

**Date:** May 23, 2019

**Case:** Oversight Hearing on Demurrage and Accessorial Charges



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SURFACE TRANSPORTATION BOARD  
OVERSIGHT HEARING ON DEMURRAGE AND  
ACCESSORIAL CHARGES  
Thursday, May 23, 2019  
9:30 a.m.  
Main Hearing Room (Room 101)  
U.S. International Trade Commission  
500 E. Street, S.W.  
Washington, D.C.

1 APPEARANCES

2 Panel VIII

3 American Chemistry Council

4 Jeffrey Sloan, Senior Director, Regulatory  
5 and Technical Affairs

6  
7 Diversified CPC International, Inc.

8 Sandra J. Dearden, Executive Consultant  
9 for Highroad Consulting, Ltd.

10 Chad Rainey, Plant Manager -- Petal, MS

11

12 Kansas City Southern Railway Company

13 Mike Naatz, Executive Vice President and  
14 Chief Marketing Officer

15

16 Panel IX

17 Barilla America, Inc.

18 Sandra Dearden, Executive Consultant for  
19 Highroad Consulting, Ltd.

20 Greg Viers, Durum Wheat and Semolina Purchasing  
21 Manager for U.S. and Canada

22

1 APPEARANCES (Continued):

2 Normerica

3 Dinoja Mariam, Legal Counsel

4

5 SA Recycling

6 Bobby Triesch, Vice President and Regional  
7 General Manager

8

9 Panel X

10 International Warehouse Logistics Association

11 Steve DeHaan, President and Chief

12 Executive Officer

13

14 International Liquid Terminals Association

15 Kathryn Clay, Ph.D., President

16

17 International Association of Refrigerated Warehouses

18 Lowell Randel, Vice President, Government  
19 and Legal Affairs

20

21

22

1 APPEARANCES (Continued):

2 Panel XI

3 BNSF Railway Company

4 Jill K. Mulligan, Vice President and  
5 General Counsel

6

7 Canadian Pacific Railway Company

8 Pam Arpin, Assistant Vice President -  
9 Customer and Corporate Services

10

11 Canadian National Railway Company

12 Derek Taylor, Vice President, Southern  
13 Region

14 Keith Courtoreille, Senior Manager,  
15 Service Delivery

16 Kathy Gainey, Counsel, United States  
17 Regulatory Affairs

18

19

20

21

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1 APPEARANCES(Conintued):

2 Panel XII

3 Western Coal Traffic League

4 Bette Whalen, President

5

6 National Coal Transportation Association

7 John Ward, Executive Director

8

9 PBF Energy

10 Kent Avery, Vice President - Commercial

11

12 Freight Rail Customer Alliance, Arizona Electric

13 Power Cooperative

14 Emily Regis, Fuel Resource Administrator,

15 Arizona Electric Power Cooperative and

16 Vice President, Freight Rail Customer

17 Alliance

18

19

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

2 CHAIRMAN BEGEMAN: Welcome to the Board's  
3 second day of our hearing on demurrage and  
4 accessorial charges. I would like to thank the first  
5 panel of witnesses who agreed to accommodate us late  
6 yesterday so that we were able to be as productive  
7 and not miss an opportunity to also talk to all the  
8 rest of the witnesses and there are about 17 to go  
9 for the day.

10 It will be probably, a full day. Looking  
11 forward to it. Yesterday was very informative, very  
12 interesting, very enlightening and I believe that  
13 today will be equally as helpful to the Board. I'm  
14 going to just quickly remind witnesses of the -- I  
15 guess, the rules if you will, with respect to time.

16 Each witness table is equipped with lights  
17 and they will guide you about your allotted time.  
18 One minute before your allotted time expires a yellow  
19 light will appear. When you see the red light if  
20 you could please conclude your remarks as soon  
21 thereafter as possible.

22 Again, a video archive will be available

1 on the Board's website in the next few days once it's  
2 available to the Board. And the record will be open  
3 for 14 days following the close of the hearing for  
4 any written comments or responses or grievances that  
5 you wish the Board to consider within the context of  
6 these issues, June 6th would be the deadline, thank  
7 you.

8 So, unless my colleagues want to say  
9 anything, we will start with the first panel.  
10 Jeffrey Sloan from AAC, Kansas City Southern and  
11 Diversified CPC International. Jeff, if you want to  
12 go first I appreciate it.

13 MR. SLOAN: Good morning, I appreciate the  
14 opportunity to be here on behalf of the American  
15 Chemistry Council. Before I begin my remarks, I'd  
16 like to thank the Board and the staff for the work  
17 that went into the rate reform task force report.  
18 Panel VIII - I'm very pleased to see that and  
19 appreciate the Board's commitment to pursuing  
20 meaningful changes in the Board's rate review  
21 processes and we look forward to working with you  
22 going forward on that.



1           The topic of today's hearing is also a  
2     source of growing concern for AAC member companies.  
3     Our industry is one of the largest customers for the  
4     U.S. freight rail system and our transportation needs  
5     are growing significantly. More than 200 billion  
6     dollars in announced new capital investments are  
7     expected to result in about 2 million new chemical  
8     and plastic shipments per year, including 300,000  
9     additional railcar shipments.

10           It should come as no surprise then that  
11    ACC members are very concerned about the major  
12    operational changes in today's rail industry,  
13    including the litany of recent changes to demurrage,  
14    storage and accessorial charges.

15           My comments will focus on some specific  
16    problems that have affected a broad range of ACC  
17    member companies. And then I'd like to outline some  
18    key principles of commercial fairness that I covered  
19    in my written testimony.

20           And then conclude with several  
21    recommendations for follow-up actions by the Board.

22           The single biggest concern for ACC members

1 is the reduction in free time, particularly the  
2 storage time for ACC members that -- in the majority  
3 of them -- own or lease their railcar fleet.

4 So, I won't go into the details of that  
5 because I think a lot of that was covered in  
6 testimony yesterday, but would reiterate that the  
7 effect of service inconsistencies by the railroads  
8 and bunching of cars really exacerbates the problem  
9 of the lack of free time.

10 And those -- the bunching issues can  
11 happen for a variety of reasons but essentially none  
12 of those are the fault of the shipper. AAC  
13 acknowledges that railroads do offer storage credits  
14 in some circumstances, but there are limits to the  
15 effectiveness of those credits.

16 First, the delivering railroad does not  
17 offer storage credits when an upstream railroad in  
18 the route is responsible for the bunching. I heard  
19 in UP's testimony yesterday that they will cancel  
20 charges in those circumstances, so I'm pleased to  
21 hear that and hope that's the case with other  
22 railroads as well.

1           But the second concern is that the credits  
2     are not always automatic. A shipper must, you know,  
3     request the credits and then in the information that  
4     the railroads provide, may be insufficient for the  
5     shipper to determine if the credits are warranted.

6           And then the window for disputing charges  
7     is often narrow and as we heard yesterday, at least  
8     in some cases there's an additional handling fee for  
9     the privilege of disputing a charge. The zero free  
10    time rules eliminate any buffer that shippers have to  
11    mitigate the impacts of bunching, and for some  
12    members compliance with the new rules requires  
13    significant operational changes or building new  
14    infrastructure, and for others compliance is simply  
15    not feasible, so they're stuck paying the bills, no  
16    matter what they do.

17           The second major concern for ACC member  
18    companies is the NS congestion charge and again, that  
19    was covered extensively in testimony yesterday, but I  
20    think the fact that this is, you know, imposed at the  
21    sole discretion of the railroad makes it, you know,  
22    particularly problematic.

1           Moreover, despite being a per car charge,  
2   my understanding is that NS does not appear to  
3   identify the cars on which the charge has been  
4   assessed, nor do they offer credits when the  
5   congestion is due to bunching, and lastly this charge  
6   appears to serve much the same purpose as the  
7   demurrage and storage charges to which the same  
8   traffic is also subject.

9           And then ACC is pleased that Union Pacific  
10   recently modified its charges for railcars that are  
11   not prepared for service, and this does significantly  
12   reduce the negative impact on ACC members. However,  
13   there are still some concerns about this charge.

14           The charge is understandable when  
15   unprepared cars impose actual costs on UP, such as  
16   requiring the railroad to make an unnecessary trip to  
17   the shipper's location. That's not always the case  
18   at a large facility where the UP is picking up and  
19   delivering multiple cars.

20           In such circumstances, it's not impacting  
21   UP's service and its more -- at least members see  
22   this as -- a revenue source for the railroads. The

1     concept of commercial fairness is critically  
2     important to shippers, particularly those that lack  
3     access to competitive transportation options.

4             Without effective competition, railroads  
5     can impose rules and charges with little regard to  
6     the impacts on their own customers. And lacking  
7     recourse in the marketplace, rail customers have to  
8     look to the STB to ensure that such practices are in  
9     fact reasonable.

10            ACC has developed 6 high-level principles  
11     that we believe should inform the Board's thinking on  
12     the reasonableness of these kind of rules and  
13     charges. Many of these have been addressed in one  
14     way or another throughout yesterday's testimony, but  
15     I'll outline them kind of in the way we see them.

16            So, first of all there must be a rational  
17     justification for the rules. The benefits in  
18     efficiency realized by the railroad are only one side  
19     of the equation. To be economically rational, newer  
20     changed practices must produce benefits that outweigh  
21     the cost that is borne by the customers to comply  
22     with the practices.

1           And also, I would note that while most  
2   Class I railroads have adopted their tariff changes  
3   as part of the implementation of precision scheduled  
4   railroading, it is not clear to ACC members when or  
5   if, they will share in the benefits of the new  
6   operating models.

7           Second, there must be a direct  
8   relationship between the rule and the desired effect  
9   on rail operations. Charges should apply only to  
10   actions that are within the shipper's control and  
11   that actually impair rail operations. And for  
12   example, there's no justification for imposing  
13   storage charges for delays triggered by bunching  
14   whether that's caused by the delivering railroad or  
15   an upstream carrier.

16           Third, railroads must allow reasonable  
17   time for shippers to take actions that are necessary  
18   to comply. And I think it was discussed yesterday,  
19   longer time may be necessary for major changes and  
20   then regardless of whether a railroad gets 20 or 90  
21   days' notice, it's unreasonable to impose charges  
22   while a facility is acting in good faith to implement

1 the changes necessary to accommodate the railroad's  
2 needs.

3 Fourth, there must be transparency in  
4 implementation. The rules have to be based on clear  
5 and objective criteria. Changes like the NS  
6 congestion charge imposed at the railroad's sole  
7 discretion, utterly fail this principle. In  
8 addition, railroads must provide well-defined  
9 standards and procedures for disputing charges and  
10 obtaining credits.

11 Fifth, there must be true reciprocity.  
12 Reciprocity should mean that a railroad may not  
13 impose charges on shippers for actions that adversely  
14 affect rail operations unless that railroad also  
15 compensates its customers for the railroad's actions  
16 that adversely affect the customer's operations.

17 And finally, no double-dipping.  
18 Railroads should not impose multiple charges that  
19 serve the same purpose. The NS congestion charge  
20 again, is a glaring example. In addition, charges  
21 for railroad services that customers use to comply  
22 with the storage rules also warrant scrutiny.

1           For example, as the elimination of free  
2   days forced shippers to move more cars onto storage  
3   track, the NS increased its fee for intra-terminal  
4   switching by 50%. The fact that a railroad is  
5   receiving additional revenue regardless of whether a  
6   shipper pays the storage charges or takes the actions  
7   to avoid them, raises serious questions as to the  
8   railroad's motives underlying the rule changes.

9           ACC proposes three potential Board actions  
10   as follow-up to this hearing. First, we ask the  
11   Board to develop a policy statement based on the  
12   principles that I've outlined and principles that  
13   others have outlined during the hearing. And this  
14   policy statement would establish standards for  
15   evaluating the reasonableness of railroad practices.

16           A policy statement would provide badly  
17   needed guidance to both railroads and to shippers,  
18   and hopefully help minimize the number of disputes  
19   that the Board may have to resolve.

20           Second, ACC asks the Board to initiate a  
21   rulemaking proceeding to adopt rules for billing and  
22   disputing demurrage and storage charges. The Board



1 has a model for such rules in its principles and  
2 practices for processing cargo loss and damage  
3 claims. Analogous rules should establish minimum  
4 information requirements that enable shippers to  
5 audit demurrage and storage charges as well as clear  
6 deadlines for the railroads to respond to disputes.

7 And finally, the Board can exercise its  
8 investigative authority granted in the STB  
9 Reauthorization Act of 2015 to proactively review and  
10 determine the lawfulness of problematic tariffs.  
11 Thank you again for this opportunity and I look  
12 forward to answering any questions.

13 CHAIRMAN BEGEMAN: Thank you Jeff, Sandra?

14 MS. DEARDEN: My name is Sandra Dearden  
15 and I am President and Executive Consultant at  
16 Highroad Consulting. Prior to starting the firm in  
17 1996, I was General Manager of Marketing and Sales at  
18 Chicago Northwestern and I stayed on with Union  
19 Pacific through the end of the year following at UP's  
20 acquisition of CNW.

21 Highroad has managed transportation for  
22 Diversified CPC International since 1998. They asked

1 me to present testimony in this proceeding on their  
2 behalf. Diversified is headquartered in Channahon  
3 Rail Station, Lorenzo, Illinois. It has 6  
4 manufacturing and distribution facilities in North  
5 America: at Lorenzo, which is served by BNSF; Sparta,  
6 New Jersey, served by NYSW; Sebring, Florida, served  
7 by CSX; Anaheim, California, served by UP; Petal, or  
8 Dragon, Mississippi, served by Norfolk Southern; and  
9 a distribution terminal in Ontario.

10 In 2017, Diversified established a  
11 transload operation at Lumberton, Mississippi, also  
12 served by NS, to support the Dragon plant, managing  
13 inbound product that is subsequently trucked to  
14 Dragon with a primary objective to mitigate  
15 demurrage.

16 Dragon has track capacity for 10 cars.  
17 Lumberton's track capacity is 27 cars. I am  
18 accompanied by Chad Rainey, who oversees the plants  
19 at Dragon and Sparta, and the transload operation at  
20 Lumberton.

21 Diversified CPC manufactures propellants  
22 for aerosols, all commodities shipped and received,

1 moved in private tank cars. While Diversified  
2 initiates some shipments by truck, they are  
3 dedicated contract carriers and the trucks are  
4 commodity- and grade-specific to avoid contamination  
5 of the products.

6 In 2017, Diversified entered the  
7 hydrocarbon refrigerant business, serving the LNG  
8 market. So, we're in the process of locating a  
9 terminal in Texas to serve those customers that do  
10 not have access to rail. The gas will be produced at  
11 the Lorenzo plant, and shipped to transload.

12 Even though Diversified is considered a  
13 leader in the aerosol propellant industry, it is a  
14 relatively small shipper. Our largest customer  
15 receives approximately 225 cars a year. However, for  
16 every gallon of finished product produced by  
17 Diversified, we receive an equal amount of raw  
18 materials inbound for production, thereby doubling  
19 our volumes.

20 Today's testimony will focus on charges  
21 and changes to the Norfolk Southern tariff. Norfolk  
22 Southern published a new charge -- the congestion

1 charge, of \$100 per car per day to apply on all cars  
2 destined to a location that, in the sole judgment of  
3 Norfolk Southern, has an excessive quantity of cars  
4 that congests in the facilities, resulting in  
5 operating problems.

6 NS may hold these excess cars at various  
7 locations and assess the charge for cars that exceed  
8 2 times the average number of cars that the consignee  
9 received at that location during the previous 2  
10 weeks. Diversified's plant at Petal has experience  
11 dealing with congestion in the NS yards.

12 Currently, the Birmingham yard, which is a  
13 major interchange point for shipments to Petal, where  
14 NS receives Diversified CPC cars at interchange, is  
15 consistently congested. In 2016, the NS yard at  
16 Dragon, was extremely congested, resulting in missed  
17 switches and the interruption of inbound product  
18 needed for Diversified's operations.

19 As a result, NS assessed demurrage charges  
20 of more than \$65,000. If this rule had been in  
21 effect at that time, the congestion charges would  
22 have been in addition to the demurrage charges. NS

1 has not established standards for the definition of a  
2 congested facility and without standards, the charge  
3 appears to be arbitrary.

4           However, it has been our experience that  
5 the congestion at Birmingham and Dragon yards, was  
6 not caused by Diversified. Instead, the congestion  
7 is, and was, the result of limited capacity of the  
8 yard at Dragon and at the interchange at Birmingham.

9  
10           Yard congestion has a negative impact on  
11 Diversified's operation and production. The railroad  
12 has missed switches of inbound raw materials at  
13 Dragon, and the cars have been delayed at  
14 Birmingham, and Birmingham continues to be a  
15 chokepoint.

16           Yet, there is no consideration of  
17 potential reciprocity by NS when assessing these  
18 charges, so Diversified and other customers can  
19 recover costs for example, for interrupted  
20 production, plant shutdowns and potential loss of  
21 business. Customers do not have control over NS  
22 operations and the charge appears to be

1 unreasonable.

2           Finally, because congestion charges are in  
3 addition to demurrage charges, it appears the  
4 assessment of congestion charges results in double-  
5 dipping. Effective January 1, 2019, NS reduced its  
6 credit days on empty private cars under constructive  
7 placement and on loaded private cars with no  
8 forwarding instructions from 2 to zero credit days.

9           Concurrently, the credit days on  
10 railroad-controlled cars were reduced from 2 to 1,  
11 although they increased credit days on loaded  
12 railroad cars from 1 to 2 when NS failed to make an  
13 ETA. As a result, railroad-controlled cars are  
14 allowed one credit day for loading and unloading,  
15 while private cars are given zero credit days for  
16 loading and unloading.

17           These changes will result in  
18 demurrage or storage charges on private cars and the  
19 charges being assessed whether the shipper is  
20 diligent in its loading and unloading operation.

21           Under this new plan, the  
22 storage charge for a private car begins to accrue at

1 12:01, after constructive placement of the car and  
2 after NS notifies a shipper, the loaded or empty car  
3 is ready to deliver to the shipper and continues  
4 until the shipper directs NS to deliver the car to  
5 its facility and it is placed.

6 NS storage charge for private cars is an  
7 average assessment. Upon constructive placement,  
8 each empty car will receive zero credits and each day  
9 thereafter that the car remains on the track, one  
10 car-day is assessed until the shipper orders the car  
11 delivered and it is placed.

12 Total credit days for private cars is  
13 subtracted from total car days for the month, and the  
14 shipper is charged a storage fee for each net  
15 car-day. Here, there can be no credits because of  
16 the zero credit days set forth in the tariff.

17 If a private car is constructively placed,  
18 that means a storage charge will likely be applied.  
19 For example, if a car is destined to a customer who  
20 orders the car in at 11:59 p.m., that means the  
21 railroad will only have one minute to take the cars  
22 off constructive placement in the system.

1           In other words, this change related to  
2 private cars will likely result in situations where a  
3 customer cannot possibly avoid storage charges being  
4 assessed, no matter how diligent they are.

5           Using this example, absent a reasonable  
6 period to accept the cars, the ability to avert the  
7 storage fees is lost. We respectfully submit that  
8 the changes in the tariff as they relate to private  
9 cars are violations of 49 U.S.C. section 10746, which  
10 provides "a rail carrier providing transportation  
11 subject to the jurisdiction of the board under this  
12 part shall compute demurrage charges, and establish  
13 rules related to those charges, in a way that  
14 fulfills the national needs related to ... freight  
15 car use and distribution; and ... maintenance of an  
16 adequate supply of freight cars to be available for  
17 transportation of property." The zero-credit rule for  
18 private cars fails to fulfill either of these  
19 national needs. This new policy simply appears to be  
20 a revenue generator for NS, and in no way does it  
21 satisfy the two national needs for freight cars.

22



1           Also, the new policies appear to be one-  
2 sided in favor of the railroads. In NS's  
3 announcement to "Rail business partner and NS tariff  
4 subscriber," they state service window, a designated  
5 block of time within a service day that NS  
6 anticipates it will physically pull and place  
7 customer's cars.

8           These times are not guaranteed, and  
9 delivery outside of these projected times will not  
10 impact the obligation to pay demurrage and storage  
11 charges. It seems that NS does not realize the  
12 significance of a need to be committed to customers  
13 as business partners. Missed switches and bunching  
14 are two examples. As explained previously, missed  
15 switches can result in plant shutdowns and bunching.

16           Currently, bunching is perceived as the  
17 accumulation of cars arriving at a yard from various  
18 origins for loading and unloading from various  
19 origins that exceed a customer's capacity for loading  
20 and unloading.

21           Frequently, bunching situations are due to  
22 service failures and in most cases, railroads will

1 waive demurrage or storage fees for cars that have  
2 already arrived at the destination yard. However,  
3 they don't give any relief to waive fees for cars  
4 already in route that subsequently become backed up  
5 in the yard.

6           So, the railroad's bunching practices  
7 should be investigated and potentially found to be  
8 unreasonable. I would like to apologize to the Board  
9 for the numerous cites of case law I presented in my  
10 written testimony. However, case law supports our  
11 position that the new demurrage and storage rules are  
12 unreasonable, and I thought it was important to share  
13 the results of our research.

14           We submit the changes in tariffs as they  
15 relate to private cars constitute an unreasonable  
16 practice. 49 USC 10702 provides rules and practices  
17 on matters related to that transportation or  
18 service. In Section 10702, Congress did not limit  
19 the Board to a single test or standard for  
20 determining whether a rule or practice is reasonable.

21           Instead, it gave the Board broad  
22 discretion to conduct case by case fact-specific

1 inquiries, to give meaning to those terms which are  
2 not self-defining in the wide variety of factual  
3 circumstances encountered. This broad discretion is  
4 necessary to permit the Board to tailor its analysis  
5 to the evidence proffered and arguments asserted  
6 under a particular set of facts.

7           The reasonableness standard applies to  
8 demurrage. The principle underlying demurrage is  
9 straight-forward. When a shipper holds a car beyond  
10 a reasonable time, it is taking up a railroad asset  
11 for which the railroad should be compensated.

12           Demurrage charges, therefore, serve two  
13 purposes -- to compensate the railroad for added cost  
14 (for example, car hire charges it pays to carriers on  
15 the equipment being held for loss of use of assets)  
16 and to encourage shippers to return freight cars to  
17 the system, thereby making the entire system more  
18 efficient.

19           The STB has defined demurrage as a charge  
20 that both compensates rail carriers for expenses  
21 incurred when route carriers are detained beyond a  
22 specific period of time for loading or unloading and

1 serves as a penalty for undue car detention to  
2 encourage the efficient use of railcars in the  
3 network.

4 Finally, the STB also defined who is  
5 subject to demurrage. Any person receiving railcars  
6 from a railroad for loading or unloading who detains  
7 the cars beyond the period of free time set forth in  
8 the governing demurrage tariff may be held liable for  
9 demurrage if the carrier has provided that person  
10 with actual notice of the demurrage tariff providing  
11 for such liability prior to the placement of  
12 railcars.

13 Notably, both definitions acknowledge a  
14 specific period of time for a rail customer to use  
15 the railroad's assets. The question then becomes  
16 what is a reasonable period? Certainly, it is more  
17 than zero because zero is not a time period.

18  
19 Finally, there is no transparency by NS to  
20 assess the fairness of any of the charges and  
21 singling out private cars for the reduction of credit  
22 days to zero seems unfair and discriminatory.

1 Demurrage and accessorial charges are a major source  
2 of revenue to the railroads.

3 Revenues for demurrage and accessorial  
4 charge reported by 4 Class I railroads, totaled 1.2  
5 billion dollars in 2018. We thank the Board for  
6 opening this proceeding and allowing time for  
7 Diversified CPC to submit its comments. This is a  
8 topic that has a significant impact on rail  
9 customers, and we encourage the Board to launch a  
10 full investigation of the rules and charges.

11 CHAIRMAN BEGEMAN: Thank you Sandra, Mike?

12 MR. NAATZ: Good morning Chairman  
13 Begeman, Vice Chairman Fuchs, Commissioner Oberman.  
14 Thank you for affording me the opportunity to speak  
15 with you this morning. Sorry, I will try that  
16 again, how's that? Alright, I'll introduce myself,  
17 my name is Mike Naatz, I'm the Executive Vice  
18 President and Chief Marketing Officer for Kansas City  
19 Southern Railroad.

20 I've been with the railroad for about 7  
21 years. In total I have 30 years of transportation  
22 experience on the buying, selling and operating side

1 of the business. Prior to joining Kansas City  
2 Southern, I served in a number of positions with YRC  
3 Worldwide, and its predecessor companies for about 18  
4 years, including a term of President of USF Holland  
5 and as President and Chief Customer Officer for YRC's  
6 customer care division.

7 In these positions I was responsible for  
8 both working with customers to meet their needs and  
9 for working with railroads as a rail customer. I  
10 also worked for the manufacturing sector as a  
11 consumer of rail services.

12 Having worked on both sides of this  
13 equation, I can certainly appreciate the many  
14 perspectives that are being discussed during the  
15 course of this hearing. Since we have submitted our  
16 written statement, I do not intend to read that  
17 statement here. I hope you found our response to be  
18 forthcoming and valuable.

19 I believe it is appropriate to start my  
20 testimony with the KCS vision statement. Our CEO  
21 carries our vision and value statement in his jacket  
22 pocket, and he asks his officers to do the same, and

1 I have mine with me today.

2 Our vision communicates our desire to  
3 consistently be the fastest growing, best-performing,  
4 most customer-focused, transportation provider in  
5 North America. And we realize that a railroad is in  
6 the business of serving customers, and that providing  
7 excellent service is what will enable us to grow. In  
8 fact, we have a very simple mantra: service begets  
9 growth.

10 In my role at KCS, I advocate for the  
11 customer as well as Kansas City Southern. In doing  
12 so, I try to look at things through the eyes of our  
13 customers. While our customers often have unique  
14 goals and objectives, it's our job at KCS to  
15 demonstrate value to each of them.

16 In the context of this hearing and our  
17 filing, we acknowledge that KCS recently adopted  
18 changes that increased our demurrage and accessorial  
19 fees. These increases followed many, many years  
20 without taking an increase. We realized that our  
21 demurrage rates distorted the marketplace and we had  
22 unintended consequences.

1           Very specifically, our low demurrage fees  
2     were creating an incentive for some customers to  
3     store cars on KCS versus other alternatives. This is  
4     contrary to our objectives and may actually inhibit  
5     the fluidity of our rail operations.

6           As a single main line railroad, it is  
7     particularly important to us that we avoid having  
8     sidings congested with stored or inactive cars. Cars  
9     that are stored in sidings prevent our trains from  
10    meeting and passing on our main line. This impairs  
11    the fluidity of our network and inhibits service to  
12    other customers.

13          Similarly, inactive cars in our yards  
14    create operating inefficiencies. Because of this, we  
15    believe demurrage and accessorial charges are a  
16    legitimate and necessary tool that facilitates  
17    service and promotes the efficient use of assets,  
18    whether they be railcars, track infrastructure,  
19    locomotives or crews.

20          Our use of demurrage is consistent with  
21    the STB's EP 707 ruling. In the month of March, 62%  
22    of our customers did not incur demurrage and in fact,



1 50% of our demurrage was concentrated in only 8 large  
2 customers who have large railcar fleets.

3 In most cases, those customers accept  
4 demurrage as an alternative to building capacity or  
5 pursuing what they would regard as other less  
6 attractive alternatives. Of course, our objective is  
7 not to place an undue burden on our shippers.

8 If a situation permits alternatives, such  
9 as leasing space where capacity is available to do  
10 so, we will work with customers on an alternative to  
11 demurrage. We are trying to balance the needs of the  
12 railroad and all of the customers we service. We  
13 cannot put the needs of a few ahead of the needs of  
14 many.

15 To maximize value for everyone, railroads  
16 and shippers need to work together collaboratively,  
17 to ensure we operate efficiently -- it's in the best  
18 interest of all parties to do so. Demurrage and  
19 accessorial fees represent less than 3% of our  
20 revenues, and disputes on a per car basis represent a  
21 small fraction of 1%.

22 We prefer to generate revenues through

1 growth and line haul volumes. We do not view  
2 demurrage and accessorial charges as a primary  
3 revenue stream, nor as a mechanism to produce profit  
4 and we share the concerns that administering  
5 exceptions can be difficult.

6 In fact, you would prefer not to be in a  
7 position to have to charge demurrage to begin with,  
8 but that is not the reality. I would like to share a  
9 few examples of collaboration and the actions that  
10 KCS has taken to improve operations. KCS employs a  
11 team of business process improvement engineers and  
12 service design professionals, and they work with  
13 customers, partners, railroads, and internal teams to  
14 eliminate waste, and find more efficient ways of  
15 doing business.

16 This work has included collaborating with  
17 our customers and partners to improve transit times,  
18 eliminate causes of demurrage and improve asset  
19 utilization. These actions directly benefit our  
20 customers and the railroad.

21 As noted in our filing, KCS has elected to  
22 waive demurrage charges for customers that committed

1 investing those funds in building additional capacity  
2 at their facilities in order to avoid future  
3 demurrage activities.

4 KCS has also made direct investments on  
5 other railroads, because we thought it was in the  
6 best interest of our railroad and our customers to do  
7 so to speed up the network. We also pay for  
8 reroutes with other carriers, even when those  
9 reroutes are not the result of KCS-induced problems.

10 At the core of these actions is our desire  
11 to grow our business, improve service and improve  
12 asset utilization. And certainly, we realize there  
13 will be disagreements from time to time. We work  
14 with our customers to reduce these conflicts and  
15 strive to be easy to do business with. Why is the  
16 question? And the answer is simple -- because we  
17 value our customers and believe that this is in the  
18 best interest of KCS.

19 In 2018, 80% of our customer disputes over  
20 demurrage and accessorial fees were resolved in the  
21 customer's favor. We have not embargoed customers  
22 for failure to pay their demurrage bills. Again, we

1     prefer to work collaboratively with our customers  
2     toward a solution.

3                 I would like to briefly address our  
4     implementation of PSR     and communicate how we  
5     believe our approach differs from that of our peers.  
6     I will begin again with our mantra -- service begets  
7     growth.

8                 We are implementing PSR at KCS for better  
9     railroading and more reliable growth. We have four  
10    objectives. The first is customer focused -- our  
11    desires to improve and sustain the consistency and  
12    reliability of our service. We also wish to create a  
13    more resilient and dependable network.

14                Number two -- we wish to facilitate  
15    growth. If we're successful with PSR, we will free  
16    up capacity for new opportunities. Number three --  
17    we wish to improve asset utilization. This will help  
18    us meet growing demand with the same number or fewer  
19    assets. This should also benefit private fleet  
20    owners. Improved asset utilization allows us to hit  
21    our fourth objective which is to improve our cost  
22    profile. We believe that we can successfully

1     increase our profitability by driving volume and  
2     revenue growth, while improving productivity and  
3     asset utilization.

4             The information I just shared with you  
5     comes from a single version of a slide that we use to  
6     communicate with all constituencies, including  
7     internal employees, our Board of Directors, customers  
8     and investors alike.

9             We will look for additional efficiencies  
10    as we move forward with our implementation. Our goal  
11    is to improve service and customer satisfaction, not  
12    to disrupt it. I would like to close with how I  
13    opened. Our vision is to be the fastest-growing,  
14    best-performing, most customer-focused  
15    transportation provider in North America.

16            We realize that our railroad is in the  
17    business of servicing customers and that providing  
18    excellent service is what will enable us to grow.  
19    Service does beget growth. And we will continue to  
20    work collaboratively with our customers to identify  
21    and resolve problems.

22            And after a slow start, thank you for your

1 attention. I'm happy to answer questions when you  
2 have them.

3 VICE CHAIRMAN FUCHS: I'll kick things off  
4 and you know, the backdrop to some of these questions  
5 Mike, is that I think it's clear in the filings and  
6 what we've heard that it's not -- KCS is not the  
7 center of where most of the complaints are coming  
8 from, but nonetheless, you know, there's been a  
9 number of ideas already this morning and yesterday,  
10 I've kind of been cataloging them, and I'm just kind  
11 of wondering what your views are on some of those.

12 One of which is the notice before changes  
13 are made. You know, you have a statute and  
14 regulation, but you know, what is your view on  
15 extending the notice time prior to say major changes,  
16 however defined, take affect?

17 MR. NAATZ: Again, trying to put ourselves  
18 in the seat of the customers.

19 VICE CHAIRMAN FUCHS: Right.

20 MR. NAATZ: As much notice we can give  
21 them, the better off everybody will be. In our case,  
22 when we were making changes, we started communicating

1 with our customers about 3 months before we made the  
2 changes. And then we did permit 23 days after the  
3 formal change was initiated.

4 VICE CHAIRMAN FUCHS: So, in your view a  
5 minimum of 3 months and is acceptable for -- at least  
6 a minimum of 3 months for anything that would  
7 constitute say, a major increase in rates, or a  
8 reduction in free time or what have you? I should  
9 say a major increase in fees.

10 MR. NAATZ: I think that's going to be  
11 situational.

12 VICE CHAIRMAN FUCHS: Yeah.

13 MR. NAATZ: I think my objective is to  
14 give customers as much time as we possibly can.  
15 Again, we want to be reasonable. They realize -- we  
16 certainly realize that they have planning objectives  
17 and changes that they may need to make, given the  
18 changes that maybe we are pursuing, so as much time  
19 as we can give them we would like to afford them, and  
20 it will be situational.

21 VICE CHAIRMAN FUCHS: Deadlines to respond  
22 -- you know, your customers have a deadline to

1     dispute things and I guess I'm wondering does KCS  
2     have an internal deadline that it imposes on itself  
3     to respond to customer's disputes?

4             MR. NAATZ:   Yes, generally speaking as  
5     soon as possible.

6             VICE CHAIRMAN FUCHS:   Right.

7             MR. NAATZ:   The reason for that is very  
8     simple.  It's much easier to resolve a problem when  
9     its fresh, than it is to resolve if it comes in  
10    months later.

11            VICE CHAIRMAN FUCHS:   Right.

12            MR. NAATZ:   So, you know, our systems and  
13    tools that are available for our customers, permit  
14    customers to begin the dispute process even before an  
15    invoice is generated.

16            VICE CHAIRMAN FUCHS:   Right, right, and  
17    that came through and it was appreciated, but I guess  
18    I'm wondering, you know, is there a situation where -  
19    - and I saw some other folks have like a 15-day  
20    deadline internally for them to respond.  Is there a  
21    situation where it would be appropriate for, or  
22    reasonable for, a railroad not to respond to a



1 customer's dispute for more than 15-day?

2 MR. NAATZ: I don't believe so. I mean we  
3 would like to respond, again, as quickly as we  
4 possibly can.

5 VICE CHAIRMAN FUCHS: And on bunching, did  
6 I see correctly in KCS's tariff that bunching is not  
7 considered railroad error?

8 MR. NAATZ: That may be the case, yes.

9 VICE CHAIRMAN FUCHS: And so, you know,  
10 the hypothetical we were using a lot yesterday was  
11 the 5, 5, and 5. You know you have 3 days and 5 cars  
12 go out on each of the days and they have different  
13 transit times, so just naturally with everybody  
14 operating perfectly, you get 15 back at the same  
15 time.

16 That customer who's shipping out 5, 5, and  
17 5, may have a maximum of 10 spots and so you've got 5  
18 that go into constructive placement. If that's that  
19 situation where the customer sent it out  
20 individually, and they got back more than they can  
21 physically take in, would KCS charge them on those 5?  
22 Do they not, do you all not give any credits?

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MR. NAATZ: We do give credits. The truth of the matter is we would evaluate that on a case by case or situational basis --

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VICE CHAIRMAN FUCHS: So, it's not an automatic thing when empties come back and outstrip capacity, the credits aren't automatic? In other words, that 5 is just hey, listen we know our customer doesn't have the capacity for these 5, we're crediting them automatically.

11

12

13

MR. NAATZ: That's correct.

VICE CHAIRMAN FUCHS: And why isn't it automatic?

14

15

MR. NAATZ: We have rules in the system that are designed to simply create efficiency.

16

17

18

VICE CHAIRMAN FUCHS: Yeah.

MR. NAATZ: And could we improve the rules technologically that may result in changes?

19

20

21

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VICE CHAIRMAN FUCHS: Right.

MR. NAATZ: I think the answer is yes, but I think there's so many different circumstances that apply, each of those need to be evaluated, so we

1     might be able to make improvements.

2                   VICE CHAIRMAN FUCHS:   Right.

3                   MR. NAATZ:   Certainly, always opportunity  
4     for that, but I think it would be difficult to try to  
5     define each and every circumstance under which we  
6     might consider waiving them.

7                   VICE CHAIRMAN FUCHS:   And is the problem  
8     because -- defining the customer space or is the  
9     problem defining exactly how many empties came back?  
10    Because it struck me those are the two datapoints  
11    you would need, so help me understand what the  
12    problem is.

13                  MR. NAATZ:   Well, I actually believe it's  
14    more complicated than that.

15                  VICE CHAIRMAN FUCHS:   Okay.

16                  MR. NAATZ:   So, 80% of what we're handling  
17    in U.S. is usually interchanged.

18                  VICE CHAIRMAN FUCHS:   Yeah.

19                  MR. NAATZ:   Through another carrier.

20                  VICE CHAIRMAN FUCHS:   Right.

21                  MR. NAATZ:   We might be dealing   with our  
22    own railroad, another railroad, we might be dealing

1 with a third party logistics company. We certainly  
2 are dealing with the shipper. We might be dealing  
3 with the receiver. There are reasons in each of  
4 those categories why bunching may occur.

5 VICE CHAIRMAN FUCHS: Right.

6 MR. NAATZ: And there maybe some  
7 proportionate impact that each of those entities  
8 have.

9 VICE CHAIRMAN FUCHS: Right.

10 MR. NAATZ: And so, I think it's  
11 difficult to program that. I think there's some  
12 judgment involved.

13 VICE CHAIRMAN FUCHS: I see, so what I'm  
14 hearing from you is not that you all couldn't figure  
15 out, hey these are 5 and our customer has 10, is the  
16 problem that you are saying okay, but if we give  
17 credit for those 5, that assumes that we're at fault  
18 when it might be someone we're interchanging with is  
19 at fault and that's why we don't want to give the  
20 credits, is that kind of an accurate?

21 MR. NAATZ: Yeah, absolutely.

22 VICE CHAIRMAN FUCHS: That is -- you said

1 -- and the technological problem is figuring out  
2 who, you know, but I guess -- alright, so then  
3 playing this scenario out. If you were  
4 interchanging with another carrier, you would know  
5 how many empties they gave you, so wouldn't you just  
6 say, okay, they've given us 15 at one time, so  
7 therefore they've already started the bunch and  
8 that's going to outstrip this person's capacity and  
9 so you couldn't assign fault to that at that moment  
10 and why is that?

11 MR. NAATZ: Because there's usually some  
12 other upstream or downstream activity.

13 VICE CHAIRMAN FUCHS: Or there's something  
14 you could do to break-up the bunch or something like  
15 that?

16 MR. NAATZ: Absolutely, and of course,  
17 yes, I mean if we can take other actions to eliminate  
18 the pain that different organizations are going to  
19 feel, we would try to do that as well.

20 VICE CHAIRMAN FUCHS: But it's kind of  
21 this unusual scenario where on one hand it sounds  
22 like a complicated scenario and difficult. On the

1 other hand, the results of the complication of the  
2 interline move is that the carrier just gets no  
3 credit, or excuse me, the receiver gets no credit.

4 And so, I guess you know, is it your view  
5 that it would be good for the customer to get those  
6 credits if only we could figure out this assignment  
7 of fault between us carriers?

8 MR. NAATZ: Yeah, I'd go back to the  
9 magnitude of the problem and I think that's going to  
10 vary.

11 VICE CHAIRMAN FUCHS: Yeah.

12 MR. NAATZ: Depending on the railroad, the  
13 customer, a number of circumstances. You know, for  
14 us, given some of the information I've shared with  
15 you, I don't view that this is a particularly  
16 significant problem for us and for the customers that  
17 we work with, and I'm really not in a great position  
18 to speak to, you know, the customer or the railroad  
19 situation.

20 VICE CHAIRMAN FUCHS: Sure. There's  
21 something I want to explore, I have more questions,  
22 but I want to make sure.

1                   COMMISSIONER OBERMAN: So, I'm going to  
2 start with you Mike, but I have some for the others  
3 too. By the way, my perception is consistent with  
4 Patrick's if we just look at what we've heard from  
5 the world of shippers and receivers. KCS doesn't  
6 seem to stand out as a target, but I'd like to get on  
7 the record some of the issues that I dealt with  
8 yesterday from KCS.

9                   So, as I see it, I mean obviously all the  
10 demurrage rates are not identical, but one of your  
11 standard rates is \$130 from your submission. Do you  
12 break down how much of that 130 is compensation and  
13 how much is penalty?

14                  MR. NAATZ: Yes, it's primarily an  
15 evaluation to understand what the rate should be and  
16 the preponderance over our rate is associated with  
17 costs and opportunity costs.

18                  COMMISSIONER OBERMAN: And did you do that  
19 before you set the rate?

20                  MR. NAATZ: Yes, we did.

21                  COMMISSIONER OBERMAN: I'm going to guess,  
22 based on what I heard yesterday, you don't want to

1 say what that break down is in public?

2 MR. NAATZ: I would rather not.

3 COMMISSIONER OBERMAN: Alright, but you'll  
4 provide that to us under some protective order if we  
5 ask for it?

6 MR. NAATZ: Certainly.

7 COMMISSIONER OBERMAN: And has that always  
8 been the case with your demurrage rates that you  
9 internally calculate some amount for compensation and  
10 some for penalty?

11 MR. NAATZ: Yes, its' primarily cost-  
12 based, but yes.

13 COMMISSIONER OBERMAN: So, one of the  
14 things that you talked about that the other railroads  
15 did not talk about which I found interesting in the  
16 context of this whole policy question about the  
17 purpose of demurrage, you talk about half of your  
18 demurrage is 5 customers, 8 customers who just have  
19 large fleets.

20 And in your written statement -- and I  
21 think you alluded to it this morning -- you said that  
22 some of these customers simply choose to leave their



1 cars on your tracks as a way of doing business and  
2 pay the demurrage?

3 MR. NAATZ: Correct.

4 COMMISSIONER OBERMAN: But you also said  
5 that you have been able to arrange for lease  
6 agreements with some customers so that they do the  
7 same thing, but they do it under a lease rather than  
8 just paying the demurrage charges?

9 MR. NAATZ: Correct.

10

11 COMMISSIONER OBERMAN: So, what's the  
12 difference? Why -- are the lease rates higher than  
13 demurrage charges, why would any customer who feels  
14 that their business model is to use your tracks for  
15 storage, why wouldn't they just enter a lease rather  
16 than suffer the demurrage?

17 MR. NAATZ: Well, again it's situational.  
18 There are areas in our network where we have more  
19 capacity and there are areas on our network where we  
20 have less capacity. If we have a capacity that is  
21 available and we believe that it would be in our  
22 customer's best interest, we would go ahead and enter

1     into a lease arrangement with those customers and  
2     they would consume that under-utilized capacity we  
3     have, and they would be able to do that at usually a  
4     lesser rate than demurrage.

5             The idea being that we would rather get  
6     those cars out of the way so that they don't impair  
7     our operations. We also don't want to have to deal  
8     with the ongoing burden of calculating demurrage on  
9     cars. So, to the extent that we could move them off,  
10    it's a win/win relationship for our customers and for  
11    the company.

12            COMMISSIONER OBERMAN: Well that makes  
13    sense, I'm wondering about the customers who are  
14    using the storage regularly, you allude to it, and  
15    aren't getting a lease. Why aren't they getting, why  
16    aren't they leasing that space?

17            MR. NAATZ: Well, they're not leasing it  
18    because we don't have additional capacity or  
19    available capacity in their areas with which to  
20    lease. In this particular example, we are actually  
21    building a storage and transit facility that some of  
22    these customers will use in the future once that

1 facility is done, and that will lighten the burden  
2 from a demurrage perspective for those customers.

3 COMMISSIONER OBERMAN: Well, the reason it  
4 sort of caught my attention is you seem to be  
5 comfortable, and I'm not being critical of this, I'm  
6 just trying to understand the business from both your  
7 side and the shippers. You seem to be comfortable  
8 with those customers who choose to accept the  
9 demurrage charge and just regularly leave their cars  
10 on your tracks, at least the tone of your statement  
11 is yes, this happens and we're fine with it. If the  
12 purpose of demurrage is to incentivize people not to  
13 do that, and I'm not urging you to raise the fees,  
14 but it seems to me it's not really part of a  
15 demurrage plan because they're not incentivizing  
16 them to leave the track.

17 You're saying it's fine, I mean leave the  
18 cars on the track. It doesn't make sense to me from  
19 that point of view.

20 MR. NAATZ: So, I certainly appreciate  
21 what you're asking. I guess I look at it a little  
22 bit differently. We have ongoing dialogues with our

1 customers including the ones that are choosing to use  
2 demurrage in this case.

3 In some situations, they're evaluating  
4 their alternatives. Maybe they're going to reduce  
5 their fleet size. Maybe they're going to build their  
6 own facility. In some cases we have agreed that  
7 we're going to build the facility and that they will  
8 enter into an agreement with us.

9 I don't believe that if we're all working  
10 together collaboratively to find a solution, I don't  
11 know that I want to penalize them through a --

12 COMMISSIONER OBERMAN: So, you're saying  
13 these situations are not really permanent, they're  
14 more interim?

15 MR. NAATZ: Correct, they're interim,  
16 exactly. We're working towards a longer-term  
17 solution that will benefit everybody.

18 COMMISSIONER OBERMAN: Well that makes more  
19 sense, but it didn't come out that way in the  
20 statement. I mean you didn't elaborate on it, so I  
21 was sort of curious about that. I wanted to ask a  
22 couple questions about the collection process or the

1     dispute process.

2                     Did you say 8% or 80% in the --

3                     MR. NAATZ: 8-0, 80%.

4                     COMMISSIONER OBERMAN: Are resolved in the  
5     customer's favor. So, I'm sort of curious about  
6     that. Does that mean you just gave in or that your  
7     bills were inaccurate?

8                     MR. NAATZ: No, I anticipated that you  
9     might ask this question. Debated whether or not to  
10    put that statement in. Again, I'll come back to the  
11    other piece of information that indicated that far  
12    less than 1% of our car totals actually end up in  
13    demurrage.

14                    When we're looking at a situation we're  
15    not necessarily admitting that KCS is the reason why  
16    something has happened and we're granting the  
17    customer's request to waive demurrage. That  
18    certainly will be the case from time to time, but  
19    there are other circumstances that we take into  
20    consideration and sometimes it just boils down to  
21    customer accommodation.

22                    We're trying to look at the big picture of

1     what we're trying to accomplish with our company and  
2     our customer's best interest, so that's probably why  
3     you see those numbers the way they are.

4                 COMMISSIONER OBERMAN:   Well, it's vastly  
5     different from anything we've heard from any other  
6     railroad so far, so you're saying it's a more  
7     customer friendly approach as distinguished from who  
8     was right or who was wrong?

9                 MR. NAATZ:   Exactly.

10                COMMISSIONER OBERMAN:   So, let me ask you  
11     what your process is because, I think one of the  
12     things we're trying to figure out is what's a  
13     reasonable, feasible process throughout the industry.  
14     Before you send a demurrage invoice, how much  
15     internal sort of due diligence or investigation or  
16     establishing a prima facie basis for sending the  
17     invoice do you do?

18                So, I got the impression yesterday that in  
19     some railroads, it's if the time is wrong on the  
20     clock, an invoice is automatically sent out by the  
21     computer and there's not much thought given to it  
22     until the customer decides to investigate and

1 protest. How does that compare to how you do it?

2 MR. NAATZ: Again, it's somewhat of a  
3 complex answer, so we, at the core of what we do, our  
4 field operators will be -- when they're spotting cars  
5 or when they're pulling cars out of industry,  
6 they're basically creating a system transaction that  
7 has a date and a time of what's happened, and they're  
8 applying a status to that information.

9 By and large, that is the rule that we  
10 operate by. Again, it's a system process.

11 COMMISSIONER OBERMAN: So, you're saying  
12 you have field observers, it's not a computer  
13 churning out the bill?

14 MR. NAATZ: Well the computer will turn  
15 out the bill or the invoice based upon inputs that  
16 are happening by field operators.

17 COMMISSIONER OBERMAN: But based on actual  
18 observation, you mean?

19 MR. NAATZ: It's an observation right now.  
20 I will tell you that those operators are not always  
21 aware of some of the upstream, downstream, or other  
22 activities that are going around, so there will be

1 times when the information they put in or a status,  
2 very specifically, that they apply may be  
3 inappropriate to that situation.

4 That's regrettable, that's why we  
5 acknowledge that there are challenges in the billing  
6 process.

7 COMMISSIONER OBERMAN: It sounds like  
8 given the way KCS operates with so much of your  
9 traffic being interchange traffic, that on a relative  
10 basis to the other Class I's, you have more upstream  
11 and downstream variables, I suppose, that affect this  
12 than some of the other cross country railroads, is  
13 that a fair statement?

14 MR. NAATZ: I don't know if it's a fair  
15 statement or not. I can only speak to what our  
16 environment is, and you know, it's fairly complex.  
17 There's a lot of moving pieces which is why we try  
18 to be flexible and collaborative in our approach.

19 COMMISSIONER OBERMAN: One final question  
20 on this point and then I'll hand it over. Do you  
21 charge your customers for the privilege of getting a  
22 refund?



1 MR. NAATZ: No, no, we do not.

2 COMMISSIONER OBERMAN: Good, thank you.

3 CHAIRMAN BEGEMAN: I'll echo that good.

4 MR. NAATZ: Thank you.

5 CHAIRMAN BEGEMAN: Jeff, could we talk  
6 about the zero free time issue for a bit? And I know  
7 this may be a little bit difficult since you're not  
8 actually the shipper, so I understand that, but I'm  
9 curious to know if your members could take a  
10 reduction in free time just not to zero? Do you --

11 MR. SLOAN: I think that's going to depend  
12 on the individual customer, but certainly zero is  
13 kind of across the board unreasonable for --  
14 unworkable for them. You know, you're having some  
15 buffer zone to accommodate the variability in the  
16 service and the bunching that will inevitably occur.  
17 Having some time to accommodate that is necessary.  
18 Exactly, you know, if it's 24 or 48 hours, I can't  
19 speak and I'm sure my members would probably give  
20 different answers.

21 CHAIRMAN BEGEMAN: And one of the latter  
22 panels yesterday seemed to have some differing

1     opinions too. Some thought 24 was certainly better  
2     than zero. And Sandra, if you want to chime in as  
3     well, you know one of the comments throughout a  
4     number of folks' testimony, not -- we haven't  
5     necessarily heard from all of them yet, but is the  
6     idea that if someone delivers at 12:59, we have one  
7     minute before we're charged. To your knowledge, has  
8     that happened?

9                   MS. DEARDEN: I'm sure it has. It's not -  
10    - it depends on when the cars arrive.

11                  CHAIRMAN BEGEMAN: It's sort of the clock  
12    is the clock, so even when you had more time.

13                  MS. DEARDEN: Right.

14                  CHAIRMAN BEGEMAN: You had a lot less time  
15    when it -- before a charge would accrue if it would  
16    be delivered that late?

17                  MS. DEARDEN: One of the issues with this  
18    is if the customer is a 5-day-a-week operation, the  
19    plant manager is -- has to monitor those inbound cars  
20    over the weekend and he's staying up until midnight  
21    to see if he has to order cars in to take them off  
22    constructive placement.

1                   So, from that standpoint, it's a major  
2     issue.

3                   CHAIRMAN BEGEMAN:   And Mike, I wanted to  
4     ask you, one of the comments that Jeff made -- I'll  
5     see if I can find it quick enough. I think it was  
6     the concept of -- just bear with me for a second --  
7     that the shipper shouldn't be charged if they can't -  
8     - if they're not responsible for the action, I mean  
9     do you agree with that, or the customer?

10                  MR. NAATZ:   I'm shaking my head, yes,  
11     again I think it's going to be a situational -- we  
12     would review each case and we'd make the decision  
13     accordingly. If it's not something that the customer  
14     has direct control over, or has not been able to  
15     influence things, we'll have that discussion with  
16     them when we'll act accordingly.

17                  CHAIRMAN BEGEMAN:   And just so I have it  
18     correct, it was that the charges should apply onto to  
19     actions that are within a shipper's control and that  
20     actually impair rail operations, so I didn't want to  
21     be unfair to you by not giving the exact comment.

22                  MR. NAATZ:   Sure.

1                   CHAIRMAN BEGEMAN: One of the things I've  
2 also asked yesterday's rail folks was whether or not  
3 you would be willing to participate in Board  
4 sponsored arbitration if requested by one of your  
5 customers?

6                   MR. NAATZ: We would certainly consider  
7 that. My objective again would be to avoid having  
8 those situations where we have to go to arbitration.

9                   CHAIRMAN BEGEMAN: Great.

10                  VICE CHAIRMAN FUCHS: And just to pick up  
11 where the Chairman left off. So, you believe that  
12 when a shipper is not at fault, they shouldn't pay  
13 demurrage and I guess I'm wondering, you know, to  
14 Jeff's point, should the onus be on the railroad to  
15 show that it was the shipper's fault in that  
16 adjudication?

17                  What I mean to say is who should have the  
18 burden of proof?

19                  MR. NAATZ: I'm not prepared to answer  
20 that question. I'll defer that one to the attorneys.  
21 I would just I guess answer it by saying these are  
22 often very complex --

1 VICE CHAIRMAN FUCHS: Right.

2 MR. NAATZ: -- decisions. Not always, but  
3 very often there's a lot of moving pieces that need  
4 to be --

5 VICE CHAIRMAN FUCHS: So, say in this  
6 switch, and we heard a lot about first mile/last  
7 mile. In the event of a missed switch that causes  
8 some sort of difficulty then with kind of loading and  
9 unloading, in subsequent days. When a railroad  
10 misses a switch, should the credits or however  
11 they're trying to alleviate demurrage charges, should  
12 that be something that's automatic and not have to  
13 be requested by the customer?

14 MR. NAATZ: Again, I come back to I  
15 believe it's going to be situational.

16 VICE CHAIRMAN FUCHS: Why, would it not be  
17 automatic? I guess I just don't -- what's the  
18 argument against or why it would be situational?

19 MR. NAATZ: There could be multiple  
20 contributing factors to why that switch was missed.  
21 And I just would want to make sure that those things  
22 are evaluated before making a decision.

1                   VICE CHAIRMAN FUCHS: Keep on talking me  
2 through that, so multiple factors, so what's a factor  
3 that would result in a missed switch that would be  
4 something that the shipper could control?

5                   MR. NAATZ: Well, if the shipper has not  
6 maintained their track, or if they have other cars in  
7 the way.

8                   VICE CHAIRMAN FUCHS: I see.

9                   MR. NAATZ: Or whatever the situation may  
10 be. I do believe that there are circumstances --  
11 again, it's situational -- where the customer or the  
12 shipper might have a responsibility, and there will  
13 be situations where we certainly, as the railroad,  
14 have responsibility.

15                  VICE CHAIRMAN FUCHS: I see, and Sandra,  
16 you mentioned this private car versus system car,  
17 again something we hit on yesterday, but you know,  
18 this phenomenon where you know, we're seeing more and  
19 more folks go to, you know, leasing or owning their  
20 own private cars, and away from system cars.

21                   And you know, some of the recent  
22 developments are that -- and to confirm in your

1 testimony that private cars actually have a more  
2 difficult demurrage regime both from a free time  
3 standpoint, in some instances, and from a charge  
4 level standpoint. Is that accurate?

5 MS. DEARDEN: Yes.

6 VICE CHAIRMAN FUCHS: But, that's not the  
7 case for you all, right Mike? That the private cars  
8 and system cars -- if anything, I think I saw  
9 correctly that in some instances private cars  
10 actually might have a little bit more, I think they  
11 have a lower charge level or some aspect, but private  
12 cars are not disadvantaged from a demurrage  
13 standpoint relative to system cars, is that  
14 accurate?

15 MR. NAATZ: That's correct, we treat them  
16 the same.

17 VICE CHAIRMAN FUCHS: And maybe this is a  
18 question for railroads that treat them differently,  
19 particularly on the private car side, in terms of  
20 them being disadvantaged, but can someone give me the  
21 argument for why private cars ought to have a more  
22 difficult regime than system cars even though the

1 owner is, you know, the owner or lessor has chosen to  
2 take on that asset for themselves in some form?

3 MR. NAATZ: I would agree with your  
4 earlier statement which is you probably should ask  
5 the railroads that are differentiating.

6 VICE CHAIRMAN FUCHS: Okay, I mean, can  
7 anyone offer -- Jeff, or Sandra, have you spoken with  
8 railroad folks? What is the, you know, help me out,  
9 is there -- what's the argument that's given for  
10 that differentiation, you know, and to help us, kind  
11 of, then preview for future questions?

12 MS. DEARDEN: Relative to private cars  
13 versus --

14 VICE CHAIRMAN FUCHS: Yeah, why are  
15 private cars -- why do they have a tougher demurrage  
16 regime than system cars? What's the reason a  
17 railroad might offer you if you asked them?

18 MS. DEARDEN: Well, first of all it makes  
19 no common sense because the railroads, on the  
20 railroad cars, especially if they're foreign cars,  
21 they're paying per diem to the foreign carrier.

22 VICE CHAIRMAN FUCHS: Right.



1 MS. DEARDEN: So, that's an added cost.  
2 And also, if they want to turn their assets, then  
3 they should be focusing on railroad cars. Instead,  
4 they're penalizing the customers who lease cars  
5 because the railroads don't want to purchase those  
6 cars.

7 VICE CHAIRMAN FUCHS: Right.

8 MS. DEARDEN: And, so they have a  
9 commitment to that railroad and like incurring those  
10 costs to lease the cars. And, by the way, it's been  
11 my experience that if a railroad establishes rates  
12 for system cars --

13 VICE CHAIRMAN FUCHS: Right.

14 MS. DEARDEN: And for private cars, and  
15 you look at the cost differential, the customer does  
16 not get adequately compensated for purchasing those  
17 cars.

18 VICE CHAIRMAN FUCHS: Right.

19 MS. DEARDEN: So, because of that, you  
20 know, they should be equal with or if there is going  
21 to be a differential, then I would think that leased  
22 cars would have a lower cost and more credit days

1     than system cars.

2                   VICE CHAIRMAN FUCHS:   Right, right, and  
3     you know, we've been talking a lot about a  
4     compensatory effect and an incentive or penalty  
5     effect depending on your terminology and you know,  
6     why that is you know, particularly for a 24-hour  
7     difference.   Why is it that private cars need a  
8     greater incentive or impose something greater when it  
9     comes to the compensatory side, you know, that  
10    justify that type of thing, it just needs to be  
11    explained to me and I haven't heard that yet.

12                   And it sounds like my from a KCS  
13    perspective, Mike, you didn't feel that private cars  
14    need some sort of greater compensation or  
15    penalty/incentive from a railroad perspective?

16                   MR. NAATZ:   Correct.

17                   CHAIRMAN BEGEMAN:   Just quickly, both Jeff  
18    and Sandra, or let me start with Jeff.   Jeff, you had  
19    commented in your testimony and to us you recognized  
20    that UP has made an adjustment to its  
21    not-ready-for-service charge and you were  
22    appreciative of that, your members are.   And I'm

1     curious and I don't want to give any type of  
2     impression that there's only one fix that needs to be  
3     changed and everyone's going to be happy.

4                 Clearly, there are a whole lot of issues  
5     that we've been talking about the last day and really  
6     before that last day, but if any, you know, if you  
7     have a magic wand, if the railroads would change  
8     what, is it --

9                 MR. SLOAN:   The extension of free time  
10     would be the number one.

11                CHAIRMAN BEGEMAN:   Okay.   That's what I  
12     thought you would say, I was just curious, and  
13     Sandra?

14                MS. DEARDEN:   No double-dipping.

15                CHAIRMAN BEGEMAN:   Alright, thank you.

16                VICE CHAIRMAN FUCHS: I'm going to ask a  
17     somewhat unfair question to Mike.   You might say,  
18     among others, so you all obviously have decided you  
19     know, for when you're evaluating, how to improve  
20     efficiency on your network, not to go to zero free  
21     time.

22                         Is zero free time unreasonable?

1           MR. NAATZ: We didn't believe that zero  
2 free time was in the best interest of our customers.

3           VICE CHAIRMAN FUCHS: And talk me through  
4 that, when you were making that decision, are your  
5 customer's best interest, how did you come to that  
6 conclusion? How did you evaluate your customer's  
7 best interests?

8           MR. NAATZ: We talked about it extensively  
9 as a team, soliciting feedback from our customers and  
10 understanding what their operational requirements are  
11 and what our operational requirements are, and we  
12 tried to find something that we thought was workable  
13 for both parties.

14          VICE CHAIRMAN FUCHS: I appreciate it.

15          COMMISSIONER OBERMAN: Actually that was  
16 exactly the sort of a follow-up question to what  
17 Patrick just asked, but I want to direct it to Sandra  
18 and it's a legal question, here as a lawyer, but  
19 since your operations in Illinois, I figure you're  
20 all wise, so I'm going to ask you to elaborate on  
21 this.

22                 And I sort of had some of the same

1 reaction as I was reading the case law. You seem to  
2 be saying -- I think others may have alluded to it,  
3 but not in their testimony, that the way the cases  
4 have been written, and you cite some of these, in  
5 defining demurrage as a charge after free time, aside  
6 from the question of whether zero is reasonable, that  
7 by definition there has to be some free time or you  
8 couldn't have the definition, is that your position,  
9 as a matter of law it can't be zero, whether it's  
10 reasonable or not.

11 MS. DEARDEN: Correct.

12 COMMISSIONER OBERMAN: That's the way I  
13 read your testimony, it's also the way -- the cases  
14 don't say it, by inference, is the way I read it, but  
15 it seems logical. Jeff, I wanted to direct you to  
16 the broader question. You were here yesterday, and  
17 you heard a lot of this discussion and I'm still  
18 trying to come to grips with the broad statistics  
19 that are provided to us by the railroads, about all  
20 of the improvements and metrics from PSR.

21 And all these numbers, velocity, dwell,  
22 and so forth and so on, and yet the room is filled

1 with shippers and receivers who say that PSR has made  
2 their life worse. And, when we've focused on this  
3 yesterday, it seemed to be a matter of first mile and  
4 last mile was responsible for the reasons that  
5 shippers aren't feeling the benefits and railroads  
6 yet are seeing the metrics.

7 I wonder if you could -- the ACC, you  
8 know, gathers a lot of data, and I wondered if your  
9 organization has had an opportunity to evaluate and  
10 make consistent, because I assume the metrics are  
11 accurate, the numbers that were being given.

12 So, could you shed some light on where the  
13 problem is? Is it first mile/last mile? And could  
14 you explain it if that's the way you look at it?

15 MR. SLOAN: I don't have hard numbers on  
16 the first mile/last mile issue, but that is clearly  
17 at the top of minds of our member companies and they  
18 have consistently when we ask them you know, is  
19 service better than before PSR was started, they say  
20 no.

21 You know, at best it's back to you know,  
22 where there were problems with implementation, at

1 best, those problems have been resolved and they're  
2 sort of back to where we were as far as the service  
3 that members are seeing at their facilities.

4 So, you know, I guess you know, I struggle  
5 with that discrepancy too, between the metrics that  
6 are improving that the railroads are reporting. I  
7 think it may be you know, those are metrics based on  
8 the perspective of the railroad, you know, and what  
9 they are looking at from their performance and not  
10 necessarily a true measure of customer service.

11 COMMISSIONER OBERMAN: And are you hearing  
12 beyond the members who actually have been here, like  
13 Olin and so forth, at this hearing, are you hearing  
14 reports, even anecdotal reports from other members  
15 that when they have this first mile/last mile service  
16 problem, that part of the reason is that PSR has  
17 resulted in fewer human beings in the yard to make  
18 switches, or fewer locomotives?

19 MR. SLOAN: There is frustration that  
20 there are fewer people providing service in some  
21 cases and fewer people to talk to when there's a  
22 problem.

1                   COMMISSIONER OBERMAN: Sandra, you are  
2    nodding, you're getting this?

3                   MS. DEARDEN: Yeah, there's -- it's a  
4    combination of factors. First of all, PSR obviously,  
5    in order to get their operating ratio down they cut  
6    personnel and stored locomotives. However, it goes  
7    back further than PSR. When the economy took a  
8    downturn, they reduced crews and they also stored  
9    locomotives.

10                  So, then when the economy rebounded, it  
11    rebounded faster than the railroad -- this is what a  
12    railroad told me, it rebounded faster than they had  
13    anticipated, so then they didn't have the resources  
14    to adequately serve the customers.

15                  So, as a result they were missing switches  
16    because they didn't have a crew and they didn't have  
17    a locomotive.

18                  COMMISSIONER OBERMAN: Well, that was a  
19    few years ago, right?

20                  MS. DEARDEN: No, that's current.

21                  COMMISSIONER OBERMAN: Oh, well, but when  
22    you said it rebounded.



1 MS. DEARDEN: Yes, it did.

2 COMMISSIONER OBERMAN: I know, but when --  
3 what year are you pointing to when this --

4 MS. DEARDEN: Well, that's an ongoing  
5 problem and every time we talk to the railroad it's  
6 like we just don't have the resources. They have  
7 train crews, and they are getting locomotives but  
8 they're not there yet.

9 COMMISSIONER OBERMAN: Well that's --

10 MS. DEARDEN: I don't know how much -- how  
11 much is due to the situation with the economy and how  
12 much is due to PSR, you see what I'm saying?

13 COMMISSIONER OBERMAN: Yes.

14 MS. DEARDEN: Okay.

15 COMMISSIONER OBERMAN: But it would seem,  
16 from what we keep hearing that as a result of PSR  
17 they're continuing to cut -- when I say they, across  
18 the boards, I'm not singling out a railroad,  
19 personnel, it seems to be inconsistent with what some  
20 have told you that they're trying to train new -- we  
21 always have to train, there's some turnover.

22 But there seems to be some disconnect here

1 in what we're hearing. I take it that neither of you  
2 challenge those metrics from the railroads about  
3 dwell and velocity, that you accept them as accurate?  
4 Thank you both, that's helpful.

5 CHAIRMAN BEGEMAN: Mike, I just have one  
6 quick question. Yesterday, towards the end of the  
7 day we were talking about credits and does your  
8 process also provide for credits to your customers?

9 MR. NAATZ: We apply credits again on an  
10 individual situational basis.

11 CHAIRMAN BEGEMAN: And do they expire  
12 monthly?

13 MR. NAATZ: We don't handle things that  
14 way.

15 CHAIRMAN BEGEMAN: Can you tell us how you  
16 do handle them?

17 MR. NAATZ: Again, on a situational basis.  
18 If we deem that we are the reason for a problem, we  
19 will work with our customer towards a solution that  
20 they believe is appropriate. It could be in the form  
21 of credit days. It could be in the form of other  
22 things.

1           VICE CHAIRMAN FUCHS: I see something, and  
2 maybe I'm not reading this correctly, but is there  
3 something in the tariff that says excess credits  
4 earned in one calendar month may not be used to  
5 offset demurrage days, in another calendar month?

6           And is that what the Chairman is referring  
7 to when it comes to credits not rolling over or is  
8 that something different?

9           MR. NAATZ: No, that would be the same,  
10 but again our application of that is going to be very  
11 situational.

12          VICE CHAIRMAN FUCHS: So, the default --  
13 the default rule is that credits expire, but you  
14 might have case by case exceptions where you would  
15 allow the rollover of credits?

16          MR. NAATZ: Correct.

17          VICE CHAIRMAN FUCHS: And, why do credits  
18 expire at all?

19          MR. NAATZ: I'm not in a position to  
20 answer that. I don't know.

21          VICE CHAIRMAN FUCHS: Okay.

22          CHAIRMAN BEGEMAN: Okay, I think that we

1 will conclude the first panel, thank you so much,  
2 very helpful, very much appreciated.

3 Panel IX

4 CHAIRMAN BEGEMAN: Alright, we will start  
5 the next panel, which again is with Barilla,  
6 Normerica and SA Recycling and Sandra, we'll go ahead  
7 and just kick it off with you.

8 MS. DEARDEN: Well I've mentioned before,  
9 before I started the firm I was with Northwestern and  
10 UP, but I think it's significant for this testimony  
11 to mention I was General Manager in the Ag Commodity  
12 Business Unit. So, because of that, I'm really  
13 familiar with the transportational landscape in Iowa.  
14 I'm accompanied by Greg Viers, who is the Barilla  
15 Purchasing Manager for Durum Wheat and Semolina, U.S.  
16 and Canada.

17 And Greg is based in Ames, Iowa. Barilla  
18 was founded in 1996 and is headquartered in North  
19 Brook, Illinois. Barilla produces and distributes  
20 pasta and sauces and it offers filled and whole  
21 grain pastas.

22 Barilla America has a production plant in

1     durham wheat mill, served by Union Pacific railroad  
2     in Ames, Iowa, and a production plant served by the  
3     Livonia, Avon and Lakeville Railroad in Avon, New  
4     York.

5             The LAL connects with 3 Class I railroads  
6     -- Norfolk Southern, CSX, and Canadian Pacific, via  
7     operating rights over NS. The Ames plant has a  
8     durham wheat mill but the plant in Avon does not have  
9     a mill. So, the Ames mill produces semolina for its  
10    own production and it also produces semolina which is  
11    shipped by rail to the Avon plant and to some cold  
12    packers.

13            Barilla is a spot-on arrival customer at  
14    Ames. The Ames mill sources its wheat from two  
15    primary regions -- U.S. origins, which are Arizona,  
16    California, Idaho, North Dakota and Montana, and  
17    Canadian Northern Plains in Alberta, and  
18    Saskatchewan. Sourcing of the wheat is based on  
19    quality demands, market conditions and delivered cost  
20    to the mill. Domestic shipments originate at  
21    stations on UP in Arizona, Idaho and California.

22            Shipments from those origins move in

1 manifest train service and comprise a minor portion  
2 of Barilla's inbound durham. Approximately 80% of  
3 the wheat originates in the Northern Plains, 90% of  
4 the wheat originates offline.

5 Barilla receives approximately 22,420  
6 wheat cars and ships approximately 210 cold product  
7 cars annually. Starting with the 2014-2015 crop  
8 year, rails serving the Northern Plains initiated a  
9 new dedicated train program.

10 The railroads committed 75 to 80% of their  
11 covered hopper fleets to dedicated trains of 100 to  
12 110 cars, changing the way they managed their grain  
13 covered hopper cars. Union Pacific Railroad  
14 encouraged Barilla to expand the track capacity at  
15 Ames, to accommodate 110-car trains. In the former  
16 configuration at the mill's infrastructure for  
17 unloading railcars, Barilla would not have been able  
18 to turn around a 110-car train in the 48-hour window  
19 to comply with UP's scheduled switches on Monday,  
20 Wednesday and Friday.

21 However, with the track expansion and  
22 continuous motion scale Barilla was confident they

1     could turn the train in 48-hours. Therefore,  
2     Barilla made the decision not to spend an additional  
3     1.2 million to expand the capacity of the unloading  
4     pits.

5                 On September 17th of 2018, UP announced  
6     the railroad's unified plan 2020, which is precision  
7     railroading. Subsequently, a UP representative told  
8     Barilla that UP may change direction in the future,  
9     trending away from unit trains. The first hit.

10                In November 2018, Barilla took a second  
11    hit when UP announced changes to its demurrage and  
12    accessorial rules and charges. UP 6004 to become  
13    effective January 1, 2019 which included reduction  
14    of the demurrage credits from 2 days to 1 day for  
15    unloading.

16                Needless to say, after spending 9.3  
17    million-dollars on a rail-related cap X project,  
18    Barilla was not happy with this potential change.  
19    With the current capacity of the unloading pits,  
20    Barilla cannot unload a train in 24-hours, and the  
21    cost to increase capacity of the unloading operation,  
22    will require an additional 1.2 million.

1           Barilla decided to do the rail expansion  
2 project and UP signed off on the design. Barilla  
3 made this decision to expand its track and storage  
4 capacity based on UP and rail industry benefits  
5 proposed including the flexibility to purchase wheat  
6 from any origin or vendor, and buy wheat that meets  
7 Barilla's, excuse me, quality requirements and most  
8 competitive price, reduced per car freight costs for  
9 100 to 110 car trains versus 25 car units, shorter  
10 lead times from origin to destination, positioning  
11 Barilla to be market competitive and mitigation of  
12 the risk of running out of wheat and shutting down  
13 production.

14           This project required the purchase of  
15 additional land and that was 210,000 plus a cap X of  
16 9.3 million for modifications to the rail yard and  
17 construction of additional silos to increase storage  
18 capacity from 20,000 to 30,000 metric tons.

19           The project was recently completed in  
20 November 2018, right?

21           MR. VIERS: Can you hear me? I'd like to  
22 go through just briefly the design of a rail yard and



1     how the UP sets cars into our rail yard, if you want  
2     to go ahead and go to the next slide. Okay, that's a  
3     picture of the rail yard as it sat before the  
4     expansion.

5                 One stipulation that the Union Pacific  
6     made when we designed the new rail yard was that the  
7     movement of the UP would not change. In other words,  
8     when they sent cars into our yard, they didn't want  
9     to change their regiment, they wanted to drop the  
10    cars off in the same pattern as they did or do, did  
11    before the expansion happened. So, this is the way  
12    the rail yard looks before the expansion, go ahead  
13    and go to the next. Sure.

14                COMMISSIONER OBERMAN: So, where is the  
15    track there? Is it --

16                MR. VIERS: Okay, that's a good question.  
17    Okay, the lead line comes off to the top right-hand  
18    corner, or the top of the slide. We've got a 4800-  
19    foot lead line coming into our property.

20                COMMISSIONER OBERMAN: So, that gray  
21    stretch is not a highway, that's a railroad track?

22                MR. VIERS: That's the railroad track.

1                   COMMISSIONER OBERMAN:  Alright, I see,  
2   okay, now I understand it.

3                   MR. VIERS:  Okay, yeah in the first, the  
4   northern most track is the UP east/west main line,  
5   it's a double track that goes clear across the State  
6   of Iowa.  So, what we did with our rail yard is we  
7   moved those switches to the top right-hand corner of  
8   the picture.  We moved those east, that's where the  
9   new property was purchased and we extended the 3 main  
10   long storage lines inside our rail yard, so go on and  
11   go to the next slide.

12                  Okay, so here's -- the left-hand picture  
13   is the way the storage looked before we added the  
14   steel hopper bottom storage tanks and go ahead and go  
15   to the next slide.  And this is the way the rail line  
16   looks, we should have gotten a little bit higher  
17   vantage point, but again the two tracks that are on  
18   the -- that are darker in color are the UP east/west  
19   main line.

20                  The next two tracks are the storage tracks  
21   that the Union Pacific uses when they bring cars in.  
22   The north track on the white rock holds 56 cars.  The

1 second track to the left holds also 56 cars, so  
2 there's your 110-112 car storage capacity for loads  
3 coming in.

4 The third track is for storage of empty  
5 cars once we unload the cars, we position the empty  
6 cars on the third track on the white rock there.

7 COMMISSIONER OBERMAN: Just, if you don't  
8 mind just for clarification, so when 110 car train is  
9 delivered, does the UP cut the train in half?

10 MR. VIERS: They do. They set the first 6  
11 cars in, pull out, throw the switch go to the second  
12 track, do the same exercise and then so what we do  
13 internally is we grab -- we're able to grab 14 cars  
14 at a time. We've got enough storage on the west end  
15 of our facility to position 14 loaded wheat cars over  
16 the unloading pit.

17 Prior to taking the cars to the unloading  
18 pit, we installed an NTP or that means in-motion  
19 scale, so we never have to stop the cars as we're  
20 putting the cars over the pit, so we get an in-motion  
21 weight, and then we unload those 14 cars, bring those  
22 14 cars out, position them on the third track from

1 the railroad's UP east/west main line and go through  
2 that exercise until we have all the cars placed.

3 And I'll make the comment right now --  
4 this may come up later. We do not or cannot release  
5 any of that unit train until all the cars are empty.  
6 So, we're paying demurrage as we sit with empty  
7 cars. So, that's really all I was going to explain  
8 is just the movement with inside our yard, and Sandy  
9 can go ahead and finish her oral testimony.

10 MS. DEARDEN: Okay, in today's testimony  
11 I'll focus on 3 primary topics and that's demurrage  
12 rules and charges, prepared for service charge and UP  
13 operations and customer service. On November 5th,  
14 2018, UP sent an email regarding changes to  
15 accessorial charges, published in UP tariff 6004 to  
16 become effective January 1 to, and I quote, "To  
17 encourage the efficient use and release of  
18 railcars."

19 A significant change was the reduction of  
20 credit days for loaded and empty railcars from 2  
21 credit days to 1 day. The same rule applies on  
22 single car shipments and cars in unit trains.

1 Barilla receives 100 to 110 car trains. Therefore,  
2 the shipper has only 1 day to unload a car or a train  
3 at its facility as opposed to 2, which has been the  
4 industry standard for decades.

5 As stated previously, when Barilla  
6 committed 9.3 million in cap X to expand its  
7 infrastructure to accommodate unit trains, UP worked  
8 with Barilla on the project design and the decision  
9 was made not to incur the additional costs to expand  
10 the capacity of the unloading pits because Barilla  
11 was confident it could unload the train in 48-hours.

12 However, with the new facility design,  
13 Barilla cannot make the 24-hour unloading  
14 constraint. The primary claim under ICC Termination  
15 Act of 1995 that is at issue here is pursuant to 49  
16 USC 10702, which requires the railroad to establish  
17 reasonable practices related to transportation and  
18 service.

19 The question is what is reasonable? In  
20 Section 10702, Congress did not limit the Board to a  
21 single test or standard for determining whether a  
22 rule or practice is reasonable. Instead, it gave the

1 Board broad discretion to conduct case by case fact-  
2 specific inquiries to give meaning to those terms.

3 Applying that broad discretion and ability  
4 to adopt rules of general applicability to the facts  
5 at hand, the Board should find the UP's demurrage and  
6 accessorial charges addressed herein to be per se,  
7 unreasonable practices.

8 The UP tariff also includes a provision  
9 that if UP does not pick up or deliver a car due to  
10 UP's actions, an accessorial charge will not be  
11 assessed. Instead, under UP's standard demurrage  
12 program, UP would give the customer 2 offsetting  
13 credits for its operational failures in order to  
14 maintain a fair and balanced approach.

15 UP also adopted a You Are Next policy, so  
16 customers are notified to prepare for loading or  
17 unloading a train. However, it's been Barilla's  
18 experience that they cannot rely on the projected  
19 ETA's and Barilla does not know actually what You Are  
20 Next means.

21 UP service is not reliable, and we are not  
22 talking about missing the ETA by a few hours. Trains

1     have actually arrived 24 to 28 hours late. During  
2     that time, Barilla and the third party incur  
3     additional labor costs for employees called in to  
4     service the train.

5             There have been a number of operational  
6     failures, yet Barilla has never seen credits when UP  
7     fails to deliver cars as promised and planned. There  
8     are a number of problems with the demurrage rules,  
9     and as a result Barilla is faced with hidden costs  
10    that were not included in the cost benefit analysis  
11    to justify expansion of the track and storage  
12    infrastructure. For example, when UP delivers trains  
13    to Barilla's plant, UP does not leave the  
14    locomotives with the train.

15            Instead, locomotives are returned to UP  
16    service and a dead head charge of \$3,200 is assessed.  
17    Subsequently, when a locomotive returns, to pick up  
18    the empties, a second dead head charge of \$3,200 is  
19    assessed. So, for every unit train, Barilla is  
20    paying \$6,400.

21            Removing the three locomotives was at  
22    Barilla's request due to asset utilization charge

1 proposed by UP of \$200 per hour per engine after free  
2 time, which was 1 day. Barilla concluded that the  
3 dead head charges were less costly than paying the  
4 hourly rate for 3 engines.

5 The dead head charges are unreasonable  
6 because the shippers are financially forced to agree  
7 with UP's decision not to leave the locomotives with  
8 the train. We can only assume that the railroad's  
9 decision to return the locomotives to service is  
10 based on the railroad's operational needs and there  
11 is a cost benefit to the railroad to have access to  
12 the locomotives for other trains that move while  
13 Barilla unloads its trains.

14 The costs, and potential cost benefit  
15 incurred by the railroad when dead heading are not  
16 transparent, so we do not know what's behind the  
17 \$6,400 per train. However, because the shipper is  
18 financially forced to concede and because dead  
19 heading is beneficial to the railroad, we submit this  
20 charge is unreasonable.

21 Another addition to the tariff was a \$400  
22 prepared-for-train-service charge when a car cannot



1 be spotted or pulled because of shipper's actions.  
2 UP gave examples of reasons for this penalty. We  
3 appreciate UP's recent announcement to modify this  
4 rule to only apply per occurrence versus per car.

5           However, UP did not go far enough. The  
6 PFS charges immediately imposed, even if the shipper  
7 is unaware of the situation blocking service and the  
8 PFS could apply on individual cars shipped or  
9 received that are single cars, or multiple car  
10 shipments, less than unit trains.

11           The PFS charge, deprives shippers of a  
12 reasonable period to remedy the situation and it is  
13 double dipping, so this charge should be terminated.  
14 In UP's announcement of the changes to the  
15 accessorial tariff, "it stated, Our top priority is  
16 to provide safe, reliable transportation for our  
17 customers. Part of that commitment is to maintain a  
18 fluid and adequate supply of railcars and to ensure  
19 that all railcar assets, both railroad and privately  
20 owned, are utilized as optimally as possible."

21           This is a noble goal. However, it seems  
22 UP is not participating in their own initiative.

1 UP's service has not improved. The railroad misses  
2 switches, and UP service and communications have  
3 become so unreliable that Barilla cannot plan for  
4 even an approximate arrival time.

5 As a result, Barilla has incurred  
6 increased labor costs, scheduling crews to unload  
7 trains that arrive 24 to 28 hours late.  
8 Furthermore, a single missed switch can have a  
9 significant impact on Barilla's operation. As an  
10 example, on April 12 of 2019, the UP local switch  
11 crew did not switch Barilla's parent, which would  
12 have provided empty pressured differential covered  
13 hoppers to the Ames mill to load semolina.

14 This missed switch, which was caused by  
15 UP, resulted in a shutdown of the Ames mill for 49  
16 hours. Shutting down a mill is lost production and  
17 it's very costly. There have been times when  
18 released empty unit trains have remained in Barilla's  
19 yard for up to 4 days before UP crews show up to pull  
20 the empty cars, thereby impacting on the railroad's  
21 equipment utilization.

22 For trains that move in private cars,

1     delayed pick-up of the empties has a negative impact  
2     on the optimization of the private car fleet.  
3     Changes to rules highlighted in this testimony are  
4     not fair or reasonable. While this testimony focuses  
5     on Union Pacific, these are issues not isolated to  
6     UP, but they represent attitudes and actions that are  
7     occurring throughout the rail industry.

8                 Union Pacific's UP 2020 plan and its  
9     consideration of potentially discouraging customers  
10    from shipping and receiving unit trains, unscheduled  
11    trains, after Barilla invested significant capital to  
12    expand its rail infrastructure and storage to  
13    accommodate unit trains is a major concern at  
14    Barilla.

15                This uncertainty and attitude of UP is a  
16    symptom of the disregard and disrespect railroads  
17    have for their customers. Barilla is a good  
18    consistent customer that is local on UP, unlike  
19    other grain shippers, Barilla's business is not  
20    seasonal, also, the trains move in railroad cars that  
21    are furnished by the origin carriers and or they move  
22    in Barilla's private cars.

1           So, as a result this is just hook and haul  
2 business for the UP. One of the questions asked by  
3 the Board was whether or not these issues can be  
4 addressed in contracts. Initially, when UP located  
5 the plant at Ames, UP established contract rates but  
6 only for the initial contract term of 5 years or  
7 2,500 wheat cars, whichever happened sooner.

8           To our knowledge, the railroads in general  
9 have decided to only publish grain rates in public  
10 tariffs. Therefore, when rates are published in  
11 tariffs, this is not an option. Changes to the  
12 rules highlighted herein are not fair or reasonable.  
13 While this testimony focuses on Union Pacific, these  
14 issues are not isolated to UP, but they represent  
15 attitudes and actions that are occurring throughout  
16 the rail industry.

17           UP's 2020 plan and it's consideration of  
18 potentially discouraging customers from shipping and  
19 receiving unit trains, unscheduled trains, after the  
20 customers commit significant capital to expand their  
21 rail infrastructure and storage to accommodate the  
22 unit trains is again a symptom of the disregard and

1       disrespect the railroads have for their customers.

2               Barilla cannot unload a train in 24-hours.

3       As a result, Barilla either incurs demurrage costs or  
4       they spend the additional 1.2 million to increase the  
5       capacity of the unloading pits. The questions are  
6       whether or not 1 day for loading or unloading is  
7       reasonable, and if the same standard should apply for  
8       loading and unloading unit trains when it takes  
9       longer to handle 110 cars versus a single car.

10

11              Current rules for calculation of demurrage  
12       need to be reviewed for potential change. Assessing  
13       debits for a full day when cars are for example,  
14       released at 12:02 versus 12:01, simply does not seem  
15       right as it does not seem fair to apply a full day of  
16       debits for only one minute.

17              Considering the clocks of various people  
18       involved, may not be in sync, so we encourage the  
19       railroads to reconsider their demurrage policies or  
20       the Board should launch an in-depth investigation of  
21       demurrage and accessorial charges. UP's rules seem  
22       to include some empty promises, including off-setting

1 credits for operational failures and the Your Are  
2 Next policy lacks substance when trains arrive 24 to  
3 28 hours late.

4 Barilla has not received any credits for  
5 operational failures and the You Are Next policy is  
6 not helpful and can be detrimental. Trains that  
7 arrive 24 to 28 hours late result in a lost labor  
8 cost for Barilla. We also submit that the dead head  
9 charges assessed against customers are unreasonable.

10 Barilla is paying dead head charges for  
11 all trains received for unloading. Without a more  
12 in-depth investigation and analysis, it would seem  
13 that the real benefits for not leaving the  
14 locomotives with the train and returning the power to  
15 service while trains are being loaded or unloaded.

16 This assumption is supported by Mr.  
17 Rocker's testimony dated May 8th where he says, "Not  
18 only is a consistent supply of railcars critical to  
19 ensuring reliability but having the right number of  
20 locomotives in our fleet is also important for  
21 consistent operations. Locomotives are costly to  
22 own, and need to be utilized to their fullest extent.

1     There is no foundation for the \$6,400 charge. We  
2     commend the Board for initiating this proceeding and  
3     we encourage the Board to initiate an in-depth  
4     investigation of the Class I railroad's demurrage and  
5     accessorial charges.

6                   CHAIRMAN BEGEMAN: Thank you. I don't  
7     know how to pronounce your first name.

8                   MS. MARIAM: Dinoja.

9                   CHAIRMAN BEGEMAN: Dinoja, thank you.

10                  MS. MARIAM: Good morning, my name is  
11     Dinoja Mariam and I am legal counsel at North Down  
12     Industrial and Normerica, Inc. which is the Canadian  
13     affiliated company. I appreciate the opportunity to  
14     participate in the hearing.

15                  A little background on our business.  
16     Normerica operates 4 manufacturing facilities in  
17     North America which are located in Dyersburg,  
18     Tennessee, Phoenix, Arizona, Bradford, Ontario and  
19     Lethbridge, Alberta.

20                  We are the leading manufacturers and  
21     suppliers of various pet products, including our  
22     primary product, cat litter. The primary raw

1 material in clumping cat litter is sodium bentonite  
2 which is mined and processed in Wyoming.

3 Due to the nature of the raw material and  
4 the volume requirements, shipments of the clay using  
5 the railway is the only viable method of  
6 transportation. Therefore, Normerica's reliance on  
7 the railway is a key component to its operations.  
8 Normerica regularly experiences business  
9 interruptions as a direct result of service-related  
10 issues caused by the railroads.

11 Demurrage is imposed without establishing  
12 fault, there is no reciprocity and there is no way to  
13 resolve disputes reasonably. The railroad's  
14 inconsistencies in service often cause a build-up of  
15 cars, either at the railroad's yards or at our  
16 facilities which inevitably cause increased demurrage  
17 and other accessorial charges.

18 More importantly, Normerica doesn't have  
19 any control over bunched deliveries and are unable to  
20 avoid these type of service inconsistencies and the  
21 resulting charges. We are forced to either pay the  
22 increase demurrage charges or request an extra switch



1 to ensure our facilities receive the necessary  
2 shipments to produce our product.

3 In either case, the railroads profit from  
4 their own service deficiencies. Even with  
5 Normerica's team of employees tasked with  
6 strategically ordering railcars, in 2018 alone,  
7 Normerica has incurred over approximately 470,000 in  
8 demurrage with CN over approximately 220,000 with UP  
9 and over 430,000 in demurrage and accessorial charges  
10 with CP.

11 Additionally, shippers must unwillingly  
12 accept the service-related failures of the railroad,  
13 including their inability to stick to any sort of  
14 timeline. However, the railroads expect shippers to  
15 adhere to very strict and precise deadlines for  
16 reporting empties and picking up railcars or are  
17 penalized as a result.

18 In recent years, Normerica has relied  
19 heavily on the Canadian Transportation Agency or the  
20 CTA, in order to manage its service-related disputes  
21 and disputes related to demurrage and accessorial  
22 fees with Canadian railroads.

1                   One of the hurdles that Normerica  
2     experiences when challenging service issues in  
3     Canada, is that when it is clear that the railroads  
4     are responsible for demurrage and accessorial fees,  
5     as well as delays in shipments, the Canadian  
6     railroads will place the blame on the U.S. railroads  
7     since the shipment originates in the State of Wyoming  
8     and is first carried by a U.S. railroad.

9                   Up until this point, Normerica has not  
10    found a fair and accessible method of challenging  
11    these issues for the method of traffic in the United  
12    States. The railroads are not held accountable and  
13    do not face consequences for their completely unfair  
14    and one-sided practices.

15                  The absence of a fair and accessible  
16    process to challenge the railroad's exercise of power  
17    has led to sub-par service. It has led to  
18    railroad's refusal to take ownership over major  
19    service-related errors, including clear mistakes  
20    made by the railroads and delayed and missed  
21    shipments. There are no consequences for their  
22    service-related errors.

1           A captive shipper's only option is to  
2     accept the sub-par, unpredictable, overly expensive  
3     service, or else shutdown its operations. Thank you  
4     for providing us with the opportunity to speak on  
5     these issues, I look forward to your questions.

6           CHAIRMAN BEGEMAN: Thank you very much.  
7     Bobby?

8           MR. TRIESCH: Good morning, Madam Chair.

9           CHAIRMAN BEGEMAN: Good to see you again.

10          MR. TRIESCH: And Vice Chair and Member  
11     Oberman, it's nice to you all again, I appreciate the  
12     opportunity to be here and speak to the Board about  
13     issues facing our company. Once again, my name is  
14     Bobby Triesch, I'm the Vice-President and Regional  
15     General Manager for SA Recycling.

16          SA Recycling is a full service ferrous and  
17     non-ferrous metal recycler based in California, we  
18     have 70 recycling facilities around the country --  
19     California, Texas, Arizona, Nevada, Georgia, Alabama  
20     and Tennessee.

21          We handle manufacturing scrap, appliance  
22     scrap, automobile recycling, demolition scrap, grain

1 waste and even oil filter recycling. We process  
2 millions of tons of scrap each year and this aids the  
3 domestic and international manufacturers by having  
4 raw materials to melt and make into new products.

5 SA Recycling is also a member of the  
6 Institute of Scrap Recycling Industries. My job is I  
7 am the Regional General Manager for the Georgia  
8 businesses and in the Georgia business, we call it  
9 the Georgia region, but it's predominantly Georgia,  
10 but it's also two facilities in Alabama, but I'll  
11 refer to it as the Georgia business.

12 It's 16 facilities, 14 of them are in  
13 Georgia and two of them are in Alabama. SA's Georgia  
14 region resulted in the acquisition of Nor-Recycling  
15 which was my family's business. Nor-Recycling was  
16 started by my grandfather back in the 1930's as one  
17 little tiny operation.

18 My grandfather was a single entrepreneur  
19 and he's the one who eventually in the 1960's came up  
20 with the idea for the automobile shredder and  
21 patented it. The automobile shredder is widely used  
22 throughout the world to handle obsolete end of life

1 metal products like cars and appliances.

2 I want to thank the Board for the time.

3 It's been very informative to hear all the different  
4 people and I appreciate you hearing our positions  
5 again. We do continue to face punitive demurrage and  
6 storage charges, and the railroads are failing to  
7 provide consistent service and we just really don't  
8 see an increased benefit of the business from these  
9 higher costs.

10 SA Recycling is heavily dependent on the  
11 railroad network for the transportation of our scrap  
12 between facilities and its customers. Our facilities  
13 ship to -- we have about, in my fleet, we have 650  
14 private cars, 400 of them are leased, and 250 of them  
15 are owned.

16 Around the entire country, including the  
17 east coast and the west coast, we're served by the  
18 UP, the BNSF and of course the Norfolk Southern which  
19 is the only provider for my Georgia-related  
20 business.

21 During 19 -- excuse me, during 2018, we  
22 collectively shipped 8,200 -- a little over 8,200

1 railcars. As a result of the serious surface issues  
2 on the NS during 2018 and more recently as a result  
3 of the zero credit days policy, which took effect in  
4 January of this year, our monthly storage and  
5 demurrage charges on the NS alone have skyrocketed.

6 The storage fees in January and February  
7 of this year were double and triple their already  
8 high levels, totaling \$120,000 in January and  
9 \$135,000 in February. Since July of last year, we  
10 now have an ongoing storage demurrage bill of  
11 \$750,000. We have disputed these charges where we  
12 believe it's the railroad's own service was an issue  
13 but many of these charges relate to empty cars for  
14 which the railroad offers no storage days and they  
15 end up bunching up and coming to us and these  
16 disputes basically remain unresolved, but it's a huge  
17 dollar amount that's out there that we're facing.

18 Some of the demurrage charges, that we've  
19 accumulated, resulted from service problems and  
20 railcar bunching, like I said, that are out of our  
21 control. It is common for us to receive a string of  
22 railcars, far more than we can accommodate and I tend

1 to focus on our Doraville, Georgia facility, which is  
2 in northeast Atlanta, because that's our busiest  
3 facility.

4           There we have 14 car spots, and we are a  
5 closed gate facility. We've had situations where the  
6 NS will deliver or receive at their adjacent rail  
7 yard, 30 railcars at a time, and of course when you  
8 can only take 14, you're going to be facing storage  
9 and demurrage charges, in a best case scenario, on  
10 the other 16 that came in.

11           And if they ended up coming in on a  
12 Saturday at 2 a.m., you're not going to have those  
13 cars brought in and unloaded on Saturday or on Sunday  
14 until Monday morning, so you're -- it's structured  
15 for failure the way it is.

16           In January of this year, the NS increased  
17 our service days from 5 days to 7 days, but  
18 realistically we cannot expect our workforce to work  
19 7 days, I think it's important to have one day off  
20 work. We work 5 and a half days which is what many  
21 people in the recycling industry do.

22           I know that Ben does the same thing, who

1     you heard from yesterday. It's impossible for, or  
2     it's not effective for us to bring in another crew to  
3     handle switching out railcars on Saturday afternoon  
4     and Sunday. It just would be impractical.

5                 The unfairness of the steeply rising  
6     charges amplified with the fact that we have made  
7     good faith efforts to accommodate and adjust our  
8     operations. We have made investments in our private  
9     cars. The NS came to us years ago, and said we're  
10    not investing in gondolas anymore, if you want to  
11    grow your business, you're going to have to buy your  
12    own fleet.

13                And we started doing that about 20 years  
14    ago and we've gradually increased that over the  
15    years. By 2007-2008, when the financial crisis hit,  
16    we had already had a 450-car fleet and that was  
17    enough to handle more volume than we're handling  
18    right now. So, that car or that fleet is right-  
19    sized.

20                Last year, as I met with NS to negotiate  
21    rates, I was not only using the 450-cars and I was  
22    using about 250 system cars as well, and I was not



1 getting the service I needed. Their response was you  
2 need more cars. So, we -- I went back to our Board,  
3 and I said it's not getting any better, they're not  
4 investing in any more railcars, we need to get our  
5 own cars.

6 So, we went to a company and we bought 50  
7 more railcars for \$92,000 each, 4.6 million dollars,  
8 and we leased from that same company 150 cars. So we  
9 increased our fleet by 200 cars last summer. So, we  
10 now have a 650-car fleet.

11 That investment is as you can imagine, a  
12 disaster, because not only do we not need those cars,  
13 we would have been better stayed with the system  
14 cars, but now we have too many cars, so what's  
15 happened now is we have taken 100 of those, or 106 of  
16 those cars, I believe, and had to pay to send them to  
17 off-site storage, just to relieve the supposed  
18 congestion in their yard.

19 There's no way to get out of these leases.  
20 When you lease railcars, you're not going to get out  
21 of a lease. We're obligated for these leases. The  
22 150 railcars that we lease for \$550 a month is

1     \$82,000 per month, so almost a million bucks a year -  
2     - that's the least, that's not even including the 4.6  
3     million dollars we spent on cars.

4                 We have investigated additional track  
5     space around our yard. I have included the Norfolk  
6     Southern Industrial Development person. I said do  
7     you have any other space anywhere, you know,  
8     anywhere, 5, 10, 15, 20, 30, 40 miles. He came back  
9     and he said there's nothing. He goes I don't have  
10    anything.

11                So, we've tried to come up with other  
12    scenarios and even if they would have said yes, we  
13    have a spot that's 10 miles away, there would have  
14    been a cost to that, there would have been  
15    transloading costs, we would have had to truck things  
16    over and it would have been -- it wouldn't have been  
17    like oh, that's great, we have another facility.

18                And where we are located, there's  
19    development all around us. There's no way to buy a  
20    piece of property next door, so it just simply can't  
21    happen. You know, we recognize the importance of an  
22    efficient railroad network, but these improvements

1     should work to the benefit of both, and when I'm  
2     talking about efficiency, I'm talking about their  
3     bunching or train building which is a new term I  
4     heard yesterday -- train building.

5                 So, it makes sense. It's logical that  
6     they would want to put together the most efficient  
7     train and get it from the steel mill servicing yard  
8     back to the scrap yard. The reality though is as  
9     you all have heard and talked about, I can ship out  
10    14 cars on Monday, and 14 cars on Tuesday and then on  
11    Monday I might not get anything back and Tuesday I  
12    may get 30 cars and putting those two together, it's  
13    expecting perfection and if there was a fair way of  
14    saying look, we're getting a benefit of having this  
15    efficient utilization of our locomotives and our  
16    railcars and for that benefit we're going to give you  
17    some -- a couple day's credit.

18                So, turning to our west coast facilities  
19    which I need to also report on. We have service  
20    mainly from UP, we've had issues with the UP in El  
21    Paso and Las Vegas. There have been times when we've  
22    been notified about car placements happening after

1 hours, after operating hours, but before midnight  
2 that of course, ends up meaning a day of storage,  
3 instant revenue for the railroad.

4           You've heard this story from many other  
5 people before, but I think a reasonable free time  
6 period would help alleviate some of these charges and  
7 then also, the UP their new policy of not prepared  
8 for service I think has some serious ramifications.  
9 This charge is basically assessed when the UP  
10 determines in its sole discretion that it's unable to  
11 pull the cars from the yard due to a customer's  
12 action, which can be made up or dreamed up.

13           Once again, it's solely at the discretion  
14 of the railroad and it's a recipe for a problem.  
15 Ultimately, the recent changes to the rules and  
16 charges have created a situation where the railroad  
17 customers are required to operate with a maximum  
18 efficiency and no margin for error, and we're  
19 penalized if we're unable to do so, where the  
20 railroads are provided maximum flexibility and are  
21 never sanctioned for their inefficiencies or their  
22 failures.

1           We believe there needs to be commercially  
2 reasonable free time and demurrage rules that  
3 incentivize efficiency for the rail system as a  
4 whole, rather than rules that force rail customers to  
5 dramatically reconfigure operations, lease their own  
6 railcars and storage track, which -- but we've done  
7 it anyway, and pay higher labor costs to try to avoid  
8 these unfair penalties.

9           We would ask that the Board consider  
10 establishing requirements for the railroads to commit  
11 to reciprocal principles when they hold up private  
12 cars or disrupt customers operations. We currently  
13 have a situation where the carriers enjoy a clear  
14 monopoly in the industry.

15           They can make any operational tariff  
16 changes by exerting their inordinate market power  
17 over their customers. In return, business like SA  
18 Recycling are expected to accommodate these changes  
19 without any regard to the disruptions caused to our  
20 operations.

21           We are simply asking the Board to  
22 recognize our concerns and establish fair, reasonable

1 and reciprocal rules and principles regarding  
2 demurrage and accessorial charges. Again, thank you  
3 for your time and listening to my comments, I  
4 appreciate it and I'm happy to answer any questions  
5 you may have.

6 CHAIRMAN BEGEMAN: Thank you all for your  
7 testimony. Sandra, or Greg, I'll start with you.  
8 So, you still have unit train service which is good  
9 to hear since you know on the messages we've been  
10 receiving is.

11 MR. VIERS: Yes, we do.

12 CHAIRMAN BEGEMAN: And was there any  
13 threat that you would have to go to merchandise or  
14 that has not been on the table?

15 MR. VIERS: To manifest train.

16 CHAIRMAN BEGEMAN: Manifest, thank you.

17 MR. VIERS: They, well even in the Union  
18 Pacific's opening statement, you may have heard this  
19 and you, maybe it was kind of disguised, so you  
20 didn't notice it. In their opening comment they  
21 said their focus was going to be the movement of all  
22 cars on their system to be as efficient as possible,

1 not train, not concentrate on trains. So, that's our  
2 biggest -- that's one of our big concerns.

3 You know, long term we may have some tough  
4 decisions to make regarding adapting our system to be  
5 able to unload faster, that will depend on what you  
6 folks on the Board decide to do.

7 But long term, we have made this  
8 investment to be able to receive unit trains.

9 CHAIRMAN BEGEMAN: So, I think before you  
10 spend the other 1.2 million to deal with a quicker  
11 unload requirement, you would want to make sure there  
12 was some kind of guarantee of continued unit  
13 service?

14 MR. VIERS: That's correct, that's  
15 correct.

16 CHAIRMAN BEGEMAN: At least based on what  
17 we heard from Ag Processing and others that a lot of  
18 investments have been made to establish the unit  
19 train facilities.

20 MR. VIERS: Yes, and so, you know, that's  
21 really scary to us long term. We've made this huge  
22 investment and we've had communications from the UP

1     that have told us that they're you know, they're  
2     contemplating moving to manifest traffic and so it's  
3     not only the receiving of unit trains, but  
4     establishment of freight rates.

5             You know that -- they can adjust their  
6     freight rates to make unit trains not as feasible for  
7     us and so, that's what worries us long term is, you  
8     know, their decisions and could be disguised in  
9     freight rates that would discourage unit train from  
10    receiving from our site, you know, into our facility.

11            So, that's really a very big concern of  
12    ours.

13            CHAIRMAN BEGEMAN: But it does sound like  
14    from when you decided to build the -- make the  
15    investment, et cetera, the over 9 million, you  
16    certainly have had good discussions. There's a lot  
17    of communication with UP?

18            MR. VIERS: Yes, absolutely, but from the  
19    time that when we made that decision, Barilla does a  
20    lot of analysis before they make a decision, so we  
21    started thinking about unit trains back in 2015, the  
22    decision was made in late 2016.



1                   And so, it's taken a while. From that  
2     time, the Union Pacific has gone through a wholesale  
3     change of management and the people that we spoke to  
4     about our unit train unloading expansion project our  
5     plans, are gone. All those people are gone.

6                   CHAIRMAN BEGEMAN: Well there are a row of  
7     very competent UP folks right behind you, a little  
8     squirmy but nodding and I know that one of them will  
9     raise, you know, shake your hand before you leave the  
10    room and you will have a contact.

11                  MR. VIERS: And I will say that we will  
12    take the UP up on their comment when they made the  
13    comment that they wanted to work with their customers  
14    and try to find out or look at any potential ways to  
15    minimize demurrage. You know, I want to be the first  
16    to say from Barilla that we need the UP, we have to  
17    have them.

18                  There's no other way to bring durum wheat  
19    clear from the production areas of North Dakota,  
20    Montana, Canada, that's a long way, you can't do that  
21    by truck. So, we need the UP, and the first 18 years  
22    of my employment with Barilla, Barilla's been there

1 for 21 years. The first 18 years were great.

2 And I must say the last 2 to 3 years, not  
3 so. So, we're willing and ready to get back to the  
4 quiet enjoyment of the UP service for sure.

5 CHAIRMAN BEGEMAN: And just to clarify for  
6 the record, Sandra, when you mentioned some of the  
7 service impacts of late, you're not actually  
8 referring to any of the results of the flooding are  
9 you? You were just --

10 MS. DEARDEN: Pardon me?

11 CHAIRMAN BEGEMAN: You weren't referring  
12 to any of the impacts of the floods as far as on the  
13 service frustrations that you have, it was before  
14 that time?

15 MS. DEARDEN: No, I wasn't.

16 CHAIRMAN BEGEMAN: Great.

17 COMMISSIONER OBERMAN: I'd just like to  
18 follow^^up on this questioning that Ann led here.  
19 Because I asked these questions yesterday, I'm just  
20 trying to get a handle on how companies like yours  
21 make an investment. So, from the way I understood  
22 the testimony, it was subsequent to the vortex

1 problems in 2014, where you had -- everybody had lost  
2 a service, that you began to investigate the unit  
3 train facility and investing the 9.3 million, is that  
4 right?

5 MR. VIERS: That's correct.

6 COMMISSIONER OBERMAN: And you said the UP  
7 came to your place and helped or approved the design  
8 of what would work?

9 MR. VIERS: Yes.

10 COMMISSIONER OBERMAN: So, what I'm trying  
11 to get a hold of here is what kind of  
12 representations, if any, were made or was it  
13 implicit? I mean no one would say you should spend 9  
14 million dollars, by the way we may cut you off in a  
15 month, so how did those conversations go? I assume  
16 there's no written promise.

17 MR. VIERS: Well, just based off of the  
18 freight rates that were in place at the time and  
19 freight rates, through rates from the durum growing  
20 regions, we're set in such a way that it made sense  
21 for us to make that investment.

22 We also made the investment from a supply

1 chain security standpoint where you know, we did run  
2 out of wheat in late 2013, early 2014 because of  
3 severe weather conditions at that time but also due  
4 to the CP's changeover to precision railroading which  
5 really negatively impacted the service and the CP's  
6 decision on how to manage their hopper car fleet.

7 COMMISSIONER OBERMAN: But what I wanted  
8 to get at though Greg, was what kind of assurance did  
9 you have if you would make a 9.3 million dollar  
10 investment that the unit train service would  
11 continue, or was it just a wing and a prayer, I mean  
12 how does that work?

13 MR. VEIRS: No, the UP was encouraged,  
14 encouraged us as a customer on their line to make  
15 this investment. We designed the plan, they approved  
16 the plan, there's a process to go through it's  
17 called the 10% conceptual plan, you have to submit  
18 that, and have it approved.

19 So, you know they were very encouraging  
20 that we make this investment.

21 COMMISSIONER OBERMAN: Well, did they say  
22 if you make the investment, we'll serve you long

1 enough to recoup the investment or did they say by  
2 the way, we're encouraging you, but we may quit  
3 tomorrow? I mean how did those conversations happen  
4 before you write a check for 9.3 million dollars, I'm  
5 sort of mystified.

6 MR. VIERS: Well, we thought that the  
7 freight rate spreads would stay in place, the  
8 industry in general sets up those freight rate  
9 spreads to be in favor of larger units, unit trains,  
10 that's the way the unit railroad industry has enticed  
11 green companies and companies that use railroad in  
12 general to increase their capacity and so, that's why  
13 we made the decision, assuming that that model to  
14 increase capacities, get larger unit trains, bring in  
15 larger unit trains would stay in place.

16 COMMISSIONER OBERMAN: This is kind of a  
17 self-serving question, but would you say it was at a  
18 reasonable assumption that you made based on past  
19 practices?

20 MR. VIERS: Yes.

21 COMMISSIONER OBERMAN: Was there any  
22 discussion with UP about your unloading pit being

1     able to accommodate a 48-hour turnover at the time  
2     and they said that was sufficient?

3                 MR. VIERS:  They, the people that we  
4     talked to that were in management positions at that  
5     time, yes, knew exactly what our capabilities were.

6                 COMMISSIONER OBERMAN:  And they said this  
7     is fine, this will work?

8                 MR. VIERS:  Well, they never mentioned the  
9     fact that they would decrease their credit days from  
10    2 to 1, so there was no objection from the UP.

11                COMMISSIONER OBERMAN:  And at the time it  
12    sounds like to have the larger pit to unload in one  
13    day was an extra 1.2 million?

14                MR. VIERS:  That's correct.

15                COMMISSIONER OBERMAN:  How much would it  
16    be if you wanted to -- or could you even change it  
17    today without redoing the whole facility?  I don't  
18    know how it works.

19                MR. VIERS:  It would be, you know, there  
20    are a number of years since the first study was done,  
21    but it would be probably close to that, probably a  
22    little bit more because, you know, everything goes

1 up in time, the materials and labor.

2 So, you know, it would still be close to  
3 that same amount now.

4 COMMISSIONER OBERMAN: And, as I  
5 understand it, the \$6,400 each for the two-ways for  
6 the locomotives, is because you don't -- if you could  
7 unload within 24-hours, you wouldn't pay that  
8 \$6,400?

9 MR. VIERS: That's correct.

10 COMMISSIONER OBERMAN: They'd leave the  
11 locomotives there, I gather.

12 MR. VIERS: That's correct.

13 COMMISSIONER OBERMAN: Are you paying for  
14 the cars as well as the \$6,400?

15 MR. VIERS: Yes, we're paying demurrage on  
16 the cars as well, and as I stated earlier, we can't  
17 release any of the cars until all the cars on the  
18 unit train are empty.

19 COMMISSIONER OBERMAN: So, how much are  
20 you paying per unit train on the car demurrage?

21 MR. VIERS: Yeah, in our yard it's \$100  
22 per car per day.

1                   COMMISSIONER OBERMAN: So, you're talking  
2 about \$10,000 on top of the \$6,400 for the second  
3 day. So, every unit train to unload and with the  
4 24-hour rule adds a little more than \$16,000 to your  
5 costs.

6                   MR. VIERS: That's correct.

7                   COMMISSIONER OBERMAN: So, the debate --

8                   MR. VIERS: I'm sorry, a full year  
9 increase just due to demurrage, not including the  
10 dead head, is \$240,000 a year for us.

11                  COMMISSIONER OBERMAN: So, you know,  
12 yesterday I don't know if you were here yesterday, I  
13 spent a lot of time trying to figure out what it is  
14 the railroads are trying to incentivize shippers to  
15 do. I guess the UP would say listen, if you spend  
16 1.2 million dollars, you can avoid \$240,000 a year  
17 and you'll get your money back in 6 years, is that  
18 the argument?

19                  MR. VIERS: It is.

20                  COMMISSIONER OBERMAN: And you're saying  
21 yeah, how do I know you'll even serve me in 6 years?

22                  MR. VIERS: Well that's right.



1                   COMMISSIONER OBERMAN: Has UP offered to  
2     guarantee you unit train service if you spend the 1.2  
3     million?

4                   MR. VIERS: No, we came -- we went to the  
5     UP early on when we talked about expansion and we  
6     asked for what their appetite was for a contract to  
7     keep us, to keep our expansion at Ames, Iowa because  
8     we also have a pasta plant in Avon, New York.

9                   However, as Sandra said earlier, we don't  
10    have a mill in Avon, New York so we really wanted to  
11    expand at Ames, and so you know, they -- at that time  
12    they never expressed interested in establishing a  
13    contract with us and have not since.

14                  COMMISSIONER OBERMAN: So, as a business  
15    person trying to figure out how to invest your  
16    capital, as you sit here today, and you may not want  
17    to reveal this, but as you sit here today, how can  
18    you make a decision as to whether it's worth to your  
19    business to save a quarter of a million dollars a  
20    year by investing 1.2 million, I mean with no  
21    uncertainty. Are you just playing it day by day or  
22    what is the process you're going through?

1                   MR. VIERS: Well, again I think that when  
2 we -- we'll decide what we're going to do longer  
3 term. When you, when the Board decides what you may  
4 suggest that the railroads do, you know, we'll have  
5 some tough decisions to make as to how we want to  
6 proceed.

7                   That's for people to decide that are  
8 higher up than me but I think we need to make some  
9 decisions down the road but I think it will depend  
10 upon your actions and what your suggestions may be  
11 for the railroads.

12                  COMMISSIONER OBERMAN: It just strikes me  
13 that, I'm sorry, Sandra?

14                  MS. DEARDEN: The unit trains basically  
15 originate on other railroads, so their interchange to  
16 Union Pacific. Union Pacific has common carrier  
17 obligations so they have to bring the unit train  
18 like Greg said, the way they could discourage that  
19 would be to --

20                  COMMISSIONER OBERMAN: Change the rates.

21                  MS. DEARDEN: Change the rates.

22                  COMMISSIONER OBERMAN: Well, this is very

1 helpful because we're trying -- I'm trying to  
2 grapple with, you know, what kind of -- you actually  
3 have a physical choice if you want to spend money.

4 MR. VIERS: Right.

5 COMMISSIONER OBEMAN: Bobby, Ben Abrams  
6 did not, but you still got to make the decision and  
7 with a lot of uncertainty, that's what seems to me  
8 the biggest issue is the uncertainty. I mean aside  
9 from the money.

10 MR. VIERS: Right, and I also want to  
11 bring this point up is you know, the Union Pacific  
12 knew fully well that we were making this big  
13 investment or that we had made this big investment.

14 I'm sure during that time they were  
15 talking about going to precision railroading, and  
16 maybe there's something that where they could not  
17 come to us and say, give us advance notice of what  
18 they were thinking about doing, I don't know.

19 But we didn't hear any before -- sometime  
20 September 15th or 17th, was the first time we heard  
21 about them migrating to this new precision  
22 railroading model. Then, of course, we didn't hear

1 the impact of the cost until November. So, here  
2 we're sitting, we made this big investment and now we  
3 fear this is going to happen, then we find out the  
4 impact of the cost, you know, in some circles they  
5 call that a bait and switch, and so --

6 COMMISSIONER OBERMAN: Here it sounds like  
7 bait, but you're not getting the switches.

8 MR. VIERS: And I, really in past history  
9 the UP's done a very good job for us, so I'm not here  
10 to just you know, disparage them, I'm just trying to  
11 explain what's happened to us.

12 COMMISSIONER OBERMAN: Very enlightening  
13 thank you.

14 VICE CHAIRMAN FUCHS: I have a little bit  
15 distinct from kind of the past investment that kind  
16 of going forward and assessing what's reasonable. As  
17 the Board's kind of thinking about what's  
18 reasonable, should it be thinking about okay, so in  
19 order to avoid demurrage, you know, whatever the  
20 incentive would have for you in order to avoid it,  
21 sounds like it's a 1.2 million dollar cost to avoid  
22 that demurrage.

1                   And that's what, I guess the incentive's  
2   designed to do and the reason why they want the  
3   incentive is there's going to be some sort of benefit  
4   to the rail network, which will go to UP, but also  
5   other customers. So, do you all view a good way for  
6   us to be thinking about this is okay, how much is  
7   that benefit to UP and the other customers versus  
8   these 1.2 million dollars.

9                   And if the benefit for a not too congested  
10   yard, you know, then not really much of a difference  
11   when it comes to network performance, isn't that  
12   great, that 1.2 million dollars, that incentive  
13   effect really isn't reasonable. Is that a way to  
14   think about it?

15                  MS. DEARDEN: Yeah, well one --

16                  VICE CHAIRMAN FUCHS: Can you mic it?

17                  MS. DEARDEN: I'm sorry, one potential  
18   solution is to consider different free time --  
19   definition of free time for our unit trains versus  
20   single car. Obviously, it takes more time to handle  
21   a train than it does to handle a single car, so maybe  
22   there should be different definitions if they want to

1 go to you know, one day, maybe that makes sense for  
2 shipments that move in manifest train service.

3 But it doesn't make sense to expect  
4 somebody to unload a train or load a train with 110  
5 cars in 24-hours.

6 VICE CHAIRMAN FUCHS: Suppose for example,  
7 a railroad, just hypothetical, a railroad could show,  
8 you know, if someone were to just make that  
9 investment, it would just -- it would really free  
10 things up, this is a very congested area, it's going  
11 to benefit all these other customers. We just really  
12 need to incent that person to make that investment.

13 Is there ever a scenario in that context  
14 where actually it would make sense to make the  
15 investment? Maybe not for you all in this, it sounds  
16 like what you're saying it does not, but could you  
17 imagine a scenario where it would make that incentive  
18 driving an investment would be a good thing for the  
19 network and other customers?

20 MS. DEARDEN: Well, the world's changed in  
21 the last -- recently. Back when I set up, when I  
22 actually located 5 100,000 ton drive-off warehouses

1 for product in Iowa, and this was kind of common in  
2 the industry when someone's locating on your railroad  
3 or expanding their infrastructure to handle trains  
4 and so forth, the railroads will participate in that  
5 cost.

6 VICE CHAIRMAN FUCHS: Right.

7 MS. DEARDEN: And what you would do is  
8 figure out does the potential of 50% of the cost  
9 you're going to invest and you would take that and  
10 with the forecasted volumes, amortize it over a 3 to  
11 5 year period and give the customer a per car  
12 allowance.

13 The railroads don't make any commitment to  
14 the customers now and it's been my experience, I  
15 talked to basically all the Class I's about this very  
16 thing except KCS, and it's just something they don't  
17 do anymore.

18 VICE CHAIRMAN FUCHS: And I'm kind, I am  
19 hearing kind of two different issues that you're  
20 raising both important, one is how to make decisions  
21 going forward and then the other is how to treat the  
22 situation of past investment and so I appreciate what

1     you all are saying.

2                   Can I ask a question of Ms. Mariam? You  
3     had in your written remarks, you had an interesting  
4     passage on Canada, the Canadian Transportation Act,  
5     and I think you mentioned final offer arbitration --

6                   MS. MARIAM: -- Yep --

7                   VICE CHAIRMAN FUCHS: -- as a way of not  
8     only addressing rates, but also issues of practices  
9     and charges and such and so I was wondering if maybe  
10    you can give us a little bit more information on how  
11    final offer arbitration works in the demurrage  
12    context, and you know, a final offer process  
13    generally.

14                   And, whether or not that's a good way to  
15    resolve disputes?

16                   MS. MARIAM: Sure, well most of the time  
17    final offer arbitration in Canada is used for more of  
18    the rate aspect of it, but demurrage could be a  
19    factor in it, so if you -- because you can  
20    incorporate the tariffs or choose not to in your  
21    final offers. So, when you put out your final offer,  
22    you could -- primarily for the rates, so you would



1 set a rate and you wouldn't know the other party's  
2 rate and you can incorporate which tariff you want  
3 and which tariff you wouldn't want included in your  
4 final offer, and then the arbitrator would determine  
5 which is reasonable and which is unreasonable.

6 VICE CHAIRMAN FUCHS: That's kind of  
7 interesting, because you know, how would you  
8 necessarily know what your demurrage is going to be  
9 when you incorporate it into your rate structure, ya  
10 know what I mean? I get that you have the terms of  
11 the tariff, but that's going to be variable based on  
12 you know, a variety of factors on the railroad end  
13 and the shipper and what's the rate for the  
14 transfer, it's a little bit more predictable I would  
15 think.

16 MS. MARIAM: Yeah, yeah, I think it's --  
17 you can kind of predict it based on how much you  
18 would be getting and what you would be ordering based  
19 on the rate.

20 VICE CHAIRMAN FUCHS: Would you look to  
21 historical averages, perhaps?

22 MS. MARIAM: Yes, it would be more on a

1 historical average. And we did, when we did go  
2 through final offer last year, for rates, we did  
3 incorporate demurrage and we did discuss it during  
4 our final offer.

5 VICE CHAIRMAN FUCHS: And so, if I'm  
6 hearing you correctly, it's standard practice in  
7 Canada that demurrage is considered for a  
8 reasonableness of rates and that there are  
9 established practices for doing so?

10 MS. MARIAM: I don't think it's standard  
11 practice, but it is considered.

12 VICE CHAIRMAN FUCHS: And you all did  
13 that?

14 MS. MARIAM: We did that.

15 VICE CHAIRMAN FUCHS: Okay, and is it your  
16 view that that overall experience was a good way to  
17 litigate things?

18 MS. MARIAM: That's a difficult question.  
19 I wouldn't say it's the best way to litigate things,  
20 but I think it helped. It's better than --

21 VICE CHAIRMAN FUCHS: Okay, and if I could  
22 turn to Bobby, you know, you mentioned a couple

1 things, you know, 4.6 million dollar investment I  
2 think I heard in cars and just this thing we've heard  
3 quite a bit, this movement from -- and it's obviously  
4 borne out of all the information that a movement from  
5 system to private cars, and you also said the most  
6 helpful thing I think I heard was more free time.

7 MR. TRIESCH: Yes.

8 VICE CHAIRMAN FUCHS: And the private cars  
9 under -- with the railroad that I think you're  
10 focused on is the private cars have less free time  
11 than the system cars?

12 MR. TRIESCH: Zero.

13 VICE CHAIRMAN FUCHS: Yes, and if you were  
14 to have a system car in your exact same situation,  
15 you would have 24 hours?

16 MR. TRIESCH: Yes, sir.

17 VICE CHAIRMAN FUCHS: And so, if in this  
18 particular case, where someone had zero free time, if  
19 a private car were treated like a system car, that  
20 would greatly alleviate a lot of your problems?

21 MR. TRIESCH: It would.

22 VICE CHAIRMAN FUCHS: And, in your

1 discussions with the railroads, to the extent that  
2 you've had them on this topic -- I know you've had  
3 discussions with them on demurrage generally -- if  
4 you would say hey, why don't you treat,  
5 notwithstanding what you said in your recent tariff  
6 changes, why don't you treat my car like a "system  
7 car." What would they say? What is their best  
8 argument back to you?

9 MR. TRIESCH: Well I haven't asked that  
10 specifically, I certainly had lots of discussions  
11 with them because, you know, when we met before I  
12 told you I genuinely like our Norfolk Southern  
13 people. I've dealt with them for 17 or 18 years, and  
14 I genuinely like them, they're likeable people.

15 I think I can say this -- I think Wall  
16 Street has probably encouraged them to overreach as a  
17 negotiating tactic, and I think that going from 5 to  
18 4 to 3 to 2 to -- I don't know, somebody said let's  
19 go to zero. What's the worse that can happen?  
20 Somebody will ask us a favor and we'll go back to 2  
21 and everybody will be happy.

22 But I think the over-reaching is so

1 significant that I haven't asked to say, "well can we  
2 just go back to 1, can we just go back to what you  
3 treat the system cars at?" So, I haven't asked  
4 that. I've said, "You guys should have stayed at 2,"  
5 there's been some.

6 VICE CHAIRMAN FUCHS: Yeah, but it sounds  
7 like from what you're saying today, obviously you'd  
8 prefer 2, but even 24-hours would be much improved  
9 for you, it would alleviate most of the problem?  
10 Give me a sense of how 24 relative to 2, I mean  
11 obviously stipulating that you want 2.

12 MR. TRIESCH: I'm negotiating against  
13 myself.

14 VICE CHAIRMAN FUCHS: Right, yeah.

15 MR. TRIESCH: Right, I think -- there was  
16 a long time that 5 was the number. And I'm not  
17 saying that we need to go to 5, but 5 days allowed  
18 for the railroad and interchange with us and it's  
19 historically inefficient. They've done great work to  
20 become more efficient, but there are still inherent  
21 inefficiencies in the process and a lot of them have  
22 to do with the first mile and the last mile.

1           You know, we watch railcars and you can  
2   see two different railcars on the same day that are  
3   released from the steel mill, they go back to an NS  
4   yard, one may go directly back to Atlanta. The other  
5   one may go to some other state and it's like "well,  
6   why does that even happen?" Well, it's because that  
7   car got stuck in between some other cars and they  
8   didn't want to stop and break it apart and bring it  
9   back, so it's for their convenience.

10           VICE CHAIRMAN FUCHS: Right.

11           MR. TRIESCH: That makes sense. But to  
12   think that zero days credit implies perfection and I  
13   think we're being held to perfection. We work lots  
14   and lots of hours and we strive for perfection, I  
15   just think it's unrealistic to go below 2.

16           VICE CHAIRMAN FUCHS: And it sounds like  
17   from other testimony that you can actually have  
18   operational perfection, but just the natural  
19   variability in transit times, you may still get a  
20   bunch on the back end.

21           So, the railroad could be perfect and the  
22   shipper -- or I should say the receiver, in this case

1 -- could be loading and unloading as fast as they  
2 possibly can with every single one of their spots,  
3 and you still could have demurrage?

4 MR. TRIESCH: That is correct.

5 VICE CHAIRMAN FUCHS: How is that  
6 incenting changes in behavior if everyone's operating  
7 perfectly and in a perfect scenario you still have  
8 demurrage?

9 MR. TRIESCH: That's exactly right.

10 And we respect the fact that train  
11 building or bunching makes sense. But you know, one  
12 would argue if I ship 14 cars, then you shall not  
13 return more than 14 cars back to me. They're going  
14 to go "no way, we don't want to have our hands tied,  
15 we want to be able to run our business and ship  
16 cars."

17 VICE CHAIRMAN FUCHS: And there are  
18 operational reasons why things might be bunched  
19 together, correct;

20 MR. TRIESCH: Correct.

21 And so, having those 2 days is not  
22 admitting that we're not efficient, because I contend

1     that we are absolutely efficient and we're on the top  
2     of our game. I have one lady who does nothing but  
3     handle our cars.

4                 I mean, it's like -- I always just say  
5     "thank you so much" because she's a miracle worker.  
6     And I'm like "so where are these cars?" She goes,  
7     "oh my gosh Bobby, I got you know, these going here  
8     and these going here" And you know, we used to be  
9     able to manage our fleet better as well because we  
10    could reroute cars but part of the new tariff is now  
11    if you don't have more than 2 rail stations between  
12    where the car is and the destination, you're not  
13    able to move the car.

14                So, there's lots of things that have been  
15    put in with these tariffs and changes that make us  
16    less effective and less efficient at being able to  
17    perfectly receive every single car that comes back  
18    and ready for constructive placement.

19                VICE CHAIRMAN FUCHS: And so at this point  
20    where I think that you know, because we've heard it a  
21    number of times and you know, there are additional  
22    railroads going today but you know, I haven't seen



1 from the other railroads that are left to testify, I  
2 haven't seen the same complaints and I haven't seen  
3 the zero free time practice.

4 And so, one of the things I really commend  
5 the folks from UP yesterday and Kenny Rocker coming  
6 back up when there was quite a bit of questions on  
7 the unit train practices, and came up and brought  
8 some additional light to the issue, and I think all  
9 of us appreciated that very much.

10 And so, if I could be so bold as to say  
11 that, you know, listen there are repeated at every  
12 single panel about zero free time, operational  
13 perfection and still leading to demurrage, as well as  
14 people not understanding why private cars are treated  
15 different than system cars, so I would encourage the  
16 representatives from Norfolk Southern who are here,  
17 if they would consider at some point today in the  
18 similar manner that UP did, and in the interest of  
19 finding constructive solutions and light, whether  
20 it's a representative of NS or someone who works for  
21 NS, to come up here and perhaps consider shedding  
22 more light on the zero time practice, particularly as

1     it relates to bunching and differential with system  
2     cars.

3                   And again, this is in the interest of  
4     clarity and constructive solutions.

5                   CHAIRMAN BEGEMAN:   And, I'd also like them  
6     to talk about the congestion charge if they choose to  
7     take us up on that offer.   Dinoja, could I ask you a  
8     quick question.   In your testimony you indicated the  
9     amount of demurrage charges for the 3 carriers that  
10    occurred in 2018.

11                   I'm curious if you have any like, any year  
12    to date stats given a lot of changes since January.  
13    Do you know, are things looking like they're doubling  
14    and tripling or static or -- ?

15                   MS. MARIAM:   I don't have that information  
16    on me right now, but I would say it's probably going  
17    up, but I would have to confirm that.

18                   CHAIRMAN BEGEMAN:   Alright and then it's  
19    also these charges are based on the U.S. operations  
20    or both U.S. and Canada?

21                   MS. MARIAM:   It was both, it was primarily  
22    due to the bunching from the U.S. to Canada.

1                   CHAIRMAN BEGEMAN: Or, at least that's  
2 what the Canadian carrier says?

3                   MS. MARIAM: Yes.

4                   CHAIRMAN BEGEMAN: Just to quote you. And  
5 then back to the conversation you were having with  
6 Patrick about the final offer arbitration. Could you  
7 just give us a sense of how much time that took?

8                   MS. MARIAM: Sure, we initially filed for  
9 final offer arbitration during the process that we  
10 went through in August, I believe, and we had our  
11 final offer actual arbitration in October. So, it  
12 was and throughout that we had a few pleadings and  
13 different issues that came up -- but I would say it's  
14 roughly half a year.

15                  CHAIRMAN BEGEMAN: And how quickly did you  
16 get the response, the answer, the decision?

17                  MS. MARIAM: It was relatively quickly. I  
18 would say a month or two.

19                  CHAIRMAN BEGEMAN: And it's confidential,  
20 isn't it?

21                  MS. MARIAM: It is, yes, it is  
22 confidential. But you can publicize -- it is

1 publicized but you can redact certain information, so  
2 all of the pleadings are online.

3 CHAIRMAN BEGEMAN: Alright, thank you.

4 COMMISSIONER OBERMAN: Just a few  
5 questions Dinoja, to follow-up. I was trying to  
6 understand as well the demurrage charges. So, CN is  
7 going to be here shortly. The 477,000, is that  
8 demurrage charged in Canada?

9 MS. MARIAM: Yes, it's in Canada.

10 COMMISSIONER OBERMAN: So, none of that  
11 was incurred at your plant in Tennessee?

12 MS. MARIAM: I believe it was split  
13 between the two.

14 COMMISSIONER OBERMAN: So, I'm not clear.  
15 CN, I assume, is not delivering these cars to the  
16 plant there?

17 MS. MARIAM: Sorry, CN is delivering to  
18 our Tennessee plant, it's our end carrier at  
19 Tennessee and in Branford, Ontario.

20 COMMISSIONER OBERMAN: Oh, it is, okay.

21 MS. MARIAM: Yeah.

22 COMMISSIONER OBERMAN: So, but you're

1     saying not all of the 477 is incurred? The reason  
2     I'm asking you this is that, as much as I'd like to  
3     consider the rest of the North America when CN gets  
4     here, I want to talk to them about what they're doing  
5     in this country.

6                 So, some but not all of that 477 is a  
7     result of charges based on what's happening in  
8     Tennessee?

9                 MS. MARIAM: Yes, that's correct.

10                COMMISSIONER OBERMAN: And is all of the  
11     basis of these demurrage charges bunching? And  
12     therefore, as I sort of skimmed through your  
13     statement, it sounds like as a result of bunching you  
14     need to keep cars longer because you have more  
15     unloading to do than if they spread them out?

16                MS. MARIAM: Yes, I wouldn't say all of it  
17     is due to bunching. I would say the majority is due  
18     to bunching and yes, you're correct, we would have to  
19     have it longer because we would get it all at once,  
20     we would get it on a Friday and we would not have  
21     enough time to produce --

22                COMMISSIONER OBERMAN: And when you try to

1 challenge that at the CTA and the CTA said we're not  
2 going to deal with the part of it that's in the  
3 United States?

4 MS. MARIAM: Yeah, they don't have  
5 jurisdiction for any portion in the United States.

6 COMMISSIONER OBERMAN: So, have you  
7 contested these -- that portion of the CN charges  
8 directly with CN?

9 MS. MARIAM: We have, and they would blame  
10 the other carriers, so they would -- and we asked to  
11 bring all of the carriers in and sit down and discuss  
12 what is happening with the bunching because -- we are  
13 missing information, we don't know the information of  
14 when the interchange happened, who -- apparently  
15 there is one carrier notifies the other carrier when  
16 the cars are available.

17 We don't have that information, so we  
18 don't know when -- who's bunching it, when the  
19 bunching is happening, what is occurring. So we're  
20 missing information, so they're reluctant to sit down  
21 and discuss with us.

22 COMMISSIONER OBERMAN: Well, is it CN's

1 position when you contest these -- is it still  
2 pending, the dispute with CN?

3 MS. MARIAM: No, not that I'm aware of.

4 COMMISSIONER OBERMAN: They've rejected  
5 it?

6 MS. MARIAM: I believe so.

7 COMMISSIONER OBERMAN: So, do I understand  
8 it this way, CN says it's not your fault and it's  
9 not our fault, it's some other carrier's fault, you  
10 pay anyway." That's their position?

11 MS. MARIAM: They don't say it's not our  
12 fault, they usually also blame us, and they also  
13 blame a different carrier, they just choose to not  
14 accept any fault on their own part.

15 COMMISSIONER OBERMAN: Now, let's assume  
16 they aren't at any fault, for the moment. They seem  
17 to be saying even if it's another carrier's fault you  
18 pay.

19 MS. MARIAM: Exactly, yes.

20 COMMISSIONER OBERMAN: And have you said  
21 "no, make the other carrier pay?"

22 MS. MARIAM: They want us to prove that

1     it's not our fault.

2                   COMMISSIONER OBERMAN:   They just put the  
3     burden on you to prove what the other carrier's  
4     doing, is that what you're saying?   And, on what  
5     basis do they say part of it's your fault?

6                   MS. MARIAM:   Well sometimes I think when  
7     we do order cars, sometimes it is our fault, and we  
8     would accept some of the charges, that's completely  
9     our fault, so --

10                  COMMISSIONER OBERMAN: In what way is it  
11     your fault?

12                  MS. MARIAM:   When we order too many cars  
13     or at one time.   And we are, we have extra cars  
14     sitting there or we aren't producing fast enough, so  
15     we do have extra cars.

16                  COMMISSIONER OBERMAN:   So, sometimes you  
17     misjudge how many cars you need.   And are you able to  
18     sort out which parts are attributable to what you've  
19     done and what's attributable to some railroad's  
20     bunching?

21                  MS. MARIAM:   We have tried to our best  
22     ability, but the majority of the time it's as a



1 result of bunching because we do strategically order  
2 cars and we know how much each plant needs to  
3 produce what we need to our input.

4 COMMISSIONER OBERMAN: Alright, and in  
5 your dispute process with CN, do you provide them  
6 with this evidence to say "look, of all of these  
7 incidents we over-ordered here, but the rest of it  
8 we didn't," and they say "we don't care, you pay  
9 anyway," that's what I'm trying to get at here.

10 MS. MARIAM: We did, we -- I'm not sure if  
11 we do that with CN, but I know with CP we did, when  
12 we sat down in Canada with them, with the Canadian  
13 equivalent. We basically had an entire spreadsheet  
14 created of what we were ordering, where it was  
15 getting bunched and what we were receiving, how much  
16 demurrage occurred, and because we were missing that  
17 information of the interchange, they essentially  
18 didn't consider it and they wanted us to bring more  
19 information to the table which we weren't able to  
20 obtain.

21 COMMISSIONER OBERMAN: You'd have to do  
22 some kind of formal discovery process, I gather, to

1 get data from the other railroad, from the  
2 interchanging railroad?

3 MS. MARIAM: Exactly.

4 COMMISSIONER OBERMAN: But that's the  
5 Canadian Program. Is all the CP 430,000 was that all  
6 in Canada?

7 MS. MARIAM: I believe so.

8 COMMISSIONER OBERMAN: So alright, well  
9 I'll pursue it further with the railroads, but you  
10 know, we're grappling with this idea of  
11 incentivizing -- there's no incentive that would  
12 cause you to be able to control what some delivering  
13 carrier is doing with bunching, you can't do anything  
14 about it, so making you pay doesn't help the system.  
15 Is that a fair statement?

16 MS. MARIAM: It is.

17 COMMISSIONER OBERMAN: Bobby, I just have  
18 -- I want to clarify a couple of things. First of  
19 all, before I ask you a question, I'd just like to  
20 note that one of your grandfather's shredders is in  
21 my Ward in Chicago. It's a very impressive operation  
22 but the reason I know it's there is that it

1 occasionally shoots out big chunks of metal into the  
2 backyards of some of my constituents.

3 MR. TRIESCH: Yikes.

4 COMMISSIONER OBERMAN: And they made that  
5 clear to me.

6 MR. TRIESCH: On the advice of counsel --

7 COMMISSIONER OBERMAN: My former  
8 constituents. It's not your yard and the yard's  
9 moving, finally.

10 MR. TRIESCH: I know which one you're  
11 talking about.

12 COMMISSIONER OBERMAN: It's quite an  
13 impressive operation. They're family friends,  
14 actually, the owners of that so I can feel free to  
15 say what the facts are. The -- I just wanted to make  
16 sure the record was clear here. You know, I went  
17 into great lengths with your counterpart in  
18 Harrisburg yesterday.

19 You seem to be physically in a similar  
20 situation -- landlocked in terms of being able to do,  
21 to spend capital if you wanted to spend it, it  
22 doesn't sound like that's a good option for you?

1 MR. TRIESCH: Correct, yes, sir.

2 COMMISSIONER OBERMAN: So, if you tried to  
3 separate out the effects of deliveries from PSR, from  
4 the reduction to zero days. In other words, if you  
5 had -- well let's follow-up what Patrick says, if  
6 you had 24 -- 1 day, could you avoid all of these  
7 demurrage charges?

8 MR. TRIESCH: I didn't do that  
9 calculation, I asked the lady that works for us, I  
10 asked her the question if we had 2 days, what would  
11 happen and I don't know the percentage but the vast  
12 majority go away, so in other words --

13 COMMISSIONER OBERMAN: With two days.

14 MR. TRIESCH: With two days, I did not run  
15 the calculation with 1, but I said go back and run it  
16 and she said "yeah, they basically all go away other  
17 than those that we may occasionally do to ourselves."

18 COMMISSIONER OBERMAN: So, the bulk of  
19 that 750,000?

20 MR. TRIESCH: Yes, sir.

21 COMMISSIONER OBERMAN: So, if we're trying  
22 to say where's the pressure point in the system, you

1     seem to have no place to move over here to spend  
2     unlimited capital, if you had it and over here, it's  
3     the railroad having to give up from zero to perhaps 2  
4     days to resolve this problem, that seems to be the  
5     options.

6                 MR. TRIESCH:   Yes, sir.

7                 COMMISSIONER OBERMAN:   And, I say this so  
8     facetiously, but only partly facetiously, if Wall  
9     Street has moved them from 5 to 4 to 3 to zero, 2 to  
10    zero, is the next move to minus 1?

11                MR. TRIESCH:   I wish you wouldn't have  
12    said that.

13                COMMISSIONER OBERMAN:   You think they  
14    needed to hear it from me to plug it in there?  
15    Alright, I just sort of -- so again, the \$750,000 is  
16    no incentive, there's nothing you can do to avoid it?

17                MR. TRIESCH:   That's exactly right and  
18    that's what I was trying to say.

19                COMMISSIONER OBERMAN:   So, it's all --

20                MR. TRIESCH:   Revenue.

21                COMMISSIONER OBERMAN:   Well, it's all  
22    revenue, it doesn't fulfill the purpose of the

1 demurrage statute to make the system flow because  
2 you're -- to accept Patrick's premise -- you're  
3 operating if not in perfection, you're operating as  
4 efficiently as a business can?

5 MR. TRIESCH: I take a lot of pride in the  
6 way we operate. We have really good people that are  
7 not only thinking, they're proactively and  
8 predictably thinking about "oh my gosh, what could  
9 happen," we're analyzing railcars and movements. I  
10 think we do a really, really good job.

11 COMMISSIONER OBERMAN: They're not sitting  
12 around with their feet up and eating Bar-b-que.

13 MR. TRIESCH: No, sir. Which is why I've  
14 come to my personal conclusion which to me is just  
15 that a negotiating tactic has been taken to an  
16 extreme and no compromise back. I think that's the  
17 solution, that's my personal two cents.

18 COMMISSIONER OBERMAN: Thank you, yeah,  
19 thank you.

20 VICE CHAIRMAN FUCHS: And just quick in  
21 the interest of fairness, you know, I think both Ms.  
22 Mariam and Mr. Triesch, you both touched on something

1     which is: it's not the case that when a bunch of cars  
2     go back to the facility, a bunch of empties, that  
3     outstrip capacity, it's not the case that it's not  
4     your fault.

5                 In other words, there are some bunches  
6     because you order too much where it is your fault.  
7     So, it's kind of tricky because --

8                 MR. TRIESCH:   Not us, we don't order.

9                 VICE CHAIRMAN FUCHS:   So, when would, talk  
10    me through your example where demurrage, you would  
11    rightfully get demurrage, is it just on the loading  
12    and unloading?

13                MR. TRIESCH:   Okay, so a case where we  
14    would rightfully have demurrage --

15                VICE CHAIRMAN FUCHS:   Yeah.

16                MR. TRIESCH:   -- is if we have a scheduled  
17    outage at our plant.

18                VICE CHAIRMAN FUCHS:   Okay.

19                MR. TRIESCH:   -- and we have no product to  
20    ship.

21                VICE CHAIRMAN FUCHS:   What about, Miss  
22    Mariam, you said sometimes you order too many cars?

1 MS. MARIAM: It doesn't happen that often,  
2 I was just giving an example.

3 VICE CHAIRMAN FUCHS: And I'm not saying  
4 it happens often, but I'm just let's say you both  
5 never did that, but let's say there's a hypothetical  
6 example where you may have ordered too many, how  
7 would we, how could we differentiate the case that  
8 I've kind of been using you know, over and over  
9 again, probably people are sick of it, which is the  
10 5, 5 and 5 on three separate days for a facility that  
11 has 10 spots, that come back as 15, okay.

12 That one there's natural -- the way I've  
13 been describing it is natural variability in transit  
14 times, plus efficiencies with railroading, it comes  
15 back as 15, it outstrips capacity. That's just a  
16 cycle time back, everything is cycling back, alright.

17 Now, talk me through using that kind of  
18 hypothetical, or whatever hypothetical you want,  
19 about when a bunch would be the fault of the  
20 receiver.

21 MS. MARIAM: I don't know if there would  
22 be an example when bunching would --



1                   VICE CHAIRMAN FUCHS: I don't mean, get  
2 away from the term bunch, but just too many empties  
3 relative to your capacity. How would we be able to  
4 verify that that was your fault? I mean not your  
5 fault, a receiver's fault.

6                   MR. TRIESCH: I would say so having too  
7 big of a fleet. If you have more cars than you can  
8 have in your fleet because of ups and downs in the  
9 markets, you have to respond by sending excess cars  
10 to off site storage, which we've done as I told you  
11 about 106 or 110 cars. We acknowledged that we have  
12 too many cars in our fleet, so we've had to take  
13 actions.

14                   That's not instantaneous. That can't  
15 happen one day. And just furthermore, I mean going  
16 back, the Doraville yard, the NS yard that's adjacent  
17 to us.

18                   VICE CHAIRMAN FUCHS: Sure.

19                   MR. TRIESCH: Historically, and we've had  
20 storage issues in the past, four to five years ago we  
21 had an issue that really had to do with -- we went to  
22 open gate because they wanted us to be open gate.

1 The problem with that -- the crews wanted to supply  
2 cars LIFO.

3 VICE CHAIRMAN FUCHS: Right.

4 MR. TRIESCH: So, I had a car, I had some  
5 cars up in the very front of the yard that didn't  
6 move for a year.

7 VICE CHAIRMAN FUCHS: And something, you  
8 know, we haven't talked about as much, but the LIFO,  
9 FIFO, is it important, yeah.

10 MR. TRIESCH: So, we went back and forth  
11 with them, but the way we ultimately settled that  
12 peacefully, amicably with my counterparts at the  
13 railroad was "look Bobby, we think that you having 85  
14 cars in our yard is the right number, meaning that's  
15 about 5 day. I'm telling you what the conversation 4  
16 or 5 years ago."

17 And so they said "look, so maybe what we  
18 can do is if you ever have more than 85 cars in a  
19 yard, then you acknowledge or you stipulate that you  
20 have too many cars in our yard and then we're going  
21 to charge you."

22 We batted that back and forth, he took it

1 up the ladder at NS and somebody didn't like that, so  
2 we didn't do anything with that. Today, we're asked  
3 for if we have more than 28 cars -- which would be  
4 two days of switching -- , if we have more than 28  
5 cars that were causing congestion to have zero  
6 demurrage, we would have 14 cars because that's all  
7 we theoretically could take in one day.

8 VICE CHAIRMAN FUCHS: I hear you, but I  
9 want to quick just make sure we get the LIFO/FIFO,  
10 because it's a non-issue we've talked a lot about,  
11 but it's been mentioned in two other testimonies. Is  
12 it your view that cars that are fungible should be  
13 treated kind of neutrally for the purposes of  
14 demurrage, if you know what I'm trying to get at,  
15 which is that regardless if one, you know, came in  
16 earlier and one came in later, but the later one's  
17 easier to get out.

18 You basically, you know, can transfer that  
19 so you're just not continually getting demurrage. If  
20 the cars are fungible, that is what a reasonable  
21 practice is.

22 MR. TRIESCH: Yes.

1                   VICE CHAIRMAN FUCHS:   Alright, now going  
2   back to the example, you know it is just an  
3   interesting scenario though because alright, so you  
4   have the 5, 5, and 5 and then you have the spots for  
5   10, and then 15 all come back.

6                   How, you know, -- and what I gather from  
7   what you're saying is okay, so you're going to get  
8   demurrage on that 5 and you're going to loading and  
9   unloading the 5 -- but if you were to say reduce  
10   your fleet to 10, and just do 10, you would have a  
11   car shortage for that third day of loading if you're  
12   tracking with me.

13                  MR. TRIESCH: We could.   We have to have  
14   more cars to make up for the way cars come back.

15                  VICE CHAIRMAN FUCHS:   Okay, but now take a  
16   scenario where a fleet is too big, right?   And so,  
17   that's what I'm hearing, you're describing, here's  
18   demurrage that our fleet has just been too big for  
19   the normal cycle times, and so we're actually using  
20   railroad capacity, and in a way that there should be  
21   some sort of incentive for us to deal with that okay.

22                  How would we know, like you know, when

1     somebody's fleet is too big? Do you know what I'm  
2     saying? Like when we're thinking about the bunching  
3     issue, it strikes me that some bunching -- I say  
4     bunching -- some bunching is going to be because  
5     people's fleets are too big and they're making too  
6     many empty car orders or something. And some  
7     bunching's going to be listen -- things are going  
8     great but it's just our shipping capacity through  
9     natural variations.

10                 And what I'm struggling with is how to  
11     differentiate.

12                 MR. TRIESCH: Sure. It's inevitably messy  
13     because of normal changes -- there could be weather  
14     related things, there's railroad related things,  
15     there's breakdown related things. The best way to  
16     do it is acknowledge that it's never going to be  
17     perfectly timed where the cars are going to get  
18     released from steel mills to the railroad to building  
19     a train to back on a just in time basis.

20                 We are going to be forced to pay, if it is  
21     zero credit days, we will be forced to pay more money  
22     for having provided a fleet to do business with the

1 railroad. If -- and I think most shippers probably  
2 have good relationships with their railroad partners,  
3 I'm just assuming that. But the way it would have  
4 happened, or not in the past, but even right now --  
5 they would say "hey, you know, you've got more cars  
6 than we need in our yard, you know, what's going on  
7 here.

8 Yeah, we're charging you demurrage, but you know, you  
9 need to move some cars out." And that's what  
10 happened in February after we had \$135,000 bill, it's  
11 like, okay, we got -- you guys are now moving cars a  
12 lot faster, we got more cars than you want in your  
13 yard, we are now going to have to make arrangements  
14 and we have to go negotiate a deal and we had to send  
15 cars to storage, you have to pay the freight to get  
16 into storage, you don't get to use your empty move to  
17 take them to storage.

18 So, you know, that was another \$100,000.

19 VICE CHAIRMAN FUCHS: So to kind of put a  
20 -- one way to look at it, just to kind of summarize  
21 it, is one thing that we're hearing is oh, you know,  
22 the Board ought to think that zero hours of free time

1 is just unreasonable, right because of the natural  
2 variability, right?

3 And then, is another way to think about it  
4 that zero free time should be presumed to be  
5 unreasonable unless the carrier can establish, you  
6 know, that there's capacity and they ship relative  
7 to what the shipment size is, you know. And there,  
8 you know, is there something that, you know, where  
9 zero hours free time the shipper -- or excuse me, the  
10 carrier -- could overcome and actually show that  
11 something actually could be reasonable based on what  
12 the actual capacity is?

13 In other words, presumptively unreasonable  
14 unless on a showing that it could be. I'm just  
15 thinking about ways that people are trying to tell,  
16 people are telling us to think about this. And I  
17 know what you're telling us is that for your case,  
18 zero is always unreasonable.

19 But you know what I mean is that, you  
20 know.

21 MR. TRIESCH: Anybody who would come and  
22 say zero is reasonable is not being truthful -- or is

1 not really looking and doesn't really granularly  
2 understand and watch the movements of railcars.

3 VICE CHAIRMAN FUCHS: Or, they could have  
4 a lot of capacity relative to their shipment size.

5 MR. TRIESCH: That is correct. I just, I  
6 truly believe that and I'm telling you the truth.

7 CHAIRMAN BEGEMAN: Thank you all, really  
8 super helpful, very informative and we will call up  
9 panel 10.

10 Panel X

11 CHAIRMAN BEGEMAN: Alright now, we will be  
12 on Panel X and why don't we start with Steve?

13 MR. DEHAAN: Thank you. Honorable members  
14 of the Surface Transportation Board, thank you so  
15 much for holding the hearing today, we really  
16 appreciate it. I was just telling some of my  
17 colleagues in the first part of March, I was with our  
18 Transportation Advisory Committee, 95% of them are  
19 rail customers and we had rail demurrage on our  
20 agenda, and we talked about how we help our members  
21 file complaints on demurrage charges.

22 And if we had one continuous theme to run



1 throughout all of those complaints as a proper  
2 resolve to this situation, what would it be? Well,  
3 little did I know 10 days later I'd be notified that  
4 you were holding a hearing.

5           So, it was kind of strange that it all  
6 happened. So I'll just tell you something a little  
7 more about the Association. We were formed in 1891,  
8 25 warehouse guys got together to discuss rail  
9 demurrage. Here we are 128 years later and we're  
10 still talking about it.

11           And it's just kind of an interesting  
12 thing. And I'm just going to kind of bottom line it  
13 a little bit to say some of the things here, but the  
14 bottom line is we really believe the resolve from the  
15 people that were in the room that the resolve is  
16 define demurrage as after actual placement 48 hours  
17 to unload.

18           We have members that unload grain in bags.  
19 We have them unload chemicals, lots of boxcars, lots  
20 of food, just about all of our warehouses are food  
21 grade, sanitary, it's important that when we receive  
22 a boxcar of goods that it is intact, sometimes

1     they're not. More so, since there's been more  
2     bunching because the more times you slam into that  
3     car the more the load shifts. So, there are lots of  
4     issues for us.

5             And when I say actual placement, what do I  
6     actually mean? For a shipper, and I might even  
7     suggest that the STB might want to create a key  
8     performance indicator of these so that you can  
9     develop hard data that's verifiable. Right now, it  
10    seems like all the data we have we beg for from the  
11    railroads.

12            And this would be verifiable from shippers  
13    and receivers. And it would be at the door, released  
14    from the door, time and date. And then at a  
15    receiver's door, at the door, date and time of  
16    release. That gives you hard data to compare up  
17    against, and you don't have this thing where -- and  
18    one of the statistics I heard from the railroads was  
19    "73% of our loads are delivered on time. Well that's  
20    on time to the local yard, what good is that?"

21            That doesn't help the car get unloaded.  
22    That doesn't put the car back in service, it doesn't

1 do anything. And we talked a lot about last mile,  
2 and it is in the last mile. It has to get to the  
3 door, and it has to have a crew and stacking  
4 equipment and all kinds of stuff available to the  
5 warehousemen in order to do that.

6 And so, absent of that, there's nothing  
7 that our receivers can do to do it. And I just go  
8 through it, you know, we talk about control over the  
9 cars. Who has control? Because without control,  
10 you can't do anything. Nothing. And for us, until  
11 it shows up at the door, we have no control. We  
12 can't get it there, nor can we get it back in the  
13 yard afterwards.

14 We are totally reliant on the railroads to  
15 do that. But they seem to have a different system.  
16 They think once they get to the yard, we start into  
17 system 2. Well, shippers aren't paying for system 2,  
18 they're paying for the load to be delivered to the  
19 receiver period.

20 So, you know I hear all of the things out  
21 there about demurrage and time and dwell and  
22 everything else, and you can read my written material

1 and it's very specific. And fortunately, I was  
2 playing devil's advocate with our own members, same  
3 as the questions you're asking the group. Asking  
4 them about this, and asking them about that, and  
5 how's this work and how's that work, and the only  
6 thing that we could get --

7 I could only get 75% agreement in the room that  
8 actual placement 48 business hours would work. That  
9 would work. I talked to them about 24, I did not  
10 talk to them about zero because that's outrageous and  
11 we all recognize that was outrageous.

12 So, I talked to them about 24. Well, it  
13 all depends what they're unloading. If they're  
14 unloading grain, they can't unload a car in 24 hours.  
15 If they're unloading everything on a pallet, it  
16 might take then 2 hours, it just depends what kind of  
17 loads they're getting.

18 Well, they don't know what kind of loads  
19 they're getting. So how do you set a rule or best  
20 practice and put it into place without doing that?  
21 So, I just wanted to let you know that. We have no  
22 control over the railroad's tariffs. We have no

1 control over when they change their tariffs.

2 But you do, as the STB. And the warehouse  
3 has no control into the when, how or the timing or  
4 anything else of that. So, again I just suggest if  
5 we could get a date and time stamp, on those four  
6 indicators, it could be verified outside of the  
7 railroads, and you would have concrete data and it  
8 would be very measurable concrete data.

9 And if you're going to make decisions in  
10 the future, we have to do data. And we're all big  
11 data today, everybody is big data today. And by the  
12 way, I was sitting with some receivers out in the  
13 audience and said they're all watching to see what  
14 cars are arriving. They're getting it on their  
15 phones, they're watching it. They're going out in  
16 the hallways making calls about making sure because  
17 they're here, they want to make sure they're doing it  
18 right and they're all doing it.

19 They're active members in this, they want  
20 to serve their customers well, their customers are  
21 the shippers because they get paid by the shippers  
22 and they don't get paid until that car is emptied.

1 They cannot bill it until it's empty. So, they have  
2 no investment in anything up to that point, although  
3 they can be penalized.

4 And they don't like it very much when  
5 they're penalized when it's like I've got my hands  
6 tied, you know, I've got service days, but I don't  
7 get delivered. I only get delivered two-thirds of  
8 the time.

9 I ask for more service days because I've  
10 got 15 cars in the yard and I've got 5 doors, I need  
11 another service day. I don't want to pay more  
12 demurrage. I don't want any demurrage charges for  
13 my shipper. I don't want any of this. How do I get  
14 another service day, et cetera, et cetera?

15 So, I asked myself, how does it work with  
16 other industries? Well, our guys receive trucks all  
17 the time. But you're given a window, your truck has  
18 to arrive within that hour long window. And we are  
19 given a window often by the shippers as to how long  
20 we have to unload that truck. So, when it has to be  
21 back out on the road. It happens all the time.

22 You see it in the airlines. You see it

1 all the time. You see the times being adjusted,  
2 thank goodness for Google, we could all see where the  
3 congestion is. We have guys that deliver auto parts.  
4 They have 26 touch points every month, different  
5 hours of the day, 6 days a week, 26 touch points.

6 If you hit all 26 touch points by your  
7 assigned time -- let's just say 10, 2 and 6 -- you  
8 get a 2% bonus. Now that's an incentive to try to  
9 hit every touch point. You miss one time and you get  
10 paid your contract. You miss two times, and you  
11 subtract 2% off your -- that's a 97% rate that you  
12 have to meet in order to get your contract.

13 You have to do it. That's how you get  
14 paid. And you're not going to make any money if you  
15 don't get to that standard. When you come to the  
16 railroads and we talk 73% to the yard. We talk 38  
17 to 50% of the customers are billed demurrage --  
18 that's a failure rate.

19 That's a failure rate to serve their  
20 customers and they're telling you what it is. 73%  
21 delivery rate, come on, what is that? We don't have  
22 that anywhere in the logistics industry. I remember

1    when my daughter sometimes was whining -- and I heard  
2    a lot of whining from the railroads, "it's too  
3    complicated, it's too complex, it's too much  
4    government oversight, elaborate dispute systems,  
5    notice before changes." Oh, asset utilization, I love  
6    that. We all want to utilize our assets. We  
7    particularly want to utilize our assets, it's not  
8    just the railroad that wants that. Every supplier  
9    wants that, and every receiver wants that.

10               Well what is that? It's the same for  
11    everybody. We value our customers. Well no, you  
12    don't. You only have a 73% success ratio in getting  
13    it to the yard on time. You haven't gotten it to the  
14    end receiver, only to the yard.

15               And you've got a 38 and 50% demurrage  
16    rate. What does that say about how you value your  
17    customers? There is no valuing of the customers.  
18    It's all about their business. It's all about their  
19    business. And I remember one time when my daughter  
20    was in college and she was whining about how tough  
21    life was and all of her problems and how it was so  
22    hard to study and everything.



1                   And I told her. "You know what? You're  
2   just going to have to suck it up." Because that's  
3   the message we have to sort of send to the railroads.  
4   It's time that you start performing and stop listing  
5   all of the things that stop you from performing.

6                   They keep blaming others and yet we don't  
7   get paid unless the goods arrive. There's nothing we  
8   can do about it. So, when I talk about actual  
9   placement, that solves, and you've got all these  
10   credit systems, all these storage systems, all these  
11   leasing systems, you got all these other things.

12                  Why? Deliver the goods. Stop writing all  
13   these tariffs, deliver the goods, start the clock  
14   then. If we don't get our job done on the other end,  
15   then we can start talking demurrage, but don't start  
16   talking demurrage if the goods haven't been  
17   delivered. That's just ridiculous.

18                  You can get a door time. They know when  
19   that car's put in service. They know how many doors  
20   the receiver has. They can get a door time. They  
21   can alter that door time as you move along. If the  
22   receivers know what the load is, they can estimate

1 the unload time.

2           They can work with the railroads and often  
3 do and a lot of them have really good relationships  
4 with the yard people and they work together to make  
5 sure. But what we have happening now is we've got  
6 longer trains and we talk congestion. I didn't even  
7 know there was a congestion fee until I arrived,  
8 nobody in our industry had talked about it yet. And  
9 it's kind of interesting to see what was happening  
10 here.

11           But the trains have gone from 4 to 600 --  
12 and I'm getting this information from my members --  
13 they've gone goes from 4 to 600 feet to 600, to 800  
14 feet. So, they are delivering 33 to 50% more cars  
15 to a yard and every time they build a train, they're  
16 building it with 33 to 50 more cars, 53% more cars.

17           Well what does that do to a yard? How do  
18 you handle 50% more cars in your yard and get it all  
19 managed so you can get it out on the service tracks  
20 and get it delivered to your customer or get them  
21 back and get them built up so you can send them back?

22           They created their own issues of yard

1 congestion and now they've developed a fee for it.  
2 It's amazing, it's just absolutely amazing. And  
3 they've done it -- not only that because it doesn't  
4 work, the demurrage clock goes off as well. All the  
5 clocks go off and you can see from my testimony  
6 there.

7 I started in this industry in 2013, the  
8 demurrage charge was \$50 a day per car. We've heard  
9 testimony here, nothing was below \$130. A lot of  
10 them were \$200, okay? We went from 48 hours to 24,  
11 my testimony says that that's an 800% increase.

12 I happen to be a statistician, I'm firm in  
13 my numbers. It's an 800% increase in 6 years. What?  
14 It reminds me of that little insurance commercial,  
15 what? You're stealing from me? It reminds me of it.

16 We've just got to move forward with this.  
17 I've watched systems with the truckers, and I've  
18 watched our systems managing brokerages, I've watched  
19 the airlines, I've watched them all, and I've got the  
20 boards of movement. I'm sure, I'm positive that the  
21 railroads have them. Our customer service  
22 departments follow all of those trucks all the time,

1 we know where they are, we send messages out to our  
2 customers all the time saying we're stuck in traffic  
3 here, you know, the Cincinnati Bridge, "we're backed  
4 up two hours again. You know, we've had an accident  
5 here, et cetera." All of those messages go out all  
6 the time. Our customer service representatives, our  
7 CSR's are busy all the time because we take care of  
8 our customers. Do you get any of that from the  
9 railroad? Oh, you better go check their system.

10 They can't tell you, they tell you to go  
11 check their system. You heard that testimony. Well,  
12 you have to go check our system. No, you know, need  
13 to know what's in your system and where your cars are  
14 and whether you're providing service to your  
15 customers or not. It's not for the customer to whine  
16 about going in to check it, it's about your making  
17 sure you're providing the service.

18 And that's what it's all about. I'm sorry  
19 to be so forceful and so straightforward. We've had  
20 this problem for 125 years. In the last 6 years it's  
21 quadrupled. When we gave the railroads the right to  
22 write their own tariffs, we trusted them. That they

1     would use their numbers and their knowledge and that  
2     they were sincere about their wanting to provide  
3     service, et cetera. And so we gave them the right to  
4     do it and stop all the oversight.

5             There is no trust anymore. You've heard  
6     so much testimony from so many people that they got  
7     something they didn't know was going to happen to  
8     them. And they won't trust the railroad ever  
9     again, ever.

10            Because they got rolled over. Multiple  
11     hundred thousand-dollar demurrage bills for a little  
12     3 million-dollar operation? What is that? I mean  
13     there's just no concern, no working with the  
14     customer, no nothing.

15            I listened to them up here, "well we're  
16     consider that on a case by case basis." No. You are  
17     systematic about sending those demurrage invoices.  
18     You don't even double-check them, you just send them  
19     and then it's up to the receiver to double-check them  
20     and I love your questions by the way, do you ever  
21     look at them, they don't.

22            They're system generated and they're awful

1 and they pile up. So, we are considering putting  
2 into our standard contract a demurrage mitigation fee  
3 because it takes so much time. 38% demurrage charges  
4 -- look at all the executive time, look at all the  
5 manager time, look at all the logging time, look at  
6 all the cameras we have to have out there to look at  
7 the loads to make sure they came in.

8 Look at all the evidence we have to create  
9 in order for somebody on your staff here to say yeah,  
10 there's enough evidence there if the railroads still  
11 refuse. I mean it's just outrageous. You have a  
12 whole staff to it, our members have a whole staff to  
13 it, the railroads have whole departments to it.

14 What is this? Get rid of it. Actual  
15 placement, time to unload. Reasonable fees, 48  
16 business hours. If you make it business hours, it  
17 doesn't matter when to bring the cars, as long as I  
18 can get a crew in to unload it. If I know it's  
19 coming it's even better, but if I have a crew there  
20 and you don't deliver it, shame on you. The  
21 railroads should know better.

22 It's just awful, they're not a good

1 partner. They are good at moving goods long  
2 distances and they are good at heavy loads. There is  
3 a place for them. You'll see in my testimony where  
4 55,000 loads -- truckloads -- go unshipped every day.  
5 We need more logistics movement than ever, but boxcar  
6 shipments are down 16%.

7 We get charged demurrage. One of the  
8 companies if I took their quarterly demurrage charge  
9 for the first quarter of 2019, would have 1.5 million  
10 dollars in demurrage. They could buy 10,000 boxcars  
11 for that at \$140,000 a car.

12 It's not about dwell time, it's not about  
13 it. You ride by any yard, any yard, you'll see  
14 boxcars sitting on the sideline. And if you ride by  
15 it 5, 10, 20, 30, 2 months, 6 months, they're still  
16 sitting there. Maybe they're broken, who knows. But  
17 why would you have a broken car sitting on the track,  
18 particularly when your yards are full?

19 You would get rid of them. There's all  
20 kinds of things out there that make you question what  
21 is really going on? I'm hearing this but it doesn't  
22 marry up to what I'm seeing. I'm hearing this, but

1 it's not what's happening to me. I'm hearing this  
2 that they're open, but every time I talk to them,  
3 they're really difficult to deal with.

4 So, with this, I leave you again, the  
5 easy, really easy answer. Actual placement, 48  
6 hours, 48 business hours to unload. It just  
7 simplifies everything. I thank you.

8 CHAIRMAN BEGEMAN: Thank you very much.  
9 Kathryn?

10 MS. CLAY: Good afternoon, good afternoon  
11 Chairman Begeman, Vice Chairman Fuchs and Board  
12 Member Oberman. Thank you for the opportunity to  
13 testify today on behalf of the International Liquid  
14 Terminals Association and I also want to thank the  
15 Board for not only holding the hearing but the  
16 inclusiveness of the hearing and if I may compliment  
17 you on your stamina, your stamina and that of your  
18 staff, so thank you very much for that.

19 The International Liquid Terminals  
20 Association represents more than 85 companies  
21 operating liquid terminals in all 50 U.S. states and  
22 in 37 countries. Our members' facilities form a



1 critical link in the transportation of a wide range  
2 of liquid commodities, including crude oil, refined  
3 products, chemicals, renewable fuels, fertilizers,  
4 vegetable oils and other food grade materials.

5 We view ourselves as an intrinsic part of  
6 the transportation system, largely because terminals  
7 provide essential logistics that enable inner  
8 connections between different modes of  
9 transportation, including from different modes to and  
10 from rail in commerce.

11 This is obviously a very complicated set  
12 of issues. We have heard over the last day and a  
13 half many, many different aspects that the Board is  
14 taking under consideration. My remarks and the  
15 position of the ILTA is very focused on one very  
16 specific issue. And that has to do with the  
17 responsibility for demurrage charges. Our issue  
18 actually also differs a bit from some of the other  
19 testimony that you've heard because it does not arise  
20 from the last 18 months in precision railroad  
21 modifications and innovations, but rather back to an  
22 STB decision in 2014 which held that the railroads

1     were able to seek compensation for demurrage from  
2     consignees rather than solely from shippers.

3                     While it is not a perfect analogy -- and  
4     you've got my written testimony. I thought a little  
5     bit about how to be a little less dry than the  
6     written testimony, so forgive me for using an  
7     analogy, it is not a perfect analogy but what comes  
8     to mind is many states will tax tobacco because they  
9     want to incentivize people to not expose themselves  
10    to health risks.

11                    And we have a public shared goal of  
12    increasing public health. In this situation we have  
13    a shared goal -- all of us, the terminals, the  
14    railroads, all of the shippers -- we have a shared  
15    goal of having the most efficient productive system  
16    possible.

17                    In the case of tobacco, we disincentivize  
18    the public health consequences, the illness, by  
19    taxing the direct tobacco product, so the user of  
20    that product receives the tax. If we were to take  
21    the kind of analogy to what we're seeing in the  
22    terminal business, it would be as if we were taxing

1 people for breathing in secondhand smoke. Now, I  
2 suppose that that could work through peer pressure  
3 that you could then incentivize those secondhand  
4 smoke breathing individuals to go to the smokers and  
5 ask them to stop smoking, but it would be an awfully  
6 indirect way to go about disincentivizing smoking.

7 In just the same way, by charging  
8 demurrage fees to the consignees rather than the  
9 shippers, you are divorcing the action from the  
10 responsibility. And for taxation to work, or any  
11 kind of disincentive charges, if you ask any  
12 economist, you have to be attaching that taxation or  
13 that fee to the behavior that you want to avoid.

14 Terminals are not customers of the  
15 railroads, they have no direct contract or service  
16 agreement with the railroads, instead we share  
17 customers. And those customers have contracts with  
18 the terminal to provide a fixed volume storage and a  
19 rated capacity to load and unload railcars for those  
20 accounts.

21 While terminal operator service agents for  
22 their customers in directing railcar activity at the

1 terminal, they operate at the behest of their  
2 customers when placing cars. Terminal operators do  
3 not own the products, do not initiate the shipments  
4 and do not schedule receipts.

5 We believe that the rule in 2014 had this  
6 effect as a purely unintended consequence, but by  
7 creating the ability for railroads to seek  
8 compensation for demurrage from terminals or other  
9 consignees, it severely weakens the intention of what  
10 demurrage is about and the kind of behavior it is  
11 meant to encourage and the kind it is meant to  
12 discourage.

13 In the last 5 years we've seen the  
14 situation become increasingly untenable for terminal  
15 operators. In its 2014 comments, ILTA noted to the  
16 STB during the rule-making process that this rule  
17 would virtually guarantee constant disputes and  
18 endless litigation on behalf of terminals and  
19 railroads.

20 And in fact, that situation has come to  
21 pass. Railroads and terminal operators are  
22 increasingly involved in litigation over payment for

1 demurrage incurred on shipper's railcars on their  
2 behalf.

3 Most terminals do include clauses in their  
4 contracts requiring that shippers would pay any  
5 demurrage fees that were incurred by no fault of the  
6 terminal operators. However in practice, terminal  
7 operators often find that they are unable to just  
8 verify the basic validity of the demurrage charges  
9 levied on them by the railroad.

10 So, because of the lack of visibility, the  
11 lack of transparency in the information provided by  
12 the railroads, even under the theory of the case that  
13 we could pass on those charges to the shipper in  
14 practice, it does not prove workable.

15 The demurrage invoices provided by the  
16 railroads often include railcars related to numerous  
17 shippers. The limited detail makes it difficult or  
18 sometimes impossible to determine which specific  
19 railcars and shippers were at issue in each case of  
20 demurrage.

21 In many cases railroads have not been able  
22 to provide further substantiation when the charges

1 have been challenged and terminal operators have been  
2 forced to establish and maintain management systems  
3 that are in many ways duplicative of existing  
4 railroad systems to track railcar activity through  
5 their facilities to attempt proper valuation of the  
6 demurrage charges.

7           And this has, of course, resulted in some  
8 considerable administrative burdens. The absurdity  
9 of treating terminals as if they were in some sense  
10 aggregate shippers, is perhaps to my mind, best  
11 encapsulated in the dilemma over free days credits  
12 that are assigned by the railroads.

13           So, confusion arises because the railroad  
14 will aggregate the 3 day credits across multiple  
15 shippers that do business at that terminal and then  
16 leave it to the terminal to decide how to them pass  
17 on, assign those credits. For the terminal operator  
18 this creates a very difficult dilemma. Allocating  
19 the credits between shippers is impractical, first in  
20 many cases, because it lacks the detail that we would  
21 need to disaggregate and assign those credits onward  
22 to the shippers.

1           Even more problematic, even if we could,  
2   to be fully transparent to the shippers, we would  
3   need to provide documentation explaining how the  
4   allocation of the credits fell across the entire  
5   transactions on the terminal property which would  
6   mean disclosing proprietary information.

7           Conversely, if the terminal decides that  
8   this isn't trackable and not possible, it's arguable  
9   that we are denying a benefit to the shippers that is  
10   owed to them under their contracts with the  
11   railroads.

12           ILTA members have been actively pursuing  
13   resolution of these challenges associated with  
14   demurrage through outreach both to our shipping  
15   customers and to the railroads. In some cases,  
16   shippers have refused to accept demurrage charges,  
17   citing the 2014 rule. In some cases, the railroads  
18   have also cited the 2014 rule saying that they have  
19   to charge the terminals due to the rule.

20           And we are left unfortunately, having  
21   pursued what we believe is all other recourse in  
22   negotiation and outreach to partners, no other

1 recourse but to come back to the STB and ask for a  
2 revision to the ruling.

3           Going forward, even if the railcars -- I'm  
4 sorry, the railroads -- were able to provide enough  
5 documentation to justify demurrage charges, we think  
6 that the 2014 ruling had again, an unintended  
7 consequence of creating an unwarranted expectation  
8 that terminals would be the mediators on demurrage  
9 between railroads and shippers.

10           So, again, we thank you for the  
11 opportunity to be here. It is a critically important  
12 issue to our industry, and we ask that the STB  
13 explore ways to amend the 2014 ruling and remove the  
14 option of direct billing of demurrage charges to  
15 consignees such as terminals. Thank you very much.

16           CHAIRMAN BEGEMAN: Thank you, Kathryn.  
17 Lowell?

18           MR. RANDEL: Thank you Madame Chairman. I  
19 appreciate the opportunity to be here. My name is  
20 Lowell Randel, I'm with the International Association  
21 of Refrigerated Warehouses, and we really appreciate  
22 the opportunity to speak at this hearing and the fact



1     that you're holding it and recognizing that there is  
2     a significant challenge facing the industry right now  
3     and I want to associate myself with the two other  
4     panelists, and really echo a lot of the things that  
5     they've been talking about.

6             But before I go into that, just a little  
7     bit about who we are. We're a third-party logistics  
8     member in the temperature-controlled space. So,  
9     these would be refrigerated warehouses that are  
10    third-party, so we're not owning any of the product,  
11    so much like the terminals or many of the IWLA's  
12    members as well. We're in that third-party  
13    logistics space, so we don't have the control that's  
14    been talked about already on the panel.

15            So, we feel like we're uniquely positioned  
16    and uniquely disadvantaged and part of that does stem  
17    from the 2014 ruling, so we would wholeheartedly  
18    concur that it is very appropriate to reconsider  
19    those policies and some of the unintended  
20    consequences and see if there's a way to more  
21    equitably look at demurrage liability, because we do  
22    feel like our industry and the third-party logistics

1 providers in general, are being disadvantaged and  
2 specifically so.

3 But rail, it's an important option for our  
4 members and we just did a recent survey of rail  
5 utilization in our industry. About two-thirds of  
6 our member facilities have functional rail spurs and  
7 rail access. That's actually down, so when we  
8 commented during the 2012 through '14 process on the  
9 previous ruling, I think that number was about 80%.  
10 We're starting to see members weigh out, "does rail  
11 make sense for our facility?" And demurrage is one of  
12 the driving factors.

13 Now, obviously, some of it is customer  
14 base and market conditions, but we're seeing overall  
15 fairly low satisfaction rates with the rail service  
16 and it's becoming a significant challenge for our  
17 members.

18 All the while we recognize that rail is  
19 good for the environment, there's fuel efficiencies,  
20 infrastructure benefits, but demurrage is limiting  
21 our ability to take advantage of those benefits.

22 Just an example from one of our larger

1 members, Americold Logistics. They've got 70 sites  
2 across the U.S. that have rail access and that has  
3 represented about 4,800 railcars so far in 2019.  
4 Over the past 3 years their demurrage charges have  
5 gone through the roof.

6 We're talking millions of dollars just for  
7 that one company alone and you know, as has been  
8 discussed, the dispute resolution process needs  
9 reform as well because they tell me they would need  
10 full-time people just to deal with processing  
11 demurrage disputes.

12 So, again, we really applaud the STB for  
13 holding this hearing. We think that, again,  
14 revisiting the 2014 decision is one distinct issue  
15 that we would recommend that you take on. But we  
16 also agree with the panelist, with Steve's suggestion  
17 on actual placement for third-party providers such  
18 as our members, actual placement is when we have  
19 control over the situation.

20 And so, to place that liability on us when  
21 we don't really have control over the situation does  
22 not appear to be equitable and is disadvantaging our

1 membership. Bunching has been talked about a lot, so  
2 I don't want to go over that too much more. But just  
3 to reiterate, that is where our members tell us is  
4 the biggest culprit when it comes to demurrage.

5           They don't think it's a warehouse capacity  
6 problem in large part, it's really demurrage is the  
7 largest contributor. Our members try to plan out  
8 labor very carefully and when cars are  
9 inconsistently placed, we've got lots of labor and no  
10 cars, or conversely, sometimes there's lots of cars  
11 and you know, inconsistent delivery means we may not  
12 have the labor available because there's too many  
13 cars there.

14           And we don't have control over the  
15 bunching so this idea of how do we assess that  
16 liability again is something we really believe needs  
17 to be addressed. I see that I'm out of time, so I  
18 will just close by reiterating actual placement,  
19 revisiting demurrage liability, finding ways to  
20 assess that liability when bunching occurs and  
21 credits have been discussed and improving the  
22 dispute resolution process. We think that those are

1 some ways that we can improve the situation.

2 COMMISSIONER OBERMAN: Just a couple of  
3 questions. Kathryn, you said that some railroads say  
4 they're required to bill demurrage to your people.

5 MS. CLAY: Yes.

6 COMMISSIONER OBERMAN: Can you tell us  
7 which railroads take that position?

8 MS. CLAY: Yes, so Kinder Morgan is the  
9 company that's had that happen, and you heard my --  
10 actually my Board member, Josh Etzel spoke earlier,  
11 yes.

12 COMMISSIONER OBERMAN: So, that's what you  
13 had in mind, CN's position?

14 MS. CLAY: Yeah.

15 COMMISSIONER OBERMAN: Well I understood  
16 him to say CN's position is they're required to bill  
17 demurrage to somebody, but you think their position  
18 is they're required to bill it to the terminal?

19 MS. CLAY: I believe we can clarify.

20 COMMISSIONER OBERMAN: Well, we're going  
21 to clarify it with CN in a minute.

22 MS. CLAY: That is my understanding.

1                   COMMISSIONER OBERMAN: And they find this  
2 requirement somewhere in 707 or do they find it in  
3 the statute, or did they find it in the either?

4                   MS. CLAY: I guess I can't really speak to  
5 their, right --

6                   COMMISSIONER OBERMAN: I mean what's the  
7 stated justification? I mean I'm just sort of  
8 puzzled by.

9                   MS. CLAY: That is the 2014.

10                  COMMISSIONER OBERMAN: And it's that rule.

11                  MS. CLAY: Yes, exactly.

12                  COMMISSIONER OBERMAN: That they say  
13 somehow.

14                  MS. CLAY: Yes.

15                  COMMISSIONER OBERMAN: Do they say we  
16 can't bill the shipper?

17                  MS. CLAY: You know, again, I wasn't party  
18 to that conversation. My understanding is that they  
19 pointed to the 2014 rule and said that their  
20 interpretation was that they must bill the  
21 consignee, if there was a consignee, they must bill a  
22 consignee.

1                   COMMISSIONER OBERMAN: And do you all, let  
2 me ask you this Lowell, Maricold, they're all over  
3 the country, so this multi-million-dollar demurrage  
4 charge, is that -- that's more than one railroad, I  
5 take it?

6                   MR. RANDEL: Yes, sir.

7                   COMMISSIONER OBERMAN: It's basically  
8 everybody?

9                   MR. RANDEL: Yes, sir.

10                  COMMISSIONER OBERMAN: And do I understand  
11 for intermediaries the problem is almost entirely  
12 bunching?

13                  MR. RANDEL: That's what our members  
14 report to us that bunching is the major contributor.

15                  COMMISSIONER OBERMAN: Do you agree?

16                  MS. CLAY: You know for us it's a little  
17 different. We really are agnostic to the cause of  
18 the demurrage because our issue is that we are not  
19 the appropriate party to be in the dialogue about  
20 the cause of demurrage. We are not a party to a  
21 contract with the railroad and so whatever the cause  
22 of demurrage is something to be dealt with between

1     either the railroad and the shipper or if the  
2     shipper says it was because of a fault at the  
3     terminal, a subsequent conversation after the  
4     railroad and shipper have ironed out their  
5     differences, a subsequent conversation should then  
6     occur between the shipper and the terminal, that's  
7     when we would be party to any discussion of  
8     demurrage.

9                 COMMISSIONER OBERMAN:   Well, one of the  
10    reasons I'm trying to get at this, you've heard a lot  
11    of conversation, I assume you've been here about the  
12    whole concept of demurrage being an incentive to  
13    avoid demurrage, so it's -- you all say you don't  
14    control it, it's not a question if you're not having  
15    enough track space to take cars in I take it, is that  
16    a fair statement?   Your members, Steve?

17                MR. DEHAAN:   Our members have between 3  
18    and 25 doors, a lot of them are smaller, 3 to 5  
19    doors, and so they don't have track space.   They're  
20    just about all in the industrial parks and so there's  
21    no way around it.

22                COMMISSIONER OBERMAN:   So, and are they



1 getting billed demurrage because more cars are coming  
2 in than they have space to take them in?

3 MR. DEHAAN: Yes, and the answer to your  
4 question I see it as bunching, scheduling of days and  
5 missing of those days. I mean it's not like I mean,  
6 if I have 5 doors and I've got 15 cars, I would like  
7 to get an extra service day.

8 So, I call the yard and I see if I can't  
9 get it set up and a lot of times, we get a yes, and  
10 then we come to our next switch day, there's no  
11 switch. They didn't service us, okay? Then about 3  
12 weeks later you get a demurrage bill for the switch  
13 that did not happen and you're getting it for all 15  
14 cars. And it's amazing the amount of work we put  
15 into making sure that we get it right and then a  
16 third of the time it comes out wrong.

17 And here's the real kicker -- you get a  
18 demurrage bill this week. You try to solve your  
19 issues, you get a demurrage bill next week, you try  
20 to solve your problems, the third time you get it,  
21 it's like what is going on here. It shouldn't be  
22 more than that, but 38% of the time you're getting

1 demurrage bills.

2 COMMISSIONER OBERMAN: Let me see if I  
3 understand the difference between the intermediaries  
4 and a shipper or a receiver that's the end user.  
5 Your customers, you're not ordering cars from your  
6 customers, your customers are shipping to you, and  
7 they control the rate at which the cars are shipped.

8 So, you have nothing -- well, when you  
9 have a deal with your customers, that they say well  
10 we're going to ship you 10 cars, are you in a  
11 position to say to them, well we only have 5 doors,  
12 don't ship us 10 cars, or how does that work?

13 MR. DEHAAN: That is an absolute  
14 conversation that they have, but again, we've had  
15 shippers that would send two cars every other day  
16 because we have 3 service days, we've got 5 doors,  
17 we've got other customers coming in of course. They  
18 think that they're mitigating for us and helping our  
19 members to not incur these kinds of things and then  
20 they might get bunched in the scenario that I'm  
21 thinking of, they delivered, they shipped two a day.

22 I don't understand this. And then they

1 delivered 9, not 10, 9.

2 COMMISSIONER OBERMAN: One was wandering  
3 around. I'm -- so you do have some control in the  
4 sense that between you and your customers you can  
5 make arrangements with them based on the capacity of  
6 your facility about how much and at what frequency  
7 they should ship to you? That part you do have some  
8 control over when you make your deals.

9 MR. DEHAAN: Somewhat. It depends how  
10 many customers you have in the building. Most of our  
11 buildings have 10 to 30 customers in them, so  
12 depending on how many are shipping via rail, we may  
13 or may not know how many cars are coming. We know  
14 because of the system, the system will tell us, but  
15 we don't necessarily know because of the customers,  
16 because again they're under constraints on their end  
17 to get their cars loaded and released.  
18 That's why I --

19 COMMISSIONER OBERMAN: Don't you have some  
20 ability to restrain your customers as to how much  
21 they ship to you so that they don't -- so, if the  
22 railroad were operating perfectly, you don't want

1     them shipping more than you can handle it seems to  
2     me. I'm trying to understand the business.

3                   MS. CLAY: If I could try to add --

4                   MR. DEHAAN: For all those customers.

5                   MS. CLAY: I would say exactly, so limited  
6     control. So, for example, so pre-2014, it would be  
7     -- it could happen that a customer that normally  
8     loaded 3 railcars a day might, because of business  
9     reasons, having a you know, particular client or  
10    deadline, wanting extra surety might order 6 cars to  
11    have 3 just in case.

12                  That shipper could direct that all of  
13    those cars, the 3 plus the addition 3, would all be  
14    directed to come to the terminal, the terminal would  
15    not be able to prevent that and so if that shipper  
16    didn't use those cars, there would be demurrage fees.

17                  Now, pre-2014, in this scenario, that  
18    could be perfectly valid and welcomed by the shipper.  
19    They would take that as a business cost that they  
20    took on intentionally because they wanted that  
21    certainty.

22                  Post-2014, what's complicated is that now

1     that shipper hypothetically could have that extra  
2     resilience or that certainty from having additional  
3     cars, but not have any obligation to pay demurrage  
4     because the terminal would cover it.

5                 COMMISSIONER OBERMAN:    So, they have no  
6     incentive to not do that.

7                 MS. CLAY:    Exactly right.

8                 COMMISSIONER OBERMAN:    So, the incentive  
9     part of the demurrage system is --

10                MS. CLAY:    It breaks down fundamentally.

11                COMMISSIONER OBERMAN:    It's fundamentally  
12     broken down.

13                MS. CLAY:    Yes.

14                COMMISSIONER OBERMAN:    And you're saying  
15     previously, even if the shipper was going to ship  
16     more capacity than your terminal had, you didn't care  
17     because it was a cost they chose to absorb.

18                MS. CLAY:    Absolutely.

19                COMMISSIONER OBERMAN:    So, that it okay,  
20     so since 2014, have you tried to change your  
21     arrangements with your shippers to say don't do that  
22     anymore?

1 MS. CLAY: Yes, and there are clauses in  
2 the contracts that stipulate that, but in practice,  
3 both because we lack the detailed information to make  
4 clear that that charge belongs to that shipper, of  
5 the many shippers that might be on the terminal. Or,  
6 if we have data, we may not be able to show it all  
7 because of confidentiality. Most of the time our  
8 members say that they are not getting sufficient data  
9 from the railroads which was causing them to have to  
10 set up their own management systems that parallel the  
11 railroads to try to decipher which cars had demurrage  
12 and to each shipper.

13 COMMISSIONER OBERMAN: Could your problems  
14 be solved if the railroads gave you all the data that  
15 a shipper would get when they want to fight a  
16 demurrage charge?

17 MS. CLAY: It wouldn't because we --  
18 because the data would all be aggregated.

19 COMMISSIONER OBERMAN: Oh, they wouldn't  
20 break it down as to which of your customers is  
21 responsible.

22 MS. CLAY: So, it cuts both ways

1     unfortunately.  If we had the data aggregated, we're  
2     not able to break it apart and attribute it  
3     appropriately.  If it's broken down, to be able to  
4     show our shippers what we're charging them to make  
5     our charges to them transparent, we would have to  
6     show them all of that information and so then we are  
7     violating proprietary business information.  So, it  
8     cuts us either way.

9                 COMMISSIONER OBERMAN:  Is there any other  
10    railroad besides CN that any of the three of you know  
11    of that takes a position that they are forced under  
12    the law to bill you, or is that some unique idea that  
13    CN came up with?

14                MR. DEHAAN:  I don't know that, but 707  
15    allows for the consignee to be billed, it allows them  
16    to be billed even though they don't have a contract  
17    with the railroad.

18                COMMISSIONER OBERMAN:  Well, it may or may  
19    not allow -- what it allows is something I think  
20    that's an open question, particularly if there's no  
21    showing of causation but that's a separate point.  
22    But I'm just trying to figure out if railroads are

1     doing it because they think they can, or if they're  
2     doing it because they claim they're required to, that  
3     seems to be the difference.

4                 CN takes that position you say and I think  
5     they have from what I understand, but the rest  
6     nobody's told you that?

7                 MS. CLAY:   No.

8                 MR. DEHAAN:  It comes down to customer  
9     relations.  We're not their customer, so we don't  
10    have a relationship.  The shipper is the customer, so  
11    rather than confronting the customer, it's a lot  
12    easier to confront the receiver.

13                COMMISSIONER OBERMAN:  Got it.  Thank you.

14                MR. DEHAAN:  And then we have to confront  
15    the customer.

16                CHAIRMAN BEGEMAN:  I'll be quick,  
17    unfortunately I left the 2014 decision on my desk  
18    with all of the stuff I was looking over, I'm trying  
19    to quickly pull it up on my phone here.  So,  
20    obviously my colleagues are not at fault or guilty  
21    for the Board's good intentions, and I can assure you  
22    the Board had good intentions.



1           Actually I'm reading quickly the summary  
2     and it says that the Board is adopting final rules  
3     establishing that a person receiving railcars from a  
4     rail carrier for loading or unloading, who detains  
5     the cars beyond the "free time" provided in the  
6     carrier's tariff, will generally be responsible for  
7     paying demurrage.

8           So, I'm wondering now that there is no  
9     free time, whether or not -- I just thought I'd throw  
10    that out there, I really, you know, Kathryn, we've  
11    had the chance to talk earlier this year. Steve,  
12    I'm sorry that you don't feel at all compassionate  
13    about these issues, I wish you kind of hopped to it  
14    on the second day of the hearing here and get us back  
15    to where we needed to be.

16           You know, look, I am sympathetic to what  
17    you and your colleagues and Joshua, others have  
18    shared with us and I'm just trying to if the Board's  
19    decision were to be reversed, and again, you know,  
20    the Board acted because we were trying to resolve a  
21    dispute between the two Circuit Courts, so we were  
22    again doing something that we needed to do.

1                   But, so if -- I'm not sure, are you asking  
2     for the decision to be entirely reversed or to be  
3     modified, and upon answering that question I'm  
4     curious to know whether or not, so instead of the  
5     carrier charging a third-party receiver, if you  
6     will, demurrage, it would go to your customer who is  
7     the actual shipper, but someone that does have -- the  
8     relationship is between the railroad and that  
9     shipper, but yet there are times when you are  
10    responsible, correct?

11                  So, now that this is good and confused,  
12    help me understand.

13                  MS. CLAY:   Sure, so and thank you and I  
14    appreciate the good intentions of the Board and  
15    believe that this was an unintended consequence from  
16    trying to fix another problem, you know, I'm not a  
17    lawyer.

18                  CHAIRMAN BEGEMAN:   That's okay.

19                  MS. CLAY:   But I do understand --

20                  CHAIRMAN BEGEMAN:   The majority of us up  
21    here aren't.

22                  COMMISSIONER OBERMAN:   She tells me that

1 all the time.

2 MS. CLAY: I would welcome, ILTA and our  
3 members would welcome the opportunity to try to work  
4 with the Board in finding language that could revisit  
5 that earlier problem, ensure that that is not  
6 disrupted, that there's a solution that remains in  
7 place for that, but closes this gap, this uncertainty  
8 that was created unintentionally.

9 So, I believe that there will be a way  
10 that we could revise the rule so that the original  
11 intent would be met, but to clarify that this state  
12 of affairs was not what the Board envisioned.

13 The practice before the 2014 rule, you  
14 know, we would also welcome, you know maybe it would  
15 be appropriate to have comments from shippers. The  
16 terminal industry's position is that things worked  
17 well, back before 2014.

18 That on a case-by-case basis, customers  
19 would raise concerns and say I was charged demurrage  
20 by the railroad, in fact it was because you had a  
21 labor issue or an equipment issue that then caused me  
22 to be late in loading my cars.

1           We believe that that worked well so that  
2     the shipper and the railroad had a contractual  
3     relationship. They would agree on how the demurrage  
4     would be attributed and then the shipper, with their  
5     contractual relationship with the terminal, would  
6     then in the second step, come to a resolution. So, I  
7     think it would be prudent for shippers to have an  
8     opportunity to comment on whether the pre-2014 state  
9     of affairs was working.

10           My industry would venture that it did work  
11     well.

12           COMMISSIONER OBERMAN: Quick question. As  
13     I understood 707, it was aimed at making sure you  
14     didn't get billed if you didn't have notice that  
15     there was a demurrage tariff, that the distinction  
16     was whether you could be billed if you had no notice,  
17     that was the Circuit dispute.

18           You don't want to get rid of the  
19     requirement that you can't get billed if you have no  
20     notice?

21           MS. CLAY: That's right, exactly.

22           COMMISSIONER OBERMAN: You'd like to keep

1     that part in, okay.

2                   MS. CLAY: It's the consignee -- yes.

3                   COMMISSIONER OBERMAN: I just wanted to  
4     put that on the record because the notice part was  
5     the benefit, the terminal.

6                   MS. CLAY: Right.

7                   CHAIRMAN BEGEMAN: Thank you.

8                   VICE CHAIRMAN FUCHS: Kathryn, I was  
9     wondering, can you -- you said it would be prudent  
10    for the Board to get comment on the shipper  
11    perspective, can you preview in your view what you  
12    think we might hear?

13                  MS. CLAY: My --

14                  CHAIRMAN BEGEMAN: Charge us.

15                  VICE CHAIRMAN FUCHS: Yeah, please.

16                  MS. CLAY: You know, my understanding, my  
17    expectation would be that you would receive comments  
18    that that worked well, because they had a contract  
19    and there were provisions in the contract saying  
20    that we have a duty of service that we were, and our  
21    members were liable to provide service and make the  
22    shippers whole if we caused demurrage charges.

1           So, I expect that there would be you know,  
2   that the shipping community would welcome a return to  
3   that. I know that our terminal members that have  
4   gone to their shippers and have asked them, would  
5   you go with us to the railroad and ask them to return  
6   to the practice of billing directly, when asked have  
7   been willing to do that.

8           So, my expectation is that it would be met  
9   favorably, but since I don't speak for that.

10          VICE CHAIRMAN FUCHS: I understand, I just  
11   wanted a preview, thank you.

12          CHAIRMAN BEGEMAN: And Steve, if you could  
13   make me a little clearer on something. Kathryn, I  
14   know exactly what you're saying. I mean I understand  
15   your request of the Board. Steve, what I'm a bit  
16   confused on, are you -- you got a lot into the actual  
17   placement issue, the 48 hours issue, does it all stem  
18   from the 2014 decision?

19          Or is that a different -- were you caught  
20   up by the 2014 decision, or is your issue separate,  
21   you always -- you would have received --

22          MR. DEHAAN: We were caught up in the 2014

1 decision because they were able to bill the  
2 consignee, and now we're caught up in the issue of  
3 the --

4 CHAIRMAN BEGEMAN: The impact.

5 MR. DEHAAN: The issues and the lack of  
6 service.

7 CHAIRMAN BEGEMAN: Thank you for  
8 clarifying.

9 COMMISSIONER OBERMAN: Just one further  
10 clarification Steve, you said 48 business hours, you  
11 don't mean 6 8-hour days, do you?

12 MR DEHAAN: I mean 5, basically when we  
13 think of business hours, we think 8 to 5, Monday  
14 through Friday. Those are business hours, okay.  
15 Now, I'll be the first one to tell you our members  
16 work well outside of that, they would be  
17 accommodating, but as far as the rule goes, they  
18 think that it has to be definitive. If we leave it  
19 squishy, then it will get really squishy. We can  
20 always go to the railroad and say, hey, will you drop  
21 cars on Friday, we'll unload them on Saturday.

22 When you bring our load in on Monday you

1 can pick up those cars, great.

2 COMMISSIONER OBERMAN: 48 hours, when  
3 you're urging that that's what we do, you don't mean  
4 48 continuous hours, you mean --

5 MR. DEHAAN: I mean 48 continuous hours,  
6 yes, I do.

7 COMMISSIONER OBERMAN: Well you said 48  
8 business hours.

9 MR. DEHAAN: Two days.

10 COMMISSIONER OBERMAN: But you're talking  
11 about 2 days.

12 MR. DEHAAN: Two business days, Monday and  
13 Tuesday.

14 COMMISSIONER OBERMAN: Okay.

15 MR. DEHAAN: Bring cars in on Monday,  
16 we'll have them ready for you Wednesday at the same  
17 time.

18 COMMISSIONER OBERMAN: I just wanted to be  
19 clear, thank you.

20 MR. DEHAAN: Saturday and Sunday don't  
21 count unless you make an agreement.

22 VICE CHAIRMAN FUCHS: Two quick ones for



1 me. The date -- actually actual placement idea, if I  
2 could hone-in on that. I think Lowell and Steve,  
3 you said that it should just be an actual placement.  
4 You know there are scenarios when something is in  
5 kind of constructive placement and we've heard that a  
6 receiver, maybe not your members, but a receiver, you  
7 know, if that person were not to order the switch or  
8 get a switch then, they would effectively be  
9 getting, you know, anchoring car storage.

10 Do you know what I mean? Within a  
11 railroad yard, so if we were just to measure on  
12 actual placement, would that create a disincentive  
13 for cars that were placed -- that were in  
14 constructive placement to you know, basically get,  
15 you know, released to a receiver's facility, such  
16 that the person would basically be getting automatic  
17 free storage?

18 MR. DEHAAN: In our particular case,  
19 because our guys don't get paid unless they unload  
20 that car, they don't want any of them in  
21 constructive, they want them all at the door as soon  
22 as they can get them to the door.

1                   VICE CHAIRMAN FUCHS:   So, as soon as  
2   they're constructive placement you want them in.

3                   MR. DEHAAN:   It's just that simple, but  
4   that's a different scenario with 3PL.

5                   VICE CHAIRMAN FUCHS:   So, when you're  
6   saying actual placement should be the -- when you say  
7   actual placement should be the standard, you are  
8   saying that in the 3PL world, there's such a great  
9   incentive for things to get out of constructive  
10   placement, the measurement of constructive placement  
11   is just not worth it?

12                  MR. DEHAAN:   Totally.

13                  VICE CHAIRMAN FUCHS:   Okay.   And then the  
14   time stamp idea.   You know you all work with both  
15   rail and truck.   Is it your experience that trucking  
16   companies provide, you know, good time stamps, date  
17   and time in a way that's superior to the rail  
18   industry?

19                         When they serve your facilities?

20                  MR. DEHAAN:   We work with large trucking  
21   firms.   We work with a lot of brokerage firms.

22                  VICE CHAIRMAN FUCHS:   Yeah.

1                   MR. DEHAAN: You know, I got into our  
2 offices, they have all the screens, they're watching  
3 all the trucks all the time.

4                   VICE CHAIRMAN FUCHS: Sure.

5                   MR. DEHAAN: If you go to a large trucking  
6 company, you go into their customer service centers.

7                   VICE CHAIRMAN FUCHS: Right.

8                   MR. DEHAAN: They got the big boards up,  
9 they're watching every truck.

10                  VICE CHAIRMAN FUCHS: Right.

11                  MR. DEHAAN: They know which trucks are  
12 falling behind, et cetera, and they're out there and  
13 they're responsible for certain trucks and they're  
14 communicating all the time what's going on and yes,  
15 they stay in great communication.

16                  And so, it's usually with whoever's in  
17 charge of your dock doors on the trucking side. On  
18 the rail side, we have some of that information  
19 because we go in and look at the system.

20                  VICE CHAIRMAN FUCHS: Right.

21                  MR. DEHAAN: And we look at it and some of  
22 our guys, because of the logging, take screen prints

1 all the time as to what's in the queue, where it's in  
2 the queue, et cetera and they're doing that. And  
3 then all of a sudden it gets to the yard and all the  
4 ETA's become suggestions, not real and the service  
5 days don't work and you don't get switched and all of  
6 a sudden it falls apart.

7 It's all for the most part, the biggest  
8 issues that we have are the last mile.

9 VICE CHAIRMAN FUCHS: That's what we were  
10 hearing over and over and again.

11 MR. DEHAAN: So, that's why we keep saying  
12 let's not do this constructive stuff because it's in  
13 the last mile and they think they've delivered when  
14 they got it to the yard.

15 VICE CHAIRMAN FUCHS: But specifically, on  
16 the time stamp issue, you're talking about the time  
17 stamp of when cars are spotted, you know, that's what  
18 you want and for the equivalent process within the  
19 trucking industry, you've got all that information.  
20 In the rail industry, that's what's lacking, is that  
21 accurate? You don't think it's accurate?

22 MR. RANDEL: Yeah, I would agree.

1 VICE CHAIRMAN FUCHS: Okay, thank you.

2 CHAIRMAN BEGEMAN: Alright, thank you very  
3 much. Greatly appreciated. Panel XI, I'm sorry,  
4 yes, XI is next, BNSF, Canadian Pacific, Canadian  
5 National.

6 Panel XI

7 CHAIRMAN BEGEMAN: Okay, Panel X, Jill,  
8 we'll start with you. I'm sorry XI, Panel XI.

9 MS. MULLIGAN: Thank you all for the  
10 opportunity to be here today. We've been carefully  
11 reviewing customer comments and also your own lines  
12 of inquiry throughout the proceeding. Given the  
13 significant amount of testimony so far, I will limit  
14 my comments to a few key areas of BNSF's demurrage  
15 program as well as the efforts we undertake with our  
16 customers in this important area.

17 BNSF's core focus, second only to  
18 achieving our safety vision, is to deliver for our  
19 customers on the operational and competitive  
20 potential of our rail network. That means maximizing  
21 the efficient use of railroad, line haul and terminal  
22 capacity and equipment, ensuring that the network can

1 function effectively in the interest of all of our  
2 shippers.

3 As detailed in our written comments, BNSF  
4 puts significant energy and resources into assuring  
5 the appropriate and tailored use of demurrage as a  
6 tool to support that goal.

7 Demurrage is not treated as a revenue  
8 generating opportunity at BNSF, simply put, our goal  
9 is to collect less demurrage from our customers.  
10 Every demurrage bill issued represents a missed  
11 opportunity to obtain operational efficiency in the  
12 loading and unloading process that's important for  
13 all our customers who rely on our network.

14 In that same regard, when delays or other  
15 inefficiencies are caused by BNSF, our consistent  
16 practice is to eliminate the demurrage charges for  
17 impacted shippers, which creates incentives for BNSF  
18 to act efficiently ourselves, or bear the associated  
19 costs with that.

20 As preparation for this testimony, I  
21 reviewed the day-to-day efforts that our customer  
22 service and demurrage professionals put into

1 achieving that goal. BNSF provides a significant  
2 number of tools and communications aimed at allowing  
3 first greater customer control of pipeline decision-  
4 making to avoid demurrage in the first place.

5 Second, the review of data relating to any  
6 charges that are incurred, and then finally, clear  
7 and timely dispute mechanisms. As part of the pre-  
8 billing process, our demurrage -- and I'm talking  
9 about pre-billing just to be clear, our demurrage  
10 team members who are assigned to specific regions and  
11 fleets of equipment, review estimated demurrage  
12 charges in light of variability in our service.

13 That can include things like our current  
14 flooding challenges, general metrics of performance  
15 of our network, like dwell and velocity, performance  
16 against a car's individual trip plan, local yard  
17 challenges and missed switches.

18 In addition, our customers are able to see  
19 that same estimated, but not yet billed demurrage and  
20 communicate with their BNSF marketing representative  
21 or engage directly with us through our demurrage tool  
22 about the service challenges they are seeing.

1           That took does contain the information  
2   that was discussed on the last panel in terms of  
3   times of placement, release, et cetera.   This early  
4   pre-billing review and customer engagement helps to  
5   ensure that bills going out the door do not assign  
6   shipper facilities, responsibility for railroad  
7   caused events.

8           We are not perfect, however, and have  
9   simple to use mechanisms for customers to dispute  
10   bills after they are issued, including using that  
11   same one-stop demurrage tool to flag charges for  
12   dispute and provide additional information that we  
13   may not have considered.

14           Our goal is to respond within the next  
15   business day and in many cases, we can actually  
16   resolve disputes in a few business days.   When we  
17   can't do so, it's often because of the complexity of  
18   the operation or the facility and what we do there is  
19   assign a customer a specific representative, a live  
20   person within BNSF to work through that.

21           But even before a shipment starts its  
22   movement on our network, a BNSF facility can use a



1 rail central suite of tools to see all shipments that  
2 originate or terminate at their facility and they  
3 can track them across the entire route as they move  
4 on BNSF's network. This is an important dataset for  
5 a lot of reasons, but for demurrage purposes, it  
6 allows a receiver to understand first, the number of  
7 loaded shipments being ordered into a facility from  
8 any original on BNSF.

9 Second, the number of cars already in  
10 route to their facility. Third, the number of cars  
11 that have been constructively placed in the yard  
12 adjacent to their facility and then finally, those  
13 cars already sitting on their track.

14 With that information, a customer can make  
15 better pipeline decisions, including whether they  
16 need to adjust the number of cars being released into  
17 the system at origin, make requests to divert  
18 shipments to other facilities, consider modifications  
19 to the use of their existing track, or consider  
20 longer term options like alternative storage  
21 locations.

22 I would like to confirm that for all these

1 BNSF tools, there's full access for receiver as well  
2 as our freight-paying shippers. We have many  
3 receivers who make very effective use of those tools  
4 to avoid demurrage charges, resulting from imbalances  
5 between releases at origin and the actual destination  
6 capacity.

7 Behind those tools are also dedicated and  
8 knowledgeable BNSF team members, engaging directly  
9 with repeat demurrage customers in a very personal  
10 way that looks to address situations at their  
11 facility and their own traffic flows, and outline  
12 specific ways that they can manage inventories and  
13 obtain reduced dwell and increase their last mile  
14 throughput.

15 BNSF will continue to develop and  
16 implement innovative programs, processes and  
17 technology to support that ongoing dialogue. All  
18 these efforts ensure that situations that warrant  
19 demurrage are the ones that are being addressed  
20 through our billable charges.

21 That's important for BNSF because the  
22 starting point of our partnership with our customers

1 is a shared interest in expectation in creating a  
2 fluid operation at all points in the route of  
3 movement, including the origin and destination.  
4 Those assumptions underpin our approach to the  
5 commercial marketplace.

6 When service interruptions occur on our  
7 network, we react quickly and work hard to restore  
8 consistent throughput and we see our customers do the  
9 same things at their facilities. Because of that  
10 joint interest with our customers and working to  
11 protect an efficient, reliable and competitive  
12 service product, the inefficiencies associated with  
13 disruptions or outlier customer facilities are not  
14 built into the system as an assumed cost.

15 Instead, situation responsive tools, like  
16 demurrage fees are used to address the outliers, when  
17 it comes to over-consumption of common rail  
18 facilities and equipment.

19 In conclusion, BNSF takes seriously its  
20 obligations as a common carrier and our role as a  
21 business partner to our customers and that informs  
22 the commercial programs that we implement, including

1 demurrage.

2 Central to our approach with our customers  
3 is a common interest in efficiencies that can be  
4 gained across the entire transportation route,  
5 including the first and last mile. We appreciate the  
6 opportunity to share with you all how our demurrage  
7 program works to support those efforts and we're  
8 happy to answer questions that you may have, thank  
9 you.

10 CHAIRMAN BEGEMAN: Thank you, Pam?

11 MS. ARPIN: Alright good afternoon, and  
12 thank you for having me, Chairman Begeman, Vice  
13 Chairman Fuchs and also Commissioner Oberman. I am  
14 Pam Arpin, and I'm the Assistant Vice President for  
15 Canadian Pacific Railway and my role is as the -- I  
16 do all of the work with supplemental activities  
17 including operational support and invoicing.

18 I'm going to focus my comments today on  
19 pre-invoicing measures with our customers. CP posts  
20 invoicing measures with our customers, ongoing  
21 dialogue that we have with our customers to improve  
22 our services and tools, and lastly facts around

1     billing and collections.

2                     CP would like to start over by reiterating  
3     comments by CP's CEO, Mr. Keith Creel to the STB on  
4     February 4th, 2019 regarding the demurrage system and  
5     its importance to the health of the rail network.  
6     Effective management of railcars is important to  
7     maintain fluid operation of the national rail network  
8     as well as the sitings and facilities of rail  
9     customers, logistics providers, ports and customer  
10    stations.

11                    Shippers and receivers are in a unique  
12    position to coordinate rail shipments to make  
13    efficient use of railcars and other rail assets,  
14    including tracking yards. Cars that are not timely  
15    loaded or unloaded or released, congest tracking  
16    yards and impact the network's ability to handle the  
17    customer's next shipment and the ability to serve  
18    other traffic.

19                    The rail industry and the United States  
20    Congress have long recognized demurrage as a  
21    necessary mechanism to ensure a fluid rail network.  
22    I'll now talk to our pre-invoicing measures with our

1 customers.

2 As described in our May 1st submission for  
3 this proceeding, CP has established mechanisms in  
4 place intended to ensure that inventory and service  
5 performance, including events that impact demurrage  
6 and accessorial charges are properly reflected in  
7 demurrage and accessorial invoices.

8 These measures include CP's onboarding  
9 team -- this is available to new customers to provide  
10 onboarding services, including familiarization for  
11 our customers around CP's tariffs, how they are  
12 applied, and the tools available from our CP portal.

13 CP's local operating planning team -- this  
14 team is unique in that they develop local operating  
15 plans and build trains for our operating teams based  
16 on customer's spot and lift requests.

17 After CP has provided the planned service,  
18 CP audits and reports internally, the actual  
19 performance against the initial customer request to  
20 confirm the level of success delivering to our  
21 customer requirements.

22 These reports are produced daily and

1 reviewed by all levels of CP's operating team,  
2 including senior leadership. Our demurrage team also  
3 uses this information to monitor for exceptions and  
4 adjust demurrage records as necessary prior to  
5 invoicing.

6 CP's customer station log-in issue  
7 functionality also allows shippers, receivers and  
8 third-parties the ability to flag concerns in real  
9 time as they relate to inventory reporting, transit  
10 and local service. This also, as BN spoke to, looks  
11 at the facility, the yard and the inbound pipeline in  
12 terms of information that's available.

13 CP provides customers with visibility to  
14 demurrage days accruing for each car. Concerns  
15 reported by customers are addressed by CP's customer  
16 service team and reviewed by our demurrage staff when  
17 compiling month-end statements.

18 Our last item in this area is CP's  
19 proforma process, also known as pre-invoicing. This  
20 was established to provide parties receiving a  
21 demurrage statement, a channel to submit consolidated  
22 feedback prior to formal invoice issuance.

1           At the end of the month a dedicated CP  
2     representative issues a proforma statement to a  
3     customer in order to provide an opportunity for A --  
4     dispute aspects within the statement; B -- for the  
5     customer to request further details, or C -- approve  
6     the statement.

7           The goal of the process is to attain  
8     agreement on the final amount to be invoiced while  
9     working collaboratively on mitigation of demurrage  
10    and accessorial charges going forward.

11          Next, I'll talk to our post-invoicing  
12    measures. Once invoiced, customers may log disputes  
13    and raise concerns through the following channels.  
14    Disputes may be logged within CP's customer station  
15    using the manage invoice tool. CP commits to  
16    responding within 15 business days. If CP does not  
17    timely respond, CP accepts the dispute as written.

18          Concerns may be raised with a CP inventory  
19    control specialist who will work with customers and  
20    CP operations in an effort to mitigate systemic  
21    events that are leading or could lead to demurrage  
22    and/or accessorial charges.



1           Our CP account managers are also another  
2   area of escalation. Concerns regarding rates, terms  
3   of service, as well as accessorial demurrage  
4   invoicing may be raised through this channel. In  
5   such instances, the account manager will help to  
6   facilitate resolution through the appropriate parties  
7   within CP.

8           The next area I'll talk about is ongoing  
9   dialogue with our customers and stakeholders to  
10   improve our services and tools. We at CP, continue  
11   to evolve our services and technology through direct  
12   dialogue with our customers. The following are  
13   examples of CP's efforts to maintain lines of  
14   communication with our customers, to improve the  
15   customer's experience.

16           The Customer Advisory Council is an  
17   initiative started in early 2018 to pull various  
18   customers together from all lines of business to  
19   discuss fluidity, technology and communication. As  
20   part of this Customer Advisory Council, CP engages in  
21   touch points throughout the year, with specific focus  
22   groups led by our customers on key areas to develop a

1 multi-year roadmap around customer experience, so we  
2 do have plans in place and a multi-year roadmap that  
3 involves technology, communication and service with  
4 our customers.

5           Using a third-party, CP also conducts  
6 annual customer surveys across our customer base in  
7 order to measure customer satisfaction on various  
8 elements of our service. We also issue two surveys  
9 each year directly around our customer portal, where  
10 customers can provide feedback and identify  
11 opportunities for improvement.

12           CP engages with customers at industry  
13 events as well, this includes, when requested,  
14 participating in discussions with shipper  
15 organizations on accessorial and demurrage charges.  
16 CP's senior management also participates in monthly  
17 meetings with the STB to share real time key  
18 performance information, supported by operating and  
19 performance data and to answer any questions or  
20 concerns brought forward by customers to the STB.

21           Of note, while we have received individual  
22 feedback on specific customer concerns on our

1 invoices, we have received very little feedback on  
2 our overall accessorial and demurrage program which  
3 has been largely unchanged since 2015.

4 The next area is around billing and  
5 collections and just to provide some facts in that  
6 space. Demurrage and accessorial charge revenue does  
7 not drive CP's financial performance, these revenues  
8 represent less than 3% of our operating revenue in  
9 the United States and just over .5% of operating  
10 revenue for CP as a whole.

11 While absolute dollars of billings  
12 increased in 2018, the increase is not  
13 disproportionate when looked at as a percentage  
14 against the total amount of revenue increase over  
15 this period.

16 Furthermore, when you look at CP's  
17 demurrage and isolation, excluding any container  
18 storage, while our revenue has increased by  
19 approximately 280 million dollars from 2016 to 2018,  
20 our demurrage charges have dropped as a percentage of  
21 total revenue as well as absolute dollars.

22 2016 the revenue was 18.6 million, in 2018

1     it was 17.7 million. CP's collection rate when  
2     comparing billed versus collected on a yearly basis  
3     has averaged around 90% in 2016 and 2017, and our  
4     collection rate increased to 94% in 2018.

5             CP's percentage of adjusted bills has also  
6     decreased over the 3-year period as well from 8.9%  
7     to 6.7%. We believe that the increase in collection  
8     rate and the decrease in adjusted bills is a  
9     reflection of improvement CP has made in our  
10    processes in communicating with customers and in our  
11    technology. These improvements, supported by our  
12    people, ensure we are providing accurate invoices to  
13    our customers.

14            We know we're not 100% perfect, and  
15    therefore as discussed earlier, CP offers further  
16    opportunities post-invoice for our customers to  
17    raise concerns. It is CP's perspective that for the  
18    vast majority of what CP issues for charges, shippers  
19    and receivers are paying the charges that they deem  
20    appropriate.

21            This is in part due to our robust  
22    processes for addressing demurrage and accessorial

1 concerns and in part due to the benefits of CP's  
2 maturing PSR program. Our customers have, by and  
3 large, adapted to PSR. Under PSR, our customers  
4 enjoy more reliable and predictable service, which in  
5 turn makes it easier for customers to avoid demurrage  
6 and accessorial charges.

7           It is important to note that CP's  
8 accessorial and demurrage charges include charges for  
9 optional services and products and that these are  
10 value add to our customers. These services and  
11 products include, for example, container storage.  
12 Container storage accounts for 29% of CP's demurrage  
13 revenue in the first quarter of 2019.

14           Accordingly, CP cautions against drawing  
15 negative conclusions from increases in demurrage  
16 and/or accessorial revenues as they may simply be a  
17 reflection of the carrier offering a value-add  
18 service at a competitive price. Additionally, it is  
19 important to note that CP's demurrage rates do not go  
20 in one direction only.

21           Congress requires that rail carriers  
22 charge demurrage in order to ensure adequate car

1 supply. When demurrage is high and car supply is  
2 tight, CP may increase demurrage rates in order to  
3 encourage more efficient use of equipment.

4           Conversely, when demand for cars is low  
5 and supply is adequate, CP may reduce demurrage rates  
6 as reflected in the data CP provided to the Board on  
7 May 1st.

8           In closing, CP believes that it's  
9 practices around demurrage and accessorial charges  
10 are balanced and reasonable. We proactively deal  
11 with issues where we can, and we provide appropriate  
12 channels for escalation of issues after invoice.

13           Furthermore, CP has not had any  
14 substantial changes to our policy during the period  
15 in question. It is the responsibility of all parties  
16 in the supply chain to ensure a fluid network. A  
17 fluid network ensures that customers receive  
18 consistent and reliable service that they depend on.

19           Demurrage is a critical tool to ensuring  
20 that all parties in the supply chain behave  
21 responsibly. As demand for rail services  
22 increases, CP is investing in its network to meet the

1 challenge. However, it is prudent and incumbent on  
2 CP to make the most of our existing assets.

3 In significant part, CP's relentless focus  
4 on making more efficient use of our existing assets,  
5 enabled CP to move 219,000 more carloads in 2018 than  
6 we did in 2016, a 9% increase. Thus, through efforts  
7 we insured that 219,000 more carloads of various  
8 commodities were available to fuel the economy.

9 This increase has been made possible  
10 through our operational excellence in precision  
11 railroading, and by ensuring we have appropriate  
12 policies in place that incent behavior around asset  
13 use. We are proud of the work of our over 13,000  
14 employees, our CP family to accomplish this.

15 I would be pleased to take any questions  
16 you may have.

17 CHAIRMAN BEGEMAN: Thank you, Kathy?

18 MS. GAINNEY: Good afternoon everyone and  
19 thank you so much for having us today. My name is  
20 Kathy Gainney and I'm U.S. Regulatory Counsel for CN.  
21 The U.S. subsidiaries of Canadian National Railway  
22 Company which is celebrating its 100th year

1 anniversary this year.

2 CN welcomes the opportunity to testify  
3 before the Board regarding our demurrage and optional  
4 services, to discuss CN's policies in this area and  
5 to answer any questions that the Board may have.

6 As with all aspects of CN's business, our  
7 top priority is operating a safe and efficient rail  
8 transportation network. Demurrage and optional  
9 service play an important role in promoting the  
10 network fluidity and high-quality service that our  
11 customers expect while provide additional optional  
12 services that some of our rail customers sometimes  
13 request.

14 I'm pleased to introduce CN's two  
15 witnesses today. Derek Taylor is CN's Vice  
16 President, Southern Region. In this role, Mr.  
17 Taylor is responsible for CN's operations in the  
18 United States. He oversees CN's efforts in the U.S.  
19 to maintain network fluidity by reducing cycle times  
20 for equipment and increasing asset utilization.

21 Before beginning his current role in  
22 August 2018, Mr. Taylor served as General Manager in



1 CN's U.S. headquarters in Homewood, Illinois. Derek  
2 Taylor joined CN in 2000 and he's held positions  
3 ranging from train master to general superintendent  
4 across CN's system in both the U.S. and Canada. We  
5 also have Keith Courtoreille, who is Senior Manager,  
6 Service Delivery at CN. In this role, Mr.  
7 Courtoreille leads the Optional Services Team that  
8 oversees the application of CN's demurrage and  
9 accessorial service tariffs. Mr. Courtoreille joined  
10 CN in 2006, and he's served in a variety of roles  
11 including manager, innovation and strategy, senior  
12 manager, e-business manager, sales and marketing and  
13 carload service delivery operations.

14 With these introductions, I will turn the  
15 presentation over to Mr. Taylor.

16 MR. TAYLOR: Thanks Kathy, I appreciate  
17 that. Good afternoon everyone. As Kathy mentioned,  
18 I'm at CN 19 years, all of which have been in  
19 operations. I'm here today, I'll explain the  
20 importance of steadily pursuing efficient rail  
21 operations to maximize network fluidity under widely  
22 varying conditions and that's ranging from record-

1 breaking cold temperatures to unprecedented flooding  
2 which some is going on today to searing heat.

3 CN railroads are dedicated as safe and  
4 efficient transportation and meet the needs of our  
5 rail customers by providing reliable rail service.  
6 Fluidity is particularly important to CN's U.S.  
7 operations which are conducted on a largely single  
8 track network.

9 Page 2 will show our 19,500-mile network  
10 in the U.S. and Canada as well as what commodities CN  
11 moved in 2018 and where CN traffic goes. Page 3  
12 reflects CN's ongoing efforts to increase capacity,  
13 resiliency and network fluidity. These are necessary  
14 for CN to drive customer service and growth.

15 With scheduled railroading is a foundation  
16 and safety as a core value, CN is focused on reducing  
17 cycle times, increasing asset utilization, and  
18 increasing capacity and network fluidity.

19 While one aspect of network fluidity  
20 involves trains operating consistently and on time,  
21 it is equally important to maximize asset  
22 utilization of rail-owned cars and private cars on

1 the rail network. This is particularly true during  
2 times of reduced capacity, such as the winter months  
3 and when maintenance and capital improvements require  
4 maintenance windows for work blocks, all of which  
5 require changes to our operations.

6 It is also true during times of  
7 congestion, because such congestion can cause ripple  
8 effects and require a railroad to stage trains and  
9 sitings miles away, waiting for the congestion to  
10 clear to access the yard that's required.

11 Slide 4 illustrates that many factors  
12 impact railcar cycle times which in term impacts  
13 network fluidity and operational efficiencies. One  
14 factor is train and track capacities. These  
15 determine loading capacity and train speed. CN  
16 invests each year in capital to enable growth. This  
17 past year CN set a record capital program of 2.9  
18 billion U.S. dollars in 2019.

19 Over the past 2 years, CN would have made  
20 a capital investment of 5.7 billion U.S. dollars. We  
21 reinvest 25 cents of every dollar in revenue into our  
22 network. In 2019, in the U.S. CN investments

1 include 190 million dollars in Illinois, to  
2 strengthen the rail network and across the state to  
3 boost capacity and network resilience, which totals  
4 more than 1.3 billion U.S. dollars in Illinois just  
5 in the past 5 years.

6 CN has also invested approximately 120  
7 million U.S. dollars in Wisconsin this year and we  
8 will now have passed the threshold of 1 billion U.S.  
9 dollars in Wisconsin over the past 5 years.

10 In addition to investing and maintaining  
11 train and track capacity, CN also works hard to  
12 increase asset utilization by encouraging equipment  
13 to be loaded and unloaded more quickly. When cars  
14 cycle faster from origin to destination and back to  
15 the next origin, the same number of cars online could  
16 move more loads for rail which translates in improved  
17 network fluidity, by reducing delays from congestion  
18 of trains and cars in the network.

19 CN is fostering resilience to respond more  
20 quickly to real world disruptions in railroading.  
21 This includes disruptions caused by severe weather  
22 that can cause plant closures, equipment failures or

1     limit the ability to operate equipment safely.

2                     Slide 5 is a picture showing some of the  
3     challenges and operational or operating during severe  
4     winter conditions. For example, this past year the  
5     extreme cold temperatures this past winter made  
6     headlines when in Chicago it was colder, as many of  
7     you know than parts of the Arctic, the Yukon, or even  
8     Mars and I've lived through the real polar vortex of  
9     2013 and 2014 in Wisconsin and Minnesota when I was  
10    General Manager and it's a tough working environment  
11    when it's 40 below Fahrenheit outside.

12                    CN engages with its customers on a regular  
13    basis to encourage their cooperation in facilitating  
14    a fluid and efficient rail network. The faster  
15    customers unload and release equipment to CN, the  
16    faster that equipment can be returned to the system  
17    to serve another customer for loading.

18                    In that regard, an empty load is just as  
19    important as the load itself. An empty car is the  
20    next loaded car. By ensuring that those empty cars  
21    are returned to the system as soon as they are  
22    available, the entire supply chain benefits. When

1 car cycle time is down, fewer cars online can serve  
2 demand, thereby alleviating congestion and increasing  
3 capacity.

4 One of the many ways in which CN  
5 encourages efficient asset utilization and movement  
6 of cars is through demurrage. CN imposes demurrage  
7 charges when customers exceed their free time  
8 allotted, for loading and unloading the railcars.

9 The purpose of demurrage charges is to  
10 incentivize customers and receivers to load and  
11 unload equipment quickly. Customers can make  
12 decisions to decrease their demurrage charges by  
13 configuring their facilities to increase track  
14 capacity, improving loading or unloading times or  
15 operating 7 days per week.

16 CN prefers customers and receivers to load  
17 and unload equipment within the free time rather than  
18 charging for demurrage. That would mean that CN's  
19 equipment was moving at maximum efficiency to the  
20 benefit of all CN customers and receivers across the  
21 entire supply chain.

22 Everyone benefits from moving freight more

1     efficiently, not from collecting demurrage from cars  
2     that are not moving and dwelling in CN's rail yards,  
3     CN's sitings, or CN's tracks.

4             By encouraging efficient use of equipment,  
5     CN's policies promote commercial fairness to our  
6     customers. Cars that are occupying space in CN's  
7     yards or tracks or awaiting loading and unloading at  
8     a customer facility make it harder for CN to provide  
9     fluid service and efficient asset distribution to  
10    other customers who are efficiently loading and  
11    unloading their cars.

12            And the longer that a customer takes to  
13    unload a CN provided railcar, the longer another  
14    customer has to wait for that equipment. Policies  
15    that encourage better asset utilization by  
16    penalizing delays are fair to the many customers who  
17    do load and unload equipment efficiently.

18            What would be commercially unfair would be  
19    to let a minority of customers, through their own  
20    commercial and operating decisions, not to promote  
21    efficiency at the facility, degrade service to other  
22    customers and receivers in the broader rail network

1 and supply chain.

2 The Board has also asked about accessorial  
3 charges. In general, accessorial charges fall into  
4 two categories. Most charges are for a menu of  
5 optional services that customers can request that CN  
6 provide over and above rail line haul services. For  
7 example, some of the optional services CN offers  
8 include inspection services, private railcar storage  
9 when available and additional switching within the  
10 gate.

11 Many customers choose to perform this work  
12 themselves or to engage a designated agent to perform  
13 the services on their behalf. Other customers prefer  
14 the convenience of CN providing the optional service  
15 as described in CN's tariffs. Some other accessorial  
16 charges serve a penalty function similar to demurrage  
17 and are designed to discourage customers from  
18 engaging in unsafe practices.

19 Safety is CN's core value. Accordingly,  
20 CN charges customers for unsafe practices such as  
21 tendering overloaded railcars or for the cost of  
22 securing railcars leaking hazardous materials or



1 dangerous goods. These charges highlight the  
2 importance of safety and act as a deterrent to  
3 protect the safety of CN employees and adjacent  
4 communities near the rail line we operate through.

5 The purpose of these charges is to  
6 encourage safe handling practices. In conclusion, CN  
7 believes that its customers benefit from CN's  
8 approach to demurrage and accessorial charges, which  
9 are aimed at providing services to CN's customers  
10 that they want and encouraging asset utilization to  
11 promote CN's safe and efficient network, thank you.

12 MR. COURTOREILLE: Good afternoon. I am  
13 pleased to describe CN's efforts to be transparent  
14 when CN administers its optional services tariffs and  
15 CN's development of a customer centered focused  
16 disputes resolution process. CN has developed  
17 tariffs to clearly explain the applicable charges and  
18 policies for demurrage and other optional services.  
19 The tariff changes are communicated directly via  
20 email to customers and receivers to ensure that they  
21 are all well notified in advance of upcoming tariff  
22 changes.

1           In addition, CN's tariffs are available on  
2   CN's website through our e-business documents tool.  
3   Each tariff version contains a summary page -- tariff  
4   version revision, I should add, a summary page, and  
5   at the end, clearly identifies each change made in  
6   the particular version.

7           In the event that CN becomes aware of a  
8   customer or receiver confusion regarding tariff  
9   language, the tariff language is reviewed, and CN may  
10   include clarifying language or offer specific  
11   examples to ensure tariffs are transparent and  
12   straightforward in a further revision.

13           CN optional services team works carefully  
14   to ensure that demurrage and optional services  
15   invoices are correct. Slide 6 provides an overview  
16   of CN's invoicing process. Invoices for demurrage or  
17   optional services can be system generated. They can  
18   also be manually based on employee instruction from  
19   our crews.

20           Invoices can be subject to manual review  
21   when circumstances suggest further review is  
22   appropriate before the invoice goes out. I will add

1     that we also have a pre-invoicing process similar to  
2     CP and where we have active dialogue and discourse  
3     with customers before invoices are released.

4                 CN information will review relevant  
5     information such as contemporaneous crew reports to  
6     determine whether demurrage charges are appropriate  
7     before charges are invoiced to customers or  
8     receivers. If CN personnel determine that the delay  
9     is attributable to CN, adjustments will be made for  
10    CN to take responsibility and reduce or cancel the  
11    invoice.

12                I would like to add the last 5 weeks, 80%  
13    of our customers did not receive a demurrage invoice.  
14    Slide 7 summarizes CN's robust dispute resolution  
15    process that is designed to ensure that charges are  
16    fair, and customers and receivers have an opportunity  
17    to raise questions about a charge if they have  
18    questions regarding that charge or believe it to be  
19    incorrect.

20                This informal dispute resolution process  
21    provides parties responsible for demurrage charges,  
22    such as customers or receivers, with a full

1 opportunity to dispute charges that they believe to  
2 be incorrect.

3 Optional services invoiced under CN's  
4 tariff 9000, including demurrage are covered by CN's  
5 18, 15, 15, billing and dispute resolution guarantee.  
6 Under that process, CN commits to invoice customers  
7 within 18 business days of the service completion day  
8 as well as 15 business days to respond to filed  
9 disputes through e-business and 15 business days to  
10 come back with an answer.

11 If CN fails to meet any of those  
12 deadlines, particular the 18-day invoicing rule, we  
13 do not charge that customer. If the party  
14 responsible for the charges disputes the invoice in  
15 CN's e-bill application within 15 business days, CN  
16 does commit to respond to the invoice within 15 days.

17 If CN does not respond within the 15  
18 invoice days, CN will accept the dispute as  
19 registered. On some occasions, a dispute by a  
20 customer receive timely raises in which to CN timely  
21 responds, it may take longer to resolve. In all  
22 cases, CN works with its customers and receivers to

1 resolve disputes amicably wherever possible through  
2 this informal process.

3 Keeping CN's tariff 9000, 18, 15, 15, 15  
4 guarantee requires constant effort from the optional  
5 services team to promptly issue invoices. We have a  
6 staff of 12 people that directly review and deal with  
7 customers on these. They investigate the underlying  
8 service as well as addressing either issues around  
9 tariff language and the specifics of data.

10 CN views these efforts as part of our  
11 commitment to provide timely and responsive billing  
12 to customers and receivers. Because of the detailed  
13 process CN follows to ensure accuracy in its  
14 invoicing, it is imperative that customers and  
15 receivers do their part to promptly dispute invoices  
16 by bringing any concerns to CN's attention with  
17 sufficient detail to allow CN to complete a thorough  
18 review.

19 Through CN's informal dispute resolution  
20 process, it works with customers to understand  
21 whether any adjustment to the invoice is appropriate,  
22 such as an issue with CN service. As an example, CN

1 customers can request an interplant switch move  
2 online wherein CN moves cars from one track at a  
3 customer's facility to another.

4           If the actual work was performed and the  
5 car was placed in the wrong location, the customer  
6 can let us know and we will correct that invoice.  
7 While CN accepts responsibility where appropriate,  
8 under the circumstances of our particular invoice, if  
9 it is determined that the charge was improperly  
10 assessed or that CN was somehow responsible for the  
11 resulting charge, CN's expectation is that customers  
12 and receivers should accept responsibility and pay  
13 valid invoices.

14           In conclusion, CN has multiple levels of  
15 processes and people in place to help customers and  
16 receivers understand CN's demurrage and optional  
17 services policies, and to provide a fair and  
18 transparent process for its customers and receivers  
19 to address any concerns they may have with invoices  
20 for these charges. Thank you.

21           CHAIRMAN BEGEMAN: Thank you, I'll start.  
22 I actually have a question for the panel. You've

1     been sitting through the testimony for the past two  
2     days like we have. I'd like you to comment on what  
3     your reaction is to your customers or I'm sure one of  
4     your customers probably testified given the number,  
5     do you have any takeaways, any responses, any  
6     thoughts, any feedback that you would be comfortable  
7     sharing?

8                   MS. MULLIGAN: Alphabetically I think I'm  
9     probably on the hook. You know, I think there's a  
10    couple things. I think that as we've been here,  
11    BNSF, we have not had as many specific instances  
12    brought up about our programs and I think there's a  
13    part of us that takes comfort in that because I think  
14    we have a lot of confidence in the processes that we  
15    put behind our rules.

16                   We feel our rules are clear and we think  
17    that the effort that we put behind that to make sure  
18    that the rules are then applied in the right  
19    circumstances bears out in terms of our relationship  
20    with our customers. I think that doesn't mean that  
21    there aren't some folks who would point to parts of  
22    rules or have experiences where they would like

1 exceptions or greater leeway, but you know, we've  
2 taken the opportunity as well as listening to the  
3 customers to talk to some of the customers in the  
4 room and seek the feedback in terms of what does work  
5 well for us, what are things where they'd like more  
6 opportunity to engage with us.

7 In general, it's been a good experience to  
8 hear that. I think that the -- in terms of you know,  
9 takeaways for what we might do, I think that the --  
10 we're very curious about where the Board is going to  
11 go in terms of directions.

12 CHAIRMAN BEGEMAN: I bet.

13 MS. MULLIGAN: Certainly, and like I said  
14 we've been listening carefully to questions. I do  
15 think there will be an opportunity probably in the  
16 panel and I'll let other people react first, to talk  
17 about some of the things that we do think that are  
18 reasonable in terms of our program that have gotten a  
19 lot of discussion like zero free time, like  
20 constructive placement in yards, so I don't want to  
21 jump ahead in terms of digging into the content  
22 there, but I do appreciate the opportunity to be here



1 and give you guys some of our thoughts on that.

2 COMMISSIONER OBERMAN: Did you say you  
3 thought zero free time is reasonable?

4 MS. MULLIGAN: We have zero free time on  
5 some of our shipments. I assume we'll talk about  
6 that.

7 CHAIRMAN BEGEMAN: Pam?

8 MS. ARPIN: I'll go next.

9 CHAIRMAN BEGEMAN: Yes.

10 MS. ARPIN: So, you know, it's interesting  
11 being here because we have started our Customer  
12 Advisory Council a couple of years ago and so a lot  
13 of the feedback we've received in changes we've made  
14 in our product overall has been a result of that  
15 feedback and so I can relate to this environment,  
16 although a little bit more charged, than I'd say our  
17 Customer Advisory Council, in terms of being  
18 actively listening.

19 We need to actively listen, and we need to  
20 ensure that we're taking a balanced approach. That  
21 being said, we are very mature in our precision  
22 railroading model at CP, and so we have the benefit

1 of looking at it in the rearview mirror, versus being  
2 in it.

3 Was it difficult at the time, making tough  
4 decisions with our customers? Absolutely, but we  
5 have been able to garner significant benefits, some  
6 of which I talked to in terms of the volumes we're  
7 able to move, the customers that are coming back  
8 online with us, the contracts we're negotiating  
9 because of our efficiencies and so, you know, we  
10 have, I guess a different perspective because of  
11 where we are at.

12 CHAIRMAN BEGEMAN: Derek or --

13 MR. TAYLOR: Yeah, no I echo those  
14 comments. I mean you heard me say scheduled  
15 railroading, that's what CN did start, and I've been  
16 here 19 years, it was the original one, so we're  
17 mature in that concept. But you know, one thing that  
18 I heard from some of the customers, first mile/last  
19 mile. That's something we have been focused on for  
20 quite some time and by no means are we perfect, but  
21 we know that's a critical touch point with our  
22 customers especially at the last mile.

1           So, a lot of the things we have molded  
2 over the years as we've adapted and changed and  
3 evolved has been focused on that and you know, a true  
4 supply chain approach, that's really been integrated  
5 in our mantra, and started in earnest, I'd say. I  
6 was actually in Vancouver, British Columbia, at the  
7 huge -- it's the biggest gateway to Canada at the  
8 time -- but imagine Chicago with a port.

9           That's Canada's version of Chicago with a  
10 port basically. So, that first mile/last mile touch  
11 point is something we have and continue to really  
12 focus on.

13           COMMISSIONER OBERMAN: Did you say with a  
14 port?

15           MR. TAYLOR: Yeah, no, I'm just using an  
16 example, that's their biggest gateway so, but it's  
17 very similar to Chicago in some aspects, it's a  
18 smaller Chicago but with a port, so, it's one of  
19 those items that we realize there's those touch  
20 points and they're critical to it, but once again  
21 some of the CP and the evolution of it, we've been --  
22 I won't say the granddaddy of it but at the end of

1 the day, you know, this has been going on at our  
2 railroad since 2000, so while we still have, I'm  
3 sure, agree to disagree with some of our customers  
4 from time to time, overall the relationships are  
5 much improved and we continue to grow our business.

6 Of all the Class I's, we've had the  
7 largest amount of growth and April of this year was  
8 our record GTM's of 1.5 billion a day, on average  
9 over 7 days, it's never been done before in the  
10 history of our company for 100 years.

11 CHAIRMAN BEGEMAN: Pam, I have just a  
12 couple of questions based on your written testimony.  
13 You had mentioned you have CP's customer service  
14 team, and I'm curious how many people you have  
15 assigned to that?

16 MS. ARPIN: So, we have just under 60  
17 individuals assigned that support both carload and  
18 intermodal volumes.

19 CHAIRMAN BEGEMAN: 6-0?

20 MS. ARPIN: 6-0.

21 CHAIRMAN BEGEMAN: And, you also had  
22 mentioned that you conduct surveys periodically, do

1     they also -- do they touch on demurrage and  
2     accessorial? And if they do, could you comment on  
3     what some of your customers have responded?

4             MS. ARPIN: Yes, they do and so we work  
5     through a third-party, Ipsis Reed, to ensure that we  
6     have phone calls and/or emails to ensure we reach a  
7     certain amount of population so it's also  
8     statistically solid as well.

9             And in terms of the questions we ask, it  
10    is about overall operating service. We get into  
11    invoicing through the merit of I'd say the 360-degree  
12    view of a customer from the moment that they contract  
13    with us through to invoicing. We ask them questions  
14    about all aspects of the business.

15            In terms of demurrage and accessorial, to  
16    be quite frank, we get more feedback about our  
17    invoicing than we do about demurrage and accessorial.  
18    And invoicing, I mean our freight invoices and our  
19    processes around our technology, than we do  
20    specifically about accessorial.

21            Now, that being said, we do get some  
22    feedback from our customers around operations and

1 first mile/last mile and that is why we have  
2 instituted some of the processes that we have in  
3 terms of how we build our trains and our yards and  
4 our audit procedures to ensure that we are  
5 successfully looking at that component to the  
6 business.

7 So, I'd say largely we're hearing first  
8 mile/last mile and that we're seeing that dial move  
9 over the last couple of years, given our focus in  
10 that area.

11 CHAIRMAN BEGEMAN: Move positively?

12 MS. ARPIN: Yes, correct.

13 CHAIRMAN BEGEMAN: And I think you also  
14 said that largely your tariffs have been largely  
15 unchanged since 2015 and I think I'm going by memory  
16 yesterday but I believe NGFA testified that there's  
17 a new charge, something to the effect that there's a  
18 \$500 diversion fee for a car, somehow even if CP is  
19 responsible.

20 I didn't have the exact language in front  
21 of me, but maybe you know what I'm talking about and  
22 you could explain it.

1 MS. ARPIN: I do, and I wasn't going to  
2 talk to it unless you guys brought it up because that  
3 information is incorrect. We have not changed our  
4 diversion fee since January 1st of 2016.

5 COMMISSIONER OBERMAN: Is that the \$500?

6 MS. ARPIN: It was \$533, and it moved to  
7 \$535 on January 1st of 2016.

8 CHAIRMAN BEGEMAN: So, it's a continued,  
9 okay. Alright, thank you.

10 VICE CHAIRMAN FUCHS: Let me just jump  
11 into the idea of credits. For I guess, Derek and CN,  
12 can you maybe explain why you all give a credit  
13 generally?

14 MR. COURTOREILLE: Sure, so we give  
15 credits for two reasons, but one is we have a loading  
16 and unloading credit, it's built into the rate and  
17 then we also give credits that are related to  
18 service, so if we have missed switches, or we start  
19 to see an accumulation that's related to CN  
20 activities, we give credits to compensate.

21 VICE CHAIRMAN FUCHS: And on that latter  
22 category, it's because you know, you all believe that

1     your service caused some sort of harm to the  
2     receiver, shipper that you want to account for with  
3     that credit?

4                   MR. TAYLOR:   We believe that the shipper  
5     was not in control of the circumstances that caused  
6     the incident, so yes, we provide a credit to correct  
7     for that.

8                   VICE CHAIRMAN FUCHS:   And you'd agree when  
9     that usually happens there's some sort of negative  
10    effect on the shipper for some sort of  
11    railroad-caused delay?

12                  MR. COURTOREILLE:   I think that really  
13    depends on the shipper themselves.    You know, if  
14    they're in a situation where the products --

15                  VICE CHAIRMAN FUCHS:   But sometimes that's  
16    true.

17                  MR. COURTOREILLE:   Sometimes it may be  
18    true.

19                  VICE CHAIRMAN FUCHS:   Okay.   And so, I  
20    noticed that your alls credit expires in a week?

21                  MR. COURTOREILLE:   So, that's the loading  
22    and unloading credit.



1 VICE CHAIRMAN FUCHS: Okay.

2 MR. COURTOREILLE: So, the service credits  
3 do not. They're effectively, they offset something  
4 that's incurred.

5 VICE CHAIRMAN FUCHS: I see.

6 MR. COURTOREILLE: The fact that something  
7 may go over the span of a week, there's no impact.

8 VICE CHAIRMAN FUCHS: I see.

9 MR. COURTOREILLE: Continue to credit  
10 essentially until that situation has been resolved.

11 VICE CHAIRMAN FUCHS: I see. So, would it  
12 be fair to say that your service-related credits  
13 don't expire?

14 MR. COURTOREILLE: That's right, they're  
15 applied immediately to offset the underlying  
16 condition.

17 VICE CHAIRMAN FUCHS: Okay, is the same  
18 true for CP and BNSF? Do any service-related  
19 credits expire?

20 MS. ARPIN: So, for CP it's on a 30-day.

21 VICE CHAIRMAN FUCHS: And why is that?

22 MS. ARPIN: So, the reason for that is

1     that we do believe at some point in time having  
2     credits extend for unknown periods of time does not  
3     have the right behaviors in terms of ensuring our  
4     assets are moving.

5                 VICE CHAIRMAN FUCHS:   Why is it the right  
6     behavior at day 29 but not the right behavior at day  
7     31?

8                 MS. ARPIN:   So, fair enough, there had to  
9     be a cut-off point.

10                VICE CHAIRMAN FUCHS:   Why did there have  
11    to be a cut-off point?

12                MS. ARPIN:   If we leave credits going in  
13    perpetuity, then I guess the question I would ask  
14    back is what then enforces the behavior of having  
15    those assets fluidly moving?

16                VICE CHAIRMAN FUCHS:   I would say the same  
17    reason that you would excuse something at day 28,  
18    which is that you, in some cases imposed a harm on  
19    someone that you want to make up for.   That's the  
20    whole purpose of the credit as I understood it,  
21    right?   If there's a service credit, you imposed a  
22    harm by missing someone's switch, so you want to

1     remove a debit, which is a harm, I guess could be  
2     considered imposed on you all or some other customer,  
3     and so you know, it's kind of what's fair is fair.

4                 MS. ARPIN: I can understand your  
5     perspective and again, just speaking to why CP has  
6     put the 30-days in place is that we want to ensure  
7     that there is behavior change when there is demurrage  
8     charges and that having credits that go on for  
9     perpetuity may mean that the customers aren't making  
10    the right decisions around the assets, and we've seen  
11    it.

12                VICE CHAIRMAN FUCHS: And we all want an  
13    efficient movement of cars. And so, you know, the  
14    way I look at it is you know, if there's a missed  
15    switch, then that's not an efficient movement of  
16    cars as well, you know, some of it may not be your  
17    fault, some of it might be your fault, right? There  
18    might be a missed switch that's just your fault.

19                And that's -- there's a national need for  
20    the efficient movement of cars, and that's an  
21    instance where maybe it didn't fulfill, so if a  
22    credit expires, then doesn't the incentive work on

1 the other foot which is that hey, you know, this  
2 credit was given because I have now contributed to  
3 the lack of efficiency in the rail network and you  
4 know, and therefore if the credit's just removed,  
5 then that means that the credit is a lower incentive  
6 for you all, would that be a fair statement?

7 MS. ARPIN: And I just want to make sure  
8 it's understood, that for us it's a rolling 30, not  
9 that if you have 28 day, you know on the whole.

10 VICE CHAIRMAN FUCHS: How often do credits  
11 expire and is this even a problem?

12 MS. ARPIN: I honestly don't see it as a  
13 huge problem. We have very large customers that you  
14 know, generate a lot of credits, and to be frank --  
15 and I know it's discussed before is that if there are  
16 issues where customers bring that up as being an  
17 issue into the next month, we will review that.

18 VICE CHAIRMAN FUCHS: Okay, and then  
19 talking about deadlines for responding, I think, you  
20 know, Jill, you mentioned that you all endeavored to  
21 get back to people within a day or two, and I take  
22 that to mean substantive responses?

1 MS. MULLIGAN: That's our goal, but  
2 certainly we make sure that we get back to someone  
3 within the next business day knowing that we received  
4 the complaint and often they're straightforward, so  
5 we're able to address them in a couple of days.

6 VICE CHAIRMAN FUCHS: And, that's great  
7 and you know, it sounded like everybody has at least  
8 15-day deadline, is that fair?

9 MS. ARPIN: Not for us.

10 VICE CHAIRMAN FUCHS: Well not for you  
11 all, but at least 15 days or better, 15 days or  
12 sooner, maybe to respond, is that fair?

13 MS. ARPIN: That's particular to our  
14 invoice.

15 VICE CHAIRMAN FUCHS: I see.

16 MS. ARPIN: That doesn't include all the  
17 work we do up front.

18 VICE CHAIRMAN FUCHS: Sure.

19 MS. ARPIN: To try to prevent the invoice.

20 VICE CHAIRMAN FUCHS: No doubt, I hear  
21 you.

22 MS. ARPIN: And a lot of that work is done

1 without the customer even being involved because we  
2 are auditing operational movements and making  
3 adjustments to records.

4 VICE CHAIRMAN FUCHS: And we've heard a  
5 lot about the burden of disputing things, and you  
6 know, I guess the first thing is just, you know,  
7 getting a response, right? And so, can you all you  
8 know, is there a scenario where if a railroad failed  
9 to give, I'll say, a substantive response within 15  
10 days, that would be appropriate or reasonable? Is  
11 there a scenario that you can think of? I mean you  
12 all seem to endeavor either require internally  
13 yourself to do, or you know, much better, so I'm just  
14 wondering if there's not a railroad response within  
15 15 days, is that ever reasonable -- substantive  
16 response?

17 MR. COURTOREILLE: I can answer for CN, so  
18 typically we're very specific in what we put, what  
19 actually applies, our 15-day billing guarantee. So,  
20 the ones that we're not able to get timely  
21 information back, it's typically things that we're  
22 working with another third party to essentially cross

1 charge or bill our customer on behalf of that third  
2 party, those we would exclude.

3 In every other case, we typically are able  
4 to respond much faster than 15 business days.

5 COMMISSIONER OBERMAN: Hi, just to -- I'd  
6 like to just dispense with that last point quickly  
7 and then go on with some questions I have. At CP and  
8 CN if the customer doesn't complain within 15 days,  
9 are they out?

10 MR. COURTOREILLE: No, they are not.

11 COMMISSIONER OBERMAN: So, there's no time  
12 limit on their complaining, it's just if they take  
13 longer than 15-days, then you don't obligate  
14 yourself to get back in 15-days, is that --

15 MR. COURTOREILLE: That's correct.

16 COMMISSIONER OBERMAN: Okay, is that the  
17 same at CP?

18 MS. ARPIN: [Nods] So, let me go to some  
19 broader questions and I'm just going to go down the  
20 panel, Jill, of your typical demurrage charge, I  
21 assume it's \$150-ish, in that ballpark?

22 MS. MULLIGAN: It is generally \$150.

1 COMMISSIONER OBERMAN: Yeah.

2 MS. MULLIGAN: For merchandise, yeah.

3 COMMISSIONER OBERMAN: And how much of  
4 that is penalty and how much of that is compensation?

5 MS. MULLIGAN: A couple points on that.  
6 One is that we have not actually changed our rates  
7 since 2015, I believe, so our rate has been fairly  
8 constant. So, in terms of a recent increase that  
9 fits into one category or the other, we just don't  
10 have that history or experience.

11 COMMISSIONER OBERMAN: Well when you set  
12 it at \$150 --

13 MS. MULLIGAN: Yeah.

14 COMMISSIONER OBERMAN: What part of it is  
15 penalty and what part of it is compensation?

16 MS. MULLIGAN: I think to be frank, we are  
17 really prioritizing driving the behavior, so in terms  
18 of the cost at an individual location, what part of  
19 that would be compensated by 150 is going to be  
20 frankly wildly variable depending on the day, the  
21 terminal, the facility, and so I think in general if  
22 you talk to our operating folks, because of all the



1 costs associated with a delayed shipment, beyond the  
2 actual cost of the equipment -- so the track, the  
3 crew's being burned.

4 I don't think they would really think of  
5 the 150 as an opportunity for a full cost to pass  
6 through, instead what I think we do is look at is the  
7 rate that we're charging effective to get the  
8 behavior? That's not irrelevant to cost, but it's  
9 not driven by cost.

10 COMMISSIONER OBERMAN: Well, when you set  
11 the rate at 150 several years ago, you set the same  
12 rate for everybody?

13 MS. MULLIGAN: We did.

14 COMMISSIONER OBERMAN: So, in order to  
15 arrive at that rate, did you figure that some of it  
16 was cost and some of it was penalty?

17 MS. MULLIGAN: We thought of it, I  
18 believe, as fully incentive, though obviously if  
19 you're collecting something in terms of incentivizing  
20 behavior, that is going to defray costs, but we do  
21 not have a component that says \$100 is the cost and  
22 the \$50 is the penalty.

1           And part of the reason why I think that's  
2   a reasonable approach for us is because we do then  
3   spend the time saying where there's railroad fault,  
4   then we're going to not have demurrage apply in that  
5   instance, and so the sort of split between what's  
6   penalty versus what's cost is perhaps more relevant  
7   when you are talking about not properly taking  
8   responsibility when it's railroad fault, but I think  
9   we think of it as our entire program and how all of  
10   those terms come together to make us feel like what  
11   we've done is set the right incentive with reasonable  
12   terms and reasonable application.

13           COMMISSIONER OBERMAN: I'm just going on  
14   some of the case law, not all of it, some of it, it's  
15   not all totally consistent, but there are cases which  
16   I'm sure you know that say unless you can show the  
17   shipper is at fault, you can't collect the penalty  
18   portion of the demurrage charge.

19           So, if you were in such a litigation  
20   session, how would you tell the court or this Board  
21   which part you're entitled to collect and which part  
22   you're not?

1 MS. MULLIGAN: To be honest, I'm not sure  
2 that that's really case law that applies to current  
3 circumstances. I believe there was some subsequent  
4 case law that talked about the fact that the  
5 responsibilities of the railroads are to look at  
6 where we are at fault and make adjustments and not  
7 put a customer on the hook for a charge associated  
8 with that, but we can provide a more fulsome  
9 response.

10 COMMISSIONER OBERMAN: I'm going to come  
11 back to that issue in a minute, I'd just like to find  
12 out if the other two can answer that question. Pam,  
13 do you have a portion of your demurrage charge  
14 that's attributable to penalty and a portion  
15 attributable to compensation?

16 MS. ARPIN: So, the way we look at it is  
17 that we are looking at the costs, and I can de-  
18 construct some of that for you without getting into  
19 particulars because of antitrust, but I will do my  
20 best. So, what we look at is -- so car hire,  
21 there's a certain charge for care hire per day. We  
22 look at cost of failure to supply for the next move

1 and the next move may be for that customer and/or  
2 other which is an opportunity cost.

3 We look at rolling storage prevention, so  
4 we do have customers in particular, that participate  
5 in spot markets where their forecasting is not known  
6 to us and therefore we have to -- it's surge capacity  
7 that we were not aware of and they take advantage of  
8 our assets as rolling storage.

9 We also look at incremental yard switching  
10 and processing costs, so excess equipment in the yard  
11 causes more switching and then we look at our local  
12 service failure costs. So, yard congestion can risk  
13 crews running out of time to service other customer  
14 needs, and this requires us to provide credits to  
15 other customers that we weren't able to fulfill their  
16 demand or incur costs of a recovery switch.

17 So, those are some of the things that we  
18 look at. And to be quite frank, the charges that we  
19 have do not cover that cost and therefore, I would  
20 agree with BN is that we're looking for the rate  
21 that incents the behavior change, because it's not  
22 covering our cost, but we're trying to be balanced

1 and fair to our customers to see what is the charge  
2 that will create the necessary change.

3 COMMISSIONER OBERMAN: So, is it your  
4 testimony that none -- no part of your daily  
5 demurrage charge is penalty, it's all compensation?

6 MS. ARPIN: It is compensating for our  
7 costs.

8 COMMISSIONER OBERMAN: Entirely?

9 MS. ARPIN: Entirely.

10 COMMISSIONER OBERMAN: And you're saying  
11 it doesn't always meet it?

12 MS. ARPIN: In most cases would not cover  
13 our costs.

14 VICE CHAIRMAN FUCHS: Marty, can I jump  
15 in on this, it's because it's something that came up  
16 in Panel II, and I'm trying to understand, you know,  
17 and so maybe this panel can kind of bring a little  
18 bit more clarity. You said it's the charge necessary  
19 to incentivize -- or I think you said necessary to  
20 incentivize the behavioral change you all want, or  
21 the necessary behavioral change -- something to that  
22 effect?

1 MS. ARPIN: Because we feel that in  
2 covering our total cost would be detrimental to our  
3 customers.

4 VICE CHAIRMAN FUCHS: True, okay, so I  
5 guess I'm trying to understand, how do you define  
6 what is you know, the necessary behavior, do you know  
7 what I mean because like you know, every dollar you  
8 add, it's going to chance the cost calculus for  
9 somebody, right? Someone who's evaluating whether or  
10 not to continue to pay the demurrage charges, versus  
11 whether or not to invest to expand their facility.

12 The higher and higher you go, the better  
13 and better that investment looks, for example. And  
14 so, you all have to draw the line. What are the  
15 specific criteria for evaluating the behavioral  
16 change that you want? What are you looking at? How  
17 do you know that you've gone too much or too little?

18 MS. ARPIN: And I think that there's some  
19 factors to that which I've included in my testimony  
20 is that we're starting to see our demurrage charges  
21 going down, which means --

22 VICE CHAIRMAN FUCHS: I mean the rate.

1 MS. ARPIN: Okay, the rate itself?

2 VICE CHAIRMAN FUCHS: Yeah.

3 MS. ARPIN: But I am going to relate it in  
4 the sense that when the demurrage charges go down,  
5 that means we're incenting the right behavior.

6 VICE CHAIRMAN FUCHS: Right.

7 MS. ARPIN: That's everybody is saying --

8 VICE CHAIRMAN FUCHS: I see.

9 MS. ARPIN: We are not here to get revenue  
10 from demurrage. I would rather get a freight  
11 movement. It is much more beneficial to the railroad  
12 to get a freight movement.

13 VICE CHAIRMAN FUCHS: Right.

14 MS. ARPIN: To have a car sit, and so we  
15 know when we're doing the right things, because we  
16 can actually see the inverse happening which is it's  
17 not going up, it's going down. I feel that when  
18 you're seeing increases, then maybe you don't have  
19 the right charge in place.

20 VICE CHAIRMAN FUCHS: But is that  
21 sufficient criteria -- like, because you can imagine,  
22 and I hate to give these crazy hypotheticals, but

1 I'll give you a crazy hypothetical, some of you are  
2 used to them. The -- if you were to charge a million  
3 dollars a day, you'd probably get no demurrage, do  
4 you know you what I'm saying?

5 MS. ARPIN: And no customers.

6 VICE CHAIRMAN FUCHS: Right, well exactly.  
7 And so, I guess that's you know, just, you know, you  
8 want to charge up until the point where, you know, so  
9 what I'm hearing is there's a revenue curve, and  
10 you're charging at the top of the revenue curve?

11 MS. ARPIN: Not necessarily, and our  
12 program maybe works a little bit different than  
13 others in that we do it based on our fleet as well,  
14 right?

15 VICE CHAIRMAN FUCHS: Right.

16 MS. ARPIN: Fleet -- the supply and demand  
17 of our fleet will also change our charge.

18 VICE CHAIRMAN FUCHS: Right.

19 MS. ARPIN: Because if we don't have that  
20 next opportunity.

21 VICE CHAIRMAN FUCHS: But you know, I'm  
22 hearing -- is it the primary evidence that you're



1 giving that you think you've hit the right balance?  
2 And keep on focusing on a level of charge because  
3 it's easy to conceptualize, but I think the same  
4 applies to free time as well, by the way, and other  
5 practices, and credit usage, but the evidence that  
6 you're giving is that now your demurrage charge is --  
7 the total revenue is going down, right? And you  
8 know, so like is that the criteria -- railroads  
9 should just keep on decreasing free time and  
10 increasing rates until we start to see demurrage  
11 charge go up, up, up until there's something that  
12 happens where demurrage total revenue goes down, is  
13 that what we should be looking at for the appropriate  
14 criteria, or is there some other way you price?

15 Or, I should say think about running your  
16 systems?

17 MS. ARPIN: We go through all of the  
18 criteria which I just stated.

19 VICE CHAIRMAN FUCHS: Yeah.

20 MS. ARPIN: But then we are trying to be  
21 rational and balanced and I get that you're trying to  
22 say --

1                   VICE CHAIRMAN FUCHS: I know, I guess I'm  
2 just missing the criteria. Is there a change in like  
3 -- let's say percentage of shippers who unload within  
4 24-hours, right? Percentage of shippers who leave  
5 things in constructive place -- I mean the actual  
6 things that the incentives are linked to, are you  
7 measuring each of those?

8                   And seeing how you move the dial and that  
9 sort of thing, that's what I'm kind of looking for  
10 here.

11                  MS. ARPIN: Yes, so we are looking at the  
12 data to say how long our car is dwelling at a  
13 customer, how long until they're able to take them  
14 into their facilities, how long are they even in  
15 their facilities depending if it's private and/or  
16 railway equipment -- how customers release that  
17 equipment.

18                  VICE CHAIRMAN FUCHS: Yeah.

19                  MS. ARPIN: We look at all of that.

20                  VICE CHAIRMAN FUCHS: Yeah.

21                  MS. ARPIN: But at some point, because we  
22 can't fully recover our costs.

1 VICE CHAIRMAN FUCHS: Right.

2 MS. ARPIN: We come up with an amount of a  
3 charge that we feel is reasonable.

4 VICE CHAIRMAN FUCHS: Okay.

5 MS. ARPIN: And, that being said, in  
6 regard to free time, I'll just comment on it now, we  
7 have had free time since back in 2013.

8 VICE CHAIRMAN FUCHS: Right.

9 MS. ARPIN: So, we haven't changed that at  
10 all.

11 VICE CHAIRMAN FUCHS: So, I don't want to,  
12 because I know my colleagues have other questions.  
13 So, you mentioned reasonable -- it's the next step  
14 which is okay, so, you're saying that you're not  
15 recovering, you know, your costs, and you're looking  
16 at the incentive and you would actually like to go  
17 more, but you've made a determination that -- or you  
18 know, obviously you want to cover your costs, right?

19 So, you'd like to go more but you've made  
20 a determination that anything more, in terms of  
21 either cutting free time or increasing level would  
22 not be reasonable.

1 MS. ARPIN: Correct.

2 VICE CHAIRMAN FUCHS: So, if the Board has  
3 a reasonable practices authority and we have to make  
4 sure things are reasonable practices, so, demurrage  
5 is a practice, and what you're saying is you made the  
6 determination on what's reasonable. Okay, so if you  
7 were sitting our shoes, what is the criteria --  
8 shipper comes, receiver comes and says, "I think this  
9 is unreasonable."

10 I'm like well if we were going to take the  
11 CP test, what would we do.

12 MS. ARPIN: Okay, can I provide some  
13 further information --

14 VICE CHAIRMAN FUCHS: Yeah.

15 MS. ARPIN: In terms of some of the  
16 expectations we have from our customers?

17 VICE CHAIRMAN FUCHS: Yeah.

18 MS. ARPIN: Because I think yesterday it  
19 went from A and I'll say Z.

20 VICE CHAIRMAN FUCHS: Yeah.

21 MS. ARPIN: I'm from Canada, but I'll say  
22 Z.

1 VICE CHAIRMAN FUCHS: Okay.

2 MS. ARPIN: So, some of the things our  
3 customers can do, you know, I did listen yesterday,  
4 so I made many notes. I've been very thoughtful  
5 about this. So linear volumes. So, looking at the  
6 volumes, providing accurate volume forecasts.  
7 There's a lot of times where volume will just show up  
8 on our line unexpectedly.

9 We have to plan as other roads, a huge  
10 network. We have crews, we have locomotives, we have  
11 assets that we have to prepare for ensuring adequate  
12 track capacity and/or private storage is available.  
13 Loading and unloading schedule for staff to mitigate  
14 demurrage, so you know, I did hear not all, but some  
15 customers talking about that they work Monday through  
16 Friday, 8 to 5.

17 We're a 24/7 operation and as such, we  
18 would like to keep those assets moving effectively  
19 for all customers. Utilizing tools available, so  
20 customer log-in issue. We have opportunities for  
21 our customers within the visibility that they have,  
22 within the tools, to log issues with us when they see

1     that there's an issue with the movement.

2             Manage invoice dispute process, reviewing  
3     inbound pipeline and monitoring car statuses,  
4     ordering from the pipeline -- we at CP, offer a  
5     service, particularly because we know people don't  
6     work 24/7 where you don't have to wait for that car  
7     to arrive in the yard, you can order it from the  
8     pipeline while you're still at work for the day, and  
9     then managing the whole pre-invoice process.

10            So, you know, for us, there's a lot of  
11     things that are within control of shippers and  
12     receivers as well.

13            VICE CHAIRMAN FUCHS:   And I appreciate the  
14     thoughtful documentation and listening to everybody's  
15     testimony, you know, because I think our theme was  
16     yesterday, what can shippers do?   So, I appreciate  
17     you laying that all out.

18            You know, I think you know, okay, so those  
19     are all the things they can do.   And you know, one of  
20     the things that Derek said that I thought was really  
21     interesting, is you know, if some customers are not  
22     loading and unloading efficiently, it could hurt

1 other customers, and of course, you know, generally  
2 hurting the rail network, and then hurting other  
3 customers and hurting you all, you know, at the same  
4 time, so is that how we should be thinking about  
5 reasonableness, which is you know, look at, okay,  
6 what are the effects of that loading and unloading  
7 practice, if it were the less efficient one, relative  
8 to all the different ways that a shipper could  
9 comply.

10 And, if there are scenarios where the  
11 costs to the shipper are greater than the effects of  
12 not complying with the you know, the lower free time  
13 or what have you, that we should say that's not  
14 reasonable. If you have to spend a million dollars  
15 in track, and you know, whatever benefit you're  
16 having for the rest of the customers is smaller than  
17 a million dollars, we should say, you know, this  
18 bill's not reasonable.

19 Is that the type of thing that we should  
20 be thinking about?

21 MR. TAYLOR: Well maybe I can bring an  
22 operation's point of view to this. Obviously, how

1 the demurrage rates are set, that is not what I do,  
2 but perspective-wise like you said, the operation's  
3 teams -- I don't want to collect demurrage. I want  
4 to have a full rail yard, a happy customer, and move  
5 their products safely and efficiently.

6 And that, sometimes I think, gets lost in  
7 some of this because it's so contentious, but from an  
8 operation's point of view, we don't want to collect  
9 that. And the supply chain is very important as she  
10 mentioned, you know, forecasting is a huge part of  
11 what we do. It takes us 6 months to qualify a  
12 conductor. It's 9 months to get a qualified  
13 engineer.

14 We are the only railroad that was in  
15 market for locomotives. GE had to reopen their  
16 factory in Fort Worth, Texas, imagine the lead time  
17 on a 4- million-dollar Tier IV locomotive.

18 VICE CHAIRMAN FUCHS: Right.

19 MR. TAYLOR: So, the scale-ability for a  
20 railroad, we want to be nimble, we want to be  
21 customer-centric, but we can't always be as nimble,  
22 especially, you know, we are a commodity-dependent,



1 so are many of our customers. Those commodities have  
2 seen some pretty significant swings over the past  
3 decade.

4 VICE CHAIRMAN FUCHS: Right.

5 MR. TAYLOR: And, you know, commodities  
6 are important too, because price has a lot to do with  
7 that, so when you look at a supply chain, you have  
8 say a customer that gets a very good price on a  
9 product, they can only say handle 5 cars a day, 5  
10 days a week.

11 Well they may go buy 100 cars of that  
12 product.

13 VICE CHAIRMAN FUCHS: Right.

14 MR. TAYLOR: And it's going to come, it's  
15 a business decision they made, I don't blame them for  
16 making that decision, but then all of a sudden  
17 demurrage becomes contentious.

18 VICE CHAIRMAN FUCHS: Right.

19 MR. TAYLOR: But even with the demurrage  
20 rate, they still make money on it, so those are part  
21 of the supply chain challenges that we deal with on a  
22 daily basis and we're not always perfect. The

1 customer is not always perfect.

2 VICE CHAIRMAN FUCHS: Right.

3 MR. TAYLOR: But, our ability to be nimble  
4 isn't as quick as many people would expect. It's  
5 because of some of the things that we have to do to  
6 ramp up or ramp down.

7 VICE CHAIRMAN FUCHS: I hear you, but and  
8 then I appreciate the operation perspective, and it  
9 came through in your testimony. But I'm thinking,  
10 you know, from a legal perspective, is what I'm kind  
11 of describing as being a benefit cost as was talked  
12 about yesterday.

13 I think you know, in particular in the  
14 chemical panel, is that type of thing appropriate for  
15 judging the reasonableness of demurrage fees?

16 MS. GAINNEY: I think it would be  
17 particularly difficult to try to develop or endeavor  
18 to develop a one size fits all, cost benefit test  
19 that would apply to all of the varying circumstances  
20 of different customers and terminals on individual  
21 railroads and the multitude of factors that go into  
22 the supply chains and the commodities that are

1 shipped on the rails.

2 One theme that has emerged from all of the  
3 testimony that the Board has heard over the last two  
4 days, is that there is really no one size fits all  
5 piece, solution here. And that might be  
6 particularly frustrating or dissatisfying, but I  
7 think it's fully consistent with the long line of  
8 demurrage case law, both at the Board and in the  
9 courts where the Board and courts have struggled  
10 with the fact-specific circumstances in individual  
11 demurrage cases when they are not able to be  
12 resolved, and they result in litigation where a  
13 carrier is trying to collect demurrage charges from a  
14 customer, and then it's really delved into the  
15 details of the particular invoices, the particular  
16 service.

17 What happened on that day? Was there  
18 over-ordering? What contributed to it? And so, it  
19 is very challenging and I'm not sure going to be the  
20 right use of the Board's resources or time to be  
21 focused on that aspect as opposed to focusing efforts  
22 on other areas.

1           And one area in particular, improving  
2     dialogue and transparency the way that the Board has  
3     asked the railroads to make more easily available,  
4     the demurrage revenues that were previously reported  
5     to the Board in a line item in the R-1's, that's an  
6     area where it seems like very easy for the Board to  
7     do and it makes that information more readily  
8     available to customers.

9           We, of course, are speaking individually  
10    with our customers on a routine basis about these  
11    issues, and we work hard with them to try to minimize  
12    the amount of demurrage invoices that they're  
13    incurring, because as Derek said, we want them to  
14    load and unload the cars as quickly as possible, and  
15    we wouldn't want anything to incentivize them not to  
16    do so.

17           VICE CHAIRMAN: Well, the last part I'm  
18    wondering about, but you know, it sounded like you've  
19    done kind of an exhaustive analysis of the case law  
20    which is very much appreciated, and I guess I'm  
21    wondering okay, so cost benefit test, impractical to  
22    apply, predominantly not a good use of the Board's

1 resources.

2 And so, what are the guiding principles we  
3 should have for the reasonableness of demurrage,  
4 maybe with an example of -- give me an example of a  
5 demurrage fee that is unreasonable, in a hypothetical  
6 event.

7 MS. GAINES: And let me be clear. When I  
8 say not a good use of resources, I mean in a broad  
9 general, trying to construct in advance, a one size  
10 fits all rule that would govern all future cases as  
11 opposed to the individual adjudication, the way that  
12 this demurrage resolved.

13 VICE CHAIRMAN FUCHS: But if we were to --  
14 when you say one size fits all, if the Board were to  
15 just come out tomorrow, and I'm not suggesting that's  
16 what we want to do, but it was a suggestion  
17 yesterday.

18 If the Board were to come out tomorrow and  
19 say that you know, shippers and receivers can  
20 challenge any -- you know, when we look at reasonable  
21 rules and practices, anybody can bring a complaint  
22 that basically says for their particular

1     circumstance, the cost of complying with this is not  
2     worth it compared to what the railroad is getting if  
3     I did comply.

4             What you're saying is that would not be a  
5     good policy statement for the Board to make?

6             MS. GAINNEY: I'm not sure that that would  
7     be the best way to focus the Board's resources and I  
8     welcome, of course, Jill's and other people's inputs  
9     on these topics, but in our view, this is a very  
10    fact-specific situation.

11            VICE CHAIRMAN FUCHS: But we would still  
12    be talking about fact-specific cases. I'm saying,  
13    the policy statement would be when you bring your  
14    fact-specific case, tell us about your fact-specific  
15    costs, and the railroad would say their fact-specific  
16    benefits so, it would still be fact-specific.

17            MS. GAINNEY: So, at that point is it very  
18    much like an adjudication as opposed to a policy  
19    statement.

20            VICE CHAIRMAN FUCHS: Yes.

21            MS. GAINNEY: Or as opposed --

22            VICE CHAIRMAN FUCHS: It's a policy

1 statement that would guide an adjudication.

2 MS. GAINEY: I wonder though, whether that  
3 would be possible to be done in the fact-specific  
4 context of an individual customer or an individual  
5 terminal on an individual railroad. These issues  
6 don't wash out the same way with respect to various  
7 commodity groups, and it is very -- I can't emphasize  
8 the amount and I'll turn to Derek here as well, to  
9 which these issues are very fact-specific and very  
10 much depend upon individual contexts and are not the  
11 same.

12 There really is not a one size fits all  
13 solution here, but the most important thing for us is  
14 incentivizing efficient loading and unloading of  
15 railcars so we can maximize the asset utilization on  
16 our network.

17 MR. TAYLOR: It's highly variable when you  
18 look at the customers. They all have different  
19 supply chains, different needs, different  
20 commodities, but one of the things for the last few  
21 days is you know a lot of folks talking about this  
22 working Monday through Friday and you've mentioned in

1 here, both of you, can you imagine if the railroad  
2 decided to shut down our 4 hump yards or mechanical  
3 facilities and everything else on Saturday and  
4 Sundays, what that would do to the supply chain.

5 And I don't mean that in a disrespectful  
6 manner, but it's one of those things where we have  
7 terminals in certain locations that only work Monday  
8 through Friday, cars keep coming Saturday and  
9 Sunday. So, it's one of those things -- it's not  
10 meant to be a penalty or anything else, but we really  
11 try to get everybody in the whole supply chain for  
12 that 7-day week.

13 VICE CHAIRMAN FUCHS: But you understand  
14 that, maximization of loading and unloading implies  
15 not considering customer costs, so are you saying  
16 that we should never consider customer costs in  
17 evaluating the reasonableness?

18 MR. TAYLOR: To Kathy's point, it's very  
19 specific. We have a number of -- call it, smaller  
20 customers.

21 VICE CHAIRMAN FUCHS: Right.

22 MR. TAYLOR: And operations, that they



1     don't have the volume that we'd never expect them to  
2     do that. We actually have called day/week service.

3                   VICE CHAIRMAN FUCHS: Right.

4                   MR. TAYLOR: Our transportation service  
5     plan is set up where we are very intertwined with  
6     those customers, so we have somebody that only has a  
7     2-car spot.

8                   VICE CHAIRMAN FUCHS: Right.

9                   MR. TAYLOR: Well, they may only have  
10    enough business to only service in 2 days a week, so  
11    we tailor that we may go service them on Monday and  
12    Wednesdays, you know, and we're not perfect and  
13    neither are they, but in some cases we've had some of  
14    those smaller shippers have some pipeline issues  
15    because they want to order a cheaper product, but we  
16    work with them to balance that out, you know, they've  
17    come to us for help and that's so very --

18                  VICE CHAIRMAN FUCHS: And I know Ann's got  
19    questions, I'll just say that you all are familiar  
20    with benefit costs in a number of contexts, and if  
21    you were to go to the FRA, for example, and say I  
22    want you to make decisions on benefit costs -- and

1     it's separate from doing a decision for a regulatory  
2     policy versus an individual policy between two  
3     businesses, I understand that completely and there's  
4     a million reasons why.

5                 But if you were to say that, you know, if  
6     you would say FRA maximize safety versus FRA weigh  
7     benefits and costs -- those are two different  
8     concepts. And so, if we're maximizing loading and  
9     unloading, that's like maximizing safety right, but  
10    you all, in other contexts frequently say, consider  
11    costs.

12                And so, I guess and what I'm never hearing  
13    as part of this discussion, a consideration of  
14    customer costs, and I guess I'm wondering, is it not  
15    appropriate that we should even be thinking about  
16    that? Is it in the demurrage context, it's just so  
17    different than regulatory context, we shouldn't care  
18    about customer costs? Somebody help me out with  
19    that.

20                MS. MULLIGAN: Maybe I can try. What I  
21    would say is I don't think it's irrelevant, but I  
22    think also you have to take a bigger picture view of

1 the cost and benefit, and if you're going to judge  
2 the reasonableness of a demurrage program, you need  
3 to think about -- and that's just, I think we maybe  
4 we need, we talk about the network.

5 But in reality, the network is our  
6 collective customer. There's 272,000 cars on our  
7 network right now.

8 We're not trying to get efficiency because it makes  
9 us feel good, it's because we have a bunch of  
10 shippers who need us to deliver their freight.

11 And frankly, I think a lot of those  
12 shippers would be concerned about not having clear,  
13 general rules of applicability that tell them the  
14 rules of the railroad and say okay, I know what I can  
15 and can't do to avoid those costs, and I give you the  
16 tools. What I think in terms of reasonableness for  
17 us is we give you the tools that enable you to engage  
18 with us, to show us when it's our fault, to make sure  
19 we're taking credit for when it's our fault because  
20 then we bear those costs, so that goes right to --  
21 those inefficiencies fall at our foot.

22 But, if you're thinking just about the

1 cost to an individual shipper who may not be  
2 operating their facility in the same way that most of  
3 your customers are, then I think you're going down  
4 the wrong path in terms of what the STB has also  
5 previously recognized in terms of the level at which  
6 you're supposed to consider reasonableness.

7 CHAIRMAN BEGEMAN: So, I think yesterday I  
8 mentioned the one size fits all concern I have, not  
9 from your perspective, Kathy, but rather how  
10 demurrage charges are being imposed on the variety of  
11 customers. And I'm not picking on any of you  
12 necessarily, I think we heard a lot about -- I'm  
13 going to say, you know, Ben from Consolidated Scrap  
14 Resources, and what was going on with NS's new  
15 charges where no matter -- I mean he doesn't have the  
16 space so he can do anything to avoid incurring  
17 demurrage costs, based on the changes that they've  
18 made.

19 They've basically imposed sort of a one  
20 size fits all. We heard from the Barilla, just a few  
21 moments ago that they can't unload a unit train in 24  
22 hours, but that's UP's one size fits all demurrage

1 imposition. And so, you got to look at it both ways,  
2 or reconsider it, I guess I should be saying.

3 It's that I mean, I know  
4 that it is good to have clarity and transparency, and  
5 I think as I mentioned maybe like I don't want to say  
6 uniformity in any type of an antitrust concern for  
7 the railroads, I don't mean it that way, maybe the  
8 uniformity needs to come from some direction from the  
9 Board.

10 MR. TAYLOR: If I could comment, you  
11 mentioned the unit train remember that was a topic of  
12 discussion yesterday, you know, from an operational  
13 point of view in our supply chains -- and, you know,  
14 we've been at this at least from our scheduled  
15 railroading for 20 years, we know what facilities in  
16 the supply chain can actually do a train if it's in  
17 12-hours, 18-hours, 24-hours, and we've worked with  
18 them.

19 So, when we know we can maximize the use  
20 of our assets in working with a supply towards the  
21 receiver or shipper, we do that. But they also know  
22 if that sweet spot is going to be more than 24-hours,

1 we move that in a manifest network for the last 20  
2 years.

3 So, it's one of those things, it is about  
4 balance to your point, but at least I can speak on  
5 behalf of CN from an operational point of view, we  
6 have that dialogue so we know what customers can be  
7 unit train centric, and actually turn the assets that  
8 quick.

9 We know what facilities can do the same  
10 thing on the receiving end, and you know, we had some  
11 contentious stuff with a facility and a shipper and  
12 ourselves, and we sat down in a room and then we  
13 worked it out and then we went out and set a record  
14 the following year, the best we ever had, for all  
15 three of us.

16 But it's the supply chain mantra that  
17 you've got to work on there, at least from a CN point  
18 of view, we work with them so they realize this makes  
19 unit train sense, it's capable through the whole  
20 supply chain, not just okay, we can load it at origin  
21 in 16 hours, but then it goes to a destination to sit  
22 for three days to unload it because it's got to

1 match, and that's at least what we've done over the  
2 years, so at least at CN that is not as contentious  
3 of an issue.

4 CHAIRMAN BEGEMAN: Well, I will say it's  
5 not lost on me that the two carriers that seem to  
6 have had the least amount of criticism directed, or  
7 concerns directed at them during these 2 days of  
8 hearings, have been BNSF, who is not doing precision  
9 scheduled railroading, and I would say KCS who is on  
10 the -- in the early stages of some elements of it.  
11 And so, I think that's somewhat informative as well.

12 COMMISSIONER OBERMAN: I'd like to pick  
13 back up and just finishing a line of questioning and  
14 then going to a couple of other subjects. So, let me  
15 go to CN on the question of telling us how much, if  
16 you can, of your demurrage charge consists of  
17 compensation and how much of it consists of penalty.  
18 Are you able to answer that question?

19 MR. COURTOREILLE: So, I would tell you  
20 that our response is very similar to CP's and the  
21 fact that it's incredibly complex to look at an  
22 individual yard and customer scenario and try and

1     determine the costs related to it.

2                   We, as well, similar to CP, believe that  
3     in most cases we're actually undercharging compared  
4     to our costs for said service.

5                   COMMISSIONER OBERMAN:   But, when you set  
6     the amount, which is 150?

7                   MR. COURTOREILLE:   So, actually just a  
8     point of clarification on the amount.   So, we  
9     actually have different amounts based on the  
10    terminal, so it was mentioned before the Chicago  
11    terminal, and Vancouver areas have higher rates  
12    because those are key -- they're the heart of our  
13    respective networks in Canada and the United States.

14                   We are trying to drive the right behavior  
15    and it is our view that a higher charge in those  
16    areas drives that behavior.

17                   COMMISSIONER OBERMAN:   Well, it's \$300 in  
18    Chicago.

19                   MR. COURTOREILLE:   It is not, it is \$170  
20    for a system car.

21                   COMMISSIONER OBERMAN:   Okay.

22                   MR. TAYLOR:   And it's \$120 for a private



1 car.

2 COMMISSIONER OBERMAN: For the 170, did  
3 you calculate at the time you determined that to be  
4 170, that a portion of that was for costs,  
5 compensation and a portion of it was for penalty?  
6 Or, did you just not make that analysis, that's what  
7 I'm trying to get at.

8 MR. COURTOREILLE: I don't have that  
9 information. I believe we did do an analysis, I just  
10 -- I cannot give you the breakdown of what that cost  
11 might be, specifically for Chicago.

12 COMMISSIONER OBERMAN: How about any other  
13 place?

14 MR. COURTOREILLE: Not with me today.

15 COMMISSIONER OBERMAN: Alright, can you  
16 provide us with that information if you did make --  
17 I'm not asking you to go out and make a new  
18 calculation, I want to know if you made a calculation  
19 before these hearings started to separate out the  
20 amounts. If you didn't okay, and if you did, I'd  
21 like to know what it is.

22 MS. GAINEY: We can respond to this

1 question after and under seal.

2 COMMISSIONER OBERMAN: Okay, the free time  
3 currently on the BN is --

4 MS. MULLIGAN: So, it depends on the  
5 equipment involved. So, for railroad-owned  
6 equipment, in that instance you have a shipper who is  
7 responsible -- potentially responsible on the clock  
8 for demurrage purposes for when it's sitting in our  
9 yard, so when it's constructively placed and when  
10 it's actually placed.

11 And so, for an empty car that's being  
12 loaded, there's a 24-hour or one credit assigned to  
13 that. For unloading, that's a process that often  
14 takes longer, it's 48-hours or two credits, and so  
15 that's for your railroad equipment.

16 COMMISSIONER OBERMAN: Okay.

17 MS. MULLIGAN: Now, when you switch to  
18 private equipment -- this is something I think is  
19 helpful to give a little information about. So,  
20 private equipment we do actually offer less free time  
21 and part of that is because there's actually only  
22 constructive placement time that you're on the hook

1 for, because when it's your own equipment, once we  
2 actually place it at your facility, then you're not  
3 on the clock for demurrage.

4 So, it makes sense that there's a  
5 differential between a railroad car and a private  
6 car, because you're not trying to account for the  
7 actual loading and unloading, you're only dealing  
8 with when it's sitting in the yard.

9 VICE CHAIRMAN FUCHS: To make sure I  
10 understand that, for the unloading -- and so the  
11 difference is it's 2 versus 1 credit -- yeah okay,  
12 because I've been kind of wondering this, you've  
13 heard me wonder this question.

14 Okay, so are the 2 credits broken up such  
15 that 1 of the 2 is only for CP or constructive  
16 placement?

17 MS. MULLIGAN: No.

18 VICE CHAIRMAN FUCHS: So, in that sense,  
19 you still could get a marginal benefit for being a  
20 railroad -- a system car relative to private car such  
21 that there are scenarios where you can be 2 days in  
22 CP and 1 day if you could unload really quickly?

1 MS. MULLIGAN: Yes, exactly, and we don't  
2 -- so sticking with railroad equipment for a second.  
3 Our approach there is -- and it's applicable also for  
4 private, but our approach is once you come into a  
5 yard after the actual day of placement, then we are  
6 paying attention and you have a credit that gives you  
7 that -- for I'll stick with the loaded.

8 VICE CHAIRMAN FUCHS: Yeah.

9 MS. MULLIGAN: That gives you 2 days to do  
10 that and we don't -- what we do is we see you come  
11 into the yard, and you go into constructive  
12 placement. So, we start the clock, you know, after  
13 the point where your free time is gone.

14 VICE CHAIRMAN FUCHS: Sure.

15 MS. MULLIGAN: Then, as soon as you  
16 request that, you go off the clock.

17 VICE CHAIRMAN FUCHS: The clock stops.

18 MS. MULLIGAN: It stops and so if you're a  
19 piece of railroad equipment, then if we bring it  
20 right to you, if we miss a switch, if we, you know,  
21 if you're open -- you release it on Friday, but  
22 you're not open until Sunday, you stay off the clock

1     until when we actually place it.

2                 VICE CHAIRMAN FUCHS:   I understand.

3                 MS. MULLIGAN:   And then we blend the two  
4     times together, so you do have the flexibility to  
5     make up if you're long on CP, you make it up on the  
6     actual placement side.

7                 VICE CHAIRMAN FUCHS:   Right.

8                 MS. MULLIGAN:   So, we don't try to  
9     micromanage that between the two.

10                VICE CHAIRMAN FUCHS:   Alright, I  
11    understand it now, thank you.

12                COMMISSIONER OBERMAN:   You were about to  
13    say what the free time was for private cars?

14                MS. MULLIGAN:   Yes, so for private cars,  
15    you get the benefit of the actual placement, which I  
16    recognize if you're getting it right at midnight,  
17    that's a half a minute.   And then you would go onto  
18    the clock.

19                COMMISSIONER OBERMAN:   How long is the  
20    clock.

21                MS. MULLIGAN:   Sorry, there's zero free  
22    time, so you are on, but if I could explain one thing

1 as well. We have different types of facilities and  
2 so 85% of our facilities are spot on arrival  
3 facilities, and so that means they're not in CP  
4 unless they don't have a space.

5 And so, when something is coming into our  
6 pipeline, they have said to us, we are spot on  
7 arrival, and so if I've got 5 track spaces open, you  
8 can bring it on in. And we adjust for, if not open  
9 on Saturdays and Sundays, but so you can actually  
10 designate yourself as a spot on arrival facility in  
11 which case you don't get constructive placement  
12 unless you have zero space at the facility.

13 COMMISSIONER OBERMAN: But the zero free  
14 time to that degree sounds like it's the same policy  
15 as NS, is that right?

16 MS. MULLIGAN: I'm not sure, I'll be  
17 honest with you, I don't --

18 COMMISSIONER OBERMAN: Okay.

19 MS. MULLIGAN: I pay attention to our  
20 policy.

21 COMMISSIONER OBERMAN: It sounds like it  
22 to me and how long --

1 MS. MULLIGAN: It is a zero free time  
2 policy, that's absolutely true and it has been since  
3 2015.

4 COMMISSIONER OBERMAN: Well I was going to  
5 ask you, how long have these free times been in  
6 effect? All of them since 2015 this way?

7 MS. MULLIGAN: We haven't and possibly  
8 even earlier, we haven't changed anything since that  
9 period.

10 COMMISSIONER OBERMAN: So, it's at least  
11 since 2015?

12 MS. MULLIGAN: Yeah.

13 COMMISSIONER OBERMAN: Alright and I'm  
14 going to come back to you in a minute, but I'd like  
15 to go down the line and get the same answers. Pam,  
16 what is your free time?

17 MS. ARPIN: It differs, it's almost  
18 exactly the same as what Jill described. We have  
19 zero free time for privates -- that being said, we do  
20 have open gate, which is the same as placed on  
21 arrival where we do provide a credit for that too and  
22 as well if you switch your own facility you get

1 another credit, so there are opportunities.

2 COMMISSIONER OBERMAN: And for the system  
3 cars, it's 24 and 48?

4 MS. ARPIN: It's 24 and 24 for ours.

5 COMMISSIONER OBERMAN: Okay.

6 MS. ARPIN: Yeah. And our policy has been  
7 in place since 2013.

8 COMMISSIONER OBERMAN: Okay, and how about  
9 CN?

10 MR. COURTOREILLE: So, for CN it's 1  
11 credit day for loading, 1 for unloading for system  
12 cars.

13 COMMISSIONER OBERMAN: 24 and 24?

14 MR. COURTOREILLE: Yes, and for private  
15 cars, so we have a slightly different definition of  
16 free time. Ours is actually aligned to the service  
17 window, so an example might be if a car arrived on  
18 the weekend and the customer is normally serviced  
19 Monday, Wednesday and Friday, they have until 4 hours  
20 before their service window would start, so again,  
21 the service on Monday, let's say from 8 a.m. to 4  
22 p.m., if they order the car in before 4 a.m. on



1 Monday for that first day's service, they do not pay  
2 any demurrage.

3 So, in that example, the car was CP'd on  
4 Saturday, they would have all day Saturday, Sunday  
5 until Monday morning at 4 a.m. to order the car in  
6 before incurring charges.

7 COMMISSIONER OBERMAN: Okay, and if it  
8 comes in on Monday, so I'm lost.

9 MR. COURTOREILLE: Okay, sure, so if it  
10 comes in Monday, so and the next service is  
11 Wednesday, they would have until 4 hours before the  
12 Wednesday start of their service.

13 COMMISSIONER OBERMAN: But it depends on  
14 your service plan for that or the days of service for  
15 that particular customer when the clock starts?

16 MR. COURTOREILLE: Yes, it's personalized  
17 in that regard.

18 COMMISSIONER OBERMAN: Okay, so it's not  
19 zero for very many people it sounds like, unless --

20 MR. COURTOREILLE: As I mentioned earlier,  
21 80% of our customers do not pay demurrage.

22 COMMISSIONER OBERMAN: Well, are you

1     implying that for people with zero they end up paying  
2     demurrage?

3                   MR. COURTOREILLE:   No, I'm not, sorry.

4                   COMMISSIONER OBERMAN:   Okay, well is it  
5     80% of your customers who don't have zero free time?

6                   MR. COURTOREILLE:   That's a mix between  
7     the system and private cars, so.

8                   COMMISSIONER OBERMAN:   And how long has  
9     this program, the 24 and 24 plus the complex  
10    description here for private cars, how long has that  
11    been in place?

12                   MR. COURTOREILLE:   The actual style of  
13    ordering in has been in place for at least 4 years  
14    and the credits have -- we changed the credit from 2  
15    to 1 days on loading in January of this year.

16                   COMMISSIONER OBERMAN:   Say that again, the  
17    credit?   The credit --

18                   MR. COURTOREILLE:   The credits for the  
19    system cars on unloading went from 2 to 1 in January  
20    this year.

21                   COMMISSIONER OBERMAN:   Well it was like  
22    BN's prior to January 1 for unloading.

1 MR. COURTOREILLE: Yes.

2 COMMISSIONER OBERMAN: Because I'm looking  
3 at the numbers and I'm trying to match up the numbers  
4 with the practices, so let's go back through the  
5 panel here. BN, your -- Jill, your yearly demurrage  
6 has gone up 50% in the time period or since before  
7 your time period, at least 2015 you said, it's gone  
8 from -- well maybe you went up in 2015, because it  
9 was 134 million in 2014 and it's been close to 200-  
10 million, went down a little bit in 2017 since then.

11 So, was there a change between 2014 and  
12 2015?

13 MS. MULLIGAN: Are you talking about the  
14 annual revenues that we forwarded?

15 COMMISSIONER OBERMAN: Yeah, I'm looking  
16 at the table.

17 MS. MULLIGAN: We feel pretty comfortable  
18 that the changes in the amounts that we collect are  
19 reflective of changes in volume and mix, not changes  
20 in the rules or changes in the dollar amounts that  
21 we collect. We have more traffic frankly, that's  
22 moving, and so, there's more.

1                   COMMISSIONER OBERMAN: So, the more  
2 business the customers do with you, the more they pay  
3 for demurrage?

4                   MS. MULLIGAN: Well, no, I mean the more  
5 units that are on the system.

6                   COMMISSIONER OBERMAN: Well, that's the  
7 more business they're doing, that's how units get on  
8 the system.

9                   MS. MULLIGAN: Yes.

10                  COMMISSIONER OBERMAN: I mean you went  
11 from the first quarter of last year to the first  
12 quarter of this year, you increased from 46 million  
13 to 56 million, or actually 47 to 57, that's a pretty  
14 hefty increase quarter to quarter.

15                  MS. MULLIGAN: But I also think within  
16 that period --

17                  COMMISSIONER OBERMAN: So, what caused  
18 that?

19                  MS. MULLIGAN: I think actually, now I'm  
20 looking for the numbers very quickly, but I think the  
21 -- if I'm not misremembering our data, there's  
22 actually a fair amount of variability within the

1 calendar year.

2 COMMISSIONER OBERMAN: No, it's only up.  
3 It went from 47 million to a little over 47 to 56,  
4 I'm sorry it did go down to 54.

5 MS. MULLIGAN: Yeah.

6 COMMISSIONER OBERMAN: And then it went up,  
7 but I'm assuming it's fair to compare quarter to  
8 quarter, because winter is different than summer.

9 MS. MULLIGAN: It's not just seasonality,  
10 it's the mix of our business, are we moving a lot of  
11 unit trains, are we moving a lot of single, a lot of  
12 privates on our system, I mean there's huge amounts  
13 of variability and it's not just seasonality.

14 COMMISSIONER OBERMAN: I mean are the  
15 customers -- you know, this is an incentive program,  
16 we all agree with that?

17 MS. MULLIGAN: Yeah.

18 COMMISSIONER OBERMAN: So, what happened  
19 to the customers in the last year on your line or  
20 over the you know, the last 4 quarters, to change  
21 their behavior to stop being incentivized because  
22 they're paying more, so the incentive isn't working,

1 I don't get it.

2 MS. MULLIGAN: I don't think actually  
3 we've seen that the incentive is not working. I  
4 think that what we see is in terms of the folks who  
5 were collecting demurrage, and we pay, let me say we  
6 pay extremely close attention to who is paying  
7 demurrage and why.

8 I mean I think that if we -- and for the  
9 reasons I described in my testimony, it's because we  
10 do think that there are situations where with better  
11 information and better understanding of our rules,  
12 customers can change their exposure to demurrage  
13 without capital investment, so I think that's an  
14 important element.

15 And because of that, we do spend a lot of  
16 time on root cause analysis associated with that.  
17 And in talking with our teams who are responsible for  
18 that, they are pretty comfortable that that is  
19 driven by changes in volume, it's a traffic mix.

20 COMMISSIONER OBERMAN: Well, it is  
21 puzzling to me because your railroad is the one that  
22 at least it says, that's not, and I assume that's

1 accurate, didn't jump on the PSR bandwagon, at least  
2 full blown, as least as others, and we don't have a  
3 lot of complaints about it, but the charges just seem  
4 to me there's been a significant increase without a  
5 change in the free time program, so I can't figure  
6 that out.

7 MS. MULLIGAN: And I think I'll just stick  
8 with what I said, it moves in relation to volume  
9 across our railroad and we don't necessarily have  
10 consistent volume from quarter to quarter because a  
11 change in mix and demand and all sorts of things.

12 COMMISSIONER OBERMAN: Is your volume up  
13 25% from first quarter of 2018 to the first quarter  
14 of 2019, for those quarters not much difference in  
15 price?

16 MS. MULLIGAN: But I think it also came  
17 down in the intervening period, so.

18 COMMISSIONER OBERMAN: A little bit, but  
19 quarter to quarter you're at 10 million dollars more  
20 in demurrage this quarter than you had the first  
21 quarter of 2018, so is that all based on a  
22 difference in volume between those two quarters?

1 MS. MULLIGAN: In terms of my  
2 conversations with our internal experts, it's largely  
3 driven by volume.

4 COMMISSIONER OBERMAN: You know, I don't  
5 have it in front of me, let's take a look at the  
6 volume numbers and see if that's -- if those graphs  
7 go together. Let me go to CP. I see a similar  
8 problem or pattern anyway in your first quarter 2019  
9 demurrage is 11 million, first quarter 2018, it was 4  
10 million. I mean what's the cause of that.

11 MS. ARPIN: So, per our testimony in  
12 those numbers the way they were sent to you. They  
13 include container storage as part of demurrage, it's  
14 in that envelope and over half of the dollar value  
15 for March or from January to March 2019 is container  
16 storage.

17 COMMISSIONER OBERMAN: And container  
18 storage went up --

19 MS. ARPIN: Container storage has gone up  
20 as a result of volume that we've secured in terms of  
21 international agreements on the intermodal side.

22 COMMISSIONER OBERMAN: So, you're saying



1     that you're charging people for leaving containers on  
2     the ground, is that what they're paying for?

3                 MS. ARPIN: They are being paid, it's a  
4     service that we provide where they can store their  
5     equipment at our terminal, yes.

6                 COMMISSIONER OBERMAN: So, is that really  
7     -- it's really not demurrage, in the traditional  
8     sense is it?

9                 MS. ARPIN: It is not.

10                COMMISSIONER OBERMAN: I mean you're not  
11     trying to incentivize them to not do that?

12                MS. ARPIN: No, it's a supplemental  
13     service and we can break that out differently for  
14     you.

15                COMMISSIONER OBERMAN: I would be  
16     interested if you could break out the demurrage  
17     that's the incentive to change behavior part of your  
18     numbers.

19                MS. ARPIN: I have that number, if you  
20     would like it, but we can do that going forward in  
21     terms of the information we provide.

22                COMMISSIONER OBERMAN: Okay, yeah rather

1     than taking up the time now, why don't you send us  
2     something on it.

3                   MS. ARPIN:   Okay.

4                   COMMISSIONER OBERMAN:   And for CN, there's  
5     also, it's just an interesting trend here, you were  
6     10 million demurrage first quarter of 2018 and 19  
7     million, it's almost double first quarter 2019, how  
8     does any of the three of you, how does that get  
9     explained?

10                  MR. COURTOREILLE:   So, I apologize we  
11     didn't bring the 2019 quarterly numbers, but I'm  
12     looking at the last 3 years in the Board requests of  
13     2016, 17, and 18 and we're effectively flat.

14                  COMMISSIONER OBERMAN:   That I see.   But  
15     2019, first quarter is \$19,640,000.

16                  MR. COURTOREILLE:   Yeah, so there is a lot  
17     of seasonality to the numbers.   Winter, because of  
18     conditions, we generally see a much higher charge and  
19     in later quarters it's reduced, so I think if we had  
20     to, you know, forecast what 2019 would be, it would  
21     be very similar to the previous 3 years.

22                  COMMISSIONER OBERMAN:   Let me tell you

1     this, based on the previous 3 years, you've only got  
2     12 million dollars to go for the next 3 quarters of  
3     2019. So, you better keep that demurrage charge, I  
4     mean if that's really going to stay flat it's a  
5     significant change.

6             Let me shift gears here, because I don't  
7     want to run out of time, keeping you all here. Pam,  
8     you made a statement, which I find interesting, and  
9     I've asked others about it and I'm going to ask some  
10    questions about it -- that the Congress requires rail  
11    carriers to charge demurrage and I'd sort of like to  
12    find out why you came to that conclusion?

13            MS. ARPIN: So, I think what I said is  
14    "long recognized demurrage a necessary mechanism to  
15    ensure a fluid rail network" -- not that we require.

16            COMMISSIONER OBERMAN: No, here's what you  
17    said in your written statement. I think you actually  
18    said it today, on page 6, "Congress requires that  
19    rail carriers charge demurrage in order to ensure  
20    adequate car supply." I'm sorry, isn't that your  
21    statement or is that CN's?

22            MS. ARPIN: I see on page 6, yes, Congress

1 requires.

2 COMMISSIONER OBERMAN: Yep, and I think  
3 you read it or said it orally here, but it's in your  
4 written statement, I highlighted it. So, where does  
5 that come from?

6 MS. ARPIN: So, I think more the  
7 perspective I was trying to provide is in relation to  
8 the comment that I made on the first page, or I  
9 should say the second page, is that it's long  
10 recognized that this is a mechanism to ensure a fluid  
11 rail network, so perhaps not the best use of words on  
12 page 6.

13 COMMISSIONER OBERMAN: It's important  
14 because you're not the only railroad that's made that  
15 representation and I'm -- I mean you're not  
16 suggesting that if CP said you know, we don't need  
17 demurrage anymore so we're just not going to charge  
18 it, you'd be in violation of the law, you're not  
19 suggesting that, are you?

20 MS. ARPIN: Not suggesting that at all.

21 COMMISSIONER OBERMAN: Alright, so I'm  
22 going to take this as a friendly amendment to the

1 word "requires" --

2 MS. ARPIN: --- Absolutely --

3 COMMISSIONER OBERMAN: Is that a fair  
4 statement on your part?

5 MS. ARPIN: That's a fair statement, yes.

6 COMMISSIONER OBERMAN: I want to shift to  
7 Kathy and ask you the same question. Is it your view  
8 that your railroad is required to charge demurrage?

9 MS. GAINEY: We believe it's important for  
10 CN to charge demurrage in appropriate circumstances  
11 to customers to incentivize them to unload and load  
12 cars quickly so that they can be released back into  
13 the national supply chain.

14 COMMISSIONER OBERMAN: Being important is  
15 a separate concept than whether the statute mandates  
16 that you charge it.

17 MS. GAINEY: Demurrage is expressly  
18 authorized by statute under 10746 and I believe the  
19 phrase in the statute is "shall compute."

20 COMMISSIONER OBERMAN: Compute but not  
21 charge, would you agree?

22 MS. GAINEY: One could argue that shall

1     compute, if you're going to actually incentivize  
2     railcars to move fluidly throughout the network,  
3     through efficient loading and unloading at  
4     facilities, that one would need to invoice a customer  
5     in order to incentivize behavior, in those  
6     circumstances where demurrage invoices are  
7     appropriately assessed.

8                 COMMISSIONER OBERMAN:   Well, I really want  
9     to press on this issue because I think it's quite  
10    important for how we deal with it under both the  
11    statute and our regulation, so I'm going to press  
12    you a little bit on it with all due respect.

13                If you chose -- I'm going to ask you the  
14    same question I just asked Pam, if CN said you know  
15    what we're not going to charge demurrage anymore,  
16    would you be in violation of the law?

17                MS. GAINEY:   I don't know that we would be  
18    in violation of the law, but it would not be  
19    incentivizing the railcars to move --

20                COMMISSIONER OBERMAN:   -- That's a  
21    separate point --

22                MS. GAINEY:   -- on the network to be

1 loaded and unloaded as efficiently as possible, and  
2 where our overall goal is to maximize the capacity of  
3 the existing assets and encourage customers to load  
4 and unload their equipment quickly, and improve  
5 network fluidity, it would not accomplish the  
6 statutory goals that Congress has laid out, or our  
7 own goals that benefit the entire supply chain.

8 COMMISSIONER OBERMAN: I understand that,  
9 I am really trying to separate this out, if you'll  
10 humor me on this. I want to know if the statute, in  
11 your view, requires you to charge demurrage period.  
12 Do you have an opinion one way or the other?

13 MS. GAINNEY: Railroads are authorized to  
14 charge demurrage --

15 COMMISSIONER OBERMAN: Authorized.

16 MS. GAINNEY: -- under the statute,  
17 expressly authorized to do so.

18 COMMISSIONER OBERMAN: I didn't ask if you  
19 were authorized. We all agree you're authorized, I'm  
20 asking you if you're mandated, could you just give me  
21 an answer? If you can't answer it, then tell me if  
22 you want to research it more, but I think it's an

1 important question that shows up in Pam's testimony,  
2 and it shows up in your lawsuit with Kinder Morgan,  
3 and that's why I'm asking the question.

4 MS. GAINEY: Our complaint in Kinder  
5 Morgan intended to describe and summarize the  
6 statutory provision of 10746.

7 COMMISSIONER OBERMAN: Your complaint says  
8 that 746 -- under 746 CN, "Has an obligation to  
9 compute," you said that. "And to enforce," that's  
10 what the complaint says -- paragraph 10. So, if you  
11 didn't enforce the demurrage rule, is it your view  
12 that you would be violating the statute?

13 MS. GAINEY: I don't know that I would say  
14 that we would be violating the statute, but we  
15 wouldn't be encouraging customers and terminals to  
16 load and unload the equipment as quickly as possible.

17 COMMISSIONER OBERMAN: Well that's a  
18 separate question it seems to me. By not charging  
19 the full cost as Keith said, and everybody seems to  
20 say, and your demurrage rate, do you think you're not  
21 enforcing the Congressional policy of behind  
22 demurrage?



1 MS. GAINNEY: No, we're trying to  
2 incentivize customers and terminals to load and  
3 unload equipment as quickly as possible, even if that  
4 means that the full cost of that equipment dwelling  
5 in a yard cannot be recovered, the important thing is  
6 about incentivizing the behavior to try to encourage  
7 customers and terminals to organize their actions in  
8 a way that will enable them to load and unload the  
9 equipment as quickly as possible.

10 COMMISSIONER OBERMAN: Well, would you  
11 agree that the railroads have leeway into how much to  
12 charge in demurrage? You don't have to recover your  
13 whole costs, none of you do when you don't think  
14 you're violating the statute right?

15 MS. GAINNEY: Correct, railroads have  
16 discretion in setting their demurrage policies so  
17 long as they're reasonable.

18 COMMISSIONER OBERMAN: Reasonable to the  
19 customer.

20 MS. GAINNEY: Reasonable to the Board.

21 COMMISSIONER OBERMAN: To the Board?

22 MS. GAINNEY: Yes.

1           COMMISSIONER OBERMAN: So, if you set your  
2 demurrage charge of \$5, and we thought it was  
3 reasonable, that'd be okay?

4           MS. GAINEY: I don't believe \$5 demurrage  
5 would incentivize customers to load and unload the  
6 equipment as quickly as possible.

7           COMMISSIONER OBERMAN: That's not my  
8 question. My question is if you decided to charge \$5  
9 voluntarily, and we said that's fine, then we'd all  
10 be okay under the statute?

11          MS. GAINEY: It would be okay under the  
12 statute, but that wouldn't necessarily suggest that  
13 \$5 is a limit on the future amount that might be  
14 appropriate to be charged, it wouldn't enable you to  
15 conclude whether or not that was a ceiling.

16          COMMISSIONER OBERMAN: I'm not suggesting  
17 \$5 is the right amount, I'm trying to understand the  
18 law here, or at least your view of it, and the  
19 railroad's view of it so we can have some guidance  
20 going forward.

21               Let me shift gears, I'll start with you  
22 Kathy, and come back down. Is it your view that in

1 order to be liable for demurrage charges, the shipper  
2 or receiver, or whoever is getting the bill, must be  
3 shown to be the cause of the delay?

4 MS. GAINNEY: Under the case law, the  
5 burden is on the carrier as a complainant in a  
6 demurrage collection case, to show how the charges  
7 are computed, and the date that the car was placed in  
8 actual placement or constructive placement and then  
9 the burden shifts to the respondent, to indicate  
10 whether or not those charges were unreasonable.

11 COMMISSIONER OBERMAN: With all due  
12 respect, Kathy, you didn't answer my question. My  
13 question is does somebody have to show that the  
14 person, the entity being billed for the demurrage, is  
15 the cause of the delay? I didn't ask you who had the  
16 burden, that's another question, it's something I'm  
17 quite interested in, but I'm really trying to find  
18 out if approximate cause or any cause concept is  
19 required before demurrage can be collected.

20 MS. GAINNEY: Under, as Keith explained  
21 earlier, under our pre-invoicing and invoicing  
22 process, if CN is responsible, CN credits the

1 customer and that is not treated as demurrage.

2 COMMISSIONER OBERMAN: I really didn't ask  
3 your practice, I asked what you think the law  
4 requires. Does it require that the person receiving  
5 or the entity or whoever's getting the bill and  
6 expected to pay for it, be shown -- who has the  
7 burden is a separate question, ultimately to be found  
8 by whoever's going to rule on it to be the cause of  
9 the delay in order to be liable for the charge. Is  
10 that the requirement under the law to your  
11 understanding?

12 MS. GAINNEY: My understanding is that in a  
13 straightforward -- and we view these, as by the time  
14 you get to the point where you're actually in  
15 litigation with a customer, we have gone through our  
16 informal dispute resolution process where CN has a  
17 detailed review with our customers about what has  
18 happened in individual circumstances of those  
19 particular invoices, and has made adjustments as  
20 appropriate.

21 And if at the end of that process, if  
22 we're not able to reach agreement with the customer

1 and we do have to that that next step of going to  
2 litigation, at that stage it's a matter of  
3 demonstrating when the car was put into actual  
4 placement and constructive placement and how the  
5 charges were computed, because the information has  
6 already been gathered and analyzed and looked at  
7 about circumstances of the particular service at that  
8 stage.

9 COMMISSIONER OBERMAN: Does that include  
10 your showing that the customer that you're suing was  
11 the cause of the delay, is that part of it?

12 MS. GAINES: To use an example, it would  
13 be a situation, for example, where a customer is not  
14 able to take in the amount of cars that have come to  
15 that facility and they're dwelling in CN's yard and  
16 so the customer has not been able to unload the cars  
17 quickly enough and thus has incurred a demurrage  
18 invoice on those cars that are dwelling in CN's yard.

19 And in that circumstance, we believe it's  
20 appropriate for the customer to pay the demurrage  
21 invoice.

22 COMMISSIONER OBERMAN: Even if their

1 failure to take them in wasn't their fault?

2 MS. GAINNEY: These are very factual  
3 circumstances that are particular to every individual  
4 case that depend upon the circumstances. But, in our  
5 view, by the time we get to the point where we file  
6 the complaint against the customer and we haven't  
7 been able to resolve it informally, through our many  
8 detailed dispute resolution process discussions, at  
9 that stage we believe it's appropriate for the  
10 customer to pay the invoice.

11 COMMISSIONER OBERMAN: Kathy, with all  
12 respect, I really feel like we're going around in  
13 circles. Can we just get to this question of whether  
14 -- what I'm trying to get at here, it should be  
15 obvious, is whether there's some strict liability if  
16 there's simply a difference in time, or if there has  
17 to be some showing of fault or cause that the  
18 customer did in order to be liable.

19 Suppose nobody's at fault, is the customer  
20 still liable?

21 MS. GAINNEY: CN works with our customers  
22 in individual situations.

1                   COMMISSIONER OBERMAN: You know what, I  
2     can't get an answer, I'll just move on to Pam.

3                   MS. GAINNEY: Okay.

4                   COMMISSIONER OBERMAN: Pam, do you have a  
5     view as to whether there's any requirement that the  
6     customer be the cause of the delay before they're  
7     liable for demurrage?

8                   MS. ARPIN: So, first I'm going to start  
9     by saying I am not a lawyer, but I am going to answer  
10    this based on our processes.

11                  COMMISSIONER OBERMAN: Pam, let me say  
12    this. It is a question that has legal aspects to it,  
13    although I don't think it's entirely legal, so if  
14    you're not comfortable, I don't want to put you on  
15    the spot of answering the question, so.

16                  MS. ARPIN: I think you're asking it from  
17    a legal perspective and so I'm not sure I'm going to  
18    fulfill it correctly.

19                  COMMISSIONER OBERMAN: That's fine, it's  
20    not fair to get you involved in a legal discussion  
21    unless you feel comfortable wanting to answer it.

22                  MS. ARPIN: I don't feel comfortable

1     answering it.

2                   COMMISSIONER OBERMAN:   Okay, then I'm not  
3     going to -- do you want to, Patrick says your  
4     lawyers, do whoever that is wants to respond?

5                   MR. WEBSTER:   We don't think it's an  
6     appropriate question in this proceeding, Member  
7     Oberman, and --

8                   COMMISSIONER OBERMAN:   Because?

9                   MR. WEBSTER:   Well because you're asking  
10    us in a vacuum to make a legal opinion without  
11    context, without a case, without preparation and  
12    completely without notice.

13                   COMMISSIONER OBERMAN:   Well, I guess it's  
14    fair to say I didn't send out a written notice of the  
15    questions that I was going to ask, but it seems to me  
16    the concept of cause and fault is replete throughout  
17    the case law in this area which I've studied and many  
18    others have studied.

19                   So, I'm not asking about a specific case,  
20    I'm just asking you generally, whether your view is  
21    that demurrage is a strict liability situation or  
22    there has to be some component of causation or fault.



1                   MR. WEBSTER: If you give us an  
2 opportunity, we'll respond.

3                   COMMISSIONER OBERMAN: Alright, I would  
4 appreciate that. I'd like to be edified of your  
5 view, I'm certainly not the last word or even the  
6 first word on it, Jill, do you want to take a crack  
7 at this question?

8                   MS. MULLIGAN: I will. So, in direct  
9 response, it's not a strict liability standard in the  
10 law or in practice. I do think that the law requires  
11 -- the case law and decisions by the STB have  
12 required that railroads consider situations where  
13 they're at fault. And so I think that, you know,  
14 programs, when we pursue the inquiries that we do  
15 before we remit a bill, we think that we're  
16 consistent with the law.

17                   We go beyond that too, I mean we've got --  
18 we have language in our tariff talking about force  
19 majeure, so when something's beyond the control of a  
20 shipper we do have language excusing that. I think -  
21 -

22                   COMMISSIONER OBERMAN: So, you're saying

1 if nobody's at fault by an act of nature, there's no  
2 demurrage liability?

3 MS. MULLIGAN: There's an opportunity for  
4 a shipper to say "I should not be on the hook for  
5 demurrage." Yes, the shipper is able to come in and  
6 say there's a force majeure event at my plant, or on  
7 the railroad or something like that and so, they have  
8 that opportunity.

9 In reality, we're already dealing with  
10 those on the front end. I mean we know when we're in  
11 a flooding situation, things like that. So we do  
12 account for that before things go out the door as  
13 best we can.

14 And so, like I said, I think we're  
15 appropriately focused on assessing when there's  
16 railroad fault in our practices.

17 COMMISSIONER OBERMAN: Let me ask all  
18 three if you have a view as to whether the railroad  
19 should have an obligation of some kind of due  
20 diligence to investigate the actual cause of the  
21 delay, or what appears to be a demurrage situation,  
22 before you send the bill. And if so, how much due

1 diligence, if you can describe it.

2 MS. MULLIGAN: Yeah.

3 COMMISSIONER OBERMAN: Because the reason  
4 I ask the question is that I thought I heard, and  
5 maybe I mis-heard and maybe not from the three of  
6 you, that some demurrage bills just get churned out  
7 by the computer if the time clock over here and the  
8 time clock over there show an excess of time, then  
9 the computer spits out a demurrage bill. And then  
10 the customer has to go to great lengths to figure out  
11 why that happened and un-prove it.

12 So, I'm not suggesting that is what your  
13 railroads do, what I'm really wanting to know is what  
14 you think railroads should do before a demurrage bill  
15 is sent out along these lines, sort of investigating  
16 -- pre-billing investigation.

17 MS. MULLIGAN: So, I think even before you  
18 get to a legal standard, our people, I mean they do  
19 think about commercial reasonableness when they  
20 approach things. And so part of the process that  
21 we've pursued is because we think that that's  
22 commercially reasonable and I think that also

1 dovetails with what the STB may consider as  
2 reasonableness.

3           So, I think that -- you know, does someone  
4 need to do exactly what we do? Possibly not, I think  
5 it depends on elements of their rules, elements of  
6 their own data collection, what kind of network they  
7 have. But for us, in terms of our customer  
8 expectations, and in terms of what we think is  
9 valuable to our customers and reasonable for them to  
10 require us -- that has informed our practices, which  
11 is, frankly, a significant amount of review before  
12 it goes out the door.

13           COMMISSIONER OBERMAN: Thank you. Pam, do  
14 you have a view on that?

15           MS. ARPIN: Yeah, similarly and per  
16 testimony, we do. My team actually pre-builds all  
17 of our local trains for the operating team and then  
18 we audit those trains in terms of what was actually  
19 moved in terms of spotting requests or pulls for the  
20 customer.

21           On top of that, customers have visibility  
22 within our [Customer] Station to see credits that are

1 applied against every single car and to see the  
2 status of the car at any given time, and to log an  
3 issue with us. So, there's a lot of pre-work that  
4 is done before an invoice even goes out. So, the  
5 short answer is we do a lot of pre-work before an  
6 invoice goes out.

7 COMMISSIONER OBERMAN: My question is  
8 should that be a requirement, as an industry  
9 practice?

10 MS. ARPIN: I think that will totally  
11 depend on each railroad's technology and what  
12 information they provide to the customer up front. I  
13 can't answer on behalf of the other roads. I can  
14 just tell you what we do and --

15 COMMISSIONER OBERMAN: Well, I'm really  
16 asking in terms of what would be a reasonable  
17 practice for the Board to consider imposing before a  
18 demurrage bill goes out. Some degree, you know,  
19 just to extrapolate, and I'm not suggesting this  
20 should be the standard at all, but we all know before  
21 you file a lawsuit you have to satisfy Federal Rule  
22 11 and so forth, have a good faith basis for making

1 your claim.

2 I'm not suggesting a standard that strict,  
3 but I am asking whether there should be, somewhere  
4 along that spectrum, as a requirement before you can  
5 ultimately send a demurrage bill out if you haven't  
6 worked it out. If you have a view on whether that  
7 should be imposed, I understand.

8 MS. ARPIN: Again, I would say that CP, in  
9 practice, looks at a lot of those invoices, we audit,  
10 we build the trains, we also have visibility within  
11 our systems. And it would be fully dependent on the  
12 technology of each of the roads around visibility to  
13 the pipelines and what's occurring as to how in depth  
14 you would go into that, would be my perspective.

15 COMMISSIONER OBERMAN: Kathy?

16 MR. COURTOREILLE: So, very similar to CP,  
17 we actually have a number of checks and balances  
18 before a bill is issued or an invoice is issued. We  
19 have -- for every single switch or service failure,  
20 we have somebody that looks at the impacts, and makes  
21 a determination of whether it is related to a  
22 customer-caused issue or a C-N or rail-way caused

1 issue.

2 COMMISSIONER OBERMAN: Do you think that  
3 kind of approach or something like that should be a  
4 required standard for the industry?

5 MR. COURTOREILLE: I can't answer whether  
6 it should be required. I can tell you that it has  
7 provided a level of transparency for customers, it's  
8 been appreciated. It has reduced the overall level  
9 of I think, angst by customers. They have a deeper  
10 picture into how we operate and how -- and what our  
11 expectations are for them. So I think that policy  
12 has helped us.

13 COMMISSIONER OBERMAN: Well, and I have to  
14 say, you know, I'm not asking these questions in a  
15 vacuum. We sat here for 2 days and heard customers  
16 complain time and again that they got a bill and  
17 they would have to drop everything they were doing  
18 and put in a huge number of person hours and expense  
19 and, as Ann pointed out, one hired a forensic  
20 accountant to figure out if the bill was correct.

21 And the impression we've gotten, and I  
22 don't think this applies to your three railroads, but

1 I'm sort of searching for whether there's a solution  
2 to the dilemma of a railroad just shooting a bill out  
3 and putting the entire burden on a customer to  
4 figure it out and disprove it.

5 You're all saying you don't do that, and I  
6 think that's good, but we're trying to figure out if  
7 there's some way to level this off in the industry.  
8 I don't know what happened there. Did I do that? I  
9 talked too long.

10 MR. COURTOREILLE: It's an emergency  
11 alert.

12 COMMISSIONER OBERMAN: Patrick, did you?

13 VICE CHAIRMAN FUCHS: Yeah, a couple of  
14 smaller things. Okay, so one of the things that was  
15 mentioned in the last panel was the idea of like a  
16 date and time stamp. Can you give a reaction to  
17 that? Have you all heard the testimony?

18 MS. MULLIGAN: Yeah, I heard it and as I  
19 was listening to it, I was thinking through my review  
20 of the demurrage tool.

21 VICE CHAIRMAN FUCHS: Yeah.

22 MS. MULLIGAN: And I believe that's



1 actually available in our demurrage tool. Where when  
2 you go, if you're a customer or a receiver -- so it's  
3 not just a freight-paying customer, so this is  
4 available to anyone who participates in the route of  
5 movement -- you go in and you see all of your  
6 shipments.

7 And to the extent they have been actually  
8 placed, ordered in, et cetera, all of those time  
9 stamps appear in the tool and then you have the  
10 opportunity to, you know, through a drop-down menu,  
11 and you talk about -- you know, put in comments.

12 VICE CHAIRMAN FUCHS: I'm listening, don't  
13 worry.

14 MS. MULLIGAN: That sort of thing. Is  
15 that like the hook?

16 VICE CHAIRMAN FUCHS: Do you want it to  
17 be?

18 Shelter in place? Okay, let's shelter in  
19 place. Are we sheltering in place right now?

20 CHAIRMAN BEGEMAN: There are windows in  
21 here, so we probably want to move to the interior  
22 hallways.

1 VICE CHAIRMAN FUCHS: Okay.

2 (Tornado warning.)

3 (Off the record 3:53 p.m.)

4 CHAIRMAN BEGEMAN: Good news, we just got  
5 our second wind. Yes, pun intended.

6 COMMISSIONER OBERMAN: Pam, one of the  
7 witnesses yesterday told us that CP has a fee of \$110  
8 for the privilege of your sending them a refund, is  
9 that right?

10 MS. ARPIN: I wasn't aware that that was,  
11 sorry, directed at us, maybe I missed that.

12 COMMISSIONER OBERMAN: I thought it was.  
13 I may have, that's what my notes say. You don't  
14 think you have such a charge?

15 MS. ARPIN: Not that I'm aware of. I'd be  
16 happy if you gave me the customer's name to follow-up  
17 with them.

18 COMMISSIONER OBERMAN: You know what, it's  
19 in the transcript and I may have gotten the wrong  
20 railroad. I wrote down CP but, just like the  
21 railroads and the customers, I'm not perfect.

22 MS. ARPIN: If it was, happy to follow-up

1 with the customer on that.

2 COMMISSIONER OBERMAN: Whoever they were  
3 talking about said it was a regular charge because I  
4 asked the question of somebody but, okay, I wanted to  
5 clear that up, thank you.

6 VICE CHAIRMAN FUCHS: Could I just kind of  
7 give -- and I know that I've asked a number of  
8 questions about it. And you all have been helpful for  
9 kind of letting me know your perspective and helping  
10 me understand your perspective, but I wouldn't want  
11 to leave the hearing and talking to railroads without  
12 really understanding what you all view as reasonable.

13 And we've got, you know, 40-50  
14 submissions, and almost everyone of them says "this  
15 is unreasonable, this is unreasonable, it's  
16 unreasonable. And different shippers and receivers  
17 have put forward different reasons for it. And I  
18 understand that it's going to be a fact-specific  
19 case, and I think that's fair, right, you know, and  
20 so we have to be careful about blanket statements.

21 But, you know, I think you can have fact  
22 specific cases with criteria that are generally used,

1 right? I mean we have criteria that are used for  
2 reasonable rates, for example, that aren't fact  
3 specific.

4 And so, you know, I don't know if it's  
5 giving me a set of facts that can help demonstrate a  
6 point, or giving me criteria, but can somebody just  
7 please help me understand. People are saying that  
8 you all are unreasonable. And obviously you all have  
9 made a determination that some of these practices are  
10 unreasonable -- you all have made a determination  
11 these practices are reasonable. I just need to  
12 understand from you all. Can -- maybe a fact pattern  
13 of something that is unreasonable would help me  
14 understand what is reasonable.

15 MS. MULLIGAN: So, I'll weigh in. And I'm  
16 going to disappoint you because I'm not going to go  
17 from the fact pattern perspective, because I think  
18 sometimes that reasonableness gets lost in that  
19 because you're focused on an individual situation  
20 with an individual shipper making choices, with a  
21 railroad making choices in a specific circumstance.

22 So, that's not to mean that that's not

1 relevant and ultimately what you're looking at in an  
2 adjudication, but in terms of the sort of -- I  
3 absolutely get wanting to be able to say these are  
4 sort of the tenets of reasonableness.

5 I think that there's room to do that and I  
6 think the Board has done that in some of their  
7 decisions about demurrage and given some of those  
8 perspectives. I think that one thing that I would  
9 ask is that, if you're doing that type of a tenet,  
10 and I'll get to some -- I'm not side-stepping it,  
11 I'll get to some tenets -- but if you're doing that,  
12 I think one of the dangers is plucking individual  
13 aspects of a program and saying this passes, this  
14 fails, this is 24-hours, why isn't it 48-hours.

15 I think one of the things that you have to  
16 really think about is how does the entire program  
17 look and feel. And so, I think the Board's already  
18 kind of going there in terms of the questions that  
19 you're asking. You're asking things about the -- are  
20 the rules clear and concise? Can someone look at  
21 them and say "okay, I know when I'm at risk of  
22 demurrage and I also feel like I'm being given

1 access to information that allows me to adjust in  
2 response to it."

3 I think a lot of our shippers -- it would  
4 resonate with them in terms of having the rules be  
5 clear and be rules of general applicability. I think  
6 it matters to us in terms of administering rules  
7 that rules are generally applicable, but I think also  
8 it gives customers a sense of reasonableness as well,  
9 when everyone's being treated the same.

10 And some people may not be completely  
11 equally impacted and maybe that's because of the  
12 level of service that we give, and so we make  
13 adjustments to free time because of how we serve a  
14 facility. But I think some of our shippers would be  
15 nervous that there's going to be exceptions that  
16 swallow the rule when -- especially for a railroad  
17 that's had charges in place for so long that have  
18 been consistent -- they have made a lot of good  
19 decisions about how to manage their pipeline.

20 How to make sure that they're scaling the  
21 business to the resources and when they're not,  
22 thinking about how they deal with excess production

1 capacity, et cetera. And so I think that that sort  
2 of general applicability is the standard that I think  
3 should be considered for reasonableness.

4 I know you all are thinking about  
5 timeliness to adjust. I do think that's important.  
6 I mean I think there's a statutory minimum. But I  
7 also think from a commercially reasonable  
8 perspective, we always think about -- I mean there's  
9 some situations where we can't wait because there's  
10 some imperative and we need to move.

11 But I do think that when we establish  
12 notice, we really think about why are we implementing  
13 this charge? And if it's a turn on a dime and really  
14 leaves people unable to respond, I think you can --  
15 that would send up some red flags -- but I think also  
16 if a carrier is saying "I'm going to tell you what  
17 the rule is, but then we're going to phase in and  
18 deal with people who can't get there quick enough."

19 And so, I think there's -- that doesn't, I  
20 haven't laid out a formula.

21 VICE CHAIRMAN FUCHS: Yeah.

22 MS. MULLIGAN: And I know that may be a

1     little frustrating and I think those are elements  
2     that matter.

3                   VICE CHAIRMAN FUCHS:   And you don't  
4     necessarily have to lay out a formula today.

5                   MS. MULLIGAN:   Yeah.

6                   VICE CHAIRMAN FUCHS:   We can also follow-  
7     up in further conversation, but you know, you all  
8     have also done an analysis of what is reasonable  
9     before it goes out there.  You know what I mean, so  
10    it's kind of --

11                  MS. MULLIGAN:   Yeah, and I think that's  
12    part of why we're comfortable with some of our rules  
13    being a little bit tighter.

14                  VICE CHAIRMAN FUCHS:   Yeah.

15                  MS. MULLIGAN:   Like on the zero time,  
16    because we have other aspects of our program that  
17    inform the reasonableness of that.

18                  VICE CHAIRMAN FUCHS:   Including like, so  
19    if you have something on the credit side, or when you  
20    start and stop the clock, or what have you.

21                  MS. MULLIGAN:   If you've got something  
22    sitting in our yard and you put your hand up, you're



1 not going to be on the clock if we miss a switch, if  
2 you miss a switch, if you give it too late, if it's a  
3 Saturday you're off. And so, we think that mitigates  
4 that, and that's important.

5 VICE CHAIRMAN FUCHS: And so, what I'm  
6 hearing from you is 4 tenets: It needs to be clear  
7 and concise. The customer needs to have the  
8 information necessary to adjust.

9 MS. MULLIGAN: Yeah.

10 VICE CHAIRMAN FUCHS: The treatment has to  
11 be the same, it has to be something of general  
12 applicability for people of class, however defined.

13 MS. MULLIGAN: Yeah.

14 VICE CHAIRMAN FUCHS: And there has to be  
15 sufficient advance notice.

16 MS. MULLIGAN: Yeah.

17 VICE CHAIRMAN FUCHS: Okay.

18 MS. MULLIGAN: And I mean, I think also  
19 the STB has also spoken about taking into  
20 consideration railroad fault.

21 VICE CHAIRMAN FUCHS: And then there's  
22 fault.

1 MS. MULLIGAN: Yeah.

2 VICE CHAIRMAN FUCHS: Okay, and now is  
3 there any component of this tenet -- any other  
4 railroads can jump in -- is there any component of  
5 these tenets that involves an adjustment that is too  
6 large to make?

7 MS. MULLIGAN: I'm not sure I follow.

8 VICE CHAIRMAN FUCHS: You know, the  
9 example that we, you know, kind of used a bunch of  
10 times, but the person who's geographically  
11 constrained, and basically, he has no extra, you  
12 know --

13 MS. MULLIGAN: -- Yeah --

14 VICE CHAIRMAN FUCHS: -- let's say the  
15 person's operating 7 days a week. I hate to go  
16 there, but you know, operating 7 days a week, can't  
17 expand track. It's really buy real estate and build  
18 a new facility, or pay the demurrage, okay?

19 MS. MULLIGAN: Yeah.

20 VICE CHAIRMAN FUCHS: Is there something  
21 we should be thinking of? And I don't mean to be  
22 repetitive.

1 MS. MULLIGAN: No.

2 VICE CHAIRMAN FUCHS: But it feels like  
3 something's missing if we don't talk about the  
4 magnitude of the adjustment.

5 MS. MULLIGAN: And I think that magnitude  
6 of the adjustment is also informed by other things  
7 than just the sort of binary situations that you set  
8 out.

9 VICE CHAIRMAN FUCHS: Yeah.

10 MS. MULLIGAN: Because one of the things  
11 that we've had a lot of success with our shippers in,  
12 is working with them to be able to use the tools that  
13 we have out there to look at, you know, going to  
14 your 5, 5, 5 situation.

15 VICE CHAIRMAN FUCHS: Yeah.

16 MS. MULLIGAN: 5, 5, 5, three different  
17 originations, those go into the system. There are  
18 times when a customer, even before -- and it's not  
19 the majority, most of our shippers engage and manage  
20 this -- but there are times where even before it hits  
21 our network, you've put 15 into the system and based  
22 on average release times at the destination, average

1 transit times, you've signed up for a demurrage bill  
2 because you're putting too much in.

3 That is -- and so I think there's some  
4 opportunity to mitigate that without having to go  
5 straight to --

6 VICE CHAIRMAN FUCHS: So in my example,  
7 the 5, 5, 5, what you are saying is "hey, that  
8 customer, the Tuesday, Wednesday, Thursday, maybe  
9 ship out on Friday, and you only get 10 back?"

10 MS. MULLIGAN: Yes, and I think the -- I  
11 think in that situation I do think it's reasonable  
12 for the customer to say "okay, well if you've had a  
13 huge spike in your" --

14 VICE CHAIRMAN FUCHS: And that's what  
15 makes the trade-off, right?

16 MS. MULLIGAN: Yeah.

17 VICE CHAIRMAN FUCHS: And so, it's this --  
18 it's enormously complex, but you know, it's like  
19 okay, well if they have to delay until Friday, right?  
20 There's going to be a productivity loss at that  
21 particular plant, right? And, at the same time, if  
22 they don't delay to Friday, there's going to be a

1 productivity loss at your yard.

2 And you know, and you all have the power  
3 to avoid that productivity loss at your yard by  
4 charging them, by incenting them to basically change  
5 their calculus to move them to the --

6 MS. MULLIGAN: Yeah.

7 VICE CHAIRMAN FUCHS: But they're going to  
8 lose, you know, they're going to have a productivity  
9 loss, right? And so, they're going to do that up  
10 until the point where whatever the demurrage bill's  
11 going to be, you know what I mean, it's going to be  
12 relative to that productivity loss, I would think,  
13 right?

14 And so, and there's two things that make  
15 me think. Like one is, you know, sometimes you might  
16 not be able to shift in that particular way; I mean  
17 my 5, 5, 5 you might be able to. And the second  
18 thing is, then it becomes a relative gain between the  
19 level of demurrage and productivity loss of the  
20 plant, and that's the calculus they're making, and  
21 the calculus maybe the Board ought to be making. I'm  
22 not saying --

1 MS. MULLIGAN: Yeah.

2 VICE CHAIRMAN FUCHS: The Board, trying to  
3 think about the national interest, is the calculus  
4 between your productivity loss and their productivity  
5 loss, not the calculus between a demurrage charge and  
6 their productivity loss. And I guess, are we  
7 fulfilling the national interest if we're not  
8 thinking about those two things?

9 MS. MULLIGAN: I think I would say our  
10 productivity loss is not just our productivity loss.  
11 You know, --

12 VICE CHAIRMAN FUCHS: When I say your  
13 productivity loss, I mean, you know, being a network  
14 industry, your productivity loss affects other  
15 customers. And so I try to stipulate it each time and  
16 I'll stipulate it again.

17 MS. MULLIGAN: I mean I think that this is  
18 probably not going to be a popular answer, but I  
19 think that there's also elements of the service that  
20 we are providing.

21 VICE CHAIRMAN FUCHS: Yeah.

22 MS. MULLIGAN: So you know, there is the

1 ability for customers to come and negotiate for  
2 something that looks more like scheduled service.  
3 And we have -- not a lot, but that does happen. When  
4 we're not in that kind of an environment, then we are  
5 ultimately a common carrier. And I think there is an  
6 element of -- not that we get to do whatever we want  
7 as a common carrier, but the responsibilities that we  
8 have are not just to the individual shipper, it's to  
9 manage the network -- like I said, not just for us,  
10 but because we have other people who are relying on  
11 it.

12 And so, there is this element of okay,  
13 there's a cost to a shipper, to a receiver --

14 VICE CHAIRMAN FUCHS: -- Right --

15 MS. MULLIGAN: -- for that piece of  
16 equipment sitting either in their yard or our yard.  
17 From our perspective, we also think a whole lot about  
18 the fact that that's sitting in a yard and that's  
19 productive capacity that we can't use. And the  
20 longer it sits there, the more that that impacts the  
21 7 other facilities in the area. And so the  
22 incentives are important, not just because there's

1 costs being exchanged back and forth, but because  
2 there's really -- I mean I think it goes to your  
3 question --

4 VICE CHAIRMAN FUCHS: There's going to be  
5 a cost, well, to somebody, right? You're going to  
6 have a cost to the shipper/receiver, it's going to be  
7 a cost I say to you all, but, and potentially other  
8 customers to the extent that the effects on you then  
9 affect other customers.

10 There's going to be a cost to somebody,  
11 right? I mean that's the way it's going to be.

12 MS. MULLIGAN: I mean you can talk about  
13 it in terms of cost.

14 VICE CHAIRMAN FUCHS: Right.

15 MS. MULLIGAN: That's fair. I think that  
16 what would be like, I don't have a sort of, I'm never  
17 going to have a math equation, because -- there's a  
18 reason why I'm a lawyer instead of an economist.

19 But I do think that if you're losing sight  
20 of the cost to the network, which is not -- there's a  
21 bottom-line cost, that's for sure.

22 VICE CHAIRMAN FUCHS: Right.



1 MS. MULLIGAN: There's the cost to the  
2 loss of the productive value. That's been very  
3 important in historic case law.

4 VICE CHAIRMAN FUCHS: I totally  
5 understand.

6 MS. MULLIGAN: And I think it's still  
7 pretty important.

8 VICE CHAIRMAN FUCHS: I totally  
9 understand. And it's hard to (inaudible) -- We want  
10 to ask if anyone else has anything to add to those  
11 tenets, but you know, you know what I'm getting at.

12 MS. MULLIGAN: I know.

13 VICE CHAIRMAN FUCHS: Should we be  
14 balancing the cost to the network versus the cost to  
15 the shipper/receiver in terms of reasonableness.

16 MS. MULLIGAN: Yeah.

17 VICE CHAIRMAN FUCHS: Because the shipper/  
18 receiver is only going to be balancing the cost to  
19 them versus the cost of demurrage.

20 MS. MULLIGAN: Yeah.

21 VICE CHAIRMAN FUCHS: And so, therefore,  
22 do you know what I mean? I'm trying to, is it the

1 Board's role, you know, as a government agency to  
2 take that broader perspective and is that the  
3 appropriate lens we should be looking at the  
4 reasonableness. And that's what a lot of my  
5 questions are kind of getting around and that's all  
6 I'm thinking about.

7 MS. MULLIGAN: Yeah.

8 VICE CHAIRMAN FUCHS: You know, and I'm  
9 just trying to think about it.

10 MS. MULLIGAN: Yeah, no and I appreciate  
11 you sharing those thoughts.

12 VICE CHAIRMAN FUCHS: Alright, on the  
13 tenets, anyone want to add anything?

14 MR. COURTOREILLE: No, I think your  
15 tenets, in fact, are well-grounded and I think we  
16 have --

17 VICE CHAIRMAN FUCHS: They're Jill's  
18 tenets.

19 MS. MULLIGAN: (laughing, inaudible) No, I  
20 didn't, I assure you. Those are our tenets, they're  
21 BNSF tenets.

22 MR. COURTOREILLE: The one thing I would

1     add. I know we focused a lot on the case where a  
2     customer feels they have no options and their only  
3     option is a massive investment to compensate for, you  
4     know, a railroad's demurrage charges.

5             I would honestly say that in many cases  
6     that, you know, just by sheer number, right, we've  
7     heard from a lot of customers, but we have thousands  
8     of customers who are not identifying this particular  
9     problem.

10            And the reason they're not is because  
11     railroads constructively, and I can speak from CN's  
12     perspective, we work constructively with customers to  
13     make sure, you know, we've done things in the past,  
14     as an example, where we've subsidized the purchase of  
15     track mobiles, we've set them in contact with third-  
16     party services to help off-set some of those, you  
17     know, those services they'd like to consume but they  
18     don't want to make the investments essentially.

19            And so, I guess where I'm going with this  
20     is there are a number of options, and I think we've  
21     heard from a particular viewpoint which is very  
22     extreme, but does not represent a lot of the cases

1     that we encounter on a day to day basis.

2                   VICE CHAIRMAN FUCHS:   Kathy, do you have  
3     anything that you want to add to the tenets or  
4     anything?

5                   MS. GAINNEY:   I think the thing I would say  
6     is that the broader interests of the network are very  
7     important to be considered.   Because it is a network  
8     industry, what happens in one particular yard impacts  
9     not just those customers that are served locally,  
10    directly from that yard, but it also impacts the  
11    interchange traffic that's going through that yard  
12    and interline service, it impacts other trains that  
13    are just going straight by the yard.   And so the  
14    ripple effects when one customer has chosen either  
15    because it's ordered too many cars and they're coming  
16    into their facility, or for whatever reason, and they  
17    aren't able to get those cars loaded or unloaded, and  
18    then they're dwelling in the yard and consuming that  
19    capacity, it really has a detrimental impact on the  
20    network as a whole.

21                   And so, that's the thing that we're really  
22    trying to work very hard with our customers and to

1 encourage them to release and to load and unload cars  
2 and release them as quickly as possible.

3 VICE CHAIRMAN FUCHS: Okay.

4 CHAIRMAN BEGEMAN: Good news, you're  
5 excused. Thank you very much, we greatly appreciate  
6 it and thank you for sitting through the tornado  
7 break. And our last, but not least panel, Panel XII,  
8 Western Coal Traffic League, PBF Energy and the  
9 Freight Rail Customer Alliance.

10 Panel XII

11 CHAIRMAN BEGEMAN: Bette, can we start  
12 with you?

13 MS. WHALEN: Good afternoon Chairman  
14 Begeman, Vice Chair Fuchs, and Board Member Oberman.  
15 My name is Bette Whalen, and I'm the Field Specialist  
16 Principal for the Lower Colorado River Authority and  
17 currently serve as President of the Western Coal  
18 Traffic League, or WCTL.

19 I'm also a member of the Board's Rail  
20 Energy Transportation Advisory Committee. On behalf  
21 of WCTL, thank you for allowing myself and other  
22 freight and rail stakeholders the opportunity to

1 share our concerns regarding demurrage and  
2 accessorial charges.

3 Although I am testifying today on behalf  
4 of WCTL, I also wish to express my strong support for  
5 the statement submitted by two of my fellow panel  
6 members, the National Coal Transportation  
7 Association and the Freight Rail Customer Alliance.

8 WCTL is a national voluntary trade  
9 association made of consumers of coal mined west of  
10 the Mississippi River and transported by rail. Our  
11 membership includes publicly traded companies, local  
12 governments, cooperatives and utilities, all of  
13 which depend on the Union Pacific Railroad and the  
14 BNSF Railway Company to ship and receive hundreds of  
15 millions of tons of coal to and from their facilities  
16 each year.

17 As a result, we are unfortunately very  
18 familiar with the disparity between what is expected  
19 from rail shippers versus what is expected from rail  
20 carriers. Demurrage and accessorial charges are just  
21 another example of the striking imbalance where  
22 shippers are required to meet certain performance

1 standards set by the railroads, or be held  
2 financially responsible, while railroads have no  
3 reciprocal requirements or accountability to  
4 shippers.

5           As our written statement details, our  
6 members' frustration with demurrage and accessorial  
7 fees stem primarily from 4 issues. One,  
8 implementation of precision scheduled railroading;  
9 Two, the railroad's failure to recognize and account  
10 for differences among commodities; Three, the  
11 railroad's inconsistent and often incorrect  
12 assessment and enforcement of fees and the  
13 significant administrative burden this places on  
14 shippers; and, Four, the lack of reciprocity in  
15 accountability.

16           Most of the issues with accessorial and  
17 demurrage charges that were reported to us came from  
18 WCTL members shipping on UP. These members reported  
19 that UP's implementation of PSR has driven and  
20 exacerbated demurrage and accessorial fees.

21           Members shipping on BNSF, such as LCRA,  
22 have reported fewer issues as BNSF has not yet made

1 any material changes to its tariffs over the last few  
2 years and is the only Class I railroad that has not  
3 yet adopted PSR.

4 The disruption and unpredictability in  
5 service that has accompanied UP's adoption of PSR has  
6 made it difficult for shippers to anticipate train  
7 arrival and pick-up times. This, in turn, has made  
8 it difficult for shippers to manage their operations.

9 For example, under UP's tariffs, shippers  
10 are penalized financially if they are unable to  
11 receive a train at the scheduled time, or if they  
12 fail to unload a railcar within the allotted 24-hour  
13 free time. UP, however, is not subject to any  
14 similar constraints or consequences.

15 Several of our members report that UP  
16 failed to pick-up its train sets at the scheduled  
17 times over the last few months, with one member  
18 reporting UP left a train sit at its facility for 9  
19 days. UP recognizes in its written testimony that  
20 "All customers benefit with improved service  
21 reliability and reduced cycle times when all assets  
22 are utilized to their fullest."



1           However, it appears UP takes advantage of  
2     some customers, like coal shippers, whose facilities  
3     are able to store railcars and as a result, service  
4     for these shippers suffer. The demurrage and  
5     accessorial fees are significant. In fact, from  
6     January 15th to April 25th, 2019, a period of just  
7     100-days, UP invoiced one WCTL member for \$183,000  
8     in new demurrage fees.

9           Another member reported UP has charged it  
10    \$124,500 in new fees so far in 2019, of which only  
11    \$9,000 was successfully contested. Like its decision  
12    to adopt PSR, UP claims it's decided to standardize  
13    and consolidate unit train service terms across all  
14    bulk commodities "to drive reliability and efficiency  
15    for both UP and unit train customers."

16           However, just like PSR, UP's  
17    standardization of unit train service terms creates  
18    inefficiencies for our members and higher costs for  
19    our customers. As the Board has heard, shippers of  
20    different commodities have different needs and a one  
21    size fits all approach is not the solution.

22           WCTL members have expended significant

1 resources to adhere to the railroads' requirements  
2 when constructing our facilities to handle unit train  
3 service. Our members did so based on a good faith  
4 understanding of how the railroads would handle unit  
5 trains and how they would assess and enforce the  
6 fees.

7 By streamlining unit train service terms,  
8 UP has removed the foundation our members have relied  
9 on for years and further eroded our already limited  
10 protections. For example, UP's previous tariff,  
11 6603C, outlined events that would extend to shippers  
12 unloading free time without penalty.

13 UP's new streamlined tariff, 6004C, simply  
14 states charges, and I quote, "will not accrue during  
15 circumstances beyond the customer's reasonable  
16 control as determined by UP." The tariff eliminates  
17 all specificity and affords UP significant discretion  
18 to assess and enforce charges.

19 Like it has with PSR, UP is using its  
20 tariffs to lower its own operating costs and generate  
21 additional revenue at the expense of shippers. To  
22 our detriment, the railroads exercise their

1 discretion to assess fees inconsistently,  
2 unpredictably and often times incorrectly.

3 For example, last month BNSF incorrectly  
4 charged a WCTL member \$75,000 in demurrage fees for  
5 the entire time a train traveled from Colorado to the  
6 member's facility and back, approximately 300 hours.  
7 BNSF cancelled the charge, but only after the member  
8 spent time processing and disputing the invoice.

9 Another member stated that just about any train that  
10 shows detention has to be disputed, because BNSF's  
11 arrival time at the facility does not reflect the  
12 time BNSF actually delivers the train for unloading.

13 WCTL members have also reported having  
14 limited success recovering incorrect fees with one  
15 member reporting only a 10 to 12% success rate. This  
16 member explained that although the client keeps  
17 records of when a train leaves the facility, BNSF  
18 relies solely on its crew's records, and never  
19 meaningfully considers the shipper's records.

20 It is similarly difficult for WCTL members  
21 to process UP invoices. One member reported it has  
22 been charged \$124,500 in demurrage fees so far in

1     2019 but did successfully contest one \$9,000 charge.  
2     The member successfully disputed that charge after  
3     it found UP had incorrectly penalized it for a train  
4     that was only delayed because UP's own rail crews  
5     arrived 12 hours late.

6             UP charged the member \$3,000 per engine  
7     for failing to timely unload the train. Although  
8     UP's invoicing has improved somewhat, one WCTL member  
9     reports more than 75% of UP's invoices still have to  
10    be disputed. The most significant problem our  
11    members and other freight rail shippers face with  
12    regard to demurrage and accessorial fees is the  
13    complete lack of reciprocity and the inherent  
14    unfairness of the charges.

15            These fees, and the railroad's assessment  
16    and enforcement, have added to the imbalance between  
17    freight rail shippers and railroads. The imbalance  
18    is clear in Kenny Rucker's written testimony for UP  
19    which states, "In the third quarter of 2018, only  
20    55% of UP's bulk train customers loaded or unloaded  
21    their railcars within 24 hours. I am pleased to  
22    report that statistic is now at 62% for the first

1     quarter of 2019."

2                     Although yesterday in his testimony he  
3     said it was 65%. But as Mr. Rocker points out,  
4     despite the threat of significant charges, over a  
5     third of UP's shippers still remain unable to meet  
6     the 24-hour deadline. It is clear that UP's  
7     deadline is unreasonable.

8                     These charges are purely punitive and are  
9     being enforced as an added source of revenue. It is  
10    hard to celebrate 7% more shippers loading and  
11    unloading their trains within 24-hours when during  
12    this time shippers were subjected to more than 50%  
13    increase in demurrage fees.

14                    UP's willingness to provide a shipper with  
15    credits to offset the demurrage fees does not go far  
16    enough, as it is the shipper who is ultimately held  
17    responsible for any imbalance. Although our members  
18    do not pay demurrage fees on a sitting train,  
19    requiring them to abide by the 24-hour unloading  
20    deadline when UP is not going to pick-up the train  
21    the following day, unnecessarily wastes shippers'  
22    resources.

1           A more balanced solution would be to  
2     calculate how often the railroad is late picking up  
3     the train over a 12-month period and give the  
4     shipper credits or reimbursement based on that amount  
5     as a percentage so the shipper can be compensated for  
6     its actual increased cost, not just given credits to  
7     offset future demurrage fees over a one month period.

8           This would incentivize railroads to  
9     evaluate the 24-hour unloading deadline in light of  
10    its actual capabilities and avoid unnecessarily  
11    driving up shipper costs or creating inefficiencies.

12           In summary, we request that railroads work  
13    with shippers to ensure that the accessorial and  
14    demurrage charges do not impose unnecessary penalties  
15    and burdens, especially when many of these charges  
16    are a direct result of PSR or railroad error.

17           More importantly, any next steps should  
18    focus on increasing reciprocity and rewarding  
19    shippers for meeting the railroad's requirements for  
20    their tariffs, rather than just penalizing shippers  
21    when they fail to do so. WCTL also urges the Board  
22    to consider any other actions it believes will aid

1     those negatively impacted by the demurrage and  
2     accessorial charges implemented by the Class I  
3     railroad.

4                 On behalf of WCTL, thank you again for  
5     allowing me to testify today and I'm happy to answer  
6     your questions.

7                 CHAIRMAN BEGEMAN:   Thank you. John?

8                 MR. WARD:   Thank you.   Chairman Begeman,  
9     Members of the Board, my name is John Ward and I  
10    serve as the Executive Director of the National Coal  
11    Transportation Association.   Thank you for your  
12    commitment to address this issue and for your stamina  
13    in seeking to understand what's going on in the rail  
14    markets today.

15                Our organization consists of electric  
16    utilities, coal producers and entities that produce,  
17    repair and manage all facets of railcar component  
18    parts and systems.   Our members have invested  
19    heavily in the ownership, leasing and control of  
20    fleets of railcars which they provide to the  
21    railroads in unit trains of up to 150 cars.

22                These fleets represent about 45% of coal

1 cars in service in the Eastern U.S. and about 90% of  
2 the coal cars in service in the Western U.S. Today  
3 coal represents as a commodity about 36% of carloads  
4 originated by Class I carriers.

5 At the risk of sounding like a history  
6 professor, I'd like to provide a little context  
7 concerning our members' relationship with the  
8 railroads. Railcar technology and design evolved  
9 rapidly during the early implementation of the  
10 Staggers Act.

11 At that time the rail carriers asked coal  
12 shippers to provide capital to purchase unit trains  
13 of railcars to serve them as the carriers did not  
14 have satisfactory access to credit. Coal shippers  
15 and receivers responded with many billions, with a  
16 "B", billions of dollars of capital to maintain rail  
17 as a viable option for coal shipments.

18 Coal shippers -- these investments  
19 extended far beyond the purchase of modern train sets  
20 to include fast loading and unloading systems,  
21 multiple loop tracks, and batch way load-out systems.

22 Furthermore, mines and utilities organized



1 to meet railroad schedules on a 24/7 basis and to  
2 maintain large and expensive stockpiles of product at  
3 both origin and destination. This stockpile factor  
4 allows railroads to miss delivery schedules by days  
5 and sometimes even weeks and represents the largest  
6 surge or smoothing capacity in the rail system  
7 between origin and destination.

8 This stockpiling of product exists at no  
9 cost to the rail carriers. And that's the history of  
10 Stagger's implementation. Today the table has  
11 turned. It is the railroads who are experiencing  
12 record profitability and the coal industry that is  
13 suffering from withering competition from other  
14 energy sources and adversarial public policy.

15 Despite this change in circumstances, I'm  
16 here to testify that our members are experiencing the  
17 same demurrage and accessorial fees issues related to  
18 precision scheduled railroading that you have heard  
19 recounted over and over again, these past two days.

20 Our written testimony contains specific  
21 examples. I will summarize by stating the coal  
22 transportation market is suffering from substantial

1 increases in fees, unilateral changes to railroad  
2 policies, and systems that put the substantial burden  
3 of disproving erroneous fees solely on the backs of  
4 the shippers.

5 Our members still desire to have  
6 financially healthy rail carriers that can provide  
7 reasonable service or reasonable rates. We fully  
8 support the goals of improving efficiency and  
9 reducing network congestion. We continue to have  
10 productive relationships with railroads on an  
11 operational level.

12 Our members' commitment to maintenance  
13 operations and repair of the tens of thousands of  
14 coal cars in their fleets is so significant that we  
15 hold an annual conference on best practices for  
16 fleet management which the rail carriers helpfully  
17 participate in.

18 But as you've heard during two long days  
19 of hearings in a very large room, a room where the  
20 initial shortage and now oversupply of chairs  
21 probably provides some analogy for the concept of  
22 demurrage. There is a need for --

1                   COMMISSIONER OBERMAN: People waiting to  
2 get in?

3                   MR. WARD: -- yeah, another tornado is  
4 happening as we speak. There is a need for the  
5 Surface Transportation Board to take actions to  
6 ensure that implementation of precision scheduled  
7 railroading under any name is carried out fairly and  
8 equitably.

9                   Taking my history professor hat off and  
10 becoming an English major for just a moment, I notice  
11 that Member Oberman's interest in definitions --  
12 reciprocity is defined as "A mutual exchange of  
13 privileges," specifically a recognition by one of two  
14 institutions of the validity of licenses or  
15 privileges granted by the other.

16                   The coal industry was there for the  
17 railroads when they needed capital for railcars,  
18 infrastructure and business models that offer  
19 schedule flexibility, fair treatment during PSR  
20 implementation is not too much to ask for in return,  
21 thank you.

22                   CHAIRMAN BEGEMAN: Thank you. Kent?

1                   MR. AVERY: Thank you, good afternoon  
2 Chairman Begeman, Vice Chairman Fuchs and Member  
3 Oberman, as well as the Surface Transportation Board  
4 staff, and thanks for providing PBF this opportunity  
5 to testify before you today on demurrage and  
6 accessorial charges related to rail shipments.

7                   My name's Ken Avery, and I'm the Vice  
8 President responsible for managing rail activities  
9 for both PBF Energy and our Master Limited  
10 Partnership PBF Logistics.

11                  A little background on PBF. PBF is one of  
12 the largest independent refiners in North America.  
13 We have a fleet of roughly 7,000 railcars. We haul  
14 chemicals such as Xylene, Tetramer, Benzene. We also  
15 haul a lot of crude oil, propane and butane.

16                  Of our 7 served operations -- 7-rail  
17 served operations, 57% of them are captive to one  
18 railroad. I want to tell you a little bit about  
19 myself. I've been in the rail industry for 30 years.  
20 The first 16 of that I worked with the Union Pacific  
21 Railroad solely in the operating department.

22                  The first 12 years of that 16-year span

1 was working in a terminal and serving a lot of  
2 customers like who you've heard from today. The last  
3 4 years of that 16-year span was spent in the  
4 dispatch center where I really learned just how  
5 complex the railroad is and how many resources are  
6 fighting for track time on the railroad.

7 And we're going to talk a little bit about  
8 that when I get further into my testimony. Unlike a  
9 lot of the testimony the Commissioners have heard,  
10 PBF has been successful at resolving a lot of our  
11 demurrage invoices, but it takes a tremendous amount  
12 of energy, persistence, you have to get nasty, you  
13 have to climb up the organizational ladder, it's just  
14 a process that's way too burdensome and frankly, I  
15 believe it is a deterrent, that they try to wear you  
16 out.

17 When we were sheltering in place out here,  
18 I had a moment to talk with the BNSF. My perception  
19 of their tools and their customer service center  
20 couldn't be further from what they mentioned to you  
21 today. I feel it's absolutely terrible.

22 The good news is we're going to have --

1 I'm going to follow-up with the BNSF representative,  
2 and we're going to talk more about it, but I just  
3 want to tell you we have polar opposite views on  
4 that.

5 I'm going to be brief. You guys have been  
6 champions the last two days at listening to  
7 everybody, so I'm going to make two quick points.  
8 First of all, my first point is trip plan compliance,  
9 or on-time service, is the key to lower cars online  
10 and therefore lower demurrage and accessorial  
11 charges. Unfortunately, this is a metric that is  
12 just not talked about on the railroad.

13 The railroads can talk to you about  
14 velocity, they can talk to you about OR or dwell in  
15 their yard, but what they don't talk about is on-time  
16 performance. And the reason why is there's not a  
17 good news story. It's typically in the low 70's,  
18 that's what it is, and it stays there.

19 Now, it's really the only segment in the  
20 transportation industry that doesn't talk about how  
21 reliable they are, which I find very telling. So,  
22 you know, you might be asking why is it that they

1     can't get trains over the road? Well, train trip  
2     plan compliance is really due to 3 primary factors in  
3     my experience.

4                 The first is episodic events. When you're  
5     in the dispatch center, the one thing you learn is  
6     just how many episodic events happen along the  
7     railroad on any given day -- this can be a crossing  
8     accident, it can be a locomotive with a locked up  
9     traction motor, it can be any number of locomotive  
10    reliability issues where a locomotive breaks down.

11                It can be a derailment, a rock slide, it  
12    can be a washout, it can be cattle on the track, but  
13    there are a number of episodic events where the  
14    railroad just simply stops.

15                The second thing that affects trip plan  
16    compliance or on time performance is planned  
17    maintenance. Railroads have done a good job at  
18    maintaining their track, but it doesn't come without  
19    a cost to the customer. They have tie gangs, steel  
20    gangs, what's called a DC car and EC car and in-track  
21    welder, a track inspector, it goes on and on and on.  
22    There are a lot of activities that need to be

1 coordinated on the main track other than just train  
2 movement.

3 The third thing that affects on-time  
4 performance is crews. And the crews are an issue any  
5 day of the week, but they're specifically an issue  
6 during the holidays.

7 So, we have 12 holidays, but it's not just  
8 the holidays that they become an issue, it's Mother's  
9 Day, it's Father's Day, it's Easter, it's the Super  
10 Bowl, it's the World Series, and it's also hunting  
11 season. When I was in the dispatch center, we had a  
12 heck of a time keeping crews in certain parts of the  
13 country because they wanted to go shoot an elk, or a  
14 moose or a deer or something, and while that's fine,  
15 my train didn't move.

16 And so, those are the things that I want  
17 to help the STB understand are really the things that  
18 are preventing the railroad from getting trains over  
19 the road. Now, I know you've heard a lot about first  
20 mile/last mile here. I have a little bit different  
21 of opinion. I think 50% of the problem is first  
22 mile/last mile, but 50% of the problem is just



1 getting the train over the road.

2 The thing is the customer really doesn't  
3 see that very much. So, you know, I would say that  
4 the railroads have made some economic decisions with  
5 respect to not addressing these 3 things that -- or I  
6 should say 2 of the 3 things -- that cause poor  
7 on-time performance.

8 As far as episodic events, they've  
9 relatively done a good job of maintaining their  
10 track. Their derailment statistics are going down.  
11 But as far as planned maintenance and crews, I think  
12 they've done a deplorable job. I think they've just  
13 done a horrible job.

14 I think the main track needs more  
15 redundancy. I think when they do spend capital, the  
16 capital is to bring more carloads on, it's not to get  
17 their current carloads more reliable. Capital spend  
18 needs to be on reliability before it is on growth.  
19 So, to summarize point one, railroads have focused  
20 heavily on efficiency and done a good job.

21 Again, every one of them can tell you  
22 about their OR. The real focus needs to be what

1 every other transportation segment focuses on and  
2 that's how reliable and consistent they are. That's  
3 not in their vocabulary.

4 My second point is simply that when it  
5 comes contract time, captive shippers virtually have  
6 no ability to negotiate on demurrage, accessorial, et  
7 freight rates, escalations, locomotive fees, et  
8 cetera.

9 Today, my fear is, you know, I should say  
10 PBF pays about a half a million dollars a month  
11 between demurrage, locomotive fees and I've lumped a  
12 bunch of stuff in that category, but we pay about a  
13 half million dollars a month.

14 I'd love to be able to negotiate, but it's  
15 hard to negotiate when they are the only player in  
16 town. So, I have a couple recommendations for the  
17 STB. I have some recommendations and some  
18 solutions. My first recommendation is please don't  
19 talk to the top of the railroads as to what the  
20 problem is.

21 If you want to know what the problem is,  
22 ask a dispatcher from each one of the railroads to

1     come in here and explain to you why the trains can't  
2     get over the road. I think you'll be educated. I  
3     would start at the bottom, rather than starting at  
4     the top.

5                 As far as my solutions. I believe  
6     demurrage should only be assessed on on-time cars.  
7     With this, this gives the railroad the incentive to  
8     improve on-time performance which, if achieved, would  
9     give customers the confidence to lower their car  
10    fleets. We really need a cost-effective way to  
11    arbitrate basic fees and really, we need a very fair  
12    way to just negotiate contracts for a captive  
13    shipper.

14                I think we should consider benchmarking  
15    services to develop a railroad customer bill of  
16    rights program like the DOT did in 2009 for the  
17    airline industry when the federal government  
18    instituted a passenger bill of rights as a direct  
19    result of the airline industry's poor, inconsistent  
20    and unreliable service.

21                Lastly, as I hope I've demonstrated in  
22    this presentation, we have got to change the

1 discussion from efficiency to performance and  
2 consistency. Thank you for the opportunity to  
3 testify.

4 CHAIRMAN BEGAMAN: Thank you, Kent. Emily?

5 MS. REGIS: Last one. Members of the  
6 Board, good afternoon, thank you for holding this  
7 hearing and for giving us an opportunity to speak  
8 with you. My name is Emily Regis, I'm wearing two  
9 hats today. First, I'm here as the Fuel Resource  
10 Administrator for Arizona Electric Power  
11 Cooperative, or AEPCO, a rail electric generation and  
12 transmission cooperative. That's my day job.

13 Second, I'm here as a Vice President of  
14 the Freight Rail Customer Alliance, or FRCA, a  
15 national association of shippers and shipper  
16 associations. AEPCO is also a member of the Western  
17 Coal Traffic League and the National Coal  
18 Transportation Association where I am the current  
19 President.

20 AEPCO and FRCA join in the League and the  
21 NCTA statements as well. AEPCO and FRCA have  
22 several areas of concern and several proposals

1 regarding demurrage and accessorial charges,  
2 particularly as they relate to precision scheduled  
3 railroading, or PSR.

4 Let me briefly summarize our written  
5 statement. First, we are being forced to pay a la  
6 carte for services that used to be included in the  
7 line haul rate. As a result, we are being forced to  
8 pay more to receive the same bundle of services.

9 Second, the higher charges associated with  
10 PSR, for example, out west we've seen higher charges  
11 with UP, but not with BNSF, at least not yet.

12 Third, it would be one thing if PSR was  
13 producing better service for us, but it has been the  
14 opposite. UP service has been less predictable and  
15 more disruptive. Volumes are not getting moved  
16 because of PSR and the reduction in surge or recovery  
17 capacity with PSR means these volumes are unlikely to  
18 be made up in the future.

19 Fourth, PSR is causing us to have to pay  
20 more but receive less. Fifth, there is an absence of  
21 fundamental fairness and basic reciprocity. If we  
22 hold on to a train too long, we get hit with

1 demurrage or detention, which we're told is allowed  
2 to include a penalty component.

3           However, the railroads do not face any  
4 financial consequences if they take too long to move  
5 a train or service suffers.

6           Our written statement details a sequence  
7 of event with our train set at AEPCO's power plant,  
8 Apache Station, located in southeastern Arizona.  
9 Very briefly, we needed a couple of extra hours to  
10 unload the train which we were willing to pay for.  
11 We needed to rerun the railcars through our dumper a  
12 second time because we wanted to make sure the cars  
13 would be completely empty of coal before we sent the  
14 cars to the shop for some scheduled maintenance.

15           But UP insisted on taking the cars while  
16 some still held small amounts of coal. This is known  
17 as carry-back coal which means additional cost to  
18 the shipper. The cars went to the shop and after  
19 they received maintenance, UP was notified that the  
20 cars would be ready to return to service on April  
21 26th. We had scheduled the cars for a coal loading  
22 at the end of April and obtained a PRB train slot

1 from the UP for that purpose.

2 But UP did not pick up our cars until May  
3 7th, 11 days after they were scheduled to move -- 11  
4 days! So, our cars sat, we couldn't use them, the  
5 shop had to provide space for them and we had to deal  
6 with the mine for the loading delay, but UP did not  
7 have to pay a penalty or compensate anyone for the  
8 problems it caused even though UP is quick to impose  
9 charges when shippers deviate from their schedules.

10 We offer several proposals. First,  
11 carriers should not be allowed to charge a la carte  
12 for services that were previously provided as part of  
13 the regular line haul service. At least not without  
14 showing that the line haul rates have been reduced or  
15 service improved.

16 Second, there should be reciprocity. If  
17 shippers are at risk for causing delays, then the  
18 same rules should apply to carriers. Third, penalty  
19 aspect of demurrage and accessorial charges should  
20 be limited. Even if a penalty component is allowed  
21 or needed, the sky should not be the limit. 25%  
22 seems like more than adequate amount.

1           Fourth, the Board should consider adopting  
2     the approach that FERC uses. At FERC, transmission  
3     providers and pipelines are allowed or even required  
4     to impose penalties to enforce compliance with  
5     reservation rules and the like, but the providers do  
6     not retain these proceeds.

7           Instead, the providers are required to  
8     distribute the proceeds to those customers that  
9     followed the rules. The charges do not function as a  
10    profit center, which is the same principle that the  
11    Board adopted, or tried to adopt, with the Safe  
12    Harbor for railroad fuel charges.

13           Thank you again for holding this hearing  
14    and allowing us to appear before you. In addition,  
15    we want to thank and commend the Board for the  
16    release of the report of the rate reform task force.  
17    Reasonable rates as well as reasonable charges and  
18    practices are all vital to shippers, especially those  
19    that lack effective competition.

20           We look forward to learning more about the  
21    recommendations, and to the opportunity to submit  
22    comments on them. We would be pleased to respond to



1 any questions you might have at this time. Thank  
2 you.

3 COMMISSIONER OBERMAN: I just have a  
4 couple. You know there was a question I meant to ask  
5 the other shipper panels earlier today and I forgot.  
6 So, I'll ask this panel and I'll just ask all of you  
7 and then you can respond. Ann had asked yesterday if  
8 any of the witnesses had concerns about retaliation  
9 if they showed up here.

10 Today, or maybe complaints, do any of you  
11 have any such perceptions or actual context from any  
12 of the railroads, Bette?

13 MS. WHALEN: I would say no, I don't think  
14 we have any concerns on that.

15 COMMISSIONER OBERMAN: John?

16 MR. WARD: I'm the Association guy, the  
17 railroads don't talk to me.

18 COMMISSIONER OBERMAN: Did any of your  
19 members have any such perception?

20 MR. WARD: I'm relatively new on the job,  
21 I've not had any members report to me any kind of  
22 retaliation. I have had some members indicate that

1     it's a fear that they might have.

2                   CHAIRMAN BEGEMAN:   I can answer for Kent,  
3     he's not afraid.

4                   COMMISSIONER OBERMAN:   I didn't think he  
5     would be, but I'll let him answer.

6                   MR. AVERY:   I'm not afraid, but I do  
7     believe there will be comments, retaliation, this is  
8     something that will be discussed for a long time,  
9     this coming before the Board and saying these things.

10                  COMMISSIONER OBERMAN:   Discussed between  
11     you and the railroads?

12                  MR. AVERY:   Yeah, I think so.

13                  COMMISSIONER OBERMAN:   Will you let us know  
14     if that happens?

15                  MR. AVERY:   I absolutely will.   I can tell  
16     you this, is I was contacted by 4 of the railroads  
17     before I ever came here.

18                  COMMISSIONER OBERMAN:   In connection with  
19     this hearing?

20                  MR. AVERY:   Yep.

21                  COMMISSIONER OBERMAN:   To suggest --  
22     you're not --

1                   MR. AVERY: Just to ask me what I was  
2 going to say and, you know, what my issues are.

3                   COMMISSIONER OBERMAN: And have they  
4 solved your problems as a result of that?

5                   MR. AVERY: No.

6                   COMMISSIONER OBERMAN: Emily?

7                   MS. REGIS: Well, I would just say this  
8 for days now I've been joking that I'm the  
9 sacrificial lamb, that I've come here to represent my  
10 company and FRCA, a group of shippers that many of  
11 which did not want their names mentioned in their  
12 statements, as well as NCTA members which I'm  
13 President of, those members also were happy to hear  
14 that we were going to come here and talk to you but  
15 they were afraid of the peril that might come their  
16 way if railroads found out that they were complaining  
17 about these things.

18                  COMMISSIONER OBERMAN: Were any of these  
19 people ones who would have said but for that they  
20 would have come themselves to testify?

21                  MS. REGIS: I can't say for sure. It's  
22 just a general fear of retaliation though.

1                   COMMISSIONER OBERMAN: Kent, two quick  
2 questions for you. You mentioned crews, how they're  
3 problems and so forth, do you have any understanding  
4 or perception that PSR itself has resulted in a  
5 reduction of the work force or crews exacerbating  
6 what apparently is the usual problem?

7                   MR. AVERY: I really can't. I really  
8 can't say for or against PSR. I can tell you crews  
9 have been an issue since Moby Dick was a minnow, so  
10 they continue to be an issue.

11                  COMMISSIONER OBERMAN: Alright, and the  
12 other question. When you said the main track needs  
13 more redundancy, what were you talking about?

14                  MR. AVERY: Well, if there was more  
15 redundancy, if there was more double track, more  
16 sitings, you know, two things could happen. First of  
17 all, if there's an episodic event it's possible you  
18 can get around it. Second of all, when they need to  
19 maintain the track, they can maintain one and run on  
20 the other.

21                  That's what I mean by it, you know, my  
22 personal opinion is every one of these railroads

1 comes into our office once a year and, you know,  
2 puffs their chest out and says look how much money  
3 I'm spending on capital, and then when you break it  
4 down, it's a lot on maintenance, and they've done a  
5 good job at reducing derailments by maintaining their  
6 track, but I don't see a lot of capital projects to  
7 improve on-time performance.

8 I see a lot of capital projects to bring  
9 more carloads on the railroad.

10 COMMISSIONER OBERMAN: So, what's the  
11 difference? Such as, what's a capital project that  
12 brings more cars on?

13 MR. AVERY: An intermodal terminal, it  
14 could be a project that they're going to do to bring  
15 a new customer on, but you know, I would say track  
16 expansion is what really needs to be done so you  
17 have some redundancy to get to an on-time network.

18 I mean I would hope that the railroad  
19 would be able to operate at 85-90% on-time at some  
20 point in time, but it's pretty much a flat line and  
21 it always has been, right at 70, it might be --  
22 somebody might be mid-70's -- but that's where they

1 mostly hang out, is in the 70's, low 70's.

2 COMMISSIONER OBERMAN: Thank you.

3 CHAIRMAN BEGEMAN: Kent, you mentioned  
4 that your company pays about half a million dollars a  
5 month in demurrage and accessorial, is that what you  
6 said?

7 MR. AVERY: Close.

8 CHAIRMAN BEGEMAN: And is it that you are  
9 choosing to pay rather than to, I guess, invest in  
10 infrastructure to avoid storage or is it that you're  
11 at fault, could you just kind of give us some  
12 perspective as to what those charges are for?

13 MR. AVERY: Sure, I'd say --

14 CHAIRMAN BEGEMAN: And are they legitimate?

15 MR. AVERY: Yeah, I mean roughly 20% of it  
16 is on locomotive fees and these locomotive fees are  
17 for unit trains that come into one of our terminals,  
18 we off-load them and if the locomotive sits for a  
19 specific amount of time, you pay a locomotive fee.

20 It's kind of like demurrage, it basically  
21 is demurrage, but for a locomotive.

22 CHAIRMAN BEGEMAN: But that's different

1     than the UP \$3,200 I mean dead head --

2                 MR. AVERY: No, I think the \$3,200 is if  
3     you release the locomotive back.

4                 CHAIRMAN BEGEMAN: So, you're holding on?

5                 MR. AVERY: We're holding on.

6                 CHAIRMAN BEGEMAN: Is it more than \$3,200?

7                 MR. AVERY: It's probably right around  
8     \$3,200 that we pay. I would say there's really no  
9     difference whether we would release it or not. One  
10    of our bigger costs is out in California. I would  
11    say that that represents half of the money that we --  
12    I talked about -- and it's on the BNSF.

13                Look, I've -- we have a refinery down in  
14    St. Torrance, which is in LA, and there's just no  
15    place to build track in the middle of LA. My concern  
16    is that the BN continues to either eliminate a  
17    demurrage agreement or reduce the amount of cars that  
18    we can have.

19                We have worked tirelessly with the BNSF to  
20    try to identify a place where we could build track  
21    that they would serve. We've looked at a half a  
22    dozen spots. The problem is they don't want to

1     serve any of the spots, so they give me no  
2     opportunity to actually build track, so what do I do?  
3     I store the cars in Arizona, on a short line.

4                 So, I move these cars. I pay a lot in  
5     demurrage because my only alternative is to pay  
6     freight out to Arizona to come back to LA when I need  
7     them. So, demurrage is going to be cheaper than  
8     paying that freight.

9                 CHAIRMAN BEGEMAN: Even though the freight  
10    is empty?

11                MR. AVERY: Yeah, yeah. Well, we move  
12    loads out there too.

13                CHAIRMAN BEGEMAN: Okay.

14                MR. AVERY: We move loads out there as  
15    well, okay, yeah.

16                CHAIRMAN BEGEMAN: But I meant it wasn't  
17    that was where all your storage was going to be?

18                MR. AVERY: That is where our storage is.  
19    I'm not sure if I'm following your question.

20                CHAIRMAN BEGEMAN: I guess maybe you're  
21    saying you're actually paying the fees because of the  
22    Arizona location, that's where your cars are, yes?



1 MR. AVERY: Yes.

2 CHAIRMAN BEGEMAN: Yes, okay.

3 COMMISSIONER OBERMAN: Now you've confused  
4 me. I thought you said it was cheaper to pay the  
5 demurrage than to move the cars to Arizona?

6 MR. AVERY: It is, but there are points in  
7 time where we have to move the cars out.

8 COMMISSIONER OBERMAN: Because?

9 MR. AVERY: Because the railroad says we  
10 need to.

11 COMMISSIONER OBERMAN: Well I'm trying to,  
12 just on this point, if you don't mind, just to figure  
13 out the incentive part of the demurrage fee.  
14 Everything we hear is it's to get the system moving,  
15 but it sounds like there's almost nothing -- you'd  
16 have to raise the demurrage fee a lot higher before  
17 it became cheaper for you to just send everything to  
18 Arizona without being forced to?

19 MR. AVERY: That's right.

20 COMMISSIONER OBERMAN: And you're not  
21 encouraging that, I'm assuming?

22 MR. AVERY: No.

1                   VICE CHAIRMAN FUCHS: It gets to the whole  
2 idea Ken, the trade-off you're making is between  
3 paying the demurrage fee and the lowest possible cost  
4 alternative to avoiding a demurrage fee, that's the  
5 trade-off you're making?

6                   MR. AVERY: That's the trade-off we're  
7 making, that's exactly right.

8                   VICE CHAIRMAN FUCHS: Okay, can I get into  
9 car trip plan compliance because it actually -- I was  
10 trying to get back to my very first question of the  
11 hearing about 19 hours ago, of -- and, you know, the  
12 whole idea of, you know, you hear now with the  
13 transition to PSR that car trip plan compliance is a  
14 measure that's being pushed out more by some of the  
15 railroads.

16                   And you know, just to make sure that I'm  
17 understanding what you're talking about Ken, is  
18 there's kind of two initial things I'm thinking  
19 about. One is from the time of release to the time  
20 of placement, and that could be constructive  
21 placement, and then if it's in the constructive  
22 displacement then it's first mile/last mile.

1           And so are you saying that on that initial  
2 segment, which I understand is how they measure car  
3 trip plan compliance, various ways, from release to  
4 constructive placement, if there's any -- for each  
5 delay you have there, you should get some sort of  
6 credit, is that basically what you're saying?

7           Like when you say that cars --

8           MR. AVERY: Well I'm saying if a car has a  
9 10-day trip time and makes a 10-day trip time, then  
10 fine, demurrage is fair.

11           VICE CHAIRMAN FUCHS: From release to  
12 constructive placement?

13           MR. AVERY: Yeah.

14           VICE CHAIRMAN FUCHS: Okay.

15           MR. AVERY: Yeah, but if --

16           VICE CHAIRMAN FUCHS: What if it's an 11-  
17 day trip time?

18           MR. AVERY: I don't think I should have to  
19 pay demurrage.

20           VICE CHAIRMAN FUCHS: Ever?

21           MR. AVERY: Yeah, and if it's a 9-day trip  
22 time, I don't think I should have to pay demurrage.

1                   VICE CHAIRMAN FUCHS: In that scenario, so  
2     there's two different ways. One is, you know, that  
3     we've been hearing is that railroads give credit, you  
4     know, they'll give a credit because there's an  
5     inconvenience here, and then the other is -- but in  
6     your scenario you're saying never demurrage -- that  
7     means it could sit in the railroad yard in perpetuity  
8     without ever having to pay anything.

9                   Does that create an incentive in the other  
10    -- or a lack of incentive that would be problematic  
11    for yard capacity?

12                  MR. AVERY: I think what I've heard here  
13    is we continue to talk about customer behavior. We  
14    need to incent railroad behavior and when you're  
15    talking about railroad behavior, the railroad  
16    behavior that I think we need to incent is on-time  
17    performance and that's where I get to that point.

18                  VICE CHAIRMAN FUCHS: Would a credit be a  
19    better way of doing that where, if someone misses  
20    their ETA, they give credits, such that, you know,  
21    the credit is going to wipe away, you know, that's  
22    some harm and it's an incentive for them, and that

1       wipes away a debit, right?

2                       And so, that their, you know, their  
3       incentive is the foregone debit, you know, but you  
4       don't run into a situation where the car can just  
5       stay in the yard forever. So, why would the credit  
6       system not be better than the "never demurrage if  
7       late" system?

8                       MR. AVERY: You know, a credit system  
9       could work, I'm not saying it couldn't. I'm just  
10      telling you my opinion on this is we need to get away  
11      from talking about the customer behavior. I think  
12      the customers are behaving exactly how the railroad  
13      wants them to behave.

14                      I think that the conversation needs to  
15      change to railroad behavior and what -- and what is  
16      going to drive more reliability? What is that  
17      behavior that's going to drive more reliability on  
18      the railroad?

19                      VICE CHAIRMAN FUCHS: I have another  
20      question on that, but, Marty --

21                      COMMISSIONER OBERMAN: Just on this point,  
22      incenting railroad behavior, and I don't mean to be

1     facetious but it may sound that way, every railroad  
2     that came through here said, you know, this  
3     demurrage is such a tiny fraction, it's really  
4     meaningless to us.

5             So, if that's accurate, then if you denied  
6     them demurrage because they're in 11-days or 9-days,  
7     it wouldn't incentivize them to do anything because  
8     they say the money they collect is meaningless, if  
9     that's true, or am I missing logic?

10            MR. AVERY: I don't think the money  
11     they're collecting is meaningless.

12            COMMISSIONER OBERMAN: So, you think it  
13     would be an incentive, if they couldn't collect that  
14     billion dollars?

15            MR. AVERY: I do.

16            VICE CHAIRMAN FUCHS: So, (inaudible) make  
17     sure that I'm -- because when we went through and you  
18     saw the previous panel and the tenets that BN laid  
19     out, one of them was fault, you know, and they  
20     seemed to be putting forward the idea that if the  
21     railroad is at fault, there should be some  
22     consequence when it comes, you know, when it comes to

1 demurrage or at least that there should be some  
2 break in demurrage. That's the way I interpreted  
3 what they meant by fault.

4 And I guess, you know, the credit system,  
5 generally. Is there a way to think about the credit  
6 system? Perhaps, Kent, as you laid out, linked to  
7 car trip plan compliance on the initial transit time  
8 over the road and then maybe something on missed  
9 switches and other things that get at first mile/last  
10 mile?

11 For the general panel, do people have a  
12 general view on the use of credits and how the Board  
13 should be thinking about credits as a way of  
14 capturing that fault concept?

15 Does that, can you do it with credits?

16 MS. WHALEN: Well I think for a unit coal  
17 train, I don't know that the credit/debit system  
18 works.

19 VICE CHAIRMAN FUCHS: Okay, explain to me.

20 MS. WHALEN: Well, because you're moving  
21 124 or 150 cars as a unit, right?

22 VICE CHAIRMAN FUCHS: Right.

1 MS. WHALEN: And so, I think the biggest  
2 impact for coal trains is the imposition by UP now of  
3 the 24-hour, you know, unloading.

4 VICE CHAIRMAN FUCHS: Right.

5 MS. WHALEN: And if you don't make it then  
6 you get assessed demurrage even if they don't come  
7 and pick up the train for, you know, a couple of  
8 days. So, you know, I know that PSR is looking at  
9 moving cars, but with coal, we're still really moving  
10 full trainloads.

11 VICE CHAIRMAN FUCHS: So, let's say for  
12 example, you know, you have 120 cars, if you held  
13 them for an extra day you would get 120 debits,  
14 right, of demurrage. If they were late or missed a  
15 switch, however, you know, if they gave you 120  
16 credits for that day, wouldn't that then kind of  
17 offset the debits that you'd get if you held it?

18 I mean, take me through why that wouldn't  
19 what is particular about why that wouldn't work?

20 MS. WHALEN: Well I can speak, I can't  
21 speak for the UP, but I can speak for the BN that  
22 they don't have -- they will give us a proposed cycle



1 time and they will give us an estimate time of  
2 arrival.

3 VICE CHAIRMAN FUCHS: Right.

4 MS. WHALEN: But if they don't arrive that  
5 time, whenever they arrive is when the start the  
6 clock. So, I mean, how do you assess that in reverse  
7 because when they get there they get there, you  
8 know, and there's no commitment on their part to say  
9 the train's going to be there at noon.

10 VICE CHAIRMAN FUCHS: Right, there's no  
11 service guarantee.

12 MS. WHALEN: There's no service guarantee.

13 VICE CHAIRMAN FUCHS: Right.

14 MS. WHALEN: So, I think it would be  
15 difficult to do that. Maybe there's a mechanism that  
16 would work, but I can't come up with a suggestion.

17 VICE CHAIRMAN FUCHS: Emily?

18 MS. REGIS: I would say many years ago, in  
19 some ancient contract that we had that, we did have a  
20 mechanism for sorting out that sort of thing on  
21 average basis cycle time performance. If they didn't  
22 meet that, then you were entitled to something, so,

1 it's possible to come up with a way of some kind of  
2 reciprocity in that, it could be worked out, it  
3 worked before.

4 VICE CHAIRMAN FUCHS: And as a general  
5 notion, we talk a lot about service measures and you  
6 know, without getting into anything that's pending,  
7 for sure, but generally, is car trip plan  
8 compliance, and then something that measures first  
9 mile/last mile, are those the two most important  
10 service kinds? It sounds like you think that they  
11 are, but the other folks on the panel, are those the  
12 two service measures that are most important for you  
13 all?

14 MS. WHALEN: Cycle time is probably one of  
15 the biggest service measures for us.

16 VICE CHAIRMAN FUCHS: The actual length of  
17 the trip?

18 MS. WHALEN: Yes, the total trip and like  
19 Emily alluded to, they used to be in contracts.  
20 There used to be a cycle time guarantee, and if at  
21 the end of the year it averaged out that they didn't  
22 meet that, then there were financial ways to take

1 care of that. But railroads have removed that and  
2 they won't even give you a cycle time guarantee.  
3 It's a planning mechanism.

4 VICE CHAIRMAN FUCHS: But once you  
5 establish the cycle time, it's compliance with that -  
6 - that's a proxy for car trip, am I right to think  
7 about that as a proxy for what the car trip, you  
8 know, is and therefore, yeah?

9 MS. WHALEN: So you can plan how many cars  
10 you need --

11 VICE CHAIRMAN FUCHS: -- Right --

12 MS. WHALEN: -- to deliver the amount of  
13 coal you need a month --

14 VICE CHAIRMAN FUCHS: -- Right --

15 MS. WHALEN: Based on their assumed cycle  
16 time.

17 MS. REGIS: It's enormously important  
18 really when you're contracting with coal producers  
19 and you have a certain volume that you have to move  
20 within a limited time, maybe even a month or a  
21 quarter and you're planning and your logistics and  
22 planning revolve around the railroad assumed cycle

1 time average.

2 If you think your train is going to take 8  
3 to 10 days to deliver a load of Powder River Basin  
4 coal to your plant, then it should take 8 to 10 days,  
5 it shouldn't be 12 days, and if it continues to be 12  
6 days then that really pushes you over the edge as far  
7 as your producer commitment.

8 VICE CHAIRMAN FUCHS: I appreciate that,  
9 so one last question for me. Just kind of going  
10 through these tenets and just thinking through them,  
11 you know, clear and concise information, having the  
12 information necessary has to adjust, treatment for  
13 folks in the similar class identically, sufficient  
14 advance notice, and capturing some element where if a  
15 railroad is at fault, you don't have to pay  
16 demurrage in some way.

17 Maybe it's a credit we were discussing,  
18 you know, Ken has -- however, right, so if those were  
19 tenets, what is it missing? You know, not to put you  
20 on the spot.

21 MR. AVERY: Can you restate it, I don't  
22 think I'm following your question.

1                   VICE CHAIRMAN FUCHS: So, if the Board is  
2     thinking about what the reasonableness of a demurrage  
3     charge is, and the reasonableness of a demurrage  
4     tariff, and the information was clear and concise  
5     and there was, I guess, sufficient advance notice,  
6     and people were treated the same, and they had the  
7     information necessary with which to plan operations,  
8     and there was something in there that accounted for  
9     railroad fault, in a true way, with credits or some  
10    other way --- if there's the credits when it's late,  
11    or a missed switch, and it was a good system, where,  
12    you actually got credits when the railroad made an  
13    error, what would still be missing from that?

14                  MR. AVERY: I don't know that anything  
15    would be missing from that, but I would say that if  
16    the railroad is the one that is the judge and the  
17    jury on that system, like what you have today, there  
18    could be some flaws with it.

19                  VICE CHAIRMAN FUCHS: I see. And then it  
20    becomes, then it's a question of the evidence and the  
21    dispute resolution and that sort of thing.

22                  MR. AVERY: Yeah, I mean that's the issue

1     today is, you know, you just have to spend an  
2     enormous amount of time battling these things, and  
3     again, I believe it's a deterrent, because they're  
4     going to wear you out and then you're going to go  
5     away and frankly, I think that's what a lot of  
6     customers do.

7                   MS. REGIS: I think there's a lack of  
8     data, you're not able to obtain the kind of data that  
9     they have on the performance of your train or your  
10    traffic or whatever and you might talk to them, "what  
11    happened with my train? Why did it go this way? And  
12    how come it took this long? And where are my cars,"  
13    et cetera, you know, you can have that conversation,  
14    you're going to get, you know, unclear answers.

15                   But you know, usually it's just okay, this  
16    time they messed up, maybe we mess up another time.  
17    We work it out, we communicate but now they want you  
18    to go through this service process on the internet  
19    and create a service issue and it's not so personal  
20    anymore, I guess, it's not so effective.

21                   VICE CHAIRMAN FUCHS: I see.

22                   CHAIRMAN BEGEMAN: Well, I just want to

1 close by saying thank you so much. Even though you  
2 were the last panel, you were as informative as the  
3 first. And I hope that you know that we have been  
4 listening to you very carefully.

5 I also want to thank the folks that have  
6 managed to stay to fill the extra seats that are  
7 here, most of you. There are quite a few less  
8 railroad representatives than there were before, but  
9 there are a couple of you. And what I really want to  
10 do is also, I want to thank my colleagues and their  
11 staff and the Board's staff.

12 The effort that they undertook to help us  
13 have this hearing, including finding us a location  
14 and figuring out how to run the lights, et cetera. I  
15 am so proud of you and if you would bear with me, I  
16 would like to read off the list of all of the people  
17 that have made us look like we know what we're doing.

18 So, starting with the Office of  
19 Proceedings, Kenyatta Clay, Raina Contee, Sarah  
20 Fancher, Jeff Herzig, Brendetta Jones, Rena  
21 Laws-Byrum, Ryan Lee, Ryan and Rena are both here,  
22 Tammy Lowery, Rebecca Morrow -- also here, who has

1     worked very hard on all these issues.

2                   Regena Smith-Bernard, Julie Waddell, who  
3     Marty mentioned yesterday as well as Sarah, Cynthia  
4     Brown, Scott Davis, I'm sorry, Scott Zimmerman,  
5     Allison Davis. From the Office of OPAGAC, we call  
6     that Lucy's shop, Katherine Bourdon, Fred Forstall,  
7     Mike Higgins, Gabe Meyer, Coral Torres, Crystal  
8     Wortham, Janie Sheng -- thank you Janie, and of  
9     course Lucy Marvin.

10                  From the Office of the Managing Director,  
11     Adil Gulamali, Don Sawyer, Jon Smith, Mike Sullivan,  
12     Roberta Workman and Rachel Campbell.

13                  Office of Economics, Alex Dusenberry, Kim  
14     Hillenbrand, Dick Klem, Laura Mizner, Doug Pelsey,  
15     Rob Plum, Pedro Ramirez, Laura Schneider, Jennifer  
16     Smith-Bozek, Frank O'Connor and Bill Brennan.

17                  The General Counsel's Office, Anika  
18     Cooper, John Rackson, Craig Keats, Judy Leader -- who  
19     works with us, and of course Patrick, Marty, Ellen,  
20     Lisa, Val, Amanda -- who has stepped away, Greg  
21     again, so thank you for bearing with me, but really  
22     obviously a lot of effort from doing charts and



1 tracking the revenues that we've asked the parties to  
2 report, and just putting together the most enormous  
3 history of demurrage.

4 I had no idea that most of these issues  
5 are a repeat of hundreds of years of pain and  
6 suffering. But really, thank you. As I had  
7 mentioned a couple of times, the record will be open  
8 for 14 days, until June 6th, so that anyone that  
9 wants to respond to what has been said today, you are  
10 welcome to submit comments.

11 And I, of course, want to turn to my  
12 colleagues to offer any closing comments they might  
13 have.

14 COMMISSIONER OBERMAN: Very briefly, you  
15 have covered the waterfront on the staff and the  
16 tremendous effort that's been put in by everybody. I  
17 just want to single out you for having led this  
18 effort from the beginning and managed these lengthy  
19 and complex hearings, really you've done a remarkable  
20 job for all of us in getting us through it.

21 And I'm going to defer to how you wind  
22 things up, thank you, but thank you much.

1                   VICE CHAIRMAN FUCHS: I echo Marty and  
2     thanks, Ann, for everything you've done to give us,  
3     you know, really great information to consider this  
4     carefully and thoughtfully, and your leadership from  
5     before we got to the Board has been truly helpful  
6     and all the staff as well.

7                   You know, Ann mentioned the materials, but  
8     I think all of us have multiple binders. And then we  
9     had a separate one of just analysis and, you know,  
10    from the legal side and the economic side and  
11    everything in between operationally, so staff did  
12    really a tremendous job and many of those folks are  
13    here and Ann listed them.

14                  And thank you to all of you, especially  
15    the ones who have been here through it all and all 12  
16    panels, but you know, we know how valuable your time  
17    is and how much effort and thought went into your  
18    filings, and so it's very much appreciated and made  
19    for a very enlightening hearing.

20                  CHAIRMAN BEGEMAN: Yes, and I also --  
21    besides thank you for your written testimony. I mean  
22    the carriers were asked to provide detailed

1 information by May 1st, and they all delivered as  
2 well, so again, I think you can feel our  
3 appreciation.

4 COMMISSIONER OBERMAN: You know Ann  
5 before, I want to -- I meant to just say before you  
6 get to wherever we're going from here --

7 CHAIRMAN BEGEMAN: Home.

8 COMMISSIONER OBERMAN: Home, speaking for  
9 my own experience here, this has been an eye-opening  
10 experience into the railroad industry. I've heard a  
11 lot in the 4 and a half months or so that I've been  
12 here of issues raised by shippers and railroads, but  
13 I have never seen so much focused attention and  
14 really opening the door to what I think is a  
15 significant portion of this industry and the  
16 difference of what we're hearing from the railroad  
17 side and the shipper/receiver side.

18 It has really been a remarkable event and  
19 I think points towards future actions, whatever they  
20 are, anyway.

21 CHAIRMAN BEGEMAN: Yeah, so I certainly  
22 hope that the railroads will reply to some -- with

1 the comments that they've heard today, let the Board  
2 know in their reply what actions they might be taking  
3 in response.

4 When I would say I kind of started this  
5 effort last fall, it wasn't because any shipper  
6 complained to me, believe it or not. It was that I  
7 was -- I found it questionable when the railroads  
8 told me what they were going to do, it didn't seem  
9 logical to me for some of their changes or frankly,  
10 it didn't seem fair.

11 So, you saw my letters and my continued  
12 letters, so it wasn't that I was pushed, you know, I  
13 really think that things -- we can't fix every  
14 problem but we can shed light on issues, and we can  
15 take action, when we need to take action and we will  
16 take action when we need to take action.

17 A lot of good ideas, constructive ideas  
18 were offered, and I am still in the process of  
19 considering, frankly, all of them. And we will have  
20 meetings and determine what next steps to take, but I  
21 do think that things can be, you know, things can be  
22 better than they are.

1           The shippers and the railroads need each  
2   other, and if we need to be the marriage counselor,  
3   we will be, but I am hopeful. I think, I really want  
4   to commend UP. They have made some adjustments based  
5   on your feedback and I'm going to remain hopeful  
6   that other carriers are going to do the same.

7           Now there are some folks, such as KCS, who  
8   is also in the room, maybe they don't need to make an  
9   adjustment, you know, people -- your hair is not on  
10  fire because of their actions, but again I hope that  
11  everyone is just going to be level-headed, consider  
12  what they can do for their customers and how the  
13  network can still be fluid, because that is in the  
14  interest for the shipper and the carrier and the  
15  economy.

16           COMMISSIONER OBERMAN: Well put.

17           CHAIRMAN BEGEMAN: Alright, we'll gavel  
18  out and thank you for everything again.

19           (Whereupon at 5:28 p.m., the hearing was  
20  adjourned.)

21

22

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| <hr/> <b>4</b><br><hr/> <b>4</b> 623:4 684:19<br>689:16 726:18<br>743:9 748:15<br>764:11,13 829:11<br>882:2 898:19,21<br>898:22 899:5,11<br>900:13 903:20<br>906:9 939:6 953:7<br>967:3 980:16<br>1005:11<br><b>4-</b> 874:17<br><b>4,800</b> 781:3<br><b>4.6</b> 699:7 700:2<br>725:1<br><b>40</b> 700:8 831:11<br><b>40-50</b> 933:13<br><b>400</b> 682:21 695:14<br><b>430,000</b> 691:9<br>740:5<br><b>45%</b> 961:22<br><b>450-car</b> 698:16<br><b>450-cars</b> 698:21<br><b>46</b> 902:12<br><b>47</b> 902:13 903:3,3<br><b>470,000</b> 691:7<br><b>477</b> 735:1,6<br><b>477,000</b> 734:7<br><b>48</b> 651:18 755:16<br>758:8 765:10<br>768:15 770:5,6<br>800:17 801:10<br>802:2,4,5,7 898:3<br><b>48-hour</b> 672:18<br>712:1<br><b>48-hours</b> 673:1<br>679:11 892:14<br>935:14 | <hr/> <b>5</b><br><hr/> <b>5</b> 635:11,11,11,11<br>635:16,16,17,17<br>635:21 636:8,9<br>638:15,17 642:18<br>686:6 697:17,20<br>700:8 720:22<br>721:11 726:17<br>727:16,17,17<br>743:9 746:10,10<br>746:10 748:15,16<br>750:4,4,4,8,9<br>760:10 769:15<br>774:13 786:18<br>787:6 788:11,16<br>801:12,13 830:5,9<br>831:2 837:12<br>871:16 875:9,9<br>896:7 916:2,4,8<br>916:13,17 941:14<br>941:14,14,16,16<br>941:16 942:7,7,7<br>943:17,17,17<br><b>5-day-a-week</b><br>652:18<br><b>5%</b> 821:9<br><b>5.7</b> 829:20<br><b>5:28</b> 1007:19<br><b>50</b> 699:6 764:16<br>765:8 770:21<br>859:22<br><b>50%</b> 610:4 627:1<br>721:8 761:17<br>762:15 764:14,18<br>901:6 959:12<br>970:21,22<br><b>500</b> 596:8 848:18<br>849:5<br><b>53%</b> 764:16<br><b>533</b> 849:6<br><b>535</b> 849:7<br><b>54</b> 903:4<br><b>55%</b> 958:20<br><b>55,000</b> 769:4<br><b>550</b> 699:22<br><b>56</b> 676:22 677:1<br>902:13 903:3<br><b>57</b> 902:13<br><b>57%</b> 966:17<br><b>5th</b> 678:13 | <hr/> <b>7</b><br><hr/> <b>7</b> 623:20 697:17,19<br>832:15 837:14<br>846:9 940:15,16<br>945:21 966:16<br><b>7-day</b> 882:12<br><b>7-rail</b> 966:16<br><b>7%</b> 959:10<br><b>7,000</b> 966:13<br><b>70</b> 693:18 781:1<br>983:21<br><b>70's</b> 968:17 984:1,1<br><b>707</b> 626:21 784:2<br>793:14 798:13<br><b>73%</b> 756:19 761:16<br>761:20 762:12<br><b>746</b> 914:8,8<br><b>75</b> 672:10<br><b>75%</b> 758:7 958:9<br><b>75,000</b> 957:4<br><b>750,000</b> 696:11<br>742:19 743:15<br><b>7th</b> 977:3                         | <hr/> <b>9</b><br><hr/> <b>9</b> 706:15 709:13<br>789:1,1 874:12<br>954:18<br><b>9-day</b> 989:21<br><b>9-days</b> 992:6<br><b>9%</b> 825:6<br><b>9,000</b> 955:11 958:1<br><b>9.3</b> 673:16 674:16<br>679:6 709:3 710:9<br>711:4<br><b>9:30</b> 596:5<br><b>90</b> 608:20<br><b>90%</b> 672:3 822:3<br>962:1<br><b>9000</b> 838:4 839:3<br><b>92,000</b> 699:7<br><b>94%</b> 822:4<br><b>95%</b> 754:18<br><b>97%</b> 761:11 |
|   |   | <hr/> <b>8</b><br><hr/> <b>8</b> 627:1 642:18<br>801:13 871:16<br>898:21 998:2,4<br><b>8-0</b> 647:3<br><b>8-hour</b> 801:11<br><b>8%</b> 647:2  |  |