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SURFACE TRANSPORTATION BOARD

EP 772

HEARING ON OVERSIGHT PERTAINING TO UNION

PACIFIC RAILROAD COMPANY'S EMBARGOES

PUBLIC HEARING

Day 2

Wednesday, December 14, 2022

9:30 a.m.

STB Hearing Room

395 E Street, S.W.

Washington, D.C.

Opening remarks

Panel IV

National Grain and Feed Association

Michael Seyfert, President and Chief Executive

Officer

Thomas W. Wilcox, Esq., of the Law Office of Thomas

W. Wilcox, LLC

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1 The Fertilizer Institute
2 Justin Louchheim, Senior Director, Government Affairs
3
4 National Mining Association
5 Katie Mills, Esq., Associate General Counsel
6
7 Panel V
8 SMART Transportation Division
9 Stephen Whitney
10 Matt Burkart
11
12 Panel VI
13 American Fuel & Petrochemical Manufacturers
14 Rob Benedict, Vice President, Petrochemicals and
15 Midstream
16
17 American Chemistry Council
18 Jeffrey Sloan, Senior Director, Regulatory Affairs
19
20
21
22

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1 PROCEEDINGS
2 CHAIRMAN OBERMAN: Sorry to keep you
3 waiting. They didn't tell me that I was also the CEO
4 of this place and so there are other things I have to
5 do in addition to chairing these hearings, so I
6 apologize for being a few minutes late. They did
7 tell me, but I didn't know what it meant.
8 A couple of announcements. I told UP
9 yesterday that they would have the opportunity to
10 rebut or respond in any way after everybody else had
11 testified.
12 (Technical issues)
13 CHAIRMAN OBERMAN: We ready? All right,
14 so we'll start again. Good morning. Before we
15 begin, two things. Yesterday I had -- I think we had
16 all indicated to UP that they would have an
17 opportunity to speak again after everybody else spoke
18 and I see that Brad Moore is here, along with some
19 others.
20 And Brad, I was actually able to take a
21 look at the numbers that your team said were just
22 filed yesterday and I actually had a couple questions

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1 about them, so if you would stick around I don't
2 think it will be a late day today.
3 Secondly, Greg Twist, from AGP, has asked
4 for a few minutes to respond to what UP said. And
5 Greg, in fairness, if you will wait until all today's
6 panels are done, we'll call you up here again. And I
7 would say the same thing to anybody. The goal of
8 these hearings is to get as full discussion and
9 revelation of everything that's relevant to this
10 issue, so the more that we can hear that people have
11 to offer I think the more the Board would want to
12 hear from people.
13 So what that, we will begin our first
14 panel which is the following, and they're all here.
15 But for the record, our friends at National Grain and
16 Feed represented by Michael Seyfert, their president,
17 and Tom Wilcox, their counsel. Justin Louchheim,
18 from the Fertilizer Institute, welcome. And Katie
19 Mills, the National Mining Association.
20 So, I think I will call on you in that
21 order. Mike, if you want to start off. Remember to
22 turn the microphone on when you're speaking so the

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1 camera gets to you and we can hear you and turn it
2 off when you're done. Thank you.
3 MR. SEYFERT: Thank you, Mr. Chairman,
4 and good morning. As you mentioned, I am joined by
5 Tom Wilcox, NGFA's outside Transportation counsel,
6 who will also testify on behalf of NGFA. And I
7 wanted to begin by commending you and the Board for
8 holding this hearing to examine Union Pacific
9 Railroad Company's use of embargos.
10 NGFA consists of more than 1,000
11 grain/feed processing exporting and other
12 grain-related companies operating more than 8,000
13 facilities. Its membership includes grain elevators,
14 feed and feed ingredient manufacturers, biofuel
15 companies, grain and oil seed processors and millers,
16 exporters, livestock and poultry integrators, and
17 associated firms that provide goods and services to
18 the nation's grain, feed, and processing industry.
19 NGFA's wide-ranging membership is proud
20 to partner with UP, the second largest carrier of
21 agricultural products. It's a partnership critical
22 to agricultural commerce, both domestically and

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1 internationally. NGFA encourages commercial
2 solutions between individual rail customers and their
3 carriers, but we have heard from several NGFA members
4 who believe they've exhausted efforts to curb UP's
5 use of embargos to meter rail services because of
6 what the railroad calls congestion and they believe
7 it is time for STB intervention.

8 NGFA believes the underlying cause for
9 UP's use of embargos is a significant rail to service
10 challenges it has experienced in 2022. While we
11 certainly are rooting for speedy rail service
12 recovery, we realize the size and complexity of UP's
13 system may delay such a recovery.

14 We have no doubt UP is working hard to
15 improve rail service, but we fear UP's significant use of
16 embargos for so-called congestion that our members
17 believe is largely the result of UP's actions may be
18 unfairly placing the cost burden of its rail service
19 recovery on their rail shipper customers.

20 Back in March, NGFA sent a letter urging
21 the Board to address substantial rail service
22 disruptions. We are thankful the Board followed up

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1 with a freight rail service hearing on April 26th
2 and 27th that brought to light the wide range of rail
3 customers that were experiencing economic harm due to
4 inadequate rail service.

5 After the hearing, the Board ordered the
6 four largest rail carriers, including UP, to submit
7 service recovery plans. In June of this year, the
8 Board also ordered UP to provide temporary emergency
9 rail service to an NGFA member due to UP's inability
10 to deliver corn from the Midwest to the West Coast
11 that was to be used for feeding dairy cattle and
12 chickens.

13 We do aim to give credit where it is due
14 and we have seen some improvements in UP's service
15 since the STB hearing in April. I also want to
16 publicly thank UP for their efforts to communicate
17 with NGFA and our members. UP's Marketing team
18 hosted me at their headquarters in Omaha this summer,
19 has been in communication with NGFA staff and sent a
20 representative who spent three hours on two panels
21 visiting with attendees at NGFA's Country Elevator
22 Conference in St. Louis last week.

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1 As I've said before, the relationship
2 between NGFA members and the railroads is a
3 partnership that must work for both sides and that
4 requires communication. Despite the good faith
5 efforts on both sides, the year-over-year numbers
6 continue to show challenges for NGFA members.

7 Here's a quick snapshot of UP's rail
8 system status for grain shippers using the most
9 recent service data reported to STB. Unfilled grain
10 car orders that were placed 11 or more days ago
11 stand at 1,088 cars as of December 7. This is down
12 from 1,518 on April 27, but higher than the 471 cars
13 in December of '21.

14 As for average dwell time and origin for
15 grain unit trans shipments it is 29.7 hours for
16 December 7, which is down from 40.5 hours on April
17 27, but higher than the 25.3 hours a year prior.
18 UP's current rail service data is better than in
19 April, but still low and almost certainly the reason
20 UP has greatly expanded its use of embargos.

21 The natural response for shippers when
22 they receive slower rail service is to buy or lease

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1 additional private cars to offset the slower service
2 and still move the amount of product their facilities
3 require. The additional rail cars come at a cost
4 for shippers and often are a multi-year investment.
5 If UP were providing the level of rail service that
6 is needed by its customers, the additional private
7 rail cars would not be on its system.

8 In 2022, UP has issued over 1,000
9 embargos. And as the Board noted, almost all of them
10 are due to UP's general claim of congestion. This
11 compares to 622 embargos in 2021 and 250 in 2020, which
12 were themselves high numbers. The general practice
13 for limiting shippers cars utilized by UP has been to
14 notify the customer of too many cars in the servicing
15 yard or corridor. If the customer is unable to put
16 together an acceptable plan with UP as the judge,
17 then an embargo is declared and service is metered
18 for an indefinite period.

19 Reported embargos only capture the
20 occurrences in which shippers were unable or unwilling
21 to agree to UP's demands. Thus, NGFA believes the
22 embargo list is not a full representation of the

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1 number of facilities that have had their car volume
2 or shipping plans decided for them.
3 We certainly appreciate UP providing
4 notice before a decision is made to embargo; however,
5 we believe more than seven days of notice should be
6 provided and that more discussions should be held
7 before the decision is made. We have heard examples
8 of limited to no discussion.
9 Shippers, like railroads, do not want to
10 carry excess cars due to cost. If there's excess
11 cars, it's usually because the shipper has concerns
12 about service. Discussions between UP and their
13 customers should be held on car inventories, but not
14 under the threat of embargo.
15 There're multiple problems for NGFA's
16 membership when they are embargoed or encouraged to
17 changing shipping plans. The processors may not be
18 able to run at full capacity, livestock or poultry
19 operations may have difficulty feeding their animals
20 and exporters may pay demurrage on vessels. Plus,
21 NGFA members may have to incur additional
22 transportation costs by using UP's cars instead of

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1 their own.
2 As you may have surmised, in 2022, NGFA
3 members have been forced to make decisions that
4 either lower their productive value or increase their
5 transportation costs. These missed opportunities
6 negatively impact the Ag value chain, meaning NGFA
7 members and farmers receive lower revenues. Neither
8 is positive for the U.S. economy.
9 My understanding is that a rail carrier,
10 like other businesses, can improve its service by
11 adding labor and/or capital. Alternatively, a rail
12 carrier can attempt to manage its service
13 deficiencies by making freight rail service more
14 inaccessible to customers through higher rates or
15 other service-limiting actions, such as embargos.
16 Valid embargos excuse railroads from
17 their statutory obligation to provide service when
18 weather events or other unforeseen disasters out of
19 the carrier's control temporarily prevent service
20 from being provided.
21 We strongly urge against the use of
22 embargos as a planned business practice when the

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1 system becomes congested because of the actions of
2 the railroad; namely, not having sufficient
3 personnel or making necessary capital expenditures.
4 Not only do embargos reduce overall productivity for
5 the U.S. economy, but they also put the rail carrier
6 in the position of picking winners and losers because
7 service is arbitrarily metered instead of provided
8 in accordance with the carrier's statutory
9 obligation.
10 We have heard from members that UP has
11 not been open about sharing data or logic behind its
12 rationale for declaring embargos and that they're
13 also concerned UP is unknowingly, at times, relying on
14 data that is skewed for service reasons.
15 Some NGFA members have been successful in
16 refuting some UP embargo declarations on this basis.
17 To be clear, we do not intend for this
18 hearing to turn into a debate over the appropriate
19 data needed for UP to continue to declaring embargos
20 based on what it calls congestion. Instead, we desire
21 for UP and the Board to hear our message that
22 embargos due to congestion should only be permitted

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1 when the railroad is not the cause of the congestion
2 it claims is the basis for an embargo. Liberal
3 declarations of embargos and the metering of service
4 should certainly not be embedded into a rail
5 carrier's business model.
6 NGFA neither desires to dictate to UP how
7 many employees or equipment it must maintain nor the
8 business model UP should employ; however, we desire
9 better rail service for our members than has been
10 provided in 2022. We believe STB can help by
11 finishing the reciprocal switching and by developing
12 guidance on the use of embargos and taking action on
13 other measures you have under consideration.
14 My colleague, Tom Wilcox, will now
15 discuss the legal rules for embargos and expand on
16 NGFA's recommendations to improve this situation.
17 Thank you for this opportunity.
18 CHAIRMAN OBERMAN: Tom?
19 MR. WILCOX: Good morning. I'm Tom
20 Wilcox and I'm appearing before you today as
21 Transportation counsel for NGFA. My testimony
22 consists of a brief discussion of the rules and

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1 standards applicable to railroad embargos and then
2 several recommendations from NGFA to the Board for
3 further action in response to the extensive use over
4 the past several years of actions of UP and other
5 Class I's that are calling embargos as a means to
6 stop providing service to their customers or to meter
7 the service they do provide.

8 The written version of my testimony
9 includes citations to some applicable cases and
10 authorities and I'll submit it into the record for
11 the Board's convenience and reference.

12 As the Board noted yesterday, the use of
13 embargos started increasing a few years ago. To me,
14 as a practitioner, this is another example of an area
15 of law where there are established rules and
16 precedents, but in today's industry the boundaries of
17 those rules get stretched and railroad practices
18 become potentially unlawful. But they become part of
19 the industry because they're not challenged. They
20 then spread as other railroads adopt them.

21 We've seen this in other areas, just to
22 name a couple is demurrage and accessorial charges,

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1 billing practices and even rates for that standpoint.

2 The concept of a railroad embargo is well
3 established and it's fairly straightforward. A
4 railroad has the statutory obligation to provide
5 service upon a reasonable request pursuant to 49 U.S.
6 Code 11101(A). The railroad cannot refuse to provide
7 service merely because to do so would be inconvenient
8 or unprofitable.

9 However, as Mike noted, that statutory
10 obligation to serve can be temporarily excused by an
11 embargo without liability to the railroad if events
12 happen out of its control that prevent it from
13 temporarily fulfilling its obligation and it takes
14 appropriate steps to eliminate the cause of the
15 disruption.

16 So, the question is not whether UP's
17 congestion practices violate the common carrier
18 obligation, which was a question asked yesterday.
19 The correct question is whether the action they've
20 taken meets the criteria of an embargo. If it does,
21 then legally, UP has no liability for violating its
22 common carrier obligation for the duration of the

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1 embargo.

2 So, if you're looking at the bigger
3 picture, if you allow the expansion of the definition
4 of embargo, that arguably removes an incentive to
5 improve service and also the efficient use of private
6 rail cars. The written version of my testimony
7 includes some judicial definitions of embargo and a
8 couple from the STB and one including that an embargo
9 is a carrier's notice to the railroad industry and
10 affected shippers that a disability or interruption in
11 operation exists which temporarily prevents it from
12 providing service or performing its common carrier
13 duties.

14 So, embargo is, by definition, and
15 discussed a little bit yesterday, they are limited to
16 emergency measure and an embargo is a temporary
17 measure. It's justified only if the conditions
18 warranting the embargo cannot reasonably be rectified
19 and that's in the GS Roofing case the Chairman
20 mentioned yesterday.

21 Most embargos are for physical
22 conditions. The Board has mentioned in cases that

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1 embargos can occur due to operating restrictions such
2 as congestion, but there are very few cases on it.

3 CHAIRMAN OBERMAN: Tom, have you found
4 any cases, either at the Board level or at Court
5 dealing with a factual situation involving congestion
6 in an embargo?

7 MR. WILCOX: Yes.

8 CHAIRMAN OBERMAN: The citations are in
9 your --

10 MR. WILCOX: Yes.

11 CHAIRMAN OBERMAN: Because we didn't.

12 MR. WILCOX: There are two examples and
13 they came out of the UPSP merger. And in that case
14 BNSF, and there's a longer discussion here, but BNSF
15 embargoed Mexican-bound traffic over the
16 International Gateway at Laredo Junction because of
17 congestion caused by the implementation of the UPSP
18 merger.

19 And in that case the congestion was being
20 caused by the merging railroad; BNSF embargoed the
21 traffic temporarily and this discusses it. They also
22 included a permitting system where they, to quote,

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1 the Board authorizing only train movements that can
2 be completed without delay.
3 Now, I also point out there's two
4 material differences to that permitting system and
5 the one we discussed with the CIMS program and that
6 is the congestion there was not caused by BNSF and
7 it's very disputed here as to what the cause of the
8 so-called congestion UP is basing its embargo claims
9 on, who caused that. And it still wasn't clear from
10 yesterday's discussion as to what's causing the
11 congestion.
12 CHAIRMAN OBERMAN: Was that decision
13 reviewed or is it just at the Board level.
14 MR. WILCOX: It's just at the Board
15 level.
16 CHAIRMAN OBERMAN: Probably why I didn't
17 find it.
18 MR. WILCOX: This is not exhaustive
19 research, but there was a couple cases that arose out
20 of the merger that I believe were settled, but
21 there's some material on some discussion about BNSF's
22 system.

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1 The other part about it is that BNSF
2 permitting action took place under a situation where
3 the Board had already issued an Emergency Service
4 Order, Order SO 1518 because of the meltdown after the
5 merger. So, they were, I think, looking for
6 solutions. Because arguably, a permitting system is
7 not really an embargo because you're still providing
8 service. You're just metering it.
9 I didn't see where that was challenged
10 and the Board didn't take it up on its own because I
11 think they were looking to solve some problems. Can
12 I have a couple more minutes?
13 CHAIRMAN OBERMAN: Sure.
14 MR. WILCOX: Okay. So, an embargo has to
15 be reasonable at all times and that includes at its
16 outset. So, if an embargo is unreasonable at the
17 outset or it becomes unreasonable because the
18 condition or disability that prevented the carrier
19 from providing service is eliminated, then the
20 carrier has violated his statutory obligations and
21 the relief for an affected shipper is damages under
22 49 U.S. Code 11704 and the shippers have up to two

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1 years to file those complaints.
2 UP has based the vast majority of its
3 embargos on so-called congestion which it hasn't
4 defined in any detail, other than to say it's
5 elevated excess inventory. And I won't repeat the
6 discussion, but there are very few cases, but I have
7 yet to find a case where an embargo declared and it
8 was not the fault of the carrier declaring the
9 embargo. So, I think I can speed things up.
10 CHAIRMAN OBERMAN: I'm not sure I follow
11 that last sentence. You've yet to find a case where
12 the embargo was lawful and it was not the fault of
13 the carrier?
14 MR. WILCOX: Well, yes, in each case the
15 -- maybe I misspoke. In each case, and they're not
16 many, but where I've seen congestion it was
17 congestion caused by somebody other or something
18 other than the railroad that's claiming the embargo.
19 CHAIRMAN OBERMAN: And you cited the BN
20 embargo case that was caused by UPSP.
21 MR. WILCOX: Right.
22 CHAIRMAN OBERMAN: (Off Mic')

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1 MR. WILCOX: Right. And in those
2 decisions what I was looking for was that question,
3 who caused the congestion and the decisions, the STB
4 decisions from there talk about a lot of other
5 factors that caused congestion, other than the
6 railroad.
7 It's a little fuzzy on what the basis for
8 UP's embargo because they embargoed after BNFS, but
9 they did not engage in a permitting system. So, I
10 think you've have to dig through the evidence a
11 little more to see what the basis for that embargo
12 was, the exact cause that UP cited, if any.
13 So, in the written version of my
14 testimony, I discuss how the liberal use of UP and
15 other Class I's embargos for congestion prompt a
16 number of questions which are listed in the
17 testimony, some of which we've sort of addressed
18 yesterday. You know what exactly is the condition,
19 disability, or event that is allegedly preventing UP
20 from fulfilling its statutory obligation to provide
21 service.
22 Is elevated excess inventory a valid

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1 example of congestion? Assuming instituting an
2 embargo for elevated excess inventory is lawful at
3 the outset, at what point is the condition or
4 disability considered eliminated and how is that to
5 be determined.

6 And then if an embargo requires cessation
7 of service under the rules, then how is a congestion
8 embargo with permits a valid embargo that provides UP
9 with a defense from an action for a breach of its
10 common carrier obligation?

11 So, in conclusion, NGFA makes several
12 suggestions to the STB for further action on this
13 issue. The first one is don't concede that UP's CIMS
14 program actions are valid embargos. The CIMS
15 program, by UP's own descriptions yesterday, is a
16 service metering or a "pipeline management system"
17 and so the defense against violations of 11101 should
18 not be allowed because UP is calling what it's doing
19 an embargo.

20 And NGFA thinks the Board should
21 instituting a public comment proceeding concerning
22 embargos similar to the process in Ex Parte 757,

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1 which culminated in the policy statement on demurrage
2 and assessorial charges. That policy statement was
3 issued to provide the public with information on
4 principles the Board would consider in evaluating the
5 reasonableness of demurrage and assessorial charges.

6 It seems a similar exercise could be
7 undertaken for so-called congestion embargos since
8 there's a chance they may become the new normal, as
9 was discussed yesterday or at least there would be an
10 attempt for it to become the new normal.

11 And then pending any further review of
12 this issue, NGFA asks the Board to not take any
13 action that would limit or foreclose the ability of
14 shippers to pursue actions for damages against UP or
15 other Class I rail carriers for allegedly unlawful
16 embargos subject to the applicable statute of
17 limitations.

18 And then, as Mike said, NGFA echoes the
19 view of others that competition, whether it's by
20 reciprocal switch or otherwise, would help resolve
21 the immediate service failures and provide
22 longer-term stability for the rail industry. So,

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1 thank you and thank you for the extra time.

2 CHAIRMAN OBERMAN: Not a problem, Tom.

3 Do you want to hold questions until we finish the
4 panel? Let's do that. You're on.

5 MR. LOUCHHEIM: All right. I'll
6 definitely have a little overlap with NGFA and their
7 comments. Good morning. Thank you, Chairman
8 Oberman, members of the Board for holding today's
9 hearing on UP's embargos.

10 I'm here today on behalf of The
11 Fertilizer Institute, TFI. TFI represents companies
12 that are engaged in all aspects of the fertilizer
13 supply chain in the United States. Half of all food
14 grown around the world is attributable to fertilizer.
15 Thanks to the fertilizer inputs half of all
16 fertilizer in this nation, more than half moves by
17 rail around the United States, so rail is absolutely
18 critical both our domestic production of fertilizer
19 and its distribution and ultimately getting it to
20 farmers.

21 In regard to rail service and staffing,
22 I'll speak generally. You hear this all the time, I

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1 think. Shippers continue to face drastic
2 deterioration of rail service all year. I'd say
3 rail service this calendar year has probably been the
4 worst it's been in perhaps in our history in this
5 nation, unfortunately.

6 The chronic service decline began as
7 railroads implemented so-called Precision Scheduled
8 Railroading, PSR, began long before the COVID-19
9 pandemic. This involved carriers cutting their
10 workforce, reducing their equipment. When the
11 pandemic hit, COVID-19, carriers made additional
12 drastic employee reductions. And from what TFI can
13 see, carriers staffing decisions have prevented them
14 from providing a reasonable level of rail service
15 and making reasonable adjustments to address demand
16 changes and service challenges that are inherent in
17 railroading.

18 The disturbing decline in rail service
19 since railroads implemented PSR hopefully serves as a
20 wakeup call and hopefully they'll be able to -- and I
21 think they're working on it. We appreciate that. I
22 mean they need to staff up. They need more

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1 resources to do their jobs.
2 Today's hearing focuses on one carrier,
3 Union Pacific, a PSR adopter. They've used embargos,
4 as has been discussed already this morning and
5 yesterday. They've used embargos to manage their
6 congestion on their rail network. Using embargos to
7 manage congestion arising from staffing and
8 management decisions, from TFI's perspective, is an
9 unacceptable practice that allows railroads to pursue
10 lean staffing models and other measures that favor
11 their operating ratios over the public interest in
12 adequate rail service, which is all embodied in the
13 common carrier obligation.
14 TFI would urge the Board to examine, and
15 I think the Board is doing that, thank you, examine
16 UP's embargo practice closely to ensure that Union
17 Pacific is not using embargos improperly, including
18 to pursue lean operating models that impair its
19 ability to satisfy its common carrier obligation.
20 So, more specifically, to UP's embargos,
21 TFI acknowledges that UP's network is currently
22 struggling. Some action that restricts activity on

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1 the network may be required to improve fluidity. We
2 don't like that, but we understand that. We think
3 the root causes they've already kind of teed up are
4 really at the fault here. The immediate question is
5 whether UP's actions are reasonable under the
6 circumstances and whether it is imposing embargos on
7 a fair and equitable basis.
8 April of this year, which is the middle
9 of the spring planting season, UP imposed and
10 threatened embargos on many TFI members. The
11 timeliness of fertilizer shipments is particularly
12 sensitive during the spring. TFI came within
13 actually about an hour of filing an emergency
14 petition with the Board.
15 We didn't. Our members were able to,
16 with a little bit of TFI's assistance, but our
17 members were able to individually work out
18 arrangements, not great. They didn't get back to a
19 great spot with UP, but they did get to a better spot
20 with UP and so we did not file then.
21 I'll also add, TFI, we appreciate and our
22 members appreciate that UP has been willing, at

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1 times, often with a lot of prodding, but they've
2 often been willing to work with our members to make
3 sure that, I guess, fertilizer gets where it needs to
4 get to.
5 The current embargos are occurring now,
6 at least when they came down more recently for our
7 members in November in the middle of the fall
8 application season for fertilizer. This is highly
9 disruptive. Not quite as potentially catastrophic as
10 it could be in the spring, certainly not as time
11 sensitive, but still quite disruptive.
12 UP's implementation of these embargos is
13 concerning for several reasons. One, as I've heard
14 from many of my members, the data underpinning UP's
15 action is generally quite bad. UP's communication
16 with its customers about the embargos has been very
17 poor. UP has failed to set clear expectations or a
18 timeline for when things might get back to normal.
19 In many cases, what UP is even asking
20 shippers to do and the methodology they're using to
21 make its embargo decisions is unclear and as a result
22 customers, TFI's members for sure, are left to guess

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1 at what traffic UP will handle and they have no
2 meaningful ability to help UP address its congestion
3 nor make appropriate business plans.
4 And this actually includes those who have
5 not even been embargoed in my membership, so data and
6 communication really has been quite unacceptable. It
7 sometimes feels a little bit like -- I don't know if
8 you've seen the Muppet Show. It feels a little bit
9 like the Swedish Chef is sort of trying to like, you
10 know, do-do-do, and there you go. It's frustrating.
11 And I'll go back to the business plan
12 piece. Our members need to make their business
13 plans. They exist in a competitive business
14 environment. You're not sure what's around the
15 corner and it's been like this all year. We've had
16 troubles and it's quite challenging.
17 All right, so as I mentioned, fertilizer
18 is a critical precursor to food supply. Various
19 geopolitical events have made fertilizer markets
20 highly challenged in recent years and to help
21 American farmers at TFI we've been working very
22 closely with the Administration, with the Congress

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1 regarding domestic fertilizer production. The
2 Administration has a \$500 million grant program to
3 promote domestic fertilizer production.
4 I can tell you what doesn't help promote
5 domestic fertilizer production, an unreliable
6 transportation network, which is what we've been
7 dealing with. And again, and I'll say it again and
8 again, really appreciate the Board's oversight and
9 activity on this stuff to try to help things smooth
10 out.
11 An unreliable transportation network is
12 highly detrimental to domestic fertilizer production.
13 UP's embargos are contributing to lost business,
14 increased costs, which will directly and negatively
15 impact domestic fertilizer production and costs.
16 The embargos also place an enormous burden on
17 fertilizer shippers who have regular seasonal
18 fluctuations in their business to support the Ag
19 market ahead of and through spring and fall
20 application seasons.
21 To remain operational many production
22 facilities need consistent rail service for inbound

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1 raw materials and outbound finished product. While
2 facilities have been able to keep running while faced
3 with UP's embargos, these embargos do force our
4 members to make costly decisions to minimize the
5 impact on their own customers, which is necessary in
6 their competitive business environments for our members.
7 As such, when possible, TFI members will
8 shift their business to other carriers or
9 transportation sectors, but capacity is constrained
10 everywhere. Certainly, for the fertilizer sector, I
11 mean, UP should have planned for much of the volume.
12 Fertilizer markets are fairly predictable. It's
13 really important for farmers. They need it. They
14 need a certain amount. You can kinda of look at past
15 years and you kind of know what's coming. You know
16 what's in front of you. So, it's predictable.
17 UP should be able to adequately prepare
18 and resource for the fertilizer sector. I'll just
19 say again when UP's customers have to look elsewhere
20 it also can create a cascading situation that puts
21 unforeseen burdens onto other carriers and
22 transportation modes. We've seen this happen in

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1 2017. I don't want to bring other companies into
2 this, but we've seen this happen before and that's a
3 real problem when something gets really sideways with
4 one particular carrier.
5 And like I said, capacity is really quite
6 constrained everywhere. We use barge movements for
7 fertilizer sectors as well. You've got low water
8 there. We can't really control rainfall right now.
9 We'll do our rain dances as we approach the spring as
10 much as we can.
11 It's not that the UP situation didn't
12 just happen this year. I think this has probably
13 been about a decade or more plus in the making, but
14 it's a little bit of an unforced error. We didn't
15 need to lose all the resources they have. So, like I
16 said, UP should've planned for much of the volume it
17 currently has.
18 I'll just say, TFI we accept that UP
19 needs to establish network fluidity, but it shouldn't
20 be relying on embargos to run its business nor should
21 it ask shippers with no notice to stop or severely
22 curtail their business. So, UP and rail carriers

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1 need to maintain staff and resources at levels that
2 will allow them to be more consistent throughout the
3 year, through up and down business cycles.
4 And more over, it may be time for
5 Congress and the Board working together on ways to
6 clarify the common carrier obligation. I think that
7 this includes the role of embargos. Embargos should
8 not be available to excuse railroads from their
9 common carrier obligations when their business
10 decisions to pursue lower operating ratios impair
11 their capacity to handle traffic reasonably.
12 In terms of next steps, TFI is certainly
13 open to a variety of potential solutions or paths
14 forward that the Board may move forward with over
15 time. I'll just say as we approach springtime the
16 situation could become increasingly problematic for
17 farmers who need fertilizer. We'll urge the Board to
18 treat service issues impacting fertilizer supply as
19 an emergency, which we believe would be consistent
20 with the general agreement that service issues
21 threatening food supply are emergencies.
22 We'd encourage the Board to consider

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1 issuing guidance stating that it will consider
2 railroad decisions regarding staff and equipment as a
3 factor when determining whether an embargo is
4 reasonable. It appears to TFI that UP's embargos are
5 unreasonable because they arise from its own
6 decisions to operate with too little resources,
7 including staff and equipment. And this guidance
8 would discourage UP and other railroads from this
9 practice with embargos.

10 Also, as we approach spring, since it
11 remains unclear when these embargos may end and when
12 they could begin again, it may also be helpful to
13 consider whether UP should articulate contingency
14 plans to ensure the movement of fertilizer during
15 periods of heightened congestion.

16 This is not to imply that fertilizer is
17 causing any network problems. The problems are, from
18 our perspective, is rooted in UP's managerial
19 decisions on staffing and resources. And also, we'd
20 be remiss to try to certain commodities over others.
21 I don't think that's a good general trajectory for
22 this space, but there are certain commodities, such

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1 as fertilizer, that are just essential precursors to
2 food supply and other essential goods.

3 And I don't know if a contingency plan is
4 a pragmatic solution for UP either. We're just
5 trying to come up with a few thoughts. And then I'll
6 also add, anything the Board can do to promote rail
7 competition and accountability is desperately needed,
8 so I encourage the Board to keep moving on all those
9 fronts. And thank you again for your oversight and
10 holding this hearing.

11 CHAIRMAN OBERMAN: Thank you, Justin.
12 Let's go to Katie.

13 MS. MILLS: Good morning, Chairman
14 Oberman, members of the Board, thank you for the
15 opportunity to speak today on behalf of the National
16 Mining Association. The NMA's members conduct
17 mining operations throughout the U.S. and rely on
18 Class I carriers to transport mine materials,
19 including coal and minerals and metals that are
20 necessary for nearly every sector of our economy.

21 One of the largest issues facing shippers
22 is the lack of communication from UP. For example,

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1 NMA's coal producing members have faced frustration
2 over the lack of a consistent point of contact from
3 UP. With just one person available to speak to coal
4 producers, who is frequently unavailable.

5 The UP also seems to be in a perpetual
6 state of management restructuring in the coal group.
7 One NMA member's industrial customers are completely
8 out of coal with no sets in service and no guidance
9 as to when the sets will be back in service.

10 Another is waiting on two trains to cycle
11 back to load for a vessel that has been at anchor in
12 Long Beach for a week. It is also not uncommon for
13 trains to be delivered to the wrong customers and the
14 wrong types of cars being brought to the destinations
15 they were planned to load for.

16 The UP's lack of communication to
17 customers is not limited to coal producers. NMA
18 members that produce copper are also facing
19 frustrations with at total breakdown in communication.
20 Often decisions for embargos, to include lifting
21 them, frequently do not make it down the line to the
22 appropriate UP employee on the track and shippers are

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1 given two conflicting responses. This results in
2 mixed communication, wasting precious time to get
3 copper shipments to the markets where it is in high
4 demand.

5 The UP's inconsistent communication with
6 shippers has resulted in a significant breakdown in
7 service. Unfortunately, the burdens of managing the
8 rail lines sometimes then fall to shippers who even
9 try to anticipate if the UP will consider an embargo
10 and proactively begin removing cars despite the
11 contractual agreement move said cars.

12 In practice, this leads to self-metering
13 or the UP asking the shipper to self-meter with a
14 threat of a future embargo. However, these instances
15 of a non-embargo or a pre-embargo are effectively a
16 de facto embargo that is not reported as an official
17 embargo.

18 In reality, the very threat of an embargo
19 hangs over captive shippers' heads like the sword of
20 Damocles where failure to anticipate a potential
21 embargo and begin self-metering or comply with UP's
22 request to remove cars or face a true embargo could

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1 risk additional financial and business consequences
2 for the shipper.
3 As Justice Marshall recognized, the value
4 of a sword of Damocles is that it hangs, not that it
5 drops. The UP wields enormous control on these
6 situations where uncertainty threatens a captive
7 shipper's ability to continue to mine and ship its
8 products to customers.
9 As an example, last month one NMA member
10 shipper was told by the UP that they had too many
11 rail cars in service and had to take cars off a
12 particular line or potentially face an embargo. Of
13 course, not wanting to risk a costly embargo, the
14 shipper began removing cars from service only to be
15 told a few days later that UP actually embargoed the
16 entire interchange after the shipper complied with
17 the original instruction to remove cars.
18 These costly days of removing trains only
19 for the UP to issue an embargo resulted in lost
20 revenue for the shipper and increased cost to truck
21 the mined product to the market. This particular
22 shift from rail to truck cost the shipper an

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1 additional \$100,000 a week.
2 The UP has underinvested in its capital
3 infrastructure to the detriment of shippers. In an
4 effort to be a part of the solution, NMA members have
5 invested in additional private rail cars to continue
6 to ship mined materials. This usually results in the
7 UP asking shippers to remove these private train
8 sets.
9 The UP has even pressured customers to
10 rent cars only to ask the shipper to not use them.
11 One NMA member offered to upgrade the regional
12 railroad switch track for 400 additional cars at a
13 cost of nearly \$10 million to the mining company as a
14 way to continue operations and not shut the mine
15 down. The UP declined the offer, saying that the
16 additional infrastructure and investment would not
17 expedite service.
18 The reality is the UP caused many of
19 these issues itself and NMA members, along with other
20 captive shippers in other industries, are left having
21 to pay for the lack of communication, the de facto
22 embargos, and the underinvestment in capital. NMA

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1 members want to be a part of the solution to better
2 rail service, but the UP has to come to the table
3 ready to talk about proactive ways to achieve that
4 goal.
5 The NMA applauds the STB for bringing the
6 UP in to speak to its continued service embargos and
7 seeking answers. Thank you again for the opportunity
8 to speak today.
9 CHAIRMAN OBERMAN: Thank you, Katie. I
10 have a number of questions, but I think I'll direct
11 some to Tom here at the beginning and then hand off
12 the baton to the other Board members. I'm sure they
13 have questions.
14 But Tom, I'm delighted that you've done
15 some homework on the law of embargos because we've
16 done some. I have found that there is very little
17 law. When you talked about what you think defines a
18 lawful embargo, are you referring only to what's been
19 said in case law as opposed to any regulation or
20 statute? I mean, I don't see anything in the
21 statutes that even refer to embargos.
22 So that the concept of an embargo is an

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1 exception to the common carrier obligation it strikes
2 me as being a common law creation, is that the way
3 you see it or am I missing something?
4 MR. WILCOX: No, that's the way I see it.
5 And I was look at, and intentionally looking at
6 decisional law because that's the contrast that we
7 run into of the practices that are being undertaken
8 by the railroads versus what if there was a dispute
9 actually started or what the actual law would be and
10 how those two mesh, so I was focusing on decisional
11 law and did not see any statutory law.
12 CHAIRMAN OBERMAN: I have being making
13 the assumption, having not personally been in the
14 rail business for 200 years, that it must have been
15 something that evolved from the very beginning. If a
16 bridge fell down, you couldn't get a train over it.
17 Obviously, you couldn't be required to run the train
18 until you fix the bridge, as an example. And that
19 that must have been where the idea of a quote -- I
20 don't even know where the word "embargo" why that was
21 chosen, where it came from. Is that a way to
22 understand it and then it evolved over time?

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1 MR. WILCOX: Yes, I think that's a way to
2 look at it. I mean, it's probably been around as
3 long as railroading has been around. And
4 conceptually, it's similar to the concept of force
5 majeure under a contract, at least in my view. That
6 if you have contractual obligations, but something
7 beyond your control prevents you from performing them
8 you're excused. But you have to do your best to
9 eliminate that condition and get back to performing
10 under the contract. I don't see a whole lot of
11 difference between the two concepts.

12 CHAIRMAN OBERMAN: Are you analogizing to
13 a duty to mitigate or something of that order?

14 MR. WILCOX: Right. Most force majeure
15 provisions say it's, first, beyond their control, but
16 also you take reasonable steps to eliminate the cause
17 of the force majeure.

18 CHAIRMAN OBERMAN: One of the challenges,
19 I think, in understanding what's happening, at least
20 with UP, if not all of the others, and I've used he
21 term repeatedly. I'm not shy about it. That these
22 problems, generally, have been self-inflicted. We

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1 had a lot of discussion along those lines at our
2 hearings in April.

3 I went back over my notes and what I
4 heard yesterday from UP trying to sort out what
5 instigated these embargos and it was a challenge, let
6 me just say this, to try to get a clear picture from
7 the UP panel. There was a lot of talk about the fire
8 on the bridges in the middle of 2021, but the
9 embargos had started long before that and they have
10 mushroomed long after that.

11 I actually think that in UP's filing of
12 June 23rd, which was their revised, revised recovery
13 plan, we got the clearest statements which we talked
14 about yesterday, saying that the staff shortages have
15 caused trains to be held for crews and contributed
16 to congesting the network. And I read I think when
17 Lance was testifying in the same paragraph, this is
18 page 4 of that filing. "When you have fewer crews
19 than desired, it is more difficult to recover from
20 unplanned variability events as extra crews are
21 typically required to operate trains to destination."
22 And I think everybody conceded it would

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1 be impossible not to concede that when you're running
2 a railroad you have to anticipate a bridge catching
3 on fire or a polar vortex. That is inherent in what
4 happens in this so-called outdoor sport. The
5 question that I want to pose to you, not for
6 necessarily that you have an exact answer, but to see
7 how you would ask us to think about it, is that what
8 do we do now with these embargos?

9 In other words, if we were to conclude,
10 based on what they have said, that the current 1,000
11 embargos, let's just focus on this year, resulted
12 from a decision to reduce the workforce by 5,000
13 people of the T&E workforce, going back to 2018. And
14 now that has resulted in embargos this year, knowing
15 that no matter what UP does it can't produce however
16 many more workers it needs overnight. They say they
17 only need 300. I'll leave that open for further
18 analysis.

19 And so, the only way, apparently, that
20 they think they can run their network is to use these
21 embargos; otherwise, it would be even worse. How
22 should we look at that in terms of whether a

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1 decision four years ago has caused the common carrier
2 violation today or should we say, well, you got
3 yourself into a pickle, but we agree you can legally
4 get yourself out of the pickle by doing what you're
5 doing now. How do you think we should look at that?

6 MR. WILCOX: Well, I understand the
7 problem certainly, but one of the things we talked
8 about yesterday was or Board Member Hedlund mentioned
9 yesterday was the need for incentives and the
10 incentives to improve service, the incentives to
11 invest in a railroad. And one of the incentives is
12 the potential being found in violation of the common
13 carrier obligation.

14 Now, I understand there haven't been a
15 whole lot of cases on that, but we need the
16 incentives where we can find them. And so, by taking
17 a -- well, I would say by not allowing a liberal
18 view of embargos and find, I guess, what you're
19 talking about is finding the appropriate balance, you
20 leave an incentive in place for them to do what
21 you're talking about in terms of invest in the
22 railroad and hire more people or else.

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1 By the same token, by allowing 1,000
2 embargos or more you're removing an incentive. You
3 know you can say how big or small that incentive is,
4 but you're flat out removing it. And so, to me,
5 that's almost -- enabling is maybe too strong a word,
6 but you're not advancing the ball that way.
7 So, I think, as I said, a first step
8 would be to not concede that all these are, in fact,
9 embargos and that's they have to stand on their own
10 because that the analysis with an embargo, whether
11 under its initial facts it's valid or not on an
12 individual basis. I think that's one way to approach
13 it, but it has to be -- and that's the Board's
14 decision, not mine, unfortunately, to find that
15 balance as to whether it's 1,000 or whether you
16 identify some circumstances where that's permissible
17 for this congestion embargo which it's an animal that
18 doesn't have a lot of authority behind it.
19 Hopefully, that's a useful answer.
20 CHAIRMAN OBERMAN: Well, I think it deals
21 with the fact that there isn't much law here. I
22 focused on GS Roofing because I thought it was one of

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1 the most thorough statements at a fairly high-level
2 Court, the 8th Circuit. I trust the attorneys back
3 here tell me the Supreme Court has not ever talked
4 about this issue, at least that they could find, so
5 the 8th Circuit may be the highest legal authority
6 that's still around and I'm told it's still good
7 law. It hasn't been questioned or overturned.
8 And in thinking this through, and let me
9 say this, I'm going to make this observation
10 analogous to a law professor raising it Socratically;
11 I don't want anybody to think I have reached a conclusion.
12 Having said that, in GS Roofing the railroad said we
13 don't want to spend the money to fix the track and
14 therefore we're going to embargo it.
15 And the 8th Circuit said, no, that's not
16 the law. Unless the Board gives you authority to
17 abandon the line, you've got to keep it running. So,
18 if you have to spend some money on the track, do it.
19 That's not an excuse. And by analogy, if a railroad
20 comes in here and says we don't want to spend money
21 on personnel to drive the trains, how does that
22 differ from not spending money on track over which

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1 the trains run, if you've made a conscious decision
2 that you're not providing the service because you
3 don't want to spend the money. I don't see the legal
4 difference and I'm sure UP -- that's why I asked them
5 if they had any legal authority will disabuse me of
6 that notion, but that's as far as I think the law has
7 evolved. I haven't seen any law dealing with crews.
8 MR. WILCOX: Right.
9 CHAIRMAN OBERMAN: And I'm anxious to get
10 your memo and read the cases you've found. I would
11 only make one other observation and then I will hand
12 it off. I'm confident in saying that the Board does
13 not know what our next steps, if any, will be.
14 Obviously, we're trying to hear all of this evidence
15 and digest it.
16 And I take your suggestion as an
17 interesting and one that we should think about of
18 opening this up to comment for then the purpose of
19 perhaps issuing a policy statement. I think when we
20 started the demurrage hearings we didn't know we were
21 going to issue a policy statement. It evolved from
22 what we heard and I assume, if we did that, we

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1 wouldn't know the outcome of that either.
2 MR. WILCOX: And it's not an immediate
3 solution, but it is something to consider.
4 CHAIRMAN OBERMAN: Two questions on that
5 or two points. Are you suggesting that we haven't
6 heard enough already, plus what we'll hear today, to
7 be educated if we thought a policy statement was the
8 way to go. I mean is there some other reason to open
9 this concept up to further discussion in your mind?
10 MR. WILCOX: Well, just because the
11 research that I did was not exhaustive, but what I
12 saw was not a lot of cases on congestion, room for
13 some policy statements or some policy calls on how to
14 treat it. And so, it seems an uncertainty you heard
15 yesterday and today from customers on what this
16 congestion embargo is all about and the notice that
17 should be provided, how long it lasts. There's some
18 questions that maybe would lend themselves to
19 discussion about what the boundaries might be and
20 then to also hear from the other side, obviously,
21 about why they the embargos are in this situation are
22 appropriate. Let me just -- the last thing I want to

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1 do is interrupt you.
2 CHAIRMAN OBERMAN: No, no, go ahead.
3 Finish your thought. I thought you were done.
4 MR. WILCOX: I just wanted to say that
5 one of the cases, there's this STB case does cite a
6 Supreme Court case when it talks about embargo, the
7 Kalo Brick & Tile case doesn't say much about it, but
8 it does cite a Supreme Court case in a context of
9 embargos, but that's in there.
10 CHAIRMAN OBERMAN: The only other thing I
11 would mentioned, it's really an obvious point and not
12 an observation meant to encourage or discourage
13 litigation. But obviously, shippers have brought
14 common carrier violations cases based on embargos
15 before, GS Roofing is one of them and there's really
16 nothing to stop a shipper or your clients or anybody
17 else's if they conclude that there has been a
18 violation to bringing a case. They don't have to
19 wait for us.
20 We would obviously decide it and I have
21 no idea how we would decide such a case, but that is
22 an avenue that exists now under the statute, it seems

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1 to me for what it's worth. And again, it's neither
2 to discourage or encourage, but to just observe that
3 the vehicle exists. Patrick?
4 BOARD MEMBER FUCHS: Well, I agree that I
5 thought Member Hedlund brought up an essential point
6 yesterday about incentives. And I think, Tom, you
7 rightly picked up on it and I think about incentives
8 in the context of competition.
9 We were discussing competition as a way
10 to mitigate the impacts of embargos yesterday,
11 somewhat, but the truth is that competition can also
12 be seen as a preventive tool with the incentive being
13 the potential loss of a customer.
14 And so, just pursuing that a little bit,
15 starting with maybe the mitigation angle. We heard
16 some of it on the first panel, but speaking broadly
17 for your members, do the shippers that have access to
18 another railroad are they generally able to feel a
19 lower impact from potential embargos?
20 MR. SEYFERT: I think there's a feeling
21 that it gives them an opportunity to avoid that, but
22 I don't know if it was one of my members or I believe

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1 one of the witnesses testified yesterday that even in
2 the situation where they had two Class I's that were
3 serving them that they still were embargoed. So, I
4 think there is a feeling that it gives them other
5 options, but I do not think you can say that it gets
6 them out of the woods.
7 BOARD MEMBER FUCHS: And the reason for
8 that, as you understood it, Mike, was that let's say,
9 for example, in the example of reciprocal switching
10 that you still have UP giving you the switch. So, if
11 it's UP remaining the incumbent carrier at, say,
12 origin it might still compromise your ability to get
13 to another carrier; is that how you all understood
14 the dilemma of relying on that?
15 MR. SEYFERT: That's how I understood it.
16 Yes.
17 MR. LOUCHHEIM: Yes, but I'm probably not
18 getting at your question. I do have a thought about
19 if the Board would issue a policy statement, which I
20 think TFI would encourage and support, I think the
21 flip side of that is potentially, to UP's credit, at
22 least they're -- I think they're doing a poor job of

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1 it, but at least they're communicating and announcing
2 this stuff in a public way.
3 I mean there is the possibility, and this
4 makes us nervous and our members nervous, someone
5 could not just show up. They could just not say
6 anything.
7 BOARD MEMBER FUCHS: I'm glad you said
8 that because I mentioned yesterday that to some
9 extent, and I think UP conceded to some extent.
10 People can debate the extent, but that embargos are
11 downstream with service problems. But service
12 problems can manifest themselves in a host of
13 different ways.
14 And UP might use embargos after they have
15 service problems and then customers put more private
16 cars on their network and then they get what they
17 call congestion or excess inventory, but it could
18 also be the case, and we heard, I think, in
19 testimony, that people could -- like to the PNW and
20 grain trails were dwelling in that origin for two
21 weeks in May and that wasn't an embargo.
22 And Marty, I think you rightly questioned

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1 that what's really the difference between a grain
2 train dwelling for two weeks versus an embargo, in
3 terms of your product, is not getting to market? So,
4 that's why I kind of take a step back and say one
5 thing to look at is dealing with just embargos. But
6 if the broader issue is service and service is
7 connected to incentives, is the Board and the public
8 better off if we reoriented or orient our focus to dealing
9 with competition and service?
10 MR. LOUCHHEIM: I think I'm tracking and I
11 think I generally agree with the thinking. My
12 thought mostly is that on a policy statement if
13 that's the direction the Board goes that it's not
14 just about embargos. It probably should encompass
15 elements of service like a car sat for a month.
16 We've had cars in our membership where they sit for a
17 month and it's crazy.

18 BOARD MEMBER FUCHS: And we've seen
19 railroads with 50 percent trip plan compliance for an
20 extended period of time. I'm so sorry. Please.

21 MR. WILCOX: I was just going to say that
22 the issue is that an embargo has, as I discussed and

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1 Marty's discussed, there's a legal significance to an
2 embargo and it excuses statutory obligations. And
3 so, I agree with you that that should be the focus,
4 service and competition. And I think part of that is
5 taking a close look at embargos and what is a proper
6 embargo and what is not, and not leaving it to having
7 the railroad -- because in the first instance they
8 have the right to declare an embargo and then you go
9 through the process of saying whether its unlawful or
10 not. But I think a statement or policy guidelines
11 that say this type -- if this happens, it's not an
12 embargo, which would be helpful.

13 BOARD MEMBER FUCHS: Which is one of the
14 things along these lines, and I appreciate that
15 point, Tom. You know you all are talking sort of in
16 the concept of fault. And one of the things that I
17 found interesting in one stream of UP's program -- I
18 think it was the CIMS serving yard is the accounting
19 for poor first/last mile performance.

20 And I think we explored yesterday that
21 that is perhaps not a complete -- I don't view it as
22 a complete measure of a railroad's performance in

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1 terms of how service performance could cause an
2 embargo or lead to an embargo. But one of the
3 advantages -- and I'd like your commentary on this --
4 is one of the advantages of kind of zooming out and
5 looking at competition from a public interest lens.
6 That you can make an assessment about service
7 performance in terms of first/last mile, in terms of
8 transit time, in terms of trip plan compliance
9 without necessarily having to disentangle precise
10 causes and fault. Yes, Dry Canyon Bridge goes out
11 and then, yes, they may not have enough crews and
12 those two coalesce into a slowdown and then people
13 put private cars on.

14 Disentangling fault could be difficult.
15 I don't know how the Board would rule if we were
16 asked if fault is an essential component. But if you
17 zoom out and look at it from a public interest lens
18 you maybe able to say, well, listen, this substandard
19 service performance with multiple contributing
20 factors may enable a remedy that both has incentive
21 effects and mitigation effects in terms of
22 competition.

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1 And competition allows you to zoom out to
2 a public interest lens as opposed to solely a
3 fault-based lens, which you might have to do if you
4 narrowly look at it in embargos. And I'd just like
5 your commentary on that.

6 MR. WILCOX: I don't disagree with what
7 you said. I think you can do both in terms of
8 examining embargos and criteria, but also zooming
9 out, as you say, so I don't have any disagreement
10 with what you said.

11 BOARD MEMBER FUCHS: Appreciate it.
12 Thank you.

13 CHAIRMAN OBERMAN: Karen?
14 BOARD MEMBER HEDLUND: Mr. Seyfert, has
15 the embargo program had any negative impact on the
16 ability of your members to export grain?

17 MR. SEYFERT: I don't know that I have
18 any specific examples that I can cite to you of that,
19 but obviously, we'd be happy to go back and check
20 individually with our members. But I think where it
21 has been a challenge is the uncertainty of when
22 they're going to be able to move or how many cars

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1 they're going to have. And clearly, we have had
2 issues in the ports this year of demurrage issues where
3 we haven't been able to get out. That's been
4 running into the regular service issues or to the
5 embargo I can't say on that. Obviously, too, as it comes
6 to exports and along the river we've had a number of
7 issues here.

8 This fall in some of our shipments for
9 exports, again, I'd want to dig a little deeper on
10 this, but may just be down a little naturally in that
11 due to the competitiveness and the value of the U.S.
12 dollar right now we're not as competitive in the
13 export market, particularly, on beans as we have been
14 the last couple of years or few years, and that's
15 impacting it as well. But we'd certainly be happy to
16 follow up with our members and get back with you
17 specifically on that.

18 What we have seen is and what we have
19 been told by them is certainly increased cost, as
20 some of the references that have been cited here and
21 I will just say one of the things we've heard from a
22 lot of our members is that they don't understand how

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1 they got on the embargo and they don't understand how
2 to get off and that is the big issue.

3 As one of our members said, I just want
4 to know how I got on it and I want to know what I
5 need to get off of it and I think that's a really key
6 point too.

7 CHAIRMAN OBERMAN: I was going to say
8 when I was in high school how I got into the
9 principal's office. I didn't always know.

10 MR. SEYFERT: I just wanted also, Karen,
11 the USDA came out with their economic research
12 service, the Wheat Outlook just came out. It does
13 say that one of the factors exports are down because
14 of high prices. Wheat prices are higher, \$30 basis.
15 But it also points to specifically rail customers are
16 paying more through the elevated export basis for a
17 decreased level of service, decreased level of rail
18 service performance and they do specify that that
19 cost of rail service you're paying more for less.
20 What we were saying yesterday. So, you get less
21 cars. You're told to embargo. So, using less cars.
22 You're paying more for system cars and that on top of

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1 the high prices, so it's almost a lose/lose.

2 BOARD MEMBER HEDLUND: I want to explain
3 why I'm asking this question. There was an article,
4 it was the lead article in Reuters yesterday talking
5 about the famine in Somalia. And part of the cause
6 is the drought in the Horn of Africa, but they also
7 mentioned the incredible increase in the cost of
8 grain due to the disruption of the market in Ukraine.

9 So, as we deal with this issue, I think
10 it should be in the back of our mind this is not just
11 about dead chickens in Southern California. We're
12 talking about feeding the world.

13 CHAIRMAN OBERMAN: I wanted to come back
14 to the discussion that you and Patrick were having.
15 And it strikes me, and we've explored this in some
16 detailed at the demurrage hearings and then in the
17 policy statement that the Board issued, and that is,
18 the concept of fault.

19 I am really just speaking for myself now.
20 I have found it more useful to not use that term
21 because it implies some kind of moral problem. And
22 to me it's more useful in trying to untangle this to

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1 just talk about causation or proximate causation,
2 regardless of bad behavior. And that is what I was
3 trying to untangle yesterday and I think it's well
4 settled in most areas of the law that you can have
5 multiple causes of the same outcome. And just
6 because there is a contributing cause doesn't mean
7 that the other causation is immune from remedy. It's
8 certainly a well-established concept in tort law.

9 And I think we heard this from UP and I
10 think we heard it from BN when they did their
11 Southern TransCon embargo. But specifically with UP,
12 and they say it in their documents, we had a crew
13 shortage and then we had a fire on a bridge and lack
14 of crews hindered our ability to recover from the
15 fire as fast as we might have in other circumstances.

16 And think back to 2019 when we had a
17 detailed exposition. I think it was a retack meeting
18 of the fact that most of the State of Nebraska was
19 under water at one point and BN and UP joined forces
20 to rebuild those tracks. I think it only took them
21 about two weeks. It was an impressive engineering
22 feat and I think the feat of rebuilding Dry Canyon

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1 was also an engineering feat.
2 But in 2019, the service recovery was
3 pretty quick, as I recall. There was always some
4 delay in catching up. Nothing like what we've seen
5 here. So, to separate out the bridge from the crew
6 shortages may be necessary if somebody ever brought a
7 case and we had to focus on it. But to me, it's more
8 useful to my analysis to think about just causation
9 factors.
10 The one thing I wanted to --
11 BOARD MEMBER FUCHS: Marty, just real
12 quick on that.
13 CHAIRMAN OBERMAN: Yes.
14 BOARD MEMBER FUCHS: And I appreciate
15 that very much, the clarification of how you're
16 thinking about it. I just wanted to observe, because
17 you mentioned when the ground froze and then the rain
18 couldn't absorb in the soil and it caused the
19 flooding in that portion of the Midwest and West, I
20 heard the very same shippers that have raised
21 concerns about the embargos were complimenting the
22 railroads at that time. So, I just wanted to add to

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1 that observation.
2 CHAIRMAN OBERMAN: It was impressive. It
3 shows you what the railroads are capable of. That's
4 one of the frustrations. If I thought they were just
5 unable to serve the economy, I'd have a different
6 view. But what has really caused me concern, and
7 I've talked about this when I spoke in New York a
8 couple weeks ago, is that they're not living up to
9 their potential. They have a great potential and we
10 need them.
11 A couple points I wanted to get back to
12 on the very useful discussion with Patrick. You said
13 something, Tom, and it may have been just a passing
14 manner of speech when you said the railroads have a
15 right to initiate an embargo and then the question
16 is, is it legal. I don't think of it that way. I
17 don't think they have a right to embargos. I think
18 an embargo is an exception to their duty under the
19 common carrier.
20 I almost think of it when it's a physical
21 safety problem like an unsafe track they have a duty
22 to embargo or an obligation. But the concept, and I

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1 would never use that term myself, that the railroad
2 has a right to an embargo. To me, an embargo is an
3 exception that's acknowledged when there's some
4 force, as you used, force majeure is a good analog,
5 beyond their control which does not allow them to run
6 the train.
7 So, I'm not sure what, unless it was just
8 an inadvertent use or why you used the term "right."
9 MR. WILCOX: I just was referring
10 procedurally railroads -- it's not a right, but
11 railroads can announce an embargo, procedurally.
12 They can say we're embargoing the track and then it's
13 on the parties who object to that to argue that the
14 initial embargo or at some point during that embargo
15 it's become unreasonable and now they're violating
16 their common carrier obligation. That's what I was
17 referring to.
18 CHAIRMAN OBERMAN: It may be unreasonable
19 the moment they think about it, depending on the
20 facts.
21 MR. WILCOX: Exactly. And the context
22 was if there are boundaries sort of out there similar

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1 to demurrage causation guidelines, then maybe they
2 don't declare the embargo in the first instance
3 because they know that it won't hold up.
4 CHAIRMAN OBERMAN: The other thought I
5 had, and I share Patrick's observations about
6 incentivizing better service through instituting more
7 competition. We've all been talking about that for
8 years, that we need to improve competition. To me,
9 there's not a one solution to these issues,
10 competition and reciprocal switching might really
11 advance the ball if we could figure out a way to put
12 it together, which, by the way, I know it seems like
13 forever, but we've been diverted here by a lot of
14 issues this year.
15 Dealing with that rule is still high on
16 our agenda to finish it, but if the railroads
17 wouldn't keep interrupting our thought process here,
18 we'd get our work done more quickly. But no, it's
19 still very much on my mind as in terms of completing
20 the work on that one way or the other.
21 But we also heard yesterday, and I think
22 we're hearing today, that only enhancing competition

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1 will not solve everybody problems. There were
2 several shippers who said there is no place for us to
3 have a reciprocal switch. We're not physically able.
4 And you pointed out, Justin, that other
5 railroads are suffering, so even if they're next door
6 they might not be able to take the traffic either.
7 So, we've got to do, it seems to me, both. But to
8 the extent competition will incentivize better
9 behavior rather than our mandating it, other than
10 implementing competition. To me, that's certainly
11 that's a high, if not the first choice, certainly it
12 should be a high priority.
13 BOARD MEMBER FUCHS: May I just make a
14 comment to that?
15 CHAIRMAN OBERMAN: Yes, go ahead,
16 Patrick.
17 BOARD MEMBER FUCHS: Not to interrupt if
18 you were going to move to a separate issue.
19 CHAIRMAN OBERMAN: No, no.
20 BOARD MEMBER FUCHS: Okay. I appreciate
21 it. Just to observations on that, which I don't
22 think you disagree with. First, is the hope is that

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1 type of framework and that type of incentive would
2 decrease the likelihood that one of the railroads
3 has inadequate assets or inadequate resources not to
4 provide it.
5 CHAIRMAN OBERMAN: One hundred percent.
6 BOARD MEMBER FUCHS: And then the second
7 thing is, and this is really related to the issues
8 that we're seeing now. This is a network industry
9 and so even if a competition remedy, a competition
10 framework is not available to every single shipper
11 because of circumstances, the prospect of losing some
12 shippers may cause the railroad to have a higher
13 resource level that benefits a broader group of
14 shippers.
15 And so, I would only make the point that
16 hopefully the whole idea behind the incentive effect
17 is that we prevent getting into this type of
18 situation. And if the incentive effect works, it
19 may have broader benefits than just the people who
20 could be eligible.
21 MR. SEYFERT: Mr. Chairman, one thing
22 maybe to follow up on a couple of comments. One

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1 thing I would say is that obviously we, as NGFA have
2 been arguing for competition and believe that's
3 important on several areas you all have talked about.
4 The other thing I would say, though, too
5 in addition to competition is -- and I'm not a
6 lawyer, so I'm trying to be a little basic here, but
7 what is the bar, so to speak, of when an embargo is
8 allowed. And I think, obviously, we've discussed
9 here what's called Acts of God, and I don't think
10 that any of us would disagree that those are valid
11 reasons.
12 But I think, as you said, Mr. Chairman,
13 declaring an embargo every time they get in a pickle
14 and if they create that pickle, I think that is a
15 concern that by doing that you lower the bar what is
16 their statutory obligation and that you do allow that
17 to become a part of the business model, not just for
18 UP, but potentially across the full system.
19 And so, competition is a part of it, but
20 I think also what qualifies as a valid embargo is an
21 important question that also has to be part of that
22 consideration.

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1 CHAIRMAN OBERMAN: I think that's a good
2 point Michael. To me, it's like most case-by-case
3 decisions where we have a spectrum here. We know
4 pretty clearly what's a valid embargo. The flood
5 washes out the bridge. You can't move the train over
6 the bridge. It isn't even worth thinking about
7 whether that's a valid embargo. It clearly is.
8 Over here we don't have too many illegal
9 embargos in the case law, but we do have GS Roofing
10 that says if the price is reasonable, you've got to
11 fix the track. You can't just stop running the
12 trains because the rails are defective and everything
13 is undefined somewhere in the middle. Where does it
14 become illegal, either because it's self-inflicted or
15 there's a reasonable way to fix it and you don't want
16 to take the reasonable out, as a railroad, and that
17 could be a reason to follow up on Tom's idea that
18 maybe we ought to try to issue a policy statement
19 laying that out.
20 It's an open question, but it does need
21 some definition, I think, Mike, and I think you hit
22 it. I'm sorry, Michelle. Go ahead.

<p style="text-align: right;">Page 519</p> <p>1 BOARD MEMBER SCHULTZ: No, you actually 2 made a lot of the points that I was going to make. 3 Tom, you actually had analogized the embargo to a 4 force majeure situation. And I know that the law 5 here is very thin. If you could maybe just walk us 6 back through the legal support that you think would 7 allow the Board to perhaps frame it in that way. 8 MR. WILCOX: Well, the authorities on 9 embargos go pretty far back, 100 years, 150 years, 10 and that they're usually -- I have not found a case 11 that does not say that the cause of the embargo -- I 12 said it wrong before, but was not out of the 13 carrier's control. So, there's no cases where the 14 railroad declaring an embargo was the cause of that 15 embargo, particularly with congestion. 16 On the bridge example, one case or one 17 fact scenario I've been looking for is, say, a 18 railroad has a bridge and they don't do any 19 maintenance on the bridge and then the bridge 20 collapses. They've done no maintenance at all and 21 the bridge collapses, can they declare an embargo? I 22 have not found that case yet.</p>	<p style="text-align: right;">Page 521</p> <p>1 period of time and therefore you're excused from your 2 obligations, but you have to mitigate or take steps 3 to eliminate the cause to the best of your ability. 4 BOARD MEMBER PRIMUS: Tom, so does the 5 embargo, unlike force majeure, does it provide relief 6 for your volume commitment? Is it your understanding 7 or does it? 8 MR. WILCOX: It relieves you of the 9 common carrier obligation. So, what that entails is 10 whatever the common carrier obligation entails in 11 terms of their commitment to provide service, any 12 trip plans, any type of tariff provisions regarding 13 the service to that facility, they're all forgiven 14 for the length of the embargo. 15 BOARD MEMBER PRIMUS: So, you're saying 16 that the rail carrier should give relief to the 17 shipper from the volume. Do they do it now or is 18 that something that should happen? 19 MR. WILCOX: Well, what I would say from 20 a legal standpoint is that if it's not an embargo, 21 then they are subject to 11101(A) and all that 22 entails. So, then they are still providing common</p>
<p style="text-align: right;">Page 520</p> <p>1 CHAIRMAN OBERMAN: Just to add the facts, 2 then you're saying they didn't paint it and it rusted 3 out and then it fell down. 4 MR. WILCOX: Exactly. Like the GS 5 Roofing the issue there was there was it was Class I 6 or excepted track. There wasn't an issue there 7 whether they were not maintaining it at all. They 8 were maintaining it to except the tracks, so it's not 9 the issue of they just bought a railroad line, just 10 let it sit there and deteriorate and then when it 11 washed out they declared an embargo and somebody said 12 they couldn't do it. 13 But force majeure it's a similar concept 14 that if you have a contractual obligation, and in 15 this case the railways have a statutory obligation. You 16 must fulfill that obligation unless something beyond 17 your control prevents you from doing it 18 temporarily. And that's the key in both -- they're 19 both similar because it's temporary. You have that 20 obligation. 21 Something could happen beyond your 22 control that prevents you from doing it for a brief</p>	<p style="text-align: right;">Page 522</p> <p>1 carrier service, but at a metered or reduced level. 2 And whether that's reasonable or not is a question 3 that would be -- that's a legal question. And so, as 4 part of that service, they could -- where metering 5 service and to completely not give any relief for 6 that, that could be unreasonable, but to be a 7 reasonable common carrier under these reduced 8 circumstances, you should and maybe you could provide 9 relief to the shipper. 10 BOARD MEMBER PRIMUS: But if there's an 11 agreement -- again, a volume agreement before the 12 embargo that's what I'm sort of getting at. Do you 13 believe that it stands to reason that if they're 14 cutting back on that service, then they too should 15 provide relief from that volume agreement? 16 MR. WILCOX: Well, they should. And then 17 that gets into the issue of contracts. Are you 18 talking about a contract, are you talking about a 19 commitment in a tariff? Once you get into 20 contracts, then the force majeure type principles 21 come in. 22 BOARD MEMBER PRIMUS: Right. And if this</p>

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1 is as common as you said, Mike, before -- and this is
2 what I sort of alluded to yesterday. If this is
3 going to be a common practice or normalization in
4 terms of embargos that are just going to be a part
5 of operating, then should it stand to reason that
6 this be part of either part of the contract or tariff
7 that if you're going to limit cars online or you're
8 going to limit service that that too then subjects
9 the volume agreement to be limited or to be relieved
10 if that takes place?
11 MR. WILCOX: Those types of measures
12 should be part of it because you would not have --
13 ideally, you don't forgive the common carrier
14 obligation. You incentivize them to do more. But
15 if you're going to excuse the common carrier from
16 those obligations, they should not be able to hold
17 their customer to account for various charges or
18 volume commitments or things like that that are
19 associated with the obligation that they've just been
20 excused from.
21 BOARD MEMBER PRIMUS: Right, right. For
22 me, it's a question of whether you're allowed to sort

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1 of circumvent the contract, if you're looking at a
2 contract, through an embargo. Because then, again,
3 they can promise that service in that contract, but
4 use embargos to not live up to it, but you'd still be
5 beholding as shipper that volume commitment.
6 I think, again, it shows a disconnect.
7 It makes it uneven by -- you know if you do use it, I
8 should say normalize it. Again, if you're using when
9 a bridge out, if you're using during a polar vortex
10 there's an understanding there. But if you're using
11 it as a method of operation, then I think it does
12 call into question whether or not the commitment
13 there, the volume commitment should be also
14 considered for relief as well.
15 CHAIRMAN OBERMAN: You know, Robert,
16 that's an interesting question you raised. I hadn't
17 thought about that issue, but it does strike me, and
18 I haven't heard it yet, that it would be at the
19 height, just to coin a legal term, hutzpah, for the
20 railroad to come in and saying we're embargoing you
21 because we have a crew shortage, but we're going to
22 sue for breaching the contract by not shipping the

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1 cars or delivering the volume to us that we're
2 telling you don't deliver. But I suppose given the
3 current state of affairs, the point you raised needs
4 to be made because we don't know what the railroads
5 would do.
6 BOARD MEMBER PRIMUS: No. I also wanted
7 to follow up on a separate question in terms of
8 demurrage. For anybody in this group, is the railroad
9 charging shipper demurrage for cars that can't be
10 delivered? Are you guys aware of that?
11 MR. WILCOX: I do not have clients where
12 I know of those situations.
13 BOARD MEMBER PRIMUS: Could you ask?
14 MR. WILCOX: But I will say, and I'll put
15 Mr. Twist on the spot, who's going to be able to
16 rebut. We were discussing this issue yesterday, so
17 he may have some thoughts on it.
18 BOARD MEMBER PRIMUS: Okay.
19 MR. LOUCHHEIM: I don't know that I have
20 the -- I can't answer that directly. I do think that
21 over the last year some of our members have paid
22 demurrage, not railroads necessarily, but there

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1 might've been an interchange point where something
2 was sitting on a water terminal or a barge and it was
3 supposed to be unloaded and reloaded onto a rail car
4 and then pull it out. And due to poor service, our
5 members will wind up paying demurrage onto a different
6 modal carrier because the rail carrier wasn't able to
7 get there as you would normally expect.
8 BOARD MEMBER PRIMUS: I would say that if
9 you can, if it applies to embargos, so the same
10 thing. If they can't offload it because the
11 interchange is embargoed, I'd like to know if that's
12 happening.
13 MR. SEYFERT: We're happy to follow up
14 with some of our members on that, Robert. Obviously,
15 we'll need to follow up with some individually, but
16 we are aware of some that haven't been under the
17 embargos and we can check on that. But certainly
18 aware of the situation that Justin mentioned on the
19 broader service issues where we've seen demurrage.
20 Some I believe have been charged on the rail side and
21 then obviously on vessels we know vessels are paid
22 demurrage because they weren't able to load because the

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1 cars weren't there or the train wasn't there.
2 And I think, following up on the question
3 you mentioned earlier, Robert and also Karen, on the
4 overall cost and transportation is that, again, I'd
5 want to follow up on being able to cite specific
6 exports that have been lost, but certainly there has
7 been additional costs due to grain or beans that've
8 had to be sourced from other areas if delivery is
9 going to be made and due to the demurrage charges
10 that've been placed, paid at some point on vessels
11 into the overall increase in rates that have been in
12 some instances on the cars. That impacts your
13 overall costs, which obviously impacts the value of
14 the export that you're putting out.
15 But that transportation cost is also
16 built into the bases which impacts the final price
17 that producers are getting paid. And when you look
18 at the experts and particularly addressing some of
19 the major food security needs around the world,
20 particularly to the Black Sea situation that you
21 referenced.
22 A key part of that for some of the

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1 countries that are trying to get or purchase food aid
2 or that are trying to purchase their food needs on
3 the market a significant majority of those sales are
4 priced in U.S. dollars on the global scale. And so,
5 the impact here, the increased transportation cost,
6 and the overall value of the dollar it's all a
7 complex web, but at the end of the day I think the
8 short answer is, yes, it impacts it. And we
9 certainly have seen increased cost here in the U.S.
10 for our exporters and our shippers and reduced prices
11 at the farm for producers because of the challenges
12 that we've seen here and the increased cost.
13 So, I don't know if that helps answer
14 that earlier question, but I did want to follow up on
15 that while I have the chance to.
16 BOARD MEMBER PRIMUS: I do have follow
17 up, but I'll let Katie.
18 MS. MILLS: Yes, I believe our members do
19 have a couple of examples, but I'm happy to follow up
20 with you all with a few specifics.
21 BOARD MEMBER PRIMUS: Thank you. I just
22 want to also, Mike, since you answered that, part of

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1 what was said yesterday -- I think Don had talked
2 about it from the chemical standpoint is sort of the
3 unintended consequences and the fallout that we look
4 at embargos and where they are and what they do, but
5 they're not just centralized to that one area.
6 It impacts going to the PNW and beyond in
7 terms of cyclical what it does to you guys, Justin.
8 I'm going to come back and ask you about that.
9 But one thing that you did bring up and
10 we talked about yesterday was the lack of
11 communication. And even how it was communicated
12 yesterday was not as clear as it should be in a sense
13 that Kenny and others when they talked about they're
14 always constantly talking to their customers,
15 communicating.
16 But I've often understood that talking to
17 somebody and not talking with somebody is two
18 different things. If they're basically to your
19 membership telling them that you're going to be
20 embargoed, as you said, and you don't know why and
21 you don't know for how long, they've communicated to
22 you. And so, technically, they've done what they

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1 said they're doing, but that communication is unclear
2 in terms of the reality.
3 And then it goes back to what Justin said
4 about planning. How do farmers plan for that? And
5 when they see others being embargoed, the question
6 is, well, what happens when they are embargoed too?
7 So, can you talk a little bit about the sense -- I
8 would probably say frustration amongst your members
9 as to not knowing and not having answers? What that
10 does to them in terms of planning, in terms of how
11 they are able to really plan their operations of
12 getting that grain to market?
13 MR. SEYFERT: Yes, I think where you see
14 with the impact is that it impacts the ability to
15 know how much you're going to be able to move out if
16 you're trying to ship out or when. If you don't know
17 how or when you're going to get off the embargo, it
18 impacts your ability to move in product. If you're
19 needing to move in product, it impacts your ability
20 to move empties or you have to take additional
21 actions when you're on sitings and you are, the
22 increases, those costs.

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1 So, at the end of the day, it really kind
2 of puts a ceiling on what you think you can do in
3 terms of your business because you're limited, have
4 some unknown factors in how far you can move there.
5 I'd also say on the communication side,
6 and I'm taking it just on conversations with members,
7 individually. I think, obviously, from the marketing
8 side of UP, and that's where the customer
9 relationships are at. And our customers speak to
10 them quite frequently. Obviously, that's part of
11 their business.
12 Some it may be a weekly. Some it's on a
13 daily basis. Where I've heard frustration from our
14 membership it's not in the discussions with those who
15 are their regular contacts with UP. It's that they
16 can't get to or cannot get to, cannot get a response
17 from, cannot have a conversation with the Operations
18 side and that that seems to be where this is taking
19 place.
20 One of my members said just tell me how
21 the hell I got on it and how the hell I get off.
22 That's what I want to know and they haven't been able

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1 to get that.
2 Another frustration I've heard is that
3 there's a feeling that they're talking a look at what
4 were my last 7, 14, 21 days of business, not what is
5 my plan for the next 7, 14, 21 days which may impact
6 the data and how they look at this. But because of
7 that it also impacts my planning of how I look ahead
8 at my operation. So, I don't know if that helps.
9 BOARD MEMBER PRIMUS: Well, no, I think
10 that dovetails into what Justin said, to how they do
11 CIMS and the 14-day and Patrick actually alluded to
12 that yesterday about the seasonality of adjustment
13 and whether or not that is adjusted and the
14 challenges of that. That they pick 14 days of you're
15 saying that it's not in line with what's going to
16 happen in the next 14 days, then you're going to be
17 out of compliance and they're going to come and tell
18 you you've got to reduce, even though that is part of
19 the cycle. So, that's a normal part. It's not like
20 it's abnormal. It's like I always do this in this
21 timeframe in these 14 days.
22 I think that's also -- again, Justin, you

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1 can touch on it. Like if you're planting in the
2 spring and fall and they're counting your 14 days in
3 the winter, well, spring and fall it seems like you
4 might get from that standpoint.
5 BOARD MEMBER FUCHS: I think that's a
6 great point, Robert. And in fact, isn't that what
7 happened during the first iteration of the embargo?
8 MR. LOUCHHEIM: Yes. So, one point to
9 make is fertilizer actually moves by rail pretty
10 consistently in each quarter of the year. It's just
11 going to be more time sensitive, particularly in the
12 spring and also in the fall.
13 I didn't mention it yet, but the two-week
14 window that they kind of use as their data metric I
15 don't know why. Why is it two weeks? Why isn't it a
16 12-month average? I don't understand why it's two
17 weeks.
18 We'll have facilities where our
19 production facility doesn't have to be fertilizer.
20 It might've had a turnaround, might've been shutdown
21 for that period of time or like of those two weeks
22 and then it comes back up and it's just running at

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1 normal operations. And all of a sudden, they're
2 like, well, our two-week window says this and now
3 you're trying to put too much stuff in the network.
4 Well, that two-week window is irrelevant. So, I
5 don't know why they're using that. I don't know who
6 thought that was a good idea. Maybe there's some
7 great explanation for that I tend to doubt there is.
8 I do want to mention -- this is a
9 sidetrack topic while I'm talking. I think Katie
10 brought this up in her comments and it's an important
11 point to raise, not necessarily as it relates to
12 embargo practice, but private rail car usage and
13 utilization.
14 As I understand it, and this isn't just
15 from my members. This is from other shippers around
16 there. I mean really what they've been embargoing
17 are private freight cars, not cars that are their own
18 assets. So, I would be curious. I'm not saying
19 it's 100 to zero, but it's close is my guess based on
20 what I've heard, not just from my members again, from
21 around the shipper world.
22 And that just kind of comes back. I know

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1 the Board has got another proceeding on private
2 freight car utilization of those assets. This is
3 just a great example of the perverse incentives that
4 I'll call it the 75 percent ownership that shippers
5 have of private freight cars relative to the 25
6 percent the railroads have and also just underscores
7 the general situation that I think -- the dynamics
8 that are going on.

9 BOARD MEMBER FUCHS: I appreciate those
10 comments. And I think we heard from UP yesterday
11 that they are giving -- the will give serious
12 consideration to adjustment to that 14-day average.
13 Again, not that you are conceding your broader point
14 about embargos, but I do want to talk just a little
15 bit about notice and end day, again, not that you're
16 conceding your broader point.

17 In the demurrage context, which you raised,
18 Tom. You know we issued that policy statement and
19 what I think about is the key phrase is reasonable
20 control there. But we took three other actions.
21 There were rulemakings, one of which I think you
22 alluded to, which was on demurrage billing

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1 requirements. And again, you have a particular
2 position on embargos, but would it be useful for the
3 Board to think about things like notification, end
4 date, data quality surrounding embargos similar to
5 that we did with demurrage or is this an area where the
6 analogy breaks down because embargos are
7 categorically different than a demurrage, which is sort
8 of an ever-present tool?

9 MR. MR. WILCOX: Well, I think my overall
10 view would be to err on the side of more guidance,
11 particularly in terms of the notice. That has been a
12 big issue. Plus, more advanced notice gives the
13 parties more opportunities to talk about whether it's
14 a valid embargo or not or whether it's something
15 else, assuming that those guidelines would also
16 include those boundaries that we talked about. So, I
17 think those additional features would be helpful.

18 BOARD MEMBER FUCHS: Katie, good with
19 you?

20 MS. MILLS: I would also say it adds an
21 increased layer of transparency. Really
22 understanding, like you said, Chairman Oberman, the

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1 spectrum, which scale it is, and helping to determine
2 which is a true embargo and which may not be, so
3 transparency is great.

4 BOARD MEMBER FUCHS: Right. And I think
5 stipulating, of course, that I think, Mike, what
6 you've called Acts of God, you know those things
7 you're not going to have notice of.

8 And these are voluntary things that UP
9 could do on its own immediately because it seems like
10 they're rolling out new technology for pipeline
11 tracking. We've heard that some shippers, working
12 with other railroads, use that type of visibility to
13 actually get notifications about how close they're
14 getting to whatever limit because the railroad is the
15 comprehensive keeper of the data.

16 Well, you might say, well, the shipper
17 should know their own pipeline, but especially when
18 things like the serving area and what the limits are
19 applied there or if there is some macro view or if
20 they're manually applying exceptions. There's all
21 sorts of reasons why the railroad's management of
22 that technology and sort of pipeline system they

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1 would be better positioned, potentially, to give
2 shippers advanced notice before someone gets to the
3 point of that seven-day trigger.

4 So, I make that suggestion to UP that as
5 they're rolling out more tech leveraging that
6 technology, so to speak, to provide that advanced
7 notification so there's a longer period of
8 discussion and people can plan their businesses
9 better.

10 And then, as a second observation,
11 there's a lot of talk about end date. I thought Vice
12 Chairman Schultz had a lot of good questions on that
13 and I understood from UP they can't give an end date
14 because they're triggered to particular levels,
15 whether it's in the serving yard or overall for
16 private cars.

17 But nobody's going to be better
18 positioned than they are to project out when those
19 levels are going to be sufficient to provide people
20 more certainty. And there's a tradeoff between --
21 maybe the projection won't be right, but the benefit
22 you get from that is certainty. And it's unrealistic

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1 to expect an individual shipper to look across the
2 Union Pacific and the disparate actions of shippers
3 that might not be really to embargo. There might be
4 self-metering, however you want to phrase it. Union
5 Pacific is best equipped to provide that date and
6 maybe that date's not going to be perfect because
7 they were targeting 5,000 private cars and maybe they
8 only achieved 46. Maybe they achieve 54, but they've
9 provided people a date certain so that they can plan
10 their businesses.

11 And so, I offer those observations
12 because I thought we did have some productive
13 dialogue in the near-term things that Union Pacific
14 can do, some of which they seem to already being
15 considering on 14 days, on advanced notification, and
16 on end dates that I think would provide some level
17 of, let's call it mitigation.

18 And then, lastly, I would just say that,
19 Mike, I've heard exactly what you've heard, which is
20 I think sometimes the Marketing people on the ground
21 or the Customer Care people that are fielding calls
22 I've heard there might not be that many of them

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1 instances, but they're working their tails off and
2 they have the data they have and they're getting the
3 data from another source, but they're trying their
4 best to maintain the relationships in this difficult
5 environment. I have heard that too and I want to
6 recognize that.

7 But to say also that if there are repeat
8 data quality issues for UP to factor that in, which
9 is for whatever reason this is a problem that we have
10 so that when a customer raises it the customer
11 doesn't have to do a forensic analysis of why the --
12 for the one customer that shows you that this is a
13 data problem, if there are other customers that say
14 this isn't true, to say, well, maybe that other
15 customer's analysis might have some applicability
16 here.

17 So, I think if data quality is an issue,
18 which I think UP would say that their data is not
19 perfect, to understand commonalities where those
20 arise. So, those are just four suggestions that I
21 think UP could take in the near term.

22 MR. WILCOX: Just two things.

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1 CHAIRMAN OBERMAN: Yes.
2 MR. WILCOX: One, on the end date, I
3 didn't answer your question on that one. I agree
4 that would be helpful in the context of "congestion"
5 embargos because with a regular embargo or even a
6 force majeure that we're talking about, you don't
7 really know the end date. It ends when it ends, you
8 know, and then you can argue about whether it ended
9 too late or whether it should've ended earlier for
10 Acts of God and things like that. So, I think that
11 would be helpful in this context.

12 The second thing, Justin mentioned
13 private car efficiency and NGFA is a co-petitioner on
14 what's before the Board and I would say that the idea
15 or the concept is to promote the efficient -- you
16 know, provide incentives to use private rail cars
17 more efficiently. And if the thought occurs that if
18 such a program was put in place the liberal use of
19 embargos could undercut it because on the one hand
20 you'd have the system of inefficient use of private
21 cars being countered by charges or whatever was put
22 in place in the program.

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1 But if you had an embargo, then arguably,
2 the railroad say, well, I'm forgiven from
3 participating in that program because I'm excused
4 from my common carrier obligation because I declared
5 an embargo and that may be useful or may be
6 appropriate when you have a washout or a bridge go
7 down and private cars pile up somewhere, but it may
8 not be a so-called congestion situation. So, I just
9 wanted to raise that.

10 BOARD MEMBER PRIMUS: Katie, if I could,
11 I just wanted to get your opinion on one issue.
12 Yesterday, the conversation with UP I asked about
13 growth and where they thought growth was coming
14 from. And one of the things that they focus on, they
15 said growth was in coal and in stone, and it seemed
16 to be right down your alley with your membership.
17 And yet, you come today and say, but they're not
18 doing the job that you're asking them to do now.

19 And I'll pose the same question that our
20 financial analyst posed to them to you. How do you
21 expect them to grow or do you think they can grow if
22 they can't meet the need that they're meeting now?

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1 MS. MILLS: I don't know. I don't know.
2 BOARD MEMBER PRIMUS: And I don't know
3 either, but when I look at that and I see, again, how
4 you can operate in a way now with embargos and with
5 the crew shortages and others that you have that you
6 can grow without first addressing whether or not
7 you're going to grow crew and you're going to sort of
8 meet the commitment you're -- you're missing now,
9 that you're leaving on the table. My guess is that
10 they're leaving your business on the table.
11 MS. MILLS: Yes, absolutely. And there
12 have been threats for mines to have to shut down
13 because the stockpiles are getting too high, so
14 there's threat to employment there in the local
15 economies there, so it really has just a snowball
16 effect on a variety of different things. So, I don't
17 know. I don't know what the answer is, but it's
18 pretty impactful.
19 CHAIRMAN OBERMAN: On that point, Robert,
20 I couldn't help but coming to a conclusion yesterday.
21 Couldn't get any concession on it from the UP team
22 that a railroad which has in the last five years cut

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1 5,000 T&E employees and 2,000 locomotives out of
2 service does not sound like a railroad that's
3 growing.
4 And I kept coming to the conclusion every
5 time they tried to justify it that it has an awful,
6 terrible analogy to the Vietnam-era message we heard
7 that we had to destroy the village in order to save
8 it and it really begins to sound like that from what
9 we keep hearing here and it's quite troubling.
10 It leads me to a question that I wanted
11 to ask each of you. Let's start with Katie. By the
12 way, Katie, it sounds to me like all the rosy
13 descriptions we had of all the communication between
14 UP and its customers that we heard from UP yesterday
15 did not apparently make its way to your members. I
16 mean this concern about communication is directly at
17 odds with what we heard yesterday.
18 MS. MILLS: Absolutely. And as I
19 testified to, some of our members say the right hand
20 isn't talking to the left when it comes to UP and so
21 we're getting mixed messages.
22 One particular company, as an example,

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1 during their most recent embargo, I think it was
2 around Thanksgiving or a major holiday, reached to UP
3 and got a response, well, I'm on vacation. So, you
4 can imagine the frustration there.
5 CHAIRMAN OBERMAN: I thought the
6 railroads told us they were 24/7, 365. They didn't
7 have vacations.
8 MS. MILLS: I can tell you the mines are
9 24/7.
10 CHAIRMAN OBERMAN: Yes. So, you said,
11 among other things, trains got sent to the wrong
12 customer. I don't know how you misplace a 100-car
13 train. I suppose anything is possible, but what I'd
14 be interested in hearing from each of you -- so you
15 talked about that, Katie.
16 Justin, you talked about the decrease
17 last spring, which we heard about in cars that they
18 were going to pick up from fertilizer manufacturers
19 and eventually these things were talked out.
20 And Mike, you talked about 1,000, I
21 think, in 88 currently unfilled car orders,
22 currently?

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1 MR. SEYFERT: I believe that was the most
2 recent data of December 7th, so that's the most
3 recent data I have, Mr. Chairman.
4 CHAIRMAN OBERMAN: Yes. So, the question
5 that I have for each of you is did your members
6 actually net lose business in there for a loss
7 revenue and profits or were these shortages
8 eventually made up or can you ever make it up? So, I
9 wonder if each of you could comment on that?
10 MS. MILLS: At least for our members,
11 once a train is missed you can't make it up. I mean
12 you can't -- you just can't. The coal isn't getting
13 to the powerplants. Copper isn't getting to the
14 smelter, so you can't make it up. It's lost forever.
15 MR. LOUCHHEIM: Ditto. There's not
16 enough slack in the system to make up lost ground.
17 So, usually what doesn't get shipped just won't get
18 shipped.
19 MR. SEYFERT: Yeah. There's certainly
20 some may have made it up with other situations, but
21 that is lost cause that you're not getting back. I
22 mean an example would be if you're in the April --

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1 you're one of my processing plants that had lost, I
2 believe, 30 days of operations in the first quarter
3 of the year. Those are 30 days you're not getting
4 back. They've only got so much capacity to
5 manufacture and produce in a day and if you're maxed
6 out on what you're producing, you can't go back and
7 catch up those 30 days that were lost. They're just
8 gone and so that profit and that revenues are gone as
9 well.

10 CHAIRMAN OBERMAN: So, some of you may
11 know that I made a stab at trying to estimate what
12 this has cost our economy a couple weeks ago,
13 starting with the AAR's analysis, which I neither
14 endorsed or not endorsed. I just used it as a
15 starting point of a \$2 billion loss to the American
16 economy per day if there were a strike.

17 And with the help of our very smart
18 economists on our staff, we've tried to take that and
19 massage some of the data and figure out what all
20 these crew shortages have cost the American economy.
21 And I'm sure it was, at best, a very general ballpark
22 conclusion that we came up using the AAR starting

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1 point of about a \$200 billion loss over the last two
2 years to the economy across all Class I's.

3 I wonder if it would be too much to ask
4 each of you to talk to your members and try to give
5 us -- I'm not asking you to do an exhaustive every
6 member calculation. But I would find it very
7 enlightening on this score, and limit it to UP
8 because that's what this hearing is about, if your
9 members could give us a ballpark on what it cost
10 them, let's say just this year or the last two years,
11 however they want to look at it, in either loss
12 revenue, loss profits, both, loss output. However is
13 the easiest way to get a handle because I mean, the
14 reason we're here, I've said it many times, is our
15 job, I believe, first and foremost, is to further the
16 American economy.

17 It's not to further railroads. It's not
18 to further shippers. It's to further the public
19 interest. Ultimately, in that, in my view and I
20 think in all of our views depends on a robust rail
21 network. It's essential. And so, all of this about
22 data and charts and all this is really useless if

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1 we're not focusing on the main questions.

2 And I would find it very helpful in my
3 thinking to, at least from your industries, they're
4 not the whole economy, but it would be I think
5 insightful for everybody, for the public, for the
6 Congress to know what does this mean. It is not game
7 playing. It strikes me that there's a net loss that
8 you cannot make up. When the mine doesn't work for a
9 day, you can't manufacture another day of mining,
10 obviously, unless we get into the space/time
11 continuum someplace beyond my kin.

12 So, I think it would be helpful if you
13 could provide us with some more concrete ideas of
14 what it cost your members to lose out on -- and one
15 of the things that you all said that I think is more
16 sinister than just these embargos. I think
17 yesterday I said, if I recall my memory, so correct
18 me.

19 At one point in time that there was
20 something like 254, I think, of their customers that
21 they reached out to and they all self-metered or
22 self-limited or whatever it is and resulted I think

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1 at that point something like 80 embargos. But the
2 sinister notion there, and you've alluded to it, is
3 that a lot of shippers are imposing restrictions on
4 themselves, so they don't get embargoed and that
5 doesn't get reported to Rail Link, I don't think.
6 Rail Link just lists the actual embargo.

7 So, it is a bigger question and a more
8 amorphous question, I think, to get a handle on what
9 this operating strategy -- and by the way, Tom, you
10 said you didn't want these embargos to become the
11 new normal. I think they're the old normal at UP.
12 They told us it was standard practice in their
13 filings, which I don't see the law saying, yes,
14 embargos are part of our operating procedure, so it
15 is costing.

16 Anyway, I would ask you all to try to
17 help us out on that. I think it would be very
18 useful. Thank you. Michelle?

19 BOARD MEMBER SCHULTZ: I just wanted to
20 offer an observation. Yesterday I'd asked the
21 question to UP about notice and had shared that some
22 of the testimony that we'd heard is that shippers

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1 were only receiving as short as seven days' notice.
2 In case you weren't here, they actually did mention
3 that they were going to take that under advisement
4 and perhaps look into a revision of how they're
5 conducting notice.
6 But just wanted to revisit the issue of
7 the end date as well. And at this time I think that
8 what I've heard from shippers is that this use of
9 embargos is basically causing such unpredictability
10 to the network, both in terms of advance notice for
11 the use of the embargo as well as the uncertainty of
12 the end date.
13 And I guess I just offer again the
14 observation, Tom, based upon your comments. If the
15 embargo is restricted or limited to an emergency
16 situation, even though you can't predict the
17 duration of the emergency, you at least would be able
18 to have an understanding of the circumstances
19 surrounding it.
20 And using again the bridge outage as the
21 example where you might not be to predict an end date
22 with certainty as to when the bridge could be

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1 reconstructed, but you do have a timeline. And so
2 maybe you do a little bit better in that timeline or
3 maybe a little worse, but there at least is at
4 defined period of time. And that, to me, at this
5 point is what's missing from what's going on.
6 CHAIRMAN OBERMAN: Thanks, Michelle.
7 Anybody else? I think I speak for all us to thank
8 you for the time and effort you've put into making
9 your presentations and to talking to use all through
10 the year. I mean we need your input.
11 Justin, one thing I meant to say you
12 following up your comment about being concerned --
13 it's not to early to anticipate the spring planting.
14 To avoid the situation we had last year with the -- I
15 think it was 20 percent reduction. As best you can,
16 and we're talking about notice and end dates, keep us
17 posted January, February, and so forth if you see
18 this coming so we don't wait until planting is here
19 to say wait a minute.
20 Beside from anything else we might do
21 that's obviously spring comes when spring comes and
22 you have to be ready.

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1 MR. LOUCHHEIM: And we'll continue to
2 also work directly and our members will with UP.
3 CHAIRMAN OBERMAN: Yes, of course.
4 MR. LOUCHHEIM: And we'll engage you all
5 if we need to. That'll be our first option there.
6 Absolutely appreciate that. Thank you, sir.
7 CHAIRMAN OBERMAN: So again, thank you
8 all. Much appreciated. So, you are all dismissed.
9 Tom, do not leave the room without getting those
10 citations to us.
11 It is 11:35. Is the Board going to take
12 a 10-minute break here? It's a little early for
13 lunch, but do you all want to break? Let's recess
14 until 11:50 and we'll hear from the next panel. And
15 eventually, we'll take a lunch break. Thank you all.
16 (Off the record)
17 CHAIRMAN OBERMAN: We are back in session
18 and on the record. We're going to hear from our next
19 panel, our Labor representatives and then at the
20 request of UP, we're going to call them next because
21 they have a plane to catch. And then, depending on
22 the time, we'll either break for lunch or hear the

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1 last panel and we also have one final witness, Greg
2 Twist.
3 So, let's see how we're going. Maybe we
4 can all do it without a lunch break, but we'll
5 proceed in that order to accommodate everybody.
6 So with that, our next panel is from
7 SMART, Stephen Whitney and Matt Burkart. Who wants
8 to go first?
9 MR. BURKART: I'll go first.
10 CHAIRMAN OBERMAN: All right, Matt,
11 you're on.
12 MR. BURKART: Chairman Oberman, ladies
13 and gentlemen of the Board, I'd like to thank you for
14 your time and for allowing us to testify at this
15 hearing today.
16 So, my name is Matt Burkart, and I'm a
17 General Chairman for the SMART Transportation
18 Division. I'm also a working yardmaster for the BNSF
19 in Denver. I represent yardmasters on several
20 different properties.
21 So, President Ferguson would like to be
22 here today personally, but the two manning crews at

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1 the FRA hearing across town is where he is, so he
2 asked me to step in. I said it would be an honor to.
3 CHAIRMAN OBERMAN: Are you saying the Two
4 Man Crews are more important than embargos?
5 MR. BURKART: There's nothing more
6 important than embargos.
7 (Laughter)
8 CHAIRMAN OBERMAN: I thought that would
9 be the answer. Go ahead.
10 MR. BURKART: So anyway, I've held a lot
11 of different positions in the past 26 years around
12 this industry. I've served on a lot of different
13 boards of director, I still do for certain things,
14 and this has taken me everywhere from circus trains
15 now in Tampa, Florida up to Pet Coke trains in
16 Pittsburgh to everything last up the innerworkings of
17 the Alaskan Railroad. I like railroads and I like
18 railroaders.
19 So with that, I've got a little bit of
20 insight into it. So, I came here today. Mr.
21 Ferguson said, hey, the UP is embargoing a bunch of
22 customers. Could you go ahead and fill in and find

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1 out what's going on? I says absolutely. And after
2 the honor of testifying before you in April, I said a
3 people will talk to me. No problem. So, I picked up
4 the phone and I started to call.
5 I started in Mr. Oberman's hometown in
6 Chicago there. All roads lead to Chicago. It's got
7 22 railroads there. Anybody that's ever done
8 anything in the railroad industry came from Chicago.
9 I've done numerous tours there.
10 So, I called the yardmaster and the
11 yardmasters are the ones that make it happen. They
12 manage up, they manage down, they're a manipulator of
13 the inventory. They go ahead and if you have a train
14 that needs to move a customer at one time or another
15 has talked to a yardmaster.
16 So, I says, hey, tell me what's going on
17 there in Chicago. And he says, well, and I said we
18 used to have a hump yard, a real efficient way to go
19 ahead and classify cars. And he said they leveled it
20 and it's now a flat switching yard, but we can still
21 manage. He says we have two-man crews and they moved
22 it down to one-man crews.

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1 I said one man crew, how does that work?
2 He says not real good. He says you get a locomotive,
3 you get some cars, and you try and switch. I says,
4 well, all right. He says sometimes a utility
5 employee will come out and help him out and it goes a
6 little faster. I says, but have you heard of these
7 embargo cars. He says, oh yeah, I seem them a lot.
8 I said embargo cars what'd you do with
9 them? He says we take them down to Yard 4. I says
10 what's Yard 4? He says it's kind of a storage yard.
11 If there's ballast cars that happen to be there, if
12 there's grain cars that don't have orders, if there's
13 something we just threw them in there. We're not
14 supposed to move them.
15 I says customers cars that have been
16 embargoed are just sitting there. He says, yeah,
17 they sit there for a while and he says and then they
18 go ahead and finally start congesting up the yard and
19 we'll just ship them off someplace. And I said,
20 well, that doesn't sound like that's helping our
21 problem here.
22 And he says, Matt, he says there's a lot

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1 of things that don't make sense. He says every day I
2 come to work and there are two tracks full of
3 locomotives that happen to be parked right there. He
4 says why would I ever sit there and have a train
5 holding for power when I've got perfectly good
6 engines there. I said I don't have a good answer for
7 you. I've been asking that for a long time. He
8 says, well, it just doesn't make sense.
9 I said what about crews? He says same
10 thing as everywhere. I'm just numb to it. I just
11 don't want to go ahead and have to deal with it. We
12 come to work and we deal with the supplies that we
13 have. I says I thank you for your time.
14 So, I get off the phone with him and I
15 decide to start moving West and I move to the great
16 state of Nebraska.
17 CHAIRMAN OBERMAN: Before you leave
18 Chicago, what yard was that?
19 MR. BURKART: That was Perviso, sir.
20 CHAIRMAN OBERMAN: Okay.
21 MR. BURKART: So, I decide to move West.
22 UP's biggest railroad is out there. What else is

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1 there in the great state of Nebraska? I spent 14
2 years there, so the Nebraska is also the home of
3 Warren Buffett, the owners of BNSF. It also happens
4 to be the home of the Harmon Center where the UP is.
5 So, while I was there also a little-known
6 fact is it's got the straightest main street in
7 America. It goes 40 miles without a curve right
8 through the nation's capital. True story. So, if
9 you go on out West there, you're going to get a place
10 where the UP has a yard. It's called North Platte.
11 North Platte happens to have Bailey Yard, the biggest
12 yard on the planet, by far. They're proud of it.
13 It's got the Golden Spike Museum there. It's a big
14 three-story thing that you can go pay to get in, get
15 to the top, and there are trains to the East and
16 there are trains to the West as far as eyes can see.
17 So, I got ahold of the yardmaster there
18 and I says tell me what's going on here at North
19 Platt. He says we bump and run. I said I've been
20 around this industry a long time. I have no idea
21 what that means and he says our whole mission in life
22 is to get cars out of that yard. It doesn't matter

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1 if they get to destination. It doesn't mean that
2 they have a crew on them. We just need to clear this
3 and purge it every day.
4 I said give me an example. He says we
5 got a train here. It's called M, for Merchandise,
6 North Platte to St. Louis, to the Alternate Southern.
7 It runs East. He says by plan every day for a month
8 we will run that out to a siting called Far, just
9 east of the yard, and sometimes it's got some
10 locomotives on it. Sometimes it's got all the
11 locomotives. Sometimes it's got switch power. But
12 as it sits there right there, we don't have crew for
13 it. We don't have crews for anything.
14 I said I've heard this story before, but
15 tell me more. He says so the next day we will run
16 the next North Platte to St. Louis train out right
17 there next to it with power. We will pull that off
18 and put it on the previous train and then we'll go
19 ahead and call a crew if we have one and it goes. We
20 leapfrog this stuff, so it's sitting 24 hours. It's
21 alleviating the yard congestion, but it's not helping
22 our customers that pay us to get from Point A to

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1 Point B. It's just sitting there. Yes, sir?
2 BOARD MEMBER PRIMUS: (Off Mic')
3 MR. BURKART: That siding right there I
4 don't have the specifics. It's not mine, but I'm
5 going to guess it's probably an 8, 9,000-foot siding,
6 and that's really a guess.
7 BOARD MEMBER PRIMUS: (Off Mic')
8 MR. BURKART: I know through the Overland
9 Route they run a lot of the big ones. Out of Denver,
10 they run a North Platte train every day that's
11 10,000-foot. I mean they run some monsters the same
12 as we do, but I do not have the specifics on that, so
13 okay.
14 BOARD MEMBER PRIMUS: Thank you.
15 MR. BURKART: Not a problem. So, I say,
16 not a problem. Well, that's interesting with this
17 bump and run concept. You've got a lot of space out
18 there in Nebraska. I says people, do you have
19 people? He says, oh yeah, we got people. I said
20 what'd you mean? He says they're called borrow outs.
21 We've got 82 of them. These are 82 people that's all
22 within the union contracts to go ahead and come into

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1 North Platte and work temporarily.
2 So, I says that's a shortage of people.
3 They took them from some place else. You're robbing
4 Peter to pay Paul. And he says, yeah, it is, but
5 we're doing what we can to stay fluid at this time.
6 I says, well, I do appreciate that. I says
7 manpower-wise you're hurting, locomotives same as
8 everywhere. It's a repeat story. I hear it over and
9 over. I said, well, thank you. I do appreciate
10 that, telling me what's going on.
11 So, I said let's go a little bit farther
12 West. I says let's go all the way out to the West
13 Coast. Let's go to Roseville. Roseville is a hump
14 yard. Hump yards are very efficient.
15 CHAIRMAN OBERMAN: Where is it?
16 MR. BURKART: Central California.
17 CHAIRMAN OBERMAN: Rose Hill?
18 MR. BURKART: Roseville.
19 CHAIRMAN OBERMAN: Roseville?
20 MR. BURKART: Yes, sir.
21 BOARD MEMBER PRIMUS: (Off Mic')
22 MR. BURKART: The hump yard was a

1 merchandise not so much the embargoed intermodal
2 stuff and my person there that I did talk to in
3 detail I said how do you handle this stuff because
4 the embargoed cars aren't supposed to move and she
5 says we just ship everything out as far as we can and
6 there's stuff parked everywhere, basically, a
7 congestion story. It wasn't any different whether
8 it was Chicago or whether it was here. It was how
9 they processed the embargoed cars.

10 So, a lot of those are planned derailment
11 type things, if you would, with the embargos. How do
12 you mitigate the damage with the cars and the trains
13 that you have, so that's it.

14 BOARD MEMBER PRIMUS: (Off Mic)

15 MR. BURKART: So, that's what she told me
16 about Roseville. So, I'm seeing a common theme of
17 everything across the board, but then I got out West
18 I said, well, I'll call the yardmaster and I've
19 worked with these guys here in Denver. I said their
20 yard's right next to mine. I work with them every
21 day and I says could you tell me what's going on over
22 at your place?

1 And he says, man, I got to tell you. He
2 says I got to tell you about zebra phones. I said
3 zebra phones. I've never heard of such a thing.
4 That is the slang term that they use that every
5 trainman will go ahead and receive and that's where
6 they get their work orders from on what to do. And
7 he says out there and I says -- Ms. Hedlund, this
8 right here is in your home state. I've heard you
9 mention Colorado lots of times, but this is going
10 east to the not mountainous part, right? And we're
11 going to all the way out on that lineman branch, you
12 know, where the wind blows all the time. Okay.

13 So, as we get all the way out down to
14 lineman branch there's this place called Rydal and
15 Rydal's got about 30 industries out there. With
16 these industries right there he says the conductor
17 got out there and he loads his zebra phone. And
18 what'd you know, that thing says, hey, these cars are
19 embargoed. And he says, so some of them were, some
20 of them weren't, and he spent his entire shift
21 switching cars out that he could pull and the ones
22 that he couldn't.

1 This should be a normal industry spot
2 pull type thing. And he took the cars, left them in
3 the industry, the ones that he wasn't allowed to
4 pull, brought the ones into town that he did. And I
5 says, well, that doesn't sound real efficient. And
6 he says, well, it gets a little different. He says
7 when you get to town in the yard right here -- the
8 yardmaster I was talking to say, hey, we get cars
9 that are embargoed. We're not blessed with space.
10 We've got to get them out of here and I can't train
11 set them. Train sets is locking it to the computer
12 program so that it can go ahead and be listed to
13 everything.

14 He says, so my manager told me to write
15 the car numbers down on the wheel, give that to the
16 conductor, and tell him to get the train out of here.
17 I says that doesn't sound right because it's not
18 right. It's all about moving it. I says okay. I
19 says anything else you'd like to talk about? He
20 says, yeah, I do.

21 And he says this week, right here, just
22 15 miles south of Cheyenne happens to be 50 cars of

1 loaded fuel. This is hazmat. He says, so for
2 whatever management decision it was, they picked
3 those cars up and they ran them 85 miles south into
4 Denver into a high threat urban area, and that's
5 fine. That's what we do. We move chemicals. And he
6 says we bring them in here and he says, but there's
7 one problem with that.

8 I'm not blessed with a whole lot of
9 spaces and he says those cars belong in Green River.
10 So, the next day they went ahead and they put them on
11 a train and they ran them 85 miles north, right pass
12 where they were and took a left and took them to
13 Green River.

14 We're talking about yesterday I heard
15 over and over 130 cars we're going to go ahead and
16 make the difference for embargoing the customer, but
17 yet, here we're running 50 cars of hazmat into a
18 high threat urban area 170 miles that they didn't
19 need to be rolling down that track. That doesn't
20 make any sense to me. But for whatever reason, if
21 that was an oversight, ever yardmaster I talked to
22 could tell me some story like this of things that

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1 just didn't make sense.
2 And I said, well, I do appreciate your
3 honesty and your candid on this. And I says, so, the
4 gist of it crew shortages, power shortages, they're
5 not running real well. This doesn't make a whole lot
6 of sense, but I'd like to address one thing that Mr.
7 Primus you asked yesterday. What does the Union
8 Pacific look like in a post-PEB world as the rank and
9 file right there.
10 And I pondered that for a while because
11 the one word I heard over and over again was fear,
12 okay. I work for the BNSF. You know I'm here. I
13 represent yardmasters. That's what a union rep does.
14 My counterpart did not want to come here. He says I
15 don't want to lose my job. Every person I talked to
16 said can this come back and hurt me and I said you're
17 on the side of the good guys. You're telling the
18 truth. You want this to go ahead and run.
19 If the Union Pacific succeeds, we
20 succeed. And he said I don't want my job cut. I
21 don't want to get fired. Nobody wants that. And I
22 says that's not good. That was part of the PEB. Was

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1 the PEB was all that about money? It wasn't. What
2 they really wanted was respect. We've all seen the
3 things that said that Labor didn't contribute.
4 You've seen those type of things. I've never seen
5 such a barrier.
6 Back in the nineties, the Norfolk
7 Southern had that reputation and the UP has it now.
8 I said that's not good. During the pandemic, all of
9 my yardmasters went ahead and took a 10 percent cut
10 in pay on the Union Pacific for three months because
11 they were told they were going to go broke during
12 this pandemic.
13 I didn't write down the exact numbers
14 yesterday but it was something like \$24 billion in
15 buybacks. \$24 billion doesn't sound like taking 300
16 yardmasters and cutting their pay is going to make
17 them go broke. They never got that money back. They
18 showed up to work. We went from essential to
19 expendable overnight and that's just not good.
20 How do you fix it? It doesn't cost a
21 nickel to say thank you. I appreciate you. You're
22 good. You're contributing. You're doing a great job

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1 with this. That's not a hard thing to go ahead and
2 do. I'm not talking about incentive. I'm just
3 talking about little things that come across, undoing
4 the damage of the language that came out of that PEB
5 that says you're here. You're part of the job.
6 You're family. You're here for life. Those are
7 important things right here to make you feel like
8 you're a part of this cog, this machine is making it
9 go.
10 I said those things right there are just
11 little things that could happen. So, how do we look
12 at the future right here? You asked about the PEB
13 and what it was. One of the yardmasters I work with
14 was 10 years in the Army, combat infantry, did five
15 tours overseas.
16 And he sat there and he looks at me and
17 he wanted to walk. He wanted to be out the door.
18 Not because he wanted to hurt anybody. He just
19 wanted to be heard. And he says, Matt, he says when
20 I was overseas right there I never made so little
21 money. He says, but you know what, I never felt like
22 the generals hated me and that stuck with me.

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1 I said this isn't right. There're little
2 things that we do in these yards right here to talk
3 about the car men that do the inspections. Car men
4 right here are qualified mechanical employees. They
5 go through a three-year journeyman program. They
6 can fix anything on a car. They replaced them with
7 train men. My brothers right there, only a number,
8 but lesser qualified.
9 Now, I can do a brake test. I can look
10 and make sure if their safety appliance is there. I
11 can do that. But you know what, I can change my oil,
12 but I can't change my engine. That's the difference
13 between the two. These are cost-cutting measures
14 that they've done that does not make the railroad run
15 better or safer.
16 So, there's a lot of things that Uncle
17 Pete could do. A lot of things that don't cost
18 money. And this is it right that and I appreciate
19 the time to go ahead and tell you, but there's a lot
20 of things that says there's yard congestion that
21 doesn't need to be congested. They've got good
22 people. They're building America. That's their

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1 model. It's on their armor yellow engines
2 everywhere and they can do better without all these
3 goofy things that they've been doing.
4 So, I appreciate your time. Thank you
5 very much. And I've brought with me, Mr. Steven
6 Whitney. And I'd like to add this right here.
7 Stephen and I have been co-workers for 10 years.
8 We've got union positions together. He's been my
9 colleague and I had find yardmasters that work for
10 the Union Pacific and not only did I find a
11 yardmaster. I found a hotdog one. And Steve looks
12 at me and he says, Matt, am I going to get fired?
13 And I says there's no guarantees in life, but you're
14 on the side of the good guys here. So, I brought Mr.
15 Whitney with me and he works in Kansas City as a
16 yardmaster. He just wants to describe what he sees
17 every day.
18 CHAIRMAN OBERMAN: Steve, why don't you
19 go ahead and then we'll have some -- then we'll ask
20 questions of both of you.
21 MR. WHITNEY: I'd like to thank the Board
22 for the opportunity to speak before you today. I'm

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1 Stephen Whitney, a yardmaster in Kansas City. I
2 hired out on the railroad just shy of 28 years ago on
3 January 4, 1995, as a switchman and six months later
4 was promoted to a conductor. In June 1998, took
5 yardmaster promotion where I've worked ever since.
6 I've worked in different yards we have in
7 Kansas City. I've enjoyed my career with the
8 railroad and I've seen many changes over the years,
9 some positive and some negative. Recently, we are
10 not running well. The yard I currently work in runs
11 very efficiently when we have 850 to 950 cars in it.
12 We are currently seeing consistently around 1100 to
13 1400 cars in it.
14 This delays the ability to yard our
15 trains, along with yarding interchange trains from
16 other railroads. Kansas City is a major point of
17 interchange to other railroads, so we have to stage
18 or hold trains until we have space to yard them.
19 This can be just a few hours or up to as long as a
20 day, which, in turn, causes congestion on the main
21 line and in other yards in the Kansas City area.
22 The cars that used to go to other yards

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1 now are coming to mine, causing us to run over
2 capacity. Kind of like rush hour on the Interstate.
3 Lots of cars slow things day. This delays getting
4 the inbound crew yarded and getting them off duty so
5 they can become rested to be called back out. In
6 some cases a second crew is needed to get the train
7 yarded if the original crew expires on the hours of
8 service.
9 Secondly, the train yarded and having the
10 ability turn the locomotives back out on outbound
11 trains can be delayed for hours as well.
12 Locomotives, we are short on them. We're
13 routinely setting off locomotives from trains in
14 order to get enough to run trains out of the yard.
15 This work event sometimes happens on the main line.
16 While this is happening other trans are stopped
17 waiting on this move to finish. All the while, we
18 have over 100 locomotives in the bowl at Neff yard,
19 just a few miles away that have been stored for over
20 three years.
21 We are leaving car behind at times
22 because we don't have the engines to pull all the

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1 cars on that day's training, causing our car
2 inventory to go up and delaying the cars a full 24
3 hours.
4 Mechanical inspections on cars, we used
5 to have designated mechanical employees working
6 inbound and outbound trains. We now use fewer
7 utility employees to do the same duties. Train size
8 also causes congestion on both the main lines and the
9 yards. Many of the trains we yard or depart are over
10 10,000 feet, 12,000 feet, sometimes in excess of
11 15,000 feet.
12 In order to yard trains of this length,
13 they have to triple or sometimes quadruple in the
14 yard which can take an hour or longer blocking
15 anything else from moving while this is happening.
16 In my yard, the longest receiving track is 4400 feet.
17 Oftentimes, the engineer cannot hear the conductor's
18 handheld radio. Myself or others have to relay for
19 them to make the move because the conductor's radio
20 won't reach the two and a half to three miles needed
21 to communicate with each other.
22 On the main lines, it's not uncommon for

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1 one of these trains to have three to four others
2 stopped, waiting on it to go through the internal
3 before they all can move. For the yard I work in, we
4 run well when we have engines to pull the cars, crews
5 to build and take the trains out, and we are not over
6 capacity.
7 In closing, I, like many other employees,
8 love the railroad and the life it has provided for
9 us. We take pride in our work and we want it to be
10 successful. We sacrifice a lot to do these jobs,
11 working nights, weekends, holidays, and being away
12 from our families to chose this career path. We want
13 to build and run trains on time and service our
14 customers. Giving adequate crews, locomotives, and
15 the right sizing of the yard capacity would go a
16 long way to hauling and servicing our customers'
17 freight.
18 This great railroad to which I've
19 dedicated my life's work can run very efficiently. I
20 want it to run smoothly and I would like to see it
21 back on track. Thank you.
22 CHAIRMAN OBERMAN: Thank you, Steve.

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1 Patrick?
2 BOARD MEMBER FUCHS: Yes. Just two
3 questions for me. Reflecting on the discussion that
4 we had yesterday, and there was discussion about
5 productivity and performance. And one of the
6 performance metrics that Union Pacific offered up is
7 there preeminent performance metric was car miles per
8 day. But to me, at the time I thought that spans
9 both categories, but it occurs to me that from a
10 customer perspective that's not the performance
11 metric that is most relevant.
12 I do hear a customer come in and say
13 they're at 190 car miles per day, now they're at 200,
14 now they're at 210. What I hear customers talk about
15 is efficiency and reliability as it reflects in
16 transit time and trip plan compliance. Did I get my
17 stuff on time and was my cycle time low. And so, the
18 first question is, in interactions with customers is
19 that generally a correct way to think about it?
20 MR. BURKART: Holding numerous positions
21 in management primarily on the BNSF, but the thing
22 when speaking with shippers is I have a product. I

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1 want to ship it from Point A to Point B. Let me know
2 when you're going to pull it. Let me know when it's
3 going to go and don't let it sit.
4 BOARD MEMBER FUCHS: Right.
5 MR. BURKART: Communication. Talk to me.
6 Grain elevators, specifically, let me know so I can
7 have a crew in there to go ahead and run my little
8 switch engine and get it spotted out. I don't want
9 to know about when. I want to know when are you
10 going to pull it, when I can next one in.
11 In measures of efficiency for terminals,
12 terminals are the key to any railroad. Getting it
13 over the road is another piece of it right there.
14 That's cost per car, how efficient are you doing
15 this? How much did it cost to process it and move
16 it? From a customer standpoint, communication, tell
17 me can you consistently do what you tell me you're
18 going to do.
19 BOARD MEMBER FUCHS: And what your
20 testimony -- and my second question is what your
21 testimony is suggesting, Matt, is that if you just
22 look at car miles per day you might be capturing some

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1 inefficient moves that are not linked to the
2 performance that's most relevant to the customer?
3 MR. BURKART: Correct.
4 BOARD MEMBER FUCHS: All right.
5 Thanks.
6 MR. BURKART: A lot of this is, with the
7 exception of UPS and stack train, is not expedited.
8 BOARD MEMBER FUCHS: Appreciate it.
9 MR. BURKART: Thank you, sir.
10 BOARD MEMBER FUCHS: Thank you.
11 BOARD MEMBER PRIMUS: Matt, I may have
12 interrupted you earlier asking about embargos at
13 North Platte, but you were about to talk about
14 California, was there anything significant in
15 California?
16 MR. BURKART: The lady that I spoke with
17 out there had worked for many years and she runs a
18 hump yard, which is more the merchandise versus a lot
19 of the California, and as I understand it, the
20 embargoed stuff had to do with the intermodal and
21 that, so I'm not versed enough to go ahead and answer
22 a lot of questions there, sir.

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1 BOARD MEMBER PRIMUS: Far enough. I just
2 wasn't sure if you had covered that. My questions
3 for you, so, have you seen embargos impact your yard,
4 and if so, how?
5 MR. WHITNEY: We do see some embargoed
6 cars. We, like North Platte, ship them on. My yard
7 does not service any industries directly, so we
8 continue to ship them on down the line. They're not
9 delayed in my yard, but we don't have the capacity to
10 hold them.
11 BOARD MEMBER PRIMUS: And when you say
12 ship them, are you shipping them back to someone or
13 are you shipping them as Matt sort of referred to, to
14 some place where it's going to sit or where they can
15 figure out what to do with it next? I mean is it
16 just kind of just --
17 MR. WHITNEY: It comes up in the system
18 as an embargoed car, so it doesn't give you a
19 destination, a next destination, but there's a way
20 you can look it up to see where that car is going and
21 we send it that direction. Now, what happens when it
22 gets there, we don't know. Does that answer your

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1 question?
2 BOARD MEMBER PRIMUS: It kind of does
3 because, again, it's to the point where the embargoed
4 cars kind of they're out there, you know, like you
5 said, in a direction where they're supposed to be,
6 but they're not necessarily where they should be.
7 But that also implies that you still have excess cars
8 on the network because they're just there.
9 MR. WHITNEY: Right. So, for instance,
10 if I see an embargoed car that's going to Phoenix, I
11 will send it on a train that's going to work its way
12 final destination towards Phoenix, okay? So, we're
13 not just sending the car anyplace, okay? It's going
14 that direction to where it's supposed to. Now, what
15 happens to it once it gets to Phoenix, I don't know
16 if it sits there or if it gets spotted or what.
17 BOARD MEMBER PRIMUS: Thank you.
18 CHAIRMAN OBERMAN: A few questions.
19 Matt, the conversations you had with other
20 yardmasters that you told us about, are those
21 current, those are recent conversations?
22 MR. BURKART: Within the last two weeks,

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1 sir.
2 CHAIRMAN OBERMAN: All right. Thank you.
3 Steve, I have a couple of questions. You said you're
4 short of locomotives and they're 100 locomotives
5 being stored in a yard just nearby. What is the
6 situation in your yard with crews, are you also short
7 of crews?
8 MR. WHITNEY: We are tight on crews, both
9 road crews and yard crews. Correct.
10 CHAIRMAN OBERMAN: It sounds like if you
11 had more crews you don't have locomotives for them to
12 drive.
13 MR. WHITNEY: That's correct.
14 CHAIRMAN OBERMAN: So, it's a two-pronged
15 problem.
16 MR. WHITNEY: It can be, yes.
17 CHAIRMAN OBERMAN: Do you have any
18 insight as to why UP hasn't moved some of those
19 locomotives out of storage into your yard?
20 MR. WHITNEY: I don't know if they're
21 working or not working. I don't have knowledge of
22 that. I don't want to speculate, but they've been

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1 there for -- there were more in that yard and some
2 have been pulled out, but there's still some, quite
3 a few, over 100 still left in there probably.
4 CHAIRMAN OBERMAN: Do you know whether
5 there's an issue about not having enough mechanics
6 and electricians to get them in working shape, is
7 that an issue here?
8 MR. WHITNEY: I don't know what their
9 mechanical staff is there.
10 CHAIRMAN OBERMAN: Is that a repair
11 facility or is it just a place to park for you?
12 MR. WHITNEY: It was a hump yard in
13 Kansas City that they idled and they've stored the
14 locomotives in the bowl.
15 CHAIRMAN OBERMAN: So, I'm a little
16 confused about -- you said that your yard runs well
17 at 850 to 950 cars, but right now you're dealing with
18 between 1100 and 1400. Why are there 3, 400 extra
19 cars in there?
20 MR. WHITNEY: Well, some of them used to
21 go -- not all of them, but some of them used to go to
22 that Neff yard. And Kansas City, like I mentioned, is

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1 a major interchange point and it's hard to track some
2 days how much interchange business we get from other
3 foreign railroads. That fluctuates, so that drives
4 volumes up on certain days and just a little bit
5 lower on others.
6 And of course, we're not departing the
7 cars because we don't have the engines to run them
8 out as quickly as we should. We're not turning the
9 cars over as fast as we should causing the
10 congestion.
11 CHAIRMAN OBERMAN: And I thought you said
12 that your longest track was 4400 feet.
13 MR. WHITNEY: Receiving.
14 CHAIRMAN OBERMAN: Receiving.
15 MR. WHITNEY: Receiving track. Yes.
16 CHAIRMAN OBERMAN: And what about --
17 MR. WHITNEY: Departure?
18 CHAIRMAN OBERMAN: Departure tracks.
19 MR. WHITNEY: 5500.
20 CHAIRMAN OBERMAN: So, when you're
21 building a 10,000-foot train or are you building a
22 10,000-foot train?

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1 MR. WHITNEY: Oh, yes.
2 CHAIRMAN OBERMAN: So, how does that
3 work?
4 MR. WHITNEY: It takes two, sometimes
5 three tracks.
6 CHAIRMAN OBERMAN: And then they pull it
7 out and back it up and hook up the different
8 sections?
9 MR. WHITNEY: Right. They double and
10 triple it out to leave and when the trains come in
11 that big, they double, triple, and sometimes
12 quadruple in the yard.
13 CHAIRMAN OBERMAN: So, while this is
14 happening is the main line being used up as the train
15 is backing and moving back and forth?
16 MR. WHITNEY: Yes.
17 CHAIRMAN OBERMAN: The one thing I'm a
18 little confused about you both referred to embargoed
19 cars, but Steve you said you have embargoed cars and
20 you put them on a train. I was under the impression
21 yesterday that the embargo meant the shipper was not
22 supposed to put their cars out for pickup in the

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1 first place. They were told to not to add these cars
2 to the network, so are you getting cars that
3 obviously left the shipper that are now embargoed
4 and I don't understand that. Can either of you
5 enlighten me on that?
6 MR. BURKART: The only consistency that I
7 saw was inconsistency. Inconsistency from handling
8 from yard to yard, from person to person. I've seen
9 embargoed cars on my railroad which sit once that
10 happens. Like I had the one switchman in Rydal left
11 them in the industry. The one in Roseville says we
12 get them on a train and we get them towards
13 destination. One that said their proviso it says we
14 have a place that we just gather them and let them
15 store. So, what they're doing with the cars when
16 they're in the bloodstream, when they're out and
17 about is different from yard to yard to yard.
18 The one consistency though was most of
19 the managers were telling them depart them. Once
20 they're here get them out, with the exception of
21 Proviso there. That makes no sense to me either.
22 CHAIRMAN OBERMAN: Yes, I'm thoroughly

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1 confused. So, apparently, UP picked up cars from an
2 origin and then -- and maybe you don't know. Then
3 decided to embargo those cars after they left the
4 shippers facility?
5 MR. BURKART: With the volume and with
6 every person that I talked, they were out there and
7 familiar with them. So, while they were pulled while
8 they were in embargo status or once they were pulled
9 from the origin and put into the bloodstream of the
10 whole railroad and then became embargoed I don't know
11 the answer to that, but everyone had seen them and
12 they'd seen them in different capacities.
13 CHAIRMAN OBERMAN: In those places where
14 the yardmaster said I'm told to get those embargoed
15 cars out of my yard, it sounds like they're getting
16 them out, but not to go to where they're supposed to
17 end up but to just get them out of the yard and go
18 anywhere; is that right --
19 MR. BURKART: Yes, sir, absolutely. Yes,
20 sir.
21 CHAIRMAN OBERMAN: -- until the embargo
22 is lifted and then they move to their --

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1 MR. BURKART: When it's the bottom line,
2 we work for the company and we do what the company
3 tells us to. And it doesn't make sense and they tell
4 us to get them out of the yard, yes, sir, yes, ma'am,
5 you got it.
6 CHAIRMAN OBERMAN: Well, to go back to
7 your yardmaster who was in the service, it sounds like
8 that old saw, dig the hole and then fill it in and
9 dig it again.
10 MR. BURKART: There are so many things
11 that could be more efficient, make no sense, and
12 that's one of them.
13 CHAIRMAN OBERMAN: And Steve, you said,
14 though, that you had embargoed cars you used the ones
15 that were going to Phoenix, for example, then you
16 actually, even though they were embargoed, put them
17 on a train to Phoenix?
18 MR. WHITNEY: We don't have a train that
19 leaves my yard to go directly to Phoenix, so the
20 routing would be through several other terminals to
21 get there, yards to get there, and we send them that
22 direction that they would work their way onto that

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1 final destination.
2 CHAIRMAN OBERMAN: So, what's the
3 difference between a car that's going to Phoenix
4 that's embargoed in terms of how you handle it in
5 your yard, what's the difference between one that's
6 going to Phoenix that's embargoed and one that's
7 going to Phoenix that's not embargoed? In either
8 case, you're sending them towards Phoenix it sounds
9 like.
10 MR. WHITNEY: Correct. And to go back on
11 your point, how we get embargoed cars on my yard --
12 and not 100 percent sure on this, but since we do a
13 lot of interchange business with foreign railroads, I
14 don't know for sure, but I can assume that some of
15 these once they hit our yard or inventory, then go
16 into embargo status, but I'm not sure on that.
17 CHAIRMAN OBERMAN: Okay. Thank you.
18 Karen?
19 BOARD MEMBER HEDLUND: You mentioned the
20 hearing that's going on right now over at FRA on the
21 two-man crews. I was wondering if the railroads are
22 there and saying we could solve our crew problems

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1 tomorrow if we could go to one-man crews?
2 MR. BURKART: I would like to comment on
3 that, but I have yardmasters and we're singular.
4 We're not there. President Ferguson could do that
5 more. I would not be surprised if that happened.
6 BOARD MEMBER HEDLUND: I've heard that
7 from heads of other railroads not represented here
8 today, so not saying that would be Union Pacific's
9 position, but I have heard it from other CEOs.
10 CHAIRMAN OBERMAN: It was said with
11 distinction at our April hearings, if I recall. (Off
12 Mic').
13 BOARD MEMBER PRIMUS: I just got an email
14 that said that Fritz is testifying right now about
15 redeploying conductors from cab to roadside truck and
16 I don't think that you were asked to hire onto a
17 railroad to jump in a truck.
18 MR. BURKART: I was not.
19 BOARD MEMBER HEDLUND: The other thing
20 that I want to comment on is, yes, you're right. I
21 do care a lot about Colorado. It is my adopted
22 state. I'm a resident there now and I love its

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1 railroads and I love its railroad history. But one
2 thing I do know is that there's a lot of concern in
3 the City of Denver about tank cars on the joint line
4 coming straight through the city and I mean there's
5 these new apartment buildings on both sides of the
6 railyard.
7 A number of years ago in D.C., the
8 District tried to essentially ban tank cars from
9 going through the city on the ground; said it was a
10 real threat. And then we all learned that these
11 cities can't do that and Denver will be told they
12 can't do anything about it either. But I know they
13 would be very concerned to find out that for no
14 apparent reason there are more tank cars going
15 through the urban area than there should be.
16 I know there was also an effort a number
17 of years ago, and the plan is still kind of out
18 there, is to move the line, the joint in Colorado
19 through Denver down south. There are two tracks.
20 UP owns one and the BNSF owns the other and they use
21 both of them, one bidirectionally.
22 There was an effort to put them out on

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1 the eastern plains. It's called he Eastern Bypass.
2 That still sounds like a good idea to me, but it did
3 not go forward for various reasons, but I do know
4 there's a lot of concern about tankers in the city.
5 So, thank you for raising that.
6 MR. BURKART: Yes, ma'am.
7 BOARD MEMBER PRIMUS: Stephen, if I could
8 ask you a quick question. When did the increase of
9 car activity at your yard, and you've been around
10 since '98 in that area. Now, it's 1100, 1400. Do
11 you see this happening before 2017 or after 2017 or
12 has this just happened over the last several months
13 or years?
14 MR. WHITNEY: We kind of ebb and flow.
15 But the increased volumes in the yard that I'm
16 currently in is probably been the last six months --
17 six, eight months.
18 BOARD MEMBER PRIMUS: Have you seen it,
19 like you said, 850 to 950 are manageable you said.
20 MR. WHITNEY: Correct.
21 BOARD MEMBER PRIMUS: Was it around the
22 850, 950 timeframe six months ago or was it just

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1 lower than the 1100 or 1400 that you're dealing with
2 now?
3 MR. WHITNEY: It was around the 8, 850
4 range and we work real good on that range. We go
5 over that we get balled up and just jammed up.
6 BOARD MEMBER PRIMUS: And again, being
7 the yardmaster there and running it, was there any
8 reason given to you for the increase in that traffic?
9 Again, adding another 400, 500 cars to our activity?
10 MR. WHITNEY: I haven't gotten a reason.
11 BOARD MEMBER PRIMUS: Any conversation
12 about when it might mitigate?
13 MR. WHITNEY: No.
14 BOARD MEMBER PRIMUS: Based on what you
15 may have heard over the last day or so about the
16 network, do you believe it'll mitigate anytime soon?
17 MR. WHITNEY: No. It appears, for us, to
18 be kind of a new normal.
19 BOARD MEMBER PRIMUS: Okay. Thank you.
20 CHAIRMAN OBERMAN: Michelle?
21 BOARD MEMBER SCHULTZ: Just following up
22 on a discussion from earlier regarding car miles per

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1 day. Do you know how UP is using car miles per day?
2 And I think you mentioned that that captures some
3 inefficient movements. And after you tell me how
4 they're using it, what would be a better metric?
5 MR. BURKART: I don't know how they're
6 using it. I don't work for the UP, but being former
7 managers they're very similar. What you measure is
8 the flavor of the day or the efficiency. I've been
9 on times that we ran on time all the time. UPS peak
10 season is one right how that we have the ability that
11 trains come in consistently early and they make sort
12 time because Christmas is important. By January, we
13 won't be doing that anymore. Again, I don't know
14 about the UP right there.
15 We have trains then that comes to the
16 merchandise network, your boxcars we will run on time
17 all the time, those were things. And then it'll be
18 wait a minute the new metric is units per train,
19 okay, where we must have the long trains, the 145-car
20 trains, the triplers, the ones that you wait forever
21 for at the crossings. So those, depending on
22 whatever corporate decides at that time depends on

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1 what it is that we are directed to do. And then
2 there are restrictions in our State of Colorado with
3 mountains and grades and things like that, some we
4 can't, but if you run east it's all downhill. You
5 can do a lot of different things.
6 My personal, I'd like to see measures of
7 efficiency. Like it's really good on that car miles
8 per day perhaps for the UP, but that's not helping
9 ADM or AGP or anything like that get their
10 consistent service. So, I like what's known as a
11 cost per cars as a metric to see if you're running
12 efficiently. Are you doing those things? Yes, right
13 train/right day is a good thing right there. Are you
14 running your on-time performance, those type of
15 things.
16 They're gathering the distributions,
17 which is first mile/last mile or your OD pairs, all
18 measurements to say did we service our customers when
19 we said we'd like to service our customers? Because
20 in the end if I don't have customers I don't have a
21 railroad and that's any railroad. So, these are
22 things that I consider. They may cost a little bit,

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1 but guess what, I drive with car insurance.
2 You know, it's like to have these things,
3 these buffers that may be a little bit expensive, but
4 if I can consistently serve a customer, then guess
5 what, they can count on me. If they can count on me,
6 then they can grow.
7 If I'm inconsistent, like the poor
8 gentleman who was talking about getting a 45-car
9 spot, his industry may not go ahead and hold that
10 many. That makes no sense to me. If he needs to
11 consistently get 10 cars a day for 50 for a week,
12 that's good. He doesn't want 50 at once.
13 So, these are the type of things that
14 being in the railroad industry, and I don't have
15 specifics on the UP. That's their management level.
16 But it makes sense to me as a measure of efficiency.
17 I hope that answers your question. Yes, sir?
18 CHAIRMAN OBERMAN: I just wanted to
19 follow up one thing you said, Matt, in answer to
20 Robert's question about post-PEB atmosphere at the
21 railroads. You said the single thing you've heard is
22 fear and I wonder if you could extrapolate on that.

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1 I understand what you meant about a person who was
2 afraid of coming here as a witness, afraid of losing
3 his job, but is there some fear that's permeating the
4 workforce beyond testifying here?
5 MR. BURKART: There has been just in the
6 yardmaster craft industry-wide, there's about 1500 of
7 us. Ten years ago there was 2200. There are
8 reductions. There has been a lot of work put on us
9 and we can do it. Don't get me wrong. We'll take
10 it. That's good. But there is fear of me,
11 personally, would I get fired for doing this. And
12 there is fear are they going to eliminate my craft,
13 my hub? Are they going to put more stuff on me?
14 There's been fear in certain places of
15 are they going to replace me with an officer.
16 CHAIRMAN OBERMAN: With a what?
17 MR. BURKART: An officer, a train master
18 or an MDO, those type of things. So, there is a
19 consistent level of uncertainty. I mean a lot of
20 these people hired out and say I've got a lot of
21 years out here. I want to hit my 30. I want to go
22 ahead and do this and so do they. It's a good paying

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1 job. It's got good benefits. It can be great. And
2 I don't want to come to work being scared whether I'm
3 going to be here or not. And a lot of it's not the
4 scare of I do something wrong. It's the scare of are
5 they trying to reduce us for whatever reason in the
6 ways of efficiency.
7 The yardmasters consistently told me
8 about losing 10 percent of their pay, yet, showing up
9 every day during the pandemic because of fear. I was
10 like, well, they did it. There're people that say,
11 yes, we're going to come here and we care about it
12 and we're going to make it work. But obviously, the
13 railroad in their testimony of stock buybacks isn't
14 going to go bankrupt. That 10 percent that they took
15 from them these are the type of things that stick
16 with them of am I going to lose my position, am I
17 going to lose my job even if I'm the best yardmaster
18 there is?
19 CHAIRMAN OBERMAN: So, a couple of
20 questions. How does that work under your yardmasters
21 collective bargaining agreement? How do they get
22 away with cutting their pay 10 percent?

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1 MR. BURKART: The yardmasters on the
2 Union Pacific, the Southern Pacific yardmasters were
3 clerks that belonged to the TCU Union, then they also
4 happened to have the former Union Pacific were the
5 SMART, the UTU yardmasters they have an agreement
6 that Steve could answer a little better because he
7 works under it as to how they went ahead and arranged
8 for that cut in pay. There was something negotiated
9 in which the company went to the UP leaders, which
10 are my peers, and this is what they came up with and
11 it was a result of the pandemic. So, that's how they
12 did it.
13 CHAIRMAN OBERMAN: I'd be interested if
14 it's calculable, if maybe the unions could do it, as
15 to what was the gross amount if you added up all
16 these yardmasters 10 percent pay cut what did it save
17 Union Pacific.
18 MR. BURKART: I will get those numbers to
19 you, sir.
20 CHAIRMAN OBERMAN: I would like to have
21 that number.
22 MR. BURKART: I will get that.

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1 CHAIRMAN OBERMAN: By the way, the number
2 for 2020, just that year, was 6.3 billion in buybacks
3 and dividends, just that one year. That was the low
4 point. All the other years were higher.
5 I have wondered. We have had reports,
6 actually, not just at UP, but I think at least other
7 railroads as well, of yards not having a yardmaster.
8 Of a yardmaster being a yardmaster for more than one
9 yard. I mean to yardmaster means that you're the
10 master of a yard. How can you have a yard without a
11 yardmaster? How does that even work?
12 MR. BURKART: I have that in many
13 locations, not just one. I have over the mountains
14 in Seattle there's a place called Wenatchee. I had
15 yardmasters there. They went ahead and eliminated
16 the yardmasters there and move the work to
17 Interbay, Seattle proper, and we run them via
18 cameras and radios across the board.
19 I can give you many. We do that at
20 Pearland, Texas for Galveston. We do that in Denver
21 for Pablo. There are a lot of remote locations and a
22 lot of places that's good. We like the work. That's

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1 not a problem. But the problem is when there was a
2 yardmaster there and you pulled them out and gave the
3 duties to somebody else and thought it was better or
4 safer or efficient via camera.
5 To me, there's nothing better than being
6 in a tower where you can hear it. You could see
7 everything. You know what's going on. It's not like
8 a dispatcher with a CTC screen that sees 130 miles of
9 train. This is your yard with a lot of moving
10 pieces. I can have six engines moving all at the
11 same time if everything goes right.
12 I had a train the other day that had a
13 knuckle failure. You heard it. You knew what was
14 going on, that type of stuff. I'm glad I have
15 yardmasters in these yards. I would rather they were
16 physically in that yard. Does that answer your
17 question, sir?
18 CHAIRMAN OBERMAN: Well, has that hurt
19 efficiency in processing and moving cars to have a
20 yard without a yardmaster physically there?
21 MR. BURKART: In my opinion, yes.
22 There's nothing that beats a yardmaster.

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1 CHAIRMAN OBERMAN: Steve, are you
2 responsible for other yards remotely or just your own
3 yard?
4 MR. WHITNEY: Yes, I control two yards.
5 And there's another yardmaster in Kansas City that
6 also controls two yards. We are in a downtown office
7 and we do everything with camera.
8 CHAIRMAN OBERMAN: So, you're not
9 physically in either yard.
10 MR. WHITNEY: Correct.
11 CHAIRMAN OBERMAN: And how does that
12 compare to when you were physically in the yard in
13 terms of you getting your job done?
14 MR. WHITNEY: Like Matt mentioned on it,
15 when you're in a tower you're surrounded by glass and
16 you have peripheral vision around you. Even though
17 I'm looking at a computer screen in front of me, I'm
18 still seeing movements going by and you hear things.
19 You can stop derailments. You see things happening.
20 You may not be able to stop a derailment if it's
21 already happened, but you can certainly stop the
22 movement faster to create less damage. I don't

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1 think it's as efficient or works as well.
2 CHAIRMAN OBERMAN: One other question,
3 Matt. You talked about yardmasters fearing a
4 reduction in force. Are you hearing beyond that, the
5 reports we keep getting, that there are people that
6 when they get those backpay lump sums are going to
7 walk? Do you have any insight into that or whether
8 that's a real phenomenon?
9 MR. BURKART: It is not a phenomenon.
10 It's a fact, okay. I'll tell you I've lost people
11 that had 15 years. I've had a lot of officers come
12 from my ranks because it's a natural progression.
13 They have just went ahead and quit. I had one guy that went
14 to a fishing boat in Alaska, walked away. He says I
15 don't need the retirement. I'm done.
16 And it's not one or two. It's a large
17 number where I've discussed and seen people that have
18 a decade out here that are a ways away from the 60
19 that said it's just not there. January 11th is the
20 day for us yardmasters to get our backpay. There are
21 people that just say I'm not going to do it anymore.
22 I want my money. Consider it a severance package.

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1 Goodbye. So that is a realism, sir.
2 CHAIRMAN OBERMAN: If and when that
3 happens, can you get us numbers of how many people
4 actually make that choice.
5 MR. BURKART: I can. When we get that, I
6 will, absolutely, sir.
7 CHAIRMAN OBERMAN: Thank you. Patrick?
8 BOARD MEMBER FUCHS: Just one final
9 question for me. You were describing what you termed
10 concerning activity in yards. To your eyes, does
11 that apply to both serving areas and metric
12 terminals, some of those practices? What we have in
13 mind is that the CIMS applies to serving areas, is it
14 to both? Are there differences in practices between
15 the two?
16 MR. BURKART: As far as embargoed cars?
17 BOARD MEMBER FUCHS: Generally, the
18 concerning operating practices that you're
19 describing.
20 MR. BURKART: A lot of it there is a
21 system push and there's also individual ways. I've
22 worked for a lot of people in a lot of different

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1 places. We cross 28 different states, so it could be
2 geographic or what the flavor of the general manager
3 is or the direction there, so there's no consistency.
4 BOARD MEMBER PRIMUS: If I could, my
5 final statements. Stephen, I just want to thank you
6 for your willingness to come before us and just give
7 us your perspective from your yard and the
8 operations. I know being here it's not easy to come.
9 I know it's a tough thing to do, but as Matt said,
10 you're on the right side. We do need to understand
11 this better and do need to know it.
12 My appreciation also is to you for what
13 you do every day. I mean you are part of what makes
14 this network great, what keeps it moving. We
15 couldn't do it without you. It is actually evident
16 that we can't do it without a lot of your peers
17 who've disappeared as well over the last several
18 years. So, my hat's off to you, my respect to you
19 for doing that.
20 Matt, you've been here before. We know
21 you're a veteran. But like you said, you're stepping
22 out to do this and I want to acknowledge that and I

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1 want to thank you for doing that and for your service
2 as well. Thank you.
3 CHAIRMAN OBERMAN: (Off Mic') what Robert
4 said. We really do appreciate you and others coming
5 here, so we really appreciate that. Thank you.
6 If there are no other questions, we'll
7 let you folks go and I'm going to ask Brad Moore to
8 come back up because I know he's got a schedule he's
9 trying to keep. Hopefully, we'll get him out of
10 here.
11 I'm thinking, while we're waiting for
12 Brad, that we should go through the rest of the
13 witnesses and not take a lunch break. I don't know
14 how the Board feels about it.
15 BOARD MEMBER FUCHS: Lunch break.
16 CHAIRMAN OBERMAN: We should take a lunch
17 break. Okay.
18 BOARD MEMBER FUCHS: I'll be 3:00 p.m.
19 CHAIRMAN OBERMAN: All right. We will
20 take a lunch break then. Gosh, you're a growing boy.
21 I don't want to deprive you of lunch.
22 (Laughter)

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1 CHAIRMAN OBERMAN: All right. Brad,
2 thank you for coming back up. Mike Rosenthal, I have
3 that right, is also with him. I did get somebody who
4 asked me last night who was that guy sitting next to
5 Lance all day and never spoke? I said he didn't
6 have to. Everything was under control. You almost
7 did at one point.
8 Brad, is there anything you would like to
9 add here because I do have a few questions and Board
10 members may too, but if you have some remarks you
11 want to add, please do.
12 MR. MOORE: Yes. Thank you, Chairman
13 Oberman. So, I would like to offer some additional
14 clarity from the UP perspective based on some of the
15 comments that we've heard over the course of the last
16 two days, as well as, obviously, feedback that we've
17 received prior to today from our customers.
18 So, first and foremost, I do want to
19 assure the Board that we've listened. We've heard
20 feedback. We've heard concerns and we are going to
21 work through that feedback diligently, and that
22 includes the comments about transparency, visibility,

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1 release rates, trend analysis, looking at can we
2 offer greater advance notification. Basically, in
3 summary, looking at all ideas, concepts that we've
4 heard leading up to the hearing and during the
5 hearing. And we'll take that back and evaluate and
6 come back with next steps and take those next steps
7 accordingly.

8 Second, I want to talk about loads versus
9 empties. Based on our testimony yesterday, we have
10 heard from a few customers that didn't follow or
11 heard, misinterpreted what we were attempting to say,
12 so I want to offer clarity because our words are
13 important that we clarify.

14 So, I want to talk about mechanics, first
15 of all, and then I'm going to talk about intent. And
16 Eric's comments yesterday around the intent of
17 embargoing loads versus empties. But let me first
18 start with the mechanics.

19 So, an embargo is issued by Union Pacific
20 predominantly at a singular customer location or a
21 facility. Each embargo can be issued based on loads,
22 based on empties, or both. The majority of the Union

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1 Pacific embargoes are issued mechanically as a
2 load-only embargo.

3 That enables the empty to physically move
4 back to the origin location, which is typically a
5 location that the plant has ownership of the cars or
6 leasing the cars and they can store the cars. That
7 shipper also may choose to store at an alternative
8 location. So, that's talking through the mechanics.

9 Now, the intent of our embargos, and
10 again, I'm going to separate -- I think it's
11 important that we continue to separate CIMS from the
12 serving area and then private car pipeline
13 management.

14 CIMS for the serving area the intent
15 there is to match up the consumption rate with the
16 production rate. And what we see again on the
17 serving areas is that the receiver or consignee is
18 not keeping up with the flow of production or the
19 enroute pipeline keeping up with the shipments.

20 Now, on the pipeline management, our
21 intent there is ultimately to remove excess empty
22 cars from the network. We see a misalignment of car

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1 inventory versus carload demand or volume and that
2 said another way is the number of cars that it takes
3 to generate a load. So, the intent of our pipeline
4 embargo ultimately is to store an empty and not
5 impact the revenue or carloadings and that's both for
6 Union Pacific and the customer.

7 Third, I want to talk a little bit about
8 system cars. We've heard some feedback about
9 railroad-controlled cars and impacting private cars
10 over and above an impact on the railroad-controlled
11 car. The point there that we'd like to make is that
12 the railroad has the ability to take direct action on
13 railroad-controlled cars.

14 That corrective action to be to redirect
15 a railroad-owned empty car flow to an alternative
16 origin or facility that is keeping up with the demand
17 or in cases where the overall demand of the network
18 for that car type is not necessary, then we can store
19 the cars to offset the downturn in demand.

20 The fourth item I would like to address
21 is communication. Certainly, I've taken to heart the
22 feedback about communication as a lot of that falls

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1 in my team. And I'll also just make a personal plug
2 here that the Customer Care and Support team, I'm a
3 little biased, but I think it's an awesome team, a
4 great team, and I want to talk to you a little bit
5 about that team a little bit more.

6 So, we have a 24-by-7 call center
7 operations for our customer base and for our
8 operation support. We also have an online
9 support team that we call e-Business to support
10 customers with questions about web applications. And
11 then we heard from the Mining Association and I did
12 want to clarify that we also have a 24x7 unit train
13 desk that fields calls from customers on an ongoing
14 basis.

15 And then, finally, when we're thinking
16 about embargos and that group is our Manifest team
17 and we have a case management technology and this
18 case management technology actually applies across my
19 organization, but it's applicable here due to the
20 embargo discussion.

21 And that case management technology
22 allows to have documentation of all of our

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1 engagements with customers. It also allows us to
2 monitor our response times and make sure we're being
3 accountable on being responsive. It also allows us
4 to collect data and do root cause analysis where we
5 have opportunities.

6 And then, to the comment about an
7 individual being on vacation, it allows and assures
8 the customer that we have group coverage and if they
9 come to that case management again it'll be
10 addressed with those are on duty and you won't need
11 to worry about who might be off of work that day.

12 I'm just going to pause for a second.

13 All right. So, then I want to address embargo cars
14 in the yard because we heard some commentary from the
15 last panel there and so I did want to clarify. So,
16 en route cars can flow to destination, so cars that
17 are billed or shipped prior to the embargos those
18 cars continue to flow. Those cars do not get held
19 for embargo. Those cars will continue to flow
20 through the pipeline and the enroute will be
21 delivered.

22 What an embargo does do is it pauses any

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1 new bills. So, those cars, for us, hit what we call
2 an ED hold, an embargo hold status and that hold will
3 be at the industry facility. Our system does not
4 block billing. We can't stop a customer from
5 billing a car. But rather, the car, if billed, and
6 if that location is embargoed, it will go into an EB
7 hold, an embargo hold status.

8 Now, the crew member at that point has
9 been advised. They know that they're not to pull EB
10 hold cars from a facility. So, if a car, as you
11 heard in the testimony, if a car is out running on
12 the railroad that is an embargo hold, then we
13 mistakenly pulled it from an origin location when it
14 was on a hold status.

15 The other possibility is that the car was
16 interchanged from another railroad and the foreign
17 road or the origin road pulled the car, mistakenly,
18 and they provided that in the interchange to the
19 Union Pacific.

20 Now, at that point we have the
21 alternative to set back the car, is the industry
22 term, to do a setback back to that road that

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1 delivered us that car, mistakenly. And on a related
2 topic, relative to demurrage, an embargo would actually
3 reduce demurrage by preventing excess serving yard
4 inventory. IN fact, I believe the Board heard from a
5 shipper last week at RSAC one shipper opinion that he
6 would actually prefer an embargo versus his
7 constantly tying up his private-owned assets.

8 And then, finally, car miles per day,
9 some conversation about out-of-route route cars. So, I do
10 want the Board to know that we do monitor and measure
11 any out-of-route. We have a term called right
12 car/right train/right day and we do monitor our
13 productivity for any cars that would hit a wrong
14 train and it is a very small percentage of our cars.

15 That was all I had. Thank you.

16 CHAIRMAN OBERMAN: Thank you, Brad. I
17 have a few questions -- yeah. Go ahead, Michelle.

18 BOARD MEMBER SCHULTZ: Brad, before we
19 move off of this, can you just speak to how you're
20 using the car miles per day?

21 MR. MOORE: So, car miles per day, I
22 believe you heard in our testimony yesterday we feel

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1 it's a very key metric for us. It's a great measure
2 of network fluidity and an overall good barometer for
3 the railroad to determine how fluid the network is
4 and how well we're cycling cars ultimately for the
5 customer experience.

6 CHAIRMAN OBERMAN: So, just on that
7 point, and I think Patrick raised this question
8 yesterday. To compute car miles per day takes into
9 account both the actual miles per hour that the car
10 is moving and the dwell because it's really averaging
11 how far that car was at the end of the day and
12 includes if it sat in a yard for a couple hours,
13 right, so it is a measure of both?

14 MR. MOORE: Yes, that is correct.

15 CHAIRMAN OBERMAN: So, there was some
16 talk sometime yesterday. Wait until we see the new
17 numbers that came out that we hadn't seen. So, if
18 you filed them, we don't have them there, but we got
19 them off of your website. And what I see is that on
20 12/9, that's the latest date that's on the website,
21 of course, because you won't report again until the
22 end of this week I gather. You were at 202.

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1 The first time this year, I believe,
2 maybe earlier in the year. You exceeded 200. Most
3 of this year you were in the 180 to 190 range. So, a
4 couple of questions, Brad.
5 Isn't it fair to say that that 202 is
6 mostly a result of the Thanksgiving slowdown in
7 volume that every railroad gets over that holiday and
8 that allows you to speed up a little bit, is that a
9 fair statement?
10 MR. MOORE: What I could say, Marty, and
11 this isn't going to be my area of expertise, so I'll
12 give you what I can on that response. What I can
13 tell you is that certainly we've talked about a
14 correlation between your inventory and your car
15 velocity. As you have less excess inventory on your
16 railroad, you can move at a higher car velocity.
17 Yes, there is during the holiday period
18 there is a historical trend where we do see some
19 volume or some inventory come off the railroad during
20 that holiday period. That said, our performance over
21 the last three weeks has been better than the
22 historical average.

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1 When you think about our operating
2 inventory reduction and what we've been able to
3 effectively have less inventory and allow us to move
4 at a higher car velocity, so we've actually been
5 able to in the last -- well, when I talk about
6 Thanksgiving Day versus December 12th, we were down 6
7 percent operating inventory versus our historical
8 average -- and when I'm thinking about historical,
9 I'm talking three-year average, prior three years
10 only able to reduce inventory by 1.4 percent, so we
11 have seen improvement there.
12 And certainly, again, Marty, there's a
13 correlation between velocity and inventory. However,
14 that performance is also partly to UP performance. I
15 don't want the Board to walk away to think that that
16 is solely due to the holiday.
17 BOARD MEMBER FUCHS: But Marty, just real
18 quick. Eric did testify yesterday that Thanksgiving
19 did play a role and do think that the three-year comp
20 is a little bit difficult because of the pandemic
21 year, if that was included in the three-year comp,
22 Brad, where reducing operating inventory, I imagine,

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1 was not a major priority there.
2 MR. MOORE: Yes. The three-year period
3 did include 2020. That said, if you look at 2019 and
4 2021, just individually, we did do better in both of
5 those comp periods if you just look at those
6 standalone.
7 BOARD MEMBER FUCHS: Appreciate it.
8 Thank you.
9 CHAIRMAN OBERMAN: I don't quite see
10 that, Brad. In 2019, I see the operating inventory
11 down in the 150's, the 160's. And I'm just looking
12 at what we printed off your website yesterday,
13 looking at this page from October 14th to the current
14 your operating inventory was around 190, 191. It
15 dropped on 12/2, which is right after Thanksgiving,
16 to 179.
17 And if I go back between July and
18 October, it hovered around 190, got up to 195, 196.
19 So, I don't see that trend that you're talking about.
20 BOARD MEMBER FUCHS: Marty, I think he's
21 talking about percentage drop, not actually dropped.
22 I mean absolute number at the end of the day. The

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1 way I interpreted at this point, and I'm sorry if I'm
2 misunderstanding where you're headed.
3 CHAIRMAN OBERMAN: No, I'm trying to
4 understand --
5 BOARD MEMBER FUCHS: I thought what Brad
6 was saying is if you look -- there's historically a
7 percentage drop around the holiday. And if you look
8 at '21 and '19, the percentage drop was less than the
9 percentage drop they saw this year, even though the
10 total number of inventory still this year is higher
11 and he is saying that the greater percentage drop is
12 evidence of not only the Thanksgiving holiday, but
13 the measures that they're taking is contributing to
14 that higher percentage. That's how I interpreted
15 what you were saying.
16 MR. MOORE: Yes, very well summarized.
17 Thank you.
18 CHAIRMAN OBERMAN: Well, you may be
19 saying that, Brad, and I appreciate that, Patrick,
20 because I didn't quite understand you to be saying
21 it. But I'm not saying that drops in inventory are
22 good. It strikes me drops in inventory means you're

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1 not moving as much stuff on the railroad.
2 But just looking at the claim that's
3 being made about your numbers, at the beginning of
4 this year you were in the 170's in January, then in
5 the 180's, and the year has worn on you're up at 190.
6 And until this 12/9 getting to 202 miles, that you
7 were in the 190's, low 190's most of the time. Back
8 in October, you did get up 191 on October 21st
9 report.
10 But where this leads me, Brad, is if I
11 look at the big picture last year you had 600 and
12 some congestion embargos and your average car miles
13 per day was 203 for the year. This year you almost
14 doubled the number of embargos. You had 1100. And
15 your average car miles today are right around 190.
16 So, if the purpose of the embargo program
17 is to improve fluidity, which you tell us is your
18 main measure, doubling the embargos is getting a
19 worse car miles per day. Does that lead you, as the
20 person who's in charge of the embargo program in some
21 ways, I guess. I don't want to misstate your job,
22 but I know that's what you've reported to us on. Does

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1 that lead you to believe that, well, wait a minute.
2 Maybe this embargo program is not doing what its'
3 supposed to do because we keep raising the number of
4 embargos, certainly the last two or three months the
5 embargos have been very high, and our car miles are
6 not getting back to where they were last year, so
7 what'd we expect next year?
8 I mean, do you just have to keep doing
9 more and more embargos? Is this like -- I think
10 Robert mentioned it yesterday -- like opioids? You
11 know you got to keep doing more and more? I am
12 having a real problem where this is going as I really
13 tried to absorb what we heard yesterday and then I
14 had time last night to sit down and reexamine these
15 numbers. It really is not making a lot of sense to
16 me. Because nobody has said -- you and everybody
17 yesterday have emphasized this is not blaming the
18 shippers and every piece of evidence that we've had
19 in this hearing is that shippers haven't changed
20 their behavior at all, basically, across the board.
21 Nobody's doubling or tripling or
22 increasing by 50 percent the amount of stuff they're

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1 sending to your railroad. So, if that stayed the
2 same and your embargo program is going up and you're
3 not improving your fluidity, where are we going? So,
4 that's one reason I'm glad you came back up here
5 because I am stumped.
6 MR. MOORE: Thank you, Mr. Chairman. So,
7 yes, if I could, first, I want to make a distinction
8 between inventory and carloads. So, when we talk
9 inventory, we're talking about the total amount of
10 cars and operating inventory for us that are out
11 cycling on the railroad versus a revenue-generating
12 carload that is essentially a reflection of the
13 customer's demand. So, I think it's important that
14 we keep those distinctions in mind.
15 So, we don't see high inventory as being
16 always a direct correlation between those
17 carloadings. Now, we want it to be and that's what
18 we're attempting to reconcile is the equilibrium
19 between the inventory and the carloads.
20 CHAIRMAN OBERMAN: Well, except that the
21 shipper has got to get the empties back to put more
22 carloads out, so they are connected. They're not

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1 totally separate concepts in my layman's
2 understanding of what a railroad does.
3 MR. MOORE: Yeah, the distinction I would
4 make is that you have an opportunity to provide
5 faster cycle time and generate more carloads with
6 less car inventory and that's ultimately the goal.
7 The goal of the railroad is to cycle the cars faster
8 so that you generate more revenue-carloads and you
9 meet more of your customer's demand with less car
10 inventory, with less what we see as excess inventory.
11 So, you made some comparative points and
12 I think it is important. I don't want you to leave
13 with the fact that we did have improvement over the
14 Thanksgiving period over the last three weeks. That
15 doesn't mean we stopped that improvement there. We
16 still have what we see as excess inventory to address
17 on the railroad.
18 So, when you gave some of those
19 historical numbers, we agree with you. We have an
20 opportunity to draw down that car inventory still on
21 the network.
22 CHAIRMAN OBERMAN: But what is the

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1 future? Is the railroad committed -- the filings
2 that I read from yesterday this is standard practice.
3 So, the way I see it, it wouldn't surprise me, Brad,
4 if the embargos, what you're averaging, about 100 a
5 month this year, you come back next year and they're
6 150 a month because you're not otherwise improving
7 the network.
8 The inventory is up -- I mean, it's not
9 really down and the car miles per day has not
10 improved in any meaningful way that I can see. So,
11 why is this the right strategy? That's really my
12 question.
13 MR. MOORE: So again, I think it's
14 important to distinguish our CIMS for the serving
15 area and CIMS pipeline management and keep in mind
16 that the vast majority of the Union Pacific embargos,
17 over 90 percent of those embargos have been CIMS for
18 the serving area, which we see and the way we do our
19 analysis, as we walked through the methodology
20 yesterday with the Board, is that CIMS for the
21 serving area means that the rate of consumption at
22 the receiving end is not keeping up with the flow of

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1 production, the pipeline of cars that are coming from
2 the shipper.
3 So, you don't necessarily have a direct
4 correlation between the number of embargos and the
5 car velocity on your railroad because that is --
6 again, over 90 percent of those embargos are related
7 to the receiver's ability to keep up with the
8 consumption rate and it's that matching of supply and
9 demand of a shipper and a receiver.
10 CHAIRMAN OBERMAN: If the idea is to not
11 launch more cars from the shipper because he receiver
12 can't take them to clear up the network so the
13 overall car miles per day, the one you like to use,
14 improves and we're not seeing it with even the great
15 increase in embargos.
16 BOARD MEMBER FUCHS: May I add to that,
17 Brad? Brad, if you would like to respond.
18 MR. MOORE: I would just go back to my
19 previous point in that we don't necessarily see that
20 there's a direct correlation between our number of
21 embargos and our car miles per day.
22 CHAIRMAN OBERMAN: Isn't the whole point

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1 of the embargos to improve the fluidity of the
2 system? If that's not being correlated, why are you
3 doing the embargos? It's not having, as I understood
4 it, the stated reason to have the embargo program.
5 Am I missing something here? What am I missing?
6 MR. MOORE: And I appreciate the
7 questioning because I think it's an important point
8 to clarify. So, we are not stating that the reason
9 for embargos is to improve car velocity necessarily.
10 And again, I think again it's important to
11 distinguish serving area versus pipeline.
12 Now, we do see an opportunity to beyond
13 the serving area to improve the fluidity and that
14 comes with drawing down what we see as excess
15 inventory on the overall network and therefore we
16 did implement pipeline management, as the Board is
17 aware, and did issue a series of embargos in November
18 that did elevate our embargo count.
19 So, I don't want to completely step away
20 and give you the impression that I'm not telling you
21 there is -- again, there is a correlation between
22 inventory and car velocity, so there is excess

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1 inventory and there is at least a component there
2 that does impact your car velocity. There's a big
3 component toward that correlation, but again, the
4 important point is for when you think about our total
5 embargo count this year is that over 90 percent of
6 our embargos are not related to that problem-solving
7 effort. They're related to addressing the consignee
8 consumption rate and the shipper production flow
9 rate.
10 CHAIRMAN OBERMAN: Patrick? Go ahead,
11 Patrick.
12 BOARD MEMBER FUCHS: Brad, to what I'm
13 hearing, I don't think it's so easily separated. It
14 may be true that the correlation between car velocity
15 and a receiver's ability to take things in the
16 serving yard might not be the highest correlation.
17 There is undoubtedly a relationship between railroad
18 service and the receiver being able to take in.
19 We've heard over and over again, dating
20 back a lot of these concerns that shippers are saying
21 now they said in 2019 when there was increased
22 bunching. There was reduction of switches. So, it

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1 might not be car miles per day, but surely if your
2 trip plan compliance is lower and you're only hitting
3 60 percent, you're only getting -- to constructive
4 placement you're only getting to the service yard
5 within 24 hours 60 percent of the time you told
6 shippers you were going to, they have to plan crews.
7 You're late all the time. And so, that is going to
8 back up the serving yard. If your cycle times are
9 significantly longer that is also going to add
10 inventory and that's going to reflect in the serving
11 yard.
12 If you are bunching cars or if you are
13 missing switches, which we've seen your first/last
14 mile rate has gotten better, but it's not where you
15 all wanted it to be that also is going to -- so, car
16 velocity might not be the highest correlation, but
17 trip plan compliance will have a strong correlation,
18 transit time will have some correlation, and of
19 course, first/last mile and beyond first/last mile
20 order fulfil rate because the switches aren't -- all
21 of those are important service metrics that are going
22 to have a strong correlation with the receiver's

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1 ability to take in things.
2 And so, I don't think we can disentangle
3 UP service from the increase we've seen in CIMS
4 serving yard, which, as you rightly point out, is
5 driving the increase in embargos. I mean, isn't that
6 generally right, that your service does have a big
7 impact on CIMS serving yard?
8 MR. MOORE: Thank you, Patrick. So, yes,
9 to address that I definitely want to reiterate what
10 we've already said, which is that the railroad, Union
11 Pacific does have opportunity, certainly in our
12 service metrics. We've been very transparent about
13 that. We do have opportunity in trip plan
14 compliance. We do have opportunity in car velocity.
15 And we do have a series of actions, many of which
16 Eric commented on yesterday that are geared at Union
17 Pacific addressing those internal opportunities that
18 we have.
19 Now, that said, CIMS for the serving area
20 does have a balanced approach, as we talked about
21 yesterday as well, in our methodology, in our
22 calculation that does include a first mile/last mile

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1 component. And I recognize, Patrick, it doesn't have
2 a trip plan compliance component, but we do have also
3 a two-day buffer that's built into the calculation
4 when we determine the MIT or the Maximum Inventory
5 Threshold for each facility.
6 It doesn't mean, again, that we don't
7 have opportunity. We do have opportunity and I'm
8 sure there is some percentage of correlation, but I
9 wouldn't say that that is significant percentage
10 when I think about our CIMS embargos for the serving
11 area.
12 BOARD MEMBER FUCHS: And just to bring it
13 full cycle, Marty, and then I'll turn it back to you
14 if that's all right. I think to bring in some of the
15 commentary that I've heard from my colleagues, and
16 not speaking for anybody, but I think I mentioned
17 some of the concerns from shippers about the
18 productivity versus performance and the differences
19 in costs.
20 But I think in thinking about this
21 strategy I think what I hear people find frustrating,
22 what I have frustrations with is that this has been

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1 going on for years with the elevated embargos and the
2 strategy seems to have trip plan compliance. If you
3 exclude the pandemic, you're stuck in the low
4 sixties. 2019 it was 65; 2021, it was 63. You've
5 been in the low sixties. You dip below that for a
6 lot of this year and that's just on time
7 performance. I think you could look at cycle times,
8 which we don't track and which you don't report and
9 it's hard to isolate by customer, but I think you'd
10 find a similarly difficult picture.
11 And so, the strategy of whatever you're
12 doing with you asset base and then embargoing when
13 the inventory kicks up doesn't seem to be improving
14 services to Marty's point. And this is now bringing
15 in kind of Karen's point is I think the thing that's
16 particularly alarming about this is what kind of
17 incentives does it provide the railroad? Because if
18 the cost of bad service which correlate to CIMS
19 serving area, and as you've pointed out, private car
20 pipeline management, the cost seems to be
21 disproportionately borne by the shipper.
22 And if that's the case then it reduces

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1 the railroad's incentive to have adequate resources.
2 And when you couple that with the lack of improvement
3 and performance, it really calls into question your
4 entire approach and I think that's what I'm hearing
5 quite a bit today is it's not only that this isn't
6 working. It's that it's not providing incentives for
7 UP to serve their customers and to grow the business
8 like we all want you to do.

9 MR. MOORE: So, Patrick, I appreciate the
10 comments, first and foremost. And I would tell that
11 our primary incentive are carloads. I mean it is
12 growth. We talked about yesterday. Lance, talked
13 about we do have different markets that we do have
14 opportunity that we're not meeting the unconstrained
15 demand that available to us. That is our primary
16 incentive and it matches and aligns with the
17 customer, which is they want to ship more. We want
18 to haul more. And that is absolutely our primary
19 incentive is not only meeting, Karen, as you've
20 talked about, the demand that's out there and
21 available, but also meeting that growth that we want
22 to capture. So, that is absolutely our primary

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1 incentive.

2 CHAIRMAN OBERMAN: And then I have a few
3 more before you leave.

4 BOARD MEMBER SCHULTZ: I have one more.
5 Just a basic question. How does UP define excess
6 cars on the network? And then the follow up to that
7 would be how would one of your customers be able to
8 know when they have excess cars on the network and
9 self-regulate to perhaps prevent an embargo?

10 MR. MOORE: Thank you, Michelle. So, how
11 do we calculate and look at excess inventory on the
12 network? We have a metric that we call
13 cars-per-carload and that's a metric of inventory,
14 the car inventory that it takes to generate a single
15 revenue-generating carload. And that ratio provides
16 that balance between the inventory and again making
17 that distinction between inventory and carloads.

18 And so, we have thresholds, we have
19 targets, and we actually report those to the Board in
20 our filings, the cars-per-carload metrics as to what
21 our target range is to achieve. And if we are out of
22 balance and don't have an equilibrium between the

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1 two, then that calculates an excess inventory.
2 BOARD MEMBER SCHULTZ: Is that for UP as
3 a whole or can a customer actually look to what's
4 being reported and self-determine?

5 MR. MOORE: Yes, so I am talking about UP
6 as a whole. That said, we do have the capacity to
7 break that metric down on an individual customer
8 basis and lane basis. We got feedback. That was
9 actually one of our approaches back in April when we
10 engaged customers in conversation. And the primary
11 feedback that we got was that that was not a known
12 term and it was a UP metric and it was one that the
13 customers didn't align to and that's why we revised.

14 That was one of the key things that we
15 revised in our methodology was to develop a metric
16 that was more understandable by customers and that's
17 when we came up with the average daily release rate
18 versus the scheduled transit time with a buffer. So,
19 while we do have the capability to break that down,
20 that didn't really translate for our customer base
21 and therefore we moved away from it.

22 So, to your second question that you

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1 asked earlier, then how does a customer know? That
2 goes back to one of the items that we're going to
3 take back as feedback is being very transparent about that
4 calculation, exactly how we arrived to it. We have
5 shared those in conversations with customers, but we
6 haven't issued a formal guidelines document and that
7 is one of the primary pieces of feedback we'll take
8 be and be transparent with customers so that they
9 have a full comprehension of how we're arriving at
10 the number.

11 CHAIRMAN OBERMAN: Just a few more, Brad,
12 before I can let you go.

13 BOARD MEMBER HEDLUND: Brad, thank you
14 very much for your clarifications for a novice like
15 me. This has been very helpful and I look forward to
16 actually sitting down and reading what you've
17 submitted so I understand it. Sometimes it's a
18 little hard to follow the back and forth through the
19 testimony.

20 But I have one specific question. Mr.
21 Boonstra yesterday said that they have one person
22 who's full-time job is getting permits. So, that

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1 suggested to me in your Customer Service Operation
2 how much have you had to expand it in terms of
3 personnel to handle all the inquiries from the
4 customers that necessarily result from this program?
5 MR. MOORE: Thank you, Karen, for the
6 question. And again, I'll distinguish serving area
7 from pipeline management. We did not have any
8 personnel increases with the serving area. We've
9 been able to manage that through a very hardworking
10 team that diligently works through processes and
11 we've also built automation for the serving area that
12 has enabled us to work through those opportunities on
13 the serving area.
14 Now, for pipeline we did bring in some
15 help from outside the Department of four individuals
16 and then we also did temporarily have folks from
17 other areas inside my department did help on a
18 temporary basis to provide additional support for the
19 program that we talked about yesterday that we ended
20 up rolling out to customers in November with some of
21 the additional embargos that we talked about
22 yesterday.

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1 BOARD MEMBER HEDLUND: I mean what you've
2 created is a fairly complex system and responding to
3 a very complicated problem. And what we've heard
4 since April, we heard in April, and then we heard
5 again this week is this communication issue. And so,
6 my question goes to have you been developing enough
7 human resources to manage this new program, which to
8 me sounds like it's a permanent program and it's no
9 longer just a customer calling up and saying I need
10 some power to pull some, but they have to actively
11 manage with you how many trains are going to be able
12 to release in any particular day. It's become a much
13 bigger management problem for them. But do you have,
14 and I understand your answer. So, the question I
15 have is do you have the management resources to
16 manage the program? Sounds to me like it's a pretty
17 complicated program and that you've got a lot of
18 questions coming from customers whose own planning
19 processes have been kind of turned upside down.
20 They're having to deal with a whole new parameter of
21 issues.
22 MR. MOORE: So, thank you for the

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1 question. Yes, at this point we do have the right
2 sized team to handle the demand of the program. And
3 again, though, we always do ongoing evaluations and
4 take that into consideration certainly. And then you
5 balance it with automation as well, right? And
6 again, we've talked to the Board about many of those
7 automated enhancements that we've made.
8 And CIMS for the serving area we talked
9 about yesterday is an additional offering that we're
10 going to have rolled out to customers early in 2023
11 and that will again help the team.
12 BOARD MEMBER HEDLUND: Thank you.
13 CHAIRMAN OBERMAN: Brad, just a few more
14 because I think you're trying to get out of here.
15 Yesterday, Kenny mentioned that UP takes multiple
16 actions before resorting to an embargo. Can you
17 specify what all the actions are? I mean we heard
18 contacting the customer who may get embargoed and say
19 self-limit or else you're going to get embargoed.
20 What other actions does UP take to avoid an embargo
21 before it imposes one?
22 MR. MOORE: So, that goes to the

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1 communication. So, with pipeline management, we did
2 have Kenny's team specifically reach out, personally,
3 via phone calls or even meetings if possible to
4 customers prior to the customer receiving a letter
5 from the CC&S team. And then the communication, the
6 letter communication from CC&S that then evolved into
7 additional conversations with customers as they had
8 questions or feedback relative to what an action
9 plan, a corrective action plan they could develop.
10 And at that point, we took that feedback,
11 listened to their action plan, had dialogue around
12 those plans. In the event that they told us they
13 needed incremental time to build that corrected
14 action in, then we granted that incremental time.
15 So, that was a key piece of feedback and additional
16 opportunity that we gave to customers. And then they
17 all had, as we talked about yesterday, different off
18 ramps that they elected to take.
19 CHAIRMAN OBERMAN: So, all of the actions
20 to avoid an embargo that UP takes are ones involved
21 dealing with that customer who is potentially is
22 going to be embargoed. When you say when UP tells us

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1 they take multiple actions, it's entirely consistent
2 with what you've just described, and I ask that for a
3 very important reason.
4 MR. MOORE: Yes, so again, we've got
5 checks and balances, first of all, on the Operations
6 side, right? With CIMS for the serving area, we've
7 got the first mile/last mile performance that we go
8 to a corrective action from the UP side if that
9 performance --
10 CHAIRMAN OBERMAN: What is it, that's the
11 question. To avoid the embargo, what corrective
12 action do you take?
13 MR. MOORE: The corrective action that we
14 take there, Marty, is that we reach out to Field
15 Operations and we ask for a corrective action plan
16 from Field Operations to improve that first
17 mile/last mile performance.
18 CHAIRMAN OBERMAN: Which includes, what
19 would that consist of, more crews, more power; what
20 does it consist of?
21 MR. MOORE: It depends on the situation,
22 but an example would be that it could be an

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1 execution-based item that we, for various reasons,
2 have not provided the adequate daily switches per
3 the schedule and then you get into root cause finding
4 as to why that might be. As an example, you may have
5 a local that needs to run out on the main line and it
6 needs to get that main line time from our dispatching
7 center to traverse the main line to service the
8 industrial lead that has the customer base and
9 therefore it may be coordination between Field
10 Operations and our Harriman Dispatch Center to make
11 sure that adequate time is allotted to the local to
12 provide that daily service. And that's just one
13 example. There's many examples when you get into
14 root cause finding and why the execution has not been
15 there.
16 CHAIRMAN OBERMAN: Well, what I'm trying
17 to find out, Brad, is what, other than contacting the
18 customers with these various efforts informally, then
19 formally for them to change their behavior that sort
20 of encompass all the things you've just listed, does
21 UP -- you're now saying that you do look into some
22 possible operational changes. Do you do that before

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1 every embargo and do you consider for that particular
2 customer situation bringing more crews, more power to
3 clear up the congestion from your end before you
4 impose an embargo? Does that happen for every
5 embargo before it gets imposed or any I guess is the
6 question, both questions?
7 MR. MOORE: So, by plan, I'd take you
8 back to our first mile/last mile performance. We set
9 that at an 80 percent threshold. If we're below
10 that, then we will take our own corrective action.
11 Now, on a global, kind of macro scale,
12 certainly we talked you a lot yesterday about our
13 hiring plan, about the resources to ensure they're
14 aligned, and we've, obviously, talked in depth about
15 that. Certainly, when you get into more of a micro
16 level and you think about each and every customer and
17 each and every hub are there right crews in the right
18 place and that is certainly part of our approach and
19 our strategy.
20 We also have a Crew Management team that
21 is daily looking at making sure that the boards are
22 set at the right level, that we're doing the right

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1 efficiencies to make sure that we can drive the crews
2 at the right time to the right service needs, to the
3 right local train service, filling those yards in
4 local jobs is a primary, critical priority for our
5 Crew Management team and that happens on a daily
6 basis.
7 So, I would tell you that the corrective
8 actions are really embedded into our daily processes
9 within side each team that has ownership and
10 accountability over improving our service metrics.
11 CHAIRMAN OBERMAN: Let me as this
12 question. We can count the number of embargos
13 because they're on Rail Link. Everybody could count
14 them. So, that's really not open to much debate as
15 to the numbers. I am unaware, and maybe it exists
16 now, I don't think so, about counting the number of
17 customers who get contacted through this process that
18 you described and end up self-limiting or they're
19 told you'd better limit or you're going to be
20 embargoed, do you have any data on how many customers
21 -- let's say take this year, last year, monthly,
22 yearly are subject to these contacts with I'll call

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1 it a threatened embargo that doesn't take place
2 because they've cut their own service down? Do you
3 keep track of that?
4 MR. MOORE: We do keep track of that,
5 Marty. I know high level I can get you back to a
6 detailed level, but I know that it's over 70 percent
7 of our engagements do not result in an embargo. So,
8 when you think about ensuring that we do work through
9 customers' alternative solutions before ever
10 approaching embargo, the level of engagements and
11 alternatives that are taken, whether it be a UP
12 opportunity to work with customers or the customer
13 choosing a different alternative that gets that
14 corrective action plan in place it's over 70 percent
15 of the time there's no resulting in an embargo.
16 CHAIRMAN OBERMAN: All right. Well, I
17 would like to see it on a monthly basis if you could
18 provide it of how many of those contacts. But it
19 sounds like, and I can't do the math in my head. I'm
20 sure somebody up here is doing it already, but the
21 1100 embargos this year represent 30 percent of the
22 times you've contacted a customer and the

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1 self-limitation didn't work, so you imposed an
2 embargo; is that a fair way to think about it? If I
3 could extrapolate what 1100 is 30 percent of, I'd
4 have a ballpark idea of how many times the customer's
5 taken corrective action and avoided the embargo.
6 Would that be the way to understand it?
7 MR. MOORE: Yes, I think that's a fair
8 representation. Again, the number I don't have the
9 precise data. I think it's actually under 30
10 percent, but yes, that's a fair characterization.
11 CHAIRMAN OBERMAN: Well, I don't want to
12 hold you to any number. If you've got the data and
13 can get it to us that would be best for both you and
14 us.
15 BOARD MEMBER HEDLUND: Also, could you
16 tell us what is your total customer count? And by
17 customer, we're talking about a specific place, not
18 just a company because a company may have numerous
19 origins, but how many discreet locations customers
20 does Union Pacific have?
21 CHAIRMAN OBERMAN: One question that we
22 talked about a little yesterday and I meant to ask a

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1 follow up and just missed it. Without getting into
2 the content or the conversation, at least at this
3 point, I did ask Lance and he did tell us that the
4 lawyers were part of the team that dealt with these
5 at this embargo program. What I didn't ask was, and
6 if you're a part of that time if you can answer it,
7 I'd appreciate it. When during this four-year period
8 that the embargos started increasing did lawyers
9 become part of the team?
10 MR. ROSENTHAL: Mr. Chairman, I really
11 don't want to start us down the road of getting into
12 areas that we're covered with privilege. We do
13 recognize appropriately that Mr. Fritz that --
14 CHAIRMAN OBERMAN: But Michael, you and I
15 both know that whether a conversation took place is
16 not itself subject to privilege. It's only the
17 content of it and all I'm asking is at what point did
18 you UP involve lawyers in deciding on this embargo
19 program, just point in time, that's all I'm asking.
20 MR. ROSENTHAL: Mr. Chairman,
21 respectfully, things like point in time can reveal
22 information about contents of conversations and we

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1 really just don't think this is a subject that is
2 appropriate because we respectfully ask that you
3 respect that.
4 CHAIRMAN OBERMAN: I don't respect it
5 because I don't think that's the law and I disagree
6 with you, but if you won't answer it today, we'll
7 follow it up. And the reason I ask is because we
8 showed a chart yesterday that you didn't have an
9 embargo program to speak of prior to 2018. And we
10 really wanted to know what generated this program and
11 what led to it.
12 And you can tell by the sheer numbers
13 that there was a complete change in UP's approach to
14 its embargo program in 2018 when the numbers took
15 off. They went from 5 to 140 and they've been going
16 up since then. And so, that was really my question
17 of Lance before that began was there a legal opinion
18 and he answered that lawyers were part of the team.
19 And the question was, was it in 2018. That's the
20 question.
21 MR. ROSENTHAL: And again, Mr. Chairman,
22 you've indicated that you're going to ask for

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1 additional information and I expect that as a result
2 of this hearing a lot of the questions that you've
3 put will be somehow collated and sent to us and we'll
4 provide information that we can provide, but we're
5 not going to provide certainly the privileged
6 information.

7 CHAIRMAN OBERMAN: Yes. I don't see it
8 that way. I guess the only other question and give
9 you a chance to -- I've asked before what's the
10 future of this. Yesterday there was a great deal of
11 discussion about end dates. Based on all of the
12 discussion we've had from both stakeholders and Board
13 members, it's not unreasonable to think that one way
14 or another, whether we decide to explore policy
15 statements or rulemakings or people bring cases, at
16 some point we're going to be asked to evaluate the
17 reasonableness of your program as it relates to the
18 little bit of law that there is out there on
19 embargos.

20 And to me, if there's any legitimacy to
21 the embargo program, and I don't opine one way or the
22 other, but the program we've seen over the last four

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1 years is it's been going for four years. It's been
2 increasing on a yearly basis, except for the brief
3 hiatus and the slowdown in traffic in 2020 and I
4 haven't heard any end to the program. I don't even
5 know what the end goal is of the program from what
6 we've heard here.

7 And if, Brad, you want to comment on
8 where this is going and what you foresee for UP, I'd
9 hear it. I'd like to give you that opportunity so we
10 can have some notion in our heads as we proceed
11 further in this matter.

12 MR. MOORE: Yes. I would take you back
13 to my earlier feedback when I reapproached the Board
14 here this afternoon and that we have listened and
15 heard the feedback, heard the concerns. We're going
16 to go and take that back as a team and further
17 evaluate and come back to the Board.

18 Now, if you look back at Eric's
19 testimony, he did make and engage some feedback
20 relative to what we see for the future. But again,
21 I'll leave you with the fact that we have heard the
22 feedback. We've heard the concerns. We're going to

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1 go back and evaluate that as a UP team and then move
2 forward.

3 CHAIRMAN OBERMAN: I hope that evaluation
4 will include whether the program ought to be brought
5 to a halt, but we'll wait to hear what that
6 evaluation is. But it's quite concerning. If we
7 hadn't had these hearings and heard this, based on
8 the numbers we've now examined, I don't have much
9 optimism for the future on these embargo numbers
10 going down. I see them going up because I don't see
11 you're accomplishing any of the things you say
12 they're supposed to accomplish. That was all I had.
13 I know you're trying to get out of here, Brad. (Off
14 Mic'). You know this is a very important issue.

15 MR. MOORE: Thank you.

16 CHAIRMAN OBERMAN: Okay. With that, it
17 is quarter to 2:00. We will take our lunch break.
18 We have the ACC and the AFPM and we have Greg Twist.
19 Greg?

20 MR. TWIST: I may have trouble testifying
21 after lunch.

22 CHAIRMAN OBERMAN: Come on up then.

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1 You've bene very patient. But AFPM and ACC, you guys
2 are young. You can hang out for a little bit of
3 time. Come on, Greg. Listen, I appreciate your
4 willingness to stick around, but I'm glad you raised
5 your hand.

6 MR. TWIST: Thank you folks. And I
7 understand I'm the only thing standing between you
8 and lunch, so I'll try to be brief.

9 CHAIRMAN OBERMAN: Take your time. We'll
10 survive.

11 MR. TWIST: Well, first of all, I'd like
12 to respond to a little bit of the testimony we heard
13 yesterday from the UP. They used the term "last
14 resort" a lot yesterday. That embargos were last
15 resort and that shippers were responsible for a lot
16 of their problems with access inventory.

17 I can tell you that in terms of private
18 cars that truly were a last resort for us as
19 shippers. I find it interesting there seems to be a
20 double standard about our performance and theirs.
21 We're allowed three days allowance in the yard.
22 Meanwhile, UP cars that we count on to

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1 run our plants are three weeks behind in application.
2 Trip plans, sixties, low sixties to seventy as a high
3 for the year with a 24-hour allowance and those
4 system cars we're counting on are down 45 percent
5 from what they offered us a year ago. Our only other
6 option, other than to add private cars, is shutdown
7 facilities like we have at Eagle Grove, which is
8 currently under embargo.

9 In 2019, I was hear for hearing we had on
10 accessorial charges and we were told by all the Class
11 I's, including the UP, that demurrage, private empty
12 car storage, was necessary to keep the local yards
13 fluid. That was their words, not mine. Now, we're
14 responsible for keeping their corridors fluid as
15 well. It seems like a lot of burden on the shippers.

16 Lance mentioned yesterday labor charges
17 or labor challenges, three areas that I heard, Twin
18 Cities, Boone, Iowa, and North Platte, Nebraska. Kind
19 of interesting, two of those points, Boone, Iowa,
20 very close to our Eagle Grove facility, which is
21 embargoed and North Platte, Nebraska, very close
22 proximity to our Hastings, Nebraska plant. Kind of

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1 interesting the congestion seems to be greater where
2 they have labor shortages.

3 I tried to explain to a friend of mine
4 why I was coming out here who has no idea of what we
5 do in terms of rail industry and it's kind of hard to
6 explain. I said, I said I'm going out for a
7 testimony about embargos with railroads. He said,
8 okay, what's that like? I said, well, it's like
9 going to Costco. I said everybody's supposed to shop
10 at one Costco and they get to the checkout counter
11 and there's 50 carts there and there's one checkout
12 line, one person checking out.

13 And you go talk to management and say can
14 you open up more checkout lines and they say, no.
15 No, we've got this computer system now and this
16 algorithm as figured out that the maximum, the
17 optimal amount of people to checkout is one person.
18 The problem is all you customers are here at one
19 time. You need to meter the time you're coming in.

20 So, in your case you can shop from
21 midnight to 2:00. Robert, you're from 2:00 to 4:00
22 and Patrick you from 4:00 to 6:00 a.m. It's all your

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1 responsibility not adding people.

2 To me, and I can tell you folks. I feel
3 a little bit like the canary in the coal mine, okay?
4 And this canary is getting old and he's losing his
5 feathers and about a year from now I won't be part of
6 this industry, okay? And I truly have enjoyed being
7 part of this industry.

8 My concern is beyond AGP. It's more
9 about national security. It's about how we operate
10 our companies. It's about freedom for us as a
11 shipper. Freedom to market our products the way we
12 see fit, not be dictated to by a railroad telling us
13 how we should operate our facilities. It's freedom
14 to grow our business and have confidence they're
15 going to be able to provide service to maintain and
16 keep up with us. And right now, we'd tell you that
17 confidence is pretty low.

18 They've created a scarcity of goods and
19 we've seen that through supply chain management. In
20 this case, the scarcity of the goods is
21 transportation itself. And through embargos, the
22 railroad's going to decide should coal move for

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1 electricity, should chlorine move for clean water,
2 should soybean meal move to keep chickens alive in
3 California. Is that really their role? I think
4 not.

5 You know the solution, talking to my
6 friend, he said it seems pretty easy to me. Sounds
7 like they need to hire more grocery clerks. I'd hope
8 we'd consider that as an option. Thank you.

9 CHAIRMAN OBERMAN: Greg, I will just say
10 that we went back and forth yesterday trying to pin
11 down UP on the causes. I think it's spelled out,
12 actually in their filings, even though it was hard to
13 get a connection from the witnesses yesterday. I'm
14 just speaking for myself, but you look at the
15 increase in embargos and it directly coincides with
16 the dropping of 2 or 3,000, then 5,000 T&E people.
17 And as I just said to Brad, nobody says shippers are
18 putting more stuff out there, so nobody says we've
19 had floods continuously in the last four years.
20 That's the only thing that's different.

21 I mean I don't think you have to look too
22 hard. This is not Perry Mason having a surprise

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1 answer, but I guess I should say because this is an
2 ongoing matter that's my observation for the moment.
3 Let's see what the information shows.
4 BOARD MEMBER PRIMUS: And I would just
5 add this, Greg, and I appreciate you coming back.
6 Your Costco analogy is not just having one person
7 check you out, but they're also eliminating what you
8 can have in your grocery cart. So, to me, it seems
9 like UP is also determining how much UP will allow
10 each shipper to ship. It seems like that's what
11 they're saying. And like I said to your point of
12 growing, that you can only grow as much as they want
13 you to grow. And when you're going more, you're
14 embargoed or you're told to cut your cars back or
15 you're told this is not permissible.
16 MR. TWIST: Well, and to add to that, we
17 have hundreds of millions of dollars in CapEx that
18 we're going to spend over the next three years
19 building and expanding on facilities that they have
20 access to, so we need them to grow. We truly do.
21 BOARD MEMBER FUCHS: With the risk of
22 taking the analogy even further, there's no grocery

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1 efficiency board. The customer could go to Safeway.
2 The customer could go to Giant. And I think what
3 we're circling around here today that I think merits
4 additional discussion is the reason why you don't see
5 that as Costco, I've never experienced that at
6 Costco, I don't hear anybody complaining about that
7 at Costco, is that you could go to those other
8 grocery stores. And Costco has the incentive for
9 that not to be the case. Costco does meet the needs
10 of the customers in that way.
11 And I say that to say that that's what
12 I'd like the discussion -- where I think the
13 discussion ought to focus on. We can't order a
14 railroad to hire additional people, but the Board has
15 a role in thinking about the incentives to make sure
16 that the railroad hires enough people, and I'd like
17 to continue the conversation.
18 And by the way, I would just add, and I
19 think, Greg, you would agree with this. The shortage
20 is not unique to UP and so it's incentives
21 industry-wide of which the embargos, downstream
22 service are a particular manifestation and so I think

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1 we ought to have a real conversation about the
2 incentives as they relate to service in the industry.
3 BOARD MEMBER HEDLUND: I'll tell you what
4 my overall impression is from listening to the couple
5 days of testimony. I actually feel a little sorry
6 for Brad Moore. He's got to administer a system
7 which clearly isn't working. It's not working for
8 them. It's not working for you. So, we've got to
9 figure out how to move them to a different solution.
10 MR. TWIST: Thank you for the time. I
11 didn't mean to make your lunch any later, but I do
12 appreciate the hearing. I appreciate hearing our
13 voice and look forward to working with you folks in
14 the future.
15 CHAIRMAN OBERMAN: As we said
16 yesterday, Greg, a lot of shippers were not willing
17 to come, understandably. You have been. You've been
18 steadfast and I do remember your involvement in the
19 demurrage hearing. We really appreciate it and we
20 appreciate your willingness to stay the second day.
21 It's been very helpful.
22 Okay, we will take our lunch recess. How

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1 about if we come back at 2:30?
2 BOARD MEMBER FUCHS: Fair enough.
3 CHAIRMAN OBERMAN: Is that enough, 35
4 minutes? Jeff, you guys are okay?
5 MR. SLOAN: (Off Mic)
6 CHAIRMAN OBERMAN: Appreciate it. Thank
7 you.
8 (Lunch recess)
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1 AFTERNOON SESSION
2 CHAIRMAN OBERMAN: All right. We will
3 reconvene and we have two final witnesses and we
4 greatly appreciate your patience and tolerance by
5 deferring to this complex schedule.
6 Rob Benedict from AFPM, American Fuel and
7 Petrochemical, and Jeff Sloan from ACC, the American
8 Chemistry Council. Rob, you want to go first?
9 MR. BENEDICT: Sure. First off, Chairman
10 Oberman and Board Members, thank you for providing
11 this opportunity to testify before you today and to
12 weigh in on this very important issue to our
13 membership.
14 My name is Rob Benedict. I'm the Vice
15 President of Midstream at the American Fuel and
16 Petrochemical Manufacturers or AFPM. And as I think
17 many of you know, AFPM is one of the leading trade
18 associations representing the makers of the fuels
19 that keep America moving, as well as the
20 petrochemicals that are the essential building blocks
21 for modern life.
22 Refiners and petrochemical manufacturers

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1 across the country rely on a healthy rail network as
2 a vital part of our supply chains and annually we
3 ship well over two million carloads of our materials,
4 but feedstocks, inputs their refining and
5 petrochemical process in our products across the U.S.
6 rails.
7 The UP occupies an essential role in our
8 operations. As you guys know, they operate over 32,000
9 miles in 23 states, primarily, in the western United
10 States. And while AFPM members operate throughout
11 the country, we are a particularly a large footprint
12 in those areas. And obviously, this makes us
13 uniquely and acutely impacted by UP service issues,
14 including their use of embargos.
15 Today in my testimony I'd like to
16 highlight four things. First, how these embargos are
17 impacting fuel and petrochemical manufacturers.
18 Second, talk a little bit about the process and
19 communication that's going on between our members and
20 UP when discussing those embargos or threats of
21 embargos. Some potential rationale from our
22 perspective of what's going on and why. And then,

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1 obviously, talk about some solutions to those
2 problems.
3 We recognize that embargos are an
4 important tool the railroads have long used to
5 control traffic movements and respond to adverse
6 network conditions, such as weather or other issues
7 beyond their control. When a railroad declares an
8 embargo, they're essentially alerting shippers they
9 will not be honoring their service contracts by
10 putting caps on the numbers and types of shipment of
11 cars over a given period of time.
12 Any breach of contract or failure to meet
13 carrier obligations is very serious, in our opinion,
14 and should only occur under extraordinary
15 circumstances. The problem we're experiencing today
16 is that UP is declaring a seemingly endless series of
17 embargos and rarely for legitimate emergency
18 scenarios, in our opinion.
19 Recently, we've seen the abuse of this
20 tool and a drastic increase in the use of embargos
21 related to general network congestion, which is not
22 an exceptional circumstance and certainly not what

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1 embargos were intended for. We've also seen the
2 threat of embargo wielded by railroads to influence
3 shipper behavior. In fact, you just heard 70 percent
4 of UP's requests for embargos were met without an
5 embargo, but we don't see that as a win, in our
6 opinion.
7 Since 2017, UP has increased their
8 embargos by over 2,000 percent, which is a staggering
9 increase. Furthermore, with few regulations in place
10 to govern embargos, rail shippers have limited
11 recourse to challenge an embargo, whether or not it's
12 fair and that's a problem for us.
13 When it comes to embargos, we're driving
14 without a map. Much like we saw with the drastic
15 increase in demurrage and accessional fees over the
16 past few years, railroads are again exploiting a gap
17 in regulation and pushing the boundaries of what
18 they can and can't do. In the case of demurrage, the
19 Board luckily stepped in and ultimately provided
20 guidance on the proper use of such fees and a similar
21 intervention may be in need in this case.
22 The increased use of embargos and threat

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1 of embargo by UP has adversely impacted our
2 membership, our customers, and the supply chains we
3 support. Embargos amount to lapses in service, as I
4 mentioned, and as we've discussed repeatedly over the
5 last couple months with potential strikes looming,
6 any lapse in service has the potential to disrupt our
7 members high utilization rates and production rates
8 that keep consumer prices down.

9 Embargos restrict our ability to move
10 certain materials in and out of our facilities and
11 they can eventually overwhelm onsite storage capacity
12 leading to bottlenecks and forced production cuts.

13 UP's specific embargos have forced
14 inefficiencies in our operations and I'll discuss
15 some of those now. Multiple AF members have noted
16 that UP will issue embargos that reduce car
17 allocations by over half of what their shipping needs
18 are or what they're contracted to serve.

19 At refineries and manufacturing
20 facilities storage is limited. Many of you have been
21 to some of our facilities and seen that yourself.
22 And in many of these instances the number of cars

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1 that we're required to store exceeds the storage
2 capacity. For many sites there isn't simply a bunch
3 of space where we can put the dozens of rail cars.

4 Some AFPM members have gone even as far
5 as to build storage yards or acquire additional
6 storage temporarily to hedge against such upsets.
7 This is incredibly costly and rare, given the small
8 footprints of our facilities.

9 UP's current allocation process, as I
10 mentioned, as imposed significant costs, but it's not
11 just the use of embargo, it's just the threat of
12 embargos. I did some back of an envelope math and I
13 think by the numbers the UP said that means over 2500
14 potential embargos, threats of embargos were
15 resolved.

16 CHAIRMAN OBERMAN: My envelope said it
17 was closer to 4,000.

18 MR. BENEDICT: Okay. Well, then I'll
19 take your math then.

20 CHAIRMAN OBERMAN: I think I'm right.

21 MR. BENEDICT: I like your math.

22 Unfortunately, our members don't. The point there

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1 is, is that while UP sees that as a positive outcome
2 our members don't and we're not meeting the
3 contracts and the needs of our customers down the
4 supply chain.

5 One facility that was under threat of
6 embargo was asked to cut their production nearly in
7 half, as I mentioned. In this case the AFPM member
8 had negotiated a contract price with UP that
9 included different rebate tiers based on shipment
10 counts. So, by limiting the shipments or threatening
11 to limit the shipments, the UP is forcing that
12 shipper to incur two specific costs, the cost in the
13 form of lost revenue from not being able to ship that
14 product to their customer, not to mention the
15 potentially damaged relationship with the customer.
16 But secondly, by losing their potential rebate due to
17 not meeting their contract obligations.

18 In another instance one member noted that
19 during the November embargos their facility narrowly
20 avoided shutdown by using alternative rail routes
21 where possible or more costly mode of transit where
22 possible. But these alternatives came with an added

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1 cost of over \$100,000 accrued in just a few weeks.

2 Captive shippers obviously face
3 additional challenges around embargos and the threat
4 of embargos. Railroads know they hold all the cards
5 in these negotiations with captive shippers.
6 Threats of embargos have been levied in negotiation
7 settings with captive shippers to strengthen the
8 railroad's already strong negotiating position and to
9 maximize their profits on the backs of their
10 customers.

11 Put simply, businesses cannot operate
12 successfully under the constant threat of embargo
13 every few weeks. UP's embargos have become far too
14 frequent and are often open-ended, as you've heard.
15 Railroads will not give shippers any indication of
16 the status of embargos and UP has openly admitted to
17 some of our members that it doesn't know what they'll
18 do after a rail embargo ends if things don't improve.

19 In the refining and petrochemical
20 industry, as well as many of the industries you've
21 heard here today, business plans are made and
22 products are sold months in advance of actual

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1 shipments. The fact that UP can demand a reduction
2 in shipments in just five to seven days has a
3 potential to disrupt commercial operations that are
4 made three to four months prior. And even more,
5 disrupt critical segments of the U.S. and global
6 economy by destabilizing inventory positions at
7 various points in the supply chain.
8 It has been AFPM's members experience
9 that UP's allocations and embargo justifications are
10 insufficient. With one member referring to the
11 decision-making process as a black box.
12 Notifications of embargos appear to be
13 auto-generated, in our opinion, and when certain
14 allocation criteria are triggered these
15 notifications include a justification for the
16 embargo, but that justification only highlight
17 shipper-controlled issues, implying that railroads
18 themselves bear no responsibility in contributing to
19 this congestion.
20 These notices neglect to consider
21 railroad-controlled issues, such as missed switches
22 or connections in many situations. This unduly puts

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1 the burden of proof on the shipper and makes it
2 incredibly impossible for us to reverse engineer the
3 process to see what exactly is happening.
4 In another instance, one of our members
5 received an initial notice of potential embargo on
6 multiple lanes of their traffic. They viewed this as
7 an opportunity to talk through the movements with UP
8 and provide feedback. Their member company even
9 established a team and researched what made up the
10 current car count in each lane, as well as a list of
11 things that they thought were inappropriate about the
12 assumptions UP was making. This company's request
13 for clarifications were left largely unanswered,
14 embargos followed.
15 In the event UP does respond to a
16 shipper's request for clarifications, UP personnel in
17 charge of the response don't seem to always exactly
18 understand how their own company has arrived at the
19 decision. In addition, our members' request for
20 clarity are often bounced around between different
21 offices. And anybody who's been bounced around on a
22 phone call knows that can be rather frustrating.

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1 Across the board, AFPM members are
2 receiving no clear direction from UP on the issues
3 and this has created a lack of confidence in the
4 system and further reinforced the impression that
5 customer service is not important to UP.
6 BOARD MEMBER PRIMUS: Hey, Rob, I'm sorry
7 to interrupt, but before we get down too far down the
8 road for that one company that did all they could,
9 they assigned people to look at it, to research to
10 figure it out and they were still embargoed, was it
11 an open-ended embargo, is the embargo over, were they
12 given any sort of answers as to after all the work
13 they put in, in terms of why it was embargoed?
14 MR. BENEDICT: So, I don't know off the
15 top of my head whether it's still an ongoing embargo.
16 I think this is one that has taken place over the
17 last month. What I will note is that they
18 specifically questioned some of the transit and turn
19 times and they were kind of roundly pushed back
20 because it is what it is kind of response there, so
21 that was not sufficient from our member shipper
22 perspective.

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1 So, I'll finish up with just some
2 potential rationale or what we see is what we think
3 might be the reasons for these embargos and also talk
4 a little bit about potential solutions.
5 While we're glad UP is here talking about
6 this, we believe that there's been a very specific
7 reason for these massive increases in embargos. AFPM
8 members experience thus far has led us to the
9 conclusion that the embargos are directly related to
10 the effort to maximize their operations or minimize
11 their operating ratios and maximize their investor
12 profits.
13 As the Board's own data showed in this
14 notice with the increase in embargos over the last
15 five years, that's also coincided with the decrease
16 in workforce by over 10,000 employees or 23 percent
17 in the workforce. Simultaneously, UP has closed hump
18 yards, storage facilities, and mothballed thousands
19 of locomotives.
20 The result has driven operating ratios
21 down, but has seen embargos increased. AFPM believes
22 that the increased use of embargos has been

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1 self-inflicted and not related to traditional
2 reasons for embargos, such as weather events and
3 things of that nature.
4 There's also an additional reason that's
5 far simpler. They're doing it because they can and
6 they're pushing the boundaries of what they can do.
7 AFPM members with responsibility for rail operations
8 have expressed frustration about this whole process.
9 And one said, and I quote, "I struggle to
10 find a law, regulation, or contract term that allows
11 this sort of behavior. A railroad's mismanagement of
12 their own network is not a valid reason to deny a
13 reasonable request for service from a contracted,
14 paying customer."
15 There are some path forwards and AFPM
16 recommends to specific pathways. We recommend
17 completing open regulatory dockets focused on
18 improving rail competition and reviewing embargos as
19 part of a larger assessment of what a railroad's
20 common carrier obligation is.
21 Specifically, we urge the Board to
22 complete the regulatory action on the reciprocal

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1 switching as this will reintroduce competition into
2 this system and push railroads to refocus their
3 efforts on customers needs, not Wall Street needs.
4 AFPM also urges the Board to conduct a
5 review of the common carrier obligation. We feel
6 that the embargo situation is very clear example that
7 there needs to be a new look at the common carrier
8 obligation. While some on the Board have indicated
9 openness to this review, both the House and the
10 Senate over the last couple months had introduced
11 various bills that both looked at the common carrier
12 obligations and we think this embargo piece is key
13 component of that.
14 I'd like to leave you with one final
15 thought and this is something one of our members had
16 pointed out to us. On December 9th, in a note to UP
17 customers regarding the resolution of recent rail
18 disputes, an executive vice president noted "The
19 president's action ended any uncertainty around the
20 threat of strike by rail workers. If you stopped or
21 slowed down shipping by rail because of that
22 uncertainty, I encourage you to resume your

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1 shipments."
2 And while the threat of a strike is over,
3 we're far from a situation where there's certainty in
4 the rail market, specifically at UP. To be clear,
5 our members want to do just what this executive is
6 asking. We want to resume shipments on the UP and
7 return to normal levels of service, but it's
8 impossible when we're faced with an endless barrage
9 of embargos that were encountered to agreed-upon
10 contracts. And unfortunately, we don't see much end
11 in sight.
12 I'd like to thank you for your time and
13 attention. I also would like to submit some written
14 testimony that provides additional details around
15 some of the things I mentioned in the spoken
16 testimony. Thank you.
17
18 CHAIRMAN OBERMAN: Rob, that would be
19 welcomed. I think I'm going to hold questions until
20 Jeff speaks.
21 MR. BENEDICT: Sure.
22 MR. SLOAN: Okay, I think everything has

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1 probably been said, but I guess I'm the last person
2 who hasn't said it yet. But I do appreciate the
3 opportunity to testify today on behalf of the
4 American Chemical Council, ACC represents more than
5 190 of America's leading chemical companies. Our
6 members are some of the largest customers of the U.S.
7 freight rail system.
8 And with new investment in U.S.
9 manufacturing capacity, our transportation needs are
10 growing. In other words, count us among the
11 industries that want to ship more by rail.
12 ACC welcomes the Board's attention to
13 UP's use of rail embargos and their impacts on rail
14 customers in downstream industries. We do understand
15 that rail embargos are necessary in some
16 circumstances and we further acknowledge that UP has
17 worked constructively with some of their customers to
18 help mitigate the negative impacts of its embargos.
19 However, we very much share the Board's concern about
20 the increasing use and misuse of embargos to manage
21 network congestion.
22 Over the past year, ACC members have been

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1 subject to multiple embargos by UP and by other
2 railroads. These embargos disrupt operations, they
3 impose significant costs on rail customers, and they
4 prolong the nation's supply chain problems. They're
5 yet another manifestation of the chronic service
6 failures that are plaguing the U.S. rail network.
7 My testimony will highlight some specific
8 issues with the UP embargos and then move on to the
9 need for some STB policy reforms to address the
10 systematic conditions that lead to embargos,
11 including the need to finalize long overdue rules for
12 reciprocal switching.
13 Based on feedback from our member
14 companies, UP has offered insufficient information to
15 them to fully explain the need for its actions or to
16 justify the specific volume targets that have been
17 imposed. Typically, the car limits have been set
18 with no customer input and UP's 14-day baseline is
19 arbitrary and does not account for factors that
20 impact traffic volume, including weather events,
21 seasonal variability, plant outages, et cetera.
22 I also learned yesterday from one ACC

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1 member that they had recently lowered their volumes
2 to meet UP demands. UP then lowered the targets
3 because the 14-day average had come down. So, they
4 were essentially penalizing the shipper for doing
5 what UP had asked them to do.
6 CHAIRMAN OBERMAN: (Off Mic)
7 MR. SLOAN: The use of embargos helps UP
8 shore up its service metrics and achieve its
9 performance improvement targets, but rationing
10 service in this manner, we believe, runs counter to
11 UP's common carrier obligation. And furthermore, it
12 undermines the Board's efforts to improve
13 transparency and accountability for rail service
14 performance.
15 I'll note that ACC members have described
16 varied experiences working with UP in their response
17 to customer concerns. Several large UP customers
18 have reported that they're working through the
19 service issues and that UP is effectively meeting
20 their needs. Other companies have reported that
21 after first threatening an embargo, UP indicated that
22 they'd achieved sufficient reductions from other

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1 shippers and that further embargos were not needed.
2 However, other ACC members report that
3 they've received little more than system-generated
4 notices from UP with predetermined volume levels and
5 that after contacting their account manager and
6 opening a case through UP's website, they've received
7 no meaningful response or follow up. To those
8 customers this response suggests a lack of interest
9 from UP in developing a supply chain solution versus
10 a railroad-specific solution.
11 You've heard numerous speakers over the
12 last two days discuss how UP embargos impose burdens
13 and harm manufacturing operations. I'll highlight a
14 few additional examples. One ACC-member facility
15 serves a large refinery in Texas. It provides
16 critical inputs for the refinery and it also uses
17 sulfur from the refining process to make sulfuric
18 acid.
19 On average, the ACC member site receives
20 four loads of raw material and ships out eight loads
21 of sulfuric acid per week. This volume, however,
22 varies at times depending on the refinery

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1 operations. Due to its size and geographic
2 restrictions, the facility has no room onsite to
3 store additional cars.
4 Recently, UP determined, without any
5 customer input, that it will hold only three cars at
6 its serving yard and that it will embargo the site
7 when that limit is reached. But managing to this
8 three-car limit is simply not feasible. The cars are
9 sourced from a production facility that's 10 days
10 away in transit time. And so, with that, the
11 variability and the need, again, that managing to
12 that limit is not feasible. The embargos threaten
13 operations at the ACC-member facility, the refinery,
14 as well as their downstream customers.
15 Furthermore, BNSF has operations in
16 serving yards in this area, but the current
17 reciprocal switching rules foreclose the facility
18 from accessing alternative rail service. I'd note
19 that where reciprocal switching is available ACC
20 members have been able to use alternative routes to
21 maintain shipments and to prevent shutdown at some of
22 their customer locations.

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1 However, due to higher tariff rates that
2 they incur, ACC members experience hundreds of
3 thousands of dollars in additional cost where UP has
4 faced on penalty for failing to meet its contractual
5 obligations. I will recognize Patrick's comments.
6 They're very much appreciated about reciprocal
7 switching being a mitigation for the embargos, but
8 also if it's more widely available, potentially,
9 creating circumstances that may reduce the need for
10 embargos in the first place.

11 Other ACC members have been asked by
12 their own customers to either divert cars that were
13 enroute or to rebill cars that were already placed at
14 the facility simply to avoid embargos. This adds
15 costs, and furthermore, it increases inefficiency in
16 the supply chain.

17 I would like to respond specifically to
18 some comments that Lance Fritz made yesterday. And
19 several times while he was up here, he suggested that
20 because a customer was able to meet UP's demand to
21 reduce cars without actually shutting down
22 production, then by definition those cars represented

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1 excess inventory.

2 I think we need to be clear. UP is
3 reducing normal levels of business through the
4 embargos. Furthermore, his comments ignore the
5 extraordinary efforts and costs that have been
6 incurred by customers to reduce those car levels to
7 meet UP's demands. In many cases it may be
8 unsustainable to maintain those efforts without
9 impacting production.

10 ACC is concerned that UP and potentially
11 other railroads will increasingly turn to embargo to
12 manage long-term congestion problems. And it's
13 particularly troubling that this congestion, in many
14 cases, were created or exacerbated by the railroad's
15 own management decisions, including actions to cut
16 jobs and mothball equipment.

17 The STB must not allow such embargos to
18 become normal and accepted practice. In exercising
19 its oversight role, we encourage the Board, as has
20 been recommended by other speakers, including Tom
21 Wilcox this morning, to establish policies that
22 define what is reasonable and what is not reasonable

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1 in terms of embargos.

2 And that should say that if an embargo,
3 if it results from staffing, equipment, and
4 infrastructure decisions that were designed to
5 increase railroad profitability then by definition
6 that embargo is unreasonable. This will send a clear
7 signal that such conditions do not relieve the
8 railroad of its common carrier obligation.

9 In addition, the Board must adopt some
10 regulatory reforms aimed at the root causes of
11 chronic rail service problems. The first one I'll
12 note is the need for permanent reporting
13 requirements to track how well railroads are
14 performing for their customers. And this should
15 include key metrics for on-time performance and first
16 mile/last mile service from EP 770.

17 Second, the Board should establish
18 minimum standards for rail service. The Board has
19 the authority to further define the common carrier
20 obligation to hold railroads accountable for failing
21 to deliver reasonable levels of service.

22 And the last one I'll note is the Board

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1 needs to complete long overdue rules to improve
2 access to competitive rail services through
3 reciprocal switching. The Board received extensive
4 testimony in the past on how expanding rail-to-rail
5 competition can improve service. And then in today's
6 hewing I want to again reemphasize that reciprocal
7 switching can help, where it's available, to prevent
8 or mitigate the harm caused by UP's embargos.

9 While none of these provides a silver
10 bullet, these reforms will increase transparency,
11 strengthen accountability, and promote market
12 competition. Collectively, they'll provide a more
13 balanced regulatory framework, one that incentivizes
14 network resiliency, growth, and customer service.

15 Thank you again for the opportunity to
16 testify. I'll be happy to answer any questions.

17 CHAIRMAN OBERMAN: Thank you. Very
18 helpful. Let me ask a question. We had, I guess, a
19 couple of companies yesterday who were are in your
20 membership, right, Univar and ChemTrade. I'll ask
21 both of you, were there others that you're aware of
22 who you know of without mentioning their names who

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1 would've come, but for fear of retaliation?
2 MR. BENEDICT: So, in my written
3 testimony, that's pretty much the lead in. That I
4 know you value our association's perspective, but you
5 would've rather hear directly from shippers because
6 they can give you very specific examples. And I
7 clearly had a strong ask to our members that we would
8 like your representation. I had members tell me
9 directly that their management said no way. That we
10 were afraid of direct or indirect retribution. So,
11 it's a real thing.
12 I mean you heard the union talk about the
13 adjectives that they described on some of the
14 railroads and that was fear. And I think that fear
15 also applies to shippers, particularly the ones that
16 are captive.
17 MR. SLOAN: I don't have specific
18 information on if companies are not coming here
19 because of fear, but I will note that companies that
20 have been significantly impacted by these embargoes
21 chose not to.
22 CHAIRMAN OBERMAN: So, let me follow up

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1 on a couple of things that both of you said. Jeff,
2 you talked about our issuing some kind of rule or a
3 policy statement providing that a embargo that
4 results from management practices, such as decrease
5 in personnel and mothballing locomotives for the
6 purpose of lowering their OR should be basically
7 ruled out as justifications for an embargo.
8 It strikes me, as I listen to that, that
9 of course that's the concept we've been talking
10 about. But would it make it too difficult, if you
11 think it through, on a shipper who wanted to
12 challenge an embargo for those reasons to prove
13 management's intent, why they did these things? And
14 I'm wondering if we were to consider reductions in
15 crew levels, such as we've seen with UP, for
16 example, by several thousand people if just the fact
17 that workforce has been reduced is a sufficient fact
18 to say that's not a reason to justify an embargo
19 rather than getting inside management strategy for
20 why they did it.
21 MS. SLOAN: Yes, I think that's a good
22 clarification. I think trying to prove the intent

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1 behind it would be very challenging. But certainly,
2 all of the decisions regarding staffing and regarding
3 equipment that are contributing to the current
4 congestion that is the justification for the embargo
5 need to be part of the equation to whether or not the
6 embargo is, in fact, reasonable.
7 CHAIRMAN OBERMAN: So, having asked the
8 question, and actually most of these railroads,
9 certainly UP, they answered it in their earnings
10 calls. They have said we're doing this in order to
11 lower our OR. They tell Wall Street that, so it's
12 really not a controverted fact as to what lead to
13 these changes in my view. They may have tried to
14 walk away from it a little bit, but they can't walk
15 away from their own statements.
16 Well, let me ask this question. Do you
17 know whether any of your impacted members have
18 considered seeking relief from us under existing,
19 limited as it is, law involving the use of embargoes?
20 And have they considered it and rejected it or is
21 this something you anticipate the people who are -- I
22 mean, you stated some pretty significant business

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1 impositions on your members from these embargo
2 practices that are really costing them or making it
3 very difficult, if not impossible, to operate. So,
4 what do they do? I mean how do they function and why
5 aren't they coming here and asking for help?
6 MR. SLOAN: I'd say I think there's
7 uncertainty of the odds of success and how they would
8 actually go about successfully challenging an
9 embargo. I think there's also questions about what
10 are the remedies and would that be enough. And I
11 think so much effort is going into managing the
12 workflow on a day-to-day basis dealing with the
13 challenges to then be thinking about how to
14 challenge it at the STB maybe is a secondary concern.
15 CHAIRMAN OBERMAN: Rob?
16 MR. BENEDICT: And I would say the
17 concern from membership is reaching a level I've not
18 seen before. That said, I think there is still
19 concern of if you bring a case to the STB during that
20 process what happens when you're beholding to that
21 single railroad. I think that's the real concern.
22 CHAIRMAN OBERMAN: Well, that is

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1 understandable. I can tell you that -- it wasn't an
2 embargo, but it might as well have been the
3 equivalent of one, the situation we had with Foster
4 Farms, that through OPAGAC and informal processes
5 there were efforts -- and I am personally engaged in
6 it, very informal, but direct process with Lance
7 before they ever filed a case.
8 And they struggled for months and I'm not
9 inside their head, but my perception was they didn't
10 want to bring a case either for the reasons you say.
11 And it finally got to the point where they were going
12 to suffer a massive loss and they brought a case.
13 And I have been told that there were one or two
14 occasions since then -- there may have been many more
15 where railroads were threatened with an emergency
16 service case subsequent to our Foster Farms decision
17 and that perception of what we might do if a case
18 was brought has brought relief. So, I'm trying to
19 figure out how people go around making their
20 decisions to solve these problems.
21 MR. BENEDICT: Yes, I think I've had some
22 conversations with members about certain lines of

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1 businesses that were threatened because of either
2 service or embargo issues. I think they've resolved
3 those, but I think that if it went that far where a
4 line of business had to be closes that's when you can
5 see some action from. But I think, as Jeff
6 mentioned, there's so much time and effort put into
7 the day-to-day operations and working with it that
8 they're really focused on that on the ground.
9 CHAIRMAN OBERMAN: Let me ask this
10 question. Has the level of concerns that you hear
11 from your members risen since the institution of
12 whatever this new pipeline CIMS program is, which
13 I'm still trying to digest, in the last few weeks
14 because the embargos have been on an upswing since
15 2018 and we've been talking about it. But have the
16 concerns and the real imposition on your members been
17 heightened since the new policies at UP?
18 MR. SLOAN: Very recently I think the
19 level of concern is going up. I don't think it's
20 new. Again, I think this is another manifestation of
21 the kind of service problems that we've been seeing
22 over the last two years, not just from UP, but across

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1 the rail networks. But certainly, the new system of
2 embargos that UP is imposing recently is a growing
3 concern for our members.
4 MR. BENEDICT: I would agree. I would
5 definitely concur with that. And I think you can
6 just look back to the embargos in California and BNSF
7 earlier this year. Our members talked it out and
8 worked out certain exemptions and permits and that
9 process is very clear. I think what's frustrating
10 our members, how a lot of the process seems to be
11 automated.
12 You heard talk of a 24/7 call center. I
13 don't think that's meeting the needs of our
14 customers. Maybe the lines are business or
15 something, but I've noticed in the past probably
16 since November a definite increase with emails,
17 concerns, phone calls from members.
18 CHAIRMAN OBERMAN: We haven't really
19 asked much about this during these two days, but it
20 sounds like your members' experiences with BN and its
21 embargo are quantitatively and qualitatively
22 different from what you're experiencing with UP. I

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1 wonder if you could enlighten us on that, if that's
2 accurate. What's the difference?
3 MR. BENEDICT: I think the fundamental
4 difference is the reason for the embargo. You know
5 BNSF's appeared to be more towards some issues with
6 track. Our members have a fundamental problem with
7 an embargo related to mismanagement of their own
8 railroad system. I think that's what's frustrating
9 us the most in this case.
10 I also think when the BNSF embargo was
11 noticed to us there was a conversation with members,
12 particularly on the refining side, that this could
13 potentially shut down the refinery. And when, I
14 think, BNSF heard that they created certain
15 exceptions that met our members' needs.
16 We haven't gotten to that level with the
17 UP yet, but we're definitely not getting the customer
18 service that we got there in those couple days before
19 that -- I guess it was the summertime embargo.
20 MR. SLOAN: I guess I would agree with
21 that, but I wouldn't want to minimize the impacts of
22 the BNSF embargo and for weeks on end some customers

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1 were shipping only 10 percent of their normal
2 shipments into the State of California that was
3 hugely impactful. I think there was a lot of effort
4 to resolve it, but I don't want to give the
5 impression that that was not a big deal.

6 CHAIRMAN OBERMAN: Just a couple of
7 things. You know one of the frustrations up here, to
8 me anyway, is -- and it appears that BN is operating
9 much better now since thing from what my sense of it
10 is, at least they ended the embargo program. But
11 when everybody all around you is suffering, what good
12 is a reciprocal switch?

13 Having said that, we asked as pointedly
14 as we could yesterday will you agree to a reciprocal
15 switch in lieu of an embargo and we got kind of a
16 half answer. Well, we'll give it serious thought.
17 Have any of your members actually approached UP to
18 institute a switch in lieu of an embargo up until now
19 and either received one or been turned down?

20 MR. SLOAN: I guess I know that some of
21 our members have, as I've said in my testimony, have
22 utilized reciprocal switching as available. I guess

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1 I don't --

2 CHAIRMAN OBERMAN: I assume that's where
3 the already have a tariff. I'm asking if they've
4 approached them for one where they don't have it now.

5 MR. SLOAN: Where they don't have that?

6 CHAIRMAN OBERMAN: Yes.

7 MR. SLOAN: I'm not aware of any, but I
8 don't know for sure.

9 CHAIRMAN OBERMAN: Well, I would
10 encourage your members to listen to what Lance said
11 yesterday and then make their own decision. I'm not
12 going to tell them how to run their businesses, but
13 to see if that works in the interim. In the interim,
14 meaning before we do anything more, assuming we're
15 going to do something. And I don't what that might
16 be, but I am concerned about what you're telling us
17 about the impact this is having on your industries
18 and how it's affecting the public. So, Patrick?

19 BOARD MEMBER FUCHS: Yes, just a couple
20 quick things. Marty, just real quick to follow up on
21 your point about what good is a reciprocal switch for
22 people that are -- two carriers that have poor

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1 performance, just to echo a point that we've heard
2 and that I mentioned earlier about the hope is that
3 over time the incentive structure would change so
4 that would happen less often.

5 But also, one thing that necessarily
6 hasn't been discussed is the aggregate numbers across
7 railroads may be very different for localized areas.
8 And think even Lance Fritz said yesterday there's a
9 particular area on UP's network that they have
10 particularly poor performance. So, it could very
11 well be that in the aggregate two railroads look like
12 they're poor performing, but they might be
13 differentially distributed.

14 So, in the immediate states that Union
15 Pacific could take and maybe how the Board should be
16 thinking about this more broadly, you heard
17 discussion earlier about UP already providing an
18 allowance for their CIMS serving yard for first/last
19 mile. And I think, Jeff, you testified to the fact
20 there are other things that 770 metrics are
21 irrelevant like trip plan compliance that also shed
22 light on service performance.

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1 And one thing that we are not collecting
2 in 770, but which I hear about a lot is transit
3 times. Because you could have a long trip plan and
4 so the transit time is not completely irrelevant.
5 So, where I'm going with this is do you think that
6 Union Pacific, just in the near term, understanding
7 there's a broader role for the Board here, building
8 in more exceptions for their poor service
9 performance, beyond just first/last mile, but other
10 types of service metrics that are clearly trackable
11 would be a positive step forward in terms of the
12 things that they can do.

13 MR. BENEDICT: So, I first want to
14 restate something I said before, which is our basic
15 belief that this isn't a valued embargo. I
16 appreciate that they're making efforts to address
17 what we see as an improper embargo or threat of
18 embargo.

19 That said, I think trip plan compliance
20 is a metric that our members constantly bring up as
21 something that actually can show service issues and
22 can be pointed to as something to improve. Taken

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1 away what I said before, I think linking certain
2 perimeters of what an embargo can and can't be on
3 that trip plan compliance could get to what Jeff and
4 I are talking about, which is that we shouldn't have
5 to pay the price for mismanagement of their own
6 network and I think trip plan compliance would get to
7 that.

8 MR. SLOAN: Yes, I think it could be
9 helpful to have some -- if embargos are truly the
10 last resort, is the UP doing everything that they
11 need to do to provide the level of service that
12 they're committing to, and if not, then embargos
13 shouldn't be imposed until they're meeting their end
14 of the bargain.

15 But I guess I see some problems with that
16 in the sense that -- I mean, the conditions that are
17 leading to UP wanting to impose the embargos are
18 real. There is congestion. There is a lack of
19 network capacity to handle the traffic that's there.
20 So, if you're exempted from an embargo because of
21 certain conditions, where does it come from? Are you
22 solving a problem or are you just moving it?

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1 MR. SLOAN: Can I just say one thing on
2 top of that? I think this gets to what some of the
3 conversations with UP was before, is what are you
4 doing to address this? And I think if they're not
5 meeting their trip plan requirements and they
6 couldn't impose an embargo, maybe they will more
7 strongly consider staffing up or pulling some
8 locomotives out of storage. It's a possibility.

9 CHAIRMAN OBERMAN: Do you find their
10 self-imposed metric of not embargoing anybody from
11 whom they're below 80 percent, how's that working
12 out?

13 MR. SLOAN: I'm not sure that's
14 sufficient. I think that some of the metrics that
15 Pat was alluding to would be more meaningful.

16 BOARD MEMBER PRIMUS: I just want to
17 follow up on what Patrick said real quick.

18 CHAIRMAN OBERMAN: Go ahead, Robert.

19 BOARD MEMBER PRIMUS: But I wanted to say
20 that you guys had talked just now about the problems
21 and the solutions and it seems like one-sided. Like
22 you said, it's fixing it on your end, but also

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1 admitting it's a labor issue, as we said. It's an
2 operational issue in terms of what are they doing to
3 accelerate that. They're asking you to fix the
4 problems on your end. They're saying it's your
5 problem, but then acknowledging that the hiring
6 aspect, which again, we questioned them on, they
7 don't have projections.

8 As I said, 1400 seems to be their number,
9 but 1400 is not the number, obviously, to answer the
10 problems that they have today. So, they have to sort
11 of step up too and as you get penalized -- as we said
12 before, as you get penalized while there's a fault in
13 operation or while things aren't working well. Let's
14 just say that. But where's the penalty on that side
15 for them not stepping up in terms of their labor
16 side? I think there's a disconnect there in terms of
17 moving forward. They get to plan out where they're
18 going. You, unfortunately, don't because you don't
19 know where their plans have in place for you. It
20 seems that way from my perspective.

21 MR. SLOAN: I mean I think that gets us
22 back to the word that keeps popping up is the

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1 incentives and long-term incentives and I think that
2 more competition provides an incentive to provide
3 better service and to staff up to needed levels. I
4 think service performance standards also provide
5 incentives. And over time, I think, the series of
6 reforms that the Board has already been looking at
7 can start to change the dynamic and long-term,
8 hopefully, keep us from having to revisit these
9 issues over and over again.

10 BOARD MEMBER PRIMUS: And on that note, I
11 wanted to come up because it was mentioned before in
12 something that Patrick and Marty said. They asked
13 about bringing cases before the Board and there was
14 sort of a hesitation. To be perfectly blunt, the
15 history of bringing cases before the Board or
16 especially when they involve this they're long,
17 tedious and generally they don't end up -- they end
18 up costing the shipper more so in the end.

19 Part of our job, and I'm going to ask
20 you. Do you think part of our job, moving forward,
21 is also to try to reform that, to streamline that?
22 So, make it a better process or more efficient or

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1 effective process. I think part of the problem I
2 think I hear from a lot of people wanting to bring
3 substantial cases before the Board is that it's going
4 to take a while and it's going to take -- by the time
5 it gets resolved, it could be years. I mean is there
6 something that you guys can look at or recommend to
7 us if there is a way to streamline or what we can do?
8 Because we want to have a process where you guys
9 don't look at it as tedious or not really answering
10 the bell. I think we need to look at that as well,
11 going forward.

12 MR. SLOAN: I mean, I think in the past
13 we've been very vocal about wanting to see
14 streamlined processes to make the remedies that are
15 available to shippers more accessible in rate cases,
16 in emergency service orders. I mean, I think we've
17 brought forward recommendations to the Board and I
18 think there may be other more specific to these kinds
19 of complaints that we can offer. I hope that the
20 Board takes us up on the suggestions and actually
21 finalizes some of the reforms that are needed.

22 CHAIRMAN OBERMAN: Just to follow up on

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1 Robert just real quickly because that's a concern I
2 have too. The deterrent to bringing cases is it more
3 what you said that people are just busy trying to run
4 their business, so they're not sure of the outcome or
5 is it the speed with which we could resolve them?

6 MR. BENEDICT: I think there's a couple
7 of reasons. I think the day-to-day is one part of
8 it. I think the speed and the potential for success,
9 and I think there is also some, particularly in this
10 case, as you mentioned when you're talking about
11 cases. There's not really a whole lot of previous
12 case law to base your potential for success of a
13 challenge on. Particularly, because in the case that
14 you mentioned before, it's analogous, but not exactly
15 the same. So, I think to be that trailblazer there's
16 some concern of what the outcome is and whether the
17 effort to put in is worth just trying to work with UP
18 until they get through this, if they get through
19 this.

20 CHAIRMAN OBERMAN: Because, and I am
21 concerned about this too, and I'm glad Robert raised
22 it. It takes us a long time to do things and that's

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1 not a negative reflection at all. It's actually a
2 compliment to our staff, which is very thorough. But
3 we also have a massive amount of work, at least in
4 the last couple of years.

5 And in just trying to assess a path
6 forward, it sounds like you'd rather we set some
7 specific criteria, if we could, and I don't know if
8 we can. That would then give shippers some
9 meaningful measuring sticks to say could I win a case
10 rather than saying we would reduce the time to
11 process a service case from -- I'm just going throw
12 out from a year to a month. It's more the certainty
13 of what the rules are it sounds like if we were
14 prioritizing what we need to do.

15 MR. BENEDICT: Yes, in this specific
16 instance, I think it's a lot like the accessorial and
17 demurrage charges. We were kind of operating there in
18 a very gray area. You put out a statement saying
19 this is what we mean by this and there isn't that
20 there or the case law when we're talking about an
21 embargo based on self-inflicted network congestion.

22 CHAIRMAN OBERMAN: (Off Mic')

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1 BOARD MEMBER FUCHS: Thanks, Marty. I
2 think you took it generally and asked some questions
3 along the lines of what I was going to ask. I'll
4 just maybe make an observation because I think,
5 Jeff, you kind of said the watch word being
6 incentives.

7 One of the things that stands out to me
8 that I haven't really heard is what is the incentive
9 for the shipper to load everything on the railroad.
10 Now, there is a collective action issue. When the
11 railroad slows down and then shippers keep on
12 putting in more after the slowdown and that
13 accumulates and you have exponential costs of
14 congestion.

15 But standing alone, prior to that if
16 there's no service issue from the railroad, shippers
17 are charged private car storage or demurrage at the
18 serving yard and if there's more operating inventory
19 of private cars those are shippers assets and that's
20 costing them more in terms of asset costs. So, both
21 those are very powerful incentives, it would seem to
22 me, to keep your operating inventory at a low level

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1 and to not put things in a railroad yard because the
2 railroad will charge you or you have to pay the asset
3 costs.
4 And so, I just wanted to make the
5 observation when we're talking about incentives in
6 terms of whether or not things are the root cause is
7 shipper behavior. I haven't heard evidence that that
8 is the case in terms of shipper loading patterns
9 changing prior to a slowdown, but I also haven't
10 heard kind of more of, just even in theory, what the
11 incentives of a shipper would be to do that. You can
12 see limited instances with plant outages or
13 mismanagement, but broadly speaking, I haven't heard
14 that as much, so make an observation.
15 CHAIRMAN OBERMAN: One thing I wanted to
16 ask about the concept of reciprocal switching, we
17 asked some of the specific shippers and they told us
18 a couple of places, yes, they could use a reciprocal
19 switch and other places there's nobody around, so
20 that's not an option for them. Do you have any sense
21 for your members how broadly available a lucid
22 reciprocal switching or more liberal rule would be in

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1 terms of the physical setup.
2 MR. SLOAN: I mean, I think our industry,
3 in particular, would benefit from it because of the
4 concentration of the industry in certain areas,
5 industrial areas that have access to multiple
6 railroads, in general. It's certainly not going to
7 benefit every one of our member facilities, but I
8 think it would benefit a lot of them; if there were
9 reasonable access rules I think it could be fairly
10 widely useful to our industry.
11 I would also repeat I think a comment you
12 made yesterday that even if it doesn't benefit
13 everyone, if it benefits the network, those indirect
14 benefits --
15 CHAIRMAN OBERMAN: I'll take credit for
16 it, but that was Patrick's.
17 MR. SLOAN: I apologize for misallocating
18 that.
19 BOARD MEMBER FUCHS: That was a great
20 point by you, Marty.
21 CHAIRMAN OBERMAN: But that's an
22 interesting question. Given the restrained, that's a

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1 euphemism I shouldn't use, approach UP has to
2 resourcing its -- or sourcing its business, do you
3 think that even if we had a more liberalized
4 reciprocal switching regime they would only staff up
5 for those places.
6 And maybe as you say, Jeff, if you've got
7 a condensed geographic area where there's a lot of
8 access to another railroad, maybe that whole region
9 is going to have to be staffed up, but I'm trying to
10 figure out the incentives and consequences of the
11 liberalized rule. How far-reaching it would be.
12 You said in your industry for your
13 members it could be a big help, but maybe, Rob, you
14 should comment on it from your perspective.
15 BOARD MEMBER FUCHS: Can I just jump in
16 on this, Marty?
17 CHAIRMAN OBERMAN: Sure.
18 BOARD MEMBER FUCHS: Let's say, for
19 example, trip line compliance or however rule is
20 structured, and this isn't necessarily reciprocal
21 switching hearing, but in order to achieve good
22 service performance it's not just going to be at the

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1 area of the switch. It's going to have to be
2 throughout the network because the journey is going
3 to be throughout the network. So, that's why if
4 you're just looking at the coverage area of the
5 switch we think about it in terms of, oh, there must
6 be a local crew breakdown. But if you look at the
7 entirety of the journey that's motivating the shipper
8 behavior that's how you get to a broader network and
9 then that's how you get to the spill over, I would
10 think.
11 MR. BENEDICT: And I would agree. As
12 Jeff kind of alluded to in his testimony, a lot of
13 our facilities are co-located near chemical
14 facilities because of the interplay in products. So,
15 I agree with Jeff that it would have an overall
16 positive impact. Obviously, certain facilities,
17 different locations might change that, but overall,
18 yes.
19 CHAIRMAN OBERMAN: Pardon for me for
20 being overly cynical, but I do wonder, Patrick, if we
21 opened up reciprocal switching, UP could say we don't
22 want to hire anybody. Go ahead, go to BN. We'd

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1 rather not improve our whole network. I really do
2 wonder, based on what we're hearing, but hopefully.
3 MR. BENEDICT: Would be a test of their
4 theory that they want to grow.
5 CHAIRMAN OBERMAN: Well, I think we've
6 already got that test, but let's see. Okay, Karen,
7 go ahead.
8 BOARD MEMBER HEDLUND: I think I know the
9 answer to this question, but to what extent do your
10 member companies have the ability to switch from
11 railcars to trucks?
12 MR. BENEDICT: It's very difficult for
13 our members to do that. For a refiner or
14 petrochemical manufacturer we have lot of different
15 pieces to the puzzle. We have the inputs coming in,
16 feedstocks. And crude oil a lot of that comes in
17 unit trains. We also have things we pull out of
18 gasoline to meet environmental standards. Jeff
19 mentioned sulfur. That mostly moves by rail. And
20 we move large volumes of things as well and to move
21 large volumes long distances is difficult. Truck is
22 just not an option. I think it's 5 to 1 the amount

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1 of tank trucks we would need to move just one railcar
2 and that's just not economical.
3 I kind of mentioned just the short-term
4 impact of that in our testimony that one member
5 choosing different rail routes if they could, but
6 also adding trucks into the mix it cost them in like
7 just a couple weeks six figures.
8 BOARD MEMBER HEDLUND: Actually, I'm glad
9 to hear that. I'm not in favor of putting more
10 petrochemicals on a highway.
11 CHAIRMAN OBERMAN: I wanted to get back
12 to the metrics question. Jeff, you had mentioned
13 about making the 770 reporting permanent. There was
14 some discussion about adding transit -- those don't
15 include transit time and I understand the merits of
16 adding transit time. Beside from that question, do
17 you find the way the metrics are currently defined,
18 the ones that were added in 770, to be adequate for
19 what they are telling you or would you improve on
20 those or modify them in some way?
21 MR. SLOAN: I think the specific metrics
22 for your first mile/last mile service fulfillment and

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1 on-time performance are good. I think perhaps might
2 offer some tweaks if it was open for comment, but I
3 think my sense from our members is that those are
4 pretty useful the way they're defined right now.
5 CHAIRMAN OBERMAN: And in terms of adding
6 to those, the ones we're talking about. I realize
7 we've got a separate first mile/last mile proceeding.
8 Those ones, the subject came up, in addition to
9 transit time, are there any others that you would
10 focus on that should be added to what's already in
11 770?
12 MR. SLOAN: I think there should be
13 consideration of -- I think it was brought up in
14 another filing in that proceeding recently, but an
15 idea of so kind of volume metric, including like
16 volumes not taken that could measure how much
17 business is being left on the table because the
18 railroad doesn't have the capacity to handle it. I
19 think that could be a useful additional metric.
20 BOARD MEMBER FUCHS: And relevant to what
21 Jeff's say, Jeff, it would seem to me that even on a
22 first/last mile basis, and this could be relevant for

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1 UP's program, if UP is indeed considering expanding
2 their exceptions to capture a more comprehensive look
3 at their service performance. But first/last mile
4 service is not synonymous with industry spot pull.
5 You could have, as we've talked about I think
6 yesterday, you could have a pretty good industry spot
7 pull, but if your spotting and pulling a highly
8 variable number of cars that could still cause
9 problems for a shipper. And it's not the volume
10 thing necessarily you were referring to, but
11 something about the order fulfillment or something of
12 that nature. I'm not saying that that is a metric
13 the Board should collect, but I just want to say that
14 even within some of these you're never going to
15 capture everything and particularly when it comes to
16 volume. I think that's the one that's particularly
17 hard to capture, even just on the first/last mile
18 level.
19 MR. BENEDICT: This is slightly
20 different, but you're asking about data to collect
21 and isn't collected. I think what opened my eyes
22 because it was antidotally I thought this was the

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1 case. But hearing the amount of potential embargos
2 that were resolved through conversations with
3 customers, I think knowing that would be a true
4 measure of the impact of UP's program, as opposed to
5 just reporting on embargos that go through the whole
6 process and reach that final stage. Because I'd be
7 interested to see if that's increased as well. My
8 guess is it probably has.

9 CHAIRMAN OBERMAN: We did ask them and
10 Brad said they would submit that data. He said it
11 was less than 30 percent. Remember I said 30 percent
12 and he said maybe a little less, so I took 1100
13 embargos this year and divided it by .28 and I got
14 just under 4,000. But what we don't know is, is that
15 4,000 separate customers? I think UP has said,
16 Karen, that they have 10,000 customers. I think
17 that's right. I may be wrong, but that's not
18 necessarily the same thing as 10,000 locations.
19 There's probably more.

20 BOARD MEMBER HEDLUND: That's why I asked
21 them the locations.

22 CHAIRMAN OBERMAN: Yes. Final question

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1 that I have that I'd asked the previous panel of
2 trade associations. Would it be too big of an ask to
3 try to get us from members who are able to do it or
4 willing to do it some specifics -- and you don't have
5 to identify the company. You can amalgamate it of
6 actual lost productivity, lost profits, lost revenue,
7 whatever the measurement is from having their
8 carloads reduced in this program?

9 I'd asked the others can you make up
10 these embargos and you can't invent another day of
11 work, so I assume that your answers would be the
12 same. You can't really make -- maybe you can make up
13 a little, but you cannot make up all of it, so
14 there's got to be a loss.

15 MR. BENEDICT: Yes, lost production is
16 lost production. I mean if we have to curtail
17 production that's gone. That's going to be pretty
18 complicated because there's probably a lot of
19 different factors that go into that cost. I
20 mentioned a couple like the alternative rates on a
21 route or different costs for transit. But we can
22 definitely talk to our members and see if we can get

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1 more information.

2 I know that Jeff's group does a quarterly
3 survey and that's all the rail network, not
4 necessarily just UP, but I think that's something we
5 would look into as well to maybe represent the
6 refining industry, as well as the chemical industry.

7 CHAIRMAN OBERMAN: Perhaps it would be
8 easier because I think you're right, in terms of the
9 profits or revenues could be a difficult computation.
10 We might get some insight, though, if just measuring
11 lost carloads. And that might not be so hard to
12 measure because you could compare it to previous time
13 periods and so forth.

14 MR. BENEDICT: Yes, I think a specific
15 kind of proxy for loss could be more easily done in
16 something that with the approval of our membership we
17 could probably work on.

18 CHAIRMAN OBERMAN: I mean this is
19 exercise over the last four years by UP is not
20 painless. And as I said to the earlier panel, I was
21 grappling with trying to communicate this to the
22 public in some what of what this is doing to our

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1 economy. The more concrete way we have of
2 communicating that I think the better it is for
3 policymaking, so it would be helpful.

4 But having said that, you folks have
5 businesses to run, so I'm not asking them to drop
6 what they're doing. But if there's an easy way to
7 get it to us, it would be enlightening. So, thank
8 you. Patrick, anybody else have any questions?

9 (No response)

10 CHAIRMAN OBERMAN: Rob, Jeff, you're
11 champions. We see you all the time. We need your
12 input. We appreciate it.

13 MR. BENEDICT: Thank you.

14 CHAIRMAN OBERMAN: Thank you both. And
15 that concludes these hearings. By no means does it
16 conclude, one way or the other, 772 because I have no
17 idea what, if any, further steps there will be, but
18 we will recess these hearings. Thank you.

19 (Whereupon, at 3:45 p.m., the hearing was
20 concluded.)
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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 statement 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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