.m. and then the proceedings
9 continued as follows:)

10 CHAIRMAN OBERMAN: We are back in session,
11 and I have a few questions for Mr. Banks, and other
12 board members may as well.

13 Mr. Banks, I would like you to tell me
14 your role. You said were you brought in to conduct
15 an audit. In the context of -- your job in this
16 RTC study is an audit. What did you do?

17 THE WITNESS: I use that word, sir, as a
18 shorthand, shortcut to the following --

19 CHAIRMAN OBERMAN: Lower your voice if you
20 can. Thank you.

21 THE WITNESS: Yes, sir. We were hired to
22 review, make recommendations, and propose fixes

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1 based on our review of the Gulf Coast RTC report
2 draft that was then extant.

3 CHAIRMAN OBERMAN: When you say "we," you
4 mean your firm?

5 THE WITNESS: My firm.

6 CHAIRMAN OBERMAN: You and Mr. Guthrie.

7 THE WITNESS: Me and Mr. Guthrie, yes,
8 sir.

9 CHAIRMAN OBERMAN: And when you say the
10 RTC report that was then extant, do you mean the
11 one that was done by HDR?

12 THE WITNESS: No. I mean the draft that
13 Mr. Dingler had prepared.

14 CHAIRMAN OBERMAN: Okay. And that draft
15 has not been submitted to us, has it?

16 THE WITNESS: You have a thoroughly vetted
17 version of that draft.

18 CHAIRMAN OBERMAN: You mean the final
19 report?

20 THE WITNESS: Yes, sir.

21 CHAIRMAN OBERMAN: But we don't know what
22 it looked like before you changed it?

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1 THE WITNESS: That's correct.

2 CHAIRMAN OBERMAN: Who wrote Exhibit 23D,
3 the one you've been looking at?

4 THE WITNESS: Just a moment, please. Are
5 we talking about the RTC modeling report dated
6 November 3rd of '21?

7 CHAIRMAN OBERMAN: Correct, that's what
8 I'm talking about.

9 THE WITNESS: The report was -- even this
10 version of the report, sir, was drafted by Mark
11 Dingler, but both Mr. Guthrie and I -- and I
12 suspect, but I cannot confirm, other members of the
13 clean team were circulated this report and asked to
14 make comments. And speaking only for myself, I
15 made a number of comments about it. You can ask
16 the other witnesses when they come up what comments
17 they may have made.

18 CHAIRMAN OBERMAN: All right. So -- well,
19 you said you made comments. Did you edit the
20 language?

21 THE WITNESS: That's what I mean by edit,
22 yes, sir. Track change.

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1 CHAIRMAN OBERMAN: Well, comments and
2 edits are not always the same thing. I'm trying to
3 figure out --

4 THE WITNESS: Also I suggested some
5 substantial reorganization of the report because I
6 thought it would be difficult for the members to
7 read the way it was organized.

8 CHAIRMAN OBERMAN: Well, there are a
9 number of questions I have about the language in
10 the report, and I don't want to waste your time or
11 the board's time, but do you stand behind the
12 language in this report? I mean, did you sign off
13 on it before it was --

14 THE WITNESS: I do.

15 CHAIRMAN OBERMAN: -- finalized?

16 THE WITNESS: I do.

17 CHAIRMAN OBERMAN: Because there were
18 quite a few questions -- and I don't want to get
19 into this -- where you said ask somebody else.
20 So -- and I'm trying to find out, when you say
21 audit, it was you and Mr. Guthrie, what did you
22 personally do as it relates to this project?

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1 THE WITNESS: I personally read the
2 report, first version thereof, communicated my
3 comments -- discussed my concerns and questions and
4 comments with Mr. Guthrie internally. And to the
5 extent the two of us decided to forward those
6 comments into discussions of the clean team, we
7 advanced them, either Larry or I, depending upon, I
8 guess, whose question it was.

9 We worked as a team, hence, the name clean
10 team. So I can't -- I can't tell you this
11 paragraph is mine and this one is Larry's and this
12 one is Mark's, et cetera, et cetera. We worked
13 collectively very effectively and very collegially
14 to produce a document that we all felt comfortable
15 signing.

16 I'm happy to entertain questions about
17 specific pieces and, if I need to redirect you to
18 somebody else, I will, and if I can answer it
19 myself, I will.

20 CHAIRMAN OBERMAN: Were any of your
21 comments and edits rejected?

22 THE WITNESS: I can't think of any.

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1 CHAIRMAN OBERMAN: Well, do you have a
2 written record of the comments you made on the
3 draft? Did you retain that?

4 THE WITNESS: I believe I have.

5 CHAIRMAN OBERMAN: Well, I would say this,
6 Mr. Banks. Mr. Warren has presented you as one of
7 the leading experts in the world that we're dealing
8 with here, in modeling and RTC work and so forth,
9 and I think it may well be enlightening to know
10 what's in here that you didn't agree with or that
11 came out differently. I'm going to leave that for
12 the moment, but I'm raising it as an issue that I
13 personally, as a board member, would find
14 enlightening.

15 But let me direct you --

16 THE WITNESS: May I respond to that, sir,
17 even though it's not in the form of a question?

18 CHAIRMAN OBERMAN: Sure.

19 THE WITNESS: There is nothing in this
20 report that I don't agree with. I may have made an
21 edit, and it may not have survived to the draft
22 that the members have before them, but if I didn't

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1 agree with it, it wouldn't be in the draft before
2 you.

3 But you need to appreciate that we worked
4 as a team, so somebody may have had a better idea
5 than my edit.

6 CHAIRMAN OBERMAN: Well, whether it was a
7 better idea, though, I think is ultimately for this
8 board to determine. That's why I asked the
9 question. And I don't know what they were, so I'm
10 not making any prejudgment, but I can't make a
11 judgment on something I haven't seen.

12 You said that the model -- when Ms. Bracey
13 asked you if the model was aimed at obtaining a
14 95 percent on-time performance, according to my
15 notes you said the model didn't aim at any
16 percentage of on-time performance, correct?

17 THE WITNESS: That is correct.

18 CHAIRMAN OBERMAN: But it is true that the
19 14 projects that were selected were selected so
20 that the model would produce a 95 percent on-time
21 performance; that is correct, is it not?

22 Well, let me move this along, Mr. Banks.

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1 In my version of the report I -- maybe it got out
2 of the Xerox machine differently. I'm on page 27.
3 It's Section 3.5.

4 THE WITNESS: Okay. I'm with you. Thank
5 you.

6 CHAIRMAN OBERMAN: Are you there?

7 THE WITNESS: I am.

8 CHAIRMAN OBERMAN: The second sentence in
9 3.5 says the project selection must -- must meet
10 the following criteria: Number 1, provide capacity
11 to achieve above 95 percent on-time performance of
12 passenger trains.

13 So that's a true statement. You stand
14 behind it. You said nothing would be in here that
15 you didn't agree with.

16 THE WITNESS: What I'm trying to
17 communicate -- apparently not very effectively --
18 is that any individual improvement among the 14 has
19 differential effects on a series of metrics that we
20 have shared with you in this report, and, yes, we
21 wanted to make sure that, collectively, the
22 improvements yielded enough -- what would be the

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1 right word? -- enough of a differential so that, in
2 reality, the host railroads were confident -- or we
3 were confident that the host railroads would be
4 able to deliver service in accordance with Amtrak's
5 new OTP metric.

6 And as I said in response to the cross,
7 there is no -- one can't push a button or turn a
8 dial on the RTC report to achieve that, so it is
9 really an expert judgment call.

10 CHAIRMAN OBERMAN: Well, I appreciate what
11 you're saying, but I wonder if you can answer the
12 question I put.

13 THE WITNESS: All right. I'll try.

14 CHAIRMAN OBERMAN: 14 projects were
15 selected so when they were put into the RTC model
16 and you ran it, it would provide an above
17 95 percent on-time performance. That's what you
18 wanted the RTC report to be able to turn out by
19 this project selection, correct?

20 THE WITNESS: That's one of the things we
21 wanted it to --

22 CHAIRMAN OBERMAN: Yes. There's three

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1 things here. That's one of them, correct?

2 THE WITNESS: Yes.

3 CHAIRMAN OBERMAN: All right. Now I want
4 to follow up on what you just said. You said in
5 your answer to Ms. Bracey that there was no
6 scientific basis for the 95 percent. I'm not sure
7 what you meant by scientific. I assume that you
8 meant -- but you tell me if I'm wrong -- that there
9 is no data that we could look to to say that if you
10 need 95 percent in order to achieve 80 percent in
11 the real world -- there is no data that you relied
12 on, correct?

13 THE WITNESS: That is correct. And even
14 if there were such data, we don't know that the
15 data that it was based on would apply to this
16 corridor.

17 CHAIRMAN OBERMAN: So it is the judgment
18 of you, Mr. Guthrie, and Mr. Dingler that said,
19 we're going to pick 95 percent as the measuring
20 stick in order to have confidence that, in the real
21 world, there will be an 80 percent OTP; is that
22 your testimony?

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1 THE WITNESS: Yes, sir.

2 CHAIRMAN OBERMAN: And did any of you come
3 up with a different idea other than 95 percent
4 before you all agreed that 95 percent was the
5 number?

6 THE WITNESS: If we did have that
7 conversation, I do not recall. I am sorry to do
8 this, but I think that's a good one for
9 Mr. Dingler.

10 CHAIRMAN OBERMAN: Well, you were in that
11 discussion, so it's a good one for you too, isn't
12 it?

13 THE WITNESS: Yes, sir.

14 CHAIRMAN OBERMAN: When did you have the
15 discussion?

16 THE WITNESS: It would have been somewhere
17 in October or September. I don't -- I did not keep
18 an agenda of which items were discussed during
19 which calls.

20 CHAIRMAN OBERMAN: Did you make any notes,
21 rough calculations of how -- well, let me withdraw
22 that.

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1 Did you -- were you one of the people who
2 suggested 95 percent or was it somebody else and
3 you agreed with it? How did that come up?

4 THE WITNESS: Somebody else and I agreed
5 with it.

6 CHAIRMAN OBERMAN: Somebody else brought
7 up the number?

8 THE WITNESS: Yes.

9 CHAIRMAN OBERMAN: Who was it?

10 THE WITNESS: I do not know, but I would
11 start with Mr. Dingler and ask him.

12 CHAIRMAN OBERMAN: All right. Did you
13 make any notes at the time of your own thoughts
14 about whether 95 percent was the right number or
15 how you got there?

16 THE WITNESS: No, I didn't, because it --
17 it seemed to me that it was -- it didn't really
18 lend itself to a lot of the kind of grounding that
19 one would like to have, because it's unprecedented.

20 CHAIRMAN OBERMAN: Did Mr. Dingler, to
21 your knowledge, make any notes?

22 THE WITNESS: You would have to ask him.

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1 CHAIRMAN OBERMAN: Well, I'm asking to
2 your knowledge.

3 THE WITNESS: To my knowledge, no.

4 CHAIRMAN OBERMAN: How about Mr. Guthrie?

5 THE WITNESS: I don't know that he made
6 notes on this particular topic either.

7 CHAIRMAN OBERMAN: Are you the only three
8 experts in the real world whose judgment you would
9 respect on whether 95 percent is the right number
10 or are there others out there?

11 THE WITNESS: Of course not.

12 CHAIRMAN OBERMAN: Pardon me?

13 THE WITNESS: Of course there are other
14 experts.

15 CHAIRMAN OBERMAN: Other experts whose
16 judgment you respect, sir?

17 THE WITNESS: Yes, sir.

18 CHAIRMAN OBERMAN: So all we have to go on
19 is your statement that this is the combined wisdom
20 of the three people who have been brought forward
21 in this case, on your side of the case; there is
22 nothing else we can look to to determine whether

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1 achieving 95 percent in the RTC model is the right
2 number?

3 THE WITNESS: That is correct, but --

4 CHAIRMAN OBERMAN: All right.

5 THE WITNESS: -- one of the reasons I keep
6 returning to RTC model is we could run it with a
7 different percentage and see where we end up --

8 CHAIRMAN OBERMAN: You could.

9 THE WITNESS: -- see what that would mean
10 in terms of improvements.

11 CHAIRMAN OBERMAN: I'm just looking at the
12 evidence that's in front of me right now,
13 Mr. Banks. I understand there could be other
14 evidence, and we may get there some day in this
15 case.

16 Secondly, again, on page 27 in Section 3.5
17 the report states -- and you stand behind it -- the
18 project selection must meet the criteria, number 2,
19 of restoring freight traffic performance to at
20 least the same as before passenger trains were
21 added.

22 You approved that language?

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1 THE WITNESS: Yes.

2 CHAIRMAN OBERMAN: So that the standard by
3 which we are to determine whether -- you know, you
4 probably heard the lawyers say -- some lawyers say
5 we have the power to make some orders regarding how
6 much infrastructure needs to be built -- if we
7 ordered all 14 projects to be built, the
8 information that your study is providing to us is
9 that that would allow no degradation or
10 diminishment in freight traffic performance because
11 it would be the same as it was before passenger
12 trains were added, correct?

13 THE WITNESS: I can't answer that with the
14 affirmative. I think the wording of number 2 could
15 have been better. I think we were trying to get
16 our concept across, and I certainly okayed the
17 wording.

18 But if you look, for example, just at
19 page 34, just as one example, you will see that we
20 provided a series of metrics. Some of those
21 metrics -- none of those metrics match because when
22 you put in a particular improvement, let alone a

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1 set of a bunch of improvements, they're going to
2 have differential effects on these metrics --
3 M-E-T-R-I-C-S, metrics.

4 And so what is unfortunate about the
5 wording of 2 on page 27 is that it suggests that
6 it's exactly the same, and it isn't. We were
7 attempting to achieve a balance. Okay? But some
8 things are better and some things are worse,
9 whether we would put the improvements in or not.
10 That's just the nature of the beast. We shared as
11 many metrics as we thought the members would find
12 useful.

13 CHAIRMAN OBERMAN: Mr. Banks, you were
14 brought in here as one of the foremost authorities
15 on RTC studies. You audited the process that
16 resulted in this product. And CSX and NS are
17 offering this to us as evidence on which to reject
18 Amtrak's petition.

19 And I am looking at the language which you
20 said at the time that says the project selection
21 must meet -- you don't say approximately meet or
22 may meet or it would be helpful to meet -- you say

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1 it must meet a level to restore freight traffic
2 performance to at least -- not the same, not
3 approximately the same, or close to the same -- at
4 least the same as before passenger trains.

5 Now you're telling me that that's an
6 unfortunate way to express it and I shouldn't rely
7 on it. Is that where we are?

8 THE WITNESS: I think you can rely on it,
9 but I don't think the wording is as exacting as it
10 could be, and I've attempted to explain to you why
11 not.

12 CHAIRMAN OBERMAN: Well, you know, when
13 you say that, Mr. Banks, it causes me to wonder, do
14 I have to go through every line of this report and
15 find out which of the wording is something that
16 could have been stated better?

17 This is all I have. So I'll just leave my
18 observation there on this point. But, you know,
19 when you say something is the gold standard and
20 then you start having to say that the gold standard
21 has defects in the way something is presented, I
22 wonder if it is the gold standard and how we are

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1 supposed to have a record on which we can rely on.

2 THE WITNESS: With all due respect, sir,
3 you are conflating the model with the report.

4 CHAIRMAN OBERMAN: Well, the report is a
5 report of the workings of the model. That's the
6 way I understood it.

7 I have a few other questions here. Is
8 Mr. Niemeyer, who you referred to, the person who
9 came up with the costs of the 14 projects?

10 THE WITNESS: Yes.

11 CHAIRMAN OBERMAN: He's not listed as a
12 witness. Is there any witness, to your knowledge,
13 here who could tell us how these costs of these
14 projects were arrived at?

15 THE WITNESS: I'm willing to attempt to
16 answer those questions. Mr. Niemeyer was not
17 listed as somebody Amtrak was interested in talking
18 to, or we would have produced him, but I'll do my
19 best to answer your questions.

20 CHAIRMAN OBERMAN: Well, I'm not faulting
21 anybody for producing or not producing witnesses.
22 I'm only trying to find out if -- I don't want to

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1 waste your time, or the board's time, in asking
2 questions about costs of somebody who can't answer
3 them. So -- I have to find my notes on this
4 subject, but if you can speak to how the costs were
5 arrived at for the various projects, then I would
6 like to direct some questions your way on that
7 point.

8 MR. WARREN: So -- I don't want to
9 interrupt, but Mr. Chairman, if it would be
10 helpful, I mean, Mr. Niemeyer's report is in the
11 record, and, you know, Amtrak agreed that they
12 wouldn't call him as a witness, or that we didn't
13 need to produce him as a witness, just as we agreed
14 with one of the witnesses who was put into evidence
15 for Amtrak.

16 So I think his verified statement is
17 already testimony if it's in the record.

18 CHAIRMAN OBERMAN: No, I understand he --

19 MR. WARREN: Mr. Banks can answer your
20 questions to the extent of his knowledge, that's
21 fine, but, you know, I don't think it's quite right
22 to say that there is nothing in here, because we do

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1 have --

2 CHAIRMAN OBERMAN: I didn't say --

3 MR. WARREN: -- written testimony.

4 CHAIRMAN OBERMAN: I'm sorry, Matt. I
5 didn't suggest there was nothing in here. The
6 question is whether I have a witness I can ask
7 about it. Mr. Niemeyer isn't here. So let me just
8 try one -- I'm not going to go through all of them.

9 There's a list of projects that I have
10 from your study that have costs associated with
11 them. And, for example, one of the projects is to
12 build a double track from Choctaw to Brookley,
13 which is 14,000 feet, which is just under 3 miles,
14 and the cost estimate is between 66 million and
15 \$71 million, which is, you know, over \$20 million a
16 mile.

17 Are you able to talk to how that number
18 was arrived at?

19 THE WITNESS: Not specifically, no.

20 CHAIRMAN OBERMAN: All right. Well, those
21 are the kind of questions I have. So should I not
22 waste any time asking you about them because you

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1 couldn't specify --

2 THE WITNESS: Yes, sir.

3 CHAIRMAN OBERMAN: And by -- I say waste
4 time. I don't mean to criticize you at all. I
5 just want to ask a witness who has knowledge.

6 THE WITNESS: If I could --

7 CHAIRMAN OBERMAN: Is there any way for --
8 pardon me?

9 THE WITNESS: If I can just speak to the
10 process?

11 CHAIRMAN OBERMAN: Sure.

12 THE WITNESS: Mr. Niemeyer and I discussed
13 how we would proceed, and he did it in a very
14 conventional way -- in the same way, frankly, my
15 firm would have done it had we had the capacity to
16 produce all of these expenses in a relatively short
17 time frame.

18 He went out and looked at the territory.
19 He developed units, various units, and then he
20 applied unit costs based on his project work that
21 he had done all over the country, including on
22 behalf of Metra. And then he checked his unit

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1 costs individually with CSX and NS to see how his
2 numbers stacked up against theirs. And if he
3 thought it was appropriate to make an adjustment
4 for something that was specific to the area, he
5 made that adjustment.

6 CHAIRMAN OBERMAN: How do you know that?
7 Did he tell you that's what he -- all the things
8 that he did?

9 THE WITNESS: No. That's what I told him
10 he was going to do.

11 CHAIRMAN OBERMAN: Didn't he know how to
12 do it without your telling him?

13 THE WITNESS: I just wanted to make it
14 clear to him what the process was going to be.

15 CHAIRMAN OBERMAN: All right. When he
16 came back with his numbers, did you then -- you
17 didn't study them to see if you agreed with them?

18 THE WITNESS: Well, I'm not an engineer,
19 sir. That's exactly why I provided the work to
20 him, but I didn't see anything wrong. I did look
21 at them and they looked reasonable to me.

22 CHAIRMAN OBERMAN: Well, it may be that

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1 they are. I just would like to find out how they
2 got there.

3 Let me ask you this. In doing your work
4 here in coming up with the costs, were you aware of
5 the estimate that came from CSX back in 2016 that
6 it would cost roughly \$1.1 billion to build the
7 needed infrastructure between New Orleans and
8 Mobile?

9 THE WITNESS: I was aware of it. I had
10 not studied it in detail.

11 CHAIRMAN OBERMAN: So you didn't try to
12 compare that to whatever numbers your study was
13 coming up with --

14 THE WITNESS: No.

15 CHAIRMAN OBERMAN: -- to see why such a
16 big difference?

17 THE WITNESS: I did not.

18 CHAIRMAN OBERMAN: Were you aware that
19 back in that time frame there was a period of time
20 where CSX changed its mind and came up with a
21 number closer to a little over 400 million, which
22 is what the number is now being proposed in the

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1 current RTC report? Were you aware of that?

2 THE WITNESS: No.

3 CHAIRMAN OBERMAN: So that had no bearing
4 on your coming up with a 405 to \$440 million number
5 in this report?

6 THE WITNESS: It did not.

7 CHAIRMAN OBERMAN: Were you aware that in
8 2021, according to news reports, CSX estimated the
9 infrastructure that would be needed was only 140 to
10 \$160 million?

11 THE WITNESS: I was not aware of that.

12 CHAIRMAN OBERMAN: Well, it was in the
13 press so -- I don't know if they did or didn't.
14 We'll find out, I suppose, before this hearing is
15 over.

16 Were you in any way responsible for which
17 runs -- I guess is the right way to say it -- were
18 run by the RTC modelers? Did you have any input
19 into -- this would be something Mr. Dingler did
20 originally; is that right?

21 THE WITNESS: He did them originally,
22 and I think the best answer I can give you is that,

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1 to some extent, the comments that Larry and I and
2 other members of the clean team gave to Mr. Dingler
3 resulted in additional runs. Whether there were
4 runs that preceded our involvement in the job and
5 remained, I just didn't keep track of.

6 CHAIRMAN OBERMAN: Did you keep any --

7 THE WITNESS: There could have been some
8 originals that remained in what you said.

9 CHAIRMAN OBERMAN: But you were in a
10 position to tell Mr. Dingler runs that you would
11 like to see made, and you did so; is that right?

12 THE WITNESS: Yes, but the -- we -- our
13 advice -- we think -- Larry and I thought that the
14 structure of the way in which the report was
15 originally put together, not its communication, but
16 its structure, was structurally sound. We -- our
17 analyses, our critiques went more to specifics of
18 the inputs.

19 So there was always, you know, a 2019 base
20 case and there was always a 2019 passenger case and
21 a build case, and same for 2039. That didn't
22 change. But what was in those cases is what we

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1 gave a thorough scrubbing of.

2 CHAIRMAN OBERMAN: Well, did you have the
3 ability in your assignment to tell Mr. Dingler you
4 would like to run another case, one that he hadn't
5 run?

6 THE WITNESS: Yes.

7 CHAIRMAN OBERMAN: And did you?

8 THE WITNESS: No.

9 CHAIRMAN OBERMAN: So you thought all the
10 cases that he had run were adequate for the
11 assignment you were given; is that a fair
12 statement?

13 THE WITNESS: Yes, sir.

14 CHAIRMAN OBERMAN: All right. Well, one
15 of the questions I have is that there were a lot of
16 cases that were run. I've tried to keep track of
17 them, but there were too many, really, for me to
18 have in my mind. But I have notes here, so let me
19 find them, because I have a couple of questions
20 about that. I just had it in front of me a few
21 seconds ago. Here they are.

22 So you ran the 2019 base case and then you

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1 ran the passenger case and then you ran the build
2 case with the 14 projects. 2019. Correct?

3 THE WITNESS: Yes, sir.

4 CHAIRMAN OBERMAN: When I say "you," the
5 team.

6 THE WITNESS: Yes.

7 CHAIRMAN OBERMAN: Mr. Dingler, with your
8 input.

9 Then you also ran the 2039 base case.
10 Then you did the 2039 passenger case without any
11 infrastructure, and then the build case with the 14
12 projects, right?

13 THE WITNESS: I'm sorry to introduce this
14 complexity into it, but we actually build the 2039
15 build case first. And the reason for that is that
16 we don't want to introduce improvements in 2019
17 that we don't need in 2039. So this is a very
18 conventional RTC approach for experienced modelers.
19 You build the improvements you think you need for
20 2039 and then you see if you still need them in
21 2019.

22 CHAIRMAN OBERMAN: All right. So you go

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1 to the future and work backwards, is what you're
2 telling me?

3 THE WITNESS: Exactly.

4 CHAIRMAN OBERMAN: So when I said "then,"
5 I didn't mean to suggest what order -- I don't know
6 what order you did the tests in. We just have the
7 results of the tests, which is what you want us to
8 pay attention to.

9 And you ran a 2039 passenger case with the
10 FRA infrastructure projects, i.e., the ones
11 identified in the Gulf Coast Working Group,
12 separate and apart from the 14 projects that you're
13 now recommending, right?

14 THE WITNESS: Correct.

15 CHAIRMAN OBERMAN: But I do not see,
16 Mr. Banks, that you ever ran a 2019 passenger case
17 with the FRA projects. That's correct, is it not?

18 THE WITNESS: I don't know that we did.
19 Sorry. I can't sit here and tell you that we did.
20 My focus was really on the six primary cases that
21 we ran.

22 CHAIRMAN OBERMAN: Well, but you said that

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1 part of your role was to tell Mr. Dingler if you
2 thought other cases should be run. You reviewed
3 what he had run and you -- you must have known what
4 he ran in order to conclude that what he ran was an
5 acceptable number of cases.

6 THE WITNESS: I didn't place a priority on
7 running our case with the FRA improvements because
8 we weren't -- because we had already come up with
9 an independent set of improvements and I thought
10 there were enough cases out there.

11 CHAIRMAN OBERMAN: Well, I would like to
12 see if I can get a clear answer to the question I
13 put. You did -- somebody determined to run a 2039
14 FRA case. Who made that decision? Mr. Dingler?

15 THE WITNESS: I believe so.

16 CHAIRMAN OBERMAN: And you told me a
17 minute ago you were in a position to say,
18 Mr. Dingler, I think there's another case you
19 should run, if you thought it should be done,
20 correct?

21 THE WITNESS: Yes.

22 CHAIRMAN OBERMAN: That was part of your

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1 assignment, wasn't it? When you say audit, one of
2 the things you were supposed to do was to determine
3 and evaluate the work that Mr. Dingler had already
4 done.

5 THE WITNESS: I agree.

6 CHAIRMAN OBERMAN: You said you didn't
7 place emphasis. My question is, did you
8 determine -- did you make a determination to run an
9 FRA case with passenger trains on the 2019 case as
10 well as the 2039?

11 THE WITNESS: I'm sorry, I forgot how your
12 question started, but I did not direct him to run
13 the FRA improvements in those two years.

14 CHAIRMAN OBERMAN: All right. Did you
15 consider whether it would be enlightening to find
16 out what the 2019 case would look like with the FRA
17 improvements as distinguished from your projects,
18 your recommendation for the 14 --

19 THE WITNESS: I understand your question.

20 CHAIRMAN OBERMAN: Yeah.

21 THE WITNESS: I didn't.

22 CHAIRMAN OBERMAN: You didn't think it --

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1 well, why did you run it for 2039? Why did you run
2 the FRA case for 2039?

3 THE WITNESS: I don't recall.

4 CHAIRMAN OBERMAN: You just told us you
5 didn't put much priority on the FRA projects
6 because you already had your own projects. So I
7 can't figure out the distinction of why we have a
8 record that has the 2039 FRA case but no 2019 FRA
9 case. Can you enlighten us on that?

10 THE WITNESS: The best I can enlighten you
11 is that we had set up -- we had finished a number
12 of these runs. I would have been happy to not
13 include them, but we discussed it and we thought,
14 well, we've done the run; maybe somebody will find
15 this enlightening, so we'll include it.

16 CHAIRMAN OBERMAN: If that's your best
17 answer, then that's your answer.

18 I apologize to my fellow board members,
19 but I do have a few other questions, and I promise
20 them they will have ample time. You may have to
21 come back in the morning, but I would like to
22 finish my questioning as much as I can here, with

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1 their indulgence.

2 In the 2039 case, I'm looking at page
3 21 -- I'm sorry -- 23. Section 3.3 of the RTC --
4 the same exhibit we've been looking at. The report
5 states --

6 THE WITNESS: Any particular paragraph,
7 sir?

8 CHAIRMAN OBERMAN: I'm right at
9 paragraph 3.3. And in that paragraph, the last
10 line says -- refers to a 2 percent annual growth
11 mentioned in the FRA guidance manual. Do you see
12 that language?

13 THE WITNESS: I do.

14 CHAIRMAN OBERMAN: And the FRA guidance
15 manual deals with what?

16 THE WITNESS: I don't recall. This was
17 not my add. I do remember looking at it, but it
18 seemed to me the important issue to me was that we
19 were not attributing growth in excess of guidance
20 provided by the FRA.

21 CHAIRMAN OBERMAN: Well, but to know
22 whether it made sense to know whether whatever

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1 number you took in comparison to the FRA guidance,
2 wouldn't you have to know the basis on which the
3 FRA arrived at its 2 percent guidance?

4 THE WITNESS: I knew at one time. I don't
5 know now.

6 CHAIRMAN OBERMAN: Did you know last fall
7 when you were working on this project?

8 THE WITNESS: That's what I meant by "one
9 time," yes, sir.

10 CHAIRMAN OBERMAN: So in doing your work
11 on this project, you made no independent evaluation
12 of whether using 2 percent as a starting point --
13 and I understand you say you actually reduced it to
14 1-1/2 -- you made no independent evaluation of the
15 soundness of using that number to do this study;
16 you just took the FRA's word for it. Would that be
17 fair?

18 THE WITNESS: That is correct, but I
19 personally do a lot of forecasting of freight rail
20 growth all over the country, and 2 percent growth
21 doesn't strike me as out of the realm of
22 reasonableness.

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1 CHAIRMAN OBERMAN: Mr. Banks, when you do
2 your forecasting, do you also look at the
3 experience of the railroad that you're actually
4 doing the forecasting for, or do you just pick the
5 number out of the manual and always use that?

6 THE WITNESS: When possible, which it
7 usually isn't, I like to base the forecast on the
8 customers who will be generating the freight,
9 talking to them directly. Unfortunately, that is
10 very challenging.

11 So, yes, I do tend to look at the growth
12 rates in the absence of being able to talk with the
13 shippers directly. Obviously, looking at
14 historical trends is a good idea.

15 CHAIRMAN OBERMAN: Well, let me ask this
16 question: Do you look at the historical trends for
17 the railroad that you are actually evaluating it
18 for? They're not all the same, are they?

19 THE WITNESS: Yes.

20 CHAIRMAN OBERMAN: Yes, you do?

21 THE WITNESS: Yes, I do.

22 CHAIRMAN OBERMAN: In signing off on this

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1 RTC study, did you look at the historical trends of
2 CSX's growth?

3 THE WITNESS: No.

4 CHAIRMAN OBERMAN: Do you know if anybody
5 else on the team did?

6 THE WITNESS: I don't.

7 CHAIRMAN OBERMAN: Would it make any
8 difference in your conclusions about what growth
9 rate to use if you had learned that, since 2005,
10 CSX non-intermodal car loads have actually declined
11 over time, over the last 17 years? Would that
12 affect the -- the growth rate you should use or any
13 growth rate going up?

14 THE WITNESS: Well, first of all, what you
15 said doesn't surprise me. But what happens when
16 you take coal out of the mix? Then what happens?

17 CHAIRMAN OBERMAN: Well, I'm not really
18 here to answer your questions, Mr. Banks. I'm just
19 wondering if you would have changed the number you
20 would use if you had learned that their
21 non-intermodal traffic had declined over time, over
22 the last 17 years, in terms of predicting the

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1 growth rate over the next 20?

2 THE WITNESS: If -- it is difficult. I
3 like to stay away from averages because the fact of
4 the matter is that -- although CSX and NS,
5 everybody thinks of them as southern railroads, the
6 fact of the matter is they also serve the Midwest
7 and they also serve the Northeast. And the average
8 masks the fact that the Southeast economy, insofar
9 as it affects freight railroad car loads, is much
10 stronger and growing in a different direction.

11 So I don't really care that much -- I
12 don't think it's that useful to just look at the
13 gross average car loads. I understand why you went
14 there; it's perfectly reasonable, but it isn't that
15 informative to me because the economies of Alabama,
16 in particular, and Mississippi -- Louisiana is a
17 very strong -- strong generator of railroad freight
18 traffic, and increasingly traffic -- businesses
19 that use rail are moving from states like Alabama
20 and Louisiana.

21 It's been a while since I've done specific
22 projects in Mississippi, but Mississippi is also

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1 pretty strong. And those -- you know, those are
2 moving in a completely different direction,
3 unfortunately, than the Middle Atlantic states
4 where I live. So the average is, to me, not
5 particularly important.

6 CHAIRMAN OBERMAN: Well, then I guess the
7 average that the FRA uses to arrive at 2 percent
8 wouldn't be very important either; would that be
9 right?

10 THE WITNESS: No, but it has the patina of
11 legitimacy.

12 CHAIRMAN OBERMAN: And that's the basis of
13 using it, a patina? Well, you don't need to answer
14 that question.

15 Did you -- would you put any weight in
16 estimating future growth on not only -- you pointed
17 out there are different economies in different
18 parts of the country. Would you put any weight,
19 though, to any degree, on the experience of the
20 railroad involved? Because railroads have
21 different growth strategies, as you know, and,
22 therefore, would you agree that CSX's growth

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1 experience, or lack thereof, would at least be a
2 relevant factor to consider in figuring out the
3 projection to be used here? Or would it not --
4 would it be irrelevant, in your view?

5 THE WITNESS: I mean, I would consider the
6 number, but I don't think I would put -- the amount
7 of weight I would put on it would depend upon what
8 other things I might be considering as well, and if
9 any particular number was an outlier, then
10 obviously I wouldn't rely on it. If a whole bunch
11 of numbers lined up approximately the same, then it
12 would give me confidence -- more confidence in that
13 number.

14 CHAIRMAN OBERMAN: All right. But you
15 didn't consider it here because you didn't even
16 find out what the growth history was for CSX?

17 THE WITNESS: That is correct.

18 CHAIRMAN OBERMAN: And to follow up on
19 your point, which I think is a very pertinent one
20 about looking at the economy in different regions,
21 did you ask CSX or NS, but mostly CSX, to provide
22 you with the growth history on this line even if

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1 you couldn't go out and talk to individual
2 shippers? They have numbers, don't they, that
3 would show you the growth, or lack thereof, of
4 freight service on this line? Did you ask them for
5 that?

6 THE WITNESS: I did not.

7 CHAIRMAN OBERMAN: So you chose not to get
8 any other input in approving this report in terms
9 of building the 2039 case other than for the
10 reasons you just stated, to use the FRA guidance
11 manual and then to discount it down to 1-1/2
12 percent? That was 100 percent of the basis of how
13 you chose the 1-1/2 percent figure?

14 THE WITNESS: That is correct. Yes, sir.

15 CHAIRMAN OBERMAN: Now, you may not be
16 able to answer this question, because it's somewhat
17 of a legal question, but based on your extensive
18 experience, can you tell me whether there's
19 anything in the statute under which we're
20 operating, 24308(e), that directs you to consider a
21 20-year growth pattern in terms of measuring
22 unreasonable impairment?

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1 And if that's a legal question, then I
2 don't want you to take a stab at it and go beyond
3 your expertise, but if you have some insight into
4 it, I would like to know the basis on which we
5 should consider freight growth for the next
6 20 years.

7 THE WITNESS: I think it does call for a
8 legal conclusion, but when we are doing work for
9 our clients, whether they are railroad clients or
10 suppliers of capital to the United States, it is
11 standard practice to not just focus on the current
12 year or a recent year.

13 How far out someone goes varies from
14 project to project, but I don't find it
15 unreasonable to look out 20 years because the
16 investments that the railroads make, whether they
17 make them on their own or make them in the context
18 of a merger proceeding or direction from someone
19 like STB, a party like the STB, these are
20 long-lived investments with very, very long
21 economic lives. We're talking about decades of
22 investment. And it seems -- and they're expensive,

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1 and it seems to me that it makes sense in that
2 context to be trying to look at forecasts.

3 Forecasts are rarely correct, but it seems
4 to me inane not to look out into the future and try
5 to get a sense of how things might develop.

6 CHAIRMAN OBERMAN: Well, I know that you
7 are aware in this case that CSX is taking the
8 position that this isn't a question of CSX choosing
9 to spend its shareholders' money and making an
10 investment based on such a projection, but it's CSX
11 asking that the taxpayers spend this money. And
12 we're charged with protecting the public interest,
13 among other things, and while we don't hand out the
14 money, what we do may have an impact on what gets
15 spent.

16 And I'm trying to figure out what basis
17 the board would have to say, you know, the
18 taxpayers should spend \$440 million because
19 Mr. Banks came in here and said he was going to
20 assume a 1-1/2 percent growth for the next
21 20 years. And as you know, Mr. Banks, the railroad
22 so far has said all of that 440 million -- they've

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1 retreated down to a little bit less than that
2 lately -- must be spent now before any trains run.

3 So I'm looking for something in this
4 record that would support a decision on that basis,
5 and that's why I'm exploring these questions with
6 you. Do you have anything to give us comfort on
7 that scale?

8 THE WITNESS: I'm sorry. Give you comfort
9 on what specifically, sir?

10 CHAIRMAN OBERMAN: That we should order
11 the taxpayers to spend \$440 million today based on
12 your report, the RTC report.

13 THE WITNESS: Well, in my response, I
14 really like to break the issues into two pieces.
15 One of them is whether the money should be spent or
16 not, and the other one is when it should be spent.

17 I have great concerns that if the money
18 isn't spent before Amtrak service commences, that
19 the service will fail and that the failure will be
20 blamed on the host railroads, because who else are
21 you going to blame? I mean, you're not going to
22 blame Amtrak.

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1 So -- and I have personal experience in
2 traveling on Amtrak. In fact, every other weekend
3 for several years during the time when the
4 Northeast Corridor Improvement Project was going
5 through. Now, that's a much bigger and more
6 expensive project than we're talking about down
7 here on the Gulf Coast corridor, but Amtrak really
8 could not maintain its schedule.

9 And I am not a civil engineer, but you
10 will have an opportunity to talk with Mr. Johnson
11 about how the maintenance work would be done, the
12 improvements would be done, and I'm extremely
13 confident that he is going to tell you that every
14 one of those projects of those 14 is going to
15 affect the ability of Amtrak to operate reliably.
16 Because you're going to have to take track out of
17 service. And there is only one track, one
18 main line track.

19 So I think it's just imprudent, frankly,
20 to try to commence service. If Amtrak starts
21 with -- I think the average was 20 to 30 riders on
22 a train -- how many trains -- how long are they

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1 going to be running trains that take an extra two
2 hours above and beyond what they're forecast to
3 take? If they really want to see the service be
4 successful, they should be patient.

5 I know there are issues pushing them in
6 the opposite direction, but I cannot countenance
7 starting the passenger services knowing full well
8 that you're going to have, I believe, several years
9 worth of improvements that can't help but impact
10 the reliability. I hope you find that
11 constructive.

12 CHAIRMAN OBERMAN: Well, your 14
13 improvements are based on the 2039 case, not on the
14 2019 case.

15 THE WITNESS: That's true, but the 11 of
16 the 14 we, you may recall, differentiated some of
17 the improvements were not necessary in the first
18 instance.

19 CHAIRMAN OBERMAN: They were, but there is
20 no -- is there an RTC run with 11 improvements?
21 There really isn't here, on which we could base a
22 decision, is there?

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1 THE WITNESS: I don't -- I would defer to
2 Mr. Dingler or Mr. Guthrie on that but -- I don't
3 believe there was such a run, but we're confident
4 that not all the improvements are necessary to
5 commence service, frankly, because the growth that
6 you and I spent the last ten minutes talking about
7 won't begin to manifest itself in a way that really
8 affects capacity until late in the '20s.

9 CHAIRMAN OBERMAN: If it grows at all.

10 Let me do this. I have a number of other
11 questions, but I have been dominating the time
12 here, and I have at least two board members who
13 have questions right on this point. In the order
14 that they contacted me, it's Patrick and Karen. So
15 I'm going to shift the ball to them, Patrick first
16 and then Karen, and others, if they have any. But
17 we'll undoubtedly be back in the morning. It's a
18 quarter to 5:00 already. And then I have some
19 further questioning that I will ask you before we
20 let you go.

21 I hope you don't mind, but I don't see any
22 other way to do it, and I really want the other

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1 board members to weigh in here.

2 So Patrick, why don't you go ahead.

3 MEMBER FUCHS: I just wanted to somewhat
4 briefly follow up, Marty, on the two points that
5 you explored with regard to the growth number and
6 the on-time performance number.

7 Mr. Banks, you did look at the 2 percent
8 number in the FRA report, correct?

9 THE WITNESS: Yes.

10 MEMBER FUCHS: So do you recall what that
11 2 percent number was in reference to?

12 THE WITNESS: I did at the time. I don't
13 now.

14 MEMBER FUCHS: Only because, as I
15 understand it, you didn't look at the local
16 economic growth, you didn't look at any of the
17 commodities in the area, you didn't look at
18 historical projections, you didn't look at CSX's
19 internal projections. And you referenced a report
20 from -- I guess at the time it would be 16 years
21 ago.

22 And I pulled up the report, and it seems

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1 to me that the 2 percent was in reference to mature
2 commuter systems and not to freight, and it
3 wasn't -- it was in reference to a different
4 geography than the geography that we're talking
5 about here.

6 So I -- there's two possibilities. One is
7 I'm mistaken in which 2 percent I'm looking at in
8 the FRA planning model from many years ago or
9 there's a different 2 percent number that would be
10 more applicable. But I'm wondering, when you
11 looked at the FRA report, what gave you confidence
12 that the 2 percent number was applicable?

13 Let me ask it another way. Is there a
14 different 2 percent report than the one referencing
15 mature commuter systems?

16 THE WITNESS: I understand your question,
17 and I can't -- I'm sorry, but I can't recall it
18 well enough to respond. Maybe I can look at it
19 over the evening and respond in the morning.

20 But overarching, my view is that it is not
21 at all unreasonable to assume 1 to 2 percent unit
22 growth in car loads on the AAR -- I'm sorry, the

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1 class 1's traffic. The revenue increases faster
2 than that, but the car loads increase between 1 and
3 2 percent.

4 You have to be careful to look at the
5 commodities that are associated with that
6 particular line.

7 MEMBER FUCHS: I totally understand.
8 You're making compelling points about the
9 importance of looking at geography and commodity.
10 I just haven't heard from you that you did that.
11 So it would -- the only citation I have in the RTC
12 report is from an FRA report from 17 years ago that
13 seemed to reference a number that may or may not
14 apply. So that's the only thing I say, is I
15 understand the logic of your argument; I just was
16 hoping that it would be in evidence.

17 And then -- so turning to the 95 percent
18 number, could you clarify for me: What is it?
19 What did you base it on again? I missed that. I
20 know there was discussion about people saying that
21 you didn't base it on -- but I missed what did you
22 base 95 percent on when you were auditing?

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1 THE WITNESS: We were collectively --
2 collectively, the clean team -- looking for a
3 number that would be high enough such that it would
4 result in the more exacting on-time performance
5 metric that Amtrak is insisting on, which is
6 essentially, if I recall, stop by stop. It's not
7 just getting to the last point, last station. It's
8 a more exacting, or demanding, if you will, metric.

9 And so if you're going to be measured more
10 frequently, then you have to build in more --
11 more -- I hate to use the word "capacity," but you
12 need to build in enough -- a number high -- enough
13 higher than 80 percent so that you will meet the
14 metric at all the stations where you're being
15 measured.

16 MEMBER FUCHS: So I think that the legal
17 requirement is for a customer OTP at current,
18 right? And so -- and your 95 percent is calculated
19 on what basis? Is it end points?

20 THE WITNESS: No. The 95 percent is --
21 instead of coming up with 80 percent -- if we used
22 80 percent -- let's try it the other way. If we

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1 used 80 percent, then the customer OTP would never
2 be 80 percent.

3 MEMBER FUCHS: Uh-huh. And so --

4 THE WITNESS: We had to go higher than
5 80 percent so that we would be -- could have more
6 confidence that we would be able to satisfy the
7 customer OTP.

8 MEMBER FUCHS: And your 95 percent is by
9 train by station or is it by train by end points?
10 I'm asking how -- what is the basis of your
11 calculation of 95 percent?

12 THE WITNESS: It's customer OTP.

13 MEMBER FUCHS: So your 95 percent is
14 customer OTP?

15 THE WITNESS: Sorry. You're asking what
16 the customer -- sorry. You're asking --

17 MEMBER FUCHS: No, no. Your 95 percent
18 on-time performance, could you --

19 THE WITNESS: If I understand --

20 MEMBER FUCHS: Let me ask it this way.
21 This will be a better question. How about -- can
22 you define the numerator and the denominator of

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1 your 95 percent?

2 THE WITNESS: That is a better question.

3 And why don't you ask that of Mr. Dingle.

4 MEMBER FUCHS: And just, you know, by way
5 of background -- I will ask this of a different
6 witness -- did you look at any other
7 state-supported routes, particularly on the NS or
8 CSX, for 95 percent calculation for that cushion
9 that you're describing? In other words, is there
10 another state-supported route that comes to your
11 mind besides perhaps the Hiawatha, but particularly
12 on the NS and CSX, which I think would be maybe the
13 Piedmont and the Pennsylvania and the Carolina and
14 the Niagara Falls -- is there a -- have you looked
15 at their historical on-time performance to inform
16 your 95 percent? In other words, are you aware of
17 a state-supported route that would hit 95 percent,
18 as you've calculated it?

19 THE WITNESS: The short answer to your
20 question is no. The longer answer to your question
21 is -- again, I'm sorry to tell you this, but I
22 don't know how helpful that would be because what

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1 is unique about this corridor, aside from the
2 connectivity to the western carriers, is the fact
3 that freight operations today, even without Amtrak,
4 have to run literally a gauntlet from New Orleans
5 to Mobile.

6 You have got swamps, you have got movable
7 bridges, you have got yards next to movable
8 bridges, you have got single track, you have got
9 quite a large industrial complex -- I'm sorry, I've
10 forgotten the name; it will come to me. And then
11 just west of there you have an extremely high
12 density of grade crossings.

13 Now, the density of grade crossings across
14 the entire line is not unique, but the density just
15 west of Pascagoula is very unusual and it really
16 makes it difficult for the freight railroads to
17 operate as efficiently as they would like to
18 because there are just not places to extend or
19 locate new sidings.

20 So the reason I'm going where I'm going --

21 MEMBER FUCHS: No, I appreciate that you
22 did.

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1 THE WITNESS: -- you can't really compare
2 the two.

3 MEMBER FUCHS: Yeah.

4 THE WITNESS: And that's our whole point.
5 That's --

6 MEMBER FUCHS: Right.

7 THE WITNESS: -- what the RTC is good for,
8 because it takes all those comparisons and averages
9 out and says, on this district, this is what you're
10 up against.

11 MEMBER FUCHS: I appreciate your insights
12 on that. One last one for me is, you know, as I
13 understand the FRA requirement, it's not an
14 absolute 80 percent and then, you know, the host is
15 definitively, you know, responsible for damages.
16 It's the 80 percent is the trigger for an
17 investigation. And then there is an examination of
18 how -- to what extent the host's failure to provide
19 preference caused the sub-80 percent performance.

20 With that backdrop -- and you talked about
21 the 95 percent because the way you calculated it
22 was meant to provide a cushion for the way that

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1 maybe FRA calculates it with customer OTP. Would
2 you -- if it were possible to calculate a customer
3 OTP with the projected service, instead of however
4 you calculated 95 percent, would you agree that
5 80 percent is the appropriate threshold given that
6 flexibility in the FRA standard?

7 In other words, you told me that the
8 reason you didn't calculate it at 80 percent is
9 because you needed that 15 percent cushion because
10 of the different ways you definitionally calculated
11 OTP. But modeling could be done so that you could
12 definitionally calculate it according to customer
13 OTP. Would that eliminate the need for the
14 cushion? It's a complex question but --

15 THE WITNESS: I think I understand it, and
16 I think the model could do it, yes, that would be
17 the way to do it. But my understanding is that
18 that algorithm hasn't been entered in the latest
19 software.

20 MEMBER FUCHS: Because you can't -- it's
21 hard to project where customers will be going on
22 the line?

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1 THE WITNESS: No. It's -- I wouldn't --
2 sorry, sir, but I wouldn't characterize it that
3 way. The thing is practitioners -- RTC
4 practitioners or modelers don't mess with the
5 software. We give feedback to the person, the
6 developer. And he -- I don't know -- annually or
7 semi-annually sends updates. Okay? If those
8 updates include customer OTP, we would be happy to
9 apply it. But --

10 MEMBER FUCHS: Okay. I appreciate --

11 THE WITNESS: -- I don't know if anyone
12 has brought that to the developer's attention yet.

13 MEMBER FUCHS: I appreciate it. Thank you
14 so much.

15 THE WITNESS: Thank you.

16 CHAIRMAN OBERMAN: Thank you, Mr. Banks.
17 Karen.

18 MEMBER HEDLUND: I just want to make one
19 thing clear. Your 2039 14 projects, those are
20 required by growth in freight traffic, not growth
21 in Amtrak traffic; is that correct, between 2019
22 and 2039?

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1 THE WITNESS: Yes, the operation of the
2 Amtrak services was not changed between the 2019
3 case and the 2039 case.

4 MEMBER HEDLUND: Right. So that's all
5 based on the assumption freight traffic will
6 increase.

7 By the way, did it take into account --
8 did you take into account in the model planned CSX
9 improvements on the line between now and 2039?

10 THE WITNESS: We did. We didn't reflect
11 them in the 2019 because they weren't built but
12 we --

13 MEMBER HEDLUND: Okay.

14 THE WITNESS: -- did reflect them in the
15 2039.

16 MEMBER HEDLUND: Okay. Then I just want
17 to go back to what was stated in 3.5 on page 27:
18 Projects were first selected to mitigate the
19 passenger impact in 2039, not in 2019. These same
20 projects were used to determine which subset of
21 projects were required to mitigate passenger
22 operations in 2019.

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1 But I think you've told us you haven't
2 identified those.

3 And then you say, It would not be a
4 financially responsible use of railroad resources
5 to propose to build projects that mitigated freight
6 degradation in 2019 but would shortly thereafter
7 become ineffective at reducing expected freight
8 degradation in the near term.

9 Now, that's described in 2039. We're
10 not -- you know, you say shortly thereafter and in
11 the near term, but we're talking 20 years later.
12 So I think there's a little gap kind of in the
13 reasoning there. But, you know, this is written in
14 the passive voice, the way engineers typically
15 write, and the lawyers always have a problem with
16 that.

17 And so the question is used by whom and
18 paid by whom? And the point here is you may think
19 that, you know, if the -- we were back in 1965 and
20 the incumbent railroad was operating both freight
21 and passenger service, your statement would be
22 correct. But it doesn't take into account we now

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1 have two separate corporate entities, and one of
2 them is supported by the taxpayer.

3 That's my only comment.

4 That's all I have, Mr. Chairman.

5 CHAIRMAN OBERMAN: All right. I'm sorry,
6 Mr. Banks. Did you have anything to add to that?

7 THE WITNESS: Truth be told, I did not,
8 because, frankly, when Karen started reading, I had
9 trouble hearing her. I would have asked her to
10 direct me to the testimony if she had a question.
11 But since she had only a comment, given the late
12 hour, I'm ready to call it a night.

13 MR. WARREN: I will say, and I don't want
14 to step on any additional members who have
15 questions -- and I appreciate that Charlie is ready
16 to call it a night, but I do think some clarifying
17 questions might be useful to the board and members.

18 CHAIRMAN OBERMAN: Well, let me say this.
19 We're asking Mr. Banks to come back tomorrow. I
20 have a number of other questions. So if he's ready
21 to -- I was actually going to ask one more question
22 just to make sure I'm clear on what we're talking

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1 about. But if you want to ask a series of
2 questions, Matt, I would prefer you wait until the
3 board members finish their questions. You'll have
4 ample time to -- whatever you want to call this,
5 re-examination, redirect -- tomorrow. I'm not
6 going to cut you off.

7 Mr. Banks, just to summarize this point
8 before we move on, if I understand correctly, this
9 whole idea about the 2039 freight case, based on a
10 1-1/2 percent growth over 20 years, that is
11 1-1/2 percent each year; is that correct?

12 THE WITNESS: Yes.

13 CHAIRMAN OBERMAN: So that your model
14 projects that in 2039 there will be 30 percent more
15 freight traffic on this line than there is today --
16 or in 2019 -- correct?

17 THE WITNESS: Yes.

18 CHAIRMAN OBERMAN: Is there anyplace in
19 the country where you have seen an actual
20 30 percent growth over that period of time on
21 freight traffic, rail traffic?

22 THE WITNESS: You're talking about an

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1 overall net number growth; is that correct, sir?

2 CHAIRMAN OBERMAN: It's your report, sir.

3 You seem to be talking about it, the 30 percent
4 growth.

5 THE WITNESS: Well, I mean, 30 percent
6 growth has been exceeded by intermodal, I would
7 imagine, but there is no intermodal on this line.
8 It's been exceeded by waste by rail, which I think
9 has a very bright future. I'm sure there are other
10 commodities as well.

11 CHAIRMAN OBERMAN: Well --

12 THE WITNESS: And, in fact, we do a lot of
13 work, as -- Mr. Warren directed some questions to
14 me about work we do for shippers. We do a lot of
15 work for shippers. Many of them are before the
16 STB, but many of them are new customers. I think
17 you and the board would be surprised about how many
18 new customers, particularly foreign-owned firms,
19 are expanding their presence in the United States
20 and are trying to increase their movement of
21 freight by rail, in many cases, converting from
22 truck to rail, not necessarily intermodal, but

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1 converting commodities from truck to rail, because
2 they are particularly concerned about climate
3 change.

4 CHAIRMAN OBERMAN: Well, I don't disagree
5 with anything you said, Mr. Banks. I'm just trying
6 to figure out the basis of a project on which we're
7 supposed to order the expenditure of \$440 million
8 of taxpayers' money.

9 So I think we all could probably use a
10 break. It's 5:04. I said we were going to try to
11 end around this time. I totally respect and would
12 defer to your counsel saying that you need a break.
13 I've had witnesses who have needed breaks, and I
14 think that's wise on everybody's account.

15 Does any member of the board have anything
16 further they would like to say? We will resume
17 tomorrow morning at 9:30.

18 MR. ATKINS: And can I ask you just one
19 question, if you don't mind. And you don't need to
20 answer it. Maybe you could just talk amongst
21 yourselves.

22 So this trial has scheduled 12 witnesses.

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1 We have made it through one, and we haven't gotten
2 through him yet. So we would just appreciate some
3 guidance, maybe tomorrow, about whether there's a
4 likelihood this trial will run over into next week
5 so we can make sure that everybody on our team has
6 accommodations and the like. So if you could just
7 caucus amongst -- you know, to give us an idea of
8 what your projected timing is and whether you think
9 you can get this done by Friday, that would be
10 appreciated.

11 CHAIRMAN OBERMAN: It's a fair question,
12 Ray. Let me just say a couple of things.

13 One, we are scheduled for four days this
14 week. I was actually hoping we wouldn't need all
15 four days, but that hope is out the window. I
16 don't know that, if we run past Friday, we can just
17 schedule this for next week. There are many, many
18 things that involve people's schedules.

19 But your request is right on target
20 because we should be looking down the road as to
21 when we can reconvene and whether we will reconvene
22 virtually or in person. That's also an open

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1 question because our office is going to be
2 reopening soon. So I think we will take that --
3 definitely take that under advisement, because
4 there are a lot of moving parts here, including
5 your witnesses who have schedules. So it's a point
6 well taken.

7 I would also, by the way, just want to
8 reemphasize -- hopefully there is no need to deal
9 with it, but if any attorney has any concern about
10 an overdesignation of confidentiality, you must ask
11 us that in some sort of formal piece of paper so we
12 can deal with it. And if you don't need to
13 challenge it, that's fine, but if you want to
14 challenge it with some sort of motion or some
15 formal request for relief, we're not going to deal
16 with it on the fly as we go through the hearing.

17 All right. Anything from Amtrak or the
18 Port before we recess for the evening?

19 MS. BRACEY: Quick point from Amtrak,
20 Chairman Oberman.

21 CHAIRMAN OBERMAN: Yes, Ms. Bracey.

22 MS. BRACEY: We're just asking that you

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1 instruct counsel and the witness not to speak over
2 the evening recess.

3 CHAIRMAN OBERMAN: Well, that is the
4 normal courtroom proceeding when you're in the
5 middle of an examination. And in default, we are
6 supposed to be guided by those rules, and so I will
7 make such an instruction of counsel.

8 MS. BRACEY: Thank you.

9 MR. WARREN: We didn't talk to Mr. Banks
10 during the break earlier, and we're going to send
11 him home and not talk to him until the morning.

12 CHAIRMAN OBERMAN: Okay. Very good.

13 And you understand, Mr. Banks, you are in
14 the middle of an examination. I'm not going to
15 characterize what my examination has been, but
16 certainly Ms. Bracey has a right to further
17 cross-examination so -- I'm sure you've testified
18 before so --

19 THE WITNESS: Well, number 1, this is not
20 my first rodeo, and --

21 CHAIRMAN OBERMAN: I'm sure.

22 THE WITNESS: -- number 2, the last people

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1 I want to talk to are lawyers tonight.

2 CHAIRMAN OBERMAN: Well said. All right,
3 sir.

4 Thank you, all. Thank you, all, for your
5 patience. It's been a long day but, as everybody
6 has said, it's precedent-setting and we want to do
7 it right. So we will see you all in the morning.
8 Thank you.

9 (Whereupon, the proceedings adjourned at
10 5:10 p.m. and were scheduled to reconvene on
11 Tuesday, April 5, 2022, at 9:30 a.m.)

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CERTIFICATE OF STENOTYPE REPORTER

I, DONNA L. LINTON, Registered Diplomat Reporter, Certified Court Reporter and Certified LiveNote Reporter, hereby certify that the foregoing proceedings were recorded by me in shorthand and electronically at the time and place mentioned in the caption hereof and thereafter transcribed by me; that said proceeding is a true record of the testimony given by said participants; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this proceeding was taken; and further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

Donna L. Linton, RDR-CCR-CLR

<p style="text-align: center;">A</p> <p>a.m 1:11,15 320:11 AAR 302:22 abandoned 38:2 abandonment 82:5 abbreviation 241:8 abeyance 79:18 ability 15:13 46:19 61:14 70:8 71:21 72:1,3 88:22 151:4,20 170:21 171:4 218:7,14 281:3 298:15 able 5:3,16 47:12 76:9 127:10 132:4 133:7 134:8 139:21 164:18 165:9 184:18 188:18 191:17 224:17 243:2 252:20 264:4,18 275:17 289:12 294:16 305:6 above-entitled 1:14 absence 210:5 289:12 absent 70:4 absolute 104:18 308:14 absolutely 32:13 55:22 73:3 75:13 77:9 112:8 153:4 163:21 216:2 abstract 19:4 128:17 accelerating 236:15 accept 48:13 58:3 72:1 113:2 123:3 152:15 153:1 154:11 acceptable 92:6 284:5 accepted 60:17 109:8 access 5:13 30:5,20 36:7 37:3 38:1,6 39:20 42:8 45:1 49:1 57:10 58:5 59:5,20 63:10,20 64:20 67:18,19 69:15,17,18 85:12 87:1 93:9 101:8 101:10,20 102:14 103:12 104:1,16 105:20 147:16 154:3,3,5 163:13 164:16 176:7 178:2,4,6 199:20 213:21 232:5 accessing 23:10 accidentally 214:12 accommodate 28:11 31:6 37:8 51:16 64:12 98:22 119:1 126:2,15,17,22 127:6,21 accommodation 92:6 accommodations 91:9 317:6 accomplished 193:2 accord 91:16</p>	<p>account 112:9 129:9,11 142:6 145:8,10 156:12 247:4 311:7,8 312:22 316:14 accounted 159:7 accounting 93:17 accurate 32:6,14 33:12 186:1 204:22 237:20 accurately 197:6 247:9 achieve 114:22 115:5 175:4 205:1 210:6 242:15,17 243:2,3 263:11 264:8 265:10 271:7 achieved 176:7 achieving 269:1 acknowledge 97:21 acknowledged 57:1 acquisition 74:21 acronym 183:6 act 108:15,18 109:20 183:5 acted 58:17 action 95:18 100:22 148:9 322:11,16 activity 178:13 acts 142:4 actual 19:8 132:6 251:11 251:20 314:19 ad 244:1 add 26:10 29:3 34:13 35:18 64:3 75:7 111:20 112:17 115:18 116:5 120:14 167:20 184:19 188:5 197:17 203:21 209:20,22 210:2,8,13 250:15 287:17 313:6 added 75:9 112:13 194:6 199:13 269:21 270:12 adding 32:19 49:20 116:14,21 135:4 182:16 210:5 245:14 addition 10:3 113:5 183:9 191:15 192:15 196:8 additional 27:14 32:19 34:11 46:16 72:5,12 76:14 83:4,15 84:11,20 86:17 93:9 97:22 110:2 110:11 111:1,7 112:11 130:21 144:5 145:1 146:9 147:1,5,5,6,8,10 147:18 148:3,6 154:9 154:22 160:22 161:3 166:22 183:10 207:5</p>	<p>242:16 250:15 280:3 313:14 additions 112:6 address 24:18,20 25:4,6,8 26:12 27:16 36:10 39:18 40:12 48:2 60:18 63:8 100:2 106:3 118:1 120:20 124:19 125:20 138:10 142:1 148:18 165:19 166:12 209:18 245:20 addressed 123:13 124:1 124:14 166:13 202:15 addressing 99:16 131:15 166:3 adequate 281:10 adhered 131:4 adjourned 320:9 adjudicate 89:1 adjudicatory 47:5 adjust 127:5 129:3 212:5 212:8 adjusted 115:5 212:11 213:3,3 adjustment 188:15 277:3 277:5 adjustments 188:13 administered 86:14 Administration 101:6 184:14 admissibility 15:18,19 16:2,8,21 18:21 admit 8:4 97:20 115:13 118:3 admitted 8:8,11 12:12,19 16:5,18 20:7,9,12,21 21:6,7,21 114:14 admittedly 92:1 adroitly 250:4 adult 174:7 advance 88:22 91:17 203:7 advanced 260:7 advantage 187:11 199:16 255:3,17 advantageous 204:5 advantages 250:21 adversarial 98:20 adverse 13:7 112:9,18 122:18,20 adversely 138:5 advice 280:13 advisable 98:1 advise 39:16 advisement 318:3</p>	<p>advocated 85:12 92:12 advocates 94:9 advocating 52:8 156:18 affairs 155:7 affect 105:20 186:22 192:16,18 290:12 298:15 affirmative 270:14 afford 93:15 agencies 62:6,7 177:13 177:13 185:14 agency 38:8 89:12 90:18 91:4 101:4 174:4 agenda 266:18 aggregate 115:3 206:20 aggressive 30:3,4,8,19 38:9 51:13 ago 35:13 53:7 56:18 75:3 105:11 131:15 188:9 195:2 281:21 284:17 301:21 302:8 303:12 agree 33:19 45:22 46:3 73:20 75:5,11 76:20 84:12,21 87:5 109:3 121:21 144:18,20 146:7 158:3 219:10,11 225:6 227:9 242:22 255:21 261:10,20 262:1 263:15 285:5 292:22 309:4 agreed 17:8 41:6 53:21 56:19,21 58:8,14 60:8 73:20 111:13 112:7 179:4 266:4 267:3,4 274:11,13 277:17 agreement 29:16 39:5 75:21 76:4,7,12,19 77:3 83:2,13,14 88:2 99:6 110:10 121:5,8 144:10 144:18,22 145:12,15 147:20,22 148:2 153:22 155:5 156:2 161:4 171:3 agreements 39:7 76:10 76:15,15,21 77:2 84:9 111:8 121:12,16 144:15 agrees 101:20 ahead 46:14 75:18 87:16 87:19,20 139:4 140:22 160:13 162:15 218:18 226:22 234:11 248:12 253:6 301:2 aids 19:1 aim 262:15 aimed 65:17 262:13</p>
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