

1 Presidential Emergency Board No. 243

2 between

3 National Railway Labor Conference

4 representing:

5 Union Pacific Railroad Company

BNSF Railway Company

6 CSX Transportation, Inc.

Norfolk Southern Railway Company

7 The Kansas City Southern Railway Company

Alton & Southern Railway Company

8 The Belt Railway Company of Chicago

Brownsville and Matamoros Bridge Company

9 Central California Traction Company

Columbia & Cowlitz Railway Company

10 Consolidated Rail Corporation

Gary Railway Company

11 Indiana Harbor Belt Railroad Company

Kansas City Terminal Railway Company

12 Longview Switching Company

Los Angeles Junction Railway Company

13 Manufacturers Railway Company

New Orleans Public Belt Railroad

14 Norfolk & Portsmouth Belt Line Railroad Company

Northeast Illinois Regional Commuter Railroad Corporation

15 Oakland Terminal Railway

Portland Terminal Railroad Association

16 Portland Terminal Railroad Company

Soo Line Railroad Company (Canadian Pacific)

17 South Carolina Public Railways

Terminal Railroad Association of St. Louis

18 Texas City Terminal Railway Company

Union Pacific Fruit Express

19 Western Fruit Express Company

Wichita Terminal Association

20 Winston-Salem Southbound Railway Company

21 and their employees represented by:

22 Rail Labor Bargaining Coalition consisting of:

1 Brotherhood of Railroad Signalman
Brotherhood of Locomotive Engineers and Trainmen
2 Brotherhood of Maintenance of Way Employes
International Brotherhood of Boilermakers, Blacksmiths, Iron Ship Builders,
3 Forgers and Helpers
 Sheet Metal Workers' International Association
4 National Conference of
5 Firemen & Oilers
6 and a coalition of Rail Unions,
7 consisting of:
8 Transportation-Communications International Union
 American Train Dispatchers Association
9 International Association of Machinists and Aerospace Workers
 International Brotherhood of Electrical Workers
10 Transport Workers Union of
11 America
12 Panel Members:
 Ira F. Jaffe, Chair
13 Roberta Golick, Member
 Joshua M. Javits, Member
14 Gil Vernon, Member
 Arnold M. Zack, Member
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14 10-20-11

15 CHAIRMAN JAFFE: Good morning. I don't think it's
16 on. Is it? Good morning everyone. If I could ask
17 everyone to be seated and we'll be ready to get to
18 closings. At your convenience.

19 ROLAND WILDER: Good morning, Mr. Chairman, Members
20 of the Board. It's been a pleasure to present the
21 closing arguments and the summation for the joint
22 coalitions in this matter. Despite the avalanche

1 of evidence (inaudible) in this record, the issues
2 before this court are relatively straightforward.
3 The ultimate question is whether the NCC's offer
4 of settlement modeled after its earlier agreement
5 with the United Transportation Union, will be
6 recommended by the Board to settle all outstanding
7 disputes between all of the carriers represented
8 by the NCCC and all of the organizations before
9 you. Those organization represent 73 percent of
10 all of the carriers employees. That's an important
11 figure in judging the efficacy or the efficiency
12 of the offer the carriers made to settle this
13 dispute. Most of the evidence in this records
14 admits of only one answer. And that answer is a
15 resounding no. There is no pattern in this case.
16 The UTU agreement furnishes no evidence whatever
17 of a pattern that warrants serious consideration
18 by this Board. Now, the testimony of Robert
19 Scardelletti and Dave Pickett and Tom Roth all
20 point in this direction. An agreement with a
21 single organization representing a strong
22 minority, that is a minority of industry

1 employees, cannot constitute a viable pattern.
2 That's not what the pattern principle is according
3 even to traditional concepts in this industry.
4 Their testimony is supported by the great weight
5 of authority. As you go back in time, you read the
6 reports given by prior Presidential Emergency
7 Boards. You recall Mr. Roth's testimony that in
8 all these archives in all his research he's
9 located only one Presidential Emergency Board
10 Report that indicates the minority agreement can
11 constitute a pattern and that was under
12 extraordinary circumstances. While it is true that
13 the NCCC also sites Presidential Emergency Board
14 reports, but they are so clearly distinguishable
15 from the current situation. So clearly
16 inapplicable that I don't believe it worth the
17 Board's time to take up its time to discuss them
18 here. They're cited in the papers, they're
19 distinguished in the papers and I think that
20 should be adequate. Now an equally important
21 reason for rejecting the NCCC's pattern argument
22 was testified to by Dan Pickett. He stated that

1 the carriers' position, if sustained, would harm
2 the movement towards coordinated bargaining that
3 characterized this round of national handling that
4 resulted in a voluntary agreement for the entire
5 industry during the last round. Now this is
6 important, I submit, because for many years people
7 like yourselves, experienced labor relations
8 professionals, have urged the parties to move
9 towards coordinated bargaining to get some of the
10 chaos and indeterminacy out of this process. And
11 I'll point out it was that chaos and indeterminacy
12 that gave rise to the so-called pattern principle
13 in the first place. So all of the reasons the
14 carriers are arguing for application of the
15 pattern principle here, regardless of its
16 applicability, would be swept aside if they had
17 bargained with one or both of the coalitions in
18 this round as they did in the 2005, 2009 round.
19 The point is that the agreement with the regiment
20 that the UTU agreement constitutes a pattern will
21 confound and set back the movement towards
22 coordinated bargaining that we hope perhaps in the

1 next round will result in true multi-union, multi-
2 employer collective bargaining but would end all
3 of the indeterminacy and chaos that has occurred
4 at the national level over the last 25 to 35
5 years. This is an important policy consideration
6 for the Board. But there's another reason why this
7 is not a pattern and not to be considered one. The
8 Sheet Metal Workers International Association is a
9 member of the Rail Labor Bargaining Coalition. And
10 as you learned just after opening statements in
11 this proceeding, the sheet metal workers is taking
12 the position that the UTU's entry into this
13 agreement with the carriers is part of a
14 continuous violation of the UTU's internal
15 obligations under the merger agreement with the
16 sheet metal workers and the SMART constitution. So
17 what will we call this pattern, if indeed the
18 carriers are successful in convincing you that it
19 is? I submit we should call the pattern the Ultra
20 Vires Pattern and that will distinguish it from
21 the true patterns that had been held in the past.
22 Now, I'm going to start off with the two major

1 issues in this case that are applicable to both
2 coalitions and all the organizations they
3 represent. First of all let me take up the wage
4 issue. And let me start with facts that cannot be
5 disputed. The carriers do not claim an inability
6 to pay the organizations waged amount. That was
7 stated on the record in this proceeding; it was
8 not in dispute. It is equally indisputable that
9 the railroads are more profitable today than they
10 ever have been. I realized that is a strong
11 statement but that is backed up by all of the
12 financial data that was brought to the Boards
13 attention by Mr. Roth in this proceeding. You will
14 recall that his testimony demonstrated the
15 industry's extraordinary profitability by every
16 possible economic in business metric. I'm not
17 going to go through that. I will mention only two.
18 The operating ratios today are extraordinarily
19 strong. From 2001 to 2010 the (unintelligible)
20 carriers' operating ratio has plunged from 82.7
21 percent to 71.8 percent. And for every 1 percent
22 reduction, that amounts to \$530 million. Think

1 about that. I don't know of another industry or
2 even company that shows that much improvement in
3 the operating ratio over such a short period of
4 time. It is true that the carriers are not United
5 Parcel Service. Nobody is United Parcel Service.
6 If that's the bar, we might as well accept what
7 they offer us. But it isn't. I'll point out from
8 very recent experience, United Parcel Service also
9 is difficult when it comes to improvements in
10 rates of pay rules and working conditions. So the
11 other metric is the return on equity. Since 2006
12 the carriers' return on equity has been in the
13 double digits. That too is extraordinary, as Mr.
14 Roth testified, particularly in light of the
15 history of this industry. Now the carriers did not
16 dispute these data because they cannot. Instead,
17 the carriers have put forward expert testimony
18 asserting that wages are not carloaded (ph) with
19 profits or profitability at the employing
20 enterprise. That's what they're saying. Don't pay
21 any attention to the carriers' profitability and
22 don't pay any attention to the carriers'

1 productivity. I express some sense of personal
2 shock after spending 35 years having carriers tell
3 me that I have to come up with concessions, work
4 rule concessions to increase their profitability
5 in order to afford the wage and benefit practice.
6 Uniformly this is done in our industry. In this
7 hearing I learned that that is beside the point.
8 Everybody's wrong if they live outside the city
9 limits of The University of Chicago, it appears.
10 I'm suggesting that the Board should give no
11 credence to this testimony at all. The reasons are
12 perhaps more legal than they are economic. The
13 point is that these theories are not helpful to
14 the Board in making its important decision. Most
15 importantly, Dr. Murphy's theory is contrary to
16 the undisputed facts of this case. I am going ask
17 you to recall, if you will, what Dr. Murphy's
18 report said. You recall his report was to the
19 effect that excessive wage gains or excessive
20 compensation which takes away accounting profits
21 that otherwise would be invested or contrary to
22 the public good that wages are correlated not with

1 profits at the employee enterprise but it profits
2 in the economy at large. And then on page 21 of
3 his report, Dr. Murphy said that as a result of
4 excessive compensation, "the implication is that
5 capital will go elsewhere as forward-looking
6 investors seek competitive returns." That is a
7 direct quote from Dr. Murphy's paper. Now we now
8 from Ken Gradia's testimony, transcript at 26 on
9 the first day, that the 2007 National Agreement
10 provided for excessive compensation; we also know
11 that because he stated even more bluntly in the
12 carriers' opening submission. So there is no
13 question that the carriers regard the last
14 National Agreement is providing for, quote,
15 excessive compensation. Well, who then are the
16 forward-looking investors? I suppose the first
17 forward-looking investor is Wall Street as a
18 whole. Has Wall Street fled the role? Has it gone
19 away? Is it starting the railroads for investments
20 to use for capital improvements? No, not within
21 ROE of 11.2 in the double digits so, Wall Street
22 has answered that question. It didn't flee. I

1 suppose the second um, forward-looking investor
2 might be Matt Roe, the CEO who testified before
3 you. You will recall that uh, Mr. Roe and others
4 such as AAR pointed out that the railroads are
5 investing in themselves. They're buying back stock
6 that this is essential for the process that the
7 railroads are going through. It seems to me that
8 Mr. Roe is a forward-looking investor and he
9 didn't flee. He's investing in his company and the
10 company's investing in itself. May I suggest that
11 the last forward-looking investor a man who is
12 known to have some acumen in the investment
13 community, Warren Buffet, also did not flee the
14 railroads instead he bought BNSF, lock, stock and
15 barrel. The point is that Dr. Murphy's theory
16 doesn't fit the facts of this case. It's
17 superimposed on the facts of this case to distract
18 the Board from the carriers' extraordinary
19 profitability and the productivity of its
20 employees. Why do I tell you this? Because Dr.
21 Murphy's testimony particularly in the sense that
22 it seeks to put forward a theory as fact does not

1 meet the so-called Daubert criteria for expert
2 testimony. The point is Dr. Murphy did not apply
3 the principles of his theory reliably to the facts
4 of this case as I have just demonstrated. There
5 was no sharing of his theory that it has been
6 tested in a highly organized industry such as the
7 railroad industry. And it is contrary to half a
8 century of examples in this industry that come
9 from the reports of public-Presidential Emergency
10 Boards in countless agreements in this industry.
11 And it's contrary to one other fact. It is our
12 job, that is, the job of organized labor to
13 monopolize the source of labor. Now this may be a
14 quaint idea elsewhere in the general economy but
15 in this industry it remains 90 percent organized.
16 This industry is not responsive to the kinds of
17 economic theory that Dr. Murphy put forward. He
18 did not even mention the fact that this industry
19 is almost totally organized. Did not even mention
20 that, didn't enter into his head or his theory at
21 least. So all I'm saying is, this testimony would
22 not meet the Daubert criteria. If you were a jury

1 you would never hear it because it would be
2 screened out in advance and I ask you to believe
3 that you were that fortunate that you never heard
4 it because it doesn't help you do what you have to
5 do. Moving forward on the wage side, the dispute
6 between Mr. Ross and Dr. Evans over their
7 respective inflation rate projections just should
8 not detain us very long. Now, I happen to think
9 that Mr. Ross got the best of that debate but I
10 don't think it's important. The employees of one
11 of the most successful industries in the United
12 States should not have to wonder whether their
13 compensation will keep pace with the cost of
14 living over the next five years. The debate
15 between Dr. Evans and Mr. Ross cuts way too close
16 to the quick. It is borderline. We are not
17 interested and will not enter into absent the most
18 serious kinds of compulsion that the contract in
19 which is open to a flip of a coin or economic
20 opinion whether or not we will make real wage
21 gains as we did last time or whether we will fall
22 behind the cost of living as we did so many times

1 in the past. That debate doesn't advance the ball
2 in this case either. Our proposal is for 19
3 percent over five years which assures some real
4 wage gains and that is not an unreasonable
5 position to take even at 2010 which is as you
6 heard the best year in history for the railroads.
7 Now there's one point that I will mention simply
8 in passing that had to do to the, with the so-
9 called return on investment uh, as compared to the
10 cost of capital. Now, Mr. Roth testified at some
11 length that this is not a business metric as much
12 as it is a regulatory metric. This is a metric
13 that the carriers strive not to meet because it
14 triggers certain adverse consequences in favor of
15 shippers before the Surface Transportation Board.
16 It's not useful in determining what kind of a
17 contract these employees should have moving into
18 the future. So the upshot on rail issues is there
19 has been none shown by the Carrier that our wage
20 proposal is not reasonable. After all, and I
21 emphasize that this, after all the carriers have
22 never been better than they have under a contract

1 providing for in the carriers' own words,
2 "excessive compensation". They've never done
3 better. The other major issue has to do with
4 health and welfare. The logical point to start is
5 with Mr. Roth's observation that the National
6 Health Plan covering all of the employees
7 represented by the organizations in the two
8 Coalitions before you is not an employee welfare
9 benefit plan that is in trouble. In fact,
10 healthcare costs that the rail carriers have been
11 remarkably stable over a decade or more. They vary
12 in the low 4 percent range and as Mr. Roth
13 indicated the healthcare costs have been more than
14 offset by the productivity increases that have
15 occurred over the past ten years. Indeed,
16 according to the analysis made by Cherion, the
17 Plan has become increasingly efficient. It simply
18 does not have a cost problem that warrants this
19 Board's attention. These facts, granted general
20 facts, support the organization's belief that the
21 appropriate position to take with respect to the
22 National Health Plan is a status quo position.

1 There are things that can be done. There are
2 improvements that can be made but the Plan is not
3 a dinosaur that has spun out of control through
4 inattention like some elderly collective
5 bargaining plans. Instead the Plan is actively
6 administered on an on-going basis by the parties
7 themselves through medium of the Joint Plan
8 Committee. It is active. It works and the evidence
9 that Mr. Hildenbrand has brought before you
10 demonstrates that it works. Not just with small
11 matters but with large matters of, that might be
12 considered settlor activity. Now what did you hear
13 in this proceeding with respect to the Plan's
14 cost? The trend rate 4.4 percent since the last
15 contract was entered into in 2007. You, you
16 remember the contract that called for excessive
17 compensation? Well, as part of that excessive
18 compensation we managed to cut the trend rate to
19 just about 50 percent of those of comparable large
20 employer plans in the marketplace, just about 50
21 percent. Another metric uh, was brought to your
22 attention by Cherion that deals with the carriers'

1 cumulative cost increases. Those too have been
2 just about half of what other large employers are
3 paying. If I recall correctly, the cumulative rate
4 was 3.2 percent over a decade on average. There's
5 another point too and this is important because it
6 deals with the unique characteristics of the
7 National Health Plan. Due to the demographics of
8 that Plan there is no question that health and
9 welfare costs will be lower at the end of the
10 contract we are bargaining over now. That's
11 because there is presently a large bulge in the
12 late 50 to 60 year bracket that is heading for
13 retirement. When they retire between 2016 and 2020
14 they will be replaced by younger employees and
15 consequently the Plan's costs will plummet. Now it
16 is this group that we are particularly concerned
17 about. This group was created by the productivity
18 gangs, frankly the furloughs and the seniority
19 principle and it's there. It's a very large bulge
20 of employees and it is on that group of employees
21 that the carriers' plan design proposal is
22 targeted, directly at that group. The point is all

1 of the savings that the carriers hope to achieve
2 by its plan design, some \$79.00 per employee per
3 month, a very large portion will be borne by this
4 vulnerable group, the sickest, oldest group
5 subject to this Plan. Now the organizations before
6 you don't think that's right. They think that's
7 contrary to the principles of organized labor in
8 which the pain is spread throughout the bargaining
9 unit. They don't that Plan costs should be shifted
10 from wealthy employers to their most vulnerable
11 employees. This is the group that is especially at
12 risk from the employer's proposed increase in co-
13 pays, the 5 percent co-insurance and the raised
14 pharmaceutical co-pays. Now, now what's the
15 problem with this from an actuarial or a technical
16 standpoint? I've given you the human reason why we
17 don't want it. People who have given their lives
18 to the railroads in their service should not be
19 subjected to this kind of treatment at the end of
20 their careers. And this is especially so when
21 within five to ten years, they will disappear from
22 the scene. But there are technical reasons too.

1 Without going into all of the evidence, the
2 technical evidence with respect to cost shifting
3 and its desirability and its ability to influence
4 behavior. If you're dealing with the sickest
5 group, the most vulnerable group, you're dealing
6 with that top 20 percent that generate 83 percent
7 of the claims in a Plan of this sort. These are
8 the people who are not going to be motivated to do
9 something different. They're not going to be
10 motivated even not to seek medical treatment.
11 They're going to do it. In terms of their
12 behaviors and hopefully the medical outcomes there
13 will be no change. So the only effect of what the
14 employer seeks to achieve is to lower its costs
15 and increase the cost of that vulnerable group. In
16 other words, testimony during the carriers'
17 rebuttal yesterday that the difference is really
18 only about \$600 per employee and the Chairman
19 asked, now is that an average? And it was readily
20 acknowledged that it had to be, "Yes, we're
21 talking about an average." So spread across the
22 entire group we're looking at \$600, Cherion

1 projects a higher figure uh, but in the \$600 to
2 \$800 range per employee on average. And that
3 includes they young guy who indestructible and has
4 yet to see his first doctor or have his first
5 headache. But the people at the other end of the
6 spectrum will bear the full brunt of the carriers'
7 plan design change. This is why it is
8 objectionable. Remember the testimony of Karen
9 Mallett and Gene Kalwarski from Cheiron. The out-
10 of-pocket cost for this group that I'm speaking of
11 will rise dramatically, far more than the cost for
12 the average employee. We submit, this radical
13 change is unwarranted. This plan is a product of
14 50 years of collective bargaining activity. It was
15 designed for the railroad world, of which its
16 participants are an important part. It has
17 excellent benefits, designed for railroad workers
18 whose work is arduous, sometimes dangerous, and
19 often exhausting. And that was the testimony of
20 Bill Hildenbrand, who ought to know from his years
21 in the maintenance of way department, and all his
22 years representing employees and serving as a

1 fiduciary, or a fiduciary assistant, more
2 accurately, on the Joint Plan Committee. The
3 carriers' rebuttal yesterday made a serious effort
4 to obscure the obvious. They claim that railroad
5 work is no longer dangerous, it's not in the top
6 firms that are cited for dangerous employment, and
7 things aren't like they used to be. The problem is
8 the carrier is talking about something different
9 than Mr. Hildenbrand. The carriers are talking
10 about occupational injury; that is, a reportable
11 injury. And so if you use that criterion, there
12 have been remarkable improvements in safety,
13 because you should remember the maintenance of way
14 vehicles that they ties - they fix track, how that
15 is done automatically. If you don't get out on the
16 right-of-way, then you're in considerably less
17 danger than you were if you were wielding the
18 shovel. That's true, that's true. But the operator
19 is subject to occupation-oriented illnesses and
20 dangers, as Mr. Hildenbrand pointed out, that are
21 new and lurking. The point is that outdoor work on
22 a 24 hours - 24/7 basis leads to more illness, the

1 fatigue-related events, than other types of work,
2 and this is true. Everybody in the railroad
3 industry knows that. We're not talking about
4 occupational entry here; we're talking about the
5 things that occur in the real world on the right-
6 of-way and elsewhere on the railroad. And along
7 that line, Dr. Tannen's survey indicates advances
8 in epidemiology that demonstrate for the first
9 time a true associational link between diesel fuel
10 fumes and pulmonary disease affecting railroad
11 workers. Now, notice I said "associational link."
12 That's because the link is statistical. We have
13 not yet gotten to the point where we can say that
14 a particular cancer or a particular case of heart
15 disease or pulmonary event is caused or related to
16 diesel fumes; we can't do that, and Dr. Tannen
17 didn't suggest that. He said that advances in the
18 quantitative analysis of data have enabled the
19 epidemiology profession to say that there is a
20 link between diesel fuel and railroad employment.
21 And it is statistically significant, and that's
22 why Dr. Tannen reviewed this literature that is

1 heavily quantitative. And unless you are very
2 quantitatively minded, it would be difficult to
3 read, but for him it was easy. That's what we're
4 talking about. Those kinds of events are not
5 proven to be occupational injury. They're not
6 going to be the subject of an FELA case, but
7 they're going to be paid out of the National
8 Health and Welfare plan. They are illnesses for
9 which planned benefits are necessary; that's the
10 point. So the carriers are talking about something
11 different than we were; I did want to clear that
12 up. There's one other point, too, that I would
13 like to make because it's, frankly, misleading.
14 There is scarcely a health and welfare plan
15 anywhere that does not have a higher spousal claim
16 rate than an employee claim rate. This is standard
17 stuff. And if you think about it, it's quite easy.
18 In this industry, there is no sick leave. The
19 first seven days are uncompensated. If you don't
20 feel well, you go to work; that's the idea. You
21 don't go to the doctor, you go to work. If you
22 can't go to work, that's when you go to the

1 doctor. But there are no such inhibitions on the
2 spouse, who may have caught the same cold, who may
3 have caught the same flu from her husband; she can
4 go. This is standard type of stuff. The complaint
5 about the carriers paying entirely were - ah -
6 injuries, that's true. There is a 15 percent fund
7 within they find that the carriers alone
8 contribute to. And the purpose of that is so the
9 carriers can avoid the danger of punitive damages
10 in FEIA cases. In other words, the FEIA claimant
11 cannot put before the Chair his medical expenses,
12 which are entirely paid for by the plan, out of
13 this fund, and consequently he can't use the
14 medical damages that argue for a higher punitive
15 damage from the jury. So that works for the
16 carriers; that's not what we're talking about
17 here. We're talking about so-called filing to
18 occupation claims that are paid out of the general
19 fund and even which we contribute. I'll point out
20 that there is no evidence in this record of so-
21 called overutilization. And I'd like to qualify
22 that because we're talking about overutilization

1 that can be dealt with or compensated for by
2 increased copays in coinsurance. Utilization that
3 we have is with the group that needs the medicine,
4 that needs to go to the doctor, that needs the
5 surgeries, and needs the protection of the plan.
6 That's not going to change. The only question is:
7 Who pays for it? Wealthy employers, or vulnerable
8 employees? Cheiron has suggested for this plan
9 that we pursue a so-called value-based plan
10 design. This is the type of approach that has been
11 pursued by the Joint Plan Committee and has been
12 extraordinarily successful; they have reached
13 agreement. We're not talking about a group that
14 we've had loggerheads all the time. Now, the
15 advantage of the value-based approach over the
16 changes that the carrier puts forward is really
17 this: Remarkably, the national health plan has the
18 lowest net benefits in the railroad industry. You
19 remember the analysis that Cheiron did of the rest
20 of the industry? Now, that was criticized because
21 it included only six of the commuter carriers,
22 which make up the passenger industry, plus Amtrak.

1 But Cheiron's analysis picked up 86 percent of the
2 commuter - of the 20 commuters. That is 86 percent
3 of the employees of the 20 commuters, plus Amtrak,
4 plus the freight industry. That's a pretty good
5 sample. We're way, way, way into the 90 percent
6 range on that. And we're determined that the net
7 benefit with the national plan is lowest, because
8 although the benefits are excellent, the plan -
9 the employee premium contribution is the highest
10 of any other. So when you net that out, employees
11 in this plan are paying more for their healthcare
12 than other railroad employees. Now, I can't
13 understand, since we're dealing with the so-called
14 world-within-a-world that Justice Frankfurter
15 referred to, why what happens elsewhere in the
16 railroad industry is irrelevant, but what happens
17 at Walmart and at the grocery chains is more
18 pertinent; I don't understand that. But I know
19 this: According to Cheiron's testimony, when
20 suitable adjustments are made, the national plan
21 compares quite favorably to those plans that were
22 in effect or are in effect elsewhere in the

1 economy through agreements and otherwise by major
2 employers. The comparison on an apples-to-apples
3 basis is very, very close. Indeed, the national
4 plan by a few cents comes out on the plus side
5 with that cost comparison. One last point in
6 healthcare that has to do with the uniformity
7 argument. The carrier says there must be
8 uniformity as between the national health plan and
9 the UTU plan. Well, and it cites three
10 Presidential Emergency Board decisions. Now,
11 there's something about those decisions that I
12 want to remind you of, other than the fact the
13 facts are entirely different. They all occurred
14 before the carriers agreed to create with United
15 Transportation Union - to create a separate plan.
16 So we have three Presidential Emergency Boards
17 saying uniformity of benefits is important. The
18 carriers' response to that was to create a
19 separate plan with the United Transportation
20 Union; a plan that has operated entirely
21 separately, a plan that's operated by separate
22 fiduciaries, and a plan over which the national

1 health plan fiduciaries have no control. And then
2 the carriers in this round entered into an
3 agreement with United Transportation Union,
4 calling for planned design changes. Now, having
5 killed both parents, they ask you to take pity on
6 them because they're orphans, and that that
7 doesn't make any sense at all. There is nothing to
8 this uniformity argument. Ms. Mallett testified
9 that in the federal sector we're looking at 24
10 different plans governing the same employee
11 groups. The uniformity is something that was made
12 up of whole cloth. The Joint Plan Committee has
13 been doing a good job of administrating this plan.
14 It's been innovative with new programs, including
15 plan design changes, and they should continue to
16 do so according to Cheiron's analysis. It is true
17 that not every idea is accepted by the Joint Plan
18 Committee. There are ideas that the union
19 representatives have made that have been rejected
20 by management. There have been ideas that
21 management have put forward that have been
22 rejected by the employee representatives, but this

1 is in the nature of healthcare. The point is that
2 the area is highly discretionary, and it is often
3 the subject, as you have heard in this proceeding,
4 of conflicting expert opinion. The fiduciaries
5 have chosen not to try to resolve these kinds of
6 disputes, so-called settlor disputes, by impartial
7 arbitration. They prefer to wait until consensus
8 emerges, perhaps based on better data, perhaps on
9 agreement, between the groups of experts. Now, I
10 have hinted at what I'm about to say and I don't
11 know how else to say it so I'm going to say it
12 directly. We are no more interested in having this
13 Presidential Board resolve technical disputes over
14 plan design that are the subject of considerable
15 disagreement by experts than we are in having Mr.
16 Kasher do the same thing at the decision maker
17 level on the plan. Now, I don't think my hints
18 have been direct enough, but I'm saying I'll point
19 out this was the direct testimony of Joel Parker
20 at 12 of his statement, page 12 of his statement.
21 He said it much better than I did, certainly more
22 directly, but that's the idea. Let the Joint Plan

1 Committee do its work. Let consensus emerge. This
2 is not a plan in trouble. It does not need your
3 intervention, but supports the notion of the
4 status quo approach. I'm going to move fairly
5 quickly into the vacation area in the limited time
6 that I have. It has been, since 1982, that the
7 national vacation agreement has been visited by
8 the parties. The years have taken their toll on
9 the benefits. As Bill Bohne testified, what was
10 once a model for other employee groups has fallen
11 behind. We now lag most other vacation plans, and
12 that supports the organizations' request for
13 improvements in the amount of vacation. But what
14 really cries out for adjustment, both on the non-
15 op side and on the op side as testified to by
16 Dennis Pierce, are the rules that relate to
17 qualification for vacation. They were first
18 developed in 1942 and they've changed very little
19 since then. Put simply, if you don't satisfy the
20 standard of days of work in the preceding year,
21 you don't get a vacation. Very often that the
22 testimony was an employee will wait a year and a

1 half before having a vacation because he or she
2 cannot meet the qualification criteria. In the
3 operating crafts, the criteria are probably even
4 more stringent, if possible; they need to be
5 modernized. The organizations have suggested
6 allocation so that the amount of vacation an
7 employee is entitled to will be based on the
8 amount of work that he or she accomplishes in the
9 preceding year. We don't propose any change in the
10 work requirement; we merely want the credit for
11 the work that we do. Let me point out that in that
12 calculation there is no soft time counted. If
13 you're sick, it doesn't count. If you're on
14 vacation, it doesn't count. If you're on an
15 authorized leave, it doesn't count. If you're in
16 the service, it doesn't count. That's the point;
17 you have to be actually at work on a full day
18 basis in order to qualify. That's how it gets so
19 draconian. Some real change and reform is
20 necessary on that point. Supplemental sickness was
21 explained so well by Mr. Roth; I won't go into
22 that. Suffice it to say that we update that at the

1 end in the beginning of every contract. The
2 organizations' proposal is to index the increases
3 to wages annually. It's a modernization that
4 should be noncontroversial. On the information,
5 you can say we are starved for information. We
6 can't answer your constant questions. I testified
7 to the stifling of negotiations based on the
8 failure of information, and the carriers' response
9 to this is twofold. In the papers they say it
10 would cost money, because they have to come up
11 with something, some kind of a structure. And I
12 was waiting for Mr. Karov to elaborate on that so
13 I know what they're talking about. But you
14 remember Mr. Karov's argument? He said we don't
15 need an enforceable right to information, because
16 if they want to give it to us, they will. Well,
17 that's the point. That's what we're complaining
18 about. That's not the answer; that's the question.
19 This is something that belongs in the national
20 agreement. The craft-specific items were strongly
21 presented by the organizations themselves. Those
22 presentations occurred the day before yesterday.

1 The rebuttal occurred yesterday from the BLET and
2 from the BMWED. You know what those issues are;
3 they could not be clearer. So I don't see a reason
4 to try your patience by extending my time for
5 argument by going into them. I'd like to reserve
6 the five minutes that I have for rebuttal.

7 CHAIRMAN JAFFE: Thank you, Mr. Wilder.

8 MR. MUNRO: Good morning.

9 CHAIRMAN JAFFE: Good morning.

10 MR. MUNRO: Mr. Chairman, members of the Board. I'd
11 like to end where I began, with fairness. If
12 nothing else, I think we agree on both sides that
13 this case is about fairness. Where we diverge is
14 how to quantify fairness which, like duty, is
15 often in the eye of the beholder. I think that PEB
16 242 was on the right track when it mentioned
17 objective indicators of fairness; something more
18 than just the subjective opinions of one side or
19 the other. What are those objective indicators
20 here? They really fall into two categories: other
21 agreements peer settlements; and numbersdata,
22 benchmarks, rates of growth, so on. Those are hard

1 facts. Those are objective indicators, they
2 provide solid ground on which to work. And in this
3 case you have both. As I said at the outset, here
4 we have a comparable agreement as well as a wealth
5 of data about these employee's current position
6 relative to their peers both in terms of wages and
7 in terms of health benefits. Let me touch on both.
8 First the UTU Agreement. At the outset I don't
9 want this legal debate over the label, pattern or
10 its impact to obscure the most important point
11 which is that there is an existing deal with 30
12 percent of rail labor; a deal that is founded on a
13 quid pro quo exchangehealth care reform for above
14 market compensation. The union's primary argument
15 to this (inaudible), Mr. Wilder made it again this
16 morning, is that you should discount it; you
17 should ignore it entirely because it is not a
18 majority. Let me make a side note here. There have
19 been repeated references by the unionsMr. Wilder
20 said it again this morningthat they represent 73
21 percent of the industry. I think that's revealing
22 with respect to the union's overall approach to

1 their numbers because they are wrong. The total
2 UTU membership, this is from the December mid-
3 month count in the base year of 2010, the year
4 both sides have been using, was 39,880. The total
5 for all other groups, the groups before you was
6 92,240. That is 30 percent, not 27 percent, not a
7 quarter of the industry30 percent. Why does this
8 matter? Why am I making a big deal about 3
9 percent? The point is this is not an insignificant
10 union. It is the biggest union by far and that
11 makes a difference. Mr. Roth says a single union
12 can't set the pattern although he concedes that it
13 has happened in the past. But he never grapples
14 with, neither Mr. Roth nor Mr. Wilder grapple with
15 the scenario that we have herethe largest union
16 reaching agreement first. Flip this around.
17 Suppose instead of the scenario you have before
18 you, Union Pacific, the largest single railroad
19 dropped out of national handling and accepted the
20 coalition's terms. Is there any doubt that if the
21 other railroads resisted the unions would claim
22 pattern? In fact, in 1996 they went so far as to

1 cite an agreement with the Illinois Central, a
2 tiny railroad, as pattern. One railroad. When you
3 have a player this big make a deal it makes a
4 difference. All of the traditional pattern
5 considerations cited by Board after Board apply
6 concerns about craft parity, about leap frogging,
7 about incenting early deal-making; they are all
8 directly applicable here. The unions also argue
9 that our pattern position is not supported by PEB
10 precedent although again they acknowledge that at
11 least one Board, PEB 114 is precedent in our
12 favor. We've also cited PEB 159 in our summary of
13 page 9 which is also stands for the proposition
14 that a single agreement can eventually lead to a
15 pattern. But the flaw in their argument is that
16 they have cited no decision which says that a
17 single union cannot set the pattern. No Board has
18 ever said so, so far as I'm aware. The closest
19 they get is PEB 178 which Ms. Parcelli mentioned
20 in her opening. But that case was before
21 coordinated bargaining. And the shop craft unions
22 in that case were on a different cycle than the

1 others. They were in the second year of their deal
2 when the matter came before PEB 178. And the Board
3 relied on that fact and the fact that the shop
4 craft agreements involved unique considerations
5 when it said we do not find a pattern here. And I
6 suggest it was those considerations, not the
7 percentage of the employees involved that led the
8 Board to its conclusion in that case, especially
9 in light of the counter-examples that you have in
10 PEB 114 and 159. But the more important point
11 beyond Board precedent is that the unions ignored
12 the many, many situations where a single union, a
13 single agreement sets a pattern. Voluntary
14 agreements. Historically it has always been, or
15 virtually always been the case that the first
16 agreement sets a pattern for those who follow.
17 It's been true in the last several rounds of
18 voluntarily bargaining. In fact, in the last round
19 it was the ROBC that set the pattern. It was a
20 minority of the industry. That's where the pattern
21 principal lives. And it's not in PEB reports; it's
22 in the real world of bargaining, the usual course

1 under the Railway Labor Act. Let me make another
2 side note here while I'm on the subject that the
3 unions made the argument that last time in the
4 last round it was the carriers that blew the
5 pattern because they reached agreement with the
6 UTU last. And the UTU got a meal allowance
7 (inaudible) [0:06:43] pattern. Well that's not
8 true. There was a quid pro quo for that and
9 (inaudible) [0:06:49] value. There was electronic
10 interchange, there were direct deposits. The
11 carriers got something for that. And so that is
12 not an example of exceeding the pattern. But let's
13 forget the label. Let's assume I'm wrong about all
14 of that. There's not a pattern in any legal sense
15 of the term. Even then, it cannot be denied that
16 the UTU Agreement is an objective indicator of
17 what is fair. Even agreements that don't set a
18 pattern are influential, to use the words of PEB
19 228, because they provide a benchmark, a measure
20 of what is fair. That leads me to my next point
21 regarding the benchmarks, the numbers, if you
22 will. But before I do that, let me just make one

1 other detour into something that Mr. Wilder
2 repeated again this morning regarding the SMART
3 merger. I frankly don't follow that argument at
4 all, but let's assume that the coalitions are
5 correct, that the UTU was desperate, it's under
6 attack by outside influences, it's scared for its
7 existence. How does it help them in that
8 circumstance to reach a weak deal with the
9 railroads? How does UTU leadership benefit from
10 that? It doesn't make any sense. In any event, on
11 to benchmarks. We've submitted a large body of
12 comparison data. We've showed, in particular, that
13 railroad employees currently enjoy a large
14 premium; not just in wages, but in benefits as
15 well over their peers. That premium was most
16 frequently referred to in the record as 80
17 percent, but it exists regardless of how you
18 measure it. It's 24 percent over other union
19 workers, 46 percent over private industry, 79
20 percent over the transportation sector. They have
21 no rebuttal to that; they don't have any contrary
22 data. At one point Mr. Roth said well it's too

1 good to be true. Either you're wrong, or your
2 bargainers are incompetent. Well actually there is
3 a historical explanation for the premium and it
4 dates back to when the railroads were regulated.
5 They could pass through increases to shippers and
6 this is what happened. It didn't matter so much if
7 there was a wage premium. Someone else was going
8 to pay for it. That's no longer the case. We're
9 not living in 1977 anymore. This is a competitive
10 marketplace and we have to behave accordingly. The
11 union's other argument in response to the
12 comparisons we've drawn is that they're invalid
13 because railroad workers can't be compared to
14 anyone. They're so generous. Well that's a
15 convenient conclusion given that none of the
16 comparisons help them. But they're factually wrong
17 in any event. We've shown by multiple
18 methodologies that railroad workers are more
19 highly paid than their peers with the same skills,
20 the same job titles by occupational code,
21 regardless of what methodology you want to use.
22 They've made a complaint about one category in

1 particular, the train dispatchers, saying that we
2 mischaracterized and degrade their, that
3 particular job category through our job
4 comparisons. It's not our comparison. That's the
5 Bureau of Labor Standards. That's the federal
6 government that sets that comparison. And in any
7 event, the dispatcher's group before you, in this
8 proceeding, is smaller than the yard masters which
9 is a group that they've derided as insignificant.
10 In any event, yesterday Mr. Roth, I thought,
11 changed course and conceded there is a wage
12 premium. In fact he said there's been a premium
13 for 50 years. It should persist for another 50
14 years. And so maybe we are in agreement on that.
15 The unions also have no response, none at all, to
16 our benchmark data on other recent union
17 settlements. There is complete silence on that
18 issue. Why? Well because the settlements that
19 we've cited, recent settlements with other major
20 unions in the last two years are virtually half
21 the average increase that the carriers are
22 proposing here. In the transportation sector the

1 average increase is 1.7 percent. I'm talking in
2 GWY terms now. It's 2 percent in industry overall.
3 And this includes a lot of notable settlements:
4 Caterpillar, 0 percent; General Electric, 2
5 percent; Allied Industries, 1.22 percent. These
6 are all cited by the way in the Summary Statement
7 of the attachments. These are major companies.
8 Some, like Caterpillar, which have been very
9 profitable lately, but are nevertheless providing
10 increases substantially below what the carriers
11 are offering here. With respect to the rebate over
12 inflation and real wage growth that Mr. Wilder
13 referenced, we showed using Congressional Budget
14 Office numbers, not ours, that there is real total
15 compensation growth under the carrier's proposal;
16 as much as 10 percent when you include the growth
17 and the value of benefits. Now Mr. Roth disputed
18 that by saying inflation has been higher than CBO
19 figures in the last 20 months. But again, he's
20 selecting a measurement period that's skewed to
21 fit his argument. As Dr. Evans pointed out,
22 inflation increases during the summer and then

1 declines over the course of the year. And so by
2 eliminating the fourth quarter of this year from
3 his analysis, Mr. Roth is effectively inflating
4 inflation. He also ignores the fact that by any
5 broader perspective, inflation has been
6 historically low in recent years. And as Dr. Evans
7 pointed out, the consensus among economists is
8 that inflation will remain low over the course of
9 this deal. So railroad employees don't have to
10 worry about this. If Mr. Wilder were correct, then
11 even under the union's proposal it would be
12 possible that there would not be real wage growth.
13 Inflation could skyrocket. But under any objective
14 measurement that you have right now, the evidence
15 is to the contrary. Mr. Roth also says, "Well I'm
16 not offering a projection. I'm just saying if it
17 is higher there wouldn't be real compensation
18 growth." But he offers no reason to believe that
19 will happen. There is every reason to believe that
20 the premium we discussed will only grow. We've
21 also heard that railroad employee's wage growth
22 has not kept up with inflation over time. Dr.

1 Evans showed that's just not true. It is based on
2 using 1977 as the base year, and by virtually any
3 other measurement period, railroad employees have
4 done very well indeed including 7 percent real
5 growth over the last ten years. This reference to
6 1977 Mr. Roth' use of that as a base year reminds
7 me of another sub theme in the presentations that
8 you've heard, and that relates to the use of
9 history. At one point, Mr. Roth took us as far
10 back as 1916. He talked about a wage cut in 1936.
11 He makes these repeated references to the 1970s.
12 But the most prominent, not just in his testimony
13 but in others as well, is the repeated references
14 to PEB 219. We've heard from multiple witnesses
15 about what a damaging event that was. Well I'd
16 like to make the point, perhaps it's an obvious
17 one, that PEB 219 was 20 years ago. I had just
18 graduated from high school. In the intervening
19 years, there have been multiple voluntary
20 agreements, as well as an intervening set of PEBs.
21 It's time to stop living in the past. Let's focus
22 on what's happening now. Old grievances about

1 Boards 20 years ago do not help to resolve current
2 disputes. The unions do want to focus on the
3 present in one respect and that's industry
4 profits. We've heard repeated references to this
5 idea. You can afford this, we're told. The
6 industry has the ability to pay. Well as a
7 threshold matter, that's not how the analysis
8 works. Let me be clear about this. Inability,
9 inability to pay is a management defense (ph) if
10 an ability to pay is raised, it's a big deal. Then
11 industry profits are highly relevant. You have to
12 overcome that as an initial hurdle to obtain the
13 package that you're seeking. But if it's not
14 raised, and here it is not, then profitability is
15 not the issue. It's benchmarks, inflation, other
16 measures of whether either side's proposal is
17 fair. In any event, we've shown that profitability
18 is certainly not important as a matter of
19 economics. We showed you that compensation and
20 profitability are not correlated in any way. We
21 also showed that setting compensation to bear some
22 relationship to the labor market, what Dr. Murphy

1 referred to as the ability to attract and retain
2 talent is important. There are consequences to
3 paying more. Mr. Roth says and Mr. Wilder repeated
4 today, that's just theory. It has no real world
5 impact. You should ignore it. They apparently do
6 not believe in the concept of substitution of
7 capital for labor. This is just University of
8 Chicago nonsense. I won't dwell on this
9 (inaudible) [0:17:49], but recall the charts that
10 both sides have put up, both sides about the
11 declining labor force in the railroad industry as
12 well as the increasing rate of capital investment.
13 One is going down, the other is going up. That is
14 substitution of capital for labor. It is real.
15 This industry is a case study in that dynamic. And
16 the point is it affects jobs. This industry is
17 growing. We want it to grow. Everybody wants it to
18 grow because it means more employment, something
19 that is critical to this country right now. And
20 the last thing we should want to do is put a
21 damper on hiring, especially in this day and age.
22 Another side note, while it's not an important

1 point, I do want to note that the union's
2 depiction of profits is, at the very least,
3 overstated. There is no doubt the industry is
4 doing well. We do not deny it. But as Mr. Gray
5 explained, even the record profits that we're
6 seeing now are no better than average when
7 compared to the rest of the world. So it's not
8 like there is some infinite amount of money here
9 that simply has no end and can be spread around to
10 everyone, no matter how high their demand. We
11 showed you, in addition, that there is a fair way
12 to share profits. It's called profit-sharing. Well
13 they don't want that. What the coalitions want is
14 a guarantee. They don't want to share in any
15 downside risk. We heard one comment about that,
16 the reason why we don't want profit-sharing is
17 there is too much risk. It's tantamount to
18 investing in just one company. Now I have two
19 answers to that. First they've already done it.
20 The BLET, one of the largest groups in the
21 coalitions, already has profit-sharing bonus deals
22 with three of the major four railroads. Second,

1 the union's argument misunderstands the point of
2 profit-sharing. It's to protect jobs. When times
3 turn bad a company that has variable compensation
4 is able to retain a larger percentage of its
5 workforce than would otherwise be the case. But
6 the carriers say, okay. You don't want profit-
7 sharing? Fine. We will still share the wealth. And
8 as I said before, 18 percent compounded wages, 20
9 percent, almost 21 percent in total compensation
10 is sharing the wealth by any reasonable measure.
11 It's also critical, I think, to remember that the
12 significant increase in compensation that the
13 carriers are proposing is a quid pro quo for
14 something that the railroads want. And that's
15 health care reform. The fact of the matter is with
16 respect to health care, we actually agree on quite
17 a bit. We agree that the current plan provides
18 excellent benefits. We agree that benefits
19 currently exceed the vast majority of other plans.
20 We agree that benefit costs will continue to go
21 up. Both sides, Cheiron as well as the carrier's
22 experts assume a more than 7 percent rate of

1 increase. And both sides agree that prescription
2 drug plan costs, excuse me, the proposed changes
3 in the prescription drug plan will decrease costs
4 for both the plan and for beneficiaries. Where we
5 part company is on the significance of the changes
6 proposed by the carriers. The coalitions use terms
7 like catastrophic, gutting the plan. Mr. Wilder
8 today you used the word radical. Whereas our
9 position is that the changes are modest. Now Mr.
10 Boley put on a numbing series of slides on this
11 topic, survey after survey showing that even with
12 the carriers' proposed changes, benefits will
13 remain far better than most. Against that
14 evidence, their answer is Amtrak and five commuter
15 railroads. And we've made the point and I won't
16 belabor it that those are not good comparers. That
17 is not the railroad industry. For one, those are
18 governmental entities. They're not privately owned
19 companies. They are not subject to market
20 discipline. They are dwarfed by the size of the
21 companies before you in this proceeding. And
22 there's no historical basis for this. This is -

1 this has never been a significant source of
2 comparison to the freight railroad industry. If
3 anything it's worked the other way around. In any
4 event, Mr. Wilder made the representation that the
5 carriers' employee contributions far exceed
6 everything else. Anything else out there. Well,
7 again, I think that while that may be true today,
8 it does not reflect the recent Amtrak deal. One of
9 their comparators. The Amtrak deal cost for cost
10 sharing at 15 percent. And there's a cap but the
11 cap goes up every year. And eventually I think
12 it's by 2013, the cap reaches \$230 which is
13 obviously more than carrier employees pay under
14 our proposal. But this also raises a further
15 point, one that Mr. Scofield made yesterday. And
16 that is the rest of the world is not standing
17 still. We've proposed a freeze on employee
18 contributions. Meaning that relative to the rest
19 of the world, we will continue to look worse and
20 worse. So if you think that the plan is rich now,
21 wait until 2016. Apparently more people want to
22 get in. (Laughter) Another comparison, if you're

1 looking for comparisons of railroad management
2 plans, Mr. Roe made the remark yesterday that many
3 management employees are moving to high
4 deductible, high employee cost plans. And that's
5 one reason why as Lisa Mancini pointed out that
6 many union employees promoted to management want
7 to go back. The benefits are better. I don't think
8 I need to belabor this point either. It's clear to
9 anyone with experience in this area that these
10 changes are modest. It will merely edge the plan
11 back toward the middle. But we also disagree on
12 whether change is necessary. And this is a
13 disagreement over cost shifting verses controlling
14 utilization. I did not hear any evidence from the
15 other side that the proposed changes do not or
16 could not effect utilization. Rather they've just
17 tried to poke holes in our evidence that
18 utilization rates will change. For example, we
19 cited the - Dr. Newhouse's Study to you. And the
20 response is well that's 30 years old. That's
21 ancient history. You can't rely on that. There's
22 some irony there. But that's their answer, it's

1 too old. And they ignore that in the recent
2 legislative debates over healthcare reform that
3 Rand Study that Dr. Newhouse did was repeatedly
4 referred to as the Gold Standard still today. It's
5 also common sense. If you charge people for
6 something that was free, they will use less of it.
7 And that should not be an area of significant
8 debate. We've also heard conflicting testimony
9 about the morbidity adjustment. I have to admit I
10 didn't know what a morbidity adjustment was before
11 I started this proceeding but I know now. And
12 Cheiron defends their use of a morbidity
13 adjustment to show - in an attempt to show that
14 the plan is not as rich as we say it is by saying
15 it's just normalizing for demographics. Nothing
16 controversial about it. Well it's no different
17 than saying that two people who eat different
18 amounts really have the same food bill when you
19 control for appetite. Cost is cost. If you use
20 more, it costs more. And if the plan was uncapped
21 and an employee share of increasing expense was
22 shared along with the railroads, I doubt we would

1 be hearing this argument that cost doesn't really
2 matter because they would be exposed to the same
3 risk that the railroads are. Now the unions also
4 make the argument that they need better benefits
5 because their jobs make them sick. We disagree
6 with that as an empirical matter. The statistical
7 evidence that we've put before you indicates that
8 if anything railroad jobs are increasingly safer.
9 But even if it were true, the on duty component of
10 sickness or injury is not relevant to plan design.
11 Why? Because those conditions are covered
12 elsewhere. That's exactly the argument that Mr.
13 Wilder made today. I think we agree on this point.
14 Their example, with respect to COPD - I didn't
15 know what that was either - regardless of how you
16 believe - whether you believe or disbelieve the
17 relevance of comparative rates of railroad
18 employee claims under COPD verses spousal or
19 dependent claims, the other piece of that chart
20 that Mr. Boley used you is that the number of
21 claims is tiny - tiny - under the plan. I can't
22 fathom why the COPD example helps them. It's

1 dominious (sp?). Moreover the related argument
2 that - the other argument that they've offered
3 against the proposed healthcare changes is that it
4 should go to the JPC - to the Joint Planning
5 Committee. And their argument is that the Joint
6 Planning Committee has made changes before and
7 that's the appropriate forum for this. Well as
8 long as you get what you want in the Joint
9 Planning Committee, I'm sure that's fine. And the
10 examples they sight are things that the unions
11 wanted. Now I'm - I can't be as colorful about
12 this as Mr. Boley but when the railroads go and
13 ask for these changes, I don't think there's any
14 confusion or uncertainty about what the answer's
15 going to be. It's the same people sitting on the
16 other side of this room. So the Joint Planning
17 Committee is a dead end. It - that is not a useful
18 suggestion for dealing with this problem. And
19 finally with respect to healthcare, I want to
20 touch on the notion that the changes proposed by
21 the carriers with respect to healthcare make this
22 proposal concessionary. That is not correct. The

1 value of benefits to employees which is part of
2 compensation will continue to go up. It's just not
3 as much as it would otherwise. And the total value
4 increases I said previously is substantial - 21
5 percent under the carriers' offer. Now one thing
6 that Mr. Grady had touched on was the - with
7 respect to value - was the value proposition. And
8 by that he meant the total value of the UTU deal.
9 It was the value proposition total value that made
10 the extra compensation demands by these unions
11 particularly problematic. We've shown you that
12 there is a significant cost element to those
13 proposals. In the aggregate, they represent a
14 demand for roughly a billion dollars in additional
15 labor costs over five years. If you want to
16 convert it to an equivalent GWI, it's about 5
17 percent. That's on top of their GWI demand. And
18 that's probably understated because it doesn't
19 include payroll tax or a lot of other factors that
20 would probably inflate that number even beyond 5
21 percent. But Mr. Grady explained that we will -
22 are willing to accommodate their special interests

1 so long as they fit within the value. In other
2 words, we will shift value from the components of
3 our offer to other things that you want so long as
4 they stay within the (inaudible at 00:10:12). And,
5 Mr. Grady and Mr. Rogers showed you what the
6 values are and how we've monetized them. Entry
7 rates one for one or if they wish a \$300 per
8 person lump sum. Certification pay; we showed how
9 we translate the 0.97 percent GWI value to UTU to
10 0.5 percent. Now they question the assumptions
11 with that calculation but they never grapple with
12 the reasons why we're making that reduction.
13 There's no mention of the difference between a
14 wage increase and a flat allowance. There's no
15 mention of the fact that the proposal - the
16 proposed special wage increase would take effect
17 at least a year before the certification allowance
18 kicks in. And there's no mention of the
19 differential in the cost savings from healthcare.
20 The fact that the carriers proposed changes will
21 almost certainly be delayed as a result of the
22 course of bargaining to date. Another detour side

1 note here, Mr. Wilder mentioned with respect to
2 the carriers' calculations that their information
3 request and the - cited as a reason for their
4 demand on this - in this regard. The reason why
5 there was no costing information provided is they
6 didn't ask. On the items they did ask about, we
7 did as Mr. Wilder conceded to provide the
8 information. So in any event, these amounts that
9 I've referenced, the cert pay and entry rate
10 amounts as well as the GWIs in the carriers'
11 proposal are available to fund other priorities.
12 But we need to remember to stay within the value
13 provided to UTU. That's the pattern. If you don't
14 do that then next time it will be the UTU before a
15 board like this claiming unfairness. It's the
16 value that defines the contours of the pattern.
17 And the other critical characteristic of a
18 pattern, one that I want to emphasize, is that this
19 was a quid pro quo. I said this at the outset and
20 I'll repeat it here at the end. It's a package
21 deal. Healthcare reform above market wage
22 increases; they go together. And both components

1 of that offer are relevant to the broader policy
2 debates that are going on in this country right
3 now. There is a healthcare crisis. There's no
4 doubt about that. There is an economic crisis.
5 There is no doubt about that. And in the face of
6 both of those crises, the railroads are acting
7 responsibly in a measured prudent fashion. And
8 that's what their offer reflects. I'd like to
9 thank the board for its attention. I would
10 especially like to thank union counsel for the
11 professionalism and courtesy that they've shown me
12 and my colleagues throughout this proceeding.
13 Thank you.

14 CHAIRMAN IRA JAFFE: Thank you Mr. Munro.

15 MR. ROLAND WILDER: I will be very brief. I am
16 going to overlook the crack about being out of
17 high school in 219 it was decided. (Laughter) And
18 I'm not going to disclose when I get out of high
19 school. The point of 219 and its relevance despite
20 the fact it was a long time ago is that it
21 illustrates when the industry was not doing well.
22 And, the fact that the rest of our economy was

1 doing well is utterly irrelevant. What happened
2 elsewhere just could not be considered. And so
3 there is a very strong whose ox is being
4 (inaudible at 00:14:38) when it comes to
5 comparisons with the non-railroad world. But that
6 should not obscure the point that it's just as
7 Frankfurter was right that this indeed is a world
8 within a world and to look everywhere else for
9 guidance in resolving this case just has to be a
10 flawed reasoning. That's the point. The notion of
11 variable compensation, as Mr. Munro mentioned,
12 there's not, in this so-called patterned
13 settlement, it was not offered by the carriers,
14 and it's therefore not before this board. When we
15 speak in terms of the comparisons for health and
16 welfare purposes that we made with the rest of the
17 railroad industry, Mr. Munro responds that 90 plus
18 percent of the freight industry, and 86 percent of
19 the passenger industry is not good enough because
20 the Mom and Pop operations are not here. Well,
21 some of those short line operations, have as few
22 of two or three employees, they are literally

1 very, very small businesses. They have healthcare
2 plans that the (inaudible) were talking about,
3 obviously not. But they are they a fair comparator
4 that ought to be considered? We should take the
5 time as Cheiron did, to deal with this analysis,
6 obviously not. They deal with a very small
7 fraction of the industry, what I call Mom and Pop
8 aspects. In terms of total compensation, that is
9 the 21 percent of wages and benefits that Mr.
10 Munro attributes to the UTU deal, but let me make
11 it clear that the value is not high enough, given
12 the circumstances, that these carriers and these
13 employees find themselves today. We're not talking
14 about rearranging the deck chairs, as Dan Pickett
15 pointed out in his testimony. We're talking about
16 more value, that's what's called for. Not
17 attempting to resolve what value the UTU deal has.
18 Now, I point out even that issue is disputed on
19 this record. We really don't know the value of the
20 UTU deal. All we know is that it's not the value
21 of the UTU deal that counts so much, it's the
22 value of the UTU deal when it's applied to these

1 organizations that counts. And what you've heard,
2 from Dennis Pierce and others, is those two values
3 do not correlate, the UTU deal means more on that
4 side than the carrier's application to that deal
5 here. Now, why do I say that the value is not
6 enough? That sounds greedy. But it really is not.
7 In 2005, 2009 round we settled this very same
8 agreement with these very same carriers, covering
9 these very same employees voluntarily. Now, it's
10 true that the agreement was made between the NCCC
11 and the RLBC, but the RLBC represented a majority
12 with the industry. More importantly, all the
13 special interests of the unions making up the RLBC
14 had been dealt with internally before they came to
15 the bargaining table. So, the agreement that was
16 reached was a amalgamation of all those special
17 interests that had been worked out ahead of time.
18 That has value from a negotiating sense. My point
19 is that the agreement that emerged from those
20 multi-union, multi-party negotiations was a fair
21 representation of what would be satisfactory to
22 the rest of the industry and it was, the

1 ratifications by one union after the next were
2 truly overwhelming. That's never happened before.
3 What we did, we settled for 17 percent over five
4 years, 18.2 percent compounded, when the industry
5 was doing half as well. In the health and welfare
6 side, we agreed to extend the benefits of the MMCP
7 Program to every part of the country. This was a
8 project of the highest order for the
9 organizations. In other words, employees who
10 worked in Montana, Wyoming and other so-called
11 white areas were given full access to the full
12 benefits with The National Health Plan. And we
13 made adjustments to pay for that. This time, we
14 didn't even get off the starting block. That's
15 where we are, lying on the cinders, and that's why
16 we came to you. And the reason for that was that
17 the carriers had buyer's remorse. They went off,
18 they made a deal with UTU for whatever particular
19 objectives the UTU had to accomplish and they
20 entered into an arrangement which is for health
21 and welfare that is unsustainable to the rest of
22 the industry. That's the story in this case. Thank

1 you.

2 CHAIRMAN JAFFE: Thank you again, Mr. Wilder. On
3 behalf of the board, we'd like to thank counsel
4 and all the witnesses for their courtesy, for
5 their insights and for the assistance they
6 provided to the board in terms of our role in the
7 process. We'd also like to thank very much,
8 publicly, the assistants of our two special
9 counsel, Norman Graber and Susanna Parker, who, as
10 counsel knows, at least from having dealt with
11 them, have been laboring and will continue to do
12 so on everyone's behalf. With that, we will stand
13 in adjournment. Thank you all very much.

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