

Date: May 22, 2019

Case: Oversight Hearing on Demurrage and Accessorial Charges



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SURFACE TRANSPORTATION BOARD
OVERSIGHT HEARING ON DEMURRAGE AND
ACCESSORIAL CHARGES

Wednesday, May 22, 2019

9:30 a.m.

Main Hearing Room (Room 101)

U.S. International Trade Commission

500 E Street, S.W.

Washington, DC

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1 APPEARANCES

2 Panel I

3 Bunge North America

4 Terry McDermott, Director - Supply Chain

5

6 Consolidated Scrap Resources, Inc.

7 Ben Abrams, President and CEO

8

9 Kinder Morgan Terminals

10 Joshua Etzel, Vice President Operations -

11 Northern Area

12

13 Olin Corporation

14 Frank Chirumbole, Vice President of

15 Global Integrated Supply Chain

16

17

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1 Panel II

2 CSX Transportation, Inc.

3 Arthur Adams, Vice President - Sales and
4 Customer Engagement

5 John Patelli, Head of Regulatory and
6 Federal Affairs, Associate General Counsel

7

8 Norfolk Southern Railway Company

9 Alan Shaw, Executive Vice President and
10 Chief Marketing Officer

11 Ed Elkins, Vice President Industrial Products

12

13 Union Pacific Railroad Company

14 Kenny Rocker, Executive Vice President,
15 Marketing and Sales

16

17 Panel III

18 Federal Maritime Commission

19 Commissioner Rebecca Dye

20

21

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1 Panel IV

2 Brainerd Chemical Company, Inc.

3 Mathew A. Brainerd, Chairman

4

5 Cargill, Inc.

6 Brad Hildebrand, Vice President -

7 Global Rail and Barge Lead

8

9 International Paper

10 Jeanne Sebring, Director of Logistics,

11 N.A. (Retired)

12

13 Packaging Corporation of America

14 Ross Corthell, Director of Transportation

15

16 MillerCoors

17 David Burchett, Senior Category Director -

18 Transportation and Logistics

19

20 Private Railcar Food and Beverage Association

21 Herman J. Haksteen, President

22

1 Panel V

2 Anderson-DuBose Company

3 Michael Boddy, Chief Operating Officer

4

5 Lhoist North America

6 Ray Neff, Logistics Manager for Lhoist

7 North America - Minerals Division

8

9 MHW Group

10 Marvin H. Weiner, Chairman and President

11

12 Palmer Logistics

13 Brett M. Mears, President

14

15 The Shippers Warehouse Co. Inc. (d/b/a The

16 Shippers Group)

17 Ken B. Johnson

18

19 Panel VI

20 Agricultural Retailers Association

21 Richard D. Gupton, Senior Vice President,

22 Public Policy and Counsel

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1 Ag Processing, Inc.

2 Gregory Twist, Senior Vice President -
3 Transportation

4
5 Corn Refiners Association

6 John Bode, President and CEO

7 Jeffrey Moreno and Jason Tutrone,
8 Counsel (Thompson Hine LLP)

9

10 National Grain and Feed Association

11 Randall C. Gordon, President and CEO

12 Tom Wilcox, Transportation Counsel and
13 Principal (GKG Law PC)

14

15 Panel VII

16 Brunk Plastic Services

17 Larry Berkowski, President and Chief
18 Executive Officer

19 Brian Steenbeke

20

21

22

1 Auriga Polymers Inc.

2 Barbara Hagler, Logistics Manager
3 Hussain Awad, Senior Vice President of
4 Procurement and Logistics

5

6 National Industrial Transportation League

7 Bruce Ridley, Chairman of the Board and
8 Vice President, Environmental Health and
9 Safety and Operational Services for
10 Packaging Corporation of America

11 Karyn Booth, Counsel (Thompson Hine LLP)

12

13 The Fertilizer Institute

14 Justin Loucheim, Director of
15 Government Affairs

16 Jeffrey Moreno and Jason Tutrone, Counsel
17 (Thompson Hine LLP)

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

2 (9:30 a.m.)

3 CHAIRMAN BEGEMAN: Good morning everyone
4 and welcome. There are about two to three more
5 people in line, and so we are going to go ahead and
6 start, and they will join us.

7 Thank you for joining us for the Board's
8 Oversight Hearing on Railroad Demurrage and
9 Accessorial Charges. I look forward to hearing
10 directly from our stakeholders today and tomorrow
11 about these very important issues, including the
12 impacts caused by carriers' reduction and so-called
13 free time before charges begin to accrue.

14 Each carrier's process by which shippers
15 may dispute charges, newly established congestion
16 charges, and impacts of the Board's 2014 decision in
17 EP 707 Demurrage Liability.

18 At the onset, I want to acknowledge and
19 express my sincere appreciation for the stakeholders'
20 participation and preparation for this hearing --
21 shippers and railroads, alike. The written comments
22 and exhibits are extensive and illuminating, and the

1 degree of public participation in this room and as
2 far as the other -- the written comments that we
3 have received, underscores the importance of the
4 issues that we are considering during this hearing.

5 As you know, the Board closely monitors
6 trends and developments in the rail industry. During
7 my time on the Board, and during my tenure as
8 Chairman, I've been particularly focused on rail
9 service reliability. Sometimes the rail network is
10 impacted by extreme weather conditions, sometimes by
11 changing market conditions and sometimes by the
12 implementation of new operating plans, and what
13 affects a particular railroad or railroads, also
14 affects shippers and the national network in turn.

15 Regardless, of what may be causing an
16 impact, I believe that a continued focus on rail
17 service is an overarching responsibility of the
18 Board. As the sole economic regulator of the U.S.
19 rail industry, the Board has oversight over
20 competitive and commercial issues.

21 During the last several months, I have
22 heard from many of our stakeholders as my colleagues

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1 have also heard from many of our stakeholders, about
2 the Class I railroads' demurrage and accessorial
3 charges.

4 I have heard about new charges,
5 modifications of existing charges, increased charges,
6 and changes to enforcement practices and relief
7 policies. Shippers, receivers, and in particular,
8 third-party logistic providers explained that costs
9 arising from demurrage and accessorial charges have
10 become increasingly significant, and in some
11 instances have curtailed or even foreclosed business
12 opportunities.

13 Shippers have questioned the
14 reasonableness of these charges, whether they are
15 fair and whether they take into account reciprocity.
16 And some are very frustrated by suddenly receiving
17 significant bills which they must painstakingly
18 review for accuracy, and then in many instances,
19 devote additional resources to correcting improper or
20 inaccurate bills.

21 One stakeholder told me that his company
22 resorted to hiring a forensic accountant to try to

1 sort out the charges. Railroads on the other hand,
2 have assured me in meetings with CEO's and COO's and
3 many others, and in written correspondence, that
4 demurrage and accessorial charges are fair and
5 reasonable and serve larger purposes related to the
6 efficient use of assets and network fluidity.

7 I have asked the Class Is to disclose to
8 the Board the revenue they derive from demurrage and
9 accessorial charges. The Board is tracking that
10 data, and it is made available to the public on the
11 Board's website.

12 While the carriers generally argue that
13 the revenue generated are a very small percentage of
14 overall revenues, around 3% for some, we will also
15 hear today from many shippers about how the sudden
16 skyrocketing demurrage bills are impacting their
17 small businesses.

18 The Board is mindful of the fact that
19 issues related to demurrage and accessorial charges
20 have come to the forefront at a time when the
21 railroad industry as a whole is experiencing
22 sustained and robust profitability, and many Class Is

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1 are adopting new operating plans to enhance
2 efficiencies, reduce cost, and improve operating
3 ratios.

4 The industry is in a far different place
5 than it was at the dawn of the Staggers Act. Today
6 and tomorrow are an opportunity to delve deeply into
7 these issues, to clarify various aspects, and to hear
8 whether each carrier individually expects to make any
9 changes based on what can only be described as an
10 outcry from customers.

11 We will also consider actions that the
12 Board may take following this hearing. The written
13 testimony has been particularly informative and
14 compelling, and I appreciate that many witnesses have
15 offered the Board constructive proposals for future
16 actions.

17 And I will say that we have all read your
18 testimony. It was quite an undertaking, but it was
19 fascinating and insightful and thank you for your
20 effort to provide that to us. I will now turn to my
21 Board member colleagues to share their opening
22 remarks, and upon their conclusions, I will briefly

1 go over a few ground rules for the hearing.

2 I am delighted to be joined by Patrick
3 Fuchs, our new Vice Chairman -- he'll be the Chairman
4 soon, and Marty Oberman, our new distinguished Board
5 member and thank you so much for your interest in all
6 of the Board's work and particularly, the issues that
7 we're considering today. Thank you.

8 VICE CHAIRMAN FUCHS: Thank you to our
9 Chairman, Ann Begeman. I greatly appreciate all your
10 leadership on this issue and I'm really grateful for
11 all of your efforts to get the data the Board needs
12 to conduct thoughtful oversight.

13 This is our first hearing as a Board of
14 this group of three, and I think we've formed a great
15 team, tackling the important issues before us. Thank
16 you to each and every person who submitted written
17 testimony, and who has joined us here today. Your
18 insights are essential, and your time is valuable. I
19 couldn't agree more with Ann, the written testimony
20 was extraordinarily illuminating, and I expect our
21 discussions in the room today will only bring more
22 light.

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1 So, as we begin today, I first want to
2 stipulate that demurrage and other charges can be
3 useful for maintaining an efficient rail network.
4 Incentivizing expeditious loading and unloading, can
5 free up cars and capacity. The concept is not new.
6 Demurrage has been explicitly codified in our
7 statute for decades, and the history dates back over
8 100 years, including used to address car shortages at
9 the turn of the 20th Century, and during World War I.

10 The question is not about demurrage in
11 concept. The question is, and has been, about
12 implementation. And certainly, implementation has
13 changed, and industry has changed since the turn of
14 the 20th Century, since World War I, since Four R and
15 Staggers, since last month, since yesterday.

16 The recent changes in implementation have
17 been significant, and the concerns raised by
18 customers have been significant. Today I am eager to
19 learn more about these concerns which were previewed
20 well by the Chairman.

21 And, as a back drop, I want to emphasize
22 two things -- first is the role of technology to

1 potentially attenuate demurrage and accessorial
2 issues on the front end, particularly improvement of
3 supply chain visibility, so customers can have better
4 information for planning orders, managing their
5 operations and insuring charge accuracy.

6 Second is the best practices of rail
7 carriers. Just as it is important to hear about what
8 is not working, it is important to hear if anything
9 is working. Any reasonable credits in flexibility,
10 notice, tools for real time information, carrier
11 response deadlines and other practices.

12 So, as you've said Ann, today is about
13 constructive solutions to improve implementation and
14 create a better rail system for everyone, including
15 everyone in this room.

16 COMMISSIONER OBERMAN: Thank you, excuse
17 me, thank you Ann. Good morning everyone, very, very
18 briefly first of all I want to congratulate Ann on
19 her leadership and bringing this hearing about and
20 the entire process, as well as everything else that
21 she's been leading us on since in the last four
22 months since Patrick and I arrived, as well as what

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1 happened before.

2 But it is a very dynamic institution and I
3 think as you can see by having brought you all here
4 together, that we mean to grapple with serious issues
5 facing the Board. There's really no reason for me to
6 get into the substance because if I had had the
7 patience to prepare a more formal statement, I would
8 have said exactly what Ann and Patrick said, and so I
9 appreciate your having done it but I agree with them
10 totally, and I do want to add my own personal thanks
11 to the industry -- all parts of it, for all of the
12 hard work you've done to submit your materials to us.

13 They have been invaluable. I view this
14 proceeding as an opportunity for us to gather facts
15 as well as opinions and policy ideas, and as the
16 hearing goes on, if the questions seem pointed, don't
17 take them personally, they're an effort for us to
18 ferret out information and make sure we get a full
19 understanding from everybody involved here, but I do
20 expect that some of you may think the questions are a
21 little too pointed, but nevertheless, we really need
22 to get at what's going on. So, with that, let's

1 begin, thank you.

2 CHAIRMAN BEGEMAN: Thank you. Now for the
3 hearing instructions. We want to hear from everyone
4 today and tomorrow. And to allow that to happen, we
5 will ask the parties to stick as closely as possible
6 to your allotted times. We recognize that this is
7 not always going to allow you to say everything that
8 you want to say, although we have read everything
9 that you wrote, but again, we just want to make sure
10 we have a chance to hear from everyone.

11 Each witness table is equipped with lights
12 which will guide you regarding your allotted time.
13 They're just not on yet. One minute before your
14 allotted time expires, a yellow light will appear.
15 When you see the red light your time has expired,
16 please conclude your remarks.

17 It's not my intent to cut any of the
18 speakers off when the red light appears, but please
19 try to wrap up quickly thereafter. A video archive
20 of the entire hearing will be placed on the Board's
21 website within a few days of the close of the
22 hearing. For the benefit of the video recording,

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1 please speak clearly into the microphone.

2 We will keep the record open for 14 days,
3 until June 6th, after the conclusion of the hearing
4 to allow for the filing of any additional written
5 comments. If you have slides or exhibits today that
6 have not already been filed, please submit them
7 promptly to the Board's Office of Proceedings in the
8 EP 754 docket.

9 Whether or not we take a short break for
10 lunch today will depend on how things go this
11 morning. We have to be out of the building by 7.
12 I'm not sure if the air conditioning shuts off at 5,
13 that might help us finish it up quicker, but we do --
14 we want to hear from everyone and so we may just
15 have to plow through without a break.

16 Please silence cell phones and I also want
17 to thank the folks at ITC, particular Bill, Tyrell,
18 Cynthia for allowing us to use this amazing facility
19 and for their assistance over the last days helping
20 us get set up. Thank you, Tyrell. And with that we
21 will start with our first panel. Thank you very
22 much, Terry, if you'd like to start?

1 Panel I

2 MR. MCDERMOTT: There we are. Good
3 morning everybody. Chairman Begeman, Vice Chairman
4 Fuchs and Commissioner Oberman, my name is Terry
5 McDermott, and I serve as the Director of the Rail
6 Supply Chain at Bunge North America in St. Louis,
7 Missouri.

8 It is great to be here this morning.
9 First of all, I would like to commend the Board for
10 the decision to schedule this hearing. The turnout
11 alone, as it's already been stated, is an
12 illustration of the importance of these issues for
13 the shipper community and it's going to be an
14 informative day for all of us.

15 So, Bunge is a global agribusiness and
16 food company and a leader in grain trading and food
17 processing. Our operations across North America
18 extend from Southern Mexico to Northern Canada,
19 consisting of five canola processing facilities, 9
20 soybean processing facilities, 8 wheat mills, 8 corn
21 mills, and 47 grain-handling facilities.

22 Excluding our joint ventures, Bunge moves

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1 roughly 150,000 railcars, annually paying the
2 railroads approximately 425 million dollars per year.
3 We also own and/or lease over 9,000 railcars, mainly
4 consisting of tank cars and hoppers to move vegetable
5 oil and meal protein products for animal feed.

6 Our railcar leases represent an additional
7 60 million dollars per year. Our facilities touch
8 all 7 North American Class I railroads, and dozens of
9 short line railroads. The railroads are paramount to
10 our company's success, given the immeasurable value
11 that they provide to us.

12 Before I start, I would like to take a
13 moment to recognize the Union Pacific Railroad and
14 the Burlington Northern Santa Fe Railway for their
15 recovery efforts during the flooding in the Midwest,
16 which primarily occurred in March.

17 Bunge has facilities throughout the
18 Midwest, including several around Omaha and Kansas
19 City. As a result, our facilities and employees were
20 impacted by the flooding. We commend the railroads
21 for their prompt and safe service. The response of
22 these railroads helped minimize lost production and

1 disruptions to our supply chain. Thank you.

2 So, I've been looking forward to this
3 hearing for some time. Not only does this hearing
4 give all stakeholders the opportunity to address
5 issues in a public transparent forum, it is also
6 important from our standpoint that we be able to do
7 so in the presence of our partners at the railroads.

8 We have discussed these issues directly
9 with them on an individual basis, and we think it
10 would only be appropriate to do that publicly as
11 well. The railroads are a fundamental partner to
12 our industry. Many of our businesses frankly could
13 not thrive or survive, for that matter, without them.
14 We are fortunate in North America to be able to
15 benefit from the most robust freight rail
16 transportation system in the world.

17 A transportation network that has evolved
18 and literally been reborn since Staggers. We are
19 also fortunate to have a network system whose players
20 have continually reinvested capital and growth
21 capacity and technologies.

22 And we are also fortunate to have

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1 relationships within these organizations at all
2 levels that extend far beyond transactional business
3 exchanges. We do feel, however, that this
4 relationship between shippers and railroads has been
5 changing as of late.

6 With the recent evolution from what we
7 will call traditional railroading towards what is now
8 commonly known as PSR or one of its many monitors,
9 call it the Unified Plan, clean sheeting, et cetera,
10 the roads are becoming much more rigid in their
11 service offerings and processes, and this can be
12 stressful to that relationship.

13 We understand that operating a lean
14 railroad means, amongst other things, optimizing
15 trips, optimizing power, optimizing rolling stock,
16 people and other resources. And when PSR works, it
17 works. But when it fails, it fails and the impact on
18 shippers is exacerbated and more often than not,
19 shippers end up paying the price.

20 When the railroads miss, it translates to
21 more cost for the customers, costs that can come in
22 the form of overtime, lost production, lost sales,

1 default penalties on contracts, and costs that can
2 also come in the form of what brings us here today --
3 railroad demurrage and accessorial charges.

4 So, my comments today are geared toward
5 the lack of reciprocity in today's demurrage and
6 accessorial tariffs, with more of a focus on the
7 demurrage side. The reality is that these tariffs
8 are changing frequently, and we are not convinced
9 that they are changing correctly.

10 Today's demurrage rules are especially
11 disconcerting, even more for the private car shipper.
12 While this may be an over-simplification, demurrage
13 rules were originally put into place to protect the
14 investment that railroads made in their rolling stock
15 by incentivizing shippers to efficiently move these
16 cars so the railroads could maximize the utilization
17 of railroad-owned rolling stock assets.

18 I think we all -- railroads and shippers,
19 as well as the rest of the players in the supply
20 chain, we all want to maximize our asset utilization,
21 yet we have, in fact, seen demurrage rules change
22 over the years, including recently, but the rules

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1 fail to reflect the changing portfolio of fleet
2 ownership in the North American network.

3 So, recalling the 1980's, the railroads
4 owned the majority of North American rail -- the
5 majority of the North American rail fleet. Today
6 non-railroads now own roughly 70% of the fleet that
7 moves freight in North America. And the governing
8 rules for the protection of the investment made in
9 these cars have not evolved accordingly.

10 As a result, they no longer serve their
11 initial purpose to protect the investment made by the
12 car owner, or lessor, by encouraging the effective
13 use and distribution of the nation's rail car fleet.

14 The rules that exist today are not
15 reciprocal in nature as they protect railroad
16 investments in rolling stock, not shipper
17 investments in rolling stock. So, to illustrate that
18 the rules are not balanced, let's consider an
19 example.

20 The railroads either charge a shipper for
21 railroad-owned equipment that dwells excessively on
22 shipper or receiver infrastructure, as well as

1 shipper or receiver equipment that dwells on railroad
2 infrastructure. There are no rules in place that
3 reciprocate when railroad cars dwell excessively on
4 shipper/receiver infrastructure, or when
5 shipper/receiver cars or private cars dwell
6 excessively on railroad infrastructure while in
7 transit between building release and actual or
8 constructive placements.

9 To explain why this is significant we took
10 a snapshot as an example and recall that at Bunge, we
11 manage a fleet of roughly 9,000 private cars. We
12 took a snapshot on the 1st and the 15th of every
13 month from this year leading up to May the 15th. On
14 the 1st and the 15th, on these random days, we had
15 the following number of cars and the following dwell
16 time days on the railroad between billing and
17 placement on averages.

18 We had on average, we had 416 cars that
19 had dwelled for at least 3 days. We had 259 cars
20 that had dwelled for at least 4 days, 163 had dwelled
21 for at least 5 days, 126 at least 6, 97 at least 7,
22 88 at least 8, 77 at least 9, and we had 67 cars on

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1 average on the 1st and the 15th of every month --
2 January through May 15th, that were dwelling in the
3 custody of the railroads for 10 or more days between
4 billing or release and actual or constructive
5 placement.

6 So, that's a clear example that the
7 demurrage rules are in no way reciprocal. In this
8 example, a shipper has no recourse, and as a
9 suggestion, we think we could simply apply the rules
10 that exist today in favor of the actual car owner or
11 lessor. At the chance to add soil charges or fees
12 charged independent of the actual freight invoices
13 that we pay as shippers, we believe that these are
14 unbalanced as well.

15 I can illustrate this with some clear-cut
16 examples, some of which the non-railroad shipper may
17 not be aware of. So, the railroads and the shippers
18 have common objectives since for the most part we are
19 largely publicly traded companies.

20 We want to create value for
21 our shareholders, but we think the railroads may have
22 lost sight of the affected shareholders within the

1 value chain, and our goal as companies, is to
2 officially and successfully make a profit within
3 those value chains, so some semblance of balance,
4 however, must be present when one driving player
5 wields an unbalanced proportion of the market
6 controlled than those represented collectively by
7 those being served.

8 To better illustrate my point, some quick
9 examples. In 2018, we had an individual railcar lost
10 on a Class I railroad for 121 days, so a normal
11 transit time of 7 days turned into 121 days and we
12 claimed that railroad for car higher relief and it
13 was denied. We received zero compensation, and the
14 only comment we received is that service is not
15 guaranteed.

16 Another example, in a specific lane that
17 consists of one single origin, one single destination
18 and a consistent demand, consistent ratable demand of
19 a 25-car shipment every two weeks. This particular
20 Class I railroad failed to place empty cars for
21 several days and ended up placing two empty units
22 within days of one another, almost back to back.

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1 This obviously caused congestion and
2 demurrage at the destination yard, and we were told
3 by that railroad that we were not going to be
4 guaranteed any credit days or any compensation for
5 the demurrage bill that was headed our way.

6 Zero credit days, or zero free days, that
7 are now being offered on loaded and unloaded cars on
8 railroad infrastructure will invariably cause
9 shippers to incur demurrage or private car storage
10 costs, even when the shipper, the receiver, and the
11 railroads perform perfectly.

12 We have done extensive modeling with this,
13 and we have reviewed this model with the railroad. I
14 will just say the response from the railroads up to
15 this point is inconclusive. The burden of proof for
16 demurrage and accessorial charges is also on the
17 shipper. We are regularly assessed finance charges
18 if disputes are erroneously denied.

19 As an example, in the case of rail car
20 diversions, when a request is actually accepted,
21 which requests are not always accepted, we are
22 automatically invoiced whether the car is actually

1 physically diverted or not.

2 The railroads also charge us reconsignment
3 fees. Reconsignment fees can be for any errors that
4 need to be corrected on waybills or bills of lading,
5 even when the railroad suffers no operational impact.

6 However, we also receive erroneous
7 paperwork from the railroads, and when they send us
8 duplicates, or erroneous invoices, which in our case
9 happens several hundreds of times per year, we
10 cannot reciprocally apply the same feedback to them
11 that they apply to us.

12 A couple more examples that are not
13 necessarily demurrage or accessorial related, but I
14 think they're worth mentioning for flavor. Upon
15 negotiating a rate contract for a lane that has two
16 Class I options. One of the Class I railroads
17 submitted a clause in the proposed contract giving
18 them the ability to unilaterally cancel the rate
19 contract on 30 days-notice.

20 When asked why this was the case the
21 railroad responded, "This comes from our legal team
22 and we basically do it to limit risk, and also

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1 because we can."

2 Another example, similar, negotiating a
3 contract with another Class I railroad. This
4 particular Class I railroad insisted on an
5 indemnification clause that forced us to fully
6 indemnify them even in the case of railroad
7 negligence. We pushed back. When we pushed back the
8 railroad responded by saying, "That is just the
9 price of admission for you to be on our railroad."

10 The last example -- in 2017, after a
11 derailment that involved several of our private cars,
12 the railroad in question did reimburse us for the
13 costs of the actual railcars, but they denied the
14 claim on the product that was in the railcars. When
15 we inquired about this, they stated that the claim
16 was not valid on the product and that the mechanical
17 group had nothing to do with the product claims
18 group and the claim was not justified on the product.

19 This matter, in all transparency, it did
20 get resolved. It had to be escalated several levels,
21 and it was finally resolved 18-months later. So,
22 these are just a few of the examples of the

1 challenges that shippers encounter when working with
2 the railroads.

3 Quite frankly, the railroads may need a
4 nudge, if you will, to remind them that they do have
5 customers to serve and, in many scenarios, customers
6 do not have another rail option. And as I mentioned
7 at the outset, we have long-term relationships with
8 our partner railroads, and we frankly cannot exist
9 without them. We just feel that the relationship has
10 changed a bit as of late, and we think it is critical
11 that they incorporate more balanced terms to the
12 demurrage and accessorial tariff items.

13 So, our ask today, and I know you're going
14 to hear a lot of testimony with a lot of asks, but
15 our ask is that over the next day and a half, that
16 the Board consider testimony from all parties,
17 railroads, shippers, and others, to ensure that the
18 rules governing rail transportation represent and
19 protect the interest of all parties and supply chains
20 and their respective investments which have changed
21 over the past couple of decades.

22 Specifically, we feel that the current

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1 demurrage rules that exist for railroad equipment
2 should be applied in some way reciprocally to account
3 for the shift in ownership of the North American
4 railcar fleet from railroads to non-railroad
5 ownership.

6 The rules that exist today do not protect
7 the investments made in the North American fleet,
8 they only protect the railroad investments made in
9 the North American fleet. And with that, I will
10 conclude, thank you.

11 CHAIRMAN BEGEMAN: Thank you Terry, Ben?

12 MR. ABRAMS: Good morning. My name is Ben
13 Abrams and I serve as the President and CEO of
14 Consolidated Scrap Resources, Incorporated. I first
15 want to thank the Board for holding this hearing on
16 changes to railroad demurrage rules and practices. I
17 appreciate the Board's efforts to better understand
18 the impacts of these changes and the challenges rail
19 customers are facing.

20 CSR is a privately held, fourth generation
21 scrap steel, metal, paper and plastic recycling
22 company with six locations and approximately 140

1 employees in south central Pennsylvania.

2 We use rail to ship scrap raw material
3 feedstock to steel mill customers. And due to our
4 geographically wide-spread customer base, we are
5 regular users that have been highly dependent on rail
6 service.

7 Our Harrisburg, Pennsylvania location is
8 on a direct rail line operated by Norfolk Southern.
9 We ship scrap steel products to numerous mills
10 located east of the Mississippi River, almost
11 exclusively in private railcars that we pay to lease.

12 In recent years, unilateral changes by
13 Norfolk Southern to their business practices, have
14 created unprecedented challenges and cost our company
15 and increasing fortune each year. First, we are
16 paying increasingly more and more money to NS,
17 particularly for demurrage assessed on our private
18 cars without gaining any measurable benefit to our
19 company.

20 Second, we have determined in good faith
21 that we cannot alter our operations and shipping
22 schedules or make additional investments to

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1 accommodate these unilateral changes by NS and make
2 them expense neutral to our company.

3 And third, we have not been able to
4 address our problems through commercial arrangements
5 and cannot avoid the impacts since we are sole served
6 by NS at our Harrisburg facility and do not have an
7 alternative to shipping our products to the customers
8 we supply by rail.

9 In our case, Norfolk Southern, but really
10 all the Class I railroads that are implementing their
11 versions of precision scheduled railroading, have
12 imposed blanket changes to tariff rules to all
13 customers with no legitimate consideration of the
14 disparate effects such applications would have.

15 We believe the Board should require the
16 railroads to establish reasonable, commercially fair,
17 and reciprocal demurrage rules that do not unfairly
18 penalize their customers, both financially and
19 operationally.

20 Moreover, these demurrage rules should
21 take into consideration individual customer's unique
22 circumstances and limitations. While this obviously

1 would require considerably more work for the
2 carriers, and more importantly, more communication
3 with their customers, it is the least they can do if
4 they want to collect fair and reasonable demurrage
5 fees on large and small shippers alike.

6 Based on their submissions for these
7 hearings, NS and the other Class Is would have us
8 believe that they were improved metrics and are
9 evidence that their tactics are working and
10 acceptable, and really their changes to the demurrage
11 tariff are okay, but judging from the turnout by the
12 customers at these hearings, it certainly appears
13 that things are most definitely not okay.

14 To be clear, we don't demonize or blame
15 the Class Is for trying to become more efficient
16 operators and improve their asset management. All
17 businesses want and should do these things. And we
18 are happy to hear that that the Class Is are
19 operating more efficiently, particularly this year.

20 But changes that are happening due to PSR
21 are not happening in a vacuum. Many customers,
22 including us, struggle to adapt quickly to

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1 accommodate the railroad's demands. We are severely
2 financially penalized with demurrage charges because
3 a railroad wants to operate more rigidly and
4 efficiently, and expects shippers to simply follow
5 along, even though that may not be possible, at least
6 on the railroad's timeline.

7 For many years in general, prior to 2012,
8 when we entered into our first small lease for
9 private railcar gondolas, we mainly used NS owned
10 railcar equipment to ship our products and pay the
11 higher shipping rate to NS for that benefit.

12 Since that time, and particularly after
13 2014, procuring NS rail equipment for our shipments
14 became increasingly difficult. Often, we would order
15 cars and they would not be available. And we came to
16 learn over time that NS was both reducing the number
17 of system cars available in general, and in
18 particular, the scrap steel shippers.

19 Our customer account manager told me at
20 that time that we should not look for NS to supply
21 the same number of gondolas they previously did as
22 they could use what gondolas remain for more

1 profitable products.

2 By the later part of 2017, rarely would we
3 ever receive the requested railcar equipment from NS.
4 As a result, over the years, we had to enter into
5 additional long-term private railcar leases to
6 replace railroad equipment that we could not rely on
7 from NS to receive.

8 The most difficult situation over the last
9 24-months, however, has been the unilateral move by
10 NS to progressively reduce and now essentially
11 eliminate empty private car storage credit days.
12 Beginning in August 2017, with the announcement in NS
13 Tariff 6004/D, NS began to gradually reduce the
14 number of credit days for customer's private railcars
15 from five to eventually zero, for each constructive
16 placement as of January 1st, 2019 and this was very
17 unfortunate news for us.

18 After years of relying on the credit base
19 to plan for capital investments, operations, shipping
20 strategies and overall product marketing, NS was
21 informing us that they were changing the rules.
22 There was no method or system in which to discuss the

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1 challenges that we would face trying to adjust, and
2 the impacts it would have on our business.

3 Indeed, at the time, we did not fathom the
4 degree to which the financial burden of shipping our
5 products on private railcars that we pay to lease,
6 would increase. CSR's demurrage paid to NS has
7 increased dramatically over the last several years.

8 From 2015 through 2017, we paid Norfolk
9 Southern on average between 1,500 and 2,700 hundred
10 dollars per month for demurrage. In 2018, the
11 average monthly demurrage bill for our company was
12 over \$11,000, a 560% per month increase over the
13 average monthly cost in 2017.

14 When I filed written testimony with the
15 Board earlier this month, the data through the first
16 quarter of 2019 showed our average per month
17 demurrage cost was in excess of \$23,000, more than
18 double the average monthly cost in 2018, and more
19 than 1,000% greater than our monthly cost in 2017.

20 And over just the last week we received
21 yet another demurrage invoice, for approximately
22 \$68,000. With this new invoice, our year to date

1 demurrage invoices from NS through the end of April
2 2019, have exceeded the total demurrage we paid them
3 in all of 2018, and our 2019 monthly demurrage cost
4 has now more than tripled the average cost last year.

5 NS serviced our Harrisburg yard 5 days a
6 week until January 2019 when we received notice that
7 they would service this location 7 days per week.
8 Yet, NS reduced the number of credit days over the
9 course of 2018, and still charged us demurrage on
10 weekends, when it did not provide service.

11 And prior to 2017, we had 5 credit days to
12 offset those weekend day demurrage charges. Further,
13 our operations in that plant for decades have been
14 designed around a 5 and a half day work week schedule
15 including Saturday mornings.

16 Demurrage charges that result from
17 bunching railcars is another problem. We have often
18 received many more cars at a given time than even NS
19 will spot. Bunched cars cause an increased workload
20 for our staff, and we need to incur additional costs
21 to clear the congestion, otherwise, we're assessed
22 with more demurrage charges.

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1 We have considered how we can adjust our
2 facility and operations to avoid incurring demurrage
3 fees but concluded that the operational changes and
4 additional investments are not viable. Our
5 Harrisburg facility contains numerous fixed internal
6 roadways and systems of large stationary processing
7 equipment.

8 The rail tracks inside the facility were
9 laid decades ago and are also today fixed in their
10 current locations. We can accommodate within the
11 facility only up to 10 gondolas at a time.
12 Redesigning the plant to help materially avoid
13 demurrage charges would be cost prohibitive.

14 Even if we could bring more cars onto our
15 property, we still get only one spot of railcars per
16 day from the railroad and additional staffing is not
17 economic or practical. In the scrap industry, as for
18 other commodities, revenues rise and fall depending
19 on the demand for our products, which in addition to
20 seasonality impacts shipping volumes.

21 We do not control this phenomenon. And
22 notwithstanding the rise and fall of the price of our

1 materials, rail costs seem to move only higher.
2 Normally, when one pays for a service, one would
3 expect to receive some benefit in return, and that is
4 what is most frustrating in all this. We have not
5 had any benefit from paying these huge cost increases
6 from the demurrage tariff.

7 No one from NS ever came to us and said
8 something like, "Hey, look, we know we have basically
9 pushed you into entering into long-term leases for
10 your own gondolas and improved car turnarounds, but
11 we want to make changes to get those cars to move off
12 our tracks faster. What's a reasonable solution that
13 works for you and us so that this change would be
14 fair to both of us?"

15 And it's hard to imagine that NS
16 considered the ramifications of how their blanket
17 imposition of this new tariff to take credit days
18 away, which have been in place for many years and
19 around which businesses like ours made long-term
20 strategic plans and commitments, would impact
21 individual customers.

22 They never spent the time or did the due

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1 diligence about the disparate impact their tariff
2 imposition would have. And NS simply impose the
3 tariff unchecked, demanding that after doing business
4 a certain way for years, customers now have to
5 substantially reconfigure their operations or pay
6 huge penal charges to the railroad, providing zero
7 credit days for shippers who use private railcars is
8 unfair and too rigid, since the railroads control
9 when a car is constructively placed for the shipper
10 to load.

11 Providing shippers with some flexibility,
12 maybe 72-hours, to request their private cars be
13 spotted for loading, once NS constructively places
14 the cars could be a part of a reasonable
15 accommodation to shippers.

16 Recent data provided by NS to the Board
17 indicates that NS's 2019 annualized demurrage
18 billings, based on first quarter numbers, are on
19 track to exceed 2018 billings by 65%. In real dollar
20 terms, they stand to gain more than 60 million
21 dollars for demurrage than they did last year.

22 And I'll just wrap up. There are many

1 individual companies in this country with
2 predicaments like CSR's vis-?-vis, the rail
3 carriers. The application of these new demurrage
4 tariff rules is having an unreasonable and disparate
5 impact on those customers' finances and operation.

6 We want to work with the railroads to help
7 them become more efficient, but not at the expense of
8 watching them rake in huge profits while shippers
9 struggle and pay to continue to operate their
10 businesses as they have in the past. Thank you.

11 CHAIRMAN BEGEMAN: Thank you, Joshua?

12 MR. ETZEL: Good morning Chairman Begeman,
13 Vice Chairman Fuchs, Board Member Oberman. My name
14 is Josh Etzel, I'm the Vice President of Operations
15 of Kinder Morgan Terminals Northern Area.

16 First, I want to thank you for holding
17 this hearing and allowing me to appear today on
18 behalf of Kinder Morgan. We have submitted detailed
19 written testimony describing the problems we are
20 experiencing with respect to the railroad's demurrage
21 collection practices, specifically to our role as
22 receivers, which is a serious issue of growing

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1 concern.

2 I'll attempt to summarize our key points
3 over the next 15 minutes. Kinder Morgan's testimony
4 focuses on the Board's 2014 demurrage liability
5 decision. The railroads are exploiting that
6 decision in a manner that we believe was not
7 unintended by the Board, alleging that decision
8 creates a form of strict liability on receivers for
9 demurrage.

10 Kinder Morgan respectfully submits that
11 this matter needs to be addressed immediately by the
12 Board, through a declaratory order or other
13 appropriate actions, to reverse or clarify the 2014
14 decision in order to restore uniformity and equity in
15 demurrage collection practices.

16 Today I'd like to summarize the situation
17 facing Kinder Morgan and discuss some recommended
18 fixes. Kinder Morgan is a major North American
19 terminal operator that transloads and stores
20 essential commodities for its customers, including
21 some of the largest shippers in North America.

22 We have 157 terminals in the U.S. and

1 Canada, we transload and store various liquid and
2 ball commodity products for more than 4,700
3 customers. Many of our terminals are rail served.
4 In 2018, Kinder Morgan handled and transloaded well
5 over 100,000 manifest cars and 1,500 unit trains in
6 North America.

7 In evaluating the assessment of demurrage
8 on terminal operators such as ourselves, it is
9 important to understand what Kinder Morgan does and
10 does not do. Kinder Morgan provides a very, very
11 simple service. We provide transloading and storage
12 services for customers, but we do not own product and
13 we do not own railcars.

14 Kinder Morgan also does not initiate the
15 shipment of loaded cars or the receipts of empty
16 cars. The customers, who are the shippers of the
17 commodities and are responsible for paying the
18 transportation costs, arrange the transportation,
19 bill and tender the shipments, and in combination
20 with the involved railroads, direct deliveries.

21 Kinder Morgan has contracts and commercial
22 relationships with these customers and shippers, but

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1 we do not have that with the railroads. Kinder
2 Morgan generally has very limited visibility and
3 control over shipments and timing and volume.

4 We do not control our visibility over
5 billing, tender, movement, interchange, pick-up or
6 return of empty railcars. Also, we do not have
7 control or visibility over shipper forecasting
8 systems and train and railcar movement systems that
9 monitor shipments, these matters have been, and will
10 continue to be under the exclusive control of
11 railroad and shippers.

12 Generally, Kinder Morgan does not have the
13 information on the location or status of railcars
14 until the railcars actually received and available at
15 the local rail switching yards, or in our open gate
16 facilities, until that car actually shows up in our
17 terminals.

18 We typically can only affect the movement
19 of cars at this very late stage of the movement
20 chain. Therefore, railroad claims that receivers
21 such as KM, have full visibility and control over the
22 volume and timing of railroad deliveries are simply

1 unfounded.

2 The genesis of the problem facing Kinder
3 Morgan with railroad demurrage is the Board's 2014
4 decision of demurrage liability, number 707. I'm not
5 a lawyer. It's my understanding this decision was
6 designed to address a split in Circuit Court
7 decisions on the narrow issue of whether a consignee
8 listed in the bill of lading without consent could be
9 held liable for demurrage charges.

10 As we discussed in our written testimony,
11 the railroads themselves at the time agreed the new
12 rules were only needed to resolve this narrow
13 conflict, and were not needed to disturb the long-
14 standing requirement that receiver liability rests on
15 something more than just merely receiving the
16 commodities shipped.

17 In order to address the narrow court
18 conflict and create more certainty, the Board
19 determined that the demurrage liability rests --
20 should rest, not on the bill of lading, but on
21 pertinent conduct. While the railroad strongly
22 supported the Board's narrow approach in practice,

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1 the railroads have treated the demurrage liability
2 much differently.

3 In fact, demurrage is now imposed upon
4 receivers without any predicate showing of fault.
5 Furthermore, the adoption of precision scheduled
6 railroading has exacerbated the problem. Many of the
7 increased demurrage efforts have been brought about
8 by precision railroading.

9 As indicated in the railroad submissions
10 to the Board for this hearing, these new programs and
11 increased charges have produced rapid, high-profit
12 revenue gains for the railroad industry at low or
13 zero cost.

14 Kinder Morgan received virtually no
15 demurrage invoices until after the Board's 2014
16 decision. Since then, and increasingly in recent
17 quarters, we have received invoices totaling over 14
18 million dollars, without any material changes in our
19 operations or rail traffic volumes.

20 While the strategy of precision
21 railroading to reduce costs, cut services and boost
22 profit may be working for the railroads, it is

1 certainly degrading service quality and placing
2 certain significant demands on the receivers that we
3 have not been used to seeing.

4 In the aftermath of the 2014 decision, the
5 railroads have revised their tariffs in various
6 respects with one similarity in that they're all one-
7 sided. The demurrage tariffs lack balance and
8 reciprocity, reasonable dispute resolution
9 mechanisms, and any incentives for railroads to
10 provide efficient service to meet the needs of
11 shippers and receivers, and there are six different
12 aspects to this.

13 First, carrier tariffs seeks to make
14 receivers solely responsible for demurrage charges.
15 An example in this is CN's optional service tariff
16 which now assigns demurrage strictly on receivers
17 even when they're not at fault. Not long after
18 issuing its new tariffs, CN filed a collection action
19 against Kinder Morgan seeking substantial demurrage
20 charges at our Argo terminal in Chicago.

21 That litigation is ongoing, and CN now
22 claims that's an 8.4 million dollar owe. Second, the

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1 carriers contend that they are not required to seek
2 demurrage charges from anyone other than the
3 receivers. The railroads then refused to enter into
4 voluntary three-part agreements with shippers who
5 both agree and request to the invoices and paid
6 demurrage directly.

7 Imposing strict liability on receivers
8 negates any incentive for efficient operations by
9 shippers as well. Those shippers recognize liability
10 will fall by the railroad's precedent solely on the
11 receiver. For example, a shipper into our Perth
12 Amboy terminal in New Jersey recently held out more
13 than 60 tank cars at the local switching yard,
14 allowing Kinder Morgan to only request in two cars
15 due to the customer's preferences and its assigned
16 tanks being full.

17 The customer, not Kinder Morgan, tendered
18 and shipped the railcars with full knowledge of the
19 likelihood that substantial demurrage assessment
20 would follow. Nonetheless, CSX assessed demurrage
21 solely on Kinder Morgan, mined over \$10,000 in daily
22 demurrage charges.

1 Thirdly, railroads are aggressively
2 imposing demurrage against receivers without
3 establishing cause or fault. Railroads have
4 eliminated long-settled demurrage defenses from their
5 tariffs. They're now assessing charges against
6 receivers, even when the cars are placed on non-
7 working tracks, the carrier bunches railcars, the
8 carrier misses or improperly performs switches, they
9 deliver the wrong cars, or deliver them late.

10 They fail to pick-up cars on a timely
11 matter and probably most importantly, their failure
12 to recognize that their delivery creates a ripple
13 effect on charges that follow, causing other cars
14 that were in the system to await delivery to incur
15 additional demurrage charges due to the internal
16 carrier service failure.

17 Here's a situation where performance
18 impacts the ability for demurrage to be collected
19 both on the short term, but then creates more
20 demurrage for every subsequent move.

21 Fourth, carrier tariffs seek to impose
22 discriminatory fees and other targeted unreasonable

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1 practices. These lead to unjust penalties against
2 receivers, while creating economic windfalls for
3 carriers. Another example with the CN Tariff 9000
4 imposed a daily demurrage charges in Chicago that are
5 one and a half times greater than anywhere else in
6 the CN system.

7 Additionally, they recently increased
8 their common carrier tariff by more than \$300 per
9 car, on all shipments only into one facility, but not
10 the other Chicago locations.

11 Fifth, the railroads are assessing
12 demurrage against receivers even after implementing
13 embargos on traffic receipts and establishing
14 training permit programs. For example, since
15 September of 2018, CN has embargoed all inbound
16 shipments of ethanol to Kinder Morgan Argo.

17 The CSX and NS have issued similar
18 embargos in the northeast and create a carrier-
19 controlled permit system restricting inbound
20 shipments to the New York Harbor complexes. Even
21 with the carriers in full control of the train and
22 car movements, through their embargo and permit we

1 still receive demurrage invoices.

2 Sixth, the carriers have implemented a
3 number of additional one side demurrage tariff
4 provisions including decreasing or eliminating free
5 time or credits, applying railcar demurrage even on
6 non-switching days, and imposing unreasonably high
7 interest rates without establishing any valid basis
8 in the underlying tariff or otherwise. These
9 unbalanced tariff provisions further demonstrate
10 they're designed not to create efficiency, but rather
11 to augment revenue.

12 Also, the carrier demurrage tariffs are
13 not reciprocal. No relief is available where
14 demurrage results from rare railcar delays
15 attributable to carrier performance, third parties or
16 other factors outside the control of the receiver.

17 CN submission for this hearing states,
18 "When railcar deliveries are delayed, CN personnel
19 will review relevant information such as
20 contemporaneous crew reports to determine whether
21 demurrage charges are appropriate before charges are
22 billed to our customers.

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1 To the contrary, CN has stated in our
2 pending litigation that it does not review the
3 invoices for service issued before being sent. The
4 carrier tariffs also lack provisions to reasonable
5 address and resolve disputes. The railroads send
6 numerous pages of computer-generated invoices each
7 month that fail to identify the individual shippers
8 associated with this shipment.

9 Reviewing each of the numerous line items
10 for billing and car errors, imposes a significant
11 cost and burdens on receivers for compliance, review
12 and objections. In summary, the railroads have
13 exploited the Board's 2014 demurrage liability
14 decision through one-sided material changes in
15 tariffs, highly aggressive demurrage assessment and
16 collection practices, coinciding with the
17 implementation of precision railroading. There's no
18 reciprocity and no mechanism to address and resolve
19 disputes reasonably.

20 In these cases, Kinder Morgan is a true
21 middleman who does not own commodity or control
22 transportation, and we are unable to take our

1 business elsewhere to avoid demurrage charges. The
2 railroads are fully using their destination monopoly
3 powers at the local level.

4 The effects cascade as the railroad has
5 now alleged strict liability under the Board's
6 decision, leaving Kinder Morgan with little choice
7 but to sue our own customers, effectively doing the
8 carrier's dirty work for them.

9 The Board's 2014 demurrage liability
10 decision has increased disputes inciting even more
11 imbalanced carrier practices and created more
12 uncertainty -- exactly the opposite of what we
13 believe was intended.

14 So, to address these things, the harsh and
15 what we believe are unintended effects of the
16 decision and to restore balance and equity to the
17 demurrage assessment system, Kinder Morgan
18 respectfully requests that the Board take actions to
19 remedy the situation immediately by adopting specific
20 tailored requests that we have put forth in our
21 written submission, revised rules if necessary,
22 policy guidance and directives.

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1 First, we ask the Board to address the
2 harsh and unintended effects of the demurrage
3 liability decision. Kinder Morgan believes the
4 decision should be reversed or at least clarified.
5 At a minimum, immediate guidance should be provided
6 to clarify the prior assessing demurrage on a
7 receiver, a railroad should be required to establish
8 legal foundation for liability and the delays as the
9 sole fault of the receiver are not attributable to
10 the carrier or other factors outside of the control
11 of the receiver.

12 Second, we ask the Board immediately
13 clarify that if requested by a shipper and a
14 receiver, a carrier shall agree to bill the shipper
15 directly for demurrage and not require the receiver
16 to assume responsibility for unpaid demurrage
17 assessments as a guarantor or condition of such
18 agreement.

19 This important matter has gridlocked
20 reasonable discussion and resolution of individual
21 disputes. This will allow receivers to use their
22 commercial contracts as intended.

1 Third, we ask the Board to immediately
2 incentive railroads to have more balanced and
3 reciprocal tariffs. It can do so by clarifying a
4 carrier demurrage tariff as deemed presumptively
5 unreasonable if it seeks to establish liability
6 solely on a receiver. If it fails to provide for
7 sufficient free time and credit, if it fails to
8 provide for adequate reciprocal provisions affording
9 the receiver for relief, including where the railroad
10 fails to meet their performance requirements.

11 If it includes unreasonable interest
12 charges, and also if it fails to include reasonable
13 dispute resolution mechanisms. And I think it's
14 important for us to mention, we ask that the Board
15 establish a demurrage dispute resolution program
16 which shall, at the election of any party, establish
17 expedited settlement conferences between railroads,
18 shippers, receivers, and ongoing disputes.

19 Kinder Morgan will be responsible for the
20 liabilities that we create but we want to be part of
21 the solution that allows us to be spread equitably
22 across the entire supply chain and let blame fall

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1 where it should.

2 Kinder Morgan believes that these discreet
3 changes will help fairness and uniformity and
4 demurrage and are responsible and necessary to
5 address the situation. This concludes my remarks.
6 I'm happy to respond to any follow-up questions that
7 the Board may have.

8 CHAIRMAN BEGEMAN: Thank you, Frank?

9 MR. CHIRUMBOLE: Thank you for the
10 opportunity to speak to you today on behalf of Olin
11 Corporation. My name is Frank Chirumbole and I am
12 the Vice President of Global Supply Chain for Olin's
13 Chemical's businesses.

14 Before I begin, Chairman Begeman, I want
15 to thank you and the Board for your leadership in
16 forming the Rate Reform Task Force, which resulted in
17 the recent STB staff report examining the need for
18 rate reforms. Olin stands ready to support you as
19 this work moves forward.

20 Olin is one of the world's largest -- or
21 is the world's largest chlorine and chlorine
22 derivative's company. You encounter our products

1 most notably, chlorine and its co-product caustic
2 soda on a daily basis as they are used in thousands
3 of applications such as water treatment,
4 disinfectants, pharmaceuticals, paper and aluminum
5 manufacturing, electronics, and wind energy
6 applications, refrigerants and many others.

7 We lease and own a large fleet of chemical
8 tank cars and make over 47,000 rail shipments per
9 year. Olin has one of the best safety records when
10 it comes to rail shipments as exemplified by the fact
11 that we have received the AAR's Grand Slam Award 3
12 years in a row.

13 Rather than read my entire testimony --
14 written testimony, I would like to briefly review the
15 most important points and answer any questions you
16 might have. The railroads have implemented changes
17 in demurrage and customer cause suggestion charges to
18 change customer behavior -- their words, ostensibly
19 in support of precision scheduled railroading.

20 Regarding demurrage, all free days have
21 been eliminated. If we don't move cars off the
22 railroad's track on the same day the cars are placed,

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1 demurrage charges begin. Notice for the customer
2 caused congestion has gone from 14 days to 5, meaning
3 now we only have 5 days to address the congestion
4 charges or the charges begin.

5 And even if we address the congestion
6 issue, the clock doesn't reset. The railroads can
7 begin charging for congestion immediately if it
8 occurs again. When you look at what causes
9 congestion and bunching of cars, the railroads
10 themselves are in large part to blame. Inconsistent
11 transit times and the tendency to bunch returning
12 empties, frequently creates situations where we
13 cannot physically receive into our sites all the cars
14 that show up in a single day.

15 In addition to Olin, the product mix of
16 returning cars is extremely important and critical.
17 As I mentioned previously, we produce the co-products
18 chlorine and caustic. The ratio of production is 1
19 chlorine car to 2 caustic cars. You cannot produce
20 1 without simultaneously producing the other. Last
21 year we experienced a situation where we had to
22 significantly reduce rates at our largest rail

1 shipping site due to not having the proper returning
2 ratio of cars.

3 When finally corrected, we had lost the
4 equivalent of 6 full days of production during a
5 period of high demand which resulted in lost sales.
6 Of course, during this time cars were stacking up
7 outside our plant, but it wasn't Olin's behavior that
8 needed to change.

9 In fact, Olin makes every effort to assist
10 the railroads in keeping cars moving in their system.
11 We are staffed 24/7 and we stand ready to move our
12 cars or move cars onto our sites when placed. We
13 routinely move full and empty cars to off-site
14 private storage yards while paying the railroad extra
15 switching fees to do this.

16 We pay to help them. Given the new
17 demurrage and congestion tariffs, Olin expects to
18 incur over 1 million dollars in additional costs, in
19 fees paid to the railroads, in storage costs, and in
20 transportation costs.

21 I emphasize this is incremental to the
22 fees we were previously paying. In addition, Olin

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1 maintains an oversized fleet to deal with the service
2 inconsistency and disruption so that we can
3 adequately serve our customers. We have been
4 evaluating 10 million dollars of on-site track
5 projects at our various sites that would allow us to
6 store more cars on-site and better manage this
7 larger-than-should-be-necessary fleet.

8 These tariff changes just add to the
9 pressure to implement these projects. So, let me
10 summarize. The railroads have implemented PSR. They
11 have increased tariffs for demurrage and customer
12 caused congestion. Their operating ratios and
13 profitability have improved as they desire, but Olin
14 is seeing increased costs in the same marginal
15 service.

16 So, what are we recommending? Regarding
17 demurrage and free days -- I need to point out as was
18 said earlier, that demurrage was designed to
19 compensate the railroads for shipper use of railroad
20 supplied cars, not for when the shippers supplied the
21 cars.

22 The railroads have been charging for

1 shipper-supplied cars and systematically reducing
2 free days. We recommend that you restore the number
3 of free days to two. While there are times when even
4 this is insufficient for shipper sites to manage
5 bunching outside their fence lines, we feel this is a
6 reasonable timeframe for both sides.

7 Secondly, restore the customer congestion
8 notice period to 14 days and reset the clock each
9 time the shipper successfully addresses the
10 congestion issue. This span covers two weekends when
11 the period where rail service is usually curtailed
12 and allows shippers sufficient time to correct the
13 problems.

14 Third, allow shippers to move empty cars
15 to storage without charging switching fees when this
16 is being done to help the railroad efficiency. And
17 finally, Olin operates in a competitive environment.
18 The railroads do not. Olin must maintain competitive
19 service and price to stay in business, the railroads
20 have no such pressures.

21 Therefore, we respectfully ask the Board
22 to exercise its authority to oversee demurrage and

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1 congestion charges and to continue its work on rate
2 reform. This is necessary to level the playing field
3 between shippers and railroads. Thank you again for
4 the opportunity to speak to you today.

5 CHAIRMAN BEGEMAN: Thank you, thank you
6 all of you. What my colleagues and I are going to do
7 is we are going to not time ourselves or to each have
8 our own 5 minutes, but rather we're going to just ask
9 questions and kind of round robin to try to keep
10 things flowing and collegial of course.

11 So, turning your microphones on, but the
12 first question I'd like to ask is just a question
13 really to the panel. One of the things that the
14 Board hears about -- has heard about certainly since
15 I have come to the Board is the concept of
16 retaliation. And so when I -- a couple folks
17 overheard me saying this that when we announced the
18 hearing, I did pause wondering whether anyone would
19 show up besides the railroads that we asked to show
20 up.

21 And, I'm just curious, and you know, you
22 all have been in your industries and your business

1 for a number of years, I'm curious to know whether or
2 not you were contacted by your carriers and maybe
3 Joshua, you're kind of in a different situation
4 because you're not technically the shipper.

5 And one other thing I would like to know
6 is -- well, I'll skip -- I'll let you answer that
7 question first, whether or not -- and I will say
8 because the last listening session that I attended I
9 learned later that every single participant had been
10 contacted by the carrier in advance of the hearing to
11 not come potentially.

12 MR. CHIRUMBOLE: In Olin Corporation's
13 case that -- no one contacted us about specifics of
14 this hearing.

15 CHAIRMAN BEGEMAN: Okay.

16 MR. ABRAMS: Same.

17 MR. MCDERMOTT: We were not contacted
18 either.

19 CHAIRMAN BEGEMAN: And Terry, I want for
20 folks in the room, since I've been around awhile I've
21 had the benefit of knowing quite a few people in this
22 room, and outside the room and I've gotten to know

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1 Terry over the last 8 years in various different
2 settings and -- all professional, I might add.

3 And Terry used to work for a railroad and
4 so I'd like, I'm wondering if you can provide some
5 insight as to when you were on the other side of
6 things, I mean, demurrage and accessorial charges,
7 they do serve a purpose. And the board has held and
8 the ICC for many, many years and many proceedings,
9 the Board, the Agency, considers issues such as this
10 every now and then when really necessary.

11 And I'm just curious for the demurrage
12 charges and practices that were going on at the time
13 that you were at a railroad, were things moving
14 efficiently or was it we really need to raise our
15 rates, or -- and perhaps you weren't quite in that
16 sphere of the charges. But I'd just like to know are
17 things moving differently and shippers need a nudge?

18 MR. MCDEMOTT: Well, and it's already been
19 stated. Vice Chairman Fuchs mentioned at the outset
20 as well, I don't think we are trying to refute the
21 idea that demurrage serves a purpose towards
22 increasing productivity.

1 There are mixed opinions in this room as
2 to whether demurrage and accessorial charges are a
3 revenue generator -- or viewed as a revenue generator
4 or not. I guess I would venture to say that I think
5 that in my experience on the railroad side, we were
6 very aware of the contribution that came from
7 demurrage and accessorial charges.

8 Now I have been on the shipper side of
9 things for the past 7 years and I cannot speak on
10 behalf of the roads or what goes on within the roads,
11 but I can say to your question as to my experience,
12 yes, we were very aware of both the contribution of
13 what demurrage and accessorial charges meant to our
14 bottom line and at the same time, we were very aware
15 of what they meant for our operation in terms of
16 asset utilization.

17 CHAIRMAN BEGEMAN: Thank you.

18 VICE CHAIRMAN FUCHS: I want to kind of
19 hone in a little bit on a couple points that were
20 raised in terms of cars being late in transit and as
21 well as the overall idea of bunching or you know,
22 when you order 5, 5 and 5 cars and then 15 come on

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1 the last day.

2 Can you maybe talk a little bit about you
3 know, how railroads establish kind of an estimated
4 time of arrival or ETA for loaded, and then, you
5 know, how railroads establish kind of a window of
6 time for delivery for empties and what your knowledge
7 of that is?

8 MR. ABRAMS: You know, we only really load
9 -- for the most part, we load empty cars. So, and as
10 I said they're all our private cars at this point.
11 So, they're all coming back to basically the origin
12 from where they were shipped. We get some
13 indication of you know, once they hit, I guess a
14 certain hump yard, you know, when they're going to
15 arrive outside our plant, sometimes they stick to
16 that, sometimes they don't.

17 I would say probably before 2019 when
18 service got a little faster, the ETA's didn't
19 necessarily mean a whole lot. You know, maybe they
20 would arrive that day or the following day or the ETA
21 would get pushed back, but it's hard to you know,
22 eventually they're going to come over outside the

1 plant and they're going to sit there until we can
2 bring them in.

3 VICE CHAIRMAN FUCHS: Right.

4 MR. ABRAMS: We're limited by the number
5 of cars we can bring in.

6 VICE CHAIRMAN FUCHS: Sure.

7 MR. ABRAMS: On a daily basis. So, just
8 something, you know, we don't control, and you know,
9 we lease a certain number of cars I think to be able
10 to give us you know, the ability to ship whatever we
11 have on any given week or month, and then we probably
12 have some cushion on top of that.

13 So, if the railroads are going to move the
14 cars faster and change them faster, it's going to
15 really impact how many sit outside, you know, our
16 plant and how long.

17 VICE CHAIRMAN FUCHS: Well, you know,
18 we've talked about the cars kind of arriving late, so
19 you know, the implication for something arriving late
20 is that there was a time that it was supposed to
21 arrive and then a time it does arrive, so you know,
22 what does it mean to say that a car is arriving late?

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1 What was that initial time? You know what I mean?

2 How do you know what that initial window
3 is that a car was supposed to arrive in empty?

4 MR. ABRAMS: Well this, I'll just say
5 first -- there's usually something you know, on the
6 website that gives you an ETA.

7 VICE CHAIRMAN FUCHS: Right.

8 MR. ABRAMS: And that, you know, the ETA
9 can change, so that's when something's in movement,
10 right, or something doesn't move from one yard, you
11 know, from one railroad yard to the next railroad
12 yard, you know, and they'll just adjust the ETA.

13 VICE CHAIRMAN FUCHS: So, if you know,
14 there was a window of time or an ETA that a car, an
15 empty, was supposed to arrive, and then let's say as
16 a hypothetical, it arrived 10 days later than you
17 were expecting. And of course, you have to be ready
18 to load and you have to have crew ready and you have
19 to have a plant ready to load, you know, maybe it's
20 continuous, maybe it's on a weekend.

21 You know, when something arrives you know,
22 10 days later than it ought to, what is the credit

1 system that railroads give you, you know, how do they
2 credit you for those 10 days?

3 MR. ABRAMS: I'm not completely familiar
4 with that component but I think the credits work more
5 for when you want to order cars in once they're
6 constructively placed if they're not brought in, but
7 I could be -- there may be more to it than that.

8 MR. CHIRUMBOLE: Yeah, I was just going to
9 comment to the question about how do we know when
10 something's going to be late? There's a steady flow,
11 at least in our business. We're a 24/7 operation.

12 VICE CHAIRMAN FUCHS: Right.

13 MR. CHIRUMBOLE: A steady flow of cars
14 coming back and we're continuing -- you know, we get
15 visibility. Railroads provide visibility where those
16 cars are, but it's really the next two days out that
17 only then does it become firm. You may see a flood
18 of cars coming back a week out, but as Ben mentioned
19 things change, and so it's not until the day before
20 the day, a couple days before we know really how many
21 are coming in. And sometimes it's more than we can
22 take based on what's going on with the outbound cars

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1 and what we're doing on the site.

2 And I don't know that I can comment on the
3 credit either, but I don't know that we get any
4 credit when a car's delayed. We'll have to get back
5 to you, the people that I know, know the answer to
6 that but I'm not sure we do.

7 VICE CHAIRMAN FUCHS: Okay.

8 MR. MCDERMOTT: Yeah, I would expound on
9 that. I mean the answer is -- well, an attempt at
10 the answer is that first of all it's not uniform
11 across all roads, right? I would say there are some
12 exceptions to where some of the roads recently are
13 trying to apply a credit due to MSDTA, whether it's 2
14 days or 5 days.

15 But in most cases, you don't get credit.
16 As a private car shipper when a car becomes empty and
17 you are trying to plan your pipeline across your
18 entire footprint, the teams are constantly looking at
19 empty flows and how are they coming back to the plan?

20 The first view that you get of that is
21 when that car becomes empty and is either
22 reverse-routed or empty-billed back to another

1 origin. Now, from that minute until -- from that day
2 until the plant makes it back to the origin, that ETA
3 can be adjusted. Now again, this is not uniform, but
4 you can say for a 14-day transit, if a car's going to
5 be late, the last time you see an ETA in that car in
6 the system, the ETA will have been adjusted.

7 So, our teams constantly go back and say,
8 okay, we have a new ETA on this bunch,
9 or we have a new ETA on this car. But in terms of
10 what credit do we get because of that late delivery?
11 For the most part, nothing.

12 VICE CHAIRMAN FUCHS: Okay.

13 MR. MCDERMOTT: That's the answer.

14 VICE CHAIRMAN FUCHS: And so, you know, if
15 something is you know, several days later than you
16 were expecting, the steady flow is disrupted in some
17 way, kind of the bunching phenomenon, generally there
18 may be something initial, but generally nothing and
19 so kind of conversely, you know, if you all were to
20 say you know, not return an empty -- you know, by the
21 time that the railroad is expected or hold it for a
22 number of days, are you all then charged on a per day

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1 basis?

2 MR. MCDERMOTT: If we ask the railroad to
3 detain?

4 VICE CHAIRMAN FUCHS: Yeah.

5 MR. MCDERMOTT: As in this example, on an
6 empty return? I don't know if we have that option.

7 MR. ABRAMS: I don't know either.

8 VICE CHAIRMAN FUCHS: No? But if you're
9 taking longer to load and unload, you're getting
10 charged on a daily basis?

11 MR. MCDERMOTT: Yes.

12 VICE CHAIRMAN FUCHS: And so, when you all
13 are talking about reciprocity, is that what you mean
14 by reciprocity, or part of what you mean by
15 reciprocity which is in that bunching phenomenon if
16 there are a number of cars that don't come basically
17 in the window that you were expecting, or at the
18 arrival time you were expecting, that those cars, for
19 each of those days won't or will basically get
20 credit the equivalent of if you all were to take more
21 time to load and unload and you get charged on a
22 daily basis, is that an aspect of kind of the

1 reciprocity that you think ought to be present
2 within demurrage charges?

3 MR. ETZEL: I would say Vice Chairman,
4 it's one aspect of reciprocity where there's a
5 dialogue between all parties to say there's a fault
6 associated with this, how are those credits then
7 applied?

8 VICE CHAIRMAN FUCHS: Right.

9 MR. ETZEL: There's also reciprocity that
10 obviously we'd like to examine where we are
11 experiencing as receivers of costs or things that
12 don't show up. We have crews scheduled cars don't
13 show up. We have credits that are applied
14 erroneously across different customers. We need to
15 make sure that they're applied to the right
16 customers and it comes from a dialogue.

17 So, a dispute resolution process where the
18 shipper, receiver and the railroad can all discuss,
19 okay, the blame falls on one of these three buckets,
20 we'll apply it as such, and it essentially creates a
21 level playing field between all the parties.

22 VICE CHAIRMAN FUCHS: And how easy is it

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1 on your end to establish railroad fault? What's the
2 visibility you have in terms of you know, and so if
3 you were to present kind of an evidentiary case,
4 what's the burden that you all have and the
5 availability of evidence?

6 MR. ETZEL: Vice Chairman, on our case
7 it's very difficult to show it on a long-standing
8 basis because we don't have visibility on cars until
9 they're literally at the last mile. From that point
10 we can say alright, the railroad missed the switch,
11 their secondary and tertiary effects for the
12 subsequent cars that should be applied, but it is a
13 complicated process and one that involves a dialogue
14 with a lot of information being managed and I think
15 what we're seeing now is demurrage charges are just
16 essentially leveled at a receiver and saying figure
17 it out.

18 Pass it to your customer, if they don't
19 pay because they dispute, it's on you to pay and we
20 want that process to be one that's functional between
21 all the parties.

22 MR. CHIRUMBOLE: There is one metric I can

1 think of that could be used and we have visibility on
2 returning car transit times and we could argue
3 whether what's typical is acceptable but there are
4 typical transit times and if those transit times are
5 unusually long, in my mind that would be evidence
6 that we could show at times when the railroads
7 haven't performed as they normally do.

8 And those are the situations where in our
9 24/7 continuous chemical process, we have to turn
10 down our plants when the cars don't show up, so, but
11 that would be the only thing.

12 VICE CHAIRMAN FUCHS: Deviation from the
13 expected --

14 MR. CHIRUMBLE: Yeah, yeah, yeah. We know
15 that cars from that location should be here in a
16 week. We're counting on it, we're keeping our rates
17 up and all of a sudden they're not there.

18 CHAIRMAN BEGEMAN: So, I just want to ask
19 a couple questions about I guess the complexity of
20 some of the tariff changes. As you know the carriers
21 provided the Board with a list of some of their more
22 recent changes and some of them were more voluminous

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1 than others.

2 And I'm trying to understand like how does
3 a shipper keep track if you have Terry or Frank, I'll
4 pick on you, since you have -- you're served by more
5 than one carrier, particularly you, Terry, you're
6 served by all of them.

7 You know, and they change fairly
8 frequently. Of course, you are given advance notice,
9 I believe 20 days, but how do you keep track? And is
10 it to a point where is it just that suddenly there
11 have been a lot of changes because of operational
12 changes, and updates? And I know, NS has articulated
13 real clearly that although they've had a lot of
14 different demurrage charges, tariffs on the books,
15 they had not been enforcing them, so much as this
16 also is about enforcement.

17 But, do the -- are we to a point where
18 there needs to be more uniformity given that the
19 whole purpose of -- the statute is that demurrage and
20 accessorial charges or at least demurrage charges are
21 to you know, promote national assets and do we need
22 some type of uniformity?

1 MR. MCDERMOTT: I think that should be
2 considered and I don't think that that is a bad idea.
3 It is hard to keep track. It is hard to keep track
4 with the frequency and by road and with the -- in
5 some cases, the interpretation of what the actual
6 tariff means and when it applies.

7 There is a certain level of ambiguity as
8 to when and how some of these tariff items will be
9 charged and it could be argued that there is a
10 certain level of subjectivity as to whether they
11 apply or not.

12 So, yes, I would think that the -- and I,
13 we'll hear lots of testimony today, but from our
14 viewpoint, I would not be opposed to a uniform
15 standardized system across the network.

16 MR. CHIRUMBOLE: I think uniformity is
17 probably important, but I mean we're still not
18 addressing the bigger issue here. This is a one-way
19 street. I mean we're "trying to be incentivized"
20 through financial penalty to do something in many
21 cases we can't do any better than we already are.

22 And so, you know, that has to be rolled

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1 into to the concept of reciprocity, I think.

2 CHAIRMAN BEGEMAN: Actually, if I can
3 interrupt, and I think both you and Ben, all that
4 really seems to be happening, you would change if you
5 could, but you're certainly constrained by your own
6 infrastructure and I think what your testimony said
7 and what you also said here is that really the only
8 impact as been you've gotten a lot of bills but
9 nothing has changed with respect to your service or
10 even your own -- you aren't incentivized because you
11 can't do anything about it.

12 MR. ABRAMS: I think if they came to us,
13 like I said, and said look, "Your cars were outside
14 on our tracks and they're causing problems for us."
15 And if we would say, "Okay, like let's figure out how
16 to deal with that," instead we've gotten these bills
17 and what I'm supposed to pay them and they're big
18 dollar figures, so you know, especially for us.

19 And I don't -- I'm not quite sure how to
20 deal with that with them, so.

21 MR. CHIRUMBOLE: Yeah, this clearly is
22 helping the railroad's performance and we're just not

1 -- if we saw service improve. If I could shorten my
2 transit times. And I told you I have a bigger than
3 necessary fleet, and I can get rid of railcars and
4 that's a huge cost. And so, if that was a benefit I
5 got, great, then I'd pay that, but I don't see it.

6 MR. ABRAMS: Do they really want -- do
7 they want the money or do they want the, you know,
8 the maximum utilization of their tracks and you know,
9 the movement of the cars? Which is it? Is it --
10 because it seems like it's the money that's important
11 versus the you know, the more precision scheduling
12 that they're articulating?

13 COMMISSIONER OBERMAN: I have a few
14 questions. Some of this may seem a little obvious,
15 but I would like to flush out some of the very
16 mundane aspects of what you've talked about, partly
17 to make sure that I understand it, partly to make
18 sure the public understands it.

19 I'm going to direct this to you, Ben, but
20 anyone can jump in if your experience is different.
21 I'd like to understand what zero credit days actually
22 means in your workday. And to be specific, in your

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1 case you're talking about a fleet that you own or
2 lease, not the railroad's cars, so zero credit days -
3 - how does that operate in real life? What does that
4 mean?

5 MR. ABRAMS: So, if a car is
6 constructively placed, and we get notice of that
7 constructive placement before a certain time on you
8 know, today for instance.

9 COMMISSIONER OBERMAN: Typically, what --
10 does that happen any time of day?

11 MR. ABRAMS: I don't know the answer to
12 that about what time of day it happens, but if we
13 have a certain amount of time then to order the car
14 in for the following day and if it doesn't meet that
15 cut-off the demurrage for the next day kicks in.

16 So, you know, previously we would have
17 notice of constructive placement and we would have 5
18 days to order that car in before demurrage started
19 kicking in. So, you know, now if a car arrives
20 today, we receive notice of that constructive
21 placement, that it's there -- right outside of our
22 yard, and we can order it in.

1 If we do it in time before the cut-off for
2 tomorrow, we would not be charged.

3 COMMISSIONER OBERMAN: Well, I want to
4 make sure I understand. So, you get a notice at 3
5 o'clock in the afternoon.

6 MR. ABRAMS: Right.

7 COMMISSIONER OBERMAN: That one of your
8 cars has been constructively placed.

9 MR. ABRAMS: Right.

10 COMMISSIONER OBERMAN: You have until 11:59
11 to order that car?

12 MR. ABRAMS: Something like that, I think
13 so, yes and I'm not sure of the exact time, but yes.

14 COMMISSIONER OBERMAN: Alright, and when
15 you order it, how quickly after you order it does the
16 railroad put the car in your yard?

17 MR. ABRAMS: They're supposed to put it in
18 tomorrow if I order it.

19 COMMISSIONER OBERMAN: The next day?

20 MR. ABRAMS: Yes.

21 COMMISSIONER OBERMAN: And how long -- and
22 it's your car?

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1 MR. ABRAMS: Right.

2 COMMISSIONER OBERMAN: So, once it's in
3 your yard, you're not being charged for it?

4 MR. ABRAMS: Correct.

5 COMMISSIONER OBERMAN: So, the demurrage
6 charge -- I'm just not clear when the -- what the
7 zero credit days means? Can you elaborate on this?

8 MR. CHIRUMBOLE: The way I understand it
9 is that the next time the railroad switches to
10 constructively place cars outside the site, that car
11 better have been pulled in. If it's still there,
12 then you're going to get charged demurrage. So, in
13 effect, if you need to move the car into your site
14 before the railroad constructively places outside
15 your yard or outside your site again.

16 COMMISSIONER OBERMAN: But the railroad is
17 moving the car into your site?

18 MR. CHIRUMBOLE: That's true.

19 COMMISSIONER OBERMAN: So --

20 MR. CHIRUMBOLE: We need to have ordered
21 it in, yes.

22 COMMISSIONER OBERMAN: Does this demurrage

1 charge depend on when you order it as distinguished
2 from when it's placed? That's what I'm trying --

3 MR. CHIRUMBOLE: No, it has to -- it's
4 from when it's placed, not when we order it is the
5 way I understand it.

6 COMMISSIONER OBERMAN: You can't order the
7 car before it's placed?

8 MR. CHIRUMBOLE: Yeah, and so if you order
9 it, then they -- you need to order it before they
10 place again outside.

11 COMMISSIONER OBERMAN: Alright, but you
12 have -- I guess what confuses me is the concept of
13 zero time. I'm trying to understand on a space time
14 continuum how you function with no times? You have
15 some time to order the car?

16 MR. ABRAMS: Yeah.

17 COMMISSIONER OBERMAN: So, what does it
18 mean? That's what I'm trying to get you to explain
19 to us?

20 MR. ABRAMS: It basically means where in
21 the past you would get a certain number of days after
22 a constructive placement as credit days, you know, to

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1 plan your operations and order that car in. You no
2 longer get -- they reduced it to zero, meaning you
3 got to order it the day it's -- basically the day
4 it's constructively placed.

5 COMMISSIONER OBERMAN: Meaning the next
6 day is a new day and that's when demurrage starts?

7 MR. ABRAMS: It needs to move in the next
8 time that the railroad switches your plant.

9 COMMISSIONER OBERMAN: And so, what
10 prevents you from ordering it in immediately when you
11 get notice that it's placed and then you start
12 incurring the charges?

13 MR. ABRAMS: The number of cars and the
14 number of cars in the yard that we may have at the
15 time, the day of the week that we get the notice, the
16 time of day maybe that we get the notice. Not all
17 notices arrive equally, you know, notices of
18 constructive placement. What we have -- depending on
19 what we have going on in our yard whether it's
20 operational challenges or labor challenges, or
21 whatever the case may be, you know.

22 COMMISSIONER OBERMAN: So, it's not a

1 question of whether you have time to pick-up the
2 phone and say bring the car in, it's a question of
3 whether the physical facility can handle the bringing
4 the car in that determines whether you can order it
5 within the less than no time that you have to order
6 it, is that what you're saying?

7 MR. ABRAMS: I would say it could be both,
8 you know, for instance if we got a notice of
9 constructive placement at 5 o'clock, and the person
10 in our facility who typically receives those notices
11 isn't there, you know, they're not -- they're going
12 to miss the window for that.

13 COMMISSIONER OBERMAN: And has that
14 happened?

15 MR. ABRAMS: Yes, it's happened.

16 MR. ETZEL: Board Member Oberman, if I can
17 jump in.

18 COMMISSIONER OBERMAN: Alright.

19 MR. ETZEL: I want to say that we
20 definitely -- those things apply and in Kinder
21 Morgan's perspective, we have the ability to call
22 cars in in a manner which meets the railroad's

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1 deadline. The problem is there's a myriad of reasons
2 why cars cannot come into the facility. Our
3 customers know how many spots they have allotted,
4 they may have made a conscious decision to send more
5 cars just to get them there.

6 There may be an issue with the track which
7 would then fall back on us. It may be that the
8 railroad from the previous day didn't give us enough
9 time to get the cars that are currently there moved
10 back out, so the reason that this is critical is
11 there's a lot of reasons why those cars may not be
12 called in. It's not as simple as yes or no, and a
13 discussion needs to follow with that.

14 COMMISSIONER OBERMAN: Well that's what
15 I'm trying to grapple with as to what are the events
16 that cause the demurrage charges to start piling up
17 and you're saying that in the past -- and then I'll
18 just direct this back to you, if you had 5 days or 2
19 days, it gives you time if you can't take the car in
20 right now to adjust your operation or move cars off
21 the track or get the labor force in to do it.

22 But when you only have the short amount of

1 time you simply can't always be flexible enough to
2 take that care into your sight, is that what you are
3 saying?

4 MR. ABRAMS: Yes, that's what I'm saying.

5 MR. MCDERMOTT: And just to --

6 COMMISSIONER OBERMAN: Go ahead, yeah?

7 MR. MCDERMOTT: I would just like to add
8 leading up to, I mean, what can cause the demurrage
9 event, or what can cause a receiver to not be able to
10 physically receive all of the cars that are at the
11 serving yard, it can be for a lot of different
12 reasons. We've mentioned bunching on several
13 occasions, and I mentioned in my testimony the
14 modeling that we did and as far as empty private
15 returns are concerned, the random modeling shows that
16 cars will accumulate at the serving yard, to a larger
17 extent, in larger volumes and larger blocks than the
18 way that they were billed out as loads.

19 So, invariably, and this is just data is
20 all it is, invariably, even in the situations where
21 loaders, shippers and receivers and the railroads all
22 perform perfectly with zero variability, in terms of

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1 load times, unload times and transit times, if you're
2 looking at several different destinations from one
3 origin with distinct transit times associated with
4 all of those destinations just railroading alone by
5 itself, as those cars pull back, they will bunch,
6 they will accumulate and an origin plant may not be
7 able to take all of those physically in, although
8 they performed perfectly.

9 COMMISSIONER OBERMAN: I'd like to also
10 just sort of get our terminology clear because you
11 have all talked about this phenomenon that we were
12 just discussing as incurring demurrage charges. As I
13 have read the cases and have tried to understand the
14 industry practice, demurrage normally has referred
15 historically to when a system car is on your property
16 and it isn't returned in the time it's supposed to
17 be.

18 You're talking about a situation that
19 you're being charged for your cars being on the
20 railroad's tracks, but you're not taking them in,
21 which in some of the times is referred to as a
22 storage charge. You talk about it as demurrage, but

1 we're talking about the same -- in your case it
2 really storage is the more accurate term, is it not,
3 than demurrage?

4 MR. MCDERMOTT: That is correct, it would
5 be referred to as private car storage.

6 COMMISSIONER OBERMAN: Yeah, alright.

7 MR. ABRAMS: Yeah, I mean and as Norfolk
8 Southern bills that we get refer to -- you know, have
9 both. They're called demurrage bills but then
10 they're referred to internally and inside the --

11 COMMISSIONER OBERMAN: Okay, I just wanted
12 to get the -- because I think this is relevant to our
13 making sure we understand the difference between
14 system cars and privately-owned or leased cars. And
15 just to emphasize the point here, I know you've all
16 dealt with it, but I want to make sure I get this
17 very concretely.

18 If you had a system car on your property
19 and you didn't return it within the time required,
20 you would be charged demurrage. When your cars --
21 and as you say system-wide it's 70% are non-railroad
22 owned, are in the hands of the railroad, and they

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1 aren't returned, and they're on railroad property,
2 they're not on your property in the time that you
3 think they should be returned, you are not able to
4 charge them storage charges or demurrage charges for
5 holding on to your property I take it?

6 MR. MCDERMOTT: That is correct.

7 COMMISSIONER OBERMAN: Is there any place
8 in the entire system where a shipper who has private
9 owned or leased cars is able to do that, do any of
10 you know?

11 MR. ETZEL: I don't even know how we would
12 charge the railroad for anything.

13 COMMISSIONER OBERMAN: Well, we're going
14 to figure out a mechanism for that. Terry, just to
15 be clear, when you talked about the study that you
16 did, and you've talked about 416 cars were on the
17 system 3 days and I couldn't write it all down. I
18 hope you'll send us those numbers. What are you
19 measuring that against? The days beyond the typical
20 transit time?

21 MR. MCDERMOTT: No, those are days that
22 the cars sat idle and did not move.

1 COMMISSIONER OBERMAN: Okay. I see what
2 you're -- so, you're --

3 MR. MCDERMOTT: As loads or empties.

4 COMMISSIONER OBERMAN: But not just
5 outside your yard, somewhere in the system they're
6 just not moving, is that what you're saying?

7 MR. MCDERMOTT: That is correct.

8 COMMISSIONER OBERMAN: Okay, I have -- I
9 don't want to dominate the whole morning here, but I
10 have a couple of other questions. Let me just ask
11 one of Joshua and then I'll hand it back and then
12 maybe if there's time I'll come back.

13 I read your testimony carefully. I read
14 everybody's and I was very interested in the CN
15 litigation. And I looked at their actual pleading.
16 And you say that CN takes the position -- and I think
17 they do, that they are required by 746 to bill you
18 for demurrage. Is that the way you -- have they told
19 you that, that they believe they're required to do
20 it?

21 MR. ETZEL: They have told us that and we
22 have actually tried to enter into agreements --

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1 three-party agreements between ourselves, the shipper
2 and the railroad where Kinder Morgan and the shipper
3 both agreed because CN has refused to participate in
4 an agreement where the shipper would get the bills,
5 and then any dispute the shipper may have or between
6 us and them. And so, CN has absolutely refused that.

7 COMMISSIONER OBERMAN: Does CN take the
8 position that they would be in violation of the
9 statute if they did not send you a demurrage bill?
10 Is that what they tell you?

11 MR. ETZEL: I can't answer that Board
12 member, but I do know that they claim that the
13 statute is what empowers them to do that.

14 COMMISSIONER OBERMAN: Well in the
15 complaint it says the statute requires that they
16 enforce their demurrage tariff, and I'm -- that
17 sounds to me like they say gee, we'd like to not bill
18 you, but we have to.

19 MR. ETZEL: I can get back to you on that
20 answer Board member, I don't know that specifically.

21 COMMISSIONER OBERMAN: Okay, I'll hand it
22 back.

1 VICE CHAIRMAN FUCHS: Just to -- I think
2 picking up on something that Marty mentioned about
3 the zero free time concept. You know, Ben, to kind
4 of drill down, are you saying that -- and I think you
5 said in your testimony that if you get a delivery on
6 a Saturday, and you have zero free time, you're
7 closed on the weekend.

8 And so, you're faced with a choice because
9 of zero free time, you can either pay the charge or
10 open your entire facility up for the weekend. And
11 so, given that choice, given the cost of opening
12 your facility on the weekends, obviously made a
13 business decision not to do that, you just basically
14 have to eat the charge?

15 MR. ABRAMS: Right, because I'm not going
16 to necessarily open this -- that doesn't always
17 happen so I would have to know when it's going to
18 happen. I have got to plan in advance for it and if
19 I tell the employees, you know, the guys or whoever's
20 coming in, be on call, they're going to be like, I
21 don't know about that, they're not going to like that
22 so much. So, yeah, that'll be the charge.

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1 VICE CHAIRMAN FUCHS: And, you know,
2 picking up on something that Terry said, you know,
3 given that cars are going to go to different
4 destinations with different transit times, they're
5 going to come back, so you can send them out at
6 different times, 5, 5 and 5 or whatever, and they can
7 all come back as 15, just the nature of variability
8 in the transit time.

9 So, even if everything's running
10 perfectly, you're going to get a bunching phenomenon.
11 Are you suggesting that if that 15 were to say
12 outstrip your capacity, you only had room to take 10
13 in, in a hypothetical, are you saying that for that
14 remaining 5, that if they're constructively placed at
15 a rail yard, they should not get demurrage?

16 So, any bunch that exceeds your capacity
17 should not get demurrage until your capacity frees up
18 under the normal demurrage rules? Is that kind of
19 the idea behind or your suggestion for how the Board
20 should think about bunching?

21 MR. MCDERMOTT: Yes, I would think, I
22 would say that that would be accurate. Not -- I

1 would say not necessarily physical capacity at the
2 facility, but the operational capacity of what the
3 facility's infrastructure allows for, yes.

4 What the Board would have to consider in
5 this analysis is that a lot of facilities are
6 landlocked. The roads have replied in the past,
7 "Well, these increased charges might be an incentive
8 for capacity, for an expansion of yard capacity
9 within the facility."

10 That may or may not be physically feasible
11 quite honestly, so that would have to be taken into
12 consideration.

13 CHAIRMAN BEGEMAN: Terry, NGSA, are their
14 arbitration processes -- do they apply to, is
15 demurrage an eligible matter to be arbitrated?

16 MR. MCDERMOTT: I would defer to NGSA on
17 that.

18 CHAIRMAN BEGEMAN: Okay, so if so, you
19 haven't participated obviously?

20 MR. MCDERMOTT: Right.

21 CHAIRMAN BEGEMAN: Okay. And Frank, or
22 whomever, but I'm going to start with you, Frank. I

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1 just and we'll end this shortly because we actually
2 could just talk all day, probably just to you.
3 Could you help me better understand the congestion
4 charge changes and from the 14 days to 5, which of
5 course, I do understand that question. But the
6 congestion -- is applying when your cars are in a
7 carrier's yard too long, or just walk me through how
8 it applies?

9 MR. CHIRUMBOLE: Yeah, and I'm not sure I
10 can give you the actual specific tenets of that, but
11 it's generally where we cause or according to the
12 railroads, we've caused congestion by the number of
13 cars on their system at any one time in any place
14 generally, and --

15 CHAIRMAN BEGEMAN: But are they
16 responsible for when they ultimately agree to take
17 the car?

18 MR. CHIRUMBOLE: That's our view of that
19 too, although they may point out that we ship more
20 cars in a certain direction than we typically do that
21 might have caused that. And while we, in our case,
22 have some remedies, it can't always be addressed in a

1 short period of time.

2 We do have to serve our customers. We
3 can't just make it all about trying to relieve the
4 congestion. If we have to redirect cars away from
5 where they're going to be needed to serve our
6 customers, then that would be an issue.

7 5 days just isn't enough time, and I would
8 just argue that yes, in all cases, it's not
9 necessarily our issue. We can't audit that really
10 either, you know, we have to take the railroad's word
11 for it. So, you know that's kind of our view on
12 that. We need that time. You know, I just would add
13 we understand what the railroads want to do, and we
14 will do everything we can to help, but we're paying
15 all the money right now to help them and that's the
16 issue in our mind.

17 And it's not getting us anything. Our
18 service isn't any better. We've got records of our
19 transit times, it's not better.

20 VICE CHAIRMAN FUCHS: Two things on the
21 record very quickly. First is you know, it's
22 interesting, one of the compliance mechanisms you can

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1 have outside of you know, bringing a crew, if you
2 have a capacity limit is to expand capacity.

3 And I contrast that with the time it takes
4 to expand capacity versus the notice that you have of
5 these changes. So, one of the mechanisms takes a
6 long time, and it takes more time to notice, you
7 can't comply in that time. So, I wonder real-quick,
8 if you could kind of say how much notice you all had
9 for the changes, you know, quickly, before they took
10 effect?

11 You know, before the railroad made a
12 change on credit days or charge level, how much
13 notice did they give you?

14 MR. CHIRUMBOLE: Are you talking about
15 like congestion charges?

16 VICE CHAIRMAN FUCHS: No, I'm talking
17 about advanced notice before the change took legal
18 effect in terms of notification to you?

19 MR. CHIRUMBOLE: For the new tariff?

20 VICE CHAIRMAN FUCHS: Yes. Because the
21 statute requires a minimum of 20 days, and of course
22 we know when the letters went out, but I'm talking

1 about communication with you all, how much advance
2 notice did you have?

3 MR. CHIRUMBOLE: I don't remember in our
4 case, but typically it's been at least that much
5 time. I don't recall.

6 MR. ETZEL: Vice Chairman, I would say the
7 standard varies, obviously by the railroad in the way
8 that they communicate the changes, but we typically
9 get an email telling us that on day X, which is
10 greater than 20 days, typically 60 days.

11 VICE CHAIRMAN FUCHS: 60 days or so?

12 MR. ETZEL: It'll take effect.

13 VICE CHAIRMAN FUCHS: And then dispute
14 resolution, you know, a lot has been talked about the
15 difficulty and the evidence and Terry you shared
16 testimony 18 months, if you were to try and dispute
17 a charge, how much time does it typically take from
18 the time you initially notified the railroad that the
19 charge was not accurate compared to ultimate
20 resolution whether in favor of the railroad or the
21 shipper? How much time do you think would be
22 typical if you were to take a median or an average?

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1 MR. MCDERMOTT: On specific to accessorial
2 charges, it's hard to take an average from some that
3 are still out there, 45 days.

4 MR. ABRAMS: It could be longer. I mean
5 we have some still sitting out there from 2018.

6 MR. ETZEL: I would say in the case of
7 Kinder Morgan, the people that we're disputing
8 charges with are typically not the decision-makers,
9 so they're rejected summarily in a lot of cases and
10 then we have to go to routes that take months. I
11 mean we're 3 years into the discussion with CN on
12 accessorials.

13 MR. CHIRUMBOLE: Yeah, in our case not too
14 many of these rises to my level because I don't know
15 that we have disputed that many, but the ones that I
16 know of were months.

17 COMMISSIONER OBERMAN: I'd like to just --
18 a few follow-ups, I'll try to do this quickly.
19 Frank, on a couple of points that you just were
20 talking about. As I have read the materials, the
21 congestion charge is based on a concept of congestion
22 that is not defined by the railroads, is that the way

1 -- I mean how do you know what congestion consists
2 of?

3 MR. CHIRUMBOLE: You know, the statement
4 is that we, the customer caused the congestion but,
5 that is true, it's not easy to determine that we have
6 done that.

7 COMMISSIONER OBERMAN: I mean is it just a
8 railroad saying we're congested, so we're going to
9 bill you without defining what that congestion means?
10 Should I ask NS to tell us?

11 MR. CHIRUMBOLE: That would probably be
12 that way because I don't know --

13 COMMISSIONER OBERMAN: Well if you don't
14 know and you have to pay it that seems to me to be a
15 concern. To follow-up on what Patrick was asking
16 about notice, and I want to just sort of compare
17 what Ben said and what you said. You're talking
18 about Olin considering or I gather, spending 10
19 million dollars, I assume to increase track on your
20 property so you can take delivery of cars and avoid
21 these storage or demurrage charges, that's the reason
22 for it?

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1 MR. CHIRUMBOLE: Yeah, that's one of them,
2 I mean we have a large fleet that we've you know,
3 have a deal with, with --

4 COMMISSIONER OBERMAN: And I take it you
5 couldn't complete a 10 million-dollar track project
6 in 60 days?

7 MR. CHIRUMBOLE: No.

8 COMMISSIONER OBERMAN: How long does that
9 take?

10 MR. CHIRUMBOLE: It would take a year or
11 more, but.

12 COMMISSIONER OBERMAN: And you've got, we
13 were, I don't know if it was in McIntosh, I mean we
14 were there. You've got land out in the country to
15 build some track, right?

16 MR. CHIRUMBOLE: Yeah, and by the way it's
17 not the only site we'd be looking at.

18 COMMISSIONER OBERMAN: Yeah, I understand
19 you have other sites, but Ben, when you talk about
20 making changes, is it basically done, you just don't
21 have the real estate to put more track in to take
22 these cars, is that the primary problem?

1 MR. ABRAMS: Yes, that's part of the --
2 first of all we're in the city. We're sandwiched
3 between state highway and the waterway, a creek, so
4 we have -- there's limited ability to move. We'd
5 have to -- there's already existing buildings and
6 equipment.

7 COMMISSIONER OBERMAN: So --

8 MR. ABRAMS: That's limited spots, yes.
9 So, if the storage charge was \$150 a day or \$1,000 a
10 day or \$2,000 a day, you just can't build more track
11 to avoid them I take it is what you're saying?

12 MR. ABRAMS: Maybe I could build a little
13 more track but it's not going to help in the bigger
14 picture.

15 COMMISSIONER OBERMAN: Well, not the
16 numbers you're talking about I take it, right?

17 MR. ABRAMS: Right, right.

18 COMMISSIONER OBERMAN: And just one
19 question for Josh, Ann asked about retaliation in
20 general, and I will tell you since I've -- the short
21 time I've been on the Board, I've heard about
22 retaliation from lots of people in this industry

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1 other than the railroads themselves.

2 And I just want to bring out in this
3 hearing, it's in your statement Josh, but you say
4 that after you contested the CN demurrage charge in
5 your 8 million dollar case in my hometown of
6 Chicago, A -- they gave you a 21% increase in
7 something, and they raised the demurrage charge to
8 \$300 which you say is the result of that that was
9 motivated by retaliation and the demurrage charge is
10 1 and a half times higher for you than for anybody
11 else in the Chicago area.

12 MR. ETZEL: We believe that was
13 retaliatory.

14 COMMISSIONER OBERMAN: And is your belief
15 based on a sequence of events is that?

16 MR. ETZEL: Based on the timing and just
17 the fact that we're in a lawsuit with charges that
18 equate to almost exactly that \$300 per car.

19 COMMISSIONER OBERMAN: I'm just going to
20 guess that in the normal commercial activities, CN
21 doesn't say okay, this is what we're doing, but it
22 was pretty clear to you that that's what they were

1 doing?

2 MR. ETZEL: It was clear to us that that's
3 what they were doing.

4 COMMISSIONER OBERMAN: Thank you.

5 CHAIRMAN BEGEMAN: Okay, just one last
6 question for you Josh. Are there situations,
7 circumstances when demurrage is appropriate for
8 entities such as a storage that you -- demurrage for
9 the third party, the intermediary, so it's not that
10 at no time are you not at fault?

11 MR. ETZEL: Chairman, we are absolutely at
12 fault in some occasions. We just ask that that
13 discussion between us and the customer and in the
14 past that's how we worked it out where they will pay
15 it and then say look, this is on you Kinder Morgan,
16 you didn't have the labor set-up properly, you had an
17 issue with your track.

18 But our customers make conscious decisions
19 to our supply chain to ship cars. They may want to
20 have them in areas away during hurricanes and they'll
21 bake that into their cost and they may put them in
22 yards knowing that they're going to sit there for a

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1 while or they may want them away from their
2 production plant so that they have room to receive
3 and clear production at their plants. Those are
4 decisions they make and obviously that's something
5 that they willingly pay to the railroads when they're
6 built, but currently those bills are going to us.
7 So, those -- there's three buckets.

8 There's the shipper's responsibility, the
9 railroad's responsibility and the terminal's
10 responsibility and we will not shy away from paying
11 our responsibility, but we want that relationship to
12 be with the people we have our commercial
13 discussions and contracts with which is our
14 customers, not with the railroads.

15 CHAIRMAN BEGEMAN: So, you're saying you
16 would reimburse the shipper but you're not going to
17 pay directly to the --

18 MR. ETZEL: That is correct, that's the
19 way our commercial contracts are set up for the
20 ruling with the customers. They're responsible for
21 demurrage and we will then work with them on a case
22 by case basis to give them credits for the things

1 that we caused.

2 And in the cases where the railroads cause
3 them, they would dispute those to the railroads and
4 then the railroads, because they have the commercial
5 relationship with our customers, they would
6 generally accept that in the past.

7 COMMISSIONER OBERMAN: One more, Frank, in
8 your statement -- and I don't know if it relates
9 directly to demurrage or not, but you said it so I'd
10 like to give you a chance to tell us what you mean
11 from Olin's perspective. You said that you fear that
12 PSR will make the railroads less resilient. I think
13 I know what that means but I'd really like you to
14 explain it from your point of view, what do you mean
15 less resilient?

16 MR. CHIRUMBOLE: Yeah, there are
17 situations where the events that not in the
18 railroad's control create situations that disrupt
19 our service -- weather is one in particular. And
20 part of the precision scheduled railroading is for
21 them to lower costs, basically do more with less.

22 And our concern would be in those

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1 situations they don't have a SWAT team for instance,
2 to be able to respond to a weather situation and
3 restore service quickly. Don't know that, but the
4 concept of doing more with less usually means you
5 have to follow a rigid schedule, you cannot deal with
6 things that are out of the ordinary as well and
7 that's a concern.

8 COMMISSIONER OBERMAN: And the less is
9 people?

10 MR. CHIRUMBOLE: Yeah, it could be people
11 or how they do --

12 COMMISSIONER OBERMAN: Or locomotives?

13 MR. CHIRUMBOLE: I don't know for a fact
14 they're reducing locomotives, but I do know they've
15 talked about longer trains so I would assume that
16 would be less locomotives, fewer crews, and how
17 they've managed their switch yards or hump yards as
18 well, so.

19 COMMISSIONER OBERMAN: That's what I
20 assumed you mean, but I think it's good to hear,
21 thank you.

22 CHAIRMAN BEGEMAN: Alright, thank you very

1 much, I really appreciate your testimony. We will
2 now call up the second panel and I believe during
3 this changeover, there are going to be additional
4 chairs brought into the room for our standing room
5 only viewers. I hope that's true, otherwise take the
6 chairs of the railroads that just emptied them.

7 PANEL II

8 CHAIRMAN BEGEMAN: If anyone doesn't have
9 a seat after the additional chairs were added, there
10 is an overflow room outside of this door. It's in
11 Courtroom A, and there is a screen set up so you
12 still will be able to observe and have a seat as
13 well, thank you. So, we will start with our second
14 panel of various railroad representatives. Thank you
15 very much.

16 We have -- lost my list. We have CSX, NS
17 and Union Pacific and we will start with CSX.

18 MR. PATELLI: Thank you Chairman Begeman.
19 Chairman, Vice Chairman Fuchs, Commissioner Oberman,
20 good morning. My name is John Patelli, Head of
21 Regulatory and Federal Affairs at CSX. It is my
22 pleasure to introduce my colleague, Arthur Adams,

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1 Vice president of Sales and Customer Engagement for
2 CSX, who is uniquely qualified to address today's
3 subject as he personally oversees accessorial and
4 demurrage for CSX as part of his responsibility,
5 Arthur?

6 MR. ADAMS: Thank you, John. Chairman
7 Begeman, Vice Chairman Fuchs, Commissioner Oberman,
8 as my colleague John Patelli mentioned, I'm
9 personally responsible for managing the customer
10 experience at CSX.

11 In fact, I or a member of my team have
12 worked directly with many of the CSX customers
13 represented at this hearing, so it's my pleasure to
14 speak to you and answer any questions that you may
15 have.

16 Today I will address four principal areas.
17 First, the purpose of these tariffs is to further the
18 efficient management of assets and promote a fluid
19 transportation pipeline.

20 Second, customer engagement is a critical
21 part of CSX's application of its tariff items.

22 Third, CSX addresses disputes in a commercially fair

1 manner and lastly, customers are benefitting from the
2 best operating performance in CSX's history.

3 Demurrage and accessorial have a long
4 history within the rail industry. You'll also see
5 them in other transportation sectors, including
6 trucking, port terminals and shipping. In all cases
7 their underlying purpose is to promote a fluid
8 transportation network, primarily for the benefit of
9 customers.

10 These tariffs have long been recognized to
11 incentivize efficient customer operations that
12 account for costs associated with the use of rail
13 assets. Those costs include car hire for the use of
14 other carrier's rail cars, additional car handling
15 and switching of stored cars, capital infrastructure
16 expenses, and opportunity costs caused by congestion
17 in the network.

18 By way of context, prior to 2017, we did
19 not consistently update or enforce these tariff
20 items. We were frankly remiss in not paying
21 sufficient attention to our tariffs and crucially to
22 their intended affect on our operations. Our service

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1 was poor. Our lack of consistent enforcement only
2 compounded our effect on our operations.

3 Our serving yards were more congested than
4 they should have been and our rail cars languished
5 and were under-utilized by not holding origin and
6 destination locations accountable for turning the
7 assets, CSX was absorbing those inefficiencies. This
8 served as a disincentive for customers to invest more
9 in plant capacity and appropriately manage their
10 inventory. That is no longer the case.

11 Our tariff changes in 2017 and 2018
12 properly incentivized customers to manage their
13 pipelines more efficiently and turn cars faster.
14 Slide 3 provides an example of what I mean. Here
15 customer A only has room for 3 cars, but orders 9, 6
16 of which sit in the CSX yard.

17 Customer A likes this arrangement because
18 it has 6 extra cars nearby whenever they're needed.
19 Customer B runs an efficient operation, ordering only
20 what is needed and turning the cars back quickly.
21 What happens when customer B has an uptick in
22 business and needs more cars, but there aren't enough

1 to fill demand because of customer A's back log.

2 Customer B suffers as a result of Customer
3 A's inefficient car management. Demurrage
4 incentivizes customer A to only order what is needed,
5 when it is needed, and turn empty cars back faster so
6 that customer B and other customers can get the
7 service they deserve.

8 Here's another example in the context of
9 private cars. Receiver A receives more cars than it
10 can hold at destination, causing excessive private
11 cars to dwell in CSX's serving yard. We now have
12 less yard space available for our operations or other
13 customers' cars. We have additional handling and
14 switching in the yard to work around the congestion,
15 and our local service to receivers B, C, and D
16 respectively languishes.

17 Private car storage incentivizes receiver
18 A to strengthen communications with his shippers,
19 better plan his shipments, make the necessary plant
20 capacity improvements or find alternative storage
21 locations. In other words, to manage his business in
22 a way that won't detrimentally impact other customers

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1 in a broader CSX network.

2 It is important to point out that we
3 ultimately want these charges to diminish. We
4 believe that over time as our customers grow more
5 comfortable with the consistency and reliability of
6 our service product, and as they continue to enhance
7 their inventory management, we'll see a decline.

8 The customer is not alone in this process.
9 My team takes great pride in working alongside our
10 customers to actively manage their pipeline which
11 leads me to the second key point of my remarks --
12 customer engagement.

13 Prior to 2017, we did not invest heavily
14 enough in this area. We now re-energized our focus
15 on the customer experience and have built an
16 organization entirely focused on customer engagement.
17 We've consolidated these functions in the sales and
18 marketing department under a single leader. All of
19 our customers now have connectivity into the
20 organization through some level of my customer
21 solutions team.

22 We know we're on the right track. Among

1 other indicators, our quarterly customer survey has
2 shown sequential improvement in the overall
3 perception of CSX for the last 5 quarters. We spend
4 significant time asking customers how we can help
5 better meet their needs.

6 Our merchandise customers consistently
7 tell us that their top priority is supply chain
8 visibility, including visibility as to demurrage
9 charges. In that regard, our online customer service
10 tools allow customers to proactively manage their
11 pipelines to reduce charges, track and evaluate
12 applied charges, and dispute charges when necessary.

13 Our ShipCSX tools are recognized as best
14 in class and we are investing to make them even
15 better. We are partnering with customers to make
16 sure they have a voice in the development process.
17 To that end, we recently held a customer workshop to
18 introduce a new ShipCSX platform with expanded
19 capabilities to gather customers feedback on the new
20 tools. We've also developed a scheduled service plan
21 that is shared with customers monthly. It provides
22 advanced notice of scheduled maintenance across the

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1 network and potential service impacts.

2 We are committed to communicating service
3 changes to customers at the local level as quickly as
4 possible and before they occur to the maximum extent
5 possible. Commercial fairness is the third key
6 item, and let me be clear, we strive always to act in
7 a conversely fair manner, and we have every incentive
8 to do so. From the top to the bottom of our
9 organization, we are driving to bring more of our
10 customer's business.

11 Today with our high-performing service
12 product, we are better positioned than ever to do so.
13 Our goal of growth would not be possible if we were
14 treating our customers unfairly. Essentially, all of
15 our customers represented here today are merchandise
16 customers.

17 Importantly, over the last three quarters,
18 CSX has incrementally increased our merchandise
19 volume by an average of 4% year over year. It has
20 been said by some participants that our policy
21 changes have made demurrage bills unavoidable. The
22 truth is for the full year 2018, roughly half of our

1 customers paid no demurrage.

2 Of those who did receive a bill, over 50%
3 paid less than \$1,000 per month on average. We work
4 hard to give those customers who do receive bills an
5 opportunity to raise concerns and contest charges
6 they believe are inappropriate. For an example, if
7 demurrage was caused by CSX missing a switch or
8 bunching traffic in route to destination, we apply
9 credits and adjust the invoices accordingly.

10 We frequently involve other internal
11 departments, including sales and marketing, car
12 management and operations to assist with customer
13 pipeline management. I believe the service
14 consistency, customer support, and online tools we
15 make available to give our customers the ability to
16 manage their inventory and reduce their exposure to
17 demurrage charges.

18 My final point is that customers are
19 benefitting from the strongest operating performance
20 in the company's history. Our current policies have
21 helped spur improvements in safety, operational
22 performance, network fluidity and capacity. Today,

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1 our customer service is hitting historical highs as
2 evidenced by record-setting velocity and dwell
3 metrics for the first quarter 2019.

4 These improvements, along with others have
5 translated into a superior service product for our
6 customers. My colleagues and I at CSX, regard
7 scheduled railroading as both an operating model and
8 a shared commitment to excellence. We believe that
9 our fair and standardized policies, including those
10 related to demurrage and accessorial items are
11 producing the intended results, contributing not only
12 to our success, but the success of our customers.

13 Customers have learned that we are able to
14 handle more freight with fewer assets, leaving them
15 with less inventory in motion. And if the customer
16 owns their cars, it's even better. They save
17 precious capital as they no longer need as many cars
18 in the fleet cycling to supply their supply chain
19 partners.

20 Those efficiency gains and the enhanced
21 level of services combine to create what might well
22 be termed a virtuous cycle. A picture is worth a

1 thousand words, but in short, service and efficiency
2 are closely correlated. In the last 2 years every
3 key service metric and efficiency metric has been
4 improving to the benefit of all of our customers.

5 In closing, I wish to thank you for the
6 opportunity to speak on this important topic. I
7 appreciate your attention and look forward to
8 answering any questions you may have.

9 CHAIRMAN BEGEMAN: Thank you. NS?

10 MR. SHAW: Good morning. I'm Alan Shaw,
11 Norfolk Southern's EVP and Chief Marketing Officer,
12 and I thank you for the opportunity to be here with
13 you today. I'm joined by my colleague, Ed Elkins,
14 our Vice President of Industrial Products. We both
15 want to take some time and speak to you about our
16 accessorial program, which is aligned with the mutual
17 goals of Norfolk Southern and our customers for a
18 more efficient and reliable service product that
19 provides our customers with a platform for growth.

20 The recent modifications to our
21 accessorial programs are designed to complement and
22 reinforce changes in our operating plan to improve

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1 our service product, which we are delivering. Let me
2 be clear -- Norfolk Southern's accessorial program is
3 not intended to increase revenues -- that is not our
4 intent.

5 It is there to improve the efficiency and
6 the reliability of our service product and turn our
7 assets and our customer's assets more frequently. At
8 Norfolk Southern, we are successfully implementing
9 our own version of precision scheduled railroading.

10 Our approach includes implementing changes
11 at a measured pace so as to mitigate the potential
12 for network disruption. We're collaborating with our
13 customers to re-engineer work and to deliver a more
14 efficient and reliable service solution, and it shows
15 in the metrics.

16 And we are removing the work before we
17 remove the assets, again, to mitigate the potential
18 for network disruption. We have a balanced plan, and
19 it's balanced between efficiency and growth. As we
20 re-engineer our network and create surplus assets, we
21 can reapply those assets to support our customers'
22 growth -- in effect, a capacity dividend.

1 We are investing 16 to 18% of our revenue
2 back into our network annually in the form of our
3 capital budget in an effort to develop an efficient
4 and reliable product that provides a platform for
5 growth. We are investing the technology to improve
6 the transparency and the visibility of our customer
7 supply chains and provide a best-in-class, consumer-
8 oriented customer experience.

9 We are developing web-based tools and
10 mobile applications to allow our customers to manage
11 their supply chains more efficiently. And we've
12 changed our leadership, and we've changed our
13 operations to improve service.

14 We're collaborating with our customers at
15 the local level to improve the consistency of local
16 service. The number of customers who are switched 6
17 or 7 days a week has more than quadrupled as we're
18 actually increasing the frequency of service. And
19 right now, approximately 85% of our industrial
20 product's volume is switched 6 or 7 days a week.

21 We're collaborating with our customers.
22 Just yesterday at St. Louis, Ed Elkins and I were at

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1 a town hall with our customers and our employees
2 alike discussing operating plan changes, and one is
3 being held as we speak today in Decatur.

4 In conjunction with these changes, we have
5 modified our accessorial program to better align it
6 with the mutual goals of Norfolk Southern and our
7 customers. At Norfolk Southern, demurrage and
8 storage is an activity-based charge that serves two
9 purposes. It encourages the efficient use of our
10 assets to the benefit of all of our customers, and it
11 compensates Norfolk Southern for the use of our
12 assets.

13 As I've said publicly, our recent changes
14 are designed to improve the efficiency through better
15 asset utilization and increase network fluidity and
16 velocity -- in essence, not counting on additional
17 revenue from these changes.

18 Recognizing the impact of these changes,
19 we provided our customers with 3 months' advance
20 notice. And importantly, we balanced these changes
21 through the application of service credits when
22 Norfolk Southern does not perform to the original

1 ETA, customers can apply these service credits to
2 offset potential demurrage charges.

3 As said, we're seeing the positive impacts
4 of all of these changes to our network. We have
5 dramatically improved the service product that we're
6 delivering to our customers. Train speeds are up
7 23%. Terminal dwell is down 36% and is at the lowest
8 level in over 16 years. And the number of cars
9 online is down 13%.

10 Just as importantly, in our customer
11 facing metrics, i.e., shared KPIs with our customers,
12 we're well on target to hit a 40% improvement in our
13 customer service in 2019 relative to 2018.
14 Customers have faith and have -- we're building
15 credibility with our customers, and they're gaining
16 confidence in our ability to perform. So they're
17 turning back leased equipment while growing with
18 Norfolk Southern, a financial benefit to our
19 customers.

20 I thank you for your time, and I look
21 forward to answering your questions and continuing
22 our ongoing dialogue with the Board and our

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1 customers.

2 CHAIRMAN BEGEMAN: Thank you. Kenny?

3 MR. ROCKER: Good morning Chairman
4 Begeman, Vice Chairman Fuchs, Commissioner Oberman,
5 and Board staff. I'm Kenny Rocker, Executive Vice
6 President of Marketing and Sales at Union Pacific
7 Railroad, and I want to thank you for allowing me to
8 speak on behalf of Union Pacific with regard to our
9 demurrage and accessorial charges.

10 The Board has specifically asked me to
11 address the following topics today: our recent
12 experience with demurrage and accessorial charges;
13 our perspectives on fairness of our accessorial
14 tariffs during the past 3 years; and, lastly, the
15 impact on our customers following the recent changes
16 to accessorial tariffs.

17 But before I jump into those topics, it is
18 important that I explicitly tell you how we think
19 about accessorial and demurrage charges at Union
20 Pacific, and what we've done to work with customers
21 through the recent changes. Our top priority is to
22 provide safe and reliable service to all of our

1 customers.

2 The objective of our accessorial and
3 demurrage program is to align customer behavior in a
4 way that promotes network fluidity for the entire
5 supply chain. All customers benefit with improved
6 service reliability and reduced cycle times when all
7 assets are utilized to their fullest.

8 As we've made changes to our
9 transportation plan in 2018, we began to put more
10 focus on moving cars rather than trains. This was a
11 fundamental change that we needed to make in order to
12 improve our service product and make it more reliable
13 for all of our customers.

14 Likewise, we made changes to our demurrage
15 and accessorial program to align it with the overall
16 objective to keep the network fluid, which benefits
17 all of our customers and the entire supply chain.

18 More importantly, here's what we did to
19 help customers navigate through the changes. First,
20 we've taken a proactive posture at every time with
21 our customers, notifying them of changes well in
22 advance.

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1 Second, we've utilized technology to hold
2 Union Pacific accountable and provide our customers
3 visibility to manage their inventory levels. And
4 I'll provide you more details on this in a minute,
5 but before doing so, I want to emphasize this next
6 point.

7 Third, in preparation of this hearing, we
8 read our customer's comments and listened to their
9 concerns. In fact, we made the following recent
10 changes to our accessorial tariffs as a direct
11 result of the Board's hearing today.

12 We changed our not-prepared-for-service
13 tariff to bill on a per-occurrence versus a per-car
14 basis. We further changed the
15 not-prepared-for-service tariff to issue billing to
16 only those customers who have three or more
17 occurrences in a calendar month. And I stress that
18 since we implemented the not-prepared-for-service
19 tariff in January, we have not -- and will not --
20 bill customers for multiple accessorials at the same
21 time.

22 So, for example, we do not assess

1 demurrage for cars that are subject to the
2 not-prepared-for-service tariff. We changed the
3 tariff language to bring it into conformity with our
4 actual practice. Thank you for allowing me to take
5 the time to provide this relevant background. I'll
6 now move on to the recent experience in accessorials
7 for Union Pacific.

8 So, as it relates to recent experience
9 over the past 2 years, we have worked to standardize
10 and simplify the tariffs for accessorials to make
11 them easier for our customers to navigate and
12 understand. For example, we reduced the number of
13 pages in our accessorial tariff document by 45%. We
14 eliminated 47 different items that were duplicative
15 and antiquated.

16 We inserted technology and tools to
17 provide superior visibility to help our customers
18 better manage their inventory pipelines. For
19 example, we're leveraging GPS data from our
20 locomotives to provide customers with more real-time
21 arrival data for their shipments and we've applied
22 artificial intelligence to that GPS data to improve

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1 the ETAs for delivery time.

2 We have an online shipment management tool
3 to provide inventory management solutions to
4 customers so they can see the number of railcars in
5 route, the number of railcars in their serving area
6 waiting to be delivered, and the number of railcars
7 at their facility. 98% of our crews report their
8 daily work events using our mobile work-order
9 devices. This gives us more accurate and timely data
10 on customer deliveries and pick-ups.

11 We have been proactive and have proactive
12 notifications like "You're Next" and Local Service to
13 Date to alert customers to prepare for the arrival of
14 our crews. In January 2019, we implemented our bulk
15 train tariff items to improve the utilization of
16 critical resources like locomotives and crews in
17 order to provide a more reliable service to all of
18 our customers.

19 And during the same period of time, we
20 rolled out a number of tools to help customers
21 navigate through the changes. As you can see, Union
22 Pacific has implemented a balanced mix of customer

1 incentives and tools to help individual customers
2 align their supply chain with our network, thus
3 promoting a more reliable and consistent service
4 system-wide to benefit all of our customers.

5 As it relates to your second topic
6 regarding accessorial tariffs and fairness, over the
7 past 3 years the total average annual charges for
8 accessorials and demurrage have been only 1% of our
9 total operating revenue. This is not a revenue-
10 generating initiative for us. And although these
11 charges have increased in the first quarter of 2019,
12 we hope that increase is temporary because the
13 intention is to improve service, not drive cost
14 increases to our customers.

15 The next area of concern you asked me to
16 address was the fairness of our billing processes.
17 But first, let me be clear that our intent is not to
18 assess any demurrage or accessorial charges that are
19 a result of UP-caused service delays or items outside
20 of the customer's control, like weather or plant
21 outages.

22 For demurrage, I mentioned in my submitted

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1 remarks on May the 8th and various ways we issue
2 credits, so I won't list them again. The bottom line
3 is that we issue credits to allow for every car,
4 both railroad and privately-owned cars, to unload in
5 24 hours.

6 To compensate the customer if UP fails to
7 deliver a railcar when the customer has capacity to
8 take a car, and for private equipment to allow
9 charges to accrue only when the private cars are
10 stored on UP property, we believe it is fair to base
11 billing on the customer's ability to keep their
12 capacity levels fluid during the course of a full
13 month. This approach aligns with customer behavior
14 in a way that promotes network fluidity and improves
15 service for all of our customers.

16 But our approach to reciprocity and
17 fairness goes beyond simply adding credits to a
18 demurrage bill. For all of our accessorial and
19 demurrage billing, we listen to our customers and
20 assess the facts with data to make fair judgment
21 about the validity of the charges.

22 Our billing accuracy is 95%. We know we

1 aren't perfect, as our billing data is subject to
2 human error from crew reporting, but we are making
3 process on improving the accuracy of their inputs.
4 We also have made it easy for customers to dispute
5 accessorial charges using our online billing and
6 receivable systems.

7 We research each disputed claim by tracing
8 the railcar shipment, even if it begins on another
9 railroad. If the facts show the charges were the
10 result of any railroad disrupting the customer's
11 supply chain, then we cancel the charges. However,
12 if we determine that the cause of the accessorial was
13 within the customer's control, then to be fair to our
14 other customers, we assess the charge to help align
15 the particular customer's behavior with the network
16 fluidity. All customers benefit when assets, both
17 the customer's and ours, move faster on the network.

18 Furthermore, Union Pacific understands the
19 Board's commitment to evidence-based decision-making.
20 We agree with that approach. We believe the facts
21 and data of each particular case must be looked at in
22 order to know what's really going on in any case. UP

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1 encourages the Board to take the same approach here -
2 - general broad statements really don't shed much
3 light on what's actually happening in a particular
4 case.

5 We suggest that after going through our
6 billing dispute resolution process, which we believe
7 is fair and a reasonable process designed to confirm
8 validity or correct errors, if a customer still feels
9 they have been charged unfairly, or unreasonably,
10 there are tools available to bring their concerns
11 back to the Board's attention, including the
12 complaint process as well as the informal complaints
13 through OPAGAC. As a reminder, Union Pacific has
14 signed up for the Board's informal mediation
15 process, and we will be open to using that process to
16 give customers streamlined access to the Board's
17 assistance.

18 Finally, you asked me to address how our
19 changes to demurrage and accessorial charges have
20 impacted our customers.

21 We have taken the customers' feedback into
22 consideration and listened to each unique scenario.

1 We have also taken measures to make the transition to
2 our changes as seamless as possible. For example,
3 back in November 2018, we gave 60-day advanced notice
4 to our customers of our intent to change accessorial
5 and demurrage tariffs. Within that 60-day window, we
6 developed material to help our customer service and
7 sales teams explain the what, the why, and how to
8 customers. Our customer service and sales teams call
9 all of our customers were who identified to be at
10 greater risk of experiencing accessorial and
11 demurrage charges.

12 We work with customers who were impacted
13 by situations outside of their reasonable control,
14 such as city ordinances that prevented night loading
15 and unloading to give them more flexibility. We
16 provided bulk tariff summary billing scenarios based
17 on actual November and December data so customers
18 would understand how the rules and charges under the
19 new tariff would apply to their operations.

20 We delayed our billing for the bulk
21 tariff. We also suppressed not-prepared-for-service
22 billing associated with third party switchers where

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1 UP did not yet have a system solution in place to
2 help them prepare for pick-ups. The results of
3 partnering with our 9,000 customers to help them use
4 our network more effectively have been impressive.

5 We are beginning to see customers turn
6 assets, both theirs and ours, faster. In the third
7 quarter of 2018, only 55% of our bulk train customers
8 loaded and unloaded their railcars within 24 hours.
9 Today this number is at 65%. Our service is
10 improving, and our network is more fluid. Compared
11 to a year ago, our current 7-day terminal dwell has
12 dropped by 13%, and our on-time delivery rates are
13 the best they've been in over 2 years.

14 Again, I want to iterate that our top
15 priority here is to provide safe and reliable service
16 to all of our customers as the supply chain becomes
17 more consistent, I'm confident the changes we've made
18 will result into a win/win for all of our
19 stakeholders.

20 Further, I want to emphasize the following
21 actions that we took making the changes to our
22 accessorial charge program. We've proactively worked

1 with our customers in advance of any change to be
2 transparent and help customers navigate through the
3 potential impact to them. We inserted technology and
4 tools to give customers better visibility for their
5 pipeline and helped them manage their shipment more
6 effectively.

7 And furthermore, we listened to our
8 customers and already have made improvements to the
9 program based on their early feedback. Each customer
10 has a unique supply chain and we will continue to
11 listen, and work with them. We remain committed to
12 make sure we are fair in how we execute our
13 accessorial program.

14 In closing, these three steps are
15 improving asset utilization, and we're seeing our
16 operating metrics get better. Union Pacific remains
17 dedicated to working with our customers to provide
18 them with a safe and reliable service product while
19 also maintaining their ability to remain competitive
20 in their own market.

21 Thank you Chairman Begeman, Vice Chairman
22 Fuchs, and Commissioner Oberman for allowing me to

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1 speak this morning. I stand ready to address any
2 questions that you may have.

3 COMMISSIONER OBERMAN: Thank you all, I'm
4 going to kick-off with a few questions. And this
5 first question is for each of the railroads and I'd
6 like to get a specific answer from each railroad.
7 I'll start with you Mr. Adams. You understand that
8 the concept of a demurrage charge is to provide
9 partly for compensation to the railroad for a shipper
10 holding on to the railroad's rolling stock and partly
11 to provide a penalty to the shipper to incentivize
12 them to not do that, is that your -- do you agree
13 that that's the way demurrage was set out in the law?

14 MR. ADAMS: I believe that's what it was
15 intended to accomplish, yes.

16 COMMISSIONER OBERMAN: So, my question for
17 you is if you take a demurrage charge, typically \$150
18 a day, would that be a good example?

19 MR. ADAMS: It varies by car type.

20 COMMISSIONER OBERMAN: Well, what would be
21 typical?

22 MR. ADAMS: Well, for a private car it

1 would be \$65 per day.

2 COMMISSIONER OBERMAN: For a system car?

3 MR. ADAMS: For a system car it would be
4 \$100 a day roughly.

5 COMMISSIONER OBERMAN: Well let's take
6 \$100 a day. How much of that \$100 a day charge is
7 compensation to CSX and how much is penalty?

8 MR. ADAMS: I don't know the answer or the
9 breakdown of that. I'd have to get back to you.

10 COMMISSIONER OBERMAN: Who does?

11 MR. PATELLI: Commissioner Oberman, I
12 would just add that, you know, we wouldn't want to
13 get in any way of breaking down our particular rate,
14 given the sensitivity -- the competitive sensitivity
15 of questions like that. I don't think -- I think
16 largely, you know, the question is associated with
17 incentives, right? Absolutely, just as we've said in
18 our written testimony, the charge is designed to take
19 into account compensation, right, and be aligned with
20 costs, take into account costs, and that cost can
21 vary.

22 Direct costs -- costs associated with

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1 switching at yards, costs associated with railroad
2 hazard related to car hire, costs associated with
3 opportunity costs, opportunity costs caused by
4 congestion, the ability to not get to other customers
5 as easily as we would like to get to because of
6 congestion caused by cars in, for example, CSX yards.

7 There's a variety of different costs
8 associated with demurrage. I don't think anyone
9 would have intended some sort of exact science.

10 COMMISSIONER OBERMAN: Well, I wasn't
11 suggesting there were no costs, but Patrick had a
12 question and then I'll come back to this.

13 VICE CHAIRMAN FUCHS: So, John, you
14 mentioned the incentive effect. I guess I'm
15 wondering before you made a change, did you forecast
16 what the effect would be of that incentive? So, in
17 other words, you know, did you -- before you made a
18 change in '18, did you project what it would do for
19 say, you know, to use one of Kenny's stats, how many
20 customers were to unload within 24 days, did you
21 project what kind of effect the incentive would have?

22 MR. ADAMS: Yeah, I would say I don't know

1 that we thought about it in that context. I would
2 take a different approach. I think the goal and
3 objective was to improve the overall service.

4 VICE CHAIRMAN FUCHS: Right.

5 MR. ADAMS: Right? And what we recognized
6 early on during the transformation of scheduled
7 railroading was that there was a series of
8 inefficiencies, some which were a function of our
9 operating protocol, some was a function of our
10 customer.

11 VICE CHAIRMAN FUCHS: Right.

12 MR. ADAMS: And their approach with us, so
13 the goal at the end of the day for us was to improve
14 the underlying service product, so we did not project
15 or forecast per se, what the effects of demurrage
16 would be from a financial perspective. I don't know
17 if that's where that question --

18 VICE CHAIRMAN FUCHS: No, I mean in terms
19 of what you care about in terms of service. So, if
20 the incentive and the changes, whether it's a change
21 in credit days or a change in the level, is designed
22 to change shipper behavior -- customer behavior -- to

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1 increase the speed of loading and unloading, you had
2 to make a determination about what the level is and
3 the number of credit days, and you all made different
4 determinations, and I'm not asking you to compare
5 against each other.

6 MR. ADAMS: Right.

7 VICE CHAIRMAN FUCHS: I'm only asking you
8 for your individual determinations: did you project
9 or think about what the actual incentive effect would
10 be on service?

11 MR. ADAMS: Correct, so as an example
12 specifically it's related to free days.

13 VICE CHAIRMAN FUCHS: Yeah.

14 MR. ADAMS: So, prior to July 2018, we
15 offered 2 free days.

16 VICE CHAIRMAN FUCHS: Right.

17 MR. ADAMS: Today we offer one free day.

18 VICE CHAIRMAN FUCHS: And you're expecting
19 what kind of effect that to have? You know what I
20 mean?

21 MR. ADAMS: You know, so we're expecting a
22 couple things, and it's reflected in our performance

1 results.

2 VICE CHAIRMAN FUCHS: Yeah.

3 MR. ADAMS: One of which is a reduction in
4 dwell.

5 VICE CHAIRMAN FUCHS: Right.

6 MR. ADAMS: So, on average we're 8 hours
7 of dwell across the entire network.

8 VICE CHAIRMAN FUCHS: Right.

9 MR. ADAMS: Another consequence, of
10 course, would be velocity. So, improving the overall
11 network fluidity would be another example of what we
12 anticipated as a result of those changes.

13 VICE CHAIRMAN FUCHS: And then on the
14 revenue side did you all when you were changing kind
15 of your demurrage structure, did you all project how
16 much more revenue you would get because of it?

17 MR. ADAMS: No, we did not because that
18 would imply that our intent was to bolster revenue,
19 and that wasn't the intent. The intent was to
20 improve the overall efficiency of the service
21 product, and we've done that.

22 VICE CHAIRMAN FUCHS: Okay.

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1 COMMISSIONER OBERMAN: I'd like to just
2 follow-up on the subject. I thought that was very
3 helpful. Just to be clear, last year your demurrage
4 billings were 246 million dollars, so you can't tell
5 us as you sit here today how much of that 246 dollars
6 was calculated as compensation for the various costs
7 that Mr. Patelli just outlined and how much was
8 penalty?

9 MR. ADAMS: Yes, that is correct.

10 COMMISSIONER OBERMAN: Mr. Patelli, I
11 realize you say this is sensitive, but as I read the
12 case -- nobody suggests there may not be costs of the
13 kinds that you enumerated, but as I read the case
14 law, I assume I'm going to direct this to you because
15 you're sitting there as counsel in addition to, so I
16 think it's fair. There is a difference between
17 requiring a shipper under past case law to pay a cost
18 that's a compensation and a penalty unless you can
19 show fault, do you agree with that?

20 MR. PATELLI: Commissioner, I think it's a
21 good question. I think there are cases, you know. A
22 recent example was fuel surcharge, right. There are

1 cases where --

2 COMMISSIONER OBERMAN: No, I'm talking
3 about let's stick with demurrage.

4 MR. PATELLI: Right, but there are certain
5 charges that the railroad is holding itself out to be
6 representative costs, right? Demurrage in my view
7 has never been traditionally just about costs as
8 you've said, it's about both. And I don't think any
9 -- as far as I know in the case law, there's been no
10 railroad to say that it's just one or the other, but
11 that it's always been really.

12 COMMISSIONER OBERMAN: It's both.

13 MR. PETELLI: A consideration of both.

14 COMMISSIONER OBERMAN: Right, but don't
15 you recognize that in the past both the ICC and the
16 courts have separated out and have held that
17 railroads cannot collect a penalty unless it is shown
18 -- we'll get to who has to show it -- that the
19 shipper is at fault as distinguished from collecting
20 the compensation portion of the demurrage charge,
21 don't you recognize that's what the courts have
22 done?

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1 MR. PATELLI: I do recognize that in some
2 of the case law that I've seen, I can't say that
3 we've done an exhaustive analysis of all the case
4 law, but I do agree that usually the case law comes
5 up in the unreasonable practice context and as part
6 of the analysis of unreasonable practice, one of the
7 considerations to your point is, you know, who's at
8 fault, right? Was the demurrage bill itself caused
9 by railroad fault? I do think that part of that
10 analysis, yes?

11 COMMISSIONER OBERMAN: Well, we have done
12 an exhaustive analysis in preparation for this
13 hearing, and let me ask if you agree with this
14 statement: "When demurrage charges penalize a
15 shipper who is powerless to avoid or abate the
16 detention," penalize is the key word here, "a shipper
17 who is powerless to avoid or abate the detention of
18 cars because of circumstances beyond its control,
19 they do not accomplish their purpose." Do you agree
20 with that holding from one of the prior cases?

21 MR. PATELLI: I do agree. I do not think
22 it's reasonable to hold a shipper accountable when

1 they're powerless.

2 COMMISSIONER OBERMAN: Well, so the
3 question is if you can't separate out the
4 compensation from the penalty portion of the \$100 a
5 day charge or the 246 million that you billed last
6 year, then how is it that the shipper can determine
7 whether it's required to pay all of the charge or
8 just the portion that's compensation, at least if it
9 can be shown that the shipper is not at fault. How
10 do you separate it out? And how does the shipper
11 separate it out?

12 MR. ADAMS: Well in terms of shipper
13 empowerment or a shipper being powerless, I would go
14 back to the intent of what we're trying to accomplish
15 here, which is to run safe and efficient operations.
16 So, if a car is dwelling longer than the time that it
17 would take for a shipper to release the product back
18 to us, us place the car to them, there is an impact
19 to our ability to operate our network in the most
20 efficient manner possible. As you've heard in the
21 first panel, we all have constraints -- physical
22 plant constraints -- whether it's a serving yard, a

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1 hump yard whether it's a physical plant capacity that
2 a receiver has or an origin for a producer.

3 Our goal and our intent is to incentivize
4 the assets to move as fluidly as possible when in our
5 possession.

6 COMMISSIONER OBERMAN: Well let's follow-
7 up on that because you say when they hold it longer
8 than they need. So, in lowering the free time from
9 48 to 24 hours, did you go through all your
10 customers and assess which ones, if any, could unload
11 their cars within 24 hours, physically able to do it?

12 MR. ADAMS: Our approach was to provide
13 advance notification on the intent of the changes
14 that we were looking to implement, and then also
15 discuss the rationale as to why, and then the
16 underlying benefit, which our customers experience
17 today which is an improved service product.

18 Did we speak to each of our 5,000
19 customers? Absolutely not. Were they all notified?
20 Absolutely yes.

21 COMMISSIONER OBERMAN: Well you've heard,
22 and I'm sure you have seen the testimony from all of

1 the shippers who are here today and many say they
2 physically can't comply with these new timeframes.
3 The prior panel explained how not so much on
4 unloading, but accepting cars when you're ready to
5 deliver them, you didn't attempt to measure whether
6 24 hours was realistic for each of your customers?

7 MR. ADAMS: I think what we've attempted
8 to do, member Oberman, is in instances where
9 customers have shared with us their concerns relative
10 to the changes that we've made, we have elected to
11 work with them individually to develop a solution
12 that works both for ourselves and for the customer.

13 As we have embarked upon the changes and
14 the transformations --

15 CHAIRMAN BEGEMAN: Excuse me, so how many
16 customers have reached out to you to try to establish
17 some additional changes? I mean --

18 MR. ADAMS: To my knowledge specifically
19 it happens probably not as frequently. I would say
20 that --

21 CHAIRMAN BEGEMAN: CSX customers start
22 calling, Mr. Adams.

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1 MR. ADAMS: Specifically, so there's
2 roughly around 40 customers that have -- we've
3 reached out to, to help reduce their overall capacity
4 based on improved service performance. So, just a
5 few more sound bites there. Of the 40 customers that
6 we've had conversations with around optimizing their
7 overall network with us, we've seen roughly about a
8 third of those customers have had significant
9 reduction in their overall fleet size as a result of
10 improved cycle times.

11 There are also instances where we've had
12 conversations with customers that did not elect to
13 reduce their fleet size knowing full well that there
14 would be demurrage associated with their existing
15 supply chains. So, we'll go on the record as saying
16 we're open and we want to have those conversations
17 with customers if there are instances where customers
18 feel as if there's an opportunity to improve their
19 overall performance and partnership with us.

20 COMMISSIONER OBERMAN: If a customer came
21 to you and showed you that they could not meet your
22 24-hour deadline, would you give them a 48-hour

1 deadline, or is it your way or the highway?

2 MR. ADAMS: No, I think it's a
3 conversation that we'd be willing to have.

4 COMMISSIONER OBERMAN: Have you increased
5 the free time for any customer to 48 hours since
6 you've reduced it to 24?

7 MR. ADAMS: There are examples of
8 customers that we've made exceptions for and we do
9 that on an individual basis based on contracts.

10 COMMISSIONER OBERMAN: Exceptions on that
11 point -- 48-hour free time?

12 MR. ADAMS: Exceptions on our demurrage
13 policies in general; I can't specifically give you an
14 example of the 48 hours, no.

15 COMMISSIONER OBERMAN: Well, are there any
16 that have gotten an extended free time since you've
17 went to 24?

18 MR. ADAMS: There are customers, when we
19 look across our demurrage and accessorial policies,
20 where we have made exceptions to the policies as
21 published.

22 COMMISSIONER OBERMAN: Well, but the

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1 specific question I'm asking is about 48 hours versus
2 24, have you made exception to that policy or that
3 rule?

4 MR. ADAMS: I will follow-up with you
5 member Oberman, and give you a --

6 COMMISSIONER OBERMAN: And if so, I'd like
7 to know how many.

8 VICE CHAIRMAN FUCHS: To get back to a
9 question that I'm just kind of wondering because, you
10 know, one of the things I said in the opening is
11 that, you know, demurrage has useful purposes --- it
12 incentivizes faster loading and unloading, and in
13 doing so you get, your cars free up quicker, you get
14 more capacity, and you know, I think it reflects in
15 terminal dwell and other service measures. And so,
16 again, I'm just trying to think about, you all had to
17 draw the line somewhere and you know, the Board, and
18 the concept of reasonableness has to think about
19 where to draw the line.

20 You made decisions on the number of
21 credits for certain railroad error, you made
22 decisions on how much free time to give, and you made

1 decisions on what level to charge. And one of the
2 things that I appreciate about Mr. Rocker's testimony
3 is he talks directly about how many people, you know,
4 what percentage of folks unloaded and loaded within
5 24 hours.

6 And you all had to make the decisions and
7 so if what we care about is incentivizing changes in
8 behavior, I haven't heard how you all think about
9 drawing the line because you all drew the line
10 differently.

11 And, you know, if that's what you're
12 after, I just would like a little bit more clarity
13 into your thinking in terms of where you drew the
14 line on all three of those margins -- the credits,
15 the free time, and the level.

16 MR. ROCKER: I'm not sure if I can respond
17 to Commissioner Oberman's question. First of all I
18 just want to say at a high level, yes, we were very
19 deliberate and thoughtful in how we came up with the
20 charges and I will tell you that the eye was towards
21 network fluidity, that's what the focus was.

22 Because of where we are with our peers and

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1 because I'm at the table with our peers, I really
2 don't feel comfortable going into the details, but I
3 can tell you that we're more than willing to be
4 transparent with the Board and sitting down with you
5 confidentially at another time and walking you
6 through how we came up with those charges.

7 VICE CHAIRMAN FUCHS: Can you all speak to
8 what you expect the percentage without maybe -- what
9 you expect the percentage of customers that will
10 increase their loading and unloading speed by a
11 measurable difference. What, you know, the 24-hour
12 measure for example. You know, you've given some
13 point estimates based on recent experience. If we
14 were to look at the end of 2019 when all these
15 demurrages truly take effect and people are changing
16 behavior, you know, and they've settled in for a
17 little bit, what does that measure look like at the
18 end of the year?

19 MR. ROCKER: So, I'll do this pretty
20 quickly. So, Vice Chairman Fuchs, I'll tell you what
21 we did. Our vision for sharing the scenarios was
22 really to just be proactive with the customers and

1 allow us the opportunity to sit down with them and
2 work with them on actually getting the bills to zero.

3 VICE CHAIRMAN FUCHS: Right.

4 MR. ROCKER: We have no interest in
5 having --

6 VICE CHAIRMAN FUCHS: Right.

7 MR. ROCKER: Any of our customers have any
8 of these bills, so that was the input as far as
9 taking that proactive posture not to go out and just
10 forecast, you know, how much we thought the
11 additional amount would be.

12 COMMISSIONER OBERMAN: Could I sort of
13 just follow-up where we were, Kenny, as long as you
14 were talking and we'll come to NS. Can you answer
15 the question of what a portion of your daily
16 demurrage charge is compensation for costs and what
17 portion is penalty? And can you tell me how much of
18 the 149 million you billed for last year is
19 compensation, and how much is penalty?

20 MR. ROCKER: Not --

21 COMMISSIONER OBERMAN: Do you have, does
22 the data exist?

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1 MR. ROCKER: Commissioner Oberman, I was
2 trying to address that earlier and basically what I'm
3 saying is that we feel comfortable being transparent
4 with the Board. We just don't feel comfortable while
5 we're sitting with our peers talking about it.

6 COMMISSIONER OBERMAN: You realize that if
7 you were litigating a case with some shipper trying
8 to collect it, you'd have to tell the court or this
9 Board publically what the portions were in order to
10 collect it?

11 MR. ROCKER: Understood.

12 COMMISSIONER OBERMAN: So, do you have the
13 data? Does it exist?

14 MR. ROCKER: We can share that data with
15 you, yes.

16 COMMISSIONER OBERMAN: Alright, on this
17 point that Patrick was asking about, I noted a couple
18 of points you've addressed here and in your written
19 testimony. When you talk about it had been 55% of
20 your bulk trains unloading in 24-hours and now it was
21 62 at the time, now you're saying it's up to 65.
22 Bulk train, is that the same as a unit train, or what

1 does that mean?

2 MR. ROCKER: Correct, yes.

3 COMMISSIONER OBERMAN: And so, two
4 questions -- the 35% of your customers who are not
5 unloading in 24 hours, why is that? Are they
6 physically able to do it in your view?

7 MR. ROCKER: In some cases we do not know
8 if they are physically able, and so in every case we
9 are providing them with an alternative service
10 solution.

11 COMMISSIONER OBERMAN: Such as?

12 MR. ROCKER: A manifest product. So, we
13 do work with our customers to do that if that's the
14 choice, that they don't believe they can unload in
15 the 24 hours.

16 COMMISSIONER OBERMAN: I'm curious of why
17 you did not include in your submission what
18 percentage of your manifest customers are unloading
19 in 24 hours, do you know that answer?

20 MR. ROCKER: Directionally, I'd tell you
21 the majority of them could.

22 COMMISSIONER OBERMAN: Well I don't know,

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1 is that 51% percent? I mean what does that mean?

2 MR. ROCKER: I don't have a specific
3 answer for you.

4 COMMISSIONER OBERMAN: You know, one of
5 the questions here that I think is following-up on
6 Patrick that has struck me about just the volume of
7 response we've got to these hearings is that if you
8 have a system in which a significant percentage of
9 the people aren't complying, and I doubt they're not
10 complying because they're lazy or indolent, it could
11 be there are some out there but I'd be surprised,
12 whether it's 35% or 49% or 50%, it's a high
13 percentage of people who are not, as you've said, the
14 intent is to have no demurrage charges, in theory if
15 it worked perfectly there would be none. Half the
16 population, or a third, can't do that.

17 On its face that tells me there's
18 something wrong some place, and I think it would be
19 very important to know what percentage of your other
20 non-unit train customers are having this problem.
21 Let me switch to NS for a minute.

22 VICE CHAIRMAN FUCHS: Marty, if I could

1 quickly just mention why I think that matters. Why I
2 think that the question in terms of what you expect
3 matters, is that if you are continually increasing
4 and continually reducing free time and you're not
5 observing a change in customer behavior, you wonder
6 whether or not it's having an incentive effect, which
7 is why I think the projections are important.

8 We think demurrage as a concept and
9 providing that fluidity is in everybody's interest.
10 The question is whether it's truly having an
11 incentive effect and changing behavior such that we
12 can improve network fluidity, or whether or not
13 something else is going on. And that's what we're
14 trying to get to, so, you know, the fact that I'm not
15 hearing concrete information about what you all
16 believe to be the incentive effect going forward, I
17 would like to have more confidence in when you're
18 making changes, you know -- what is expected so we
19 know that those changes are considered and that
20 we're all kind of moving together and thinking about
21 network fluidity.

22 So, I think that's why it matters and

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1 that's the purpose of the question.

2 MR. ADAMS: So, Vice Chairman Fuchs, to
3 answer your question more pointedly, in terms of what
4 are we looking at to define success.

5 VICE CHAIRMAN FUCHS: Yes, that's a good
6 way to describe it.

7 MR. ADAMS: Okay, so we measure dwell
8 across all individual car types and what we're seeing
9 sequentially quarter over quarter, as we started, as
10 you could imagine the percentages were dramatic and
11 now we've seen continued incremental improvement in
12 reduced cycle times across all of our car types, both
13 our scheduled network, our manifest network as Kenny
14 alluded to from UP, and for our bulk-train customers
15 alike.

16 I think the other component of your
17 question that you're pulling on is what does the
18 future hold in terms of the effects of demurrage and
19 accessorials on improving the overall performance of
20 the network?

21 Over the last 18 months I think the
22 changes that we've made and the pace at which we've

1 made those changes have delivered the desired
2 outcomes. And what I mean by that is what are
3 customers buying from us? They're buying a service
4 product that fundamentally is 35% faster and more
5 reliable than it was when we started this journey 18
6 months ago.

7 So, that's the evidence of where we stand
8 today. In terms of what we intend to do on a go
9 forward basis -- I think what we'd like to continue
10 to do is continue to monitor the overall effects of
11 service performance relative to demurrage, but in
12 terms of a drawing a line in the sand, in terms of
13 what success looks like, I don't have an answer for
14 you today, but we'd love to, you know, continue to
15 have dialogue about how we get there together.

16 CHAIRMAN BEGEMAN: So, aren't you going to
17 need to drill down more than a one-size-fits-all
18 approach to demurrage and to 24-hours and the ability
19 for a customer to load or unload. I mean on the one
20 chart you had said demurrage incentivizes customer A
21 to order fewer cars, but it doesn't sound like --
22 while you do have metrics, dwell, it's a number of

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1 things that you have improved upon, and you should be
2 proud of where you've come after self-imploding to
3 get there a while ago, but it seems that you're going
4 to have to drill down. There are customers such as
5 Ben. I know Ben was talking about NS but there are
6 customers that will probably never be able to be
7 incentivized and not be able to pay the price that
8 you are charging them because they just don't have
9 the ability to avoid the demurrage costs.

10 And so at some point, like, there needs to
11 be drilling down on a customer, per-customer basis to
12 determine whether or not changes need to occur
13 besides a one-size-fits-all approach. And one of the
14 questions I have is, so Kenny, thank you for making
15 it real clear that you have read your customer's
16 testimony. You have actually taken
17 some actions with -- UP has -- with respect to what
18 the testimony indicated to you. I'm curious, have
19 you and NS and CSX, did you read the testimony? I
20 mean did you listen to the first panel?

21 MR. ELKINS: Yes, ma'am.

22 CHAIRMAN BEGEMAN: Things aren't all rosy.

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MR. ELKINS: No, ma'am. I'll speak for Norfolk Southern and try to address some of the issues that have already come up or the question that have already come up. We started down the road to improvement of our service knowing a couple of things. Number one was our service was not where our customers needed it to be, our network was not as fluid as it needed to be nor as stable and resilient.

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We heard that word earlier. At the same time, we knew a component of that lack of service standard that we wanted to pursue, we had a lot of cars online, both private and system cars and our fluidity, like I said, was not where we wanted it to be.

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So, we started our journey on PSR with the idea that we want to provide service to our customer, number one first thing -- manage our assets and control our costs. That does not mean lower your costs, control your costs. So, when you think about reciprocity, we knew one of the first things we had

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1 to do if we want our customers to load and unload
2 faster and produce more product at a higher rate, we
3 needed to do the same thing.

4 And so therefore, we increased the level
5 of service to our customers dramatically on a daily
6 basis. And I think you heard Alan say earlier that
7 we've quadrupled the amount of customers.

8 CHAIRMAN BEGEMAN: For those customers
9 though that cannot go to a 6- or 7-day-a-week switch
10 and yet now they're being charged demurrage?

11 MR. ELKINS: Well I would say we did not
12 think it was reasonable for us to have an expectation
13 for the customer to work more often if we didn't work
14 more often ourselves because that was our first piece
15 of it.

16 CHAIRMAN BEGEMAN: But not everyone can be
17 open 7 days a week or work 24/7. We can.

18 MR. ELKINS: Yeah, I would ---

19 COMMISSIONER OBERMAN: And we do.

20 MR. ELKINS: And I think many companies
21 make economic decisions based on how often they're
22 going to work and what days they're going to work,

1 and there's an economic price if they decide not to.

2 CHAIRMAN BEGEMAN: I do want to say
3 something quickly. I have bashed CSX a few times
4 publicly about history -- recent history -- and I
5 have been pressuring UP and NS and KCS and anybody
6 else that wants to change their operating plans to do
7 it slowly, methodically. Do not reduce your
8 headcount for your customer service operations.

9 I'm not saying I support your operating
10 plan changes, but I commend you for, you know, having
11 customer service representatives, for going slow, for
12 not, you know, going with the caving to the Wall
13 Street pressure of rip off the band aid --- you can
14 do that, but just know we're here.

15 MR. ELKINS: We understand and --

16 CHAIRMAN BEGEMAN: And I'm not going
17 through that again and neither are customers, so
18 thank you.

19 MR. SHAW: You've heard our strategy and
20 to the Vice Chairman's question about the targets for
21 this, we were very clear that we would improve our
22 customer-facing metrics by 40% this year which we are

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1 on target to do.

2 We are also very clear that we would
3 reduce the number of cars online which -- and we're
4 going to hit that target as well. That has a causal
5 impact on service, and also service has an impact on
6 the number of cars online and it's not -- so I want
7 to make it clear that it's not just the accessorial
8 program that's driving these.

9 VICE CHAIRMAN FUCHS: Right.

10 MR. SHAW: There are a lot of independent
11 variables that go into this, including changes that
12 we've made. We were doing things that made it very
13 inefficient and provided a poor service product for
14 our customer. We had to change that. We changed
15 that in conjunction with our accessorial programs.

16 Our customers this time last year were
17 telling us we needed to make changes to our service
18 product. We've done that and we're delivering those
19 results.

20 COMMISSIONER OBERMAN: I'd like to follow-
21 up here and continue on a couple lines of
22 questioning. So, for NS, can you answer the

1 question of how much of your typical demurrage charge
2 is calculated as compensation and how much is
3 penalty, not only on a daily basis, but how much of
4 the \$243,000 you billed for last year was penalty,
5 how much was compensation, can you answer that?

6 MR. SHAW: I do not feel comfortable
7 talking about how we calibrate rates in a public
8 forum.

9 COMMISSIONER OBERMAN: Well, is some
10 portion of it penalty, without telling me how much?

11 MR. SHAW: So, for us demurrage is
12 designed for two things -- to encourage more
13 efficient use of our -- we have over 5,000
14 customers. It's designed to encourage more efficient
15 use of our assets, including track space.

16 COMMISSIONER OBERMAN: I understand what
17 it's designed for, I'm trying to figure out how it's
18 calculated. So, let me ask all three of these
19 railroads, I'm going to ask all the rest of the
20 railroads over the next two days. I'd like to know
21 what portion of your charges are calculated as
22 compensation and what are calculated as penalty. And

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1 I'd like to know what the answer to that question
2 was yesterday before I raised the issue because if
3 you haven't thought about it until today, I'd like
4 you to be candid and tell us that.

5 And if you don't have an answer, I'd like
6 to know that too. I think it's quite important based
7 on what I understand the law to be on your right to
8 bill and collect these charges. I think it's
9 crucial. And it's crucial to educating us on how we
10 go forward particularly on this question of fault and
11 proximate cost, which comes up all the time.

12 I'm going to get, specifically with regard
13 to NS, follow-up on what Patrick was getting, but I
14 want to get a little more granular about it and I'm
15 just going to talk about the prior panel. So,
16 you've heard, I'm sure you've read Consolidated
17 Scrap, I'm going to say it wrong, CSR, yes,
18 Consolidated Scrap's account, which I've not only
19 heard here but I've heard before.

20 So, is it NS's position that the purpose
21 of your new demurrage or storage charge, whichever
22 you want to call it, that is being paid by CSR is to

1 incentivize them to hire staff and to be open 7 days
2 a week? Is that what you're trying to incentivize?

3 MR. ELKINS: Sir, we're trying to
4 incentivize them to manage their pipeline, and if
5 they elect to use our track to store their cars then
6 there's an economic cost for that.

7 COMMISSIONER OBERMAN: Yes, but I'm trying
8 to find out, I think we're all trying to find out
9 what can they do if the goal -- let me go back. Do
10 we all agree with Kenny's statement that in an ideal
11 world nobody would pay demurrage because the system
12 would function perfectly? That's the goal we're
13 trying to get to, do you agree?

14 MR. SHAW: That Norfolk Southern's goal.

15 COMMISSIONER OBERMAN: Pardon?

16 MR. SHAW: That is Norfolk Southern's
17 goal.

18 COMMISSIONER OBERMAN: Alright, so if
19 that's the goal, what are you trying to incentivize?
20 And I use CSR because I don't think they're unique
21 but they were here and we have their specific facts.
22 And then I'm going to talk about Olin.

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1 So, what is it that you want to
2 incentivize CSR to do? Do you want them to move
3 their yard to a place where they have enough acreage
4 to build more track? Do you want them to hire staff
5 to operate 24/7? Are they lazy? What is the
6 problem? And what are you trying to get them to do?

7 MR. ELKIN: We are trying to incentivize
8 them to manage their pipeline and their fleet.

9 COMMISSIONER OBERMAN: I want to know
10 specifically what can they do? Manage it doesn't
11 answer my question.

12 MR. ELKIN: Well there are a number of
13 things they could do. They could expand their
14 facility.

15 COMMISSIONER OBERMAN: Where?

16 MR. ELKIN: Or add another facility
17 somewhere else.

18 COMMISSIONER OBERMAN: So, they could buy
19 real estate?

20 CHAIRMAN BEGEMAN: I think Ben said no one
21 ever has talked to them.

22 COMMISSIONER OBERMAN: Yeah, they said you

1 never came around but now you're talking to them
2 here. So, A -- they could go out and buy real
3 estate, that's one thing they could do.

4 MR. ELKIN: They could ---

5 COMMISSIONER OBERMAN: And then they'd
6 have to have cars delivered to other real estate. Do
7 you know what a scrap processing plant looks like and
8 the kind of equipment you have to put in there to
9 process scrap?

10 MR. ELKIN: Yes -- -

11 COMMISSIONER OBERMAN: You know, are you
12 incentivizing them to go out and spend millions of
13 dollars on new shredders and other things at another
14 location that has more track, is that what you're
15 trying? I'm just trying to figure out how this is
16 supposed to work.

17 MR. ELKIN: Well, we're trying to
18 incentivize them or at least reflect the decision
19 they're making by not being able to take all the cars
20 in.

21 COMMISSIONER OBERMAN: I understand that
22 but I'm trying to figure out whether this makes any

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1 sense for each shipper? This is a shipper that
2 doesn't have real estate to add track, doesn't
3 operate 7 days a week. So, to accommodate you, who
4 wants to deliver 7 days a week and give them no free
5 time, they have to buy real estate, build track, buy
6 shredders, or hire more personnel. Those are the
7 things you're trying to incentivize, yes or no?

8 MR. ELKINS: Well we are having to build
9 track, if they don't, to store their cars.

10 COMMISSIONER OBERMAN: Well, I'm just
11 trying to get at who's building the track and who's
12 going to pay the money for it? So --

13 CHAIRMAN BEGEMAN: But you aren't
14 currently having to add infrastructure for CSR?

15 MR. ELKIN: They're consuming
16 infrastructure that is available to the network.

17 COMMISSIONER OBERMAN: But they weren't
18 were they, and why didn't the previous 48-hour system
19 work?

20 MR. SHAW: Our service metrics weren't
21 where they needed to be. Our customers told us we
22 needed to improve our service product --

1 COMMISSIONER OBERMAN: So if CSR comes to
2 you and says look, I can't meet the no free time and
3 avoid the demurrage, and you heard the numbers that
4 they gave us, 67,000 I think just last month. If
5 they tell you I physically can't do it, so I want
6 more free time because they were not incurring these
7 charges when they had more free time.

8 Is your answer take it or leave it? If
9 you want our service you will operate with no free
10 time, is that the answer?

11 MR. ELKINS: To be honest, I need to find
12 out a lot more about their particular situation, but
13 I would say this in general. We keep referring to
14 free time, that's free time to the customer or the
15 receiver, but it's not free time for us.

16 COMMISSIONER OBERMAN: Whatever you want
17 to call it is the answer. This is how we're offering
18 our service. If you don't like it, ship your scrap
19 some other way, is that the answer?

20 MR. ELKINS: Well I think the answer is
21 there must be an economic benefit for you to store
22 your cars on our railroad, if you're not going to do

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1 something else with them.

2 COMMISSIONER OBERMAN: I understand your
3 rationale, I'm trying to figure out what CSR's
4 options are here.

5 MR. ELKINS: We don't know enough about
6 CSR sitting right here right now.

7 COMMISSIONER OBERMAN: I'll come back to
8 Olin.

9 VICE CHAIRMAN FUCHS: I think Marty is
10 touching on a really important issue because what I'm
11 hearing from you all is that when you're making these
12 changes, you talked about an economic benefit, and
13 you know, and I thought that Mr. Adam's presentation,
14 you know, tried to lay out what that benefit was,
15 because it wasn't for just you all but it might be
16 for another customer that can take advantage of that
17 capacity or free up some yard space or what have you
18 and then things move fluidly.

19 And I'm tracking, but I think what, you
20 know, what we're trying to think about here is there
21 may be a benefit to you, but there may be a cost to
22 someone else. So, you know, you might get a benefit

1 and one of the customers might get a benefit and then
2 another one of the customers might get a cost.

3 And so, I think one of the frameworks that
4 we're kind of thinking about is so if customer A gets
5 a huge cost, has to buy a new plant, you know, really
6 has to expand capacity and, you know, customer B in
7 your yard has some capacity, you don't have to build
8 more track. You know there might be some service
9 issue.

10 There might be some -- a performance
11 issue, you know, just by using more capacity, but you
12 know, is the right framework to think about it, how
13 much, what the burden is on that particular customer
14 A relative to what you gain? Is that the framework
15 that we should be thinking about?

16 MR. ELKINS: I think the framework, it is
17 very complex because it is a network.

18 VICE CHAIRMAN FUCHS: Right.

19 MR. ELKINS: And there's hundreds and
20 thousands of inputs.

21 VICE CHAIRMAN FUCHS: Right.

22 MR. ELKINS: And outputs along the way, but

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1 our goal is to move our customer's freight from
2 origin to destination as quickly as we possibly can
3 and frankly, handling cars around other cars that are
4 sitting there --

5 VICE CHAIRMAN FUCHS: I hear you.

6 MR. ELKINS: Is inherently --

7 VICE CHAIRMAN FUCHS: But we're kind of
8 operating, you know, you all are saying I want better
9 performance, better performance and there's a benefit
10 to it. And then you have this customer saying, you
11 know, we're at a threshold right now where I can't
12 change my behavior and I'm going to incur a huge
13 cost.

14 And you know, if the Board is thinking
15 about what is reasonable in any one of these cases,
16 should it be looking at, wow, this person would take
17 5 million dollars to build a new plant as you all
18 were suggesting or at least contemplating, and
19 really, you know, our capacity is really not that
20 much and therefore that's not reasonable because the
21 costs to this customer are so much larger than what
22 you all gain, is that how we should be thinking about

1 it?

2 MR. ADAMS: May I comment here, Vice
3 Chairman Fuchs? So, I think there's two sides to
4 this equation that we need to think about. First and
5 foremost, there are unintended consequences when our
6 service deteriorates, so in other words, in the
7 example that you just outlined, if our service was
8 inferior and we were congested, many of our customers
9 would have to find additional relief valves to move
10 the existing traffic that they move today, okay?

11 So, our goal is at the 5,000 customer
12 level, many of our customers do not pay demurrage as
13 I stated in my comments, 50% don't pay demurrage.
14 And so, when we look at the other 50% of customers
15 that do pay demurrage, what we're thinking about is
16 how do we help customers, both upstream and
17 downstream, so whether it's the Olins of the world
18 who are the receivers or whether it's shippers, how
19 do we help them think through solutions that make
20 sense in order to do business with the railroad? So,
21 you know, as we think about a framework, my only
22 concern would be I think we have to think about both,

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1 you know, both sides of the equation.

2 VICE CHAIRMAN FUCHS: At some point, you
3 know, something stopped you all from raising per-day
4 charges to 500, okay? And, you know, something
5 stopped some of you all from having zero free time.
6 And I guess I'm wondering what the framework is the
7 Board should be thinking about for when something
8 becomes unreasonable? Something stopped you.

9 COMMISSIONER OBERMAN: Just to pick up on
10 that because we have a specific example here this
11 morning, and I have to believe you folks from NS are
12 familiar with Olin because I'm sure it's one of your
13 biggest customers. We're familiar with Olin because
14 we were just there.

15 Olin says to avoid your charges, they're
16 going to have to build -- invest 10 million dollars
17 in infrastructure. Are you trying to incentivize
18 them to go out and spend 10 million dollars? Is that
19 how you would defend your charges to Olin?

20 MR. ELKINS: Sir, I'll say we're trying to
21 make sure that Olin is able to make reasonable
22 economic decisions about what they're going to do in

1 the future.

2 COMMISSIONER OBERMAN: Is that reasonable
3 in your view? You'd say that if it's 10 million,
4 that's what's reasonable?

5 MR. SHAW: I don't have visibility into
6 their business decisions and into their processes to
7 make a judgment on that.

8 COMMISSIONER OBERMAN: Yeah, but to follow
9 on Patrick's question, you're asking them to spend 10
10 million dollars.

11 MR. SHAW: We're not necessarily asking
12 them to spend --

13 COMMISSIONER OBERMAN: Sure you are. You
14 just said that's the only way you can avoid it.
15 You're not saying that he doesn't know what it's
16 going to cost him to avoid your charges, are you? Is
17 there some reason we should doubt Olin when they tell
18 us it's going to cost them 10 million dollars to
19 avoid your charges?

20 MR. SHAW: No, I'm not suggesting that at
21 all. I told you, we do not have visibility into
22 their potential solutions.

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1 COMMISSIONER OBERMAN: But when Patrick
2 asked you how do you evaluate the cost benefit here
3 and how should we figure out, okay, this is a good
4 idea, Olin has to spend 10 million and NS could make
5 these charges, that's okay, that's the way the system
6 should work. I mean we're supposed to just look up
7 at a rock or something and say yeah, that's a good
8 way to do it? I mean there has to be somebody said
9 here they want to make evidence-based decisions, was
10 that Kenny, somebody?

11 I assume you all would endorse that
12 concept here, so I'm trying to -- what I'm struggling
13 with is what appears to just be some arbitrariness to
14 these numbers and I just don't have an explanation.
15 You know, MillerCoors, which won't come on until
16 after you're here, but has complaints that you raised
17 their demurrage from 100 to 150 a day, they say in
18 retaliation for the fight over the Manhattan
19 distributors, you're familiar with -- you read their
20 testimony I'm sure.

21 MR. ELKINS: Yes.

22 COMMISSIONER OBERMAN: So, was there a

1 problem with MillerCoors that you had to give them an
2 extra \$50 because they weren't moving cars fast
3 enough? Was there some evidence of that?

4 MR. ELKINS: No, in the case of
5 MillerCoors, it's about the equipment type, and what
6 we try to do is reflect the demand for that
7 particular equipment type across our system.

8 COMMISSIONER OBERMAN: Did demand go up
9 50%?

10 MR. ELKINS: Demand went up, yes sir.

11 COMMISSIONER OBERMAN: 50%?

12 MR. ELKINS: I'm not sure, I don't know
13 the specifics.

14 COMMISSIONER OBERMAN: Just our overall
15 question here about -- all of you tell us so when
16 you're trying to defend these things that it benefits
17 all the customers. Am I hearing that prior to the
18 skyrocketing increase in demurrage charges that began
19 in the last couple of years -- and the numbers are
20 astronomical in my view in terms of percentage
21 increase --

22 Do I hear that your customer bases were

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1 coming to you and clamoring for you to increase
2 everybody's demurrage charges so their service would
3 be better? Is that what generated this?

4 MR. SHAW: Customers were coming to us and
5 clamoring for us to improve our service product and
6 turn equipment faster. Boxcars were one equipment
7 type and we were short and you, the Board, heard
8 yourself from customers who had to use other forms of
9 transportation when we didn't have boxcars available.
10 So, we needed to make a change to our operating plan,
11 and we needed to make a change to our accessorial charges so
12 that we could turn the equipment faster and satisfy
13 the needs of over 5,500 customers.

14 CHAIRMAN BEGEMAN: NS and UP [have] heard
15 from the Board over the last year, year and a half
16 frankly. When CSX to their new operating plan, a lot
17 of that traffic went to NS and you ended up sort of
18 in a place where you couldn't really dig out and you
19 were under a lot of pressure. You've done a lot of
20 phone calls with our Board staff as UP, whether it
21 was the hurricanes from last summer or just there
22 were a lot of different steps to take.

1 In fact, about a year ago in March I wrote
2 a letter to all the carriers saying so what do you
3 expect for the rest of the year? I will say no one
4 said we plan to implement precision-scheduled
5 railroading, CSX you already had been doing that.
6 So, a lot -- you know, things change sort of on a
7 dime, even in the railroad industry it seems.

8 But so, I do -- I want to acknowledge that
9 yes, you have been having service issues. You are
10 not where, I guess, where your customers, where your
11 Board, where the nation's economy needed you to be,
12 so thank you for your efforts.

13 Having said that, you know you get to a
14 point where some things become sort of beyond the
15 pale from what we are hearing and I do hope that if
16 you haven't read testimony, read it. I'd like to
17 know. Kenny thank you for saying that you read the
18 testimony. You've actually made some changes based
19 on it. I'm curious to know if either of the other
20 carriers have also thought of additional changes
21 based on that feedback.

22 The other railroad witnesses will be asked

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1 the same question. Feel free to come up with changes
2 tonight that you can announce. You know, I say that
3 tongue in cheek and clearly, you know, there's some
4 constructive input based on all of this testimony.

5 MR. ROCKER: Just real-quick, Chairman
6 Begeman, I mean we're going to continue to assess and
7 re-evaluate the charges we have in place. I can tell
8 you that right now we've got some thoughtful
9 deliberate discussions on making another concession
10 here, we just want to make sure we get it right, but
11 we do appreciate the venue and the feedback from the
12 customers.

13 MR. ELKINS: Let me say we are constantly
14 evaluating our programs for their reasonableness and
15 the effectiveness in terms of the outcomes.

16 CHAIRMAN BEGEMAN: Do you talk to your
17 customers in that effort?

18 MR. ELKINS: A great deal, you're looking
19 at the two most pro-shipper people in this room.

20 We --

21 CHAIRMAN BEGEMAN: Hey, I don't know about
22 that.

1 COMMISSIONER OBERMAN: I'm going to
2 introduce you to Ben Abrams when the meeting's over
3 here.

4 VICE CHAIRMAN FUCHS: You mentioned,
5 that's what I'm trying to get at is you know, help us
6 out in terms of how we should be thinking about
7 reasonableness because we've got hundreds of pages
8 of people saying that all are not being reasonable
9 and shippers are saying ways that it can be more
10 reasonable, you know.

11 Elements of reciprocity and other things
12 that we are exploring in the first panel and I'm not
13 hearing from you all how we should be thinking about
14 what is reasonable. You say you evaluate for
15 reasonableness, what are your criteria?

16 MR. ELKINS: Our criteria are based off
17 the interactions we have with our customers every day
18 and we do have those every single day.

19 VICE CHAIRMAN FUCHS: What does that mean?
20 I mean you know, it's you know, there's going to be -
21 - I think there hopefully will be some network
22 benefit to some of these changes, but you didn't do

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1 \$500 a day because there's a benefit trail off. I'm
2 trying to get at you know, why would -- maybe a one-
3 way, as a thought experiment would be you know, some
4 of you didn't do zero free time, okay and all of you
5 don't have \$500 a day.

6 I'm not asking to compare to each other,
7 but for your individual decisions, are there things
8 that you wanted to do that you thought would have a
9 benefit for network velocity that you just thought,
10 you know, they weren't reasonable? And if so, why?
11 Specific criteria.

12 MR. ELKINS: Specific criteria, I will
13 attempt this, is we believed when we assessed our
14 programs more than a year and a half ago that 5 free
15 days was not reasonable based on the effect it was
16 having on our network and on the rest of our
17 customers. So, we began to gradually draw that down
18 and the anticipated course was zero.

19 We urgently need to deliver value to our
20 customers through service and it's a very dynamic
21 interplay between that sort of program than the
22 service we deliver. I mentioned earlier that we

1 increase frequency for our customers on a daily basis
2 -- quadrupled it, and that is not a cost-cutting
3 measure, you know, that's putting more people in the
4 field and more boots on the ground so to speak.

5 COMMISSIONER OBERMAN: But that doesn't
6 help everybody. Some people are hurt by your
7 increased frequency.

8 MR. ELKINS: It does not help everybody
9 but we --

10 MR. SHAW: It helps the entire network and
11 it overall, it's to the benefit of our 5,500
12 customers.

13 COMMISSIONER OBERMAN: So, some customers
14 have to pay for others is what you're saying?

15 MR. SHAW: There are --

16 COMMISSIONER OBERMAN: That's what you're
17 saying?

18 MR. SHAW: There are inefficiencies out
19 there and the customers who more efficiently utilize
20 the equipment will benefit.

21 COMMISSIONER OBERMAN: But you're implying
22 that a customer has an ability to respond, and that's

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1 what we're trying to get at. So, physically your
2 system-wide change means that some customers are
3 subsidizing you and are subsidizing other customers?
4 I don't know how you can get away from the simple
5 arithmetic, but I'm not going to -- go ahead.

6 VICE CHAIRMAN FUCHS: So, the \$500
7 hypothetical right, you know, you increased the
8 dollar amount of an incentive, you would expect that
9 you would get a certain change in behavior, right?

10 MR. SHAW: Right, yes.

11 VICE CHAIRMAN FUCHS: Okay, you all didn't
12 go to that level?

13 MR. SHAW: Correct.

14 VICE CHAIRMAN FUCHS: And I guess I'm just
15 trying to -- because we're trying to think about
16 reasonableness here and this is before the credit
17 days and reciprocity of credit days and all that
18 sort of thing, but I think, you know, generally
19 speaking the framework can be applied in different
20 contexts.

21 So, you know, okay you guys stared at an
22 incentive that you thought would improve network

1 velocity and you didn't do it. So, that leads me to
2 believe that either you thought that any dollar
3 above what you're currently charging or any reduction
4 in free time would not have an effect on network
5 velocity, or for whatever reason you decided that
6 whatever benefits in network velocity was not worth
7 what you would be imposing on other customers.

8 And I'm trying to understand why, or how
9 you came to that decision.

10 MR. SHAW: Well, I would say this. I'm
11 uncomfortable talking about the way we set prices or
12 incentives with my colleagues here. We'd be really
13 glad to discuss this in private with you and talk
14 about the methodology that we applied.

15 VICE CHAIRMAN FUCHS: Okay, I will take
16 you up on that if you all could just explain to us
17 what's a reasonable charge and what's an unreasonable
18 charge. And if you think that it leads to specific
19 issues, competitive issues, then we can have
20 individual discussions. I do tend to think that you
21 can maybe speak in you know, I think the criteria for
22 assessing reasonableness may be a competitive issue,

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1 but if you think that the specific about how you
2 apply that criteria to your business, then I'll take
3 you up on having an individual discussion.

4 MR. SHAW: Thank you.

5 CHAIRMAN BEGEMAN: Do any of you care to
6 comment on some of the earlier testimony about the
7 change in ownership of the fleet and how it seems
8 that the private owners are not being fairly, I
9 guess, compensated or their -- it seems to be an
10 imbalance of the changes given what demurrage's
11 original purpose was for -- to move assets owned by
12 the carriers?

13 I take that as a no.

14 MR. SHAW: We are continuing to reinvest
15 in our fleet and we, over the past couple of years
16 we've reinvested in coil cars, we've reinvested in
17 coal cars. We've invested in --

18 CHAIRMAN BEGEMAN: But certainly it has
19 changed quite a bit?

20 MR. SHAW: There has been a shift.

21 CHAIRMAN BEGEMAN: Yes.

22 MR. SHAW: Right, from --

1 COMMISSIONER OBERMAN: Have any of you
2 ever considered compensating any of the private car
3 owners that were here today when you delay in
4 returning their cars, have you ever considered it?
5 I'll take that as a no, okay.

6 CHAIRMAN BEGEMAN: I actually would like
7 to get -- talk a bit about your dispute resolution
8 process for when a customer wants to, I guess, you
9 know, dispute a demurrage or accessorial charge.
10 Some of the things that we hear is that the invoices
11 are automatically processed, and you know, dispensed
12 to the customer.

13 I'm curious to know if you know what your
14 deadlines are for when a customer has to basically
15 say hey, I want to challenge this? I think Kenny,
16 you lay it out in your testimony, but do railroads -
17 - what is your process, and also do you have a
18 timeframe for when you must respond to your customer
19 and ideally how quickly does a situation get
20 resolved?

21 MR. ROCKER: Just real-quick Chairman
22 Begeman, just to talk about some of the tools we

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1 have. We actually have real time dispute tools
2 during the month which means that a customer can
3 literally go into the system and see where their
4 charges are on the 10th of the month, the 18th of the
5 month, so there is not a surprise. There isn't at
6 the end of the month the customer is saying hey this
7 was something that I wasn't aware of. I heard the
8 back and forth earlier about the number of days and
9 disputes that were out there for months and I can
10 tell you that we respond on average in 10 days, but I
11 want to differentiate a response from resolution.

12 So, on average we respond in about 10
13 days. I'm sure there are customers here that say
14 well it took us longer to resolve, but we are going
15 in, digging into the data, looking at the facts and
16 again I just want to emphasize something. If there's
17 something that the customer did or didn't do with
18 their supply chain, then we do feel like they're
19 accountable.

20 If it's something that Union Pacific has
21 done, then you know, we cancel those bills. Even if
22 -- and I heard this a little bit earlier, even if it

1 starts off on a different railroad out in the east,
2 we're literally going in, looking at the waybills and
3 reconciling whether or not we believe the bunching
4 has occurred.

5 So, it's real time, so I want to say real
6 time but then we're also quick to respond in 10 days,
7 and the last piece is that we're looking and and
8 getting all the facts.

9 COMMISSIONER OBERMAN: One quick follow-up
10 on that Kenny, do you do that investigation before
11 you send the demurrage bill or only if somebody
12 challenges it?

13 MR. ROCKER: On the disputes.

14 COMMISSIONER OBERMAN: So, you may send a
15 demurrage bill where you're totally responsible for
16 it. And you may send it anyway and it only arises to
17 the level of your figuring out whether you're
18 responsible if the tests were disputes. Is that the
19 way the system works?

20 MR. ROCKER: Roughly 95% of our bills are
21 accurate so they're --

22 COMMISSIONER OBERMAN: What's the basis of

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1 that?

2 MR. ROCKER: We get that from the disputes
3 also. There are sometimes reporting errors where --

4 COMMISSIONER OBERMAN: But you don't know
5 how many people are getting bills that aren't
6 accurate that aren't bothering to dispute it, do you?

7 MR. ROCKER: Well with about 8% usually
8 dispute.

9 COMMISSIONER OBERMAN: Yes, but there could
10 be other people out there who are going to -- it's a
11 small bill or it costs them too much to dispute it,
12 so they just pay it. You don't have -- you have no
13 way of telling us that?

14 MR. ROCKER: Yeah, I don't have a way of
15 telling you that, but I also don't have a way of
16 seeing that that's happening so.

17 COMMISSIONER OBERMAN: I'm sorry.

18 VICE CHAIRMAN FUCHS: I have a completely
19 separate question.

20 CHAIRMAN BEGEMAN: Okay, well then, I will
21 continue somewhat. UP, you know, having -- I've been
22 here for longer than my colleagues and I did remember

1 in 2013 when UP was and remains the only carrier to
2 sort of opt into the Board's arbitration program and
3 you announced certain matters that you would be
4 willing to arbitrate with your customers.

5 I believe it was demurrage and accessorial
6 charges and misrouting or mishandling of railcars
7 with caps of \$200,000. So, one -- thank you for
8 that. I will say no one has taken you up on that
9 gesture. I hope maybe perhaps at this point, you
10 know, time goes on, maybe some shippers have
11 forgotten your willingness to do that.

12 I'm going to ask the other panelists
13 whether or not you would consider participating in
14 Board sponsored mediation or, and the other future
15 panelists I will ask as well.

16 MR. ELKINS: Yes, ma'am. If we were
17 approached, we would consider it.

18 CHAIRMAN BEGEMAN: Okay, so if the
19 customer like came to you, then you would kind of
20 jointly come to the Board?

21 MR. ELKINS: We would consider and see
22 where it went, yes ma'am.

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1 COMMISSIONER OBERMAN: I just want to
2 finish on dispute resolution, Patrick, there's a
3 couple of questions I had for NS. A number of people
4 have focused, and you apparently are unique among the
5 railroads on your \$500 charge for the privilege of
6 disputing the demurrage bill. What is the basis --
7 what is the justification for that?

8 MR. ELKINS: Well our demurrage dispute
9 process is robust, and we actually enhanced it as we
10 made these changes. And the way our demurrage
11 dispute process works today is our customers can go
12 online using our online tools each day and see where
13 they stand in terms of credits and debits.

14 They can dispute any charge at any time
15 during the month -- it's a monthly bill, and they can
16 dispute any charge up to 5 days after the end of the
17 month for the previous month.

18 COMMISSIONER OBERMAN: For no charge?

19 MR. ELKINS: For no charge, and our
20 commitment is a 2 hour turnaround on any dispute made
21 online. So, we take that process very seriously.
22 Once you leave that period of time where we --

1 COMMISSIONER OBERMAN: 5 days?

2 MR. ELKINS: The 5 days after the end of
3 the month, then if we are -- if we review the dispute
4 and determine that the bill is correct, that is where
5 the \$500 charge comes in.

6 COMMISSIONER OBERMAN: And if you
7 determine that the bill is not correct, do you pay
8 them \$500?

9 MR. ELKINS: No sir, but we do not charge
10 them.

11 CHAIRMAN BEGEMAN: Wow.

12 COMMISSIONER OBERMAN: And, have you made
13 some evidence-based determination that most shippers
14 can figure out whether it is worth challenging a
15 demurrage bill within 5 days given the complexity of
16 the system?

17 MR. ELKINS: For our shippers we've
18 invested a lot of money in online tools and continue
19 to enhance them. The honest truth is this. It's in
20 our very best interest to have robust visibility for
21 all of our rail users in our system. We want them to
22 manage their pipelines. We don't want to manage the

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1 pipeline for them for their product, so we try to
2 make it as simple as possible.

3 And I think we can show you some evidence.
4 I don't have it today, but I can show you some
5 evidence that we've made a substantial investment to
6 improve that process for our customers.

7 COMMISSIONER OBERMAN: Your tariffs
8 provide that if you litigate with a customer over
9 demurrage, and you win, the customer must pay your
10 attorney's fees and costs going to court, you're
11 aware of that?

12 MR. ELKINS: Yes, sir.

13 COMMISSIONER OBERMAN: You're also aware
14 that the same tariff does not provide that if you
15 lose in court, or in front of this Board, you pay
16 their attorney's fees?

17 MR. ELKINS: Yes, sir.

18 COMMISSIONER OBERMAN: Have you ever heard
19 of the concept in contract law of lack of mutuality?
20 I know you're not a lawyer or you don't say you are.

21 MR. ELKINS: No, sir.

22 COMMISSIONER OBERMAN: You've never heard

1 that concept?

2 MR. ELKINS: No, sir.

3 COMMISSIONER OBERMAN: Can you figure out
4 what it means?

5 MR. ELKINS: I sure can.

6 COMMISSIONER OBERMAN: Yeah, do you think
7 that's fair?

8 CHAIRMAN BEGEMAN: It's okay if you're not
9 a lawyer.

10 COMMISSIONER OBERMAN: Do you think that's
11 fair?

12 MR. ELKINS: Sir, our tariff is designed
13 to reflect an activity-based system so that our
14 customers can -- the network can be efficient and in
15 the case of disputes, I really can't comment any
16 further.

17 COMMISSIONER OBERMAN: Well but when
18 you're wrong, if a customer has to take you to court
19 and they win, first of all there's -- I've been in a
20 lot of fee-shifting cases, there's a high deterrent
21 for litigating if you're going to lose and you have
22 to pay somebody's attorney's fees. So, the fact that

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1 that's in there, I don't need any evidence to tell
2 you is a deterrent to many people from even
3 challenging you because they may not only lose the
4 demurrage case, they may pay a fortune in attorney's
5 fees.

6 But I can tell you that if there was at
7 least the opportunity to collect their fees, if they
8 win that would level that playing field. Do you see
9 that?

10 MR. ELKINS: I see what you're saying sir,
11 yes.

12 VICE CHAIRMAN FUCHS: And you all talked
13 about efforts to reduce errors and improve the
14 system. Can you maybe talk us through some of the
15 errors that you saw that you were working to
16 improve? What are the most common causes of
17 erroneous demurrage bills?

18 MR. ELKINS: The example that comes to
19 mind.

20 VICE CHAIRMAN FUCHS: Yeah.

21 MR. ELKINS: Are usually around the human
22 interaction in the process where our crews are given

1 a reason code for activity field.

2 VICE CHAIRMAN FUCHS: Yeah.

3 MR. ELKINS: And either that's incomplete
4 or in some cases missing and we really take a strong
5 stance toward trying to police that data and enhance
6 it.

7 VICE CHAIRMAN FUCHS: And did you say
8 enter activity -- I saw in some of your testimony
9 that you know, crews have more hand-held devices and
10 all that sort of stuff, and I you know, I kind of
11 think to supply more evidence, you know, to verify
12 when something actually happened.

13 And so, you know, what specifically is
14 being done to improve what you just described?

15 MR. SHAW: We have changed our operating
16 procedures and are requiring our crews to more timely
17 input the information into the system after the
18 switch is completed. And then the hopes is that our
19 customers will be able to go to our online suite of
20 tools and look at the individual activity relatively
21 quickly while the information is still fresh in
22 everyone's heads.

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1 VICE CHAIRMAN FUCHS: And do you audit it
2 and enforce against crew error? I mean I'm just
3 trying to think about what gives meat to the
4 improvement.

5 MR. ELKINS: We do, we have a process
6 particularly in any case where a code is missing or
7 entered that would show that a customer action caused
8 a charge, we have a manager that goes in and audits
9 every one of those.

10 VICE CHAIRMAN FUCHS: And I don't want to
11 change away from the dispute resolution if you all --
12 if I can kind of get into another area. One of the
13 things that kind of stuck out to me in your
14 testimony and in the move to PSR generally, is the
15 whole idea of car trip plans.

16 And measuring yourself up against car trip
17 plan compliance, which intuitively makes good sense,
18 you know, and I understand you know, the way a car
19 trip is measured is sometime from when the customer
20 releases it to placement.

21 And there might be some margin in between
22 but generally you know, they're actually constructive

1 placement. And so, I guess I'm wondering just as a
2 starting question, what is your current car trip plan
3 compliance?

4 MR. ROCKER: I'll take that, and I'll tell
5 you what it used to be and what it is.

6 VICE CHAIRMAN FUCHS: That'd be great.

7 MR. ROCKER: It used to be 24-hours plus
8 or minus of a day, so if we said it'd be there
9 Wednesday, 24-hours it might get there Tuesday or
10 Thursday if we counted it on time. Today it's within
11 8 hours, so a car trip plan is within 8 hours of
12 whenever we said.

13 VICE CHAIRMAN FUCHS: The original ETA?

14 MR. ROCKER: Correct.

15 VICE CHAIRMAN FUCHS: Okay.

16 MR. SHAW: Ours is plus or minus 24-hours
17 to the original ETA.

18 MR. ADAMS: We actually measure to the
19 hour, so within the scheduled crew shift, so 8 hours.

20 COMMISSIONER OBERMAN: I take it that no
21 one uses the Metro 6 minutes on time on this measure.

22 VICE CHAIRMAN FUCHS: And what percentage

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1 of car trip or car trips meet their original ETA?

2 MR. ROCKER: For us, before the floods it
3 was at 73%.

4 MR. ELKINS: On time early for us is now
5 above 90%.

6 MR. ADAMS: Trip plan compliance for us is
7 in the high 70%, right.

8 VICE CHAIRMAN FUCHS: Okay, so for the --
9 let's say before the 27%, if something is late from
10 the original ETA, talk us through whether or not they
11 get you know, credits and whether or not they incur
12 demurrage. So, does -- can you all say that every
13 single shipment, every single car that does not meet
14 its car trip plan on its original ETA, so therefore
15 whatever expectation the customer had was somehow
16 changed during transit in some way, and it was not in
17 the last mile issue by the way.

18 Do all of those shipments get some sort of
19 break on demurrage if they arrive later than what was
20 projected to the customer?

21 MR. ELKINS: Every load on Norfolk
22 Southern gets a service credit. In fact, we doubled

1 those late last year.

2 VICE CHAIRMAN FUCHS: Yeah, I saw that.

3 MR. ELKINS: So, every loaded shipment
4 gets a service credit if it falls early or late,
5 versus that 24-hour window.

6 VICE CHAIRMAN FUCHS: Okay.

7 MR. ROCKER: Yeah, I would just quickly,
8 if it's not delivered in the serving yard. If it's
9 in the serving yard and it's not delivered on time,
10 then yeah, there is a credit.

11 VICE CHAIRMAN FUCHS: If it's in the
12 serving yard, but what about the original -- if it
13 doesn't meet its original ETA that was established
14 when the car was originally released?

15 MR. ROCKER: That's when we're looking at
16 it and going back and looking at when the cars were
17 way-billed.

18 VICE CHAIRMAN FUCHS: Okay.

19 MR. ADAMS: Yes, so very similarly, once
20 it hits the local serving yard, if for whatever
21 reason it's a delay based on railroad service, we
22 will automatically issue a credit to the customer.

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1 In terms of the overall service product, trip plan
2 and lines and visibility in issuing a credit in or
3 out, we haven't gotten to that level of
4 sophistication yet, but it is something that we're
5 looking at.

6 VICE CHAIRMAN FUCHS: And you all would
7 agree that, you know, that going earlier in the
8 supply chain would allow customers greater time to
9 shift their operations and manage demurrage charges
10 if in fact there was kind of -- I hate to say
11 reciprocal, but there was some sort of credit for
12 lateness and some sort of a burden kind of imposed
13 upon them relative to their initial expectations.

14 You all kind of, you know, acknowledged
15 that if you could get to that technological
16 capability, it's something that certainly would be
17 helpful to customers.

18 MR. ADAMS: I would say there's a couple
19 things that we're doing.

20 VICE CHAIRMAN FUCHS: Yeah.

21 MR. ADAMS: Whether it's dispute
22 resolution or leveraging technology. You know, we

1 give customers in the end visibility from the time
2 that car is actually released.

3 VICE CHAIRMAN FUCHS: Right.

4 MR. ADAMS: To the time it's arrived at
5 the local serving yard. So, a customer has the
6 ability to adjust, you know, their opportunity if you
7 will, real time, especially if it's a 4 or 5 or 6-day
8 transit.

9 VICE CHAIRMAN FUCHS: Sure.

10 MR. ADAMS: There's also instances whereby
11 they have an opportunity to work with the local crew.
12 If there -- let's say for example, it's a customer
13 that's only getting 5 day a week service, and they
14 have a car that comes into the yard and they have a
15 relationship with the local crew, they want to pull
16 that car in early. They have the ability to do that
17 and the same works in reverse.

18 VICE CHAIRMAN FUCHS: And just to be
19 absolutely clear, when we talk about car trip plan
20 compliance, we're talking about loaded release to
21 placement, correct?

22 MR. ADAMS: Correct.

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1 VICE CHAIRMAN FUCHS: And not empties, but
2 a lot of the problems we were hearing were on
3 empties, so you know I saw some nods and such that
4 you know, people thought generally it's a good
5 practice if you miss your ETA, that you give some
6 credit, if your technological capabilities are there.

7 And first of all, I mean anyone jump in if
8 someone thinks that's not a good practice.

9 MR. ADAMS: Well I just want to clarify.
10 So, when we talked about trip plans, we're talking
11 about trip plans for all of our cars.

12 VICE CHAIRMAN FUCHS: Right.

13 MR. ADAMS: Right, so not --

14 VICE CHAIRMAN FUCHS: On the empty side
15 too.

16 MR. ADAMS: Correct.

17 VICE CHAIRMAN FUCHS: But do your empties
18 get an ETA as well, or do your empties get a window
19 whereby you have a window and then you have an order
20 fulfillment rate?

21 MR. ADAMS: Yes, so there's two pieces to
22 that question.

1 VICE CHAIRMAN FUCHS: Yeah.

2 MR. ADAMS: One is the system cars.

3 VICE CHAIRMAN FUCHS: Yeah.

4 MR. ADAMS: So, the instances where
5 customers are using our cars. We give customers a
6 10-day window to order in and so at the third day
7 they didn't have visibility to the arrival times.

8 VICE CHAIRMAN FUCHS: So, when you'll get
9 an arrival time on that third day?

10 MR. ADAMS: Right, and as a general rule,
11 we allow ourselves 7 days to be able to get the car
12 released and then appropriately place it in route to
13 a customer that wants to use a system car.

14 VICE CHAIRMAN FUCHS: So, you have a plus
15 or minus 7 on the empty side, am I hearing that
16 correctly?

17 MR. ADAMS: Correct, the terms of their
18 ability to order the car, give us advanced
19 notification or sufficient lead time to move that car
20 to 10-day cycle. Because on average it takes us 7
21 days to move that empty to the location where the
22 customer needs to utilize it.

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1 VICE CHAIRMAN FUCHS: And one of the
2 things I'm kind of beginning to appreciate is the
3 difficulty with inner line moves, because you all
4 might have an ETA for your segment and someone else
5 might have an ETA for a different segment, and there
6 might be a third party logistics person, but their
7 party might be historical data and now your actual
8 operational data, and so it's kind of a big web where
9 you either can have multiple platforms that aren't
10 talking to each other, or you can have one platform
11 that's maybe not as perfect as the railroad platform.

12 Or, as good as the railroad platform --
13 so, from a visibility standpoint the customer is in a
14 difficult spot, I think, you know, on those and a
15 more difficult spot and a line move than of course,
16 a single carrier move, and I think that's obvious. A
17 couple things on the inner line.

18 First is when one carrier gets to an
19 interchange and offers up traffic for another
20 carrier, and let's say that that second carrier
21 isn't ready. Does that second carrier pay the first
22 carrier, in interchange? So, there's an interchange

1 and you know, something was released to the other
2 carrier, is there some sort of pay, call hire maybe?

3 MR. ADAMS: Well yeah, car hire.

4 VICE CHAIRMAN FUCHS: So, you're using one
5 of the railroad's tracks and there's a car delay, why
6 -- talk me through why car hire is the only charge
7 there and you're not charging the other railroad
8 demurrage? When you offer something up at
9 interchange and another railroad is not ready to pick
10 it up, it's using your car, it's using your track,
11 why doesn't that railroad get demurrage?

12 CHAIRMAN BEGEMAN: Because they won't pay
13 it.

14 VICE CHAIRMAN FUCHS: I'm just kind of,
15 you know, it's the same concept right, it's about
16 network fluidity and incentives.

17 MR. ADAMS: My understanding is car hire
18 is the governing structure that we use economically,
19 so that's -- I think that's the way we've structured.

20 VICE CHAIRMAN FUCHS: But the car hire
21 doesn't have the penalty component that demurrage
22 does, right? Demurrage rates are significantly

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1 higher than car hire charges, so you know, if it was
2 -- if the customer is using your track and car, you
3 want to -- the whole purpose of demurrage is to
4 incentivize the customer to change the behavior.

5 I guess I'm wondering why you wouldn't
6 want to adopt the same incentive structure for the
7 railroad that's delayed in picking something up in
8 interchange to change the behavior?

9 MR. ADAMS: Well, I can speak for our
10 railroad as a net receiver and I'm certain Norfolk
11 Southern can appreciate this. We are a net receiver
12 of cars, so I can tell you car hire for us is a very
13 big deal and on an annual basis it's significantly
14 more than demurrage so we have every incentive to
15 partner with our interline partners to move cars as
16 quickly across our network as we possibly can.

17 And I think as an industry, we want to
18 explore a different structure. I think that's a
19 conversation that we should have.

20 VICE CHAIRMAN FUCHS: And I guess I'm
21 wondering you know, and I don't mean to be too you
22 know, because I know the cost and the way you guys

1 interchange is extremely complex and it's developed
2 over years and I don't mean to disrupt it, but it's
3 again I'm trying another way to get at that incentive
4 effect.

5 So, Mr. Adams, you said that the car hire
6 charge on a rate basis was sufficient to motivate
7 you. But then there's a judgment call made for the
8 shipper that that car hire charge, which is much
9 lower in the demurrage isn't sufficient to motivate
10 the shipper, do you know what I mean? And it's for
11 the same thing using another -- using the railroad's
12 track and car.

13 And so, it's like the shipper needs a
14 higher incentive than the railroad or, you know, talk
15 me through that.

16 MR. ADAMS: Are you saying on a monetary
17 basis for that?

18 VICE CHAIRMAN FUCHS: Yeah.

19 MR. ADAMS: I can tell you for us car hire
20 is substantial. So, it's --

21 VICE CHAIRMAN FUCHS: Not on a rate basis,
22 on an instance basis so if you were using a western

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1 carrier's track and car, you are paying a lower rate
2 than a shipper that's using a western carrier's track
3 and car, is that -- I mean it's a fair statement.
4 Car hire and demurrage are different things but it's
5 a fair statement, right?

6 MR. ELKINS: I think in the interest of
7 accuracy and transparency I'd rather give more
8 information to respond.

9 VICE CHAIRMAN FUCHS: Okay, alright.

10 CHAIRMAN BEGEMAN: Okay, I'll try to be
11 relatively quick. I want to give CSX a chance to
12 respond to my question for sponsored arbitration. I
13 know you nodded and gave me a thumbs up, but that
14 may not translate.

15 MR. PATELLI: But Chairman Begeman, just
16 to respond on that arbitration. I think you would
17 recognize that we have time and time again utilized
18 the Board's resources on whether the OPAGAC and Lucy
19 Martin's team did such a good job serving in that
20 mediation role from time to time, or whether it be
21 even in rate cases where again, CSX on more than one
22 occasion has utilized the Board's good resources on

1 medication -- taken advantage of those and then
2 brought about a mutually agreed upon solution with
3 the customer.

4 And then here too, we would also -- we are
5 always open to alternative dispute resolution, always
6 and so if a shipper were to bring to us a dispute on
7 arbitration, we would highly consider it.

8 CHAIRMAN BEGEMAN: Great answer. My
9 second question is just would any of you care to
10 comment or respond to the testimony from Kinder
11 Morgan and the other intermediaries that we're going
12 to hear from later on, the third party folks, any
13 comments you have based on what they have said as far
14 as --

15 MR. ADAMS: So, when we think about
16 customers, we think about all customers very
17 similarly right? So, whether it's a shipper or a
18 third-party logistics provider or a receiver very
19 similar to Kinder Morgan, and our goal is to actively
20 engage them very similarly to the way that we engage
21 our shippers.

22 My observations of our receiver community

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1 is that there are many instances where our warehouse
2 partners and our receivers are being very successful
3 using the scheduled railroading principles around
4 efficiency and supply chain optimization.

5 My recommendation would be that the third
6 parties play an active role in managing both upstream
7 and downstream in order to insure that they're able
8 to effectively manage their inventories as they come
9 inbound and more importantly, on the outbound side, I
10 would also respond to Kinder Morgan in particular, in
11 terms of how we view the interaction with the
12 receivers.

13 Every customer that's a party to the
14 waybill, has access to the information and ships CSX.
15 So, under no conditions is there a receiver or a
16 warehouse that's flying blind relative to inbound
17 inventories that are coming in.

18 CHAIRMAN BEGEMAN: But they can't
19 necessarily control it, it's more the shipper saying
20 no, I don't want it yet, right?

21 MR. ADAMS: I think it's incumbent upon
22 the receiver to have active dialogue with the shipper

1 to ensure that they don't create congestion, both in
2 the yard and also congestion for that particular
3 receiver.

4 To suggest that somehow that's the sole
5 responsibility of the shipper and the railroad, I
6 don't think that's appropriate because there are
7 three parties involved that should be communicating
8 to ensure the most optimal outcome.

9 COMMISSIONER OBERMAN: Just on this point
10 though, but in your understanding of Kinder Morgan to
11 say that the way the billing works where the bill is
12 imposed on the intermediary on a "no fault" basis,
13 they have no leverage to work out anything with a
14 shipper because of the way you, the railroads are
15 billing them in general I assume all of you, did you
16 understand that part of the problem? How did they
17 solve that?

18 MR. ADAMS: I understand. I don't
19 disagree with it based on my experience dealing with
20 receivers. Again, I think that if there are
21 congestion issues that are being caused upstream, I
22 think the receivers have a couple different options.

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1 They can always bill back whatever those incremental
2 demurrage charges that they are receiving, they can
3 bill those back in some accessorial form to their
4 shipper.

5 They can work with their shipper to
6 develop a more optimal supply chain, so that they
7 aren't creating congestion in our yard nor for
8 themselves at the last mile. Those are the solutions
9 that I would offer up.

10 MR. ROCKER: All that I can tell you is
11 that we're working with all the folks in the supply
12 chain, so if it is a receiver, we are giving them
13 tools to manage and we are taking that all the way
14 throughout the supply chain at the origin point and
15 working with them to ensure that they aren't sending
16 too many cars, so that's an active discussion.

17 It's not a situation where we just have or
18 just in certain technology, we're actually working
19 with those receivers.

20 MR. ELKINS: And at Norfolk Southern, we
21 believe everyone in the supply chain has a
22 responsibility to the network, certainly Norfolk

1 Southern has a responsibility to supply a stable,
2 reliable environment for our customers to succeed,
3 and our customers, receivers, shippers, consignees,
4 have a responsibility to promote a fluid network.

5 COMMISSIONER OBERMAN: A couple more
6 isolated points to tie up a few things we've talked
7 about. On the question of your congestion charge,
8 this is to the NS folks, everything I've read said
9 there's no definition of congestion. How does the
10 shipper know when they're going to be socked for a
11 congestion charge?

12 MR. ELKINS: As I said earlier, we're
13 always evaluating our programs to make sure that they
14 are reasonable (and effective. The tariff and it's
15 in our May 1 submission, it's really the definition
16 of 2 days of inventory for that customer based on
17 their recent switching activity in terms of how many
18 cars they can take in or out). So 2 days is sort of
19 a threshold, but we really try very, very
20 deliberately to tailor that to local conditions, if
21 that makes sense.

22 COMMISSIONER OBERMAN: Well, you know, Mr.

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1 Chirumbole, I'm not sure I pronounced that correctly,
2 says he doesn't know how you compute it and therefore
3 can't avoid it, that's the essence of what I heard.
4 You heard him this morning.

5 MR. ELKINS: I did.

6 COMMISSIONER OBERMAN: How could that
7 happen if you've defined it for him?

8 MR. ELKINS: We do define it for him, and
9 we work diligently to try to work inventory down
10 before we impose any charge.

11 COMMISSIONER OBERMAN: I think maybe I
12 should introduce you to him too when the hearing's
13 over. Mr. Patelli, you're unfortunately the only
14 lawyer identified on here, so I'll direct this
15 question to you, others can answer it.

16 Do you share CN's view that under section
17 746 you are mandated to bill people for demurrage,
18 you don't have an option?

19 MR. PATELLI: Yeah Commissioner, I think
20 it's helpful to go back to that language, 10746 --
21 rail carriers shall compute demurrage charges and
22 establish rules related to those charges in a way

1 that fulfills the national needs related to freight
2 car use and distribution and to maintenance of an
3 adequate supply of freight cars.

4 So, I do think that Congress -- the intent
5 of Congress there is very direct, right? I think
6 that that language makes it very clear how important
7 it was for railroads to use demurrage to help
8 control network flows on their network, right? And
9 it's reflective of the fact demurrage has been around
10 for a very, very long time.

11 I think in some respects probably when
12 Congress put that language in, it was an assumption
13 right, that it's here today, it's going to be here
14 forever, and it's also I think an acknowledgement or
15 recognition that is a very important tool for
16 controlling network.

17 COMMISSIONER OBERMAN: Congress doesn't
18 tell you how to set the demurrage rates. Do you
19 think you'd be in violation of the statute if you
20 reduce the free time from -- if you increase it from
21 24 back to 48-hours? I mean?

22 MR. PATELLI: No, I do think that actually

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1 inherent in that language too is flexibility and
2 discussion on the part of the rail carrier.

3 COMMISSIONER OBERMAN: Well that's what I
4 was getting at. CN doesn't seem to take that point
5 of view and I wanted to see if you did.

6 MR. PATELLI: I do think there's a
7 directive there. "Shall compute demurrage charges,"
8 I do think there's a directive there and I think I'm
9 trying to get, you know, I could think of language.

10 COMMISSIONER OBERMAN: The "shall" is the
11 way I read it is the computing, not the sending the
12 bill.

13 MR. PATELLI: Yeah. I do think, you know,
14 some of this is probably an open question, but if you
15 thought about it all the way through, like if you had
16 a hypothetical, but railcars didn't have demurrage
17 right, in their published tariff for example, you
18 know.

19 And let's say their service was highly
20 inadequate, you know, would the other customers on
21 the line who are officially managing their assets,
22 have some sort of complaint towards that railroad for

1 not doing what the statute says very clearly, "shall
2 compute demurrage charges?" Yeah I think it's a
3 question. I don't pretend to have the answer right
4 now, but it is clear and something that we see.

5 CHAIRMAN BEGEMAN: Getting sued for not?

6 VICE CHAIRMAN FUCHS: It's something that
7 we see in history too, in terms of you know, as I
8 mentioned in 1906 car shortages, right? And then the
9 establishment of the Uniform Code and then there was
10 big increases in demurrage, you know, during World
11 War I.

12 And you know, when we see that, you know,
13 to your point there are some aspects where you know,
14 demurrage does provide an incentive, that is
15 recognized by statute. You know, and I think the
16 situation we're dealing with is the other way on the
17 reasonableness then of those practices.

18 COMMISSIONER OBERMAN: Well and that leads
19 into sort of my final area. All of you have talked
20 about trying to modify your systems over the last 2
21 or 3 years and it's a work in progress to get from
22 here to there. So, we've heard witnesses, and I'm

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1 sure they're not unique, but just take the ones we
2 heard this morning.

3 So, Olin says they're considering, I
4 gather, investing 10 million dollars in order to have
5 more, I guess, storage or space to move cars, to put
6 cars on to avoid your charges. So, if you
7 understand that the change in the system is something
8 that will cause shippers to change their behavior
9 over time, one of the things I'm struggling with is
10 you didn't give them time particularly where it's a
11 long term. Mr. Chirumbole says it will take a year
12 for them to build this new infrastructure.

13 In the meantime, you've slapped these
14 demurrage charges on them. So, if one of these
15 shippers comes to -- and any of you could answer it,
16 but the example was NS -- it says look, we're
17 willing to spend 10 million dollars to avoid these
18 new charges, but it's going to take us a year, so
19 don't bill us during the year because now we're
20 paying twice. Are you open to that?

21 MR. ELKINS: Sir, we're always glad to
22 talk to our customers. We do it every day and we

1 will continue to do that.

2 COMMISSIONER OBERMAN: Has anything like
3 that happened in the 2 or 3 years since you've
4 embarked on this program, any of you?

5 MR. ELKINS: I would rather not answer
6 that in an open forum since --

7 COMMISSIONER OBERMAN: Well you don't have
8 to name the customer, I'm just talking conceptually,
9 is it an open -- is it something that has happened
10 and are you willing and have you actually done it in
11 a way that shows us you're willing to do it?

12 MR. ROCKER: I can answer that for UP. We
13 have made exceptions. Every case is unique. Every
14 customer is unique, so there are exceptions out
15 there. The other thing --

16 COMMISSIONER OBERMAN: Do they center
17 around this concept that it will take the customer
18 some months or a year to get their shop in shape to
19 meet your requirements?

20 MR. ROCKER: Directionally, yes. The
21 other thing though, and I've said this before and I'd
22 be remiss if I didn't say it again is that we were

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1 deliberate in how we looked at assessing the charges
2 and we do have -- we are aware of which customers and
3 how much can support the 24 hours. My response was
4 the majority, I don't feel comfortable going into the
5 details there, but I can tell you that at every turn
6 we have worked to ensure that we've minimized, and we
7 want to be at zero, so.

8 COMMISSIONER OBERMAN: CSX?

9 MR. ADAMS: Yes, sir, member Oberman, so
10 to answer your question pointedly, the answer is yes.
11 I personally have been involved with a number of
12 different customer-specific issues whereby customers
13 have requested lead time in order to build
14 infrastructure or to fully optimize their supply
15 chain to minimize their exposure to demurrage, and
16 that's a conversation that we will continue to have
17 with our customers.

18 COMMISSIONER OBERMAN: And when they do
19 that, do you then say fine we won't charge you the
20 demurrage while you're making those expenses?

21 MR. ADAMS: There are instances where
22 we've done that, yes.

1 COMMISSIONER OBERMAN: Thank you, that was
2 all I had.

3 CHAIRMAN BEGEMAN: Well that will conclude
4 Panel II at 1:20, thank you all very much. I want to
5 just say something before it gets loud. We're going
6 to make one quick change in order. Rebecca Dye from
7 the FMC is going to go next and then the next panel
8 will follow her.

9 And I also would like to acknowledge
10 another important person in this room, Mr. Ron Pitori
11 from the FRA. Thank you for attending, someone
12 should get him a seat.

13 MR. PITORI: Likewise.

14 CHAIRMAN BEGEMAN: Thank you.

15 MR. PITORI: Yes.

16 VICE CHAIRMAN FUCHS: Thank you for
17 attending Administrator.

18 CHAIRMAN BEGEMAN: Thank all of you for
19 your testimony, I appreciate it.

20 COMMISSIONER OBERMAN: Thank you all.

21 PANEL III

22 CHAIRMAN BEGEMAN: Okay everyone, we're

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1 going to get started. Our next witness is
2 Commissioner Rebecca Dye from the FMC, thank you and
3 thank you for sitting through most of this hearing so
4 far.

5 MS. DYE: I learned a lot, thank you, my
6 compliments on a good hearing. Thank you very much
7 and I'm pleased that you would allow me to appear
8 before you today to discuss the recommendations of
9 the Memphis Supply Chain Innovation Team.

10 Federal Maritime Commission has employed a
11 new approach to Steve Port's suggestion called Supply
12 Chain Innovation Teams to develop commercial
13 solutions to freight delivery underlying operational
14 problems.

15 The Memphis team arose out of the
16 Commission's current investigation of ocean carrier
17 and marine terminal demurrage and detention charges,
18 and as I said we've gotten lots of good ideas today.

19 And thank you for the opportunity to come
20 over and talk to you about our approaches and I look
21 very much forward to our continued collaboration on
22 our mutual concerns. The team in Memphis has a lot

1 of experience in delivering international ocean
2 freight and I originally was awfully concerned about
3 going and leading that team, but then I talked to my
4 lawyers and they said, "sure, these are ocean freight
5 moves through the rail ramp in Memphis."

6 And then I came over and talked to you and
7 off we went. In our first meeting last May, the team
8 agreed that the most critical need for improvement in
9 freight velocity and fluidity in and out of the rail
10 ramp and Memphis, was for a single and operable grade
11 pool of chassis.

12 How chassis are made available has become
13 a critical element of American international supply
14 chain productivity. The Memphis team concluded that
15 the essential qualities of this high performing
16 grade pool are number one -- an adequate supply of
17 interoperable chassis.

18 Number two -- safe and good quality
19 chassis, number three -- reasonable access to
20 choices, choice on merchant shipping when the
21 shipper or the trucker has responsibility for
22 delivery and finally most important, a pool manager

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1 with authority and accountability for chassis quality
2 and supply.

3 Strong support for the grade chassis pool
4 was expressed in this December meeting in Memphis
5 included 4 Class I railroads, VNSS, UP, CN and CSX
6 and from our Ocean Carrier Association, OCEMA.

7 And I also want to ensure the Board that
8 the two major chassis providers were also at the
9 meeting and represented at last December's meeting.

10 Major importers and exporters shared their
11 stories of millions of dollars in inventory held up
12 in congestion in Memphis, resulting, they believe
13 from the lack of chassis. American cotton and paper
14 exporters shared the loss of export sales, millions
15 of dollars in additional air freight costs to prevent
16 mills from shutting down overseas.

17 The impact of these service disruptions
18 from the past 2 years has drastically affected cotton
19 and other agricultural competitiveness and reputation
20 in the market. In summary, the Memphis team
21 concluded that current chassis provisioning is not
22 keeping up with intermodal demand and changes

1 necessary.

2 And the first step in these supply
3 changes, geared to port congestion, seaport
4 congestion, in 2016 and 2017 we observed that where
5 in our supply chain there are direct customer
6 relationships, there is at least a vehicle for
7 commercial problems to get resolved.

8 When no customer relationship exists
9 between a provider of equipment service and the user
10 of the equipment or service, operational problems are
11 magnified. In our inland rail locations where most
12 customers, most containers are mounted on chassis,
13 there is no customer relationship between truckers
14 and chassis providers, or even involvement in chassis
15 provisioning decisions that are made by others.

16 For this reason, I support greater
17 provider choice from the carriers. The Memphis team
18 has prepared a white paper. We believe that this
19 initiative would alleviate a lot of underlying
20 problems and I ask that the white paper and my full
21 statement be included in your hearing record, thank
22 you. I look forward to our greater collaboration. I

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1 very much appreciate this opportunity today to
2 discuss their findings, next steps for them is to get
3 a little more visibility for their findings since the
4 first time that this chassis pool issue has ever been
5 completely considered.

6 And it is a problem in the seaport since
7 2009 and ocean carriers began to divest their chassis
8 equipment. Thank you. I'll be glad to answer your
9 questions or for the record if you prefer.

10 CHAIRMAN BEGEMAN: Thank you very much for
11 joining us and thank you for the various meetings
12 we've had over the years, working more
13 collaboratively is something we certainly enjoy
14 doing. It's a great opportunity. And one of the
15 things that I think is terrific which I'm going to
16 try to emulate is the fact that the FMC can assign a
17 project, so important, as the project that you
18 undertook, to another colleague. And I think that is
19 something I could certainly trust my colleagues with
20 as well, so thank you for that.

21 Because there's plenty of work to do,
22 plenty of work to go around, so thank you. We will

1 save questions but thank you for your flexibility.

2 VICE CHAIRMAN FUCHS: And likewise,
3 Commissioner Dye, thank you for everything you've
4 done for the supply chain innovation teams and for
5 leading these solutions, thank you.

6 CHAIRMAN BEGEMAN: We will now go to the
7 third panel, please join us and I know that at least
8 one person unfortunately had to leave with Herman's
9 group, and I know Brad needs to catch a plane
10 momentarily. So, if anyone wants to swap orders,
11 please do so.

12 PANEL IV

13 VICE CHAIRMAN FUCHS: Thank you. So, I'll
14 kick-off this panel, some familiar faces for RSTAC
15 and RETAC and other forums, so thank you all for
16 being here and we'll start with Matt.

17 MR. BRAINERD: Good afternoon Chairman
18 Begeman, Vice Chairman Fuchs and Member Oberman. My
19 name is Matt Brainerd. I am owner and Chairman of
20 Brainerd Chemical Company, a chemical distributor
21 based in Tulsa, Oklahoma. My remarks will also
22 express the concerns of many members of the National

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1 Association of Chemical Distributors.

2 Brainerd is a major supplier of chemicals
3 for over 3,000 customers across the country. Among
4 these locations we have 7,000 feet of rail spur with
5 capacity for 82 cars. Brainerd receives an average
6 of 11 million pounds of bulk product each month via
7 rail.

8 Dependable rail service is essential for
9 Brainerd in servicing our customers. A substantial
10 percentage of NACD members receive products by rail
11 and depend on timely shipments in order to meet
12 customer demand. Brainerd's ongoing concerns about
13 demurrage charges have become worse in recent years
14 with the Class I railroads reduction in the amount of
15 time allowed for us to accept railcars from 48-hours
16 to 24-hours.

17 This means that if the railroad arrives
18 with a car at 11 p.m. on a Friday, we must take the
19 car by 11 p.m. on Saturday in order to avoid
20 demurrage charges. If the switch of the railcar to
21 our plant does not take place, we must request a
22 shipment problem resolution through the railroad's

1 website. This is a frustrating and time-consuming
2 experience.

3 There is little opportunity to negotiate
4 delivery terms with customer service as the process
5 is all online. I have a recent example of how this
6 process can breakdown resulting in demurrage charges
7 for Brainerd and excessive company staff time working
8 to resolve the problem that was created by the
9 railroad provider.

10 This incident took place in our Danville,
11 Illinois plant that is served solely by CSX. On
12 February 19th, my staff ordered a switch of two
13 railcars, these cars that were sitting outside our
14 gate should have arrived Wednesday, February 20th,
15 but were not delivered until Friday, March 1st -- 9
16 days after their requested date.

17 CSX informed us that the cars were not
18 delivered due to a system issue on their side. Then
19 they told us the cars had been placed when they had
20 not. During this time, we received daily demurrage
21 charge summaries with zero balances. In mid-March we
22 received an invoice for \$1,500, despite the fact that

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1 the delays were initiated by CSX.

2 My staff emailed the CSX contact on the
3 invoice and was told to go through the dispute
4 process on the CSX website. Since then, members of
5 our accounting and operations teams have worked to
6 escalate the problem with CSX. Just this week I
7 received a statement from CSX with a zero demurrage
8 balance.

9 There was no additional communication from
10 the railroad even though the wrongful charge was
11 corrected. There is no way to recapture my staff's
12 extensive time and effort in resolving the dispute.
13 Of Brainerd's three facilities with rail capacity,
14 Danville is the only one served by just a single
15 Class I railroad.

16 Our other facilities with rail are both in
17 Oklahoma and are served by much more responsive short
18 line railroads. Recent changes in railroad demurrage
19 policy have had a negative impact on Brainerd and
20 other NACD members. I commend you Chairman Begeman
21 for recently writing to the Class I railroads,
22 expressing your concern about their changes to

1 demurrage charges.

2 Demurrage is intended to serve the public
3 interest by facilitating the flow of commerce through
4 the prompt loading and unloading of cargo. These
5 fees were meant to improve efficiency, not generate 9
6 figure revenue lines for Class I railroads.

7 This already challenging situation for
8 rail customers has become even more so with the Class
9 I's adoption of precision scheduled railroading. PSR
10 has created enormous delays for rail customers like
11 Brainerd while also imposing more restrictive
12 service conditions.

13 For example, the reduction in the amount
14 of time allowed for us to accept railcars from 48-
15 hours to 24-hours means that Brainerd must have
16 employees on call more frequently to receive railcars
17 or pay demurrage. To provide incentives for both
18 customers and railroads, to move product, and
19 railcars more efficiently, Brainerd and NACD support
20 the establishment of reciprocal demurrage.

21 Under this system when a railroad fails to
22 pick-up or deliver cars, the shipper or receiver

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1 would charge the same demurrage rate per day to the
2 railroad. Reciprocal demurrage would provide
3 railroads with a reason to move product more
4 efficiently and help Brainerd and other rail
5 customers to recover lost costs due to delays.

6 Brainerd and other NACD members need
7 reliable, efficient and affordable rail service to
8 operate our businesses and serve our customers. We
9 commend the Board for investigating unreasonable
10 demurrage fees and look forward to working on
11 proposals to create a more favorable rail service
12 environment, thank you.

13 CHAIRMAN BEGEMAN: Thank you, Brad?

14 MR. HILDEBRAND: Good afternoon Chairman
15 Begeman, Vice Chairman Fuchs and Member Oberman. My
16 name is Brad Hildebrand, I'm the Vice President of
17 Global Rail and Barge Lead for Cargill, Inc. based in
18 Minneapolis, Minnesota. Cargill's purpose is to
19 nourish the world in a safe, responsible and
20 sustainable way.

21 Cargill is a major grain trading and Ag
22 processing company with over 200 locations that are

1 rail served here in North America. We operate in 70
2 countries and employ 150,000 people around the
3 globe. As a global rail and barge lead for Cargill,
4 I work closely with all the Class I railroads to
5 secure competitive rates and service, to deliver our
6 grains and products to customers throughout North
7 America.

8 I also help oversee the 19,800 private
9 railcars that we use to transport these goods. I
10 appreciate the opportunity to share my views and
11 recommendations on what should be done to curb the
12 growing cost of demurrage and accessorial charges.
13 I've often referred to accessorial charges as death
14 by a thousand cuts, death by a thousand cuts.

15 Individually, each charge is \$200 to \$500
16 per infraction. When multiplied over the months and
17 year, they add up to significant dollars. Cargill
18 spends millions of dollars each year on these
19 charges. Over the past few years, we have invested
20 in more track space at our facilities in an effort to
21 reduce our demurrage costs.

22 Despite making these investments, our

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1 demurrage costs last year was about the same as it
2 was in 2017. I find it interesting that the
3 railroads will tell you that demurrage and
4 accessorials are really a small part of their overall
5 revenue. Many will say that they would rather not
6 collect these charges if they can avoid them.

7 If it was such a small part of their
8 revenue, and something they really do not want to
9 collect, then why would the Norfolk Southern dedicate
10 an entire team of individuals in defending these
11 charges when you call to dispute them?

12 They call this team the revenue defense
13 group. I see they're here to defend that. Demurrage
14 and accessorial charges are one-sided and also
15 difficult to dispute, get reduced or eliminated. As
16 a way of example, the NS has a tariff that states
17 that they can charge you \$500 if you dispute a charge
18 and they find out that they were right.

19 We just got hit with one of these about a
20 week ago. The latest round of demurrage and
21 accessorial charges that have been announced are
22 increasingly punitive and costly to shippers. Take

1 for example the Union Pacific's charge for taking
2 power off unit trains. If we cannot turn the unit
3 train around in 24-hours, we have to declare this
4 when the train arrives. The UP then charges us
5 \$3,200 to remove the locomotives. Then, they charge
6 you another \$3,200 when you call them out to pick-up
7 the loaded train. We currently see these charges
8 with our ethanol trains.

9 Typically, we do not have a loaded train
10 of cars waiting for the empty train to arrive. With
11 this change, the UP is now collecting another \$6,400
12 on every train of ethanol that we ship. Imagine
13 yourself walking into a McDonald's restaurant and
14 being confronted with a list of charges like things
15 like taking too long to order a meal, sitting too
16 long to eat, or spilling trying to dispense ketchup
17 out of one of those pump containers.

18 While this might seem like a far-fetched
19 extension of demurrage and accessorial charges, I
20 have to ask you one question -- where could you get
21 away with imposing these charges in any business
22 today and still retain your customers? The answer is

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1 the railroad industry.

2 The railroads seemingly have the unchecked
3 power to extract these types of charges. So, what
4 can the STB do to step in and protect shippers from
5 these ever-increasing charges? I offer the
6 following recommendations for your consideration.

7 Let's start with demurrage. Currently, we
8 are paying \$100 to as much as \$200 per day for
9 railroad cars that are on demurrage. A covered
10 hopper costs \$80,000 today. If you apply \$150 per
11 day demurrage rate for a railroad-owned car that sits
12 for a year, that comes to \$54,750 -- \$80,000 for the
13 car, one year's worth of demurrage, \$54,750, that's a
14 68% return per year.

15 As a comparison, credit card companies
16 charge you 15% per year on outstanding balances.
17 Now, let's take the barge industry. They charge
18 demurrage like the railroad industry; however, they
19 are a competitive marketplace. They have a demurrage
20 schedule for covered barges that gives you 3 free
21 days to load the barge.

22 After that they charge you \$300 per day

1 for the first 10 days and then \$400 per day
2 thereafter. A new barge costs \$600,000. A barge is
3 7.5 times more expensive than a hopper car. Applying
4 this factor to the \$300 per day barge demurrage rate,
5 gives you a rail cost equivalent rate of \$40 a day,
6 not the \$150 that many carriers currently are
7 charging.

8 Another idea the Commissioners might want
9 to consider is setting a maximum demurrage rate using
10 the weighted average cost of capital that is
11 currently being calculated by the STB each year.
12 This rate could be applied to the weighted average
13 value of the carrier's car on their books to come up
14 with a daily demurrage rate.

15 My first recommendation is for the STB to
16 make a rule that states or sets the demurrage rate,
17 bases the competitive marketplace like the barge
18 industry, or sets a rate that is in line with their
19 weighted average cost of capital for railroads.

20 Next, I'll turn your attention to private
21 car demurrage charges. The Class I's charge anywhere
22 from \$75 per day to \$150 per day for private car

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1 demurrage. These rates are typically close to the
2 railroad-owned car demurrage charges as discussed
3 earlier.

4 The big difference is that shippers are
5 paying for these cars. Companies that have track
6 space to store cars in the United States charge
7 anywhere from \$3 a day to as much as \$25 a day.
8 Compare this to the \$75 to \$150 per day that the
9 Class Is charge us for private cars.

10 My second recommendation is for the STB to
11 make a rule that sets the charges for private car
12 demurrage at the national average rate for storing
13 cars in the United States. This is a market-driven
14 cost calculation that is something akin to the
15 national average highway diesel price that the STB
16 okayed as a cost proxy for setting fuel surcharges.

17 Moving on to accessorial -- I would
18 recommend that the Board review the types of
19 accessorial charges that are being imposed on
20 shippers today looking for reasonableness within
21 these charges. You will find charges for diversion,
22 reconsignments, extra switching, weighing, moving

1 cars to pull the leased cars, et cetera.

2 There are also charges for incorrect bills
3 of lading, disputing demurrage charges as I just
4 mentioned and refunding us money when we've overpaid
5 a freight bill. This last category of charges should
6 be prohibited and thrown out as unreasonable. The
7 railroads make errors and mistakes just like we do.
8 They should not be allowed to charge us for these
9 petty things just because they can.

10 We currently have no way of charging them
11 for our time to research and dispute erroneous
12 charges as you just mentioned. The NS does not allow
13 us to charge them \$500 when we dispute a demurrage
14 charge and we prevail. The railroads are more
15 profitable today than they've ever been.

16 They're buying back billions of dollars of
17 their stock each year. While we have no issues with
18 the railroads making money, these demurrage and
19 accessorial charges are getting out of hand. What
20 I'm recommending is that the Board establish some
21 rules and guidelines that add some competitive
22 market-based costs to what can be charged for

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1 demurrage, private car storage and accessorial
2 charges.

3 Each category of charges should be
4 examined for reasonableness. Let's put some fairness
5 and balance into a system that is totally one-sided.
6 I hope that you will give my recommendations some
7 consideration. Thank you for your time and your
8 support in this effort. This concludes my comments.

9 CHAIRMAN BEGEMAN: Thank you Brad, Jeanne?

10 MS. SEBRING: Good afternoon Chairman
11 Begeman, Vice Chairman Fuchs, Commissioner Oberman.
12 I'm Jeanne Sebring from International Paper. Thank
13 you for the opportunity to testify today and for
14 holding this hearing on a very important issue
15 impacting rail shippers.

16 International Paper is a leading global
17 producer of renewable, fiber-based packaging, pulp
18 and paper products headquartered in Memphis,
19 Tennessee. In the U.S. we employ 33,000 colleagues
20 across 26 manufacturing mills, nearly 200 converting
21 plants and a network of 16 recycling facilities as
22 well as several corporate locations.

1 The size and scope of these operations put
2 IP among leaders of movement of freight domestically
3 and from U.S. ports. More to the point of today's
4 hearing however, IP is the largest boxcar shipper on
5 moving on U.S. railroads, shipping more than 135,000
6 carloads annually. We are served by every Class I
7 railroad and many short lines. Our mills rely
8 heavily on rail for inbound raw materials such as
9 chips, recovered fiber and chemicals, and for
10 outbound production that ships predominantly in
11 boxcars.

12 Because we are highly integrated, often
13 our mill production ships to our many converting and
14 distribution facilities in addition to the
15 traditional external customers. This integration
16 increases our exposure to rail service failures when
17 they occur because we often experience the
18 repercussions on one or both sides.

19 Over the past 2 years, many of our rail
20 partners have taken us on their journey towards PSR.
21 Over this time, IP has had to contend with reduced
22 service and unmet carrier commitments, increased

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1 rates and a dramatic growth in demurrage and
2 accessorial fees that are increasingly unavoidable
3 the way they are constructed.

4 These supplemental fees are an apparent
5 and growing revenue opportunity for carriers, while
6 it places a heavy, heavy burden on shippers costs,
7 labor and administrative overhead. The equation
8 completely lacks commensurate shipper-side value.
9 Consider too, that these burdens are occurring on top
10 of ongoing operational volatility and rising carload
11 rates. This is the impetus for our testimony today.

12 Carriers will tell you that demurrage and
13 accessorial charges are not only compensatory, but
14 that it incentivizes good shipper behavior for
15 promptly turning cars at the dock. However, it fails
16 to recognize the operational realities contributed by
17 carriers and now the near unavoidability of penalties
18 under the new demurrage and accessorial provisions,
19 some examples being reduced switch frequency which
20 has often led to last mile service issues.

21 Longer and fewer trains have created
22 higher stakes when failures occur leading to more

1 bunching and more volatile end-to-end transit times.
2 And, of course, changes to local serving yards have
3 also heightened risk for service failures. These are
4 just some of all the things that can affect flow into
5 a facility, and our ability to planning fully
6 returning cars without incurring one penalty or
7 another.

8 As a result, since the adoption of PSR, IP
9 has seen demurrage more than double to over 7 million
10 dollars when comparing our most recent full quarter -
11 - quarter one of this year to the same quarter in
12 2017, which would be before PSR. Note that I said
13 over 7 million dollars in quarter one. These are
14 actual costs paid by IP after the validation or
15 dispute process has taken place.

16 In 2018 we successfully disputed over 2
17 million dollars in fees by allocating two people
18 nearly full-time to focus on demurrage tracking for
19 just two of our facilities. Given my time allotment
20 for testimony, I would like to walk you through just
21 a few key examples. I'm happy to provide more
22 information or additional examples to the Board

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1 separately, upon request.

2 First, I'll speak to our experience with
3 CSX given our footprint with them and the head start
4 they had in PSR over the more recent implementations
5 by NS, UP and KCS. Toward the end of 2017, CSX
6 notified us of tariff changes that would take effect
7 at the start of 2018, failing to recognize that their
8 operational changes and service delivery were
9 important components to a customer's ability to turn
10 equipment and thus avoid supplemental charging.

11 In that same timeframe, CSX also expanded
12 their weekly car fulfillment window from 7 to 14 days
13 to fill our weekly car orders. At the same time, the
14 shipper had to pay \$300 per car for any
15 cancellations or reductions done after 3 days from
16 the date of the order or if within 7 days of the
17 order weeks.

18 Essentially, what they did was they
19 loosened their obligation window and tightened ours
20 with a financial penalty imposed only on one side.
21 But it also increased the potential for bunching
22 empty cars into a facility, thus triggering penalties

1 and further downstream impacts at our receiving
2 locations as well.

3 No consideration exists for the customer
4 disruption that uneven supply could cause to our
5 operation or even potential lost business except for
6 the heavy and uncertain burden of dispute resolution
7 that is limited only to what shows up on the
8 carrier's bill.

9 At one of our mill complexes in the
10 southeast that is CSX-captive, changes in CSX's
11 demurrage and accessorial charges have worked in
12 tandem with reduced service execution to drive
13 increased costs to IP. At this complex we faced
14 numerous challenges, among them unreliable and
15 inconsistent car supply where less than 43% of
16 weekly car orders in the last 12-month period were
17 met at a 95% target fill rate or better.

18 Poor last-mile execution where the mill
19 orders in very specific cars to support very specific
20 planned production and CSX just brings in different
21 cars. Bunching of rail cars where despite suppliers
22 originating our railcars on different days, CSX has

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1 frequently brought them to the mill on the same day.

2 Naturally, this reduces our ability to
3 unload and turn the cars in the allowed free time.
4 And of course, volatility and transit times where
5 CSX's inconsistent performance reduces our planning
6 and predictability and impacts how and when we can
7 turn cars when they do not arrive as expected.

8 As a result, this particular complex had a
9 39-fold, year over year increase in demurrage fees
10 compared to our most recent full quarter -- I'm
11 sorry, comparing our most recent full quarter to the
12 same quarter in 2018.

13 In fact, hearing about the trend line
14 might help when you compare the demurrage paid in Q1
15 in each of the last 3 years. \$910 in 2017, again
16 pre-PSR, followed by \$9,600 last year and now
17 \$376,000 in the current year.

18 Fee-acceleration of this magnitude cannot
19 be absorbed by manufacturers competing in domestic
20 and global markets. Reciprocity is also lacking
21 here. When carriers fail, and they often do,
22 shippers do not have the same ability to charge the

1 carriers for the operational harm that is done to
2 their business.

3 I'll quickly share one other example that
4 just typifies the worsening administrative burden on
5 shippers. This one concerns events from just this
6 January of this year at another one of our mills in
7 the southeast and it stems from reduced cooperative
8 boxcar cooling by carriers, something that we saw as
9 an offshoot of PSR.

10 This dual-served mill was surprised by
11 \$14,000 in adverse loading fees from CSX that upon
12 copious research discovered it was for NS's delivery
13 of 7 empty cars to fulfill an NS car order. IP
14 subsequently loaded out these cars back to NS routes,
15 and by all appearances, it looked like we did all the
16 right things.

17 The investigation showed however, that the
18 cars were actually owned by CSX, but NS supplied the
19 cars to the mill. Unfortunately, once IP, or any
20 shipper receives a bill like this, the burden falls
21 to us to make the case. We either become embroiled
22 in sorting out the situation or we accept the

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1 charges.

2 These are often really very labor
3 intensive cases that require pulling and reviewing
4 detailed communications, IP and rail move records,
5 dates, circumstances, times, all in support of a
6 dispute which in this case ironically stems from
7 issues between the two serving carriers.

8 Dedicating the effort needed to research
9 and dispute supplemental charges requires will,
10 countless hours and extra overhead to drive
11 resolution. Demurrage issues can be especially
12 complicated due to the possibility of upstream causes
13 like service disruptions.

14 The burden is on the shipper to verify and
15 dispute billing issues that may arise from the
16 carrier's operation, sometimes their process changes,
17 or sometimes simply imperfect or missing data.
18 While I'm not saying that these invoices are released
19 without due diligence, I am saying that the customer
20 bears the brunt of disputing these invoices, even in
21 the event the charges are dubious.

22 The toll on our company's productivity is

1 sizable, especially now that these types of charges
2 are rising. This is time that could be better spent
3 working with customers or driving other supply chain
4 improvements.

5 So, in closing, I want to just say the
6 implementation of PSR across many of the Class Is has
7 led to significant operational issues and rising
8 costs for U.S. manufacturers. Railroads continue to
9 add new fees, like NS's congestion fee, that are
10 still so new that we cannot speak to impact yet.

11 But these fees look highly subjective in
12 nature and raise further concerns about the financial
13 burden as well as the time and effort required to
14 dispute the reasonableness of the application. The
15 focus on PSR and the use of supplemental fees as part
16 of it only grows more cumbersome, expensive and
17 without commensurate gain in shipper-side value.

18 Left unchecked, it will continue to impact
19 shippers and by extension, the broader economy.
20 International Paper greatly appreciates the efforts
21 of the Board in holding today's hearing. We value
22 our partnerships with the railroads and will continue

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1 to do our part to be a strategic customer.

2 However, without continued Board
3 oversight, these added fees will undoubtedly
4 continue, and we look forward to your engagement,
5 thank you.

6 CHAIRMAN BEGEMAN: Thank you Jeanne.
7 David, you're next on the schedule but if you aren't
8 ready, Ross if you want to go you are ready, but you
9 can arm wrestle, whoever wants to do it. Thank you,
10 Ross.

11 MR. CORTHELL: Absolutely. Good afternoon
12 and thank you. My name is Ross Corthell. I am Vice
13 President of Transportation for Packaging Corporation
14 of America, also known as PCA. I also serve as Rail
15 Committee Chairman and a Board Director for the
16 National Industrial Transportation League, as well as
17 a Board Director for the National Freight
18 Transportation Association.

19 I have 26 years of experience in
20 transportation and supply chain management. PCA is
21 the third largest producer of container board in the
22 United States, and the third largest producer of

1 uncoated free sheet in North America, all based on
2 production capacity. PCA's white paper business
3 operates under the trade name Boise Paper, a division
4 of Packaging Corporation of America. PCA is
5 headquartered in Lake Forest, Illinois and has
6 approximately 15,000 employees and operates primarily
7 in the United States.

8 PCA has 6 brown paper mills and 2 white
9 paper mills and all of our mills are served by rail.
10 Rail transportation is utilized by PCA's brown paper
11 mills to transport large paper rolls from the mills
12 to the converting facilities, also known as box
13 plants.

14 PCA's white paper business utilizes rail
15 transportation for shipment of palletized and rolled
16 paper product from PCA mills to distribution centers.
17 These shipments are moved primarily by rail.

18 PCA also has 95 converting facilities,
19 a/k/a box plants, most of which are served by rail.
20 In addition to paper mills and box plants, PCA
21 operates a commercial trucking division with over 600
22 dry van trailers and a short line railroad with over

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1 1,800 railcars.

2 In this context, I would say PCA
3 understands very well the value of maximizing asset
4 utilization within the supply chain. PCA thanks the
5 Surface Transportation Board for holding this hearing
6 and collecting data for the nation's railroads on
7 their demurrage and accessorial charges. PCA has
8 serious concerns about the changes in the nation's
9 Class I's railroads have announced and/or have
10 implemented in their demurrage and related tariffs,
11 and the effect of those changes on our operations and
12 costs.

13 In its notice announcing this hearing, the
14 Board noted that railroads are required to establish
15 a reasonable rules and practices for demurrage and
16 related charges. PCA agrees with the Board that when
17 analyzing the railroad's demurrage practices, it is
18 appropriate to evaluate reciprocity and commercial
19 fairness.

20 The issue of a reciprocity and fairness is
21 particularly important in situations where railroads
22 are asking for compensation when their own conduct

1 often causes these delays and inefficiencies. By
2 comparison, PCA would never be able to devise a
3 pricing mechanism that charges our customers in the
4 event one of our machines fails and restock that
5 customer out only to flood them with product later.

6 In the interest of time I'm not going to
7 go repeat my written testimony here today. I do draw
8 the Board's attention and encourage the Board to
9 review the data that PCS provided on railroad local
10 service variability as well as line haul transit
11 variability.

12 The data PCA has provided in one example
13 is a two-month sample where Class I switching times
14 ranged from 12:21 a.m. to 11:53 p.m. at the same
15 site. In other words, the railroad showed up in the
16 nearly 24-hour window without any specific
17 communication.

18 Needless to say, this significantly
19 impacts PCA's ability to resource plan and therefore
20 load and unload and turn assets efficiently. In
21 short, precision scheduled railroading is not
22 exactly precise at origin and destination.

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1 PCA has also provided data on rail transit
2 variability and the significant impact on our
3 efficiency. In just one of the many examples we
4 provided, and one origin and destination pair had a
5 mean transit of 15 days, but a standard deviation of
6 4 days.

7 As we all learned in our statistic's
8 classes, the mean plus or minus 2 standard deviations
9 allow us to predict an outcome with 95% confidence.
10 In other words, in this example, we would predict
11 transit at 95% confidence in this real world to be
12 between 7 days and 23 days.

13 Needless to say, this variation makes it
14 nearly impossible to optimally plan resources to load
15 and unload. Rather, we must react to what the
16 railroads give us. One of the consequences of the
17 erratic transit is the bunching of cars in transit as
18 been mentioned before. PCA has provided data on one
19 origin destination pair and demonstrated this
20 factually.

21 Referencing the data, we supplied on a
22 single line haul, we shipped 68 cars over 26 ship

1 days and the railroad constructively placed 63 cars
2 over 11 CP dates. In other words, we shipped 2.6
3 cars per ship day and the railroad CP'd 5.7 cars per
4 receipt day in that particular example.

5 Now we've provided months' worth of data
6 so this is not, you can see this is not an anomaly.
7 Our data shows the pattern repeats itself over many
8 months and many origin-destination pairings and is
9 particularly potent in interchange service as has
10 been noted in previous testimony.

11 Needless to say, this bunching
12 significantly impacts our ability to efficiently
13 unload and avoid substantial demurrage. None of the
14 Class Is today in our opinion, do a good job of
15 accounting for bunching in their demurrage invoices,
16 and this burden is placed squarely on the shoulders
17 of receivers who must use their own data to dispute
18 erroneous invoices.

19 This is especially true in lanes involving
20 multiple railroads interchanging traffic to each
21 other. In our written testimony, PCA did not call
22 out individual Class I railroads, as we currently do

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1 not see substantial differences between them in how
2 they manage demurrage.

3 Even where tariffs reference service
4 credits, it has been PCA's experience that their
5 systems don't adequately capture these service
6 issues, resulting in erroneous demurrage invoicing
7 that we must then dispute through a long and broken
8 process.

9 In closing, PCA believes the Board should
10 take action to ensure the railroad demurrage
11 practices are commercially fair and reasonable and we
12 support the recommendations made by the National
13 Industrial Transportation League and the American
14 Forest and Paper Association as outlined in our
15 written testimony.

16 Thank you again for your time and the
17 seriousness in which you have demonstrated reviewing
18 these issues. That was the conclusion of my
19 comments, but if I could, since the light is still
20 green, I'd like to provide some clarity from the
21 first panel around constructive placement and zero
22 time.

1 So, if you can think about day zero being
2 constructive placement, then the demurrage clock
3 starts at 12:01 a.m. on day one. So, day zero is
4 when a car is constructively placed, and the
5 customer is notified the car is available. Day one
6 begins at 12:01a.m. the following day.

7 That is the extent of the free time. If
8 the customer does not unload that car by day one and
9 release it as an empty, then that becomes a
10 chargeable event. And I will tell you that there's -
11 - as I mentioned in these 24-hour windows that they
12 switch you, that could come before or after a cut-off
13 time for your service to be requested for the
14 following day.

15 So, you may incur what they would say is
16 precise service. You did get your switch that day,
17 but it was after the cut-off which precluded your
18 ability to release those cars for the following day
19 and avoid the demurrage. So, I hope that that helps
20 you understand and provides some clarity around what
21 is zero -- what is the impact of zero "free or credit
22 days." Thank you very much.

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1 CHAIRMAN BEGEMAN: Thank you. David?

2 MR. BURCHETT: Good afternoon, my name is
3 David Burchett and I'm here today to give testimony
4 on behalf of MillerCoors. I'm responsible for the
5 procurement of over 700 million in transportation
6 services covering multiple modes of transportation
7 including rail.

8 First, I'd like to thank the Board for
9 hearing my testimony today. I think that you will
10 see from what I present that at least one of the
11 railroad's blatant disregard for the regulations that
12 have been put in place to prevent unfair and anti-
13 competitive practices is having a material impact on
14 MillerCoors. And we as a company, respectfully ask
15 that the Board address these actions.

16 I'd like to take a minute to tell you a
17 little bit about MillerCoors and how we utilize rail
18 transportation. MillerCoors is the second largest
19 beer brewer in the United States, with beer brands
20 that include Coors Light, Miller Light, Coors
21 Banquet, Blue Moon and many more.

22 MillerCoors operates 7 major breweries and

1 multiple warehouse operations across the U.S. that
2 utilize rail services and we utilize both rail-owned
3 and leased cars. How beer is different is how we get
4 it out to our consumer.

5 In the United States beer is sold through
6 a 3-tier system. Brewers like MillerCoors sell their
7 products to independent distributors who in turn sell
8 the products to retailers who in turn sell the
9 products to consumers. This 3-tier system is
10 mandated by state and federal law.

11 And importantly, MillerCoors distributors
12 have exclusive territories and therefore MillerCoors
13 is completely dependent on one distributor to
14 distribute products in that territory. So, to put
15 that in context, if you go to your local Walmart to
16 pick-up, you know your favorite detergent, if it's
17 not there you could probably go down the street to a
18 Target and find it. If our product does not get to
19 that specific distributor, you're not going to find
20 it in Walmart, in Target, and any grocery store and
21 any convenience store in that region -- that's
22 important for some of my testimony later.

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1 Rail transportation is an integral part
2 of MillerCoors' logistics plan which it relies on to
3 move items to destinations all across the country.
4 Shipping by rail is ideal for MillerCoors on both
5 inbound and outbound where possible because of the
6 characteristics of the product we're shipping.

7 Inbound, bulk, agricultural products to
8 our breweries that are used in the brewing process
9 and heavy finished beverage products out to our
10 distributors. Because of the heavy finished product
11 that we ship and the current weight restrictions for
12 interstate trucking, the ability to utilize rail as
13 much as possible for the shipping of our finished
14 product to our distributors is both environmentally
15 friendly and safer by taking thousands of truckloads
16 off of already congested interstate system.

17 MillerCoors is captive to single rail
18 carriers at all but one of our breweries and at
19 numerous origins and destinations. As a result, we
20 do not have any bargaining leverage with the serving
21 rail carrier in these situations regarding rates and
22 service.

1 You've heard today and will continue to
2 hear about the unfair changes that the railroads have
3 made to their demurrage rules. MillerCoors agrees
4 that these changes by the railroads are not
5 warranted to improve productivity, but that they're
6 purely a way to increase revenues.

7 I've heard a number of times that if I
8 don't like how the railroads operate, I can move to
9 their competition -- trucking companies. In my
10 opinion, I don't really consider them competition.
11 They have very different cost factors. These are
12 completely different modes of transportation, so they
13 are not true competition.

14 Truckload carriers also have accessorial
15 charges similar to the railroads when drivers are
16 delayed or when equipment is held for too long. But
17 without those charges, trucking companies would not
18 be profitable at all. Most trucking companies have
19 operating ratios above 90% while the railroads are
20 bragging to Wall Street that they are having record
21 profits every quarter with operating ratios in the
22 low 60's and pushing to get them below 60%.

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1 Also, when truckload carriers are late for
2 their deliveries, most of the accessorial charges
3 regarding detention of drivers or equipment do not
4 apply. Railroads consistently do not meet agreed
5 upon transit times on shipments at no fault of the
6 shipper, leading to bunching of cars at destinations.

7 But instead of disqualifying charges for
8 these shipments, this actually works out in the
9 railroads' favor because they can charge more
10 demurrage when companies cannot unload the carriers
11 or the cars on time. Again, demurrage charges have
12 not been made because shippers are taking advantage
13 of the railroads, but as a way to increase margins
14 and lower operating ratios.

15 As far as our private cars go, we've
16 actually had to hire a company to track our empty
17 cars because they get held by the railroads and that
18 company then calls the railroads to tell them to get
19 moving. We don't get any compensation back from the
20 railroads for those.

21 Because of a demurrage dispute in early
22 2018, NS imposed an embargo at its New York Suffern

1 Yard and refused to deliver MillerCoors products to
2 our distributor -- Manhattan Beer Distributors.

3 As stated earlier, Manhattan is
4 MillerCoors' sole and exclusive route to market to
5 service the critical New York City market. As you
6 would expect, the Greater New York City market is
7 one of the most important sales regions for
8 MillerCoors.

9 As we understood the situation, NS was in
10 a dispute with Manhattan over demurrage. As a
11 result, it imposed embargo on and was not delivering
12 cars to Manhattan. MillerCoors, not Manhattan was
13 NS's customer in this situation. We advised NS that
14 the cars they were holding hostage contained
15 perishable product.

16 MillerCoors also advised NS that these
17 cars had left its brewery before the rail carrier
18 imposed its embargo on Manhattan. MillerCoors was
19 given no warning of the embargo and was only told
20 about the situation when its railcars of beer arrived
21 at the Suffern Yard outside of New York City.

22 Miller Coors also explained to NS that

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1 Manhattan was the only beer distributor it could use
2 for distribution purposes in New York City. The
3 bottom line was NS had no dispute with MillerCoors
4 and there was no rational reason for NS not to
5 deliver the cars.

6 But even after being advised of these
7 unacceptable and financially damaging circumstances,
8 NS employees refused to move these railcars to
9 Manhattan. MillerCoors escalated the situation to a
10 higher-level executive at NS who reasonably had the
11 first set of cars delivered to Manhattan. However,
12 NS refused to move the second set of cars filled with
13 beer to Manhattan. MillerCoors begged NS to move
14 this set of cars to no avail.

15 As a result some of the product went out
16 of date and some of it had to be trans-loaded to
17 truck at a very expensive rate to get the beer to
18 Manhattan. The cost to trans-load and switch some of
19 these loads to truck was in the hundreds of thousands
20 of dollars, but the impact to MillerCoors was much
21 greater, easily in the millions of dollars.

22 We make our product based on orders from

1 our distributors. Our product takes roughly 21-days
2 to brew and package. One of those breweries is 1,800
3 miles away from New York City, so you have the
4 transit time that goes along with that as well. And
5 when a disruption of our supply chain like this
6 happens it sets off a domino effect and moving
7 product around to satisfy orders until the new
8 product can be produced.

9 MillerCoors was astounded by its treatment
10 by NS and by an even more brazen response at the
11 beginning of 2019, NS increased its rates with
12 MillerCoors to the New York destinations by an
13 average of 21% in what MillerCoors believes was
14 retaliation for the demurrage issues between NS and
15 Manhattan Beer.

16 In another example of a railroad
17 distinguishing any semblance of competition in its
18 business, MillerCoors decided to get competing rates
19 from two railroads at the one brewery that
20 MillerCoors has that is dual-served. MillerCoors
21 informed the railroad that they would be losing a
22 significant inbound lane to that brewery based on

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1 their pricing.

2 The representative asked where they needed
3 to be on the rate to keep the business. In a
4 partnership effort to give the incumbent carrier an
5 opportunity to keep the business, MillerCoors gave
6 them the rate that they would need to be at to keep
7 the business. Instead of changing the rate, or
8 responding to MillerCoors that they could not meet
9 the rate, the railroad responded that if MillerCoors
10 moved the business to the other railroad, that they
11 would increase rates to a captive brewery in an
12 effort to prevent competition.

13 Based upon this response, MillerCoors was
14 forced to keep the business with NS because of the
15 rate captive lane impact. Railroad negotiations have
16 become one-way in recent years because of the
17 trucking rate data that's available for purchase.

18 With that data the railroads are able to
19 price just under what the equivalent truckload costs
20 would be and their negotiation response is, "If
21 that's too much you can move it by truck." Many
22 shippers choose to do that because the value of

1 shorter transit times and less damage to their
2 product.

3 In closing, I'd like to give you a quote
4 from James Squires, the Norfolk Southern Chairman and
5 President and CEO at their most recent earnings
6 report. "We set company records for many financial
7 measures in the first quarter." Well, one of those
8 was their demurrage revenues. These demurrage
9 changes are not being implemented because operations
10 are being impacted by shippers and receivers --
11 they're a revenue stream.

12 And when you challenge them as one of our
13 customers did, your freight is embargoed. I feel the
14 issues are deeper than just demurrage as well with
15 the pricing practices that the railroads have
16 instituted.

17 MillerCoors appreciates the rate review
18 announcement that just came out and we ask that the
19 Board continue to look at both unreasonable pricing
20 practices as well as demurrage as we go forward with
21 this testimony. Thank you for your time and
22 attention today.

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1 CHAIRMAN BEGEMAN: Thank you and finally,
2 Herman, I know that you have your Board of Directors
3 with you. I'm sorry that because we're running a
4 little late, one of your folks had to leave who
5 represents Pepsi, but we certainly know they were
6 here.

7 MR. HAKSTEEN: Thank you, thank you very
8 much for the opportunity to be here today and thank
9 you for that opening. We've had meetings in the past
10 and it's been very important to the Board that we
11 bring out shippers so that they can hear real
12 situations.

13 For the sake of time we're not going to
14 have all of our shippers speak here today, but we are
15 -- want to take a minute of the Board's time to
16 introduce the folks who are here. First of all, the
17 Chairman of the Board which is by the way, the
18 Private Railcar Food and Beverage Shippers
19 Association, which we call PRFBA. The Chairman of
20 that Board is Patrice Lageur is with Bondwell, thank
21 you.

22 Rob McCray, the Pepsi guy is the Vice

1 Chairman who unfortunately had to leave. Mark
2 Swenson, a Board Member, I believe Mark is here --
3 yeah, Mark Swenson, Board Member, his real job is
4 with Kraft Heinz, Barb Catanio, real job is MHW
5 Group, Secretary of the Board for PRFBA, Rick
6 Rantiner on the Board. His real job is McCain,
7 thanks Rick.

8 And Mike Boddy, he's here today to
9 represent the McDonald's Restaurant System, he's a
10 distributor for McDonald's restaurants and a member.
11 Dave Burchett, who just spoke is also a member of
12 PRFBA and finally Martin Weiner, real job MHW and
13 also part of PRFBA.

14 So, as a group we're not going to take all
15 the time today to obviously speak, and I almost feel
16 like we don't need to speak because it sounds like
17 it's been a replay today over and over again, so I
18 apologize, you guys are having lunch in your chair to
19 hear the same thing time and time again.

20 But if you don't mind, I'm going to go
21 ahead and read our testimony anyway and this is from
22 us as a group. So, first of all thanks and also, I

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1 want to take a couple of moments to say thank you
2 very much for that rate reform release, the task
3 force report recently.

4 We strongly support your work in that
5 area, as do we continue to appreciate your assistance
6 in the demurrage attention issues. Before I move on
7 to the detailed testimony, I want to clarify that we
8 believe that the railroads in North America represent
9 the most important transportation infrastructure this
10 country has.

11 Every week the railroads move the
12 equivalent of about 2 million truckloads of freight -
13 - that's 2 million trucks that aren't on our
14 highways, they're not on our bridges, they're not on
15 the infrastructure that's already worn out.

16 Rail is better for the environment, it's
17 four times more fuel efficient and it's more
18 effective from a labor perspective. We at PRFBA want
19 the railroads to be open for business. We want the
20 railroads to grow capacity and we want them to accept
21 more freight at rates, including accessorial, that
22 customers and shippers can afford.

1 We at PRFBA want the railroads to
2 understand that we have a social accountability
3 mindset at PRFBA. We want to choose the right
4 sustainable form of transportation, not only for our
5 business needs, but also for the environment. The
6 railroads were created with federal funding to open
7 this country to commerce over 150 years ago.

8 But that role seems to have changed.
9 Since the 1960's, railroad tonnage hauled has
10 remained relatively flat while the trucking industry
11 has more than quadrupled the amount of tonnage that
12 they haul to market.

13 Today, Wall Street and the railroads
14 decide what freight moves by rail. The decision
15 process made by the railroads and their investors is
16 pushing freight to other modes, mostly truckloads.
17 The railroads are always very open about saying we
18 have a choice as Mr. Burchett pointed out, but the
19 choice they push us to, primarily truck, puts all
20 this excessive wear and tear on infrastructure, an
21 environment that's already critical.

22 So, let's talk about infrastructure for a

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1 minute. How can we pass an infrastructure bill in
2 this country without including some kind of
3 accountability, incentive, directive to the rails to
4 help out? By help out, I mean increase the tonnage
5 to take more truck, increase the tonnage they move to
6 take more trucks off the road.

7 How can we justify asking taxpayers to pay
8 more for a gallon of fuel at the pumps for repairing
9 the worn out roads and bridges, while the railroads
10 for the sake of increasing profits push more freight
11 to truck -- trucks that have a much greater impact on
12 the infrastructure wear and tear than the person
13 driving the car that's wanting -- that's being asked
14 to pay the extra tax at the pump.

15 We need the STB to help bring our nation's
16 railroad back to serving commerce across this
17 country, not lining the pockets of investors. PRFBA
18 would like to bring to your attention today the
19 impact of the accessorial charge that I'll say hits
20 home, mostly for them which is everybody in our
21 organization owns private railcar assets.

22 The charges we want to specifically talk

1 about today are private car detention, private car
2 storage, private empty car storage or whatever other
3 railroad term can be applied. To clarify, privately
4 owned or leased railcars that are not spotted
5 immediately upon arrival to a shipper or receiver's
6 tracks for loading or unloading can be assessed a
7 daily charge, as we've heard many times today.

8 Even though these are private assets which
9 have absolutely no cost basis to the handling
10 railroad other than the tiny bit of track they take
11 up. All of the U.S. Class I railroads have tariff
12 provisions that provide storage charges and those
13 storage charges, at least in our industry range
14 anywhere from \$60 to \$150 a day, some have zero
15 credit days -- the most generous railroad gives us
16 one.

17 Again, I stress these are charges on
18 assets that are not owned or have a cost basis with a
19 handling tariff -- handling railroad. The railroads
20 believe that they have the right to charge for
21 storage of these assets when those assets are on
22 their tracks. They claim it is done to keep the

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1 railroads fluid, however, shippers strongly believe
2 that these fees which are inconsistently assessed on
3 private cars, are solely used by the railroads to
4 earn revenue, but I believe also gain leverage.

5 Without a shipper's investment in these
6 private railcars, this freight in most cases would
7 not move by rail. It seems counter-intuitive to me
8 to penalize shippers that bring valuable assets in
9 turn bringing significant revenues to the railroad.

10 PRFBA agrees that there should be some
11 reasonable arrangement between the railroads and the
12 shippers or receivers for the use of railroad track
13 and to keep the shippers focused on moving cars.
14 Under normal circumstances in a normal industry, two
15 reasonable business partners would get together and
16 work that out to make transportation accommodations
17 for whatever delivery works best for either party.

18 Unfortunately, in the rail world, private
19 railcars begin to accrue charges as soon as they're
20 available for delivery to a receiving warehouse
21 regardless of the receiving warehouse's hours of
22 operation as you've heard several times again today.

1 The railroad wants 7 days a week -- of course we
2 should work 7 days a week.

3 I wonder if they shared that message with
4 Chick-Fil-A. Anyway, they have no interest in their
5 ordering patterns, their infrastructure or any other
6 important factors that might be at the shipper or the
7 receiver. Most receiving warehouses are limited in
8 track space as we've heard again today, most of them
9 have limited hours of operation.

10 Typically, a transportation provider would
11 take that into consideration. In the railroad world,
12 the railroad alone decides when it will spot cars,
13 when it will make cars available for placement, how
14 many cars it will place in a given time and finally,
15 they get to decide if they'll charge us for the cars
16 they leave behind in their railyard.

17 The issue has been significantly impacted
18 by precision scheduled railroading in an attempt for
19 the railroads to become more efficient, they're
20 seeking longer, heavier trains. The net impact of
21 this new service model is that railcars get bunched
22 en route. And I've heard that term many times today,

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1 so I do want to help everybody here today.

2 I was straightened out in the past few
3 months by a senior railroad executive who says, "We
4 don't call it bunching anymore under PSR, this is now
5 called train building." So, we have to sort of
6 change our mindset, it's train building. It sounds
7 much better, it does.

8 Undoubtedly, it is more efficient for the
9 railroad to take more cars on fewer trains. But
10 unfortunately, that impact of their efficiency is
11 clearly the deficiency on the end users. Almost done
12 -- the hidden cost about PRFBA or for PRFBA in the
13 end users in our case is not just these accessorial
14 charges, but it is and, in many cases greater, the
15 inefficient use of their assets.

16 So, in the food industry we're using
17 expensive, highly customized refrigerated or
18 insulated cars. These assets, while sitting idle,
19 waiting for a slot to unload while the car owners are
20 having to continue to shoulder the cost -- daily cost
21 of ownership for those assets. The railroads would
22 have us believe that this is a shipper receiver

1 issue. It isn't. It's the changes to the
2 railroading model that have created this issue today.

3 The new rail process supposedly to gain
4 efficiency has caused additional train building or
5 bunching of cars. It's caused bottleneck at both
6 shipping and receiving locations. PRFBA agrees and
7 understands that the railroads should be efficient.
8 We also want to be efficient, but we can't do that at
9 the cost of our customers.

10 What has become extremely apparent since
11 PSR became the norm, is railroad efficiency comes at
12 a cost of their customer. That transfer of cost is
13 shown clearly in today's Class I profit results.
14 Suddenly, 60% operating ratios are the bottom of the
15 barrel.

16 In most industries those kinds of margins
17 are unachievable. The railroads continue to drive
18 their efficiency for these profitability goals.
19 Unfortunately, those efficiencies are being done at
20 the cost of their customers.

21 The same shippers who invested in railroad
22 equipment to help the railroads handle more volume

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1 and earn more revenue are being penalized by
2 subsequent revenue-producing policies of the
3 railroad.

4 PRFBA respectfully asks the SPB today to
5 consider a few thoughts of solutions. First, that in
6 the definition of reasonable, considering it's a
7 private asset with no cost base to the railroad, we'd
8 like to inquire as to whether the STB could
9 completely strike down any demurrage or detention
10 cost against private car assets.

11 Also, we'd like the STB to consider that
12 Class I railroads adopt mandatory performance-based
13 pricing. This could be simply accomplished through a
14 credit process where a railroad provides daily
15 credits to private car owners when transit time
16 exceeds published schedules.

17 I know that question was asked earlier
18 today, most of the Class I railroads publish on their
19 websites what the standard transit schedule is
20 between their points. Simply taken, if they exceed
21 that for any reason, car owners would get a credit
22 applied to the rate of a load by load basis for the

1 additional days in transit.

2 Perhaps a simple quick solution is maybe
3 just to roll back tariffs to 2014, but on a broader
4 scope, completely out of the box, and I have to throw
5 this out today and I apologize, but on a completely
6 different path, with the sake of the infrastructure
7 spending bill before everybody, I would like to
8 suggest that we would recommend that the STB begin a
9 scorecard, and that scorecard would collect data to
10 show whether the railroad is actually increasing
11 tonnage year over year or increasing the origin
12 destination pairs that it serves.

13 If they do not, we should fine them, and
14 the proceeds from those fines should go to fund the
15 infrastructure bill. That's it, thank you for
16 listening, I appreciate your time and hope that we
17 can all work together to implement FPR fair precision
18 railroading.

19 VICE CHAIRMAN FUCHS: I'll kick things off
20 and you know, we had I think over 2 hours of
21 questioning to the railroads and I think you all have
22 identified specific concerns, specific practices. I

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1 just want to kind of take a step back and maybe just
2 ask on a general basis, you know, is there a carrier
3 practice that is working well that you all believe is
4 fulfilling the intent of the statute and you know,
5 the intent of demurrage to improve network fluidity?

6 Is there -- are there things that you can
7 point the Board towards the things that work well?

8 MR. CORTHELL: I would say there's
9 certainly one aspect of the NS's testimony and their
10 plan that makes sense to me from a precision
11 scheduled railroading perspective, and that is the
12 concept that they're trying to take the work out
13 before they take the assets out. I think that is
14 certainly the right way to approach precision
15 scheduled railroading.

16 It is not the way that predecessor
17 companies had approached it and so we're hopeful that
18 that approach will alleviate some of the disasters
19 that were created in previous implementations.

20 MR. BRAINERD: If I had just an experience
21 that works well, it may not answer your exact
22 question but with our Oklahoma plants we for 15 years

1 have had both UP and BNSF staff as an originating
2 Class I carrier. We can select one or the other and
3 the short line delivers to us. And that system just
4 has worked seamlessly, and the short line has in two
5 different short lines, both short lines will run
6 across and do things for us that we can never get the
7 Class Is to do, and I mean a little extra service as
8 well as if we have a challenge with a bill they still
9 pick up the telephone.

10 It's just an easier process, so that
11 experience of ours is so much more fluid and we have
12 options.

13 MR. HAKSTEEN: I think, if I can add one
14 more, so this was a situation that happened within
15 the last 60 days. So -- and I hate to keep picking
16 on the NS, but it is what it is. So, this is an NS
17 served location 100% by private cars. They had not
18 billed the customer any detention or demurrage
19 charges over that 60 to 90-day period.

20 They had not notified the customer of the
21 change because the customer was actually the freight
22 payer who was the shipper and the receiver who was

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1 now going to be accountable for the bill was not in
2 their records because the receiver had gone through
3 an ownership change.

4 So, for 60 to 90-days they were sending
5 the bills to a dead address, thousands of dollars of
6 detention demurrage bills were accruing because the
7 receiver was having an issue during that ownership
8 change receiving enough inventory. At the end of the
9 day, NS simply embargoed the destination, not doing
10 the nasty stuff that they did to MillerCoors and
11 actually hold cars for hostage.

12 They just simply said, "Hey guys, we've
13 been talking to you for a long time, you obviously
14 have some issues, so we're not going to let your
15 shipper ship anymore cars to you until you clean up
16 all the ones that are at the other end." They all
17 agreed that was a great idea, thank you very much for
18 putting it all together.

19 The week after it was resolved, then they
20 realized oh, and by the way, there's a few thousands
21 of dollars of detention bills that we forgot to give
22 you because we were sending it to the wrong address,

1 here's your bill.

2 The reality is they resolved the problem
3 with their ability to embargo an origin or
4 destination that the reason for all the charges
5 obviously to some of the question points earlier, is
6 it impacting the change? In this case, clearly it
7 wasn't.

8 VICE CHAIRMAN FUCHS: Can I pick-up on
9 something that we started to talk about, oh I'm
10 sorry, Brad, you were going to say something?

11 MR. HILDEBRAND: Yeah, if I could just
12 jump in, there was a lot of dialogue and then it was
13 most entertaining earlier regarding cause and effect
14 from PSR and things are speeding up and look at us,
15 aren't we great? If you look at the AAR data, the
16 car loadings this year are down from a year ago.
17 They're also down from historical averages because of
18 a drop-off in coal shipments primarily.

19 But a number of different commodities are
20 down. They're on pace right now to just beat out
21 2016 which was the lowest that it's been I think
22 since records were taken. So, for them to say that

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1 it's PSR baby, just look at us relative to the fact
2 that their volumes are down, I think is a little bit
3 misguided.

4 And so I think you've got to look at a
5 much bigger picture today than what they're painting
6 as far as cause and effect because of the things that
7 they're doing within PSR. There are fewer cars on
8 the road today which if I went out on your interstate
9 around here, I'm going to get to the airport in a
10 much faster way if there are fewer cars on the
11 interstate than I would when things are packed.

12 VICE CHAIRMAN FUCHS: Brad, you're
13 referring to carload traffic? Yep, are you factoring
14 in intermodal traffic as well?

15 MR. HILDEBRAND: Intermodal's down as
16 well.

17 VICE CHAIRMAN FUCHS: But not in absolute
18 terms?

19 MR. HILDEBRAND: Right.

20 VICE CHAIRMAN FUCHS: Not from years past?

21 MR. HILDEBRAND: Not from years past, it's
22 grown every year and to the point where there are

1 more intermodal units going out and that's a
2 different subject for a different day.

3 VICE CHAIRMAN FUCHS: Right.

4 MR. HILDEBRAND: On the amount of time and
5 effort intermodal takes relative to carload traffic.

6 VICE CHAIRMAN FUCHS: Right.

7 MR. HILDEBRAND: But we can argue that one
8 on a different day.

9 VICE CHAIRMAN FUCHS: And then something
10 that is a common theme I think in Panel I and today
11 in this panel, is bunching and you know, Terry had
12 said during Panel I, that you know, the variability
13 and transit time means that you could be 5, 5 and 5
14 and get 15 back and you might only have room for 10
15 for example.

16 So, talk us through how a reasonable
17 program would work with respect to bunching? You
18 know, in that example that I gave where 15 come back,
19 you have room for 10, is it that you -- a reasonable
20 thing is that each of those 5 get credits for a day
21 or what have you? Kind of describe how you would
22 address the bunching issue?

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1 MR. CORTHELL: Well, from my perspective,
2 you not only have to consider the 5 cars that you
3 couldn't unload optimally, but you have to consider
4 what's in the pipeline to that facility as well
5 because if those delays have now have a rippling
6 effect -- and somebody even used that word "rippling
7 effect" and we use that frequently in our
8 conversations as well.

9 But the ripple effect on your supply chain
10 is if you're 5, 5, 5, 5 that it's not only the missed
11 switch or the bunching that delivered 15, and now you
12 can still only unload 5 or 10, but the ripple effect
13 of all of those cars that didn't arrive into that
14 site prior to you being able to optimize your
15 unloading are now subject to demurrage as well. So,
16 optimally what would happen is the systems themselves
17 would review that entire situation and there's
18 algorithms can be written to do this, this isn't you
19 know, rocket science, but the systems themselves
20 should analyze that situation and apply what the
21 railroads say they apply today, which is automatic
22 credits and issue any kind of demurrage bill or not

1 accurately the first time.

2 And today the process is that they issue a
3 demurrage bill and then we use our own data to
4 dispute that demurrage bill. So, can you imagine a
5 time when the electric utility would send you a bill
6 on a monthly basis, and each individual user of
7 electricity would have to prove how much electricity
8 they used.

9 MR. HAKSTEEN: I just want to throw one
10 more simple solution -- everything needs to be
11 simple, right? If it's not on-time, there's no
12 bills period. The trucking industry works that way.
13 If you miss your delivery appointment, those guys
14 don't get driver detention, they don't get a
15 rescheduled appointment, there's no accessorial
16 charges paid.

17 Railroads like to compare themselves as
18 competition to the trucking business and it works for
19 them. Here's a really good example. If you're not
20 on time and plus or minus 24-hours is a bit
21 ridiculous on time, okay, if you're not on time, plus
22 or minus 24-hours, there's no accessorial bills

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1 because the missing piece -- most warehouses are made
2 out of concrete. People look at gap reports. If
3 they see that they're going to miss deliveries, they
4 go call emergency trucks, they do other stuff to get
5 supply into that building.

6 So, now when the railroad car merrily
7 shows up a couple of days late, no big deal, better
8 get it unloaded. The railroad said -- you say, "Hey
9 pal, we had to put 50 trucks on the road because we
10 didn't want to run New York out of beer, it's
11 important, and so we filled the warehouse up with the
12 trucks." Well, now that you're car finally got here,
13 all of a sudden I've got to change the world and
14 expand my warehouse to take the product in that I had
15 to replace with another mode of transportation.

16 Bottom line -- no accessorial charges on a
17 load that's not delivered on time period.

18 MS. SEBRING: Yeah, the subject of
19 accessorial charges or demurrage are just added
20 insult on top of a bunching injury and so, you know,
21 we get into what's the operational harm that's being
22 done and I think Herman described it perfectly. I

1 mean if we've had to launch emergency supplies to get
2 around whatever delays are there, then that means by
3 the time that load actually arrives, now we are in an
4 upset condition as to we've got to unload that or
5 potentially find some way to deal with that inventory
6 in what might be a location that maybe has 3 or 5 car
7 spots.

8 So, it does create a lot of operational
9 upset just when we start talking about the effects of
10 bunching, never mind all the accessorial aspects of
11 one penalty or another.

12 COMMISSIONER OBERMAN: Excuse me, a few
13 points I'd like to -- some isolated points and then
14 get to the overall subject. Jeanne, could you just
15 define for us adverse loading, I'm not familiar with
16 the term.

17 MS. SEBRING: Well, at a number of the
18 dual-served locations, back closer to the advent of
19 PSR, we had cooperative equipment pooling that the
20 carriers would engage in to basically overcome
21 short, uneven supply. So, in other words, if it was
22 the CSX and NS served point, what would happen is so

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1 long as roughly in that same month the use of NS
2 equipment could be used for CSX moves and CSX's
3 equipment could be used for NS moves.

4 Sometimes it balanced out at the end of
5 the month, and that was done through boxcar pooling
6 agreements.

7 COMMISSIONER OBERMAN: So, it only applies
8 where you've got at least -- served at least by two
9 carriers?

10 MS. SEBRING: Generally, yes.

11 COMMISSIONER OBERMAN: Yeah, okay.

12 MS. SEBRING: And so, when the PSR
13 initially was CSX, started kicking-in, they began
14 disengaging from these cooperative pooling
15 arrangements. It is not exclusive to NS and CSX. I
16 think a lot of it had to do with what they thought of
17 in terms of their equipment velocities and their
18 reinvestment strategies.

19 And so, what that led to was an incredible
20 rise of adverse charges -- adverse loading charges
21 where I think in CSX it's \$2,000 per car.

22 COMMISSIONER OBERMAN: So, how does that

1 work?

2 MS. SEBRING: NS is \$3,000.

3 COMMISSIONER OBERMAN: What causes it --
4 so can you describe what's happening there to cause
5 the charge?

6 MS. SEBRING: Well if -- and I'll take you
7 through an example such as if we need 10 cars from NS
8 and 15 cars from CSX and if CSX doesn't bring 15 cars
9 and we are in a desperate situation, we may find
10 ourselves needing to use some of those NS cars on the
11 CSX routes.

12 And so, if you waybill any of those on the
13 adverse route, then you get that adverse charge.

14 COMMISSIONER OBERMAN: You're going to get
15 -- you're going to pay more, you mean, for using the
16 NS cars on the CSX route?

17 MS. SEBRING: Correct.

18 COMMISSIONER OBERMAN: So, that's what
19 you're referring --

20 MS. SEBRING: NS is 3,000, CSX is 2,000.

21 COMMISSIONER OBERMAN: And you're saying
22 this phenomenon has been exacerbated with PSR?

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1 MS. SEBRING: Absolutely.

2 COMMISSIONER OBERMAN: Alright, Ross could
3 I -- I want to get back to what I was actually asking
4 Ben Abrams about this morning, but it sounds like
5 you're describing, I want to get to the zero time.
6 What you were describing sounded to me like you were
7 talking about what happens with system cars, not
8 privately-owned cars, in terms of unloading, is that
9 right?

10 MR. CORTHELL: Correct.

11 COMMISSIONER OBERMAN: So, just to get --
12 because everybody's talking about zero time and
13 they're using the same language, so what Ben was
14 describing is that if he gets a notice of a placement
15 at sometime during the day, in order to avoid a
16 demurrage or storage charge he just has to tell the
17 railroad before 12:01 tonight, deliver the car to me,
18 then he's off the hook if he can do that.

19 You're talking about you get notice of a
20 system car that's placed at say 2:45 in the
21 afternoon, are you saying that with zero time in
22 order to avoid a demurrage charge you not only have

1 to have it delivered but unloaded and released before
2 12:01 tonight?

3 MR. CORTHELL: No, sir. You do have to
4 order it in by their cut-off, so in your example if
5 you receive a constructive placement notice at 2:45
6 p.m. and your cut-off for the next day's work is
7 after that, that A -- gives you the ability to call
8 the car in to be unloaded on the next switch which
9 theoretically would be the following day.

10 The demurrage clock itself would start at
11 12:01 a.m. the following day. And so, as long as you
12 get your service, you order the car on the cut-off,
13 you get your service, and you receive the car and
14 unload it on day one in that example, then you're not
15 subject to any additional demurrage charges.

16 COMMISSIONER OBERMAN: So, if you get the
17 notice at 2:45 and you order the car in, that might
18 not happen until tomorrow morning?

19 MR. CORTHELL: That is correct, in fact,
20 our data shows that it could happen anywhere from
21 12:01 a.m. until 11:59 p.m. the following day.

22 COMMISSIONER OBERMAN: And in order to

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1 avoid demurrage, you have to release it before 11:59
2 or 12:01 the day after that?

3 MR. CORTHELL: Well, it's even worse than
4 that. You must release it before your service cut-
5 off time. And in our example if your service cut-off
6 time was at 3 p.m. and the car actually placed after
7 that time the following day, you will have missed
8 your window to release that car the following day in
9 order for them to create a work order for what would
10 be your second switch of the week theoretically.

11 COMMISSIONER OBERMAN: So, are you telling
12 me that under this zero time, it can happen and
13 really more importantly does happen that it is
14 impossible to avoid the charge because you get the
15 delivery the following day after your cut-off time,
16 so even if you unloaded the car in 5 minutes, it's
17 too late to release it, is that what you're saying?

18 MR. CORTHELL: No, for clarity I'm going
19 to say that if everything happened precisely and
20 according to schedule, and you were able to order
21 those before the cut-off and they delivered it the
22 following day and you were able to unload and release

1 it that following day, you would avoid demurrage for
2 that particular car.

3 But, if you recall, what I also said was
4 that precision scheduled railroading has been
5 anything but precise in that transaction.

6 COMMISSIONER OBERMAN: That part I
7 understand, but I thought you said you had to release
8 it before the next day's cut-off?

9 MR. CORTHELL: You do have to release it
10 before the next day's cut-off, that is correct. If
11 the cut-off is at 3 p.m. and they have spotted the
12 car, so for example they spotted the car at 10 a.m.
13 and you're able to unload it in that time between 10
14 a.m. and 3 p.m. you can --

15 COMMISSIONER OBERMAN: You're okay?

16 MR. CORTHELL: Release the car in time --
17 if they spot it after 3 p.m. you have no chance.

18 COMMISSIONER OBERMAN: That's what I mean.
19 So, you -- it's possible under this system that the
20 railroad delivers the car to you after its own cut-
21 off so that you cannot meet the deadline even if your
22 cut-off is at 3 and they deliver it at 3:30 and you

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1 unloaded it in 5 minutes, you're still stuck, is that
2 right?

3 MR. CORTHELL: That's is absolutely true.

4 COMMISSIONER OBERMAN: Does that happen?

5 MR. CORTHELL: Yes.

6 COMMISSIONER OBERMAN: And, under those
7 circumstances will they -- can you dispute the
8 demurrage, or do they just charge you anyway?

9 MR. CORTHELL: You certainly can dispute
10 it, I would say the dispute process as has been
11 testified is relatively broken and typically the
12 front line folks have very little authority. They
13 may make a decision quickly, but the decision is very
14 seldom in the receiver or shipper's favor.

15 COMMISSIONER OBERMAN: And under those
16 circumstances, are you saying even the railroad in
17 theory would agree that you don't have to pay, but
18 you still have to go through the dispute process?

19 MR. CORTHELL: Yes.

20 COMMISSIONER OBERMAN: So, of all of the 5
21 of you sitting there, what's the frequency of this
22 particular kind of -- it's one thing to give you a

1 short amount of time, but it's another thing to make
2 it impossible to comply physically. So, what's the
3 frequency of these occurrences that Ross is
4 describing?

5 MR. HAKSTEEN: We have them as well.

6 COMMISSIONER OBERMAN: I mean is it a lot,
7 2%, 50%, I mean is it a lot, a little?

8 MR. HAKSTEEN: It's enough to bring most
9 of us out here today to testify.

10 VICE CHAIRMAN FUCHS: Well, Marty, I think
11 getting at this is -- Jeanne, you said that you
12 successfully disputed 2 million dollars-worth of
13 charges?

14 MS. SEBRING: Correct.

15 VICE CHAIRMAN FUCHS: And, based on what I
16 saw your projections under every scenario, that's
17 over 20% of charges?

18 MS. SEBRING: Yes, one was systemwide.

19 VICE CHAIRMAN FUCHS: Yeah.

20 MS. SEBRING: And the other figure was
21 really related to two facilities.

22 VICE CHAIRMAN FUCHS: Okay, and --

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1 MS. SEBRING: But I will say that just to
2 finish with that thought.

3 VICE CHAIRMAN FUCHS: Yes, please.

4 MS. SEBRING: Is we have locations that
5 are not served, but 3 days a week. And so, if
6 they're getting switched 3 times a week, you know,
7 when the demurrage clock starts, in theory you're
8 already at a catch 22 on when demurrage hits. Your
9 free time is over before -- long before your next
10 switch comes.

11 So, it kind of counts on a couple of
12 things. You need to insure that you released it
13 before that next switch comes, but if you haven't
14 done the system release, you could be exposed to
15 charges there as well.

16 So, I mean the point is the tariff changed
17 so that your free time kicked in the day after --

18 VICE CHAIRMAN FUCHS: Right.

19 MS. SEBRING: The switch.

20 COMMISSIONER OBERMAN: That's what I was
21 going to ask, so under Ross's scenario here, if you
22 still had 24-hours free time, under all the same

1 facts you get the release time on the second day was
2 3 o'clock, the car didn't come in to 3:15, you
3 actually have until the following day to release it.

4 MS. SEBRING: Right.

5 COMMISSIONER OBERMAN: So, you still don't
6 have much time to unload it, depending on the nature
7 of the commodity but this physical impossibility of
8 missing the cut-off couldn't happen if you actually
9 have the 24-hours, right?

10 MS. SEBRING: Correct, at one point the
11 charges -- the clock started the day after the next
12 scheduled switch. So, there was --

13 COMMISSIONER OBERMAN: So, it really
14 starts at 12:01 the next -- if he gets a car -- I
15 just want to go back. I mean it's sort of like a
16 Rubik's Cube to me, I'm really trying to grasp this.
17 If you get a car 2:45 on Wednesday, under the no free
18 time -- and your cut-off is at 3 o'clock the next
19 day, and they don't deliver the -- you ordered it,
20 but they don't deliver it until 3:15 as we just
21 said, you cannot avoid demurrage.

22 If you still had 24-hours, you would have

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1 until 3 o'clock Friday, and so you've got the car at
2 3:15 Thursday, you have a chance of unloading it and
3 releasing it before 3 o'clock Friday and avoiding a
4 demurrage charge.

5 MR. CORTHELL: I'd say you have that
6 exact.

7 COMMISSIONER OBERMAN: Because I mean I'm
8 trying to go back to this incentive concept that's in
9 the law, you cannot be incentivized to roll time
10 backwards I'm pretty sure, okay. Brad, did you want
11 to add something?

12 MR. HILDEBRAND: Yeah, I -- just a point
13 of clarification. So, let's go back to your 2:45,
14 the car shows up and your cut-off time for ordering
15 is 3 p.m. Somehow, some way you find out that the
16 car has actually showed up. You call it in for the
17 next day. If they fail to bring it to you, you
18 should in theory, get another credit day because they
19 failed. Now --

20 COMMISSIONER OBERMAN: They failed to
21 bring it to you by when?

22 MR. HILDEBRAND: By the next -- whenever

1 your next service is and your next switch. So, it
2 could be, you know, 6 a.m., it could be, you know,
3 sometime in the afternoon of the following day
4 whenever your normal scheduled switch is.

5 If they fail to bring it to you within
6 that 24-hour window, or on your next scheduled
7 switch, you should get one credit day. Now, you've
8 got to monitor all of this. You've got to, you know,
9 keep score, and have somebody that followed through
10 to make sure that indeed the car showed up, and
11 that's a part of our challenge, right, is somebody
12 has to watch them like a hawk because otherwise you
13 know, boom, here comes the demurrage charge.

14 COMMISSIONER OBERMAN: I had a question
15 Brad, that I'm glad you raised, and I actually asked
16 -- mean to ask Kenny Rucker about it when we were
17 flipping through my notes. I'm interested in this
18 \$3,200 each way on your unit trains for removing the
19 locomotives.

20 So, UP delivers a unit train to your
21 facility, drops it off, unhooks the locomotives and
22 leaves -- every time?

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1 MR. HILDEBRAND: In most instances in our
2 ethanol plant that's the way it works.

3 COMMISSIONER OBERMAN: Alright, and they
4 immediately charge you \$3,200 for doing that?

5 MR. HILDEBRAND: For the first -- on the
6 outbound. And then when we call to you know, say hey
7 come get the train it's now loaded --

8 COMMISSIONER OBERMAN: They charge you
9 another \$3,200?

10 MR. HILDEBRAND: That is correct.

11 COMMISSIONER OBERMAN: And when did that
12 start?

13 MR. HILDEBRAND: Just this spring.

14 COMMISSIONER OBERMAN: And how did it work
15 before, did they just leave the locomotives there?

16 MR. HILDEBRAND: They either left the
17 locomotives or pulled the locomotives but didn't
18 charge us for that service.

19 COMMISSIONER OBERMAN: And what is the
20 stated rationale for adding this charge?

21 MR. HILDEBRAND: I think they're giving us
22 that this is a locomotive asset utilization charge of

1 some nature because they've got to, you know, pull
2 this locomotive out versus having it sit around for
3 24 hours, and it's for them, something about
4 locomotive utilization is the rationale that they're
5 giving us.

6 COMMISSIONER OBERMAN: You may not know
7 the answer, which is why I wanted to ask Kenny, but
8 he can send us a letter if he's still here, oh, there
9 he is. Yep, so they pull a locomotive out, they take
10 it some place. Would it be fair to infer that
11 they're using that locomotive to make money on some
12 other haul?

13 MR. HILDEBRAND: I'm not a railroader but
14 I think it would be fair to infer that.

15 COMMISSIONER OBERMAN: So, they're getting
16 paid for that and they're also charging you?

17 MR. HILDEBRAND: Yeah, I mean you've got
18 to believe that the reason why they're pulling it is
19 they've got some use for that locomotive in another
20 part of their business.

21 COMMISSIONER OBERMAN: Okay, is it okay.
22 Alright, we'll let him answer. Thank you, Kenny,

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1 because I was going to ask you to explain this.

2 MR. ROCKER: Yeah, we feel like we have a
3 good relationship with Cargill and --

4 COMMISSIONER OBERMAN: Until now.

5 MR. ROCKER: And I have confidence that we
6 share more than just a locomotive utilization issue.
7 We have our crews and we have to get our crews,
8 sometimes they may be locally, sometimes we may have
9 to pull them from somewhere else, so there is a
10 justification there for us to get the crews to go
11 pick-up that locomotive, and then we do want to
12 utilize that locomotive somewhere because we don't
13 know when the customer or Cargill may want to use or
14 needs the locomotive again.

15 And then we'll have to go back and then
16 get more crews to bring the locomotive back, so yes,
17 there is a justification there. I don't want to make
18 it seem like it's just a locomotive utilization
19 charge. There's a direct --

20 CHAIRMAN BEGEMAN: And it's accessorial,
21 not demurrage?

22 MR. ROCKER: Yes, correct.

1 MR. HILDEBRAND: It's an accessorial.

2 MR. ROCKER: It's an accessorial, not a
3 demurrage.

4 MR. HILDEBRAND: But Kenny, what you just
5 described to me is what a railroader does, right?
6 You schedule crews, you schedule locomotives to come
7 pick-up our train and then you take that train to the
8 final destination and we pay you for that. It should
9 be all part of the fee, now you're tacking on one new
10 fee on top of something that you should have built
11 into your rates.

12 COMMISSIONER OBERMAN: I'm sorry, go
13 ahead.

14 MR. ROCKER: I just want to say this, and
15 I really do appreciate that perspective and I'll tell
16 you we do have customers that -- and Brad you know
17 this because you're one of them. We have customers
18 that do unload and load in 15-hours and quite a few
19 that do it in less than 24-hours and for those they
20 don't have any of those charges. But we also have
21 some customers that will utilize our locomotives for
22 a few days, you know, maybe 3 or 4 days and we could

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1 be utilizing that 3 and a half, 5 million-dollar or 3
2 and a half million-dollar asset somewhere else.

3 But I want to make it clear that there
4 really is a cost there to go out, get those crews to
5 go get that locomotive and then get the crews to get
6 it back.

7 COMMISSIONER OBERMAN: Well to Brad's
8 point about how it should require the rate, it kind
9 of sounds to me like the person who is staying in a
10 \$500 a night hotel room and then they charge him
11 \$2.50 for a complimentary cup of coffee. But, let me
12 ask this question. Are you saying that you only
13 apply the \$3,200 if the unit train user can't turn
14 the train back within 24 hours?

15 MR. ROCKER: That's correct.

16 COMMISSIONER OBERMAN: And how do you know
17 that when you deliver the train -- they tell you we
18 won't be done in 24-hours?

19 MR. ROCKER: Correct.

20 COMMISSIONER OBERMAN: If they tell you we
21 will be you leave the locomotives there?

22 MR. ROCKER: That is correct.

1 COMMISSIONER OBERMAN: So, the only other
2 question I have, and I've asked this of other
3 railroads about the whole advent of PSR, why now? I
4 mean you've been a railroad for I don't know, close
5 to 200 years, and maybe not that -- in my view,
6 everything I've always heard is UP's a well-run
7 railroad, nobody figured this out until 2 months ago?

8 I mean what prompts this kind of a fairly
9 dramatic change.

10 MR. ROCKER: The impetus for us is we have
11 to get our car trip plan compliance to be more
12 reliable. As I've stated, it's the most reliable
13 that it has been in the last 2 years because of these
14 changes. So, that's -- that's our impetus, we want
15 to grow with our customers, we want to win with our
16 customers and we can do that if we have a more
17 reliable railroad and we do what we say we're going
18 to do.

19 CHAIRMAN BEGEMAN: Kenny, can you just add
20 in the fact that you -- I mean, I know that you're
21 taking as many locomotives off the system as you can,
22 so it's not that you don't have any that could stay

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1 with Brad's train, but just it's kind of hard to see
2 the full picture that they need to stay in storage
3 rather than with the train. I understand it correct,
4 don't get me wrong on that, but --

5 MR. ROCKER: Yeah, I mean it really boils
6 down to the fact that we would rather have our asset,
7 you know, highly valued asset more in use than just
8 stored at a facility whether it's on the origin or
9 the destination for several days.

10 COMMISSIONER OBERMAN: Did you, prior to
11 this plan did you have a limit of how long a unit
12 train owner could keep the locomotives there without
13 being charged? A different limit than 24-hours?

14 MR. ROCKER: No, we didn't. We did
15 differentiate the customers. There are some
16 customers that can do it in less than 24-hours and
17 there are customers who would fall under a scenario
18 that Brad is talking about where it's unscheduled,
19 an unscheduled unit train network, and we're not sure
20 how long it will take for them to load or unload.

21 I will say this -- on those customers
22 where there are unscheduled work, where they don't

1 know how long they're going to have a locomotive, I
2 can tell you our commercial team has worked with them
3 to provide a manifest alternative, so maybe the
4 scenario isn't the best service product for the
5 customer, and I'm not talking about Brad and Cargill
6 here, but I want to make it clear that we have
7 optionality here and that optionality is that
8 manifest network, if you can't load and unload in the
9 24-hours.

10 VICE CHAIRMAN FUCHS: But the manifest
11 network costs a lot more than a unit train, right?

12 MR. ROCKER: I don't want to disclose any
13 strategies here, but that is not a factual comment in
14 every case, I can tell you that. I feel comfortable
15 saying that. In every case that is not the truth in
16 every case, and I know every part of our rate
17 structure so that is not true in every case.

18 COMMISSIONER OBERMAN: And are we talking
19 about when you say it's unscheduled, the reason for
20 the inability to unload in 24-hours is because a
21 shipper didn't know they were getting a train?
22 What's unscheduled about it?

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1 MR. ROCKER: Each customer has a unique
2 scenario. In some cases, the customer may not have
3 the infrastructure at one end. They may have it at
4 the origin end, but they may not have it at the
5 destination end, so each scenario, each case is
6 different.

7 MR. HILDEBRAND: About this unscheduled if
8 I may, partly Marty, it's about how much we process
9 on a given day. We've got a plant that kicks out 25
10 cars a day, here comes a train of 100 or let's call
11 it 100 cars, so it's a 4-day load, essentially. Now,
12 we probably have cars that are already there that are
13 being loaded that are waiting for the next train to
14 come in of empties, and then it will take us maybe 3
15 days.

16 But our production rates are fairly
17 constant and they change a little bit over time and
18 we have peaks and valleys and things, but generally
19 speaking, we're producing about the same. And we
20 tell this to the railroad whether it be UP, or
21 anybody else, they see what our production schedule
22 is.

1 We plan this out and give them the heads
2 up. So, to say that it's unscheduled I think is a
3 little bit of a misnomer.

4 COMMISSIONER OBERMAN: So, you're saying
5 from your -- from Cargill's point of view, your need
6 for the train and the locomotives is predictable?

7 MR. HILDEBRAND: That's correct.

8 COMMISSIONER OBERMAN: And you're saying
9 you can't schedule your locomotives to just leave
10 them there even though you know it's going to be
11 predictable?

12 MR. ROCKER: I'm saying that it is not as
13 predictable always and that there is also other
14 options out there in terms of manifest options.

15 COMMISSIONER OBERMAN: Alright, well I
16 don't want to beat this any further, but that's very
17 enlightening because I couldn't for the life of me
18 figure out what was going on here. This was very
19 helpful.

20 CHAIRMAN BEGEMAN: And Kenny, thank you
21 for rejoining.

22 COMMISSIONER OBERMAN: Yeah, thank you.

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1 CHAIRMAN BEGEMAN: And other railroads may
2 need to rejoin us later on too.

3 COMMISSIONER OBERMAN: We'll tell them you
4 get extra credit and overtime pay.

5 CHAIRMAN BEGEMAN: The day is getting away
6 from us, but I don't want you to think of the lack of
7 additional robust questioning by me means anything, I
8 do want to quickly ask though can any of you comment
9 on the congestion, I guess I was going to say
10 pricing, but I don't mean it that way, the new
11 congestion fee and how that is impacting -- have you
12 been charged yet based on the -- NS's judgment that
13 you've caused the congestion? Anyone?

14 MR. CORTHELL: We have not, so I don't
15 have a comment on that.

16 CHAIRMAN BEGEMAN: Okay.

17 MR. BURCHETT: We haven't been charged,
18 just embargoed.

19 MS. SEBRING: Nor have we.

20 MR. HILDEBRAND: Nor have we.

21 CHAIRMAN BEGEMAN: NS, keep it up.
22 Joking, okay, you both have --

1 VICE CHAIRMAN FUCHS: Car incentive time
2 as well, but there were I think, various solutions
3 said in this panel that were a little bit different
4 than those in the first panel, so I just wanted to
5 kind of hone-in on those and make sure I fully
6 understand.

7 You know, Brad, you had talked about kind
8 of either a weighted cost of capital or kind of
9 looking to barge rates, kind of as a competitive
10 market and basically having a demurrage rate cap if I
11 understand correctly.

12 Is there, you know, would you agree that
13 kind of demurrage includes a compensatory effect and
14 an incentive effect?

15 MR. HILDEBRAND: Yeah, I think it's what's
16 grown up on the barge side is like.

17 VICE CHAIRMAN FUCHS: Right.

18 MR. HILDEBRAND: That the marketplace over
19 time has moved towards stricter and stricter
20 demurrage terms.

21 VICE CHAIRMAN FUCHS: Right.

22 MR. HILDEBRAND: As the value and the

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1 demand for barges over time has gone up.

2 VICE CHAIRMAN FUCHS: Right.

3 MR. HILDEBRAND: So, this has shifted
4 around in the last --I think has been out there for
5 about 5 years is my understanding, at least 5 years,
6 and it's what the market itself has gravitated
7 towards as being you know, reasonable and competitive
8 and that everybody's gone to them.

9 VICE CHAIRMAN FUCHS: But is there
10 something within the rail network, both in terms of
11 kind of the cost of the infrastructure itself, and
12 maybe something about time value for different
13 transportation, for different commodities, that would
14 lead you to believe that maybe for rail it ought to
15 be higher than the barge rate for those reasons?

16 MR. HILDEBRAND: I mean you could go and
17 make that kind of a decision, then you're going to
18 have to say okay, well what is that and the amazing
19 thing to me as I stated in my speech is that those
20 people that are willing to lease you space.

21 VICE CHAIRMAN FUCHS: Yeah.

22 MR. HILDEBRAND: On their network, are

1 charging fractions of dollars relative to what the
2 railroad is wanting to charge us. So, it kind of
3 gets to that -- you know, if you look at that and
4 say they've got assets, they've got you know,
5 maintenance.

6 VICE CHAIRMAN FUCHS: Right.

7 MR. HILDEBRAND: Things like that, and yet
8 they're willing to charge us a much smaller fee
9 that's supposedly competitive and is competitive in
10 the marketplace.

11 VICE CHAIRMAN FUCHS: And kind of getting
12 to that, when you mention that kind of national
13 average for storage and I think some of that, you
14 know, is there something about the storage track that
15 is less valuable than you know, the track that's
16 being used when something's put in constructive
17 placement for example, such that you know, stored and
18 constructive placement such that you would expect a
19 higher rate and the railroad storage was that and
20 that may not be the best measure, is there some truth
21 to that?

22 MR. HILDEBRAND: I think that that's a

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1 fair comment to say that a yard -- a working yard
2 that is utilized for interchanging traffic and things
3 like that has more utility than say somebody else who
4 just has a bunch of tracks that you know, are
5 collecting dust, so to speak, that are just available
6 at any one point in time.

7 VICE CHAIRMAN FUCHS: Right.

8 MR. HILDEBRAND: I think that that is not
9 -- I think that's a fair comment.

10 VICE CHAIRMAN FUCHS: And then Herman, you
11 were talking about a private car, there should be no
12 charge if it's a private car, basically, do I
13 understand that correctly?

14 Now, if a private car is in constructive
15 placement, are you separating the cost of using
16 capacity from railroad compared to the cost of using
17 the car, or are you saying that when a private car is
18 in constructive placement there should be no charge
19 whatsoever?

20 MR. HAKSTEEN: I'm challenging or
21 suggesting that a very easy solution would be that
22 there should be no cost of demurrage, detention or

1 storage on a private car because it's much likely
2 that the railroad held up your car and they cost you
3 because those extra days transit, versus the few
4 times that you're going to cost them for taking up a
5 little bit of their track space.

6 So, rather than doing all that tracking
7 and tracing and arguing and auditing, maybe you could
8 just have a no charge for private cars, just a
9 thought.

10 VICE CHAIRMAN FUCHS: Do you think that
11 that would create a disincentive at all for private
12 car owners not to --

13 MR. HAKSTEEN: Absolutely not, the cost of
14 a refrigerated car per day loaded, it costs the
15 lessee about 150 bucks a day. Quite frankly, even
16 though I guess CNS is the lowest charge at 80 bucks
17 a day or 60 bucks a day for a private car, I mean
18 their own cost of ownership on a loaded refrigerated
19 car is three times that of their charge.

20 So, no, I think the motivation to the
21 private car owner is to move his darn assets. He
22 doesn't need the railroad throwing tariffs at him.

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1 VICE CHAIRMAN FUCHS: But for example, you
2 know, there are some private car owners that actually
3 choose to purchase car storage because maybe they
4 don't, you know, they don't store it on their plants
5 or they just need storage capacity, right?

6 And if there was no charge for a private
7 car owner from using a railroad asset in CP, why
8 would anyone pay for a car storage when they could
9 just leave it in the railroad yard for free?

10 MR. HAKSTEEN: So, the railroad could come
11 back and suggest that they're using tracks for
12 storage that they shouldn't be and if they continue
13 to do it they'll embargo them.

14 COMMISSIONER OBERMAN: I'd like to sort of
15 pose a broad question, but only if somebody can deal
16 with it briefly, because we're going to run out of
17 time. But I am sitting up here listening to the
18 railroads come in and put all these numbers up on the
19 screen about how everything is moving fast or faster
20 and then I'm listening to the 6 of you tell us how
21 it's going in the opposite direction.

22 Can somebody put these two concepts

1 together because the numbers are the numbers, but
2 you're not feeling it or you're not seeing it. I
3 mean, Matt you said PSR has caused, since PSR you've
4 been suffering more delays. Jeanne, you've kind of
5 suggested the same thing, so I don't get it, can
6 somebody -- what's wrong with this picture.

7 MR. HILDEBRAND: Alright, so let me take a
8 shot at this. The velocity numbers generally
9 speaking are -- have improved, certainly over the
10 last couple years if you just look at it. And we
11 would say looking at our numbers, because we look at
12 origin dwell, loaded move, destination dwell, empty
13 move back.

14 So, if you just take when the car's in the
15 possession of the railroads, it's fairly consistent
16 but it's generally been improving. Where we run into
17 trouble and whether you're the CSX, the NS, UP, BNSF,
18 any of the Class I's, it's the first mile/last mile
19 is where they're struggling.

20 So, if you hear angst from this group, and
21 I don't mean to speak for everybody, but I know
22 personally, and as Cargill, where we feel it the most

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1 and where we're not seeing the real benefit of PSR
2 and we're struggling to really recognize this, it's
3 on the origin piece where the cars are being spotted
4 to us, and the destination piece if you're a customer
5 or if you're Cargill because we receive cars as well
6 --that's what's inconsistent.

7 COMMISSIONER OBERMAN: Is that where the -
8 - go ahead Matt.

9 MR. BRAINERD: I was just going to say
10 quickly our challenge is on the last mile, that's
11 where our delay is and it will sit outside our gate
12 for multiple days and that's where our delay is.
13 And, if we're charged a demurrage charge, it's
14 because it's sitting outside our gate, not because
15 and we do all private cars, so this conversation
16 there's two different 24-hour issues going on, one's
17 right.

18 COMMISSIONER OBERMAN: But I -- I'm sorry,
19 Jeanne, go ahead.

20 MS. SEBRING: It's just that averages will
21 kill you, right? They're sharing numbers in high
22 averages across a very complex system and frankly, we

1 have a pretty complicated system as well of
2 facilities. So, when we look at just high averages,
3 it's really not going to tell you enough.

4 You know, the significant pain points,
5 there are chronic areas that are still going to, you
6 know, kind of detail far better what's actually
7 happening there, and then there's always the whack a
8 mole picture. You know, you fix one, the problem
9 pops up somewhere else.

10 And so, you know, it doesn't reduce the
11 pain level, it just has you constantly chasing it.

12 COMMISSIONER OBERMAN: So, first mile/last
13 mile, are you talking about situations where the
14 Class I is actually delivering the cars and picking
15 them up to your facility as distinguished from a
16 short line?

17 MR. BRAINERD: Yes, I am.

18 COMMISSIONER OBERMAN: Because you had
19 talked about how the short line. So, you're saying
20 that the PSR has caused -- if I get this right, the
21 PSR program seemed to have improved performance on
22 the hauls, the long hauls from origin to destination

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1 until you actually get there, and then during the
2 switching and moving the cars in and out of your
3 actual facilities, it's somehow worsened by PSR
4 because of the rigid scheduling, is that the reason?
5 Or rigidity in scheduling?

6 MR. HILDEBRAND: It's some rigidity, but I
7 think it's also they lack bodies. They've reduced
8 crews and, so you've got, you know, God bless the
9 crews that are out there because they're being
10 charged with serving more customers than what they
11 would normally serve, and they just run out of hours.
12 You know, they start off every day and they want to
13 get to every customer but sometimes things slow down
14 and then all of a sudden they run out of hours and
15 then they don't get to serve those that are at the
16 end of the line.

17 MS. SEBRING: Right.

18 COMMISSIONER OBERMAN: So, we should be
19 asking these railroads, the next group that comes up
20 here, what their data is on the first mile/last mile
21 and not the big picture items, is that --

22 MR. HILDEBRAND: That'd be great.

1 COMMISSIONER OBERMAN: To try to get at
2 the bottom of this, okay, thank you.

3 MR. CORTHELL: That'd be wonderful. In
4 our written testimony, we provided data on that
5 topic. It's a small sample but it is a 30-day sample
6 and there -- in that case there were 21 switchable
7 events and they missed 5 of them.

8 COMMISSIONER OBERMAN: The last time I
9 looked at the statistics was in 1964, and so I glazed
10 over. When I looked at your table, but I'll look
11 again, thanks.

12 MR. CORTHELL: I'd be happy to spend any
13 amount of time on the phone with you.

14 COMMISSIONER OBERMAN: We'll need it,
15 thank you.

16 CHAIRMAN BEGEMAN: Any further comments?

17 MR. CORTHELL: I would just say thank you
18 again for the seriousness and the great questions.
19 It's really clear to us that you're trying to
20 understand this issue and it's important for us that
21 you do that, so thank you very much.

22 CHAIRMAN BEGEMAN: Thank you. Thank all

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1 of you, it was very helpful.

2 Panel V

3 CHAIRMAN BEGEMAN: Thank you, thank you
4 for the very short break, so we could stand up for a
5 second. We'll now have Panel V.

6 MR. BODDY: Good afternoon, Chairman
7 Begeman, Vice Chairman Fuchs, and Board Member
8 Oberman. I'd like to thank the Surface and
9 Transportation Board for holding the hearing and
10 investigating the unreasonable railroad demurrage and
11 accessorial charges practices.

12 My name is Michael Boddy and I appear
13 before you today in conjunction with PRFBA and as the
14 Chief Operating Officer of the Anderson-DuBose
15 Company, a small business that utilizes inbound rail
16 service.

17 The Anderson-DuBose Company is a private
18 minority-owned food service company that provides
19 logistics and distribution service to McDonalds,
20 covering Ohio, Pennsylvania, New York and West
21 Virginia.

22 In April of 2012, we decided to cut and

1 consolidate two older centers located in Solon, Ohio
2 and Carnegie, Pennsylvania into one state of the arts
3 center in Lordstown, Ohio. This investment was made
4 to realize long-term financial savings from a more
5 efficient distribution center and logistics benefits
6 from a more strategic geographical location.

7 A key factor in our business case to build
8 a new 22 million-dollar center in Lordstown, was the
9 ability to utilize and leverage inbound rail service
10 to receive several of our core refrigerated
11 products.

12 Our studies and business cases identified
13 that we could fund this facility to pass on the
14 efficiencies and savings gains to our restaurants we
15 serve, which are primarily owned by other small
16 business owners. Locating the center in Lordstown,
17 Ohio also provided new well-paid jobs to a struggling
18 local economy.

19 As a small business, we do not own our own
20 railcars. We utilize refrigerated railcars that are
21 owned by BNSF railway and we receive rail service
22 from CSX at our Lordstown facility.

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1 The reference to demurrage rules and
2 guidelines in my testimony apply to those imposed by
3 CSX. When our facility was built in 2012, it was
4 built to support our current and projected future
5 needs. The sales of the products we receive were
6 projected and remain fairly consistent and we were
7 projected to order one or two refrigerated cars each
8 day.

9 Our facility was designed with two inbound
10 rail doors and in order to accommodate these
11 projections, and over the past 7 years, these sales
12 and ordering trends have remained consistent. While
13 we should receive a regular flow of one or two
14 railcars per day based on our ordering and shipping,
15 on a regular basis we have -- our railcars held at
16 CSX railyards, awaiting future cars destined for us.

17 This practice of bunching cars causes
18 operational challenges and inefficiencies for us.
19 This CSX railcar bunching has increased over the past
20 several years with the onset of the precision
21 scheduled railroading. This attempt by railroads to
22 become more efficient has severely impacted our

1 operational costs.

2 Since PSR was initiated and we are now
3 consistently having days with zero railcars arriving
4 and then receiving a bunch of 4 or more railcars at
5 one time. The CSX initiated bunching causes
6 operational issues which impact our work force,
7 increase our operational costs through employee
8 overtime, additional equipment needs, diminished
9 warehouse productivity and the use of truckloads to
10 supplement our needs.

11 Although we've always incurred some level
12 of bunching and added operational cost in the first 2
13 years after opening the facility, we were able to
14 control our CSX demurrage charges using unload credit
15 days provided by CSX.

16 When we began rail service in April of
17 2012, we negotiated a CSX local demurrage tariff
18 which provided for 3 days of credit. The 3 days of
19 credit were beneficial and allowed us to accumulate
20 credit days when we unloaded and returned cars early.

21 These credit days were utilized to offset
22 the additional dwell days that we accumulated when we

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1 received bunch cars from CSX. This local 3-day
2 credit was eliminated by CSX in 2017 and we are then
3 subject to demurrage tariff terms outlined in the
4 national CSX 8100 publication which only provided one
5 day of credit.

6 With only one day of credit, the ability
7 to accrue credit days was essentially eliminated,
8 exposing us to additional demurrage charges caused by
9 CSX bunching. In addition to the elimination of
10 credit days, CSX has also adjusted the demurrage
11 tariff several times since 2017, increasing the per
12 day demurrage charge.

13 With the CSX demurrage tariff change that
14 was placed in effect on January 1st, 2018 we are now
15 charged \$250 per day for cars that are not processed
16 within one day. This is a 67% increase from the
17 \$150 per day that was in place prior to January 1st,
18 2017.

19 With the increases in the daily demurrage
20 tariff rate and the loss of credit days previously
21 provided, we have seen our CSX demurrage charges
22 increase by 165% since 2016. This exponential

1 increase has resulted in over \$400,000 of additional
2 demurrage expense each year, which has severely
3 impacted our business plan and eliminated our ability
4 to pass along the planned efficiencies gained to our
5 customers.

6 If PSR practices in the current demurrage
7 tariff policies continue, we and other small
8 businesses that utilize rail service may be forced to
9 abandon rail and return to truckload options.

10 With the current and future trucking
11 industry gap in CDL drivers, and the added
12 environmental impact of additional truckloads, we
13 find this option less appealing. We believe that
14 rail service can be a viable option for small
15 businesses like us, by eliminating these unreasonable
16 practices and by stopping PSR, practice of bunching,
17 increasing the credit days from unloading to 5 days
18 and rolling back demurrage tariff rates, we at the
19 Anderson-Dubose Company respectfully ask for your
20 review of the current unreasonable practices and
21 charges that are impacting the industry.

22 These practices and the imposed demurrage

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1 and accessorial charges have been particularly
2 impactful on small businesses such as us and the
3 customers we serve. Thank you for allowing me the
4 opportunity to share our concerns and be part of this
5 important hearing.

6 CHAIRMAN BEGEMAN: Thank you, Ray?

7 MR. NEFF: Thank you. First, I'd like to
8 thank the Board for taking the time to review these
9 charges and listen to the testimony. It's well-known
10 that the Class I railroads in today's -- in North
11 America today are going to the precision-based
12 railroading. This has 3 components to it -- shipping
13 consistence, shipping on time and shipping with fewer
14 assets or better utilization.

15 The railroads and the networks of North
16 America should be viewed as economic assets to North
17 America. Lhoist North America supports the efforts
18 of the railroads, as they would any business that
19 continues looking for ways to improve efficiency and
20 effectiveness. Shipping and single car shipments
21 should be the most economical way for shipment
22 throughout North America.

1 However, these new changes have not been
2 reciprocal to both parties. They're difficult to
3 manage and dispute and are showing signs of pushing
4 freight off of the railroads onto trucks or highways
5 and interstates.

6 One of the key principles to precision-
7 based railroading is running freight consistently and
8 on time. In my experience as a logistic manager, the
9 first implementation of scheduled railroading could
10 be very difficult to achieve. The precision
11 scheduled railroading concept, when successful,
12 allows logistic managers to better plan the supply of
13 raw materials and finished goods to the customer
14 base.

15 It is widely known that just in time
16 inventory is an active principle in the production
17 world, and the transit times in these shipments are
18 very impactful. The way to overcome a shipment that
19 does not make it on time is to bring trucking and
20 supplement the inventory.

21 This situation can be expensive because
22 it's short-term notice and the spot market in trucks

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1 is usually double than what it typically is. It also
2 has bad effects, financially, and that is the
3 accessorial charges will follow, so once you've
4 filled up your bins and you've filled up the need for
5 the inventory, the railcar will arrive.

6 At that time, it's been testified from
7 others, sometimes you don't have room for that
8 railcar anymore. So, you have to just basically
9 suffer the demurrage charges. When this does occur,
10 it's very difficult to fight those charges. The
11 tariffs do not protect the shipper or the receiver at
12 that point and you're just charged the charge.

13 You've also lost the utilization in your
14 private cars if you have private cars. Another key
15 principle of precision-based railroading is limiting
16 railroad owned assets or increasing utilization.
17 This one to me kind of hits home. It's something
18 that as a shipper I can partner with the railroad and
19 have skin in the game.

20 So, bringing on owned assets or leased
21 cars is something that I feel very strongly about.
22 In doing that, you've got to make sure that you know

1 what your ratios are, what your transit times are to
2 size your fleet correctly.

3 The railroads do not want these extra cars
4 sitting around in their yards because it does cause
5 congestion and it also causes operational impacts to
6 them as well. So, knowing what those schedules are
7 and being able to right size your fleet is very, very
8 important.

9 If they don't adhere to that, they don't
10 use the precision railroading or aren't able to meet
11 the schedules, there are no provisions in the current
12 tariffs that allow us as private car owners, any type
13 of repercussion on the railroad or cost
14 justification.

15 In addition to the lack of provisions to
16 the tariff in protecting the shipper, these charges
17 are administratively challenging. These charges
18 start after a day as has been discussed, the shipment
19 history doesn't seem to matter if the car was bunched
20 or if it wasn't picked up on time, that's not figured
21 into the demurrage.

22 The demurrage bill is just simply cut and

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1 sent to you. The charges really impact the freight
2 portfolio and make it very difficult to sometimes be
3 effective and efficient. These updates are not
4 always operationally accurate. It makes it difficult
5 or impossible to understand how many cars will
6 receive daily -- that's the excuse me, just one
7 second there.

8 When I'm speaking about that, I'm talking
9 about the notifications. So, we get notifications
10 from the railroads on our shipment. It will let you
11 know if the ETA of that shipment is on time, if it's
12 going to be delayed or if the shipment is actually
13 going to arrive early. Many times, with that,
14 especially with cars coming back, there is nothing I
15 can do to impact that.

16 If they call, if they send me an email
17 that says the car isn't going to make it on time or
18 it's going to be early, I can't make changes within
19 my operational logistics plan at that point to
20 accommodate that.

21 And the last topic really is pushing
22 shipments off of our rail lines onto our railroads.

1 Since 2019, I've seen a dramatic increase in this
2 type of behavior. It's rapidly increasing and it's
3 based off of the logistics charges or accessorial
4 charges that the shipping and receiving folks are
5 accruing.

6 So, what they're doing is they're moving
7 to the truck base. In my experience, the trucking
8 industry is struggling as well with drivers and as
9 well as our infrastructure. My fear is that our 16-
10 mile industrial spur in Tennessee will suffer the
11 same fate as our facilities in Florida and Texas have
12 seen, and that is Lhoist North America will
13 eventually be forced to abandon the rail.

14 In time the tracks will become too
15 deteriorated to use, and the capital will be too
16 great to reinvest. It is crucial to our market to
17 have efficient and cost-effective transportation.
18 Rail shipments have the potential to be the most
19 cost-effective method to transport materials like
20 ours. These changes are accelerating the demise of
21 rail shipments at an alarming rate. And once those
22 shipments are gone, they are gone in my experience.

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1 The shipping base will just stay with the truck base
2 then.

3 I'd like to thank you for your time today,
4 I appreciate your concern and willingness to listen
5 to all of the testimony.

6 CHAIRMAN BEGEMAN: I'm sorry, I hit the
7 wrong button. Mr. Weiner, thank you.

8 MR. WEINER: Good afternoon, it's been a
9 long morning and afternoon. I appear before you
10 today wearing a couple of hats, that of the President
11 of North America's largest privately held lessor of
12 2,200 insulated mechanically-refrigerated railcars.

13 I'm also the owner of two 375,000 square
14 foot refrigerated warehouses, one in Perryville,
15 Maryland, the second in Chambersburg -- each served
16 by the CSX railroad. My associate, Herman Haksteen
17 has spoken to you earlier from a rail lessor
18 perspective, and as President of the Private Railcar
19 and Food and Beverage Association.

20 My appearance here today is not without a
21 great deal of concern. Allow me to explain. In
22 October of 2017, my CEO Mr. Haksteen, spoke before

1 the same Board at a hearing that included testimony
2 from the now departed Hunter Harrison, then Chairman
3 of the CSX, the same railroad that service my two
4 warehouses.

5 Six months later in March 2018, demurrage
6 and detention credit days were reduced from 3 days to
7 1 day. Railcar placement times became erratic,
8 service days were changed, and car placement refunds
9 were eliminated. I would hope that further
10 retribution by the CSX against my facilities will not
11 be the result of my participation today at this
12 hearing.

13 Public Law 96-448 enacted on October 14,
14 1980, the law that created the Surface Transportation
15 Board as one of its stated goals and I quote, "To
16 provide a regulatory process that balances the needs
17 of carriers, shippers and the public." There's
18 nothing fair from the railroads. There is no balance
19 of the needs of the rail community. There is nothing
20 reasonable emanating from the railroads to the needs
21 of the shippers and the public.

22 In Black's Law Dictionary 10th Edition

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1 2014, reasonable is defined as fair, proper or
2 moderate under the circumstances, sensible. There's
3 nothing fair, proper or moderate in the railroad
4 shipper relationship.

5 96-448 has created a monopoly that inures
6 to the benefit of the shareholders of the railroad,
7 absent of any financial normalcy in rates,
8 accessorial charges. Market power has been created
9 that is unparalleled in other sectors of the economy.
10 Market power or monopoly power creates a duopoly, the
11 ability of a company to heavily influence the price
12 charged for its product.

13 Since the railroads have exclusive
14 franchise domination granted to each of them by the
15 STB, absent reciprocal switching, they enjoy
16 unfettered market power and where firms possess
17 market power, there exists a danger of such power may
18 be abused.

19 For example, charging a monopolistic
20 pricing to the detriment of its consumers. And such
21 is the state today of the shipper railroad economic
22 relationship. Railroads under the protection, not of

1 the law, of the STB, are afforded the luxury of
2 market dominance, the cost of which transfers to the
3 distribution system and ultimately then to the
4 consumer.

5 The cost today is not even quantifiable.
6 Allow me, please, to offer a couple personal examples
7 issued that speak to the subject of today's hearing.
8 Perryville Cold Storage, Perryville, Maryland is
9 located midway between Baltimore and Philadelphia.
10 There's a railcar delivery track adjacent to the main
11 rail line between Baltimore and Philadelphia on which
12 the Perryville cars are placed by the CSX.

13 The delivery track is almost a mile from
14 the Perryville facility. The cars are brought to our
15 facility from the delivery track by a third-party
16 switcher. CSX starts the demurrage detention clock
17 at the time the cars are placed on the delivery
18 track, not -- I repeat, not when the cars are
19 actually delivered to our facility.

20 There's no consideration as to when the
21 facility actually receives the cars for unloading.
22 In order to minimize the exposure to demurrage and

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1 detention, we have repeatedly requested that CSX
2 deliver the cars directly to the facility, which is
3 their obligation under the Railroad Bill of Lading,
4 and not leave them for the switching service.

5 This then would be fair and reasonable as
6 to when the clock starts in determining charges for
7 detention and demurrage. Not only have we been
8 unsuccessful in our approach, but using the years
9 2017 and '18 as an example, Perryville and our sister
10 warehouse, Chambersburg, have paid in excess of
11 \$271,000 in demurrage and accessorial charges.

12 Bunching is prevalent and minimal
13 consideration for relief by the CSX is normal. I
14 have in my hand, which I'm happy to share with the
15 Board, a document that shows a listing of 20 bunched
16 cars delivered at 11:03 p.m. at the CSX delivery
17 track at Perryville last Wednesday, May 14th.

18 All but one shipped to Perryville from the
19 same Oregon location. The days in transit ranged
20 from 11 days to 22 days -- a span of 11 days extra.
21 Would you not agree that this is ludicrous? Is this
22 what the railways referred to as precision scheduling

1 of railroading?

2 In closing, members of the Board, we are
3 here today because the STB has not yet addressed its
4 mandate of providing a regulatory process that
5 balances the needs of carriers, shippers and the
6 public. The railroads must be held accountable to
7 not only the Board, the shipping and receiving arms
8 of the rail transportation system.

9 Until the STB takes a firm position in
10 protecting the public from the arrogance and
11 monopolistic posture of today's railroad system, the
12 result will continue to be the same -- a
13 deteriorating service level and a push by the
14 railroads to pass on to the consumer, the costs
15 associated with the inefficiencies of the system.

16 I join and respectfully request that the
17 STB consider the plight of the associations
18 represented here -- shippers, receivers and private
19 rail equipment lessees, by crafting a firm policy of
20 reasonableness by the railroad of its charges to the
21 rail community at large. Absent such a policy by the
22 STB would be a monumental economic tragedy. Thank

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1 you for affording me the opportunity to be a part of
2 this hearing today.

3 CHAIRMAN BEGEMAN: Thank you, Brett?

4 MR. MEARS: I'd like to thank the Board
5 for this hearing and for allowing me to participate
6 in it. My name is Brett Mears, I'm the President of
7 Palmer Logistics in Houston, Texas, we're a third-
8 party warehouse, very similar to the gentleman from
9 Kinder Morgan, we don't have any control over the
10 shipping and receiving of the cars, it's directed by
11 our customers.

12 We ship about 300 boxcars per year of
13 chemical goods, and we receive about 600 boxcars of
14 food stuffs. At the end of 2017, we secured a
15 contract with the U.S. government, with USAID. We
16 were the pre-positioned warehouse for food aid for
17 USAID. We started handling that business in one of
18 our existing facilities that's served by the Union
19 Pacific.

20 We're limited there by the UP to three
21 switches per week with 7 cars per switch. So,
22 February/March of 2018, we quickly racked up about

1 \$150,000 in demurrage and decided we needed to do
2 something differently.

3 So, we went out and we procured a new
4 facility, leased another warehouse in Houston -- a
5 multi-million-dollar lease over 3 years and we
6 approached the UP. They agreed to switch us three
7 switches per week at that site to 10 cars per switch.

8 In June of 2018, we started receiving
9 heavy volume. USDA had tendered to their suppliers
10 and we started receiving heavy volume for a buy for
11 the humanitarian crisis in Yemen. Over the next 3
12 months at this site, we had serious UP service issues
13 -- they missed 15 of 40 switches and they refused to
14 increase the switches as well.

15 And those numbers are their numbers -- we
16 actually hold it to be higher because we didn't get
17 our 10 switches per switch, and we got them on every
18 day of the week. So, we quickly racked up \$750,000
19 in bill demurrage by the Union Pacific. We also
20 delayed a humanitarian shipment to Yemen.

21 The initial bill as I said was over three-
22 quarters of a million dollars. It's since been

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1 reduced to \$242,800 which is what UP says it would
2 have been if they gave us perfect service.
3 Unfortunately, this is going to be passed to the
4 taxpayers and it's going to reduce the amount of
5 money that USAID can spend on humanitarian relief and
6 it really could have been avoided if the Union
7 Pacific had expanded service to that site and gave us
8 more than the 3 switches at 10 cars per switch.

9 We're in a similar situation with respect
10 to preparing for a humanitarian issue that's ongoing
11 right now. This year the U.S. government and their
12 suppliers have decided to truck the material to our
13 facility because they were concerned about the
14 reliability and the demurrage costs if they tried to
15 ship this by rail. So, that's over 10,000 tons of
16 material that's going to ship to our facility via
17 truck over 500 trucks on the road instead of 180
18 approximate railcars that are coming to us to deliver
19 this humanitarian aid.

20 One thing to note, these cars are packed
21 with about 1,500 floor-loaded bags of agricultural
22 product -- beans, lentils, flour, rice, so we have to

1 line up labor in advance to these cars delivering.

2 So, if we line up labor and then the switch doesn't
3 happen, I now have 12 people that I have to pay to
4 sit around to do nothing because if I don't pay them
5 when the railcar comes, they're not going to come
6 back and work for me.

7 So, we have a significant issue when the
8 railroad does not deliver to schedule. So, what I
9 think -- what I'd like to point out as unreasonable
10 is the inflexibility of the railroads to increase
11 switches vis-a-vis the shipment volume that was a 4
12 month time period that we did not get any extra
13 switches despite the volume that delivered to Houston
14 in 2018.

15 We get fined for driving rail efficiency,
16 but what recourse do we have when they don't deliver,
17 and I have to pay that labor bill? And then finally,
18 the demurrage is just billed out of their system,
19 there's no sync-up to what their operational
20 performance truly is, so the burden falls on the
21 shipper or in this case the third party warehouse to
22 contest that, spending a lot of time and effort to do

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1 that.

2 The ask -- I would ask the STB that if the
3 switch days are limited, define reasonable
4 flexibility for a railroad when the volume exceeds
5 the switch capacity. Everybody else in the supply
6 chain has to be flexible, has to account for spikes
7 and seasonality. I believe the railroad should as
8 well.

9 If there are punitive measures for driving
10 railroad inefficiency, there should be punitive
11 measures for a shipper and receiver costs associated
12 with the railroad failing to deliver. And then I
13 believe the demurrage bill needs to be validated
14 before sending it to the customer. That concludes my
15 remarks, thank you.

16 CHAIRMAN BEGEMAN: Thank you, Ken?

17 MR. JOHNSON: Chairman Begeman, Vice
18 Chairman Fuchs, Board Member Oberman. Thank you for
19 your time today and good afternoon. My name is Ken
20 Johnson. I'm the CEO of the Shippers Group. We're
21 a provider of third-party logistics services based in
22 Dallas, Texas. We have facilities throughout the

1 United States. Of those facilities, three of them
2 are rail-served. Those facilities -- one of them in
3 the southeast, and two of them in Texas.

4 We're served by Norfolk Southern in the
5 southeast and by the Union Pacific in Texas. On the
6 28th of August in 2018, we were notified by the Union
7 Pacific that they had based upon their analysis of
8 our volumes, they had decided that our service days
9 per week were going to be adjusted from 5 -- those
10 being Monday through Friday, to 2, being Monday and
11 Thursday.

12 Now this is prior to the implementation of
13 the tariff that came out a few months later that
14 changed the free time from 48-hours to 24-hours and
15 changed the demurrage fees per box car from \$100 to
16 \$200.

17 In November, two months later, we received
18 a demurrage bill for \$11,000 for a facility that we
19 had never had a demurrage bill for. We've been in
20 that building 3 years, never had a demurrage bill at
21 all.

22 When we approached the Union Pacific in

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1 regard to this demurrage bill, their response was
2 that it was our fault for not controlling the volume
3 once they told us they were going to reduce our
4 switches. All of our switches are multi-customers
5 serviced by boxcar, so there is no one customer in
6 any facility that takes up all of the boxcar service.

7 As you might expect, a number of
8 discussions with Union Pacific about this two
9 different times -- we had them visit us in Texas and
10 I had a long phone call with an executive and I
11 wanted to pass on some of the things that were said
12 during those conversations.

13 First of all, with regard to adjusting our
14 volumes to fit what they say our requirement was -- I
15 made mention of the fact that we don't know, we don't
16 have control over the volumes. I happened to have my
17 customer in the room -- one of my customers in the
18 room when I made that statement and he confirmed
19 that.

20 So, he asked -- the railroad executive
21 asked the customer when do you know -- when can you
22 let us know what this volume increase is going to be?

1 And he said well the minute I know they're in your
2 system. The minute that we make that decision
3 they're in your system, to which the railroad
4 executive replied well, then just look in our system
5 and tell us when you're going to have this
6 additional volume and both my customer and myself
7 thought it was odd that they expected us to look in
8 the system and give them the information back that
9 they already had.

10 We were fortunate in negotiating away that
11 demurrage bill in its entirety, but with the
12 statement from the railroad that that would not
13 happen again. That being said, we are -- feel
14 confident in our analysis of our business that we
15 absolutely are going to incur significant demurrage
16 charges in the very near future if we haven't already
17 and maybe just not received the bill.

18 All of our customers have been notified
19 that if it becomes a big enough financial burden upon
20 our company, that we're simply not going to accept
21 boxcars anymore. 850 boxcars equate to about 2,500
22 trucks back on the roads, but we're simply not going

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1 to eat that. We're not going to get in the argument
2 with our customers, since there are multiple
3 customers in each location about which one is
4 responsible for the demurrage.

5 It's just an unrealistic situation that I
6 don't think the railroad understands. They made
7 comments to us about well we have 3PLs that do
8 control their volume and I said you know, 3PLs are
9 like a lot of businesses, they change, they're all
10 different and I can't speak for the other companies
11 but I can tell you that we don't.

12 We don't control our customer's volumes
13 and we're not going to be allowed to. And I want to
14 briefly mention another couple of subjects --
15 bunching, the railroad executives admitted to
16 bunching. I actually don't have a problem with
17 bunching. I understand why they do it. The only
18 problem I have, and it was discussed in one of the
19 panels earlier, is it ought to be taken into account
20 when demurrage charges are assessed.

21 I understand the need to utilize their
22 assets as effectively as they can but don't make us

1 pay for it. The second comment I'd like to make is
2 when credits are issued for a service failure such
3 as a failure to switch -- for instance, one of our
4 facilities has 10 spots, so if they don't switch us,
5 they give us 10 credits.

6 My argument with that is you didn't just
7 add one day to 10 boxcars, you added 10 days
8 absolutely to every boxcar that's in constructive
9 placement and really you added a day to every boxcar
10 that's in the system, whether it's in constructive
11 placement yet or not.

12 They don't agree with me, but I think it's
13 fairly logical that that's the fact, that a day was
14 added to every single boxcar.

15 And the last point I'd like to make is we
16 feel that the basis of any fair demurrage rule going
17 forward would be based upon actual placement with 48-
18 hours given after actual placement. Obviously, it
19 would be much more involved than that, but we think
20 that should be the bones of it and in that I'll
21 conclude my comments, thank you very much.

22 CHAIRMAN BEGEMAN: Thank you. Ken, when

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1 you receive your demurrage bill, since you have a
2 variety of customers, do the bills identify which
3 customer's cars are at issue?

4 MR. JOHNSON: By number, by number, yes.

5 But you know, if you get in -- first of all our
6 customer's volumes per month are not uniform. They
7 all have different spikes throughout the year in
8 their business, and sometimes those spikes change.
9 One year the spike might be in March, the next year
10 it might be in June and you know, there's 5 at least
11 in every one of those buildings.

12 It's next to impossible for us -- well it
13 is impossible. We feel it's impossible for us to
14 control that. We have knowledge right now. We've
15 got a new rail customer that we're going to get in
16 one of our facilities and we've already told him
17 they're coming, they tell us it's going to be this
18 many boxcars, two switches per week is not going to
19 be sufficient when it happens.

20 And I failed to mention that since the
21 railroad told us they were going to give us two
22 switches per week, they've been pretty good about

1 doing that, but they told us they'd be Monday and
2 Thursday. 33% of the time they miss Monday and
3 Thursday and some of the 33% -- about half the time,
4 the switches were made on the weekend. That only
5 refers to days. With regard to uniformity of the
6 time of day there's none whatsoever. Even when we
7 get the Monday and the Thursday switches, there's no
8 telling at what time of the day it will be.

9 COMMISSIONER OBERMAN: A couple of
10 questions and I'm going to go back down to Ken, when
11 you said that you had never had demurrage charges
12 ever, and then you got the bill for \$11,000, so do I
13 understand that the reason for that is because with
14 the reduced service days there was bunching and
15 therefore you couldn't unload within 24 hours -- and
16 then you also got 24-hours of free time?

17 MR. JOHNSON: Yes, sir.

18 COMMISSIONER OBERMAN: So, that's what
19 caused it?

20 MR. JOHNSON: That's correct.

21 COMMISSIONER OBERMAN: Did you know that
22 was coming?

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1 MR. JOHNSON: No, no.

2 COMMISSIONER OBERMAN: Well, they told --
3 they must have told you they were reducing your free
4 time to 24 --

5 MR. JOHNSON: Oh, no, no, we knew the --
6 no, I'm sorry I misunderstood, yes, we knew the
7 changes and free time was coming.

8 COMMISSIONER OBERMAN: So, you knew that
9 you would -- if you couldn't unload them, you knew
10 you were going to be getting a demurrage bill?

11 MR. JOHNSON: In all honesty, we should
12 have known. We should have known, had we known the
13 volume increase that our customers were going to give
14 us -- we didn't. Given the fact that when they
15 switched us every day, those same yearly fluctuations
16 based upon peaks and valleys, we had never had it --
17 a demurrage bill.

18 COMMISSIONER OBERMAN: Even with
19 fluctuations and volumes?

20 MR. JOHNSON: Even with fluctuations and
21 volumes, we had never had one.

22 COMMISSIONER OBERMAN: So, my question is

1 had you known or now you do know, what can you do to
2 avoid the demurrage charges?

3 MR. JOHNSON: If they're bunched in
4 transit with the additional volumes and there's no
5 alteration made to the way that demurrage is
6 calculated, we're not going to be able to avoid it.
7 That's why I made the comment that I made that we've
8 already told our customers if this becomes a
9 financial burden, that we think it's going to be.

10 COMMISSIONER OBERMAN: Let's assume that
11 you were willing to spend whatever it took,
12 physically what can you do to avoid the demurrage --
13 hiring more people, getting more warehouses, or what
14 would you have to do?

15 MR. JOHNSON: Well, you know a warehouse
16 is a pretty big fixed cost.

17 COMMISSIONER OBERMAN: No, I understand.
18 I'm trying to get.

19 MR. JOHNSON: It comes close to the
20 savings of avoiding the demurrage.

21 COMMISSIONER OBERMAN: Well, that's really
22 sort of the question. The concept that we're being

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1 told is that this is an incentive to get you to move
2 faster. It sounds to me like it's an incentive to
3 get you to stop using the railroad.

4 MR. JOHNSON: Well, actually I don't agree
5 with that.

6 COMMISSIONER OBERMAN: Alright.

7 MR. JOHNSON: I think it's a profit
8 incentive by the railroad because one of the comments
9 of making some conversation out in the hallway was if
10 our company has a constant need it's difficult to
11 deliver to and we doubled their rate to make
12 deliveries to that consignee. What that is, that's a
13 negative incentive because we're trying to change
14 behavior. However, the difference is there's 500
15 other trucking companies that will take that delivery
16 and if they choose to.

17 In the case of boxcars, that's not the
18 case. So, my feeling is that the railroad feels we
19 have no alternative which makes that nothing but a
20 profit incentive. And when you arbitrarily change a
21 demurrage rate per day from \$100 to \$200, where'd
22 that come from?

1 COMMISSIONER OBERMAN: That's what I'm
2 trying --

3 MR. JOHNSON: I wish I could double my
4 rate.

5 COMMISSIONER OBERMAN: So, the point and
6 actually I was trying to get out and you sort of
7 backed into it, is that there is no incentive
8 involved because there's nothing you can feasibly do
9 to meet these charges and still do the business
10 you're doing, it'll put you out of business.

11 MR. JOHNSON: Nothing reasonable. Nothing
12 reasonable that makes financial sense.

13 COMMISSIONER OBERMAN: Well, or there's
14 another way of asking it. If you had to do
15 everything you had to do to pay these charges, you
16 couldn't stay in business?

17 MR. JOHNSON: Or we just wouldn't do it.

18 COMMISSIONER OBERMAN: It would take your
19 profits away?

20 MR. JOHNSON: Right, right.

21 COMMISSIONER OBERMAN: And, actually
22 that's sort of the same question, you know, I have

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1 for you Brett, is the cause of your -- these enormous
2 demurrage amounts, the change in the delivery
3 schedule and bunching, is that what brought it about?

4 MR. MEARS: Yes, it's the limitation of the
5 delivery schedule because after the first episode of
6 demurrage at the first site, we went back to USAID
7 and said look, please talk to USDA and we have to
8 schedule these shipments.

9 They went to their commodity suppliers and
10 they told them it's impossible for us to schedule
11 deliveries into Houston because the rail times are
12 variable and then in addition, on top of that you
13 have the bunching scenario so basically, the feedback
14 we got from our customer was it's not -- you can't
15 schedule it.

16 So, in the absence of scheduling, and if I
17 can't get the railcar from the Union Pacific service
18 yard to my facility, I could certainly keep up if
19 they switched me 5 to 6 days a week and I'm happy to
20 add work on Saturday and Sunday if I had to, to keep
21 up with it. The problem is I'm powerless. I have no
22 way to get the railcars from their yard to my

1 facility to unload it in those interim days that they
2 don't switch me.

3 COMMISSIONER OBERMAN: So, if the
4 demurrage charge were \$10 or \$500, it wouldn't make
5 any difference in your behavior because you can't
6 change your behavior because these things are out of
7 your control?

8 MR. MEARS: That's correct. It will get
9 to a point where we just have to declare force
10 majeure and we can't do the contract anymore because
11 of the cost, the punitive cost of demurrage which we
12 cannot control.

13 COMMISSIONER OBERMAN: Same question,
14 Michael, to you. It sounds like at some cost
15 Anderson-DuBose could accommodate or could unload
16 faster, right, could you just comment on it? What is
17 it you could do to avoid, you know, \$400,000 a year
18 is a lot of money to a company your size?

19 MR. BODDY: Sure, additional staffing,
20 you know, on premium shifts or possibly opening up
21 additional shifts at a higher cost -- that would be
22 one thing. Expanding the facility, right, we're at

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1 two doors, so we could expand it to push the through
2 put but that would be very costly.

3 COMMISSIONER OBERMAN: Would you have to
4 spend more than \$400,000 to avoid these charges?

5 MR. BODDY: I would think so, based on a
6 recent expansion that we had, yes, I would say that's
7 true.

8 COMMISSIONER OBERMAN: So, it's not an
9 actual incentive to get you to do anything?

10 MR. BODDY: No.

11 COMMISSIONER OBERMAN: And the only other
12 question I had was for Mr. Weiner, is it Weiner or
13 Weiner?

14 MR. WEINER: Weiner.

15 COMMISSIONER OBERMAN: Weiner, you -- I
16 was interested as the Chairman is in this retaliation
17 question and my only question was that you listed the
18 things that happened to you after Herman testified
19 two years ago.

20 MR. WEINER: Yeah, Herman got me in
21 trouble.

22 COMMISSIONER OBERMAN: Yeah, well is he

1 still around? There he is, Herman behave yourself.
2 My only question was the changes that you mentioned
3 your time was reduced from 3 to 1 day and so forth,
4 was that only applied to your company and not other
5 shippers and receivers by the railroad?

6 I mean were you singled out for this
7 treatment, do you know?

8 MR. WEINER: I believe so, sir.

9 COMMISSONER OBERMAN: Okay, that was all I
10 had, thank you.

11 VICE CHAIRMAN FUCHS: A couple questions.
12 Brett, you posed a couple solutions, one of which was
13 that charges should be validated before they're
14 issued and I guess I'm wondering you know, sitting
15 where we are, how would we know something is
16 validated, what, you know, how should we be thinking
17 about whether or not there's appropriate validation
18 protocols in place?

19 MR. MEARS: Well, I mean you know, the
20 fact that they billed us three-quarters of a million
21 dollars and then after 3 months of kind of back and
22 forth through their dispute process, dropped it to

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1 242,000 tells me that they basically just fired
2 something out of their system and didn't ever go back
3 and compare to see did they serve my site to what the
4 standing agreement was, which was 10 cars per switch
5 3 days a week.

6 So, I think that would be the first step
7 and then the bunching would be a second step as well,
8 so.

9 VICE CHAIRMAN FUCHS: Yeah, and you beat
10 me to that, and so they're kind of -- the
11 hypothetical example that we've been using, I guess,
12 today is you know, the 5, 5 and 5 that comes back as
13 15 for you know, with truck capacity for 10. And
14 talk me through how the Board should be thinking
15 about if the Board, you know, how the Board should be
16 thinking about you know, those 5 cars and I think it
17 was discussed in the last panel was ripple effects,
18 so how should we be thinking about you know, if we
19 wanted to address bunching, how would we do that?

20 MR. MEARS: You know, I think I see the
21 point of why cars are bunched, as my colleague Ken
22 commented here, you want to be able to do that but I

1 think if you're going to -- if the railroad is going
2 to do that, they spoke a lot about increasing the
3 efficiency and I think they're speaking about the
4 point to point efficiency.

5 The problem is they don't have the
6 resources, you know, in the last mile delivery to
7 affect that so, you know, I think what is reasonable
8 is if you're going to bunch 5, 5, and 5 to 15, and
9 you can only deliver 10 at a time, then you need to
10 give them an allowance, anything beyond those 10 cars
11 when they get there, you need to give them an
12 allowance.

13 VICE CHAIRMAN FUCHS: The equivalent of 5
14 credits in that instance?

15 MR. MEARS: The equivalent of 5 credits
16 until their next switch day and that needs to be, you
17 know, kind of to Mr. Johnson's comments that that
18 needs to push back on every car in that back log
19 because otherwise you can get a cascading backlog.

20 VICE CHAIRMAN FUCHS: Right, that's what
21 people -- people are also talking about the ripple
22 effect, but the 5 only captured, the 5 credits that

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1 you're describing only captures the 5 there, right?

2 MR. MEARS: It has to be in perpetually --

3 it has to be done perpetually for all the cars in
4 transit if you're operating close to capacity.

5 VICE CHAIRMAN FUCHS: Up until capacity
6 constraints are alleviated?

7 MR. MEARS: Exactly.

8 VICE CHAIRMAN FUCHS: Within a reasonable,
9 okay -- and then Ken, you mentioned you get one
10 credit, so let's use this hypothetical again, are you
11 saying that if you had kind of those 5 cars in
12 constructive placement and let's just say for
13 whatever reason you just left them there for too
14 long.

15 Are you saying that the one credit or in
16 the 5 that are in constructive placement, are you
17 saying that the one credit would apply, just one
18 credit for all 5?

19 MR. JOHNSON: If they didn't switch.

20 VICE CHAIRMAN FUCHS: Yeah, you get one
21 credit for all --

22 MR. JOHNSON: You get one per car.

1 VICE CHAIRMAN FUCHS: You get one per car?

2 MR. JOHNSON: Or if there's 25 cars in
3 constructive placement. My point is when you don't
4 switch, you don't just add a day to every car you
5 fail to switch.

6 VICE CHAIRMAN FUCHS: Okay.

7 MR. JOHNSON: You add a day to every car
8 in the system.

9 VICE CHAIRMAN FUCHS: I see.

10 MR. JOHNSON: If you wanted to call it
11 constructive placement which is not every car in the
12 system, but okay, constructive placement. But we all
13 know that there's probably cars in the system that
14 are not yet in constructive placement and then this
15 thing, you know, failure to switch is adding a day to
16 everything.

17 VICE CHAIRMAN FUCHS: I see, so then what
18 you're talking about is additional credits to
19 capture, I guess, the ripple effect as it has been
20 described.

21 MR. JOHNSON: The way that that describes.

22 VICE CHAIRMAN FUCHS: Okay, I just wanted

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1 clarity on those two points, thanks.

2 MR. JOHNSON: Yeah.

3 CHAIRMAN BEGEMAN: Is there anything any
4 of you would like to say with respect to the
5 testimony you've heard so far or anything as far as
6 what we've been asking?

7 MR. JOHNSON: Briefly, I've been told by
8 some folks that I came here with not to be emotional,
9 so I'm not going to do that. But I will say this,
10 there were some comments made earlier about
11 percentages of success by the railroad, 73% on time,
12 95% correct billing, and the comment that I made was
13 we get fired for those kinds of percentages.

14 That would be completely unacceptable in
15 the world that we live in.

16 COMMISSIONER OBERMAN: But don't cry about
17 it. I'll just make this observation and I don't want
18 any of you to think because we haven't maybe drilled
19 as much home as we did with earlier panels, I mean
20 we're hearing a lot of the same things and your
21 unique stories are very helpful to us but it doesn't
22 mean, we're not just as interested in your situations

1 as all the others.

2 Each one of you, to me, has added a great
3 deal to our education so I appreciate that.

4 CHAIRMAN BEGEMAN: And I think it's been
5 really great that it's really been a diverse panel of
6 interests.

7 MR. MEARS: I'd like to add one thing if I
8 could. You know, if each of my -- if the bill was
9 sent to each of my customers, then I would have about
10 17 or 18 customers that received demurrage, so the
11 comment that you know, we have a lot of customers
12 that aren't billed demurrage, well, when you bill a
13 third-party warehouse that has 10 or 12 shipper
14 customers in that warehouse, they're not getting the
15 bill but we are and it's essentially driven by their
16 behavior. Thank you.

17 CHAIRMAN BEGEMAN: Thank you, the next
18 panel, panel 6.

19 Panel VI

20 CHAIRMAN BEGEMAN: Okay, we will start
21 with Panel VI and it is 4:08. Go ahead, thank you
22 Richard.

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1 MR. GUPTON: Thank you and I'd like to
2 thank the STB for having this hearing today. It's an
3 important one to focus on the demurrage and
4 accessorial charges that have been imposed on
5 railroad customers.

6 And I'd also like to thank you for the
7 efforts on the rate reform and other regulatory
8 reform efforts that the STB is looking at. We want
9 to have a partnership with the railroads. We want to
10 make sure it operates in an efficient way. We also
11 want to make sure that it's a true partnership and
12 there's some accountabilities when there's
13 deficiency, so we again, appreciate taking a look at
14 this.

15 And I'm Richard Gupton, I'm the Senior
16 Vice President of Public Policy and Counsel for the
17 Agricultural Retailers Association. We're a non-
18 profit trade association representing agriculture
19 retailers and distributors across the country.

20 Our members provide goods and services to
21 farmers and ranchers which include fertilizers,
22 pesticides, seed, crop scouting, soil testing, custom

1 application of pesticides and fertilizers. They're
2 certified crop advisors and agronomous, work with the
3 farmers on comprehensive nutrient management plans.

4 Our Ag retail distribution facilities for
5 our members are scattered throughout the United
6 States and they range from small family held business
7 to one or two outlets to former cooperatives to large
8 companies with multiple outlets across the country.

9 Our members use the railroads to transport
10 crop input materials because it's generally the
11 safest, most secure and efficient way to move these
12 products, assuring that the rail service is
13 dependable and provides consistent delivery to
14 agriculture retail and distribution operations is
15 critical to insure that a complex distribution system
16 moving a large volume of products remains successful
17 and efficient.

18 For example, in the Midwest nearly all the
19 regional dry and liquid product fertilizer warehouses
20 are primarily filled by train. The other modes of
21 transportations which are pipelines, trucks or
22 barges, all have their more limitations and whether

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1 related to the lack of capacity, lack of trucks or
2 drivers which is a big debate right now, or
3 geographic limitations when it comes to barges, those
4 are all a lot of constraints.

5 The costs of rail service for ARA members
6 has increased at a rate that forces the industry to
7 try to look towards alternatives, but there are few
8 realistic economically viable options that remain
9 available.

10 The Fertilizer Institute conducted a
11 survey and they're testifying later today about the
12 significant increase in the rates for a product
13 called anhydrous ammonia which is a widely used
14 critical crop protection product. Their rate went up
15 over 200%. That compares to inflation only going up
16 at that same time 26%.

17 So, looking at these issues is very
18 important to our members. The reports that have been
19 submitted by the railroads, actually clearly show the
20 significant railroad revenue being generated through
21 demurrage charges being imposed against the rail
22 customers and this type of reporting is something

1 that the STB needs to kind of bring about the
2 necessary transparency and should be continued as
3 part of any regular reporting process.

4 ARA believes that these charges are well
5 above and beyond the intent of the STB demurrage
6 liability regulations that are designed to encourage
7 an efficient transportation network. We recently
8 surveyed members on this issue and they all came back
9 that they had problems with one Class I railroad or
10 another.

11 And the main issues and it's the theme I
12 think throughout this day is focused on, is the 24-
13 hour constructive placement is a totally unreasonable
14 time for our members. A minimum of -- we recommend a
15 minimum of 48 hours and potentially up to 96 hours as
16 needed depending on the circumstances, like in the
17 busy season.

18 The short timeframe when moving these cars
19 from the short line interchange to the Ag retail
20 facility then back to the interchange effectively
21 leaves about 15 to 16 hours to load or unload after
22 constructive placement with little time to align the

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1 crews and inspectors within that window.

2 And a major problem relates to, as has
3 been discussed today, is the bunching. Until they
4 have more cars to be sent to those facilities. And
5 I, you know, understand why they're doing that to be
6 more efficient, but you also need more flexibility
7 for these facilities and a broader window of time to
8 accomplish that.

9 Our members should not be charged for the
10 delayed delivery of those railcars and given only
11 short notice and narrow timeframe to unload or load
12 the products. The overall transit time for products
13 can be anywhere from 14 to 21 days but they are again
14 only given this short window and then have them do a
15 short notice trying to hire the additional people,
16 the personnel, to handle the cars.

17 And during the peak seasons there's not
18 enough time during the day to handle that under the
19 current rules, and so what they're having to do is
20 again, hire more people at overtime and have them
21 sometimes be done, unloaded during the dark which
22 adds increased safety risk and issues.

1 We were informed by one of our members
2 that in the first month of the new demurrage rules,
3 they were experiencing railroad charges from yard
4 storage exceeding \$130,000 forcing them to try to
5 look at alternative transportation sources to move
6 their product.

7 ARA members have also been required to
8 build additional tracks at their expense and the cost
9 estimates we got back was roughly \$800,000 or more
10 per facility, but many of them do not have the
11 physical room to expand their in-house storage
12 tracks.

13 The railroads have not, from the input
14 we've received, have not provided the sources of the
15 fixed and variable costs, so there's really not
16 transparency about how they come up with these
17 charges -- the numbers.

18 And they've been closing some of their
19 yards in the name of efficiency, but that increased
20 distance of being serviced, all the costs are being
21 imposed on our members. So, what we would like to
22 see is again, a more -- and it was mentioned today,

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1 they're implementing these systems for more efficient
2 timely reporting of where the products are in
3 transit, so if they do have that kind of real time
4 information for our members, I think that will go a
5 long way to at least help them know when those cars
6 may arrive.

7 And I think if they can, if the cars were
8 delivered 5 at a time, those could be easily handled
9 at our member's facilities, but when you're getting
10 20 cars at a time, they can't reasonably make that
11 24-hour period to unload those, it's just not
12 reasonable and possible.

13 And when they have, from our members, they
14 said when they have unloaded ahead of time and got
15 ahead of schedule so railroads may not be able to
16 take them, they're not getting credit for those
17 things, so if they are running ahead of time it would
18 be more efficient, they need to get the credit for
19 that.

20 The last thing I'll mention is there needs
21 to be again, some reciprocity. If the railroads
22 aren't living up to their shipment dates and the

1 like, then there needs to be reciprocal demurrage
2 charges against them or some type of credit system
3 where they're held accountable.

4 This will lead to more commercial
5 fairness, foster increased competition and
6 accountability and a more efficient rail system and
7 we look forward to working with the STB and the
8 railroads on this important issue, thank you.

9 CHAIRMAN BEGEMAN: Thank you, hi Greg.

10 MR. TWIST: Hi. Commissioner Oberman,
11 Vice Chairman Fuchs and Chairman Begeman, thank you
12 for this opportunity to present here today. My name
13 is Greg Twist, I'm the Senior Vice President of
14 Transportation for Ag Processing, Inc. better known
15 as AGP.

16 AGP is the leading Agri business engaged
17 in procuring, processing, marketing and transporting
18 of oil seeds, grains and related products. AGP is a
19 cooperative owned by 147 local and regional
20 cooperatives that represent more than 250,000 farmers
21 throughout the United States and Canada.

22 I started my career in Agri business in

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1 1982 and I've witnessed first-hand a number of
2 changes in railroad structures, operations and
3 profitability during this time. I appreciate the
4 opportunity to address the Surface Transportation
5 Board regarding demurrage and accessorial charges and
6 the fundamental question of fairness.

7 Unfortunately, it's sometimes difficult to
8 focus on these current charges without knowing some
9 of the history of how they came about. I'll do my
10 best to shed some light on this history. The C&W
11 railroad was bought and merged into the UP railroad
12 in June of 1995. In conversations with UP marketing
13 personnel, AGP was encouraged to supply more of our
14 own private covered hoppers, which at that time
15 comprised about 25% of our fleet.

16 The UP was dealing with a lack of system
17 equipment and capital was premium, so they took on
18 the acquisition of the Southern Pacific merger in
19 1996. The BN had similar concerns with the
20 acquisition the peak of the Atchinson Topeka Santa Fe
21 in 1996 as well.

22 AGP invested in covered hoppers that cost

1 about \$53,000 to build at that time. A similar car
2 today would cost about \$84,000 to build, an increase
3 of 58%. However, compensation on these covered
4 hoppers has dropped 30% per trip to a domestic point
5 like Turlock, California and 53% per trip to an
6 export facility like Aberdeen, Washington since these
7 cars were first built.

8 Part of the rationale used to reduce our
9 compensation on private covered hoppers was the
10 ability to turn cars quicker in units versus manifest
11 service. Ironically, Turlock and Aberdeen are
12 destinations that UP has chosen to move back in a
13 manifest service as part of their PSR model.

14 However, the UP has not increased private
15 car allowance as a result of their slower manifest
16 service. Our export facility in Aberdeen,
17 Washington, experienced a 114% increase in transit
18 time for the UP since that move to manifest service.

19 And to your point Mr. Oberman, talking
20 about the difference and the numbers, if you take
21 that out of unit shipment and you can't load it in 24
22 hours, that makes the remainder look higher by

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1 simply moving that to manifest service.

2 So, their numbers look better, ours look
3 terrible. Turlock, California domestic point is
4 scheduled to go to manifest service come June 1. I
5 expect a similar increase in transit there. When
6 shippers like AGP started adding private covered
7 hoppers, demurrage charges were \$25 per day for
8 railroad covered hoppers for as far back as I can
9 find a railroad tariff and that was the BN 6004 dated
10 August of 2001.

11 At that time all the Class I carriers held
12 our private empty cars for free. Today, now that AGP
13 provides 90% of its covered hopper fleet, the UP and
14 the BNSF now charge more for private empty car
15 storage than demurrage. UP is now \$140 for private
16 empty car storage versus \$100 for demurrage.

17 BNSF is at \$150 per car versus \$75 for
18 demurrage. How can these railroads charge more for
19 private cars that they encourage shippers to invest
20 in versus demurrage for their own cars which should
21 have a car component cost? Simply put, because they
22 can.

1 Accessorial charges are completely tilted
2 towards the railroads who wrote the tariffs. Take
3 for example, UP Tariff 6004, Item 9613, which deals
4 with unit train service. AGP is required to
5 forecast a day that the units will ship 30 days in
6 advance and can adjust that date no later than 72
7 hours ahead of the forecast date.

8 AGP billed 105-car unit at Sergeant Bluff,
9 Iowa on February 6th of '19, at noon, destined for
10 Mexico. The UP pulled the unit 81 hours later. Had
11 AGP missed our target by 81 hours, we would have owed
12 the UP more than \$50,000 for being that far off the
13 target.

14 AGP competes against international
15 competition in South America, mainly from Argentina
16 and Brazil. These countries have spent millions of
17 dollars to reduce transportation costs from the
18 source to export, meanwhile rail transportation costs
19 including accessorial charges, continue to climb in
20 the U.S.

21 AGP adds a rail cost of approximately \$36
22 for a short ton to move 1,900 miles from our Nebraska

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1 crushing facility to our export facility. Our ocean
2 freight to reach essential growth markets for
3 soybean meal is approximately \$30 per short ton and
4 moves 6,700 miles.

5 Put another way -- our rail freight from
6 our processing plant, constitutes 55% of our total
7 transportation costs only traversing 22% of the total
8 miles. Accessorial charges only add to the
9 challenge to compete long-term internationally.

10 The adoption of PSR by most of the Class
11 I's, I should say by all but one of the Class I's,
12 has brought with it a barrage of new charges, all
13 under the guise of efficiency. The UP recently added
14 a not prepared for service charge which in essence
15 penalized shippers \$400 per occurrence.

16 They cannot immediately access cars that
17 are listed to be pulled. However, the UP cannot
18 accurately tell us the time of day to expect our
19 service. Our facility at Mason City, Iowa went one
20 full week -- it's a tri-weekly service, so it missed
21 three switches, at Mason City, Iowa in February. Yet
22 they show up after no service for a week and find a

1 rail car in the way and they can charge us.

2 AGP received notice of not ready for
3 service on 8 different occasions between May 3rd and
4 May 16th at our St. Joe, Missouri plant. In every
5 case, our personnel at St. Joe, Missouri used the
6 UP's automatic order X system to order cars in as
7 required.

8 For example, on May 3rd we ordered -- used
9 the order X system to order in 20 private covered
10 hoppers from the UP yard. Order X takes our request
11 and applies to 20 private covered hoppers against
12 the order. However, when the local switch crew,
13 local UP switch crew, is ready to serve our facility,
14 they discovered the cars that order X has applied are
15 not the 20 most convenient cars to bring into our
16 facility, so they in turn bring in the most
17 convenient cars, which generates the charge.

18 An invoice is generated because a UP
19 automated system and local crew cannot agree on what
20 cars should be received and we have to dispute the
21 charges. I see the UP has changed and pulled back
22 some of these types of things, they can be charged on

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1 this tariff which was amended on May 17th, and I
2 applaud them for their effort.

3 However, it would have been preferred to
4 resolve this in our hometown at Omaha, not in
5 Washington, D.C. because of written testimony. The
6 problem is that tariff interpretation usually
7 generates bills that have to be disputed. But thanks
8 to PSR, there are fewer and fewer people to talk to
9 that have the authority to grant relief.

10 AGP spends an inordinate amount of time
11 disputing these charges which are highly inaccurate.
12 The UP also warned shippers that single cars need to
13 be pre-blocked. In other words, cars added to
14 similar destinations need to be blocked together, a
15 function that used to be performed at the local UP
16 yard.

17 UP also suggested level loading of
18 railcars, meaning an equal number of cars be switched
19 out every day that we are serviced. That would be
20 ideal if our plants were designed just to accommodate
21 the UP. Unfortunately, we have customers to service
22 that require more truck loading Monday through

1 Friday, and thus more rail loading on weekends.

2 What other business can provide a service
3 and dictate how customers run their business or levy
4 a penalty. It will be interesting to watch if future
5 accessorial charges develop from these.

6 Railroads used to be a key economic
7 indicator for U.S. economy. My concern is that they
8 have become an impediment to economic activity
9 through their adoption of PSR, they have lowered
10 their operating cost, which limits capacity, less
11 local service, which increases dwell times at
12 shipper's facilities which are not reported in their
13 transit numbers.

14 And accessorial charges which lack
15 reciprocity, reward the railroads for their poor
16 performance. UP also reported personal injury
17 increased 22% in their last quarterly report -- that
18 concerns me as a customer. My goal today was to
19 present my facts with passion, not emotion, to convey
20 frustration with railroad's behavior, not anger.

21 But I would be less than honest if I told
22 you I was not very concerned about the wave of

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1 accessorial charges coming at us and thanks to PSR,
2 fewer people to resolve erroneous charges at the
3 railroads.

4 Railroads have done a wonderful job of
5 redefining the English language. Customer no longer
6 means shippers to Wall Street. Shipper now means
7 income stream necessary to police customers, see
8 above. Railroad efficiency means customers doing
9 more of their own work and not ready for service
10 means get out of our way when we finally make it to
11 your plant. And my personal favorite, incentive
12 means penalty.

13 I was raised in rural Illinois, the
14 youngest of 4 boys. My father would occasionally
15 have to spank one of us and it was usually deserved -
16 - well, always deserved. But he never referred to it
17 as an incentive.

18 Central Illinois, kind of outside Decatur,
19 Clinton, Illinois. So, lastly, before I wrap up. I
20 just want to clarify a couple of things. We were
21 talking about some of the charges -- the \$3,200 per
22 charge taking units off the soybean meal units.

1 Those units never stayed in our plant.

2 It always took 4 to 5 days to build those
3 units and that power never stayed inside our plant.
4 So, to say those units going out, somehow that's a
5 new cost is just -- I don't get that. Lastly, with
6 PSR, and on the same vein we had 4 markets we could
7 go to on the UP with unit shipments, okay.

8 We could go to Mexico, we still can --
9 that's still allowed under their PSR, but it costs us
10 \$3,200 more in and out. We had the river market, the
11 Mississippi River market, and the P&W we could go to.
12 That's moved to manifest service. So, to my point I
13 said earlier, that's increased our transit time 114%.
14 To the UP's assertions that they have a manifest
15 model, they do, that spread which they didn't want to
16 talk about, it's about \$900 to \$1,000 more per car.
17 That's the reason AGP invested 32 million dollars
18 over time to reduce charges and be able to unitize
19 our shipments.

20 And now when you waive out of that, that
21 makes our investment look very, very shaky going
22 forward. So, that's a concern to us as well.

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1 So, lastly, I encourage the STB to use the
2 power and authority you have to balance these
3 charges. My concern is if something is not done to
4 balance these charges there will be less shippers to
5 testify going forward as railroads ration their way
6 to greater earnings with capped capacity, I welcome
7 your questions.

8 CHAIRMAN BEGEMAN: Thank you, John?

9 MR. BODE: Thank you. Alright, I'd like
10 to thank the Board not only for the opportunity to
11 testify today, but also especially for the engagement
12 of the Board in this hearing and the dialogue that's
13 occurred. This is the way hearings of this kind
14 ought to work.

15 So, thank you for that. My name is John
16 Bode and I'm President of the Corn Refiners
17 Association. CRA is the national trade association,
18 106 years-old, representing the corn refining
19 industry in the United States. Corn refining is a
20 value added agricultural process during which kernels
21 are separated into their principal parts and utilized
22 in thousands of different consumer products and

1 industrial goods used every day around the world.

2 My member companies are highly dependent
3 upon rail transportation with few or no alternatives
4 for inbound deliveries of raw materials and outbound
5 shipments of finished products. This fact can create
6 a sense of helplessness when it comes to objecting
7 to practices they believe are unreasonable.

8 My members play an integral role in the
9 agricultural industry and the U.S. economy. CRA also
10 endorses the testimony of the National Grain and Feed
11 Association in this proceeding. The shipping
12 community, our customers and ultimately consumers
13 could benefit greatly if the Board provided clear
14 guidance to assess the reasonableness of demurrage
15 and storage practices.

16 The Board has at least two tools by which
17 it could do so. First, as a general matter, the
18 Board could issue a policy statement that sets forth
19 key principles and facts that it would consider in
20 evaluating reasonableness.

21 Second, with respect to the across the
22 board reductions in free time recently implemented by

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1 the Class I railroads, the Board could invoke its
2 statutory investigative authority to review
3 practices at regional or national significance and
4 ultimately determine their reasonableness based upon
5 application of key principles and I'd like to submit
6 four for your consideration.

7 CRA urges the Board to take these steps
8 and include the following four principles among the
9 factors you consider. The degree of reciprocity in
10 commercial fairness reflected in railroad practices.

11 Second, the ability of shippers to comply
12 with new practices in a timely and cost-efficient
13 manner, if at all.

14 Third, the extent to which rail service
15 inconsistencies preclude compliance with the rail
16 practice. And fourth, the extent to which railroads
17 are likely to profit from the new rules either
18 directly from payment of unavoidable demurrage or
19 storage charges, or indirectly through other rail
20 services a shipper must purchase to avoid demurrage
21 or storage charges.

22 Before I address each of these foregoing

1 principles, I'd like to make three fundamental
2 points. First, CRA members do not object to
3 demurrage and storage charges to truly incentivize
4 the efficient use of railroad assets. Such
5 incentives benefit all stakeholders including
6 shippers by fostering great network fluidity which in
7 turn can reduce costs and benefit the consuming
8 public, however recent across the board free time
9 reductions to as few as zero days on private cars
10 have stretched the credibility of railroad
11 efficiency justification.

12 Second, recent actions by the rail
13 industry have treated efficiency as a one-way street,
14 where any charge that enhances rail efficiency, no
15 matter how small the enhancement is justified
16 without regard to the negative impacts upon rail
17 customers, no matter how great those impacts.

18 Third, railroads have not been willing to
19 accept the responsibility for the efficiency effects
20 of their own behavior upon their customers. These
21 concerns underly each of the four principles that I
22 will now address.

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1 First, reciprocity and commercial fairness
2 is CRA's number one priority. This has taken on
3 greater significance over the past two decades as
4 railroads have shifted more and more responsibility
5 for the instrumentalities of transportation,
6 primarily the supply of rail cars to their customers.

7 Indeed, CRA members own or lease tens of
8 thousands of railcars including some of the largest
9 private railcar fleets in the nation. For example,
10 according to their written testimony in this
11 proceeding, two CRA members -- ADM and Cargill have
12 relatively approximately 28,000 and 19,800 railcars
13 respectively. In addition to shifting responsibility
14 for supplying railcars to their customers, railroads
15 also require those customers to pay for storing those
16 cars on railroad tracks even though the railroads
17 incur that cost themselves when storing their own
18 cars.

19 This cost shifting requires a more
20 balanced assessment in unreasonable practice
21 determinations. Demurrage and storage charges
22 originally were designed to foster the efficient use

1 of railroad supplied railcars and storage track, but
2 with most of the nation's rail fleet now privately
3 owned, these incentives need to be a two-way street.

4 Shippers have the same interest as
5 railroads and the efficient use of their railcars,
6 reliable and consistent railroad service is a major
7 factor in determining how large a fleet must be in
8 order for shippers to meet their needs.

9 But remarkably, there are no comparable
10 incentives to demurrage and storage charges to
11 incentivize railroads to make efficient use of
12 shipper-supplied rail cars. Railroads rarely, if
13 ever, accept accountability for the effects of
14 service disruptions and inconsistencies upon their
15 customers, even when the railroad is at fault.

16 This Board is the only entity that can
17 require such accountability and it can begin by
18 requiring reciprocity in demurrage and storage
19 charges. Such reciprocity could take the form of
20 paying a shipper a comparable charge when a railroad
21 fails to move the shipper's private car within the
22 same timeframe, the same free time that the railroad

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1 grants the shipper before assessing demurrage or
2 storage charges.

3 The rail industry has taken a very narrow
4 view of the reciprocity and commercial fairness of
5 what reciprocity and commercial fairness means. In
6 response to the Chair's letters last fall asking the
7 railroads to review their tariff charges from the
8 standpoint of commercial fairness, they pointed to
9 their willingness to give demurrage and storage
10 credits for selected service and weather related
11 issues that could delay a shipper's ability to load
12 or unload a railcar.

13 That is not reciprocity. It merely
14 recognizes that shippers should not pay demurrage or
15 storage charges when the extended detention of
16 railcars for occupancy of storage track is not the
17 shipper's fault. While such credits may -- will
18 mitigate the demurrage and storage charges that the
19 railroad may collect from a shipper, they do nothing
20 to compensate the shipper for its cost to its
21 operation caused by railroad service failures.

22 If railroads were able to change shippers

1 -- charge shippers for acts or omissions that
2 adversely affect rail operations, reciprocity means
3 that railroads should compensate shippers for acts or
4 omissions that affect shipper operations.

5 Next, cost effective and timely compliance
6 by shippers is CRA's second principle for determining
7 reasonableness of demurrage and storage facilities.
8 These charges cannot serve their efficiency enhancing
9 objective if a shipper cannot avoid the charge or can
10 do so only at excessive expense.

11 By pushing free time all the way down to
12 zero days, the rail industry has selected the lowest
13 possible number. Only those shippers with sufficient
14 track within their facilities can comply
15 immediately. Others will have to build more track or
16 if there is no space within their facilities to do
17 so, they will have to lease track at remote
18 locations.

19 In some instances, those locations may be
20 very remote simply because there is no storage track
21 available in the vicinity of their facilities. These
22 measures will impose additional costs upon those

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1 shippers in the form of track leases and switching
2 charges to and from the storage track, potentially
3 onerous enough for them to conclude that it is less
4 costly just to pay the demurrage and storage fees.

5 Furthermore, the construction or
6 acquisition of additional storage track cannot be
7 accomplished within the short time periods shippers
8 have been given to comply with the new free time
9 rules. A one size fits all approach to demurrage and
10 storage free time, especially when reduced to zero
11 days, is unreasonable because it fails to account for
12 these significant differences in the ability of rail
13 customers to comply.

14 In addition, railroad efficiency claims
15 should be carefully scrutinized for inconsistencies.
16 For example, because many shippers must secure
17 storage track at remote locations to avoid demurrage
18 and storage charges under the reduced free time
19 periods. That creates additional work for the
20 railroad to switch cars to and from those remote
21 locations.

22 Also, depending upon how remote a storage

1 location is, shippers may be challenged to retrieve
2 cars from storage tracks in a timely manner. That
3 reduces the utilization rate for those cars which
4 requires the shipper to acquire even more railcars to
5 transport the same volume of traffic thereby
6 consuming more rail capacity.

7 We appreciate that your guiding principle
8 is public welfare, thus, your determination of
9 reasonableness dictates a consideration of the
10 efficiency that is broader than merely reducing
11 railroad operating costs.

12 We respectfully submit that this Board
13 should weigh the costs and benefits to both railroads
14 and shippers of the free time reductions. Even if
15 the alleged benefits to rail operations materialize,
16 the burdens imposed upon rail customers may far
17 exceed those benefits, although the balancing of
18 costs and benefits ordinarily would occur through
19 competition, competition is more limited and often
20 non-existent for many rail shippers.

21 The reasonableness of railroad demurrage
22 and storage charge practices therefore requires the

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1 Board to conduct that balancing in our view. The
2 role of rail service in the imposition of demurrage
3 and storage charges is CRA's third principle for
4 evaluating reasonableness, demurrage and storage
5 charges only serve their desired efficiency
6 objectives when the rail customer can avoid those
7 charges through its actions.

8 Rail service, however, is inherently
9 variable and that variability over which a customer
10 has no control can impair that customer's ability to
11 avoid demurrage and storage fees. Bunching of
12 railcars by a railroad is the most common example of
13 this. I appreciate it's been extensively discussed
14 today.

15 Most, but not all railroads offer credits
16 for bunching to offset resulting demurrage and
17 storage debt debits, but only when the bunching
18 occurs on their rail line. Bunching, however, often
19 occurs on a connecting railroad through no fault of
20 the shipper. It should be unreasonable for a
21 railroad to assess demurrage and storage charges any
22 time the reason for such charges is beyond the

1 shipper's control.

2 Inconsistent or variable rail service also
3 should dictate how much free time is reasonable. The
4 greater the variants in a railroad service, the more
5 inventory of loaded and empty railcars the shipper
6 must maintain at its facilities as buffer capacity to
7 ensure that rail service does not impair the
8 shipper's operations.

9 If the railroad provided consistent rail
10 service that buffered capacity could be reduced, if
11 not eliminated, leaving more track within a facility
12 to receive railcars within reduced free time
13 periods. Thus, it would be equitable to evaluate the
14 reasonableness of free time by comparing it to the
15 variability of rail service to a customer.

16 Railroad motivation is CRA's fourth
17 principle for evaluating reasonableness of demurrage
18 and storage facilities -- storage practices is beyond
19 dispute. The demurrage charges are not to be
20 regarded as a source of carrier revenue. That
21 principle, however, should be applied within the
22 broader framework than just the demurrage or storage

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1 charge itself.

2 As I've already pointed out, many rail
3 shippers can only avoid demurrage and storage charges
4 by leasing track at remote locations and then paying
5 a fee to move their cars to and from that track.

6 Often that track is leased from the very same
7 railroad assessing the demurrage charge, and always
8 that same railroad receives a fee for transporting
9 cars between the leased storage track and the
10 customer's facilities.

11 Moreover, in a particularly perverse
12 arrangement, when inconsistent railroad service
13 necessitates the lease of remote storage track, the
14 railroad is rewarded for that inconsistent service
15 with this additional revenue.

16 In conclusion, CRA urges the Board to
17 issue a policy statement that outlines key principles
18 it will apply when evaluating the reasonableness of
19 railroad practices pertaining to demurrage and
20 storage charges, including the four principles that I
21 have just suggested.

22 CRA also urges the Board to invoke its

1 investigative authority to review and evaluate the
2 reasonableness of recent free time reductions
3 pursuant to those principles. That review could
4 consider factors such as reciprocity for railroad
5 service failures, shipper ability to comply with free
6 time reductions in a timely manner if at all, rail
7 service inconsistencies and railroad motivations to
8 create new revenue streams. Thank you for your
9 consideration of our views.

10 CHAIRMAN BEGEMAN: Thank you very much,
11 Randy?

12 MR. GORDON: Hi, good afternoon, Chairman
13 Begeman, Vice Chairman Fuchs and Commissioner
14 Oberman. I am Randy Gordon, President and CEO of the
15 National Grain and Feed Association and I'm
16 accompanied this afternoon by NGFA Transportation
17 Counsel Tom Wilcox, a partner in the Washington-based
18 law firm of GKG Law.

19 We're going to kind of divide up our
20 statement based on our presentation. We deeply
21 appreciate this opportunity to summarize the major
22 points in NGFA's May 8th filing as well as to bring

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1 some additional new information to the Board's
2 attention that we believe only strengthens and
3 reinforces the need for the Board to follow-up this
4 public hearing with further action to facilitate the
5 adoption of commercially fair, commercially
6 practicable as well as reciprocal demurrage and
7 accessorial charges and policies by the Class I
8 railroads.

9 You all are very cognizant of who NGFA is.
10 We've got 1,100 member companies and our diverse
11 membership handles about, excuse me, 70% of the
12 nation's grain and oil seed crop. We're very
13 pleased to have our statement for the record
14 supported by the Corn Refiner's Association as well
15 as the National Oil Seed Processor's Association, the
16 North America Freight Car Association and the North
17 American Miller's Association.

18 Let me start by thanking Chairman Begeman
19 and this Board for focusing on this very important
20 issue and the diligence, which is very obvious today,
21 with which you're doing so.

22 We believe that in far too many cases

1 current demurrage and accessorial charges and
2 practices merely exemplify the market power of
3 today's Class I railroads, reflected in their ability
4 to unilaterally impose one-sided terms and conditions
5 on their customers.

6 There is no question that the Board's
7 attention has brought increased transparency to these
8 practices and triggered what has been a pent-up
9 ground swell of concern among rail customers as
10 evidenced by the heavy turnout at this hearing.

11 Frankly, NGFA members in some segments of
12 our industry believe they are at a virtual tipping
13 point in the relationship with Class I railroads. In
14 our time today, NGFA wishes to do three things.
15 First, we want to highlight several examples of Class
16 I railroad tariffs that we believe contain
17 commercially unfair, commercially unachievable and
18 non-reciprocal demurrage and accessorial charges and
19 practices, many of which have already been discussed
20 today and I'm not going to belabor those or go
21 through all of those that we cited in our written
22 testimony because -- and written statement, because

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1 those are already in your hands and have been
2 reviewed.

3 Second, NGFA wishes to highlight the
4 disparity and dispute resolution procedures,
5 including several that we believe are designated or,
6 excuse me, designed to intimidate aggrieved parties
7 of ever filing a dispute.

8 Third, and perhaps most importantly, NGFA
9 would like to present for the Board's consideration,
10 a path forward on developing and implementing
11 policies and guidelines that would, we think, help
12 lead railroads to modify their tariffs to be more
13 commercially fair, practicable and reciprocal and the
14 legal basis and justification that we believe the
15 Board has for doing that.

16 I will address the first two items of that
17 outline and ask Mr. Wilcox to address the third.
18 Before doing so, I do want to just make a couple of
19 statements. It's already been referenced about the
20 extent to which the railcar fleet today is privately
21 owned or leased, including 100% of the tank cars and
22 in the grain sector, about 80% of the grain hopper

1 cars are now privately owned.

2 Excuse me, owned or leased -- in addition,
3 many rail shippers and receivers have invested tens
4 of millions of dollars at individual facilities to
5 acquire, expand, operate and maintain track and other
6 physical loading and receiving assets, as well as
7 hired additional personnel to perform tasks
8 previously done by the Class I railroads.

9 Meanwhile, the number of tariff provisions
10 pertaining to demurrage, car storage and accessorial
11 charges has expanded significantly during the past 6
12 years. And those charges have increased
13 dramatically. Further, these tariff changes often
14 are being imposed unilaterally and with little to no
15 notice.

16 We would make note of one NS charge
17 related to locomotive charges for removing and adding
18 a locomotive of 100 cars per locomotive that went
19 into effect immediately upon notification rather than
20 -- an email notification rather than with the
21 required 20-day notice.

22 But in that regard, in the longer term, we

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1 do believe the current 20-day notice requirement for
2 tariff change needs to be increased significantly to
3 provide sufficient protection to rail customers and
4 in recognition of the investment made by rail
5 customers in their facilities and capacity to handle
6 rail traffic.

7 NGFA's written statement notes the
8 majority of complaints received from its members have
9 been associated with demurrage and accessorial
10 charges and practices implemented by the Union
11 Pacific and the Norfolk Southern, but it's not
12 limited to those two carriers, and in fact we think a
13 broader statement of Board principles and guidelines
14 is needed in order to provide some parameters around
15 railroad conduct -- yeah in this area.

16 First, each tariff should be evaluated
17 from the standpoint of commercial fairness and
18 whether it is achievable given best practices of the
19 shipper or receiver. One example cited by many
20 parties in this proceeding is the reduction of credit
21 days to zero and I will not further elaborate on
22 that.

1 What we do believe is that a minimum of 24
2 or even 48-hours of free time, once a unit train or a
3 train is actually placed at a customer's facilities
4 needs to be considered. In this regard, UP concedes
5 in its May 8th statement to the Board that it's
6 unilateral reduction in free time to unload cars to
7 24-hours now from the previous 48-hours is a major
8 factor in its increased demurrage revenues.

9 Second, tariffs should be required to
10 contain clearly stated and monetarily comparable
11 reciprocal provisions that will apply to the railroad
12 if it is at fault or the rail customer is not
13 responsible for delays, such as for spot and pull
14 delays.

15 A classic example there is the much
16 discussed not prepared for service tariff requirement
17 by the UP which I won't further belabor. The same
18 principle applies to UP's general rule that penalizes
19 rail customers \$10,000 per occurrence, that if they
20 cancel unit trains within 48-hours of the forecasted
21 data release -- that's been brought to our attention
22 by many members of NGFA and has been elaborated on

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1 already by Greg.

2 The BNSF railway also states in its May
3 8th filing with the Board that it's practice is to
4 excuse demurrage charges proposed on affected
5 shippers is BNSF is responsible for delays and
6 inefficiencies that result in such charges, but there
7 is no mention of reciprocity in the BNSF tariff.

8 Third, -- or in this BNSF statement.
9 Third, some Class I railroad tariffs previously
10 contain language that excuse demurrage and
11 accessorial charges caused by the railcars -- rail
12 carriers bunching of cars.

13 Tariffs should be required to contain
14 language that specifically spells out when charges
15 will be waived because of bunching and any penalties
16 that should apply when the bunching further
17 compromises their individual rail customer's
18 facility's ability to function.

19 Fourth, some railroads debit and credit
20 systems are vague, while others are commercially
21 unfair. Rail tariffs should be specific and
22 unambiguous regarding debit and credit procedures.

1 In other cases, NGFA believes the charges being
2 imposed clearly are commercially unfair and
3 unreasonable. Our written statement cites several
4 Canadian Pacific railways and CSX transportation
5 company tariffs as examples of this.

6 I'd like to bring to the Board's attention
7 though two or three others that have surfaced since
8 we submitted our filing on May 8th, and these all
9 involve the Canadian Pacific. First, is a \$500 per
10 car diversion charge, even if CP is responsible and
11 even if the reason is to divert empty cars to load
12 balance private cars.

13 Second, CP \$535 per car charge if a car
14 must be switched onto a train after being set-off at
15 an unplanned location with no reciprocity provided by
16 CP if it caused the set-off.

17 Third, \$125 per mile special train
18 service, even if CP is at fault. And finally, on CP,
19 \$110 fee to collect a refund if the shipper is shown
20 to be correct in challenging a demurrage bill or
21 accessorial charge.

22 Given the focus earlier today on dispute

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1 resolution and NGFA's involvement in that, Chairman
2 Begeman in particular, in response to your questions
3 I want to highlight some items in that area.

4 By looking at briefly highlighting our
5 concerns regarding the current dispute resolution
6 processes. By omitting or eliminating tariff
7 language that's specified when demurrage and/or
8 accessorial charges would be waived, credits issued
9 or the absence of customer fault recognized, the
10 Class I railroads have given themselves sole
11 discretion to make such determination if a dispute
12 occurs.

13 NGFA's written statement documents the
14 one-sided nature of most of these dispute resolution
15 mechanisms and the rail carriers' own filings
16 document that they collect the vast majority of their
17 claimed amounts.

18 One railroad, BNSF Railway, states in its
19 tariff that it will arbitrate all disputes, claims,
20 questions or controversies arising out of charges
21 assessed under both its tariff and demurrage books
22 involving the transportation of grain or grain

1 products under NGFA's rail arbitration rules unless
2 the parties agree otherwise -- that's a positive
3 move.

4 In addition, NGFA learned for the first
5 time from UP's filing on May 1, that it purportedly
6 has agreed to arbitrate contested demurrage and
7 accessorial charges using a number of commodity or
8 mode-specific rules and it specifically referenced
9 NGFA's rail arbitration system, but we have not been
10 able to identify that language in any UP tariff to
11 this point.

12 Yet, even as a full throated proponent of
13 alternate dispute resolution, NGFA believes that
14 absent a clear set of STB established basic ground
15 rules outlining what demurrage and accessorial
16 practices are and are not acceptable, arbitration
17 too, would become a cumbersome process by forcing the
18 current myriad of questionable practices to be
19 resolved in individual disputes, rather than having
20 many eliminated by the existence of basic principles
21 of whether a tariff is commercially fair, practicable
22 and reciprocal.

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1 And Chairman Begeman, in response to your
2 question earlier today, our rail arbitration rules do
3 provide for arbitration under our rail arbitration
4 system of the application of demurrage terms and
5 rules, but not necessarily the terms of those rules
6 or the fairness of those rules or the reciprocity of
7 those rules.

8 So, and under our arbitration system rail
9 carriers obviously have an ability with 90 days
10 written notice to withdraw from that system as well,
11 so those are -- again, I think that points to the
12 need for some basic principles by the Board to put
13 some guardrails around what is a reasonable tariff
14 and what is not in this area.

15 As an example that NGFA believes clearly
16 is commercially unreasonable is the one that
17 Commissioner Oberman already cited -- the NS's
18 language related to having all reasonable attorney
19 costs borne by the shipper, but not any reciprocity
20 in terms of if the shipper wins a case.

21 In NGFA's view, that kind of language has
22 a chilling effect on a rail customer's willingness to

1 challenge any NS charge. NGFA's written statement
2 also cites UP tariff language that has a similar
3 effect.

4 NGFA also has recently been informed that
5 under CP's 15-day timely dispute process, it
6 typically responds to a customer dispute by asserting
7 that its computer system prevails and rendering a
8 verdict dispute declined with no further explanation.

9 In these instances, too, we believe the
10 Board should rule that such language is presumptively
11 commercially unfair and non-reciprocal. Now, I'd
12 like to turn our presentation over to Mr. Wilcox to
13 discuss how NGFA respectfully suggests the Board
14 proceed from this point and the legal basis for doing
15 so, thank you.

16 MR. WILCOX: Thanks Randy. I think we
17 only have a few minutes left so I'll try to be quick.
18 NGFA submitted a long submission and the reason is
19 that NGFA's been looking at these issues for a while
20 and that included a review of the various statutory
21 provisions, maybe not as exhaustive a review as
22 Commissioner Oberman mentioned earlier today, but we

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1 took a look at it.

2 NGFA believes the Board has ample
3 authority to direct the railroads to modify their
4 current tariffs to be more reciprocal, commercially
5 fair and should do so as an outcome of this
6 proceeding.

7 Our discussion starts on you know, page
8 29, it includes a talk through the various statutes
9 and some precedent, but some of the precedent we cite
10 are several decisions where the Board held that you
11 know, mere statements of the railroads about how they
12 intend to interpret their tariffs in dealing with
13 their customers.

14 And you've been hearing a lot of those
15 statements really since November of last year. Those
16 statements, you know, are not acceptable if there's
17 no support in the tariff for what the railroad is
18 saying, you know, in terms of how we're going to work
19 with our customers, and we're going to add credits
20 and do whatever.

21 If the tariff doesn't really spell that
22 out, the Board has held in several cases that tariff

1 provision is unreasonable because it's impermissibly
2 vague. And that's a big part of the problem as
3 you've been hearing today and as Randy just
4 discussed, you have some language that used to be in
5 tariffs where the railroad admitted fault or you
6 know, took care of -- if the railroad was at fault or
7 the shipper was not at fault, charges would be waived
8 or credits or you know, that kind of language, even
9 bunching -- that language has been removed from a lot
10 of tariffs and so you have a lot of arbitrariness,
11 you have a lot of uncertainty and inability of a
12 shipper to you know, point to a tariff and say here's
13 our deal under the tariff, and you're at fault there,
14 you need you waive your charge or whatever.

15 Instead, it's thrown into these dispute
16 resolutions processes which you've heard about and
17 then the step beyond that is a place where shippers
18 are reluctant to go, which is you know, litigation -
19 - formal litigation in federal court or before the
20 Board.

21 And so, the general approach historically
22 from the STB the default position has been if there's

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1 a dispute over a demurrage or accessorial charge or
2 tariff is to bring a formal complaint and the Board
3 said something about this -- Chairman Begeman had
4 mentioned EP 707 there were some -- it was a narrow
5 decision and during the comment process some shippers
6 tried to say well let's talk about these other issues
7 and the Board said no, we have ADR and we have the
8 complaint process.

9 But the ADR is not shown to be effective
10 and more significantly, as you've been hearing and
11 reading, the volume and the breadth of the changes
12 have just been staggering, particularly over the last
13 couple of years so the idea of resolving all those
14 issues complaint by complaint by complaint is really
15 unrealistic and would be administratively burdensome
16 and plus, you have to remember that a lot of
17 complaints that are brought before you are
18 eventually settled by the parties and so, the idea of
19 getting a precedent that could be used in the future
20 by other complainants -- potential complainants and
21 it goes away if those parties settle and they settle
22 confidentially -- so, that's a consideration.

1 And that's not even getting into the cost
2 and complexity and all those issues. And as has been
3 mentioned throughout this proceeding, you know, the
4 industry has changed in terms of the distribution of
5 railcars, private rail car ownership, assets, and so
6 that begs for a policy change in terms of the rules.

7 And so, NGFA believes it's a pressing and
8 current need for the Board to act by developing
9 specific guidance as Randy mentioned. And as we talk
10 on page 34 and 35, it's so long I have to give you
11 the page numbers, we suggest that the process the
12 Board followed in the fuel surcharge proceeding lends
13 itself to this proceeding.

14 In that case there was no complaint filed,
15 there's no petition for declaratory order filed,
16 there was just a really large outcry about percentage
17 of the rate-based fuel surcharges. And the Board
18 proceeded in that -- in EP 661 saying under 10702,
19 they have the authority to adopt rules of general
20 applicability for future conduct to address an
21 unreasonable practice.

22 And so, in that case there was a first

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1 round of hearings, like this, oversight hearing, and
2 that was filed a few months later by a decision with
3 some proposed guiding principles for rail fuel
4 surcharges.

5 And then there was another comment period
6 to discuss those proposed guiding principals and then
7 that was followed by a final decision where the Board
8 issued guidelines and gave the railroads 90-days to
9 amend their tariffs to comply. Railroads were
10 directed to amend them.

11 And so, we suggest that you know, the
12 information you've been provided and to the extent
13 you want additional information about some of these
14 principles that you've been hearing, there's a lot of
15 themes -- consistent themes, would lend itself to
16 that kind of process and we suggest it could be used,
17 but also with the addition -- and somebody mentioned
18 this earlier, of Board oversight, rather than have
19 the process where the Board directed the railroads to
20 amend their tariffs.

21 They amend their tariffs and then the way
22 of testing whether they complied is for someone to

1 file a formal complaint. That's happened in other
2 proceedings. We suggest a more efficient way would
3 be for the Board to retain oversight and you could
4 have shippers that didn't think their particular
5 railroad complied, could file like a motion to show
6 cause, you know, as to you know, why that railroad
7 didn't comply with the principles that the Board has
8 issued.

9 In the alternative, you could have
10 shippers file a petition for declaratory order,
11 something short of a formal rate complaint, excuse
12 me, you don't want to do that, no one does right? A
13 complaint case, but it would still -- this would not
14 eliminate complaints, formal complaints, but what is
15 needed now and I think what you've been hearing is
16 there needs to be a step by the Board to rebalance
17 some of these tariffs and the relationships, the
18 commercial relationships through the tariffs and to
19 sort of enable the parties to resolve it that way
20 through the language in the tariff restore some of
21 this balance, while leaving the complaint process in
22 place for, you know, bigger issues that can't be

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1 resolved. So, that's under my time.

2 CHAIRMAN BEGEMAN: Really your testimony,
3 all of it collectively was terrific and I will admit
4 that when I got to your 43-page document to read and
5 when I still had half of the testimony to go, I was
6 like, not overly thankful until I got through it. It
7 was super helpful and focusing on a number of the
8 tariffs that otherwise I may not have been as
9 familiar with.

10 I'm going to make a comment because I
11 don't want to forget to say it and then I want to
12 make another comment, but Tom, well I appreciate your
13 recommendations as far as what the Board could do
14 and I started as you were playing it out, I'm not a
15 patient person and so while I just -- so by next year
16 the Board could put something out.

17 What I would ask the carriers to do in the
18 meantime. Again, I don't know what the Board will
19 do, but I think the Board will be doing something
20 here and there, is to really please take to heart
21 what your customers are saying. UP again, I commend
22 you, you read the testimony and you've taken some

1 action.

2 I'm not saying its' enough action. I'm
3 just saying thank you for being receptive and to
4 trying to work with your customers. Greg, I thought
5 your testimony was amazing as usual, whether you're
6 here at the Grain Car Council, you always have a
7 story. But before I forget to say it, I wanted to,
8 for planning purposes because we still have scheduled
9 two more panels to go and I don't want to end up
10 really short-changing any of you who are before us at
11 the moment or the other two panels.

12 The rail panel, KCS and CN, I believe it
13 is who are scheduled to go next. They are willing to
14 defer until tomorrow morning so that we could then
15 turn to the last panel, the chemical panel. I
16 realize that those of you who are on point for
17 tomorrow are like ah, but I have a plane to catch, et
18 cetera.

19 If any of you feel that -- are worried
20 about how you're going to get through the day and
21 home again, if you would just come and visit with
22 Lucy Marvin, what we will do is you know, we can --

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1 you don't have to be on your panel, we can -- we
2 won't put you on the rail panel, but we can work you
3 in earlier or maybe we will, it might be a good
4 dialogue actually.

5 But if you please talk to Lucy if any of
6 you are concerned about a delay, particularly for the
7 afternoon, so thank you for that and thank you
8 railroads, for your willingness to defer and
9 readjust your testimony. Thank you. Do either of you
10 want to chime in?

11 COMMISSIONER OBERMAN: Thank you, Ann. In
12 no particular order, Tom, a couple of things. First
13 of all I should mention specifically that when I said
14 we had done a thorough review of the law, I'm talking
15 about Julie Waddell on our staff and Sarah Fancher
16 and they should be noted by name because the research
17 they've done for us is phenomenal.

18 You'd all be lucky to have them on your
19 team. So, and the carriers as well -- so, I wanted
20 to not let the day go without mentioning that. Tom,
21 I've discussed you are a lawyer and I like to ask
22 lawyer questions, a couple. I don't know that you've

1 prepared for this but you know there's been a great
2 deal of talk today about shippers being, if they
3 request service, are being told here's the terms of
4 the service, this is the demurrage tariff.

5 And that's the way it is. So, I went back
6 to Black's Law Dictionary to look up the -- remind
7 myself of the definition of contracts of adhesion.
8 Would you think that's a fair description of what
9 we've heard here today about the terms in which
10 shippers and receivers are offered service and
11 subject to these demurrage tariffs?

12 Do you want me to read the definition to
13 you or do you remember from law school?

14 MR. WILCOX: I haven't looked at it in a
15 while. In fact, it was in the context of a
16 percentage-based rail fuel surcharge being imposed.

17 COMMISSIONER OBERMAN: Well, one of the --
18 the definitions says, "It may be a take it or leave
19 it proposition, often called a contract of adhesion,
20 under which the only alternative to complete it here
21 is outright rejection." Is that a fair description
22 of what's being offered here?

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1 MR. WILCOX: Well, I think -- I see where
2 you're going but the thing that gives me pause is
3 that in a contract of adhesion you usually don't have
4 any recourse and there is you know, the Board has
5 jurisdiction over these demurrage practices. There
6 is recourse, but it's seldom taken because it's --

7 COMMISSIONER OBERMAN: Well in a contract
8 of adhesion you can ask a court to declare it
9 invalid, that's the usual remedy, so it seems to be
10 it had some analogies to it.

11 MR. WILCOX: But in terms of the current
12 market and rail market such as it is, and the
13 captivity of many shippers, yes, it gets very, very
14 close to that indeed.

15 COMMISSIONER OBERMAN: Alright thanks, I
16 wanted to just raise that issue because it's been
17 coming around in my head all day as I've been
18 listening to these. Greg, on a personal note, I grew
19 up in Springfield and had some of the similar non-
20 incentive treatments as a young child myself, not far
21 from Clinton.

22 I wanted to -- that's why I asked you the

1 question. The -- I wanted to ask and maybe both Greg
2 and Randy you can address this question. There's
3 been a number of references in the testimony and in
4 other aspects of things I've had to deal with since
5 I've gotten to the Board, about the phenomenon of
6 that railroads encouraging, particularly grain
7 shippers, but others to invest in facilities that
8 would accommodate unit trains and then they'd offer
9 you unit train service and of course, it's at a lower
10 rate than manifest service.

11 And I've been puzzled by how businesses
12 make these decisions. I think one of you talked
13 about investing \$32 million dollars to build such a
14 facility. There's been others we've heard about, so
15 could one or both of you tell me how does this come
16 about?

17 When a railroad comes along and says you
18 know, we have this wonderful unit train option if you
19 -- but you need to have a facility that can
20 accommodate it, so if you spend the money, we'll
21 provide the service. I take it there's no written
22 contract between you and the railroad that says we're

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1 relying or maybe there is, we are relying on your
2 representation to spend this money.

3 You can't cut us off or maybe there is, or
4 how do you make that decision to spend that money
5 without some kind of assurance that you're going to
6 have the unit train service for at least enough years
7 to recoup the investment?

8 MR. TWIST: Well that's the concern when
9 you make that investment. But to be honest, when
10 you're looking at our facility and the thin margins
11 that you have, we have to be competitive with our
12 competition and so, railroads often times know that.

13 So, if you're going to be competitive to
14 the domestic poultry market in California, you're
15 going to need to be able to ship that 100-car units
16 to reach that market. If not, that spread from units
17 to singles is about \$1,000 a car, about \$10.00 a ton,
18 or about 24 cents per bushel from our standpoint,
19 when we look at being competitive there.

20 And that's the difference in between being
21 competitive and not. So, it becomes somewhat a cost
22 of doing business that if you're going to be a rail

1 shipper and be competitive there you have to go that
2 portion, you have to make that investment. And I'll
3 be honest, you take a leap of faith on some of this.
4 That's why it's discouraging for us when we look at
5 the PSR model now moving away from these units
6 because when we made these investments -- and
7 granted, these were probably 10-12 years ago for some
8 of these investments.

9 There was no mention of 24-hours to load a
10 unit. Why would there be? We're loading private
11 cars on our track. So, how long it takes us to load
12 inside our own facility is really inconsequential
13 because power was never left with that. What they
14 assumed was, and we did too, was when the unit was
15 done, they'll bring it in, it's blocked, ready to go
16 as one unit, and out it goes, and that was it. And
17 our whole return criteria was the spread between
18 single cars and the unit shipments, that was our
19 complete return criteria.

20 And yes, we've thought about that in
21 terms, so when you enter into this, what keeps a
22 railroad from changing with the stroke of a pen any

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1 tariff or any spreads out there, and taking your
2 return criteria for your investment away?

3 That is definitely a concern and that's
4 happening now as this is going forward.

5 COMMISSIONER OBERMAN: Well and it's even
6 beyond that isn't it, because I hear that UP and
7 others are saying we're going to just stop unit train
8 service in some cases all together, it won't be an
9 option, 24-hours or anything else, is that -- are you
10 experiencing that?

11 MR. TWIST: In three of our four markets
12 we reach by units as little as a year ago, yes. By
13 June 1, three of those four will be moving manifest
14 service. Now, in fairness, they're protecting for
15 now, the unit train rate. The challenge becomes
16 October 1 when they said they're covering things
17 until September 30th, what happens then?

18 If they take it and simply move us to a
19 manifest rate, then our investment is worth nil now,
20 in terms of what we put into it.

21 COMMISSIONER OBERMAN: You may not want to
22 answer this, but I am sort of -- I've really been

1 curious about this, as long as this subject came up,
2 when a railroad -- any railroad came to you, anybody
3 who's built a unit train facility and says if you do
4 this, we will bring unit trains to you. What did
5 those conversations actually consist of?

6 Did they say yes, but there's a risk,
7 don't assume we'll always provide them? You proceed
8 at your peril. Or, did they say trust us, we'll be
9 with you forever. I mean what is the actual nature
10 of those communications, were they written
11 representations or was it all just a handshake, how
12 did that work?

13 MR. TWIST: No, there was no -- nothing in
14 writing as far as guaranteeing anything long-term.
15 Basically, they pointed out to us and others, what
16 the spread was going to be for single cars versus
17 units and then it was up to the individual companies
18 to make that decision. If it was worth the
19 investment to keep -- to lower their cost relative to
20 units.

21 COMMISSIONER OBERMAN: To be candid, I'm
22 just thinking 32 million dollars is a lot of money to

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1 write a check on a hope and a prayer. It sort of
2 mystifies me but did you want to add something?

3 MR. GUPTON: This goes back to ways when
4 several years back before the current situation, but
5 exactly what you're talking about where they were
6 encouraging to invest in additional track and update
7 that but there were no guarantees and because they
8 weren't servicing enough cars at that retail
9 facility, they were stop service.

10 I don't know what the current situation
11 is. This goes back a few years, but the situation
12 you're talking about is exactly what happened where
13 they did make investment, upgrade their facilities,
14 but there was no guarantee the railroad was going to
15 be continuing to deliver the cars at that facility
16 because the volume to move cars there was not, you
17 know, good for the railroads, it wasn't conducive.

18 So, that issue even before today has taken
19 place, this goes back a few years.

20 COMMISSIONER OBERMAN: No, I know I've
21 seen it in other situations, that's why I wanted to
22 just be enlightened on it.

1 MR. GORDON: Mr. Oberman, if I could add
2 very quickly, I think the other thing that really
3 grates on our members that report this to me is that
4 when they decide not to provide unit train service
5 any further and to go toward manifest traffic, it's
6 on very short notice, typically.

7 We're going to change our model, we're
8 going to switch over, it may be 3 months, 4 months
9 down and that doesn't take into account the amount of
10 investment that the facility made and the return on
11 that investment over time.

12 And a couple of statements that have been
13 repeated to me is from the railroads, has been well
14 we didn't promise it would last forever.

15 COMMISSIONER OBERMAN: Apparently not. I
16 have a few more but go ahead.

17 VICE CHAIRMAN FUCHS: So, I think Greg,
18 in your testimony you were talking about the push to
19 private cars. And you know, I think you have some
20 really helpful graphics explaining those dynamics.
21 You know, I guess I'm wondering in your discussions
22 with the railroads, you know, what justification is

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1 given to you as to why you make the investment of
2 private cars and now, you're on less favorable terms
3 than a system car?

4 MR. TWIST: Well, it's been a slow erosion
5 as far as the return. When we first went into this
6 and were really asked to invest in cars was probably
7 1996-97. The UP was very tight in terms of
8 equipment, then they were tight in terms of capital
9 and when you looked at what we could get for return
10 on the cars, for instance we took a point like
11 Turlock, California and Aberdeen, Washington and
12 showed that the return -- we got full mileage --

13 VICE CHAIRMAN FUCHS: Sure.

14 MR. TWIST: -- based on the value of the
15 car and that was somewhere in the neighborhood of
16 \$949-950 per car. They took the first chip away when
17 they went to zero rated private car rates and the
18 rationale was pretty simple -- look, you don't need
19 all these accountants, we don't need all these
20 accountants keeping track of these invoices going
21 back and forth, let's just discount you on the rate
22 in advance, and in theory that makes sense, rather

1 than sending invoices back and forth.

2 But when that happened, we handed kind of
3 the keys to the kingdom to the railroad on the
4 private cars because now they're controlling what the
5 allowance was and they arbitrarily kept moving it
6 down.

7 And part of it was unitized shipments. As
8 they turned cars faster, they also took that spread
9 down more.

10 VICE CHAIRMAN FUCHS: Why, what reason was
11 given for the difference between the private car
12 storage relative to system car demurrage in that
13 private car? It sounded like from your testimony
14 you were saying that the folks who own their own
15 assets actually are being treated worse for the
16 purpose of demurrage and storage than the folks that
17 are using the railroad assets and I'm just kind of
18 wondering how those discussions have played out and
19 if I'm hearing you correctly?

20 MR. TWIST: Yes, we do get charged more
21 for private empty car storage than would be railroad
22 demurrage. I don't have an answer for you because

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1 we've asked that question and you hear some of the
2 talk about the track and their availability.

3 The reality is their yard should never be
4 more fluid than it is now. Because you think about
5 it, we've added all this track in our facility.
6 We're taking all these private cars into our
7 facility. Their yards should be more fluid than
8 they've ever been.

9 So, the notion that they're having to
10 build more track to hold our cars is nonsense,
11 because we've never supplied a higher percent of our
12 privates.

13 VICE CHAIRMAN FUCHS: So, for the system
14 car kind of let's say in constructive placement using
15 railroad track and the private car.

16 MR. TWIST: Right.

17 VICE CHAIRMAN FUCHS: There's a difference
18 there that this favors the private car?

19 MR. TWIST: We are charged more for
20 private empty car storage from both the Burlington
21 Northern and the UP than we would demurrage for a
22 system car.

1 VICE CHAIRMAN FUCHS: If that car match
2 became a system car, it would be charged less?
3 That's what I just want to make sure I understand.

4 MR. TWIST: Correct.

5 VICE CHAIRMAN FUCHS: Okay.

6 MR. TWIST: And I think part of which is
7 it coincides with the fact that at the time where the
8 demurrage was higher, we supplied maybe 25% of our
9 fleet, our own private fleet.

10 VICE CHAIRMAN FUCHS: Yeah.

11 MR. TWIST: And now we provide 90%.

12 VICE CHAIRMAN FUCHS: Right.

13 MR. TWIST: And all of a sudden, the
14 charges have kind of flip-flopped now that we provide
15 90% of those.

16 VICE CHAIRMAN FUCHS: I appreciate it, and
17 John, I think you mentioned some aspects of the fact
18 that railroads don't take into account the costs on
19 the shipper when they're making these changes and I
20 think you talked about kind of a you know, that the
21 railroad says there's benefits for them but they
22 don't take into account, you know, costs on you.

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1 Are you saying that when the Board is
2 thinking about the reasonableness, that that is a
3 suitable standard by which to evaluate the
4 reasonableness of charges?

5 MR. BODE: We think it's an important
6 consideration for the Board.

7 VICE CHAIRMAN FUCHS: And, so let's say
8 for example there were to be a case. How would you
9 go about trying to disprove railroad claims about
10 benefits for their system?

11 MR. BODE: I, too, have the benefit of
12 being accompanied by counsel, and let me ask Jeff
13 Moreno to help.

14 VICE CHAIRMAN FUCHS: I appreciate it.

15 MR. MORENO: I think that's a good
16 question at this point. Exactly how to do that? A
17 shipper doesn't have access to that information. I
18 think some form of discovery would probably be
19 appropriate in those circumstances because what
20 you're talking about is a complaint proceeding.

21 At the same time the shipper does have
22 access to the cost to it and the railroad does not

1 know what the shipper's costs are.

2 VICE CHAIRMAN FUCHS: Right.

3 MR. MORENO: So, that form of reciprocal
4 discovery would be involved and I think that's part
5 of the course of litigation.

6 VICE CHAIRMAN FUCHS: And, it's your view
7 Jeff, that you know, when the railroad puts forward
8 every possible benefit it could have, they're going
9 to look and see, you know, what the effects are on
10 velocity and dwell time and others. It's your view
11 that that wouldn't create a standard that would be
12 too costly to litigate or that would be something
13 that would be practical for the parties to get good
14 information on both sides?

15 MR. MORENO: I honestly can't answer that
16 question at this stage of the process. This is more
17 kind of trying to develop ideas for further
18 exploration and I think the questions you're raising
19 are valid ones that need to be addressed as part of
20 the public comment process.

21 VICE CHAIRMAN FUCHS: And then a question
22 for Tom and Randy about notice. And something that

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1 goes beyond the 20-days, you know, and I think there
2 was some things connected about, you know, good faith
3 effort and these types of things throughout the
4 testimony.

5 You know, correct me if I'm wrong but
6 there may be some types of changes where 20-days is
7 sufficient notice. You know, we have these spread
8 sheets of changes right, and not all of them are so
9 significant and then there are some that are more
10 significant and so I guess I'm trying to think about
11 from your perspective, two things.

12 One is, what is adequate notice? And the
13 second is what's the trigger by which something needs
14 beyond 20-days of notice?

15 MR. WILCOX: Well, you're right, I mean in
16 some cases 20-days works fine. And we've had some
17 discussions with shippers like Greg and others in
18 terms of where their assets have -- they've made, you
19 know, investments in tracks and other assets and now
20 they have to change and it's not that they can't, but
21 we've heard aside if there's going to be a
22 substantial change to operations from unit train to

1 manifest, maybe 180-days even to enable them to
2 recoup what they can out of the investment that, or
3 minimize the cost I guess or the impact of that and
4 not you know, just immediately strand that investment
5 and become you know, non-competitive.

6 MR. GORDON: Patrick, I think that's a
7 really key question that we're going to be talking
8 with our rail shipper receiver committee and our
9 governing bodies about. I think that's a concept
10 that came up in March at our convention and I think
11 it's one we need to drill down more and to kind of
12 classify the kinds of tariffs we're talking about.

13 There may be some that need over a year
14 given the amount of investment that's been made by a
15 facility. So, I kind of would like to defer specific
16 answers.

17 VICE CHAIRMAN FUCHS: So you're thinking
18 about it there's kind of a major change threshold by
19 which some things are major changes that deserve more
20 notice?

21 MR. GORDON: Yes.

22 VICE CHAIRMAN FUCHS: That's kind of the

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1 way you're thinking about it?

2 MR. GORDON: Yes, yes, but we're just
3 beginning to have those kinds of discussions
4 internally.

5 VICE CHAIRMAN FUCHS: And then to be
6 clear, during this window status quo in terms of --
7 or some sort of break from whatever the change effect
8 would have. The transitional phase, okay.

9 CHAIRMAN BEGEMAN: Go ahead Greg.

10 MR. TWIST: One thing just to add, we're
11 talking about the unit shipments and so forth. In
12 the case of some new plants being built, I know in
13 talking to some of these ethanol plants, in order to
14 get service from railroads, they were required in the
15 case sometimes three loop tracks.

16 So, it wasn't a case of do you want to
17 ship singles or units, this was a requirement from us
18 to the railroad to provide service to your facility.
19 And now I think about some of these same plants of
20 maybe 300 cars of storage are going to be shipping
21 everything out of single cars, which seems a real
22 waste of money.

1 COMMISSIONER OBERMAN: Were those -- did
2 those situations involve different communications?
3 I've just got my lawyer's hat on here and I'm trying
4 to figure out what kind of reasonable reliance was
5 going on here or whether the reliance was reasonable.

6 Did those situations where you're building
7 a new plant and the railroad said we won't even come
8 there if you don't build the loop?

9 MR. TWIST: I won't speak for AGP, but in
10 talking to other folks who built new corn plants,
11 we're told that they were required to build a certain
12 amount of track, in some cases up to three loop
13 tracks or 300 cars of space before they would provide
14 service.

15 COMMISSIONER OBERMAN: Just to follow-up
16 on a couple of other points that are left hanging
17 here. When you said Greg, that the railroads are now
18 requiring you to build blocks of cars on your
19 property before they pick them up -- service they
20 used to provide in their yard, you said.

21 MR. TWIST: That was communicated to us
22 that they wanted us to start blocking cars together.

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1 That was part of the conditions for them to still
2 grant this unit car rate.

3 COMMISSIONER OBERMAN: Well that was a
4 question I was going to ask. Did they lower the rate
5 when you're doing part of their job?

6 MR. TWIST: Right, that was part of what
7 they requested us to continue to do to try to do
8 block -- pre-blocking of cars and to try to do level
9 loading, and that was sent out in the same
10 communication that said we're going to continue to
11 honor your unit rate, even though we're moving this
12 unit as manifest service.

13 So, it was not a mandate at this point,
14 but it always makes me nervous when the railroads
15 request something because that usually means down the
16 road it's going to be a charge.

17 COMMISSIONER OBERMAN: But it was sort of
18 a trade-off when they raised it?

19 MR. TWIST: That was pretty much implied
20 that came with the fact that we're going to continue
21 to haul our units at a unit rate even in manifest
22 service.

1 COMMISSIONER OBERMAN: Richard, I wanted
2 to just follow-up with you a little bit more on the
3 nature of your members. These are retailers, but I
4 assume we're not talking about some store you walk
5 into, we're talking about a facility that has tanks
6 and things to store liquid?

7 MR. GUPTON: Parts supply dealers, so I've
8 been to a lot of retail locations, they don't --
9 they're all different. They have similar business,
10 the farmers they're servicing sell similar products,
11 but no location is set up the same. But typically,
12 its farmer customers are who they're servicing, some,
13 but there are some of our members that are also a
14 local hardware store, feed store, servicing the rural
15 community if that's what you're talking about.

16 COMMISSIONER OBERMAN: Well, I'm trying to
17 figure out how they're getting their train cars. Are
18 these people that have tracks coming up to their
19 facility?

20 MR. GUPTON: Sure, they have tracks that
21 come up to their facility for delivery and some that
22 are here within driving distance too, so I would

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1 invite you all to come visit a retail facility if you
2 haven't been to any, to see how they operate.

3 COMMISSIONER OBERMAN: And, I take it that
4 most of the stuff that's coming by rail is by tank
5 car, it's liquid, is there fertilizer?

6 MR. GUPTON: It can be dry too but it
7 depends on what they're selling to their customers,
8 liquid or dry.

9 COMMISSIONER OBERMAN: And then is any of
10 this TIH material?

11 MR. GUPTON: The Midwest for corn it would
12 be Anhydrous ammonia, so it would be TIH material.

13 COMMISSIONER OBERMAN: Because you've
14 talked about you know, when pressure is put on to
15 unload it and things in short order, there's you
16 know, after dark it gets more dangerous. I'm trying
17 to picture the set up here, that's all, is that what
18 you're talking about.

19 MR. GUPTON: Well just any. I mean that
20 doesn't help the situation, but any of the products
21 that are delivered obviously when you're doing it at
22 night, it's darker, it's harder to see, you know, you

1 always have additional issues.

2 If they can do it during the daytime it's
3 you know, more visibility, less safety risk, if
4 that's what you're getting on.

5 COMMISSIONER OBERMAN: Well, you've
6 mentioned it and I was just trying to picture the
7 facility.

8 MR. GUPTON: Yeah, having the deliveries
9 during the normal business hours during the day for
10 the railcar unloading makes more sense from a safety
11 standpoint too, versus during the middle of the
12 night.

13 COMMISSIONER OBERMAN: I assume if we're
14 talking about incentivizing people to meet the 24-
15 hour, you're talking about extra people, you may be
16 talking about building flood lights or something so
17 you could work all night, that sort of thing?

18 MR. GUPTON: They would have all of that,
19 they would have to hire extra additional people and
20 particularly, I think it was mentioned too, if
21 they're not showing up at the time they're supposed
22 to be, you're having to pay the extra for those

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1 employees and keep them on until that delivery takes
2 place.

3 COMMISSIONER OBERMAN: Alright, thank you.

4 CHAIRMAN BEGEMAN: Could you clarify for
5 me, because I think I have forgotten the answer, but
6 for the move from the unit train to manifest, et
7 cetera, is that primarily with UP at this point that
8 you're talking about?

9 MR. TWIST: Yes, yes it was.

10 CHAIRMAN BEGEMAN: Okay, and I also
11 believe that if I remember correctly, not from this
12 morning, but initially when UP made this
13 announcement last fall, I think it was one of their
14 first announcements with their unified 2020, there
15 was -- the rate was not adjusted or held harmless
16 through I believe it was going to be through May?

17 MR. TWIST: I think it was through like
18 April and now that's been extended.

19 CHAIRMAN BEGEMAN: And ultimately, they've
20 extended it.

21 MR. TWIST: Through the end of September,
22 yes.

1 CHAIRMAN BEGEMAN: So, one of the things
2 that I'm curious to know is -- so I guess, overall,
3 so the unit rates are more economical?

4 MR. TWIST: Yes.

5 CHAIRMAN BEGEMAN: But when you say you
6 want to -- you haven't said be held harmless, but you
7 don't expect that you would -- your rate would never
8 go up at all, it's just that it wouldn't go up as
9 high as a manifest rate, is that your hope?

10 MR. TWIST: Well, our hope was that the
11 money we invested we'd still have return criteria and
12 if it goes to the single car rate, then any return we
13 had based on that investment it's gone, yeah.

14 CHAIRMAN BEGEMAN: And does anyone want to
15 talk about the NS congestion tariff or the -- and
16 this is a different issue, but the issue of the
17 credits. Credits actually expire, don't they, at the
18 end of the month and so you -- Greg, take it away.

19 MR. TWIST: Well we're not served by the
20 NS. I can tell you that credits to me are a little
21 bit like a slot machine at the casino that doesn't
22 have a cash out button. You can keep playing but you

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1 can never get cash back. So, and it's -- and so if
2 you can never walk away from it, so that's the issue
3 I have with credits.

4 Sometimes they won't allow you to use
5 those for different commodities, sometimes you can't
6 carry them over from month to month, so to me the
7 credit system too is a bit of a game and so, if
8 you're going to have a credit to me, if we make an
9 insurance claim, we get a check from the insurance
10 company.

11 It would be nice if there's an amount
12 that's agreed upon as an amount. You can use that
13 against future business in whatever way you want.
14 Not have it all these different ties to it.

15 VICE CHAIRMAN FUCHS: There's one carrier
16 that does -- it's by individual location and by week
17 if I'm not mistaken, so it's that limited, is that
18 correct. I think I read that in one of the May 1st
19 filings, anyone? Sounds right?

20 CHAIRMAN BEGEMAN: Don't give anyone
21 ideas.

22 VICE CHAIRMAN FUCHS: Right.

1 CHAIRMAN BEGEMAN: So, John, when you had
2 really helpful ideas and Jeff, thank you for always
3 being present behind someone. Sometimes by yourself.
4 When you talked about the need for reciprocity and
5 the focus on that and this kind of ties in with the
6 questions that we were talking about with the
7 credits, but is it more -- you're not saying give us
8 a check, but rather have there be like a level, a
9 trade, a fair trade, so that the credits would
10 continue instead of being cut off by month or what
11 are you envisioning?

12 To make things more complicated, really
13 wouldn't help any of us.

14 MR. BODE: Right, we're not looking for
15 more complications in the system. We seek simplicity
16 and we seek reciprocity and the limitations on
17 credits are simply as Greg said, it makes it a game.

18 And so, that's a fundamental concern,
19 Jeff, do you have more to add?

20 MR. MORENO: Well, I think one of the
21 issues with the credits expiring is you could have --
22 you can earn a credit on the 29th of the month and

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1 it's only good until the 30th, one day. On an off-
2 set it would seem to make sense to at least have the
3 credits if they're only going to last for 30 days, I
4 mean make them all last 30 days, not just based on a
5 calendar month where they expire on the 31st no
6 matter when they were earned.

7 COMMISSIONER OBERMAN: Do you mean a
8 rolling 30 days, kind of a rolling 30-day period?

9 MR. MORENO: Yes.

10 VICE CHAIRMAN FUCHS: Why should credits
11 expire?

12 MR. MORENO: Well, that's a good question.
13 I would say -- no, it seems reasonable that you don't
14 want someone 5 years down the road applying a credit
15 that they earned 5 years earlier, but the question is
16 where should that cut-off be? Should it be 30 days,
17 or should it be somewhere 60, 90 or a year?

18 VICE CHAIRMAN FUCHS: Wouldn't the credit
19 just be applied at whatever debit bill they have?

20 Maybe they have no demurrage and they
21 carry it over 5 years, that would be a pretty rare
22 situation if you had carried forward. Would you --

1 am I understanding, it would be a pretty rare
2 situation that you would have a balance of credits if
3 you accumulated over months that could be carried
4 forward over time, right?

5 I mean there would be no incentive not to
6 just immediately off-set the first debit that you
7 get, alright.

8 CHAIRMAN BEGEMAN: So, as association
9 representative, not all of you, Greg you're unique.
10 You know, there are always issues that shippers have
11 concerns about grievances about, frustrations about
12 and I'm just curious to know to what level you are
13 hearing from the people that you work for that got
14 you to come and sit before us at this table.

15 Is this a different set of pitchforks that
16 you haven't been used to?

17 MR. GORDON: Yes, I think to use an
18 analogy, the crickets are chirping loudly, and I
19 think in -- there are two to three major issues and
20 the rate reform task force let me compliment them and
21 you all, particularly Chairman Begeman.

22 CHAIRMAN BEGEMAN: The task force gets the

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1 credit.

2 MR. GORDON: Well they've come up with a
3 good body of work that needs to be explored. I think
4 that issue, the accessorial and demurrage charge
5 issues are really top of mind for our members right
6 now. And so, it's a big, big deal.

7 MR. BODE: I would add that I think the
8 crickets are roaring. This was a leading topic at
9 our last Board meeting. It was the matter of
10 extensive discussion and our members operate million
11 dollar plus facilities and a number of them rely
12 exclusively on rail or the corn that they're
13 processing.

14 They process a tremendous amount of corn
15 in a facility and also the discussion was that
16 operations of these facilities that are built to
17 operate 24/7 for 361 days a year are being slowed
18 because they cannot load out their production.

19 And so, you have these massive facilities,
20 very heavy capital investment where the operations of
21 the facility simply is being slowed down because
22 there's not an ability to ship out. That is a very

1 serious detrimental effect on our industry and that's
2 why I'm here to express the concern.

3 COMMISSIONER OBERMAN: Because of the
4 variability and delivery because of PSR?

5 MR. BODE: Yes, yes.

6 COMMISSIONER OBERMAN: I just wanted to
7 follow-up on something, I'm sorry?

8 MR. GUPTON: I just want to, from our --
9 it has been a growing problem. This is just kind of
10 the latest thing and besides dealing with this the
11 mention of trucking shortages, driver shortages,
12 other transportation pressure, so some of these
13 products, there aren't alternatives to try to look
14 into these products in an efficient way and it's
15 continued to kind of grow and so, that's why we're
16 here today.

17 And again, our members working with the
18 railroads want to be treated as equals.

19 We have members in our association, they
20 have their customers but it's really a captive
21 customer for the railroads and so we just want to
22 make sure that there's fairness and what NGFA is

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1 suggested I think would bring about some of that
2 thing and more accountability and the point brought
3 up why should the credits go away?

4 The demurrage charges don't go away, so
5 why would credits go away? If you're not going to
6 have an equal system to hold them accountable. So,
7 this is just the latest in a number of things, the
8 fuel surcharge thing was one, but given the Ag
9 economics that is going on right now and having these
10 additional charges just puts more pressure on our
11 members.

12 MR. TWIST: Not part of an association,
13 but AGP -

14 CHAIRMAN BEGEMAN: Many would like you to
15 be, PAY DUES.

16 MR. TWIST: With AGP being owned by a
17 cooperative, a lot of our members are pretty
18 motivated on this, and I've had several customers
19 call me up that I had not talked to before, saw that
20 my name was listed to be in front of the STB and
21 called me up and said hey, go get them, here's things
22 we're hearing, here's what's going on on our end.

1 And so, I would tell you. I haven't seen
2 that in my time in transportation. It is -- people
3 are energized.

4 MR. GORDON: Chairman Begeman, let me add
5 just one thing to echo what Greg is saying. I've
6 heard from non-members of NGFA would you please plead
7 our case. And for other industry sectors saying the
8 same thing, and I think it's because they feel
9 defenseless in this environment right now.

10 It's one-sided, it's arbitrary, and
11 there's just a throwing up of hands saying we don't
12 know what to do anymore without some parameters
13 around these practices.

14 COMMISSIONER OBERMAN: I just wanted to
15 follow-up on the reciprocity question that Ann asked,
16 because we have heard from some shippers today who
17 said prior to these practices we never paid a penny
18 in demurrage and now all of a sudden, we're paying a
19 lot.

20 So, when you say reciprocity, we've also
21 heard a number of people say that when the railroad
22 is unduly holding on to a private car fleet,

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1 shouldn't they pay for the detention just the way you
2 pay if you're holding on to their cars?

3 So, in terms of simplicity and you sort of
4 asked were they asking to write a check. I thought I
5 heard that some witnesses today are saying yes, even
6 if we don't owe you, if you're holding on to our
7 cars, write us a check, is that one of the things
8 you're saying, anyone?

9 MR. WILCOX: Yeah, well I'll add it in,
10 yes, you circle all the way back to the very first
11 panel. True reciprocity it takes -- credits are a
12 piece of it, it's a start, but true reciprocity takes
13 into account you know the business losses, the
14 investment you know, harm to the investment in
15 railcars, harm to assets, business damages.

16 And so, that would involve something
17 beyond just credits and the simplistic, it's
18 certainly you know, more complicated than it sounds,
19 but the idea would be if the railroad is charging me,
20 you know, \$10,000 for something that I've done, if
21 the railroad does the same thing, the railroad owes
22 me \$10,000.

1 COMMISSONER OBERMAN: Well, what I'm
2 wondering is based on the actual experience would it
3 be to any of your groups or individual's advantage to
4 just say nobody pays? Or, do you think if the
5 railroads were paying you at the same rate you're
6 paying them, do you think you'd come out ahead based
7 on what's going on now?

8 Do you think you'd come out about even?
9 What's the experience and also because the demurrage
10 law says they want to incentivize you to get the cars
11 moving, there's no statute that I know of that says
12 do you want to incentivize them to get your cars back
13 to you other than the general requirement that the
14 practices be reasonable and that may be sufficient, I
15 suppose, maybe there's some -- I'm missing here, Tom
16 or Jeff can fill me in, I'm new here.

17 But I'm trying to sort of gauge the
18 magnitude of the problem.

19 MR. TWIST: You know, that's a great
20 question. That's the source of our frustration is
21 that we're being held to a standard they can't hold
22 up themselves, and so I would say probably in our

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1 case, yeah, they'd owe us more than we owe them, yes,
2 based on the service I've seen.

3 COMMISSIONER OBERMAN: But if you were
4 offered the choice to say nobody pays anything or
5 everybody pays what they owe, you'd come out ahead on
6 the latter?

7 MR. TWIST: I think so. That's my
8 opinion.

9 CHAIRMAN BEGEMAN: So, maybe just one last
10 comment, maybe I'll regret it, it won't be the last
11 time or the first thing. But the one time it seems
12 that is being said for the many different shipper
13 panelists is that this isn't really about being a
14 captive shipper but rather in this circumstance,
15 everyone is sort of -- every shipper is sort of being
16 treated the same.

17 I don't mean to imply that every railroad
18 has the same demurrage or accessorial charges, they
19 have their own. They have their own programs, but am
20 I missing something like are captive shippers somehow
21 feeling even further -- I'm going to say put upon,
22 but that's not actually what I mean, but I think that

1 whether or not you're captive or you have options, I
2 mean Terry has options and there are folks also that
3 there have been a lot of witnesses that are exempt
4 from Board regulation that have still come and have
5 really interesting stories to tell, and compelling
6 and so it seems that this is sort of an across the
7 board treatment.

8 And if I'm wrong on that could you correct
9 me?

10 MR. TWIST: I think you're right. I think
11 it is across the board. I don't think they've
12 singled out closed shippers and said we're going to
13 treat them differently than any point of ours that
14 have access open to other railroads, so I think
15 you're correct.

16 CHAIRMAN BEGEMAN: Okay.

17 MR. MORENO: Chairman Begeman, yeah if I
18 can supplement a response to Vice Chairman Fuchs
19 question earlier about cost benefit analysis. Part
20 of the question and the complexity is dependent upon
21 the scope of that analysis and what are you looking
22 at?

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1 So, for example, if you're asking are the
2 total benefits to the railroad on a one size fits all
3 approach across it's entire system, do they outweigh
4 the cost to every single shipper of compliance,
5 that's a pretty herculean task.

6 But I think this could also be cut into
7 bite size pieces for purposes of analyzing demurrage
8 free time for example. Because as we've heard from
9 many shippers today, some have been able to comply
10 with the new rules because they have the extra track,
11 they have the extra real estate in which they can
12 build.

13 Others are very constrained and nothing
14 they can do will avoid those charges. And a one size
15 fits all approach might have worked well or at least
16 acceptably well, when we had 48 hours or more of
17 free time because that at least covered -- gave 99%
18 of the shippers the ability to comply.

19 But now that we've come down to zero, some
20 shippers can, some shippers cannot, and the cost
21 benefit analysis could be carved into those -- more
22 of those specific situations of perhaps this one size

1 fits all rule doesn't fit all.

2 VICE CHAIRMAN FUCHS: And Jeff, what
3 you're saying by the same token on the benefits for
4 railroads, it could be carved up looking at could you
5 even look at local yards but you know, it's very hard
6 to just look at one aspect of the rail network, you
7 know what I mean if things are interconnected.

8 So, I get carving it up on the shipper's
9 side, could you even do that on the rail side?

10 MR. MORENO: I think you could do that on
11 the rail side. I understand this thing about rails
12 being networks, but in terms of one or a few shippers
13 who can't satisfy these particular demurrage times,
14 what's the incremental impact upon that rail network
15 going to be?

16 I think if you look at it in that more
17 bite size chunks, it becomes more manageable.

18 COMMISSIONER OBERMAN: As long as we're
19 talking about a regulatory approach that measures
20 cost benefit analysis, what I'm thinking about is
21 given the fact that in demurrage, not just the
22 overall regulation, but demurrage is subject to a

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1 specific statute and governmental policy which is
2 incentivizing movement of cars.

3 It's really not aimed at -- that is
4 everybody, railroads and shippers alike seem to focus
5 on that. So, I'm wondering, I guess this is for
6 Jeff, or for you and Tom, if we were going to
7 consider some approach, should the cost benefit
8 measurement be not what's the benefit to the
9 railroad, but whether the cost of complying is
10 greater or less than the cost of paying the demurrage
11 because otherwise in one scenario there's no
12 incentive at all and the other one there might be,
13 wouldn't that be the analysis?

14 MR. MORENO: I think that's one way to
15 plausibly look at it, yes.

16 CHAIRMAN BEGEMAN: Before you're excused,
17 thank you so much and thank everyone in the room.
18 So, for our next panel, we have more -- if everyone
19 uses their allotted time, we will be 2 minutes after
20 7 and we won't have an opportunity to ask you
21 questions and we know you want us to ask you
22 questions.

1 If there are a couple of you local folks that would
2 be willing to defer until tomorrow, that would be
3 great. I don't know your schedules, but if there's
4 any chance that any of you -- again, we want to hear
5 from as many of you tonight as we can, but if there's
6 someone who'd be like yeah, I'll go tomorrow, yeah,
7 Jeff, thank you. That'd be great. Jeff Sloan, yeah.
8 Anyone else? I know there are folks that are
9 traveling, local folks, non-local folks.

10 Justin, thank you. Sandra, are you sure?
11 You don't have to get on a flight? Okay, alright, so
12 the next modified panel please come forward and thank
13 you all again. And thank everyone for still hanging
14 in there listening to this, it's very fascinating.

15 Panel VII

16 CHAIRMAN BEGEMAN: Feels like January when
17 I was all by myself. We'll wait just for a moment as
18 I didn't realize they weren't lingering. Alright, we
19 are going to start because otherwise we won't be able
20 to get through. Larry? Actually, I'm not looking at
21 the witness list, I'm seeing you, please go.

22 MR. BERKOWSKI: Chairman Begeman, and the

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1 entire Surface Transportation Board, I'm Larry
2 Berkowski, President and CEO of Brunk Plastic
3 Services and Brunk Transport. Thank you for allowing
4 us to present our testimony at today's hearing on
5 demurrage storage and accessorial charges.

6 Compared to the many large companies here,
7 we are very small, yet the magnitude of these tariffs
8 are equally or even more painful for such a small
9 private company who is a third party consignee, not
10 the shipper, nor their customer, with little pricing
11 power or market leverage, we're a service provider.

12 Despite our size, Brunk is the largest
13 toll pulverizer of polyethylene for rotational
14 molders with also a tractor trailer fleet of 20 units
15 to transload plastic pellets from railcars to our
16 trailers to the ultimate customers.

17 The NS, Elkhart hump yard has delivered
18 Brunk its railcars for 25 years and we were never
19 charged a fee of any kind. Receiving now some 600
20 railcars per year. I'm certain that it's helped make
21 NS Elkhart yard, or our business has helped make them
22 a very successful railroad.

1 The tariffs were available for NS to use
2 for years, but they never enforced them, and they
3 provided the details to us on occasion but never
4 enforced them. In essence, only 45-days prior to
5 January 1 of 2019, did they give us the full
6 magnitude or scope of what they intended to do.

7 We had no idea how serious they were about
8 implementing the tariffs and we were given no
9 direction or guidance from them. The market
10 conditions dictate buying and selling surges by the
11 shippers and their customers, we as the consignee,
12 bear the burden of these tariffs.

13 And NS should have put the burden onto the
14 shippers and their customers equally to make them
15 understand the magnitude of what was going on.

16 There's one particular large petrochemical plastic
17 producer who sold 30 railcars of material to one of
18 our customers at the very end of last year that
19 overloaded the Elkhart yard which led to us as one of
20 the main reasons why we had so many customer caused
21 congestion charges which I'll talk about in a minute.

22 We had to abruptly allocate storage space

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1 to our customers who were uninformed seemingly by NS,
2 thus risking our business by limiting their purchase
3 potential. For Brunk, we work on very small margins,
4 but very high volume of railcars and our customers
5 have options. They can go to Grand Rapids, Toledo,
6 Chicago, other places, we're not the only game in
7 town unlike the NS railroad.

8 We had to evaluate four track lease
9 options and negotiate the terms of multi-year leases
10 which added cost and complexity to our business. We
11 actually had to rush through the lease terms and
12 accept ones we never would have just because we were
13 running out of time.

14 NS did nothing to prepare us even though 2
15 of the 4 options we looked at were companies who
16 lease their track from the NS and in some cases put
17 us in what I would call a wild goose chase trying to
18 find our best option with very little time.

19 The winning lessor, a short line railroad
20 called Elkhart in Western, needed time in the middle
21 of winter to excavate and lay a gravel road for our
22 tractor trailers to pick up trans loads. We were

1 lucky the weather was decent and only several weeks
2 were lost, but it still took over a month for the
3 road to go in.

4 Our customers -- many large distributors,
5 plastic distributors or producers, they needed time
6 just to change their ERP systems, including putting
7 in the new address for our second storage track at
8 the Elkhart in Western that the Norfolk Southern
9 couldn't even figure out what the right address was
10 for several weeks leading to many billing errors,
11 many of which came our way. Charging \$60 a day for
12 private car storage and \$100 a day for discretionary
13 customer cost congestion is too high. It's price
14 gouging.

15 Where we charge sometimes nothing up to
16 maybe \$9.90 per day. The 24-hour grace period for
17 railcars arriving at the Elkhart yard before delivery
18 is not enough time considering our size and
19 complexity. It should be at least 48, if not 72,
20 hours because it allows us to work within our own
21 logistics of our 4 tracks that we have.

22 In addition, they now come every day of

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1 the week bringing only maybe 1 or 2 cars per day
2 instead of what used to be 3 days a week, Monday,
3 Wednesday, Friday, bringing us anywhere from 2 to 5
4 cars. That means we have to shut our plant down
5 every day and whether they're bringing in 1 car or 3
6 or 5, it takes about the same amount of time.

7 So, this is great for NS, the Elkhart yard
8 is completely void of all cars, but the burden has
9 now fallen to Brunk, and I'm sure everyone else in
10 this room that has a similar story.

11 Also, in the future monopoly railroads
12 need to give more notification for changes requiring
13 new track leases and other long lead time items. I
14 don't know enough about the other people here to know
15 what their issue may be.

16 We needed more time than just the amount
17 of time they gave us. By March 1st, the Elkhart yard
18 was literally empty of all cars, including ours,
19 because they come every day, while NS PSR --
20 precision scheduled railroading or operation clean
21 sheet effort -- (different terms), were accomplished
22 2 years ahead of their own published date because

1 their target date was the completion of 2021.

2 NS said on numerous occasions they would
3 "Go to bat for Brunk with management," who they never
4 identified, they never gave us access to in seeking a
5 delay of the new tariffs until April 1, even though
6 we only needed it until March 1 so that our new
7 track, our lease, our company, our customers were
8 ready.

9 Instead, they invoiced us \$66,000 which
10 came January/February, probably into March of which
11 55 of the 66 were these very nebulous, arbitrary
12 customer cost congestion charges, while also claiming
13 this was not about the money.

14 The customer cost congestion rules
15 actually penalize us. If there's a slow period where
16 cars are not coming in in over a period of time and
17 then they should start piling up, we could get hit
18 because of how they identify or how they define
19 customer caused congestions.

20 This is a huge financial burden for Brunk
21 that we can't pay and considering that NS has forever
22 to reap the benefits, we ask the STB to step in and

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1 deny NS this money. I can't afford, I've looked into
2 it, I can't afford to pay a law firm 150,000 to bring
3 a case before the STB, so you just heard my case.

4 So, in closing -- I also want a few
5 qualifying things, it did come up. The credits that
6 we get when they don't show up, which is fairly
7 frequently, once a week maybe. The credits expire at
8 the end of a month even though when we have a storage
9 fee, it's due.

10 An error on billings -- we had a recent
11 error on a billing where they did an interplant
12 switch for us, which has a fee of 250 we pay, but
13 somehow in their system, they identified that car as
14 a Brunk car, even though it belonged to one of our
15 customers, and they started recording a storage or
16 demurrage charge to Brunk even though that car moved
17 from one of our track to another track which should
18 have been a \$250 charge, they ended up invoicing us
19 \$800 and it was up to us to figure out they screwed
20 it up within their own system.

21 And it's "in dispute" right now, but we
22 know we're going to win it. Unfortunately, it costs

1 my customer service manager and his manager something
2 like 5 hours to figure out their error.

3 And lastly, we haven't heard from NS in 2
4 months even though we owe them this money. I
5 considered not coming for fear of maybe this thing
6 will just go away, but I decided it was worth it
7 because again, some of the overarching issues I think
8 are good for the industry.

9 They gave us too short a period of time to
10 get a new track lease, their fees for storage and
11 customer are just too high. It's just not right for
12 the industry to have to bear that. Thank you.

13 CHAIRMAN BEGEMAN: Thank you, Barbara?
14 Sorry, I probably should have started with you, but.

15 MS. HAGLER: No worries. My name is
16 Barbara Hagler and first off, I want to thank the
17 Board for their time today, especially as we get into
18 this late hour. We appreciate you holding the
19 hearing and would absolutely love the opportunity to
20 participate in more hearings like this regarding
21 service issues and other issues that we are having.

22 I also want to thank you for your work

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1 with the rate reform task force. I need to read into
2 it a little bit more, but I know it's much needed and
3 again, we appreciate that as well.

4 I am the Logistics Manager for Auriga
5 Polymers, a wholly owned subsidiary of Indorama. I
6 have rail logistics responsibilities throughout North
7 America.

8 I was to be joined by John Fields, but
9 unfortunately, due to health issues, he could not
10 come, and our Senior VP of Procurement and Logistics
11 is here, Mr. Hussain Awad, to join me as well.

12 The purpose of our testimony today is to
13 draw attention to the unreasonable revisions in
14 Norfolk Southern rail tariffs, and to request your
15 assistance in seeking immediate resolution to stop
16 the sustained damage being caused by the NS to our
17 Indorama affiliated companies in general but in
18 particular, the additional demurrage charges we're
19 seeing at Star Pet, Incorporated in Asheboro, North
20 Carolina, who is captive to the NS. Indorama has 8
21 manufacturing plants throughout North America, and,
22 with the exception of Mexico and West Lake,

1 Louisiana, all Indorama facilities have been
2 negatively affected by NS service failures and
3 changes to NS operations due to their effort to
4 initiate precision scheduled railroading.

5 Three Indorama businesses are captive to
6 the NS -- Star Pet in Asheboro as I've already
7 mentioned, and then Alpha Pet and Indorama Ventures
8 Xylenes and PTA in Decatur, Alabama.

9 As you know, in October of 2018, NS issued
10 freight tariff NS 6004-D relating to demurrage
11 storage rules and charges. It's a revision to the
12 6004-C which was effective back in 2017. The
13 revised tariff made various changes including those
14 to private cars which are the matters we want to
15 discuss here.

16 The first revision at issue by NS is to
17 item 600. The rules governing cars held for loading
18 reduce the number of credit days from 2 to zero as
19 we've all discussed today. They'll be earned for
20 each empty private car under construction placement.

21 The second pertinent change that NS made
22 to this tariff is item 1010, which reduces all

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1 private car storage from 2 loading and unloading
2 credits again to zero loading and unloading credits.
3 As a result, railroad-controlled cars are given 1
4 credit a day for loading and unloading as I
5 understand it, and private cars are given the zero.
6 We only use private cars, so my knowledge of the
7 railroad-controlled cars is not as much as the
8 private.

9 These changes have resulted in storage
10 charges being assessed upon shippers across the NS
11 network regardless of whether the shipper is diligent
12 in loading or unloading operations. Specifically,
13 with respect to Star Pet, these NS tariff changes
14 have in fact created immediate demurrage penalties.

15 Star Pet has advised NS on numerous
16 occasions that it's practices, including these tariff
17 changes and changes to the points and yards where RCP
18 occurs, are unreasonable and unfair. The facts in
19 support of Star Pet's objection to its recent
20 demurrage charges are as follows:

21 As part of their precision scheduled
22 railroading initiative, NS simultaneously made

1 multiple changes affecting Star Pet's operation.

2 They reduced train starts between Linwood and High
3 Point, North Carolina from 2 a day to 1.

4 NS changed the way that Star Pet was able
5 to order in cars. Rather than our historical daily
6 order of 7 empty cars, 7 PTA cars, and 3 glycol cars,
7 Star Pet must now order a total number of cars and NS
8 brings the cars easiest for them to deliver. Star
9 Pet then does not receive the correct mix of cars.
10 NS has changed CP locations for Star Pet from High
11 Point, North Carolina to Linwood, North Carolina to
12 Spencer, North Carolina without notice.

13 Furthermore, they would then move the cars
14 onto Greensboro and Lexington while still under
15 constructive placement. Star Pet has no control over
16 the location of the cars in the area and some of
17 these locations take 2 days to deliver to Star Pet
18 and demurrage cannot be avoided.

19 Despite being shipped according to a
20 rateable schedule, our raw material cars continue to
21 bunch making it impossible to bring all of our cars
22 in at once. These changes by NS have resulted in

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1 over 200 railcars costing over \$100,000 per month
2 being added to our fleet to compensate for NS service
3 failures and to protect our market share.

4 Multiple production slowdowns at Star Pet
5 as well as over 30 failures at customer sites in
6 Georgia, Ohio, and North Carolina causing schedule
7 alterations and truck deliveries. Star Pet lost the
8 sales of one million pounds per month that a customer
9 only 2 miles of empty track from Star Pet due to an
10 embargo not related to Star Pet until the customer
11 can convert to receiving trucks.

12 In addition, over the 20 months from
13 January 2017 to August 2018, Star Pet had a total of
14 \$540 in demurrage, so over 20 months before the
15 changes, \$540 total. Once CP placement was changed
16 to multiple yards, we are now being charged over
17 \$20,000 per month. This happened with no deviation
18 in Star Pet operations other than trying to
19 accommodate to NS tariff changes while maximizing our
20 production.

21 Star Pet is constantly forced to react to
22 changes by Norfolk Southern to its rail service and

1 demurrage tariffs as it relates to the Asheboro site
2 over the past 24 months, including many occasions of
3 lowering production and near miss shutdowns.

4 In spite of these continuing unacceptable
5 service events, Star Pet remains committed to a
6 partnership with Norfolk Southern. While National
7 Freight Transportation Association annual meeting in
8 March of 2019, we had a quick meeting with NS upper
9 management and requested a more detailed sit down in
10 Charlotte, where we are headquartered to go over all
11 the issues we're having.

12 NS responded with a date, a full month and
13 a half after our requested date. This speaks to NS's
14 lack of urgency to help right the issues these
15 changes and service failures have caused. Now, once
16 we informed NS that we were aware of the scheduled
17 hearing today and that we plan to participate, they
18 did offer an earlier date at another location, but
19 unfortunately it wouldn't work with our schedules.

20 Despite continued attempts by Indorama to
21 resolve this conflict, NS ultimately returns with the
22 same response -- the charges were determined to be

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1 correct as billed.

2 Quantities and high point fluctuate from
3 next to nothing to complaints of overflowing the
4 yard. This is done by NS operations, not at our
5 request. Demurrage charges for Star Pet's site now
6 total over \$150,000 as of May 8th, 2019.

7 Although we do not believe any of the
8 demurrage penalty charges are valid, in view of the
9 unreasonable and unfair initiatives, we offered to
10 put some amount in escrow just as a good faith
11 measure until this matter is resolved. However, NS
12 rejected our offer.

13 NS did offer to send in a third party to
14 Star Pet's site to evaluate our operations with a
15 view toward pushing more railcars onto our property
16 and reducing the dynamic track space used by Star
17 Pet to do switching and organize outbound loads and
18 empties. We refused such direct calls to Star Pet by
19 the third party.

20 NS then offered an in-house entity to
21 evaluate Star Pet's site which was also rejected
22 because NS does not possess the expertise or have

1 Star Pet's best interest at heart. We believe NS is
2 only looking for ways to use the customer property to
3 subsidize their service failures.

4 We have no leverage to cause NS to correct
5 its unreasonable tariff changes and CP practices
6 before costing Star Pet thousands of dollars with no
7 way to, excuse me, with no way to recover these
8 losses except to use the only possible avenue
9 available to shippers which is appearing before the
10 Surface Transportation Board.

11 We do not take this lightly and we feel
12 we've been very patient. We see potential violations
13 of two ICCTA provisions that may be considered here -
14 - 49 USC 10702, which requires that a railroad
15 establish reasonable practices related to
16 transportation service and 49 USC 10746 which
17 requires that demurrage charges fulfill two
18 enumerated national needs objectives.

19 While there has not been a case that deals
20 with the situation where a railroad applies zero
21 credit days for storage purpose, the case law
22 requires some credit days or time for a shipper to

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1 reasonably deal with the cars it receives from a
2 railroad.

3 The reasonable standard applies to
4 demurrage due to time constraints, I had a whole
5 bunch of examples in my written, I'm not going to go
6 through them --

7 CHAIRMAN BEGEMAN: We read it.

8 MS. NAGLER: Wonderful. Wonderful. So
9 I'm going to skip to the last page.

10 NS claimed on December 4th, 2018 letter to
11 the STB that they're only making these changes to
12 properly align stakeholder incentives with improving
13 our asset utilization because using assets more
14 efficiently will lead to network fluidity and better
15 service, however, these demurrage storage changes
16 have not had that type of impact.

17 The only impact has been a substantial
18 increase in its revenues for demurrage and storage
19 charges. For example, NS also increased the one day
20 demurrage charge by 50% from \$100 to 150 in the
21 tariff without any basis.

22 Based on the reports that the NS has

1 submitted to the Board this year, NS's quarterly
2 review for demurrage has skyrocketed from
3 approximately 55 million in the first quarter of '18
4 to 79 million in the first quarter of '19.

5 In other words, in one year the amount of
6 revenue earned per quarter from demurrage, has
7 increased by nearly 44% and it's not gone unnoticed
8 by their stockholders. On April 24th, 2019, the
9 stock note regarding NS issued by Wolf Research, the
10 analyst noted that NS yields were higher than
11 expected for the first quarter of '19.

12 Higher accessorial charges boosted yields
13 by 90BP and we expect this tailwind to accelerate to
14 second quarter as NS benefits from a full quarter of
15 charges. While NS says one thing to its regulator,
16 it says another to its shareholders, and the numbers
17 do not lie.

18 NS is only making these changes to
19 increase its revenue at the expense of its customers
20 like Indorama. Alan Shaw, NS Executive Vice
21 President and Chief Marketing Officer, acknowledged
22 during a 2018 rail trends conference, the railroad's

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1 strategic plan was delivering financially, but not on
2 service reliability and consistency.

3 To be clear, Indorama's position on these
4 tariffs and service changes has not changed. They
5 are unreasonable and unfair. And we believe they
6 should be rolled back to mirror the 2017 tariffs.
7 Thank you for your attention today.

8 CHAIRMAN BEGEMAN: Thank you, Bruce?

9 MR. RIDLEY: Good evening Chairman Begeman
10 and Vice Chair Fuchs and Member Oberman. So, my name
11 is Bruce Ridley, and I'm Senior Vice President of
12 Environmental Health and Safety and Operational
13 Services for Packaging Corporation of America.

14 I'm also Chairman of the Board of
15 Directors of the National Industrial Transportation
16 League and joining me is Karyn Booth, who I think you
17 all well know. So, I have 40 years of experience in
18 transportation and supply chain arena.

19 I was previously a member of the Surface
20 Transportation Board's R-STAC Committee, so this
21 testimony today is being provided. My role is the
22 NIT League Chairman. So, the League first of all

1 wants to thank the Surface Transportation Board for
2 addressing rate reform and for holding this hearing
3 and collecting data from the nation's railroads on
4 the demurrage and accessorial charges.

5 The League and it's members have serious
6 concerns about these changes that the Class I
7 railroads have implemented in their demurrage and
8 related tariffs, and their effect on rail customer
9 operations and costs and ultimately the nation's
10 consumers and economy at large.

11 So, in announcing this hearing, the Board
12 noted that the railroads are required to establish
13 reasonable rates and practices for demurrage and
14 related charges, not that demurrage should be
15 designed to fulfill national railcar needs and usage.

16 The Board has asked whether the current
17 demurrage and accessorial tariffs are commercially
18 fair and if they have created a balanced and
19 appropriate incentives for both the customers and
20 the railroads.

21 So NIT League members have been adversely
22 affected by changes in the railroad demurrage rules

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1 and accessorial charges in a variety of ways,
2 depending on the options of the shipper or the
3 receiver. However, I'm going to simplify my
4 testimony to the highlights of the most common
5 concerns.

6 The first one is free time reductions --
7 so, over the past 3 years all Class I carriers have
8 reduced free time for their loading and unloading of
9 railroad-owned cars or for the holding of cars
10 constructively placed on the railroad tracks, from 5
11 days to 2 days and now to 24 hours for railroad cars
12 and zero days for private cars.

13 The reduction of free time has been
14 particularly difficult and costly for shippers and
15 receivers at closed gate sites and those that do not
16 have 24-hour coverage. The railroads generally make
17 no commitment to meet a shipper or receiver's
18 schedule or service needs, and they miss delivery by
19 the railroad, disrupts operations by preventing the
20 customer from timely loading product or receiving
21 materials needed for its production.

22 Under the current restrictive free time

1 rules, a missed delivery by the railroad often
2 results in demurrage or storage charges since the
3 shipper/receiver cannot immediately rewind its
4 operations or output, or easily find additional track
5 capacity to hold loaded cars or empties that may be
6 backed up.

7 It's common for the railroads to have a
8 wide variation of timeliness of deliveries and in
9 some cases, 24 hours or more, so you might say
10 railroads are consistently inconsistent and I think
11 that if you listen to a lot of testimony today, the
12 root cause to a lot of the issues are first mile and
13 last mile consistently inconsistent.

14 They refuse to agree to service
15 performance standards and provide themselves with
16 maximum flexibility, but they impose a rigid, one
17 size fits all, free time window of 24 hours or less
18 for their customers. This is too restrictive and
19 commercially unfair based on the railroad's own
20 service availability.

21 Moreover, given the complexity of the
22 rural customer operations and the time, money and

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1 difficulty involved with constructing new facilities
2 or acquiring additional track capacity, many rail
3 customers have not been able to avoid the
4 substantially increasing demurrage or storage charges
5 due to the reduction in the free time.

6 Allowing free time of at least 2 days or
7 more would be more reasonable rule that better
8 aligned with the variable operations of both the
9 carriers and their customers.

10 Bunching and demurrage -- amplifying the
11 effect of free time reductions is the issue of
12 bunching. Bunching occurs when cars accumulate in
13 the rail system and then they are all delivered at
14 once at a shipper or receiver's facilities regarding
15 the, excuse me, regardless of its actual delivery
16 often overwhelming the customer's ability to handle
17 the cars.

18 Bunching can occur for a wide variety of
19 reasons, virtually none of these reasons are the
20 fault of or in control of the shipper or the
21 receiver. For example, many railroads will charge
22 demurrage when bunching cars occurs on an upstream

1 carrier, or when they miss a service call resulting
2 in cars accumulating in the railroad's yard.

3 For private cars there is no free time and
4 storage charges begin to accrue after the railroad
5 provides notice that the cars are available and if
6 the receiver is not able to order in all the cars by
7 midnight on the same day.

8 This is true even if the railroad provides
9 notice at 11:59 p.m. So, if the railroad-owned cars
10 are involved and the number of cars overwhelm the
11 receiver's ability to handle them, then charges
12 start within 24 hours when the free time is exceeded,
13 even though it was the railroad's actions and not the
14 shipper's or receiver's operations that actually
15 caused the problem.

16 Even if the railroad does provide relief
17 for its own areas, which could encompass bunching,
18 there is no standard across the railroads and often
19 bills for the charge that requires a
20 shipper/receiver to apply the credit or dispute the
21 charge.

22 This process itself can be time consuming

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1 and requires the customer to have the data needed to
2 support its position which it may not always have.
3 So, in 2014 decision in the ex parte 707 demurrage
4 liability, the Board declined a request by NIT League
5 to amend the proposed demurrage rules to account for
6 railcar detention that was caused by rail carrier.

7 In that decision the Board indicated that
8 the receiver could "solve the problem by pursuing a
9 complaint with the Board." But the option of filing
10 a complaint to dispute what might be a single charge
11 is not realistic, given the time and cost involved
12 with the STB litigation.

13 And also, our exempt commodity shippers,
14 they don't have access to this process either. It is
15 also not a reasonable solution since the bunching
16 which resulted in the charge was caused by and cannot
17 be prevented by the receiver.

18 So, the Board should revisit the decision
19 of ex parte 707 and consider adopting a rule
20 prohibiting the receiver from being charged or
21 require an extension of free time when that bunching
22 or other railroad conduct prevents the receiver from

1 avoiding the charge. This would be commercially fair
2 and reasonable.

3 Another concern for the NIT League members
4 is the NS congestion charge. Here, NS assesses the
5 consignee a \$100 per day, per car charge for all cars
6 destined to a location that in the sole judgment of
7 the Norfolk Southern, is an excessive quantity of
8 cars, it congests NS facilities, causing material
9 operating problems.

10 NS may assess that charge if cars exceed
11 two times the average number of cars that the
12 consignee has received at that location during the
13 previous two weeks. The tariff rule appears
14 arbitrary because its application is solely within
15 the judgment of the railroad. There are no standards
16 of what constitutes a congested facility and material
17 operating problems, and there is no standard for
18 determining whether the exercise of the railroad's
19 sole judgment is rational.

20 Additionally, congestion charges applied
21 on top of the usual storage charge, so even though
22 the storage charge already includes a penal incentive

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1 to encourage the prompt removal of the cars held in
2 the railroad yards, thus the purpose underlying both
3 the congestion and storage charges appear to be the
4 same.

5 And by assessing both charges, the
6 railroad is penalizing the consignee twice to
7 incentivize the same conduct, resulting in double
8 recovery. The League believes that there are
9 legitimate questions as to the reasonableness of this
10 congestion charge.

11 Lastly, I'll talk about the burden of
12 proof. Other challenges involve dispute resolution.
13 Within implementation of PSR, there have been
14 reductions in railroad customer service personnel
15 which has made disrupting -- excuse me, disputing
16 railroad invoices even more difficult and time
17 consuming.

18 Some railroads have failed to include both
19 the date and the time that a car has been
20 constructively placed in their demurrage or storage
21 invoices which hinders efficient dispute resolution.
22 The Board should require the railroads to provide

1 shippers and receivers with the data they need to
2 dispute a charge that they believe has been assessed
3 improperly, and to identify and make available
4 knowledgeable personnel who can help address disputes
5 promptly.

6 The League believes that the Board should
7 take several actions to ensure demurrage related
8 charges are reasonable. They're in my written
9 testimony so I'm not going to go through them today.

10 I will finish with two personal comments,
11 not NIT League comments, these are Bruce Ridley
12 comments. So, in the first quarter this year,
13 finally settled a CSX demurrage bill that was from
14 2017 and about a month ago I finished one that was
15 for 2018 and one of the big issues there and Member
16 Oberman, you've talked about it, they talked about
17 the day of placement but they would not give us the
18 time.

19 And, as you recognized the time of
20 placement is very critical to determine when that 24-
21 hour clock starts. So, that was a really big, big --
22 a lot of man hours were put into that because we

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1 didn't have the data we needed.

2 The other thing I'll mention, just two
3 other comments, yard to yard efficiency improvements
4 that we're seeing that they're reporting -- that's
5 great. Issues are first mile and last mile, so that
6 doesn't take that into account.

7 And then if your efficiency increases over
8 2018, my only comment is that's a pretty low bar, so
9 thank you.

10 CHAIRMAN BEGEMAN: Thank you, Justin?

11 MR. LOUCHEIM: Thank you, good evening
12 Chairman Begeman, Vice Chairman Fuchs, and
13 Commissioner Oberman. My name is Justin Loucheim,
14 I'm Director of Government Affairs for The Fertilizer
15 Institute, TFI.

16 TFI is the national trade association
17 representing the fertilizer industry including
18 companies that are engaged in all aspects of the
19 fertilizer supply chain. 50% of crop yields are
20 attributable to commercial fertilizers that feed the
21 plants that feed the world, which is expected to
22 surpass 9.5 billion people by 2050.

1 Overall, the U.S. fertilizer industry
2 generates approximately 154 billion in economic
3 benefit annually, provides nearly 90,000 direct jobs
4 throughout our nation including 1,300 in South
5 Dakota, 2,200 in Wisconsin, and 6,100 in Illinois.

6 On behalf of TFI and our members, thank
7 you for holding this hearing and for your oversight
8 of railroad demurrage storage and accessorial
9 charges.

10 So, a lot of information has been
11 discussed today, you know, being among -- being the
12 last to testify today and thank you for letting me
13 come back on here. I'll largely summarize TFI's
14 written testimony and add a couple additional
15 thoughts.

16 So, an additional thought -- beyond
17 demurrage and accessorial charges and the market
18 fairness of them, today's hearing is about
19 implementation of precision scheduled railroading,
20 PSR and the direction of the rail industry.

21 From TFI's perspective, PSR represents an
22 obsession with operating ratio, which is driven by

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1 short-term Wall Street gains over long-term business
2 planning which would be more beneficial to all
3 stakeholders in the U.S. economy if we had a more
4 long-term outlook.

5 This also reflects a lack of competition
6 in the rail industry. This kind of behavior does not
7 happen in other shipping modes, and we wouldn't be
8 having this conversation if shippers had other
9 options. That said, the disregard for rail
10 customers, combined with ever higher rates has
11 resulted in some little shift from rail to truck for
12 fertilizer.

13 For example, rail rates for ammonia, an
14 essential fertilizer used by farmers, has gone up
15 over 200% over the last 15 years. So, more
16 specifically to this hearing and regarding PSR. It
17 often means reductions in crew and power.

18 When the weather gets, you know, one
19 example here would be when the weather gets extremely
20 cold up north, train lengths must be reduced due to
21 the interaction of the cold weather with the brake
22 lines. When this happens, more crews and power are

1 needed to move cars.

2 As I understand it and as I'm told, yard
3 crews are often pulled from the yards onto the main
4 lines. This doesn't leave enough people in the
5 yards, however, to move cars and as a result,
6 operations often get plugged up.

7 Communication is another challenge for our
8 members. The electronic means of the communicating
9 where cars are located is great when everything works
10 as intended. However, when cars are missing or there
11 are delays, I'm told that communication is often
12 frustratingly lacking on the first and last mile.

13 In particular, it's not often clear who a
14 shipper can contact to actually resolve a delayed or
15 lost car. So, as it relates to this hearing and back
16 to sort of more of my written testimony now, and this
17 will be much briefer than the written version. The
18 most significant complaint for TFI's members are the
19 reductions to free time for demurrage and storage
20 charges. In most instances, free time is now just 24
21 hours for demurrage, and zero hours for private car
22 storage.

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1 Our members have designed their operations
2 and infrastructure around a standard of 48 hours and
3 have suddenly been forced to redesign everything in
4 less than 45 days' notice in most cases. By far the
5 most significant obstacle to compliance with reduced
6 free time standards is inconsistent rail service, as
7 many have already spoken to.

8 Bunching is the most common reason why a
9 facility cannot receive railcars upon arrival at a
10 terminal. Bunching can overwhelm our members'
11 limited storage track capacity at their facilities.
12 Bunching also makes compliance with the reduced free
13 time standards more difficult because when cars are
14 bunched, that means a customer is receiving some cars
15 later than they are needed for plant operations.

16 Consequently, TFI members often must keep
17 more railcars at their plants as buffer capacity that
18 would be needed if railroads provided regular -- that
19 would not, would be less needed if railroads provided
20 regular and consistent service.

21 So, inconsistent rail service is probably
22 the greatest obstacle to compliance with a number of

1 these charges. Rather than targeting inefficient
2 behavior, the free time reductions appear to shift
3 certain costs associated with PSR from railroads to
4 shippers, and/or create new revenue streams for
5 railroads.

6 This is a challenging situation that lacks
7 market fairness and reciprocity. TFI members accept
8 that when they are at fault and are all in and
9 disrupt rail operations, it is fair that railroads
10 assess charges. However, railroads also should
11 compensate shippers for railroad actions that disrupt
12 shipper operations.

13 TFI urges the Board to use this hearing as
14 a stepping-stone to provide clarity and guidance for
15 rail and shipper stakeholders alike on appropriate
16 practices. TFI recommends the Board issue a policy
17 statement that sets forth standards the Board will
18 consider when evaluating the reasonableness of these
19 practices.

20 Key elements of that policy, guided by
21 market fairness and reciprocity, should include the
22 following principles:

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1 The benefits of demurrage and storage
2 rules to rail operations must outweigh the costs to
3 consumers of complying with those rules.

4 Demurrage and storage practices are not
5 reasonable if their principal objective or result is
6 to generate revenue.

7 Railroads may not assess charges for
8 problems that arise from their own service
9 deficiencies.

10 Railroads may only charge shippers for
11 behavior that disrupts railroad operations if the
12 railroad's reciprocally pay comparable charges to
13 shippers for behavior that disrupts shipper
14 operations.

15 The cost to the shipper of actions taken
16 to avoid demurrage and storage charges must be
17 reasonable.

18 Railroads must allow customers the
19 sufficient time to comply with changes to demurrage
20 and storage practices that would subject the customer
21 to such charges and circumstances where they
22 previously did not apply.

1 Finally, TFI asks the Board to exercise
2 its authority to investigate railroad practices
3 without complaint, to initiate an investigation into
4 the recent free time reductions by Class I
5 railroads, and ultimately to declare these reduced
6 timeframes unreasonable.

7 Thank you again. I appreciate the
8 opportunity to be here and your focus and attention
9 to the hearing, all day and up to this evening hour.
10

11 VICE CHAIRMAN FUCHS: Justin, you
12 mentioned kind of the biggest issue being free time
13 along with inconsistent service. I think Bruce, one
14 of your suggestions was to declare zero hours of
15 free time to be unreasonable. We've talked a lot
16 about the credit system and other charges, but just
17 you're kind of honing that on free time. Is that the
18 only amount of free time that people believe to be
19 unreasonable?

20 In other words, 48 hours preferred, but
21 does anyone believe 24 hours to be unreasonable?

22 MR. RIDLEY: Not as unreasonable as zero.

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1 I think 48 hours has worked really well in the past
2 and people have geared up, you know, a lot of their
3 operations based on that. So, yeah, zero is totally
4 unreasonable, you know 24 is less, I guess.

5 VICHE CHAIRMAN FUCHS: And, so talk us
6 through how you all think about the reasonableness of
7 free time? You know, if the Board were assessing on
8 a situation by situation basis for example, how
9 should you know, how should we be thinking about what
10 a reasonableness of free time is?

11 MR. RIDLEY: So, if you look at our
12 members, you've got a wide variety of operations out
13 there, whether you're shippers or carriers, some are
14 24/7, some work weekends, some if they know they're
15 going to get a switch on Saturday, they'll bring
16 people in, some people can't do that.

17 So, it goes back to what we were talking
18 about -- you were all talking about earlier, I think
19 you have to look at a lot of this on a case by case
20 basis where the railroad works with the individual
21 customers. It says you know, what makes sense for
22 your facility and can we do this or one person or one

1 facility of PCA, we were not there on Saturday, but
2 we give them the keys to get in the door and they do
3 a switch on Saturday, even though we're not there --
4 we come in Monday morning we got it there.

5 In the past you know, we were unable to do
6 that because we were, you know, we were shut down,
7 but in order to accommodate them, but again it was a
8 case where the shipper and the carrier got together
9 and worked it out -- what made sense?

10 MR. MORENO: If I can supplement that,
11 there's a question that hasn't been asked or raised
12 by anyone today, and we ---

13 CHAIRMAN BEGEMAN: What?

14 MR. MORENO: Believe it or not, why is
15 the free time for private cars different than the
16 free time for railroad supplied cars and demurrage?

17 The demurrage rules are the railroads give
18 24 hours. On the private cars, that's where the zero
19 free time comes in. But think about the railroads
20 have a common carrier obligation to provide the
21 railcar. When the private -- when a shipper provides
22 a private car though, that relieves the railroad of

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1 that obligation to supply that car.

2 If the railroad had supplied the car,
3 there would be no demurrage for 24 hours, but a
4 private car is occupying the railroad's track
5 capacity for the same amount of time as the railroad
6 supplied car, so why should the private car owner pay
7 a storage charge during the time the railroad would
8 not assess a demurrage charge?

9 The logic seems to escape me in that one
10 and I think that's a key part of assessing the
11 reasonableness.

12 VICE CHAIRMAN FUCHS: And Jeff, if I'm not
13 mistaken, there are instances where the private car
14 storage fee is greater than the demurrage fee, such
15 that by going and investing or leasing the private
16 car for the exact same situation, not only would you
17 have a free time difference, you would actually have
18 a rate difference as well?

19 MR. MORENO: Yes, you would.

20 VICE CHAIRMAN FUCHS: And Bruce, you
21 mentioned the first mile/last mile truly being key
22 and, you know, we've talked a little bit about ETA's

1 and you know, so can you maybe -- what are some
2 measures that the Board would look at, you know, in
3 terms of evidence when you look at whether or not,
4 you know, last mile was successfully fulfilled.

5 Is it missed switches or what should we be
6 looking at?

7 MR. RIDLEY: Missed switches is a big, big
8 part of it. Obviously, the bunching along the way as
9 they build the longer trains. I've seen 140-car
10 trains believe it or not, so again it's all of that,
11 and then depending on our customers, a lot of that
12 first mile/last mile now is the short line railroads.

13 And so, you know, you have to get into
14 some of the transparency on the you know, the
15 electronic side, how to roll the short lines in with
16 the Class I's to keep that switch, it's a difficult
17 metric to have the railroad say you know, you need to
18 provide me with that first mile/last mile because
19 they may or may not have that information.

20 VICE CHAIRMAN FUCHS: And you talk about
21 the importance of time, not just day? Can you, what
22 is the practice in terms of providing time? Some of

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1 the railroads have mentioned in their testimony the
2 idea of kind of mobile entry units and they're
3 training staff for some of their services.

4 What is your experience with that? And,
5 you know, what visibility do you have in terms of
6 time relative to today?

7 MR. RIDLEY: So, when you're doing a quick
8 look in the pipeline you can usually get an ETA on
9 times. You can see when it left a yard and all that,
10 but when they send you your demurrage bill or even
11 worse, when you get a demurrage bill and its come
12 through the claim's department, they'll give you, you
13 know, the car number and they'll give you the date
14 and all that, but it won't have the time and so when
15 you try to go back and see whether I had an issue
16 with my plant personnel not getting it unloaded or
17 not releasing it or not placing it, that time of day
18 is critical.

19 VICE CHAIRMAN FUCHS: Is it your view that
20 the time exists and it's not provided or that the
21 railroads need to do a better job recording time or
22 both?

1 MR. RIDLEY: So, this was with CSX, and so
2 I do not know whether they would not provide it or
3 they could not provide it.

4 COMMISSIONER OBERMAN: I'd just like to
5 follow-up on that Bruce, and a couple of other
6 points. So, you don't record the time when you get
7 notified of the placement?

8 MR. RIDLEY: That's --

9 COMMISSIONER OBERMAN: I mean, you could,
10 right?

11 MR. RIDLEY: Well we do with the
12 individual -- yes, sir, we do record that, so but we
13 couldn't match that with the records from CSX because
14 they didn't, so that's how through many painstakingly
15 hours of research, that's how we were able to agree
16 upon what was our part and what was the carrier's
17 part.

18 COMMISSOINER OBERMAN: So, you had to go
19 through your records to find the time to match up
20 with the car number or whatever it was. Was there
21 some obviously identifying mark on the demurrage
22 bill as to what car they were talking about?

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1 MR. RIDLEY: Correct.

2 COMMISSIONER OBERMAN: A lot of people
3 have used this hypothetical on the no free time
4 about, well, they could deliver the car at 11:59. In
5 the real world, is that happening -- 11:59 or what's
6 the range or is it all over the map?

7 MR. RIDLEY: It depends on a facility, so
8 depending on the railroad and depending on, we have
9 some that get very consistent service, especially if
10 there's a short line in between. Usually if there's
11 a short line in between you get some pretty good
12 service.

13 Our Class I directs, depending on the
14 facility, where you are in the delivery, it's all
15 over the map, not only from what time of day, but to
16 whether it even gets here that day because they run
17 out of crew time and then that crew has to start at
18 the end of the last day instead of the beginning of
19 the first day and try to make it all up and it gets
20 out of whack.

21 COMMISSIONER OBERMAN: So, it's not an
22 extreme hypothetical to say that sometimes you do get

1 notice at 11:59, I mean that actually happens?

2 MR. RIDLEY: That's true.

3 COMMISSIONER OBERMAN: I want to talk
4 about the NS congestion charge that's been mentioned
5 a couple of times. I didn't find it in your written
6 testimony, but I think you said there's a threshold
7 that they can only even charge it if they are -- they
8 have twice the number of cars that they've delivered
9 to you in the last two weeks, can you define that for
10 me again? Is that what --?

11 MR. RIDLEY: That is exactly why I brought
12 Karyn with me.

13 COMMISSIONER OBERMAN: Okay, yeah.

14 MS. BOOTH: I mean I think the NS could
15 probably describe it best, but we do have it in the
16 written statement and it basically just --

17 COMMISSIONER OBERMAN: Then maybe I missed
18 it.

19 MS. BOOTH: Regurgitates the NS railroad
20 tariff rule on page 6 of the NIT League statement
21 here.

22 COMMISSIONER OBERMAN: And it's --

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1 MS. BOOTH: Essentially the tariff allows
2 the NS to charge \$100 per car, per day for cars
3 destined to a location that the NS would designate as
4 congested, and it does that in its sole discretion as
5 we understand it. And they determine if there's, I
6 guess, an excess quantity of cars at that yard that
7 has to also cause what's in the tariff "material
8 operating problems" which then allows the NS to hold
9 the cars there and charge them or move them at other
10 locations but they do define the excess quantity of
11 cars to be essentially two times the average number
12 of cars that the consignee has received at that
13 location during the previous two weeks, so it would
14 be a rolling two-week average.

15 COMMISSIONER OBERMAN: So, that in other
16 words, the number of cars exceeding twice the number
17 of the last two-weeks is the measure of how much they
18 charge you, but not a measure of whether they declare
19 a congestion?

20 MS. BOOTH: Correct.

21 COMMISSIONER OBERMAN: And whether they
22 declare a congestion? It's not defined.

1 MS. BOOTH: You'd have to ask Norfolk
2 Southern, right, so I think the concern that the
3 League was raising was the arbitrariness or the
4 potential arbitrariness of the rule and the inability
5 for there to be any standards that the shipper could
6 understand what qualifies as, you know, as a
7 congested yard, what qualifies as the material
8 disruption.

9 COMMISSIONER OBERMAN: In actual practice
10 since this rule has been in effect, has anybody been
11 able to discern a pattern from NS's actual behavior?

12 MR. BERKOWSKI: We have \$66,000 in
13 invoices and 55 of them are customer caused
14 congestion.

15 COMMISSIONER OBERMAN: To try and
16 understand --

17 MR. BERKOWSKI: -- but they've gone away -
18 --

19 COMMISSIONER OBERMAN: -- and I was going
20 to ask you about your particular problem in a minute
21 but I'm talking about in general, going forward do
22 you, or does anybody have an idea?

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1 MR. BERKOWSKI: I mean I would say like
2 we've talked, I think I mentioned this, but I'll just
3 reiterate. I mean if we go through a quiet 2-week
4 period where not many cars are coming, bad for NS
5 and bad for us and our potential business, and then
6 things pick up, by definition, if we go two times
7 over one, so 3 cars, they could -- that third car
8 could be, they could define it and in reality
9 there'd be no congestion there because on any given
10 time period, we may get 3 or 4 cars showing up in any
11 given day over many days that's you know, we would
12 have like 3 to 5 cars that might be showing up and
13 then at their Elkhart yard before they get delivered
14 to us.

15 COMMISSIONER OBERMAN: Let me follow-up
16 with you Larry, because I had, in reading your
17 statement and what you talked about today, just to
18 try to condense it, you seem to be saying that when
19 NS instituted its new congestion charge, you did have
20 discussions with them and you had discussions about
21 delaying imposing the charge until you could change
22 your practice. And they on the face of it said yes,

1 we'll do that and then they didn't do it. That in
2 effect what happened?

3 MR. BERKOWSKI: They said they would go to
4 bat for us.

5 COMMISSIONER OBERMAN: Go to bat, they're
6 the railroad.

7 MR. BERKOWSKI: Well, it was ---

8 COMMISSIONER OBERMAN: Bat with
9 themselves, I don't understand that.

10 MR. BERKOWSKI: Yeah, and we assumed that
11 well they wouldn't have said it at all unless they
12 meant it, otherwise they should have just said no.

13 COMMISSIONER OBERMAN: Because I assume
14 you were here, I asked NS specifically this morning
15 do you go to a shipper and say if it's going to take
16 you time to comply, we'll consider not imposing -- if
17 you show us you're going to comply, we'll give you
18 some time before we slap the charge on you.

19 It sounds like that was the discussion you
20 had but they didn't --

21 MR. BERKOWSKI: Right, but I don't think
22 they answered. I think the other companies answered,

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1 I don't think they did and we're not the shipper.

2 COMMISSIONER OBERMAN: Well, they said
3 they would -- they have done it and they would
4 consider doing it. I asked them specifically about
5 Olin needing a year.

6 MR. BERKOWSKI: Okay. I must have missed
7 that.

8 COMMISSIONER OBERMAN: Yeah, I mean it was
9 general.

10 MR. BERKOWSKI: But we're not the shipper
11 anyway, we're like some third-party, we're a
12 consignee, we're a nobody.

13 COMMISSIONER OBERMAN: Do you think that
14 makes it, the difference?

15 MR. BERKOWSKI: Yeah, I think if you're
16 Dow Chemical or Exxon, possibly with options, we have
17 no option. We're NS or bust or we don't exist.

18 COMMISSIONER OBERMAN: Well, there are
19 many others who have been here today who are large
20 who didn't have options either but.

21 MR. BERKOWSKI: Yeah.

22 COMMISSIONER OBERMAN: I just wanted to

1 make sure I understood what you were saying. I
2 thought that's what it was.

3 MR. BERKOWSKI: Exactly.

4 COMMISSIONER OBERMAN: Getting back to the
5 first mile/last mile, when I asked Matt Brainerd
6 about this, he said that he doesn't have a first
7 mile/last mile problem in the yards that are served
8 by short lines.

9 Nationwide, what we're hearing is that PSR
10 is moving trains faster across the country but not
11 first mile/last mile, so Bruce, you said that you
12 have a lot of service from short lines. Are you
13 still getting inconsistent delivery even where the
14 short lines are taking the last mile?

15 MR. RIDLEY: Usually the answer to that is
16 yes, but lots of times the short line has got
17 trackage and they will actually store some empties or
18 store your loaded vehicles, cars for you to make up
19 to the train so even if you missed one switch or
20 don't get delivery that day you can -- there's some
21 buffer in there.

22 COMMISSIONER OBERMAN: They can soften the

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1 blows is. Sometimes they can soften the blows is.

2 MR. RIDLEY: Right.

3 COMMISSIONER OBERMAN: What you are
4 saying, but overall, whether there's a short line or
5 not, and Justin, you seem to be saying this, you're
6 not getting good service but you attribute it to the
7 first mile/last mile problem.

8 MR. LOUCHEIM: I haven't heard from my
9 members issues with short lines, with the main lines,
10 Class I's, it's been you know, first mile/last mile
11 has been a point of frustration. In a lot of cases,
12 you know, things are okay. It's kind of when
13 something's delayed or missing, you know, the various
14 electronic means to track stuff doesn't really, in a
15 lot of cases, isn't working the way it's intended
16 perhaps and people don't locate the car, they don't
17 know when it's going to arrive and for some
18 facilities, especially rural ones where they don't
19 have 24-7 staffing.

20 COMMISSIONER OBERMAN: Well that's what
21 I'm getting at as to what is it about PSR that makes
22 this first mile/last mile problematic. I think you

1 said, I think somebody earlier today said -- well,
2 I'd sort of like to flush this out if there's
3 anything more to say. Does it mean that the Class
4 I's have fewer crews and fewer locomotives running in
5 a yard to make switches and therefore that's the
6 cause of it?

7 MR. BERKOWSKI: Yes.

8 COMMISSIONER OBERMAN: Is it just that
9 simple?

10 MR. BERKOWSKI: Maybe more, but like Brunk
11 has a facility in Bloomington, Minnesota served by
12 short line, Progressive Rail. We have no issues with
13 Progressive Rail. We're on their track. We have
14 to --

15 COMMISSIONER OBERMAN: That's because
16 they're progressive.

17 MR. BERKOWSKI: They're progressive but in
18 Goshen, Indiana, we're served by the NS and we're on
19 their rail so there is no short line to service us.
20 It would almost be in some respects, be better if
21 there was because we get better service from the
22 short line and I think PSR means NS and all the other

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1 railroads, they just want to take cars from New York
2 to California, from hump yard to hump yard, and not
3 have to deal with customers that are on their line,
4 that's my interpretation.

5 COMMISSIONER OBERMAN: And does -- and the
6 basis of all you're saying that yes, that's the
7 problem, there's just less staffing, whatever --
8 Anne, I think, coined it -- somebody did less with
9 less and so forth, but how do you --

10 CHARIMAN BEGEMAN: I was repeating what I
11 was told.

12 COMMISSIONER OBERMAN: Good turn of a
13 phrase, but what -- ? So how do we know that though?
14 How do you document that? You just -- your people
15 are told that by the railroad, "well we don't have a
16 crew, we can't make the switch," how does that
17 happen?

18 MR. BERKOWSKI: Like for us and I said
19 this, I'll repeat it one more time. We liked getting
20 3 days a week delivery, Monday, Wednesday, Friday,
21 even if they missed and Monday became Tuesday and
22 Wednesday became a double on Friday, and they were

1 bringing us 3 to 5 cars on those 3 days.

2 Now, they're insisting, claiming it's a
3 value, I don't know to who, they're now coming every
4 day to bring us 1 or 2 cars. It shuts down our
5 production facility, so I don't know why, like when
6 my customers, we negotiate on terms, pricing,
7 delivery and everything.

8 With NS there's no negotiation with them
9 around that, we're saying please just come 3 days a
10 week and bring 3 cars. How could that really cost
11 you more? Does it really change your cost? Come
12 on, I don't believe it.

13 COMMISSIONER OBERMAN: Thank you.

14 CHAIRMAN BEGEMAN: Barbara, if I could ask
15 you, you know, and it's not strictly directed at you,
16 but I will ask it of you. Shippers and railroads you
17 have, you know, a love/hate relationship, you need
18 each other. And I'm curious to know if -- what was
19 your, I guess, relationship with NS before -- I mean,
20 have you always had like various complaints and
21 frustrations or is it just suddenly you're like,
22 what?

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1 MS. HAGLER: Yes and no. Obviously, we've
2 been dealing with the NS and the railroads for years
3 and our relationship always has been a little bit
4 love/hate, but by far in the last 2 years it has
5 exponentially I would say, gotten worse.

6 We feel helpless and we are not an
7 enormous company but we're a good-size company and to
8 feel like we don't have any other choice or other
9 negotiating options, it's difficult and it's -- when
10 you have continued conversations and you're trying to
11 come up with new ways and you're even trying to do,
12 we have had many, many meetings with the NS and the
13 other railroads giving them market analysis, here's
14 what our market is and here's -- we want to help you
15 understand who we are, what we do and what we're
16 dealing with.

17 And they, you know, they'll sit there, and
18 they'll nod their heads and say "that's great." And
19 then they go back and then they say "but nothing's
20 changed and we're not doing anything to help" or --
21 act like we've made any difference in the way they
22 want to try to help us, it doesn't feel like a

1 partnership at all anymore, definitely a one-way
2 street.

3 MR. AWAD: If I may, just one example,
4 our manufacturing site requires two feedstock
5 materials in order to make the final product, at
6 certain ratio, so, the Norfolk Southern changed the
7 way we ordered the railcars to quantity of railcars,
8 so it doesn't matter if it's this feedstock, or
9 empty, or the other feedstock.

10 But chemistry doesn't work that way. We
11 need 3 cars of this product and one car of this
12 product to make this product. So, so far, they're
13 still at the quantity ordering. So, even though we
14 explained to them in simple terms when you make a
15 cake, you know, we need some flour, some sugar, some
16 eggs, right? It's not the same ratio, they still
17 don't get that. And speaking of PSR, I think PSR to
18 me is pressure customer's resources in order to make
19 them more efficient.

20 CHAIRMAN BEGEMAN: I know that Kenny had
21 an opportunity to come in and help us understand a
22 few things after his panel tomorrow, NS, if you'd

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1 like to come and help us better understand
2 congestion tariffs, I kind of -- we kind of ran out
3 of time and I had some questions that I would have
4 liked to ask, but if you don't want to take us up on
5 that opportunity, perhaps for the written comments
6 that are due in 14 days, I struggle to understand how
7 you could -- there could be a material operating
8 problem that's being caused to necessitate such a fee
9 while at the same time you just testified how you've
10 never -- and it's true.

11 The metrics show that you are doing better
12 service-wise than you have in several years, so to
13 me, there's sort of like a kind of a disconnect in
14 messaging and impact to your customers. Bruce?

15 MR. RIDLEY: The real scary thing about
16 that is if it goes through, we got 6 other railroads
17 that are going to be right behind it.

18 COMMISSIONER OBERMAN: You mean on the
19 congestion pricing?

20 MR. MORENO: On the PSR connection as
21 well, I think a witness earlier this morning summed
22 up what I think is part of the problem is that PSR is

1 doing, whether it's less with less or more with
2 less, it's still with less and resiliency was the key
3 issue.

4 When everything's running fine, it may be
5 doing quite well, but a slightest hiccup and suddenly
6 that impacts the entire network, and if customers do
7 not have buffer inventory at their facilities, then
8 they're in shutdown or slowdown situations and these
9 demurrage charges are now penalizing the customer for
10 maintaining that excess inventory.

11 CHAIRMAN BEGEMAN: Would anyone like to
12 make any closing comments? Yes, you have 6 minutes,
13 actually you need to be out of the building in 6
14 minutes. Someone pull the fire alarm.

15 MR. LOUCHEIM: I just have one thought
16 that's probably not, it may not be STB's purview but
17 my one thought just with the forum and I know the
18 railroads are listening, I think a little more carrot
19 and maybe a little less stick would be a good path
20 forward.

21 CHAIRMAN BEGEMAN: We are hungry by the
22 way.

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1 MR. LOUCHEIM: That's all.

2 CHAIRMAN BEGEMAN: Thank you, and Larry, I
3 realized you are the person I cut in front of this
4 morning. I apologize. I had cut in front of other
5 people as well, they were actually gracious and just
6 let me through and thank you Betty, but Larry I don't
7 think you knew, as far as I knew you were an ITC
8 person coming to talk, anyway thank you for getting
9 over it.

10 Alright, thank you all very much
11 appreciate your time and thank everyone for working
12 to juggle the schedules for tomorrow, greatly
13 appreciated. It's been a long day and tomorrow will
14 be as well, so thank you, looking forward to it.

15 MR. BERKOWSKI: Will there be a follow-up
16 communication with where this is headed and if the
17 STB's going to look into unfair CCC practices or
18 number of free days that could change? I mean I'm
19 still sitting on a \$66,000 invoice that I don't know
20 what to do.

21 CHAIRMAN BEGEMAN: Okay, I think that our
22 rail customer and public assistance office will try

1 to help you with having a conversation with the
2 carrier, so that you get some clarity.

3 MR. BERKOWSKI: Okay.

4 CHAIRMAN BEGEMAN: And, yes there will be
5 more to come, but it won't be announced today.

6 MR. BERKOWSKI: Okay, thank you.

7 CHAIRMAN BEGEMAN: Thank you. We also
8 have another day of testimony to hear from, maybe
9 we'll be convinced that none of this was true, just
10 kidding.

11 (Whereupon the meeting concluded at
12 6:56 p.m.)

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