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Office of Proceedings
March 3, 2023
Part of
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Date: September 29, 2022

Case: Proposed CP/KCS Merger



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SURFACE TRANSPORTATION BOARD
Hearing on the Proposed CP/KCS Merger
Docket No. FD 36500
REMOTE PUBLIC HEARING

Thursday, September 29, 2022

9:00 a.m.

Surface Transportation Board
395 E Street, S.W.
Washington, DC

The above-entitled matter came on, pursuant to notice, at 9:00 a.m., Chairman Martin Oberman presiding.

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

2 CHAIRMAN OBERMAN: All right. Good
3 morning everyone. We are back on the record, and I
4 have a few preliminary announcements. Pat, my
5 microphone is on. If you can't hear me we're in
6 trouble. When I was in the Chicago City Council
7 they gave me a gigantic red megaphone because Mayor
8 Daley used to cut off your microphone if he didn't
9 like what you were saying, literally, and I learned
10 to speak very loudly. I never brought the megaphone
11 there, but I still have it.

12 So, that was a long time ago. A few
13 preliminary announcements. It's quite clear that we
14 are not going to be able to finish all of the
15 witnesses during today's and tomorrow's session, and
16 we have asked a number of witnesses who were
17 testifying virtually, what their flexibility is.
18 And fortunately, a number of them have some
19 flexibility, and so our anticipation is once we hear
20 from all of those people today we will reorganize the
21 schedule for some of the virtual witnesses, and
22 convene virtually, probably around mid-day on Monday.

1 Long before then we'll give you the
2 specifics of how that is going to work out, so
3 everybody knows what the order of witnesses is, and
4 what the time is, and if we need time we'll go over
5 to Tuesday morning and finish in advance of the
6 beginning of Yom Kippur on Tuesday afternoon.

7 But it seems realistically that that's
8 what's going to happen. Number two, we do plan to
9 finish enough witnesses that we will hear at least a
10 major part of CP's rebuttal, CP/KCS's rebuttal case
11 in person before we leave here tomorrow, and we're
12 just going to have to see how the schedule works out.
13 But if we haven't finished all the other witnesses,
14 we will plan to give CP some additional rebuttal time
15 after the last witness because as the applicant they
16 do, and should normally have the last word.

17 One other thing I had meant to mention at
18 the end of Metra's presentation yesterday, and I
19 wanted to see if they were still here. Hopefully
20 they're listening virtually. I know there were
21 issues raised about some evidentiary matters that
22 were part of Metra's presentation. I'm not sure

1 there was any issues still to be resolved, but I
2 wanted to let CP know that CP certainly has the
3 liberty to raise any issues they had on an
4 evidentiary basis to Metra's presentation yesterday.

5 That's not foreclosed, just because we
6 listened to it. If you have any. If you don't,
7 fine, but I wanted to let people know because of the
8 nuances of the evidentiary motions that I think we
9 ruled on one of them before the hearing started, and
10 I didn't hear from CP during that presentation, so if
11 you have anything to say about it evidentiary-wise
12 you're free to do that.

13 David, you're not on the record, that's
14 the problem.

15 MR. MEYER: Chairman, we will be filing a
16 letter addressing that issue, just a short letter.
17 We do object to that. I didn't think it would be
18 appropriate to stand up yesterday and try and
19 intervene in the middle of their presentation, but it
20 was the case that many, if not most, of the RTC
21 related slides were exactly the evidence that just
22 the day before the Board told Metra they were not

1 allowed to put it in the record. We'll address that
2 then.

3 CHAIRMAN OBERMAN: Well to me the issue is
4 still somewhat murky, David, because we did tell them
5 that they were free to make their arguments in both
6 their oral presentation and their closing brief. So
7 we have to sort it out, and that's what I didn't want
8 to foreclose you from sorting that out.

9 MR. MEYER: Chairman, we'll address this
10 argument, but not evidence. And I think there's a
11 very important distinction, but we'll address it.

12 CHAIRMAN OBERMAN: I'm aware of that
13 distinction. I wasn't sure I could always tell where
14 the line was drawn, that's why I wanted to give you
15 the opportunity to address it. With that we are
16 going to begin this morning with two of yesterday's
17 witnesses, and mentioned, and then we will go right
18 into Panel 9.

19 First up is let me get my -- first up is
20 Canpotex Limited, represented by, I'm not going to
21 say this well, Vidyadher Kachroo, who is testifying
22 virtually. Mr. Kachroo are you there?

1 MR. KACHROO: Hi Mr. Chair.

2 CHAIRMAN OBERMAN: All right. Proceed.

3 MR. KACHROO: Thank you. Good morning to
4 you all. Mr. Chair and Board Members I want to thank
5 you for the opportunity to speak to you today in
6 support of this CP/KCS combination. My name is Vee
7 Kachroo, I'm the Senior Vice President of Operations
8 for Canpotex, Limited.

9 Canpotex -- (Webex interference) was
10 founded in 1972, and proudly celebrating our 50th
11 year of nourishing the world. The cornerstone of our
12 offering to our customers is great poly products
13 delivered in a reliable and cost-effective manner.

14 As the need for potash continues to grow,
15 our volumes are growing. We're shipping over 13
16 million tons -- 13 million metric tons of potash
17 around the world to countries like Brazil, India,
18 China, Malaysia, Indonesia, Australia and 40 other
19 countries. Transportation logistics is a key part of
20 what we do and it's deeply important to us.

21 Our investments into our supply chain is
22 significant. For example, we currently operate a

1 fleet of more than 6,500 railcars, and keep them in
2 safe working order at our own rail maintenance
3 facility in Saskatchewan. As our volumes grow we
4 will continue to invest in increasing the size of our
5 fleet, using railcar manufacturers in Canada, the
6 U.S. and Mexico, and we see significant growth in
7 2023 for railcars.

8 Our potash moves by rail from mine
9 locations in Saskatchewan to our terminals in the
10 ports of Vancouver, British Columbia, Portland,
11 Oregon and St. John, New Brunswick. As well, we use
12 the Port of Thunder Bay.

13 At these terminals our potash transfers
14 from rail cars to a storage shed, or directly to
15 ocean-going vessels which we charter. CP originates
16 over 75 percent of our rail business. And as
17 recognized by the Board yesterday multiple times, we
18 can also attest with the reliability service levels
19 from CP that we receive today.

20 As such, the CP/KCS combination is
21 exciting for us because it opens up possibilities
22 that do not exist today. First, the CP/KCS

1 combination will expand CP's reliable service to a
2 new, single line option to the U.S. Gulf Coast,
3 served by the KCS network currently.

4 Shipping via Gulf ports is onerous with
5 the existing rail options that we have available to
6 us. Access to the Gulf by CP/KCS new single line
7 offering, however, changes the calculus. It gives
8 us additional port optionality, and will expand our
9 market reach by offering new competitive
10 transportation options for our shipments of potash to
11 existing and new customers around the world, but with
12 even more focus on Latin America, Brazil, Mexico, and
13 other countries in Central South America.

14 The world demand for our Canadian origin
15 products will continue to be on a strong growth
16 trajectory over the coming years. Currently there is
17 a significant gap in world potash supply due to
18 sanctions against Belarus, which currently produces
19 about 20 percent of the world's export flow of
20 potash.

21 And due to the war conflict in Ukraine
22 it's also hampering the flow of Russian potash, which

1 is another 20 percent of the world's export supply.
2 And even if these sanctions and conflicts ended
3 today, it could take several years for my production
4 and the supply chains in these countries to return to
5 normal levels.

6 Canpotex and CP/KCS, with a new routing by
7 a Gulf port terminal could help supply necessary
8 potash for agriculture around the world. With
9 this, additional export terminal capacity is a
10 requirement for reliable, resilient, supply chains.
11 And as I indicated the previous facilities, that's
12 part of how we get our product to market.

13 Adding port optionality will shore up our
14 ability to supply new parts of the world when supply
15 chains are impacted, or tested by severe weather
16 events. Recoverability is something we think about
17 and discuss with our rail partners. We had multiple
18 weather events in 2021 in western Canada,
19 specifically British Columbia last year, and terminal
20 optionality and routes that were preplanned to
21 develop with CP were extremely helpful for us to
22 recover those volumes, and we continue to see more

1 weather related events occurring with more frequency
2 as in recent years.

3 With strong growth in the South American
4 markets the Gulf is ideally positioned for us. We've
5 been testing several different U.S. port options this
6 year, and have not found one where the economics are
7 favorable. The single line haul made possible by the
8 combination of CP and KCS will create a seamless
9 connection between origin and Saskatchewan, and
10 destination with faster car cycles and more effective
11 freight rates, and will be the impetus for Canpotex
12 to commit volumes to an export terminal in the Gulf.

13 We are currently in discussions with CP
14 regarding this potential, and could move forward
15 should the merger be approved by the STB. We're also
16 excited to explore the possibility of delivering some
17 of our products to Mexican customers by rail as an
18 alternative to our current supply chain.

19 As you know CP/KCS will be the first
20 railroad connecting Canada, the U.S. and Mexico, and
21 this overland route has not existed before in this
22 manner. In short, Canpotex supports the CP/KCS

1 combination because it will expand service by an
2 already trusted rail partner, and enhance the
3 reliability and resiliency for our supply chain to
4 our customers.

5 This will create new reach, creating new
6 possibilities for us to support the growing volumes
7 for the environments we serve around the world. We,
8 therefore, respectfully, urge the Board to approve
9 the combination. Thank you again for the
10 opportunity to speak as part of the CP/KCS
11 combination, thank you. Are there any questions?

12 CHAIRMAN OBERMAN: Thank you sir.
13 Appreciate your flexibility.

14 ,MR. KACHROO: Thank you. Take care, have
15 a great day.

16 CHAIRMAN OBERMAN: Next up is Joel Kennedy
17 of Unifor.

18 MR. KENNEDY: Good morning Mr. Chair, and
19 Board Members. My name is Joel Kennedy. I am a
20 national representative of Unifor, Canada's largest,
21 private sector union. We have nearly 315,000
22 members who work across almost every industry in

1 private sector. Specifically, in the rail sector, we
2 represent nearly 10,000 employees working in
3 ticketing offices, passenger rail service,
4 engineers, conductors, electricians, mechanics, et
5 cetera.

6 Thank you to the Board for providing us
7 with opportunity to provide our comments supporting
8 the CP/KCS merger. Unifor is for the merger of Canadian
9 Pacific and the Kansas City Southern Railway merger,
10 and we would also ask the Board rule the same.

11 This is potentially one of the last possible
12 mergers in North America, and is of great
13 significance in post-pandemic planning in strategic
14 North American supply chain protection. The merger
15 between CP and KCS will bring more rail competition
16 for shippers, and consumers in North America. This
17 venture will also unlock new markets and more
18 products for consumers living in all three countries.

19 Also, with the Canadian Pacific and Kansas
20 City Southern merger, forms a single rail line
21 between Canada, United States and Mexico, with
22 increased intermodal and passenger rail services. In

1 our view, one the merger's most relevant, significant
2 benefits is reducing the number of trucks and other
3 vehicles off highways, and helping protect our
4 environment by reducing carbon and other greenhouse
5 gas emissions, providing more sustainable mode of
6 transportation.

7 Another significant benefit to the public,
8 and one I must add emphasis to, is with the increase
9 of freight and passenger rail traffic volumes, is the
10 creation of good-paying jobs, and employment
11 opportunities in all three countries, Canada, the
12 United States, and in Mexico.

13 In terms of existing jobs the applicant
14 has satisfied us by committing to either honoring or
15 improving existing employee protective conditions,
16 such as job security, employment security, providing
17 family/work life balance, and competitive wages.

18 Finally, the COVID-19 pandemic exploited
19 many things, including the global supply chain in
20 particular, in North America, the availability of
21 shipping containers diminished, driving higher
22 consumer costs and limited products, and shipper

1 availability. But the merger of CP and KCS, a single
2 rail line will be developed between Mexico, the
3 U.S.A. and Canada, giving North America greater
4 control and security of its own supply chain, and
5 reduce reliance on other foreign markets. Thank you.

6 CHAIRMAN OBERMAN: Thank you Mr. Kennedy.
7 And again we appreciate your flexibility in adjusting
8 the schedule.

9 MR. KENNEDY: Thank you sir.

10 CHAIRMAN OBERMAN: Any questions for Mr.
11 Kennedy? All right. Thank you very much. All
12 right. So we will now proceed to Panel IX, and that
13 is Ron Reynolds, Texas State Rep; Rodney Ellis,
14 Harris County Commissioner; and Robert Gallegos, a
15 Houston City Council Member. Are you all here?
16 Okay. Come up to the panel please.

17 MR. REYNOLDS: And Ron Reynolds is
18 appearing virtually.

19 CHAIRMAN OBERMAN: Oh, okay, Mr. Reynolds,
20 why don't you lead off.

21 MR. REYNOLDS: Thank you. Good morning,
22 and thank you for the opportunity to speak in front

1 of the Board today. My name is Ron Reynolds, and I'm
2 a six-term State Representative from Southeast Texas. Earlier
3 this month I was elected Chair of the Texas Legislative Black
4 Caucus, and also serve as Chair of the Texas House
5 Progressive Caucus.

6 I have represented Texas House District 27
7 for nearly 12 years. I know this community. I know
8 this region, and I know the challenges that we face.
9 As proposed, the pending acquisition between Canadian
10 Pacific Railway and Kansas City Southern will have
11 detrimental effects to the most marginalized Texans
12 in Harris and Fort Bend counties, two of the most
13 diverse places in the country.

14 This is only the latest in a long history
15 of environmental injustice for the benefit of
16 corporate interest. Before discussing the merger
17 itself, I'd like to say a word about the process. I
18 remain concerned about the lack of engagement with
19 local leaders in Southeast Texas regarding the
20 merger.

21 Harris County Commissioner Rodney Ellis,
22 who is before you now, has sent no fewer than three

1 letters to the Board requesting site visits, asking
2 for public hearings, and suggesting mitigation
3 measures. His office did not receive as much as an
4 acknowledgement of his letters.

5 Earlier this month nine of my Southeast
6 Texas colleagues in the Texas House and I sent a
7 letter urging the Board to hold an in-person hearing
8 in Houston. I submitted the letter twice through
9 the STB's online filing system, and called to confirm
10 that it had been received.

11 Despite this, as of today, our public
12 comment has not been published, and we have not
13 received a call from STB staff as promised. While
14 I'm glad that the Board moved this monthly in-person EIS
15 hearing from Vidor, Texas, a well-known sundown town,
16 to Beaumont, this meeting alone was insufficient for
17 the working families in my district and in Harris
18 County, driving almost 100 miles one way was just not
19 possible on a week night.

20 While I understand that this hearing is
21 intended to discuss the public interest, rather than
22 the environmental effects, I would argue that the

1 public interest in Southeast Texas cannot be
2 separated from the tenants of environmental justice
3 and health. Harris County already struggles with
4 industrial air pollution, and its health
5 consequences.

6 The merger compounds existing pollution at
7 a time when Southeast Texas needs to be improving air
8 quality, not worsening it. Harris County is already
9 a non-attainment area for ozone, and is nearing
10 non-attainment status for PM 2.5, additional
11 pollutants can lead to severe health risks.

12 According to the EPA, the small particle
13 generated by the trains pose the greatest problems.
14 Exposure to PM 2.5 can harm both the lungs and heart,
15 leading to many health risks, including premature
16 death in people with heart or lung disease, non-fatal
17 heart attacks, irregular heartbeat, aggravated
18 asthma, decreased lung function, and increased
19 respiratory symptoms such as irritation of the
20 airways, coughing or difficulty breathing.

21 And Houston's Fifth Ward, where residents
22 already endure population from multiple industrial

1 sources, asthma and cancer rates for the majority of
2 black and brown communities, far exceeds surrounding
3 areas, and life expectancy is a full decade lower.

4 I am also concerned about the impacts of
5 increased train traffic through our communities. STB
6 analysis projects an additional eight trains per day
7 as a result of the merger. That's nearly 3,000
8 additional trains per year running through 890
9 at-grade crossings in Harris County. Despite Canadian
10 Pacific's promises to run shorter trains, the average
11 length of their freighters in late 2021 was 1.5 miles
12 long, more miles long means more traffic, which
13 impacts everything from a worker's daily commute to
14 response times in emergency situations.

15 First responders up and down the proposed
16 line have voiced their concerns about the impact on
17 emergency response. The Board's impact study
18 minimizes three concerns, but first responders have
19 stated that even a split second delay could mean the
20 difference between life and death. I have yet to
21 hear a satisfactory response to these concerns from
22 the railways or the Board.

1 And I know my time is up, so I'll just get
2 to the conclusion. Despite all of this, the safety
3 issues, the environmental risk, the health concerns,
4 Harris County has largely been overlooked from the
5 public comment period, even though at nearly 5
6 million strong, it is the largest population center
7 along the proposed lines.

8 The acquisition of Kansas City Southern by
9 Canadian Pacific is not in the public interest of
10 Southeast Texas. It is only in the interests of the
11 railways, and their bottom line, and I urge the
12 Surface Transportation Board to reject it. And I
13 thank you for your time and your consideration.

14 CHAIRMAN OBERMAN: Representative
15 Reynolds, thank you very much. And I have to say I
16 would be extremely concerned if our staff did not
17 respond to any citizen, but particularly an elected
18 representative. And I think there must have been
19 something lost in the transition, but maybe
20 Commissioner Ellis can enlighten us on this because
21 back in July I think we did miss, Commissioner, your
22 first message.

1 But it's my understanding that our
2 environmental office did email you back in July in
3 response to your inquiries, and you know, certainly
4 we respect every citizens, and if it isn't happening
5 I want to know about it. But I think we did get back
6 to you, and maybe you could enlighten us on that, but
7 I do appreciate the issues you've raised
8 Representative, and if there are no questions we'll
9 move on to Commissioner Ellis. I'm sorry Robert?

10 BOARD MEMBER PRIMUS: I don't have a
11 question, but I just want to echo what Marty just
12 said. We do take this very seriously, especially
13 with the public and community's input, and I'm going
14 to follow-up, and I'll talk to our folks as well. I
15 know even coming down like I said we had moved it
16 from Vidor. I think that was an error on our part,
17 and we moved it closer into Beaumont.

18 Whether or not we should have looked at
19 other, or other ways to address. And I'm from New
20 Jersey, so I'm not from Texas, of not knowing the 100
21 miles. You know I get mad when I have to drive ten
22 miles, so I certainly understand that. But I'm happy

1 to look into that further.

2 CHAIRMAN OBERMAN: By the way I would add
3 that I'm sympathetic to not having had more site
4 visits, but there's I think 12,000 loop miles here,
5 and we couldn't hold hearings everywhere in the
6 country. I thought this particular matter was so
7 crucial to the public interest, as well as to the
8 rail network specifically, that I concluded that
9 Board Members should be out attending these
10 meetings.

11 And actually Board Member Hedlund and I
12 were at the meeting in Beaumont, and I am sympathetic
13 to the fact that we couldn't be everywhere all the
14 time. I will say I was somewhat disappointed that
15 there weren't more people in Beaumont, and maybe
16 it's for the reason that you said, Representative,
17 but we did hear from some very forceful witnesses on
18 behalf of the community there.

19 I also attended all of the other regional
20 environmental hearings, as did each Board Member
21 attended one with me. So we've tried to get out
22 there, but you know it's a big country. We can't be

1 everywhere all the time. We did I think, the best we
2 could. But we do appreciate your views. Thank you.

3 MR. REYNOLDS: Thank you.

4 CHAIRMAN OBERMAN: Commissioner Ellis?

5 COMMISSIONER ELLIS: Thank you Mr.

6 Chairman and Members. I'm Rodney Ellis, and I'm a
7 member of Harris County Commissioner's Court. I've
8 been in politics a long time. I'm a former Houston
9 City Council Member, State Senator for 26 years.

10 And as a County Commissioner in Harris
11 County, we're slightly smaller than Cook County. So
12 that means if we were a separate state, we'd be the
13 25th largest state in the country. Part of the
14 concern about a hearing in Houston was in part driven
15 by the decision to have a meeting in Vidor. And
16 Representative Reynolds pointed out a sundown town by
17 the way, is one where when I was in graduate school,
18 there was a billboard up saying people who look like
19 me don't get caught when the sun goes down in that
20 town, in Vidor.

21 Beaumont is a great town. No disrespect
22 to them, but how a decision was made not to have one

1 in Houston, when there's such tremendous impact there
2 is just very troubling. And I'm going to be here for
3 several days and would be more than happy to get with
4 your staff. And I have staff here, but I appreciate
5 the work. I know how tough it is as an ex-City
6 Council member in particular.

7 But look, I appreciate you letting me come
8 here. My precinct has 1.2 million people in it, many
9 live inside the city limits of Houston, some do not.
10 Many of whom have been born with disproportionate
11 burdens from pollution, illness, and inaccessibility
12 because of existing activity by freight corporations
13 in our region. I know how important they are.

14 I happen to have worked on the North
15 American Free Trade Agreement, and got a lot of my
16 friends in labor angry. I was supportive of it when
17 I was in the State Senate. My office has already
18 engaged with the Surface Transportation Board
19 environmental review process with this merger. So
20 far the process has failed to adequately assess the
21 potential harm of this merger on America's third
22 largest county.

1 The transportation merits, or demerits of
2 this merger, are necessarily interwoven with the
3 environmental and public health impacts that it will
4 have if it's approved. It would be irresponsible in
5 my judgment to discuss the impact of adding more
6 railcars without mentioning the attending delays, the
7 increase in emissions, and the risk of a crude oil
8 spill.

9 We know in our region in particular, those
10 possibilities are real. The health and quality of
11 life for our constituents depends on strong
12 regulation. That's why two weeks ago the Harris
13 County Commission's Court passed a resolution
14 affirming our commitment to seeking equitable and
15 proportional mitigation should this blockbuster
16 merger be approved.

17 I want to give you a sense of how existing
18 train traffic impacts Houston residents. Waste
19 removal schedules in many neighborhoods are
20 complicated by stalled trains. One vendor has a
21 referenced delays of several hours that prevent that
22 truck from accessing neighborhoods and delivering

1 waste to landfills.

2 The City of Houston's Fire Department, the
3 department which serves many of my constituents, has
4 been forced to detour over 3,000 routes in three
5 years because of trains stalled at grid crossings.
6 These blockages don't just make it harder to deliver
7 essential services, and respond to emergencies, they
8 also create risk.

9 At several locations in my precinct,
10 children traveling from school on foot, race across
11 tracks when they see a train approaching, and hop in
12 between stalled cars to reach their destination.
13 Oftentimes the destination is school. Train traffic
14 in one such residential neighborhood will increase to
15 51 trains a day if this merger is approved, turning a
16 burdensome reality into an untenable situation.

17 Freight and rail corporations currently
18 operating in our region claim that service is just
19 sufficient for current levels of activities. But the
20 concerns of my constituents compel me to disagree.
21 Anticipated impacts of any increases in activity must
22 be offset by strong mitigation, including investments

1 in capital improvements.

2 I find it troubling that the applicants
3 have not extended themselves to study the impacts of
4 that merger, or the impacts it will have on 4.68
5 million residents, on proposed capital improvements
6 to the Houston complex. I expect, and hope that as
7 regulators, the Board will mandate such a study, and
8 condition any approval of the merger on equitable,
9 and proportionate mitigation for impacted
10 communities.

11 Doing so is not only within the Board's
12 power, but it is also morally imperative given the
13 vast influence of freight corporations on the lives
14 of everyday Americans. I appreciate all of you being
15 here, and being so attentive. I would be more than
16 happy to answer any questions, or defer to my
17 colleague.

18 CHAIRMAN OBERMAN: Thank you Commissioner.
19 Does anyone have any questions? Robert?

20 BOARD MEMBER PRIMUS: I just have one
21 quick question. What area is seeing, is potentially
22 seeing 51 trains a day? What area of Houston?

1 COMMISSIONER ELLIS: It will be on the
2 east end and near Fifth Ward.

3 BOARD MEMBER PRIMUS: And do you know how
4 many trains a day they are currently incurring?

5 COMMISSIONER ELLIS: I do. I know I have
6 it in my submitted testimony. I'm not sure if my
7 genius staff would have to pass me a note, but I
8 think in my footnote here it is. It says here
9 stalled trains, eastern drivers are tracking delays
10 themselves, and the City of Houston. This is an
11 article from the Houston Chronicle by Doug Bigley,
12 May 14, 2022. And we'll submit my testimony, if we
13 have not already, and there's a link to it.

14 BOARD MEMBER PRIMUS: Okay. So the 51
15 trains are from the newspaper article?

16 COMMISSIONER ELLIS: Yeah. Well no here
17 it is, Draft Environmental Impact Statement prepared
18 by the Surface Transportation Board, so train traffic
19 is one such residential neighborhood it will increase
20 to 51 trains a day if this merger is approved. So
21 we're pulling that from the Draft Environmental
22 Impact Statement proposed by the Surface

1 Transportation Board.

2 CHAIRMAN OBERMAN: (Off mic) Do you --
3 you probably don't have it with you but I would be interested
4 to know where blockages are now are that's KCS trains or
5 whose trains they are because there are a lot of trains that
6 go to Houston.

7 COMMISSIONER ELLIS: Yeah. We can submit
8 it. I'm not sure which ones, be we documented it. I
9 know that our County legal department is doing a more
10 thorough environmental assessment. I don't know how
11 long it will take them to complete it, but once the
12 Commission has passed a resolution, they're digging
13 in, and they're digging with the numbers. They leave me
14 with the big pictures.

15 You can recall as a former Council Member,
16 you let the bureaucracy dig in deep and put a face on
17 it.

18 CHAIRMAN OBERMAN: I am partial to Council
19 Members.

20 COMMISSIONER ELLIS: Well that's the way I
21 started if there's Councils in this process.

22 CHAIRMAN OBERMAN: Current and former.

1 Member Karen Hedlund has a question.

2 BOARD MEMBER HEDLUND: Commissioner, I, as
3 was mentioned, I had the privilege of going to
4 Beaumont, and I would second the testimony in
5 Beaumont was very forceful, and your name was
6 mentioned, so I'm very happy to see you here today.
7 Thank you for coming so far to visit us, and bring
8 your concerns to us.

9 COMMISSIONER ELLIS: Thank you. I
10 practiced law with a Beaumont firm, so I'm always
11 sensitive, and Beaumont's such an important region
12 obviously. It has a declining population, but in
13 terms of that port, it's a major economic hub in our
14 region, but most of them people, a good number of
15 people in Beaumont and Orange by the way, commute to
16 Houston, if they're working class people, and then go
17 back.

18 BOARD MEMBER HEDLUND: Thank you.

19 CHAIRMAN OBERMAN: Yeah. All right. Any
20 further questions? Okay. All right. Commissioner
21 if you would turn your mic off, we're ready for Mr.
22 Gallegos.

1 MR. GALLEGOS: Thank you. Chairman
2 Oberman, Members of the Surface Transportation Board,
3 good morning, and thank you for this opportunity.
4 I'm Robert Gallegos, Houston City Council Member for
5 District I, and I'm here this morning representing
6 the City of Houston, along with State Representative
7 Reynolds and County Commissioner Ellis, to express
8 our shared concerns regarding the proposed merger
9 between Canadian Pacific Railway and Kansas City
10 Southern Railway.

11 We at the City of Houston oppose the
12 merger as proposed. As has been reported, the
13 proposed merger will funnel additional freight trains
14 through an increasingly busy Houston railroad
15 complex, which will cause further congestion, and
16 have significant impacts across numerous communities,
17 including historically underserved and socially
18 vulnerable neighborhoods in the City of Houston.

19 As the Surface Transportation Board may be
20 aware, Union Pacific Railroad and BNSF Railway own
21 most of the tracks in Houston. Both companies
22 maintain extensive operations, and have a

1 significant presence in our city. Over the last few
2 years communities in Houston, especially on the East
3 side, which I represent, have had to live with the
4 problems and nuisances stemming from increasingly
5 busier railroad tracks.

6 From impacts on public safety, mobility,
7 air quality, and noise, the community is experiencing
8 adverse effects in many ways, and this merger will
9 make things worse by bringing even more freight
10 trains through the middle of Houston, a city of 2.3
11 million residents. But let me focus on a couple of
12 important points today.

13 Impacts on mobility and emergency
14 response. Our community has been impacted by more
15 trains and longer length trains, occupying railroad
16 tracks and crossings that block major thoroughfares,
17 and neighborhood access points lasting from several
18 minutes to hours.

19 Prolonged blockages, and associated
20 disruptions are not rare, isolated occurrences. In
21 fact, through a new smart camera pilot program the
22 City of Houston launched earlier this year, we had

1 documented multiple instances in which major
2 thoroughfares, specifically those vital to Houston
3 emergency response have been blocked for hours at a
4 time.

5 Let me be clear, blockages have become
6 increasingly frequent and excessive. This leaves
7 motorists stranded, prompting unsafe motorists and
8 pedestrian behavior, and too frequently forces
9 emergency responders to scramble to find alternate,
10 longer routes. Let me give you some numbers across
11 our city.

12 The Houston Fire Department reported 905
13 incidents in 2019, in which first responders had to
14 reroute, or were delayed by trains occupying critical
15 crossings. That number grew to 974 in 2020, and
16 surged to nearly 1,400 reports in 2021. That trend
17 has remained consistent year to date with almost 900
18 incidents reported as of September 27, 2022.

19 The impacts on emergency response, coupled
20 with unsafe motorist behavior have elevated advanced
21 costs by freight trains to become a threat to public
22 safety. This concern, and our requests for

1 assistance and mitigation, have been repeatedly
2 reported to the railroad companies and the Federal
3 Railroad Administration.

4 As I have already noted, the Houston
5 terminal has experienced congestion issues with only
6 a minor increase in its yearly average of trains. So
7 what will happen when the merger increases traffic?
8 Even more troubling to us at the city is the fact
9 that the applicants have proposed no infrastructure,
10 or capacity expansion projects in Houston to mitigate
11 impacts related to the merger, nor have they proposed
12 any mitigation agreements with local authorities as
13 they have done in other places.

14 This is likely because the applicants to
15 our knowledge have not conducted any formal analysis
16 of Houston's capacity to determine whether the
17 existing infrastructure in the Houston complex can
18 handle the increase in traffic.

19 Of the 25 capital improvement projects
20 proposed, not a single project -- let me repeat that.
21 Not a single project would take place in Houston or
22 Harris County. And by the way, even these projects

1 would only be as needed. This is unacceptable. The
2 applicants should not be allowed to add to an already
3 strained railroad complex without fully studying and
4 analyzing the impacts they will cause in Houston, and
5 without investing in mitigation.

6 That is why we at the City of Houston are
7 alarmed, and oppose the merger as proposed. Before
8 any further action is taken on this matter we implore
9 the STB to require CP/KCS to conduct such an
10 analysis, and to identify the infrastructure needed
11 to responsibly handle the increased traffic resulting
12 from the merger.

13 Equally important is the need for the
14 applicants to engage local stakeholders, including
15 city and county leaders, emergency officials, and
16 especially the community on their plans to manage
17 increased traffic through the Houston complex, and
18 mitigated effects on safety, mobility and quality of
19 life. Let me just add this. If the federal
20 government allows this merger to proceed as
21 proposed, with no mitigation investments in Houston
22 by CP/KCS, then the federal government should be

1 prepared to play a leading role in resolving ongoing
2 issues, merger related problems, investing in
3 solutions, and providing more oversight and
4 enforcement.

5 Federal regulatory agencies must be
6 responsible for protecting Houstonians from merger
7 related impacts. The City of Houston asks the Board
8 to give our concerns all due consideration. We also
9 welcome and encourage the Board and the applicants,
10 to come to Houston, and hear directly from our
11 communities before taking further action. Thank you
12 Mr. Chairman and Board Members.

13 CHAIRMAN OBERMAN: Thank you Councilman
14 Gallegos. Are there any questions? Karen?

15 BOARD MEMBER HEDLUND: Councilman (Off
16 mic).

17 MR. GALLEGOS: Definitely we are. I know
18 I'm working with public works, so that way we can try
19 to secure some of that funding. But again, right now
20 BNSF and Union Pacific operate in the Houston region.
21 The City of Houston has been working on a grade
22 separation coming into downtown Houston with Union

1 Pacific.

2 The past history that we've had with the
3 railroads unfortunately have impacted our city.
4 There is a project that Public Works and Union
5 Pacific have been working on for some time in regards
6 to a grade separation, but unfortunately -- well from
7 the last that I've heard, Union Pacific has reneged
8 on an agreement in regards to adding some monies to
9 that infrastructure improvement, and of course this
10 is before the Infrastructure Bill.

11 So now with the Infrastructure Bill,
12 hopefully, we can actually finally do that grade
13 separation. It's a major, major point of entrance
14 into the City of Houston coming from the east end.
15 So that's the history that we've had with the
16 railroads.

17 And now that you have Canadian Pacific,
18 and Kansas City Southern merger, where they're not
19 even considering one, two, or three infrastructure
20 improvements in the City of Houston, when we've
21 already been impacted many, many years by the
22 railroads that we have there now.

1 BOARD MEMBER HEDLUND: I would note that
2 those programs do require a roadmap.

3 MR. GALLEGOS: Yes.

4 BOARD MEMBER HEDLUND: Thank you.

5 CHAIRMAN OBERMAN: Councilman, I would say
6 to you and to the other panelists, that I would urge
7 you to have your remarks filed in the environmental
8 process as well, because that is really where these
9 concerns get taken up when we ultimately consider
10 them, whether to approve this merger.

11 And if you have any specific mitigation
12 proposals relating to the CP/KCS traffic, please
13 include that in your remarks, or if your public works
14 department has been studying them, so we can have
15 that in the record.

16 MR. GALLEGOS: Yes, thank you Chairman. I
17 will definitely bring that to our public works
18 attention, so that way we can submit information and
19 see if Canadian Pacific is willing to do some
20 infrastructure improvements to help mitigate this
21 issue.

22 CHAIRMAN OBERMAN: Yeah, but in order to

1 even think about that we would have to have -- I'd
2 like to see the specifics of which projects you think
3 are needed. All right.

4 MR. GALLEGOS: Thank you.

5 CHAIRMAN OBERMAN: Thank you. Thank you
6 all very much, and I appreciate your traveling all
7 the way here to see us, even if we didn't get to
8 every place to see you, thank you.

9 COMMISSIONER ELLIS: It's a little cooler
10 here than it is in Texas.

11 CHAIRMAN OBERMAN: Yeah, and it's going to
12 get a little windy here in the next day or two.
13 Thank you. All right. Next up is Canadian National.
14 I'm going to read off all the people who are listed
15 as appearing here.

16 Let's see if they're all here. Rob
17 Reilly, Doug MacDonald, Daniel Bresolin, Derek
18 Taylor, Sarah Slazinski, Kathy Gainey, Ray Atkins and
19 Matt Warren. So let's -- yes it would be thank you.

20 (Off mic chat.)

21 CHAIRMAN OBERMAN: The music is still
22 playing, so you have time to take your seats. So is

1 everybody I read off is here as it looks like. Is
2 anybody not here? Yeah. Okay. Thank you. Who is
3 going to lead off here, Ray? All right you may
4 proceed.

5 MR. ATKINS: Thank you. Chairman Oberman,
6 Members of the Board, yesterday you heard CP's vision
7 for this merger with KCS. It plans to unlock one
8 billion dollars a year of additional profits by
9 replacing current, joint line service through Kansas
10 City with single line service, and by implementing
11 PSR principles more aggressively on the KCS network.

12 The operating ratio of the combined
13 railroad would fall to 57 percent. Capital
14 investment as a percentage of revenue would also
15 fall, and a large amount of high margin traffic would
16 be diverted for the western carriers to much longer
17 CP/KCS routes. In the world according to CP, it will
18 generate these new profits with no plausible risk of
19 public harm to customers, communities or the
20 railroad network validity.

21 Anyone who steps forward and challenges
22 either the plausibility of those diversions, their

1 operating plan, or the seriousness of the potential
2 public harms is labeled by CP as an obstructionist, a
3 newbie, or a frightened competitor. If CN has one
4 single request at outset, it is that the STB not view
5 this merger through CP's rose colored glasses.

6 This is the largest railroad merger in
7 decades. No merger of this size and complexity is
8 free from potential risks of public harm. There are
9 obvious questions that STB must address. Will there
10 be service disruptions that could dwarf any public
11 benefits?

12 How should the agency protect against
13 competition foreclosure at gateways? Does CP have
14 sufficient resources in planning to advance its
15 ambitious plan in an pro-competitive manner, and will
16 that ambitious plan harm local communities? And
17 whether or not the public interest favors divestiture
18 of a parallel line.

19 What we think is unique about this merger
20 is CP's unwillingness to propose solutions to the
21 concerns raised by stakeholders. If you look at the
22 major mergers in the past, the applicants understood

1 that the benefits they sought nonetheless posed
2 potential risks to service competition and local
3 communities, and they worked to solve those
4 challenges so the merger would be clearly in the
5 public interest.

6 Whether it's the Conrail merger, or the
7 UPSP merger, the BN Santa Fe merger, the CNIC merger,
8 the Tex-Mex merger, the applicants worked with
9 stakeholders and devised meaningful solutions that
10 were then imposed by the STB as conditions of the
11 merger.

12 Indeed, even in the far, smaller Pan-Am
13 transaction, which you are very familiar with, CSX
14 bent over backwards to address stakeholder concerns.
15 CP has taken a different path. And it was a bit
16 surprising to hear Mr. Creel claim to have engaged in
17 good faith with everyone.

18 I could tell the STB there has been no
19 serious engagement with CN to address any of its
20 concerns. But whatever engagement CP was referring
21 to, the results are unimpressive. CP is offered no
22 meaningful merger conditions to assure the public

1 that its implementation of this merger will not cause
2 service disruptions. It has offered only vague
3 promises to protect against foreclosure at gateways.
4 Nothing whatsoever to address the parallel line, and
5 nothing to address the congestion concerns in Houston
6 that you just heard of, and Chicago, which you heard
7 about yesterday.

8 Instead, CP demands something unheard of
9 in modern memory. An unconditioned rail merger.
10 Chairman Oberman, Members of the Board, an
11 unconditioned merger is plainly not in the public
12 interest. Private profits do not equate to public
13 benefits, and the merger related public benefits of
14 this transaction are far from clear, and the multiple
15 risks of public harm must be addressed.

16 So why is CN here? Well contrary to CP's
17 rhetoric, CN is not here because it fears competition
18 from an integrated CP/KCS network. Their own diversion
19 data, which is in the record, shows that they
20 expected to earn about .1 percent of CN's annual
21 carloads. CN's not afraid of that competition. CN
22 is here today because it is the single, largest

1 interchange partner with CP.

2 It is concerned that CP has failed to
3 present a reliable plan that would mitigate service
4 disruptions, particularly given the careless
5 operating plan it submitted to this agency. If CP is
6 successful, and is suddenly flush with traffic
7 diverted from UP and BNSF customers, does it have
8 sufficient resources, planning, and capital
9 investment to handle that surge in volume?

10 As a major interchange partner, CN will
11 bear the brunt of any resulting service disruptions,
12 and if CP is unsuccessful in diverting that traffic
13 away from the western railroads, what happens then?
14 Given the price they paid, and the promises to
15 shareholders, CP will have to replace those missing
16 profits, and CN is deeply concerned that CP will try
17 to exploit the newfound ability to foreclose
18 competition.

19 So our presentation here today is going to
20 have three chapters, each one addressing one of CN's
21 key concerns. The first chapter will focus on
22 service. Rob Reilly, CN's Chief Operating Officer,

1 and my colleague Matt Warren, will discuss the need
2 for the Board and stakeholders to see a service plan
3 from CP to avoid the kind of service disruptions that
4 have unfortunately, followed in past mergers, and has
5 followed prior efforts to impose PSR principles in an
6 unstructured and unplanned fashion.

7 It's very hard, Your Honors, to understand
8 CP's hostility to offering the public, and the STB a
9 concrete plan for public scrutiny. Indeed, CP
10 promised you this kind of information in exchange for
11 getting the old merger rules. CP should be held to
12 its representation, and a trust us approach is not a
13 plan. To protect the public interest you should
14 demand more.

15 The second chapter is going to focus on
16 the parallel line between Kansas City and Chicago.
17 Matt Warren will lead that discussion and introduce
18 you to the team from CN that will describe its plans
19 for the Springfield line. Now Congress specifically
20 gave you the authority to order the divestiture of a
21 parallel line when it's in the public interest.

22 And CN has attempted to craft a solution

1 to the parallel line that it is in my view, the most
2 applicant friendly merger condition I've ever seen,
3 and we think it's in the public interest. It results
4 in no harm to combine CP/KCS, other than the
5 increased competition, which of course is a public
6 benefit.

7 You'll see massive investment by CN in the
8 Springfield line to unlock its potential, to
9 strengthen supply chains, and improve the fluidity of
10 the U.S. network. CN would provide better service
11 and more options for its existing customers on that
12 line, and this massive infusion of capital would
13 permit CN to divert 80,000 long haul trucks off the
14 roads annually, more than the CP and KCS project for
15 their whole merger.

16 In the final chapter I will briefly
17 discuss the importance of imposing a binding gateway
18 commitment on the combined CP/KCS. CP has
19 acknowledged the need for that commitment, even if
20 their counsel seemed at times yesterday to walk back
21 the promise, but it's obviously too late for CP to
22 withdraw its commitment to keep gateways open on

1 commercially reasonable terms.

2 However, CN is asking the STB to make sure
3 that the gateway condition is not so vague, or so
4 difficult to enforce as to be essentially useless.
5 The condition must be clear, the gateways to which it
6 applies must be clear, and the process to enforce the
7 condition should be practical. I'll discuss in a bit
8 more detail, CN's proposal, which is to require CP to
9 arbitrate any disputes around this gateway condition.

10 Arbitration to enforce merger conditions
11 is not uncommon, and it would create a practical
12 process that could be used by both the customers, and
13 interchange partners, to give the gateway condition
14 teeth. So with that overview, I'll turn the
15 presentation over to Mr. Rob Reilly to discuss
16 service issues in greater depth. Well good, we'll
17 skip over the slides that correspond to my. You
18 were on a roll, so I wasn't going to interrupt. How
19 do we advance the slides?

20 MR. REILLY: All right good morning. My
21 name Rob Reilly, Executive Vice President, and Chief
22 Operating Officer at CN. I've been a railroader for

1 33 years now, beginning my career at the Atchison,
2 Topeka and Santa Fe Railway, which became BNSF, where
3 I worked for 30 years, and now at CN for the last 3
4 years.

5 During my railroad career, I've had the
6 opportunity to be responsible for some of the
7 busiest, and most challenging railroad operations in
8 North America such as Chicago, where I worked four
9 different times, Kansas City, Texas, Los Angeles, San
10 Bernadino, Barstow, and several other stops along the
11 way.

12 I'm pleased to be with you today. My CN
13 colleagues will speak about our responsive
14 application to acquire the Springfield line, which we
15 think is a way the Board can preserve competition in
16 a way that significantly benefits the public
17 interest, in part by converting more than 80,000 long
18 haul trucks to rail service annually.

19 But before we start talking about the
20 Springfield line, I'd like to talk about some of the
21 broader issues that this proposed merger has for the
22 rail network. CN is dedicated to providing safe, and

1 reliable service to its customers. That's why we are
2 concerned about the proposed mergers potential impact
3 on rail service in the United States.

4 If you approve the proposed CP/KCS
5 transaction, the stakes for CP and KCS getting this
6 right are extraordinarily high. Flaws in the
7 applicant's data, lack of plans for service
8 integration, and other issues will have real world
9 impact if the STB approves the merger, and those
10 impacts are not just limited to CP and KCS and their
11 customers.

12 The rail network is interconnected. The
13 failures on one or two Class 1 railroads can quickly
14 cascade across the rail network to other railroads,
15 and other customers, and supply chain partners.
16 Unfortunately, we have seen such a scenario play out
17 before.

18 In 1996 Union Pacific and Southern Pacific
19 merged, as the railroads began to integrate, severe
20 congestion developed on the combined network,
21 particularly in the Houston area, and this began
22 affecting rail service throughout the United States.

1 The Board had to step in with a wide
2 ranging emergency service order to address the
3 transportation emergency in the Western United
4 States, including service in Southern California,
5 service to Midwest grain shippers with the Board
6 concerned about UP's, SP's and BNSF's ability to
7 prioritize grain, so that it did not spoil, and
8 service for coal mines in the Powder River Basin,
9 Utah, Colorado and Southern Illinois.

10 The emergency began in Houston, and the
11 Board addressed the problem in the west by focusing
12 on Houston. The agency ordered UPSP to release
13 shippers from contracts to use other railroads,
14 directed UPSP to allow BNSF and Tex-Mex, before it
15 was owned by KCS to modify their operations to
16 minimize congestion by routing traffic around
17 Houston, rather than going through it.

18 It took an extended period of time, nearly
19 a year, before the service situation improved
20 adequately for the Board to halt the emergency
21 service order. I lived through these events. In
22 1997 and 98 I was at BNSF, and saw the havoc caused

1 by the UPSP integration and service issues. And
2 while Houston was the epicenter of that disruption,
3 we felt that it at other railroads, and in other
4 parts of the United States.

5 I wasn't with UP or SP, I was with BNSF,
6 but we felt the impacts of Houston disruption
7 hundreds of miles away, and it took years to fully
8 resolve. A short time after, despite stepped up
9 scrutiny, and more advance planning, Norfolk Southern
10 and CSX acquisition of Conrail also led to
11 significant service problems.

12 Our rail network is connected and
13 interdependent, and service problems in one area, on
14 one railroad, can cascade throughout the system. And
15 more recently in 2013 and 2014, we saw congestion in
16 the networks of Canadian Pacific. This resulted in
17 service problems, including concern whether CP could
18 finish moving harvest before the next harvest began,
19 and widespread congestion, particularly in Chicago
20 interchanges with other railroads.

21 I was on the Board of Directors of the
22 Belt Railway in Chicago at that time. I can tell you

1 the impact was felt there and throughout the city.
2 These prior experiences show why it is critical to
3 get this right. We must take further steps to avoid
4 the mistakes of the past.

5 One condition that CN and other
6 commenters, such as the United States Department of
7 Agriculture, and a coalition of shipper groups,
8 including the American Chemistry Council, the
9 Fertilizer Institute, National Grain and Feed
10 Association, and the National Industrial League have
11 all sought at various stages of the proceedings is
12 for the Board to require CP and KCS to prepare a
13 service assurance plan, and submit it for public
14 comment.

15 CP and KCS promised that they would do as
16 much when they asked the Board to waive its current
17 merger rules. After many commenters, including seven
18 shipper associations, asked the Board to require CP
19 and KCS to submit an application under the current
20 rules, with the service assurance plan, CP and KCS
21 told the Board that was unnecessary because they give
22 the Board and other stakeholders all of the

1 information needed to demonstrate that integration
2 has been carefully planned, and that they had plans
3 in place to safeguard service levels, including at
4 interchanges with connecting railroads.

5 But the information submitted thus far, is
6 sorely lacking. The Board should require a service
7 assurance plans to avoid repeating the mistakes of
8 the past. The service assurance plan is especially
9 critical, given the service issues in the United
10 States rail network this year, ongoing supply chain
11 congestion at the ports, and a shortage of truck
12 drivers and equipment.

13 It will benefit CP/KCS, other railroads,
14 customers, supply chain participants, other
15 stakeholders and communities through which the
16 railroads operate. This country has already
17 experienced first-hand the effects of a merger
18 related service meltdown in Houston, and its wide
19 ranging impacts to other areas of the country.

20 No one would want to repeat that
21 experience. But what Houston was to the UPSP merger,
22 and accompanying service failures, Chicago could be

1 to the CP/KCS merger. Chicago, and this merger's
2 impacts there should be a key concern for the Board
3 and all stakeholders who depend on fluidity in the
4 Chicago terminal, the heart of the U.S. rail network.

5 This map from CP's application shows CP's
6 route in the Chicago terminal. O'Hare Airport is
7 near Bensonville Yard for reference. You will notice
8 that CP does not own lines in the Chicago terminal.
9 As Metra discussed yesterday, CP operates over
10 tracks owned by Metra in the Chicago terminal, which
11 is the red hash lines.

12 CP also operates over tracks of other
13 Class 1's like CN and Norfolk Southern. CP also
14 operates over tracks owned by two short lines known
15 as the Indiana Harbor Belt Railway, and the Belt
16 Railway of Chicago, which are partially owned by CP.
17 CP projects that almost eight new trains a day from
18 west into Bensonville Yard, or to the west from
19 Bensonville Yard, yet CP just assumes that all the
20 traffic from those eight new trains per day will all
21 be handled by existing trains within the Chicago
22 East, and south of Bensonville Yard.

1 Given the realities of the Chicago
2 terminal, such a merger related increase could impact
3 other railroads and rail shippers. As this Board is
4 aware, rail services face some challenges this year,
5 and I know the Board has been focused on improving
6 service.

7 But even a perfectly functioning rail
8 network faces challenge on the congested Chicago
9 lines, particularly during winter. Chicago is
10 critical to the entire U.S. rail network. A quarter
11 of all U.S. freight rail traffic, and over 40 percent
12 of all intermodal traffic touches Chicago.

13 As a result, CN participates along with
14 other Class 1 short line and passenger railroads in
15 Chicago to regularly monitor and improve Chicago
16 terminal operations. Such coordination and advance
17 planning is critical. So let's focus on CP's
18 operations over CN's track in Chicago between Tower
19 B-12 and Franklin Park, and Schiller Park Yard.

20 CN's track is shown in blue.

21 MR. MEYER: I'm going to, since I was
22 addressed earlier today with respect to the Metra

1 issue, there was evidence put in the record late by
2 CN.

3 CHAIRMAN OBERMAN: I can't hear you David.

4 MR. MEYER: Is it working now?

5 CHAIRMAN OBERMAN: Better.

6 MR. MEYER: Sorry. So applicants filed a
7 motion to strike with respect to certain evidence
8 regarding exactly the issue this witness is about to
9 discuss, just raised the topic. The Board granted
10 that motion, and struck the evidence. And this is
11 another backdoor attempt to testify about evidence
12 that was stricken from the record. So I would
13 object, and be happy to address it in writing, but I
14 don't think the witness should be allowed to
15 proceed.

16 MR. WARREN: If I could address that. I
17 think it is outrageous that applicant's Counsel is
18 trying to interrupt a public hearing, and he's wrong.
19 He's true that there was a motion to strike that was
20 granted, but we addressed this issue specifically in
21 our June 9th comments. That is what Mr. Reilly is
22 talking about.

1 So this is absolutely in the record,
2 something that applicants had an opportunity to
3 respond to that they did not. They filed a motion to
4 strike for something totally different, or rather a
5 larger expansion of that, but this is in the record.
6 They have not proceeded to respond, and the idea that
7 they are standing up and interrupting our
8 presentations to make an objection is outrageous.

9 MR. ATKINS: And if I might
10 suggest Chairman, they can file a motion, you can
11 just note the motion and we could address it in
12 briefing after this hearing, maybe we could just
13 proceed forward.

14 BOARD MEMBER HEDLUND: And finally I'll
15 add that this is a public hearing, and any person was
16 invited to speak.

17 CHAIRMAN OBERMAN: Well, let me suggest
18 this. First of all I do not think it's outrageous
19 that Mr. Meyers got up. And it's better for us to
20 know what parts of the record that may be
21 challenged, rather than going back after hours trying
22 to sort out what might be objected to, so I don't

1 accept that characterization.

2 I think the approach Ray, actually was I
3 was about to suggest that we proceed, that CP focus
4 on any parts of this presentation which you think
5 should be stricken or not taken into account, and
6 specify that in your final briefing, or in a motion
7 after the hearing.

8 It's hard, almost impossible, I think for
9 the Board to sort out the nuances of what may or may
10 be in the record as having not been objected to
11 before. But it would be better for you to parse it
12 when you have the transcript, and have exactly
13 whatever it is Mr. Reilly is going to deal with. And
14 so, unless the Board disagrees, we'll proceed in that
15 fashion.

16 MR. REILLY: Proceed ahead? Okay. Let's
17 focus on CP's operation over CN's track in Chicago
18 between Tower B-12 and Franklin Park and Schiller
19 Park Yard. CN's track is shown in blue on CP's map,
20 and is located on the map, partially underneath the
21 label Bensonville.

22 CP and KCS projects sizable increases in

1 carload and truck activity at Schiller Park. They
2 disclosed no tonnage data, or trains per day data, in
3 either their operating plan, or amended operating
4 plan for the 2.3 mile line segment owned by CN that a
5 merged CP/KCS must traverse to reach Schiller Park
6 Yard.

7 CHAIRMAN OBERMAN: Rob, I'm just having,
8 you don't -- I'm trying to place where precisely
9 you're talking about the blue line between
10 Bensenville up to Schiller Park, is that the stretch
11 you're talking about?

12 MR. REILLY: Exactly.

13 CHAIRMAN OBERMAN: Okay. It's a small
14 map.

15 MR. REILLY: Yeah.

16 CHAIRMAN OBERMAN: So all right. Go
17 ahead.

18 MR. REILLY: To get to Schiller Park from
19 Bensenville Yard, CP moves over Metra's tracks, and
20 then performs a reverse shove move to come on the CN
21 track to reach Schiller Park Yard. This missing data
22 is needed for the Board and interested stakeholders

1 to analyze the impacts of the proposed merger.

2 But it is also data CN needs to understand
3 how operations will work on that segment going
4 forward. You heard yesterday from Metra and the
5 Coalition of Chicago Communities about their
6 concerns. In addition to concerns with CP/KCS is
7 wrong in changing data, their failure to disclose
8 data for line segments anywhere, but especially in
9 and around Chicago terminal may have long standing
10 impacts that are impossible to predict.

11 It is not enough for merging railroads to
12 simply assert to the Board that they will get it
13 right. No doubt that CP and KCS have many smart and
14 capable railroaders. UP and SP did as well, in
15 1996, as did Norfolk Southern, CSX and Conrail a few
16 years later.

17 That's not enough, and merger applicants
18 must be required to affirmatively demonstrate to the
19 Board other railroads with whom they interchange
20 traffic with, and rail shippers, that their
21 integration will not repeat the service mistakes of
22 the past.

1 With that, I'll turn it over to Matt to
2 talk more about the concerns about the unreliable and
3 inconsistent information that CP and KCS have
4 provided, and what the Board should do about it at
5 this stage.

6 CHAIRMAN OBERMAN: Rob, before you --
7 while we're on this I'd like to ask a couple of
8 questions, and other board members may too. What is
9 -- can you be more specific, other than saying CP
10 hasn't given us data, what's your concern? What is
11 CN's concern about this particular transit point that
12 you were focused on? I thought it was an operations
13 question.

14 MR. REILLY: Yeah, I'll start. Maybe you
15 have something to add. I don't want to cut you off.
16 This is an area where we run trains, so obviously if
17 the traffic is changing, and the patterns are
18 changing, we need to be aware of that so we can
19 adjust our plans. I mean making a reverse shove move
20 is kind of like taking a semi out on Lake Shore
21 Drive, taking a left and then backing up. Not a
22 great move. So we need to understand how that's

1 going to work.

2 CHAIRMAN OBERMAN: So have you been
3 engaged in any communication with CP?

4 MR. REILLY: We have not.

5 CHAIRMAN OBERMAN: They haven't reached
6 out to you? You haven't reached out to them I take
7 it.

8 MR. REILLY: That's correct.

9 MR. WARREN: I mean as I
10 said in our June 9th comments we raised this issue
11 and the concern that essentially there's no
12 information on their plans, you know, densities on
13 this corridor, and we haven't heard anything back
14 from them.

15 MS. GAINEY: And to be clear, the no
16 information, it's a missing line segment both in the
17 operating plan and in the information that was
18 submitted to the OEA.

19 CHAIRMAN OBERMAN: And the harm that you
20 figure will come from this is what? Can you be more
21 specific?

22 MR. REILLY: Well we don't know. We just

1 need to understand, so our customers aren't impacted
2 on that line, the segment that we operate on, so we
3 just need disclosure in terms of what that is, so we
4 can plan the operating plans as such.

5 CHAIRMAN OBERMAN: And you're not
6 necessarily saying you're going to do, it should be
7 not allowed, you just say.

8 MR. REILLY: That's exactly right.

9 MS. GAINEY: We need to know what it is, and
10 the information they provided about activities in
11 Schiller Park Yard, which is shared with CN and CP
12 disclosed that the truck activity and railcar
13 activity in the yard exceeds the Board's thresholds
14 for environmental analysis.

15 So from our perspective this is a missing
16 line segment that's nowhere described in the
17 operating plan, or in the environmental information
18 that is provided to the Board.

19 CHAIRMAN OBERMAN: Okay.

20 BOARD MEMBER HEDLUND: If I could go up to
21 the 5,000 foot level, we're talking here about eight
22 additional trains into the Chicago terminal. How

1 many trains a day transfers to Chicago terminal
2 today?

3 MR. REILLY: I don't have the exact
4 number.

5 BOARD MEMBER HEDLUND: But it's hundreds,
6 right?

7 MR. REILLY: Oh yeah. It's a
8 significantly busy.

9 BOARD MEMBER HEDLUND: So why is a mere
10 eight additional trains a day likely to cause
11 significant more congestion? And I realize the
12 Chicago terminal is the most congested terminal in
13 the country.

14 MR. REILLY: Yeah. You just got to know
15 where it's going to. Eight trains could definitely
16 have an impact in the Chicago terminal. Not only
17 that, you know, having lived part of my life parked
18 on the Stevenson Freeway, I'd be concerned where
19 that's going in the City of Chicago across town.
20 Whether it's going on the Eisenhower, the Tri State,
21 the Dan Ryan, all of that is going to get more
22 congested.

1 I don't know. I don't know where the
2 traffic is going in Chicago, but and that would be
3 really what we'd need to answer your question
4 appropriately.

5 BOARD MEMBER HEDLUND: I'm from Chicago,
6 so I know what you're talking about.

7 CHAIRMAN OBERMAN: Rob, you should have
8 been on Metra's Heritage line. All right. Any other
9 questions at this point, Robert?

10 BOARD MEMBER PRIMUS: I do. Just for me,
11 clarification because I haven't been out to see. So
12 can you just talk to me about, sort of describe the
13 activities at Schiller Park? Like how many trains
14 you usually operate through that?

15 MR. REILLY: Derek? Do you want to
16 respond to that?

17 MR. TAYLOR: Yeah, good morning. Our
18 operation through there, that's our actual access to
19 get to the Indiana Harbor Belt Railroad, and also to
20 the BRC? We operate between four and eight trains a
21 day, it just depends on the bulk trains that may move
22 through potash and other bulk commodities, but four

1 to eight, the core plan is about three.

2 BOARD MEMBER PRIMUS: Okay. Do you
3 typically see a lot of congestion there now? I mean
4 its operations?

5 MR. TAYLOR: No. In today's world you
6 know we work with our partners at CP. Obviously,
7 you have two Metra crews there, you have the line
8 that runs east/west, which is essentially on the CP
9 route, but we also run Metra's on our Waukesha, so it
10 actually connects at B-12 to that route, to get to
11 downtown.

12 So you essentially have you know 24 hours
13 a day in Chicago, and you can in 18 hours. So there
14 are times that Schiller Park can get congested, you
15 know we have separate yards there. They have their
16 facility there, we have our freight facility there.
17 We run a local out of there also, so there's separate
18 locations, but they're right next door to each other,
19 and the access in and out of there is controlled by
20 our dispatch office, hence Mr. Reilly's comments
21 about having the knowledge of what it is and where
22 it's going is very important for us to be able to

1 plan to work with Metra through those curfews.

2 BOARD MEMBER PRIMUS: Thank you.

3 MR. WARREN: Kathy, just for my own
4 understanding, can you state the missing segment
5 claim again, and why you believe it trips our
6 thresholds?

7 MS. GAINEY: We do not know whether the
8 segment does, or does not trip the threshold, because
9 the segment was not included in any of the operating
10 plan tables, or the information that was provided to
11 the environmental office. So that includes the
12 Appendix T of the amended operating plan.

13 And so the base data was not provided, the
14 projected train traffic increases, merger related,
15 were not provided, and thus the post merger traffic
16 increases, both for GTMs, and trains per day are not
17 included in the record from applicants.

18 MR. WARREN: And the one thing I'd add to
19 that is that we filed a comment on the Draft EIS that
20 you know spells this issue out.

21 CHAIRMAN OBERMAN: Karen?

22 BOARD MEMBER HEDLUND: One last question.

1 If you're so concerned about congestion in Chicago,
2 why did you withdraw from the Create Program?

3 MS. GAINEY: I believe after -- Doug or
4 Derek, do you want to take it, otherwise I can go.

5 MR. TAYLOR: I would just say in terms of
6 that you know, we are still part of Create, although
7 we don't actively go through different things. But
8 you know we did purchase the EJ&E, that would have
9 essentially allowed us to do different things, and
10 have a single line direct around Chicago that we
11 control.

12 Before the EJ&E purchase, we had to run
13 every single train to and from Western Canada over
14 the IHB or the BRC, so the EJ&E allowed us unique to
15 connect our entire network, so that enabled us to not
16 have to do certain things with Create.

17 MS. GAINEY: And then purchasing the J it
18 was a \$303.00 acquisition, but then we invested 271
19 million dollars in rail line connections, and
20 improving the track facilities in Chicago.

21 CHAIRMAN OBERMAN: Any other questions?
22 All right. Matt, you were going to take it from

1 there?

2 MR. WARREN: Yes, thank you Mr. Chairman.
3 So you know after UPSP mergers approved by the STB
4 typically have featured substantial service related
5 conditions. So for example, in Conrail there was a
6 significant settlement agreement with the National
7 Industrial Transportation League, a number of
8 implementation level conditions.

9 CNIC features a stipulation that CN and IC
10 entered into with NITL guaranteeing service levels
11 for certain shippers for ten years. When KCS
12 acquired Tex-Mex, that was just a minor transaction,
13 they also negotiated an agreement with NITL to
14 guarantee service levels, and CN Wisconsin Central
15 actually had a full voluntary service assurance plan,
16 again just for a minor transaction.

17 So it's somewhat remarkable that this
18 major merger application that is being proposed in
19 the midst of network wide service issues in 2022, has
20 so few concrete commitments relating to service, and
21 so little information about how the applicants plan
22 to protect service during implementation.

1 And the Board has heard from many parties
2 concerned about the impact of this proposed merger on
3 service. You heard from Metra yesterday. You've
4 heard concerns about impacts in Houston, and you've
5 heard from a number of shipper associations asking
6 for the Board to take steps to ensure that service is
7 not harmed.

8 CN is also concerned that there's been
9 inadequate planning for the merger transition. So
10 unlike some parties, we don't have a particular part
11 of the network where we're asking for a particular
12 condition, or a particular investment. You know our
13 concern is similar to the concern that the Department
14 of Agriculture had, that we think that the applicants
15 you know have not provided sufficient information on
16 how they're going to implement their merger without
17 impacting service.

18 And we think the answer to that is a
19 service assurance plan. And we think that, let's see
20 if I can get my clicker to work. We think that
21 primarily for three reasons. First, CP is planning
22 significant operating expense cuts in year one, that

1 could impact the rail network if they're not well
2 executed.

3 Second, now I'm pushing too hard, and
4 there we go. And second, they would not produce a
5 reliable operating plan, or supporting density data
6 that can give the Board confidence that they have a
7 plan to implement the merger without transitional
8 service disruption.

9 And third, CP and KCS promised this Board
10 in April 2021, that they would be providing all of
11 the information needed to satisfy the Board that
12 applicants have carefully planned for integration,
13 including measures to monitor and safeguard service
14 levels all under Board oversight.

15 They have not fulfilled that promise. And
16 we think the best way to hold them to it is to
17 require them to prepare a service assurance plan for
18 public comments. First, let's talk about the
19 planned operating expense cuts. Go ahead.

20 CHAIRMAN OBERMAN: Matt, let me interrupt
21 you for a second. How is our court reporter doing?
22 Okay. Let me know, raise your hand when you need a

1 break, thank you. Go ahead Matt.

2 MR. WARREN: Okay. Yes. Well I know
3 these numbers are small, so hopefully you can see
4 this in your slide deck. And we do have footnotes on
5 this slide that are even smaller, so you can see
6 where we're pulling all of this information from at
7 the records.

8 The Board's heard a lot of talk about how
9 CP and KCS expect to grow their revenues by diverting
10 traffic from other railroads, but they have also
11 proposed over 115 million in annual operating expense
12 reductions. And they have done very little to
13 demonstrate that this cost cutting can be achieved
14 without disrupting service and the interconnected
15 rail network.

16 So in the base year of 2019, CP and KCS
17 reported combined gross ton miles of 385.6 billion.
18 By year three they project increasing those combined
19 gross ton miles up to 461.9 billion. So I'm having
20 trouble reading, but a 76 billion increase, or about
21 20 percent.

22 And just to be clear, this is only

1 counting merger related growth. This does not
2 include projected organic growth. And I would love
3 to put the organic growth up there, but it's
4 actually coming out of you know highly confidential
5 work papers, so I can't. It's actually even higher.

6 But as you see this substantial increase
7 in volume is not being matched by an increase in the
8 people or the resources to move that volume. The
9 employment is only going up 5 percent. They're not
10 actually increasing the labor force to keep up with
11 their projected volume growth.

12 The locomotives are flat. Revenue cars
13 are actually going down. They're proposing to have
14 less cars to carry this much higher volume. And
15 they're not planning for the capital investment to
16 keep pace with volume growth either, so their overall
17 capital investment is planned to stay flat. It's 1.9
18 billion in the base year, and all of these numbers
19 are coming out of the financial exhibits in their
20 application.

21 1.9 in the base year, 1.9 in year one, 1.9
22 in year two, 1.9 in year three. Not changing. So as

1 the gross ton miles are going to go up and up and up
2 allegedly, and their revenues are going to go up and
3 up and up, they're not planning to increase the CapEx.
4 So the CapEx as a percentage of revenues
5 is actually you know projected by them to go down
6 over the course of their merger.

7 And we have heard a lot about 200, and I
8 can't remember if it's 275 or 276 million in merger
9 related capital investment. That is not, and I think
10 they've said a couple times in their papers, that
11 this is not something that is coming out of their
12 ordinary capital investment. That's not what their
13 financial exhibit shows of course.

14 Their financial exhibit doesn't show you
15 know a 275 billion dollar bump. They're just keeping
16 it flat, so you know it's coming out of the ordinary
17 budget. And the context of a major merger, I mean it
18 sounds odd to say that 270 million isn't a lot, when
19 the context of a major merger, it's not really a lot.

20 UPSP was 1.2 billion, and that was in
21 1996, so if you escalate that up, that's well over 2
22 billion. Conrail, you know 1.2 billion. One was

1 1.3, one was 1.2, I can't remember which one. The
2 Conrail was 1.2 billion, and again you know well over
3 20 years ago, so if you guys swipe that up, that's
4 approaching 2 billion.

5 And you know back when CP you know bought
6 the DM&E a decade and a half ago, they were going to
7 invest 300 million just on the DM&E lines in South
8 Dakota. So 276 million is not a particularly high
9 level of capital investment that would lead you to
10 believe that they've got a transformative plan to
11 start reducing you know, not increase their locos
12 not increase their freight cars because they've got
13 all of these great capital investments lined up.

14 And we'll get to Springfield in a moment,
15 but we'd note that you know CN's plan for the
16 Springfield line would invest 250 million just on
17 that, which on a per mile basis is significantly you
18 know higher than -- it's significantly higher than
19 the applicants are planning to do.

20 And if you do the math, according to them,
21 they are headed towards record low operating ratios.
22 Again, you see the footnotes, this is all out of you

1 know Heath Randall verified statements. You know he
2 calculated that the applicants were projecting that
3 their operating expenses per gross ton mile that
4 were about 13 percent lower than pre-merger
5 performance, and this slide shows as he calculated,
6 how that would translate to a projection operating
7 ratio.

8 BOARD MEMBER FUCHS: Matt?

9 MR. WARREN: Yes.

10 BOARD MEMBER FUCHS: I think in January of this year
11 when Canadian National announced a 1,800 person --
12 1,800 job cut, what was the target operating ratio
13 for 2022 at the start of the year?

14 MR. REILLY: That was announced in September,
15 and part of that was a 57. 57 percent.

16 MR. WARREN: Right. So I take your point,
17 but I think the point that we're making is that this
18 is a significant reduction that is in their plan
19 immediately.

20 BOARD MEMBER FUCHS: We are also making the point
21 that it's unprecedented. The plan is unprecedented,
22 but your plan in 2022 was lower.

1 MR. WARREN: Yeah, and I apologize. What
2 I mean was it was unprecedented for KCS.

3 BOARD MEMBER FUCHS: Okay.

4 MR. WARREN: And the question really is
5 how are they going to get there? You know where are
6 the efficiencies? It's not going to be through more
7 efficient routes. The networks only touch at one
8 point where they already share a yard.

9 There's a lot of vague language in their
10 filings about how they're going to apply PSR
11 experience, and about re-optimizing operations, but
12 there's not a whole lot of detail, but exactly how
13 and where they're going to be cutting back, just that
14 they're going to be doing more work with fewer cars,
15 the same locos, only a few more people, and the
16 same CapEx.

17 And of course KCS has already implemented
18 precision scheduled railroading, so it's not clear
19 what further expense cuts CP thinks it's going to get
20 out of KCS. But whatever changes they're making are
21 going to be happening almost immediately.

22 You know you heard yesterday that there's

1 not going to be a big bang. And there's going to be
2 a methodical march as they integrate, but that is not
3 true for the expected operating expense cuts and
4 their optimized plan. You know 80.8 percent of those
5 operating efficiencies are supposedly going to be
6 realized in year one.

7 That's not a methodical march. And our
8 concern is that CP and KCS have not produced any
9 reliable planning to show that they'll be able to
10 achieve these operating cuts without harm to
11 service. They have promised you. They certainly
12 have promised you, but they haven't shown you.

13 Moreover, it could be that they're going
14 to need to cut even deeper to match their promises to
15 investors. Like as we showed in the verified
16 statement of David Hunt, CP's and KCS's experts have
17 made extraordinarily aggressive assumptions about
18 traffic diversions. They've assumed that they're
19 going to immediately get market share without any
20 meaningful price concessions, even though their rail
21 to rail diversions average 217 route miles longer
22 than existing routes.

1 If CP and KCS don't achieve those
2 aggressive diversion assumptions, they're going to be
3 under even more pressure to cut expenses. And while
4 I'm on the topic of diversions, Mr. Chairman you were
5 asking yesterday about environmental impacts from
6 diversions.

7 So rail to rail diversions that are on
8 average a 217 miles longer, obviously have a negative
9 environmental impact. More fuel, more emissions,
10 more traffic, more blocked crossings. And the Draft
11 EIS currently assumes that all the rail to rail
12 diversions are a wash environmentally, but that's
13 obviously not true when the rail to rail diversions
14 are going to go under a much longer route.

15 And applicants are planning to transport
16 that merger growth traffic at extraordinary low
17 costs. So this slide is you know taken straight from
18 Appendix B to their application, depicts their total
19 claims incremental revenue growth from traffic
20 diversions, and their claimed cost of handling that
21 additional traffic.

22 And if you go to the sort of normalized

1 year, it's at 1.15 in revenue, and 345 million in
2 costs, which translates to a 333 RVC ratio. And of
3 course by definition, every single one of these cars
4 is something that has competitive options. It's
5 something that's already moving on another railroad.
6 It's something that already is being transported by
7 truck.

8 And I think the Board and its Staff have
9 got enough experience with RVC ratios to know that a
10 333 average RVC on traffic, that by definition has
11 other options, is not likely to be achievable. And
12 here, you know, if you run the numbers on an
13 operating ratio you get to 30, and Member Fuchs, I
14 don't think anybody suggests anybody is going to get
15 to 30.

16 So what does all this mean? Like it is
17 not a concern to the public interest if CP and KCS
18 get these profit projections, or they don't get these
19 profit projections, from a public interest
20 perspective, that doesn't matter. The real concern,
21 and CN's concern, is what are they going to do to
22 make up the difference when they don't get hundreds

1 of thousands of cars or diversion traffic at a 333
2 RVC.

3 They're already planning aggressive
4 operating expense cuts with little explanation of how
5 they will get there. But how deep are they going to
6 cut when those sky high diversion profits don't
7 materialize, and they are under pressure to match
8 their promises to shareholders. That is something
9 that can have a substantial impact on the public
10 interest.

11 And the second reason we're concerned is
12 that the data at the foundation of the operating plan
13 is just not reliable. Again, we've detailed these
14 concerns in the verified statements of Carl Van Dyke,
15 and I just want to summarize the major issues here.

16 So I think this slide, if I could ever get
17 there, on the Springfield line, sort of illustrates
18 our basic concern. So the first column of numbers
19 here is the original density numbers in the
20 application, Exhibit 14, which we understand are the
21 numbers that CP and KCS maintained at the ordinary
22 course of business, so that's Column A.

1 So Column B are the modeled numbers that
2 they gave the environmental office last October.
3 They are obviously different. And as we've
4 explained, and as I'll get to in a moment, those
5 actually that's supposedly 2019 data, but it's
6 actually not based on 2019 data. Most of it is
7 modeled based on a single month in 2020, which they
8 combined with some data from 2021.

9 Now after this issue came to light earlier
10 this year, CP and KCS re-submitted those numbers in
11 March, and said you know actually we apologize for
12 you know, for our original Exhibit 14. The OEA numbers are the
13 right numbers. These are the OEA numbers are the
14 right Exhibit 14 numbers. But after you ordered them
15 to resubmit their operating plan, we've got a brand
16 new set of modeled numbers to their remitted
17 operating plan. And that's Column C.

18 So the explanation that we've gotten for
19 the numbers is that the applicants, there were
20 inaccuracies in the data that they had collected, so
21 therefore they had to develop a model for purposes of
22 the operating plan. So there's been a lot on the

1 record where they've tried to explain you know why
2 they had Column A, and why they had Column B.

3 But there in the first place I'll say
4 there was no suggestion in their original application
5 that Exhibit 14 was unreliable. Like on the
6 contrary, the original operating plan explicitly
7 pointed to Exhibit 14 as the source for projected
8 changes in train volumes and density.

9 But the broader point is that while they
10 explained why they think they had to use the model,
11 at no point have the applicants given the Board any
12 coherent explanation for why the May outputs in
13 Column C are different from the March outputs in
14 Column B.

15 And I would point out that the Board's
16 April 27 decision contemplated that the numbers in
17 the amended operating plan would be essentially the
18 same as those provided to OEA, and they plainly are
19 not.

20 BOARD MEMBER FUCHS: Matt?

21 MR. WARREN: Yes.

22 BOARD MEMBER FUCHS: And I understand

1 you're going to continue with the data point, but
2 maybe to frame the discussion, can you just summarize
3 or give an example of a condition that the Board
4 ought to impose if they used your preferred traffic
5 numbers, but we wouldn't impose if we used CP's
6 preferred traffic numbers.

7 MR. WARREN: So that's an excellent
8 question. And I think you know CN is probably not in
9 a position where we are going to be proposing
10 conditions based on that. It is, I think, very
11 important because as I'll get to, where the data gets
12 really unreliable is at a segment level.

13 And those are the things that are going to
14 be driving community concerns. They could be driving
15 conditions that a railroad might ask for if it's a
16 segment that can be addressing interchange. You
17 know, but I don't want to -- go ahead.

18 BOARD MEMBER FUCHS: Are you able to
19 identify, I think what I'm trying to get at is
20 understanding reliability in and of itself is an
21 important goal, but what I'm trying to ascertain is
22 whether or not the difference makes a difference when

1 it comes to Board action.

2 So you know, can you point to a specific
3 Board action that is no longer justified because CP
4 has a particular estimate for a particular segment?

5 MR. WARREN: So I think that in a couple
6 slides I will show you, you know, a slide that I
7 suspect the panel in front of us will be very
8 interested in, and I do think that you know most of
9 these specific conditions are going to be driven by
10 that the parties might ask for, are really driven by
11 the individual segments.

12 The condition we are asking for, is we're
13 asking for a service assurance plan. We're not
14 saying this is a segment that looks wrong, you know
15 please contribute to our capital investment on the
16 segment, or please, we're not asking for train load
17 traffic.

18 BOARD MEMBER FUCHS: It doesn't appear to
19 me that a service assurance plan would be driven by a
20 particular segment density.

21 MR. WARREN: Well I think that the
22 densities that are informing the operating plan do

1 suggest that there has been a level of casualness in
2 the way that they've approached this public review
3 process that gives us some concern, so.

4 MS. GAINEY: I can offer two perspectives,
5 and Matt's going to talk about this some more. You
6 know we've emphasized the importance of a service
7 assurance plan, and the idea -- one way we've been
8 thinking about this is the need for public comment on
9 such a plan.

10 And one way Patrick, to your question,
11 that a condition could be integrated would be to
12 order the applicants to use the actual ordinary
13 course data in such a service assurance plan because
14 inevitably in a service assurance plan you're looking
15 at what the historic service levels were for example,
16 if you're trying to maintain certain service levels.

17
18 That's one way that it can be integrated
19 into a condition. But I'd like to come back to a
20 10,000 foot level and say these are the baseline GTM
21 2019 numbers that underlie the operating plan, and
22 also the environmental submissions from the

1 applicants.

2 And so all of our witnesses have very
3 complicated flow charts that illustrate where these
4 inputs flow into other aspects of the case, but this
5 isn't a number that just sort of sits by itself in
6 the case. It feeds into other aspects of the
7 planning and the work that the applicants have done
8 in the operating plan, and that everyone has been
9 commenting upon.

10 BOARD MEMBER FUCHS: What service
11 assurance plan in the agency history factors in
12 segment level GTM?

13 MR. WARREN: I think Pat, Member Fuchs, we
14 all have a data set of one. We have Wisconsin
15 Central, which was a very simple service assurance
16 plan because it was a minor transaction.

17 BOARD MEMBER FUCHS: Yeah I know. I'm
18 just not hearing the nexus to a particular decision
19 point though.

20 MR. ATKINS: Patrick, if I can just weigh in
21 and try and maybe I'll go above 10,000 foot. We
22 think it's important that you have a plan from CP

1 that assures that service will not be disrupted as a
2 result of their plan. One of our concerns is if you
3 look at the operating plan, in total it's not a
4 specific problem with densities, it's so laden with
5 errors and problems, that it cannot give you the
6 confidence that they've got a service plan in place
7 to successfully implement their plans for this
8 merger.

9 So all of these examples we're giving you,
10 they're not isolated instances where we're concerned
11 about a particular corridor. When we looked at their
12 operating plan, and our experts came in, there are
13 just so many data inconsistencies with this
14 submission that we've drawn to their attention, which
15 they don't necessary correct that it should give you
16 pause.

17 And so the result of it is not a specific
18 line segment investment, although individual
19 communities, if they saw the right data might ask for
20 it. We think it actually just lends support for you
21 holding them to the commitment that they made at the
22 very beginning of this case, which is to give you

1 sufficient information to assure yourselves that they
2 can deploy their vision without causing service
3 disruptions.

4 That's the ask, and that's why we're
5 walking you through all of the data and consistencies
6 to make sure that you're seeing what we're seeing.

7 BOARD MEMBER FUCHS: I appreciate that
8 very much, and that's why I wanted to jump in at the
9 start of your slides to make sure that they're in the
10 right context.

11 MR. ATKINS: Absolutely yes. We appreciate
12 it. Matt, do you want to continue?

13 MR. WARREN: Yeah, and so we're going to
14 show just a couple more examples again of why we're
15 concerned. So the slide that I'm going to try to get
16 to is focusing on Seville versus Airline Junction.
17 And in this slide if I can ever get to it, we're
18 only looking at the May numbers in the amended
19 operating plan.

20 On this segment CP and KCS are planning to
21 route more than 14 new trains. Just let me go back.
22 So anyway, it's in the decks in front of you, and I'm

1 apparently never going to get it on the screen.

2 BOARD MEMBER FUCHS: That's okay.

3 MR. WARREN: But this is something we've
4 explained in Mr. Van Dyke's verified statements. The
5 projected train counts don't change. They say, I
6 think it's 14.1, and that those are going to be the
7 project train counts. But the densities are going up
8 and down on the line, and as we explained in Mr. Van
9 Dyke's verified statements, you know, these are just
10 run through trains.

11 They're not stopping. They're not doing
12 work. There's no logical reason for the densities to
13 be changing, and essentially the implications that
14 the trains waits must be changing, which can't
15 possibly be correct. So you have that, that will be
16 in the record.

17 And a couple of slides that might be
18 relevant to the panel in front of us, you know, these
19 are the numbers in Houston, and you know it's
20 obviously a critical you know segment from Beaumont
21 to Rosenberg, and we have gotten a number of
22 different numbers from them, you know, as pretty much

1 everywhere else.

2 We've got a different number in the
3 original Exhibit 14, a different number submitted to
4 OEA, and a different number in May. The difference
5 in Houston is that we actually got two different
6 numbers in that. So on this critical segment
7 Appendix A is the amended operating plan, has the
8 densities at 17039, and appendix T has them at 2590.

9 And that lowest number out of all of those
10 is actually the one that's being used for the Draft
11 EIS. And one thing we've heard from the applicants
12 is you don't need to worry about this because base
13 year densities don't matter, all that matters is the
14 delta. All that matters is how it's changing.

15 In the first place that's not true,
16 because how much traffic is on the line right now,
17 has an impact on how much additional traffic it can
18 accommodate. Second, the projected growth is also
19 all over the place. Sticking with the same segment
20 in Houston, you know again, we've got one number on
21 Exhibit 14 to the application.

22 You've got a different number, a

1 substantially higher number that was provided to OEA,
2 and then in May you've got two different numbers
3 again, Appendix A to the amended operating plan had a
4 14,000 number, which was you know kind of close to
5 what they gave OEA, but Appendix T has a much lower
6 number, and the current Draft EIS actually uses that
7 lowest number.

8 And bad results are typically stem from a
9 bad process, and that's what happened here. So the
10 applicants really had a choice here. They could have
11 just used their actual 2019 data. Now we recognize
12 that they think that there were problems with that
13 data, things they needed to correct. They certainly
14 could have done that.

15 As we showed in our evidence, most of our
16 problems with actual data that they claim are things
17 that they are easily fixed. They say well the KCS
18 tonnages have locomotives, and the CP tonnages don't.
19 But it's not that hard to back out the locomotive
20 waits.

21 We've showed how to do that. They didn't
22 follow that approach. They picked the model. And so

1 to create segment density for 2019, they didn't start
2 with any data from 2019. Instead they took daily
3 train counts for carload traffic, and intermodal
4 traffic from October 2020.

5 So in the middle of the pandemic, and they
6 only for October 2020, that's just the manifest and
7 the intermodal. For other unit trains we have step
8 two, where they added the unit trains. They didn't
9 use October 2020 for those, they used different
10 periods in 2021 for CP and KCS.

11 And step three was actually to yank some
12 trains for those train counts. They applied
13 something called the 25 percent rule, which meant
14 that if they didn't see a train that was hitting 25
15 percent of the stations on the line, they pulled it
16 out, they didn't count it, and we think that's
17 probably a process that would lead to them you know
18 missing some locals, and missing some yard trains.

19 And then so now they've got their trains
20 counts that they've cobbled together, so you could
21 figure out the densities, they took historic average
22 train waits. That's step four. And again, they used

1 different time periods for reasons that you know
2 defy explanation.

3 They used 2020 for CP, early 2021 for KCS,
4 and then what they did is they you know multiplied
5 the system wide average train weight to you know, to
6 the train counts for the segments, and they got their
7 uncalibrated base period data. So the assumption in
8 their analysis is that train waits are perfectly even
9 across the entire CP system, the entire KCS system,
10 and of course that's not true.

11 And when they got to the end of that
12 process, the reason it's not the final data they gave
13 you, and it's the uncalibrated data, is because the
14 totals of that data don't look anything like the
15 totals for 2019. So they had to try to figure out a
16 way to force the totals that they calculated for the
17 segments to the actual totals they had, and they call
18 this calibration, which all that means is they took
19 the difference between the actuals, and the
20 differences between what the model spat out.

21 They figure out a factor to what the
22 mathematical difference is, and then they just like

1 spread it evenly across all the segments.

2 BOARD MEMBER SCHULTZ: Just a quick
3 question?

4 MR. WARREN: Yes.

5 BOARD MEMBER SCHULTZ: I wonder if you
6 could tell me in what way they did not meet the Board
7 standard with regard to submission?

8 MR. WARREN: So well I think you know for
9 -- I think the Board has determined already that this
10 approach did not you know violate the rule for
11 Exhibit 14. We think that's you know, we had a
12 different interpretation of the rule. We thought the
13 rule you know required, as has happened in past
14 applications, that actual data be used.

15 You know, we do think that there are
16 significant public or interest reasons for the Board
17 to be relying on reliable data, and not model data.
18 Even you know regardless of whether it is
19 technically compliant with the rules or not, the
20 question is do you have the best data that you need?

21 And it's a different question. I think in
22 the environmental context, or the transportation

1 context. I'm not an environmental lawyer, so I don't
2 know, but I think on the environmental context there
3 is a requirement underneath it to use the best
4 available data.

5 But the Board has much more discretion
6 under a public interest test. We just think it's
7 important carrying out your public interest duties,
8 to have the best available data.

9 MS. GAINEY: And if I can just add as well,
10 in the Board's decision in April when it asked the
11 applicants to amend the operating plan, it noted that
12 a modeling perspective, a model could be used, but
13 that the question of whether the model was reliable
14 would be deferred until the end of the case, and
15 asked commenters to put comments in on whether the
16 model was reliable.

17 And then the Board also stated its
18 expectation that the data that was going to come in
19 May in the amended operating plan would be
20 essentially the same data that the OEA had received
21 last October. That is not actually what happened.
22 And then CN submitted in our June comments, a

1 verified statement of NATCOM that explained why the
2 modeling effort was not reliable.

3 BOARD MEMBER SCHULTZ: Thank you.

4 MR. WARREN: And I think our bottom line
5 for all of this is that we think the Board should be
6 requiring more of CP and KCS, and we think that the
7 Board should start just by holding them to their
8 word. So last April, seven major shipper
9 organizations, the U.S. Department of Justice,
10 multiple other parties, all asked the Board to use
11 its current merger rules to review this merger.

12 And one of the major reasons they asked
13 for that was that the new rules required service
14 assurance plans. And somehow I've jumped slides
15 again because I can't seem to work this thing. So,
16 and we have a screenshot up here from what the joint
17 shippers you know put in.

18 And they pointed out that the reason you
19 do service assurance plans is to ensure that
20 potential service problems are addressed before
21 disruptions happen. And there is a good reason you
22 know why the Board developed the service assurance

1 plan requirement in 2001, and good reasons why these
2 stakeholders ask for one.

3 A service assurance plan has key elements
4 that are needed for the Board, and for stakeholders
5 to analyze the impacts of a merger. And you know,
6 it's a plan that shows the precise steps that the
7 applicants are going to take to ensure that their
8 projected service levels would be attainable, to
9 explain with reasonable precision how the operating
10 plan efficiencies are going to translate into present
11 and future benefits for the shipping public.

12 To describe areas of potential service
13 degradation that might result, and how you might
14 mitigate them. Yet to notify connecting railroads,
15 and passenger agencies of how you're going to
16 coordinate with them. Provide evidence that
17 contingency plans are in place, and to provide
18 benchmarking for key corridors, yards, and
19 terminals, and for passenger performance.

20 So in response to these calls to use the
21 current rules, one of the things that CP and KCS said
22 is you don't need to use the current rules because we

1 will voluntarily give the Board all the information
2 it needs to satisfy itself that applicants have
3 carefully planned for the integration of these
4 railroads, and will implement measures to monitor and
5 adjust service levels during the integration process,
6 so that shipper's service levels are safeguarded, all
7 under appropriate Board oversight of course.

8 Now I want to be fair here. Like CP and
9 KCS did not say that they would be doing a service
10 assurance plan. But they did indicate that they
11 would be providing some of the key elements that the
12 Board adopted. You know, sufficient information to
13 satisfy the Board that there was a careful plan for
14 integration. Evidence that they would implement
15 measures to monitor and adjust service, evidence that
16 service levels would be safeguarded, and a plan for
17 Board oversight of all of us.

18 But when it came time to file an
19 application, they didn't follow through on that
20 promise. They gave you no detailed information on
21 integration planning, they proposed no metrics. They
22 initially proposed no monitoring of Board oversight

1 at all, and they didn't even acknowledge this promise
2 that they made back in April 2021.

3 And you know, we pointed out in our
4 comments in February that we thought that they
5 promised to do a service assurance plan. They filed
6 or applied on July 12th. They didn't respond to our
7 basic argument, which is that you promised to do
8 this. And instead they said well, we're going to
9 have something new.

10 We're going to have a service promise.
11 It's just jumping all over the place. But the
12 service -- just quickly. The service promise isn't a
13 whole lot more than the platitudes they put in the
14 original application. They say they will plan, but
15 they don't actually reveal the plan. They promise to
16 fix service problems that arise with a SWAT team, but
17 that's something that raises more concerns than it
18 resolves.

19 The purpose of the service assurance plan
20 is to forestall the need for SWAT teams to fix
21 problems after they happen. The point is to plan so
22 that you don't need SWAT teams. They do say we're

1 going to produce metrics, but they primarily are
2 promising to give you the ex parte 724 and 770 data
3 that they're already required to give you.

4 And they do say that they are going to
5 produce data on a couple of additional corridors, but
6 they've got no detail on what additional metrics they
7 are producing. They say that they are in the process
8 of assessing the specific metrics. This is their
9 final evidentiary filing, filed at a time when no
10 party can respond to it. They're still in the
11 process of developing the metrics.

12 This is not a substitute for an actual
13 service assurance plan subject to comment. And I
14 think I'm starting to wrap up. You know we can
15 compare what they've offered with what a service
16 assurance plan requires. You know have they
17 explained anywhere in their filings, the precise
18 steps to ensure that their service levels are going
19 to be attainable. They haven't.

20 They've just announced a very aggressive
21 plan to cut expenses that will be achieved almost
22 immediately after merger. Have they shown with

1 reasonable precision how operating plan efficiencies
2 will translate into benefits for the shipping public?
3 They've got 150 million in alleged operating savings
4 on their merger benefits exhibit, but that's just a
5 projected future profit statement.

6 That's not a statement of public benefits.
7 How is it that they're translating their plan into
8 better service, and not just increased profits? Have
9 they identified particular problem areas? Again,
10 they haven't. They just have this happy talk that
11 they're aren't going to be any problems because
12 they're great operators.

13 And I agree, they are great operators.
14 But the point of this is to plan for worse case
15 scenarios, and not assume that everything is going to
16 go according to plan. Have they provided connecting
17 railroads and passenger entities with sufficient
18 information on how their operations would be
19 affected?

20 You heard about the segment that we're
21 concerned about, that we pointed out in our June 9th
22 comments. You heard form Metra yesterday. I don't

1 think they're satisfied. You know have they given
2 you contingency plans? There's nothing public. Have
3 they given you clear metrics to monitor service?
4 They haven't.

5 You know, and yesterday we heard for the
6 first time, I think, that Mr. Clements apparently is
7 in charge of an integration planning team, but they
8 haven't shared any plan with you. They haven't
9 shared it with stakeholders, and they haven't
10 explained how they're going to reconcile their
11 aggressive operating expense cuts and inconsistent
12 data with a well calibrated and careful plan to
13 integrate operations without harming the network.

14 So in wrapping up this chapter I just note
15 that there are some interesting post mortems written
16 at the wake of the UPSP service meltdown. So one of
17 those was a Fortune Magazine piece that concluded
18 that the fundamental cause was arrogance. It was a
19 team of very smart, and very talented railroaders who
20 thought they could walk in the door and make
21 everything work immediately because they were the
22 smartest railroaders in the world.

1 And the real lessons of UPSP is that major
2 mergers have to be undertaken with some humility with
3 careful planning in advance for the ways that things
4 could go wrong, with a willingness to go slow to
5 avoid disruption. And with the listening to
6 stakeholders with concerns about the impact with the
7 first major merger in over 20 years.

8 And not just assuming that every party
9 with a concern must be ignorance, or malicious or a
10 nimby or scared of competition. One of the core
11 purposes of a service assurance plan is to make
12 merger applicants be humble, to plan for the worst
13 case scenarios and not just the best case scenarios.
14 And to share those plans with stakeholders and the
15 Board in advance, so they know what is coming and
16 they can offer improvements, and so the Board has a
17 measuring stick to keep them honest.

18 The Board should order the applicants to
19 fulfill the promise they made in April 2021, to give
20 it sufficient information, to understand that they
21 have sufficient integration planning. We think the
22 best way to do that is to make them produce a service

1 insurance plan for public comments.

2 So unless there are any questions, I think
3 we'll start moving on to Springfield.

4 CHAIRMAN OBERMAN: I wanted to -- I was
5 trying to, there's too much paper in front of me. I
6 was searching for it, but in terms of the operating
7 positions, which you've dealt with earlier, somebody
8 dealt with earlier, your comments that they weren't
9 really increasing the workforce.

10 According to one of the filings they
11 anticipate they say adding 1,000 union operating
12 positions to accommodate traffic growth.

13 MR. WARREN: Yes. And I think Mr.
14 Chairman, that's the same number we've got on our
15 slide.

16 CHAIRMAN OBERMAN: Okay. And you're
17 saying that's not enough?

18 MR. WARREN: Our point is that they're
19 growing volumes by 20 percent. And their workforce
20 they say they're going to grow by 5 percent, with the
21 locals flat and the freight cars down. That's our
22 point. We're not denying, and we're just putting up

1 what their plan is. They absolutely say they're
2 going to increase.

3 CHAIRMAN OBERMAN: The 5 percent you're
4 talking about are those in position?

5 MR. .WARREN: Yes, yes, the math is on
6 that slide, and then it cites back to where it's in
7 the record on it.

8 CHAIRMAN OBERMAN: I was trying to go back
9 to your slide and their file and I couldn't get the
10 two together. Okay. That was the only question I
11 had for the moment. Any other questions, Karen?

12 BOARD MEMBER HEDLUND: Matt, do you have
13 any particular concerns about issues related to a
14 vertical merger as opposed to a horizontal merger?
15 UP/SP was a horizontal merger.

16 MR. WARREN: Well I think that so, Member
17 Hedlund, if I could understand, do you mean from a
18 service perspective, or from a gateway, from a
19 competition perspective?

20 BOARD MEMBER HEDLUND: No, no, from a
21 service perspective. What are the unique service
22 issues with respect to a vertical merger, and because

1 the reference that you make UP/SP was a different kind
2 of merger.

3 MR. WARREN: Yeah, I think that's a fair
4 point, and I think that there again, I would just
5 point to the 150 million in operating expense
6 changes. So if it's just, I think the premise of
7 your question is in a vertical merger you're not
8 going to be reducing as many facilities, and so you
9 won't have as many issues.

10 Well they're going to find 115 million in
11 operating expense savings, and they think they're
12 going to get 81 percent of those savings in the first
13 year. So they are planning changes. They haven't
14 really explained what those changes are going to be,
15 but they you know, they have something. They call it
16 the optimized plan that's going to roll out.

17 So it may not you know, and again service
18 assurance plans we think probably come in all shapes
19 and sizes. You go back to the one at Wisconsin
20 Central, it's pretty short. You know I think if you
21 had one in an east/west merger, it would be pretty
22 big. And you know I think the service assurance

1 plan, you know for this, for CP/KCS is probably going
2 to be somewhere in the middle.

3 We do think there are issues, and we think
4 that it's appropriate to ask them to produce that
5 integration planning.

6 BOARD MEMBER HEDLUND: Thank you, I'm
7 done.

8 CHAIRMAN OBERMAN: Patrick?

9 BOARD MEMBER FUCHS: The last merger that
10 could be characterized as sort of more vertically
11 integrated, a major merger, would be CN/IC. Is that
12 fair to say?

13 MR. WARREN: I think that's right, yes.

14 BOARD MEMBER FUCHS: Okay. And what were
15 the operating expense savings in the years following
16 that merger?

17 MR. WARREN: That is not something that I
18 have in my head, but we could certainly provide it.
19 But I feel like you might know the answer already.

20 BOARD MEMBER FUCHS: Well a pretty
21 substantial drop in the operating ratio at CN during
22 that time period after the merger. Fair to say?

1 MR. WARREN: I think it's fair to say,
2 it's 20 years ago yes.

3 BOARD MEMBER FUCHS: Okay. And did CN/IC
4 submit a service assurance plan under the old rules?

5 MR. WARREN: No. I don't think they did.

6 BOARD MEMBER FUCHS: Were there any
7 service problems?

8 MR. WARREN: There weren't.

9 BOARD MEMBER FUCHS: Okay.

10 MR. WARREN: So what I would say is that
11 you know I think that it's important to not just
12 point to the situations where everything worked out,
13 and assume that, and make the assumption that
14 everything is going to work out here too. You know
15 we're not saying, you know, we see catastrophe on the
16 horizon.

17 Like what we're saying is we see a plan
18 for substantial cuts upfront. We see very unreliable
19 data that's just all over the place in the operating
20 plan, and we are worried that this is a situation
21 where the assumption is we're the smartest
22 railroaders in the world, we do great service. This

1 is going to be easy, we've got it.

2 And like all we're asking to do, all we're
3 asking for is that they be asked that they be
4 required to do what they promised you they would do,
5 which is they put forward a service assurance plan.
6 And they tell the Board, you know, publicly that this
7 is the planning that we have done. These are the
8 problems that could happen, this is how we're going
9 to fix them. These are the metrics that we're going
10 to give you to show you how to measure our service
11 metrics that go pre-merger to post-merger, that's our
12 only request.

13 BOARD MEMBER FUCHS: And understanding
14 they weren't major mergers, but obviously CN has
15 engaged in a number of transactions post 2000, not
16 counting the Wisconsin Central. Did CN submit a
17 service assurance plan? And by the way, appreciating
18 what applicants state their point is understood.

19 Did CN submit a service assurance plan in
20 any other transaction that it engaged in?

21 MR. WARREN: I think the only one has been
22 at Wisconsin Central.

1 BOARD MEMBER FUCHS: Were there any issues
2 that a service assurance plan you think could have
3 helped say coming out of EJ&E, or any other
4 transaction. I think DMIR was another one.

5 MR. WARREN: I think that in a lot of ways
6 a service assurance plan is requiring applicants to
7 do publicly what they should be doing privately. And
8 to put their integration out there publicly, so that
9 members that are interested in service, and members
10 of the public that are interested in service,
11 obviously members of the Board that are interested in
12 service can see what the plan is, and know in
13 advance where the hot spots are going to be. You
14 know, what are the metrics we can use to measure
15 this?

16 Like we don't think it's enough for them
17 to say we're going to give the 724 and 770 metrics
18 we're already giving you, and again as I said, they
19 say that they're going to do some other metrics.
20 They haven't told you what they are yet. And you
21 know they haven't given any party any opportunity to
22 comment on that, which is sort of ironic, you know,

1 given our earlier interruption today.

2 MR. ATKINS: So Chairman, before we move on
3 the next segment chapter is rather lengthy, it might
4 be an appropriate spot for a five minute break. I'm
5 just saying in terms of timing it would work well for
6 our presentation.

7 CHAIRMAN OBERMAN: Noted. But before we
8 get there I just wanted to follow-up on this question
9 Matt. As I understand it your lengthy discussion
10 about a service assurance plan, you're referring to a
11 service assurance plan which would have been required
12 if the new rules had applied?

13 MR. WARREN: Yes, that's right.

14 CHAIRMAN OBERMAN: And then you seem to be
15 saying we should require it anyway, but you also have
16 pages in your slide deck say well if there were no
17 service assurance plan they should have provided X,
18 Y, and Z that they said they would provide. So I'm
19 not clear what would satisfy CN, what request you're
20 making.

21 Are you saying it's sufficient if we
22 agreed with your construction of what you say CP

1 "promised." Or are you saying nothing short of the
2 kind of service assurance plan that would have been
3 required under the new rules will be adequate?

4 MR. WARREN: Sorry, so Mr. Chairman, I
5 think we are where we are in this proceeding, so I
6 suspect that if the application filed a year ago had
7 something that was short of a service assurance plan,
8 but was taking some steps to fulfill that promise to
9 the Board, we probably wouldn't be here today asking
10 for it.

11 I mean a service assurance plan is
12 something that is you know there are clear roles for
13 it, you know, it was developed by the Board. We
14 think it's a good model. And we think that if the
15 Board, or the applicants -- the applicants have just
16 said no, we're not giving you anything.

17 If they said boy, you know, we think that
18 this one particular element isn't appropriate here,
19 but we'll do the other elements, that might be
20 something that the Board could certainly consider
21 that as a condition, or could consider something that
22 is less than the full service assurance plan. You

1 know we think they haven't done anything. They
2 clearly haven't met the requirements.

3 One, I think administratively simple way
4 for the applicants to fulfill that promise, would be
5 to just you know tick down the steps of a service
6 assurance plan.

7 CHAIRMAN OBERMAN: Well I understand that,
8 but I'm trying to really nail down what you minimally
9 are asking of us. I assume you're not actually
10 asking us to -- well maybe you are, to reverse our
11 decision and apply the new rules. So I can't quite,
12 you know you keep going back and forth between much
13 of this presentation has been saying what would be
14 great about a service assurance plan, but we I think
15 as you point out, we are where we are.

16 So what exactly, can I find this in your
17 slide deck, or in your filings, what you think we
18 should require short of a service assurance plan?

19 MR. WARREN: So I think what we said in
20 our original comments that the service assurance plan
21 or it's equivalent. I think the Board in its
22 discretion absolutely can require more of applicants

1 than -- can require you know any manner of
2 information from applicants. You did that earlier
3 this year where you told them to resubmit their
4 operating plan. So I think that --

5 CHAIRMAN OBERMAN: I know. I'm just
6 trying to get the specifics.

7 MR. WARREN: Right, yeah.

8 CHAIRMAN OBERMAN: So you know something.
9 It's very hard to implement if we were to agree with
10 you, something that's "adequate".

11 MR. WARREN: Yes.

12 CHAIRMAN OBERMAN: So you seem to have a
13 lot of details in here, I'm trying to pinpoint which
14 ones you would say are minimally required.

15 MR. WARREN: Yeah, well and I think and
16 again the applicants haven't really addressed this.
17 They've just said no, we don't need to do it. So,
18 and they haven't really offered to come halfway. I
19 will say again, in their reply, their last
20 evidentiary filing, not their application, they said
21 oh now we will submit Board oversight, and now we
22 will give you some metrics.

1 So no party was able to comment on that,
2 and you know --

3 CHAIRMAN OBERMAN: Well you're able to
4 comment on it now, that's one of the reasons why
5 we're having a hearing and there will be --

6 MR. WARREN: Well I'm not sure applicants
7 agree I could comment on new things now.

8 CHAIRMAN OBERMAN: Well there will be
9 final briefs, that's one of the reasons we're having
10 the hearing, and we said there will be final briefs.
11 Comment is not necessarily new evidence, as Mr.
12 Meyers pointed out before, assuming we could sort
13 that out.

14 I just want your best advice to the Board
15 if we were to accept it with precision as to what you
16 think is needed, so that's all.

17 MR. WARREN: So my best advice would be
18 that applicants would be asked, and maybe they'll
19 offer to do it tomorrow. Applicants should be asked
20 to provide a service assurance plan for public
21 comment.

22 I would ask that it be based on actual

1 data, and not some set of model data, and you know if
2 applicants want to say you know actually we think
3 that this particular part of the service assurance
4 plan is unneeded, or this particular part is too
5 burdensome, they could certainly say that.

6 You know we're sort of arguing you know,
7 negotiating against myself here because we asked for
8 it. Applicants said nothing, and you know we agree
9 from the outset. I mean they did not say we'll do a
10 service assurance plan. They told me they would
11 do more than the old rules required, and that is
12 something they didn't do.

13 CHAIRMAN OBERMAN: Well that is what I'm
14 trying to focus in on. If you could provide us with
15 an alternative. I understand you think they should
16 provide a service assurance plan, but assuming we're
17 not going to require that, and I'm not making any
18 prejudgment, I have no idea what the Board will do.
19 Is there some other way to be specific based on what
20 they said they were going to do in your view that
21 they haven't done?

22 That's what I'd like, and maybe it's in

1 the slide deck.

2 MR. WARREN: Yes, and you know one thing
3 the Board, again we think the service assurance plan
4 actually provides a good framework, but the Board
5 could you know say we order applicants to comply with
6 this promise. We order applicants, and I can go back
7 to that slide.

8 We order them to provide the Board with
9 sufficient information to satisfy us that you've
10 appropriately planned for implementation.

11 CHAIRMAN OBERMAN: Which slide? Is it the
12 slide that's up there now? Is that the one you're
13 talking about?

14 MR. WARREN: You know how I am with the
15 slide deck Mr. Chairman, but I will do my best. I am
16 going to blame the clicker because I promise I'm
17 pushing the button.

18 CHAIRMAN OBERMAN: Well we can all take
19 out our anger on an inanimate object.

20 MR. WARREN: Yeah.

21 MR. ATKINS: Can I say one thing?

22 MR. WARREN: Yeah, go right ahead.

1 MR. ATKINS: So Chairman, let me just make
2 one observation though. So everyone wants you know,
3 contrary to what CP may think. You know we
4 understand that we want this whole process to be
5 efficient. And so it's clear they didn't meet their
6 commitment, so the question is what do you order?

7 You have an off the shelf set of rules
8 that you can simply pull off, and there will be no
9 longer any dispute that they've complied with it. If
10 we try to customize something that was specific to
11 their promise in the vertical nature of this merger,
12 I'd be worried that they'll submit it, and you'll
13 have people, maybe us, maybe NITL, maybe Ag saying
14 it's insufficient.

15 But you've got basically something that
16 you designed to assure the Board that there would be
17 sufficient planning in place, all the regulations are
18 there. It's just it's very -- for us it was the
19 easiest ask, as opposed to coming to you and saying,
20 let's try and craft something that's customized for
21 this circumstance and that promise.

22 So I appreciate you know you may decide

1 you want to tailor it yourselves, but that was why we
2 picked the request they simply be required to follow,
3 you take it off the shelf basically, and implement
4 it.

5 CHAIRMAN OBERMAN: I understand that. But
6 since we have already made a decision a long time ago
7 about the old rules versus the new rules, I'm asking
8 you to take the opportunity to be specific. So if we
9 were to agree with you, we could figure out if we can
10 order what you think is needed, so whether we agree
11 with you or not, but I'd like to have something
12 concrete to measure it.

13 MR. ATKINS: Absolutely. We'll be sure to
14 brief this point in detail Chairman.

15 CHAIRMAN OBERMAN: No I understand.

16 MR. ATKINS: I just wanted to indicate why I
17 still believe you're better off picking a plan that
18 you know is going to be sufficient, than us trying to
19 customize one for this proceeding, but, so do you
20 want to take a break?

21 CHAIRMAN OBERMAN: I think that's a good
22 idea. Let's take a ten minute break. We'll

1 reconvene at 11:30.

2 (Break)

3 CHAIRMAN OBERMAN: All right. We are back
4 on the record. Let me just say something here by way
5 of scheduling to give some people advance notice here
6 in order to make sure we get this done, or get as
7 much done as possible. Hold on one second.

8 So here is the current plan, which
9 hopefully will not change. We're going to finish
10 with CN, and then we're going to hear from two
11 witnesses who cannot be here later in the afternoon,
12 hopefully they're listening so they can be ready.
13 I'm not sure how long we're going to continue with
14 CN, but whatever it takes.

15 Dan Borgen of USD Group, and James Irving
16 of J.D. Irving, Limited. And then we will break for
17 lunch. And excuse me, immediately after lunch we
18 will move ahead to BNSF and NS for a couple of
19 reasons. One, they may take longer, and two, at
20 least one NS witness has some time limitations, and
21 then we will resume after that whatever time is left
22 for today to hear as many witnesses as we can.

1 I think it is the Board's intent to be
2 available to keep going at least until 7:00, assuming
3 there are witnesses who are still available to
4 testify at that point. So with that Ray, proceed to
5 your next section.

6 MR. WARREN: Well and I'll ask for my
7 nemesis, the slide deck, to see if it can come up on
8 the screen. I'll just go ahead and get started.
9 CN's responsive application seeking divestiture of
10 the Springfield line is strongly in the public
11 interest, and we have a number of witnesses here
12 today who are going to talk about the public interest
13 benefits of the application, and the steps that CN
14 has taken to ensure that it's good for all parties.

15 Yesterday you heard from the applicants
16 quite confidently that CN's responsive application
17 should be denied because the Springfield line isn't a
18 competitive alternative to the CP line between Kansas
19 City and Chicago. Well, that is not what Mr. Creel
20 said in his July 12th verified statement when he said
21 that he was concerned that an independent Springfield
22 line in CN's hands would compete with CP/KCS for

1 traffic opportunities of the Kansas City - Chicago
2 lane.

3 In that sworn statement -- it would "poach
4 traffic" that CP/KCS would otherwise pursue in the
5 Kansas City - Chicago lane. You can't poach traffic
6 unless the line is competitive. And of course, one
7 of the core principles of this Board's merger
8 precedent is that carriers are not entitled to
9 protect their traffic opportunities from being
10 poached by competitors.

11 Competition is good. And merging carriers
12 do not have the right to snuff out competition
13 because they want to concentrate traffic on CP's Kansas
14 City line to build densities on that line. And you
15 can see from a map why it is that Mr. Creel said that
16 the Springfield line views it as a competitive
17 threat. There's not really serious dispute from CP
18 and KCS that the lines are parallel, and Congress
19 specifically amended the Board, the statute in ICCTA to make
20 clear that this agency has the authority to order
21 divestiture of parallel lines when that is in the
22 public interest.

1 There was about a 4,000 page reply filing
2 from the applicants in July. Not once in there did
3 they address this statutory language in which
4 Congress explicitly added language making it clear
5 that the Board had the authority to require
6 divestiture of parallel lines, and that's a standard.

7 In a Class I merger the Board will impose
8 conditions that remedy a merger related harm, that
9 are consistent with the public interest. And one of
10 the tools that Congress wants you to consider is
11 divestiture of parallel lines when you can show that
12 that's in the public interest.

13 The core argument from CP and KCS is that
14 there's not really any competitive harm here. Is
15 there are other routes between Chicago and Kansas
16 City, and there's not much CN/KCS traffic that has
17 historically moved over the line in recent years.
18 And that's wrong for a few reasons.

19 In the first place, CP's suggestion that
20 this Board has to have a purely backward looking
21 approach to competitive analysis is not consistent
22 with Board precedent or the public interest. The

1 Board has historically granted competitive conditions
2 where the only competitive harm was a loss of future
3 potential competition.

4 That's what the Board has done when a
5 merger might affect incentives to do a future
6 buildout. That's a loss of future competitive
7 potential because the buildout obviously doesn't
8 exist yet, and that's a competitive harm that's
9 warranted conditions. And as we pointed out in our
10 August 11th rebuttal, modern anti-trust policy
11 recognizes that there are serious concerns with
12 mergers that are designed to snuff out potential
13 competition.

14 The Board has looked to the future, and
15 future potential, and it should keep to that policy
16 here. And here of course you don't just have to look
17 to the future because it's not a buildout. The line
18 is a current competitive option for interline
19 traffic, both for CN, and for other carriers at
20 Springfield and East St. Louis.

21 We agreed with applicants that the line is
22 not currently being used to its full competitive

1 potential, largely because there's a need for
2 investment on the KCS side. But there's also no
3 doubt that it's a current option with enormous future
4 potential, and that's what our witnesses are going to
5 talk about. Allowing a merged CP/KC to cut off that
6 potential, and to eliminate the threat their traffic
7 opportunities might be poached, is the textbook
8 definition of a merger related harm.

9 And in this major merger under a public
10 interest test, the Board is at the apex of its
11 authority to impose a condition that would mitigate a
12 merger harm, particularly when that condition is
13 designed not to hurt any legitimate merger synergy,
14 and to be such a clear benefit to the public
15 interest.

16 Before I turn it over to Doug to talk
17 about those public interest benefits, I want to
18 correct the record on a couple of issues. First, CP
19 and KCS suggested yesterday that the Springfield
20 line was somehow key to the growth plans. They put
21 up a slide with a graph that I don't think I had ever
22 seen before, claiming that this was the aorta of the

1 KCS great network.

2 That is not what their application says,
3 so this is a page straight from their own amended
4 operating plan, the one they filed in May. This is
5 Exhibit 14, page 72. That is their projection of the
6 traffic volume in year three. So you can see that
7 big thick line on the north/south routes, and
8 essentially nothing on the Springfield line.

9 This is not part of the plans for merger
10 growth. And as you can see on the next slide again,
11 pulled this straight of their May operating plan,
12 they plan no merger related capital investment on the
13 line. No investments in intermodal service over the
14 line, no investments in automotive service, no
15 planned investments in East St. Louis, or in
16 Springfield, and no planned investments to improve
17 service to the great customers on the line.

18 The second thing I'd like to clear up.
19 Mr. Ottensmeyer testified yesterday that there is no
20 customer on the line that supports CN's responsive
21 application. He has been misinformed. ADM has
22 facilities on the Springfield line at Mexico, and

1 again at Cockrell.

2 And it submitted a letter supporting the
3 Springfield divestiture, which was attached to our
4 July 12th reply. As ADM noted in that letter, it
5 believes that divestiture will be particularly
6 beneficial to agricultural customers and producers
7 across the Midwest, they rightly noted that CN's
8 investments in the line would improve transit times
9 and track speeds, increase the frequency of manifest
10 service, and that it "makes sense" to support change
11 that increases velocity and creates competitive
12 alternatives.

13 Lastly, the suggestion yesterday from CP
14 and KCS that the only real value of the Springfield
15 line was as a grain gathering line for the KCS
16 network, is also not supported by the record.
17 According to the waybill sample these are highly aggregated
18 numbers, so I can share them. In 2019 about 39,000
19 loaded and empty cars and intermodal units were
20 interchanged at either East St. Louis or Springfield,
21 the seven different railroads.

22 This isn't just a grain feeder line. To

1 be sure this is a line that's not living up to its
2 potential. And it can be a critical competitive link
3 in the supply chain, if it's got an owner that's
4 willing to invest in it. CP and KCS's application
5 makes clear that they don't see that future
6 potential, and that they aren't willing to make those
7 investments.

8 CN has a very different vision for the
9 line, and I'll now turn it over to Doug to talk about
10 that vision.

11 CHAIRMAN OBERMAN: Before you leave Matt,
12 what is if any, the amount of traffic that's moving
13 from Kansas City to Chicago on this line currently?

14 MR. WARREN: From Kansas City to Chicago
15 over this line. I think, yes.

16 CHAIRMAN OBERMAN: The one that you say is
17 a parallel competitive line, that's what I understand
18 there's virtually no traffic moving.

19 MR. WARREN: And that's exactly, I think
20 that that's why the emphasis on it is on future
21 competition. I mean I think if you're asking about
22 you know KCS, you know CN interchanges over the

1 line, you know, I think in recent years it's only
2 been about 200 cars. Again, you know, as we've
3 described in papers.

4 CHAIRMAN OBERMAN: So why is that?

5 MR. WARREN: Primarily, and some others
6 might be able to address that. I think primarily, go
7 ahead.

8 SPEAKER: So we did have an agreement for
9 a while with an interchange at the KCS on that line,
10 so due to the poor service involved, due to the slow
11 speed of it all, we were never able to grow that
12 business. So what we did is we reverted back to an
13 either East St. Louis interchange, or over Jackson.

14 CHAIRMAN OBERMAN: You're saying that the
15 condition of the line between Springfield and Kansas
16 City, what's the rating, what classification is it?

17 SPEAKER: And we just do our due diligence
18 that our prior look at the KCS, around Cockrell, a
19 lot of it is 10 miles an hour, and then it gets up to
20 approximate 25 up to Roodhouse and from Roodhouse
21 which is a line that comes from St. Louis to
22 Roodhouse, and then to Kansas City. That is Class 3

1 at 40 miles an hour if I recall.

2 CHAIRMAN OBERMAN: So you're saying the
3 slow sections are sufficient to deter moving traffic
4 from Kansas City to Chicago, and that's why it hasn't
5 been done. Is that your contention?

6 MS. GAINNEY: I would say it's the customers,
7 sir, who are saying that the service was too slow to
8 be able to justify it.

9 SPEAKER: And this is something that Derek
10 Taylor is going to be speaking about momentarily, but
11 there's also a lack of interchange facilities on the
12 KCS side near Cockrell.

13 CHAIRMAN OBERMAN: All right. Well I
14 wanted to get the history because I assume you're
15 going into the future, so go ahead.

16 MR. MACDONALD: Okay. Good morning. My
17 name is Doug MacDonald. I am the Chief Marketing
18 Officer of CN, a position I've held since April of
19 2022. In my role I oversee all customer related
20 business areas and activities, including the
21 strategic commercial roadmap for CN.

22 I have more than 30 years of experience in

1 the rail industry, and prior to my current role I've
2 held diverse roles at CN in marketing, sales,
3 information technology, and operations, including the
4 Senior Vice President, Special Products, Office of
5 the President, and CEO, Senior VP, Information
6 Technology, Vice President of Operations for Eastern
7 Region, Senior Vice President Sales and Marketing for
8 all products, Vice President for Industrial
9 Products, and Vice President for Corporate Marketing.

10 I'm excited to talk to you about CN's
11 responsive application to acquire the Springfield
12 line. Combining CN's network with the KCS and
13 Springfield line would be a pro-competitive
14 opportunity that would best utilize the competitive
15 presence of the Springfield line to the benefit of
16 shippers and the public.

17 As CN's responsive application describes
18 in detail, there is a tremendous market opportunity
19 for a CN owned Springfield line that could compete
20 aggressively with trucks and a combined CP/KCS for
21 traffic. Take 80,000 long haul trucks off the road
22 annually, and offer a vastly improved railroad that

1 avoids the congested Chicago terminal.

2 Customers and stakeholders have recognized
3 the opportunity, which is reflected in the 75 letters
4 of support for divestiture of the Springfield line to
5 CN. As described in my verified statement, CN was
6 looking at the potential of the Springfield line to
7 compete with trucks before CP and KCS first
8 announced the planned merger in 2021 in March.

9 In fact, CN's efforts to increase the
10 market opportunities presented by the Springfield
11 line significantly predates the news that KCS was
12 contemplating a sale of its franchise. In addition
13 to CN's efforts decades ago to grow the Springfield
14 line through the alliance with KCS, CN has in recent
15 years considered options to invest in the Springfield
16 line to develop its full potential.

17 Ranging from partnership discussions with
18 the private equity group, to CN's proposal last year
19 to acquire KCS. CN's longstanding interest in the
20 Springfield line was something KCS talked about
21 publicly over the summer of 2021. So after KCS and
22 CP signed a new merger agreement last September, we

1 were disappointed to see that CP and KCS had planned
2 zero investment for the Springfield line, with no
3 plan to improve the service over the line, or develop
4 new intermodal and automotive traffic on the line.

5 Instead, their plan is to treat the
6 Springfield line as a minor feeder line, and
7 concentrate traffic on the parallel CP route between
8 Kansas City and Chicago. We at CN are concerned
9 about the combined CP/KCS plan to under utilize the
10 Springfield line in order to concentrate traffic on
11 CP's parallel line, and forever foreclose a strong
12 competitor from the opportunity to develop the
13 Springfield line.

14 This plan is anti-competitive. Allowing
15 CP to acquire a new KCS rail asset, and prevent it
16 from being used to compete effectively with CP's
17 legacy service, would subvert competition in the rail
18 industry, and desert the public interest --
19 disservice the public interest.

20 Indeed, the only outcome that would
21 permanently extinguish the Springfield line as a
22 competitive alternative between Kansas City and

1 Chicago is approval of the CP/KCS merger without a
2 divestiture condition. In response we decided to
3 propose the Springfield responsive application as a
4 solution for preserving the competitive option of the
5 Springfield line.

6 In doing this, we did something different
7 from what you've seen in condition requests for prior
8 mergers. We designed our responsive application to
9 not harm CP and KCS at all. We have offered to give
10 CP and KCS unfettered access to all customers on the
11 line, and to use the line for interchange with other
12 rail carriers in the East St. Louis and Springfield
13 gateways as they wish.

14 We have offered a haulage agreement with a
15 provision assuring the merged CP/KCS traffic would
16 receive service as good as CN traffic gets. We have
17 committed to invest 250 million to upgrade speeds and
18 facilities on the line, and we have designed a
19 service plan with equal or more frequent service than
20 KCS provides today.

21 It's an incredibly good deal when it comes
22 to a combined CP/KC's ability to access existing

1 customers on the Springfield line, and their ability
2 to pursue any new opportunities with those
3 customers, or even with new customers that may locate
4 on the line.

5 The only actual drawback from CP's
6 perspective is that it would mean that they can't
7 foreclose the Springfield line as a competitive
8 option to CP's existing and parallel line from Kansas
9 City to Chicago. While a combined CP/KC may prefer
10 the private business benefits of less competition,
11 foreclosing competition is clearly a public interest
12 harm.

13 By contrast it's plainly in the public
14 interest to preserve competitive presence of the
15 Springfield line by allowing it to continue as an
16 independent routing option, and to let CN invest in
17 the line to grow intermodal and automotive traffic,
18 compete with the combined CP/KCS, and take tens of
19 thousands of long haul trucks off the road.

20 Derek Taylor is here to discuss CN's
21 vision for the Springfield line can become with CN's
22 planned 250 million investment, planned hiring, and

1 our plan to improve service. I also have Dan
2 Bresolin and Sarah Slazinski here to talk about the
3 benefits we see for intermodal and automotive
4 customers from the new terminal facilities at East
5 St. Louis, Illinois and expanded capacity in Kansas
6 City Missouri.

7 Before I turn it over to my colleagues,
8 I'd like to talk about the impact of our responsive
9 application on grain customers. Grain shippers stand
10 only to benefit from a CN owned Springfield line.

11 While it appears that CP and KCS have been saying the
12 opposite to their customers, I want to reassure every
13 grain customer in the United States that a CN owned
14 Springfield line will only increase, it would not at
15 all decrease their rail shipping options, and would
16 improve service as a result of CN's planned
17 investment.

18 Let me talk first about customers on the
19 Springfield line who are currently shipping to KCS
20 destinations in Mexico, or elsewhere in KCS's
21 network, and who want to continue doing so. They
22 will be able to do so with better service and more

1 competitive leverage.

2 As we explained in our filings, a combined
3 CP/KC would be given haulage rights to all current
4 and future customers on the line. The haulage
5 arrangement would permit a merged CP/KCS to quote
6 rates directly to customers on the Springfield line
7 for the entire move, origin to destination as KCS
8 does today. If the customer wants to ship on the
9 merged CP/KCS, they can deal exclusively with CP/KCS,
10 and get single line pricing. They don't need to get
11 a rate from CN.

12 That haulage traffic is going to receive
13 the same level of service as CN traffic, that's not
14 just a promise. It's something that we have offered
15 to write into the haulage agreement. For carload
16 traffic, any CP/KCS haulage traffic would move in the
17 same trains as CN traffic.

18 For unit trains moving to KCS territory,
19 we've required that the KCS put dedicated locomotives
20 on the unit train sets, which would enable efficient
21 cycling. There would just be a step on, step off
22 crew change in Kansas City, similar to what happens

1 today between the crews of the former Gateway Western
2 and KCS.

3 And of course CN will be making major
4 investments in the line, which will improve service
5 for all online customers, including increased track
6 speeds between Cockrell and Roodhouse, Illinois.
7 Moreover, all of those Springfield line customers
8 would have an additional competitive option. If they
9 wanted to, they would ask -- they could ask CN for a
10 rate to Kansas City, and get competition for that leg
11 of the route.

12 Or they could ask for an eastbound rate to
13 Springfield or East St. Louis, and take advantage of
14 geographic competition to ship to a CN served
15 destination. Even for customers who only intend to
16 ship to KCS destinations, having the competitive
17 leverage is plainly an advantage.

18 That is one of the reasons that more than
19 75 customers and stakeholders, including ADM have
20 come out to support the Springfield divestiture.
21 While we're preserving existing competition, and
22 insuring better service, and options for grain

1 customers, we'll also be creating new opportunities
2 for intermodal and automotive customers to reach
3 markets in Kansas City, and East St. Louis, and avoid
4 congestion in Chicago.

5 I'm going to turn it over to Derek Taylor
6 to share CN's vision for what the Springfield Line
7 could become with CN's ownership and investment.

8 MR. WARREN: Thanks Doug.

9 BOARD MEMBER SCHULTZ: I'll ask a quick
10 question before you switch. It's my understanding
11 that BN, UP and NS all have competitive routes along
12 the Springfield line, so I was wondering if you could
13 just speak generally to how the applicants' retention
14 of the line would actually reduce competition.

15 MR. WARREN: Maybe I should address that.
16 And I don't want to pick on them, but I would go back
17 again to Mr. Creel thinks that it would reduce
18 competition, and claimed that that would be a harm of
19 the merger because CN would be able to you know poach
20 their traffic. So we absolutely -- I mean there are
21 multiple routes, it's a really competitive market.

22 You know obviously there's truck, there's

1 truck competition there now, and most of what CN is
2 trying to capture is traffic that is currently moving
3 by truck. But you know, the applicants see it as a
4 competitive threat.

5 So even though as Doug laid out, they're
6 getting in a lot of ways the deal of a lifetime,
7 because you know when prior divestitures were
8 proposed, nobody was proposing that the party who
9 the line was being taken away from would actually get
10 to retain access to all of their customers, and use
11 the line for interchange, you know, and have you know
12 additional new investment in the line, and a
13 guarantee that they'd get the same level of service.

14 So you're right. There are different ways
15 to get there. It's a really competitive market. But
16 this particular line, they've got competition on this
17 line is going to be foreclosed, and that is a merger
18 harm.

19 MR. ATKINS: I would also just add,
20 Member Shultz, the standard for you to think about
21 viewing this lens is set forth in the statute, which
22 is, is this in the public interest? So you need to

1 look at what are the benefits that flow from this
2 divestiture, and compare them to the public costs of
3 doing so. That's the standard Congress gave you, and
4 I think by the time you're done hearing from -- I
5 think the benefits are overwhelming, and the public
6 harms are -- we designed it to minimize them, or
7 remove them.

8 So I think in the grand scheme of things
9 when you think about this, the standard that Congress
10 gave you to decide whether to divest a parallel line,
11 this exact circumstance. It's that broad public
12 interest standard, which is what we're here to
13 hopefully convince you that you know this type of
14 increased investment, trucks off the road, increased
15 competition is in fact in the public interest.

16 BOARD MEMBER SCHULTZ: And I appreciate
17 that, and I guess I would just highlight the term
18 poaching to me actually underscores the fact that
19 competition is in fact available.

20 BOARD MEMBER PRIMUS: I got a question.

21 CHAIRMAN OBERMAN: Robert?

22 BOARD MEMBER PRIMUS: Yeah, if you don't

1 mind. Doug or whoever, you know it says that you
2 guys are planning potentially taking 80,000 long haul
3 trucks off the road annually. More than CP is taking
4 off the entire CP/KCS system. Where's that 80,000
5 come from?

6 MR. MACDONALD: That's existing business
7 moving between really Kansas City today, and Detroit
8 in Eastern Canada market, and it's only a small
9 portion of what we're -- like that 80,000 represents
10 only a small portion of the exact number of trucks
11 moved.

12 BOARD MEMBER PRIMUS: Right, and so how
13 did you guys arrive sort of at the 80,000? I mean
14 was there a target? And according to what I'm
15 reading right here you're saying you're only adding,
16 increasing the amount of traffic on that line by two
17 trains a day.

18 You know how do you get 80,000, pick up
19 80,000 truckloads on two trains a day worth of
20 growth?

21 MR. WARREN: So I would say Board Member
22 Primus, so the source for this is the verified

1 statement of David Hans. He did the diversion
2 analysis, so he you know, when he went through and
3 analyzed the market, and as Doug mentioned, there's
4 an absolute enormous long haul truck market, so you
5 don't have to capture very much of it to be able to
6 take 80,000 you know in trucks off the road.

7 And so that's where the 80,000 you know
8 trucks come from, and how you get 80,000 trucks on
9 two trains a day, a lot of it is you're going to hear
10 about it's the great math of efficiency of an
11 intermodal train. And when you have a long
12 intermodal double stack train, you can take so many
13 trucks off the road with every single train, I think
14 it's 300, have I got that right?

15 So every single
16 train is 300 trucks. Okay.

17 MR. WARREN: And so that's how you can get to
18 those public interest benefits without you know
19 actually you know only doing it on two trains a day.

20 BOARD MEMBER PRIMUS: So 300 trains,
21 that's they're all full times 365 okay, I'll do my
22 math, I'm a little slow, but I'll get this, I'll get

1 there.

2 MR. WARREN: And then in both directions.

3 BOARD MEMBER PRIMUS: And so how do you,
4 so what does it mean in terms of 85,000 to the
5 capacity, and to the overall volume of that line? I
6 mean we are we getting -- what levels are we
7 getting?

8 MR. TAYLOR: That's something I'm going to be
9 touching on next when we talk capacity investments
10 and where, but that line can handle the two
11 additional trains a day right now from our area
12 between Chicago to Springfield, which is our current
13 network, and then from Springfield to Kansas City
14 with the investments we're making on the current KCS
15 network.

16 CHAIRMAN OBERMAN: My math is that 80,000
17 trucks is 266 trains, which is almost five trains a
18 day, not two. If you're moving 300 containers per
19 train, so I share Robert's concern about the math.

20 MR. WARREN: I don't have a calculator here,
21 but I do think it's laid out pretty well in Mr.
22 Hunt's verified statement. I might be scribbling

1 some math here while Derek talks.

2 BOARD MEMBER PRIMUS: No, I get that. And
3 I wish Mr. Hunt was around because I really would
4 like to ask him, I mean, because its an important
5 point if you guys are saying what it's going to do,
6 and it's implications. I mean even what you're
7 saying in terms of it's doing more than what CP/KCS
8 is even suggesting throughout their whole network,
9 that's pretty substantial.

10 So you know having those answers and
11 address again, and asking if you just wanted to go
12 further into it, so.

13 MR. ATKINS: So I'm going to let Matt
14 continue to do the math while we move on to Derek.

15 MR. WARREN: I promise I'm not using
16 my phone for any other purposes
17 than the calculator function.

18 BOARD MEMBER PRIMUS: Let me ask just one
19 last, and I said one, so attached to this, you know,
20 again agreeing with moving through on this merger,
21 and you're asking for this divestiture. Would you
22 also be putting a service assurance plan together for

1 those customers on that line? And if so, could you
2 detail it for us?

3 MR. WARREN: So we think, that's a great
4 question. I mean it's a minor transaction, so.

5 BOARD MEMBER PRIMUS: I know, but.

6 MR. WARREN: We think it's really important.
7 I mean to do that we would need some cooperation from
8 the applicants because as you probably know, you
9 know, one of the main things you're trying to do is
10 you're trying to compare prior service to later
11 service.

12 And you're going to hear we're increasing
13 service frequency, so Derek is going to lay out our
14 service plan. But to actually get those metrics we
15 probably need to get some cooperation from the
16 applicants to put that together. But if the Board
17 wanted to make that a condition of the divestiture.

18 SPEAKER: I don't want to go out on a
19 limb.

20 SPEAKER: Yes, CN wouldn't worry about it.

21 MS. GAINNEY: CN of course would be happy and
22 willing to do so.

1 BOARD MEMBER PRIMUS: Okay, thank you.

2 BOARD MEMBER FUCHS: I just want to
3 follow-up on a question that Member Schultz raised,
4 Vice Chairman Shultz. Mainly focused on intermodal
5 and auto right, and for years, I would say decades,
6 the rail industry has maintained to the Board that
7 these are the most intensely competitive categories
8 of traffic, which is why they're exempt.

9 And so I think the question is right on in
10 the sense that at the shipper level, have you all
11 conducted an analysis of kind of the base line level
12 of competition, in terms of competitive options, that
13 these auto and intermodal shippers have compared to
14 the post transaction level of competition?

15 MR. WARREN: I mean I think that's something
16 we're going to address. I mean it's an additional
17 option. I mean I don't know we didn't, there's not I
18 think a competition metric that we decided
19 pre-transaction, post-transaction, but we're adding
20 an option, and we obviously have a lot of support
21 from intermodal and automotive shippers, we have a
22 lot of support.

1 So I don't know if we've got a math number
2 I can give you that this is how competition has
3 changed, but I think you know you'll hear from the
4 railroad people who are you know trying to you know,
5 or building these business portfolios, and from the
6 customers, they think it helps competition.

7 BOARD MEMBER FUCHS: Well you know the
8 rail industry has said there's immense geographic
9 competition because there's ports all over the
10 country, and you know, there's a lot of facilities
11 all over the country, and you know that's before you
12 get to a truck competition, and you know to some
13 extent additional waterway competition.

14 And you know, would you agree there's a
15 difference between a facility that has eight options,
16 and could have nine, versus one that has two options,
17 and would have one. Yeah, there's a substantive
18 difference.

19 MR. WARREN: Yes. I agree that there's a
20 substantive difference. I think the other thing I
21 would say is that you are not the Department of
22 Justice, like you're not applying the anti-trust

1 laws, you're applying the public interest.

2 And so there is certainly a different
3 degree of competitive harm when you're going from
4 three to two, or two to one, than when you're going
5 from you know maybe four to three, or five to four,
6 but it's still a harm. And if it is a harm to
7 competition, then I think then the Board is at the
8 maximum of its authority to think about if there's a
9 condition to mitigate that harm.

10 And you know in most instances you know
11 parties have historically proposed conditions that
12 are designed to grab something from the applicants
13 and take it for themselves. That is not what CN is
14 trying to do here. Like the reason we're focusing
15 on the 80,000 trucks, the intermodal automotive,
16 that's what we're trying to do.

17 Like everything they want to do they get
18 to do, as Doug laid out, you know, they will have
19 full access to all of their grain customers, we will
20 support their service to customers that want to keep
21 shipping to Mexico. We will invest in the line, so a
22 customer is going to be getting better service, and

1 will commit in the contract that they get the same
2 level of service that CN gets.

3 So what we've tried to design, and we
4 understand that it is not you know, SSPSF levels of
5 competitive harm. But we also are not doing any harm
6 to the applicants. And we're doing it in a way that
7 we think has substantial public interest benefits.

8 BOARD MEMBER FUCHS: So it's your view
9 that there has to be some level of competitive harm
10 in order for the Board to impose this type of
11 condition. And but, once there is some level of
12 harm, even if it's going from 11 options to 10
13 options. Then the Board moves to just a benefit cost
14 analysis, that's the framework you think we should be
15 employing.

16 MR. WARREN: I think that's right. I think
17 my only amendment would be I mean we think this is
18 competitive harm, but I don't think that the Board is
19 limited to addressing competitive harms in a Class 1
20 merger on a public interest test. Like I mean the
21 statute has other factors, such as adequacy of
22 transportation.

1 I mean I don't think the Board you know,
2 we've presented this as competitive harm. The thing
3 is competitive harm. The Board isn't limited that
4 way when you're in this context of a Class 1 merger
5 where the standard is the public interest.

6 SPEAKER: Back to Derek.

7 MR. TAYLOR: Yes sir. Good morning
8 Chairman Oberman. Good morning Board Members. My
9 name is Derek Taylor. I'm CN's Vice President of
10 Transportation for the Southern region, and I
11 cosponsored CN's Springfield operating plan
12 alongside Carl Van Dyke from Oliver Wyman.

13 You heard earlier from a couple of my
14 colleagues about the tremendous opportunities we see
15 for a CN owned Springfield line. To capitalize on
16 those opportunities, we will invest in this route,
17 which will enable us to increase service and grow the
18 traffic.

19 The operating plan we submitted to the
20 Board does that, and CP and KCS really do not
21 question CN's basic approach to operating the
22 Springfield line in the written filings. I would

1 like to share how we plan to increase service on the
2 line with our investments. First, we will have a new
3 intermodal automotive train from Chicago with single
4 line service to Kansas City, which is planned for 7
5 days a week.

6 This will serve intermodal and automotive
7 shippers moving traffic between Kansas City, East St.
8 Louis and the Toronto Montreal Detroit markets.
9 Second, we'll have the new intermodal automotive
10 service to East St. Louis, which will connect to the
11 direct service from Chicago at Roodhouse, Illinois,
12 that's also planned for 7 days a week.

13 Third, we will have a manifest train
14 operating 6 days per week in each direction between
15 Kansas City and East St. Louis to support local train
16 and yard assignments, improving on the current
17 frequency.

18 Fourth, we'll have improved local service
19 along key corridors between Roodhouse, Illinois and
20 Mexico, Missouri, by extending service to Ladonia,
21 Missouri with increased frequency, multiple times per
22 week. The net result is that existing local service

1 experienced by Springfield line customers will
2 continue at the same, or higher frequency than is
3 provided today, while there will also be additional
4 through line opportunities.

5 CN has also proposed a haulage agreement,
6 which I will discuss in more detail shortly, which
7 will allow a combined CP/KC to continue to serve both
8 its existing customers on the Springfield line, and
9 any new customers it obtains. CN would also be able
10 to serve these customers, increasing competition.

11 As stated above, a combined CP/KC would
12 continue to have access to any current or potential
13 customers on the Springfield line via haulage
14 agreement proposed by CN. Despite some statements
15 to the contrary, haulage service is not an inferior
16 offering.

17 Indeed haulage service is used by every
18 Class 1 railroad, and numerous short line railroads,
19 and is typically viewed as a benefit, not a detriment
20 for customers. CN proposed a haulage agreement so
21 that local customers on the Springfield line will
22 continue to have direct commercial and pricing access

1 to the merged CP/KC network, with CN performing a
2 local service on behalf of the merged CP/KC.

3 CN's proposed haulage would also enable a
4 merged CP/KC to interchange traffic with other
5 railroads in East St. Louis and in Springfield,
6 Illinois. For unit train traffic on the Springfield
7 line the handoff between CN and a merged CP/KC would
8 be functionally identical to what it is today with
9 KCS.

10 The shipper and KCS would negotiate car
11 supply for unit trains moving to KCS destinations,
12 and KCS locomotives would be used. There would be a
13 step on, step off crew exchange between CN and the
14 merged CP/KC at Kansas City that is virtually
15 identical to the KCS Gateway Western crew changes
16 that occur today, where a KCS, formerly Gateway Western crew
17 operates west to Kansas City over the Springfield
18 line, and a separate KCS crew operates south of
19 Kansas City. The only difference will be which
20 railroad pays the salaries and employs the crews of
21 the former Gateway Western.

22 Customers of a combined CP/KC would also

1 benefit from the increased train service described
2 above, and the increased capital investment in the
3 line. CN proposes to make capital investments of
4 approximately 250 million dollars on the Springfield
5 line and adjacent Gilman subdivision.

6 CN's objective is for the entire
7 Springfield line, main line tracks between Kansas
8 City and Gilman, Illinois to be at Class 3 standards
9 to allow for a minimum freight speed of 40 miles an
10 hour. At Roodhouse, Illinois, 5,000 feet of new yard
11 track will also be constructed.

12 On the adjacent Gilman subdivision, CN
13 will install new ties, upgrade certain curves for
14 increased speeds, remove rail defects in the existing
15 track, upgrade the rail on the main line, install a
16 full flange bearing diamond at Mount Pulaski,
17 Illinois, and make a few other improvements to
18 achieve 40 miles an hour speeds on the entire
19 subdivision.

20 CN will extend seven siding's on the
21 Springfield line, and build an entirely new siding at
22 Cockrell, Illinois. At East St. Louis Yard,

1 significant investments will be made to support
2 increased intermodal and automotive traffic in line
3 with CN's diversion analysis and operating plan.

4 Specifically, CN will construct 6,000 feet
5 of track -- 6,000 track feet with intermodal pads and
6 accompanying pavement to handle over 90 lifts per
7 day. CN will also invest in the construction of
8 5,000 track feet for multi-level loading and
9 unloading and car storage, giving it the ability to
10 handle on the order of 40 inbound and outbound auto
11 racks per day.

12 In addition, approximately 25 acres will
13 be developed with necessary roadways, parking and
14 truck areas. Similar investment will be made at the
15 IFG terminal at Grandview, with facilities
16 constructed to accommodate 360 intermodal lifts per
17 day, consisting of 20,000 track feet and associated
18 pad, and associated storage, and accompanying
19 pavement.

20 For automotive traffic CN will construct
21 sufficient capacity to accommodate on the order of 50
22 inbound and outbound multi-levels per day. This

1 project will require construction of 6,600 track feet
2 for multi-level loading and unloading and storage.
3 The accompanying work will include roadways, and rail
4 head parking and truck access. Yes sir.

5 CHAIRMAN OBERMAN: Can I just ask you on
6 this slide, the one you just had up. I'm trying to
7 follow the dots, and there is a green indication for
8 track improvements, but I don't see it on the map.

9 MR. TAYLOR: Yeah, if you look maybe the
10 light blue, with my eyesight too, but if you look
11 between Springfield and Jackson, oh there we go. So
12 between Springfield and Jacksonville, Illinois, and
13 then you see Roodhouse with a big yellow, a dot
14 there.

15 CHAIRMAN OBERMAN: I see the yellow dot,
16 but I don't see any green dots.

17 MR. TAYLOR: Yeah I don't, it may be a
18 lighter blue.

19 SPEAKER: It's the green dashes on the
20 line.

21 MR. TAYLOR: It's the green dashes there
22 between the two.

1 CHAIRMAN OBERMAN: Oh that's supposed to
2 be the track improvements, okay.

3 MR. TAYLOR: That's correct.

4 CHAIRMAN OBERMAN: I'm just trying to
5 follow the map, thank you.

6 MR. TAYLOR: Springfield to Roodhouse.
7 The glasses came in handy.

8 CHAIRMAN OBERMAN: My wife says I'm color
9 blind, so we're good.

10 MR. TAYLOR: So as numerous stakeholders
11 have recognized, CN's routing would also help avoid
12 Chicago congestion, which as Rob explained, could be
13 a critical issue for the proposed merger. CN's
14 existing route for traffic between the Springfield
15 line, and the Detroit Eastern Canada largely avoids
16 the Chicago terminal all together, as shown on the
17 map.

18 In particular, traffic moving to or from
19 the Springfield line would move east towards Detroit,
20 or south towards the Springfield line from Madison,
21 Illinois and the rail yard to Madison's immediate
22 north and Harvey and Hazel Crest, Illinois, while

1 staying well south of Chicago.

2 The route bypasses the City of Chicago,
3 avoids the terminals most congested rail lines, and
4 does not require the use of intermediate switching
5 railroads, and does not compete for operating slots
6 with any Metra commuter train operations.

7 CHAIRMAN OBERMAN: Can I ask you a
8 question? Do you on the slide bypassing Chicago, do
9 you have any information on what that bypass would
10 mean to the plan increase on traffic, if any, on the
11 Metra lines that we heard about yesterday?

12 MR. TAYLOR: Sure. Yeah, there is no
13 impact to any Metra trains with the service. We stay
14 on the southeast side of Chicago.

15 CHAIRMAN OBERMAN: No, I understand that,
16 but if you had this line would it decrease the
17 proposed impact on the Metra lines?

18 MR. TAYLOR: Potentially it could, yes
19 sir.

20 CHAIRMAN OBERMAN: How would it do that?

21 MR. TAYLOR: Well this traffic here is
22 going to be focused on automotive and intermodal that

1 would come from the greater Kansas City area, or some
2 point south, which I'll let Sarah get into in her
3 presentation, and it will directly compete. We
4 could go CN single haul from Kansas City, basically,
5 minus the small trackage rights we're asking for,
6 IFG, all the way to Halifax, Nova Scotia essentially.

7 So that volume that we've be competing
8 for with CP going to eastern Canada, that would be
9 some of this line.

10 CHAIRMAN OBERMAN: Well is the volume that
11 CP is going to increase on the Metra west line,
12 that's not going from Nova Scotia is it?

13 MR. TAYLOR: Well no, but that is going to
14 Southern Ontario per some of their maps I believe
15 earlier, and potentially parts of Michigan, so it is
16 a one to one competition with that, so they will come
17 up from Kansas City, and then come through the line
18 into Bensenville and then head east.

19 We will take a different route. We would
20 come through Kansas City to Springfield onto the far
21 east side of Chicago to run to Indiana and head east.

22 CHAIRMAN OBERMAN: Are you able to say

1 that if you obtain this divestiture, that there would
2 be fewer than eight new trains a day on that Metra
3 west line?

4 MR. TAYLOR: I don't know CP's
5 projections, so I can't speak to that, or what that
6 traffic is, but I can say that is competing for the
7 same traffic.

8 CHAIRMAN OBERMAN: Okay, thank you.

9 MR. TAYLOR: Yes sir.

10 BOARD MEMBER HEDLUND: I've got a related
11 question. Does part of this line going to Chicago, I
12 see where it goes through Gilman and Kankakee. Is
13 that the line that hosts the Amtrak trains?

14 MR. TAYLOR: Yes it does, and I actually
15 have some comments to that in a bit, but it hosts six
16 Amtrak trains pre-COVID. Right now they're not
17 running on full strength. It's the City of New
18 Orleans, which is a pair of trains, and then the
19 four Illini/Saliki trains.

20 BOARD MEMBER HEDLUND: Right. And that
21 has pretty poor, I think, on time performance. Would
22 this further impact the on time performance of those

1 Amtrak trains?

2 MR. TAYLOR: That answer is no. A number
3 of issues with Amtrak performance over the years, and
4 we're still involved in some items with that, and
5 some of the legalese. But I don't want to touch
6 upon it all here. But at the same time I can tell
7 you that segment of track is only about 57 miles from
8 Homewood to Gilman. The Homewood station is actually
9 three main lines there, so we don't have any issues
10 at Homewood per se.

11 It's actually 7 mile siding space and with
12 5 siding's between where we go to single track just
13 out to Chicago to Gilman. And then the Amtrak
14 station at Kankakee you mentioned, there is a CTC
15 siding at actually 20,000 feet, that is just 3,000
16 feet north of that station. So on that short segment
17 we have a practical capacity, and I have it in my
18 notes here in terms of trains.

19 Where did I put it -- of about 30 to 32
20 trains per day. Even with these two trains due to
21 increase, right now we're only running 18 to 20
22 trains a day in that short 55 mile segment, so we do

1 not anticipate from our model that any issues would
2 impact Amtrak.

3 MS. GAINNEY: And if I can chime in. CN is
4 working with Amtrak to try to update the schedules
5 for both the City of New Orleans service, and the
6 Saluki service, so that process is underway pursuant
7 to the FRA's final rule for the on time performance
8 rulemaking. But even though the schedules have not
9 been aligned to the new customer on time performance
10 metric, CN's City of New Orleans service, the
11 long-distance service, is one of the most
12 consistently high performing services in the country.

13 BOARD MEMBER HEDLUND: Thank you.

14 MR. TAYLOR: With the 250 million dollar
15 investment, plus the ability to bypass Chicago
16 congestion, CN's ownership can unlock the potential
17 of the Springfield line for automotive, intermodal
18 and grain customers. As Dan Bresolin and Sarah
19 Slazinski will discuss, we project over 80,000 units
20 of truck to rail diversions annually, including
21 almost 1,500 multi-level cars. In crafting the
22 operating plan our goal is to serve that traffic

1 safely and efficiently.

2 Along with our plan for investment and
3 increased service, CN is committed to hiring the
4 employees working on the Springfield line today. As
5 shown above, CN anticipates hiring 140 employees
6 with 129 of those in new positions. No major changes
7 in the current number of positions are anticipated on
8 the Springfield line.

9 These significant benefits are achievable
10 with a minimal increase in trains per day over the
11 Springfield line and CN's Gilman subdivision. To
12 serve the projected automotive and intermodal
13 traffic, CN will add an average of two trains per day
14 between our terminals in Harvey and Hazel Crest,
15 Illinois, south of Chicago, and the international
16 freight gateway in Grandview, Missouri, south of
17 Kansas City.

18 Those new trains would avoid congestion in
19 Chicago, and automotive and intermodal traffic east
20 of Madison, Illinois would move on existing service
21 trains. Overall, the operating plan will increase
22 train frequencies on the Springfield line, and CN's

1 Gilman subdivision by approximately 2 trains per day.

2 But beyond the Springfield line in the
3 Gilman subdivision the traffic will be absorbed by
4 existing CN trains as it heads to Detroit and Eastern
5 Canada, or other destinations. That means there is
6 substantial public benefit, including taking 80,000
7 trucks off the roadways for relatively small increase
8 in trains and limited impact on the broader rail
9 network.

10 There are no harms of CN's proposed
11 Springfield divestiture. In that regard I want to
12 address some of the CP and KCS's criticisms on the
13 operating plan regarding ownership of the IFG and the
14 current Springfield interchange.

15 BOARD MEMBER PRIMUS: Hey Derek?

16 MR. TAYLOR: Yes sir?

17 BOARD MEMBER PRIMUS: I'm sorry real
18 quick. So I'm just going back, the bypassing
19 Chicago, is there any infrastructure improvements
20 that are going to be needed for the increased train
21 traffic at Madison or anyplace east?

22 MR. TAYLOR: No sir. From Madison to

1 Griffith, Indiana, all the way to -- actually double
2 track on the former EJ&E than our South Bend Sub after
3 the connection is actually double track minus two
4 segments all the way to Battle Creek, Michigan.

5 BOARD MEMBER PRIMUS: Okay. Thank you.

6 MR. TAYLOR: Make sure we're getting out
7 of here, okay. CP and KCS have stated that CN's
8 plan to share the IFG's ownership with CP and KCS is
9 somehow unworkable. CN's proposed that each carrier
10 would conduct separate operations and stagger the
11 facility. CN's shared ownership interest in IFG is
12 important so they can operationally protect its
13 facilities, interest, and traffic there.

14 These types of arrangements are common in
15 the rail industry. Most notably in this context, CN
16 and CP share Schiller Park Yard in Chicago, Illinois
17 with each carrier conducting segregated yard
18 operations in distinct areas of the yard. Just as
19 it proposed for IFG.

20 In addition, CN has a comparable 50/50
21 arrangement with CSXT for the intermodal yard in
22 Memphis, Tennessee, where both carriers separately

1 operate their own respective intermodal terminals.
2 CN owns the lead tracks into the facility in Memphis,
3 and CSXT and CN own the property underlying the
4 facility on a 50/50 basis.

5 Even CP and KCS themselves have jointly
6 owned and operated Knoche Yard in Kansas City, the
7 so-called joint agency for decades. These
8 relationships are perfectly manageable and common in
9 the rail industry. CP and KCS also claim that CN
10 sought to shut down the existing Springfield
11 interchange. This is incorrect. The Springfield
12 interchange gateway with KCS remains open and remains
13 both viable and important for CN.

14 The physical Springfield interchange is at
15 Cockrell, Illinois, just southwest of Springfield.
16 This location has two complicating factors. First,
17 Union Pacific retains ownership of a short, isolated
18 segment of track known as the airline block, east of
19 Cockrell on the Springfield interchange route between
20 CN and KCS.

21 Because of contractual restrictions
22 between KCS and Union Pacific, KCS may not operate

1 over the airline block to interchange certain traffic
2 with CN at Springfield. CN can operate without
3 restriction over the airline block to interchange
4 traffic with KCS at Cockrell, where KCS's line
5 begins.

6 Second, there are insufficient track
7 facilities to interchange traffic with KCS at
8 Cockrell, hence our investment of a siding at
9 Cockrell, Illinois. KCS's track at this location is
10 a single line, main line, with no siding in the
11 vicinity. There is a ADM facility located at
12 Cockrell, but the tracks at the ADM facility are
13 ADM's private tracks.

14 Interchange at that location between CN
15 and KCS for manifest traffic could cause interference
16 with ADM's operations at the Cockrell facility.
17 CN and KCS therefore mutually decided in 2019 to move the
18 physical interchange location for some Springfield
19 traffic from Cockrell, Illinois to East St. Louis,
20 Illinois, in order to minimize these issues.

21 However, this has caused longer transit
22 times for the traffic involved because moving the

1 physical interchange adds over 350 miles round trip
2 because the traffic must go out of route to the south
3 on CN to Du Quoin, Illinois before reversing back to
4 the KCS connection in East St. Louis.

5 The interchange at Cockrell remains open,
6 but there is inadequate space in that location for
7 the move CN/KCS need to make given the inadequate
8 facilities on the KCS line. Moving interchange
9 because of current physical limitations, does not
10 discount the overall potential of the Springfield
11 line interchange to provide competitive value.

12 Finally, I wanted to address concerns
13 raised by Amtrak in the written comments. First, CN
14 always stands ready to work with Amtrak and other
15 passenger railroads. Second, Amtrak receives, and
16 will continue to receive the highest priority
17 dispatch in our U.S. lines. Yeah, you bet, it was
18 coming at some point. But the concerns Amtrak has
19 raised really speak to pre-existing conditions that
20 are unrelated to the divestiture proposal.

21 There is adequate capacity on CN's
22 Homewood-Gilman line segment for two additional

1 freight trains per day, as demonstrated by CN's
2 internal capacity forecast submitted with our
3 evidence, and shared with Amtrak's management team.
4 For the Board's background, there are only two Amtrak
5 stations located on CN's Homewood to Gilman segment.

6 Homewood and Kankakee. At the Homewood
7 Station Amtrak's stop is on main one where CN freight
8 trains can also use main two and main three to enter
9 and exist the area at Hazel Crest, where there should
10 be no operational issues there.

11 At Kankakee, the two new trains are not
12 likely to cause disruption to Amtrak service. Amtrak
13 trains stop at the station on the CN main line, and
14 there is a long passing siding 3,000 feet from the
15 station. CN's proposed two new trains per day are
16 through trains carrying intermodal and automotive
17 traffic, and will not be making any local stops
18 between the Springfield line, and the automotive, and
19 intermodal yards at Hazel Crest and Harvey.

20 There are not planned crew changes between
21 the Springfield line and those CN yards. There is
22 simply no reason to believe these additional trains

1 would adversely impact Amtrak performance. But
2 once again, CN stands ready to assist Amtrak with
3 its operation on CN lines.

4 Thank you for the opportunity to share
5 with you CN's plans for the Springfield line, and why
6 operational concerns raised about the plans are
7 misplaced. I will now turn it over to Dan Bresolin
8 to discuss the benefits of the Springfield
9 divestiture for intermodal customers and consumers,
10 or happily take any further questions.

11 CHAIRMAN OBERMAN: Patrick had a couple
12 questions.

13 BOARD MEMBER FUCHS: I think probably now
14 is the appropriate time before we get into gateways.
15 So I just want to make sure that we're pinning down
16 how the Board should be analyzing the competitive
17 harm. So there are three scenarios. One is that
18 there's no transaction, main transaction. The other
19 is that there is a transaction without any of the
20 conditions that you all request, and then the other
21 is the transaction with the divestiture.

22 For the analysis of harm we should be

1 looking at if there were no transaction compared to
2 if there were a transaction with no condition.
3 That's what we should be looking at for the
4 assessment of harm. Is that correct?

5 MR. WARREN: Yes.

6 BOARD MEMBER FUCHS: Okay. And in that
7 are you able to tell us from no transaction to
8 transaction with no condition. Any specific shipper
9 that loses any particular option.

10 MR. WARREN: So I think that the
11 intermodal and automotive customers that Dan and
12 Sarah are going to talk about you know will be, there
13 are again we're talking about you know potential. So
14 it's not shippers that are using the line today, but
15 it's the loss of a potential client as a -- yeah.

16 Well and I was just going to say, and the
17 difference is, I mean the difference between you know
18 no transaction and you know approved transaction
19 without Springfield divestiture, is that they made
20 very clear that they're not interested in investing
21 in the line and working with CN.

22 BOARD MEMBER FUCHS: They? That's CP and KCS. Like they don't have

1 the same vision for the line. If there were no
2 transaction, you heard from Doug you know CN was
3 working on proposals to jointly develop the
4 Springfield line with KCS.

5 BOARD MEMBER FUCHS: But we have to
6 evaluate what would happen in the absence of the
7 transaction, and you all have not provided any
8 indication that there will be an additional option in
9 the absence of the transaction.

10 MR. TAYLOR: I mean I think we've said we
11 can't prove it because we're talking about the
12 future. But we have proven that CN was looking at
13 this very hard. I think the record shows we've got,
14 and I don't want to get into highly confidential
15 stuff, but we've got sections of our rebuttal that
16 makes very clear KCS was really excited about this
17 opportunity too, and they're not interested in the
18 opportunity now.

19 Now we're hearing a very different vision
20 for the Springfield line. So that's what I think,
21 that's the difference between you know, pre-merger,
22 where it's an independent Springfield line that's

1 independently competitive with the CP line, and
2 post-merger, where you have the two lines, where
3 there -- these two parallel lines will be jointly
4 controlled.

5 BOARD MEMBER FUCHS: Would you agree that
6 when the Board assesses competitive harm from no
7 transaction scenario to transaction without
8 condition, the competitive harm has to be
9 significant?

10 MR. TAYLOR: I would think for one, this
11 is a Class 1 merger, and not a significant or minor
12 transaction, so the standard is different. So I
13 would not agree that the Board can only impose
14 conditions when there is significant competitive
15 harm.

16 BOARD MEMBER FUCHS: What was CN's
17 position in CN/IC?

18 MR. TAYLOR: So I was in college. So I
19 think, but this is what I you know, but I think when
20 the Board has talked about significant competitive
21 harm, like it has used that as an example. As an
22 example of this sort of situation. I don't think

1 there's anything in the statute, or anything inherent
2 in the public interest standard that says that in a
3 Class 1 merger you don't have to worry about
4 competitive harm unless it's significant.

5 BOARD MEMBER FUCHS: In the history of
6 Class 1 mergers, what's the condition that comes
7 closest to what you want?

8 MR. TAYLOR: I think the condition that
9 probably comes closest to what we want is you know I
10 would point back to you know CN/IC, you know the
11 preservation of build out options. You know,
12 addressing future and again this is completely, it
13 was hypothetical future competition, you know from
14 the shipper buildouts that was now there wasn't the
15 same sort of incentive for those buildouts to be
16 built, and so actually you know I mean CN actually
17 consented to give some of the you know, considered
18 the competitive conditions for some shippers, and
19 then the Board expanded that and added the two
20 additional shippers.

21 BOARD MEMBER FUCHS: You know there's a
22 lot of precedent about the conditions being narrowly

1 tailored. Obviously, this is a significant
2 structural change, and you all argue you know about
3 DOJ's views on structural remedies, versus that, so I
4 appreciate that point very much. But can you point
5 to under the Board's rules any instance where
6 considering our narrowly tailored precedent, we've
7 kind of embarked on this type of divestiture?

8 MR. WARREN: No. But that's because for
9 one thing whenever we're looking at past mergers, or
10 you know, have a relatively limited dataset, and so
11 two, this is different from other divestitures
12 because this is not, we are not coming in to try to
13 grab a bunch of traffic from them.

14 This is you know there has never been a
15 divestiture proposal like this that where the party
16 proposing divestiture is bent over backwards the way
17 that CN has to try to ensure that the applicants
18 actually are left in a better position. They have
19 access to every current customer, every future
20 customer, they could use the line for interchange
21 traffic.

22 We're investing in the line. We're making

1 a service commitment. Like we've done everything we
2 could to ensure that it is not actually causing any
3 harm to applicants.

4 MR. TAYLOR: If I could just add one other
5 observation. So Congress clarified that this was a
6 remedy condition for when you see parallel lines with
7 ICCTA. And so I don't think the precedent, before
8 ICCTA, is particularly useful because Congress, you
9 know you need to take into consideration Congress
10 doesn't change the law without reason, and the
11 standard they set is if it's in the public interest.

12 So you have to infer from that that
13 Congress at least understood that letting an
14 applicant retain two parallel lines is an industry
15 where we're not going to see a great deal of
16 additional you know new lines springing forth, is
17 something that they wanted you to look at carefully.
18 And the standard is not in the statute, the degree of
19 the lack, it's is it in the public interest to require the
20 divestiture.

21 BOARD MEMBER FUCHS: If we granted your
22 request would that itself create a parallel line

1 issue between Springfield and East St. Louis?

2 MR. WARREN: We don't -- no. No it
3 wouldn't in part. I think we have a couple of
4 answers there as we put in our rebuttal. I mean
5 number one, you know, because we are giving CP/KC,
6 they keep haulage rights, there's no loss of
7 competition at all. So they have the exact same
8 level of competition too. There's absolutely no
9 evidence that those are any kind of realistic
10 parallel, you know, corridors.

11 I mean we kind of showed in our evidence
12 how such traffic would have to move over the
13 relatively short difference which they need East St.
14 Louis and Springfield. But the primary answer is
15 that there's no loss of competition because you know
16 KCS can certainly you know serve both points today.
17 CP/KCS will be able to serve both the points in the
18 future.

19 So to the extent that there's actually
20 rail traffic going back and forth between East St.
21 Louis and Springfield, there's no loss of that
22 competition.

1 MS. GAINNEY: And not only is there no loss
2 of competition, but there's also actually going to be
3 increased access for those customers on the line.
4 Because today they have access to one Class 1
5 railroad. Under the haulage proposal that we've made
6 where every existing customer on the line, as well as
7 any new customer in the future that locates on the
8 line because of the haulage, they would have access
9 to the merged CP/KCS network, as well as the CN
10 network, so it's actually increasing options for
11 customers who are located on the line. Thank you.

12 CHAIRMAN OBERMAN: Just one question, and
13 we have to take a break for a technical reason. Matt
14 you just said this is not a situation where we're
15 coming in to grab traffic away from the applicant,
16 but one of your words to that effect, but you're
17 citing Mr. Creel's alleged statement that what you
18 want to do is poach traffic as a reason that you'd
19 like to do this, so you could compete.

20 So I don't get, what's the difference
21 between poaching and grabbing?

22 MR. WARREN: I could tell you were a good

1 trial lawyer Mr. Chairman. So let me be clear. You
2 are, and to be clear you know, I've obviously spoken
3 inelegantly, but you know the point here is we are not,
4 you know, prior divestiture proposals were proposals
5 typically by other railroads to come in and take the
6 whole line hook, line, and sinker, not leaving anything
7 left for the applicant carrier.

8 That is not you know what you know, CN is
9 proposing to do here. We're proposing to compete.
10 But they have everything, so that's their grain
11 customers you know that KCS has indicated that you
12 know they're very important to this network, that
13 they get to keep shipping on KCS, and we will support
14 that service.

15 And those shippers are actually going to
16 be better off because right now they're all captive
17 to KCS, and they'll have two options. They can keep
18 shipping down to the KCS network if they want the
19 geographic competition of going the other way, they
20 can do that too, but yes you did a good job of
21 catching me in inelegant language.

22 CHAIRMAN OBERMAN: I just wanted you to

1 know I was paying attention. We have to take a very
2 short technical break because apparently on Zoom all
3 people are getting a spotty audio, and I am told we
4 have to reboot, which will take about five minutes.
5 So get up and stretch, but don't go too far because
6 we want to keep going, all right? So we'll take a
7 short break.

8 CHAIRMAN OBERMAN: We are rebooted and
9 we're reconvening and we're back on the record. I
10 had a couple of questions for Mr. Taylor, then we'll
11 proceed. One is you cited, or one of the two of
12 you, Doug MacDonald, cited 75 letters of support.
13 Other than Archer Daniels Midland, are any shippers
14 among those 75 on this line? Or who is supporting
15 it?

16 MR. WARREN: As far as shippers I think
17 the only shipper on the line and these are all
18 obviously -- oh, I'm sorry. Yes. All right.

19 CHAIRMAN OBERMAN: My bad. I'm going to
20 start over again. I'm going to start over again.

21 MR. WARREN: Okay.

22 CHAIRMAN OBERMAN: We are back on the

1 record. I was so anxious to move us along, so I did.
2 Question for Mr. Taylor and Mr. MacDonald, the 75
3 letters of support. Are there any shippers among
4 those others other than ADM on this line?

5 MR. WARREN: So there are -- I'll answer
6 it. There are many shippers. The only shipper on
7 the line is ADM, and these are KCS customers, but
8 yeah, the only shipper on the line that issued a
9 letter of support is ADM.

10 CHAIRMAN OBERMAN: And where are the
11 other, how many of the 75 are shippers, and where are
12 they?

13 MR. WARREN: I don't have the exact number
14 in my head, but I think you know it's primarily
15 intermodal and automotive customers who are excited
16 about the opportunity, so you would see that number
17 from -- Kathy, you may be able to help me here. You
18 know Michigan, Eastern Canada, but we have a number
19 of -- and there's some public officials there too,
20 but it's all, it's the appendix to our responsive
21 application at the beginning of the letters of
22 support.

1 We've got a table of everything who has
2 put in a letter.

3 MS. SLAZINSKI: Sara Slazinski, speaking
4 with their customers, but on the intermodal side it
5 includes customers who are shipping refrigerated
6 product to Kansas City and from Kansas City, and
7 other intermodal customers.

8 CHAIRMAN OBERMAN: Well let me, I did the
9 math again, Mr. Taylor maybe you could enlighten us
10 on it. Two trains a day is 104 trains a year if you
11 run them every day, it's 365 days, 760 trains, is
12 that what you're talking about?

13 MR. TAYLOR: Yeah the pair of trains, so it's 365
14 times two.

15 CHAIRMAN OBERMAN: And you know are those
16 trains going to all be the equivalent of 300
17 containers or?

18 MR. TAYLOR: From a planning point, that's
19 what you have to do from a planning point of view. I
20 mean it's obviously you know that's the forecast,
21 marketing forecast. It could be service of goods can
22 be more, but that's what it's based upon.

1 CHAIRMAN OBERMAN: If we did the math are
2 you going to get to 80,000 truckloads there?

3 MR. WARREN: So we can all report on our
4 math homework Mr. Chairman. So the way I did it is
5 80,000 divided by 365, and what that gets you is 219
6 a day, so when you're talking about you know two
7 trains, you know 300 you know, capacity for a train
8 there's ample capacity there. And as I think we said
9 in our responsive application, we're not going to
10 wait until we have 300 units to run the train. The
11 way it's got to work for this service.

12 CHAIRMAN OBERMAN: No, I understand.

13 MR. WARREN: If the trains do start
14 running, and you know we'll fill them up, and once
15 we've got enough capacity to run two, we'll run two.

16 CHAIRMAN OBERMAN: All right. Go ahead
17 with I think you were moving to another witness.

18 MR. BRESOLIN: Good afternoon Chairman and
19 Board Members, and thank you for listening today. My
20 name is Daniel R. Bresolin, and I currently serve as
21 Vice President Intermodal for CN. In my role I focus
22 on driving growth in both domestic and international

1 intermodal traffic, and I am responsible for all
2 components of CN's international and domestic
3 intermodal portfolios, including strategic
4 investments, service innovations, and customer
5 centric growth.

6 I am proud that CN is the industry leader
7 in intermodal growth and service offerings. CN is
8 skilled at providing tailored supply chain solutions
9 that help our intermodal customers access markets in
10 their supply chains, so that we can all grow together
11 as one team.

12 CN's future oriented planning, customer
13 minded investments, and innovative product offerings
14 have led to incredible growth in our intermodal
15 traffic since 2010, which has seen intermodal growth
16 of 76 percent or 1.1 million additional units. We
17 are a growth focused railroad. For example, CN has
18 added multiple new inland destinations and
19 connections with other rail partners since 2010, to
20 the benefit of our intermodal customers, and our
21 overall rail network.

22 These new destinations and connections

1 include New Richmond, Wisconsin, Regina,
2 Saskatchewan, Chippewa Falls, Wisconsin, Joliet,
3 Illinois, Duluth, Minnesota, and steel wheel
4 interchange connections with CSX and NS to the Ohio
5 Valley, which includes destinations like Cleveland,
6 Columbus, Cincinnati and Louisville.

7 A new connection at Indianapolis with our
8 regional partner, the Indiana railroad, and new
9 connections at the Port of New York, and the Port of
10 Mobile. CN also offers unparalleled equipment and
11 infrastructure options to tailor our intermodal
12 service offerings to meet our customer's needs,
13 including a centralized dispatch group, a logistics
14 management team, heated, refrigerated, and dry 53
15 foot containers, access to CN's large wholesale
16 partnership fleet, and more.

17 CN's three coast network adds to the
18 strength of CN's intermodal service offerings, and
19 continues to drive CN to innovate in a way that adds
20 value to our intermodal customers. If the
21 Springfield line is divested to CN, I am excited
22 about our ability to offer industry leading services

1 to more intermodal customers and connect to Kansas
2 City and St. Louis to more ports with single line
3 service.

4 CN's investment in the Springfield Line
5 will intensify competition, improve service, increase
6 efficiency, and reduce transit times for our
7 customers. There is no other entity in this
8 proceeding who has the ability, track record, or
9 vision for fully utilizing the Springfield line to
10 ensure its competitive presence is preserved and is
11 used to fiercely compete with the combined CP/KCS
12 parallel route to the west.

13 Divesting the Springfield line to CN will
14 take tens of thousands of trucks off the U.S.
15 highways in Michigan, Indiana, Illinois and Missouri,
16 offering U.S. communities primarily along Interstate
17 94, 55, 72, cleaner air, less highway congestion, and
18 less road maintenance expenses pulled from taxpayer
19 funds. When it comes to the Springfield line there
20 is a massive addressable truck market for movements
21 between Kansas City area and Chicago, Detroit, and
22 Eastern Canada that a combined CP/KCS has no plans to

1 pursue.

2 As we explain in our responsive
3 application, intermodal customers are eager for more
4 competitive and sustainable rail transportation
5 options between Chicago and Kansas City, that a CN
6 owned Springfield line would provide. Today,
7 intermodal containers are moving primarily by truck
8 on highways between Chicago and Kansas City, and
9 their vicinities.

10 This negatively impacts communities along
11 the I-94 in Michigan and Indiana, I-55 in Illinois,
12 and I-72 in Missouri. Many of those truck movements
13 can become rail movements. It just takes a
14 willingness to invest in the intermodal business, and
15 offer attractive transportation options to intermodal
16 customers. That's what we do at CN, and that's what
17 we are asking the Board to allow us to do with a CN
18 owned, Springfield line.

19 CN already has a strong track record of
20 successfully diverting tens of thousands of trucks
21 off U.S. highways, and onto rail in a relatively
22 short period of time as a result of CN's efforts to

1 design new service offerings. For example, CN's
2 recent partnership with CSX at the Port of New York,
3 New Jersey and Philadelphia, is a great example of
4 how CN turns its investments into value for its
5 intermodal customers and surrounding communities.

6 In late 2019 CN invested in a partnership
7 with CSX to allow CN to access both gateways.

8 Despite the fact that these were highly competitive
9 markets in the intermodal space, with fierce truck
10 competition within a little over a year, CN began
11 successfully winning traffic, and has taken tens of
12 thousands of trucks off the road since 2021 as a
13 result of this investment.

14 CN's traffic from this partnership moving
15 imports, exports, and refrigerated containers from
16 the U.S. Northeast to Toronto and Montreal has
17 continued to grow year after year. This example
18 highlights how CN successfully invests and
19 coordinates with its underlying partners to grow with
20 our intermodal customers, and to drive that growth
21 while benefiting ports and the surrounding
22 communities by taking trucks off local roads and

1 highways.

2 If CN acquires the Springfield line, CN
3 would do the same. I want to emphasize the unique
4 opportunity a CN owned Springfield line would be for
5 our customers, and our nation's environmental and
6 sustainability goals. Rail is more environmentally
7 friendly and sustainable than trucks. And just as
8 CN has committed publicly to reduce greenhouse gas
9 emissions progressively over time, our intermodal
10 customers are looking for ways to ship via rail to
11 achieve their own environmental, social and corporate
12 governance, or ESG initiatives.

13 At the same time our intermodal customers
14 ship goods that are time sensitive, so they require
15 efficient rail transit times that are competitive
16 with the speed of trucks. A CN owned Springfield
17 line would marry these two important objectives,
18 speed, and sustainability for our intermodal
19 customers, and would benefit the environment as a
20 result.

21 Divesting the Springfield line to CN would
22 also strengthen the U.S. supply chain, and increase

1 the fluidity of the North American rail network.
2 Over the past two years we have seen increased
3 external shocks to the rail network from the COVID-19
4 pandemic, extreme weather, and international
5 conflicts.

6 Those unpredictable events have
7 illustrated that the strength and fluidity of the
8 North American supply chain are critical to the
9 public interest. CN's commitment to invest 250
10 million dollars in the Springfield line will directly
11 address this very real concern.

12 For example, CN plans to grow the capacity
13 of the Springfield line to accommodate 10,000 foot
14 intermodal and automotive trains. CN will address
15 current inadequate facilities on the line by adding
16 a new siding at Cockrell, a new yard track at
17 Roodhouse, upgraded track on the line, and new
18 sidings to transform this track from a low volume
19 branch line to a true main line intermodal corridor.

20 CN also plans to invest in expanding other
21 sidings along the Springfield line through Illinois
22 and Missouri. This will further increase capacity

1 and fluidity via an improved route that runs through
2 America's heartland. CN's investment plan for the
3 line will also connect intermodal shippers with major
4 and growing markets in the Gulf, Southeast, Midwest
5 and Northeast, as well as international Atlantic and
6 Gulf ports in the U.S. and Canada.

7 With this added capacity, a CN owned
8 Springfield line would offer critical support to
9 supply chains, both nationally and internationally to
10 support the U.S. economy, and get consumers what
11 they need when they need it, including critical
12 products like food and medical supplies. CN's
13 network has capacity available in the Gulf at the
14 Ports of New Orleans and Mobile, and at the ports in
15 Eastern Canada.

16 We have multiple weekly departures for
17 exports to ports that CN serves as shown in the map.
18 This capacity, combined with the efficiency and
19 optionality of a CN owned Springfield line would
20 help goods move faster and more reliably to
21 consumers, and help businesses sell their goods in
22 global markets to power the nation's economy.

1 When it comes to moving perishable food,
2 CN has one of the largest refrigerated container
3 fleets in North America, with access to 3,000
4 refrigerated containers and other assets, other
5 supporting assets. CN's equipment fleet would enable
6 perishable food exporters located near Kansas City to
7 reach ports served by CN and the Gulf and Eastern
8 Canada, to help feed the globe.

9 Turning to intermodal shippers in
10 particular, there will be new tangible benefits from
11 CN's ownership and investment in the Springfield
12 line. For example, upon acquiring the Springfield
13 line CN plans to create a new intermodal facility in
14 East St. Louis that does not exist today.

15 CN's intermodal customers would benefit
16 from the efficient single line route to move
17 containers between Kansas City, and points in
18 Michigan and Eastern Canada. In addition, new
19 markets would open up for intermodal shippers. If CN
20 acquired the Springfield line, CN's investments would
21 provide intermodal customers with new access, be it
22 CN to KCS's Yard in East St. Louis, and result in

1 more traffic moving through CN's Memphis intermodal
2 terminal, meaning more jobs and a boosted economy in
3 West Tennessee.

4 Ensuring the Springfield line is an
5 alternative to a combined CP/KCS road to the west is
6 also important because it preserves optionality for
7 customers who would prefer to avoid the
8 aforementioned infamous congestion in Chicago. If CN
9 acquired the Springfield line, we would be able to
10 compete with CP to move intermodal and automotive
11 freight between Kansas City, East St. Louis, and
12 points in Michigan, such as Detroit and Eastern
13 Canada.

14 CN's route would have minimal impact on
15 the Chicago area, particularly as compared to CP's
16 parallel route. It's no accident that over 75
17 intermodal shippers and other stakeholders have
18 submitted letters supporting the Springfield
19 divestiture. Divesting in the Springfield line to CN
20 is a tremendous opportunity for the STB to impose a
21 condition that would at the same time remedy the
22 competitive harm of the merger that would result from

1 CP consolidating control over parallel lines, and
2 promote the public interest on multiple levels, as I
3 just discussed.

4 On the flip side, the substantial benefit
5 of CN owned Springfield line, including diverting
6 tens of thousands of trucks off road each year, and
7 strengthening supply chains, would be lost forever if
8 this merger is approved without divesting the
9 Springfield line to CN.

10 In closing the time to reserve competitive
11 options over Springfield line is now. The Board will
12 not get this opportunity back. If CN does not get
13 the Springfield line, CP will let it lie foul.
14 Foreclosing competition, and the many public benefits
15 that this line can achieve under CN's ownership,
16 every piece of rail capacity is precious, shipper
17 optionality is critical. Thank you. And I'll pass
18 it over to Sarah.

19 MS. SLAZINSKI: Chairman Oberman and
20 Members of the Board. My name is Sarah Slazinski. I
21 currently serve as Assistant Vice President
22 Automotive for CN in Troy, Michigan. In my role, I

1 prioritize serving our automotive customers, and that
2 means ensuring fluid and resilient supply chains by
3 rail, as well as developing future innovative
4 services.

5 The automotive industry is undergoing a
6 transformation from internal combustion engines to
7 electric vehicles. Although we are in the early
8 stages of this transition, the race is on to achieve
9 a resilient North America supply chain, to support
10 President Biden's objectives for the federal
11 government to achieve 100 percent zero emission
12 vehicle acquisition by 2035.

13 As a brief background, CN moves both
14 finished vehicles and auto parts to major population
15 areas in the U.S., Midwest and Gulf regions, as well
16 as in Canada. CN's three coast network allows us to
17 compete and offer flexibility, which enhances supply
18 chain, and supports the customer's ability to import
19 and export raw materials, production parts, and
20 finished vehicles around the globe.

21 Today I'll describe how CN's ownership of
22 the Springfield line would build resiliency, increase

1 transportation competition, preserve a much needed
2 alternative route for automotive rail shipments, and
3 produce significant benefits for the automotive
4 industry in North America that could not be achieved
5 but for CN ownership.

6 I'd like to start by describing why CN's
7 network with the Springfield line is uniquely
8 positioned to increase competition and offer
9 significant value to North American automotive
10 shippers. First, CN's network has access to 22
11 vehicle assembly plants, producing approximately 3
12 million vehicles in Ontario, Michigan and Ohio. That
13 would have a new competitive option via a CN owned
14 Springfield line that does not exist today.

15 This new competitive option would offer
16 new solution for outbound finished vehicles and the
17 inbound network of raw materials and production parts
18 that move through North America. In addition with
19 the Springfield line, CN would offer new competition,
20 new competitive options for the two vehicle assembly
21 plants in Kansas City, which would be able to reach
22 new points in the United States and Canada.

1 To paint the picture more clearly,
2 currently for the automotive industry there's only
3 one Class 1 railroad option that directly connects
4 Michigan to Kansas City via single line service, and
5 only one Canadian Class 1 railroad that directly
6 connects Ontario to Kansas City via single line
7 service.

8 CN ownership of, and investment in the
9 Springfield line would offer automotive customers a
10 new direct service, and increased competition for
11 shipments moving to and from Kansas City.

12 Automotive customers want this option. A CN owned
13 Springfield line would directly benefit automotive
14 customers who would ensure the time and cost savings
15 of an additional route that bypasses the congestion
16 of a Chicago interchange, and that could connect to
17 the automotive network that already exists today in
18 Kansas City.

19 A CN route, via the Springfield line,
20 would offer automotive customers a new route linking
21 Canada, Michigan, and Ohio to the local Kansas City
22 market. There could also be a potential future

1 design, interchanging traffic to Kansas City, to the
2 large automotive markets in the west and Mexico.

3 A CN owned Springfield line would also
4 benefit automotive customers and the American public
5 consumers connected to the Mexico vehicle export
6 market. Like the Michigan, Ohio and Ontario vehicle
7 origin market, Mexico has 19 vehicle assembly plants
8 that produce over three million vehicles, of which
9 over 80 percent are exported into the U.S. and
10 Canada.

11 Kansas City is one of the locations where
12 these export vehicle shipments are interchanged.
13 With the Springfield line soon could offer a new
14 competitive interchange solution in Kansas City that
15 does not exist today, offering new solutions and
16 flexibility as well as increased competition with
17 trucks.

18 This new CN interchange at Kansas City
19 would also benefit the automotive supply chain,
20 preserve thousands of tier 1, 2, and 3 car suppliers,
21 in addition to the vehicle assembly plants, all of
22 which could benefit from an alternative gateway to

1 move raw materials and parts that U.S. and Canada
2 vehicle assembly plants need via CN's Springfield
3 line.

4 More generally, a new CN interchange at
5 Kansas City via Springfield line could build critical
6 resiliency into the North American rail network, as
7 well as create an alternative to Chicago
8 interchange, where much of the vehicle traffic flows
9 today.

10 As we all know from the past few years,
11 severe weather, and unexpected global events impact
12 railroad operations and service, so alternative
13 railroad connections are important now more than ever
14 to support the North American automotive supply
15 chain. A CN owned Springfield line would result in
16 just that, more connections feeding into an existing
17 auto network, ultimately providing increased
18 stability, optionality, and more service for
19 automotive customers to the benefit of the American
20 public.

21 Lastly, I'd like to touch on the future we
22 need to build together, and how divesting the

1 Springfield line to CN will support that future. New
2 clean and traceable supply chains will need to be
3 built to support a sustainable North America eco
4 system for EV vehicles. Like the US, Canada has
5 abundant natural resources essential for battery
6 productions, such as lithium, nickel, cobalt and
7 copper.

8 With the recently passed Inflation
9 Reduction Act of 2022, we expect to see higher demand
10 for raw materials in the U.S. and Canada. The Act
11 requires 40 percent of critical minerals and battery
12 content to be sourced within the United States, or a
13 country with which we have a free trade agreement,
14 which includes Canada, with the content requirement
15 increasing to 80 percent by 2027.

16 The original equipment manufacturers,
17 known as OEMs, are currently in the process of making
18 sourcing decisions, so their customers can get the
19 benefits of the new program. That means that new,
20 resilient and sustainable value chain solutions need
21 to be created.

22 A CN owned Springfield line to Kansas City

1 would be critical support for the EV vehicle supply
2 chain because CN's network would connect the battery
3 resource areas to auto manufacturing plants, while
4 simultaneously adding rail capacity to support this
5 new market currently in its infancy.

6 CN is taken part in pledges to improve
7 sustainability, and is committed to its automotive
8 customers innovating to make sustainability more and
9 more possible. In this regard we are bringing ideas
10 to the table to improve supply chain resiliency that
11 is scalable. Alongside our customers innovation, we
12 continue to innovate to expand our offerings, offer
13 more competition, and deliver better products and
14 service.

15 To support the budding EV market and our
16 national sustainability goals, we need to make
17 foundational investments now to navigate the future,
18 and set us up for sustainable and resilient success.
19 A CN owned Springfield line would be a critical
20 resource in this innovation towards a more
21 sustainable future. I also want to highlight that CN
22 is uniquely positioned to utilize the Springfield

1 line in a way that results in significant public
2 benefits for the automotive shippers and the U.S.
3 public.

4 CN is deeply committed to its automotive
5 customers, and has continued to invest in their
6 existing automotive compounds and intermodal
7 terminals. To support growth, we recently added
8 capacity and invested in a multi-million dollar
9 automotive and intermodal terminal in March of 2021,
10 in New Richmond, Wisconsin, to service Minneapolis
11 and the surrounding areas.

12 If Springfield divestiture is approved, CN
13 will likely invest in the vehicle and intermodal
14 facility on the 64 acres at the international freight
15 gateway, IFG, outside of Kansas City, which would
16 increase capacity through Kansas City to support the
17 transportation needs of the automotive supply chain.
18 This increased optionality is an extremely effective
19 way to strengthen supply chains, and enhance the
20 validity of the rail network.

21 By contrast, a combined CP/KCS network is
22 uniquely positioned to foreclose competition for

1 Kansas City automotive traffic. If CP is permitted
2 to acquire KCS, a combined CP/KCS network will be the
3 only option for automotive customers in Canada to
4 reach Kansas City and single line service.

5 Now KCS is neutral, and has a strong
6 incentive to grow the automotive business as it has.
7 However, a combined CP/KCS would control the parallel
8 lines between Kansas City and Chicago for automotive
9 traffic, permanently foreclosing the competitive
10 presence and potential of the Springfield line.

11 A merged CP/KCS would not have an
12 incentive to work with CN to ship automotive traffic
13 over the Springfield line, or invest in the
14 Springfield line because that would directly harm
15 their single line service over CP's parallel line.

16 Approving the proposed merger without
17 divesting the Springfield line to CN would be a
18 significant lost opportunity to increase competition,
19 add capacity, build much needed resiliency for
20 automotive traffic, and support national
21 sustainability efforts, including the emerging
22 electric vehicle market.

1 In my informed opinion, a CP/KCS
2 consolidation without divesting the Springfield line
3 to CN would be an anti-competitive result. I can
4 tell you that customers have asked for competitive
5 alternatives to access Kansas City markets via the
6 Springfield line.

7 I can confidently say that CN would be a
8 good steward of the Springfield line, and is the only
9 entity in this proceeding who has the ability,
10 incentive, and vision to utilize the line for public
11 benefit. Thank you for the opportunity. I'll turn
12 it over to Matt.

13 CHAIRMAN OBERMAN: I have a few questions
14 here, and other Board Members may as well. First of
15 all it's interesting for me to hear the praise for
16 President Biden's competition initiative. I didn't
17 hear that from any parts of the rail industry a year
18 ago, so perhaps people are seeing the light.

19 But here's what I'm trying to understand.
20 The 80,000 movements are both intermodal and
21 automotive. Mr. Bresolin is that the way we're
22 supposed to understand it?

1 MR. BRESOLIN: Yes.

2 CHAIRMAN OBERMAN: If this line would be a
3 parallel line to CP's, why are not those 80,000
4 movements going to move over the CP parallel line if
5 its directly competitive? Why not? I don't know if
6 that's a legal question. I mean you can answer it.
7 Matt, I think it's not a railroad question, somebody
8 answer.

9 MR. WARREN: So I mean I don't think you
10 know it is more of a railroad question, so I may get
11 out of my depth quickly, but I don't think CP has a
12 great route to some of those markets.

13 You know they have limitations on their
14 ability to get into Detroit and so, I think that's --
15 and when you look at there, and I think you actually
16 can see it there in their application, that they have
17 sort of discounted, or are not planning to have as
18 significant versions there, which is about the only
19 place their application they didn't anticipate that
20 they would be getting very significant diversions.

21 CHAIRMAN OBERMAN: So then it's not
22 competitive.

1 MR. WARREN: So for this level of
2 intermodal it is competitive, and they may see it as
3 competitive, but these are categories of traffic that
4 we're going after that they're not going after
5 because getting intermodal and automotive business
6 takes investment. It takes a lot of money. It's 250
7 million dollars that CN has been putting into the
8 Springfield line. They're proposing just to put zero
9 to it.

10 CHAIRMAN OBERMAN: No. But why wouldn't
11 they use it on the so-called parallel? I mean I
12 don't assume necessarily the accuracy of your
13 description of this being a parallel line, but for
14 purposes of this inquiry, why if the lines are truly
15 parallel, why wouldn't CP want to take that 80,000
16 additional movements on their line and make money off
17 of it? I'm not following it's either competitive or
18 it's not.

19 MR. WARREN: Mr. Chairman, I would say
20 that we don't know for sure, but you're right. This
21 is a large market between Detroit and Kansas City
22 that's now dominated by trucks. So it is -- and you

1 heard yesterday maps showing their vision for their
2 auto market. And if you look at where the red lines
3 went, they went right up to Kansas City, over their
4 northern tier up to Detroit.

5 So I expect you're absolutely right. That
6 this is an opportunity that CP would, if they can,
7 with their new single line service, try to compete
8 those trucks off the highways. All we're telling you
9 is they didn't put that into their plan, so we're
10 kind of we're looking at what they're projecting over
11 the next three years.

12 But yes, and you heard from Creel that
13 their concern is that if you permit this divestiture
14 to CN, that then is going to be competing with
15 their vision for the northern route, which is why
16 they're not investing in the southern route. In the
17 Springfield line they're investing in the northern
18 line.

19 CHAIRMAN OBERMAN: Well I'm only trying to
20 follow-up on all the pluses for the auto industry
21 that Ms. -- and I'm going to get your name wrong,
22 Slazinski, thank you I had to look, talked about why

1 all those pluses to the auto industry won't flow
2 through CP as well as CN?

3 MR. WARREN: You could probably imagine
4 Chairman when you talk to any rivals, they're going to
5 say that their network is better than their rival's
6 network, and I'm confident we agree that CN has some
7 competitive advantages that it would like to deploy
8 on this route, but you're absolutely right.

9 Technically they could you know this
10 market opportunity for autos intermodal, if they make
11 the investments, is something that they could
12 transport, or seek to try to compete for from Kansas
13 City up through Chicago, and then along their various
14 corridors and trackage rights and haulage
15 arrangements to get to Detroit and points north.

16 CHAIRMAN OBERMAN: Because I'm trying to
17 sort out the advantages to the public interest, and I
18 heard a lot of advantages for sustainability, new
19 electric vehicles, and the whole automobile market,
20 but it strikes me that's a wash if we accept your
21 notion that it's truly a competitive line. So it's
22 more rates that would be at stake in theory about

1 competing.

2 MR. WARREN: It's also investment,
3 Chairman. So you began this proceeding by talking
4 about the need for the rail industry to invest in
5 order to unlock this particular market that you just
6 heard Dan and Sarah talk about. You've got to invest
7 to make sure you can offer basically truck like
8 service from Detroit all the way to Kansas City, and
9 CN has a plan to do it on the Springfield line, and
10 if CP takes control of it, that plan will vanish.

11 They will have no incentive to work
12 cooperatively because they're going to be protecting
13 their northern tier.

14 CHAIRMAN OBERMAN: You're not going to
15 invest that money if you don't think you're going to
16 make money on your investment.

17 MR. WARREN: Correct, that's right.

18 CHAIRMAN OBERMAN: And am I to assume that
19 Mr. Creel is a different profit seeker than CN is,
20 and wouldn't invest money if he thought he couldn't
21 make money on it? I mean what are you asking us to
22 assume here?

1 MR. WARREN: I'm not asking you to assume
2 anything about CP Chairman, I'm just saying that we
3 -- CN, has identified this as an opportunity, and
4 it's real, and it will vanish, and it's not in the
5 public interest to let that happen. Now CP has
6 launched with a different vision of where they're
7 going to be targeting markets. This is an expensive
8 market to go into, and they're likely to you know
9 minimize the capital investment perhaps.

10 I don't want to speak for CP about why
11 they're not going after this market, but CN wants the
12 opportunity that you foreclose if you let the
13 parallel lines get consumed within one entity, that
14 opportunity will disappear.

15 CHAIRMAN OBERMAN: Well if in order to realize, to come to
16 grips with these fairly general notions that we have
17 to grapple with here, I'm trying to assess who's
18 going to try to take advantage of potential markets,
19 and take traffic off the highways and make money from
20 it, which is fine. That's what business you're in.

21 I don't see anything about CP's recent
22 history that says they're afraid to invest. They've

1 just made this big investment in the Rupert
2 intermodal. They just bought CM&Q, is that the name
3 of it?

4 MR. WARREN: Port St. John.

5 CHAIRMAN OBERMAN: Yeah, but then CM&Q
6 railroad, so they could get to Port St. John. It's
7 not like this is a railroad with a history of being
8 afraid to invest in growing intermodal.

9 MR. WARREN: If they do that will be
10 great, and you'll see robust competition between CN
11 and CP to win that traffic, which is uniformly is
12 what, Chairman, you've been speaking to as something
13 you'd like to see more of in the rail industry
14 combined with additional investment in infrastructure
15 that's being underutilized.

16 CHAIRMAN OBERMAN: I would, but I'm also
17 trying to assess the fairly dramatic relief you're
18 asking for, for us to deprive people of property that
19 they've bid for. And so, I've put all of that in
20 context, and what I'm hearing here it was sort of a
21 portrayal that somehow there would be a huge loss to
22 the general economy, and to the public if CP gets

1 this line rather than CN. And I'm not seeing exactly
2 why that is because I have to accept conflicting
3 parts of your presentation, you know.

4 Either it's not going to happen, or it is
5 going to happen because it's the same parallel like.
6 Those two don't -- there's a disconnect there as I'm
7 hearing the evidence, that's what I'm talking about.

8 MS. SLAZINSKI: And if I can give just one
9 example. So to use the IFG facility as an example,
10 in CP's plan for year one through three, they're
11 planning to primarily use that facility in terms of
12 changes for block swaps of carload traffic, and
13 minimal amounts of merger related traffic, whereas in
14 CN's vision we would invest within that facility to
15 create expanded capacity for intermodal and
16 automotive traffic to flow through that facility.

17 CHAIRMAN OBERMAN: Because you see the
18 potential to make money off of that investment. I
19 assume CP could figure that out too. I mean I don't
20 hear you know this isn't some kind of fly by night
21 organization coming in here for this, so I'm just
22 having difficulty with understanding why your

1 business strategies are so different from CP's
2 business strategy. I don't get it.

3 MR. WARREN: And I would say Mr. Chairman,
4 I mean you would anticipate that everybody is going
5 to be economically rational. But if you got two
6 parallel lines, the economically rational thing to do
7 is to pick the line you're going to favor, and
8 concentrate the traffic, concentrate the investment
9 there. And that's what they propose to do.

10 We're saying you keep those lines
11 independent, the way they are today, and let the
12 railroads compete. I'm sure you could put, you know,
13 CP's intermodal person, automotive person, would get
14 up here they would talk about why their network is
15 great, why they're going to go compete.

16 But when you have two parallel lines which
17 are parallel routes, and you're letting you know the
18 merging railroads, you take one and decide that's
19 what they're going to favor, and they're not going to
20 favor the other one, we think that's a harm to
21 competition.

22 CHAIRMAN OBERMAN: Let me ask this

1 question. Is there something less than divestiture
2 that would provide you with the alternative you seek?
3 Trackage rights, haulage rights, that kinds of
4 conditions?

5 MR. WARREN: So I think the issue with
6 trackage -- and you know they haven't proposed it, so
7 I feel like I'm negotiating against myself again.
8 But you have, and --

9 CHAIRMAN OBERMAN: No, you're negotiating
10 with me.

11 MR. WARREN: Yes. So I would say that's
12 -- I would say that you know you've got to have a
13 level of ownership to be able to make the investments
14 to the line. And the problem with trackage rights or
15 haulage rights is that we're not going to be able to
16 make the investments that are needed to develop the
17 line. And that's why we ask for you know
18 divestiture.

19 It's certainly possible you know, if
20 they're willing to talk to us, you know, we might be
21 able to work out some sort of a joint venture, or
22 something like that. That is what as Doug

1 explained, that is what CN was thinking about
2 proposing to KCS before all this merger stuff
3 happened, was to find a way to work together.

4 But there's got to be an ownership
5 interest there, and you have to invest in facilities.
6 And Kathy talked about IFG. I mean you've got to it
7 seems we need to build a terminal there, and if you
8 don't have the ability to have a terminal, just
9 having trackage rights isn't going to actually you
10 know give you the ability to develop the business.

11 CHAIRMAN OBERMAN: So let me ask this
12 question. As I think Mr. Creel himself said, and I
13 think it's pretty clear from the facts. The great
14 interest in somebody acquiring KCS was simulated by I
15 think it was Pat Ottensmeyer who said it actually.
16 A hedge fund that came forward two years ago as I
17 recall, two or three years ago.

18 Before that I mean this market automotive,
19 trans -- I'm sorry, intermodal. That's nothing new.
20 Where was CN three, four, five years ago if this was
21 such a great plan of approaching KCS and offering
22 them a bundle of money for this line, or some kind of

1 joint venture, which both people could make money?

2 I mean this proposal strikes me quite
3 frankly as reactive, rather than something CN figured
4 out would be good for the world. So I wonder if
5 anyone wants to comment on that.

6 MS. SLAZINSKI: Do you want to take it and
7 talk about the CNIC, or do you want I can do that if
8 you want to. So one thing that we have done over the
9 years is to try to work with KCS in a variety of
10 ways, and that included during the CNIC merger.

11 There was an effort to override that
12 contractual restriction that presented KCS to come on
13 to an interchange with CN on our side of the
14 ownership at the Springfield terminal. The Board
15 denied that request with the expectation that
16 interchange facilities would be built at Cockrell.
17 Over time that hasn't happened, and so as a result to
18 the train traffic that was moving at the time over
19 Cockrell has not, you know, has suffered as a result
20 of that lack of facilities and the layout at
21 Cockrell.

22 And so we have over time tried to work

1 together with KCS to explore opportunities, and the
2 two sides independently, the business lines haven't
3 sort of worked out, and so instead that traffic has
4 been flowing over East St. Louis as Derek Taylor
5 described earlier.

6 CHAIRMAN OBERMAN: So how did the
7 economics change? I mean everything has a price if
8 it had that much potential. Why didn't CN figure out
9 a way to make it happen years ago?

10 MS. SLAZINSKI: And so the critical
11 difference is up until now KCS has been a neutral
12 operator. So if it was traffic say in Eastern Canada
13 trying to reach Kansas City markets, or trying to
14 reach points in Mexico, from KCS's perspective,
15 whether they were going to give a certain interline
16 division to CP from Kansas City to points in the
17 Eastern Canada or to CN, off of the Springfield line.
18 They are neutral in terms of trying to develop as
19 much traffic as possible.

20 It was mentioned yesterday that
21 approximately 80 percent of KCS's traffic is
22 interchanged with other carriers. It's the loss of

1 the neutrality when CP owns the KCS that CNC has the
2 loss of permanent options from the Springfield line.

3 CHAIRMAN OBERMAN: What I'm missing though
4 is that this seems in the absence of this transaction
5 it would have -- this would have been a business
6 opportunity for KCS to either joint venture, or sell
7 this off at a fancy price if it was as valuable to
8 you as you're now telling us. And I'm not clear why
9 that hasn't happened if it was such an important
10 addition.

11 MR. WARREN: So, and I think the one thing
12 I'd add Mr. Chairman, I do think situations change,
13 and as we put in our testimony, and as actually some
14 of the exhibits they used in their July 12 replies
15 showed, you know CN was looking at this before we
16 knew that you know, anything about a CP/KCS
17 transaction.

18 But if you go back you know three or four
19 years ago, yeah. We probably -- CN probably wishes
20 that we had talked, you know that they talked to KCS
21 earlier. You go back five years ago you know, KCS
22 had you know haulage rights over hundreds of miles of

1 the CP network, and so it wouldn't have been an end
2 to end merger you know, five years ago.

3 I mean I think you've got to look to the
4 future, and I think that's what we're concerned about
5 is the loss of that future competitive potential.

6 CHAIRMAN OBERMAN: Well what strikes me,
7 and I say this only so you know it's of concern that
8 you can address, is what's changed is that CP seems
9 to have won the bidding war with CN for KCS, and now
10 you're here trying to ask us to force a deal that you
11 have been unable, or unwilling to make with KCS over
12 the years up until now, and taking the advantage of
13 the fact that there's a merger application in front
14 of us to obtain something that you couldn't obtain in
15 the private market.

16 So that's what I'm hearing. If I'm
17 missing something, you know I want to be enlightened
18 of it.

19 MR. ATKINS: Yeah, so Chairman we
20 appreciate the feedback, and I will make the same two
21 points that Matt did versus things do change. You
22 heard from Dan and Sarah that actually the markets

1 are changing as well, so the EV development, all of
2 this stuff in the auto that you're speaking to. But
3 I will just be frank, yes to some extent it's
4 reactive.

5 You see a parallel line that you thought
6 that all of a sudden it's going to be acquired and
7 disappear. It does focus one's attention on what is
8 lost, what are the opportunities associated with that
9 line. So I appreciate your perspective, but we think
10 the question is not why didn't we structure this deal
11 with KCS three or four years ago to perhaps to our
12 regret is, is it in the public interest?

13 That's the standard Congress set for you
14 to let the two parallel lines be subsumed by a single
15 carrier, or in these circumstances, is it in the
16 public interest to require the divestiture of that
17 line? And we do think, particularly given the
18 modern messaging from the board about what is in the
19 public interest, investment, taking trucks off the
20 highway, increasing competition, increasing
21 resiliency, that this divestiture satisfies that
22 standard Chairman.

1 CHAIRMAN OBERMAN: And do I take it, and
2 just to nail down a response to my earlier question
3 that if the Board were to approve the merger and not
4 grant your responsive application for divestiture,
5 then you're not interested in a trackage rights
6 condition?

7 MR. ATKINS: I'd ask you to let us take
8 that away and discuss with it, but trackage rights
9 you need to have the incentive to invest.

10 CHAIRMAN OBERMAN: All right.

11 MR. ATKINS: And so we've have to -- it
12 wouldn't be what you'd view as a trackage rights
13 agreement. We would be putting into that agreement,
14 you know, the rights to invest at their discretion.
15 That's not really a trackage rights agreement, but
16 let us take that away and we'll make sure that we
17 brief for you the lesser alternative of a trackage
18 rights agreement, and whether that would --

19 CHAIRMAN OBERMAN: Or maybe some other
20 kind of agreement, something short of divestiture.
21 Is there something we should be thinking about?
22 That's really my question.

1 MR. ATKINS: Understood, and we'll take
2 that away.

3 CHAIRMAN OBERMAN: Any other, Karen?

4 BOARD MEMBER HEDLUND: So Ms. Slazinski,
5 I apologize. People murder my name all the time too.
6 The only time people get Hedlund right is punting
7 this. What percentage of the additional traffic that
8 you would be taking over this line would be
9 originated in Canada versus Michigan?

10 MS. SLAZINSKI: There's currently 14 U.S.
11 assembly plants, vehicle assembly plants and eight in
12 Canada, so more than 50 percent.

13 BOARD MEMBER HEDLUND: Would be that you
14 serve? That you can serve?

15 MS. SLAZINSKI: That we have service and
16 access to, yes.

17 BOARD MEMBER HEDLUND: Okay. And then
18 just to comment on it, it really goes to where I
19 think the Chairman was getting. I appreciate that
20 this, you're proposed divestiture would be of
21 enormous value to you. What I am concerned about is
22 that it seems disproportionate to the competitive

1 harm that may arise from this if any.

2 And if we, this Board, could wave a wand
3 and rationalize the whole U.S. rail system, I think
4 that would be great. And I would start with you know
5 Amtrak's long distance service. But we don't --
6 that's not what we're here to do, and although this
7 might be a major opportunity to you know help create
8 a new market for you, I just don't know if this is
9 the time or place where we can do that. And we'll
10 have to discuss that further.

11 MS. SLAZINSKI: The automotive customers are interested in
12 options, and we understand we get questions about
13 Kansas City, and we currently don't go there. We
14 stopped short in Chicago, or elsewhere. So to
15 create new solutions, and new opportunities, and
16 perhaps decongest Chicago, this is a great solution
17 and a great opportunity that we're asking for
18 consideration.

19 BOARD MEMBER HEDLUND: Thank you.

20 CHAIRMAN OBERMAN: Any other questions at
21 this point, or let me just say for scheduling
22 purposes. We're up here, I think I speak for all

1 five of us, prepared to just plow ahead before lunch
2 and have CN finish, unless anybody is feeling
3 light-headed, tell me about that.

4 The two witnesses who I've mentioned,
5 whose names are not in front of me that we were going
6 to try to finish with their testimony before --
7 non-CN people, before the lunchbreak. We're not
8 going to get there. Those people have agreed to be
9 available on Monday or Tuesday.

10 So we will finish with CN, and then we
11 have another witness after lunch from Richardson
12 International, and then we will move into both the
13 Norfolk Southern and Burlington Northern. So unless
14 anybody on the panel doesn't have the stamina, we'll
15 proceed. Go ahead.

16 MR. WARREN: Mr. Chairman, so we're going
17 to turn to the Gateway condition, which is our third
18 concern. And you're going to hear a lot of about
19 this from other carriers, so what I'm going to try
20 and do is just highlight the two features, the two
21 parts of our request since it seems to be accepted by
22 everyone that there needs to be a condition to

1 protect the foreclosure of gateways.

2 So we have really two key concerns. The
3 first is if the condition should be clear. I want to
4 make sure that this gateway condition is not so
5 amorphous, and so difficult to implement, that it
6 becomes empty. And so for example, Member Schultz you
7 asked what gateways does this apply to.

8 That shouldn't be a hard question for them
9 to answer, and we asked them the same questions in
10 depositions. The answer that we got was similar to
11 what you heard from counsel, which is any place the
12 Class 1's interchange traffic. We've asked in our
13 comments for them to clarify that that was what they
14 meant by a gateway condition.

15 They ignored it. We'd ask you to enforce
16 that as the definition of what is or is not a gateway
17 in these circumstances. And it's important because
18 we're not just talking about the southern gateways,
19 like Jackson, and Kansas City and Laredo. You need
20 to make sure that the gateways with CP also remain
21 open on commercially reasonable terms.

22 So we think that's probably our first

1 biggest request is to make sure it's clear. The
2 second thing that I think that is unique to CN's
3 proposal is how are you going to enforce the
4 condition? I know I'm putting off the third bucket,
5 which is how do you define it, but how do you enforce
6 it?

7 And as the Chairman mentioned, you need
8 some sort of practical process. And CN's proposal is
9 to use arbitration. Now arbitration is not uncommon
10 to use to enforce a merger condition. You impose it
11 on the applicants as a condition, which means that a
12 customer or an interchange partner, would be able to
13 go to arbitration and try to resolve whether or not
14 it's a commercially reasonable rate, and if not, the
15 arbitrator resolves that, and on a confidential
16 basis.

17 And then that could be reviewed by the
18 Board under your normal lace curtain type of standard
19 review, very highly differential. This is how you
20 resolve labor disputes. So you impose labor
21 conditions in mergers. And if the labor employee and
22 their carrier has a dispute, they don't come to the

1 Board and start fighting over whether what part of
2 our doc applies or doesn't apply, it goes to
3 arbitration and then it comes up to the Board.

4 We think this is a really good idea that
5 we put in our proposal in our comments, and has been
6 completely ignored by CP. And you know for all the
7 reasons why you know that arbitration can be superior
8 to formal litigation. It's faster. I mean just we
9 praise to respect bringing a new case to the board on
10 commercially reasonableness would probably take
11 longer to resolve than the market opportunity might
12 exist.

13 So it's a quick process, and it should be
14 available to everybody. So it's not just customers
15 who should be able to pursue relief, interchange
16 partners should be able to protect themselves as
17 well. So those are the kind of two key features.
18 The last point I know is a more challenging one,
19 we're actually going to just let you defer that
20 conversation to BNSF and UP.

21 We're trying to define how do you -- what
22 is commercially reasonable? CN has not put forward a

1 proposal. Our thinking would be is that you let the
2 parties argue what they think is or is not
3 commercially reasonable to the arbitrator, so it
4 maintains some flexibility. And all the arguments
5 that you've heard from other parties could be
6 presented to the arbitrator as justification for why
7 it is or is not commercially reasonable.

8 Factors, you know I'm not sure I would
9 recommend you try to delineate factors, because it
10 might elevate in the arbitrator's mind, factors above
11 others that people might want to bring. But the
12 obvious ones include things like the relationship
13 between the rate, the interline rate and the single
14 line rate, or what are the cost differentials between
15 the two movements.

16 What are the different densities of the
17 line, or the geographic differences? There's a
18 number of arguments that you could present, rather
19 than you trying to resolve all of that in the
20 condition we think the approach that CN recommends is
21 that you actually basically take it to an arbitrator,
22 let the parties submit their presentation to the

1 arbitrator, the arbitrator resolves the dispute, and
2 hopefully we move on.

3 If necessary, you can apply it to the
4 Board, but under standard, very deferential standards
5 of review. So those are our two key points, and I'm
6 willing to handle any questions you have on
7 gateways, or that ends CN's presentation here. But
8 I'll just pause, so does anybody have any questions
9 for CN related to gateways?

10 BOARD MEMBERS FUCHS: I'll be very brief.
11 Very much appreciate your point on the clarity to
12 gateways. On your second point about binding
13 arbitration, obviously commercially reasonable is not
14 a new standard in terms of what carriers have
15 offered. Can we point to any carrier that has agreed
16 to a binding arbitration process? Perhaps even
17 outside the purview of the merger that would be a
18 good model beyond the labor model?

19 MR. WARREN: Yep, Tex-Mex. And you don't
20 have to look very far because I think it's Exhibit 1
21 to Mr. Brook's verified statements, but a guess. Tex-Mex.

22 CHAIRMAN OBERMAN: Is that all you had

1 Patrick?

2 BOARD MEMBER FUCHS: Yep.

3 CHAIRMAN OBERMAN: Just a couple of
4 observations. If CN has anything further to add on
5 how commercially reasonable is defined, you've got a
6 final brief.

7 MR. WARREN: Yes sir.

8 CHAIRMAN OBERMAN: What you could advise
9 us. What I -- hearing this question about defining
10 gateways, one possible way to move forward with
11 clarity, or as much clarity as the interchange
12 partners want, and I'll say this to the other four as
13 they come before us is you know where your
14 interchanges are, give us a list.

15 Rather than guessing what's an
16 interchange, we'll have something concrete to look
17 at.

18 MR. WARREN: We'll provide you that in the
19 final brief absolutely.

20 CHAIRMAN OBERMAN: Yeah. All right. Are
21 there no other questions, Michelle?

22 BOARD MEMBER SCHULTZ: Kind of circling

1 back on the service assurance plans. If the Board
2 would decide to uphold the standard under the old
3 rules, and not require a service assurance plan,
4 maybe in the final briefs if you could just set forth
5 what the applicants asserted, and what standard the
6 Board should hold them accountable to.

7 MR. WARREN: We could do that.

8 CHAIRMAN OBERMAN: Any other questions on
9 this point? All right. Do you have some
10 conclusions?

11 MR. ATKINS: Actually I'm just going to
12 skip the conclusions and let us all go to lunch.

13 CHAIRMAN OBERMAN: Okay. Before we go --
14 who? Okay. Where is that person? We do have one
15 witness we're going to hear before we break for
16 lunch, but Ray that was a wise move because I don't
17 think we can hear anymore than what's already been
18 said.

19 MR. ATKINS: I assumed as much.

20 CHAIRMAN OBERMAN: Okay. All right.
21 Thank you. We have one very short witness that we're
22 going to hear before lunch, and then we will break.

1 And that is James Irving, from J.D. Irving, Limited,
2 who is testifying virtually.

3 Thank you all from CN. I appreciate it.
4 Very, very interesting and thorough presentation.

5 MR. IRVING: Mr. Chairman?

6 CHAIRMAN OBERMAN: Are you there?

7 MR. IRVING: Yes, yes sir, can you hear
8 me? Can you hear me?

9 CHAIRMAN OBERMAN: Mr. Irving?

10 MR. IRVING: Yes sir. Mr. Chairman can
11 you hear me?

12 SPEAKER: We're trying to get on
13 here, we're trying to speak.

14 MR. IRVING: Mr. Chairman can you hear me?

15 CHAIRMAN OBERMAN: That's not -- where is
16 this guy? Mr. Irving?

17 MR. IRVING: Yes sir I'm right here.

18 CHAIRMAN OBERMAN: Are you ready to go?
19 We can't hear you if you're saying anything.

20 SPEAKER: You're muted.

21 CHAIRMAN OBERMAN: You may be muted.
22 Still can't hear you. I can't. Try again.

1 MR. IRVING: Yes sir, can you hear me now
2 Mr. Chairman? Can you hear me now?

3 CHAIRMAN OBERMAN: We're trying to fix
4 this problem, don't anybody leave.

5 MR. IRVING: Can you hear me sir? Hello,
6 hello. Can you hear me Mr. Chairman, hello, hello?

7 SPEAKER: They're working on it, they just
8 can't hear you. But everyone can.

9 CHAIRMAN OBERMAN: Apparently the people
10 on Zoom can hear, but we can't hear.

11 SPEAKER: Testing, testing.

12 SPEAKER: We might be able to take his
13 testimony and listen to it on Zoom on the lunch
14 break.

15 CHAIRMAN OBERMAN: No. I think I'd like
16 to hear Mr. Irving he's been very patient. If we can
17 get this fixed in the next couple of minutes so. Mr.
18 Irving bear with us.

19 MR. IRVING: Okay that's fine. Mr.
20 Chairman can you hear us? Hello?

21 SPEAKER: I believe we're still working on
22 it. One second.

1 MR. IRVING: Okay, we're here. Hello,
2 hello? Hello.

3 CHAIRMAN OBERMAN: Mr. Irving do you want
4 to try this again?

5 MR. IRVING: Yes sir, can you hear me?

6 CHAIRMAN OBERMAN: No, sorry hold on.

7 MR. IRVING: Okay.

8 CHAIRMAN OBERMAN: Can you hear us?

9 MR. IRVING: Yes sir I can. Mr. Chairman
10 can you hear me now?

11 CHAIRMAN OBERMAN: Yes.

12 MR. IRVING: Okay, can you hear me sir?
13 Hello.

14 SPEAKER: There's a delay. I think
15 they're looking at it over YouTube.

16 CHAIRMAN OBERMAN: Go ahead.

17 MR. IRVING: Mr. Chairman can you hear me
18 now? Can you hear me?

19 CHAIRMAN OBERMAN: Can you hear me? Okay.

20 MR. IRVING: So can we proceed?

21 SPEAKER: Please go ahead.

22 MR. IRVING: Okay. Mr. Chairman I

1 apologize for the delay to your lunch. My name is
2 Jim Irving. I'm the co-CEO with my brother Rob.
3 We're a family business here in --

4 CHAIRMAN OBERMAN: Go ahead and give your
5 presentation Mr. Irving. I think we can hear you.

6 MR. IRVING: Okay, can you hear me now
7 sir?

8 CHAIRMAN OBERMAN: Yes.

9 SPEAKER: Please go ahead.

10 MR. IRVING: Okay. Mr. Chairman I
11 apologize for the late lunch. My name is Jim Irving,
12 I'm co-CEO with my brother Rob. We're a family
13 business. We are in --

14 CHAIRMAN OBERMAN: Go head and give your
15 presentation.

16 MR. IRVING: Am I supposed to speaking
17 here, or what am I supposed to do? Someone tell me?

18 SPEAKER: Mr. Irving please go ahead.

19 MR. IRVING: Okay. So Mr. Chairman, okay
20 I apologize for the delay here. As I said my name is
21 Jim Irving, I'm co-CEO of our family business with my
22 brother here located in St. John --

1 CHAIRMAN OBERMAN: Mr. Irving. If you,
2 I'm sorry it's really almost impossible to get the
3 benefit of your presentation. Can you be available
4 in a half and hour and we'll take our lunch break and
5 convene, and we'll try to hear you before you have to
6 take off. Is that okay?

7 MR. IRVING: 100 percent, that's fine,
8 good half an hour, thank you.

9 CHAIRMAN OBERMAN: All right. I feel
10 like I'm in the Fifth Dimension. All right a half an
11 hour, we'll break for lunch. Let's be back sharply,
12 thank you.

13 (Lunch break.)

14 CHAIRMAN OBERMAN: Mr. Irving can you hear
15 us?

16 MR. IRVING: Do I got the Chairman here?
17 Oh my God, yes sir.

18 CHAIRMAN OBERMAN: You have the Chairman.

19 MR. IRVING: Can you hear me?

20 CHAIRMAN OBERMAN: For better or worse. I
21 really apologize.

22 MR. IRVING: Don't worry about a thing.

1 You're on important business, and we're patient here.

2 No problem at all. I hope you had your lunch.

3 CHAIRMAN OBERMAN: Well we did have our
4 lunch and your business is equally important. So the
5 entire Board is gathered here. We're actually in my
6 office with the court reporter, and of course we're
7 on the public feed, so this is a public meeting, and
8 we want to hear your testimony, so if you are ready
9 proceed.

10 MR. IRVING: Okay sir, I'll do that. And
11 thank you for listening to me this afternoon. I will
12 speak to you and the Board. I tell you just by way
13 of introduction my name is Jim Irving, and I'm Co-CEO
14 with my brother Robert of our family owned business.
15 We're up in -- the head office is in St. Johns, New
16 Brunswick, where I am today. And you referenced the
17 Port of St. John at one point I heard on your
18 discussions here this morning, so that's where we
19 are, eastern part of Canada.

20 We're a privately owned family-owned
21 business. Been in business since 1882, almost 20,000
22 employees, and we're in a variety of businesses from

1 ship building to food processing, horse products,
2 transportation, and a number of other companies. So
3 those are the businesses we operate. We're
4 manufacturers and exporters, and do a lot of business
5 in our operations both in Canada and the U.S.

6 So we're most interested in today's
7 activities because this is about efficiency, reliable
8 service, and it's been difficult to get reliable
9 service for the last couple of years, but I'm
10 optimistic that this is going to make a difference.
11 Plus, having a single line that connects with CP and
12 KCS. From our part of the world it's going to be
13 very beneficial.

14 You know we are going to be able to access
15 new markets in Texas, Mexico, very important for both
16 our Canadian and our U.S. operations, efficiency and
17 supply chain. As railroaders we have a small issue, I
18 should have mentioned that. We have a small
19 railroad, a short line operation, it's part of our
20 transportation business.

21 Even though we're in a trucking business,
22 and we are both the fifth largest trucking company in

1 Canada, we have a short line with 500 miles of track,
2 40 locomotives, and it's somewhere around 1800 box,
3 and center beam cars and another 500 or so would
4 ship.

5 So we're a bit familiar with railroading,
6 and so we're very interested in being able to put our
7 cars with product coming out of the U.S. or Canada on
8 a line, and get to our customers, and get the cars
9 back directly without being re-routed on all kinds of other
10 railroad, so that's important to us, a lot of
11 efficiencies to be gained there in the field.

12 And also you know we've had good luck with
13 the folks at CP. We know the senior management,
14 Keith Creel, and his executive team. Very good
15 folks. They've done what they said they were going
16 to do. They acquired the CM as was mentioned earlier
17 this morning, and they've done -- that's who we
18 interface with here in New Brunswick, over in Maine I
19 should say, the State of Maine.

20 So but they've done a good job. They've
21 lived up to their promises and executed, and we've
22 seen dramatic improvement at the surface. And having

1 this is going to allow for more competition as far as
2 we're concerned. The Port of St. Johns, an east
3 coast port, undergoing major renovations at the present
4 time. And BP World is a large container ship
5 operator, one of the largest in the world, and our
6 port facility operator I should say.

7 So imports into St. John, exports out of
8 St. John, connecting all the way down to Mexico. We
9 see that as a very important train line, and boy do
10 we need more port capacity in North America on both
11 coasts to get this thing really rolling. So we're
12 very keen on that.

13 And it should lower costs to shippers, and
14 provide better service, and that's what the world is
15 all about. I can tell you when we go, and we're a
16 major supplier to folks like Home Depot, the lumber.
17 We're about the eighth largest lumber producer in
18 Canada, or Sam's Club with our tissue products, it's
19 all about efficiency, all about cost, all about
20 performance.

21 And nobody wants to hear any excuses of
22 why we're late, it's just get it there and do it.

1 And so, we are very focused on that aspect of it, so
2 we think more customer service, more competition,
3 what we have to have. And then you know
4 sustainability, it's been mentioned here about ESG.

5 We're very proud to say in our forest
6 products, which we're a pretty good size producer of,
7 pulp paper, tissue, lumber. We're carbon neutral.
8 We're about the fifth largest land owner in North
9 America, and we plant over a billion trees ourselves
10 over our history. We're proud of that. And so they
11 can be able to have a train where we could have roughly
12 a train that's 8 to 10,000 feet long. We take 300
13 trucks off the road, great. We're off of that
14 because we've got to be more environmentally
15 responsible, and we're proud of what we're doing, and
16 we want to keep improving our number.

17 So that's a brief overview, very quick. I
18 realize that, I apologize for being so brief, but I
19 don't want to waste your time, but we certainly
20 support you know CP/KCS merger. We think it's a good
21 thing. We're going to have more competition, better
22 service to both our Canadian and our U.S. operators.

1 And I'll try and answer any questions I could to do
2 for you.

3 CHAIRMAN OBERMAN: Thank you much Mr.
4 Irving, and very, very helpful information from your
5 perspective. Any questions by any Board members? We
6 don't, and again I do apologize for the
7 inconvenience, but I am very glad we got to hear your
8 testimony before you had to disappear, so we
9 appreciate it.

10 MR. IRVING: Have a good day sir, and the
11 rest of the Committee. Thank you very much.

12 CHAIRMAN OBERMAN: Thank you. Thanks very
13 much.

14 MR. IRVING: Thank you.

15 CHAIRMAN OBERMAN: All right. We will now
16 go off the record for a couple of minutes while we
17 reconvene in the hearing room, and then we'll be back
18 on the record. Thank you all.

19 (Break.)

20 CHAIRMAN OBERMAN: All right. We are back
21 on the record, and in order to accommodate another
22 witness who has a time constraint, we're going to

1 hear from him first, and then we will hear from NS
2 and BN. So Mr. Justin Cauley is still here? There
3 he is, okay. I know he has a flight to catch, and we
4 don't want to miss out on your testimony. All right
5 you may proceed.

6 MR. CAULEY: All right. Thank you for the
7 opportunity to speak to you today. My name is Justin
8 Cauley, and I am the Senior Director of
9 Transportation for CHS, Inc. CHS is diversified,
10 global, agri business cooperative, owned by farmers
11 and local cooperatives across the United States, and
12 it employs over 10,000 people.

13 Together CHS employees based in offices,
14 retail operations, processing facilities, and
15 refineries across the U.S. and Canada serve more
16 than 600,000 farmer owners, either as direct CHS
17 members, or as members of approximately 1,000 member
18 cooperatives. CHS also does business with a
19 multitude of non-cooperative energy, grains and foods
20 customers.

21 CHS trades and transports corn, wheat,
22 soybeans, feed grains, propane, fuels, bio fuels, and

1 a litany of other commodities. Rail is essential to
2 our business model, and having competitive rail
3 access -- having competitive access to markets via
4 rail is critical.

5 CHS previously submitted a letter
6 supporting the approval of the CP/KCS merger. I am
7 here today to confirm that we continue to support
8 this merger. The merger will benefit CHS, farmers,
9 their families, and rural communities in which they
10 live by creating new single line routes that were
11 more efficient than existing interline routes.

12 These single line routes will provide much
13 needed optionality for grain shippers, and likely
14 spur further investments in efficient infrastructure.
15 Currently CHS ships around 32,000 railcars per year
16 per year on CP. We are happy with the CP as a
17 trusted partner.

18 In the past five years CP has made
19 significant improvements in the capacity and quality
20 of its fleet and service. For example, CP has made a
21 significant investment of a half a billion dollars in
22 its covered hopper fleet by investing in more than

1 7,300 new high capacity cars.

2 These hoppers are shorter, lighter, and
3 can carry more grain per car enabling CHS to ship
4 more grain per train. Although we've been happy with
5 CP's existing service, the lack of single line haul
6 destination outlets for our origins on CPS has limited
7 the services CP can officially provide.

8 Single line haul routes are generally more
9 efficient than interline routes. That is why we are
10 excited about the CP adding KCS demand destinations
11 in the Gulf region, Texas and Mexico to their
12 network. Access to those destinations will enable CP
13 to offer single line routes connecting our grain
14 growing origins with grain consuming destinations,
15 and generate additional benefits for CHS and the
16 farmers we serve.

17 These benefits will be particularly
18 important for corn, soybean and wheat growers in the
19 Dakotas, Minnesota and Montana, who are adjusting to
20 the changing weather patterns and consumer demand.
21 Currently these growers depend on the few existing
22 north south shipping lanes to ship their crops in the

1 U.S. and the Gulf and Southern U.S. Export terminals.

2 These properties will still benefit from
3 single line hauls and direct north/south access to
4 ports in both those regions. Every season in
5 agriculture is different, and crop production areas
6 are increasingly subject to changing weather patterns
7 and consumer demand.

8 For example, corn acres are shifting
9 north. Sunflower acres are shifting west. Highly
10 valued Durham wheat acres are north into Canada.
11 This year the drought in the southern plains and
12 Southwest creates the need for railroads to haul
13 grain farther from the northern plains.

14 A merged CP/KC will create significant
15 optionality for producers and grain shippers,
16 allowing CHS to buy more grain and compete more
17 effectively to Mexico, to the Gulf, and to the feeder
18 market south of Kansas City, all to more effectively
19 serve customers, farmer owners, and agriculture.

20 Destination optionality reduces risk, and
21 will allow CHS to buy and sell more grain and other
22 commodities even through traditional P and W outlets.

1 Finally, CHS firmly believes the increased
2 efficiencies in market access created by the CP/KCS
3 merger will be an impetus for rail using companies,
4 such as CHS to capitalize on those benefits
5 considering -- capitalized by considering new
6 potential investments and supply chain
7 infrastructure.

8 CHS has been investigating potential new
9 investments in both U.S. and Mexico. Without the
10 CP/KCS merger and aforementioned benefits, such
11 investments will be unlikely to provide a strategic
12 rationale, or rate of return sufficient to justify
13 the capital investment, and therefore simply not
14 happen. For these reasons, CHS respectfully urges
15 the Board to approve the CP/KCS merger in its
16 entirety with no line concessions.

17 Thank you again for allowing me the
18 opportunity to voice CHS's support.

19 CHAIRMAN OBERMAN: I have a couple of
20 questions. The kind of infrastructure capital
21 investments that you'd be incentivized to make if
22 this merger were approved, what type of facilities

1 are you talking about?

2 MR. CAULEY: Those would be destination
3 type facilities. CHS has origins today on the CP.

4 CHAIRMAN OBERMAN: So can you be more
5 concrete?

6 MR. CAULEY: Perhaps distribution
7 facilities that could take grain to feed the local
8 feed in the regions where the KCS operates today.
9 It's nothing concrete yet.

10 CHAIRMAN OBERMAN: But I mean are we
11 talking about spur lines to distribution centers, or
12 what kind of rail oriented infrastructure would be
13 involved?

14 MR. CAULEY: I'll have to get back on
15 exactly the locations we're looking at.

16 CHAIRMAN OBERMAN: Well not so much
17 location, just the type of -- are we talking about
18 building tracks that can handle unit trains, or what
19 kind of infrastructure are we talking about.

20 MR. CAULEY: Yeah. We're looking at
21 potentially track that can handle unit trains, and
22 they're very large trains.

1 CHAIRMAN OBERMAN: All right. The other
2 question I had is the 32,000 cars per year, is that
3 all the U.S. or did you include Canada as well?

4 MR. CAULEY: U.S. origins, sometimes
5 routed through Canada, but all the origins we operate
6 today are in the United States.

7 CHAIRMAN OBERMAN: All right. You said
8 something about approving this without any line
9 exceptions. Were you referring to the Springfield
10 line?

11 MR. CAULEY: It was any line that could
12 reduce the competitiveness.

13 CHAIRMAN OBERMAN: Okay. All right. That
14 was all I had. Any other questions?

15 BOARD MEMBER FUCHS: Mr. Cauley thank you
16 very much for being here. Would you expect the
17 improvement post merger to show up in both rates and
18 service?

19 MR. CAULEY: You know my impression would
20 be yes, yes, rates and service.

21 CHAIRMAN OBERMAN: Any other questions? I
22 thank you for your patience, and bearing with us and

1 adjusting the scheduling, but I'm glad we were able
2 to accommodate you.

3 MR. CAULEY: Thank you.

4 CHAIRMAN OBERMAN: All right. So while
5 Burlington Northern and Norfolk Southern are coming
6 up to speak, I just would like to make an observation
7 to all of the stakeholders who have asked to testify,
8 and to the public who may be watching that I think on
9 behalf of the Board I want to sort of apologize for
10 some of the scheduling adjustments.

11 None of it is based on the substance of
12 who the witnesses are, or anything they have to say.
13 It's really trying to accommodate a complex schedule,
14 and sometimes it has been easier to ask witnesses who
15 are testifying virtually to adjust their appearance
16 rather than people who have traveled to Washington to
17 be here in person.

18 So if it may seem like some of the shipper
19 representatives are getting short tripped, they're
20 not. It's all just a complex Rubik's cube of trying
21 to get everybody on to testify when they're
22 available, and when we can get them here. So I

1 apologize to those in the past, and anybody in
2 advance if we have to adjust their appearance. With
3 that, it looks like we are close to being set here.

4 So while people are sitting, according to
5 my list we have four people from Norfolk Southern.
6 Ed Elkins, who I know. Michael McClellan, who I also
7 know, John Mayo and Carrie Mahan, you're all here.
8 From BN we have Roger Nober, who everybody knows well
9 at this agency anyway, Courtney Estes, Jon Gabriel,
10 Paul Hirsch, Peter Denton, and David Reishus. I'm
11 not sure I pronounced that correctly, close enough.

12 Okay. So is everybody here? Okay. So
13 Norfolk Southern is listed first. So who wants to
14 lead off for NS?

15 MS. MAHAN: That would be me. Good
16 afternoon Chairman Oberman and Members of the Board.
17 Norfolk Southern appreciates the opportunity to
18 appear before the Board, and address its concerns
19 regarding the CP/KCS transaction.

20 I am joined today by Mr. Ed
21 Elkins, Executive Vice President and Chief Marketing
22 Officer of Norfolk Southern, who will provide an

1 overview of Norfolk Southern's intermodal business,
2 and the importance of efficient on time service, and
3 Norfolk Southern's investment in the Meridian
4 Speedway for our intermodal customers.

5 He'll also address the impact of the
6 applicant's proposed transaction on these customers.
7 I'm also joined to Mr. Elkin's right by Mr. Mike
8 McClellan. Mr. McClellan is a Senior Vice President
9 and Chief Strategy Officer of Norfolk Southern, who
10 will explain the rationales and the goals for the
11 Meridian Speedway joint venture.

12 He'll then provide a high level overview
13 of the structure and critical terms of the joint
14 venture agreements, address the applicant's
15 opposition to Norfolk Southern's narrow request for
16 conditions, and explain how CSX's arguments and
17 requests are misguided.

18 Finally, I am joined by Dr. John Mayo, who
19 can provide his expert economic opinion with respect
20 to the proposed transaction, as well as to address
21 arguments raised by CSX unrelated to the CP/KCS
22 transaction raised in this proceeding. Before I turn

1 the microphone to our esteemed colleagues, I wanted
2 to provide the board with a brief overview of Norfolk
3 Southern's positions and requests with respect to the
4 transaction.

5 Norfolk Southern is participating in this
6 proceeding for one reason, and for one reason only,
7 to make sure that its shippers retain the same
8 efficient options and service levels they enjoy
9 today after a combination of CP/KCS. Norfolk
10 Southern has carefully reviewed the CP/KCS
11 application, and has identified discreet transaction
12 specific changes that threaten to harm our
13 intermodal shippers, and we accordingly request a
14 narrowly tailored condition to remedy this harm, to
15 protect our shippers, and to preserve competition as
16 it exists today.

17 As we will explain, Norfolk Southern asked
18 the Board to require the applicants to enter into a
19 contingent trackage rights agreement with Norfolk
20 Southern on the KCS line between Shreveport and the
21 Wylie intermodal terminal near Dallas.

22 These contingent trackage rights would not

1 give Norfolk Southern access to any new routes. It
2 would not give Norfolk Southern access to any new
3 categories of traffic, and it would impose no new
4 burden on the applicants. Rather, the requested
5 relief merely allows Norfolk Southern to step in if
6 necessary and maintain the level of service that its
7 customers require, and that would exist without the
8 CP/KCS transaction.

9 Now despite the extremely limited nature
10 of this request, CSX has inundated the Board and the
11 parties with a raft of allegations related not to the
12 proposed CP/KCS transaction, but to the Meridian
13 Speedway joint venture created by KCS and Norfolk
14 Southern nearly two decades ago.

15 As you likely know, the Meridian Speedway
16 joint venture owns and operates the Meridian
17 Speedway, which is the rail line between Meridian,
18 Mississippi and Shreveport, Louisiana. As Mr.
19 Elkins and Mr. McClellan will discuss in detail,
20 Norfolk Southern and KCS formed this joint venture
21 because the Meridian Speedway was in dire need of
22 significant repairs.

1 And KCS did not have the money available
2 at the time to make the long-term investments needed
3 to support the existing traffic. Indeed, as part of
4 the Speedway joint venture, Norfolk Southern invested
5 over 300 million dollars to develop this intermodal
6 route.

7 To put that investment in perspective we
8 heard yesterday of the applicants' three year
9 investment projections for 276 million dollars across
10 their entire combined network. When Norfolk
11 Southern invested 300 million 2006 dollars just on
12 the Meridian Speedway.

13 As outlined in detail in our written
14 filings, CSX requests related to the Speedway joint
15 venture should be rejected. Not only because they're
16 procedurally deficient and don't meet the clear
17 standards set by this Board for this proceeding, but
18 also because they're simply factually, legally and
19 economically wrong.

20 As an initial matter CSX attack on the
21 Speedway joint venture doesn't meet the standards set
22 by this Board for the review of the transaction,

1 which is the sole focus of this proceeding. For this
2 Board to grant CSX's request for conditions the harm
3 alleged by CSX must be directly and causally related
4 to the CP/KCS transaction.

5 But CSX has identified no nexus between
6 the harm it alleges and the CP/KCS transaction, nor
7 does the CP/KCS transaction exacerbate any of the
8 harm CSX alleges. As Mr. McClellan will explain, the
9 CP/KCS amended operating plan excludes one category
10 of traffic with which CSX takes issue, and shows no
11 change in the other.

12 CSX has failed to identify any effect of
13 the CP/KCS transaction for which the imposition of
14 conditions is warranted. And this Board has ruled
15 before that it will not impose conditions that are in
16 no way related to the merger.

17 Further, because this Board has determined
18 that the pre-2001 rules apply to its review of the
19 CP/KCS transaction, the Board must consider whether a
20 requested condition would preserve competition lost
21 as a result of the transaction, not whether a
22 requested condition would enhance competition.

1 Put another way, the purpose of the
2 conditioning power is to preserve competitive options,
3 not to expand them. CSX has not been shy about its
4 disregard for the Board standard in this proceeding.
5 In February, CSX stated its goal was to re-establish
6 the competitive status quo before 2006, and in CSX's
7 notice of intent to participate in these hearings
8 just two weeks ago they reaffirmed this stance,
9 arguing that their proposed conditions would result
10 in new competition, not preserving existing
11 competition.

12 Finally, CSX's anti-trust arguments in
13 support of its request fail on the facts, and are
14 unsupported by the economics. As Dr. Mayo will
15 explain, joint ventures are consistently upheld
16 under the anti-trust laws as pro-competitive.
17 Transactions that generate efficiencies and promote
18 competition.

19 The last 16 years make clear that the
20 Speedway joint venture achieved both of these
21 outcomes. The formation of the Speedway was exempted
22 by the Board in 2006. The notice of exemption was

1 duly and publicly filed, and no party, including CSX
2 filed an opposition.

3 In fact, 41 intermodal shippers filed
4 letters of support for the joint venture in 2006.
5 And since that time output on the Speedway has gone
6 up, service has improved, transit times have
7 decreased, and competition for intermodal traffic in
8 the southeast has flourished.

9 CSX's attempt to unravel the joint venture
10 is an attempt to abuse the Board's review of the
11 CP/KCS transaction to place itself in a better
12 position than it would have otherwise occupied, and
13 their requested relief should be denied. So I thank
14 you again, Mr. Chairman and members of the Board, for
15 your time and attention, and I will pass the
16 microphone to Mr. Ed Elkins.

17 CHAIRMAN OBERMAN: Before you do that.
18 Would you do me a favor, perhaps other Board members,
19 so I do not have this entire record in my head. Some
20 people think I have nothing in my head, but that's a
21 different day. Could you briefly summarize the CSX
22 contention -- request that you are responding to,

1 just so I have it in front of me.

2 MS. MAHAN: I certainly can, just give me
3 one minute. Excuse me. CSX has a number of
4 different requests, which I think we'll got through
5 in some degree when we go through Mr. Elkins' and
6 excuse me Mr. McClellan's statements, so it actually
7 may be better if possible to do that because I think
8 it will flow a little bit better.

9 CHAIRMAN OBERMAN: I'd just like to set up
10 what you're knocking down, so I have it in my head.
11 Okay. Are you next?

12 MR. ELKINS: Yes sir.

13 CHAIRMAN OBERMAN: Go ahead.

14 MR. ELKINS: All right very good. Thank
15 you Carrie. Chairman Oberman, Members of the Board,
16 thank you again for the opportunity to speak today.
17 As Carrie mentioned, I'm Ed Elkins, I'm Executive
18 Vice President and Chief Marketing Officer at Norfolk
19 Southern.

20 I'm responsible for developing and
21 implementing our marketing strategies to provide the
22 competitive and responsive rail transportation

1 services that our customers demand. I appreciate
2 the opportunity as always, to discuss our business at
3 Norfolk Southern, and the potential negative effects
4 on rail competition and service arising from the
5 CP/KCS transaction that impact NS and our customers.

6 Norfolk Southern's rail network is a key
7 component of the nation's supply chain, covering the
8 Eastern United States. We operate approximately
9 19,300 miles in 22 states, including the District of
10 Columbia, and we serve every major container port in
11 the Eastern United States, providing efficient
12 connections to other rail carriers as well.

13 Intermodal transportation is the strategic
14 focus for Norfolk Southern. And intermodal
15 transportation is generally considered the most
16 competitive sector of rail transportation of all.
17 Intermodal customers have many options in North
18 America to move their goods. This includes rail of
19 course, highways and barges as well as utilizing
20 different carriers in combination with any or all of
21 these services.

22 Our intermodal customers need fast and

1 reliable rail service. And to meet their needs, we
2 at Norfolk Southern have invested significant time
3 and capital over the past two decades. When I met
4 with you in the spring I spoke about our new
5 operating plan called Top SPG, and how that plan
6 creates a platform for consistent service, continuous
7 productivity improvement, and unlocks smart growth
8 for our customers.

9 At Norfolk Southern our goal is to deliver
10 both a good service product, and a good customer
11 service experience. A good service product means how
12 well do we move a shipment from point A to point B,
13 and does it arrive when it's supposed to? And a good
14 customer service experience means how well we provide
15 logistical support to proactively solve our customers
16 supply chain issues, not all of which are NS caused.

17 These points are very critical for our
18 intermodal customers, which is a core element of our
19 growth strategy going forward. The Meridian
20 Speedway, which runs between Meridian, Mississippi
21 and Shreveport, Louisiana, connects with KCS's line
22 in Shreveport, and it's an important component of our

1 intermodal network today.

2 Now however, this was not always the case.
3 In the early 2000's it was apparent that the service
4 on what is now the Meridian Speedway, was not
5 adequate to meet intermodal customer demand, or
6 compete with highway alternatives between Dallas and
7 the Southeast markets.

8 To facilitate the necessary investments to
9 meet shippers' growing needs, we entered into the
10 Meridian Speedway joint venture with KCS. We
11 invested more than 300 million dollars directly into
12 the Meridian Speedway joint venture. 260 million of
13 which went right into track infrastructure
14 improvements.

15 These investments double the capacity on
16 the speedway and significantly decreased transit
17 times. Today, almost all that traffic is moving
18 between 50 and 60 miles an hour. Since 2006 we've
19 continued to invest in the Meridian Speedway, and
20 we've invested an additional 300 million dollars plus
21 in intermodal facilities throughout the Southeast.

22 As a result intermodal customers have a

1 reliable, and competitive option between Dallas and
2 the Southeast, and a significantly improved rail option for
3 transcontinental intermodal traffic. Today the
4 Speedway supports three categories of growth for
5 Norfolk Southern.

6 The first is the Dallas intermodal
7 traffic, which moves on the Meridian Wylie route over
8 the Speedway and KCS's line between Shreveport,
9 Louisiana and Wylie, Texas. Second, is our
10 transcontinental intermodal traffic, which traverses
11 the Meridian Speedway, connecting points on the west
12 coast and points in the Southeast, and lastly as
13 international traffic between Mexico and the
14 Southeast.

15 Focusing first on Dallas intermodal
16 traffic, the investment in the Meridian Speedway
17 created a new and competitive rail option for
18 customers who previously had been using the highway.
19 Our support for, and participation in the Speedway
20 joint venture keeps that option available to them.
21 In fact, most of the growth on the Meridian Speedway
22 has been traffic that we diverted from the highway,

1 not from rail.

2 It is our hope to keep it that way. Our
3 investment also significantly decreased transit times
4 on the transcontinental route that traverses the
5 Speedway. In 2006, the standard run time from Los
6 Angeles to Atlanta was at 100 hours. By 2007 the
7 Meridian Speedway premium run time was down to 74
8 hours. These operational improvements resulted in
9 significant benefits to customers, and increased
10 competition for the provision of transcontinental
11 intermodal service.

12 Given these facts it's clear why more than
13 40 customers supported the Meridian Speedway joint
14 venture when the transaction was first announced.
15 These benefits would not have been achieved without
16 our significant investment in the Speedway. Now I'm
17 aware that CSX is using the Board's review of the
18 CP/KCS transaction to argue that the Meridian
19 Speedway joint venture is anti-competitive, and has
20 somehow harmed customers.

21 To be frank, their arguments are simply
22 inconsistent with the reality. While our investment

1 created a better, and more competitive rail option,
2 the Meridian Speedway is by no means the only option
3 for intermodal customers. For Dallas intermodal
4 traffic, despite the significant investment that
5 we've made, the highway continues to serve most of
6 the traffic in this lane.

7 For trans-con traffic, we face competition
8 from multiple other rail routes, including the BNSF,
9 CSXT partnership, which connects the west coast and
10 Atlanta, which I viewed as a direct response to the
11 Meridian Speedway joint venture, and from other
12 combinations of rail and highway alternatives.

13 Now as it relates to the proposed merger
14 between CP and KCS itself, the primary message that I
15 hear from customers is the desire to maintain the
16 existing and efficient rail transportation options
17 that they utilized today. I understand the
18 applicants predict a transaction specific increase in
19 traffic on the lane that runs between Shreveport,
20 Louisiana, and Wylie, Texas, of more than 50 percent,
21 52 percent.

22 To put it simply, this increase in traffic

1 risks disruption of intermodal customers who demand
2 and expect consistent and reliable service on this
3 lane. As I've discussed our investment in the
4 Meridian Speedway created a rail option that
5 competes with the highway between Dallas and the
6 southeast. And the majority of the growth on the
7 Speedway came from traffic that previously moved on
8 the highway.

9 If the transaction specific growth the
10 applicants predict will follow the CP/KCS
11 transaction, harms our service in this lane, many of
12 these intermodal customers in this lane will have no
13 choice but to switch back to truck using the highway.
14 The potential foreclosure of this existing rail
15 option is bad for customers, bad for competition, and
16 bad for passenger traffic utilized in our highways.

17 To ensure that customers don't lose an
18 option as a result of the CP/KCS transaction, we're
19 requesting a very narrow condition. Contingent
20 trackage rights on KCS's line between Shreveport,
21 Louisiana and the Wylie intermodal terminal near
22 Dallas, Texas.

1 These rights could be exercised only if the
2 service provided by the applicants deteriorates below
3 contracted service levels, and even then we could
4 only exercise the contingent trackage rights if we
5 exercise our option to purchase the Wylie intermodal
6 terminal located near Dallas, Texas.

7 The contingent trackage rights that we
8 seek are extremely narrow, and seek only to preserve
9 the status quo, in which case the contingent trackage
10 rights granted need never be triggered. But if it's
11 necessary to protect the service, these rights will
12 be there. Put another way, these contingent trackage
13 rights guarantee that we can continue to provide the
14 level of service that our intermodal customers demand
15 and receive today.

16 To briefly conclude, our goal at Norfolk
17 Southern is to be customer centric and operations
18 focused in everything that we do. We're
19 participating in this proceeding to ensure that our
20 customers do not lose any of the options that they
21 relied upon over the past decade, and that they
22 continue to utilize today.

1 We carefully reviewed the evidence put
2 forward by CP and KCS, including the amended
3 operating plan, and we identified potential harm that
4 may occur if the transaction is approved without
5 appropriate conditions.

6 These conditions that we seek are narrowly
7 tailored to address this transaction specific harm.
8 Mr. Chairman, I thank you for the opportunity to
9 speak today, and if you'll allow me, I'll now turn it
10 over to Mike McClellan.

11 CHAIRMAN OBERMAN: Do we have any
12 questions? I'm not sure if I didn't miss something,
13 but what is it about this transaction that causes you
14 to fear that you won't get the continued service over
15 that Shreveport to Wylie section?

16 MR. MCCLELLEN: Do you want me to answer?
17 Okay. There were three things that we're concerned
18 about. And it's not just one thing, it's the
19 combination of these three things. The first one,
20 there is going to be traffic growth between Wylie and
21 Shreveport. We understand that. Whether that
22 results in additional train pair today, or longer

1 trains, that could potentially impact the service
2 that we have on that line.

3 Second of all the amount of volume they're
4 putting into Wylie, it looks like that capacity at
5 Wylie is going to exceed the current capacity of the
6 facility. And I know that this is something that the
7 CP has addressed in subsequent filings, but from our
8 view, and from the public records, it does appear
9 that there is going to be more volume ascribed to
10 Wylie than there is capacity, which could squeeze out
11 the customers that use the Norfolk Southern KCS
12 route.

13 The third thing is that recently the UP
14 and the CP stopped doing business together on the EMP
15 program. The EMP is a free running box program, that
16 was started by UP and NS. CP was in it for a
17 while, they're no longer in it. That creates a real
18 problem for us because a significant amount of our
19 business moving between Dallas and Atlanta moves in
20 the EMP program.

21 The KCS has access to the EMP program, the
22 CP doesn't, and at this point we don't really have a

1 replacement program for that box program and the
2 significant number of customers that are using it.

3 CHAIRMAN OBERMAN: I'm not following you.
4 If CP is out and KCS is in, wouldn't they just take
5 their place if the merger goes through?

6 MR. MCCLELLAN: They can't do that.

7 CHAIRMAN OBERMAN: Why not?

8 MR. MCCLELLAN: I don't want to get into
9 the details of the UP agreement, but the UP has the
10 right to determine who can and cannot participate in
11 the EMP program. And the UP has chosen to exclude
12 the CP from that program.

13 CHARIMAN OBERMAN: But you said KCS is in
14 the program.

15 MR. MCCLELLAN: That is correct.

16 CHAIRMAN OBERMAN: So why wouldn't if the
17 merger goes through, KCS just pick up where CP left
18 off?

19 MR. MCCLELLAN: They can't do that.

20 CHAIRMAN OBERMAN: You said they're in the
21 program. What? You said UP won't let them do it.
22 Is that what you're saying?

1 MR. MCCLELLAN: UP, I can't speak for the
2 UP, I'm just telling you what happened, and UP does
3 have the right to determine which western railroads
4 could participate in the EMP program.

5 CHAIRMAN OBERMAN: So you're saying even
6 after the merger it will be still excluding CP.
7 That's what you're saying. They won't pick up KCS's
8 participants?

9 MR. MCCLELLAN: I can't speak for the UP,
10 but I suspect that that's what will happen.

11 CHAIRMAN OBERMAN: Okay.

12 MR. MCCLELLAN: Based on the UP's recent
13 announcement.

14 CHAIRMAN OBERMAN: Do I understand Ed that
15 you have some contractual right to have your
16 intermodal traffic move from Shreveport to Wylie?

17 MR. ELKINS: We have an agreement of
18 course through the Meridian Speedway that moves it
19 across the Speedway, and then on to Wylie, Texas,
20 using KCS beyond the Speedway.

21 CHAIRMAN OBERMAN: And why isn't that
22 agreement enough to protect you?

1 MR. ELKINS: Well I think what Mike
2 explained is that given the amount of growth that's
3 projected in the filing on the portion between
4 Shreveport and Wylie, we believe that it might,
5 could possibly, exceed the capacity of that line at
6 the velocity levels that our customer require.

7 And as he mentioned also it appears from
8 the filing that the amount of freight that might be
9 moved into Wylie could exceed the current capacity of
10 that facility, which we think would also endanger our
11 service.

12 CHAIRMAN OBERMAN: Does your contract or
13 agreement give you any kind of service metrics that
14 they're required to live up to now?

15 MR. MCCLELLAN: Yes.

16 CHAIRMAN OBERMAN: Well why wouldn't those
17 survive the merger?

18 MR. MCCLELLAN: Well those metrics are
19 primarily on the Meridian Speedway of Shreveport and
20 east, and --

21 CHAIRMAN OBERMAN: Well that's what I'm
22 asking. Are there service levels under your

1 agreement that KCS is required to meet from
2 Shreveport to Wylie?

3 MR. MCCLELLAN: Right now there are not.
4 It is an interline service between the KCS and
5 Norfolk Southern on the Dallas freight, so the route
6 would be Dallas, or Wylie, KCS, Meridian, Norfolk
7 Southern. It's an interline move.

8 CHAIRMAN OBERMAN: All right. But I
9 thought you said you have an agreement, which
10 requires them to move the traffic from Shreveport to
11 Wylie? I thought that's what Ed said.

12 MR. ELKINS: No across the Meridian
13 Speedway through Shreveport and then on to Wylie.

14 CHAIRMAN OBERMAN: So you have no
15 agreement in existence between Shreveport and Wylie?
16 That's all I'm trying to get at.

17 MR. MCCLELLAN: Our agreement, it's an
18 interline service today, all right. If Norfolk
19 Southern, as I've mentioned, if Norfolk Southern
20 elects to purchase the Wylie facility, then that
21 interline deal turns into a haulage deal, okay, and
22 the KCS would provide haulage for NS between

1 Shreveport and Wylie.

2 At that point service guarantees, service
3 standards, do kick in. So there is a triggering
4 mechanism that would drive service standards west of
5 Shreveport.

6 CHAIRMAN OBERMAN: Do you have that
7 agreement now?

8 MR. MCCLELLAN: We do have that agreement
9 now, yes.

10 CHAIRMAN OBERMAN: You have an option to
11 buy the Wylie Yard now?

12 MR. MCCLELLAN: Yes we do.

13 CHAIRMAN OBERMAN: So what do you need
14 from us? What am I missing here?

15 MR. MCCLELLAN: Well what we're asking,
16 what the ask is as Carrie said, is specifically, is
17 that there are service standards if this freight goes
18 to haulage between Shreveport and Wylie.

19 And what we're asking is if there is a
20 material deterioration in the service standards,
21 which is spelled out in the Meridian Speedway joint
22 venture, and that is a sustained material

1 deterioration in service, that Norfolk Southern can
2 exercise contingent trackage rights, so that we can
3 put our crews into that, and take better control over
4 the operation of that train.

5 CHAIRMAN OBERMAN: I understand what
6 you're asking for. What I'm mystified here, maybe
7 I'm just thick headed, is what that gives you beyond
8 what you already have. You have an option today it
9 sounds like if your service falls below a certain
10 standard, to have certain standards in the haulage
11 agreement, and a right to buy the Wylie Yard now if
12 this transaction never existed. Do I understand that
13 correctly?

14 MR. MCCLELLAN: No. What we have right now
15 is an option to buy the Wylie facility. If we do
16 that then it converts to haulage. If it converts to
17 haulage west of Shreveport, then there are service
18 standards associated with that.

19 CHAIRMAN OBERMAN: Right. And why isn't
20 that enough to protect you in terms of keeping the
21 standards up that you say you need to serve your
22 intermodal customers?

1 MR. MCCLELLAN: The remedies in the
2 agreement are limited. If there is a sustained
3 deterioration in the service between Shreveport and
4 Wylie, the remedies in the agreement are very
5 limited, and we're asking for an additional remedy,
6 which is the ability to go to trackage rights, put
7 our crews on the train.

8 CHAIRMAN OBERMAN: Well what I heard you
9 say is that the haulage agreement that would come
10 into effect has service standards in it.

11 MR. MCCLELLAN: Yes it does.

12 CHAIRMAN OBERMAN: Are those service
13 standards not adequate to protect your customers?

14 MR. MCCLELLAN: They're adequate, but the
15 remedies associated with them are limited.

16 CHAIRMAN OBERMAN: What do you mean by
17 that? What are the remedies that are limited? I
18 mean you negotiated a contract to provide either
19 service you need, it seems to me. I'm just I'm at a
20 loss to see why you need more. What's the
21 difference?

22 MS. MAHAN: The option to acquire the

1 Wylie terminal is part of, was part of the Meridian
2 Speedway joint venture agreements. The Meridian
3 Speedway joint ventures don't cover the traffic that
4 is not on the Meridian Speedway. I think what Mr.
5 McClellan was explaining is that in the future if
6 that option is exercised as part of that, we will
7 have the ability to have a haulage agreement on the
8 portion that is not the Meridian Speedway.

9 If those, and there are service standards
10 in there. You are correct Mr. Chairman. If they
11 breach those service standards, and if it is a
12 sustained service standard failure, the terms of the
13 agreement, which forgive me as I don't have the copy
14 of the agreement sitting here with me, are not
15 particularly efficient, and I think that they would
16 leave -- the company would leave Norfolk Southern
17 with an inability to adequately address and get the
18 service standards level back up to keep the
19 intermodal customers on that route, and prevent them
20 from going back to the highway.

21 So what they're asking for is a contingent
22 trackage right that basically says if it is

1 contingent, if the terminal is acquired, and if we
2 then have the haulage rights, and there is a
3 sustained service standard failure, that Norfolk
4 Southern has the ability to convert that to trackage
5 rights, so that they can get their crews and their
6 trains to address the service standard, and keep the
7 route moving at a competitive place. Do you agree
8 with that Mike?

9 MR. MCCLELLAN: Yeah.

10 CHAIRMAN OBERMAN: What you're concerned
11 about is more traffic on that Shreveport to Wylie
12 segment, which is going to interfere with service.

13 MR. MCCLELLAN: I'm sorry, our concerns
14 are the three that we enumerated. Traffic being one
15 of them.

16 CHAIRMAN OBERMAN: Right. And the
17 inadequacy in the Wylie yard which you can solve by
18 exercising your option to buy it, then do with it
19 what you feel needs to be done.

20 But, and forgive me for not knowing
21 exactly what the trackage rights would bring you, but
22 if your concern is that the merged company will add

1 more traffic to the Shreveport Wylie section, thereby
2 deteriorating the service you now get, excuse me, if
3 you have trackage rights, rather than haulage rights,
4 your trains are still going to compete with the
5 CP/KCS trains for the use of that line.

6 What's the difference? How will your
7 service be protected, and trackage rights, vis-a-vis
8 haulage rights?

9 MR. MCCLELLAN: One thing that's import
10 here, two things that are important to point at are
11 number one, we hope these contingent -- we would
12 never have to exercise these contingent trackage
13 rights. I mean CP is an excellent operator, and
14 we're talking about this 20, 30 or 40 years, or two,
15 three or four years into the future, right?

16 This is not something we necessarily would
17 want to do. It would be a last resort. The second
18 thing you have to remember is that right now the way
19 that the Meridian Speedway joint venture is set up if
20 there are material and sustained service failures on
21 the Meridian Speedway, on the haulage, Norfolk
22 Southern has the right to convert that to trackage

1 rights.

2 And so if that also happened between, on
3 the whole route from Meridian to Dallas, we'd have
4 trackage rights on the speedway, and then haulage
5 from Shreveport to Wylie. What we are trying to do
6 here is to ensure that we have the control to provide
7 the service that we need between Meridian and Wylie.

8 CHAIRMAN OBERMAN: All I'm trying to
9 figure out is if there's too many trains on the
10 Shreveport to Wylie section to allow your service to
11 run at the speeds or the efficiency that you have
12 now. Those trains are still going to be there even
13 if you have trackage rights, so how are you trains
14 going to get through regardless of who's driving the
15 train. That's all I'm confused about.

16 MR. MCCLELLAN: Yeah. Again, our concerns
17 are really the sum of those three issues, and not
18 just the volume of trains on that line.

19 CHAIRMAN OBERMAN: I know, but I'm still
20 trying to figure out how this condition you're asking
21 for guarantees you the service you need. If the
22 problem is that the line is too congested. What

1 difference does it make whether it's haulage or
2 trackage? The train still can't get through if
3 there's too many other trains on it.

4 Unless there's something about this
5 railroad operations which I have yet to learn, which
6 is a lot, so I'm asking you to enlighten me.

7 MR. MCCLELLAN: No, I mean -- I'm sorry.
8 Okay. What we're saying here is that the additional
9 trains on this line in their three year plan, in and
10 of itself, is not the primary concern. It is the sum
11 total of the three things that we talked about,
12 capacity to Wylie, the volume on the line, and the
13 EMP program.

14 CHAIRMAN OBERMAN: I'm trying to separate
15 them out.

16 MR. MCCLELLAN: Okay.

17 CHAIRMAN OBERMAN: The capacity of Wylie
18 can be solved under your current arrangement because
19 you have an option to buy it. Am I right?

20 MR. MCCLELLAN: Yes.

21 CHAIRMAN OBERMAN: So that would be the
22 same way that we grant your condition or not. You

1 don't get anything new that you don't have now. So
2 the thing that you're concerned about is too many
3 CP/KCS trains on that line, which are going to slow
4 down your trains moving as efficiently as you want to
5 Wylie, back and forth between Wylie and Shreveport,
6 right?

7 MR. MCCLELLAN: Yes.

8 CHAIRMAN OBERMAN: All right. How is that
9 going to change if you have trackage rights? Those
10 other trains are still going to be there. I mean I
11 don't know how many tracks, is that double tracks,
12 single track?

13 MR. MCCLELLAN: It's largely single track
14 yeah.

15 CHAIRMAN OBERMAN: Yeah. So trains still
16 have to get past each other, whether you're driving
17 them, or CP's crews are driving them. I don't
18 understand what you gain from the trackage rights
19 in this situation. I can understand in other
20 situations.

21 MR. MCCLELLAN: Well I think in this case
22 I mean it might be the number of trains. It might be

1 the priority under which we're dispatched. It might
2 be a crew availability.

3 CHAIRMAN OBERMAN: Well if you have
4 trackage rights you're not going to get dispatching
5 rights with it are you?

6 MR. MCCLELLAN: No I'm not getting
7 dispatch. I'm just saying that's not the only reason
8 that a train gets delayed.

9 CHAIRMAN OBERMAN: No. I understand.

10 MR. MCCLELLAN: Yeah.

11 CHAIRMAN OBERMAN: I just can't fathom
12 what advantage it is to get the condition you're
13 asking for.

14 MR. MCCLELLAN: Well if there is a
15 sustained and material decline in service we can't
16 exercise our rights for trackage rights between.

17 CHAIRMAN OBERMAN: I think we're going
18 around in circles.

19 MR. MCCLELLAN: Okay.

20 CHAIRMAN OBERMAN: So I'm going to pass
21 and let somebody else.

22 BOARD MEMBER FUCHS: Very quickly Marty.

1 I want to ask a really broad question, and then maybe
2 a more narrow one. My broad question is you know you
3 heard me say earlier for years railroads have
4 maintained that this is the most competitive traffic
5 on the network, intermodal traffic, and I think we
6 generally see in our service numbers, the intermodal
7 traffic performs much better than a lot of the other
8 traffic on the network.

9 Why isn't it that competitive market
10 forces will not cause any service issue?

11 MR. ELKINS: I just want to make sure I
12 understand sir. Can you repeat the question?

13 BOARD MEMBER FUCHS: So your condition is
14 contingent upon CP providing port service.

15 MR. ELKINS: Right.

16 BOARD MEMBER FUCHS: CP/KC, and I'm
17 wondering why the market won't discipline CP/KC?

18 MR. ELKINS: It probably would. I
19 think it's a rational market, and I think what you're
20 inferring is yes, it would happen. What we're
21 looking to do though is set up some safeguards so
22 that rather than market forces pushing all that

1 freight back to the highway, congesting the highway,
2 and forcing us to sort of rebuild that traffic base,
3 is have some contingencies in place so that we can
4 respond before the market reaches that tipping point
5 so to speak.

6 BOARD MEMBER FUCHS: I appreciate that.
7 You know I have the occasion though to look at your
8 filing and commodity exemptions, and you know for
9 years NS has maintained before the agency that there
10 is no need for regulatory backstop for a lot of
11 traffic that is subject to market forces, including
12 intermodal, which is our largest exempt category.

13 And you know there is a bit of a
14 disconnect with you all coming up here and saying I
15 need regulatory protection for the most competitive
16 traffic, and you all maintaining across wide swaths
17 of traffic, much of which has a much lower degree of
18 competition in intermodal that they need no
19 protection whatsoever.

20 And so there's a bit of a disconnect
21 between your filings that I'm trying to make sense
22 of.

1 MR. ELKINS: You know I think what we're
2 really trying to do is set up a backstop so that the
3 good work that we've done over the past two decades
4 in terms of building a franchise which includes
5 Dallas as part of that across Meridian Speedway.

6 And you know I think I said
7 it earlier, most of that freight came directly off
8 the highway, and onto our service on the train, which
9 I think is a very good story, not only for us, for
10 our customers, for the general public who uses the
11 highway between Dallas and Atlanta, but also for the
12 communities along the way.

13 We don't want to see that work eroded
14 because of what I would call an action on the part of
15 the transaction, which would probably not willfully,
16 but might inadvertently degrade that service over
17 time.

18 BOARD MEMBER FUCHS: Well I'm trying to --
19 you raise an interesting point because you mention a
20 causal element to the transaction. But Mr. McClellan
21 mentions that it could be 20 years, 30 years in the
22 future, and so I'm trying to disentangle something

1 20 to 30 years in the future might be directly caused
2 to the transaction and how we can you know ascertain
3 that difference.

4 I guess maybe a better way to say it is
5 what about the transaction would be causal here, the
6 CP/KCS. Is it just more traffic overall?

7 MR. ELKINS: No. I think and I'll refer
8 to Mike or to Carrie, but I think that when we look
9 through the transaction we really looked for anything
10 that would really jeopardize the status quo so to
11 speak, and our customers I think want us to do that.
12 They want us to make sure that we're protecting what
13 is a very viable intermodal route by the least
14 intrusive means possible.

15 BOARD MEMBER FUCHS: One other question from me,
16 I mean this is the narrow question.

17 MR. ELKINS: Yeah.

18 BOARD MEMBER FUCHS: So I heard you were
19 careful to say current capacity at Wylie, and I
20 noticed that the record included some indications
21 from applicants that they plan to expand Wylie, you
22 know, some of which I believe are operational

1 changes, when it came to track work cycles. And some
2 were, I think there were two new pad tracks in the
3 record, potentially new cranes, and some paving
4 projects.

5 And so I'm wondering if those investments
6 were evaluated as part of your capacity analysis, and
7 whether or not those go a long way towards resolving your
8 first concern about the capacity of Wylie.

9 MR. ELKINS: Member Fuchs, I'll defer
10 to Mike.

11 MR. MCCLELLAN: Yeah right. Yeah, we
12 noticed those as well, but I don't think those were
13 in the original application, and certainly there is
14 room to do that. We just we don't have the full
15 understanding of what is planned to do there, but it
16 was not in the original application.

17 BOARD MEMBER FUCHS: Having seen those in
18 the rebuttal, does that satisfy you?

19 MR. MCCLELLAN: Remember, we have three
20 concerns, so that would be one way to solve one of
21 the concerns.

22 BOARD MEMBER FUCHS: Thank you.

1 CHAIRMAN OBERMAN: Any questions down
2 here? All right. I don't think we have time,
3 proceed.

4 MR. MCCLELLAN: All right. Well where was
5 I?

6 CHAIRMAN OBERMAN: You were here.

7 MR. MCCLELLAN: That's right. Well thank
8 you Ed, and thank you Chairman Oberman and Members of
9 the Board for the opportunity to speak. I'm Mike
10 McClellan. I've been in this industry for 35 years,
11 and I'm currently Chief Strategy Officer of Norfolk
12 Southern.

13 The Meridian Speedway joint venture as
14 you've heard is between NS and KCS, has been the
15 subject of extensive briefing in this proceeding you
16 may recall Pat Ottensmeyer talking about it as one of
17 the important strategic developments of the KCS in
18 the past two decades.

19 I was involved with Meridian Speedway
20 transaction on behalf of NS from its inception. And
21 I continue to be involved in the strategy for our
22 operations on the speedway. I am here to provide

1 background on the Meridian Speedway joint venture,
2 our current operations, and the significant
3 demonstrable benefits to shippers that the Speedway
4 transaction has delivered, and will continue to
5 deliver.

6 I will then address potential harm that we
7 see resulting from CP/KCS transaction, and the
8 condition, the narrow condition that we are
9 requesting to resolve that harm. I will close by
10 addressing the baseless attacks that CSX has leveled
11 against this Meridian Speedway joint venture.

12 So it's important for me to begin by
13 describing the condition of the line between
14 Meridian, Mississippi and Shreveport, Louisiana,
15 known as the Meridian Speedway, as it was in the
16 early 2000's. Because this was the impetus for the
17 joint venture.

18 In 2000 NS and KCS entered into a series
19 of haulage agreements for certain intermodal traffic
20 moving on KCS's line between Dallas and Meridian,
21 Mississippi, including the Meridian Speedway.

22 The haulage agreement between NS and KCS

1 was renegotiated periodically, but we both recognized
2 that a longer term solution was needed. The Meridian
3 Speedway was deteriorating, and required significant
4 maintenance. Service concerns by our customers on
5 the route were becoming acute, and business loss,
6 especially by our premium customers was all but
7 assured it would continue on that course.

8 It became clear to us that the Meridian
9 Speedway would not be able to support the service
10 that our customers demanded unless significant
11 upgrades were made. However the KCS did not have the
12 capital to make the required investments to preserve
13 and grow the intermodal business.

14 If NS and KCS were going to reduce a route
15 that could effectively compete against highways,
16 something had to be done. Track speeds had to be
17 upgraded, bridges had to be replaced or repaired,
18 sitings expanded, et cetera. If the route was going
19 to be an effective strategic link in North American
20 network, significant investment had to be made, and
21 KCS could not do it.

22 So after extensive negotiations, which

1 lasted well over a year, NS and KCS agreed to the
2 Meridian Speedway joint venture, and NS agreed to
3 invest 300 million dollars into the property, 260
4 million dollars went directly into capital
5 investment. In turn, Norfolk Southern took a
6 minority position in the company, less than 30
7 percent.

8 So as Ed explained, our investment in the
9 Meridian Speedway was intended to and did, increase
10 the capacity and the speed of the speedway, and
11 improve the quality of service on that line. The
12 improvements we made were extensive. To give just
13 one example we said about installing over 440,000
14 feet of 136 pound rail on the line, almost 80 miles.

15 One cannot simply invest in a rail line,
16 and then walk away as we know. Constant maintenance
17 and renewal is required to sustain a rail route. NS
18 was, and is committed to maintaining the route at
19 high levels, and we ensure that the JV has the
20 resources to do this through three important
21 mechanisms.

22 First, as we noted, NS contributed 260

1 million dollars that went directly into the
2 infrastructure. Second, to support growth on the JV,
3 NS has continued to invest on our network, and
4 equipment facilities in connections all in order to
5 provide customers with a level of service and
6 capacity that they expect on this route.

7 And we have made this investment because
8 of the strategic access we had to the Meridian
9 Speedway through the JV. Finally, NS has an
10 obligation to support capital calls for
11 infrastructure should the JV not be able to fund such
12 improvements, and we have. These mechanisms,
13 combined with our minority position on the Board of
14 the JV, helps NS ensure the strategic viability of
15 the line.

16 The Meridian Speedway agreements were the
17 result of extensive work and negotiations between NS
18 and KCS to make sure we were allocated the rights and
19 responsibilities between NS and KCS. This in turn,
20 laid the foundation for a very close working
21 relationship between KCS and NS, and one that has
22 helped ensure the joint venture could deliver on new

1 and improved service options for both KCS and NS, and
2 in turn our customers.

3 As one example, the Meridian Speedway
4 joint venture agreements create long term governance
5 mechanisms that enable NS to have a seat at the table
6 in ensuring the significant capital investments we
7 make in the Speedway were used to deliver, to
8 improve, service to our customers.

9 Another example is that while KCR was
10 hired to be the operator of the Meridian Speedway,
11 for maintenance, dispatch and service, the agreement
12 specifies the service levels that must be provided by
13 the Speedway joint venture with KCS as the operator.
14 And to make sure that traffic that moves on the
15 Speedway for NS benefits from the investments made by
16 NS.

17 So the Meridian Speedway JV was explicitly
18 a mechanism to enable significant investment and
19 expansion of capacity in the Meridian Speedway. And
20 two, to ensure for the sustained competitive
21 operations of both parties on the line. Both of
22 these ultimately benefited both NS and KCS, and our

1 mutual customers.

2 Ed described the improvements and service
3 that our investment in the Meridian Speedway joint
4 venture generated for our customers. The growth on
5 the Meridian Speedway is a testament to those
6 benefits. Our intermodal traffic on the Meridian
7 Speedway grew by 340 percent between 2004 and 2021.

8 As Ed highlighted, a significant portion
9 of the growth came from the highways. Over 40
10 customers wrote to the STB voicing their support for
11 the transaction in 2006, and the continued and
12 growing use of the Meridian Speedway by these
13 customers demonstrates the ongoing benefits that they
14 are receiving.

15 So with this background in mind, I will
16 now turn to the CP/KCS transaction, as we just
17 discussed. You heard yesterday from the applicants
18 that our requested conditions have no connection to
19 the CP/KCS transaction. We think that is wrong
20 because the applicant's amended operating plan shows
21 an increase in traffic on certain segments of the
22 combined network, and plan to make certain

1 operational changes as a result of the CP/KCS
2 transaction.

3 In particular, CP and KCS plan to operate
4 more and longer trains over the route, between
5 Shreveport and Wylie. CP and KCS also plan to
6 combine our intermodal, and KCS manifest traffic,
7 which we believe will create operational hurdles,
8 which could degrade the quality of the intermodal
9 product that KCS and NS currently provide our
10 customers.

11 These changes, which are transaction
12 specific, threaten to harm service on the overall
13 Meridian Wylie route, and the overall viability of
14 the intermodal product. To address this potential
15 harm NS has filed an amended responsive application
16 seeking these very limited contingent trackage
17 rights.

18 CP and KCS oppose our request on the
19 contingent trackage rights raising a number of
20 alleged concerns, regarding the operational execution
21 of the rights. Our August filing addressed those
22 concerns, but I'll briefly explain why the CP/KCS

1 opposition falls short.

2 NS is requesting contingent trackage
3 rights to move Dallas intermodal traffic on the KCS
4 line between Shreveport and Wylie. This traffic
5 currently moves in an interline basis between KCS and
6 NS. As part of the JV agreements, NS has the
7 contractual right to purchase the Wylie terminal
8 which we just talked about.

9 If NS chooses to do this then Dallas
10 intermodal traffic will cease moving on an interline
11 basis, and will convert to KCS haulage moving between
12 Meridian and Wylie, the entire route between
13 Meridian and Wylie.

14 Under the current agreement if there are
15 prolonged service failures in the haulage service
16 that KCS provides to traffic, then haulage only on
17 the Meridian Speedway, the Meridian Shreveport, we
18 would have the right to exercise trackage rights
19 over that during a period of sustained service
20 degradation.

21 In other words the business would move via
22 trackage rights between Meridian and Shreveport, and

1 then haulage from Shreveport to Wylie. This is the
2 baseline that we talked about earlier.

3 So turning now to the effect of the
4 requested contingent trackage rights, it is important
5 to note that one of the contingencies that must occur
6 before we can actually exercise the trackage rights,
7 is the deterioration of the service level below that
8 which the KCS is currently obligated to provide.

9 If the CP/KCS transaction is approved, the
10 service obligation continues with the JV agreement.
11 In other words, our request for contingent trackage
12 rights impose no new service obligations on CP/KC.
13 Rather, the contingent trackage rights are designed
14 to preserve the options and quality of service that
15 our customers rely on today.

16 NS's contingent trackage rights would kick
17 in only if service falls below pre-existing level
18 that CP/KC would be obligated to provide as part of
19 the JV agreement. Even then, the only change would
20 be from movement from haulage to trackage rights.
21 And the shift would allow NS to move Dallas
22 intermodal traffic via NS trackage rights over the

1 full route, and not just Meridian to Shreveport.

2 Very simply, these contingent trackage
3 rights would ensure that if CP does not adequately
4 serve customers on the line that NS has the
5 opportunity to do so. During the negotiations in
6 2006 we did not negotiate trackage rights for this
7 traffic on KCS line between Shreveport and Wylie.

8 At the time we could not have envisioned
9 that the CP would be seeking to acquire KCS, or what
10 CP's plans for the line would be. Now, however, we
11 are concerned that the incentives and priorities of a
12 combined CP/KC would differ from an independent KC.
13 In fact, the transaction specific growth in traffic
14 between Shreveport and Wylie, and related plans made
15 clear that the combined CP/KC if approved, would
16 indeed have different incentives and priorities that
17 could negatively impact the current intermodal
18 customers.

19 CP and KCS argue that they would have
20 every incentive to provide quality service for Dallas
21 intermodal traffic. If that's the case, then our
22 requested contingent rights are sleeves off the

1 vest. Again, as I said earlier, this is not
2 something we would want to do.

3 In other words, if service continues to
4 meet levels specified in the agreements, then we
5 receive nothing under this, under the contingent
6 trackage rights. If service deteriorates, however,
7 then the contingent trackage rights would give NS the
8 ability to continue to provide service to our
9 customers' demand, and would have absent this
10 transaction.

11 So let's turn to the CSX request right
12 now, and I'd like to address the absurd claims that
13 CSX has made against the Meridian Speedway, and the
14 conditions they are seeking in this proceeding. CSX
15 is asking the Board to effectively unwind the
16 Meridian Speedway agreement, a venture that has
17 removed freight from the highway, and enhanced
18 competition between railroads.

19 CSX has argued the opposite, that these
20 agreements are anti-competitive. These allegations
21 are inconsistent with the reality of intermodal
22 competition today. As I explained, the Meridian

1 Speedway transaction revitalized a deteriorating
2 route, and increased competition for intermodal
3 traffic into and out of the southeast.

4 As a result of the Meridian Speedway
5 transactions, shippers have a faster, more reliable
6 route for transcontinental intermodal traffic. As I
7 previously described, the Meridian Speedway
8 agreements are hundreds of pages with innumerable and
9 interrelated terms. The agreements in their
10 entirety, and all of the terms contained therein were
11 necessary for us and the KCS to form the joint
12 venture, and bring the benefits to the customers.

13 CSX however, either ignores, or doesn't
14 understand the full set of rights and obligations
15 that make up the Meridian Speedway agreement. And
16 instead takes issue with a cherry picked provisions.
17 This is why CSX's arguments in this proceeding
18 relating to the Speedway are out of context,
19 misleading, and ultimately invalid.

20 As Ed said, NS has two main categories of
21 traffic on the Speedway. The transcontinental
22 intermodal traffic, which traverses the Speedway

1 connecting points in the west coast, and points in
2 the southeast, and the Dallas intermodal traffic,
3 which moves on the Meridian Wylie route over the
4 Speedway, and over KCS's line between Shreveport and
5 Wylie.

6 The first category, transcontinental
7 intermodal traffic, is subject to the NS traffic
8 provision in the Meridian Speedway agreement, and a
9 focus of CSX's arguments to the Board. NS traffic
10 consists of intermodal traffic that one, originates
11 or terminates west of Dallas, or and originates and
12 terminates east of Meridian.

13 And two, does not originate or terminate
14 on the KCS system, and this is traffic that traverses
15 the Meridian Speedway. Our eastbound Trans Con moves
16 UP, Shreveport NS in the opposite way, westbound. It
17 is important to know at the outset that this traffic
18 moves in haulage.

19 The Speedway joint venture with KCS is the
20 contract operator. It is merely the haulage carrier
21 has no role in the marketing or promotion of this
22 service. As a result this traffic is not included in

1 the CP/KCS amended operating plan, and is unaffected
2 by the proposed CP/KCS transaction.

3 That is reason alone not to discuss the
4 matter further, nor to entertain CSX's misguided
5 objections. But as context for this provision it
6 would have been irresponsible for NS to make a 300
7 million dollar investment in the Meridian Speedway,
8 and subsequent investment on our own facilities
9 without an assurance that we could deliver for our
10 customers.

11 The limited restriction for NS traffic is
12 one part of the many provisions NS negotiated in
13 order to ensure the joint venture could deliver new,
14 improved intermodal services. But it was not the
15 only aspect. The service standards, line
16 commitments, access to additional capacity, to
17 further investment and delegation of operations were
18 all necessary components for us to effectively serve
19 our customers over this route.

20 Without the service assurances in the Meridian
21 Speedway agreements and the guarantee that NS would
22 have the volume to offer a commercially viable

1 intermodal service, these significant improvements
2 could not have been achieved.

3 In the face of these facts CSX argues that
4 this narrow restriction deprives shipper of options.
5 I'm sorry, okay. In addition, I would argue just the
6 opposite, and CSX's own actions and operations over
7 the years contradict this argument. In addition to
8 the growth on the Speedway itself, the Meridian
9 Speedway joint ventures spurred competition into and
10 out of the southeast among other carriers.

11 In October 2006 in response to our new
12 service of the Meridian Speedway, the BNSF and CSX
13 announce the new high volume intermodal corridor
14 connecting California, Atlanta, and the rest of the
15 southeast. This BNSF CSX route was, and remains, a
16 very attractive option for shippers. In fact, so
17 much so, that NS lost half of its Meridian Speedway
18 traffic, Trans Con traffic, when they launched the
19 service.

20 So let me repeat that. CSX started a new
21 competitive service as a result of the Meridian
22 Speedway deal, and NS lost half of its business over

1 the Meridian speedway. The 2006 BNSF/CSX route, which
2 connected west coast with the southeast through
3 Birmingham was in fact the better option than the
4 Meridian Speedway for Trans Con intermodal traffic.

5 The Meridian Speedway transaction spurred
6 competition for Trans Con intermodal traffic, and
7 there continues to be significant competition between
8 the BN/CSX route and the Meridian Speedway, as well
9 as at least two other interline rail routes, and six
10 overall rail routes, that handle Trans Con traffic in
11 this corridor.

12 And that doesn't include the most
13 competitive option, which is truck. CSX's suggestion
14 that shippers have suffered harm because CSX does not
15 have access to the Meridian Speedway is misleading.
16 Rather, the traffic growth on the Speedway itself,
17 and the new service launched by the BN and CSX are
18 all consistent with competition, and demonstrate the
19 benefits to shippers that resulted from the Meridian
20 Speedway transaction.

21 The second category, Dallas intermodal
22 traffic involves a lift or drop at KCS's Wylie

1 intermodal terminal near Dallas. NS has the right of
2 first refusal to move Dallas intermodal traffic.
3 For Dallas intermodal traffic, KCS must first offer a
4 rate quote to NS, and NS can either accept it or
5 decline it.

6 As with the Trans Con intermodal traffic,
7 I am not aware of any increase in this traffic
8 resulting from the CP/KCS transaction. This is again
9 a reason alone not to discuss this further in this
10 hearing, or to entertain CSX's objections, but again
11 we will respond.

12 As with the NS traffic provision governing
13 Trans Con intermodal traffic, CSX seeks to take a
14 single provision from the innumerable and
15 interlocking terms of the Meridian and Speedway
16 agreement out of context, innumerable. I tried to
17 say that yep.

18 The right of first refusal is connected to
19 the service standards, the volume commitments, access
20 to additional capacity through further investment,
21 and delegations of operations that were all necessary
22 to ensure that the joint venture could run

1 efficiently and effectively.

2 CSX ignores the significant highway
3 competition in this lane. Trucks, not NS and KCS,
4 handled the majority of the truck traffic between
5 Dallas and the southeast. NS and KCS developed a
6 new truck competitive service through our JV, one
7 that has removed well over 1 million trucks from the
8 highway since its inception.

9 It cannot be the case that there's an
10 anti-competitive outcome when the Meridian Speedway
11 transaction created a new competitive alternative to
12 the highway. There is nothing preventing CSX from
13 developing a rail competitive service between Dallas
14 and the southeast for either the BN, or the UP,
15 exactly the way they did with BN to create the Trans
16 Con service in 2006.

17 Further, if NS chooses to purchase the
18 Wylie terminal, CP/KC and CSX will have no
19 restrictions on starting a Dallas southeast service
20 on the CP/KC lines. The final category of NS
21 traffic on the speedway is international traffic
22 between Mexico and the southeast. This represents a

1 very small percentage of our business.

2 And contrary to CSX's arguments, there are
3 no provisions in the Meridian Speedway agreement that
4 impact their ability to contract with KCS to move
5 this traffic. And as such we have no idea why
6 they're trying to confuse the matter by introducing
7 this false claim.

8 To put it simply, CSX seems to be taking
9 advantage of these proceedings for an unrelated
10 issue. CSX has known about the Meridian Speedway
11 since its inception, and to the best of our
12 knowledge has never challenged or opposed this
13 transaction. CSX has operated, invested and competed
14 in the environment that included the Meridian
15 Speedway for nearly two decades, and has done so
16 successfully as we have pointed out.

17 CSX's arguments are inconsistent with the
18 actual outcomes in the commercial reality today. The
19 Meridian Speedway transaction increased competition
20 for traffic in and out of the southeast, and created
21 new rail options for shippers. The results of the
22 Meridian Speedway make it clear the transaction was,

1 remains and will be pro-competitive.

2 I want to close by echoing something Ed
3 said. We are participating in this proceeding to
4 ensure our customers did not lose any of the options
5 or services they have today. Our requests for
6 contingent trackage rights is carefully crafted to
7 accomplish this, and nothing more. We identified
8 potential harm to our customers, that has not been
9 addressed by the CPKC, and our requested relief is
10 only available if that harm actually materializes.

11 This is exactly the kind of request the
12 Board can impose, and impose to ensure our customers
13 do not lose options or services. CSX on the other
14 hand, is using this proceeding in an attempt to
15 revisit the Meridian Speedway transaction, which is
16 wholly unrelated and unaffected by the CPKC
17 transaction.

18 The argument CSX has put forward are out
19 of context, and inconsistent with the actual outcomes
20 of the Meridian venture. The Meridian Speedway is
21 pro-competitive, that increase output, improve
22 service quality and continues to benefit shippers.

1 The Board should grant NS's requested
2 conditions, and deny the CSX's absurd requests.
3 Thank you for the opportunity to speak today, and
4 I'll turn this over to Dr. John Mayo.

5 CHAIRMAN OBERMAN: Mike, I have a few
6 questions before we switch.

7 MR. MCCLELLAN: Sure.

8 CHAIRMAN OBERMAN: Just a couple of
9 factual questions about this Speedway. How many
10 miles is the Speedway, and how long is the Shreveport
11 to Wylie section?

12 MR. MCCLELLAN: I don't know the exact
13 mileage, but ballpark 300 and 160.

14 CHAIRMAN OBERMAN: 300 from Meridian to
15 Shreveport and 160 from Shreveport to Wylie?

16 MR. MCCLELLAN: I believe so.

17 CHAIRMAN OBERMAN: And what was the reason
18 when you put this deal together that the Speedway
19 stopped at Shreveport if it's really to serve
20 intermodal all the way between Dallas and Meridian?
21 Did the Shreveport to Wylie segment not need a lot of
22 investment, or why did it evolve that way?

1 MR. MCCLELLAN: I prefer not to answer
2 this question in this room.

3 CHAIRMAN OBERMAN: Okay. So it wasn't
4 necessarily physical, it has something to do with the
5 business relationships.

6 MR. MCCLELLAN: Yes sir.

7 CHARIMAN OBERMAN: I don't want to
8 pressure you in the proprietary information, but I
9 sort have always been mystified by a Speedway which
10 stops halfway to the end, just using layman's
11 parlance. So what I'm still a little bit at a loss is
12 what, if you could -- CSX's argument, put it into
13 context.

14 What is the situation? CSX does not,
15 because you've mentioned that CSX if this merger goes
16 through would have the option to make a deal with
17 CP/KCS to use the Speedway. Did I hear you say that,
18 or did I misunderstand it?

19 MR. MCCLELLAN: No. what I said is that
20 if NS purchased the Wylie terminal, then KCS would
21 have the right to do a deal, a similar deal with
22 another railroad.

1 CHAIRMAN OBERMAN: To use the Speedway you
2 mean, or the whole line?

3 MR. MCCLELLAN: To use a portion of the
4 line.

5 CHAIRMAN OBERMAN: Right now CSX does not
6 have access to the Speedway.

7 MR. MCCLELLAN: I don't know if they do or
8 not. I mean for intermodal traffic.

9 CHAIRMAN OBERMAN: Or for any
10 purpose. I mean they don't connect to the Meridian
11 Speedway anywhere. They go, the Meridian Bigbee
12 Railroad connects the CSX to Meridian via Montgomery,
13 Alabama, I believe. One CSX Montgomery
14 Meridian Bigbee, Meridian, Meridian Speedway.

15 CHAIRMAN OBERMAN: What are they asking
16 for that you're objecting to?

17 MS. MAHAN: The combination of all of
18 their requests relating to gateways and rights, which
19 Dr. Mayo will explain, is really they're seeking to
20 unwind several key portions of the joint venture
21 agreement, including for instance the exclusivity
22 provisions that Mr. McClellan walked through in some

1 detail.

2 They're looking for the Board to pick
3 apart a very complicated joint venture agreement and
4 say this portion you can keep, but this portion over
5 here we're going to abrogate 20 years after you
6 reach these agreements. So one of the key aspects
7 Mr. Chairman is the exclusivity provisions in the
8 Meridian's Speedway joint venture.

9 CHAIRMAN OBERMAN: They want access to the
10 Speedway, is that what you say?

11 MS. MAHAN: Correct.

12 CHAIRMAN OBERMAN: Without putting any
13 capital in. Is that your position?

14 MS. MAHAN: Well they're not looking to
15 put capital in Commissioner.

16 CHAIRMAN OBERMAN: That's not part of
17 their --

18 MS. MAHAN: Yes.

19 CHAIRMAN OBERMAN: All right. And do I
20 understand that if the CP/KCS merger goes through the
21 joint venture agreement will survive and be imposed
22 on the new entity?

1 MR. MCCLELLAN: Yes.

2 CHAIRMAN OBERMAN: So nothing will change
3 in that regard, correct?

4 MR. MCCLELLAN: Correct.

5 CHAIRMAN OBERMAN: Okay. Just a couple of
6 -- any questions? All right. Dr. Mayo.

7 DR. MAYO: Good afternoon, and thank you
8 for the opportunity to present some material to the
9 Board. My name is John Mayo. I am the Elsa Carlson
10 McDonough Chair of Business Administration at
11 Georgetown University's McDonough School of
12 Business, and I am a Professor of Economics Business
13 and Public Policy at Georgetown.

14 I'm also the Executive Director of
15 Georgetown's Center for Business and Public Policy.
16 I don't want to go in to a long story of my
17 background. A copy of my vitae has been provided to
18 the Board. I have written hundreds of articles, a
19 number of which have to do with the rail industry.
20 I've recently co-edited a book on the rail industry.

21 I hope you all have it in your offices.
22 Turning to the present matter.

1 CHAIRMAN OBERMAN: Do you want to send us
2 copies, autographed?

3 DR. MAYO: I'll be happy to after this
4 proceeding is over. Turning to this proceeding, I
5 was engaged by Norfolk Southern in February of 2021,
6 to provide an independent assessment and evaluation of
7 the various proposals that have been made to
8 restructure this industry.

9 And in the current matter in Canadian -- the
10 merger proposal between Canadian Pacific and KCS. I
11 have filed three verified statements for the Board.
12 In the first statement I undertook an independent
13 review of the proposed CP/KCS merger, and I found
14 that absent the imposition of regulatory conditions,
15 the merger of CP and KCS would increase both
16 incentives and the ability of the merged railroad to
17 harm competition.

18 Given the threat to competition that is
19 posed by the proposed CP/KCS merger two categories of
20 regulatory conditions appear appropriate. First,
21 conditions that provide vigorous protections of
22 existing gateway traffic to ensure that price and

1 quality, terms and conditions for traffic exchanged
2 at the gateways are not adversely affected by the
3 merger.

4 And secondly, conditions that ensure that
5 the preservation of competition exists as the merger
6 provokes asset reallocation throughout the industry.
7 Mr. Elkins and Mr. McClellan are versed in how those
8 conditions apply to Norfolk Southern, and you've
9 begun that discussion already.

10 In my second and third verified statements
11 I addressed a different matter that has risen in
12 these proceedings, specifically I became aware that
13 CSXT has advanced a claim through its economists
14 that the Meridian Speedway joint venture known as the
15 MSLLC, and the agreements associated with it,
16 represent an anti-competitive conspiracy.

17 An anti-competitive conspiracy that sought
18 to limit price competition. For reasons that I
19 described in my verified statements, there is
20 absolutely no merit whatsoever to the claim that the
21 Meridian Speedway joint venture acts to harm
22 competition. In fact, quite the opposite is true.

1 The Meridian Speedway joint venture
2 removed competitive restraints that existed in the
3 rail industry in the early 2000's. Since it's
4 consummation virtually every single competitive
5 metric related to the Meridian Speedway has improved.

6 Consequently, there is simply no economic
7 basis upon which to compel through regulation an
8 unwinding of this joint venture. Now what I'd like
9 to do in the time that I have before you this
10 afternoon is to explain how I got to that conclusion,
11 and perhaps give you some comfort that the analysis
12 is sound.

13 To begin let me say that when I first
14 became aware of this joint venture I observed it as
15 simply a collaborative venture between two firms.
16 Fortunately, the field of economics is rich with a
17 literature on collaboration of firms and the lessons
18 of that research are documented in my second verified
19 statement.

20 The bottom line takeaway from that
21 literature is that firm collaborations are both
22 common and most typically, most typically

1 pro-competitive and efficiency enhancing. This is
2 especially true in cases as is the case with a joint
3 venture between Norfolk Southern and KCS. The firms
4 offer complimentary, rather than substitute products.

5 Even in cases where unlike here, firms are
6 competitors, the anti-trust agencies, the Department
7 of Justice Anti-Trust Division and the Federal Trade
8 Commission, through their collaboration guidelines,
9 indicate that in situations of joint ventures that
10 act to expand access to markets, to fund innovative
11 efforts, and to lower costs are "not only benign, but
12 pro-competitive."

13 Joint ventures such as the one fashioned
14 by Norfolk Southern and Kansas City Southern are a
15 common collaborative tool to advance these
16 pro-competitive aims. In that context I should say
17 that it is not uncommon, nor a prima facie threat to
18 competition, that joint venture agreements will often
19 contain language that restricts the behavior of one
20 or more parties to the contract.

21 For example, joint venture agreements that
22 involve large, specific assets, investments, often

1 contain exclusivity language that prevents free
2 riding on those investments. In the case at hand the
3 MSLLC is exactly the sort of joint venture with a 300
4 million dollar investment made to upgrade the quality
5 of the Meridian Speedway, and which to prevent free
6 riding contains language that provides that a
7 portion, a portion of that traffic that traverses the
8 Meridian Speedway is to be exclusive to NS.

9 Now with that general understanding at
10 hand, I did undertake a detailed examination of the
11 economics of the Meridian Speedway joint venture to
12 assess its affect on competition. To do so I
13 followed a roadmap, the roadmap offered by the
14 anti-trust agencies in their collaboration
15 guidelines.

16 They indicate that there are two steps
17 that they follow, two paths. First, to analyze the
18 business purpose of the joint venture, or of the
19 collaboration. What's the motivation? What was the
20 rationale for this in the first instance?

21 Secondly, to assess the effects of the
22 agreement on key competitive metrics. Two steps.

1 What's the rationale? What was the motivation?

2 Second step, what are the key economic metrics that
3 followed in the wake of the collaboration. As I've
4 detailed in my second verified statement, I found
5 that the business justification for the MSLLC was
6 pro-competitive.

7 This conclusion follows straight forwardly
8 from an examination of the contemporaneous documents
9 from 2005 and 2006 that discuss the rationale for the
10 formation of the MSLLC. They show that the up side
11 potential for demand growth for traffic over the
12 Meridian Speedway at the time was really high, but
13 that the poor physical infrastructure of the speedway
14 was a constraining factor for that growth.

15 KCS was simply not in a financial position
16 to provide the funding necessary for the capital
17 improvements to enable and accommodate that growth.
18 The joint venture then was a classic gains from trade
19 that economists speak about, in which the track would
20 be upgraded through substantial infusion of
21 financial capital by Norfolk Southern, and in
22 return it would secure a 30 percent equity share in

1 the Meridian Speedway joint venture.

2 The multi-million dollar investment in
3 turn would permit increased output, and improved
4 quality. These are exactly -- these are exactly the
5 economic characteristics that economists speak about
6 and point to when they describe an action as
7 pro-competitive, increased output and improved
8 quality.

9 The second step necessary to assess the
10 competitive consequences of collaboration is to
11 examine the impact of the collaboration here at the
12 Meridian Speedway joint venture on standard economic
13 metrics such as output, price, quality and
14 investment. My second and third verified statements
15 provide empirical evidence on all of these metrics.

16 What I observed is that in the wake of the
17 formation of the Meridian Speedway joint venture
18 virtually every single metric improved substantially.
19 Output expanded dramatically. I think you just heard
20 Mr. McClellan say that output growth over the
21 Meridian Speedway was 340 percent over the last 17
22 years.

1 Prices have fallen, quality has improved
2 markedly, and both direct and indirect investment
3 occurred that have improved the ability of rail
4 service, this rail service, to compete more
5 generally in the market for transportation services.
6 Along the way the Meridian Speedway joint venture
7 provoked, as you just heard, increased rivalry
8 between Norfolk Southern and CSXT. This is the sort
9 of thing that gets business school professors very
10 excited about competition.

11 It is exactly this sort of increased
12 rivalry that provides the foundation of effective
13 competition which benefits consumers. Now, despite
14 this very clear, I think, and unambiguous evidence of
15 the pro-competitive impact of the Meridian Speedway,
16 CSXT's economists have none the less argued that the
17 MSLLC joint venture was anti-competitive and should
18 be unwound.

19 I have considered those arguments
20 carefully, and I will tell you that I do not find
21 them credible at either a theoretical, or at an
22 empirical level. At a theoretical level, CSXT's

1 economists have offered two alternative theories of
2 harm to competition. First, they argue that the
3 joint venture was primarily an affront to horizontal
4 competition, by having two competing firms in the
5 same market allocate themselves certain customers and
6 types of services.

7 In making this argument they acknowledge
8 though that the potential for -- that there are
9 potential efficiencies in the case of vertical joint
10 ventures, or vertical agreements, but argue very
11 clearly that the joint venture agreement is
12 horizontal in nature.

13 The problem with this theory is that at
14 the time of the formation of the MSLLC the joint
15 venture partners did not compete in the provision of
16 transcontinental intermodal traffic. Prior to the
17 JV, KCS simply provided complimentary haulage
18 services for NS under a series of short run
19 contracts. The joint venture allowed the firms to
20 solidify that relationship, but it did not remove any
21 horizontal competitors as the theory of horizontal
22 harm would require.

1 So in fact there was no harm to horizontal
2 competition. Perhaps, perhaps in recognition that
3 the horizontal theory of harm is particularly ill
4 suited to the facts CSXT's economists more recently
5 have pivoted to emphasize a vertical theory of harm.

6 Under this theory of harm NS, either has
7 used the MSLLC to foreclose competition, or it has
8 used the MSLLC to raise its rivals' costs, that is
9 CSXT's costs. In theory, either could harm
10 competition. And again, however, the theory is it
11 turns out utterly inconsistent with the facts.

12 As shown in figures 1 and 2 of my third
13 verified statement, I described that CSXT, sorry
14 there's lots of letters in this rail industry. CSXT
15 has a completely independent viable routing that
16 allows it to participate as a carrier for
17 transcontinental intermodal shipments from the west
18 coast to the southeast, and vice-versa.

19 Given this completely independent routing
20 from NS, there is robust competition for west coast
21 to southeast transcontinental intermodal traffic.
22 There is literally no way for NS to foreclose CSX,

1 and to foreclose that competition. Nothing about the
2 MSLLC prevents CSX from competing robustly for that
3 traffic.

4 CSXT also claims that because the Meridian
5 Speedway provides an attractive low-cost routing for
6 transcontinental traffic, the MSLLC joint venture has
7 raised CSXT's costs, and therefore reduced
8 competition. This I must tell you is an ironic
9 twist in an otherwise legitimate economic theory of
10 raising your rival's cost to harm competition.

11 CSXT did not use or rely upon the Meridian
12 Speedway to provide transcontinental intermodal
13 traffic at the time of the formation of the joint
14 venture. As such, nothing about the formation of the
15 joint venture altered CSXT's cost to providing the
16 competing service. On the other hand, the formation
17 of the MSLLC did lower the joint venture partners' own
18 costs of providing service.

19 But lowering your own cost in contrast to
20 raising the cost of rivals is distinctly
21 pro-competitive. Let me say that again. Lowering
22 your own costs is pro-competitive, distinct from

1 what's being alleged, which is raising your rival's
2 costs. Beyond the theoretical inconsistencies in
3 CSXT's argument, CSXT's economists also offer a
4 variety of empirical analyses that they believe
5 support their contention that competition has been harmed
6 by the joint venture.

7 I've considered each of these carefully,
8 and I will tell you that neither individually, nor
9 jointly support the contention that the joint venture
10 has harmed competition. While an exhaustive
11 recounting would take far too long here today, let me
12 briefly highlight three propositions advanced by
13 CSXT's economists to give you a sense of what they're
14 asking you to believe.

15 First, the CSXT economists claim that high
16 market shares for NS traffic indicate a lack of
17 competition. But in my review of CSXT's market share
18 analysis, which is documented in my second and third
19 verified statement, it reveals that the market share
20 analysis suffers from at least five rather
21 fundamental and fatal flaws.

22 I'll just simply recount these here in a

1 list form, and commend the article, or my verified
2 statement to you for the details. Number one, the
3 shares calculated are not shares of the economically
4 relevant markets. Number two, the competitive
5 presence of a major intermodal carrier is arbitrarily
6 excluded from their analysis.

7 Number three, the competitive alternative
8 of trucking -- remember this is for intermodal
9 traffic, is omitted. Number four, high market shares
10 can result from, and are quite logically the outcome
11 of pro-competitive efforts of lowering price and
12 raising quality. This possibility is never
13 considered by CSXT.

14 And finally, fifth the market shares that
15 CSXT would have you look at are cherry picked routes
16 in which they believe NS has a high market share,
17 while it curiously omits market share routes in which
18 CSXT has a high market share. In sum, the
19 consequence of all these errors I believe are that
20 the market share presentation presented by CSXT is
21 not credible.

22 Secondly CSXT's economists claim to have

1 empirically identified anticompetitive output
2 reductions cause by the MSLLC, but in my review,
3 which is detailed in my third verified statement, it
4 indicates that both examined at a very simple and
5 intuitive level, and at a more sophisticated
6 econometric level, that any conclusion that the MSLLC
7 has led to output reductions is flawed.

8 As a simple matter it's shown on my
9 third verified statement, the output growth has been
10 very significant. Again, I'll point to Mr.
11 McClellan's growth rate of 340 percent, so there's
12 been terrific growth over the speedway over time.
13 This growth, I think is powerful evidence of a lack
14 of anticompetitive output reduction.

15 In addition, CSXT has argued that through
16 its econometric analysis that perhaps, perhaps we
17 should look at the counter factual world, well maybe,
18 maybe, output would have been even higher had it not
19 been for the presence of the joint venture. I
20 examined this proposition econometrically and find it
21 to be lacking.

22 Third, CSXT's economists claim that price

1 premiums for NS traffic that moves over the Meridian
2 Speedway relative to the NS traffic that does not
3 move over the speedway, is an indication of
4 competitive harm. But to conclude that the presence
5 of anti-competitive harm exists from the mere fact
6 that a firm charges a high price for some of its
7 products rather than for others, is completely
8 without economic foundation.

9 For instance, UPS charges more for its
10 overnight service, delivery service, than it does for
11 the three day ground service. That certainly doesn't
12 mean anything, or imply anything about the super
13 competitive pricing, or market power that UPS may
14 enjoy.

15 Let me conclude by simply saying this. My
16 analysis indicates that the Meridian Speedway joint
17 venture was fashioned as a pro-competitive
18 collaboration, and the effects have indeed been
19 demonstrably pro-competitive. Nothing I've seen from
20 CSXT's economists provides convincing evidence that
21 leads me to question this conclusion.

22 Consequently, I conclude that there is

1 simply no sound economic rationale for using the
2 heavy handed regulation in this instance to unwind a
3 collaborative agreement that has been so
4 demonstrably pro-competitive. Thank you for your
5 patience in listening.

6 CHAIRMAN OBERMAN: Okay. Are there any
7 questions of Dr. Mayo? Go ahead Patrick.

8 BOARD MEMBER FUCHS: Thank you for being
9 here Dr. Mayo. One question for you. You addressed
10 one one theory and vertical foreclosure in your
11 verified statement, and you've also written about the
12 economic foundations of rate regulation. I'm
13 wondering if you could provide a view on the proper
14 rate mechanism?

15 DR. MAYO: On?

16 BOARD MEMBER FUCHS: Proportional
17 mechanism setting bottleneck rates based on mileage.

18 DR. MAYO: Okay. So I haven't looked at
19 any specific proposals of setting rates based on
20 mileage in this proceeding. I heard some of the
21 discussion yesterday, but I really am not in a
22 position to comment on that. I did hear the

1 discussion of the one lump theory yesterday, and I
2 have some thoughts on that, but I don't want to go
3 off script here if that's not what you're looking
4 for.

5 BOARD MEMBER FUCHS: Appreciate it. Nope. Thank
6 you.

7 CHAIRMAN OBERMAN: Any other questions?
8 Carrie does that conclude your presentation?

9 MS. MAHAN: It does Your Honor. It does
10 Chairman.

11 CHAIRMAN OBERMAN: Hey I'm Honorable.

12 MS. MAHAN: You're very, very Honorable.

13 CHAIRMAN OBERMAN: That's only an
14 incremental increase, it's what you have to deal
15 with. I'm wondering if we ought to take a short
16 break for everybody, perhaps the court reporter's
17 benefit before we begin.

18 BOARD MEMBER FUCHS: We're fine to take a
19 five minute break yeah.

20 CHAIRMAN OBERMAN: All right. Let's just
21 try to keep it at five minutes. Okay thank you.

22 (Break.)

1 CHAIRMAN OBERMAN: We're back on the
2 record, and we are going to hear from my friends at
3 BNSF. And I think on a personal note I would just
4 like to note Roger's appearance here. Roger I don't
5 know. If this is your swan song before the STB,
6 maybe not because the year's not out yet, and you're
7 still around.

8 But I do think it's the first time in
9 public you've been here, and we've been here since
10 you made your announcement, and I really do think we
11 should all acknowledge your great contribution to the
12 rail industry in many different roles over a very
13 long period of time, and it's been a distinguished
14 record of service, and I think we all appreciate it
15 and respect it.

16 MR. NOBER: Thank you very much. You
17 should probably wait until after I speak, to say such
18 kind things, but thank you so much for that.

19 CHAIRMAN OBERMAN: Roger, I already know
20 what you were going to say, so I thought -- with that
21 are you leading, who's leading, Peter are you leading
22 the presentation? Okay Peter you're on.

1 MR. DENTON: Okay. Good afternoon Mr.
2 Chairman, Board Members. My name is Peter Denton.
3 I'm outside Counsel for BNSF Railway Company. I'm
4 joined today by someone who apparently needs no
5 introduction. Roger Nober, Executive Vice President,
6 Law and Corporate Affairs, and Chief Legal Officer.
7 Mr. Nober will explain why two characteristics of
8 this transaction require the narrowly tailored
9 conditions we're requesting here.

10 Next, to his right, Jon Gabriel, Vice
11 President, Service Design and Performance. Mr.
12 Gabriele will explain our concerns about service and
13 the critical Houston terminal, and why applicants
14 must be responsible for the cost of their merger.

15 To Mr. Gabriel's right is Paul Hirsch,
16 Assistant Vice President of the Mexico business unit.
17 Mr. Hirsch will discuss why access to the markets
18 served by the Laredo gateway are so important, and
19 why BNSF struggles to compete over Laredo today.

20 Next is Dr. David Reishus, outside
21 Economic Consultant for BNSF. Dr. Reishus will
22 explain many of these issues from an economic

1 perspective, and address criticism of our proposals
2 by applicants. To David's right is Courtney Estes,
3 Assistant Vice President and Associate General
4 Counsel for BNSF, and Ms. Estes and I will be
5 available to answer questions regarding our joint
6 facilities arrangements with UP and KCS and any other
7 legal issues.

8 So without further ado I'll turn it over
9 to Mr. Nober. And I apologize, we have a slide deck.
10 I'm not sure if we have that loaded up here today.

11 CHAIRMAN OBERMAN: It may be that we have
12 to apologize the way things have been going, but
13 hopefully it's here. There it is okay, we don't have
14 to apologize so far.

15 MR. NOBER: Well good afternoon Chairman
16 Oberman, and Members of the Board, and again I just
17 want to -- I probably don't need to introduce myself
18 again, but do want to thank you for that very
19 humbling comment, your comments from earlier, and
20 thank you very much for that.

21 Now on behalf of BNSF, I think I can speak
22 for all of us in that we appreciate the opportunity

1 to address and raise a couple of our specific
2 concerns with the pending CP/KCS transaction. And
3 what I would say is in this transaction when you look
4 beyond the proponent's general positioning, and what
5 this merger actually entails, BNSF believes that
6 combining CP and KCS raises two significant,
7 competitive and operational concerns regarding cross
8 border traffic to Mexico.

9 Yet they are asking this Board to let them
10 move forward without addressing these valid concerns,
11 and we'd like you to consider our suggestions. Now
12 as a former Chairman I appreciate the difficult past
13 this agency faces. How to carefully assess whether
14 an unconditioned merger, or any merger is in the
15 public interest, or whether you must impose any of
16 the conditions that have been requested by BNSF and
17 many of the other parties that have testified before
18 you, and whether that would be necessary to meet the
19 public interest standard.

20 And certainly, I could say with respect to
21 the conditions BNSF requests, we strongly believe
22 that you should. So let me start with some

1 background. At the outset, and I think this is a
2 point raised yesterday, I want to emphasize that BNSF
3 believes that end to end mergers, such as this, are
4 generally pro-competitive, and benefit the rail
5 industry and the public.

6 And but this merger creates two unique
7 concerns. The first is that a combined CP/KCS will
8 have the ability and the incentive to dominate the
9 critical Laredo gateway by manipulating rates on the
10 Mexican side of the border, and as we know you've
11 read in our filings, we believe that a mere
12 commitment to maintain an open gateway on
13 commercially reasonable terms is not sufficient to
14 maintain the long-term competitiveness of the
15 gateway and traffic to Mexico.

16 And that secondly, the combined CP/KCS
17 will access the critical markets, Mexico markets, via
18 trackage rights over UP and BNSF lines through
19 Houston and the Gulf Coast, and I know you've heard
20 about that earlier today as well. They forecast
21 significant increases in traffic in Houston, yet are
22 not proposing to fund the infrastructure to address

1 that traffic.

2 And my colleague, Mr. Gabriel, will speak
3 further about that, and my colleague Mr. Hirsch and
4 our expert Dr. Reishus will help me a little bit on
5 the gateway and the foreclosure. So, I'll first turn
6 to the issues at Laredo. Now as you know this merger
7 has the potential to reshape how freight moves across
8 North America.

9 And most importantly, the real issues in
10 this transaction arise from accessing and serving the
11 locations in Mexico. Now we believe it's clear that
12 without the conditions requested by BNSF, and
13 suggested by others, the combined railroad will be
14 able to use its newfound market power to force
15 traffic onto their new network.

16 So what is the problem, and let me see if
17 I can walk through it. Let's start with the
18 situation today. KCS, UP and BNSF compete for
19 traffic over the Laredo gateway, however, as my
20 colleague Paul Hirsch will explain, south of the
21 border only KCS serves the key Mexican markets that
22 could only be reached via Laredo gateway.

1 And gateways to Mexico are unique. The
2 map that's up there if you can see it, shows the
3 route that each carrier takes to Laredo. The KCS
4 route must go through downtown Houston. UP has its
5 own route that allows it to access Laredo without
6 going anywhere near Houston.

7 BNSF similarly operates to the west of
8 Houston, but we cannot really reach Laredo on our
9 own, and we must interchange traffic with the KCS at
10 Robstown to be further moved to the Laredo border
11 interchange. Now the importance of Laredo is not
12 new. In two key railroad mergers over the last
13 quarter century this Board is focused on how to
14 preserve competition at the Laredo gateway.

15 So first, in the merger of UP and SP in
16 1996, this agency ordered BNSF to serve as a
17 competitive replacement for SP and the Mexican
18 markets that were accessed via Laredo. At the time
19 of the UPSP merger, the Board thought correctly at
20 the time, that access for BNSF to Robstown the
21 interchange would be sufficient to get to Laredo.

22 Because at the time Tex-Mex and the

1 Mexican Railroad were both independent. Tex-Mex is a
2 short line, the Mexican Railroad was the concession
3 TFM, and they had no reason to disfavor traffic
4 brought to them by the BNSF. Now second, in 2004 and
5 2005, KCS acquired first the Tex-Mex, and then later
6 an exclusive concession to operate lines in Mexico
7 that are accessed via Laredo, giving it economic and
8 operational control of that important gateway.

9 This now allows KCS to offer single line
10 service between its U.S. network via Mexico, Robstown
11 and Laredo. Now as you probably know I was the
12 Chairman when this Board assessed and approved KCS's
13 acquisition of the Tex-Mex. And in that proceeding
14 the parties and KCS acknowledged the problem that we
15 raised today, which is the foreclosure of competition
16 at the Laredo gateway, and recognize that it was a
17 potential issue the Board must protect against.

18 KCS proposed to generally keep the gateway
19 open on a commercially reasonable basis, the same as
20 they are proposing now. Now ironically at the time,
21 CP recognized the general commitment would not be
22 enough, and they stated that the importance of the

1 future competitive viability of interline routes
2 connecting Mexico and the rest of the North American
3 continent via Laredo is too important to leave to
4 chance.

5 But CP has now embraced the exact same
6 approach that KCS addressed back then. And after
7 probing these issues in the Tex-Mex transaction, the
8 STB thought that the open gateway commitments made
9 by KCS at the Laredo border crossing would be
10 sufficient to protect against cross border harms.

11 Now I can tell you that in hindsight that
12 I've learned both from my official capacity, and now
13 at BNSF, that that guarantee proved to be wrong. We
14 now know that CP and the other railroads who raised
15 concerns about Laredo gateway and the KCS Tex-Mex
16 proceeding were right.

17 Now as this slide shows, shortly after KCS
18 integrated the Tex-Mex line, and the Mexican lines
19 into their network, KCS doubled their rate on the
20 Robstown Laredo line, and BNSF volume dropped
21 precipitously as you can see. Now you might ask, and
22 I'm sure you will, why didn't we complain to the

1 Board then or after the traffic drops?

2 There's no real easy answer for that, and
3 the reasons are multiple. The first, and a very
4 important for the Laredo gateway is that BNSF does
5 not have visibility into the Mexican portion of the
6 rate. And as you can see the traffic didn't leave
7 all at once. It left incrementally over several
8 years.

9 At the same time BNSF desired to grow in
10 Mexico, and we had to weigh the consequence of both
11 trying to develop new markets through Eagle Pass and
12 El Paso with the consequence of bringing a complaint
13 before the STB when we wanted to do more business
14 with the KCS.

15 And finally, and as you've seen in some of
16 your other cases, BNSF has found that it is difficult
17 post-hoc, to demonstrate that ongoing incremental
18 commercial actions actually violate merger
19 conditions in a way that is actionable, and I won't
20 go into that, but you're all well familiar with what
21 some of those issues are.

22 Now Mr. Hirsch will explain that BNSF

1 currently struggles to compete at the Laredo border
2 crossing due to KCS's practices, and that in the
3 future a combined KCS/CP further freezing out
4 competitors at the border crossing could result in
5 higher costs and worse service to shippers in the long
6 run.

7 It could also drive shippers to move their
8 freight from rail to trucks, or not to put it on rail
9 at all. So, what happened and what did the STB miss
10 in 2004? We have an example with some
11 demonstratives that I'm going to hope to get right to
12 demonstrate the problem and the proposed solution.

13 We first need to understand the mechanics
14 of how CP/KCS could restrain competition in a stealth
15 way, and of course, a combined CP/KCS will be able to
16 take advantage of single line efficiencies and
17 compete strongly for traffic through Laredo as it
18 should.

19 But the combined railroad will have a much
20 broader reach of destinations that it can reach
21 through single line service, again as it should. But
22 KCS and CP will also have the ability and the

1 incentive to manipulate the rate allocations between
2 Mexico and the U.S. segments of the move, to
3 effectively constrain or eliminate competition from
4 BNSF and other railroads.

5 And neither we, nor shippers, would have
6 visibility to prevent this, and the shippers and the
7 markets will suffer long-term consequences. Now we
8 have a hypothetical example here that shows an
9 international movement as things stand today, with
10 two independent U.S. carriers, we call them A and B,
11 that can interchange with an independent Mexican
12 carrier at Laredo.

13 Now assume that the rate for this full
14 origin to destination movement from Mexico into the
15 U.S. is \$1,000.00.

16 CHAIRMAN OBERMAN: Roger, I'm sorry to
17 interrupt, but aren't there three carriers?

18 MR. NOBER: There are. This is just we're
19 trying to just simplify it.

20 CHAIRMAN OBERMAN: Oh, okay.

21 MR. NOBER: It's an example, it's.

22 CHAIRMAN OBERMAN: So it's just a

1 hypothetical?

2 MR. NOBER: This is just a hypothetical.
3 I'm sorry if I skipped over that, yes. Yes because
4 we try to -- we poured over this to make this as
5 simple and understandable as possible, and then Dr.
6 Reishus will get into the complex realities, but just
7 a level set.

8 CHAIRMAN OBERMAN: Simple is good for me.

9 MR. NOBER: It's good for all of us. So
10 assume that the rate from origin to destination is
11 \$1,000.00. This consists of a rate on the Mexican
12 railroad, which here is going to be \$400.00. And the
13 rate each U.S. railroad charges for the U.S. portion
14 of the move, and this example again simplified, is
15 \$600.00.

16 And applicants have told us that Mexican
17 law requires the Mexican railroad to charge the same
18 amount for movements in Mexico to any interchanging
19 U.S. railroad, so that has to be the same. Now if
20 railroad A acquires the Mexican carrier, so now we
21 have a now merged carrier of one, the now merged
22 international carrier will establish the price that

1 the competing U.S. carrier must absorb for the Mexico
2 part of the movement.

3 The merged carrier can now raise rates on
4 the Mexico portion of the move, but maintain the same
5 through rate to shippers for movements in the merged
6 carrier, and we'll see if we can take this slowly,
7 and make it understandable.

8 Now in these figures the merged carrier
9 raises the internal allocation, so it divides the
10 \$1,000.00 rate, and put more on Mexico and less on
11 the U.S. And it does it from \$400.00 to \$700.00, and
12 lowers the allocation of the \$1,000.00 rate in the
13 U.S. from \$600.00 to \$300.00.

14 Now in each case if the shipper is staying
15 on the merged railroad, it pays \$1,000.00 for the
16 through move on the merged carrier. And the merged
17 carrier should be indifferent as to whether the
18 Mexico portion is \$700.00 or \$400.00 or any other
19 number because it's a rate that's an internal
20 allocation.

21 The merged carrier would need to offer the
22 same rate that it allocates in Mexico to the

1 competing U.S. carrier, as part of a Rule 11
2 interline movement, but the U.S. carrier doesn't have
3 the same ability to artificially reduce its \$600.00
4 rate for the U.S. portion of the move, so the shipper
5 would pay to use the U.S. carrier for an interline
6 movement where the merged carrier would go from
7 \$1,000.00 to \$1,300.00.

8 So the merged carrier has effectively left
9 the existing U.S. carrier non-competitive in the
10 market, and that's the concern. So how does this
11 turn into gateway closure? After it has eliminated
12 competition from the -- effective competition from
13 the U.S. carrier, the merged carrier is free to raise
14 its rates through the movements from \$1,000.00. In
15 our example, it raises it to \$1,100.00.

16 In fact the merged carrier could keep
17 raising the rate the shipper would need to pay as
18 long as it's less than what the interline rate would
19 be, that a shipper could assemble from the U.S.
20 carrier, and the U.S. portion and the merged carrier
21 for the Mexican portion.

22 Now the potential for this type of

1 manipulation, I have to be honest with you, is what
2 the STB missed in the Tex-Mex transaction in 2004.
3 Now I'd also like to address a couple of issues that
4 were raised yesterday. For traffic to or from
5 Mexico, a shipper has no ability to challenge a rate
6 before the STB as unreasonable.

7 In fact, in the 2004 hearings on the KCS
8 Tex-Mex hearing, when I was Chairman I explored this
9 very question first with KCS CEO Mike Haverty and
10 then with representatives of UP, BNSF and CN, how to
11 address potential rate challenges in Mexico. And I
12 will tell you that at the time I was very concerned
13 that it would amount to -- that a Mexican railroad
14 was independent, and the STB while it would have
15 jurisdiction over a through rate, not necessarily
16 over Rule 11 rate, and we wouldn't be able to impose
17 rate regulation in Mexico.

18 That was the concern at the time. And I
19 think that there are some changed circumstances here,
20 but that was one of the factors that if you go back
21 when I re-read the hearing transcript I remember
22 vividly we explored in detail. Now as Mr. Meyer very

1 carefully explained yesterday, a shipper carrier's
2 recourse would be to bring a case before the Board
3 alleging that the pattern of rates were charged did
4 not constitute a commercially reasonable gateway, and
5 that the carrier had generally violated a merger
6 condition.

7 Now that's not a practical remedy however,
8 because it would be looking in the future
9 retroactively at what had happened, and essentially
10 put the burden on the complaining shipper or the
11 carrier, to show that the actions weren't
12 commercially reasonable. You have to prove the
13 negative because that would be your burden.

14 You'd have to show that what the existing
15 carriers do is not commercially reasonable, and
16 that's just not a practical alternative for a
17 competitor, or for a shipper. Now a competing
18 carrier like BNSF, has no visibility into the rate
19 factor quoted in Mexico, so as a practical matter all
20 we would know is if we won the business or not, not
21 why we did it.

22 Now Dr. Reishus will explain the mechanics

1 of how this would work in further detail and far more
2 eloquently. But to address in advance two of your
3 apparent concerns from yesterday, I will just say
4 summarily that we believe that our proposed solution
5 prop rate is neither rigid nor overly regulatory. So
6 what's our solution?

7 Now BNSF, and we know you've read our
8 materials, and are familiar with it, but let me just
9 take a brief minute to explain it anyway. Now BNSF
10 and UP were faced with a very similar situation in
11 connection with the UP/SP merger. How to ensure that
12 the Portland, Oregon gateway remained open to UP
13 after BNSF had acquired a line from UP.

14 In other words, BNSF was, for different
15 circumstances, but in the shoes of CP/KCS and today's
16 transaction. Now unlike the applicants here, BNSF
17 acknowledged UP's concerns. The parties decided to
18 adopt a firm and transparent measure was necessary,
19 and came up with what we call a proportional or prop
20 rate mechanism to ensure that UP could continue to
21 compete over the Portland gateway.

22 The parties negotiated this, and presented

1 the solution to the Board, which imposed this
2 mechanism now called the I-5 prop rate as a condition
3 to its approval of the UP/SP merger. Now we've seen
4 for the last quarter century this mechanism is easy
5 to implement, works well to allow both BNSF and UP to
6 compete for traffic where the rail line ownership and
7 geography might have otherwise stifled competition,
8 and shippers moved freight every day using this.

9 Now BNSF thinks a similar proposal would
10 work well here to limit CP/KCS's ability to
11 manipulate the rates in order to freeze out other
12 U.S. competitors. In fact, BNSF, UP and the
13 coalition of shipper organizations have each
14 independently identified similar market based
15 mechanisms, and while you may furrow your eyebrows at
16 referring to this as a market based mechanism, it's
17 based on actual rates by different commodities going
18 to different destinations.

19 So we believe it is market based. We
20 think, and I would like to say that ours is limited
21 simply to Laredo for some of the reasons I said
22 earlier, that it's unique because there's no

1 visibility and because there's no real alternative,
2 and because of the Mexican regulatory regime.

3 So we think our approach is best, of
4 course. It's narrowly tailored to the Laredo
5 gateway, and will function seamlessly and
6 automatically in the background, and prevent some of
7 the concerns that we've seen in other mergers.

8 Now Dr. Reishus will talk about the
9 solution in further detail, but I'll provide you with
10 some broad strokes. Under our proposal when CP/KCS
11 traffic moves across Laredo, the market based rate
12 for that entire movement will be prorated on a per
13 mile basis. Now for example, as this slide shows, if
14 full CP/KCS single line move was \$1,000.00 and the
15 rate was \$1,000.00, the per mile factor would be
16 \$1.00 per mile.

17 That \$1.00 per mile factor would be
18 applied to the actual mileage of the portion between
19 Laredo and Robstown, or the Mexican origin and
20 destination to come up with a prop rate for that
21 segment. BNSF and the other railroads could use that
22 foundation as a market based rate for the Mexico

1 segment to quote through rates to their customers.

2 Now hopefully it doesn't sound complicated
3 and rigid, but it actually is very straightforward,
4 and requires no regulatory oversight. UP uses it
5 every day to quote rates from customers without
6 having to contact BNSF first.

7 So with that I won't say anymore, and turn
8 it over to my colleagues, and start with John Gabriel
9 who will talk now about Houston, and then we'll get
10 to Mr. Hirsch and to Dr. Reishus.

11 CHAIRMAN OBERMAN: Roger, let me ask you a
12 couple of questions.

13 MR. NOBER: Sure.

14 CHAIRMAN OBERMAN: Where on the map is
15 Eagle Pass?

16 MR. NOBER: Eagle Pass is in west Texas.
17 So it's north of the way the border goes if we can
18 get to it, it's north of Laredo. So I guess we can't
19 really see it. It's in front of that, so Laredo is
20 --

21 CHAIRMAN OBERMAN: I can see Laredo, yeah.

22 MR. NOBER: Along the borders, and

1 northwest along the Rio Grande which is the border
2 there.

3 CHAIRMAN OBERMAN: Well BN now gets into
4 Mexico through Eagle Pass right.

5 MR. NOBER: Correct. So.

6 CHAIRMAN OBERMAN: Are we going to have a
7 bar graph showing that as the traffic went down in
8 Laredo, it went up at Eagle Pass?

9 MR. NOBER: Well Paul is going to talk
10 about that.

11 CHAIRMAN OBERMAN: He's going to talk
12 about that?

13 MR. NOBER: Yes he is. Absolutely.

14 CHAIRMAN OBERMAN: Okay.

15 MR. NOBER: It was not the same traffic
16 moving gateways, it was new markets that we developed
17 to make up for what we were losing, and Paul will
18 talk in some detail about that.

19 CHAIRMAN OBERMAN: Well that's what I was
20 trying to get at.

21 MR. NOBER: Yeah.

22 CHAIRMAN OBERMAN: Your total traffic, as

1 I understand it hasn't really decreased. It's just
2 switched. There may be different traffic, but the
3 total amount you're moving is.

4 MR. DENTON: So respectfully that would
5 imply that there's a one Mexican market, and what
6 we're going to explain here today is that Mexico is
7 comprised of many markets accessed by different
8 gateways.

9 CHAIRMAN OBERMAN: That may be, but you
10 didn't start to use Eagle Pass until you were
11 complaining about Laredo, right?

12 MR. NOBER: I think I would say that
13 conflates. It's not as if we had traffic that was
14 going to go over Laredo and go to the valley of
15 Mexico, that we used to move over Laredo and now
16 we're moving to Eagle Pass. It's totally different
17 kinds of traffic going to totally different
18 destinations.

19 CHAIRMAN OBERMAN: Yes but why didn't you
20 develop Eagle Pass even when you had access to
21 Laredo?

22 MR. HIRSCH: Oh yeah, we were moving --

1 CHAIRMAN OBERMAN: Oh, I thought it had
2 increased when Laredo.

3 MR. HIRSCH: It increased, yes.

4 CHAIRMAN OBERMAN: All right. Well you
5 know maybe you can deal with that in a little more
6 detail. The other question I have Roger, the
7 phenomenon that you've described at the end where
8 the Mexican portion is raised to \$700.00, and so now
9 it's \$1,300.00 versus \$1,000.00. Has that phenomenon
10 actually happened since this?

11 MR. NOBER: Well we don't have, and I
12 don't have visibility into that because that would be
13 in a highly confidential waybill sample, so I think
14 --

15 MR. HIRSCH: What we do know is that the
16 rate of the Tex-Mex after the merger was doubled.

17 CHAIRMAN OBERMAN: Yes. But the question
18 is are your competitors --

19 DR. REISHUS: No I'm sorry, it's the rate
20 that KCSM is quoting to the shippers.

21 CHAIRMAN OBERMAN: The shippers aren't
22 coming to you and saying I'm getting a lower rate

1 from KCS, give me a lower rate?

2 MR. REISHUS: We don't know, yeah they're
3 always going to come and say we want a lower rate.

4 CHAIRMAN OBERMAN: That's some evidence
5 all right. Karen, go ahead.

6 BOARD MEMBER HEDLUND: Roger, you said
7 that back in whenever it was that the Board
8 determined it couldn't regulate rates in Mexico. Is
9 the prop rate scheme that you are recommending, does
10 that become a back door way of regulating rates in
11 Mexico, and would the Mexican government complain
12 about it, or would we have a problem under our
13 international agreements now with respect to this
14 regime?

15 MR. NOBER: I don't believe so. So the
16 issue in 2004 was that the TFM was a Mexico company
17 that didn't come into the U.S. So all of its rates
18 to the U.S. were interchange rates. So you could --
19 the STB could regulate the portion from Laredo on,
20 but it was a question as to what would happen in
21 Mexico.

22 Now in U.S. Canada mergers, of which there

1 have been several, the Board does have, and I think
2 it's without question, the right to regulate through
3 rates. In fact, we had a shipper litigated a case
4 called Canexus before this Board about a decade
5 ago, involving through rates from Vancouver, Canada.
6 And so, what the Board would have is the jurisdiction
7 to regulate the through rate on a U.S. owned carrier,
8 which this would now be, an origin to destination
9 rate that would be going, and the prop rate would be
10 what they have to offer to the U.S. on the
11 interchange in the U.S.

12 BOARD MEMBER HEDLUND: Not what they have
13 to offer in Mexico?

14 MR. DENTON: Yeah it would be to offer for
15 the Mexican portion of the movement right, so they
16 would have to offer the \$400.00 in this example rate
17 for the Mexican portion of the movement on an
18 interline movement between BNSF, UP, whoever else,
19 and KCSM, and then BNSF, UP and other competitors
20 would compete for the U.S. portion of the movement
21 with the combined CP/KC.

22 And as Dr. Reishus is going to talk about

1 in further detail, you know there will be real
2 competition there, and CP/KC very well may win. But
3 we need to be able to have that prop rate in order
4 for that competition to occur, and again Dr. Reishus
5 will.

6 BOARD MEMBER HEDLUND: i will have a
7 question, and I hope you --

8 MR. NOBER: I see what your question is.

9 BOARD MEMBER HEDLUND: I want to make sure
10 that we don't trip over anything.

11 MR. NOBER: Because what you are not doing
12 in this instance is regulating, or we would not be
13 asking to regulate a rate solely within Mexico on a
14 Mexican carrier. This would be on a North American
15 carrier, so a U.S. regulated carrier by you.

16 BOARD MEMBER HEDLUND: Are we then
17 regulating the allocation of a rate to the Mexican --

18 MR. NOBER: On a through rate, just what
19 they have to offer as part of a through rate.

20 BOARD MEMBER HEDLUND: But does that mean,
21 does that you know go through the accounting and the
22 balance sheet and everything else that limits the

1 allocation of the rate to the Mexican carrier?

2 MR. DENTON: Member Hedlund, we have an
3 extensive briefing on the jurisdictional issues here
4 in this case, and applicants have not challenged the
5 jurisdictional issues. We firmly believe that the
6 Board has jurisdiction to address what we're asking
7 for here, which is a mechanism to maintain an open
8 gateway.

9 And the Board across many different cases,
10 and again we put this all in our briefing, has taken
11 that on and looked at cross border moves, and made
12 sure that in a merger like this the cross border
13 moves preserve competition. That's really just what
14 we're asking.

15 BOARD MEMBER HEDLUND: I mean what was
16 said yesterday one of the things that I am concerned
17 about is our not doing anything that causes a problem
18 with either the Canadian government and its
19 authorities, or the Mexican government and its
20 authorities.

21 And we would perhaps have had more
22 information on that had this been under the new rules

1 as opposed to the old rules, and so I'm concerned
2 we're kind of flying blind here because we haven't
3 talked to either of those authorities. And we'll
4 have to do the best we can, but we'll take a look at
5 your briefings on that.

6 I am very concerned about that. This is a
7 very important critical international transaction,
8 and we have to take into account you know the public
9 interest in the United States, but as a federal
10 entity we also have to be careful that we're not
11 tripping over anything that will cause a problem with
12 you know, our two closest neighbors.

13 MR. NOBER: And Member Hedlund, I
14 appreciate your concern.

15 BOARD MEMBER HEDLUND: And
16 you obviously have the same concern.

17 MR. NOBER: Back then, and there were a
18 couple of critical differences though, which is that
19 the Mexican Railway was a wholly, was a Mexican
20 corporation that was owned and not owned by a U.S.
21 entity. And so here now, it's going to be part of a
22 through international movement. And we go to Canada

1 today, BNSF moves cases, and we've had rate and
2 service cases originating out of say Vancouver,
3 Canada that have been going into the U.S.

4 And so, that was never a concern. I
5 think it's fairly clear that for an -- you wouldn't
6 have jurisdiction over a move solely in Canada, or
7 solely in Mexico, but for the U.S., or for the
8 Canadian or Mexican portion of a move to the U.S.
9 what you could do is address the condition by which
10 it enters into the U.S., which would be the part of
11 the rate that would come in.

12 So I think that, and again as our briefing
13 has shown, and I don't think that -- I don't believe
14 that CP and KCS would contest, that for purely
15 international movements, only for movements that are
16 cross border you would have the jurisdiction to set
17 conditions on that. Not certainly, for internal
18 cabotage in Mexico, absolutely not, or Canada.

19 BOARD MEMBER HEDLUND: Thank you.

20 MR. DENTON: And I'll just direct you to
21 Section 3 of our opening comments.

22 CHAIRMAN OBERMAN: Before we proceed I

1 just want to make a scheduling observation. We have
2 two -- we have a number of witnesses we're still
3 going to try to hear before we leave today, two of
4 them have six o'clock deadlines, so if we're still
5 going with this panel at around 5:30, I'm going to
6 ask your deference to step aside for them.

7 I don't actually think you have to
8 physically step aside, and we'll hear two witnesses
9 who have six o'clock deadlines. But let's see where
10 we are in a half an hour. Patrick, did you have a
11 question?

12 BOARD MEMBER FUCHS: I'm sure we'll talk
13 more about the prop rate mechanism, but this is
14 probably more on the legal side of things. Why has
15 BNSF apparently taken the position in multiple Board
16 proceedings that mileage based divisions are not
17 market based? I think there's at least three where
18 BNSF made that argument explicitly, understanding the
19 I-5 agreement, but why has BNSF repeatedly taken that
20 position?

21 MR. NOBER: Well I'm not sure
22 which one you're specifically referring to.

1 BOARD MEMBER FUCHS: McCarty, Excel, Major Issues.

2 MR. NOBER: McCarty Farms from the 1980's?

3 BOARD MEMBER FUCHS: Well it wasn't resolved in the 1980's, and I think
4 in Major Issues in 2006 after Tex-Mex BNSF took
5 this position.

6 MR. DENTON: Yeah. I'll just say Member
7 Fuchs that I think we took a very close look at this
8 transaction. We kind of assimilated all the
9 experience that we've had with the I-5 prop rate
10 agreement, and frankly we noted the similarities
11 between the problem that was presented in the I-5
12 situation and the problem here.

13 And we noted that the solution, frankly,
14 fits both of those, both of those situations. And
15 you know I can't speak to what BNSF said 30-40 years
16 ago in any particular proceeding, but.

17 BOARD MEMBER FUCHS: No. I'm actually
18 talking about after Tex-Mex, BNSF.

19 MR. NOBER: Well BNSF also didn't suggest
20 this during Tex-Mex to be clear. We are here now
21 because we've identified the issue. We've spent the
22 time analyzing this transaction, comparing it for

1 example to existing arrangements that we have like
2 I-5, and now we're here asking you to consider this.

3 BOARD MEMBER FUCHS: It's been my
4 experience in having discussions with BNSF and rate
5 regulation, that BNSF brings a host of factors to
6 inform how rates should be thought of, including
7 density, including a number of other factors relevant
8 to demand, to the actual cost structure of the local
9 move, none of which are picked up by a mileage based
10 threshold.

11 So to say that one portion of the move is
12 just you know proportionate based on mileage, ignores
13 all the other factors that BNSF has repeatedly cited
14 over the years. And I'm just trying to make sense of
15 that.

16 MR. NOBER: Yeah well I would say
17 Commissioner, Member Fuchs, that there also is the
18 issue in Mexico right, that there's no transparency
19 into what happens there, so in many of those other
20 things there's rate transparency, there's the fact
21 that they're challengeable. There are regulatory
22 options to address those, and I can't speak to every

1 one of those statements, every one of those was
2 before I got to BNSF, and I'm the longest serving person on
3 the BNSF executive, team, but even with that in 2006
4 I was not there.

5 But even with that there may have well
6 been reasons why mileage base, or cost based for
7 example on a switch, don't really work. But then
8 there are other situations like you have in Mexico
9 where you don't have visibility into what the rate is
10 being charged. There's no ability for anyone to
11 charge it, and to be able to challenge a rate. And
12 while we don't love the idea of formulaic
13 approaches to rates, that's true, there really isn't
14 in our view, a better way to deal with it here.

15 Now you know, is a straight pro-rate the
16 only way to do it? No. You could weight more
17 towards the Mexico factor. A lot of different things
18 that you could do. I would say in general you know
19 we're usually the long mileage carrier, and so
20 pro-rates usually are not for us.

21 And so we, we're usually on the wrong side
22 of that generally speaking.

1 BOARD MEMBER FUCHS: And you heard from my
2 comments on the first panel. It's not as though I'm
3 not struggling with the issue of the transparency of
4 rate in Mexico, or the possibility of vertical
5 foreclosure. I think that's a key issue that the
6 Board is trying to figure out in this hearing.

7 I'm only trying to disentangle the
8 argument that a proportionate rate is a market based
9 rate versus a proportionate rate is the best we can
10 do given the information we have.

11 MR. NOBER: Well we would say
12 it is market based rate because it's not based on --
13 it's based on the actual rates that the incumbent
14 carrier is charging for the individual -- for
15 individual moves.

16 So it's going to a certain destination for
17 a certain commodity. It is those factors, if you
18 will that populate the matrix. So it is based on
19 what they're charging marketwise. Now it's allocated
20 in a formulaic way, but it's derived not from URCS
21 or anything else, not from cost, it's derived from
22 the actual market rates being charged.

1 So maybe that's semantics, but that's why
2 we think it is a market rate.

3 BOARD MEMBER FUCHS: Well if that were
4 true then the revenue divisions observed in practice
5 would track with the pro-rate mileage, but there is
6 empirical evidence on record, and I don't want to
7 then bleed into the economic case, but if it were
8 true that a market base rate I would think that there
9 would be a significantly better correlation between
10 revenue divisions and pro-rate mileage formula, but
11 there's not.

12 MR. DENTON: Yeah, respectfully Patrick, I
13 think Dr. Reishus is going to cover that. Thank you.

14 And look, I mean
15 because of the rules, I mean we're limited, I'm
16 limited in what I can see and know, so there's going
17 to be a --

18 BOARD MEMBER FUCHS: Fair enough. And if I've
19 stepped on highly confidential I'll try and step
20 back.

21 BOARD MEMBER HEDLUND: I have one other
22 concern, and I have no idea what the answer is, but

1 does this have any tax implications as to what income
2 is taxed in Mexico, and what is taxed in the United
3 States?

4 MR. DENTON: That certainly hasn't been
5 raised by the applicants to my knowledge. I don't
6 think we've analyzed the tax issues here.

7 MR. NOBER: I truly don't know.

8 MR. DENTON: Okay. So with that we're going
9 to turn it over to Jon Gabriel.

10 MR. GABRIEL: All right. Good afternoon
11 Mr. Chairman, Commissioners of the Board. As Roger
12 said, thank you for allowing us to talk with you
13 today. My name is Jon Gabriel, I'm Vice President of
14 Service Design and performance network strategy for BNSF.

15 As part of this role I'm responsible for
16 overseeing capacity planning, and scheduling of
17 service to meet our customers' expectations, and
18 optimize the functional performance of BNSF's
19 network. A key aspect of what I do is forward
20 looking, anticipating the future shipper needs,
21 changes in traffic flows, and to ensure that we have
22 sufficient network capacity to grow with our

1 customers while delivering consistent service.

2 Canadian Pacific and KCS have asked you
3 essentially to rubber stamp their merger application
4 with no conditions. We share many of the same
5 concerns raised by Council Member Gallegos and
6 County Commissioner Ellis around bigger trains and
7 increased train counts. We also have some of the
8 same questions raised by the Board yesterday during
9 CP's testimony surrounding the absence of a detailed
10 study, and plan for infrastructure in advance of the
11 anticipated merger volume coming on.

12 Just as importantly, applicants have
13 failed to take responsibility to adequately study the
14 impact of the step level increase in both train
15 traffic counts, and train size through Houston. A
16 comprehensive study is critical to help us assess the
17 cost and the need for infrastructure improvement to
18 handle these longer trains for this long haul
19 traffic.

20 If the Board allows CP/KCS to increase
21 traffic on these lines unconditioned, congestion in
22 the Houston terminal, complex and metro area is

1 inevitable. This will subsequently lead to service
2 deterioration for BNSF and its customers, leaving us
3 and our customers footing the bill for this
4 infrastructure improvement necessary to address
5 merger traffic driven congestion.

6 The Board can prevent this by imposing the
7 conditions requested by BNSF. You've heard a lot
8 about Houston in this hearing. I'd like to start by
9 providing some of our own context. Houston is one of
10 the most significant terminals in North America. It
11 is a major railroad terminal serving a number of
12 critical refineries, one of the largest port
13 facilities in the country, and a hub for highway
14 transportation.

15 The railroads within the Houston complex
16 provide rail service to more than 900 local
17 customers. To give the Board an idea of just how
18 important Houston is, in 2019 1.25 million, or one
19 out of every 30 carloads or intermodal containers
20 shipped in the U.S. originated or terminated at
21 Houston.

22 Again, these 900 local customers in the

1 Houston area make up one in 30 carloads and
2 intermodal shipments in the U.S. This is who we're
3 here to protect the interest of. As you can see from
4 this map, the Houston terminal is a complicated web
5 of local rail lines and yards.

6 We do believe that the current Houston
7 complex network is sufficient for the current traffic
8 levels for local flows, but the network does not have
9 capacity to support the proposed step level increase
10 and merger related traffic, long haul through traffic
11 without additional capacity improvements.

12 As Mr. Nober explained earlier, KCS's path
13 to Mexico through Laredo runs along the Gulf Coast
14 right through the heart of the Houston complex. This
15 route in Texas is over a combination of both KCS
16 owned lines, and trackage rights owned by UP and
17 BNSF. The map shows that unlike BNSF and UP who
18 bypass downtown Houston with long haul traffic, KCS's
19 long haul traffic must run directly through the
20 Houston metro area.

21 Traffic moving on BNSF or UP through
22 Laredo can avoid the Houston complex by operating on

1 lines bypassing to the west. To use an analogy,
2 think of it like BNSF and UP have interstate highway
3 bypasses that overhead traffic outside the beltway.
4 CP/KCS's only route through is the busy local side
5 streets of Houston, many of which operate in a
6 one-way or directional fashion.

7 If the Board remembers the slide shown by
8 CP yesterday with a chart on Houston trains and
9 capacity, which Chairman Oberman astutely asked
10 several questions about the details of what made up
11 this chart, the lack of response given is exactly our
12 concern. There were no details explained to that
13 assertion that there's ample capacity in Houston.

14 What CP is trying to do is give the
15 illusion that at first glance at a macro level, the
16 various side streets of rail light traffic in
17 Houston's rail complex, there's available capacity.
18 Overall general capacity is irrelevant. They will
19 exceed the capacity on the lines that they are using,
20 and that will have a ripple effect through the
21 complex of Houston.

22 The capacity simply isn't there to handle

1 this kind of step level increase in volume of longer
2 trains. We heard from Mr. Creel yesterday that when
3 railroads intersect at places like Chicago, we have
4 to have a plan. But in the case of the Houston rail
5 complex and these 900 local customers, rather than a
6 detailed study, CP/KCS is now asking the Board simply
7 rest assured and trust them.

8 The applicants project that the rail
9 merger will result in 8 to 11 new CP/KCS trains
10 running through the Texas Gulf Coast and Houston.
11 That's three to 4,000 trains per year. This is a
12 doubling of KCS's current volume on four of the five
13 subdivisions in the Houston complex. This slide
14 shows the annual additional trains that will be added
15 to the already busy Houston complex as a result of
16 this merger.

17 Take for example tower 26 in Houston,
18 where BNSF and KCS cross each other at an at-grade
19 intersection where they'll also be at a local
20 at-grade road crossing, adding 8 CP/KCS trains per
21 day throughout this intersection will almost
22 certainly delay BNSF local trains, as well as

1 motorists, causing the cascading effect through
2 Houston and the National Rail Network.

3 This is just one localized example of what
4 will happen to the entire Houston terminal area.

5 CHAIRMAN OBERMAN: I -- to slow you down
6 on this map.

7 MR. GABRIEL: Yes sir.

8 CHAIRMAN OBERMAN: I'm trying to follow
9 where you're telling us these trains are going to
10 intersect.

11 MR. GABRIEL: So it will come out of
12 Robstown, they'll pop back out at Beaumont, but
13 as you can see the number of web of rails that are
14 there are really designed to serve local customers,
15 and again I'll go back to the point that I made that
16 BNSF and UP route their interstate traffic, or what I
17 would call overhead traffic beyond Houston, on a
18 bypass route west of the Houston complex.

19 CP will try to navigate through this web
20 of localized rail where we have the 900 customers
21 being served by our locals and road switchers.

22 CHAIRMAN OBERMAN: I mean you don' t have

1 a pointer but I'm trying to figure out which of
2 these spiderwebs is going to take this traffic.

3 MR. GABRIEL: We can follow-up with the
4 Board and draw kind of a highlighter heat map type,
5 but essentially if you were to --

6 BOARD MEMBER PRIMUS: Can you describe
7 which ones?

8 MR. GABRIEL: Yeah sure if we can go back
9 yeah. So essentially if you were take the red map,
10 or the red route there coming up into the middle of
11 Houston, and then you can see it kind of opens up
12 into what we call an east belt and the west belt.

13 So we essentially run this traffic.
14 Remember when I said much of this traffic runs in a
15 directional or one-way type street. That belt, or
16 that circle in the middle runs in a directional
17 fashion to serve the local customers and industries
18 that are there, so we would split off part of the
19 concentration of UP's through traffic across that
20 west belt again in the face of the local industries
21 and serving ours that are there.

22 Going eastward over the top end, and the

1 westward one over the bottom end, but it's really
2 outside that belt where the concern is that this
3 concentration would impact us.

4 CHAIRMAN OBERMAN: So is the KCS traffic
5 coming in on the thing that's labeled East Dayton?

6 MR. GABRIEL: No sir.

7 CHAIRMAN OBERMAN: Which one of these?

8 MR. GABRIEL: It would be the far
9 southwest portion of this map.

10 CHAIRMAN OBERMAN: Which of these lines is
11 bringing -- that's all I'm trying to just understand
12 the map.

13 MR. NOBER: Yeah it's not on the screen
14 unfortunately. He can demonstrate it, but I don't
15 know if that could be put on the record.

16 CHAIRMAN OBERMAN: Well, you know these
17 lines are labeled east Dayton.

18 MR. GABRIEL: Yeah, so towards the one,
19 that's correct. That's where they pop out and come
20 through.

21 MR. NOBER: To the one that says East
22 Dayton is the one it would come in on, yeah.

1 CHAIRMAN OBERMAN: The one that says East
2 Dayton. You're going to come in that way, and then
3 they go more horizontally towards the line that
4 intersects and goes up to Cypress? Is that what
5 you're saying?

6 MR. GABRIEL: Yes sir, there's a belt
7 there that operates around, yeah you can kind of see
8 the circle I guess so to say, not to call it a belt.

9 CHAIRMAN OBERMAN: And then it goes --

10 MR. NOBER: Mr. Chairman could I get up
11 and point to you on the screen?

12 CHAIRMAN OBERMAN: That would be helpful
13 if somebody would do that.

14 MR. GABRIEL: If you guys could get that.

15 CHAIRMAN OBERMAN: Well it would help me
16 anyway. I can't speak for the other four.

17 MR. GABRIEL: (Off mic). We would operate
18 them through this way and --

19 CHAIRMAN OBERMAN: Yeah, so if they're
20 coming westbound they're going to go clockwise?

21 MR. GABRIEL: I think this complexity is
22 exactly our concern Mr. Chairman.

1 CHAIRMAN OBERMAN: So what do you say is
2 -- all right, and where is it that you said there
3 were some at-grade intersections?

4 MR. GABRIEL: So Tower 26 would be down in
5 this corner right in here. I don't have it on the map here
6 locally, but it would be right in this intersection
7 of this bottleneck here. And we've got a chart I
8 think a couple that shows exactly where it is.

9 CHAIRMAN OBERMAN: Okay. And okay, I was
10 just trying to understand.

11 MR. GABRIEL: Yeah sure.

12 CHAIRMAN OBERMAN: On the map what you
13 were describing.

14 MR. GABRIEL: And unfortunately, that
15 complex web that's there. It depends, the answer is
16 sort of it depends, Mr. Commissioner and the Board,
17 depending on where the customer traffic is, where we
18 have industry spotting and pulling, and that's where
19 we get concerned with 220 mile long haul you know
20 through trains, trying to interweave between what's
21 really a lot of local industry switching. That is
22 the primary concern that we have, no you're fine.

1 CHAIRMAN OBERMAN: Go ahead.

2 BOARD MEMBER SCHULTZ: Wait, just a quick
3 question. Have there been any infrastructure
4 investments made in this area?

5 MR. GABRIEL: Yes. There has to support
6 the localized you know traffic growth over the last
7 ten years, correct.

8 BOARD MEMBER SCHULTZ: And who were those
9 made by?

10 MR. GABRIEL: We fund a portion of that
11 based on the trackage rights, and our usage of it.
12 So it would be us and UP largely.

13 MR. NOBER: There's a formula,
14 right for how that's done?

15 MR. GABRIEL: That's mileage, GTM usage
16 base.

17 MR. NOBER: That comes from the
18 UP/SP merger.

19 BOARD MEMBER SCHULTZ: And would those
20 investments support the increased capacity?

21 MR. GABRIEL: No ma'am. Really the
22 increased capacity and the investments that have been

1 made have been to support the local switching demand
2 to take care of the localized customers. It is not
3 to create you know, call it a thoroughfare, or a high
4 speed freeway, through the City of Houston, that is
5 not what we've designed it for, again us and UP have
6 that would be our Galveston sub, which is not on the
7 map there.

8 Yeah it is, so the blue line that hooks
9 outside of Houston, that's the BNSF Galveston sub,
10 that's where we would invest our money for overhead
11 or long haul traffic. UP does a similar thing
12 bypassing west of the City of Houston. That is
13 exactly our concern Commissioner.

14 BOARD MEMBER SCHULTZ: Have you proposed a
15 level of infrastructure that would actually support
16 the increased capacity?

17 MR. GABRIEL: So there have been studies
18 done in the past, but what I would I ground is we've
19 never studied this kind of step level increase in
20 thorough freight traffic. That is exactly what we're
21 asking for in part today, is that the Board help us
22 actually analyze in detail similar to what CP did in

1 the Chicago complex here in the Houston complex.
2 There has been no such study though, nor have we been
3 engaged, or formally sat down with CP to do so.

4 MR. DENTON: Member Schultz if I may, we
5 believe that is the burden of applicants that has not
6 been met here.

7 BOARD MEMBER PRIMUS: Just real quick,
8 just to follow-up on what Michelle asked, so
9 understanding that it's not the burden of the
10 applicant, but we also understand that you know
11 Houston's had this problem for a long time. You
12 know, and because you and UP have like I see it here,
13 a majority of the lines, has there ever been any
14 consideration for that long haul?

15 I know you say out of Galveston, but we're
16 looking at you know your investment in Mexico, where
17 we're talking about opening up a gateway, so the
18 gateway is available to everyone. So obviously,
19 there's got to be some thought that that traffic is
20 not going to stop at Houston, it's going to continue
21 for and throughout your network.

22 MR. GABRIEL: And we would operate it

1 bypassing Houston across our Galveston sub, which is
2 that blue line that goes west of the Houston complex,
3 or green line, whatever color, sorry, color blind.
4 Yes, green line excuse me, that goes west of the City
5 of Houston. That is our concern. In terms of when
6 you say the problems been there, the problems have
7 been localized customers potentially, but we feel
8 like there's adequate capacity to handle that
9 customer demand there. This step level increase in
10 overhead traffic that needs to penetrate the heart of
11 Houston is what us, nor UP have ever had to do
12 because again we can bypass west of the city.

13 BOARD MEMBER PRIMUS: So you don't
14 anticipate --

15 BOARD MEMBER HEDLUND: Can you define the
16 step level increase? What are we talking about? How
17 many trains?

18 MR. GABRIEL: Yeah. Eight to 10 trains
19 over a very concentrated route, so that would be
20 somewhere in the magnitude of 25 to 30 percent
21 increase on those line segments that they're
22 traversing there. That is the step level increase

1 that we're referring to. Yes sir, three to 4,000 per
2 year.

3 Yes, and certainly the length of the train
4 matters that these are not localized, you know small
5 local road switchers, they're overhead type trains.

6 BOARD MEMBER SCHULTZ: And all the
7 increased trains would run on BN?

8 MR. GABRIEL: Shared lines, both shared I
9 would say some KCS route, and then a portion of that
10 would be shared with the BNSF and UP trackage right
11 lines.

12 BOARD MEMBER HEDLUND: So they're
13 currently running 24 overhead trains, and they were
14 going to be adding 8 additional. Is that what you're
15 saying?

16 MR. GABRIEL: I'm saying that the total
17 trains by all carriers would increase by 25 to 30
18 percent. The KCS is doubling the number of trains
19 that they operate over that concentrated route. That
20 is the step level difference that we're talking about
21 that us and our customers should not burden the
22 infrastructure costs.

1 BOARD MEMBER HEDLUND: The increase in the
2 total number, including your own trains is?

3 MR. GABRIEL: 25 to 30 percent.

4 BOARD MEMBER HEDLUND: 25 to 30 percent.

5 MR. NOBER: But ours are local
6 and theirs are overhead, principally?

7 MR. GABRIEL: Correct. Meaning small
8 industry jobs going from a yard close by to take care
9 of a customer, and a train coming back. Unless you tell me
10 I am.

11 CHAIRMAN OBERMAN: No, no, no, I was just
12 wondering if you completed your presentation.

13 MR. GABRIEL: Absolutely. In connection
14 with their application the applicants have claimed
15 the studied effect of the additional merger traffic
16 and infrastructure across their proposed network, CP/KCS
17 had proposed 276 million dollars in capacity
18 improvements on a number of line segments north of
19 Texas.

20 But conveniently assert to new
21 capacity was required to accommodate the three to
22 4,000 trains we've been talking about here that will

1 run directly through the Houston terminal. As you've
2 heard the applicants claim no capacity improvements
3 are required to accommodate all their rail merger
4 traffic, south or west of Louisiana.

5 To be clear, the applicants have not today
6 worked with BNSF to analyze whether capacity on this
7 shared line in the Texas Gulf Coast is sufficient to
8 accommodate their merger traffic. Contrast this with
9 the Chicago area portion of yesterday's CP
10 testimony, the applicant's testimony showed detailed
11 assessments of impacts done with Metra and other key
12 stakeholders in Chicago.

13 CP prepared substantial studies and
14 traffic models, streamlines and all, to illustrate
15 the impact of increased CP/KCS traffic. This is the
16 level of analysis that we're asking for in the
17 critical Houston complex, as well as requirements to
18 fund anticipated infrastructure needs to handle this
19 step level increase in merger traffic as well as
20 post-merger oversight of service in Houston.

21 The Board is familiar with the gridlock
22 that the Houston meltdown caused after the UP/SP

1 merger, so what does this all mean? BNSF has asked
2 the Board to prevent these issues by restricting CP
3 and KCS from increasing KCS traffic levels on shared
4 lines in Texas, where such increases would compromise
5 fluidity on those lines until necessary capital
6 improvements are in place and fully funded by CP/KCS.

7 Next I would like to talk to you about who
8 should pay for the improvements to accommodate the CP
9 and KCS merger traffic. In determining where the
10 capacity projects would be necessary to accommodate
11 merger growth, applicants conveniently omitted the
12 one area of the network, the shared lines in Texas,
13 where they could claim that the competing railroads
14 and their customers should foot the bill for the
15 projects required by the merger.

16 A significant portion of these lines are
17 owned by other railroads as we discussed, not
18 the applicants. KCS uses those tracks today under
19 trackage rights agreements with UP. KCS claims this
20 is what requires UP to cover the cost of capacity
21 projects needed to accommodate merger related traffic
22 growth. Without intervention by this Board, the

1 applicants have assumed that the existing agreements
2 could allow CPKCS to burden the cost of implementing
3 its merger to its competitors and their customers.

4 You're going to have a hypothetical slide
5 in front of you. You'll see an example of how this
6 existing cost sharing arrangement would work in this
7 hypothetical project. Take for example that as a
8 result CP/KCS merger related traffic increases
9 caused the need for a new 100 million dollar bridge
10 to be built on a line owned by the UP, and used by
11 UP, BNSF and CP/KCS.

12 This bridge, not required to support
13 existing traffic, or ordinary incremental traffic
14 growth through the gateway, rather simply the merger
15 related traffic increases. Under the trackage
16 rights agreements between UP and KCS, applicants
17 claim that CP/KCS would have no responsibility for
18 the cost of the project beyond the annual rents that
19 they pay to UP for usage of the line.

20 Rather, under current agreements BNSF
21 could be responsible for a percentage of the cost of
22 the project. This amount would be equal to the

1 percentage usage that the line segment for the
2 previous year, so that answers the question that we
3 were getting at earlier of how this formula would
4 work, that we would pay for the portion that we used
5 the prior year.

6 Those agreements, not designed for the
7 unique merger situation which comes with the dramatic
8 increase in traffic that CP/KCS plans once the Board
9 approves this transaction. So all this being said
10 without STB intervention, where BNSF accounts for 35
11 percent of the traffic on the line, BNSF and our
12 shippers could have to pay millions of dollars for
13 projects that would not otherwise have been required,
14 but for the CP/KC merger.

15 BOARD MEMBER HEDLUND: So you're
16 complaining about your own contract?

17 MR. GABRIEL: I don't believe so. What I
18 would say is our current contract is based on, and
19 centered around handling the organic growth that's
20 there for the localized customers. This is a
21 fundamental shift in the traffic that's going to be
22 traversing through the Houston terminal complex.

1 MS. ESTES: And Member Hedlund if I can
2 just address that as well.

3 BOARD MEMBER HEDLUND: Yeah.

4 MS. ESTES: Under our agreement with UP/SP
5 for these trackage rights, UP/SP, when they merged,
6 they actually paid all infrastructure that was
7 necessary for their merger. That is merger policy
8 that's sort of all how mergers have been treated.
9 The merging carriers come in and they pay for the
10 infrastructure, or capacity improvements needed.

11 So we then got those trackage rights, and
12 our use of those lines is based on the past 12 months
13 use of our gross ton mile usage. And what you're
14 going to do is you're going to have KCS come in and
15 say, hey, we need you know a new bridge because
16 we're bringing this step level increase.

17 But KCS's position is under their
18 agreements with UP, they're not required to pay for
19 any past usage, or future usage, they just pay a GTM
20 rate. So they don't actually -- their position, and
21 the position they take under their agreements with UP
22 is that they do not pay for addition to betterments.

1 They pay it as part of their GTM rate, and not any
2 extra payment for that.

3 BOARD MEMBER HEDLUND: Right. But that's
4 a problem with the contract.

5 MR. DENTON: Again, the contract was put
6 in place in connection with the UP/SP merger, and the
7 predicate to the contract, the language is up on the
8 screen here. It was that UP/SP when it merged, was
9 responsible for the cost of all capacity improvements
10 necessary to implement its merger.

11 And then after that these contracts were
12 put in place to handle you know additional things
13 that could happen post-merger. It's a basic merger
14 policy. David Reishus will talk about this in
15 further detail, not to externalize the costs of the
16 transaction onto competitors.

17 BOARD MEMBER HEDLUND: Now that I
18 understand, but what I'm trying to understand is are
19 you saying that there's some kind of flaw in the
20 contract that doesn't account for what you would
21 define as a step increase in traffic, that it would
22 be okay if it was organic, whatever that means, but

1 this is something else?

2 I just I understand your point about
3 merger policy, but we also have a contract here that
4 sounds like the parties of the contract are trying to
5 get us to modify for them.

6 MR. NOBER: Well I guess I would say
7 Member Hedlund, that the contract was an ongoing
8 arrangement after the last merger reflecting the
9 status of the parties at that time right, which
10 meant that UP and SP paid for all their one-time
11 costs, and then this was an ongoing study.

12 The factual situation is now changing
13 right ? So the contract shouldn't apply in this
14 circumstance because now one of the parties is now
15 merging right, and it's going to have -- it's going
16 to bring another one time change in its traffic
17 patterns. It should pay for that, and then the
18 contract may well work as an ongoing steady state,
19 but it doesn't address, and it was never intended to
20 address the one-time change of one of the parties
21 merging.

22 BOARD MEMBER HEDLUND: What if the

1 increase in traffic had come from you know a very
2 large new customer like a big new automotive plant?

3 MR. NOBER: It would be handled under
4 the existing agreements, no doubt.

5 BOARD MEMBER HEDLUND: So how is that
6 different from the result of the merger?

7 MR. NOBER: Because the merger -- this
8 is not organic growth from individual customers who
9 don't grow at that rate.

10 BOARD MEMBER HEDLUND: Does the contract
11 talk about organic growth?

12 MR. DENTON: The contract doesn't talk
13 about organic growth Commissioner Hedlund, but what
14 we're asking for here is pretty simple, and frankly I
15 think it's a modest ask. What we're asking for is
16 the Board to set down a principle that applicants are
17 responsible for the costs of any infrastructure
18 improvements that would not be required but for the
19 merger.

20 If you lay down that principle, and set it
21 as a condition to any approval that you may give to
22 this merger, we'll be able to take that principle and

1 apply it as necessary. We're not asking you to you
2 know, to abrogate the contract, or to look at you
3 know the details of this, it's simply to impose good
4 merger policy on this merger, and we will take that
5 and then you know apply it as necessary.

6 BOARD MEMBER HEDLUND: Well who determines
7 what's necessary? I mean have you done an RTC study?
8 No? How do you know what's necessary?

9 MR. DENTON: We have. Funny that you
10 ask. That study was as you know stricken from the
11 record, so we're going to try to avoid much detail
12 discussion.

13 MS. ESTES: And if I can just add one more
14 point about the trackage rights agreements, I think
15 there's a reason why applicants haven't come in and
16 asked for certain infrastructure in Houston, because
17 under their agreements with UP, just as ours with
18 UP, if the user proposes -- the user has the right to
19 propose certain improvements on the line, but they
20 have to fully fund that.

21 So I think there's a reason why you don't
22 see applicants coming and doing what they did in

1 Chicago here in Houston, because if they propose
2 something new, then they have to fund it upfront,
3 fully fund it and there's no reimbursement.

4 BOARD MEMBER HEDLUND: All right. No
5 further questions. I look forward to hearing what
6 the applicants have to say about this.

7 MR. GABRIEL: All right. But on topic, as
8 you can see on the slide here in the past merging
9 parties have accepted responsibility of merger costs.
10 Dr. Reishus will explain that the merging parties,
11 not BNSF and its customers, should be held
12 responsible for the costs imposed by their merger.

13 This will be regardless of how costs are
14 allocated in the ordinary course outside the context
15 of the merger. As was with prior railroad mergers,
16 it would make sense that the merger proponents should
17 be required to pay for their transaction just as UP
18 and Southern Pacific Railway accepted that
19 responsibility.

20 The fix here is simple. We ask that the
21 Board to make it clear that CP/KCS must be fully
22 responsible for the costs to add capacity needed to

1 accommodate the merger related traffic growth
2 resulting from this transaction. Again, I'm happy to
3 take any more questions from the Board, or I can pass
4 it over to Mr. Hirsch with concerns around protecting
5 rail competition in and out of Mexico.

6 CHAIRMAN OBERMAN: Let me because I have a
7 few questions for Mr. Gabriel, and others may too,
8 but I'd like to finish with Mr. Gabriel and then
9 break for those other two witnesses, unless this goes
10 on too long.

11 MR. GABRIEL: Yes sir.

12 CHAIRMAN OBERMAN: I want to follow-up
13 where Karen was. The trackage rights -- well first
14 of all, the KCS trackage rights agreement, was that
15 part of the conditions of the UP/SP merger? Where did
16 that trackage rights agreement come from?

17 MR. DENTON: They got the trackage rights
18 based on rights granted during the UP/SP merger, yes.
19 Basically all of this arrangement in Houston is a
20 result of the UPSP merger.

21 CHAIRMAN OBERMAN: So KCS got trackage
22 rights out of that merger?

1 MR. DENTON: Um-hmm. Tex-Mex I believe
2 actually, sorry. And then KCS acquired Tex-Mex later
3 on.

4 CHAIRMAN OBERMAN: Tex-Mex got the
5 trackage rights is that what you're saying?

6 MR. DENTON: I believe that's right.

7 CHAIRMAN OBERMAN: And the trackage rights
8 agreement, was that prescribed by the Board, or was
9 that negotiated by the parties just as a result of a
10 Board requirement that it gets?

11 MR. DENTON: There's a lot of back and
12 forth in the record Mr. Chairman, of the UP/SP merger
13 about how the details of these trackage rights
14 agreements evolved. There's a lot of discussion.
15 The parties commented on various terms. So it was
16 proposed by the parties, and then ultimately imposed
17 by the Board as a condition after considering
18 concerns from various parties.

19 CHAIRMAN OBERMAN: But in terms of the
20 cost arrangements and the fees and so forth in the
21 trackage rights agreements, were those prescribed by
22 the Board?

1 MR. DENTON: Sure. I mean all of these
2 are imposed by the Board as a condition to the
3 merger, yes.

4 CHAIRMAN OBERMAN: Well I understand the
5 trackage rights, but the financial details of the
6 trackage rights agreements were prescribed by the
7 board?

8 MR. DENTON: Mr. Chairman there's a
9 decision which the number I can't quote off of my
10 head on UP/SP, where the board analyzed you know GTM
11 rates, and there were people who were concerned that
12 GTM rates are too high, or too low, and the Board
13 decided that this was an appropriate measure to deal
14 with the merger, including this basic premise that we
15 have.

16 CHAIRMAN OBERMAN: And did the parties ask
17 for provisions in the trackage rights agreements to
18 cover future growth of traffic that might impinge on
19 infrastructure? Yeah, so anybody?

20 MR. DENTON: Yeah, I'm just not sure that
21 was necessarily relevant at the time, particularly
22 for something like this. I mean this is a new merger

1 that's imposing you know new costs on the parties.

2 CHAIRMAN OBERMAN: I'd like to do this
3 outside the context of a merger. Everybody in rail
4 since I've been here anticipates growth, so we're
5 supposed to promote growth. So it's hard to imagine,
6 particularly in Houston, the fastest growing city in
7 the world, or however they bill themselves, that it
8 wasn't anticipated that traffic would grow after this
9 merger.

10 So there must have been some thought by
11 the railroads involved that as traffic grows, we're
12 going to need more infrastructure, how are we going
13 to pay for it? Aside from any acute infrastructure
14 need immediately as a result of the merger?

15 MR. GABRIEL: If I may sir, the investment
16 that BNSF really has made for this type of overhead
17 or through train traffic that doesn't originate or
18 terminate in Houston, we've invested in our Galveston
19 sub, and the rest of our network, as has Union
20 Pacific.

21 What is fundamentally different here is
22 the type of traffic, and the size of the trains that

1 are coming through the City of Houston.

2 CHAIRMAN OBERMAN: I understand that. But
3 I just I'd like to dissect this step by step if I
4 could. And I'd like to know if the trackage rights
5 agreements anticipated traffic growth of any kind
6 that would require more infrastructure. Is that, or
7 is it not in the trackage rights agreement?

8 MR. GABRIEL: Yes.

9 MS. ESTES: So yes.

10 CHAIRMAN OBERMAN: And how is it dealt
11 with?

12 MS. ESTES: So in the UP/BNSF trackage
13 right agreements the way it's dealt with is that when
14 --

15 CHAIRMAN OBERMAN: No the KCS is the one
16 I'm interested in.

17 MS. ESTES: Yes.

18 CHAIRMAN OBERMAN: You're not asking --

19 BOARD MEMBER FUCHS: Doesn't it say that
20 UP is obligated to accommodate the traffic of KCS on
21 current service standards?

22 MS. ESTES: The applicants I believe are

1 taking a position that maybe is not what the
2 agreement says. I think their position is that UP is
3 responsible as part of the GTM rate for putting in
4 any additional infrastructure that is needed to
5 accommodate their traffic.

6 CHAIRMAN OBERMAN: And what's your
7 position? What does the contract say? Hey, I'm a
8 lawyer, tell me.

9 MR. DENTON: Respectfully, that's their
10 contract.

11 CHAIRMAN OBERMAN: Whose contract?

12 MR. DENTON: It's a contract between UP
13 and KCS I mean.

14 BOARD MEMBER FUCHS: It says shall, and
15 maybe I'm not looking at the right provision, so
16 you'll have to educate me, but it says shall be
17 necessary to accommodate the traffic of owner and
18 user, while maintaining service standards. Owner
19 being UP, user being KCS. Obligation on UP. Is that
20 right?

21 MS. ESTES: That is the language of that
22 KCS agreement.

1 BOARD MEMBER FUCHS: So it says the
2 traffic. There's no qualifier of the traffic, you
3 know, there's no out clause that I might not be aware
4 of if KCS happens to be acquired by somebody else?

5 MR. DENTON: Member Fuchs, again this is
6 a contract between UP and KCS. KCS and CP have made
7 kind of very specific claims. I think Mr. Simmons,
8 in his response verified statement about what these
9 contracts mean, but it's not for us, BNSF to tell
10 you exactly how you UP and KCS are allocating their
11 --

12 CHAIRMAN OBERMAN: Does -- is there, I
13 thought that KCS uses some BN tracks as well,
14 under trackage rights?

15 MR. DENTON: Right. So jointly owned
16 tracks, that's right 50/50 line for example.

17 CHAIRMAN OBERMAN: Well, and is there a
18 separate agreement between BN and KCS for trackage
19 rights?

20 MS. ESTES: I'm thinking there's the
21 Tex-Mex and there's the HBT. I believe it's the HBTS
22 credit serve agreement.

1 MR. DENTON: Right. What we're focused
2 on here Mr. Chairman is just this example that
3 applicants themselves are telling right? If you read
4 Mr. Simmon's statement they are telling you
5 explicitly that they are not responsible, absent you
6 know the rents that they pay.

7 CHAIRMAN OBERMAN: I know what they're
8 saying. I'm trying to figure out what you're saying.

9 MR. DENTON: What we're saying is that
10 under our agreements, our agreements with UP, we
11 would be responsible on a usage basis, on a look back
12 usage basis for a percentage of an improvement that
13 KCS that would not be needed, but for the merger.

14 CHAIRMAN OBERMAN: Do you have an
15 agreement with KCS for trackage rights on your
16 tracks?

17 MS. ESTES: No. There's an agreement I
18 believe with KCS for the 50/50 line. They have a
19 right to the 50/50 line that we own jointly with the
20 UP.

21 CHAIRMAN OBERMAN: All right. And --

22 MS. ESTES: Chairman, we can take a break

1 and --

2 CHAIRMAN OBERMAN: Are you and all three
3 railroads are parties to that trackage rights
4 agreement?

5 MS. ESTES: No, I don't believe so. The
6 agreements at issue are between us and UP and then
7 KCS and UP.

8 CHAIRMAN OBERMAN: So you have no contract
9 with KCS? That's all I'm trying to find out. What
10 are the contractual relationships, that's where Karen
11 was going.

12 MR. DENTON: The issue here right, the
13 issue here is that UP and KCS have a contractual
14 relationship. KCS has told you exactly what they
15 think that contractual relationship means. We have a
16 separate relationship with UP, BNSF, and we're
17 telling you under that relationship what we will be
18 obligated to pay.

19 CHAIRMAN OBERMAN: All right. Let me do
20 this because I want to pursue this further. It's 20
21 minutes to 6:00, so I thought we could finish with
22 this subject matter, but I don't think we can for the

1 moment. I'd like to accommodate these two other
2 witnesses, and I want to come back to this.

3 But when we come back if you would humor
4 me, and try to answer specifically what I'm trying to
5 get at, and then make your conclusionary remarks when
6 I'm done and you're done, that would be helpful to
7 move this along.

8 (Off mic).

9 CHAIRMAN OBERMAN: I want to know what the
10 contractual relationships are, and what they say
11 about traffic growth. That's what I want to know,
12 and then we'll take it from there.

13 MR. NOBER: That's not a short subject.

14 CHAIRMAN OBERMAN: Well okay. It may not
15 be short, but I think we need to get into it. Yeah,
16 so what?

17 (Side talk.)

18 CHAIRMAN OBERMAN: Can you handle those
19 two five minute witnesses? Okay, and then we will
20 take a break. Thank you. All right. As we're
21 waiting for these two additional witnesses
22 apparently NS, you're not needed anymore for this

1 purpose. But I would say I don't know if you're
2 planning to attend tomorrow's session, any of you,
3 because there may be some further discussion about
4 submissions. Virtually would be fine, but we may
5 want to communicate with you, that's all.

6 Don't change travel plans on our account,
7 just if you're on virtually. But we may want to have
8 at least all the railroads available. With that
9 we're going to deviate for a moment from the BN
10 presentation. I'm going to ask the Richardson
11 International witnesses Jean-Marc Ruest and Robert
12 Bielik, are they virtual?

13 We're going to have to do this through
14 computer, so it's going to be right here Mr.
15 Reporter, and hopefully you'll be able to hear.

16 MR. RUEST: Good afternoon. Can you hear
17 us?

18 CHAIRMAN OBERMAN: All right. Mr. Ruest
19 can you hear us?

20 MR. RUEST: Yes I can hear you. Can you
21 hear us?

22 CHAIRMAN OBERMAN: Yes. We can.

1 MR. RUEST: Perfect, excellent.

2 CHAIRMAN OBERMAN: Are you both
3 testifying?

4 MR. RUEST: Pardon me?

5 CHAIRMAN OBERMAN: Are both you and Mr.
6 Bielik going to speak?

7 MR. RUEST: Yes we are. I'll just make
8 some very preliminary remarks, and then Mr. Bielik
9 will lead us through the bulk of our comments, which
10 will be quite quick.

11 CHAIRMAN OBERMAN: Very good. I just
12 can't resist asking you if you're related to J.J.?

13 MR. RUEST: No. Actually I go by J.M. and
14 many people have made the mistake of I receive the
15 occasional angry phone calls from people that thought
16 that I was J.J.

17 CHAIRMAN OBERMAN: And you didn't even get
18 his severance check I bet.

19 MR. RUEST: Maybe if I play my cards
20 right. The problem is that this isn't on the record
21 is it? All right. Well thank you very much for
22 having us here this afternoon. My name is Jean-Marc

1 Ruest, and I'm the Senior Vice President of Corporate
2 Affairs and General Counsel for Richardson
3 International. And I am accompanied by Mr. Rob
4 Bielik, who is our Vice President of Transportation.

5 Richardson International is Canada's
6 largest agri business, and a worldwide handler and
7 merchandiser of grains and oil seeds, and a
8 vertically integrated processor of oats and canola
9 based products. We were listening previously to Mr.
10 Irving who leads another iconic Canadian corporation.
11 He mentioned that they were established in 1882,
12 while Richardson was established in 1857, which makes
13 us a little bit older than the Irving company.

14 And to give you a little more of a
15 reference point that is actually 57 is 10 years prior
16 to the Canadian Federation, so we've been around for
17 quite a while. We have operations in the United
18 States. We own the Wesson Cooking Oil brand and its
19 manufacturing plant in Memphis, Tennessee.

20 We also own an oat mill in Seltzer City,
21 Nebraska, and grain elevators in North Dakota along
22 the largest mill in North America, which is located

1 in St. Louis, operating under the Granny brand.
2 We're here today to testify in support of the CP/KCS
3 acquisition. We believe it will add to the footprint
4 of the rail network in North America to which my
5 colleague Rob will provide more details. Thanks.

6 MR. BIELIK: Good afternoon. My name is
7 Rob Bielik. I'm the Vice President of Transportation
8 at Richardson International. As Jean-Marc has stated,
9 Richardson supports CP's acquisition with KCS, and it
10 is our view that consolidation of the KCS network
11 into the CP network will provide Richardson with
12 greater transportation efficiencies and economies, by
13 having one single line carrier, rather than two
14 interchange carriers providing service to our U.S.
15 facilities.

16 This will be achieved in our view by the
17 elimination of handoffs between carriers, which exist
18 today, and which create time delays, and the
19 opportunities to negotiate rates and service with one
20 carrier rather than two.

21 I will illustrate for you some examples
22 with existing routes which we use today, along with

1 routes we plan to use in the future after the
2 acquisition of KCS. For greater context, Richardson
3 ships approximately 20,000 railcars to U.S. origins
4 each year. This includes grain, flour, oil,
5 byproducts and fertilizer, and make use of all the
6 costs of railroads in the U.S., including CN and CP.

7 Example one, movement from grain elevators
8 in North Dakota to our Durham mill in St. Louis. I
9 refer the Board to slide 1, which I'll mark on the
10 screen, hopefully you could see it. So Richardson
11 owns grain elevators in North Dakota and a Durham
12 mill in St. Louis. The mill consumes approximately 1
13 unit train, or a 100 cars per week of Durham.

14 Today we ship Durham from our elevators in
15 North Dakota to the mill via CP and UP, which
16 requires separate rate negotiations with CP and UP,
17 along with the physical hand-off traffic between both
18 carriers. Under the CP/KCS acquisition, we'll be
19 presented with the opportunity to use a combined
20 CP/KCS direct route to St. Louis as an alternative.
21 Please see slide 2.

22 So the original route is lighter, and then

1 the new route is in the darker blue. This will
2 provide a more efficient, direct alternative, and the
3 fact that CP and UP routing remains available, will
4 effectively provide more competition to this
5 destination for Richardson.

6 Example two, movement of fertilizer to our
7 fertilizer shed in Tolley, North Dakota. Please
8 refer to slide 2, which Jean-Marc now has up on the
9 screen. We own a fertilizer shed in Tolley, North
10 Dakota, which we use to distribute fertilizer to
11 farmers in the area. Today we move fertilizer to the
12 shed primarily by truck from Idaho and Canada.

13 Subsequent to the CP/KCS acquisition, we
14 would look to move fertilizer by rail from the Gulf
15 of Mexico, either Galveston or New Orleans, via KCS
16 to Kansas City, then via CP to Tolley, again using a
17 single carrier. The advantage here to Richardson
18 from this move is that the transportation cost is
19 less with rail as compared to truck.

20 Example three, movement of fertilizer to
21 our retail crop input business in Canada. Slide 4
22 which Jean-Marc has on the screen. Richardson owns

1 95 retail crop in locations that are spread across
2 western Canada, but today we move fertilizer by rail,
3 BNSF in Galveston and the Gulf of Mexico, under the
4 CP/KCS acquisition we would have an alternative route
5 to move fertilizer to our retail network in Canada
6 via a single line carrier, either from Galveston or
7 New Orleans, refer to slide 5.

8 So you see the new potential route in the
9 darker blue. Again, this will provide Richardson
10 another rail transportation option for existing path,
11 thereby increasing competition. We also believe
12 there will be other opportunities for us under the
13 acquisition.

14 These include access to known markets in
15 Mexico. Richardson believes a merger would provide
16 greater access to some of our many customers in
17 Mexico to receive goods from North Dakota by rail,
18 which currently does not occur, and oil seed to
19 Mexico. Richardson sources canola seed in Western
20 Canada, and moves that seed via ocean going vessel
21 from Vancouver, Canada to our customers in Mexico.

22 We believe that the merger could provide

1 opportunities to move that seed via rail in the
2 future. Further, while we're not currently sourcing
3 canola seed from North Dakota today, move to Mexico.
4 The acquisition could provide the opportunity to ship
5 to North Dakota from Mexico through a single line
6 carrier.

7 In conclusion, Richardson supports the
8 CP/KCS acquisition as we believe it will improve the
9 efficiency and economy of our existing rail movements
10 by providing an alternative, single line carrier to
11 some of our existing destinations, and also open up
12 other destinations which Richardson can use in the
13 future. Jean-Marc and I would be happy to take your
14 questions, thank you.

15 CHAIRMAN OBERMAN: Thank you very much.
16 Are there any questions from the Board? No, it's
17 very helpful testimony, and we appreciate your
18 tolerance of our IT difficulties, and we're glad we
19 were able to accommodate you before the day expired,
20 so thank you much.

21 MR. RUEST: Thanks a lot, thank you very
22 much.

1 CHAIRMAN OBERMAN: All right. So we are
2 going to proceed immediately to Katherine Garcia of
3 the Sierra Club.

4 MS. GARCIA: Got it, thank you. Good
5 afternoon Chairman Oberman and the Surface
6 Transportation Board, and I appreciate your
7 flexibility today to accommodate my schedule. And I
8 apologize for the interruption to the previous
9 testifiers.

10 So my name is Katherine Garcia, and I am
11 the Director of Sierra Club's Clean Transportation
12 for All Campaign. The Sierra Club is the most
13 enduring and influential grass roots environmental
14 organization in the United States. We amplify the
15 power of our 3 million members, and supporters, to
16 defend everyone's right to a healthy world.

17 This proposed merger will have a profound
18 environmental and economic impact throughout the
19 nation. For example, in many parts of the country
20 rail traffic shipping hazardous, dirty crude oil from
21 Canada to Mexico will increase, threatening rural
22 ecosystems, suburban communities and dense urban

1 neighborhoods.

2 The merger will also have a major economic
3 impact. For example, the Canadian Pacific
4 headquarters in Minneapolis, Minnesota, will move to
5 Kansas City, Missouri. This will result in over 200
6 jobs, and an estimated 15 million in wages being lost
7 from the Twin Cities.

8 This will have a lasting and devastating
9 impact on the economy of the region. Any
10 consideration of a railroad merger should both
11 recognize the effects of that merger, and also
12 incorporate actions to mitigate those impacts. It
13 should also factor in past behavior of the railroads,
14 and call upon them to be good neighbors to impacted
15 communities.

16 In the Minneapolis St. Paul region, where
17 the job losses will be largest, a broad coalition of
18 local, elected officials have reached out to their
19 Congressional representatives seeking mitigations.
20 These local officials are understandably frustrated
21 that CP has been unwilling to repurpose long unused,
22 right-of-way for the public good.

1 You have already received this letter from
2 U.S. Representative Betty McCollum, who represents
3 St. Paul. And tomorrow the Office of U.S.
4 Representative Ilhan Omar, who represents
5 Minneapolis, will be testifying here to call on you
6 to get the railroads to be better neighbors, and to
7 specifically help mitigate the impact of job losses
8 by repurposing four sections of unused right-of-way.

9 Converting former railroad right-of-way
10 for bicycle and pedestrian use is hugely beneficial
11 for economic development, public health, and climate
12 action. Your efforts on this matter will not be
13 wasted. The Twin Cities have a well-earned
14 reputation as a model for the most rails to trails
15 projects in the U.S. As just one example, the
16 midtown Greenway in Minneapolis is so popular with
17 people walking and biking, that it carries more daily
18 users than 90 percent of city streets.

19 It is such a valuable community amenity
20 that it has inspired a huge development boom of
21 housing called bicycle oriented development, or BOD,
22 for miles directly adjacent to the corridor.

1 Minneapolis's tax base has benefitted greatly from
2 this, and the whole region benefits from the housing
3 provided.

4 There is a brand new trail just across the
5 Mississippi River that with a stroke of CP's pen
6 could easily be connected to create a seamless
7 bicycle highway connecting Minnesota's capital city
8 to the larger Twin City.

9 The two cities of Minneapolis and St. Paul
10 would love to connect these two trails, and share the
11 direct and indirect economic and public health
12 benefits of that connection, but they have been
13 stymied by CP, even though there is available empty
14 right-of-way and a bridge over the Mississippi River
15 that has lacked a second set of tracks for many, many
16 years.

17 How the STB handles this proposed merger
18 will determine whether impacted communities only
19 experience the down sides of economic losses, or
20 whether compensating upsides can be delivered by a
21 railroad that behaves like a partner and a neighbor.

22 Please listen to the long list of local

1 elected officials and their Congressional
2 representatives, McCollum and Omar. I urge that you
3 use this historic chance, a once in a lifetime
4 opportunity, to bring CP to the negotiating table, to
5 listen to two members of Congress, and 22 state and
6 city elected officials to secure public benefits to
7 reduce the harms of this proposed merger from
8 Minnesota and every community impacted.

9 Thank you for holding today's hearing, and
10 for this opportunity to testify.

11 CHAIRMAN OBERMAN: Thank you very much,
12 and you don't have to apologize for the scheduling
13 here. We're really trying to do what we can, and we
14 wanted to accommodate you. I have a couple of
15 questions. Have you approached CP about the use of
16 these unused right-of-ways for either bicycle or
17 walking paths?

18 MS. GARCIA: I believe our chapter has in
19 Minnesota. I believe so.

20 CHAIRMAN OBERMAN: And they're not
21 interested, they turned you down, what's the
22 response?

1 MS. GARCIA: I believe they just have not
2 been interested in accommodating that, and that's why
3 we're taking this opportunity to raise these issues
4 now.

5 CHAIRMAN OBERMAN: And are you asking us
6 to condition the merger on some kind of a use of
7 these right-of-ways?

8 MS. GARCIA: We essentially want to bring
9 this to your attention that this is like the letter
10 from McCollum specifically states that by using this
11 -- by mentioning this as a directive essentially,
12 this is like the right time to make this appropriate
13 recommendation before it goes -- basically, this is
14 the important time to make this recommendation.

15 CHAIRMAN OBERMAN: I'm not at all
16 familiar. I can't picture what all of the network in
17 the Twin Cities area looks like. Do you have a --
18 which you don't have to provide now, a more specific
19 description of the rights-of-way areas that you think
20 should be accommodated for walking paths, and so
21 forth?

22 MS. GARCIA: So this particular letter

1 does have a map on here. And it has this
2 information.

3 CHAIRMAN OBERMAN: All right. It
4 designates the areas you're talking about, and that
5 is a letter from whom?

6 MS. GARCIA: This is from Representative
7 McCollum.

8 CHAIRMAN OBERMAN: To the Board?

9 MS. GARCIA: To the Board.

10 CHAIRMAN OBERMAN: What's the date on it
11 just so we could find it?

12 MS. GARCIA: September 7.

13 CHAIRMAN OBERMAN: All right. And so
14 that's the same area you're talking about?

15 MS. GARCIA: Yes, yes. I'm here basically
16 raising up this issue on behalf of the Sierra Club.

17 CHAIRMAN OBERMAN: And do you know whether
18 these rights-of-ways still have tracks and track pit
19 on them? Have them been taken up? Do you know the
20 condition of them?

21 MS. GARCIA: I don't know the condition.

22 CHAIRMAN OBERMAN: Okay. We'll find out

1 I'm sure.

2 MS. GARCIA: Okay.

3 CHAIRMAN OBERMAN: Any other Board members
4 have questions?

5 Thank you Ms. Garcia and I appreciate your
6 patience. Okay. Our court reporter has asked for
7 relief, and I'm going to grant it to him, so let's
8 take a 10 minute recess, and then we'll reconvene
9 with the BN panel.

10 (Break.)

11 CHAIRMAN OBERMAN: We'll finish. The
12 court reporter is going to fade at what time?

13 COURT REPORTER: 7:00.

14 CHAIRMAN OBERMAN: Oh you are out at 7:00.
15 Oh okay.

16 COURT REPORTER: 7:00 I'm sorry.

17 CHAIRMAN OBERMAN: No, that's okay you
18 were told because I was accurate. No, it's okay.
19 Well then I have to -- then I'm not optimistic about
20 getting finished with BN tonight. I thought -- no,
21 no, you're fine. You were told 7:00. You're not
22 obligated to stay past 7:00. Don't worry about it.

1 All right. But let's get back and finish this issue
2 with Mr. Gabriel.

3 So I think when we recessed for a moment
4 the question pending was the contractual
5 relationship, if any. I'll just go back to the UP/SP
6 merger, somewhere out of that merger KCS got
7 trackage rights. And were those trackage rights,
8 they were embodied in a contract with UP, but also
9 with both UP and BN on this 50/50 line?

10 MR. DENTON: So let me try to provide some
11 clarity here, and I apologize for not answering
12 directly Mr. Chairman.

13 CHAIRMAN OBERMAN: That's all right.

14 MR. DENTON: So figure one to Mr.
15 Gabriel's opening verified statement, it's page BNSF
16 9 - 219. I could even bring it up there if it would
17 be helpful, but it has a map of the various line
18 segments over which KCS operates, yeah.

19 CHAIRMAN OBERMAN: Do you have an extra
20 copy it would be helpful.

21 MR. DENTON: Sure. Yeah. Ms. Estes is
22 bring it up.

1 CHAIRMAN OBERMAN: Thank you much.

2 MR. DENTON: So the map depicts 11
3 different subdivisions or line segments between
4 Laredo and to Quincy. You'll see that there are a
5 number of line segments that are owned by Union
6 Pacific over which KCS operates, along with others,
7 BNSF, Amtrak, et cetera. But the great, large
8 majority of these are KCS operating as a tenant over
9 UP as a landlord.

10 The HBT for example, is the Belt Line, the
11 Houston Belt Line railroad, which is a joint venture
12 50/50 between UP and BNSF. The only piece where KCS
13 operates over a BNSF owned line is the 50/50 line
14 segment, which is shown as number 2 on this map. The
15 50/50 line segment I understand the trackage rights
16 agreement between KCS and the landlord, was between
17 KCS and Union Pacific.

18 And after that trackage rights agreement
19 was entered into BNSF bought a 50 percent interest in
20 that line. So I understand that the trackage rights
21 agreement is between Union Pacific and KCS. So
22 again, to sum all of this up, KCS is largely a tenant

1 on Union Pacific lines, and the contractual
2 relationship for those is between KCS and UP.

3 And again, Mr. Simmons in his verified
4 statement, makes it very clear how KCS interprets the
5 cost allocations.

6 CHAIRMAN OBERMAN: That I understand, but
7 let me just ask this question. When you bought the
8 50 percent ownership in it, Did you become
9 obligated under that contract as a new joint owner?

10 MS. ESTES: Yes Chairman. That particular
11 deal was part of the UPSP merger.

12 CHAIRMAN OBERMAN: All right. So that
13 agreement has something to say about who pays what
14 under some circumstances. And my question is -- I'm
15 just trying to get a handle on this. If the traffic
16 growth had happened naturally over a period of years
17 rather than suddenly as a result of a merger, sort of
18 like the boiling frog at some point you're going to
19 need more infrastructure. Under the trackage rights
20 agreement who pays for it?

21 MS. ESTES: Chairman, in general, I don't
22 have them all at my fingertips. I think we can

1 certainly submit a fuller list of all the agreements.
2 I believe they're in our work papers. In general,
3 under the agreements that arose out of UP/SP merger,
4 which BNSF has with UP, the way the infrastructure is
5 handled is an addition in betterment, a siding, a
6 bridge, you know, a second track is handled, first we
7 coordinate with UP.

8 We were talking with them all the time,
9 determining what is needed that investment would be
10 put in place, and then it would be billed back to the
11 users on a usage percentage basis, based on your
12 GTM's for the prior 12 month period.

13 Now all of that is after UP/SP put in
14 whatever was needed for their merger.

15 CHAIRMAN OBERMAN: I understand. So the
16 answer to my question is if we weren't in a merger
17 situation, and KCS's traffic just increased over a
18 period of years, by these number of trains, if more
19 infrastructure was needed it would be paid for under
20 this formula you've just described?

21 MS. ESTES: Well no, because again KCS has
22 their own agreements with UP. So I think that's

1 probably a line of questions for UP tomorrow, but
2 it's our understanding that there's a dispute
3 between those parties as to how much KCS should pay
4 in those situations.

5 I think it's KCS's position that any
6 addition and betterment is covered by the rent they
7 pay, and not an extra, which again is why I think the
8 applicants in our opinion, why the applicants did not
9 go down and study Houston. Because if they suggest
10 infrastructure that's needed down there, they're
11 responsible for fully funding it.

12 CHAIRMAN OBERMAN: Well, let me ask this
13 question. I understand that apparently you submitted
14 some kind of a study that was stricken because it was
15 in a reply brief, but just not to get into it for
16 that reason, but was it an RTC study, or some other
17 kind of capacity model?

18 MR. DENTON: Yes sir, RTC study.

19 CHAIRMAN OBERMAN: It was an RTC study.

20 MR. DENTON: Yes.

21 CHAIRMAN OBERMAN: Do you -- yeah?

22 MR. GABRIEL: Within the last 60 days.

1 MR. OBERMAN: All right. And I take it,
2 let me ask this question. You are not here and
3 asking for this as a condition with any specific
4 number in terms of how much infrastructure has to be
5 built, or what infrastructure is needed. Is that
6 right?

7 MR. GABRIEL: Yeah, so we're simply
8 wanting to perform a study with all the necessary
9 data points that we have. Obviously, we only know
10 the assumptions that we had to perform the data. We
11 didn't have the assumptions of where the traffic,
12 when the traffic would come on from CP/KCS, so what
13 we're looking to do is assess and build that roadmap
14 of projects that are needed for when this traffic
15 will come on.

16 As stated earlier, the way this would
17 normally work is us and UP would work hand in hand
18 regularly to address that you know slow and steady
19 organic growth. That's what we don't have as all
20 the assumptions here, so that's one of our basic
21 asks.

22 CHAIRMAN OBERMAN: If you are asking for

1 us to condition this merger on an expenditure for
2 infrastructure, is it not your burden to tell us what
3 that condition should be? That's I guess for Peter.

4 MR. DENTON: Right, no. I believe Mr.
5 Chairman that the burden is on the applicants to put
6 forward their operating plan, and to apply that to
7 existing infrastructure to determine whether any
8 capacity improvements are necessary. And they did
9 that, you know, across the majority of their network.
10 It just so happens that in the one part of the
11 network where they could be able to foist their costs
12 onto their competitors, they proposed nothing.

13 CHAIRMAN OBERMAN: Yes, but now you're
14 here asking for a condition. So isn't it your
15 obligation to tell us what that condition should be,
16 and not just free floating?

17 MR. DENTON: Frankly, I think the
18 condition should be what sound merger policy is, both
19 on in terms of studying the issue and making sure
20 that applicants are responsible for internalizing
21 the costs of their merger. What we're asking for is
22 very modest. It's not for a particular project, it's

1 not for you to analyze an RTC model in determining
2 you know whether or not it's correct or not.

3 It's for everybody to sit down, come up
4 with a plan to handle this, and make sure applicants
5 are responsible for their costs.

6 CHAIRMAN OBERMAN: So Karen asked the
7 question about whether infrastructure was needed now
8 if there were no merger, and I think you said it
9 wasn't, but we just heard from Councilman Gallegos
10 about all of the problems in Houston. It doesn't
11 sound to me, and I haven't heard anybody contest
12 that, that there's adequate infrastructure in the
13 Houston terminal to handle -- I'm not sure whether
14 it's your trains or not, but the whole terminal, it
15 sounds like there's significant blockages inside the
16 City of Houston.

17 So you know we've dealt with this
18 conceptually, not to get into another case, in the
19 Gulf Coast case of who's going to benefit from more
20 infrastructure. And I'm not at all clear if more
21 infrastructure is built to facilitate train movements
22 through Houston, it's not going to benefit everybody,

1 and you're asking KCS to absorb it all, so I don't
2 know how we sort that out.

3 MR. GABRIEL: So in response to that Mr.
4 Chairman, I would say a couple things. One as you
5 know, most of the railroads have had a challenge --
6 had challenges throughout most of the summer as we've
7 talked with you quite regularly on. But what I
8 would say is that the Houston complex is back to
9 performing at normalized levels under normalized
10 traffic at its current state.

11 The last you know six weeks would be
12 parallel to the service improvements that we've been
13 submitting to you, and you've seen Houston and the
14 Houston complex would largely follow that same trend
15 line, so again the challenges this summer were
16 certainly there, and that could be part of what Mr.
17 Gallegos, I don't want to speculate. But again, I
18 would say under the current volumes and historical
19 levels it's performing at what we would call a
20 historical norm.

21 CHAIRMAN OBERMAN: It didn't sound like
22 from Councilman Gallegos, that historical norm was

1 satisfactory. I didn't hear him say this was just a
2 short term acute problem, you know. And what I know
3 about terminals and cities that have been built up
4 over time, my strong sense is that that's not the
5 case.

6 Let me ask this question, and I don't know
7 where all of these routes are, but you've described
8 that your traffic and UP's traffic go around Houston.
9 Is there capacity there to move KCS's through traffic
10 around Houston through some alternative trackage
11 rights agreement, rather than going through the
12 middle of the city?

13 MR. GABRIEL: So I would say largely our
14 traffic and UP's traffic utilizes the full web of
15 tracks that are there because that's where the
16 customers are, and that's where our serving yards
17 are. The main line thoroughfares for lack of better
18 words will carry the concentrated burden of this
19 through traffic that is a step level increase.

20 And it does address kind of the last point
21 we were discussing that this step level will come on
22 faster if we would have time to do the diligence, and

1 certainly get ahead of the capacity projects
2 necessary to handle it, and that's why we're asking
3 that the traffic cannot be brought on until we at
4 least study it. We're confident we'll identify
5 projects that will need to be funded by KCS.

6 CHAIRMAN OBERMAN: Well maybe I wasn't
7 being clear. I thought you had told us earlier
8 that BN and UP's through traffic goes around Houston.
9 You showed us the map showing it's based on.

10 MR. GABRIEL: Yes, after Temple, Texas is
11 Fort Worth and so forth. One way is from Quincy,
12 Louisiana circuit.

13 CHAIRMAN OBERMAN: But is there a way to
14 get to KCS traffic onto these tracks that go around
15 the city, and relieving the traffic inside the city?
16 I don't know what the capacity is on your traffic,
17 and UP's for your tracks and UP's tracks. I'm just
18 trying to think logically of a system, or a network
19 point of view if that doesn't make more sense, and if
20 it's possible. And it may be impossible, I have no
21 idea where the tracks go.

22 MR. GABRIEL: Without studying it in

1 detail, I would say I would have the same concerns of
2 the step level nature of the increase, and the
3 inability to get ahead of the capital expansion
4 needed to handle that against a step level increase
5 in the volume on those routes. I don't want to speak
6 for UP, but for BNSF that's how I would.

7 CHAIRMAN OBERMAN: I just assume logically
8 there's more fluidity if all the trains are through
9 trains, than if you got a lot of stopping and
10 starting from local trains it might be easier, and
11 result in either no infrastructure, or less
12 infrastructure, if you could make that arrangement
13 with KCS if it their trains coming through the city
14 were really going to cause that big of a problem.

15 MR. GABRIEL: As always we're willing to
16 talk and engage with them on many of those
17 discussions.

18 MS. ESTES: And Chairman, I think you
19 know, applicants would have to agree that there's a
20 problem in Houston, and we're not at that point. If
21 they agree there was a problem, they would do what
22 applicants do in other mergers, we would be talking,

1 we would be negotiating settlements. We'd do what we
2 did in UP/SP.

3 CHAIRMAN OBERMAN: You're trying to get us
4 to say there's a problem, and I'm trying to find out
5 if we did say there's a problem, are there
6 alternative solutions. That's why.

7 MR. GABRIEL: Part of our ask is that we
8 would study you know, is there a problem or not, and
9 quantifiably say that there is or not.

10 CHAIRMAN OBERMAN: All right. Let me ask
11 this question, assuming you have to come back
12 tomorrow, which I think is a fair subject, is it
13 possible just to get a map showing physically where
14 your through routes go, and where they may, or may
15 not even connect with KCS?

16 And maybe I'm asking the impossible, it's
17 just a thought that occurs to me listening to your
18 description, but that was all I had.

19 BOARD MEMBER FUCHS: I wanted to just make
20 sure, Marty, clarifications are very helpful, thank
21 you. On the kind of additions point, do you all
22 understand -- and I know this is probably a better

1 question for UP, but for additions, KCS is obligated
2 on a GTM base to pay for additions that the way it
3 works.

4 UP pays sort of and bills KCS. Is that
5 how it works?

6 MS. ESTES: I think it's another question
7 for UP.

8 BOARD MEMBER FUCHS: Okay.

9 MS. ESTES: That's not certainly not KCS's
10 interpretation.

11 BOARD MEMBER FUCHS: Understood. And so
12 are you all saying that you believe that any
13 additional traffic beyond what you deem to be the
14 capacity of Houston complex, should be 100 percent
15 funded by KCS, and do you understand KCS's position
16 to basically it should be proportioned to the excess
17 ton miles, or what are you -- can you summarize
18 exactly where the parties are to your understanding
19 right now?

20 MS. ESTES: Sure, sure. So I think KCS's
21 position is that they should not have to pay for any
22 infrastructure improvement.

1 BOARD MEMBER FUCHS: Because it's already
2 at capacity.

3 MS. ESTES: And even if the Board said
4 look, you need something new. They would say that
5 additional betterment should be covered by the rent
6 they pay to UP, and that is it.

7 BOARD MEMBER FUCHS: That's it. Okay.

8 MS. ESTES: So nothing would change. They
9 would just continue to pay their rent.

10 BOARD MEMBER FUCHS: Okay.

11 MS. ESTES: Their GTM mill rate. Under,
12 let's say you ordered 100 million dollar bridge. BNSF
13 would then pay our usage share for the past 12 months
14 looking back, when KCS doesn't even have those
15 increased trains, we would be responsible for
16 whatever our usage was at 35 percent let's say of the
17 100 million dollar bridge.

18 BOARD MEMBER FUCHS: And your position is
19 that CP/KC should be responsible for 100 percent?

20 MS. ESTES: Correct. No need to bridge,
21 but for this step up level increase.

22 BOARD MEMBER FUCHS: I understand, all

1 right thank you.

2 BOARD MEMBER SCHULTZ: Just a couple of
3 general questions. I think we touched upon this
4 earlier in terms of investment and infrastructure
5 that has already been made in that region, around
6 what years were those investments made?

7 MR. GABRIEL: So I'm going on an
8 annualized basis, so us and UP as was mentioned
9 earlier, worked annually throughout the year to
10 figure out the next year and the years out capital
11 investment, but there's been incremental investment
12 made over the you know, in the last ten years.

13 BOARD MEMBER SCHULTZ: And so when you
14 make those investments how far out do you project in
15 terms of increased growth in the region?

16 MR. GABRIEL: Normally three to five years
17 based on permitting cycles, but it does depend on the
18 size of the project. So for example, like small
19 siding passing track would be different than a
20 bridge. You know so to say, based on permitting and
21 so forth, so again the unfortunate answer is it
22 depends on size, scope and certainly other outside

1 factors.

2 BOARD MEMBER SCHULTZ: And so this is I
3 guess specific, but at the time you made those
4 investments how many trains per day were you running?

5 MR. GABRIEL: It would again depend on the
6 web of the rails that you think about, so again it
7 depends on the individual line segment for that
8 subdivision. So again going back to the route that
9 was going to be consumed here, we'd be 25 ish trains
10 a day, and that's where the concern is that you have
11 this step level of call it a 30 percent add in
12 trains, coming across that small segment in such a
13 short period of time.

14 So you know it would depend on the
15 individual traffic on that segment, or subdivision as
16 we call it.

17 BOARD MEMBER SCHULTZ: I think again what
18 I'm trying to figure out is I guess what investments
19 were made, how many trains were running per day at
20 the time the investment was made, and how many years
21 out did you project for growth, and where are we
22 today, and what is projected beyond that?

1 MR. GABRIEL: We could follow-up with
2 specifics on what projects we've done and the volume.
3 I would say typically our out years are somewhere in
4 the 5 to 10 year range, so.

5 BOARD MEMBER SCHULTZ: Okay.

6 BOARD MEMBER FUCHS: Very quickly, and I
7 hesitate to even suggest this or ask about it given
8 some of the difficulty that we've had working with
9 people on different RTC models, but there was a
10 suggestion by applicants that they would support the
11 work of joint RTC. Has there been thought of the
12 parties getting together, each company has RTC
13 experts, and I'm sure that there are independent
14 firms available.

15 Contracting together an independent firm
16 your experts weighing in, and making that type of
17 assessment on the capacity of the region. What the
18 Board's rule on that is open to debate, but I'm
19 wondering what your reaction is to applicant's
20 suggestion?

21 MR. DENTON: Not only was there a thought,
22 that's our suggestion to be clear. Yes.

1 CHAIRMAN OBERMAN: And just so I'm clear.
2 You're talking about an RTC study done by a different
3 jointly hired contractor, not the one that they
4 submitted and was stricken?

5 MR. DENTON: We would be open to a
6 collaborative effort you know however we all decide
7 to do so, where we study the issue, and all come to
8 the right place.

9 BOARD MEMBER HEDLUND: how long do you
10 think such a study would take?

11 MR. GABRIEL: We would call a 90 days to
12 six months.

13 MR. DENTON: I will note that a fair
14 amount of work has been done already, so again we're
15 not going to get into details about what's been
16 stricken from the record, but a fair amount of work
17 has been done already that we think shows you know a
18 good current state, plus the KCS trains.

19 BOARD MEMBER HEDLUND: So what you're
20 suggesting is we should hold off a decision until a
21 study is done that would take three to six months?

22 MR. DENTON: I don't think we're here

1 telling you that you need to you know expand your
2 statutory deadlines at all. I think what we're
3 telling you is that once a plan is in place, and the
4 infrastructure is adequately assessed, paid for by
5 applicants, and implemented, before any of that
6 happens, we don't want KCS to increase traffic if
7 those increases would impact existing traffic flows
8 in Houston.

9 So we're not asking you right now to hit
10 pause on your merger proceeding, and you know deal
11 with this issue. We think this can be dealt with
12 after approval for example, if what we're asking for
13 is put in place by you.

14 CHAIRMAN OBERMAN: I always muse about how
15 you have something that is the "gold standard" that
16 can be hotly contested by which firm you hire. I do
17 understand from my little knowledge of RTC studies,
18 if you've already done one, that some of that work
19 could be used by somebody else and you wouldn't have
20 to start from scratch.

21 MR. DENTON: In fact, we didn't start from
22 scratch. It was a TxDot study which was

1 performed, and we submitted that was not stricken
2 from the record. It was submitted with our opening
3 comments, where you can take a look and see where
4 what results of that study. We took that study,
5 built on it, and came up with what we have.

6 CHAIRMAN OBERMAN: So are you saying TxDot
7 had a consultant, and you hired the same
8 consultant to elaborate on their study?

9 MR. DENTON: Correct.

10 CHAIRMAN OBERMAN: Okay. Are there any
11 other questions for Mr. Gabriel, or on this subject?
12 Patrick?

13 BOARD MEMBER FUCHS: I would say I think
14 that maybe perhaps that's the key difference then in
15 applicants in yours, it comes down to the payment
16 mechanism, right? So I think it sounds like a lot of
17 people can agree to get in the same room and discuss
18 inputs about a model, and to determine whether or not
19 there is adequate capacity in Houston, but that
20 doesn't necessarily answer the payment question, and
21 you're proposing that the Board answer the payment
22 question?

1 MR. DENTON: Yes, Commissioner Fuchs, in a
2 very straightforward, and frankly, we think modest
3 way of setting down the standard that good merger
4 policy says that applicant should be responsible for
5 those costs.

6 BOARD MEMBER FUCHS: I understand, thank
7 you.

8 CHAIRMAN OBERMAN: Except for the
9 conceptual difficulty of sorting out how much benefit
10 you're going to get from the existing problems in the
11 Houston area, from any new infrastructure.

12 MR. DENTON: Yes Mr. Chairman. And we
13 recognize that there are complexities there, but we
14 believe if you set down you know what we believe, and
15 most agree, is good merger policy, we would be able
16 to take that standard and apply it as necessary.

17 CHAIRMAN OBERMAN: Well, merger policy
18 doesn't answer the question of who's benefitting from
19 physical infrastructure. See e.g. CREATE because
20 it's always never been clear to me who's really
21 benefitting from those projects the most, compared to
22 who's paying for them. So I think it can be.

1 There's a way to answer it, but I don't think it's
2 just a numbers question. There was a lot of
3 judgment calls.

4 All right. I think we are finished with
5 this phase of your presentation. I really since we
6 obviously couldn't come close to finishing today, and
7 we do have these three witnesses who really needed
8 today, I think we should switch. If they're very
9 short, and we have time to get started we could
10 proceed until seven o'clock. It seems unlikely that
11 it would be worth it, but if you won't mind sticking
12 around I think we're going to switch to these three
13 other witnesses.

14 MR. DENTON: Sure, thank you.

15 CHAIRMAN OBERMAN: And listen, I apologize
16 to everybody. It's really nobody's fault. It's just
17 at least this Board's effort to be thorough.

18 MR. DENTON: We start at 9:00 tomorrow?

19 CHAIRMAN OBERMAN: We start at 9:00
20 tomorrow. And unless I am wrong, we would start with
21 you immediately right? Yeah.

22 MR. NOBER: You will not delay us for

1 other witnesses because we really, it's important, we
2 will but.

3 CHAIRMAN OBERMAN: No I think it's fair.
4 We'll start with you.

5 MR. DENTON: Thank you.

6 CHAIRMAN OBERMAN: Okay. Let's ask Kirk
7 Aubry from Savage, who's testifying virtually, but
8 give us a moment until we get the computer set up.
9 Mr. Aubry? Mr. Aubry are you with us? All right.
10 Let's switch to Mr. Knief, Bob Knief from Bartlett?
11 No? Did we lose him?

12 MR. KNIEF: Over here.

13 CHAIRMAN OBERMAN: Oh you're there. Are
14 you together?

15 MR. KNIEF: We are, and actually Kirk is
16 going to join from another office. I'm in Kansas
17 City, he's in Salt Lake, so he's going to join, but I
18 just let him know.

19 CHAIRMAN OBERMAN: Okay.

20 MR. KNIEF: So he's going to hop on here
21 momentarily.

22 CHAIRMAN OBERMAN: All right. Why don't

1 you start Mr. Knief if you're ready.

2 MR. KNIEF: Okay. And I think the way
3 we've got this if you don't mind giving him about a
4 minute, he's going to be here, and that might work a
5 little bit better for us.

6 CHAIRMAN OBERMAN: All right. All right.
7 Mr. Aubry are you there? Can you hear us?

8 MR. AUBRY: I can hear you. Can you hear
9 me Mr. Chairman?

10 CHAIRMAN OBERMAN: Yes sir, proceed.

11 MR. AUBRY: Thank you very much. Good
12 afternoon Chairman Oberman and Board Members. We
13 want to thank you for the opportunity to share our
14 thoughts on the CP/KCS combination. My name is Kirk
15 Aubry, I'm the President and CEO of Savage.

16 I was having a tenure envy based on the
17 other presenters. We're only a 75 year old company,
18 started in Salt Lake City, and our company is today a
19 global provider of industry, infrastructure and
20 supply chain. So I have the privilege today of
21 speaking on behalf of our 4,500 team members in over
22 225 locations.

1 And I would share with the Board that we
2 have a strong legacy as a company, having grown from
3 three brothers and a truck, a truck which we still
4 have, starting in 1946 to moving and managing what is
5 essential to our customers around the world. Savage
6 today handles over 800,000 railcars across North
7 America every year.

8 We move grain from farmer's fields, and we
9 partner with the KCS to move that grain from our
10 elevators in the Midwest to our terminals in Mexico.
11 We also handle industrial products throughout North
12 America. And we are pleased, I would say, emphasize
13 that we are very pleased with the service we get, and
14 have gotten from KCS to move that grain, and more
15 importantly, we view KCS as an important service
16 provider, but also as a partner, and see them as
17 focusing on meeting our transportation needs.

18 So in short, we support the approval of
19 the CP/KCS combination, and I'll tell you why. We
20 believe the transaction would provide significant
21 benefits. When I first learned about the merger it
22 struck me as a major step in operationalizing USMCA

1 and facilitating the flow of goods throughout this
2 free trade corridor that we all worked so hard on
3 establishing.

4 And I would just also say during the many
5 years that we worked with KCS as a partner, we
6 believe that this transaction will actually increase
7 their ability to support us, and grow, and help us
8 thrive into the future.

9 Currently, as a shipper with the KCS,
10 we've had limited access to some upper Midwest U.S.
11 markets to source products for our customers. We
12 also haven't had economic rail access to Canadian
13 markets. And so, through the combination of CP and
14 KCS, we're going to be able to access new single line
15 haul markets that will help us grow our business, and
16 help us serve our customers better.

17 These new markets will open the door for
18 us to competitively expand, not only our grain
19 franchise, which is incredibly important to our
20 growth, to help us serve more farmers and more
21 customers, but also help us serve and create a
22 service for our rail centric bulk material handling

1 business through the creation of multi-commodity
2 transload terminals and logistics parks.

3 We see that as ultimately benefiting
4 consumers by providing additional and more
5 consistent, reliable supply chains. And it will
6 continue our effort to take trucks off the road, and
7 move freight more efficiently, more safely, and more
8 cost-effectively. The transload terminals I'm
9 talking about and logistics parks that we're
10 contemplating, and building will benefit from the
11 economically advantaged single line haul service to
12 source products from across a more robust, combined
13 network footprint.

14 Safety is embedded in our culture. We've
15 heard testimony, I've had the benefit of listening to
16 some of the other testimony, and safety is a
17 particularly critical issue for all of us. It's in
18 our culture, and we believe that both railroads share
19 that strong focus on safety, and have a track record
20 of operational excellence.

21 I'm confident that the CP/KCS combination
22 will be able to integrate, and integrate their

1 operations to the benefit of rail customers and other
2 stakeholders, and we've seen strong evidence of that
3 goal as we've gone through this process. We really
4 do see the transaction as uniquely beneficial, with
5 none of the down sides that might result from another
6 round of Class I railroad consolidation.

7 We have the benefit of working with other
8 Class I railroads as well, most of them. We think
9 the potential impact of the transaction is that it
10 will allow a combined CP and KCS to drive what we
11 consider better volume, better velocity and value.
12 That means the ability to handle freight even more
13 efficiently, more safely and more cost-effectively.

14 And we believe it will allow our company,
15 and also other companies, to reach previously
16 uneconomic markets ultimately improving supply chains
17 for customers and consumers. For these reasons,
18 Savage is voicing strong support for the combination
19 of CP and KCS because we're convinced that it will
20 enhance competition, provide expanded options, and
21 drive efficiencies for customers of all sizes, so we
22 urge this Board to approve the CP acquisition of KCS

1 so that the rail systems could be integrated, and the
2 end to end benefits that we see are going to be
3 realized for all stakeholders.

4 Thank you again for the opportunity to
5 share our enthusiastic support for the combination of
6 KCS and CP.

7 CHAIRMAN OBERMAN: Thank you much Mr.
8 Aubry. Can I be optimistic enough to say that Mr.
9 Knief spoke for you too, or do you have something
10 you'd like to add?

11 MR. KNIEF: We're not so lucky Mr.
12 Chairman. I've got a few words to share, but I'll
13 get through it. Thanks for that opportunity. My
14 name is Bob Knief. I'm President of Bartlett, which
15 is a Savage company. We previously submitted a
16 letter in this matter in support of CP/KC, the
17 transaction, and opposing Canadian National's request
18 for divestiture of the KCS line between Kansas City
19 and Springfield, Illinois, which we understand in
20 this proceeding has been referred to as the
21 Springfield line.

22 We stand by both of those positions today.

1 Bartlett was established in 1907, we're a diverse
2 agri business, focused on the acquisition, storage,
3 transportation, processing and merchandising of
4 grain. We operate 22 facilities in the U.S. and
5 Mexico, supply all classes of wheat, feed grains,
6 food grain, corn and soybeans to millers and
7 processors, and we produce a full line of commercial
8 patent flowers and animal feeds.

9 We're a leading exporter of U.S. grain to
10 Mexico. For some of our facilities such as Council
11 Bluffs, Iowa, other Class I railroads could provide
12 service to Mexico. Since 2005 we have directed
13 nearly all of that traffic to Mexico from those
14 facilities via KCS routes.

15 Other rail options have always been
16 available to us, but we have continued to choose KCS
17 single line routes because they best meet our
18 transportation needs. Further, we believe the CP/KCS
19 transaction can only enhance the service options
20 available to us. We find the single line options are
21 typically superior to interline options, and we look
22 forward to new single line options unlocked by the

1 transaction.

2 In fact, we are actively considering
3 additional investment if the transaction is approved.
4 In addition to supporting the transaction, we
5 strongly oppose Canadian National's request for a
6 forced sale of the Springfield line. The Springfield
7 line is a key part of the efficient, KCS service,
8 underpinning a number of important investments
9 Bartlett has made.

10 A forced sale of the line to CN would
11 remove an efficient single line available to us
12 today, and force us to use a less efficient
13 alternative. We operate a facility on the
14 Springfield line located in Jacksonville, Illinois.
15 All of the grain shipped out of that facility goes to
16 Mexico. Last year we shipped almost 11,000 railcars
17 from this facility alone, all to Mexico, and all on
18 KCS.

19 We've made substantial investments in that
20 facility to support shuttle service to Mexico. We've
21 made additional investments in three regions of
22 Mexico to further capitalize on the efficiencies of

1 this service. A CN takeover of the KCS line that
2 serves our Jacksonville facility would put these
3 investments at risk by depriving us of the single
4 line service going west and south to Mexico, that we
5 benefit from today.

6 And haulage rights we don't see as a cure,
7 even if CP/KC were allowed to quote rates from Mexico
8 to Jacksonville, we would be hostage to CN's operations,
9 and the need for a new inefficient interchange at
10 Kansas City. The last thing we want is to destroy
11 the efficiency we have built through years of
12 partnership with KCS, and substantial investment by
13 injecting CN into this movement when it is not
14 necessary, and does not remedy anything.

15 Adding an unnecessary hand off between CN
16 and CP/KC to move our grain to Mexico makes no sense
17 when we have an efficient shuttle loading operation.
18 We don't want our single line service to Mexico to be
19 converted into a joint line move with haulage to
20 Kansas City for hand off to CP/KC to go to Mexico.

21 Slowing things down by injecting extra
22 handlings and delays from an interchange is a step

1 backwards. So in sum, KCS has been a very valued
2 partner for us for many years. We believe the CP/KC
3 transaction will create new efficiencies, and we are
4 in the process of evaluating substantial investment
5 to capitalize on those efficiencies.

6 And finally, a forced sale of the
7 Springfield line to the CN would move in the opposite
8 direction, eliminating a valuable and efficient
9 single line option that we have invested tens of
10 millions of dollars to support, and forcing upon us
11 in its place an inefficient alternative.

12 We therefore respectfully urge the Board
13 to approve CP's purchase of KCS, and to reject CN's
14 request for the forced sale of the Springfield line.
15 Thank you for that opportunity, and we welcome any
16 questions.

17 CHAIRMAN OBERMAN: We have -- Patrick has
18 a question.

19 BOARD MEMBER FUCHS: Can you hear me?

20 MR. KNIEF: Yes. We can.

21 BOARD MEMBER FUCHS: Great. I understood
22 you to say that the additional hand off would add

1 costs to the move, and eventually a source of delay.
2 Did I also hear you say that it could potentially
3 force alternative routings? And could you maybe
4 speak a little bit if I did hear that, could you
5 speak a little bit about what that means for your
6 business?

7 MR. KNIEF: Yeah. I didn't, I don't think
8 I hit on additional routings, but what we do, what we
9 are concerned about is cost and delays and
10 operational issues. We have facilities that are
11 served in that way, and the direct line option is
12 clearly a better way to go.

13 BOARD MEMBER FUCHS: Got it, thank you.

14 CHAIRMAN OBERMAN: All right. Mr. Knief,
15 thank you very much, and I did not mean to undersell
16 the importance of your testimony, and actually it
17 added something that's very meaningful to what Mr.
18 Aubry said, so I appreciate it. All right, thank
19 you.

20 So we have one more witness who is here I
21 hope still. Mr. Tavengwa Runyowa.

22 MR. RUNYOWA: And I want to be very clear

1 at the outset that this is not a presentation about
2 what's happening in Canada, or that case. That's
3 just the context of what brought me here, but not the
4 content of my presentation. So the reason why I'm
5 here is to discuss how this merger would dramatically
6 increase the latent, but serious problems arising
7 from CP railway's cross-border police command, or
8 police force, that's the CP police service here in
9 the United States.

10 And to just provide some general context
11 of why does this matter, make such a difference, I'm
12 just going to give you a few points of context around
13 how this CP police service is structured. So, as you
14 may be aware there's only one CP police service. CP
15 operates in a multiple number of incarnations and
16 subsidiaries on both sides of the Canada U.S. border.

17 But in terms of the CP police service
18 itself, it's got a united command that is based in
19 the Chief of Police in Canada, who is in charge
20 overall of the entire police force, and then there's
21 a Chief here for operations in the United States, and
22 a Chief for operations in Canada.

1 The Chief in Canada is a police officer
2 who is empowered under the Railway Safety Act,
3 Section 44, and based on information that we have
4 gathered, the Chief is not a commissioned police
5 officer anywhere in the United States, but certainly
6 not, and once they were able to get more data in the
7 State of Illinois.

8 In terms of the reporting hierarchy, the
9 Chief reports to the Chief Legal Officer, who as you
10 know is a corporate civilian and is based in Canada.
11 Now the Chief's duty, if he has to execute his duties
12 properly, it requires that he has access to
13 information so he can instruct his subordinates here
14 in the United States, obtain information that is
15 relevant to his power as someone who is commanding
16 police officers in the country, and so on, and so
17 forth.

18 So when you take all of that together
19 there is a number of systemic issues that arise from
20 this. The first one is the question of potential
21 civil rights issues. Is it in the American interest
22 to have persons who are not commissioned police

1 officers anywhere in the United States, who legally
2 speaking in this country are civilians because they
3 are not sworn police officers, exercising that cross
4 border control over police officers in the country?

5 So for example, if someone is arrested by
6 a police officer and this is not about did they do
7 it, or did they not, but is subjecting the citizen to
8 the law enforcement powers of an entity that is
9 ultimately controlled from outside American soil by
10 corporate civilians, consistent with the Civil Rights
11 for Americans. So, because I want to express that
12 I'm all the way over here, I'm just flagging these
13 issues, and those who aren't educated about it can
14 reach better conclusions.

15 The other question is obviously one of
16 sovereignty, can you have a foreign, like a presence
17 who is not based in the country who potentially might
18 not be citizens. I'm not sure if they are,
19 exercising the cross border command? You've got a
20 digital tunnel of information that has to go through
21 when a Chief asks about a file, or is providing
22 instructions.

1 So who on the corporate side is getting
2 access to this information? Is there a system to who
3 has got the proper security clearances as the U.S.
4 government might do if it was people who were based
5 in the country. And then there's also the question
6 of the expert territorial abdication of Canadian or
7 the United States.

8 So because the Chief's powers as police
9 officers arise solely under the Railway Safety Act,
10 that raises the question of where they're commanding
11 police powers in the United States, pursuant to a
12 Canadian statute, is that a potential violation of
13 American laws unless there is bilateral agreement
14 between the countries, for example, allowing
15 something like that to be happening.

16 There's also obviously customs and
17 immigration consequences too because when the trains
18 are going across an international border, all of
19 those police powers are vested in corporate civilians
20 who are based in Calgary, but they're watching
21 trains to do their job properly.

22 They have to watch trains. They have to

1 watch Calgary, and all the things that come along
2 with having to cross an international border. And
3 with its merger, this is a merger of not only
4 regional consequence, but also international
5 consequence as well. I see that my time is running
6 down, but I just wanted to emphasize that you know
7 when it comes to this issue it's not only about the
8 systemic part, but also about how deaths and serious
9 injuries are investigated.

10 And I know the submissions that this Board
11 is currently looking at, CP applied to strike those.
12 I believe a decision on that is pending, but those
13 submissions provide further details about all these
14 implications that we've discussed.

15 So I think I will just close by saying
16 something that was echoed a number of times by
17 members of this panel about how you want to find the
18 narrowest, and most proportionate way to address a
19 problem. And I will just make it clear that we
20 understand that the FRA in 2017 put out a regulation
21 that allows railroad companies to contract out their
22 police services, and they said they don't

1 necessarily have to hire them themselves.

2 There's a way that they can be
3 independent, based in the United States, that allows
4 CP to protect its property, to protect its workers,
5 to protect its customer's merchandise, but without
6 having to control that police force from said
7 American territory.

8 So in closing I'll just say that you know
9 this is a potential can of worms, it seems like it's
10 been an underground fire that's been burning for a
11 while. And with any can of worms it always is best
12 you know to deal with them under conditions that you
13 control and dictate.

14 Because if there's an incident down the
15 road on any of these accesses to national security,
16 privacy, and so on and so forth, that can puncture
17 this can, then it will be harder to control all the
18 problems that crawl out of it. So this merger,
19 because it's looking at how are we extending these
20 policing powers because once they acquire KCS the
21 police force is not going to fall under the
22 jurisdiction of the combined company with its

1 headquarters in the United States.

2 So what this Board is looking at is pretty
3 much an unprecedented expansion of a police force to
4 an entire U.S. MCA region, and this is the best time
5 to be looking at if this merger does go through, how
6 do we address the potential impacts of the policing
7 side on all of the interests that I just mentioned.

8 CHAIRMAN OBERMAN: Thank you very much.
9 You know you mentioned the FRA. I'm not clear as I
10 hear your concerns whether those issues are properly
11 something that we can even deal with as
12 distinguished from the FRA, but we appreciate your
13 being here, and bringing that issue to our attention.

14 MR. RUNYOWA: Just to clarify, I only
15 raised the FRA to just give the Board the idea that
16 you shouldn't be too concerned about the
17 repercussions of taking any actions that restrict
18 policing activity because there's alternatives, so
19 it's not important to be in FRA's jurisdiction.

20 CHAIRMAN OBERMAN: But even in terms of
21 whether we have jurisdiction to deal with these
22 issues in the context of this merger, it's an open --

1 I don't know the answer to the question, but it does
2 occur to me it may be something within the FRA's
3 purview, not ours, but we will hear what you're
4 saying, and we'll look into it, and we appreciate it.

5 MR. RUNYOWA: Thank you very much.

6 CHAIRMAN OBERMAN: Thank you sir, and I
7 appreciate your patience for waiting this out, thank
8 you. And with that it is seven o'clock, and the
9 court reporter is going to turn into a pumpkin in
10 about 30 seconds, so we are going to recess for
11 today. We will convene at 9:00 a.m. tomorrow morning
12 with the BN panel. Thank you all.

13 (Whereupon, at 7:00 p.m., the hearing
14 adjourned.)

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CERTIFICATE OF COURT REPORTER

I, LARRY FLOWERS, Court Reporter, do hereby certify that that the testimony contained herein is a true record of the testimony given by said witness, and I further certify that I am neither attorney nor counsel for, related to, or employed by any of the parties to the action in which this statment is taken; and, further, that I am not a relative or an employee of any attorney or counsel employed by the parties hereto, or financially interested in the action.

LARRY FLOWERS

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