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SURFACE TRANSPORTATION BOARD

Pre-Evidentiary Hearing Conference For  
"Application of the National Railroad Passenger  
Corporation Under 49 U.S.C. Section 24308 (e) -  
CSX Transportation Inc., and Norfolk Southern Railway  
Company"

Wednesday, February 16, 2022

1:17 p.m.

Via Zoom

The above-entitled matter came on, pursuant to  
notice, at 1:17 p.m., Chairman Martin Oberman,  
presiding.

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

2 CHAIRMAN OBERMAN: A document for  
3 impeachment at the hearing. You know we're not all  
4 going to be in the same room where you can hand it up  
5 to the Board. How do you want to handle that? Any  
6 on the panel? Do the attorneys have a suggestion?

7 MR. WARREN: So if I might Mr. Chairman,  
8 Matt Warren for CSX, I would think that if we're  
9 using a format like this, like Zoom, there is the  
10 ability to share a screen, and you know there would  
11 also be the ability to potentially you know email an  
12 exhibit that was not really about a specific -- email  
13 a document that was being used you know for  
14 impeachments.

15 CHAIRMAN OBERMAN: Well logistically it  
16 would seem that both of those would work, if I could  
17 look at a document on the screen and at a witness's  
18 face at the same time, particularly if you're hoping  
19 to score a point by impeachment I want to see the  
20 reaction.

21 MR. WARREN: Yes. Well and I think we  
22 would as well, sorry I didn't mean to talk over you.

1                   CHAIRMAN OBERMAN: No, no go ahead.

2                   MR. WARREN: But you know I would think  
3 that you know and maybe this is hypothetical because  
4 I suspect that many of the things that witnesses may  
5 be impeached over potentially impeached over, will be  
6 documents that are on the exhibit list, but we do  
7 think that you know, from CSX's perspective that you  
8 know as it would be typical, and you know in Courts  
9 pretty much anywhere, you know, parties should be  
10 allowed to impeach the document that's not  
11 necessarily on the exhibit list.

12                   I don't disagree at all. I suppose  
13 another possibility Matt, and I don't know how people  
14 would react to the fairness of this, is if you know  
15 in advance what your potential impeachment documents  
16 are you could send them to the Board in advance of  
17 the hearing, and only to the Board.

18                   In other words if you're not -- alert the  
19 witness about the document before the hearing, send  
20 them only to us, so we have them, and then you can  
21 tell us, or refer to it. I think I would -- I have  
22 suggested this. I have not discussed that with

1 staff, so I think I would like our general counsel to  
2 weigh in on whether that works under the APA.

3 But logistically it would work I think  
4 from our point of view. I think that the posting  
5 them on the screen gets to the document, but it does  
6 not allow us to as I said see the witnesses, so  
7 that's the concern. General counsel's a little bit  
8 put off by having made that decision. But I think we  
9 can as you say the suggestion is being made that you  
10 email the documents to us.

11 The problem will be if you do it during  
12 the hearing then we're going to lose time because I'm  
13 going to want to print it out. I'm sure the others  
14 will, and have it in front of me while you're  
15 questioning the witness. I think you have to do it  
16 in advance if that works.

17 MR. WARREN: I think from CSX's  
18 perspective that that would work you know, along you  
19 know, with a general caveat that if something truly  
20 unexpected happens you know I think CSX and probably  
21 the other parties would preserve the ability to you  
22 know to maybe impeach with something that wasn't you

1 know previously provided.

2 But you know if the general counsel's  
3 office agrees that it makes sense for us to be able  
4 to you know pre-provide anything that could  
5 potentially be impeached that's not on the exhibit  
6 list, we don't have any objection to providing that  
7 in advance.

8 CHAIRMAN OBERMAN: All right. It does  
9 strike me that the chances of your not only using a  
10 document that's not on your exhibit list, but using  
11 one that you haven't thought about and sent to us  
12 before the hearing, and only came up because of  
13 something a witness said could happen. It's happened  
14 to me, but the chances given all the preparation are  
15 small. And if needed then we could take the five or  
16 ten minutes needed to get it emailed and printed  
17 out, and so forth.

18 Let's see how the rest of the crowd Bill,  
19 Rob, Jessie, are you onboard with this idea?

20 MR. WIMBISH: I'm onboard with the idea.  
21 I think the prospect of there being a document that  
22 is relied upon for impeachment purposes in this kind

1 of anticipatory submission I'm not personally very  
2 comfortable with it because of the notion of trying  
3 to anticipate how a witness exactly is going to  
4 impeach themselves. It's a pretty cynical process.

5 But I do think that it might work to call  
6 a recess in the event of the presentation of  
7 impeachment materials, distribute that document  
8 electronically to the Board members, and then resume  
9 with the hearing.

10 CHAIRMAN OBERMAN: Rob I think the  
11 suggestion was made, perhaps it isn't clear, was that  
12 there are three categories of impeachment documents.  
13 One are documents from the exhibit list, there's no  
14 problem we'll have those. Two, if between now and  
15 March 9th in preparing to examine the list any lawyer  
16 says oh, here a document I'm almost certain to use  
17 for impeachment that's not on our exhibit list, that  
18 could be pre-submitted if you what it is. That would  
19 save time.

20 And three, if in the process of the  
21 hearing the idea for an impeachment document comes up  
22 for the very first time, and that would be your

1 discretion. We're not going to try to second guess  
2 you. And you, you know, Google something, you find a  
3 piece of paper you want to use, then we can take a  
4 few minutes recess to get it.

5 MR. WIMBISH: Right. And just for the  
6 record Mr. Chairman I didn't object to it. I just  
7 explained and I see it looks like you may have frozen  
8 up.

9 CHAIRMAN OBERMAN: You froze, there you  
10 go. I'm here.

11 MR. WIMBISH: Oh, that I am embracing the  
12 third of those options not to swallow up the other  
13 two, but simply because I think that that is a  
14 reflection of the fact that you can simply not  
15 anticipate as you yourself admitted.

16 CHAIRMAN OBERMAN: Yeah.

17 MR. WIMBISH: How a witness might address  
18 something on cross-examination for example, that goes  
19 in a direction that you really didn't anticipate. So  
20 I'm just simply saying I'm glad that we do have that  
21 option three available because I think it could be  
22 very difficult for some of us to anticipate where

1 another witness may go off their prior testimony.

2 CHAIRMAN OBERMAN: Go on.

3 MR. MULLINS: Mr. Chairman I would say  
4 that we echo the comments of Mr. Wimbish. I mean I  
5 hear you -- I'm sorry go ahead sir.

6 CHAIRMAN OBERMAN: I could not, hello?  
7 Can you hear me? I'm having trouble here.

8 MR. MULLINS: Okay. Let me try again.  
9 Mr. Wimbish's comments, we share those comments that  
10 you know we get it with the one documents and the two  
11 documents, but there are definitely going to be --  
12 it's going to be hard to guess ahead of time what we  
13 might want to use depending on what the witness says,  
14 so we like the idea if we haven't previously produced  
15 that document, that if it comes up in impeachment  
16 that there be a short recess while we email it to  
17 everybody, and you know, and then everybody can look  
18 at it and then we'll go back on the record.

19 CHAIRMAN OBERMAN: Well Bill I totally  
20 agree. I do not want to stifle any lawyer's ability  
21 within the rules that we follow to cross-examine  
22 witnesses. I think the only suggestion is I imagine

1 all of you are -- (connectivity issues) before March  
2 9th, and if you do it will facilitate the hearing if  
3 you send them around that's all to the board.

4 MR. MULLINS: Yeah totally understand yes  
5 sir.

6 CHAIRMAN OBERMAN: But the other option of  
7 coming up with a new document during the process of  
8 the hearing I think should be open to everybody.  
9 Jessie are you onboard with this, or have any  
10 further other thoughts?

11 MS. AMUNSON: The only thought I would add  
12 Mr. Chair is that as to the category two that you  
13 identified, those are documents that would  
14 potentially be used for impeachment, which have not  
15 previously been submitted to the Board, so I would  
16 think if we are sending those to the Board we should  
17 sort of do so separately, identifying them as  
18 potential impeachment material, and the Board should  
19 not necessarily look at those documents unless and  
20 until the counsel actually uses them.

21 Because otherwise there would be some  
22 issue I think with what is already part of the record

1 versus what would be becoming part of the record  
2 through the hearing.

3 CHAIRMAN OBERMAN: Well I think you raised  
4 a good question because that's how it would normally  
5 work in Court, but I would like to see. I'm not  
6 clear how I would get my hands on a document that  
7 you're sending me a couple of days in advance without  
8 at least knowing I've got a piece of paper in my  
9 hand, so we could all use our integrity to say well  
10 we're not going to study it or read it, but I think  
11 we're going to have to put our hands on a piece of  
12 paper to be ready to retrieve it during the hearing  
13 if you ask us to.

14 Would that work with you? Would you trust  
15 us to use our discretion?

16 MS. AMUNSON: Certainly. I was simply  
17 saying when we send you, when we work with your staff  
18 to send you the physical exhibits that whatever was  
19 designated as potential impeachment evidence would be  
20 sort of separately identified and you know packaged  
21 separately potentially, so that you could go to it in  
22 the event you needed it.

1                   CHAIRMAN OBERMAN: 100 percent, in fact we  
2 would want you to do that, so we don't -- so we know  
3 which are the exhibits, and which may never be called  
4 on. So all right. It seems like we have an  
5 agreement there with Matt, this exchange started with  
6 Matt, somehow a record of what we're doing here will  
7 be made.

8                   I haven't thought about that, so we're all  
9 on the same page, but we have a lot of staff  
10 listening to this, and we have a Court Reporter. So I  
11 think that's good. Is it fair to say that the  
12 parties are going to have some visual slide  
13 presentations, or other visual exhibits that could  
14 only be looked at electronically? Starting with CSX,  
15 why don't we just go down the line there.

16                   MR. WARREN: I think that it is possible.  
17 I mean I think that we are, and you saw in our joint  
18 report that the parties contemplate that they will  
19 you know, may have some demonstrative exhibits. I  
20 would think that a lot of those are probably exhibits  
21 that could be printed out on paper if it's a you  
22 know, a map or picture.

1           There is a lot of evidence in this case  
2 that doesn't easily translate to paper. So you see a  
3 model itself, a lot of the underlying files, it's  
4 possible that you know one of the questions I've been  
5 jotting down here was what do we do about native file  
6 exhibits that might be a work paper that we want to  
7 ask a witness about.

8           We can certainly do our best to print that  
9 PDF, but it doesn't always translate quite as well.

10           CHAIRMAN OBERMAN: Well I think you have  
11 to use your discretion of what you need, and I'm  
12 going to say you, all the attorneys to adequately put  
13 your case on. And I have spent a little bit of time  
14 having staff demonstrate to me how the RTC model  
15 works. It's way beyond my akin, but I've looked at  
16 it, and I think if any party wants to examine a  
17 witness about the RTC model that has to be done  
18 electronically because it's got moving parts.

19           I don't see how you can demonstrate your  
20 point without doing that, and to that extent we'll  
21 have to put it on the screen. My hunch is there's a  
22 way to split screen if we really want to keep our eye

1 on the witness as well. So I'm going to leave that  
2 to the parties and the Zoom experts to work out with  
3 our staff, the technology of how you to do it, but I  
4 think you make a good point Matt.

5           There may be some who have to do it  
6 electronically. We want to make sure you get all  
7 that stuff to it, so it also somehow is properly  
8 identified and in the record. I have a question that  
9 none of the parties have talked about. I've spent a  
10 fair amount of time in reviewing the record trying to  
11 visualize a number of the areas on this line that are  
12 in issue, and I personally, and I have even  
13 entertained the idea that the Board may end up taking  
14 a site visit looking at the whole line at some point.

15           But without reaching that decision, and  
16 I'm not sure how the other Board members feel about  
17 it, it has occurred to me that it probably could be  
18 done relatively easy to take a drone video of the  
19 line. And I'm wondering if any of the parties have  
20 thought about presenting that such a visualization to  
21 the Board, either in whole or if you're talking about  
22 a particular siting, or a particular drawbridge to

1 focus in on it and show us what you're talking about  
2 either -- any of the parties.

3 MR. ATKINS: So I can take that one. So  
4 CSX would be planning on presenting drone footage to  
5 help you visualize certain key features of the line,  
6 so that is something that we're currently exploring,  
7 we do think it could be done and be helpful to help  
8 conceptualize the issues that are in front of the  
9 Board.

10 CHAIRMAN OBERMAN: How do the other, I  
11 have a follow-up suggestion right. I appreciate  
12 that. But before I make it I wonder how the other  
13 parties would feel about if they were planning their  
14 own video, drone videos?

15 MR. MULLINS: We were contemplating our  
16 own drone video to show the New Orleans black belt  
17 issue. There has been no definitive decision on  
18 that, but we would like the opportunity to do that  
19 Mr. Chairman.

20 CHAIRMAN OBERMAN: All right and Rob does  
21 the port have any thoughts along those lines?

22 MR. WIMBISH: I haven't decided about any

1 video evidence or demonstrations Mr. Chairman.  
2 Obviously we agree with you that visual aids are  
3 central to our evidentiary presentations. I will  
4 simply echo something that carries over from my  
5 comments earlier in the day that we would certainly  
6 love to be able to show you these things, so that you  
7 can see in person what they are.

8 But if that doesn't happen, we will do our  
9 utmost to try to make sure that we provide you with  
10 sufficient visual aids to understand what's happening  
11 in our little corner of this proposed operation.

12 CHAIRMAN OBERMAN: All right And Jessie?

13 MS. AMUNSON: I have not conferred with my  
14 client about video evidence. And would be happy to  
15 report back as to whether we have any plans there, or  
16 would have any objections to the parties.

17 CHAIRMAN OBERMAN: All right. It does  
18 strike me that, and I want to get back to this, that  
19 it's possible. I'm not saying you have to do it, for  
20 there to be one drone shot of the whole line. And  
21 then different lawyers can use different parts of it  
22 to make whatever points they want to make, so we only

1 have one video to look at.

2 Having said that, I don't assume that you  
3 would all be able to agree on just one drone video,  
4 but it would be helpful to facilitate the  
5 presentation.

6 MR. WIMBISH: Well Mr. Oberman if I may,  
7 Mr. Chairman if I may.

8 CHAIRMAN OBERMAN: Sure.

9 MR. WIMBISH: That rings as a good point.  
10 I mean clearly for us speaking of our specific  
11 circumstance, while we may not necessarily see  
12 completely eye to eye with our other cohorts on this  
13 one, one thing I think we probably could collaborate  
14 on, particularly for the Mobile terminal, since we do  
15 use -- since the port that is, does use a portion  
16 CSX's line is that that may present an opportunity  
17 there for us to work with CSX to collaborate on that,  
18 so I think that's a good point. We'd certainly be  
19 welcome to that idea.

20 CHAIRMAN OBERMAN: Well I'm just thinking  
21 I'm not a drone expert, but I assume if you send a  
22 drone up in the air it can go from Mobile all the way

1 to the -- I forgot what you called it Bill, the area  
2 in New Orleans, what was the area?

3 MR. MULLINS: Yeah the back belt. It's  
4 called the back belt.

5 CHAIRMAN OBERMAN: The back belt.

6 MR. MULLINS: That's where all the  
7 interchanges takes place.

8 CHAIRMAN OBERMAN: Yeah, so it's  
9 physically possible I would assume for a drone to  
10 make a video of the entire line. The issue, which I  
11 don't want to stimulate disagreement, but I would  
12 encourage if the parties can work it out so we have  
13 one video, but nobody try to take advantage and show  
14 the video only of the time when all of the trains are  
15 in one place for five minutes, and then ten hours  
16 there's no trains there doesn't help the cause to  
17 have people fighting over what the video shows, so.

18 MR. ATKINS: Well Chairman Oberman if I  
19 might we've been looking at this for a while. It  
20 would be very difficult to try to come up with one,  
21 just even logistically you can't necessarily fly a  
22 drone all the way along the line. There are certain

1 areas where there are no fly zones, and it's a very  
2 tactically complicated process.

3 This has been underway at CSX for a while,  
4 and so I mean as much as we'd love to coordinate with  
5 others, and we certainly will on the sort of the  
6 allied party side, I think it would be challenging to  
7 have one single drone footage that people would then  
8 try and cut and paste what they would like from the  
9 footage. Just from a technical perspective knowing  
10 how complicated it's been to date to try to work on  
11 drone footage.

12 It's not quite as easy as a lay person  
13 like myself would have thought it would be.

14 CHAIRMAN OBERMAN: All right. Well  
15 there's no more a lay person in this area than me, so  
16 Ray you and I are in the same position. Well let me  
17 suggest this as with any evidence. I think it would  
18 be useful to the Board, but it is essentially if  
19 people are going to make their own drone videos, and  
20 even if we only have one from one railroad, if  
21 there's somebody who can authenticate what we're  
22 seeing, which is the usual requirement for a

1 photograph, you know I would assume we would hear it.

2 But it's got to be provided to all the  
3 parties, and it's got to be provided in a searchable  
4 or useable way. But I would say Ray that whoever  
5 undertakes to make a video, unless it's the port,  
6 which only has a small part of it, that you get as  
7 much of that line in the video as possible so that  
8 another party who doesn't have the resources to make  
9 a video is not disadvantaged.

10 MR. ATKINS: Understood.

11 CHAIRMAN OBERMAN: I'm going to say this  
12 only by comparison and not for the record, but it's  
13 almost like being a Court's witness to get this video  
14 prepared so we can all benefit from it. But you  
15 understand the point I'm making.

16 MR. ATKINS: Yep understood.

17 CHAIRMAN OBERMAN: Okay. Well that would  
18 be very helpful. I think we'd all benefit from it.  
19 And of course if that is shown like the RTC study  
20 it's going to have to be on the screen while the  
21 witnesses are there. We'll have to figure that out.  
22 Okay.

1                   Now we have the question of confidential  
2 materials. And I've sort of written this out, so I'm  
3 just going to at the risk of drowning out myself I'm  
4 just going to read this. The parties have  
5 recommended that whenever counsel intends to discuss  
6 or display materials designated confidential, or  
7 highly confidential under the protective order the  
8 Board turned off the camera and audio, and will  
9 display text informing the public that the live feed  
10 will return when the non-public portion of the  
11 hearing concludes.

12                   The parties have agreed to organize their  
13 examination so as to minimum the number and duration  
14 of instances where the public live feed must be  
15 turned off. Our IT staff will work on how we will do  
16 that, but we should be able to manage it so that the  
17 confidential material remains confidential.

18                   The parties also recommend ways to  
19 distinguish which witnesses and lawyers can see  
20 confidential, or highly confidential information. We  
21 can make this simple. You all know who is allowed  
22 to see which type of information, and we expect the

1 lawyers will only prevent people to listen or watch  
2 the things that they are authorized to listen and  
3 watch.

4 In other words, and I think the parties  
5 explicitly agree to this, take care of your  
6 witnesses, principals and other counsel and make sure  
7 that everyone stays within their lane on confidential  
8 and highly confidential materials. As I read does  
9 that -- is that in accord with the lawyers  
10 understanding? Is there anything you would like to  
11 add?

12 MR. WIMBISH: That accords with us. It's  
13 fine. Yes that makes sense to CSX.

14 CHAIRMAN OBERMAN: All right. Rob, Jessie  
15 you're onboard?

16 MS. AMUNSON: Yes and to Amtrak.

17 CHAIRMAN OBERMAN: Okay. Thank you. The  
18 parties have submitted their witness lists to us, and  
19 I want to explicitly -- where is my hold on I just  
20 want to get my witness list out here. I think that  
21 only Amtrak has identified what I would call adverse  
22 examinations. No that's not true. I think that the

1 port -- Rob you have also correct?

2 MR. WIMBISH: Excuse me sir?

3 CHAIRMAN OBERMAN: You have identified

4 witnesses, what I would call adverse witnesses.

5 Other parties witnesses who you want to be produced

6 at the hearing for cross-examination.

7 MR. WIMBISH: Which as I recall from

8 looking at the other parties submissions would be

9 called during the hearing anyway, anticipate being

10 called.

11 CHAIRMAN OBERMAN: Well that may be true

12 of yours, it's not entirely true of Amtrak's list of

13 adverse witnesses. So let me ask first are there any

14 objections to any of the direct examination

15 witnesses disclosed by any party on the filings that

16 you've made with us?

17 Secondly, Amtrak has identified four,

18 seven, ten -- well I call adverse witnesses.

19 Witnesses who belong or are controlled by the other

20 party. Ricky Johnson, Randall Hunt, Charles Banks,

21 Larry Guthrie, Mark Dingler, Ted Niemeyer Hannah

22 Rossi, Holly Sinconen, Robert Golder and John

1 Driscoll. Is there any resistance or objection to  
2 producing those witnesses at the hearing if Amtrak  
3 needs them?

4 MR. WARREN: So I think Chairman Oberman,  
5 from CSX's perspective one, I think we can narrow  
6 this as Mr. Wimbish said. Yeah I think most of the  
7 adverse witnesses. In fact if I'm following this  
8 correctly, all but one are being called in a party's  
9 direct evidence, so the only one who is not is Ted  
10 Niemeyer who is listed by Amtrak.

11 And I'm not you know prepared to object to  
12 Mr. Niemeyer's examination by Amtrak today, but I  
13 would note that Amtrak did not respond to Mr.  
14 Niemeyer, Mr. Niemeyer's report at all in their  
15 rebuttal statement. So I'm not really sure how  
16 appropriate it is for Amtrak to examine, put on  
17 evidence at the hearing for adverse examination Mr.  
18 Niemeyer when they didn't say anything in their  
19 reply evidence about Mr. Niemeyer's evidence.

20 CHAIRMAN OBERMAN: Well isn't it possible  
21 that Amtrak was -- felt no need to do that because  
22 they were going to cross-examine him at the hearing?

1 I mean as I understand it he has a report that was  
2 relied on in the preparation of the RTC model.

3 MR. WARREN: He does, and as I said you  
4 know I'm not objecting at this time. And we may  
5 confer with Amtrak about this, but I think it's  
6 really just about Mr. Niemeyer.

7 CHAIRMAN OBERMAN: Well I don't want to  
8 get to the hearing and have a witness that's needed  
9 and not available, so let me suggest that you make  
10 him physically available, and if there are  
11 objections we can rule on them at the time, but I  
12 don't want him to be in Europe or some place where he  
13 can't be online if we rule that he has to be  
14 examined.

15 MR. WARREN: Fair enough.

16 CHAIRMAN OBERMAN: All right. Okay. And  
17 I would expect the parties you know --

18 MR. WIMBISH: Mr. Chairman if I may to  
19 interrupt, I think you had asked, and I just want to  
20 make sure that we had responded to it. You had asked  
21 whether we had any objection to any of the witnesses  
22 that -- adverse witnesses that is, that Amtrak

1 indicated that they may call. They identified the  
2 two witnesses that we expected to direct examine, and  
3 just for the record we do not have any objection to  
4 their anticipated cross-examination of those two  
5 witnesses the port will supply.

6 CHAIRMAN OBERMAN: And those are Mr.  
7 Golden and Mr. Driscoll?

8 MR. WIMBISH: Yeah Mr. Golden and Mr.  
9 Driscoll. That is correct.

10 CHAIRMAN OBERMAN: All right. You know  
11 one of the things that we have, and I haven't really  
12 thought about in this context is that you know this  
13 is not a jury trial, and we are not a Court,  
14 although we are in a Court like proceeding. And for  
15 efficiencies sake this has happened in many bench  
16 trials that I participated in. I don't know your  
17 preference.

18 But in order to speed it up have the  
19 lawyers given any thought to having cross-examination  
20 go beyond direct examination when you call a witness,  
21 so you don't have to call that same witness back in  
22 the other party's case?

1           MR. HELENHOUSE: We did not, this is James  
2 Helenhouse Mr. Chairman, and we did not explicitly  
3 talk about it, but I think that when we were having  
4 discussions about witnesses, we kind of assumed that  
5 we'd go beyond the scope so that you can call you  
6 know just as you're contemplating you can go beyond  
7 the scope, which you would otherwise putting on your  
8 case in chief.

9           And I don't think it's efficient for  
10 anybody to call a witness twice.

11           CHAIRMAN OBERMAN: I don't either if we  
12 could avoid it, but I also don't want to step on the  
13 toes of lawyers if they have some legitimate reason  
14 that they don't want to do it, but I would encourage  
15 it, and I appreciate what you say James. Does  
16 everybody else have the same view as James, or does  
17 anybody have a different view?

18           MR. HELENHOUSE: Mr. Chairman let me add  
19 one more thing related to that. I suppose there is a  
20 possibility that someone would, and this I have a  
21 related comment on this too, I suppose there is this  
22 possibility that someone would want to call a witness

1 adversely to address matters that came up later in  
2 the hearing after that witness was presented, so  
3 that's point one.

4 Point two, we really didn't talk about  
5 rebuttal and a rebuttal case, and that kind of  
6 dovetails along with this calling a witness again.

7 CHAIRMAN OBERMAN: I think you raised a  
8 good point James both are good points. My approach  
9 to this -- let me say this. I've tried a lot of  
10 cases, but never behind a bench, so this is a first  
11 for me, and this is an administrative proceeding  
12 which has a certain lack of formality built in.

13 So I think we can be flexible. Now I  
14 think the watch word of the day is with regard to  
15 your general examination on witnesses, let's try to  
16 have each witness on once. If the two situations  
17 arise that you identified A, that something is  
18 happening in the hearing in which you need to call  
19 that witness again, or you are in a rebuttal case,  
20 which I guess would only be in the case of the  
21 carriers, although I imagine there could be a claim  
22 of surprise and Amtrak would want to come in at yet

1 another time too.

2 I wouldn't want to rule that out in  
3 advance. And you present to us why you need to  
4 recall the witness. I would expect flexibility on  
5 the Board's part so we could have a complete record.  
6 That is our general approach. I don't want to  
7 prejudge it, or commit to anything, but I was  
8 speaking for myself, and I think I speak for the  
9 Board. We'd rather have a complete record than some  
10 kind of artificial limitation based on the usual  
11 rules of evidence, does that make sense?

12 MR. HELENHOUSE: Yes sir.

13 CHAIRMAN OBERMAN: Can everybody live with  
14 that approach?

15 MR. HELENHOUSE: Yes Mr. Chairman, can I  
16 ask a clarifying question.

17 CHAIRMAN OBERMAN: Sure go for it.

18 MR. HELENHOUSE: I just want to make sure  
19 that that gives us the right to call a witness as a  
20 rebuttal witness.

21 CHAIRMAN OBERMAN: Yes. I think if you  
22 need one, and you need to rebut something that wasn't

1 appropriate, or needed to come out, or you know on  
2 direct or cross-examination during somebody's case in  
3 chief, and you point out to us why you need to recall  
4 the person, you know. We don't want repetition, and  
5 we don't want overdoing it.

6 MR. HELENHOUSE: Sure.

7 CHAIRMAN OBERMAN: But I expect you all to  
8 be responsible about that and to call witnesses as  
9 needed. Keeping in mind like any listener of  
10 evidence if you bore us to death you may lose us.

11 So I'm just making a human, not a legal  
12 observation. All right. Is everybody else onboard  
13 with the general flexible approach I'm trying to  
14 announce here? Jessie, Ray?

15 MR. WARREN: Yes, sir. Yes for CSX.

16 CHAIRMAN OBERMAN: All right.

17 MS. AMUNSON: Yes.

18 CHAIRMAN OBERMAN: Okay. Thank you. I  
19 think that should work. And I do expect cooperation  
20 among the attorneys to give adverse -- people who are  
21 producing adverse witnesses advanced notice as to  
22 there's only two days set so far, we're going to get

1 to that in a moment. But as to when the person might  
2 be in, so they can prepare themselves and be  
3 available as would be the in the case of any kind of  
4 contested matter.

5 So we've gotten to the question of which  
6 witnesses. As I have read everybody's sort of  
7 anticipated time expectations, and I don't mean to  
8 say this to criticize because I think it's very hard  
9 to know that far in advance of the hearing how  
10 examinations are going to go. But if we add  
11 everything up this case could never happen in two  
12 days.

13 And if that much testimony is needed it's  
14 not the Board's plan to limit you to the two days  
15 that are scheduled, but I would encourage everybody  
16 to -- and I don't think it's fair unless you could  
17 tell us now to ask you to make some different time  
18 decision today from what you have listed on your  
19 witness list.

20 But I would encourage everybody to say  
21 this is supposed to be a two day trial, maybe we can  
22 get there. If we can't, then I'm going to asking

1 some questions here in a few minutes, which will  
2 probably make you all say no, it will never happen in  
3 two days, but it is a time situation that we all have  
4 to grapple with.

5 I can tell you now that if we have to add  
6 a third day it cannot be March 11 because a Board  
7 member is not available, and it can't be the  
8 following week because we have the reciprocal  
9 switching area already set and there's just too much  
10 for the Board to do. So there would be at least a  
11 two week hiatus between the days of the trial, which  
12 is highly unusual in our business, I mean the Court's  
13 business, and maybe longer.

14 So you might all want to confer amongst  
15 each other as to your availability in the beginning  
16 of the week. I'm not sure what day that is. And I  
17 don't know the Board member's availability, so don't  
18 hold me to this. Beginning the week of the 21st and  
19 thereafter sometime before the 9th you might all want  
20 to confer on when you could resume the trial, but it  
21 strikes me unless the times for examination, or the  
22 number of witnesses ends up being a lot less, it will

1 not be possible to get this done in two days.

2 Does anybody have a view that we could get  
3 it done in two days? No.

4 MR. WARREN: Well yeah, I mean hope  
5 springs eternal Mr. Chairman. When I add together  
6 the directs, I think it's nine hours, so you know  
7 cross is relatively close to that if folks are  
8 efficient. I think it's possible.

9 CHAIRMAN OBERMAN: Well I will say, and  
10 I've given a lot of thought to this. You know there  
11 was some initial thinking that all we had to hear was  
12 cross because we got everybody's verified  
13 statements. I think the answer is sort of a mixed  
14 one. You can expect that the Board members will have  
15 really read through this record. I think we've  
16 pretty much done that already for the most part,  
17 although we still have reading to do, and our staff.

18 So that we will be familiar with your  
19 cases. And I am not going to tell you how to try  
20 your cases, but you should be aware that you're not  
21 starting with a tabular asset here as to what each  
22 witness has to say, and you may be able to narrow

1 down your direct examinations to focus on what you  
2 really want us to focus on if you find that suitable.  
3 It's up to you, but that could shorten things up.

4 And of course the cross-examination you  
5 know needs to be fulsome, or as fulsome as you want  
6 it to be. So yes, I would encourage you all to think  
7 that through and I'll go with you Matt that hope  
8 springs eternal. But I do not intend to artificially  
9 restrict lawyers from providing their case.

10 MR. WIMBISH: Mr. Chairman I agree with  
11 that. I would simply add as a matter of logistics,  
12 and I'm sure this has been in the back of your mind  
13 too as you considered Board member availability,  
14 especially looking past March 10th, that the same  
15 consideration clearly also applies to those witnesses  
16 that we're providing right?

17 The notion here that if we know for  
18 example that there could be continuing development of  
19 the evidentiary record after March 10, but we know or  
20 have some certainty as of March 10, or very shortly  
21 thereafter, that a particular witness would not be  
22 needed for the carryover session, it would be a

1     courtesy to those individuals to know that they  
2     wouldn't necessarily have to block out their  
3     schedules for those days, that day or days.

4                   CHAIRMAN OBERMAN:  I think that's a very  
5     valid point Rob, it really goes into the arena of  
6     just common courtesies between opposing parties, and  
7     I would encourage you all to figure that out if you  
8     can and get certain witnesses completely finished.  
9     You may not be able to know that with certainty  
10    because of possible rebuttal needs, and I'm assuming  
11    if we don't finish on the 10th we won't have started  
12    rebuttal by the 10th, so you may not know on the  
13    10th who you're going to need for rebuttal.

14                   But to the extent you do, I would  
15    encourage the parties to coordinate with each other  
16    and try to complete one witness in their entirety on  
17    the 9th and 10th so that they can be dismissed.  If  
18    you can, but it's up to all of you.  I can't try your  
19    case for you in that sense.  It's a good point.

20                   MS. AMUNSON:  Mr. Chairman I'll just state  
21    from Amtrak's perspective we would very much like to  
22    keep the hearing to the two days if at all possible,

1 and we're certainly willing to work with counsel to  
2 try to make that happen.

3 CHAIRMAN OBERMAN: Well one of the ways  
4 that this could happen is if you could all agree to  
5 stipulate to certain facts, and I would encourage you  
6 to do that. That would help the cause of time that's  
7 all. When I say cause, which I'm talking efficiency.

8 There is a time aspect of this case. It's  
9 an old case. There's a lot of interest and everybody  
10 concerned on getting it resolved, so I share your  
11 concern Jessie, but at the same time there are a lot  
12 of complexities and I do not want to artificially  
13 cut off anybody, including Amtrak from putting on a  
14 case they need to put on. So there's a tension  
15 there, but so if parties could stipulate that would  
16 really advance the cause and focus in on what really  
17 needs to be argued about.

18 Okay. Any other comments on witnesses,  
19 timing, scheduling, that sort of thing that we've  
20 discovered? Okay. I'm going to shift gears. And  
21 there are a few items -- issues that I want to raise  
22 with the parties in terms of focusing your attention

1 on things that I and I believe, well I am interested  
2 in, and I think will be of interest to the Board,  
3 other Board members as well, that I don't believe  
4 have been fully developed.

5           And I'm going to preface this part of my  
6 remarks by quoting from CSX's brief on page 61 in  
7 which CSX tells us citing an earlier decision from  
8 2005, "The Board was not intended to be a passive  
9 arbiter, but the guardian of the general public  
10 interest with a duty to see that this interest is at  
11 all times effectively protected."

12           If any of you have followed the Board  
13 since I've been on it, you know that that is  
14 generally a concern of mine that at all times we have  
15 to have the minds of the public interest. And while  
16 you are contesting parties in a hearing on the  
17 record, and you're entitled to make your arguments,  
18 we have an obligation to rule on your arguments, and  
19 also to rule with that eye on the public interest.

20           So with that concept in mind I want to  
21 address your attention to various points, and before  
22 I do I want to underscore and make it very clear that

1 I do not want anyone to draw any inference from my  
2 questions as to where the Board is leaning on any  
3 issue. The Board hasn't reached any decisions on the  
4 merits of this case, and as a Board I have not as a  
5 Board member, and I'm quite confident that no other  
6 Board member has reached a decision.

7 We've all been studying the record, and we  
8 have been trying to educate ourselves and like any  
9 person I'm sure we're forming notions about it, but  
10 no decisions have been reached, and there's been no  
11 prejudging of the final outcome of this case. So  
12 with that in mind I would first I'm going to direct  
13 this question to you Jessie.

14 Amtrak has raised a number of concerns in  
15 its pleadings, and today emphatically that it did not  
16 have access to all of the input that was used in the  
17 RTC study. And there's been a great deal of focus on  
18 trains I think there was somewhere a ghost train,  
19 365 trains that you couldn't find in the records.

20 My only question and I think Mr. Gardner  
21 this morning referred to the RTC model from your  
22 perspective as a black box. My question is did

1 Amtrak because we don't have access to it unless  
2 disputes come all the way to the Board over  
3 discovery, did Amtrak seek discovery of any of the  
4 materials that it says it did not have access to,  
5 including names of field personnel, possible  
6 depositions of those people, that sort of thing. Did  
7 it initiate any such discovery in this case?

8 MS. AMUNSON: Mr. Chairman we asked that  
9 everything underlying the RTC model be provided. We  
10 were assured that everything that underlined the RTC  
11 model was in fact provided, and it was not until CSX  
12 and NS's reply evidence that they disclosed that in  
13 fact the numerous over 600 trains that were not  
14 actually in the data that was underlying the RTC  
15 model, were actually based on narratives from field  
16 personnel, so it was not until well into the reply  
17 evidence was actually field that we were at all aware  
18 that these trains were actually based on narratives  
19 rather than something that we could actually find in  
20 the data that was provided.

21 CHAIRMAN OBERMAN: And did you at that  
22 time seek to initiate any discovery?

1 MS. AMUNSON: This was just we filed our  
2 server model in response to that Mr. Chair, so it was  
3 no, we have not sought discovery. This was just  
4 weeks ago at this point.

5 CHAIRMAN OBERMAN: Well I understand,  
6 but --

7 MS. AMUNSON: I will say also, Mr. Chair  
8 that when CSX and NS did file their rebuttal  
9 evidence, we also asked about things that we thought  
10 were missing. There was an exchange of letters  
11 between the parties. We asked about things that we  
12 thought were missing from what was provided to us.  
13 We also asked about the designations of various  
14 things as highly confidential and confidential, and  
15 so there was an exchange of letters, which I believe  
16 is in the record in Amtrak's filing with respect to  
17 making its reply evidence public as opposed to having  
18 everything designated confidential or highly  
19 confidential.

20 MR. WARREN: Mr. Chair if I may respond.

21 CHAIRMAN OBERMAN: Were you finished  
22 Jessie?

1 MS. AMUNSON: Yes. And the last thing I  
2 would just add is of course discovery had been closed  
3 for quite a long time by the time CSX filed its reply  
4 evidence disclosing that in fact many of the trains  
5 were based on narratives from field personnel.

6 CHAIRMAN OBERMAN: Matt?

7 MR. WARREN: So I think two things are  
8 getting conflated. So to be clear Amtrak in  
9 discovery asked for essentially all the RTC modeling  
10 of CSX and NS I assume as well, had ever done.  
11 Everything that was provided to HDR, and Amtrak got  
12 all of that. So everything that was connected to the  
13 study that at one time CSX, NS and Amtrak were  
14 working on collectively, all of that data was  
15 presented to Amtrak.

16 So everything that you had been hearing  
17 for the last couple of days about how Amtrak didn't  
18 have it, that is not true for purposes of this  
19 litigation. Amtrak got that in discovery. Now CSX  
20 and NS you know pursuant to that HDR agreement we  
21 asked to finish the study, Amtrak said no, so we had  
22 to start again and do our own study.

1           And so we did a study working with you  
2 know HTV and LL Banks and that study was presented in  
3 our opening evidence. All the work papers were  
4 presented in that opening evidence, everything that  
5 we used to develop it was there. You know we clearly  
6 explained there that you know some of the operational  
7 details had come about in conversations you know with  
8 CSX employees. There have never been any motions to  
9 compel in this case, never any suggestions that we  
10 didn't produce everything we're asked for.

11           But I think there's some conflation of the  
12 two different you know models, but you know  
13 everything has been given to Amtrak. We gave them  
14 everything they asked for in discovery, and we put  
15 the whole model into our work paper, so it's all  
16 there for the Board.

17           CHAIRMAN OBERMAN: How is Amtrak to  
18 challenge the so-called narrative reports of numbers  
19 of trains at that point without opening -- seeking to  
20 reopen discovery and then delaying the ultimate  
21 outcome of this case?

22           MR. WARREN: So I would ask Amtrak, and I

1 would ask the Chair and the Board to look at our  
2 rebuttal evidence where we show pretty definitively  
3 that most of the things that Mr. Gardner was talking  
4 about earlier today are simply not true. That what  
5 happened is that Amtrak's experts found a file and  
6 they said aha, these are all the trains on the line,  
7 and they aren't all the trains on the line.

8 And we've seen that before with these  
9 experts where you know they do an RTC model and there  
10 are lots of missing trains, and you have the exact  
11 same thing here, and that is in our rebuttal  
12 evidence.

13 CHAIRMAN OBERMAN: Well we will -- Jessie  
14 do you want to respond?

15 MS. AMUNSON: Yes briefly Your Honor. I  
16 will say that in our server rebuttal evidence what we  
17 point out is that if you look at their chart of how  
18 they are counting for most of those missing trains,  
19 approximately 600 of those trains are trains that  
20 were based on narratives with field personnel.

21 And then there's another category that  
22 they say these are not actually trains. They are

1 simply train movements. So it's a category of trains  
2 that's listed in the trains kind of RTC modeling  
3 input that literally in their rebuttal evidence as  
4 these are not actually trains. So that's why we --  
5 our expert evidence showed that in fact there was 257  
6 percent of the trains that were modeled are not  
7 actually shown as operating during the relevant time  
8 period.

9 MR. WARREN: Yes, and if I may just to  
10 close. Yeah we'll dive into this at the hearing, but  
11 you know as we explained in our rebuttal, the way RTC  
12 works, and Mr. Crowley should know this very well, is  
13 that when you've got a yard job, your local train is  
14 doing multiple things, it's got to be modeled as  
15 different trains in the model.

16 It perfectly represents exactly the work  
17 that that local is doing, but you know these are some  
18 of the details that we will be getting into in March.

19 CHAIRMAN OBERMAN: All right. Final  
20 word, Jessie, anything final? We'd like to move on  
21 the subject.

22 MS. AMUNSON: We're happy to continue to

1 address it in March Mr. Chairman.

2 CHAIRMAN OBERMAN: All right. Well Bill  
3 wanted to weigh in.

4 MR. MULLINS: Yeah Mr. Chairman I feel  
5 like I just want to be clear that in opening, in  
6 opening there was a work paper disclosed in the  
7 Dangler report that noted that there had been field  
8 conversations with the interchange narratives. So  
9 they on opening had reviewed that work paper, had an  
10 opportunity to file discovery.

11 We have also learned in the context of  
12 their surrebuttal that there was certain information  
13 that they provided and relied upon, but was not  
14 disclosed to us. So this is not a you know just a  
15 one way street here. There's what we call tableau  
16 information and reports that was not disclosed until  
17 later, so you know this is all very complicated and  
18 difficult.

19 It either can be dealt with at the hearing  
20 through the examinations of the witnesses.

21 CHAIRMAN OBERMAN: Well I will say this.  
22 We're not going to make any rulings obviously today.

1 I did want to explore this a little bit because I was  
2 puzzled by the arguments that have been made, and at  
3 this point if anybody has objections to make they can  
4 make them and argue them at the trial, and I would  
5 anticipate a very vigorous and enlightening  
6 cross-examination of all the witnesses involved in  
7 this issue to perhaps shed further light on it.

8 But I don't think we need to dwell on it  
9 further today, but I have an interest in exploring  
10 it, at least to this degree. Do any other Board  
11 members have a question on this subject matter  
12 before I move on?

13 I want to move on to a question that I  
14 find somewhat concerning in the presentations on the  
15 RTC model in terms of candor and completeness, and  
16 you can correct me if you think I'm getting it wrong.  
17 But I read the RTC report, and of course the briefs,  
18 and there was a great deal of emphasis by the  
19 carriers about the uniqueness of this line because of  
20 all of the moveable bridges.

21 And there is repeated emphasis that these  
22 bridges open at random times, and an emphasis on the

1 statutory right of voters to have precedent to open  
2 the bridge whenever they feel like it. There's  
3 almost no mention except buried in various places,  
4 about the potential of working with the Coast Guard  
5 to arrange for scheduling of the opening of bridges  
6 to minimize train interference.

7           And I have since found in the record a  
8 letter from an Admiral of the Coast Guard to Senator  
9 Wicker who discussed just that potential, to relieve  
10 some of the interference if you run more trains on  
11 this line. So I'm concerned about that. I'm also  
12 concerned that while I do find in some of the  
13 exhibits reference to the fact that some of these  
14 bridges have been automated, or are in the process of  
15 being automated, but in the RTC and in the briefs  
16 all I find are references to all the bridge tenders  
17 having to hire themselves out to the bridges.

18           So no one on any side addressed what the  
19 impact would be on freight and passenger trains in  
20 the event that the Coast Guard did work out a  
21 schedule, and when the day comes, and when that day  
22 will be, although it seems like it is on the horizon

1 of when all the bridges are automated, and we get  
2 these high railers off the line.

3 And so what I would like to address the  
4 parties on is first, and I can't order you to do  
5 anything, and I'm not going to argue how to try your  
6 case, but I'm going to tell you what I'm interested  
7 in. And I would like all of the parties who are here  
8 today to go arm in arm to the Coast Guard before  
9 March 9, and report back to us on what you learned.

10 What is their willingness to workout a  
11 schedule? How long will it take? I think that's  
12 central to my understanding of this case. You may  
13 say it's not and we don't need to know, and if you  
14 want to take that position you're free to take it,  
15 but I am telling you what I am interested in.

16 I'd also like to have some witness on some  
17 side, if not all the witnesses talk to us about what  
18 the freight service situation will be if a schedule  
19 can be worked out to avoid these so-called random  
20 delays, and if we get all the high railers off of  
21 the line. I'm well aware that when a high rail goes  
22 on the line, all the trains have to stop for safety

1 reasons.

2 I don't know, maybe it's in there, and I  
3 am just too quick to understand it. I don't know the  
4 impact of the high railing into the RTC model, but it  
5 strikes me that it must have some significance  
6 because it was highlighted in the briefs, and in the  
7 RTC report.

8 So on the bridge issue I think we've  
9 gotten a partial presentation at least by the  
10 carriers, and I really am disturbed that we didn't  
11 get a more fulsome discussion of what the potential  
12 is here without any added infrastructure at all of  
13 how much of the problems you say will be there could  
14 be alleviated before we get to the infrastructure  
15 question, and it's central to understanding the  
16 case.

17 Again, we made no rulings, no  
18 prejudgments, I just think it's an absence of  
19 information that stands out to you when you read  
20 these papers. So if anyone wants to respond to that  
21 feel free, but I wanted you to know my concerns and  
22 what I would like to be addressed at the hearing on

1 that issue, and I have a few others.

2 MR. ATKINS: So Chairman I'll just start.  
3 I appreciate knowing what your concerns are. We will  
4 definitely be addressing substantively. We'll try to  
5 coordinate amongst the group along the lines you  
6 suggested, but we know the concern. I just want to  
7 emphasize that there might be a little bit in  
8 terminology issues that we'll try to clear up at the  
9 hearing.

10 When people talk about animation, what  
11 they're really talking about is remote control access  
12 on the bridges, so just in case anyone, a lay person  
13 meaning things might just open or close, that's not  
14 what's going to happen. It just makes it remote  
15 control from a different location than having  
16 somebody on the bridge do it.

17 We will talk to you specifically about  
18 that and the impact on the modeling. And then you've  
19 also mentioned pilot-ish type programs where you  
20 might change the nature of who has priority and when  
21 it comes to those bridges which does require the  
22 Coast Guard is in charge of that. We will also have

1 a witness who will speak directly to that, to their  
2 experience with that.

3 And you can field any question that you  
4 want to ask both to the executive who could tell you  
5 what they're doing with the Coast Guard, but also the  
6 modelers could explain to you the implications on the  
7 RTC model.

8 CHAIRMAN OBERMAN: Am I right to  
9 understand Ray that a bridge which is operated  
10 remotely does not require a high railer to take a  
11 human being out there?

12 MR. ATKINS: That is correct, although  
13 several of the bridges that are going to be automated  
14 don't currently require high rails. Some of them are  
15 located where you can just truck an employee in, so  
16 removing the remote control will matter, but I  
17 really need to defer to the experts who we will  
18 present who can tell you, you know, walk through each  
19 of the bridges online and tell you really sir what's  
20 happening, and what might happen in the future if the  
21 coast rail adopts the regulations.

22 CHAIRMAN OBERMAN: Well and the key

1 question here is when will those things happen, and  
2 what impact will it have on your stated freight  
3 delays?

4 MR. ATKINS: Understood.

5 CHAIRMAN OBERMAN: It's just absent. But  
6 I would like not only to hear from a witness who has  
7 had past experience with the Coast Guard. I'd like  
8 to find out what we can find out from the Coast Guard  
9 today what it will take to work out a schedule with  
10 them. And I'd really like everybody to go together,  
11 but you can do it any way you want. I can't order  
12 you to be friends, but I think it would be efficient,  
13 so everybody hears the same thing and can report to  
14 the Board at the hearing.

15 MR. ATKINS: Understood Chairman Oberman.

16 CHAIRMAN OBERMAN: All right. Does  
17 anybody else want to comment on that? Okay. There's  
18 another issue, a broader issue which has been talked  
19 about in the briefs, but I don't think has been as  
20 fully briefed as I as a lawyer, and I think the other  
21 Board members would like to be educated on from the  
22 parties point of view. We've certainly been doing

1 our own homework, but we really rely on the parties  
2 to carry their burden to educate us.

3 And that is the issue about whether the  
4 Board has the authority to order any infrastructure  
5 as part of an order which would order trains to be  
6 vetted to the line. And I don't want to debate that  
7 question now, but I do want the parties to more  
8 fulsomely address it at the hearing under the  
9 statute, and there's some sub-parts to that.

10 But before I get to that there has been  
11 reference in all of the pleadings to the parties  
12 having agreement, the kind of agreement that's  
13 referenced in the statute to cover compensation for  
14 passenger use. We don't have that agreement. I  
15 think it is essential that we review it. It's been  
16 referred to, so I would ask the parties, and you're  
17 free to object, but if there is no objection, I want  
18 you to file that with the Board as fast as you can  
19 really within what's today Wednesday? By Monday.  
20 We'd like to digest it and understand it.

21 The related question is what is the  
22 parties contentions if they have any, as to whether

1 that agreement covers payment for infrastructure,  
2 whether it doesn't, or whether there's a dispute. A  
3 related question which I'd like the parties to  
4 address, all of these things have been sort of  
5 alluded to, but they've not been centrally briefed as  
6 much as I think they should be is that if we were to  
7 consider whether we can and should order  
8 infrastructure, what statutory authority is there  
9 that authorizes us to order infrastructure to provide  
10 for use of the line 20 years into the future?

11 So those are legal questions that I would  
12 like the parties to address at the hearing. I don't  
13 want to -- this isn't the appropriate place to argue  
14 about them, I'm just telling you there are questions  
15 that we'd like to have more fulsome information  
16 about.

17 And I'm going to shift slightly, but I am  
18 going to talk about more infrastructure. Does  
19 anybody want to respond or comment to anything I just  
20 said?

21 MR. ATKINS: Chairman Oberman can I just  
22 ask a clarification on that last question.

1 CHAIRMAN OBERMAN: Go ahead.

2 MR. ATKINS: I just want to make sure of  
3 course that we're responding to concerns by the  
4 Board. You said what statutory authority to order  
5 infrastructure 20 years into the future? Are you --

6 CHAIRMAN OBERMAN: I am looking at here  
7 2039 base case.

8 MR. ATKINS: Okay. So you're --

9 CHAIRMAN OBERMAN: You argue that we  
10 should order Amtrak to spend 400 million dollars to  
11 make sure there's no freight delays 20 years into the  
12 future, assumingly had any authority to order any  
13 infrastructure, where in the statute are we empowered  
14 to look into the future and make that kind of an  
15 order. How do you read the statute?

16 MR. ATKINS: Thank you. That was the  
17 clarification we sought.

18 CHAIRMAN OBERMAN: Yeah okay. And that  
19 when I say 20 years it's based entirely on the RTC,  
20 2039 discussion. All right. I'm going to move on  
21 now. I was going to ask this question anyway, and  
22 Karen Hedlund addressed Steve Gardner this morning,

1 so I can elaborate a little bit.

2           It was always my understanding that Amtrak  
3 supported -- I'm using that word advisably. The Gulf  
4 Coast study working group rather report recommending  
5 roughly 100 million dollar investments. That was  
6 back in 2017 I think I have the year right. And  
7 Steve reiterated this morning that Amtrak supports  
8 those ideas and the amounts, I thought he said, and  
9 the record will speak for itself. I don't want to  
10 misstate, misquote him.

11           And my only question is we have heard  
12 nothing from Amtrak about what its plans are if  
13 service was ordered. What would be the timing of the  
14 construction of these projects assuming that those  
15 are the projects that should be built? Will it take  
16 a year? A month? Ten years? I assume they won't  
17 all be built at the same time.

18           I'd like Amtrak to address that at the  
19 hearing, and provide us with information about when  
20 those expenditures would be made. I also want -- no  
21 one has addressed the question phrased by the  
22 statute. I want to get the statute in front of me.

1 BOARD MEMBER HEDLUND: Mr. Chairman?

2 CHAIRMAN OBERMAN: Yes I'm sorry. Go  
3 ahead.

4 BOARD MEMBER HEDLUND: I have a follow-on.

5 CHAIRMAN OBERMAN: Go ahead.

6 BOARD MEMBER HEDLUND: I think maybe  
7 related to that is how long does CSX think that it  
8 would take to build the infrastructure that it has  
9 identified as being needed before Amtrak can access  
10 the route?

11 CHAIRMAN OBERMAN: That would be a good  
12 additional piece of information.

13 BOARD MEMBER HEDLUND: Thank you.

14 CHAIRMAN OBERMAN: I agree. No one has  
15 addressed as I understand it, maybe I missed it,  
16 there was a lot to read. The section of 308(e)(2)(B),  
17 we need a better organizer of these statutes, saying  
18 that Amtrak should be able to meet the statutory goal  
19 of obtaining a 60 mile an hour average for these  
20 trains.

21 And I would ask everybody, but  
22 particularly Amtrak to inform us at the hearing of

1 whether it expects to be able to operate the train at  
2 60 miles an hour on this line in its approach to the  
3 case. And obviously any party can and should address  
4 that issue if they have something to say about it.

5 And in a related question, it really is  
6 related to both of these points. All Amtrak has told  
7 us to date is on the question of the 14 improvements  
8 that recommended by the RTC report for CSX and are  
9 argued for by the carriers, in the carrier's briefs  
10 whether there's any lesser number of improvements  
11 than 14 that should be built, maybe that's  
12 overlapping with the improvements from the  
13 Congressional working group proposals.

14 But I'd like Amtrak to address that issue  
15 at the hearing.

16 MS. AMUNSON: Mr. Chair could I just ask a  
17 clarifying question there which is --

18 CHAIRMAN OBERMAN: Yes please.

19 MS. AMUNSON: Since it is the position of  
20 CSX and NS that all of those, or at least 11 of those  
21 14 must be built before Amtrak can run a single  
22 train. I think it would be helpful also for Amtrak

1 to know from CSX and NS's perspective as the ones  
2 that have come up with those as the projects that are  
3 required, which of those might be necessary for  
4 Amtrak to be able to start service.

5 CHAIRMAN OBERMAN: Well CSX has already  
6 stated it's position on that. And if they choose to  
7 modify that position and there's no objection we'll  
8 hear it, if there is an objection we'll rule on it,  
9 but to me the lack of information is on the other.  
10 You know we keep hearing in the papers all we hear  
11 from Amtrak is that CSX has failed to meet its burden  
12 of proof.

13 We hear other statements such as Steve's  
14 this morning, but it's not the first time Amtrak has  
15 said that it supports the working group. And this is  
16 why by the way that I emphasized at the beginning of  
17 this part of this session the quote which was so  
18 handily provided to us by Ray in his brief about the  
19 guardian of the general public interest.

20 So in my view, whatever kind of ruling we  
21 make we have to keep an eye not only on the technical  
22 pleading jousting between the parties, but what is

1 the best outcome of this case for the public  
2 interest, and I'm not sure we have enough information  
3 right now. As I said I haven't decided.

4 I guess another way to phrase it in more  
5 lawyer like terms is Amtrak's position is that CSX  
6 has failed to meet its burden of proof, so it loses.  
7 They haven't made any such ruling. What will happen  
8 if the Board rules that CSX has made a prima facia  
9 case then what? What's your argument to defeat that  
10 prima facia case if you have one?

11 Another way of saying is there some number  
12 of projects that would do the job, and I'm not sure  
13 those rulings will be made if argued during the 9th  
14 and 10th hearings, because these are complex matters.  
15 I doubt we'll make any rulings from bench. We may.  
16 I don't want to prejudge any of it, but it comes to  
17 mind in trying to try a case and dispose of it to be  
18 prepared in the alternative, and that is what I'm  
19 asking Amtrak to really the reason for these question  
20 is so we can be prepared to analyze some other  
21 approach other than the 14 improvements that CSX  
22 promotes.

1           So are there any other questions about  
2 these inquiries on my part so there's clarity here?

3           MR. WIMBISH: Yes sir. I'd like to ask a  
4 question about it Mr. Oberman, Chairman Oberman.

5           CHAIRMAN OBERMAN: Yes Rob?

6           MR. WIMBISH: Just it's a concern more  
7 than anything else for now, but I want to mention it.  
8 I appreciate the Board members wanting to drill down  
9 on the infrastructure issue. My concern is if Amtrak  
10 were hypothetically to come back and say you know we  
11 really hadn't been definitive before in putting up my  
12 words not theirs.

13           Really hadn't put anything out there  
14 specific to what infrastructure we think is  
15 appropriate if any to protect freight rail  
16 transportation. And Amtrak comes back with a  
17 proposal that says on second thought here are some  
18 infrastructure improvements we would be willing to  
19 contribute.

20           To me this is just our first impression,  
21 that seems to be -- and again because this is first  
22 impression, tantamount of their application, in

1 essence an amendment of their complaint. In our  
2 assessments, our opening evidence, our rebuttal  
3 evidence, all of the evidence so far was predicated  
4 on an understanding that Amtrak had committed to no  
5 freight service protecting infrastructure  
6 improvements.

7 And I'm concerned about some due process  
8 issues associated with an amendment of a complaint at  
9 the trial phase of the proceeding. I'm not sure how  
10 I am suppose to prepare to respond in a very short  
11 period of time, even if I got that information in a  
12 week to address the adequacy of those infrastructure  
13 improvements.

14 In other words, to be blunt about it,  
15 Amtrak has made its pleading. It indicated today  
16 that it generally supported -- those are the  
17 generally supports actually if I'm going to quote it  
18 exactly, the working group study from a few years ago  
19 about 95 million in improvements.

20 Generally supports, not a commitment,  
21 generally supports. So if you're going to allow  
22 Amtrak to amend its application I have a concern

1 about that, and I just want to put that in here right  
2 now about what I think that does to the process, and  
3 how those who want to look at that and study that can  
4 adequately do so within the timeframes that you're  
5 currently contemplating and I just want to share that  
6 with you.

7 CHAIRMAN OBERMAN: Rob, I think it's a  
8 fair point to raise. I certainly wouldn't presume to  
9 decide it now because we don't know what Amtrak's  
10 going to say. But I think that is best dealt with at  
11 the hearing. And if Amtrak makes proposals any party  
12 can persuade us to require that party have adequate  
13 time to respond to, then that argument should be made  
14 at the time, and we'll entertain it.

15 I will say this that I think it is fair  
16 for the Board to expect that all the parties to this  
17 proceeding who have been working on this project for  
18 years. We're not in the dark about the impact of the  
19 working group's proposals for examples. It can't be  
20 the first time you've heard about them, and I imagine  
21 it would not be the first time your clients have  
22 thought about them.

1           That doesn't necessarily mean that you  
2 don't need more time to respond if Amtrak does deal  
3 with it. I don't know whether I would make no  
4 comment on their description, and I realize you're  
5 responding to this idea off the top of your head, so  
6 I'm not holding you to any commitment here. I don't  
7 know that it would be accurate to describe this as an  
8 amendment to the complaint. Maybe it is, maybe it  
9 isn't, something we'd have to deal with if you've  
10 made such an argument.

11           But I think we are all tuned in to a fine  
12 point of fundamental fairness in our proceedings.  
13 Certainly we're all governed by the due process  
14 clause, and so nothing is foreclosed, let me say  
15 that, but we also want to keep in mind how long this  
16 case has been pending, how much notice people have  
17 actually had.

18           But I am cognizant of the issue raised. I  
19 thought about it myself even before we raised it. So  
20 you will have every opportunity to make arguments  
21 along those lines at the hearing should that occasion  
22 arise. Fair enough?

1                   MR. WIMBISH:  Yes thank you.  I just  
2 wanted to like I said share the concern here, so it's  
3 understood.  Coming forward I'm glad you were  
4 thinking about it too.

5                   CHAIRMAN OBERMAN:  Yeah I'm glad you put  
6 it on the table.  I would like to embellish a little  
7 bit on what I just said to Amtrak about their  
8 planning and the timing of any infrastructure  
9 improvements.  And to include in your information to  
10 us to what degree your plans are contingent on grant  
11 money, infrastructure money from FRA.

12                   Mr. Bose told us yesterday about all of  
13 the -- we all know that I thought he did a good job  
14 of summarizing all the resources that could be  
15 available for improvements on this line.  Some money  
16 we know has already been appropriated, it's been  
17 referred to.  I've seen the number 66 million, so to  
18 the extent there's any uncertainty about the funding  
19 to do it please include that in whatever information  
20 you can provide to us.

21                   Any other comments or inquiries about my  
22 inquiries about infrastructure before I move on to

1 the next topic? Okay. Another statutory issue which  
2 has caused some head scratching on my part, perhaps  
3 others, which I'd like the parties to address. It  
4 hasn't been addressed I think by anyone, and that is  
5 the language in 24308(e) that says, "The Board may  
6 order the carrier," very important comma, "within 60  
7 days, to provide or allow for the operation of the  
8 requested trains."

9 Does that statute mean we can only order  
10 the trains to start within 60 days, or does it mean  
11 we can order the trains to start at least within 60  
12 days, but we could order them at a longer time if the  
13 evidence supports it? I'd like the parties to  
14 enlighten us on your views of that statute.

15 MR. WARREN: I would say we could address  
16 this at the hearing if you'd like Mr. Chairman. I  
17 think that as I read the statute it's a requirement  
18 that the Board issue its decision within 60 days of  
19 the hearing.

20 CHAIRMAN OBERMAN: You think it applies to  
21 when the decision comes out?

22 MR. WARREN: Yes. It would be, and you

1 know if it was the Board may order the carrier to  
2 provide within 60 days, then you would more logically  
3 modify and provide.

4 CHAIRMAN OBERMAN: I thought -- I looked  
5 at that statute for a long time, and I appreciate  
6 your saying. I will say quickly, I don't want to  
7 debate it here because I really want people to have  
8 the opportunity to think about it and write us, or  
9 address it at the hearing.

10 If that's what it meant Matt, I wouldn't  
11 think you, far be it for me to criticize the  
12 Congress, but I would have thought they would have  
13 said the Board may within 60 days order. If that's  
14 what I think it means what you think it means. But  
15 you may be right. I don't have a -- I've not  
16 prejudged it. I find it mysterious, and the  
17 placement of the commas confusing, so I'd like to  
18 have the parties views on what our authority is under  
19 that statute.

20 Okay. Now I want to address CSX in  
21 particular, maybe NS a little bit. It appears from  
22 the information we have on record that one of the

1 reasons for the carriers concerns about delays. The  
2 growing length of trains and in some place we heard  
3 that they are running 15,000 foot trains on this line  
4 of through trains, and they are too long for the  
5 sidings, and they're only going to get longer I think  
6 someplace, I read that somewhere, don't hold me to  
7 it, the RTC.

8           If I look at the sidings that are now on  
9 this line they range in length from 10,000. There  
10 are many short ones, but there are several that are  
11 10,000, 8,500, 9,000 and so forth, and I'm not sure  
12 where those are, and how they would work in the  
13 operations on the line. What is absent from any of  
14 the modeling that we have, or any information is  
15 whether over time if the way to approach this turns  
16 out to be to build infrastructure projects over time,  
17 I'm not saying again no decision has been made.

18           What would the impact be on freight  
19 service if trains were run short enough to fit within  
20 the existing sidings today, and only be extended in  
21 late as new sitings are built, assuming new sitings  
22 are required? I don't see any information on any

1 effort to adjust the train length on an interim  
2 basis, whether that interim is a month or five years.

3 I make no presumption, while  
4 infrastructure projects, which are required, whether  
5 it's all 14 that CSX argues for, or some lesser  
6 number, or none, while those are being built. And I  
7 would like CSX I guess who is the primary mover,  
8 maybe NS has something to say about it, to enlighten  
9 us if you can on what kind of improvements could be  
10 made by making operational changes.

11 This is really related to the same inquiry  
12 about the bridges and the high rails. All of these  
13 there are things that can be done that don't cost any  
14 infrastructure, you know capital money, just  
15 operational changes. And I realize the railroads  
16 have a high interest in running their very long  
17 trains which is another issue to be dealt with in a  
18 different form.

19 So I would just like CSX to address us on  
20 that issue, and give me a moment here because I have  
21 to take a look at something.

22 BOARD MEMBER HEDLUND: I have a follow-up

1 Mr. Chairman.

2 CHAIRMAN OBERMAN: Yeah hold on one second  
3 Karen, let me just check one thing and I'm going to  
4 get to you.

5 BOARD MEMBER HEDLUND: Yep, okay.

6 CHAIRMAN OBERMAN: And I guess the related  
7 question here is to be very specific in informing us.  
8 Don't assume we figured it all out just by reading,  
9 how the growth in train length over time will differ  
10 from the train lengths that were used as of 2019 in  
11 the model, and how those things are going to play  
12 over time because it relates to when infrastructure  
13 needs to be built over time to accommodate.

14 And I didn't find enough detail. It may  
15 be in there, but I think it would be great to address  
16 that at the hearing. I would ask CSX to be very  
17 specific about it specifically to see if you were  
18 willing to determine to run trains only to fit into  
19 the existing sitings, until new sitings are built,  
20 what kind of delays would we have that may be  
21 different from what your RTC model says.

22 So Karen before you add in, am I being

1 clear, or am I being obtrusive?

2 MR. WARREN: I do, and Member Hedlund if  
3 you would like to add your follow-up.

4 BOARD MEMBER HEDLUND: Why don't you  
5 finish because my follow-up is for Amtrak.

6 MR. WARREN: Okay. So what I would say  
7 Mr. Chairman is first we'll be sure to address this  
8 at the hearing in March. Second, I would say you  
9 know the 2019, what our evidence shows that the base  
10 case runs in 2019. It runs, and the freight delays  
11 are not in the base case. They are when the  
12 passenger trains are added. In the 2039 case, which  
13 includes planned improvements, including the  
14 lengthening of several sidings.

15 So those lengthening's are not part of the  
16 infrastructure package that CSX is asking, it is  
17 saying it is related to passenger service. Those are  
18 the projects CSX is building, and the 2039 base case  
19 runs. So I think that's a lot of the answer to your  
20 question, and you know I would say that you know if  
21 you have you know CSX in the 2039 you know case, CSX  
22 was expecting that it's going to handle expected

1 growth by lengthening tracks by quarter frames, I  
2 didn't mean to speak over you.

3 CHAIRMAN OBERMAN: No, no I'm sorry. I  
4 thought you were --

5 MR. WARREN: I was just wrapping up. You  
6 know if you run shorter trains then you have more  
7 trains, and CSX is determined that it could run more  
8 efficiently with the longer trains, but again you  
9 know the way it's addressed in the RTC is the RTC  
10 runs a base case runs on the carrier's plan for its  
11 freight operations.

12 And what we're showing is that you know  
13 that base case runs, and it's only when add passenger  
14 to the mix that you start having issues.

15 MR. ATKINS: If I can add Chairman  
16 Oberman.

17 CHAIRMAN OBERMAN: Go ahead.

18 MR. ATKINS: We really do appreciate some  
19 of the clarity to some of the things you'd like us to  
20 focus on because the RTC model as you know is really  
21 tremendously complicated. All the details that  
22 you're asking for are actually in the work papers,

1 and we'll have our RTC experts, and the executives  
2 teasing that information out, and providing it to you  
3 so you can have a better understanding of how train  
4 lengths are being modeled, both in the base case, and  
5 as Matt said in 2039.

6 So we appreciate, we can't answer all your  
7 questions here today.

8 CHAIRMAN OBERMAN: No I don't want you to  
9 answer them today.

10 MR. ATKINS: Yeah but I can assure that we  
11 will, it's helpful for us to know where in the sea of  
12 complexity around the RTC modeling you'd love us,  
13 you'd like us to focus a bit of our attention.

14 CHAIRMAN OBERMAN: Sea of complexity is  
15 another half a phrase Ray. Is it not the case Ray in  
16 math that CSX is running 15,000 foot trains there  
17 now?

18 MR. ATKINS: No.

19 CHAIRMAN OBERMAN: Okay. Well let's be  
20 clear on what train lengths are, then I  
21 misunderstood.

22 MR. ATKINS: No, no, you heard that, but

1 we'll have genuine experts at the trial that can walk  
2 you through how long they are and in which direction.

3 CHAIRMAN OBERMAN: All right. I  
4 apparently got lost in the sea. Karen you wanted to  
5 add on to that question?

6 BOARD MEMBER HEDLUND: Yeah it's kind of  
7 the flip side of this for Amtrak going back to a  
8 question that I asked Mr. Gardner this morning which  
9 is when you say we should be given access today, and  
10 will support the construction of additional  
11 infrastructure over time to improve service, does  
12 that mean you are contemplating running trains less  
13 than 60 miles per hour, or with not you know delays  
14 of some amount before that infrastructure is put in  
15 place.

16 MS. AMUNDSON: Member Hedland our  
17 witnesses can address this in detail at the hearing,  
18 but I will say that as we disclosed in our pleadings  
19 our schedule was constructed with extra recovery  
20 time for concerns about the movable bridges, et  
21 cetera, so the schedule is a bit longer right now,  
22 but our witnesses can address that in full at the

1 hearing.

2 CHAIRMAN OBERMAN: Thank you Jessie.  
3 Karen were you?

4 BOARD MEMBER HEDLUND: That's it.

5 CHAIRMAN OBERMAN: Sure okay. I was  
6 distracted. I was looking at what I just saw that  
7 was the list of train lengths that I am told the RTC  
8 model said it was modeled on, and it looks like  
9 there are a fair number of 10,000 and 11,000 foot  
10 trains. And there are only three 10,000 foot  
11 sidings, and I assume a 10,000 foot train doesn't  
12 actually fit in a 10,000 foot siding, maybe it does.  
13 So anyway Ray you know I appreciate what you said  
14 about being able to address the modeling, if only the  
15 existing sidings -- only transit will fit into the  
16 existing sidings are used at the outset of any Amtrak  
17 service until five new sidings are built, is really  
18 the question.

19 I want to say this because we've all been  
20 really emersed in digesting the wealth of information  
21 we have, and I don't have to tell you it's very time  
22 consuming. It may be that there are some additional

1 refinements, particularly on the legal side of  
2 reading this very challenging statute, how to read A  
3 and E together and so forth, what does C have to do  
4 with it?

5           And if we want to do that we will in a  
6 very short order -- I hope within a very few days,  
7 send you an order saying please also answer the  
8 following legal question. I didn't want to assume  
9 that I would be able to capture everything that every  
10 Board member wanted to hear. We don't want to burden  
11 you too much, but if we have other, we find all of  
12 these I think are in the nature of my view of  
13 refinements, which I have covered in a lot of the  
14 papers, but aren't dealt with as fulsome layers as  
15 directly as the rest of us would like to hear. Those  
16 were all --

17           MR. WIMBISH: Mr. Chairman I would like to  
18 if I could go back to your train length questions I  
19 know that was directed to CSX and to Norfolk  
20 Southern.

21           CHAIRMAN OBERMAN: Sure.

22           MR. WIMBISH: But I'm always thinking

1 about the port.

2 CHAIRMAN OBERMAN: You should be.

3 MR. WIMBISH: That's my task here.

4 CHAIRMAN OBERMAN: I hope so.

5 MR. WIMBISH: And so what I ask as part of  
6 that, and I think it probably went without saying,  
7 but you know, just for our edification and for our  
8 protection if you're expecting, and it sounds like  
9 CSX and Norfolk Southern would accommodate the  
10 request about the ramifications of potentially  
11 running shorter trains, clearly for the port and the  
12 Mobile operations we would want to know not only what  
13 that would do for main line operations, but what  
14 that does within the two respective terminals here,  
15 particularly Mobile for us, but also New Orleans.

16 So I suspect that was probably within the  
17 scope of what you were looking for, but clearly those  
18 ramifications as far as congestion or alleviating  
19 congestion in the Mobile terminal are very relevant  
20 to us, and I hope you would be looking for that  
21 component of that explanation as well.

22 CHAIRMAN OBERMAN: Well I'm looking for

1 any enlightenment we could get, and one of the  
2 reasons that you have been granted intervention in  
3 this case is so you could make sure your concerns  
4 are addressed. So I would concur that you ought to  
5 be able to evaluate what CSX and NS are talking about  
6 as it relates to the port, the interest of the port.

7 I had no further areas that I wanted to  
8 direct the parties to. What I would like to do is  
9 first ask if any other Board member has any such  
10 inquiries, and if they don't I would like to take a  
11 very short break.

12 First of all we've been going for a while,  
13 so we can all take a breather and just clear our  
14 heads and make sure we've covered everything that  
15 needs to be covered so we can have an efficient  
16 hearing on March 9, the beginning of March 9, and  
17 give the counsel time to regroup without my peppering  
18 you in case there are things that occur to you that  
19 you want to address to us, or objections you want to  
20 make to anything that's been discussed here.

21 So I would suggest that we take a 15  
22 minute break. It's 4:04. Come back at 4:20. Is

1 everybody okay with that? Okay. We will recess.

2 Thank you Rob.

3 (Break)

4 CHAIRMAN OBERMAN: Okay we're back on the  
5 record, Matt we're back on the record?

6 IT MANAGER: Yep.

7 CHAIRMAN OBERMAN: Okay once again the  
8 most important person in the proceedings is the IT  
9 manager. So we can conclude. I think we are ready  
10 to conclude this hearing. I have a few closing  
11 observations. Do any of the parties have anything  
12 further they would like to address the Board on?

13 MR. MULLINS: Mr. Chairman?

14 CHAIRMAN OBERMAN: Yes sir.

15 MR. MULLINS: I have a process question  
16 since this is a unique process. If there are  
17 objections, rulings that need to be made you know,  
18 from the bench so to speak, and there's five of you,  
19 is this going to be a majority vote? Do you make  
20 those rulings? I mean how is that ordered?

21 CHAIRMAN OBERMAN: You've been inside our  
22 offices Bill. So I'll just be totally candid.

1 There's a sense at the Board that because I spent a  
2 fair amount of my life as a trial lawyer that  
3 everybody should look to me to make those rulings. I  
4 don't anticipate difficult rulings. I think the  
5 answer is that's a Board decision, or it's a no  
6 objection kind of vote, so that all Board members  
7 have a say in any ruling we make procedural or  
8 otherwise.

9 I think I will manage the hearing as I've  
10 managed the Pan Am hearing and this one, I guess  
11 manage is an acceptable word. Somebody has to be the  
12 orchestra leader. But I think they will be Board  
13 decisions, and so if I certainly if I am uncertain, I  
14 am going to make sure I may take a break and consult  
15 with our staff before I come back and make a  
16 recommendation to the Board, so that could happen.

17 Or you know it's an administrative  
18 hearing, so if there's an admissibility objection we  
19 could always hear the evidence, take the objection  
20 under advisement and strike it later if we find out  
21 it was inadmissible. That's a possibility. You know  
22 the goal here is to have a smooth hearing, but it's a

1 very valid question, and it is one I think that is  
2 new to us as an institution for the reasons you say,  
3 we're a five headed multi-headed monster here, and we  
4 have to manage this.

5 But that's what we anticipate, and I guess  
6 I can say in advance that if it gets screwed up it's  
7 probably on my end because everybody thinks I'll get  
8 it right.

9 MR. MULLINS: Okay thank you.

10 CHAIRMAN OBERMAN: But we've got a lot of  
11 support people to make sure I don't screw it up, so  
12 it won't be. All right.

13 MR. MULLINS: That makes sense.

14 CHAIRMAN OBERMAN: Okay. Any other  
15 inquiries?

16 MR. WARREN: I have a couple for CSX Mr.  
17 Chairman. So one of them as we were conferring  
18 during the break and talking about some of the issues  
19 that the Board would like more information about at  
20 the hearing, it occurred to us that we may not have  
21 all of the right witnesses, so it may be that on some  
22 of these points we might be asking to add a witness

1 or two.

2 And I don't know what the cut-off time is  
3 for doing that. We understand the witness list was  
4 Monday, and that's what we intended to put in, but  
5 now we know that the Board's interested in some  
6 particular issues, and we may need to supplement our  
7 witness list.

8 CHAIRMAN OBERMAN: That's a fair  
9 observation. I would say this, the sooner the  
10 better, and the sooner everybody else sends notice of  
11 what additional witnesses may be called to answer a  
12 Board inquiry the better. And of course if there are  
13 objections we'll hear them on March 9, but I'd rather  
14 you proceed as though you're going to call on the  
15 additional witness if you have to because we would  
16 really like to have the information. Everybody  
17 seems to be agreeable in providing it.

18 So that is what I would say. Does anybody  
19 on the Board have a different view about adding a  
20 witness in response to our inquiries, not the parties  
21 concern? Okay. So let's do that.

22 MS. AMUNSON: Mr. Chairman?

1 CHAIRMAN OBERMAN: Yes.

2 MS. AMUNSON: Could I just ask if the  
3 parties are disclosing additional witnesses that they  
4 also provide a summary of what that witness is  
5 expected to testify to, just so that all the parties  
6 can have notice of why this additional person is  
7 being designated?

8 We had been operating under the assumption  
9 that the witnesses designated would be those who had  
10 already submitted verified statements to the Board.

11 CHAIRMAN OBERMAN: An excellent  
12 suggestion Jessie, the kind of summary you might have  
13 under local disclosure rules would probably be enough  
14 subject matter or response to an inquiry from the  
15 Board. I think that's a perfectly appropriate  
16 request, and so I'd ask whoever comes in with an  
17 additional witness to give enough of a summary so  
18 opposing counsel knows what's going on.

19 MR. WARREN: Yes that makes sense.

20 CHAIRMAN OBERMAN: Yeah. On this point  
21 about additional information, and I thought about  
22 this too during the break, it's one of the reasons I

1 took a break to clear my head. When you get back to  
2 us about the train length issue and using existing  
3 sitings, because the RTC model is based on the 2019  
4 operations, but if we issue an order this year it  
5 will be in favor of Amtrak if we were to do that.

6 They will be inserting trains on the 2022  
7 operations, so I would request that you look at the  
8 current train lengths if they're different from the  
9 ones that went into the RTC model. And that may be  
10 the reason we've heard different numbers, I don't  
11 know, but you should I would assume have updated  
12 information.

13 Any other inquiries, questions from  
14 counsel?

15 MR. WARREN: One more for me.

16 CHAIRMAN OBERMAN: Yeah.

17 MR. WARREN: This was at the back of our,  
18 the parties joint report is we've asked about what  
19 the Court Reporting arrangements would be. You know  
20 we're obviously aren't going to be a Courtroom where  
21 we're going to have a reporter right there that we  
22 can you know ask to read back something in the

1 record, and you know this may be something that we  
2 should take up with staff, but we had some questions  
3 about what the Board was going to be doing, and  
4 whether there's going to be any kind of a real time  
5 transcript, or you know, how that was going to work.

6 CHAIRMAN OBERMAN: You know Matt I think  
7 that is an excellent question. I have not thought  
8 about it, and I have no idea. So let's -- is there  
9 anybody on staff who wants to step up the plate now,  
10 or should we just I think the question needs to be  
11 answered Matt, and it should be answered well in  
12 advance of the hearing, so everybody understands.

13 Particularly with Zoom, and somebody's  
14 internet connection is not good you may definitely  
15 have to read a question back, or an answer back. If  
16 staff has an immediate answer fine, otherwise we'll  
17 ask staff to get in touch with the lawyers as fast  
18 as possible and work out the logistics of that.

19 MR. WARREN: Okay.

20 CHAIRMAN OBERMAN: is there anybody on  
21 staff who wants to answer the question?

22 MS. CAMPBELL: It's Rachel. You know we

1 had a Court Reporter for this proceeding, and you  
2 know we were anticipating a Court Reporter for the  
3 hearing on the 9th, and we will work out process wise  
4 with the Court Reporter, you know, what their  
5 practice is regarding Zoom, evidentiary hearings.

6 CHAIRMAN OBERMAN: All right thank you  
7 Rachel.

8 MS. CAMPBELL: Yep.

9 CHAIRMAN OBERMAN: And we'll get back to  
10 counsel.

11 MS. CAMPBELL: Yeah.

12 CHAIRMAN OBERMAN: I'm sure there's a way  
13 to do this because many lawyers I know have been  
14 trying, for these bench trials on Zoom, during the  
15 pandemic and so this problem has undoubtedly been  
16 dealt with by the Court Reporting world, and I'm  
17 sure they have a way of grappling with this. What  
18 that way is unfortunately I don't have to worry about  
19 yet, but I will.

20 But let me just --

21 BOARD MEMBER FUCHS: I only know Marty  
22 that I have benefited from the closed captioning that

1 we have had in real time during the public phase.

2 CHAIRMAN OBERMAN: Oh really oh, I haven't  
3 even turned that on because I don't know how to do  
4 it. It's not a bad idea though for counsel, maybe  
5 you've all been using it. Let me draw this session  
6 to a close by first of all thanking everybody, but  
7 particularly the parties. This is a long couple of  
8 days, we've challenged you with a number of matters,  
9 and you've all been very professional and responsive,  
10 and speaking for myself, and I'm sure for the Board  
11 and the staff, you know I much appreciate it, and  
12 it's a shades of a good productive positive hearing  
13 setting coming forward on March 9.

14 I would only say, and this is partially in  
15 response to a query that Ron Wimbish made in response  
16 to my requesting that Amtrak come forward with  
17 whatever plans it has about infrastructure that the  
18 Board is always encouraging settlements of any case  
19 that comes before us of any kind. This one is no  
20 different.

21 And I've thought about this just as we're  
22 wrapping up here. We've asked you to look at a

1 number of things involving bridges, high rails, Coast  
2 Guard, train lengths, what Amtrak has plans for  
3 infrastructure, and all of those together may lead to  
4 the parties being able to get this matter resolved,  
5 and if you were able to do that, that would be great.

6           And so Rob it may be that when you hear  
7 from Amtrak rather than objecting, you like what they  
8 have to say, so I wouldn't want to prejudge anything,  
9 but I would encourage the parties to go forth from  
10 this proceeding with a positive view despite all of  
11 the complaints about the past history, put it behind  
12 you. It's a new day, and see if you can't try to  
13 work this out, keeping in mind my admonition about  
14 the public interest.

15           So I will leave you all to your best  
16 instincts, you're all experienced, seasoned,  
17 thoughtful and smart counsel go to it.

18           MR. WIMBISH: Chairman Oberman on that  
19 note I appreciate you mentioning that. Supposing in  
20 connection with your admonition, and I know this  
21 agency's strong preference for negotiated solutions  
22 to issues like this. Supposing in this case, and I

1 know again this is just a hypothetical, and again  
2 admittedly off the top of my head, but if the parties  
3 were willing to do that and wanted your good offices  
4 to help facilitate that, would this Board be willing  
5 to facilitate some sort of a multi-party mediation  
6 if that was the parties inclination?

7 CHAIRMAN OBERMAN: I have to ask my  
8 counsel for advice. We're very cognizant of the time  
9 that has elapsed in this whole matter since 2005  
10 really, but if it really would facilitate a  
11 resolution that's always on the table. So I wouldn't  
12 rule anything out Rob.

13 I wouldn't answer it today. You know I go  
14 back to the days when the trial judge says before we  
15 pick a jury let's get this case settled, and we go  
16 into chambers, and they knock heads together and it's  
17 done. I'm not sure I'm allowed to do that. I've  
18 been tempted I will say on other cases, but  
19 settlements are always to be encouraged. Patrick?

20 BOARD MEMBER FUCHS: I though Ray was  
21 going to jump in with a response to that as well.

22 MR. ATKINS: Just on record Chairman

1 Oberman, the CEO mentioned today that we, CSX would  
2 be pleased to participate in Board sponsored  
3 mediation if all the parties were so inclined.

4 CHAIRMAN OBERMAN: Yes I did hear him say  
5 that. I appreciate that. All right. With that does  
6 Amtrak want to address the question of a potential  
7 negotiation with or without formal mediation, or do  
8 you want to think about it? I don't want to put you  
9 on the spot, so.

10 MS. AMUNSON: Mr. Chairman we appreciate  
11 your sentiments. As you alluded to this has been  
12 going on since 2005, and there have been many  
13 attempts made, and as you've heard Mr. Gardner say,  
14 that's why we brought this case to the Board because  
15 we feel that that is what is needed, a decision from  
16 the Board.

17 CHAIRMAN OBERMAN: All right. Well  
18 nothing is off the table in terms of the lawyers  
19 talking to each other. Lawyers often have to bring  
20 their clients around. We've all done that, so I  
21 invite you to do it if you think it will be  
22 productive, but no burden on anybody. It won't

1 prejudice us at all as to how we conduct the hearing,  
2 but if you solve it I think everybody will be ahead.

3           So with that we will I think formally,  
4 somebody told me on staff if I'm wrong, that the  
5 formal resolution today to recess until 9:30 a.m. on  
6 March 9. This is all one proceeding. So if there is  
7 no objection we will recess. Thank you all again.

8           (Whereupon the Board is in recess at  
9 4:37 p.m.)

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