

CONFIDENTIAL

BEFORE PRESIDENTIAL EMERGENCY BOARD NO. 250
ARBITRATION HEARING IN THE MATTER OF:

AMERICAN TRAIN DISPATCHERS ASSOCIATION;
BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND
TRAINMEN/IBT; BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION/IBT; BROTHERHOOD OF RAILROAD
SIGNALMEN; INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS; INTERNATIONAL ASSOCIATION
OF SHEET METAL, AIR, RAIL AND TRANSPORTATION WORKERS
MECHANICAL DEPARTMENT; INTERNATIONAL BROTHERHOOD OF
BOILERMAKERS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS; NATIONAL CONFERENCE OF FIREMEN & OILERS,
LOCAL 32BJ/SEIU; TRANSPORTATION COMMUNICATIONS
UNION/IAM; BROTHERHOOD OF RAILWAY CARMEN
DIVISION, TCU/IAM; AND TRANSPORT WORKERS UNION OF
AMERICA

NMB Case Nos. A-13998 (ATDA), A-13999 (BLET),
A-13986 (BMWED), A-14000 (BRS), A-14001 (IAM),
A-14005 (SMART-TD), A-13985 (SMART-MD),
A-14002 (IBB), A-14003 (IBEW), A-14004 (NCFO),
A-14006 (TCU/IAM-Clerical), A-14007 (TCU/IAM-Carmen),
and A-14008 (TWU)

Held at: Grand Hyatt Washington
1000 H Street, N.W.
Washington, D.C. 20001

VOLUME V
Thursday, July 28, 2022
8:01 a.m. EST to 6:01 p.m. EST
Reported by: Okeemah S. Henderson, LSR

<p>Page 1515</p> <p>PRESIDENTIAL EMERGENCY BOARD MEMBERS: CHAIRMAN IRA F. JAFFE BOARD MEMBER BARBARA C. DEINHARDT BOARD MEMBER DAVID P. TWOMEY</p> <p>COUNSEL ON BEHALF OF NATIONAL CARRIERS CONFERENCE COMMITTEE (NCCC): DONALD J. MUNRO, ESQUIRE JONES DAY 51 Louisiana Avenue, N.W. Washington, D.C. 20001-2113 (202) 879-3939</p> <p>COUNSEL ON BEHALF OF ALL OF THE UNIONS BEFORE THE BOARD: ELIZABETH A. ROMA, ESQUIRE GUERRIERI, BARTOS & ROMA, P.C. 1900 M Street, N.W., Suite 700 Washington, D.C. 20036 (202) 624-7420</p> <p>COUNSEL ON BEHALF OF BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN: JOSHUA McINERNEY, ESQUIRE WENTZ, McINERNEY, PEIFER & PETROFF, LLC 3311 Bear Pointe Circle Powell, Ohio 43065 (614) 756-5566</p> <p>COUNSEL ON BEHALF OF SMART TRANSPORTATION DIVISION: ERIKA DIEHL-GIBBONS, ESQUIRE ASSOCIATE GENERAL COUNSEL SMART TRANSPORTATION DIVISION UNITED TRANSPORTATION UNION 24950 Country Club Boulevard, Suite 340 21 North Olmstead, Ohio 44070 (216) 228-9400</p>	<p>Page 1516</p> <p>TABLE OF CONTENTS</p> <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left;">WITNESS</th> <th style="text-align: right;">PAGE</th> </tr> </thead> <tbody> <tr><td>JESSE DAVID</td><td style="text-align: right;">1524</td></tr> <tr><td>DAVID ALLEN</td><td style="text-align: right;">1554</td></tr> <tr><td>JUDY CARTER</td><td style="text-align: right;">1554</td></tr> <tr><td>JENNIFER HAMANN</td><td style="text-align: right;">1554</td></tr> <tr><td>IAN DUNCAN</td><td style="text-align: right;">1588</td></tr> <tr><td>DANA GOLDMAN</td><td style="text-align: right;">1599</td></tr> <tr><td>MARAL DERSARKISSIAN</td><td style="text-align: right;">1606</td></tr> <tr><td>DAVID SCOFIELD</td><td style="text-align: right;">1612</td></tr> <tr><td>JEFF RODGERS</td><td style="text-align: right;">1639</td></tr> <tr><td>MATT GARLAN</td><td style="text-align: right;">1659</td></tr> <tr><td>SAM MACEDONIO</td><td style="text-align: right;">1666</td></tr> <tr><td>JEREMY MOORE</td><td style="text-align: right;">1689</td></tr> <tr><td>BRENDON BRANON</td><td style="text-align: right;">1700</td></tr> <tr><td>THOMAS ROTH</td><td style="text-align: right;">1709</td></tr> <tr><td>KAREN MALLET</td><td style="text-align: right;">1788</td></tr> <tr><td>GAELE GRAVOT</td><td style="text-align: right;">1788</td></tr> <tr><td>DAN COOK</td><td style="text-align: right;">1803</td></tr> </tbody> </table>	WITNESS	PAGE	JESSE DAVID	1524	DAVID ALLEN	1554	JUDY CARTER	1554	JENNIFER HAMANN	1554	IAN DUNCAN	1588	DANA GOLDMAN	1599	MARAL DERSARKISSIAN	1606	DAVID SCOFIELD	1612	JEFF RODGERS	1639	MATT GARLAN	1659	SAM MACEDONIO	1666	JEREMY MOORE	1689	BRENDON BRANON	1700	THOMAS ROTH	1709	KAREN MALLET	1788	GAELE GRAVOT	1788	DAN COOK	1803
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<p style="text-align: right;">Page 1519</p> <p>1 will wrap up with costing and work rules, 2 and some brief concluding remarks from Mr. 3 Branon. 4 With respect to the compensation 5 panel, I'd like -- what I'd like to do is 6 have our group of witnesses testify from 7 the table to do some of the back and 8 forth. 9 We have Dr. David, who you've met 10 before. We have Dr. Allen, who you've 11 also met before. Judy Carter, who 12 testified in our case-in-chief. And a new 13 witness, Maqui Parkerson from Union 14 Pacific Railroad. She is the Vice 15 President of Labor Relations. 16 CHAIRMAN JAFFE: Thank you. 17 May I ask that the Court Reporter 18 swear in Ms. Parkerson? 19 And then the rest of the folks, 20 I'll just remind you that you're still 21 under oath. 22</p>	<p style="text-align: right;">Page 1520</p> <p>1 THEREUPON: 2 MAQUI PARKERSON 3 was then duly sworn, and the proceeding 4 continued as follows: 5 MR. MUNRO: Good morning, Mr. 6 Chairman, members of the Board 7 CHAIRMAN JAFFE: Morning. 8 MR. EASLEY: Before we move on to 9 the witnesses, we wanted to note that we 10 have provided the Board with the 11 information requested with respect to 12 collective bargaining settlements that 13 were analyzed by Mr. Jerry Glass during 14 his testimony. 15 During his testimony, Mr. Glass 16 explained that his analysis of recent 17 collective bargaining settlements between 18 2020 through the present indicated that 19 such settlements, on average -- have 20 averaged about three percent on our wage 21 increases. And he also testified that the 22 settlements have not kept up with</p>
<p style="text-align: right;">Page 1521</p> <p>1 inflation, consistent with Dr. Murphy's 2 observation that US workers have been 3 experiencing negative real wage growth 4 recently due to high inflation. 5 Mr. Glass also observed that recent 6 collective bargaining settlements have -- 7 had included lump sums to offset the 8 impact of inflation rather than structural 9 increases such as general wage increases, 10 and during his testimony, Mr. Glass was 11 asked if these trends have changed in 12 2022. Although he responded to that 13 question in his testimony, the Carriers 14 would like to share a few recent 15 collective bargaining settlements that 16 occurred in the last few months that were 17 not included in Mr. Glass's analysis for 18 illustrative purposes. 19 First, the Carriers would like to 20 call your attention to the recent 21 settlement reached between the BLET and 22 the Montana Rail Link, which was ratified</p>	<p style="text-align: right;">Page 1522</p> <p>1 on May 9th of 2022. Now, I know here that 2 the Carriers are not suggesting this 3 settlement, which involves a smaller Class 4 II Railroad, constitutes any kind of 5 pattern settlement, as the settlement only 6 covers approximately 475 employees. 7 However, the settlement falls in line with 8 the findings outlined by Mr. Glass. The 9 cumulative general wage increases 10 negotiated by the parties were 15.5 11 percent over five years, or an average of 12 3.1 percent per year. And secondly, the 13 settlement included a lump sum payment, 14 which is payable upon ratification in 2022 15 of \$1,750. 16 Second, the Carriers offer for your 17 consideration the recent settlements 18 reached between AT&T and the 19 Communications Workers of America which 20 were finalized on April 10th of 2022. 21 These two agreements cover more than nine 22 thousand employees throughout the United</p>

3 (Pages 1519 to 1522)

<p style="text-align: right;">Page 1523</p> <p>1 States and US territories. These two 2 agreements provide for cumulative general 3 wage increases of 10.5 percent over four 4 years, and -- which amounts to an average 5 increase of 2.6 percent per year. And 6 like the Montana Rail Link settlement, 7 these agreements also provide for a lump 8 sum payment of \$500 upon ratification. 9 And third, the Carriers would like 10 to call the Board's attention to the April 11 25th, 2022, settlement between Lockheed 12 Martin Corporation and the International 13 Association of Machinists and Aerospace 14 Workers. This agreement covers more than 15 five thousand manufacturing workers 16 located in three states. In this 17 settlement, the parties agreed to 18 cumulative general wage increases of 19 fourteen and a half percent over four 20 years or annual general wage increases of 21 three and a half percent. But also note 22 that in this settlement, the parties</p>	<p style="text-align: right;">Page 1524</p> <p>1 agreed to roll in accumulated COLA into 2 the base rates as part of the first-year 3 wage adjustment. The settlement also 4 included a lump sum payment of \$4,000, 5 payable upon ratification. 6 And unless the Board has any 7 questions about these three settlements, 8 I'll present our first rebuttal witness, 9 Dr. Jesse David. 10 CHAIRMAN JAFFE: Any questions? I 11 think we're good. 12 Thank you very much. 13 (Thereupon, a discussion was had 14 off of the record.) 15 THEREUPON: 16 JESSE DAVID 17 was called for examination, and, having 18 been previously duly sworn, testified as 19 follows: 20 DR. DAVID: Very good. Good 21 morning. 22 CHAIRMAN JAFFE: Morning.</p>
<p style="text-align: right;">Page 1525</p> <p>1 DR. DAVID: I'll dive right in. I 2 have about twenty minutes, I think, of -- 3 of discussion here. I was asked to come 4 back to respond to some of the questions 5 that the Board had asked in my direct 6 testimony, make sure I cleared up some of 7 the data issues, and also to respond to 8 some of the allegations, I guess, I would 9 say, of -- the folks from the Union-side 10 about my testimony, and to clear up some 11 of the issues that were raised there. 12 Two general areas I'd like to 13 cover. One is my benchmarking analysis. 14 And I'd like to respond to some of the 15 Board's questions about the total comp 16 that I used for that and recap the purpose 17 and the method of my analysis. In 18 particular, talk about the reason for 19 using the base year of 2005, which I also 20 did for 2010 and 2015. But to explain, 21 again, what -- what my justification for 22 that was.</p>	<p style="text-align: right;">Page 1526</p> <p>1 And then I'd also want to spend a 2 little bit of time going over the 3 differences between Mr. Roth's calculation 4 and mine in terms of the proposals and 5 make sure everybody's clear on the reasons 6 that we're getting different numbers 7 there. 8 On the first issue, this one's 9 pretty straightforward. There was a 10 question about some of the elements of 11 total comp that I included in my 12 calculation. One was, you know, what's in 13 the lump sum? My understanding is that 14 those are payments under some performance 15 programs for the local agreements and 16 policies. It's quite small. It's about 17 one percent of total comp. But that's 18 what I -- what I understand that comes 19 from. 20 The other question was about the 21 early retirement health component. And 22 was that actually money that would be</p>

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1 given to current employees or past
 2 employees? My understanding is that the
 3 funding is based on current employee
 4 accounts, but that will then cover current
 5 employees when they then retire. So I
 6 thought it was reasonable to include,
 7 essentially, the current cohorts'
 8 contribution as a benefit to them.
 9 Obviously, those dollars are funding
 10 earlier retirees, but later payments will
 11 come in for the current employees. So
 12 that was a -- those two elements.
 13 One other point about the -- these
 14 wage numbers. Obviously, these are
 15 averages. They vary not just across
 16 crafts, but within crafts. I don't -- I
 17 wasn't here for it, but there may have
 18 been some questions about specific wage
 19 levels for individual crafts that maybe
 20 didn't look exactly like some of the
 21 numbers here. That's because these are
 22 averages across people with quite a wide

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1 **BOARD MEMBER DEINHARDT:** And those
 2 are all taxed?
 3 **DR. DAVID:** All three of those,
 4 yes. And those combined --
 5 **BOARD MEMBER DEINHARDT:** The same
 6 person isn't going to have both Tier I,
 7 and Tier II, are they?
 8 **DR. DAVID:** Right. So, these would
 9 be averages across everybody. Any
 10 individual might have a larger amount of
 11 Tier I and a smaller amount of Tier II or
 12 vice versa. So this would be spread out
 13 across everybody. It would be very
 14 similar, I think; for example, like, the
 15 Board asked me constructive allowances;
 16 obviously, lots of people get zero for
 17 constructive allowances. The number here
 18 that you see is the amounts paid to the
 19 operating crafts but spread out across
 20 everybody as an average.
 21 **BOARD MEMBER DEINHARDT:** All right.
 22 Thank you.

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1 range of tenures, even within individual
 2 crafts. I think everybody would expect
 3 that to happen.
 4 Next, I'll turn to the
 5 benchmarking. I had two purposes for --
 6 for the approach that I that -- I took on
 7 benchmarking --
 8 **BOARD MEMBER DEINHARDT:** Can I just
 9 ask you one question?
 10 **DR. DAVID:** Yes.
 11 **BOARD MEMBER DEINHARDT:** I'm sorry.
 12 I don't understand where you list Railroad
 13 Retirement Tier I and Tier II.
 14 **DR. DAVID:** Those are the payroll
 15 taxes.
 16 **BOARD MEMBER DEINHARDT:** No, it's
 17 under Total Health and Welfare.
 18 **DR. DAVID:** The -- the retirement
 19 elements, those are below Health and
 20 Welfare. So if you add those three rows
 21 up, that gets you the total payroll tax
 22 contributions.

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1 **DR. DAVID:** Sure.
 2 Okay, so the benchmarking analysis,
 3 has two purposes. One is to evaluate what
 4 comparator groups of employees that
 5 represent potential alternative
 6 opportunities for the railroad workers at
 7 the time that they begin their tenure at
 8 the railroads, right? That's the reason I
 9 picked a fifteen-year look-back period
 10 because that is the average tenure of the
 11 current employees.
 12 So if you wanted to evaluate what
 13 could those people have done if they had
 14 chosen a different path for their
 15 employment fifteen years ago, the
 16 benchmark analyses provide one measure of
 17 that. And I used several worker
 18 characteristics to further refine that. I
 19 mentioned education level and several
 20 other characteristics in order to further
 21 and home in on what those folks -- what
 22 types of opportunities those folks likely

<p style="text-align: right;">Page 1531</p> <p>1 would have had fifteen years ago. Now, of 2 course, many railroad employees have been 3 there longer than fifteen years, but many 4 less. I picked fifteen Because that was 5 the average. 6 The second reason was that the 7 comparator groups provide one measure, at 8 least, of the opportunities available 9 today if somebody decided they didn't want 10 to work for the railroads anymore or if a 11 new recruit was choosing between railroads 12 and something else. That's the -- that 13 would be another way to use the 14 benchmarking analysis is -- to figure out 15 what likely possibilities there are in 16 those situations. I am not saying that 17 the job responsibilities of the comparator 18 occupations are identical or even 19 necessarily very similar. That's clearly 20 not what's going on here. But it's more 21 about opportunities. 22 From the testimony that I heard, it</p>	<p style="text-align: right;">Page 1532</p> <p>1 seems that the Union's representatives 2 appear to believe that there's no reason 3 to evaluate that -- those issues at all, 4 or the either that or that there are no 5 appropriate comparators. But I would 6 point out, Mr. Roth, for example, compared 7 the railroad workers' wage trajectory to 8 the ECI, which is a measure of wages for 9 all US workers, which, obviously, is a 10 less comparable group than the measures 11 the -- the groups that I chose and 12 analyzed. 13 We also heard something, I think, 14 from one of the attorneys who pointed out, 15 for example, that railroad workers might 16 choose to go get a job at Walmart, 17 instead. They might quit and go work at 18 Walmart. Well, that's the kind of 19 opportunity that I'm evaluating there. 20 Now, I looked at two -- two sources 21 of data for this. The first one, which 22 address total compensation, I use the</p>
<p style="text-align: right;">Page 1533</p> <p>1 ECEC. That's the same data as Mr. Roth's 2 ECI. It provides some detail about 3 industries and occupations, but not a lot. 4 What it's good for is providing detail for 5 the individual components of compensation. 6 So if you want to get total compensation, 7 ECEC is the place to go. But you can't 8 get a very fine cut on industries and 9 occupations. So I did provide that. 10 As a second analysis, when I looked 11 at just wages. Now you can go to the BLS' 12 OEWS, which does provide that fine 13 industry and occupation detail. It 14 doesn't get you the other elements of 15 total comp. And when I did that, I did 16 use very specific occupation groups that 17 were as finely honed to match the job 18 responsibilities or characteristics of the 19 occupations of the railroad employees as 20 possible. I would encourage everybody to 21 take a look at Table 19 in my report, 22 where I show a crosswalk between the ICC</p>	<p style="text-align: right;">Page 1534</p> <p>1 codes and the individual occupations. The 2 occupations that you see in that chart are 3 the only ones that I considered in my 4 analysis of wages. 5 Just to give an example, I compared 6 ICC 608, which is road freight conductors. 7 That's the ICC number that has the most 8 railroad employees in it. I compared that 9 to four BLS categories, railroad 10 conductors and yardmasters, which, 11 obviously, includes the railroad workers, 12 but I also included sailors and marine 13 oilers, bridge and lock tenders, and 14 subway and streetcar operators. That's 15 it. 16 Now, one could certainly -- there's 17 some judgment involved about how 18 comparable those occupations are. I would 19 completely accept somebody having a 20 different view about that. But, for 21 example, farmers are not included in 22 there, right? Electrical engineers are</p>

<p style="text-align: right;">Page 1535</p> <p>1 not included in there. I also included 2 only full-time employees. But that's all 3 in my Table 19 If you want some more 4 detail on that. 5 Turning to the period of the 6 benchmark analysis, I chose 2005 to 2020. 7 I also presented a ten-year look back and 8 a five-year look back. So I presented 9 three analyses for that. Mr. Roth accused 10 me, I thought rather uncharitably, of 11 cherry-picking this because I use a 12 fifteen-year look-back period. I 13 explained the reason for that is because 14 that exactly matches the average tenure of 15 the current railroad workers. The actual 16 trajectory of the typical worker over that 17 period; it covers multiple bargaining 18 rounds, multiple complete business cycles 19 in the US economy, and BLS has very 20 consistent data in terms of definitions 21 during that period. So I certainly 22 disagree with Mr. Roth's characterization</p>	<p style="text-align: right;">Page 1536</p> <p>1 of that. 2 He asserted that the only proper 3 base year was 1979. The justification for 4 that wasn't entirely clear to me, but it 5 was before the Staggers Act; it was before 6 and enforced PEB. I'm not sure why one 7 would choose a base year during a 8 regulated regime to analyze growth during 9 an unregulated regime. But, put that 10 aside, I mean, he can have his opinion 11 about that, just as I do. I would point 12 out that only about one percent of the 13 current railroad workers were employed at 14 that time. Ninety-nine percent of 15 railroad workers have started after 1979. 16 And in fact, more than a third of them 17 weren't even born at that time. So, there 18 may be very good reasons to look at 1979. 19 I chose 2005 for the reasons that I've 20 described. 21 I would also point out that, even 22 though Mr. Roth says 1979 is the only</p>
<p style="text-align: right;">Page 1537</p> <p>1 appropriate base year, he did present 2 multiple additional analyses that use 2004 3 as a base year, which is essentially the 4 same one that I chose. Again, he said he 5 had reasons for that, I accept that. But 6 I do have a problem with the claim about 7 cherry-picking. 8 Now, I did want to point out the 9 one benchmarking type analysis that Mr. 10 Roth provided was this chart on the left 11 where he compared an average wage rate for 12 the railroad employees to the ECI. I have 13 a couple of points to make about this 14 chart. 15 First, as Mr. Roth testified, the 16 blue line, which is this wage rate that he 17 created to hold constant the mix of 18 crafts, I don't have any problem with how 19 that was done. But as he pointed out, it 20 does not include all cash components of 21 compensation. It's only partial. I don't 22 know how significant that is, but my</p>	<p style="text-align: right;">Page 1538</p> <p>1 measures do include all those components. 2 Another point about this chart, 3 he's got something at the top right where 4 he says wage lag of 17.9 percent. I would 5 like to just point out that, although that 6 box is next to the line, that vertical 7 dotted line at 2019, that's 17.9 percent, 8 is actually the number in 2021, after two 9 years of flat wages, which is not going to 10 be maintained. After a retroactive 11 increase, that blue line is gonna go up 12 for those last two years, and there won't 13 be a wage lag of 17.9 percent. The actual 14 number from his chart at 2019 is about 9 15 percent. 16 So, according to Mr. Roth, wages of 17 the railroad workers through 2019, have 18 lagged by about nine percent. I have a 19 concern about that, because there's an 20 implicit assumption there, that whatever 21 wage premiums were being earned in 1979, 22 is the only appropriate target here. And</p>

<p style="text-align: right;">Page 1539</p> <p>1 that's what we're lagging supposedly. But 2 he does that without any analysis of what 3 those premium might have been, as of 1979. 4 The ECI can't do that, because it only 5 measures growth rates, it doesn't give you 6 any insight into the level of wages of 7 either the railroad workers or anybody 8 else. That's why I used the ECEC data, 9 that does give you dollars per hour and I 10 pointed out the actual levels of the 11 premium at the point of my -- at the start 12 my benchmark period. 13 So again, there's this underlying 14 assumption here is that whatever the 15 status of the railroad workers was, as of 16 1979, that's our target. But, you know, 17 it doesn't say what they were actually 18 doing as of 1979. If one judged that the 19 premium during that period were too high, 20 well, then he's targeting something too 21 high; if they were too low, then he's 22 targeting something that's too low; he</p>	<p style="text-align: right;">Page 1540</p> <p>1 didn't analyze. And I just added a chart 2 here, which shows what you get if you take 3 Mr. Roth's data and use 2005 as the 4 benchmark year instead of 1979. Same data 5 -- same wage data and the same ECI data. 6 During that period, the railroad workers 7 average wage, according to Mr. Roth, is 8 actually up about nine percent relative to 9 the ECI. Not lagging. It's a premium. 10 So that's just a little perspective 11 on the difference the between the -- the 12 benchmark periods. 13 Okay, and now let's go to the last 14 general topic, which is the inflation 15 treatments for the five years of the 16 bargaining round, and the implications for 17 analyzing the two proposals. 18 Here's the data that I used. One 19 of the Board Members asked me for the 20 exact numbers and so I wanted to make sure 21 I provided that. 22 Two years, I used CPU. I had a</p>
<p style="text-align: right;">Page 1541</p> <p>1 separate analysis where I use PCE, I'm not 2 going to replicate that here, you could 3 basically take all these numbers and drop 4 them by about half a percent. That's what 5 you would get with the PCE. I used actual 6 data for two years, and then the CBOs 7 projection for three years. You get an 8 average of the five-year period of about 9 3.5 percent. 10 As I also testified, if you thought 11 that the recent spike in inflation was not 12 transitory, that is the part that CBO 13 essentially missed during roughly the last 14 three months. If one thought that that 15 was never going to go away, it would be 16 reasonable to add about a half a percent 17 per year to my projections for inflation, 18 to account for that. So that would raise 19 the five-year average, up to about four 20 percent, in terms of average inflation. 21 Mr. Roth criticized me for not 22 acknowledging that spike in inflation. I</p>	<p style="text-align: right;">Page 1542</p> <p>1 mean, I certainly testified about that, 2 that was not something that I ignored or 3 skipped or anything like that. That was 4 an important part of my testimony, I 5 think. And let's just take a look at what 6 is actually happening with inflation here. 7 And I'll explain the justification for my 8 approach. 9 You can see the spike that Mr. Roth 10 is talking about. As those top lines, 11 which are the headline inflation, the 12 green and the blue, and you can see over 13 the last roughly three or four months, it 14 started down and it jumped back up. What 15 is that? That's Ukraine. That's entirely 16 due to a spike in energy prices since 17 roughly March or April. And the reason 18 CBO missed it is because they didn't 19 predict Ukraine, right. On the other 20 hand, the blue line, which is the core 21 inflation, where energy and food is taken 22 out of the regular CPI, you can see that's</p>

<p style="text-align: right;">Page 1543</p> <p>1 headed down over that same period. And 2 what that means is CBO got that part, 3 right. Basic inflation is headed down, 4 with this extra volatility over the last 5 few months due to energy prices. 6 So if you wanted to predict what 7 was going to happen over the next months, 8 if you look at the core inflation number, 9 that blue line, we're already headed down. 10 And one thing about the difference between 11 the headline numbers and the core numbers 12 is -- is that those differences tend not 13 to just go away in the future, they tend 14 to be reversed. So if gas prices are 15 causing an upward spike in inflation this 16 month, when gas prices return to their 17 previous level, which they usually do, 18 there's no guarantee, but they're -- they 19 fluctuate. When they return to their 20 previous level, that premium in the 21 inflation measure doesn't just go away, 22 it's actually reversed and taken out of</p>	<p style="text-align: right;">Page 1544</p> <p>1 inflation because gas prices are now 2 falling faster than the prices of 3 everything else, they're actually going 4 negative. And you can see that that does 5 happen. There's some points in the past, 6 for example, if you look around mid 2020, 7 you can see that the headline numbers are 8 actually below core. And that's because 9 energy inflation during that period was 10 negative. That is what CBO expects, I 11 think that's a reasonable way to go about 12 this. That's why I chose the inflation 13 measures that I chose. 14 I'd Just like to point out, there 15 was some action in terms of inflation and 16 interest rates that some of you are 17 probably aware of in the last couple of 18 days. The Fed made a pretty strong move 19 to try to rein inflation in and this 20 article that I found was actually issued 21 just before the Fed's decision. This is a 22 Bloomberg article. And they said, "even</p>
<p style="text-align: right;">Page 1545</p> <p>1 as forward-looking measures indicate a 2 retreat in inflation." So, for people who 3 are modeling inflation, they're thinking 4 that inflation already is going down, 5 notwithstanding the spike in energy 6 prices. That's why I chose to use the CBO 7 projection but recognize that if you think 8 CBO is going to get it wrong in the long 9 run, you could add roughly two to two and 10 a half percent over five years or a half a 11 percent per year. That was the reason I 12 did that approach. And the reason I 13 testified on that issue. 14 Okay, well, the last topic is the 15 projection models that Mr. Roth used and 16 that I used, and I wanted to cover all the 17 reasons why we're getting different 18 answers in terms of real rates growth over 19 the five-year period. Mr. Roth only 20 testified about the Union's proposal, so 21 that's what I'm going to use for my 22 discussion here. But the same issues</p>	<p style="text-align: right;">Page 1546</p> <p>1 apply for the -- the Carrier's proposal, 2 obviously, just with lower numbers. 3 There are two categories of 4 differences between our analyses, one has 5 to do with the choice of inflation. He 6 used CPI-W; I used CPI-U or PCE. Mr. Roth 7 mixed in a CPI-U projection from CBO with 8 his CPI-W actuals. I used a consistent 9 set of data, either CPI-U or PCE, for all 10 five years. I'd just like to talk a 11 little bit more about that, but obviously, 12 there were some fine details about what 13 projection assumption each of us uses for 14 each year. That's one category of issue, 15 I'll give you a little more detail in a 16 moment. 17 The other category of issue has to 18 do with the timing of the GWI increases, 19 and this is pretty important issue here. 20 I put up Mr. Roth's model on the left, and 21 I created one, and this wasn't in my 22 report, but the calculations were in my</p>

<p style="text-align: right;">Page 1547</p> <p>1 backup materials. This is how I 2 calculated growth in real wages during the 3 five-year period on the right, a very 4 similar kind of layout there. And I'd 5 like to highlight a couple of key 6 calculations in Mr. Roth's analysis and 7 explain why I did something different. 8 If you look at the last column of 9 Mr. Roth's method there, which is the real 10 wage, and you go down to the bottom, and 11 you can see that after accounting for 12 inflation, he says there was a 4.4 percent 13 increase over five years. And you can see 14 that number in that right hand column 15 104.4 percent at the end of 2024. And you 16 can compare that to one hundred at the end 17 of 2019. So that's a 4.4 percent real 18 wage growth over five years. 19 What's important to note is that is 20 just comparing December to December. That 21 may be a useful measure. The problem is 22 that doesn't actually tell you what was</p>	<p style="text-align: right;">Page 1548</p> <p>1 being earned during the year. And you 2 would get the same answer, 4.4 percent, 3 whether the GWI highs were in January or 4 February or July or December. You would 5 have guessed 4.4 percent, according to his 6 method, no matter what the timing of the 7 GWI is. That doesn't make sense, because 8 obviously having an earlier GWI is costly 9 to the railroads, and it's a benefit to 10 the workers. And his method just won't 11 pick that up. 12 Now, if the timing of the GWI 13 stayed the same, and it was always July, 14 forever, and forever in the past, the 15 difference -- there would be no difference 16 in terms of what the final answer you'd 17 get using these approaches. But I think 18 we all know that the Unions are asking to 19 move those GWIs forward by six months. So 20 the timing does matter. And essentially 21 what happens you can see in the analysis 22 that I did on the right, and if you look</p>
<p style="text-align: right;">Page 1549</p> <p>1 at what they do GWI is, you can see that 2 essentially 6 months' worth of the 2019 3 GWI of 3 percent. 4 Under the Union's proposal, its 5 being replaced by six percent GWI, so 6 there is effectively an extra three 7 percent growth there for six months that 8 is not captured in Mr. Roth's method. My 9 method does capture that. So instead of 10 comparing December to December, I compare 11 the average in the full calendar year to 12 the average in the full calendar previous 13 year. That's how I measure growth, not 14 December over December. Again, those two 15 would give you the same answer if the GWIs 16 never moved. But because they get shifted 17 forward in the Union's proposal, my method 18 shows an additional one and a half percent 19 growth over five years. That's the reason 20 of course, that they're asking for it to 21 be moved to January, because there's a 22 benefit to them. Mr. Roth's method</p>	<p style="text-align: right;">Page 1550</p> <p>1 doesn't capture that. 2 Okay. So here's a summary of the 3 differences between our approaches. In 4 terms of the timing, he does December over 5 December, which doesn't account for the 6 GWI -- the months of the GWIs, whereas I'm 7 using full calendar year relative to full 8 calendar year. I mean, the earnings over 9 the calendar year is what goes into the 10 pockets of the Union employees, not what 11 you get at the end of December. That's 12 obviously just a partial measure. 13 Mr. Roth uses X -- CPI-W through 14 the middle of 2022, whereas I explained 15 I'm using actuals, only through the end of 16 2021 and then a forecast. Although I do 17 say that it's reasonable to add about two 18 and a half percent over five years if you 19 thought that what happened the last few 20 months was not going to be reversed. I 21 personally think it's most likely that it 22 will be but I'm not a macro economist.</p>

<p style="text-align: right;">Page 1551</p> <p>1 And bottom line, what do you get 2 for the two measures? If you take Mr. 3 Roth's approach and do nothing else but 4 just fix the timing issue so that it plans 5 reflects the six months shift in GWI that 6 the Unions are asking, for his number 7 would go up from .9& to 1.3&. So that's 8 the implication of not correcting for the 9 timing of the GWIs. On my side, I this 10 was not in my report, but I basically 11 converted the inflation and wage growth 12 numbers into a real wage growth measure 13 that's analogous to Mr. Roth's. Under the 14 two measures of inflation that I use, you 15 get a range of somewhere between 1.8 16 percent and 2.8 percent, real growth for 17 the -- the Union's proposal per year. So 18 almost three percent, depending if you're 19 going to go with PCE with no adjustment 20 for the recent spike; closer to two 21 percent if you use CPI with an adjustment 22 for the recent spike. That's why there's</p>	<p style="text-align: right;">Page 1552</p> <p>1 that range of half a percent in each of 2 those two is to -- depending on whether 3 you want to include that -- that 4 adjustment factor for the recent spike. 5 And I would just say that, so 6 obviously, according to my calculations, 7 the Union's would be getting much more 8 than a one percent real wage growth up to 9 as much as perhaps three percent. A 10 proposal or a cumulative wage measure that 11 would get you approximately one percent 12 using my method of calculation is 13 somewhere in the neighborhood of eighteen 14 percent to twenty-two percent cumulative, 15 not twenty-eight percent cumulative, which 16 is what the Unions are proposing. 17 BOARD MEMBER DEINHARDT: I'm sorry, 18 could you say that last sentence -- 19 MR. DAVID: Sure. 20 BOARD MEMBER DEINHARDT: -- one 21 more time? 22 MR. DAVID: So if one thought that</p>
<p style="text-align: right;">Page 1553</p> <p>1 we ought to be targeting one percent real 2 wage growth, I have no opinion about 3 whether that's the right thing to do or 4 reasonable or anything. Obviously, we've 5 heard some testimony that not many workers 6 are getting one percent real wage growth 7 during this period. But if we thought 8 that the Unions should be getting one 9 percent, then a cumulative package in the 10 range of eighteen percent to twenty-two 11 percent, depending on your inflation 12 assumptions, would get you that one 13 percent. 14 BOARD MEMBER DEINHARDT: Thank you. 15 DR. DAVID: And that's it. That's 16 all I have. If there any further 17 questions, I'd be happy to take those. 18 CHAIRMAN JAFFE: Thank you, Dr. 19 David. 20 We're in good shape for the moment. 21 Thank you, sir. 22 DR. DAVID: You're welcome.</p>	<p style="text-align: right;">Page 1554</p> <p>1 THEREUPON: 2 DAVID ALLEN, JUDY CARTER, 3 and JENNIFER HAMANN 4 were called for examination, and, having 5 been previously duly sworn, testified as 6 follows: 7 DR. ALLEN: Good morning. 8 CHAIRMAN JAFFE: Good morning. 9 DR. ALLEN: I'm David Allen and we 10 have collected some additional data 11 related to recruitment and retention in 12 order to respond to several of the queries 13 that were raised from the first time 14 around. And so, together with the 15 representatives from two of the Carriers, 16 we're going to provide a little bit of 17 evidence and a little bit of context 18 related to several of the issues that were 19 raised around hiring and around reasons 20 for quitting; around the localized hiring 21 incentives, recall acceptance rates, and 22 the issue of mid-career retirements.</p>

<p style="text-align: right;">Page 1555</p> <p>1 And just, once again, I'll just 2 start off by saying that all of this still 3 point to the conclusion of the railroad 4 jobs remain highly attractive jobs. 5 So, many of the queries seem to 6 center around this broad issue of, why is 7 it the Carrier's position that -- that the 8 increased incremental composition -- 9 compensation beyond their proposal is 10 really not necessary in order to recruit 11 and retain the talent that they need, 12 given that they are experiencing a 13 challenging labor market and -- and 14 evidence of related service disruptions. 15 And really, the gist of what we're going 16 to be talking about today is that there's 17 two main reasons for that. 18 One is that the hiring needs and 19 challenges that the railroads are facing 20 are dynamic ones. So they differ by 21 location, and they differ by job type. 22 And we're going to get some -- some color</p>	<p style="text-align: right;">Page 1556</p> <p>1 around what that looks like. And thus, 2 the targeted incentives that we're seeing 3 evidence of are a rational response to 4 dealing with that that makes more sense 5 than necessarily in an across-the-board 6 higher wage rate to deal with it. 7 The other one is, turning to the 8 quit issue, is that we've shown evidence 9 that, in this case, the quits are being 10 driven far more by the external reasons, 11 by the opportunities in the labor market, 12 than they are by internal factors, 13 particularly compensation. 14 And so we're going to turn first to 15 the hiring data and start with a quick 16 example from BNSF about some of the data 17 related to that. 18 MS. CARTER: So just to orient you 19 to the slide, one of the things that we 20 heard from the Unions is that we delayed 21 recalling employees and slowed our hiring 22 after the pandemic. So the dynamic</p>
<p style="text-align: right;">Page 1557</p> <p>1 situation in 2020, you can see here on the 2 chart, was our headcount versus our 3 carload traffic. So you can see, in the 4 blue bar, our carload traffic was going up 5 and we were responding incrementally with 6 our headcount. Now, we were working 7 through -- started working through 8 recalling those in -- those furloughed 9 employees. And so we were working through 10 that, and then working through what we 11 were seeing based on volumes and how we 12 should respond from a headcount and hiring 13 plans perspective. 14 So we don't feel like we have 15 evidence that there was a delay in 16 recalling from furlough and then having 17 the -- the forecasting of what our hiring 18 plan should be in 2021 and in 2022. There 19 is some slight lag and that, you know, 20 hiring takes time. We have to respond to 21 the dynamic situation that was going on at 22 the time, with the volume forecasting, as</p>	<p style="text-align: right;">Page 1558</p> <p>1 well as knowing that, you know, one of our 2 primary goals in hiring is making sure 3 that we're hiring candidates that can 4 safely perform the job, and then giving 5 them the necessary training to be able to 6 hit the ground in a safe manner. So the 7 training for TY&E is -- is a 8 three-to-four-month process. 9 So all of this demonstrates that, 10 you know, while this is maybe a little bit 11 unique to how we process it throughout the 12 railroad, we were being subjected to the 13 same pressures and overall market during 14 the pandemic and -- and, you know, 15 responding to that headcount in a way that 16 was measured throughout the process. 17 (Thereupon, the Court Reporter 18 requested clarification.) 19 DR. ALLEN: And just continuing on 20 -- on this discussion of -- of hiring, and 21 particularly with respect to headcount. I 22 mean, we've made the argument that the</p>

<p style="text-align: right;">Page 1559</p> <p>1 Carriers are in fact hiring and increasing 2 headcount. This -- this is an article 3 from May a year ago, talking about the 4 increasing hiring in T&E and the -- the 5 rise in headcount. And then to pull this 6 forward a bit, you know, this is data that 7 was submitted by the Carriers to the STB, 8 and again, this is T&E employment, which 9 is the job category that's having the most 10 challenges associated with it. And this 11 shows the rise in headcount from June of 12 '20 to June of 2022, so a thirteen percent 13 rise in headcount. So the Carriers are in 14 fact, hiring and able to hire and increase 15 their headcount. Just, as -- as Judy 16 mentioned, there are some time lags 17 involved.</p> <p>18 One other hiring related issues 19 that was raised was in one of the charts 20 that I showed on the ratio of applicants 21 to hires, the chart did in fact show a 22 decrease from 2020 to '21 in the ratio of</p>	<p style="text-align: right;">Page 1560</p> <p>1 applicants for hire. And I just want to 2 emphasize that that type of decrease can 3 be seen, even if applications are not 4 decreasing and that's because it's the 5 ratio, and what we're actually seeing, in 6 this case, is that the hiring is 7 increasing, which is what's changing that 8 ratio.</p> <p>9 And so these data are again pulled 10 forward to compare the period January to 11 May of '22, with the same period the year 12 before. And you can see that, in this 13 case, the number of applications is pretty 14 close to constant, well over 100,000 15 across the Carriers. A less than one 16 percent decrease in applications, but the 17 hires are up fifty percent from -- from 18 the time -- the period before.</p> <p>19 And so if you were to look at 20 applicants for higher ratio, in this case, 21 it would be going down, noticeably, but 22 that's not because applications are down,</p>
<p style="text-align: right;">Page 1561</p> <p>1 it's because hires are up.</p> <p>2 Just emphasizing the efforts that 3 the Carriers are making to increase their 4 hiring as needed. And again, I'm gonna 5 turn to BNSF, to provide a little bit of 6 context.</p> <p>7 MS. CARTER: So I talked about this 8 a little bit in my prior testimony, but 9 just to reiterate the point and provide an 10 example of what David was just explaining.</p> <p>11 This graph represents our 12 applications per hire at BNSF. Going back 13 to 2017. And so, in the terms of 14 applicants per hire for 2022, we're back 15 to the ratios that we were seeing the last 16 time we had a significant hiring plan, 17 which was in 2018. And that was a factor 18 of both, you know, we always plan to hire 19 to cover attrition, as well as look at 20 volume forecast. So that was the last 21 time we had a significant to a hiring plan 22 in particular.</p>	<p style="text-align: right;">Page 1562</p> <p>1 And so in both 2018, and what we're 2 seeing here in 2022, is that our applicant 3 flow is consistent over time and shows 4 that we are attracting enough applicants 5 to our pool to fulfill our hiring plan.</p> <p>6 DR. ALLEN: Related to this issue 7 was the question of the hiring incentives, 8 I think the -- I presented some general 9 data that the railroads are getting 10 sufficient number of applicants to fill 11 their need. But at the same time, the 12 point was raised that well, aren't the 13 Carriers doing a lot of very specific 14 things in terms of hiring incentives and 15 hiring bonuses, and those types of issues.</p> <p>16 And so how can both of those things 17 be true? And the answer to that is, yes, 18 the Carriers are, in fact, working hard 19 with hiring incentives and bonuses in 20 certain locations for certain types of 21 jobs. And so the request is made for -- 22 can we get -- can we see a little bit more</p>

<p style="text-align: right;">Page 1563</p> <p>1 of what that looks like. And so I'm going 2 to, we're going to see examples from -- 3 from both of these Carriers about what 4 their -- their localized challenges and 5 opportunities are related to that. 6 And I'll just make the point, 7 though, that as we -- as we will see, 8 because the challenges are localized to 9 certain job types and certain locations, 10 and because they change over time. That's 11 why I'm making the argument that it makes 12 more strategic sense for the Carrier's to 13 use their flexibility to provide these 14 incentives in a more targeted and 15 strategic way, which is what I think that 16 they're doing. 17 And so again, we're going to start 18 with BNSF. 19 MS. CARTER: So here we show the 20 BNSF network, and the key point here is 21 that our hiring strategy, particularly in 22 2022, has been extremely dynamic with the</p>	<p style="text-align: right;">Page 1564</p> <p>1 tight labor market. And so we're hiring 2 across twenty-eight states and what that 3 has looked like has been a little bit 4 different than prior years. It's that we 5 are -- we are being what I would call 6 surgical about this because if we have, 7 and I think Mr. Garlan, my colleague, 8 explained the other day in his testimony, 9 that if we have a situation where we're -- 10 we're facing a hiring challenge in 11 California, that can have a ripple effect 12 and a bunching effect across the whole 13 network, which explains what were -- the 14 conversations we're having with STB around 15 service disruptions as a relates to where 16 our crews are. we have to have them at 17 the right place at the right time to have 18 the fluidity of the whole network. 19 So from an HR attraction and 20 retention standpoint, we're looking at 21 these places in a very surgical way. And, 22 literally weekly, across HR and workforce</p>
<p style="text-align: right;">Page 1565</p> <p>1 planning, sitting down and saying, where 2 are we having applicants? Where do we 3 have a lot of applicants? Where do we 4 have applications where there's a few too 5 few? And making in the moment adjustments 6 to our hiring, attracting, and sourcing 7 programs and in the week-to-week, propped 8 up. 9 So we look at a very -- a lot of 10 variables here. I think UP is going to 11 talk through their strategy, but it's 12 unemployment rate, local wage competition, 13 cost of living, what our hiring goals are 14 for any location, what the current 15 employee population density is in those 16 locations, and then make decisions 17 accordingly. 18 So if you flip from that slide, 19 David, I'll give you a couple of examples. 20 So Nebraska is a place where we've 21 had some challenges. We've got a hiring 22 plan of about 130 -- 136 employees that</p>	<p style="text-align: right;">Page 1566</p> <p>1 we're trying to attract with a very low 2 unemployment rate. And that is -- 3 Nebraska represents about 9.6 percent of 4 our employee population. So large hiring 5 plan, low unemployment rate, higher 6 headcount percentage. So looking at that, 7 that is what we would conclude is an area 8 that we need to offer an incentive. 9 To provide another example, 10 California and Washington. Three hundred 11 plus employees that we're trying to hire 12 in those locations. Obviously, those are 13 high cost of living areas, lots of 14 competition, competitors offering 15 incentives as well. So putting all of 16 those factors together, it makes it more 17 difficult to hire. So we came up with a 18 decision to offer an incentive in those 19 locations as well. 20 MS. HAMANN: So to support our 21 service and position us for growth going 22 forward, Union Pacific has announced a</p>

<p style="text-align: right;">Page 1567</p> <p>1 goal to hire 1,400, TE&Y employees and 2 we've made some good progress towards that 3 goal, as you can see. We're absolutely 4 confident that we're going to be able to 5 meet that goal, but it's going to come 6 with challenges in certain locations. 7 Next slide, please. 8 In response to Board Member 9 Deinhardt's request from earlier in the 10 week about the localized nature of our 11 hiring challenges, we put together the dot 12 map that you see here to give you a better 13 sense of what this looks like on our 14 network. Now, there's a lot going on 15 here. So let me take a moment to level 16 set so we all understand what we're 17 looking at. 18 First of all, this is the Union 19 Pacific Network. The dots show the 20 locations of our crew bases, which we 21 refer to as hubs. The dots are also sized 22 based on the size of the crew base in this</p>	<p style="text-align: right;">Page 1568</p> <p>1 particular location. So the larger the 2 dot, the larger the crew base. The other 3 thing that we've done is we've color coded 4 the dots to give you a sense of the hiring 5 environment, the difficulty or ease of the 6 hiring environment, in each of those 7 locations. 8 Dots are colored in green, when 9 we're hiring experience, which refers to 10 the number of people we're able to hire 11 against our goal is similar to our past 12 historical experience. The yellow dots 13 indicate areas where -- that we're 14 watching. And the red dots really show 15 you the acute places where we take a look 16 at the unique local hiring challenges in 17 those locations. The other thing that 18 we've done for you is in the call out 19 boxes for the red dots, we've tried to 20 give you a sense of the factors that we 21 believe are contributing to the difficult 22 hiring environment in those factors. And</p>
<p style="text-align: right;">Page 1569</p> <p>1 they're different for each location. 2 Just by way of example, if you look 3 at Zone 100, which is Cheyenne East on our 4 network, it's pretty much Nebraska, we're 5 dealing with an extremely low unemployment 6 rate of 1.7 percent. And really vigorous 7 -- a very vigorous labor market. 8 Just west there, Zone 200, which is 9 which is our Wyoming district. In 10 addition to very low unemployment, the 11 real story there is, there just aren't a 12 lot of people in the area, you've got 13 about a population of about 58,000 people 14 in the two counties in which our system is 15 located, that covers about 18,000 square 16 miles. So, really finding the bodies to 17 apply for the job is a challenge. 18 And then when we look to the far 19 left at Portland Zone 1, that again, is a 20 different local dynamic. So in addition 21 to low unemployment, and vigorous 22 competition from other employers, there's</p>	<p style="text-align: right;">Page 1570</p> <p>1 a really high cost of living there, right? 2 The cost of living there is like thirty 3 percent higher than the national average, 4 which presents a unique challenge. 5 You know, the one thing that you'll 6 notice about this map is that most of our 7 hotspots are in our northern region, 8 right? So it -- it makes sense that 9 hiring markets are a lot like real estate. 10 They're really affected by these local 11 issue. Now, every week, our WR (ph.) 12 group gets together, and they take a look 13 at the competitive elements of the hiring 14 markets in these localities. And they 15 consider whether we need to offer 16 incentives and what those incentives need 17 to work like. 18 You know, offering hiring 19 incentives isn't something that's new to 20 Union Pacific and the past, where we've 21 had difficulties in certain locations, we 22 have offered hiring bonuses. And back in</p>

<p style="text-align: right;">Page 1571</p> <p>1 2018, we had hiring bonuses for TE&Y 2 employees in eleven of our crew hubs. I 3 don't know if you recall, but it was 4 pretty hard to hire a diesel mechanic in 5 Kansas City back in that same timeframe. 6 So we were offering hiring incentives for 7 those types of skill sets to attract them 8 into our workforce. 9 Currently, we're using some 10 different flavors of hiring incentives 11 that you see there on the screen. And in 12 addition to a straight-up hiring bonus in 13 certain locations, we're offering travel 14 relocation allowances for relocations over 15 three hundred miles. We're also offering 16 in certain of the red hubs, relocation -- 17 additional relocation allowances for 18 current employees who choose to move from 19 the green dots to the red dot. And for 20 our employees that are currently in the 21 training pipeline, we offer an in-training 22 transfer bonus, for moves from the green</p>	<p style="text-align: right;">Page 1572</p> <p>1 to the red hubs. 2 We really rely on these localized 3 incentives, and they give us the 4 flexibility to really address the unique 5 local factors that -- in those hiring 6 markets. A system-wide general wage 7 increase across -- across all of our 8 employee base is really not the 9 appropriate way to address our current 10 hiring challenges. 11 MR. DAVID: I'm going to turn now 12 quickly to the quit rate data. 13 I think, you know, we presented 14 some pretty systematic data about quit 15 rates and about reasons for quitting, 16 showing that compensation was not a 17 primary driver. I do -- I think I 18 characterize some of the Union data on 19 this as anecdotal and I -- I think there 20 was a response that they did have some -- 21 some exit or survey type data. So I'll 22 just reiterate the point. I mean, there</p>
<p style="text-align: right;">Page 1573</p> <p>1 -- there are -- in the in the STD filings, 2 for example, there are significant numbers 3 of -- of letters from people describing 4 their experiences and their reasons for 5 quitting. But I'll just make the case 6 that these are illustrative and perhaps, 7 provide some useful information. But they 8 don't allow you to make really generalized 9 conclusions about what's going on from 10 just a few examples. 11 I did look at some of what appeared 12 to be some, some exit type survey data 13 that was included. And I'll just observe 14 that. So for example, there was a set of 15 twenty-eight responses from CSX; one of 16 them suggested pay as the primary reason 17 for leaving. There's a set of twenty from 18 CN; none of them indicated pay as a reason 19 for leaving. There was a set of 102 from 20 BNSF; thirteen of those mentioned pay as a 21 reason for leaving. And these, these are 22 pulled from the -- the Union provided data</p>	<p style="text-align: right;">Page 1574</p> <p>1 about reasons that their members gave for 2 leaving. 3 And I'll just make the point, I 4 still think that the data we presented is 5 more systematic, showing that compensation 6 is not a primary driver. But even if you 7 look at the data that are provided, 8 there's still no evidence establishing 9 compensation is the primary driver of -- 10 of quits. 11 One of the related questions was 12 looking at the acceptance of recall from 13 furlough. And so I wanted to give a 14 little bit of data related to that. So, 15 you know, in my view, a return from 16 furlough is a fundamentally different 17 phenomenon from -- from quitting your 18 active job. But still, we requested from 19 the Carriers to see the acceptance rate of 20 these requests. And this chart, what the 21 responses that we got, you'll see, it was 22 difficult to draw a specific trend or</p>

<p style="text-align: right;">Page 1575</p> <p>1 conclusion, we received the data across 2 some different sorts of timeframes. But 3 these are the -- the acceptance rates of 4 return requests. 5 And so just some observations that 6 I make looking at this, for example, when 7 I look at the BNSF, which has the -- the 8 longest timeframe to look at, I mean, it 9 may look like recent acceptance rates are 10 a bit low, relative to some others, but 11 they're higher than they were in 2018, for 12 example. When I look at the data that UP 13 provided, they provided it in a 14 pre-pandemic and post-pandemic range for 15 acceptance rates, and they're essentially 16 the same. Obviously, any data that are 17 provided for 2020 tend to be high, given 18 the unique things going on during that 19 time period. 20 Without a clear benchmark for 21 what's a good acceptance rate, I'll just 22 -- I'll observe two things. One, from my</p>	<p style="text-align: right;">Page 1576</p> <p>1 perspective, the -- the idea that, really, 2 something close to half, accept to recall 3 after some timeframe is sort of remarkable 4 after the organization has laid them off 5 and -- and they've had some time to do 6 some other things. But related to that, 7 what we really see when we look at these 8 data is that the biggest predictor of 9 whether somebody accepts this request or 10 not, is how long they've been out; is the 11 duration for that. 12 And so, again, I'm going to Ask the 13 Carriers to provide a little bit of 14 context around -- around that duration 15 issue. 16 MS. HAMANN: So, at Union Pacific, 17 as you can see, our expand -- our current 18 experience post-pandemic, in terms of 19 recall from furloughs, it's not all that 20 different from the pre-pandemic 21 experience. This is just one of the data 22 points that we look at that makes us</p>
<p style="text-align: right;">Page 1577</p> <p>1 believe that the railroad jobs that we're 2 offering are not -- are not necessarily 3 less desirable. 4 MS. CARTER: And to further 5 elaborate an example of what David's point 6 on average time amount of time on 7 furlough, when you see that, that you get 8 past that two-year mark, and you're -- 9 you're less likely to return. So in 2022, 10 we've called back over a thousand TY&E 11 workers. And you can see, you know, based 12 on how long they had been on furlough 13 really impacts the acceptance rate. So 14 much less likely to return after being 15 furloughed for two years; highly likely to 16 return in that under two-year mark. 17 DR. ALLEN: One of the other issues 18 that was raised was the idea that -- that 19 the rural workers are now retiring 20 mid-career in very large numbers. So 21 requested some data, this chart presents 22 the average tenure of the workers who have</p>	<p style="text-align: right;">Page 1578</p> <p>1 retired at the time of retirement over 2 this time period. 3 And in the interest of time, I'll 4 just say, in every case, there -- it's 5 twenty-seven years or higher, even in the 6 most recent period. And -- and I don't 7 think that most people will consider an 8 average tenure of twenty-seven years to be 9 mid-career. So I don't think there's any 10 evidence supporting that contention. 11 And again, turn to the Carriers for 12 a little bit of context. 13 MS. CARTER: I won't say we talked 14 about, you know, looking at the full total 15 reward of the compensation and benefit 16 package. One of the things that makes 17 railroad job so attractive is our 18 retirement incentive. 19 And I know a lot of you are 20 probably familiar with it but just as a 21 reminder, much like Social Security, you 22 know, it's a lifetime monthly benefit for</p>

<p style="text-align: right;">Page 1579</p> <p>1 both the employee and the spouse, but 2 generally at higher rates than what the 3 Social Security system is going to pay 4 out, so you can retire at thirty years of 5 age or sixty-two. 6 And there's those joining there -- 7 the railroad later in career, we're seeing 8 that they reach that age of service before 9 their thirty years of service -- that they 10 reach the age of sixty-two before the 11 thirty years of service, I'm sorry. So 12 that monthly annuity can range for, you 13 know, about \$3,000 a month for an employee 14 that is at age sixty-two with twenty years 15 of service to, you know, about 4,500 for 16 an employee with thirty years of -- years 17 of service. And this remains to be a very 18 attractive part of our benefits program. 19 DR. ALLEN: And then I'll just 20 close by saying, I think I mentioned on -- 21 on Monday that in my opinion that this, 22 what people are calling the great</p>	<p style="text-align: right;">Page 1580</p> <p>1 resignation, is likely to slow soon. And 2 this is an article that came out yesterday 3 in Bloomberg by Randstad, which is a very 4 large recruiting firm, and you can just 5 see from the title that their data are 6 [sic] suggesting to them that the great 7 resignation is slowing and that a large 8 number of workers who left are now 9 reconsidering whether that was the right 10 move, and -- and in fact, some going back 11 to their -- their prior employers. 12 And then, of course, we know what 13 happened with the rising interest rates, 14 which often, when that happens, in order 15 to -- in order to cool down the economy 16 that often is -- is related down the road 17 to a slowdown in in job moves. 18 And I believe that is the extent of 19 our testimony. Thank you. 20 CHAIRMAN JAFFE: Thank you very 21 much. 22 I've just got a couple to clarify,</p>
<p style="text-align: right;">Page 1581</p> <p>1 if I may. 2 With respect to the hiring 3 incentives or bonuses, what percentage of 4 the overall jobs that you were seeking to 5 fill did you apply bonuses in say 2022? 6 MS. HAMANN: That's a good 7 question. I -- we didn't look at that 8 data, but I can get you that data point. 9 MS. CARTER: Same -- same thing for 10 BNSF. 11 CHAIRMAN JAFFE: Did you tailor the 12 amount of the bonus, as well, based on the 13 individual market conditions, or was it 14 simply an up or down on bonus once you 15 decided that you needed it in order to 16 attract the appropriate candidates? 17 MS. CARTER: You know, are purchase 18 is kind of like ice cream each -- each 19 flavor is worth a certain amount. For 20 certain markets we've layered multiple 21 types of incentives. So, in some of our 22 really hard to fill locations, in those</p>	<p style="text-align: right;">Page 1582</p> <p>1 bigger red dots, we're offering both the 2 travel allowance and the relocation bonus 3 on top of that. So. 4 MS. CARTER: And it's the same in 5 BNSF. It depends on the competitive 6 nature of what's being offered in the 7 market. So all of our cash incentives are 8 not the same. 9 CHAIRMAN JAFFE: And did either of 10 the Carriers decide to eliminate the entry 11 level hiring rate and just simply go to 12 full job rate as part of the incentives to 13 get people on board? 14 MS. HAMANN: Union Pacific has not 15 done that. 16 CHAIRMAN JAFFE: Did not. 17 MS. CARTER: And neither has BNSF. 18 CHAIRMAN JAFFE: Okay. 19 BOARD MEMBER DEINHARDT: Let me add 20 something. 21 So is it your testimony that the 22 uploaded testimony from some of the STB</p>

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1 hearings, from some of the Carrier CEOs
 2 acknowledging staffing shortages, that
 3 that testimony refers primarily to these
 4 localized challenges?
 5 **MS. HAMANN:** Yes.
 6 **BOARD MEMBER DEINHARDT:** And would
 7 you say that these localized challenges
 8 are more severe than they were five years
 9 ago; 10 years ago?
 10 **MS. HAMANN:** I'm not necessarily
 11 sure if that -- if that's something that I
 12 would say. I mean, it really does depend
 13 on the competitive dynamics in the labor
 14 markets. So I think it's -- it's --
 15 that's a harder question to answer without
 16 really digging into what was going on at
 17 the time.
 18 **BOARD MEMBER DEINHARDT:** Okay.
 19 Thank you.
 20 **CHAIRMAN JAFFE:** We're in great
 21 shape. Thank you all very much.
 22 **MR. MUNRO:** Mr. Chairman, we'll

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1 Duncan?
 2 THEREUPON:
 3 IAN DUNCAN
 4 was then duly sworn, and the proceeding
 5 continued as follows:
 6 **CHAIRMAN JAFFE:** Thank you.
 7 (Thereupon, the Court Reporter
 8 requested clarification.)
 9 **MR. EATON:** Good morning, Mr.
 10 Chairman, and members. I thought Don
 11 mentioned everybody, but he didn't say
 12 everything I was going to say. So if I
 13 could take a second, I'd appreciate it.
 14 **CHAIRMAN JAFFE:** Sure.
 15 (Thereupon, the Court Reporter
 16 requested clarification.)
 17 **MR. EATON:** Miguel Eaton from Jones
 18 Day. We're going to present the Carrier's
 19 rebuttal for health and welfare.
 20 As Don mentioned, you have two
 21 witnesses that we heard from before David
 22 Scofield and Dana Goldman. We have two

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1 just take a moment to swap out our panels.
 2 We now have our health care team coming
 3 online.
 4 We're going to hear again from Dana
 5 Goldman, who you heard from on Tuesday, as
 6 well as Mr. Scofield, who also testified.
 7 And I do have an additional expert witness
 8 since we do have a never-ending supply.
 9 So, Dr. Ian Duncan, who was the author
 10 with -- the co-author with Mr. Scofield of
 11 one of our reports. So, we will need to
 12 swear Mr. Duncan, in as well.
 13 **CHAIRMAN JAFFE:** Thank you very
 14 much.
 15 **MR. MUNRO:** And I am also joined by
 16 my partner, Miguel Eaton, who is going to
 17 be assisting with the panel.
 18 Did I -- did I miss someone?
 19 (Thereupon, off the record
 20 clarification was made by Counsel.)
 21 **CHAIRMAN JAFFE:** May I ask the
 22 Court Reporter to please swear in Dr.

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1 new ones.
 2 Ian Duncan. Dr. Duncan is a Fellow
 3 in the Society of Actuaries and a
 4 Professor at UC Santa Barbara. Pertinent
 5 here, he's a preeminent Healthcare
 6 Actuary. Indeed, there are a few
 7 textbooks that are required reading for
 8 healthcare actuaries; he's authored two of
 9 those.
 10 Dr. Duncan will address some of the
 11 points raised by the Unions and Cheiron
 12 regarding actuarial value, cost trend, and
 13 benchmarking.
 14 Our other new witnesses is Maral
 15 DerSarkissian. Dr. DerSarkissian is an
 16 Epidemiologist and a Professor at UCLA's
 17 Fielding School of Public Health and a
 18 Vice President of the Analysis Group.
 19 She's an expert in epidemiologic
 20 methodology and application of modern
 21 methods to observational health data.
 22 She will address the studies in the

<p style="text-align: right;">Page 1587</p> <p>1 Union's papers about working conditions 2 and the impact on Union health. Her 3 written work with submitted; Carrier's 4 Exhibit 9. 5 Also joining them is Mr. Branon. 6 He may have a few points to chime in on. 7 CHAIRMAN JAFFE: Thank you, Mr. 8 Eaton. 9 And I don't think that Dr. 10 DerSarkissian was identified as new 11 before, although we saw her up there. May 12 -- may the Court Reporter please swear her 13 in as well so that they can present 14 somewhat seamlessly among the various 15 people. 16 THEREUPON: 17 MARAL DERSARKISSIAN 18 was then duly sworn, and the proceeding 19 continued as follows: 20 CHAIRMAN JAFFE: Okay. At your 21 convenience. 22</p>	<p style="text-align: right;">Page 1588</p> <p>1 THEREUPON: 2 IAN DUNCAN 3 was called for examination, and, having 4 been previously duly sworn, testified as 5 follows: 6 DR. DUNCAN: Good morning, Mr. 7 Chairman, members, the Board. My name is 8 Ian Duncan. They're two important 9 measures that health actuaries track on a 10 regular basis and use for manage -- 11 managing and monitoring health care plans. 12 The first of these is cost per employee 13 per year. And the second of them is 14 healthcare cost trend. Cheiron has put in 15 front of us total, cost measures. And 16 indeed they're correct. 17 Total cost has been -- has been 18 decreasing over the last few years from 19 2015 to '21. Total costs reduced by 6.8 20 percent. But this is largely due to a 21 reduction in headcount. Headcount over 22 the same period has fallen by 32.5</p>
<p style="text-align: right;">Page 1589</p> <p>1 percent. So really, looking at total cost 2 is not the way that actuaries and plan 3 managers look at the management of health 4 care costs and health care plans. We look 5 instead at cost per employee per year. 6 And here you can see cost per 7 employee per year in 2016 compared with 8 2023. The number in the side for 2016 is 9 incorrect, the number should be \$18,311 in 10 total. In 2023, it is projected to rise 11 to \$25,397. You can see the -- assuming 12 that the member contribution stays the 13 same, at \$2,747, the balance of the costs 14 of the health plan is paid for by the 15 employers. \$15,564 rising to \$22,651. In 16 total costs will go up by 4.8 percent per 17 year -- projected to go up by 4.8 percent 18 per year. But because of the leveraging 19 of the fixed employee contribution, at 20 \$2,747, the actual cost faced by the 21 employer in this case increases by five 22 and a half percent per year. That is the</p>	<p style="text-align: right;">Page 1590</p> <p>1 effective healthcare trend. 2 So, I said the first item that -- 3 that we monitor as actuaries in looking at 4 health plan costs and health care -- 5 health plan cost increases is total cost. 6 And here, we have a total cost of \$25,397 7 projected for 2023. This is a very rich 8 plan. And if you look at the way that 9 CMS, with the Affordable Care Act, defines 10 health care plan values, actuarial value, 11 this would be considered to be a platinum 12 plan. And indeed, it would be considered 13 to be a platinum plan at the top of the 14 range of platinum plans. 15 We also compare total healthcare 16 costs to those of different peer groups. 17 And the Carriers have put out two 18 important comparisons here. One of them 19 is to union plans. And you can see that 20 this is a 2021 number, \$17,219, compares 21 with \$13,644 for a basket of union plans, 22 and \$10,443 for the broad base of all</p>

<p style="text-align: right;">Page 1591</p> <p>1 national plans that we've compared to. So 2 the railroad plan comes in at about 3 twenty-six percent higher than union plans 4 and sixty percent higher than comparable 5 national plans. 6 Cheiron has taken some time and 7 effort to talk about benchmarking and the 8 kinds of surveys that they recommend for 9 benchmarking. The Carrier benchmarks 10 consist of a broad-based range of 11 different surveys, Aon Hewitt, Bureau of 12 Labor Statistics, Gallagher, Kaiser Family 13 Foundation and so forth. What these 14 surveys have in common is that they're all 15 large surveys, have been conducted for a 16 number of years, are based on very large 17 numbers of employers throughout the 18 country, and what's more, they're 19 validated. The data has been checked over 20 years, so they are reliable. 21 One other point to make about the 22 surveys particularly on the Union-side,</p>	<p style="text-align: right;">Page 1592</p> <p>1 over on the right, in red, is that these 2 were repeatedly referenced during 3 negotiations by the Unions and recommended 4 by the Unions to be comparable -- 5 comparable surveys to compare to the 6 railroads. So, here we have a collection 7 of surveys that is large, that is 8 validated, and contains recommendations 9 from the Union. So, Cheiron's point about 10 the -- their hand-picked collection of 11 plans for commuter railroads, hand-picked 12 with employer offerings, lower wage 13 employees, mostly in large cities. 14 A convenient sample that's been 15 assembled just for this purpose, that 16 hasn't been validated against history or 17 against any other source, we submitted not 18 the appropriate way to compare to the -- 19 to compare the railroad plans. The 20 carrier plans are broad national surveys 21 contain -- contain comparable employers 22 suggested by the Unions, and they're</p>
<p style="text-align: right;">Page 1593</p> <p>1 validated. So we think that the -- if I 2 go back, quickly, two slides, we can 3 really take -- we're really confident in 4 this comparison here on the right. 5 One of the reasons for the union 6 plan being higher than the comparable 7 benchmarks, you can see over there on the 8 left. There's been some confusion about 9 the number of members per employee on the 10 railroad -- in the railroad plans. 11 Cheiron had a number yesterday of about 12 3.5 percent, I believe, that that number 13 is incorrect because the denominator was 14 incorrect. The correct number is 3.25 15 percent. 16 So what we see here is a union 17 ratio of members to employee of about 18 fifty percent higher than the comparable 19 benchmark. And that's part of the reason 20 for those numbers over on the right being 21 higher than the comparable benchmarks. 22 The other reason being, of course, the</p>	<p style="text-align: right;">Page 1594</p> <p>1 simple actuarial value of the plans 2 themselves. So that takes care of the 3 first of the -- of the items that 4 actuaries track the total per employee per 5 year cost. 6 The second item that we track is 7 healthcare cost trend. Cost trend is not 8 medical inflation, medical inflation is a 9 component of cost trends, but the other 10 two important components are increases in 11 utilization of services and the 12 leveraging. We saw the effect of 13 leveraging in the previous slide. And you 14 can see here that over a long period, from 15 2007 to 2023, the effect of cost trends 16 just goes on inexorably. It never falls. 17 It does -- some of the numbers do decrease 18 temporarily because of new agreements that 19 have been reached. But the overall trend 20 is upwards. And the rate here goes up at 21 four percent per year without changes to 22 the underlying employee plan. That</p>

<p style="text-align: right;">Page 1595</p> <p>1 additional cost gets borne by the 2 employers. 3 You can see that even though the 4 average number of over time has been about 5 four percent, in the last few years, that 6 number has been accelerating. So the 7 trend is currently accelerating. Those -- 8 those bars at the end of the table. 9 So yesterday Cheiron, in their 10 presentation, make -- talked a lot about 11 the fact that healthcare is not an average 12 business. And we would agree with that. 13 What you see here, a trend is an average. 14 But within the employee plan, the railroad 15 employee plan. We've looked at the cost 16 sharing that is borne by the employees. 17 One of the things that we've seen 18 in 2021 numbers, the average out-of-pocket 19 payment of an employee with family is 20 about \$1,600. This is the sum of 21 co-payments, deductibles, cost sharing, 22 but not including the employee</p>	<p style="text-align: right;">Page 1596</p> <p>1 contribution. \$1,600. The median is 2 about \$1,100. And what this means is, 3 that for fifty percent of employees with 4 families, they paid less than or equal to 5 \$1,100 per year in cost sharing. 6 At the other end of the scale, 7 which Cheiron very much focused on 8 yesterday, if you look at the 99th 9 percentile of the distribution, the 10 average payment there by an employee with 11 family is about \$7,000. So if you add 12 \$7,000 to the employee contribution of 13 \$2,700, you're slightly -- you're just 14 about \$10,000 in total. And what this 15 means is that about one percent of all 16 employees bear a cost in excess of \$10,000 17 per year. 18 Now, Cheiron yesterday, made a big 19 deal about the Armstrong family, the 20 Armstrong family has more afflictions than 21 Joe. They have hip replacement, Lyme 22 disease, mental health, and so on. But if</p>
<p style="text-align: right;">Page 1597</p> <p>1 you look at the -- at the incidence of 2 these particular conditions, in a year, in 3 a population, the number works out to be 4 about three per one hundred million life 5 years. 6 So what Cheiron is trying to do 7 with their presentation is get us to focus 8 on the extreme number at the end of the 9 distribution. And I would suggest that 10 what we should look at is more what occurs 11 over the broad range of the distribution. 12 And from the numbers that I presented 13 earlier, in terms of the mean and the 14 median, the plan is satisfactorily 15 providing high value to the bulk of the 16 employees. 17 And that brings us to the last 18 point which is actuarial value. Actuarial 19 value was something that we thought about 20 a lot as healthcare actuaries, but we just 21 didn't call it actuarial value until the 22 term was defined by the Affordable Care</p>	<p style="text-align: right;">Page 1598</p> <p>1 Act in 2010. And what this basically is 2 saying is, the actuarial value of the plan 3 is the portion of total allowed charges 4 that the plan sponsor is paying. 5 And Cheiron misleads us, I think, 6 to some degree, by subtracting from the 7 allowed charges, coordination of benefits 8 and -- and drug rebate numbers, which is 9 fine, they can certainly do that, but 10 doesn't produce a comparable statistic to 11 actuarial value. 12 What we have here is a rich plan 13 with an actuarial value that is at the top 14 end of the Affordable Care Act Platinum 15 Plan range, and without any changes to the 16 plan within a couple of years will exceed 17 the top end of the Affordable Care Act 18 Platinum range. 19 With that, I'll turn it over to Dr. 20 Gordon. 21 22</p>

<p style="text-align: right;">Page 1599</p> <p>1 THEREUPON:</p> <p>2 DANA GOLDMAN</p> <p>3 was called for examination, and, having</p> <p>4 been previously duly sworn, testified as</p> <p>5 follows:</p> <p>6 DR. GOLDMAN: Thank you.</p> <p>7 Dana Goldman, thank you very much.</p> <p>8 There, as Professor Duncan noted,</p> <p>9 there is an inexorable trend in increasing</p> <p>10 health care costs and we've argued that</p> <p>11 cost sharing is admittedly blunt, but an</p> <p>12 important tool in lowering healthcare</p> <p>13 utilization. And the real question is</p> <p>14 whether it has adverse consequences on the</p> <p>15 railroad population health.</p> <p>16 I -- there were some exhibits that</p> <p>17 were presented by the Union, and they were</p> <p>18 not discussed. But I think it's important</p> <p>19 to look at this evidence because the</p> <p>20 question came up from the Board about how</p> <p>21 can we assess the relevance. So, they've</p> <p>22 selected a few studies, and I'd like to</p>	<p style="text-align: right;">Page 1600</p> <p>1 discuss the ones that they've selected.</p> <p>2 They -- in addition, they presented</p> <p>3 a statement from Professors Brot-Goldberg</p> <p>4 and Kolstad. I think it's important to</p> <p>5 look at the data they used to undergird</p> <p>6 what they're doing. They examined a</p> <p>7 company that went from free care to</p> <p>8 imposing a High Deductible Health Plan,</p> <p>9 and by high deductible, we're talking</p> <p>10 about something that's four hundred</p> <p>11 percent larger than the current benefit</p> <p>12 designed for the railroad population, an</p> <p>13 OOP max that sixty-two percent higher,</p> <p>14 and, importantly, prescription drugs</p> <p>15 spending is subject to the deductible.</p> <p>16 And so, on Tuesday, I used the</p> <p>17 analogy of going from zero to a hundred.</p> <p>18 This would be my example of going from</p> <p>19 zero to a hundred; you went from free care</p> <p>20 to a plan with an actuarial value of</p> <p>21 seventy-eight percent. The current</p> <p>22 benefits designed for the railroad</p>
<p style="text-align: right;">Page 1601</p> <p>1 population is a ninety-two percent</p> <p>2 actuarial value. But even with that</p> <p>3 design, if you look at their paper</p> <p>4 carefully, they don't address the impact</p> <p>5 on health outcomes. In fact, I've argued</p> <p>6 that hospitalization is an important</p> <p>7 measure here, and if you look,</p> <p>8 hospitalizations went down nine percent,</p> <p>9 even in the high deductible plan, and so</p> <p>10 they conclude, in their working paper,</p> <p>11 though quite different in terms of</p> <p>12 context, that these results mirror those</p> <p>13 found in the RAND HIE, in the sense that</p> <p>14 consumers reduce quantities across the</p> <p>15 range of medical services in response to</p> <p>16 high-cost sharing.</p> <p>17 The second study, on that side, is</p> <p>18 the study by Chaudhry, et al (ph.),</p> <p>19 published in the New England Journal of</p> <p>20 Medicine, one of the premier medical</p> <p>21 journals, it was a randomized study where</p> <p>22 they took people in plans, who -- and they</p>	<p style="text-align: right;">Page 1602</p> <p>1 examined people who had had a heart</p> <p>2 attack. So after myocardial infarction.</p> <p>3 One of the points I've made is we need to</p> <p>4 look at the vulnerable populations.</p> <p>5 But it's important to understand</p> <p>6 that the plans they looked at were more</p> <p>7 generous than the railroad when you look</p> <p>8 at some of the key drugs. The railroad</p> <p>9 co-payment is \$10; in the plans that</p> <p>10 Chaudhry et al. looked at, they were \$25</p> <p>11 per prescription.</p> <p>12 And what they did is they said</p> <p>13 we're going to completely eliminate that</p> <p>14 \$25 on average co-payment, and what they</p> <p>15 saw as an improvement in adherence by</p> <p>16 around five percentage points. But if you</p> <p>17 look at that study, they did not find</p> <p>18 significant reductions in major</p> <p>19 cardiovascular events or</p> <p>20 revascularization.</p> <p>21 In other words, were people ending</p> <p>22 up back in the hospital as a result of</p>

<p style="text-align: right;">Page 1603</p> <p>1 this. And in fact, what they say is, we 2 did not significantly reduce rates of the 3 trials primary outcome. 4 And so the important point and is 5 that benefit design is a useful tool, we 6 want to guard against reducing adherence 7 and the like. But it is very difficult to 8 find evidence of general impact on health 9 populations. And so they also, in their 10 materials, they cite two other studies, 11 and one of them is Miller, et al (ph.). 12 And what that study said is that 13 when you take people who are uninsured, 14 and you give them Medicaid, you can 15 actually reduce mortality. Very important 16 for public policy. But Medicaid is not a 17 very generous plan. And indeed, Medicaid, 18 even though it's free care, has tremendous 19 access problems. And I don't think anyone 20 is arguing that we're trying to mimic 21 Medicaid for this population. 22 And so a more relevant study here</p>	<p style="text-align: right;">Page 1604</p> <p>1 is they've cited golden at all, and the 2 Goldman, et al (ph.) plan. What they did 3 is they encouraged people to sign up for 4 ACA plans, and they did that through a 5 letter from the IRS, that's a 6 quasi-randomization of very good design. 7 But remember, the modal plan in the ACA is 8 a silver plan with an actuarial value of 9 seventy percent. 10 And what they found is that it 11 actually can improve mortality, but again, 12 if anything, this strengthens something I 13 said to you on Tuesday, which is that the 14 evidence shows that even in the range of 15 an actuarial value of seventy percent to 16 eighty percent, you can actually -- it 17 improves health. And this does not speak 18 to the effects the health 19 -- the adverse health effects of moving 20 from ninety-two percent actuarial value to 21 eighty-eight percent actuarial value. 22 And I would argue that the most</p>
<p style="text-align: right;">Page 1605</p> <p>1 important point here is something that, 2 you know, the author, the principal 3 investigator of the RAND Health Insurance 4 Experiment, Joe Newhouse, has articulated 5 this himself as well. Yes, medical 6 technology has changed over time, we 7 really need to monitor how changes in plan 8 design are affecting populations today, 9 and in particular, how treatment of 10 chronic illness and some other markers. 11 And actually, they've taken the 12 Newhouse remarks out of context, and -- 13 because what he says is, we need to 14 monitor things like hospitalizations, ER 15 use, and prescription drug use, and that's 16 exactly in the materials that I presented 17 you looking at the benefit design changes 18 in the railroad population. 19 I think that's -- yes. 20 Thank you. 21 CHAIRMAN JAFFE: Thank you. 22</p>	<p style="text-align: right;">Page 1606</p> <p>1 THEREUPON: 2 MARAL DERSARKISSIAN 3 was called for examination, and, having 4 been previously duly sworn, testified as 5 follows: 6 DR. DERSARKISSIAN: Thank you. My 7 name is Maral DerSarkissian. I was asked 8 to review and evaluate methods and 9 findings from three studies sponsored by 10 the BMWED in order to determine whether 11 they could be relied upon for valid causal 12 inferences regarding work related health 13 outcomes of its members. 14 The three cities are listed on the 15 slide. The first was by Goldsmith and 16 Bartlett, the second by Landsbergis, et al 17 (ph.), the third by Rutenberg. Based on 18 my review of the studies, I found that all 19 three studies suffered from fundamental, 20 methodological flaws, both in study design 21 and in statistical analyses, that rendered 22 the findings and conclusions of the</p>

<p style="text-align: right;">Page 1607</p> <p>1 authors unreliable and invalid. As a 2 result, the findings cannot be used to 3 support causal inference regarding the 4 relationship between work and health 5 outcomes of MOW workers. 6 So there are a great deal of detail 7 in the subsequent slides about my 8 criticisms of these studies. And these 9 are discussed in the exhibit that I 10 submitted. 11 What I'd like to do now is just 12 briefly highlight three of the main biases 13 that impact the three studies and call 14 into question the validity of drawing 15 causal inferences from the studies about 16 the exposures and outcomes that were 17 assessed. 18 The first is selection bias. So 19 all three studies relied on a survey, the 20 BMWED survey, that had a very low response 21 rate of twelve and a half percent, which 22 points to a high likelihood of selection</p>	<p style="text-align: right;">Page 1608</p> <p>1 bias. 2 So selection bias refers to a 3 phenomenon that occurs when individuals or 4 groups that are included in a study sample 5 differ systematically from the target 6 population of interest, the population to 7 which inferences are being drawn and 8 conclusions are being made. And this 9 leads to systematic errors in the 10 associations that are estimated or the -- 11 the outcomes that are analyzed. 12 The second is recall bias. And 13 this occurs when study participants are 14 systematically more or less likely to 15 recall or report information about their 16 exposures based on the outcomes that they 17 experience, or about their outcomes based 18 on the exposures that they experience. 19 And this can lead to biases and invalid 20 associations, incorrect associations, 21 being estimated from data that is impacted 22 by -- by recall bias.</p>
<p style="text-align: right;">Page 1609</p> <p>1 And the third is confounding. And 2 this refers to a phenomenon where there's 3 lack of comparability between an exposed 4 and an unexposed population. So an index 5 population, in this case it would be the 6 BMWED population, and comparator 7 populations. Generally, the authors of 8 these studies compared to a US adult male 9 population. And so, lack of comparability 10 between the index in the comparator group 11 with the exposed and unexposed group 12 arises because the experience of the 13 exposed group differs from that in the 14 actual unexposed group in the absence of 15 exposure, meaning, lifestyle. 16 There's risk differences in 17 lifestyle risk factors that independently 18 affect the outcomes that affect the risk 19 of mortality or the diseases under study 20 are -- are differentially distributed 21 between the two groups. And therefore, in 22 the absence of exposure, these other</p>	<p style="text-align: right;">Page 1610</p> <p>1 independent risk factors would lead to 2 differences in this -- differences between 3 the populations that would bias the 4 associations that are being estimated. 5 So given these three biases, which 6 impacts the three studies that were 7 discussed, that were published by the -- 8 that were sponsored by the BMWED, it is 9 invalid to draw causal inferences 10 regarding MOW work exposures, and the 11 outcomes that were reported. 12 Thank you. 13 CHAIRMAN JAFFE: One quick 14 question, if I may. 15 DR. DERSARKISSIAN: Yes, sir. 16 CHAIRMAN JAFFE: You said the 17 studies that were sponsored by the BMWED. 18 Did you mean just simply offered in this 19 proceeding? Or did you mean, actually 20 paid for, and commissioned by? 21 DR. DERSARKISSIAN: My 22 understanding is they were sponsored by</p>

<p style="text-align: right;">Page 1611</p> <p>1 the -- the BMWED. And they were published 2 in peer-reviewed journals prior to this 3 proceeding. 4 CHAIRMAN JAFFE: I apologize. I'm 5 still not certain of what this answer 6 says. 7 Is sponsored meaning simply offered 8 here or mean sponsored mean, kind of like 9 the criticism of one or more studies we 10 heard earlier, that said it was industry 11 sponsored? That industry paid for that. 12 DR. DERSARKISSIAN: That's right. 13 That's right. It's the -- the authors 14 were paid for -- 15 CHAIRMAN JAFFE: Fair enough 16 DR. DERSARKISSIAN: -- paid by the 17 BMWED. 18 CHAIRMAN JAFFE: That's all I was 19 trying to do was understand. 20 Thank you. 21 DR. DERSARKISSIAN: Sure. 22</p>	<p style="text-align: right;">Page 1612</p> <p>1 THEREUPON: 2 DAVID SCOFIELD 3 was called for examination, and, having 4 been previously duly sworn, testified as 5 follows: 6 MR. SCHOFIELD: Good morning, Mr. 7 Chairman, members of the Board. I'm happy 8 to be here with you again today. 9 So I'm going to talk about the 10 Carriers proposal again and try to clear 11 up any confusion that Cheiron has about 12 what the Carriers are proposing. 13 First, I want to make a couple of 14 comments, as Cheiron had stated that the 15 Carriers and I had misrepresented or 16 misinterpreted the Union's position, up 17 until last week, on what were valid 18 benchmarks for the purpose of assessing 19 the Carrier's national plan. 20 So we -- I'm going to -- well -- 21 okay. 22 So, this page is a page from a</p>
<p style="text-align: right;">Page 1613</p> <p>1 presentation was done on January 17th, 2 about six months ago, and we independently 3 verified this information. But this is 4 from a presentation done by a -- a 5 consultant for the labor organizations. 6 This slide, if you can see the -- 7 this font, the small font here, this -- 8 the top rectangle shows the actuarial 9 value that was suggested for a -- first a 10 survey of union employees -- plans for 11 union employees on the left and then a 12 smaller subset of that union group for 13 transportation workers. 14 So the broader union benchmark was 15 presented as 86.5 percent, as we had 16 highlighted quite extensively in -- in 17 some of our materials. And then the other 18 benchmark of 87.9 percent, I mentioned on 19 Monday as being the other -- the other 20 benchmark that was presented. But they 21 described this as being inappropriate and 22 a good benchmark for the purpose of</p>	<p style="text-align: right;">Page 1614</p> <p>1 comparing the railroad's plan to it. I 2 would characterize this as really not a 3 misinterpretation or misrepresentation. 4 Similarly, about two years ago, 5 this is from a presentation done by Mr. 6 Roth, October 1st, 2020. We've got two 7 red boxes around some items that cite 8 different surveys, but the important one 9 in my mind is the -- the large -- the 10 rectangular box at the top of the page. 11 This indicates a reference to the BLS 12 National Compensation Survey, a private 13 sector union workers results, and this, 14 you know, it was a couple years older 15 survey. But this is one of the surveys, 16 exactly, that we used in putting together 17 our employee contribution benchmark for 18 the purpose of comparing to plan costs for 19 employee contributions. 20 So again, I don't think we 21 misinterpreted or misrepresented this at 22 all or the Union's position prior to last</p>

<p style="text-align: right;">Page 1615</p> <p>1 week.</p> <p>2 So now you get into the Carrier</p> <p>3 proposals. Again, these are the proposals</p> <p>4 that were presented by Mr. Branon and</p> <p>5 myself. And I'll get into each aspect</p> <p>6 now.</p> <p>7 So, before we begin, I just want</p> <p>8 to, you know, make a couple of opening</p> <p>9 comments. Every proposal has a purpose.</p> <p>10 Every proposal has an alternative approach</p> <p>11 that -- that one could look to if one</p> <p>12 wanted to but could -- that could still</p> <p>13 achieve the set -- the same overall goal</p> <p>14 that the Carriers are seeking. Not a</p> <p>15 single proposal is unusual or outside of</p> <p>16 mainstream benefit practices in the US.</p> <p>17 The Carriers are not proposing a</p> <p>18 death spiral. The Carriers think pharmacy</p> <p>19 rules and the Opioid Management Program</p> <p>20 are good for the railroad population. And</p> <p>21 the Carriers know how outside care will</p> <p>22 work. And I will explain that further in</p>	<p style="text-align: right;">Page 1616</p> <p>1 a few minutes.</p> <p>2 So this was a -- the page that</p> <p>3 showed that eighty-eight percent AV plan</p> <p>4 design that we talked about on Monday, and</p> <p>5 that was included in the Carrier's</p> <p>6 submission. The note at the bottom, which</p> <p>7 is now highlighted, which is to say that</p> <p>8 the Carriers are generally amenable to</p> <p>9 different approaches to getting to an</p> <p>10 eighty-eight percent AV, I just want to</p> <p>11 expand on that just for a second.</p> <p>12 The levels that exist for all plans</p> <p>13 are just these four when it comes to</p> <p>14 determining an actuarial value, or a</p> <p>15 planned value, deductible, co-pay,</p> <p>16 co-insurance, out-of-pocket maximum. So</p> <p>17 these levels can --one can be reduced, one</p> <p>18 could be increased, such that, you know,</p> <p>19 you can get different designs that would</p> <p>20 settle on an eighty-eight percent</p> <p>21 actuarial value. So we -- the levels that</p> <p>22 we chose on the prior page certainly are</p>
<p style="text-align: right;">Page 1617</p> <p>1 not exclusive to getting -- getting to an</p> <p>2 eighty-eight percent AV, and, as I had</p> <p>3 mentioned, we have a sophisticated pricing</p> <p>4 model that could easily update any type of</p> <p>5 view of the design that one would want to</p> <p>6 look at.</p> <p>7 With regard to the employee</p> <p>8 contribution proposal, again, we view this</p> <p>9 as a pretty simple process, very similar</p> <p>10 to the way most employers would conduct</p> <p>11 their determination of employee</p> <p>12 contributions when preparing for open</p> <p>13 enrollment.</p> <p>14 Step one, as we had described, was</p> <p>15 -- make use of the fifteen percent</p> <p>16 historical formula. Again, that was --</p> <p>17 you add up the four different payment</p> <p>18 rates for medical, dental, vision, and</p> <p>19 life, take fifteen percent, and that's the</p> <p>20 contribution. And we had showed you the -</p> <p>21 - shown you the example of how you get to</p> <p>22 the \$228.89. We propose that that is now</p>	<p style="text-align: right;">Page 1618</p> <p>1 -- would be updated to be reflective of</p> <p>2 2023 costs.</p> <p>3 The second step would be to take</p> <p>4 that composite contribution and apply the</p> <p>5 carrying methodology. And as was being</p> <p>6 discussed yesterday, in some back and</p> <p>7 forth between the Board and Cheiron, it</p> <p>8 seems like, you know, a question was</p> <p>9 raised, are there alternatives to creating</p> <p>10 tiered contributions to what the Carriers</p> <p>11 have proposed, and there -- there</p> <p>12 certainly are, there's a -- any number of</p> <p>13 approaches.</p> <p>14 But just to remind the Board of</p> <p>15 what the proposal the Carriers have put</p> <p>16 out there is to develop a two-tier</p> <p>17 contributions, balancing to the fifteen</p> <p>18 percent total payment of the total payment</p> <p>19 rate composite. So after that is done,</p> <p>20 after you have the composite, we have our</p> <p>21 proposal, which is on the left, which is</p> <p>22 to fix the tier-one contribution at the</p>

<p style="text-align: right;">Page 1619</p> <p>1 \$228.89 and have the tier two contribution 2 be the balancing item. 3 What the Carriers were trying to do 4 with this is to have a gradual approach to 5 get to; eventually, the \$150 to \$200 range 6 of differential between tier one and tier 7 two that, we believe, is kind of the 8 standard in the market; for having the 9 extra coverage of a spouse be reflected in 10 the contributions. 11 So a different approach would be, 12 rather than, you know, a gradual approach 13 to that \$150 to \$200 range is to simply 14 take the differential and stick with it. 15 So, for instance, we were suggesting you 16 could pick \$150 or \$200 as the 17 differential and use that as the item that 18 you fixed. And then with the proportion 19 of the membership that's on tier one and 20 tier two, you could develop the specific 21 dollar amounts from there. 22 So this was the page that I had</p>	<p style="text-align: right;">Page 1620</p> <p>1 walked through with you on Monday, 2 developing the contributions for 2022, 3 '23, '24, and '25. By 2025, this shows a 4 contribution of something that's still 5 less than the \$150 to \$200 range that, you 6 know, we would -- we think we need to get 7 to in order to have a meaningful -- create 8 a meaningful incentive for spouses to 9 consider possibly enrolling in their own 10 health insurance rather than enrolling 11 into the Railroads' insurance plan. 12 Annual indexing. I think it got 13 described as a vague proposal that the 14 Carriers were making, but the proposal on 15 indexing is not vague at all, and it would 16 be specifically written into the 17 collective bargaining agreement and 18 defined. And the way we, the Carriers, 19 have defined that indexing proposal is to 20 increase the deductible and the 21 out-of-pocket maximum, by \$50 and \$500 22 respectively, each year and then have the</p>
<p style="text-align: right;">Page 1621</p> <p>1 other deductible and out-of-pocket 2 maximums increase in -- in proportion to 3 their relationship to the MMCP and network 4 levels. 5 This was exactly the approach that 6 was used by the parties at the -- for the 7 last two years of the last bargaining 8 round when initial changes went in, in 9 2018. And then we're increased, the 10 deductible and out-of-pocket, were 11 increased for 2019 to maintain a ninety 12 percent actuarial value, and then, 13 therefore, indexing for that final year; 14 that was how that was done in those years. 15 An alternative would be to, rather than 16 restrict yourself to the deductible and 17 out-of-pocket maximum, to increase, 18 slightly, the -- all the cost sharing 19 features, which would include the co-pay. 20 So you could say, what do we think the 21 trend is going be for next year and apply 22 a trend-like increase to the dollar</p>	<p style="text-align: right;">Page 1622</p> <p>1 amounts that are the deductible, co-pay, 2 and out-of-pocket maximum, and that would 3 be, you know, a more broad spread of that 4 indexing effect rather than just on the 5 deductible and the out-of-pocket max. 6 So there's quite a little -- quite 7 a lot of commentary on the pharmacy rules 8 and the character proposal to expand on 9 what is -- is now in place it -- and place 10 it with the plans. And there was a 11 comment. So first, there was a comment 12 made about the fox watching the henhouse, 13 and I just wanted to describe how these 14 rules come to be. 15 The ESI rules are clinically sound; 16 thoroughly vetted through their national 17 pharmacy and therapeutics committee, 18 consisting of fourteen independent 19 physicians and two independent pharmacists 20 from active community and academic 21 practice, an elected physician chairs the 22 committee, the PNC committee members are</p>

<p style="text-align: right;">Page 1623</p> <p>1 not employed by ESI and receive no 2 compensation from ESI. Therefore, what 3 they really are is a non-biased 4 organization making decisions based on 5 clinical evidence. 6 And to add to that PEB 243 found 7 and concluded that the concerns about 8 providing undue authority to PBMs are 9 unpersuasive, and then the report went on 10 further to acknowledge the internal 11 professional review committee in place to 12 hear member appeals. So I think that, you 13 know, our view is that, you know, there's 14 no -- no bias in the way that this UM 15 program puts drugs or drug classes into 16 these three different categories of rules, 17 and that it's an appropriate safeguard for 18 -- for the membership. And in particular, 19 we're talking about AOM, Advanced Opioid 20 Management, and our view, that it would be 21 a very beneficial program for the railroad 22 population, as well as any population.</p>	<p style="text-align: right;">Page 1624</p> <p>1 And it appeared to get some criticism. 2 But I think, you know, just to 3 summarize what it is, there's a prior 4 authorization process that members would 5 have to go through when they're first 6 prescribed opioids, there's a drug 7 quantity management maximum approved 8 amount, which would not allow someone 9 before the fifth prescription to have more 10 than seven days' supply because there's a 11 significant concern that dependency can 12 develop. And, you know, there was a point 13 about cancer treatments, this would in no 14 way inhibit a person with cancer, who's on 15 chemotherapy, it would not inhibit them 16 from getting them the medications they 17 need, that are prescribed by their doctor. 18 It would -- would certainly be authorized 19 for the higher, you know, amounts of 20 prescription fill that would be needed for 21 such a patient. 22 And the last comment, just about</p>
<p style="text-align: right;">Page 1625</p> <p>1 how labor and management, how you'd like 2 it to work in practice, but that it 3 doesn't. So Labor has resisted drug rules 4 back during -- to PEB 243. They've 5 resisted any expansion between that point 6 in time and now, and they continue to 7 resist now. So the suggestion that labor 8 and management could and should consider 9 these rules outside of this -- a process 10 like this and implement new rules on an 11 ongoing basis. That just doesn't happen 12 in practice. And that's why the Carriers 13 are asking the Board to -- to recommend 14 what the Carriers are proposing. 15 BOARD MEMBER DEINHARDT: Can I just 16 ask you a question about that before you 17 go on to a new topic? 18 So the Carrier's proposing that the 19 ESI do all of the rulemaking in this, the 20 utilization rules? 21 Yes, ma'am. 22 BOARD MEMBER DEINHARDT: Labor is</p>	<p style="text-align: right;">Page 1626</p> <p>1 proposing that it be left to the parties 2 to negotiate, I guess, as part of 3 bargaining, or in some other structure, 4 and you say that won't work because labor 5 is resisting these rules. 6 Do you see any other proposal other 7 than leaving it to complete collective 8 bargaining or giving it all over to ESI, 9 that would meet the Carrier's objectives? 10 MR. SCHOFIELD: Well, I do just 11 want to make a comment about the rules 12 that went into place back in 2012. 13 Those were put in place based on 14 the -- then at the time, the Medco 15 pharmacist who was working with the plans, 16 that individual recommended the rules that 17 we now have. So even at the -- at the 18 beginning, the plans were relying on the 19 advice from the pharmacy benefit manager 20 to put the rules in place that we have. 21 So I don't think that relying on ESI now 22 to do a similar process is -- is really</p>

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1 any different than that.
 2 And so, I mean, to answer your
 3 question, though, is there something
 4 that's in between? I think that it was
 5 suggested even by -- by the Cheiron folks
 6 yesterday that, you know, would you look
 7 to an independent organization to approve
 8 of the medications that would, you know,
 9 have additional rules. And I think that
 10 while that's possible, you know, might be
 11 unwieldy and make introduction of the
 12 rules take longer, the Carriers would just
 13 like to have the outcome be the important
 14 rules that are PBM thinks are appropriate
 15 for our population, just to roll them out
 16 as soon as -- as we can and not have this
 17 longer delay of, you know, this program,
 18 which is effectively guardrails to protect
 19 the members from getting in place.
 20 **BOARD MEMBER DEINHARDT:** Thank you.
 21 **CHAIRMAN JAFFE:** My piggyback on
 22 that question, if I may, and your answer.

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1 the proposal, at least as I understood it
 2 from the Carriers, would result in the
 3 creation of an additional tier, right, a
 4 specialty tier that doesn't exist
 5 currently. Is that correct?
 6 **MR. SCHOFIELD:** That's correct.
 7 **CHAIRMAN JAFFE:** Is there anything
 8 about utilization decisions on the part of
 9 the pharmacy benefit manager that would
 10 preclude the trustees from looking
 11 independently at not only what the tiers
 12 ought to be, but also what the amount of
 13 the co-pay ought to be?
 14 **MR. SCHOFIELD:** There's nothing
 15 about the pharmacy utilization management
 16 rules that dictates or even integrates
 17 with the co-pay plan designs. They're,
 18 they're independent.
 19 **CHAIRMAN JAFFE:** Got it
 20 **MR. SCHOFIELD:** Yes.
 21 **CHAIRMAN JAFFE:** So then one could
 22 adopt the program without necessarily

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1 **MR. SCHOFIELD:** Yes, sir.
 2 **CHAIRMAN JAFFE:** What would be the
 3 problem if the trustees simply addressed
 4 any significant change in the coverage of
 5 one or more important drugs? And in the
 6 event that they disagreed, take it to the
 7 deadlock neutral for a prompt
 8 determination?
 9 **MR. SCHOFIELD:** Yes, that process
 10 is certainly available.
 11 I would just add that my
 12 understanding of the way that process
 13 works is that it is not a fast process.
 14 It takes a while and takes a lot of
 15 resources to, you know, to put those
 16 arguments forward. So it would delay.
 17 But, I mean, you're right that that
 18 process is there. If -- if that was like
 19 the backstop that you had to rely on.
 20 **CHAIRMAN JAFFE:** And one more by
 21 way of the advanced utilization
 22 management, one of the things that's in

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1 adopting either the fourth tier, or if
 2 there is a fourth tier, the amount that
 3 that would be greater than the third tier?
 4 **MR. SCHOFIELD:** That's correct.
 5 That's correct --
 6 **CHAIRMAN JAFFE:** Fair enough.
 7 **MR. SCHOFIELD:** -- the difference
 8 in the co-pays would affect the actual
 9 value and other things --
 10 **CHAIRMAN JAFFE:** I understand.
 11 **MR. SCHOFIELD:** -- but would not
 12 interact at all with the utilization
 13 management rules.
 14 **CHAIRMAN JAFFE:** Thank you.
 15 **MR. SCHOFIELD:** Sure
 16 Decided care management program.
 17 This is just a replay of what that program
 18 is. It has two components a prior
 19 authorization component, and a co-pay
 20 differential component. You can see the
 21 co-pay differentials in the middle box,
 22 and then the exceptions that we had cited

<p style="text-align: right;">Page 1631</p> <p>1 for, an individual as either in-patient, 2 or in the emergency room, or if a member 3 did not have reasonable access in their 4 geographic area to a free-standing 5 facility. 6 And I think a suggestion was made 7 that, you know, United Healthcare is 8 confused; we don't know what we're 9 proposing. But that's not true. United 10 Healthcare is not confused about this. In 11 addition, and Highmark the other two 12 medical vendors, which would also be 13 responsible for administering the prior 14 authorization piece of this. They're not 15 confused either. They understand our 16 goal. The Carrier's goal is to put 17 information into the hands of the 18 membership through this prior 19 authorization process whereby, in order to 20 get approved, you know, for not having an 21 additional co-pay, you go through the -- 22 this prior authorization process. If</p>	<p style="text-align: right;">Page 1632</p> <p>1 there was not reasonable access to a 2 free-standing facility, that additional 3 co-pay wouldn't apply. 4 The Carriers acknowledge that this 5 approach is only common for very large, 6 sophisticated employers. And, you know, 7 we're very large, and we want to be 8 sophisticated too. And I -- this is an 9 approach that really, what it does is 10 recognize the existence of a problem, 11 which is we continue to have excessive 12 utilization in the outpatient hospital 13 setting, which, I believe, it's probably 14 more likely that the members don't realize 15 that they have an option that would be -- 16 would result in them having a greatly 17 reduced cost because they would, you know, 18 the -- the way, this service is. Their 19 cost sharing is determined based on 20 co-insurance. So to the extent that you 21 pay the, you know, the plan pays for lower 22 cost for a free-standing facility for a</p>
<p style="text-align: right;">Page 1633</p> <p>1 surgery than an outpatient hospital, the 2 membership, the members would pay, 3 correspondingly, much lower out-of-pocket 4 costs as well. And so the goal is for 5 tiers rather than additional co-pays. 6 CHAIRMAN JAFFE: I'm sorry, I 7 apologize, but I'm still a little 8 confused. 9 The approach that was advocated for 10 site of care management was to provide for 11 additional costs if a member or one of the 12 members family who is covered, opted for a 13 hospital, as opposed to the site of care, 14 clinic or otherwise, right? 15 MR. SCHOFIELD: That's correct, 16 provided that they had access -- 17 reasonable access to that in their 18 geographic area, 19 CHAIRMAN JAFFE: 20 If the goal was not the additional 21 co-pays but also to affect employee 22 selection as to where the particular item</p>	<p style="text-align: right;">Page 1634</p> <p>1 is -- medical services to occur, why not 2 simply reduce the existing co-pays that 3 would apply if it's in the hospital if the 4 member opts to have it done at the lower 5 cost site of care? 6 MR. SCHOFIELD: 7 Yes, that was not the Carrier's 8 proposal, but to the extent that you 9 structured it in a way that would create 10 the same incentive, I agree that that 11 could accomplish the goal. 12 CHAIRMAN JAFFE: Thank you. 13 MR. SCHOFIELD: So lastly, on the 14 fiduciary responsibility. 15 This was -- this slide was provided 16 to me by Counsel. And this wording comes 17 from a document that's on the Department 18 of Labor site, and you can see the quote 19 from Page 6, the employer should establish 20 a formal review process and follow it at 21 reasonable intervals to decide if it wants 22 to continue using the current service</p>

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1 provider or look for replacements.
 2 All we're suggesting is this, you
 3 know, basic suggestion of how plan
 4 management be conducted, and fiduciary
 5 responsibility be maintained, that -- the
 6 Carriers want to allow for this with the
 7 various health and welfare vendors that
 8 are offered under the plans.
 9 And thank you, that was my end of
 10 my prepared remarks.
 11 **CHAIRMAN JAFFE:** Thank you.
 12 **BOARD MEMBER DEINHARDT:**
 13 So this question about bidding,
 14 this is not a decision that can be made
 15 now by the trustees?
 16 **MR. SCHOFIELD:** I think that if the
 17 parties agreed to do this, you wouldn't
 18 need to have some adjustment to the -- to
 19 the plan, to the collective bargaining
 20 agreement. I think in practice, what I
 21 have observed, and I can only speak to
 22 that, that the parties have not agreed,

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1 **BOARD MEMBER DEINHARDT:** Thank you.
 2 **MR. SCHOFIELD:** You're welcome.
 3 **BOARD MEMBER DEINHARDT:** I'm in
 4 good shape.
 5 **CHAIRMAN JAFFE:** I'm in good shape
 6 as well. Thank you very much.
 7 **MR. SCHOFIELD:** Thank you very
 8 much.
 9 **MR. MUNRO:** Chairman, at this
 10 point, I would suggest a short break. I
 11 believe it's about five of ten. And in
 12 order to maintain my reputation for
 13 precision scheduled litigation, I would
 14 request that we have an actual
 15 fifteen-minute break as opposed to the
 16 labor relations fifteen.
 17 **CHAIRMAN JAFFE:** Fair enough.
 18 Off the record.
 19 (Thereupon, a brief recess was
 20 taken.)
 21 **CHAIRMAN JAFFE:** On the record,
 22 please.

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1 and so it, these kind of rebids do not
 2 occur. So -- and it's because there's
 3 resistance from the labor organizations.
 4 **BOARD MEMBER DEINHARDT:** And this
 5 is a type of disagreement that is not
 6 appropriate for the deadlock -- to
 7 deadlift neutral?
 8 **MR. SCHOFIELD:** It's my
 9 understanding that that is a matter of
 10 debate, but to the extent that it was
 11 subjected to that process, you know, the
 12 -- the only common idea is that, yes,
 13 that's an important process for the
 14 parties to have. But, you know, we found
 15 in practice, that it extends and delays
 16 any eventual, you know, potential outcome
 17 that would happen.
 18 So possibly it could work, but it
 19 would extend the timeframe and the
 20 resources that we needed, you know, to be
 21 expended to get through that process would
 22 be significant.

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1 **MR. MUNRO:** The Carriers are now
 2 going to move into their rebuttal case on
 3 work rules.
 4 We're going to start off with a
 5 brief presentation from Jeff Rodgers, who
 6 are -- who you already heard from. He's
 7 going to talk about proposal costing and
 8 bargaining aspects of work rules.
 9 We'll then move on to Matt Garlan
 10 and Sam Macedonio, also both witnesses we
 11 already heard from who are going to have
 12 some follow up on the topics they already
 13 discussed.
 14 And then we have a new witness on
 15 his panel, and that's Jeremy Moore. He's
 16 the Assistant Vice President of Labor
 17 Relations at Norfolk Southern. He's going
 18 to follow up a bit on Mr. Weaver's and Mr.
 19 Elium's testimony on some of the questions
 20 that were raised, and then he'll be
 21 addressing some of the craft-specific
 22 proposals where we haven't offered any

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1 evidence yet.

2 **CHAIRMAN JAFFE:** Thank you.

3 To get the swearing-in of the

4 witnesses out of the way, I'd like to

5 please remind those who testified

6 previously that they're still under oath.

7 And if I could ask the Court

8 Reporter to please administer the oath to

9 Mr. Moore.

10 THEREUPON:

11 JEREMY MOORE

12 was then duly sworn, and the proceeding

13 continued as follows:

14 **MR. RODGERS:** Morning.

15 **CHAIRMAN JAFFE:** Morning.

16 (Thereupon, the Court Reporter

17 requested clarification.)

18 THEREUPON:

19 JEFF RODGERS

20 was called for examination, and, having

21 been previously duly sworn, testified as

22 follows:

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1 information. And I agree with Tom, the

2 numbers are the numbers, but where we

3 disagree is the starting assumptions for

4 the aggregate cost. Now I will say it did

5 demonstrate the importance of having

6 meaningful dialogue between the parties

7 because afterwards, I believe we both made

8 changes to our assumptions.

9 Now as depicted on the slide, when

10 we were reviewing with SMART Mechanical

11 and BMW back in 2021, we had a difference

12 of \$383 million with this coalition. And

13 these categories, you can actually see,

14 our demonstrated in the waterfall chart on

15 this slide. At the time, now we only had

16 preliminary labor cost for 2020, so

17 keeping what we have done in modeling for

18 previous rounds, we would take the year

19 prior to the round's start and use that as

20 our base. Once we are actually able to

21 confirm that 2020 data, and, since there

22 was a significant difference, as Tom

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1 **MR. RODGERS:** This morning, I plan

2 to briefly review our costing model, and

3 then move on to the rebuttal for the

4 selected work rules that were discussed

5 this week.

6 But when we started this round,

7 there were a lot of considerations on the

8 table, you know, such as modernization of

9 work rules, quality of life for our

10 employees, and, of course, costing. And

11 in reviewing the costing models, it's

12 clear we have variances in the total

13 expenses from the Union's model. And I

14 want to address what is causing those

15 variances and the amount. As I stated on

16 Tuesday, we reviewed the costing models in

17 2021 with BMW and SMART Mechanical. Tom

18 Roth, Peter Kennedy, and Joe Fraley joined

19 the Union side, and Kiara Williams, our

20 Director of Finance and Economics, I

21 participated for the NRLC.

22 Now, it was a worthwhile exchange

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1 pointed out, we then updated our model to

2 reflect actual 2020 labor costs.

3 So, based on our calls, we updated

4 the headcount to reflect the change in

5 2021 and slowly adjusted back over the

6 next three years. This is just one

7 example of how our assumptions vary from

8 each other's models. Now, so as this

9 slide depicts, our incremental increase in

10 labor costs, it's for \$14.6 billion, and

11 the Union's model is \$10.6 billion. And

12 based on the costings included in our

13 submission, it clearly shows a \$4 billion

14 in aggregate costs. Now, I do believe the

15 details of the variances, or most of those

16 variances can easily be explained.

17 The \$4 billion dollars is shown on

18 here is basically in five essential main

19 points: paid leave, application DWIs, the

20 CSX, headcount variance, health and

21 welfare costing methodology, and the

22 craft-specific rules. Now, as we've done

<p style="text-align: right;">Page 1643</p> <p>1 in previous rounds, we did not apply a GWI 2 increase to paid leave and that accounts 3 for the lower cost of \$373 million from 4 what the Union model reflects. 5 For the next two categories, they 6 are part of what we consider wage 7 variances. The first being the 8 application of GWIs; the second CSX 9 headcount variants. Now, the application 10 that GWI increases on certain pay 11 categories, the difference is \$1.3 12 billion. And I want to explain how that 13 happens. You know, both sides do apply 14 wage increases differently. The Union 15 assumes twelve percent of the wages will 16 not be adjusted when there's an increase 17 to GWI. Our model is closer to one 18 percent, which you can see, there's a 19 significant Delta there. 20 It's my understanding and our 21 conversations with Tom that the Union's 22 model, it's comparing the second quarter</p>	<p style="text-align: right;">Page 1644</p> <p>1 of 2019 wages with the third quarter of 2 2019 wages, it subtracts out the three 3 percent GWI increase, and they say that 4 difference has to be what is not subject 5 to GWI increases. Well, by using, in my 6 opinion, such a small sample size, it 7 creates a flawed data point, since it 8 cannot compare the variability from 9 quarter to quarter on items such as 10 seasonal operations, overtime, headcount 11 variances, and other labor costs. 12 In comparison, when we did our 13 analysis, we serve a dollar spent by 14 classification of time codes and this is 15 the background of pay systems for pay 16 allocation. And we excluded nontaxable 17 payments to things like travel and meal 18 expenses. Now, the results for all 19 crafts, when this was done, is ninety- 20 nine percent of the codes -- pay codes 21 receive a GWI increase. And that's what 22 got back into our model.</p>
<p style="text-align: right;">Page 1645</p> <p>1 Now also, we include, in part of 2 that \$2 billion variance, the CSX TY&E 3 employees, and that accounts for \$738 4 million. The Union excluded them from 5 their model. Now, when we did our costing 6 exercise with Mr. Roth, it was only for 7 BMW back in '21, 2021, and SMART 8 Mechanical, and at the time, CSX, it still 9 is, was in for wages and work rules with 10 them. So we included them. In our 11 current model, we have CSX TY&E employees 12 in because they are now part of national 13 handling for wages and rules. 14 Now, additionally, we include the 15 increase and health and welfare benefits, 16 and that's a big number, it's \$1.6 17 billion, versus the \$25 million that the 18 Union states is because the benefits that 19 we see will rise and should be included in 20 the aggregate labor cost, it's part of the 21 costs. Now, he says that it's not 22 appropriate to include anything that's not</p>	<p style="text-align: right;">Page 1646</p> <p>1 covered in the new contract. Fair enough. 2 But our practice has been to include the 3 costs for extending the existing plan 4 benefits for the term of the new 5 agreement. So, I believe there's a basis 6 for including the increase in the benefits 7 in our costing. 8 And finally, the work rule 9 craft-specific proposal cost, as shown 10 here, is \$785 million dollars of the \$4 11 billion variance. And I understand that 12 Mr. Roth, he will include some of these, 13 but we haven't seen them yet. He also 14 stated he will adjust sick day based on 15 the assumptions that employees will not 16 use all of those days. Well, however, the 17 Union's proposal says they can carry an 18 unlimited amount over. So, per our 19 accounting practices, we booked the 20 liability of sick days, and we include 21 them in our cost. 22 Now, frankly, the issue is not</p>

<p style="text-align: right;">Page 1647</p> <p>1 really the difference in the math that we 2 talked about here, but the starting 3 assumptions both sides use, and how we 4 apply that. 5 Although our assumptions may differ 6 from Mr. Roth, no matter whose assumptions 7 you use, it's still a significant increase 8 in labor cost. 9 I want to thank you again for your 10 time and attention to this matter. Unless 11 there's any questions, I would like to 12 move on to discuss work rules. 13 CHAIRMAN JAFFE: We're in good 14 shape. 15 Thank you, Mr. Rodgers. 16 MR. RODGERS: All right, sir. 17 Over the past few days, you've been 18 hearing differing views from the parties 19 with respect to the bargaining record. 20 And frankly, I don't think it's really 21 worth the back and forth, debating the 22 amount of time that, frankly, is not</p>	<p style="text-align: right;">Page 1648</p> <p>1 productive. But I do say we do stand by 2 our time estimates. Instead, I want to 3 talk about the principles of bargaining 4 and how we applied them. 5 Now Passports have found that work 6 rules, they are far too complex to 7 implement without first being subjected to 8 the crucibles of good faith bargaining. 9 The Carrier's bargaining record, and as 10 you can see here, we have extensive and 11 indicate -- and indicative of good faith 12 bargaining. The stack of documents is 13 just what the Carriers gave to the Unions. 14 I also will note here that the Carrier 15 spent a considerable amount of time 16 bargaining over our proposed health and 17 welfare changes, which is also found in 18 the bargaining record. 19 It's been my experience, and Boards 20 have affirmed, that true bargaining 21 requires a give and take from the parties. 22 And additionally, there must be quid pro</p>
<p style="text-align: right;">Page 1649</p> <p>1 quos to ameliorate the tremendous monetary 2 costs that's associated with the requested 3 change. And we did that. The Carrier's 4 proposal for improved approach to job 5 assignments meets those requirements and 6 is an example of meaningful bargaining. 7 We provided detailed proposals to BLET and 8 SMART-TD with respect to our Section 6 9 Notice in February of 2020, October of 10 2020, and in the OPs Small Working Group, 11 and I agree, we made progress there. And 12 the productive time spent on this proposal 13 allowed us to take their feedback, from 14 the Unions, and present a proposed 15 contract language in December 7th's OP 16 Small Working Group meeting. Now the 17 contract language can be found in Appendix 18 3, Tab 60. 19 And we acknowledged there is give 20 and take to bargaining. Thus, we provided 21 a quid pro quo for our proposal. Adoption 22 of our proposal would include quality of</p>	<p style="text-align: right;">Page 1650</p> <p>1 life improvements, you know, by way of 2 swap turns, rest days, possibly, or 3 pre-arranged layoffs. Additionally, the 4 Carriers are proposing one paid leave day 5 for all crafts. Now, we think that you'll 6 find that the Carrier's met our burden of 7 proving that good faith bargaining 8 occurred on our proposal, and we've 9 established that quid pro quo was offered. 10 I want to take a couple of moments 11 to talk about comments on a few other 12 craft-specific proposals that were 13 mentioned yesterday. 14 Before I comment on what you heard 15 from President Baldwin at BRS, I'll 16 firstly briefly touch on what Mr. Kennedy 17 said regarding be BMW travel allowances. 18 Now he mentioned Arbitration Board 19 298 and PEB 229. I think it's important 20 to note that these proceedings actually 21 did not overlook travel allowances. When 22 you read these awards, it was never</p>

<p style="text-align: right;">Page 1651</p> <p>1 intended to be a one-for-one 2 reimbursement. In most cases, these 3 employees get a per diem when they're in a 4 gang, even when they are at home. They 5 want to keep their higher -- higher wages; 6 and they want to keep their per diem; and, 7 as well as additional compensation that 8 they've received in prior proceedings. 9 Moving on to -- to BRS, and, as I 10 stated on Tuesday, I was part of the team 11 that when we completed the site visits, we 12 asked BRS to complete a report that we 13 would review and provide comment. If we 14 could not agree on the findings to the 15 report, and as you may recall, Mr. Jaffe 16 -- Chairman Jaffe, the disputes could go 17 to a neutral that could serve as a basis 18 for a mutually agreeable solution. Now, 19 none of this occurred. And as I stated on 20 Tuesday, we assumed at that point, no 21 further action was needed. 22 And I will end with one clarifying</p>	<p style="text-align: right;">Page 1652</p> <p>1 point regarding holidays. The Carrier's 2 proposed holiday swap, the idea of a 3 holiday swap, it's not a new concept to 4 the parties. In fact, effective January 5 1st, 1983, Veterans Day, that the Unions 6 are now requesting, was actually traded 7 for New Year's Eve, which is one of their 8 current holidays. 9 Now, at this point, -- 10 BOARD MEMBER DEINHARDT: What -- 11 what is -- 12 MR. RODGERS: Yes, ma'am? 13 BOARD MEMBER DEINHARDT: Can you 14 just explain what you said? Veterans Day 15 was traded for New Years -- 16 MR. RODGERS: The -- they had 17 Veterans Day as a holiday. 18 BOARD MEMBER DEINHARDT: So is it 19 listed in the holiday? 20 CHAIRMAN JAFFE: No, they had it -- 21 MR. RODGERS: 22 The parties --</p>
<p style="text-align: right;">Page 1653</p> <p>1 CHAIRMAN JAFFE: -- through '83. 2 BOARD MEMBER DEINHARDT: So I don't 3 know. Could you just explain that to me? 4 MR. RODGERS: Sure. 5 So we have eleven holidays, and I 6 don't remember exactly how many they had 7 back then, but one of them was Veterans 8 Day, back in the 1980s -- early eighties. 9 BOARD MEMBER DEINHARDT: Oh, I see. 10 So in the negotiation -- 11 MR. RODGERS: In the negotiations 12 -- 13 BOARD MEMBER DEINHARDT: -- they 14 opted to trade. 15 MR. RODGERS: -- they opted to say 16 we want Veterans Day to be traded for New 17 Year's Eve. It's a priority. We assumed 18 that was a priority and we made the 19 switch. So that was effective January 20 1st, 1983. 21 BOARD MEMBER DEINHARDT: Got it. 22 MR. RODGERS: If there's no other</p>	<p style="text-align: right;">Page 1654</p> <p>1 questions, I'll be happy to turn it over 2 to Matt Garlan. 3 BOARD MEMBER DEINHARDT: I have a 4 question about -- 5 MR. RODGERS: Yes, ma'am. 6 BOARD MEMBER DEINHARDT: -- the 7 travel allowances. 8 MR. RODGERS: Yes, ma'am. 9 BOARD MEMBER DEINHARDT: In this 10 round, were there in fact negotiations 11 about the travel allowances? 12 MR. RODGERS: I would have to say 13 that there probably was some discussions 14 about it, but it wasn't extensive. In my 15 opinion. 16 BOARD MEMBER DEINHARDT: Did the 17 Carriers agree to discuss the proposal in 18 detail? 19 MR. RODGERS: Did we agree to what? 20 BOARD MEMBER DEINHARDT: To discuss 21 the Union's proposal in any detail? 22 MR. RODGERS: Well, what they have</p>

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1 on the table, it's the first time I've
 2 ever seen it, to be honest. The mileage
 3 rate for IRS, the single-occupancy, was
 4 never raised. In my -- in my
 5 recollection, that any of that was ever
 6 raised at the table, about doing
 7 single-person lodging since, frankly, most
 8 of that's been resolved. This GSA rate of
 9 \$96 for -- or not \$96 -- \$69 for special
 10 transportation, never raised. So we could
 11 not talk about what they have on the table
 12 for PEB proposal.

13 **BOARD MEMBER DEINHARDT:** Was there
 14 a proposal on the table for --

15 **MR. RODGERS:** There was.

16 **BOARD MEMBER DEINHARDT:** -- special
 17 allowances?

18 **MR. RODGERS:** Yes, ma'am.

19 **BOARD MEMBER DEINHARDT:** And did
 20 the Carrier agree to discuss that proposal
 21 in any detail?

22 **MR. RODGERS:** I don't think we

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1 you're on four tens or five eights, you
 2 get a different rate. Now, it's not
 3 adjusted for UP by CPI.

4 Other carriers have -- CSX has a
 5 flat weekly rate that they pay, that
 6 includes the travel mileage. So there's
 7 such differences between the Carriers that
 8 it's really hard to understand how to make
 9 those adjustments. So, CSX changes it by
 10 CPI-W -- or -- yeah, CPI-W. So there are
 11 variances that are very difficult to say,
 12 but as long as you're on that gang, you
 13 would get per diem when you go home on
 14 most carriers.

15 **CHAIRMAN JAFFE:** You said when you
 16 go home, you're talking about the travel
 17 time, are you talking about --

18 **MR. RODGERS:** The entire --

19 **CHAIRMAN JAFFE:** -- the time while
 20 you're --

21 **MR. RODGERS:** So, you get travel --

22 **CHAIRMAN JAFFE:** at home?

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1 talked about in any detail that I can
 2 recall.

3 **BOARD MEMBER DEINHARDT:** Thank you.

4 **CHAIRMAN JAFFE:** On the travel and
 5 per diem --

6 **MR. RODGERS:** Yes, sir?

7 **CHAIRMAN JAFFE:** -- question, you
 8 indicated that the BMWED employees receive
 9 per diem when at home? :

10 **MR. RODGERS:** Yes.

11 **CHAIRMAN JAFFE:** Do they receive
 12 the per diem essentially every day of the
 13 year? Or is --

14 **MR. RODGERS:** Well, --

15 **CHAIRMAN JAFFE:** -- is some --

16 **MR. RODGERS:** -- you have to be
 17 part of a gang, and not every carrier does
 18 this. So UP in the last -- in 2010 round,
 19 negotiated a separate deal, they pay a
 20 higher rate based on -- they don't do
 21 lodging, they have incidental meals and
 22 lodging included in that rate. And if

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1 **MR. RODGERS:** -- mileage when you
 2 go home.

3 And if you're a passenger in the
 4 car, you get the same travel mileage.

5 **CHAIRMAN JAFFE:** Great.

6 **MR. RODGERS:** And then, so most
 7 people buddy up and they go -- when they
 8 go home.

9 And then when they're home for
 10 those three or four days, until they have
 11 to report back to work, they will get per
 12 diem at home.

13 **CHAIRMAN JAFFE:** Got it.

14 **MR. RODGERS:** Non-taxable.

15 **CHAIRMAN JAFFE:** Fair enough.
 16 Thank you.

17 **MR. RODGERS:** Any other questions,
 18 sir?

19 **CHAIRMAN JAFFE:** We're good.

20 **MR. RODGERS:** Okay.

21 **CHAIRMAN JAFFE:** Thank you.

22 **MR. RODGERS:** Thank you.

<p style="text-align: right;">Page 1659</p> <p>1 THEREUPON:</p> <p>2 MATT GARLAN</p> <p>3 was called for examination, and, having</p> <p>4 been previously duly sworn, testified as</p> <p>5 follows:</p> <p>6 MR. GARLAN: Okay. Thank you,</p> <p>7 Jeff.</p> <p>8 All right. Good morning.</p> <p>9 CHAIRMAN JAFFE: Good morning.</p> <p>10 MR. GARLAN: Mr. Chairman, members</p> <p>11 of the Board, I'm going to address and</p> <p>12 clarify additional considerations related</p> <p>13 to work staffing.</p> <p>14 First, what you've heard from</p> <p>15 everyone in the room over the past week,</p> <p>16 Carriers and Unions alike, is that our</p> <p>17 employees work hard in railroads cannot do</p> <p>18 the important work moving Americans</p> <p>19 freight without them. There's no dispute</p> <p>20 about that. We acknowledge that our</p> <p>21 employees work hard and make sacrifices.</p> <p>22 As I stated in my previous testimony,</p>	<p style="text-align: right;">Page 1660</p> <p>1 railroading is very important work.</p> <p>2 What the Carriers do dispute,</p> <p>3 however, is the Union's claim that our</p> <p>4 employees are overworked, undervalued, or</p> <p>5 that there has been a fundamental shift in</p> <p>6 the way that we staff or run our</p> <p>7 operations in a way that has negatively</p> <p>8 impacted our workforce. The data and</p> <p>9 facts do not support that.</p> <p>10 In fact, the processes, and</p> <p>11 policies we are enacting are designed to</p> <p>12 help our employees improve -- improve</p> <p>13 their quality of life, while</p> <p>14 simultaneously improve the consistency of</p> <p>15 service to our customers and to help the</p> <p>16 entire rail industry grow.</p> <p>17 So first is, we discussed how</p> <p>18 mobile technology has enabled our</p> <p>19 workforce to maximize their time away from</p> <p>20 work, even when on call. Gone are the</p> <p>21 days where employees sitting at home</p> <p>22 waiting for calls on their landlines with</p>
<p style="text-align: right;">Page 1661</p> <p>1 no visibility into where they were on the</p> <p>2 lineup. This tethered them to our -- to</p> <p>3 their homes and limited their activities.</p> <p>4 With the implementation of technology,</p> <p>5 like Workforce Hub, and you see that in</p> <p>6 the middle of the slide, our employees can</p> <p>7 now maximize their time while on call and</p> <p>8 can respond from virtually anywhere.</p> <p>9 That's a fundamental shift improving the</p> <p>10 quality of life for all of our employees.</p> <p>11 The Unions have continued to claim</p> <p>12 this week that employees are spending more</p> <p>13 time at work and more time away from home</p> <p>14 than they ever have in the past. But the</p> <p>15 facts and data do not support that. To</p> <p>16 reiterate, the average team -- TY&E</p> <p>17 employee at BNSF works thirty-three hours</p> <p>18 a week.</p> <p>19 To Chairman Jaffe, you asked during</p> <p>20 my original presentation how much time the</p> <p>21 average TY&E employee spends away from</p> <p>22 home. And as you can see from the slide,</p>	<p style="text-align: right;">Page 1662</p> <p>1 the five-year average is approximately 16</p> <p>2 hours. And contrary to the Union's</p> <p>3 claims, the amounts are not increasing;</p> <p>4 instead, the relatively flat</p> <p>5 month-over-month and year-over-year.</p> <p>6 Importantly, this graphic also</p> <p>7 demonstrates that the Union's claims that</p> <p>8 attendance policy changes have</p> <p>9 significantly increased their time away</p> <p>10 from home are unfounded.</p> <p>11 To the extent that there's any</p> <p>12 correlation that can be drawn the data</p> <p>13 suggests that time away from home has</p> <p>14 actually decreased since the</p> <p>15 implementation of High-Vis in February.</p> <p>16 Again, it's in both parties interest and</p> <p>17 minimize time away from home, both for a</p> <p>18 company's productivity and the employees</p> <p>19 quality of life.</p> <p>20 A key driver of time away from home</p> <p>21 terminal is the overall state of the</p> <p>22 network operation. As this slide</p>

<p style="text-align: right;">Page 1663</p> <p>1 demonstrates, 2022 has been a challenging 2 year from a service interruption and 3 weather perspective. The extreme weather 4 events that we faced on the network, which 5 started in 2021, drove a net decrease in 6 velocity and increased our car -- our 7 overall car inventory. So when this 8 happens, as it did in 2014, when we 9 experienced the same dynamic, the 10 railroads responded by increasing our 11 resources both in crews and locomotives. 12 Overreacting to the situation by 13 excessively hiring creates a dynamic where 14 there are too many people, which leads to 15 employees being furloughed almost 16 immediately after completing training. 17 This is an untenable situation for 18 employees and the Carriers alike. 19 So as we discussed, railroading's a 20 network-based business. Staffing 21 shortages, excessive layoffs on weekends, 22 and service interruptions have a ripple</p>	<p style="text-align: right;">Page 1664</p> <p>1 effect across the entire system. The crew 2 shortages have been wildly overstated. 3 And while we have seen impacts in some 4 locations, this is a combination of labor 5 market challenges in mostly rural 6 locations, combined with reduced network 7 speeds from the various weather driven 8 issues. Neither of which we believe to be 9 systemic, and as we restore the velocity 10 on our networks, our fluidity improves, 11 and our crew utilization improves along 12 with it. 13 At most, when the service 14 interruptions are accounted for and 15 normalized, we estimate and approximate a 16 three percent shortage of BNSF, and Judy 17 Carter in this morning's panel highlighted 18 the plans we have in place to address this 19 in the specific locations where it exists. 20 So, I acknowledged the change is 21 difficult for our employees. We haven't 22 changed our art core attendance policy in</p>
<p style="text-align: right;">Page 1665</p> <p>1 over 20 years. And the emotion you heard 2 yesterday is a reaction to a change in the 3 way our employees work. However, we've 4 shown that our employees are not 5 overworked. They're not spending any more 6 time away from home. And outside of the 7 challenges we face the fear of service 8 interruptions. Their quality of life is 9 improving through the use of technology. 10 Rail networks are very complicated 11 businesses, and the additional 12 unrestricted days off can create havoc to 13 the entire industry and would have a 14 ripple effect across the American economy 15 and fragile supply chain. 16 I will now turn it over to Sam 17 Macedonio to discuss the Union's leave and 18 attendance proposals. 19 Thank you. 20 CHAIRMAN JAFFE: Thank you. 21 We're in good shape at the moment, 22 then. And thank you.</p>	<p style="text-align: right;">Page 1666</p> <p>1 MR. GARLAN: Thank you, sir. 2 THEREUPON: 3 SAM MACEDONIO 4 was called for examination, and, having 5 been previously duly sworn, testified as 6 follows: 7 MR. MACEDONIO: Okay, good morning. 8 Nice to see all of you again. 9 This morning, I'm going to fill in 10 a few blanks and address a few of the 11 assertions made during the Union's 12 case-in-chief. 13 First, I would like to talk about 14 ways one can mark off sick or take days 15 off when needed. You heard from the 16 Unions that their members do not have any 17 access to sick leave and because of that 18 there are no good options when they want 19 to mark off. That's just not simply the 20 case. In many of the railroads, or most 21 of the railroads, they have point systems 22 that allow for points when individuals</p>

<p style="text-align: right;">Page 1667</p> <p>1 need to take off or they have other 2 attendance systems in place that allow for 3 that. Additionally, they do have paid 4 time off. Each of the Carriers have one 5 to two weeks, as we discussed before, in 6 paid vacation, that they can take in 7 single days, and also have a number of 8 personal leave days based on their 9 seniority.</p> <p>10 So what happens if an employee 11 needs to take a day off or wakes up sick, 12 and, as Matt said, they look in that 13 Workforce Hub and they have time before 14 they have to go to work? Well, if they 15 need to mark off sick, or they need a 16 medical -- make a medical appointment that 17 day, or they need to attend an important 18 event, they have many things that they can 19 do.</p> <p>20 In the first instance, they can 21 request a single day paid vacation, or a 22 single day personal leave day. In doing</p>	<p style="text-align: right;">Page 1668</p> <p>1 so, they would go into a system anywhere 2 from 60 days to four hours before they 3 want it to mark off and ask for that day 4 off. And we'll talk about many people can 5 carry these days over. And in fact, last 6 year at BNSF, we had nine thousand 7 employees carry over about 97,000 banked 8 personal leave days still which they could 9 use. If they are to use their vacation 10 day or personal leave day for that day, 11 there are no points under the High-Vis 12 system or any of the other carriers 13 attendance systems. They simply are off 14 for the day, and they receive pay for that 15 day.</p> <p>16 How do we get to our personal leave 17 day caps at BNSF? Everybody has a 18 different formula. But at BNSF, we take 19 our actual liability and increase it by 20 twenty-five percent and then spread it 21 across the week. Those will set the 22 individual caps for the day's. In</p>
<p style="text-align: right;">Page 1669</p> <p>1 addition to that, we allow employees to go 2 what's called over the cap for reasons of 3 personal, you know, personal reasons that 4 they talked with their supervisor about, 5 and we'll show some of those in a little 6 bit.</p> <p>7 Additionally, at BNSF we have an 8 algorithm that runs in the background and 9 assesses immediate use -- immediate need. 10 So, up to four hours prior if you ask for 11 personal leave day in the caps are full, 12 the algorithm runs and adjusts if there's 13 service in demand and can allow you to 14 take off, it allows you to take off as a 15 personal leave that even though those caps 16 are full.</p> <p>17 And as you can see, this year 18 alone, we've already granted 1,700 19 retroactive paid leave days. So in 20 certain instances, which I'm going to 21 discuss now, individuals are not able to 22 take a personal leave day or single day</p>	<p style="text-align: right;">Page 1670</p> <p>1 vacation to take care of the absence. So 2 instead they mark off sick. And like I 3 said, under our policies we all have -- 4 they all have the ability to mark off sick 5 without violating our policy. If they are 6 to mark off sick and then would like pay 7 in the future, they can retroactively go 8 in and apply a paid day for the day they 9 missed. And like I said, at BNSF, there 10 has been seven -- done 1,700 times this 11 year.</p> <p>12 And I believe, Member Deinhardt, 13 you had asked about that in the -- during 14 Tuesday's testimony.</p> <p>15 Additionally, employees have the 16 right to use it FMLA. As you can see here 17 6,000 TY&E employees, that 6,000 out of 18 approximately 14,500 have been approved 19 for FMLA. They are entitled to up to 12 20 weeks of FMLA leave. For the most part, 21 we say individual and two- or three-day 22 bursts of FMLA usage across the property.</p>

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1 Before I leave, I wanted to talk
 2 about the personal leave days above caps.
 3 There's been some discussions about how
 4 hard is it to get a personal leave day.
 5 And, of course, yes, there are caps for
 6 each day of the week, usually Monday
 7 through Friday, those caps are open, and
 8 employees can take days off. But during
 9 the weekends, they are a bit harder, but
 10 we still do go over and above caps.
 11 This year, we've already approved
 12 at 8,700 days above caps, last year,
 13 11,000 days, and on the right hand is just
 14 a handful of reasons of why. So these are
 15 individuals going and talking to their
 16 supervisor and saying the caps are full, I
 17 need off for these reasons, can you please
 18 open up the cap and allow me to take a day
 19 off. And in fact, the supervisor does.
 20 In fact, last year, 2021, BNSF
 21 employees laid off sick, doesn't
 22 necessarily have to be off sick, it's --

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1 vacation, doesn't include any paid days.
 2 These are just marking off, say sickness
 3 and family. Say, we don't call them
 4 personal days, but if you have a doctor's
 5 appointment to go to, you would call up
 6 and mark out sick under our -- and that's
 7 what this includes.
 8 Does that answer your question?
 9 **BOARD MEMBER DEINHARDT:** So, these
 10 are all unpaid mark offs?
 11 **MR. MACEDONIO:** That's correct.
 12 **CHAIRMAN JAFFE:** Is there any
 13 tracking of requests to mark off that are
 14 denied?
 15 **MR. MACEDONIO:** In the personal
 16 leave system?
 17 **CHAIRMAN JAFFE:** On -- any on any
 18 basis?
 19 **MR. MACEDONIO:** I do not know. I
 20 can look into that. I'm not -- I haven't
 21 seen that number, but I don't -- I don't
 22 know if there is one.

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1 they had a layoff event where they were
 2 unavailable, 336,000 times. An average of
 3 23 days per person. So when the Union's
 4 talk about the 15 days, in individual --
 5 in their -- in their proposals, not being
 6 used, I think that falls flat. Or records
 7 indicate that individuals are going to
 8 take in excess of those 15 days off. And
 9 these are under unpaid days.
 10 **BOARD MEMBER DEINHARDT:** But you
 11 said these are not just sick days? These
 12 are what, sick and personal days?
 13 **MR. MACEDONIO:** No, they're -- we
 14 call them -- the Railroads call them sick,
 15 but you don't necessarily have to be sick.
 16 You don't have to put a doctor's note in.
 17 It's just you call up and you mark off or
 18 you go into the Workforce Hub, and you
 19 mark off.
 20 **BOARD MEMBER DEINHARDT:** But it
 21 doesn't include vacation?
 22 **MR. MACEDONIO:** It doesn't include

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1 **CHAIRMAN JAFFE:** I was just asking
 2 if it was tracked.
 3 **MR. MACEDONIO:** No, we do not track
 4 it.
 5 **CHAIRMAN JAFFE:** Do not track it.
 6 Fair enough.
 7 Thank you.
 8 **MR. MACEDONIO:** Now, I would like
 9 to just switch and briefly talk about the
 10 attendance policy implications of sick
 11 mark offs
 12 First, I'd like look at the number
 13 of days taken without the policy, which we
 14 just talked about, 336 days. So we needed
 15 to change. We moved to a new system,
 16 where the Union has suggested that people
 17 get thirty points for life. That is not
 18 correct. You all start off with a 30-day
 19 bank. However, we expect people to manage
 20 their points. If you manage your points
 21 during the course of a year, just by
 22 saying marked up on weekends and high

<p>Page 1675</p> <p>1 impact days, you have the ability to earn 2 approximately sixty-two recognition points 3 in a year. That's an additional 30-day -- 4 weekdays off. And that's before the 5 fifteen weekend days -- the first -- the 6 fifteen weekdays you can take off under 7 the policy and the thirty points, because 8 as you may remember, it's two points for a 9 Monday through Thursday mark off. You get 10 thirty points before violating the policy 11 at all. So just marking off one day is 12 not a violation of the policy. We also 13 have three other recognition point systems 14 that are in place and that does not 15 include those.</p> <p>16 I think this is reflected in the 17 fact that at BNSF this year, we've only 18 had fifteen employees dismissed across 19 15,000 or 14,500 TY&E employees.</p> <p>20 CSX has only had fifteen employees 21 dismissed for attendance related issues 22 and that's both non-OPs and OPs. That's</p>	<p>Page 1676</p> <p>1 17,000.</p> <p>2 In KCS, under their system, has 3 only had thirteen craft employees 4 dismissed out of 1,300.</p> <p>5 So as you can see, these policies 6 are working, people are working within 7 them to stay out of it violating them, and 8 the results are much better than even 9 under the prior policies.</p> <p>10 If the panel were to grant the 11 15-day sick day -- the proposal for 12 fifteen paid sick days to the Unions, this 13 would be catastrophic. Not only are they 14 without recourse, but they can be carried 15 over, building up to hundreds of days, 16 possibly over the course of years, which 17 could be taken off all at once, without 18 reason. Therefore, we would suggest that 19 that policy be rejected in its entirety.</p> <p>20 Now, I'd like to quickly fill in a 21 few blanks regarding BNSF's High-Vis 22 attendance policy and the Union's</p>
<p>Page 1677</p> <p>1 grievance or lack thereof.</p> <p>2 During the President's testimony, 3 Mr. Ferguson and President Pierce -- or 4 President Ferguson and President Pierce, 5 they indicated that they -- they were 6 asked if they had advanced a grievance on 7 the reasonableness of the policy. And the 8 answer to that question is no.</p> <p>9 They submitted a letter that they 10 had written to us, and Mr. Ferguson was 11 unaware of whether or not we had 12 conferences, he thought there may be some 13 scheduling issues involved. However, on 14 May 25th , and you'll see a letter there 15 to the Unions, we set up a conference on 16 May 25th to discuss the underlying 17 grievance. However, they had not 18 submitted one.</p> <p>19 As we came to the table on that day 20 and spent about a half a day, we talked 21 about some of their issues that they may 22 have had with the policy. And they</p>	<p>Page 1678</p> <p>1 brought up four people that they felt were 2 treated unfairly. We looked at all of 3 them, and actually agreed that some of 4 them had been treated unfairly. They gave 5 us the name of three of the four people 6 and we corrected them that day before we 7 even left. They had been given points in 8 places, such as they were at the away from 9 home terminal; an individual's wife was 10 hospitalized, we drove him home and the 11 system ran in the background, like I 12 mentioned the other day gave him points, 13 we erased those points right there and 14 then.</p> <p>15 We then, later, we also discussed 16 at that conference that they needed to 17 submit a grievance, paper grievance, 18 electronic grievance, we indicated that in 19 our letter, and in fact, they acknowledged 20 it on that day. However, it's now been 21 two months since we met, and we have not 22 received any grievance at it, of any kind,</p>

<p style="text-align: right;">Page 1679</p> <p>1 on the reasonableness of the policy. 2 However, we have received, I 3 mentioned in my last testimony, that we 4 have disciplined approximately two hundred 5 people for violating the High-Vis' 6 attendance policy, and we've dismissed 7 fifteen people under that policy. Of 8 those 250 cases, as you guys all know, 9 people are allowed to appeal the dismissal 10 and/or discipline. We received two 11 appeals of those 215 disciplines. And as 12 you can see, by the excerpt pulled out 13 here today, they did not challenge the 14 reasonableness of the policy. Instead, 15 they challenged the points themselves in 16 the merits of the case. 17 BOARD MEMBER DEINHARDT: Now, I 18 don't remember if this example was a BNSF 19 example of the employee that had every 20 other weekend child custody and -- and was 21 told he was going to get a weekend, you 22 know, points for that. Is that the kind</p>	<p style="text-align: right;">Page 1680</p> <p>1 of thing that would be brought to a 2 supervisors attention? Would it be a 3 grievance? How would that be handled? 4 MR. MACEDONIO: Yeah, I mean, you 5 would have to bring that to your 6 supervisor. I do not know. 7 You know, in the case of child 8 custody on the weekend, that's gonna be 9 much harder to make an accommodation for, 10 they would probably suggest that that 11 employee move to a job that has weekends 12 off. A yard job, a local job, something 13 like that. Work 24 hours, seven days a 14 week, they're bound by seniority and it's 15 difficult for us to give individuals 16 weekends off because everybody really 17 wants them off. So, he would have to work 18 within that structure. But that's no 19 different than the old policy as well. 20 BOARD MEMBER DEINHARDT: I know. 21 MR. MACEDONIO: Additionally, I 22 just wanted to quickly talk about -- we're</p>
<p style="text-align: right;">Page 1681</p> <p>1 talking about High-Vis, before I leave it, 2 about the mass resignations. The numbers 3 the Union was giving, a thousand people 4 off, was for all crafts. If you look back 5 to the numbers, we presented 395 in the 6 TY&E crafts. Now, that's about .25 7 percent of all TY&E employees. 8 I think mostly from what I heard 9 from Presidents Pierce and Ferguson is 10 that we need to go back, at BNSF, and do a 11 better job of educating our employees on 12 the benefits of High-Vis, how to use 13 points, and not to be afraid to mark off. 14 And then we also need to go talk to our 15 supervisors and make sure they understand 16 the reasonableness of the policy and how 17 to work within it. 18 Additionally, I'm going to talk to 19 my LR team so that the first time we hear 20 about some of these incidences shouldn't 21 be at a PDB, it should be communicated 22 daily. So, those are two takeaways that</p>	<p style="text-align: right;">Page 1682</p> <p>1 we're going to have at BNSF. 2 Additionally, I want to just 3 quickly address the agreements that Mr. 4 Pierce brought up about how, in 2009, we 5 canceled them as a result of RSIA. That, 6 in fact, is true. We had policy, we had 7 many, many work/rest agreements in place 8 that, when bumped up against RSIA, would 9 have been illegal, or we felt did not work 10 because they would have involved in law. 11 So we served cancellation. The piece that 12 Mr. Pierce did not talk about was, the 13 very next day, we entered into an 14 agreement to replace all of those. It was 15 optional, and we did replace them in 2009; 16 there are many of them. Those ran about 17 five or six years until 2014. 18 Then, in 2014, we found out that, 19 or we figured out that the seven and 20 three, and there's a six and two method as 21 well, since the rest days were not static, 22 they were not mandatory, individuals were</p>

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1 playing games under the collective
 2 bargaining agreement and taking most of
 3 the weekends off. So we were forced to
 4 cancel those as well. And, however,
 5 though, in the years since 2014, we've
 6 actually put in a myriad of work/rest, as
 7 you can see anywhere from four and two;
 8 six and three; seven and three; and they
 9 all have different pieces depending on the
 10 pool that they are associated with, but
 11 all of them have self-supporting pools;
 12 pool regulation embedded within the
 13 work/rest agreements.

14 **BOARD MEMBER DEINHARDT:** So, you're
 15 saying that these negotiations have gone
 16 on and are continuing to go on in a very
 17 localized way?

18 **MR. MACEDONIO:** Yes. In fact, we
 19 had many of them in -- prior to High-Vis.
 20 After we put in High-Vis, we heard from
 21 our employees that they wanted work/rest
 22 agreements, we then sent out work/rest

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1 yeah. Sorry.

2 **BOARD MEMBER DEINHARDT:** Go ahead.

3 **MR. MACEDONIO:** Under the national
 4 agreement, I believe it was the 1996
 5 national agreement, the -- all operating
 6 craft employees have the ability to take
 7 one week of vacation in single days. So
 8 that's short notice.

9 You can take that off anywhere from
 10 sixty days before and our property four
 11 hours before. On some of the properties,
 12 BNSF, NS, and CSX, I know. I think UP as
 13 well. Certain crafts have negotiated two
 14 weeks of single-day vacation allotments.
 15 Which means they can do that with two
 16 weeks out of their allotment, of say, four
 17 or five weeks.

18 **BOARD MEMBER DEINHARDT:** And in
 19 your chart, it said that the personal
 20 leave days that you listed were for
 21 operating crafts and --

22 **MR. MACEDONIO:** Yes.

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1 agreement options to all our General
 2 Chairman. There was a flurry of about 12
 3 or 13 that were put in within the month of
 4 February to March. And then, as -- I
 5 think you heard Melissa testify, those all
 6 kind of dried up and the Union recoiled
 7 from any -- entering any new ones.
 8 Hopefully, after this PEB, they'll enter
 9 into some more.

10 **BOARD MEMBER DEINHARDT:** I had a
 11 couple of questions on some of your other
 12 testimony.

13 The Unions said yesterday, I think,
 14 that most -- on most properties, you have
 15 to take vacation in one week. Chunks.
 16 Scheduled far in advance. You say that
 17 there is a short notice single day
 18 vacation option, at least a BNSF --

19 **MR. MACEDONIO:** Yeah, so --

20 **BOARD MEMBER DEINHARDT:** -- are
 21 those --

22 **MR. MACEDONIO:** -- under those --

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1 **BOARD MEMBER DEINHARDT:** What is
 2 the general situation with the
 3 non-operating?

4 **MR. MACEDONIO:** The non-operating
 5 crafts, I believe, have anywhere from
 6 three to five days off, depending on the
 7 craft, for personal leave.

8 **BOARD MEMBER DEINHARDT:** Thank you.

9 THEREUPON:

10 JEREMY MOORE
 11 was called for examination, and, having
 12 been previously duly sworn, testified as
 13 follows:

14 **MR. MOORE:** Yes, so this is -- I'm
 15 Jeremy Moore, and I'm pleased to address
 16 the board. I am going to move fairly
 17 quickly through my remarks to save time
 18 for Chairman Branon.

19 I'd first like to address the OPs
 20 crafts scheduling proposal -- excuse me,
 21 for voluntary rest days. The OPs crafts
 22 propose voluntary rest days for all

<p style="text-align: right;">Page 1687</p> <p>1 employees and unassigned service. 2 As backdrop I've been with Norfolk 3 Southern for 30 years as of last week. 4 During the early 2000s, we tried -- we, 5 like BNSF, tried and entered into 6 voluntary rest day agreements at NS. And 7 they didn't work. 8 Employees chose to observe their 9 voluntary rest days in and around weekends 10 and holidays, exacerbating the staffing 11 issues on those days, and chose not to 12 observe the rest days on normal weekdays. 13 This perpetuated the unscheduled 14 unavailability that the industry is 15 focused on this round and before this 16 panel. 17 Several years later, as Scott 18 Weaver and Jacob Elium explained on 19 Tuesday, Norfolk Southern reached 20 agreement with BLET, under which engineers 21 in nearly all pools receive scheduled, 22 mandatory, not voluntary, rest days in</p>	<p style="text-align: right;">Page 1688</p> <p>1 conjunction with various operational 2 changes that improved efficiency. These 3 were automated, job fitting 4 self-supporting pools, and regulating 5 pools by starts rather than mileage. As 6 part of the scheduling proposal, the 7 self-supporting pools with assigned 8 rotating rest days on NS to make the pools 9 spin faster, including at the 10 away-from-home terminal. And employees 11 mark off less in these pools because they 12 know they have scheduled rest days. 13 As both President Pierce and Scott 14 Weaver acknowledged, this approach, while 15 not a panacea, significantly improved 16 work-life balance, and provided improved 17 availability throughout the week. 18 We acknowledged that scheduled rest 19 days don't work across the board in all 20 unassigned service. In our scheduling 21 proposal, we recognize it's not 22 necessarily a one size fits all approach.</p>
<p style="text-align: right;">Page 1689</p> <p>1 Jeff Rodgers alluded to this earlier. 2 That's why we provided a framework in our 3 one and only workgroup proposal for the 4 parties to negotiate quid pro quos that 5 work to address operational needs and the 6 work-life balance that labor is seeking. 7 I'm proud of the work we did to get 8 this deal on Norfolk Southern. But 9 unfortunately, we find ourselves, as an 10 industry, in a position to ask the board 11 to provide the framework that moves the 12 industry forward, leveraging technology 13 for automated bid to improve availability, 14 promote the work-life balance that our 15 employees crave, while serving our 16 customers. We are also asking the board 17 for an arbitration backstop if the parties 18 cannot agree. 19 Our scheduling proposal is proven 20 to work, and we ask this board to adopt 21 the framework to move us forward. 22 In addition to the quid pro quo, as</p>	<p style="text-align: right;">Page 1690</p> <p>1 I mentioned, we're also willing to 2 compensate all crafts and another 3 compensated leave day. That is an 4 important -- that is the importance we 5 place on our single scheduling proposal. 6 (Thereupon, a discussion was had 7 off of the record.) 8 MR. MOORE: Okay, next, I'd like to 9 address the operating crafts request for 10 increases in meal allowances to -- 11 CHAIRMAN JAFFE: Mr. Moore, can I 12 pose a question -- 13 MR. MOORE: Yep. 14 CHAIRMAN JAFFE: -- on the prior 15 area just addressed. 16 With respect to the requested 17 arbitration backstop, just so we're clear, 18 you've indicated, I think, it's not one 19 size fits all. The anticipation is that 20 the bargaining will take place locally. 21 Right? By -- 22 MR. MOORE: Yes, sir</p>

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1 **CHAIRMAN JAFFE:** -- by Carrier
 2 basis, and maybe within that.
 3 **MR. MOORE:** Yes, we would hope to
 4 reach voluntary agreements. But, if not
 5 --
 6 **CHAIRMAN JAFFE:** So the arbitration
 7 backstops would be a series of potential
 8 arbitration backstops with the potential
 9 for different rulings based on the facts
 10 of each Carrier situation and each craft
 11 situation?
 12 **MR. MOORE:** Yes, Chairman.
 13 **CHAIRMAN JAFFE:** You're not looking
 14 for uniform treatment?
 15 **MR. MOORE:** Yes, correct, Chairman.
 16 **CHAIRMAN JAFFE:** I just wanted to
 17 confirm that, that was my understanding.
 18 Thank you very much.
 19 (Thereupon, a discussion was had
 20 off of the record.)
 21 **MR. MOORE:** In the interest of
 22 time, I'm going to move forward past

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1 yardmasters scope and the be away meal
 2 allowances and focus, instead, on the shop
 3 craft proposals for weekend shift
 4 differentials and meal allowances.
 5 As we have heard time and again,
 6 railroading is a 24/7, 365-day operation.
 7 This, everybody in this room agrees on.
 8 Regardless of staffing levels, we have
 9 always regularly staff weekends and
 10 traditional three-shift operations without
 11 paying differentials. Positions --
 12 positions are filled on a seniority basis
 13 and, like most crafts, the less desirable
 14 shifts are filled by the junior employees
 15 until they have seniority bid to more
 16 preferable assignments.
 17 Notwithstanding the inference made
 18 by the shop crafts regarding excess
 19 overtime, it is not substantially
 20 different, as you can see on this chart,
 21 from overtime in prior years. In 2021,
 22 the industry averaged 3.6 hours of

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1 overtime per employee per week. The ten
 2 percent differential the shop crafts is
 3 seeking is a big ask, and we believe is
 4 unnecessary to fill these positions.
 5 Similar to the other craft proposals I've
 6 addressed, it is unwarranted and should be
 7 withdrawn or, at a minimum, accompanied by
 8 a quid pro quo.
 9 (Thereupon, a discussion was had
 10 off of the record.)
 11 **BOARD MEMBER DEINHARDT:** I know
 12 we're short on time, but I would like to
 13 hear if there are any specific points that
 14 you wanted to make on the meal allowance,
 15 the Union's meal allowance proposal.
 16 **MR. MOORE:** Yes. I'll quickly --
 17 I'll quickly address that.
 18 The parties -- sorry.
 19 If you go to the last slide.
 20 So with respect to the national
 21 meal allowances, several carriers, as you
 22 can see on this slide, have, in quid pro

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1 quo bargaining, adjusted the away from
 2 home meal allowances.
 3 And it's important to note that, in
 4 addition to the meal allowances, that is
 5 not the only pay that our over the road
 6 crews receive at the away from terminal.
 7 And in respect to the next slide.
 8 As you can see from this slide, slide
 9 thirty-six, it represents a significant
 10 increase to adopt the CSX standard. And
 11 that was not done in isolation; that was
 12 done as in part as a broader package of
 13 bargaining. And if you were to compare it
 14 to the national standard, or the national
 15 agreement, the CSX standard would be 183
 16 percent increase for conductors and 277
 17 percent increase for engineers, and, of
 18 course, that would be lower where the
 19 parties have negotiated additional
 20 increases to the -- to the national
 21 standard.
 22 **BOARD MEMBER DEINHARDT:** Thank you.

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1 **MR. MOORE:** And with that, I'll
 2 turn it over to Chairman Branon's to close
 3 us out.
 4 **BOARD MEMBER DEINHARDT:** Can I just
 5 go back to Mr. Rodgers for one second.
 6 A couple of days ago, when we were
 7 talking about holidays, there was some
 8 reference to if the Union or the
 9 individual members wanted to take
 10 Juneteenth or Martin Luther King Day, or
 11 Veterans Day, they could swap holidays.
 12 Am I understanding that correct?
 13 **MR. RODGERS:** No, ma'am. That --
 14 that's a --
 15 **BOARD MEMBER DEINHARDT:** Could you
 16 explain that?
 17 **MR. RODGERS:** That's a -- it would
 18 be -- the swapping of the holidays would
 19 be a national rule. And we would have to
 20 swap it for one of the other national
 21 holidays that are currently -- of the
 22 eleven holidays that are there.

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1 THEREUPON:
 2 BRENDON BRANON
 3 was called for examination, and, having
 4 been previously duly sworn, testified as
 5 follows:
 6 **MR. BRANON:** Ah, if I may.
 7 Good morning, members of the Board.
 8 I'm Brendon Branon, Chairman of the NRLC
 9 and NCCC. If just don't mind indulging me
 10 as we close the record here. I'd just
 11 like to make a few comments.
 12 And first, again, I'd like to thank
 13 the Board for all of your time and your
 14 efforts. I thank the NFB Council and all
 15 the staff that I know has been involved in
 16 organizing and supporting this effort.
 17 I'd like to thank the Court
 18 Reporter as well. And, as Mr. DeVita did,
 19 thank the hotel staff. We've certainly
 20 been treated very well here throughout the
 21 course of the week.
 22 This is undoubtedly a difficult

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1 If you wanted to take your personal
 2 day, that we're offering, and make that a
 3 holiday, that would be an option to the
 4 employee.
 5 **BOARD MEMBER DEINHARDT:** I see.
 6 Okay, thank you.
 7 **MR. RODGERS:** I one thing I want to
 8 clarify, and I apologize for -- this is --
 9 and I know you asked about bargaining on
 10 the BMW travel allowance, and I think
 11 it's important.
 12 We did put it in a proposal late in
 13 May. we offered a change to go to \$17.50,
 14 I believe, on the startup and breakup of
 15 the gang. And the idea behind that was to
 16 begin bargaining on that particular issue.
 17 But at that point, the Union had been
 18 wanting to go to impasse and move to this
 19 -- to this process.
 20 So, that was never engaged fully at
 21 that point.
 22 **BOARD MEMBER DEINHARDT:** Thank you.

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1 process; it has unquestionably been a
 2 difficult round; I think it would have
 3 been a difficult round for many of the
 4 reasons that we have heard through the
 5 course of the last few days, irrespective
 6 of the pandemic, and the pandemic and all
 7 of the factors and forces that that has
 8 brought to bear upon the parties and the
 9 country. And all of us individually,
 10 personally, and professionally through
 11 this period, I think even more so.
 12 It is not our objective to be here.
 13 This is the final step in the Section 6
 14 process, if you will, prior to the
 15 bargaining being exhausted. And it's been
 16 a long time since this industry and these
 17 parties found themselves here, especially
 18 in the absence of any agreements between
 19 the -- the multi-party coalition and any
 20 of the labor representatives, and that's
 21 obviously made this perhaps even more
 22 difficult. And, you know, admittedly,

<p style="text-align: right;">Page 1699</p> <p>1 that reflects that the bargaining process 2 in this round has not been successful. 3 And that disappoints us. 4 We recognize that it takes two 5 parties to reach an agreement, and it's, I 6 think, an acknowledgment that the 7 objective is to reach an agreement. We 8 haven't done that here. But we will need 9 to be successful, and it is our objective 10 to reach agreements. And the time to do 11 that is now. 12 It is really not a question of 13 whether our employees need and deserve a 14 raise, whether they need and deserve a new 15 contract to provide retroactive pay that 16 both parties are -- are proposing, lump 17 sum payments that the Carriers are 18 proposing. We all agree that they do. I 19 think we all agree that resolving this 20 bargaining round and reaching new 21 agreements will improve the circumstances 22 of the railroads. The question is just</p>	<p style="text-align: right;">Page 1700</p> <p>1 really for this Board and for these 2 parties in terms of your recommendations 3 on our agreements and what should those 4 be. 5 And you will hear from my 6 colleague, Don Monroe, later today that we 7 believe, based on the facts and the 8 benchmarks in our history, which is 9 really, in the absence of any agreement in 10 this round, the best pattern that we have 11 here, that we believe this Board's 12 recommendations at this point in the 13 process should be based upon the positions 14 that we have maintained. 15 We recognize the Board's assessment 16 of these issues that there's been little 17 agreed upon, and -- and there remains a 18 considerable gap between those positions. 19 Both sides have presented robust cases 20 here, and in that respect, that I believe 21 the record has been developed in a fulsome 22 manner, even independent of the</p>
<p style="text-align: right;">Page 1701</p> <p>1 recommendations that we expect the Board 2 will be issuing here. 3 In short order, this process, I 4 think, is a crucible itself and serves its 5 own purpose to move us towards an 6 agreement and to better illuminate the 7 issues and the positions of the parties 8 afford themselves to hear. 9 We also know that the parties have, 10 historically, even went in this position, 11 and even through this process, resolve 12 their differences and reached and ratified 13 agreements. And I trust that this will be 14 no different, that this process will 15 produce that same outcome. And the 16 Board's recommendations in this matter 17 will assist us in doing so. 18 I trust as well, and we look 19 forward to those agreements being durable, 20 allowing us to move forward, move forward 21 together, address our respective 22 interests, and serve as the foundation for</p>	<p style="text-align: right;">Page 1702</p> <p>1 future agreements in a better and more 2 functioning bargaining relationship 3 between the parties. 4 Will we have our share of 5 disagreements? Of course, I don't think 6 anybody in this room will expect that they 7 would just magically go away. But our 8 hope and our objective would be to limit 9 them through what comes out of this 10 bargaining round and the agreements that 11 we hope to reach moving forward. So that 12 we can resolve those differences between 13 ourselves and turn our full attention to 14 focusing on our employees fully and their 15 needs in running the railroad. And for 16 the management teams, in turn, to focus, 17 in full, upon running the best and highest 18 quality freight transportation system 19 anywhere in the world. 20 So just as we close the record, 21 from the Carrier's perspective, I know 22 we're waiting on the -- the Union's</p>

<p>Page 1703</p> <p>1 rebuttal case and then closing arguments. 2 Again, I just like to thank the Board. 3 We're very appreciative of your 4 assistance. We know that going back some 5 number of weeks, you may have had 6 different plans for the remainder of the 7 summer. But I want to stress that we will 8 remain available throughout the 9 continuance of your duties as you fulfill 10 them here and assist you in whatever way 11 is possible in any questions, interests, 12 or concerns that you have as you prepare, 13 and draft, and submit your report to the 14 President, that I know so many of us will 15 be quite, obviously, interested, and 16 appreciative in receiving. 17 So, just with that, I'd just like 18 to thank you, and if you have any 19 questions for me before we close the 20 record, I'm happy to take them. 21 CHAIRMAN JAFFE: Thank you, Mr. 22 Branon.</p>	<p>Page 1704</p> <p>1 Off the record for lunch break, and 2 then we will resume with the Union's case. 3 The rebuttal case. 4 (Thereupon, at 11:10 a.m., a lunch 5 recess was taken.) 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22</p>
<p>Page 1705</p> <p>1 AFTERNOON SESSION (12:17 p.m.) 2 CONFIDENTIAL PROCEEDINGS 3 4 CHAIRMAN JAFFE: On the record. At 5 your convenience Ms. Roma. 6 MS. ROMA: Thank you. I hope 7 everyone had a good lunch. 8 For the Union's rebuttal case, I 9 just wanted to walk through what our plan 10 was for the next three hours. First, we 11 are going to hear from Mr. Roth again, and 12 then we will -- our plan is to take a 13 short 15-minute break after hearing from 14 Mr. Roth, and then we are going to bring 15 back Karen Mallet and Gaelle Gravot from 16 Cheiron to answer some questions. 17 Mr. Cook will be available in case 18 there are questions the Board has. We 19 weren't planning on having him testify, 20 but we'll have him up here and available 21 to answer any questions, and then I will 22 be briefly speaking on a few issues that</p>	<p>Page 1706</p> <p>1 have been raised during the rebuttal, and 2 that should wrap up our case. So with 3 that, I will turn it over to Mr. Roth. 4 CHAIRMAN JAFFE: That's fine. 5 And let me just remind you, you're 6 still under oath, we don't have to swear 7 you back in. 8 THEREUPON: 9 THOMAS ROTH 10 was called for examination, and, having 11 been previously duly sworn, testified as 12 follows: 13 MR. ROTH: Thank you, sir. I 14 understand. 15 Mr. Chairman and Members of the 16 Board, thank you for giving me this 17 opportunity this afternoon. I have to 18 cover a lot of ground, and I'm confident 19 that I don't have enough time to cover all 20 of the material that I have in my written 21 submission, but I'm confident that the 22 board members will read it at their</p>

<p style="text-align: right;">Page 1707</p> <p>1 earliest opportunity.</p> <p>2 So some of the sections that are in</p> <p>3 the written submission will be skipped</p> <p>4 over or mentioned very briefly. But I</p> <p>5 want to start on page one of the</p> <p>6 submission by reminding the Board of our</p> <p>7 agreement between the parties as to the</p> <p>8 central and basic approach to the case,</p> <p>9 and that's to reflect on the parties'</p> <p>10 bargaining history to be informed as to</p> <p>11 what might be acceptable and appropriate</p> <p>12 going forward.</p> <p>13 And again, I was quoted in the</p> <p>14 Carriers' case as testifying to that</p> <p>15 effect and I just wanted to provide you at</p> <p>16 the outset of my statement of the balance</p> <p>17 of that quote which also goes into some</p> <p>18 other expression of the importance of the</p> <p>19 parties' bargaining history in arriving at</p> <p>20 standards and the weight with respect to</p> <p>21 those standards that are kind of been</p> <p>22 mutually acceptable between the parties as</p>	<p style="text-align: right;">Page 1708</p> <p>1 made evident by the deals they have made</p> <p>2 over time.</p> <p>3 So the challenge, of course, for</p> <p>4 the Board is ascertaining what facts and</p> <p>5 factors have motivated the parties to</p> <p>6 agreement in the past. While the concept</p> <p>7 is nice in principle, it requires work by</p> <p>8 the Board to determine what has influenced</p> <p>9 the parties over time.</p> <p>10 The Carriers acknowledge the</p> <p>11 importance of examining bargaining history</p> <p>12 and recommending terms which are</p> <p>13 acceptable to the parties. As they said</p> <p>14 past settlements suggest what the parties'</p> <p>15 plausible expectations or wage outcomes</p> <p>16 should be in this round, but there's</p> <p>17 differences between us as to how to</p> <p>18 capture that bargaining history and those</p> <p>19 facts and factors which have motivated the</p> <p>20 parties.</p> <p>21 Real bargaining history does not</p> <p>22 start in 1985. The Carriers are asking</p>
<p style="text-align: right;">Page 1709</p> <p>1 you to look at the nominal annual wage</p> <p>2 change over the preceding five bargaining</p> <p>3 cycles and then based upon that judge</p> <p>4 adequacy and acceptability of their</p> <p>5 proposed 17 percent, and they observe that</p> <p>6 over those five rounds of bargaining or --</p> <p>7 all of the rounds of bargaining I should</p> <p>8 say since 1985 that their 17 percent</p> <p>9 nominal wage increase stacks up.</p> <p>10 Well, I would suggest that you look</p> <p>11 at a more thorough view of parties'</p> <p>12 bargaining history. The nominal wage</p> <p>13 change over the proceeding seventeen</p> <p>14 rounds before 2005 average 6.5 percent and</p> <p>15 that compares with the organization's</p> <p>16 proposed annual increase of 5.6 percent</p> <p>17 per year and the Carriers' 3.2 percent.</p> <p>18 Under six of these seventeen</p> <p>19 previous agreements, nominal wage</p> <p>20 increases exceeded 10 percent. The source</p> <p>21 of this information is my examination of</p> <p>22 wage agreements made between the parties</p>	<p style="text-align: right;">Page 1710</p> <p>1 over the past 25 years including that</p> <p>2 period of time covered by the Carriers'</p> <p>3 materials. As you can see in the table</p> <p>4 that I put up on the screen, we're looking</p> <p>5 at all of the agreements, so twenty-five</p> <p>6 agreements since 1947. Each line across</p> <p>7 the table represents one round of</p> <p>8 bargaining, one wage movement in the rail</p> <p>9 industry.</p> <p>10 So the first line what you're</p> <p>11 looking at on the left-hand side are the</p> <p>12 expiration of the moratoriums. So the</p> <p>13 amendable date of each one of these</p> <p>14 agreements would keep the next day</p> <p>15 following those dates shown on the screen</p> <p>16 Based upon my wage calculator given</p> <p>17 the weights in 2019, I generate a wage</p> <p>18 chronology going back to 1947, and then I</p> <p>19 look at each collective bargaining</p> <p>20 agreement and calculate the increase in</p> <p>21 both nominal terms per year of the</p> <p>22 contract term and the real wage increase</p>

<p style="text-align: right;">Page 1711</p> <p>1 over that period of time, and that's the 2 source, if you will, of the comments that 3 I have in my submission regarding 4 bargaining history. 5 The Carriers' view of wage 6 bargaining history blinds themselves to 7 the major driving force of wage change and 8 that is a change in the cost of living and 9 the maintenance of real wages. They note 10 that over the contract since 1985 wages 11 rose 3 percent per year, but the annual 12 rate of inflation over that same period 13 was only 2.5 percent per year. 14 And that includes 2008, when the 15 consumer price index actually declined for 16 the first time in 50 years. So during the 17 period with historically low inflation, I 18 would expect to have historically low 19 nominal wage change. What I've done here 20 is reproduced the table that appears in 21 submission two of the Carriers. This is 22 their table No. 3.</p>	<p style="text-align: right;">Page 1712</p> <p>1 And what I've added to their 2 information is the comparison between the 3 increases and wages and the CPI in that 4 over the course of that term. So, for 5 example, what they show you is column No. 6 2, the second column here, which is the 7 nominal wage change in each of those 8 years, and then I'm adding to the table 9 the increase in the CPIW over that period 10 and then compare the two columns and 11 calculate the real wage over the life of 12 those collective bargaining agreements. 13 And as you can see, they're what I 14 project to be a 7 percent cut over the 15 terms of the agreement under their 16 proposal does not stack up very well 17 against bargaining history, even looking 18 only at the period from 1985 forward. 19 The exception would be the imposed 20 contract in 1990, beginning in July of 21 1988 of the earlier period. But that's 22 the 12.8 percent real wage cut that I had</p>
<p style="text-align: right;">Page 1713</p> <p>1 referred to in my affirmative presentation 2 resulting from the infamous 2019 imposed 3 agreement. But compared to what the 4 employees are proposing, and that is a 5 4.4% real wage increase, we think, we 6 stack up pretty well, even in the more 7 current period. 8 But my position is that you should 9 look to the entire bargaining history of 10 the parties, at least a period of time 11 over a course that more resembles the 12 economic realities that the negotiators 13 currently face. After all, we are now in 14 period of time with rates of inflation 15 rising at rates we haven't seen for 42 16 years. 17 So it seems a bit uninformative to 18 look to a period of time where we had 19 historically low inflation rates and 20 focused only on nominal wage change. I 21 think that gives you a false impression of 22 what the parties have accomplished and</p>	<p style="text-align: right;">Page 1714</p> <p>1 agreed to by virtue of their mutuality 2 over the course of the past -- their 3 extended bargaining history. 4 The proposed cut and real pay, I 5 think I mentioned this in my earlier 6 testimony, would be -- represent the worst 7 collective bargaining agreement from the 8 employees perspective since the imposed 9 PEB 219. 10 I want to make a comment about the 11 business of the lump sum. With respect to 12 the current inflation problem, the 13 Carriers argue, and I'm quoting from their 14 submission No. 1, page 16, history also 15 shows that when the parties have bargained 16 during periods of relatively high 17 inflation, such in the early 1990s, they 18 have typically accounted for that issue by 19 adding nonstructural increases, i.e., lump 20 sums that are not rolled into the wage 21 base. 22 In other words, the parties have</p>

<p style="text-align: center;">Page 1715</p> <p>1 not addressed short-term inflation by 2 making long-term, (indeed permanent) 3 change in the wage base. That's their 4 position in support of substituting what 5 they regard as nonstructural compensation 6 change as opposed to what the employees 7 would insist on as structural permanent 8 changes.</p> <p>9 Now, in my view this statement is a 10 fabrication. The history of real wage 11 change we counted above which I showed you 12 on that long chart, that's based upon -- 13 that excludes lump sums. That's what the 14 parties have agreed to in terms of 15 permanent structural wage change. When 16 lump sums were made and they have been 17 made over time, the organizations 18 regarding them as an arbitrary payment in 19 lieu of retro activity when GWIs were 20 deferred or not retroactive back to the 21 amendable date. That showed as a lump sum 22 that could substitute in an arbitrary way</p>	<p style="text-align: center;">Page 1716</p> <p>1 because it's not a calculation or it's not 2 an amount that is derived by looking at 3 the actual pay hours of individual; it's 4 an arbitrary that would substitute for a 5 retroactive application of a general wage 6 increase.</p> <p>7 They were never regarded as a 8 substitute for wage increases, and they 9 have no value in maintaining real wages. 10 When workers experience a spike in 11 inflation as we have over the last year, 12 they hope the increase in the future will 13 moderate. It's not going to go down, but 14 the rate of increase will go -- we hope 15 will moderate, will recede. But no one 16 expects prices to fall to the level a year 17 ago.</p> <p>18 So the increase in the cost of 19 living experienced this year is permanent. 20 It's embedded in the cost of living. It 21 takes a permanent wage increase to 22 compensate for the increase. A lump sum</p>
<p style="text-align: center;">Page 1717</p> <p>1 payment is like a winning lottery ticket. 2 Unless you expect to win that same amount 3 every year, you can't adjust your living 4 standard by that amount.</p> <p>5 Lump sums are not a substitute for 6 wage increases and any wage negotiator 7 would be a fool to think otherwise. Later 8 in the Carrier submission they argue that 9 the Carriers' proposal calls for a wage 10 increase averaging 3.2 percent per year 11 annually through July 2024 or 17 percent 12 compounded over 5 years. That offer is 13 consistent with the annual inflation to 14 date plus CBO forecast indicating that the 15 employees' purchasing power, as well as 16 their historic advantage over their peers 17 in other industries will be maintained, 18 unquote.</p> <p>19 Dr. David was kind enough to reveal 20 differences between us as to our 21 calculations of wage change over the 22 course of this agreement but our</p>	<p style="text-align: center;">Page 1718</p> <p>1 differences over the forecast of inflation 2 and I'm going to return the favor and 3 point out some additional differences 4 between us.</p> <p>5 I'm reminded that on the slide here 6 I have reversed the Carrier's proposal and 7 the Union's proposal and I meant no 8 disrespect to the Carriers. That was an 9 unintended mistake. If only it were true. 10 Thanks for that. I didn't think that went 11 beyond your understanding of where we are.</p> <p>12 CHAIRMAN JAFFE: It reversed on the 13 original exhibit that you then added 14 columns to.</p> <p>15 MR. ROTH: Okay. Thank you. This 16 is page 12 of the exhibit that Dr. David 17 presented this morning, and he accurately 18 reproduces the table that I laid out in my 19 affirmative case which outlines what I 20 believe to be the annual rate of real 21 increase over 5 years.</p> <p>22 And when he described his</p>

<p style="text-align: right;">Page 1719</p> <p>1 methodology which is shown on the right- 2 hand side, he described it, and I'm not 3 recount how he expressed that calculation, 4 but there are two problems with that 5 methodology, at least two. The first one 6 is you see that 3 percent on the GWI 7 column of July 1, 2019, that was an 8 increase under the last agreement. 9 And I thought the purpose of the 10 exercise here was to demonstrate to the 11 Board the consequence on worker's wage 12 rates resulting from your recommendation 13 and the parties' agreement over this term. 14 So I don't know what 3 percent at 7/1/2019 15 has to do with anything and why it would 16 be included in cumulative wage increase 17 which he shows to be 3.25 percent through 18 July of '24. It just doesn't belong 19 there. It has nothing to the with this 20 round of bargaining. 21 The second thing we see is that the 22 five-year cumulative total is really 33.2</p>	<p style="text-align: right;">Page 1720</p> <p>1 percent and what is being conveyed by Dr. 2 David here is that there is a value to the 3 workers based upon the distribution of 4 wages over the period of time. Of course 5 that's true. When I advise my Union 6 clients on how to judge the quality of a 7 wage agreement, I ask them to look at two 8 metrics. 9 The first is the cumulative 10 increase over the course of agreement. 11 That gives you your terminal value, that's 12 the wage rate that you end up with at the 13 end of the contract and that's the wage 14 increase -- a wage that you will go into 15 the next round of bargaining with, and 16 absent any concessions to that rate will 17 be the rate that you will be your base 18 rate in perpetuity plus additional future 19 increase, but that's the terminal value. 20 If you have a 31.2 percent raise on 21 the last day of the contract, the terminal 22 value is the same as though it were paid</p>
<p style="text-align: right;">Page 1721</p> <p>1 on the first day of the contract. The 2 second metric of course is I think what 3 Dr. David will call the time weighted 4 increase, but I calculate it differently. 5 I said I look at the agreement and I said, 6 this is the money that you put in your 7 pocket over the course of the agreement. 8 I say look at those two things; one 9 has to do with the cumulative increase and 10 the terminal value of the contract. The 11 other has to do with the distribution of 12 those increases over the term, and that's 13 fundamental, that's basic. But I think 14 what Dr. David is suggesting is that the 15 five-year cumulative total over this 16 contract period is really not 31.3 percent 17 as represented by Mr. Roth, it's really 18 33.2 percent. 19 This is what I would -- how I would 20 answer that. If you want to build in the 21 value of distribution of the dollars over 22 the term and calculate a time weighted</p>	<p style="text-align: right;">Page 1722</p> <p>1 increase, I don't have any quarrel with 2 that. I'm not quarreling with the 3 arithmetic. What I'm saying is that the 4 next day after the amendable date, that 5 33.2 percent goes -- is cut by the 2 6 percent, it goes to 31.3. So you can look 7 at the -- if you're going to consider the 8 time-weighted increase, consider also that 9 the next day I'm taking a 2 percent wage 10 cut because the terminal value cannot 11 change. It's 31.2 percent. 12 When you're measuring changes in 13 that increase against changes in the cost 14 of living, there's only one rational way 15 to do it and that's the way the coalition 16 Unions method handles matters. This is 17 another reproduction of Dr. David's chart 18 on page 12, and when we're dealing with 19 forecast there's this debate about what's 20 going to happen to inflation. 21 And I just want to remind the Board 22 because I think the narrative is that</p>

<p style="text-align: right;">Page 1723</p> <p>1 inflation is going to go down. Well, what 2 we really mean, and I think what Dr. David 3 really meant is that the rate of inflation 4 is going down, and we all hope that is 5 going to happen. 6 I'm predicting that in my analysis. 7 I hope that we're all right, that we hope 8 that the rate of inflation goes down, but 9 the cost of living is not going down. 10 It's true that components of the CPI may 11 fall. I think Dr. David mentioned fuel 12 prices. We're hoping that fuel prices 13 actually goes down, but when you add all 14 the commodities up that workers consume, 15 some go up, some go down, but in the end, 16 the CPI is not going to fall; it's just 17 going to increase at a slower rate 18 hopefully 19 And as Dr. David's chart shows 20 there's only one year, and this is true 21 for the last 50 years, where the CPI 22 actually fell. And there's nobody in this</p>	<p style="text-align: right;">Page 1724</p> <p>1 room that's predicting that's going to 2 happen over the course of this agreement. 3 We're predicting that it goes up at a 4 slower rate, we're hoping that it does but 5 it's not going down. 6 I want to deal with the use of CPI. 7 Now there doesn't seem to be any 8 disagreement between the parties as the 9 importance and the weight that's 10 attributed to the cost-of-living standard. 11 Again as I've indicated, the record of 12 collective bargaining decisions and 13 National Railroad bargaining proves that 14 negotiators and emergency Boards were 15 guided by the principal increasing and 16 maintaining real wages. 17 So one of the Carriers' focus on 18 this is the use of the CPI-W in measuring 19 that -- those changes. Of course what I 20 showed you relied upon changes in the CPI- 21 W. 22 The CPI either the U or the W it's</p>
<p style="text-align: right;">Page 1725</p> <p>1 not a perfect instrument for measuring 2 changes in the cost of living; everybody 3 knows that; every negotiator knows that. 4 But use of the CPI persists as the most 5 viable and acceptable measure for changes 6 in the cost of living for many reasons. 7 The first reason is that there have 8 been several major revisions made by the 9 BLS, the CPI that has made it more 10 reliable today than in the past, and you 11 can go online and track those with the BLS 12 and have their at least 7 or 8 major 13 revisions of CPI that improved it beyond 14 what the commission recommended back in 15 198 -- 1986 I think it was. 16 Secondly, the substitution biases 17 which is one of the criticisms of the use 18 of the CPI as opposed to other measures 19 should not be corrected in measuring 20 changes and living standards. I just give 21 you one example. Let's say I have a 22 household of with my family that I have a</p>	<p style="text-align: right;">Page 1726</p> <p>1 four-room apartment and rent goes up and I 2 move into a three-bedroom apartment, my 3 rent stays the same. 4 So my cost of rent, of housing, 5 stays the same. But my living standard 6 collapsed when I went into a much smaller 7 home and it's the same as the example that 8 Dr. David used in substituting chicken for 9 steak, maybe I maintain my cost of living, 10 but my living standards went down. 11 The third reason is that the 12 tolerance in wage negotiations and 13 specifically in forecasting CPI changes 14 really exceeds the tiny measurement errors 15 that are identified by critics of the CPI 16 today. 17 Fourth, and I think most 18 importantly, the CPI is the most widely 19 recognized published and used measure of 20 consumer price change. Period. And if 21 you look at my submission on the footnote 22 on eleven, the Department of Labor reports</p>

<p style="text-align: right;">Page 1727</p> <p>1 that the CPI is published, and I quote, is 2 the most widely used measure inflation, 3 unquote. 4 BLS also states that the CPI is a 5 major indicator of the effected of 6 government economic policy; the president, 7 the Congress, the Federal Reserve Board 8 used movement of the CPI to formulate and 9 monitor the effect of fiscal and monetary 10 policies. 11 Business executives, labor leaders 12 and other private citizens also use the 13 index as a guide in making economic 14 decisions. BLS goes on to say, and I 15 quote, the index directly affects the 16 income of almost eighty million people, 17 social security benefits and military and 18 federal civil service pension payments are 19 all adjusted by the CPI-W. The social 20 security by the way is adjusted by the 21 CPI-W. Food stamp programs use a CPI for 22 food at home and changes in the CPI affect</p>	<p style="text-align: right;">Page 1728</p> <p>1 cost of school lunches for children in the 2 -- they note in the private sector -- this 3 is the BLS language -- in the private 4 sector, many collective bargaining 5 agreements tie automatic wage increases to 6 the CPI. 7 Some private firms of individuals 8 use the index to keep rents, alimony, 9 child support payments in lieu of the 10 changing prices, unquote. So it is the 11 most widely-used, widely-recognized 12 standard, but the fifth reason is that the 13 measurement arguments are basically 14 academic. In view of the parties' 15 reliance on the traditional CPI in their 16 bargaining and in their formal 17 presentations to PEBs. 18 With respect to that last point, I 19 should note that these parties included an 20 automatic cost escalator clause and or 21 more of their national agreements between 22 1951 and 2007, that's 56 years, and guess</p>
<p style="text-align: right;">Page 1729</p> <p>1 what, they incorporate the traditional 2 CPI-W as the cost-of-living measurement 3 tool. Why? Because it was appropriate, 4 and it was considered the appropriate 5 measure. 6 It seems to me a bit late to 7 parachute in from 50,000 feet and say the 8 CPI should not be used as an appropriate 9 measurement tool. It's an academic 10 discussion that has no relevance to making 11 collective bargaining agreements. 12 Additionally when you remember my 13 testimony a moment ago about parties' 14 practice, to the extent that when I 15 express that history that has overstated 16 change in the cost of living because I'm 17 using the CPI-W. Well, it follows that I 18 understated what the parties actually 19 agreed to. 20 And our target for matching what 21 the parties have agreed to in terms of 22 maintenance in advancement of real pay</p>	<p style="text-align: right;">Page 1730</p> <p>1 simply changes. If you're going to say 2 well the history when I use a CPI-I I come 3 up with an overall increase under last 4 twenty-five agreements of 1.6 percent per 5 year. 6 The Carrier says yeah but you used 7 a CPI-W overstated actual change in the 8 cost of living. Well guess what, then 1.6 9 is low, the target is higher now. It's a 10 highly academic exercise. Plus in CCC in 11 its presentation to PEB 243 and during the 12 course of bargaining used the traditional 13 CPI to measure real wage progress of rail 14 workers. 15 You can go on the website of the 16 NRLC right now and they have tables that 17 are in my file where they show increases 18 in the wage rates for railroad workers and 19 in measuring real wage change, they use a 20 CPI. The traditional CPI-W. 21 This is a new issue. This wasn't 22 an issue in bargaining; it wasn't an issue</p>

<p style="text-align: right;">Page 1731</p> <p>1 in private PEBs; all of a sudden, it's an 2 issue. I scoured the record, and I found 3 one case, and I've been involved in every 4 round of bargaining and national handling 5 in every major PEB for the last 45 years. 6 I found one case in the NCCC 7 produced someone to question the use of 8 the CPI, and that was in the arbitration 9 Board 579, and fortunately or 10 unfortunately, there's no opinion in that 11 case by Arbitrator Bob Harris. So we 12 don't know what the consequence of that 13 criticism was, and my judgment is I 14 handled that case in the TCU, and I don't 15 recall it being material in any 16 discussion, certainly on the record in 17 that case. In any event, that's just an 18 illustration of how new this is and how 19 rare this is. 20 But I'll tell you what, the issue 21 and the subject of CPI-U's has come up in 22 non-railroad cases, and particularly where</p>	<p style="text-align: right;">Page 1732</p> <p>1 arbitration is governed by a statute which 2 requires the arbitrator to rely on the 3 cost of living as a factor in rendering 4 the award. 5 Now notably in this regard is the 6 experience that the Massachusetts Bay 7 Transportation Authority, the MBTA. Over 8 the past 40 years since statutory factors 9 were passed and had governed arbitration, 10 interest arbitration between the MBTA and 11 its many Unions there have been twenty 12 interest arbitration cases. I have 13 chaired in eighteen of them. 14 In every case the MBTA advocates 15 asserted experts, asserted that the CPI 16 should not be relied upon to measure 17 changes in the cost of living. 18 In fact, they produced in a case 19 before Arbitrator Bloodsworth; they 20 produced Robert Gordon. Robert Gordon was 21 a member of the Boston Commission, and he 22 is the most vocal critic of using the CPI</p>
<p style="text-align: right;">Page 1733</p> <p>1 as a measure of cost of living; and they 2 actually produced his testimony in this 3 case which I'm going to give you an 4 opinion of. 5 I didn't want to burden the 6 submission by including my analysis of 7 those cases, but it is attached as -- it's 8 an attachment to my submission at 9 attachment C. You can deal with this 10 later, panel members, but basically, I 11 looked at all twenty interest arbitration 12 cases, and like I said, I have the 13 transcripts of all of them, and I actually 14 handled on behalf of my Union clients 15 about 18 of them. 16 In seven of those cases there was 17 no opinion mentioning the controversy on 18 the use of the CPI, but in each of those 19 seven cases the arbitrator used the, CPI 20 the traditional CPI, in making their 21 calculations on real pay. 22 In two of the cases there's no</p>	<p style="text-align: right;">Page 1734</p> <p>1 acknowledgment by the arbitrator one way 2 or the other as to what they -- he or she 3 felt about use of CPI. In the five cases 4 arbitrator specifically addressed the 5 issue on CPI over statement and use of the 6 traditional CPI-W when measuring and 7 applying factor F which was under the 8 statute referenced in the cost of living. 9 And in all of those cases, all five 10 cases the arbitrator dismissed the 11 authority's position and used the 12 unadjusted published CPI as urged by the 13 Union. That was Jim Healy in 1983, David 14 Bloodsworth in 1985, Arnold Zach in 1989, 15 David Bloodsworth again in 1994, and Sarah 16 Garrity most recently in 2013. 17 I have their comments, their 18 excerpts from their opinions at page 3 of 19 our attachment C, and just to give -- Jim 20 Healy was no lightweight. In 1983 in 21 terms of arbitrators in the nation, and he 22 said, and I quote, the arbitrator is fully</p>

Page 1735	<p>1 aware of criticisms which have been</p> <p>2 directed at the CPI as to its accuracy in</p> <p>3 measuring true changes in the cost of</p> <p>4 living. Nevertheless, it remains the only</p> <p>5 viable measurement and undoubtedly what</p> <p>6 the authors of chapter 581 had in mind</p> <p>7 when referring to what is commonly known</p> <p>8 as the cost of living. Unquote.</p> <p>9 David Bloodsworth this is after he</p> <p>10 heard the testimony of Mr. Gordon said the</p> <p>11 following and I quote, cost of living is</p> <p>12 also factored to be considered in this</p> <p>13 case. Requiring an examination of</p> <p>14 increase in the consumer price index as</p> <p>15 has been noted before me. The CPI is not</p> <p>16 without its fault, it still remains easily</p> <p>17 understood and widely used measure</p> <p>18 inflation. Arnold Zack came next. He</p> <p>19 had something to say about this and of</p> <p>20 course Sarah Garrity, most recently, and</p> <p>21 this is after revisions of CPI.</p> <p>22 Remember back when Jim Heely was</p>	Page 1736	<p>1 considering this issue? It wasn't the</p> <p>2 perfect instrument that as perfect a</p> <p>3 treatment it is today. And Sarah Garrity</p> <p>4 wrote, and I quote, if I were the first</p> <p>5 MBTA interest arbitrator before woman the</p> <p>6 authority had raised this argument. I</p> <p>7 would have concluded that even if in</p> <p>8 perfect CPI remains the standard and most</p> <p>9 widely used measure inflation and has</p> <p>10 therefore been a basis for wage rates and</p> <p>11 wage comparisons over time and in every</p> <p>12 industry, unquote.</p> <p>13 So this has been raised, not in the</p> <p>14 railroad industry but outside the railroad</p> <p>15 industry in my other arbitration</p> <p>16 practices, and where the debate has a</p> <p>17 risen, I have never lost in argument. It</p> <p>18 is your pleasure to discount the use of</p> <p>19 CPI-W as to the proper means of measuring</p> <p>20 changes in the rate of real pay for these</p> <p>21 workers, it will be a precedent-setting</p> <p>22 decision. It would be new.</p>
Page 1737	<p>1 I want to talk about projections.</p> <p>2 In the left-hand column you have the</p> <p>3 contract years and you have seen my</p> <p>4 projections before. By measuring the CPI-</p> <p>5 W in the first year of the agreement it</p> <p>6 went up by 1.4 percent, in 2021 it went up</p> <p>7 by 7.8 percent. The first 6 months of</p> <p>8 2022 it went up by 6.8 percent. Those</p> <p>9 numbers are all known. You can look them</p> <p>10 up on the internet, but those are actual</p> <p>11 known increase in CPI for the first year</p> <p>12 of the contract, the second year of the</p> <p>13 contract and the next six months of the</p> <p>14 agreement. Those are known.</p> <p>15 For the last half of this year, I</p> <p>16 am crossing my fingers that we experience</p> <p>17 a 2 percent increase. I have no idea</p> <p>18 what's going to happen. It looks pretty</p> <p>19 optimistic, the Board will have more</p> <p>20 intelligence on that next month as it</p> <p>21 deliberates, and then of course in 2023</p> <p>22 I'm hoping that the CPI-W goes up by 3.1</p>	Page 1738	<p>1 percent and in 2024, 2.4 percent. I'm</p> <p>2 using for that purpose the office -- the</p> <p>3 CBO the Congressional Budget Office's</p> <p>4 estimates for increases in the CPI-U.</p> <p>5 Now we know that the CPI-W tends to</p> <p>6 increase at a slightly more rapid pace</p> <p>7 than the CPI-U because it has the</p> <p>8 experience of workers only and not of</p> <p>9 retirees and other folks. So I'm hoping</p> <p>10 that the CPI-W goes up by the same rate as</p> <p>11 the CPI-U, but I'm probably</p> <p>12 underestimating using the Congressional</p> <p>13 Budget Office forecast for increases of</p> <p>14 CPI-W by applying them there.</p> <p>15 I would judge that for the fourth</p> <p>16 and fifth year of the collective</p> <p>17 bargaining agreements, Dr. David and</p> <p>18 myself are kind of in synch on what we are</p> <p>19 praying will happen</p> <p>20 However, there are two problems I</p> <p>21 have with the right-hand column and that's</p> <p>22 the NCCC forecast for the CPI-U and that</p>

<p style="text-align: right;">Page 1739</p> <p>1 comes from Carrier's Exhibit 3 page 32, 2 but it also has been replicated again in 3 this record by Dr. David on this morning 4 and occasions before.</p> <p>5 This is problem No. 1. Increases 6 shown for 20 and 21 by Dr. David are 7 wrong. They are not a calendar year. 8 They do not represent a change in the CPI- 9 U over the course of either the first year 10 of the agreement which is calendar year 20 11 and the second year of the agreement 2021.</p> <p>12 When I looked at the difference 13 between us, between 21 -- in 2021, 7.8 14 percent versus 4.7 I suspected something 15 was wrong. So I went to the data. What 16 Dr. David did is to measure the average -- 17 he took the average of 2019 as the base 18 and compared it with the average of the 19 CPI index in 2020 and calculated the 20 difference which is 1.2 percent. I can 21 replicate that.</p> <p>22 But that's not the increase in 2020</p>	<p style="text-align: right;">Page 1740</p> <p>1 nor is it the increase in the first year 2 of the collective bargaining agreement, 3 that's just wrong. What it's capturing 4 when you use the average for the year is 5 the month over month increase in the CPI 6 in 2019 which was very moderate, I think 7 2.5 percent over the course of the year.</p> <p>8 He compares that then to the 9 average of the CPI indexes over 2020 which 10 again is capturing half of that year when 11 inflation was lower. So the difference is 12 when you do the math that if you take the 13 index number for December of 2019 it's 14 256.974. These numbers are in my 15 submission, and you compare that with 16 December 2020, which is 260.474, you get 17 an increase in the first year of the 18 collective bargaining agreement of 1.4 19 percent instead of 1.2, that's the 20 calendar year increase. That's the first 21 year of the collective bargaining 22 agreement. It's not the average. It's</p>
<p style="text-align: right;">Page 1741</p> <p>1 December to December.</p> <p>2 This is not rocket science. That's 3 the increase in 2020, the first year of 4 the collective bargaining agreement, which 5 is what this Board should be concerned 6 about, not what it was in 2019.</p> <p>7 Now the difference between 1.2 and 8 1.4 and looking at CPI-U only and you may 9 say well, that's insignificant. I 10 wouldn't be quarrelling with Dr. David 11 over this if it wasn't consequential 12 because the increase in the CPI-U during 13 the second year of the collective 14 bargaining agreement is not 4.7 percent, 15 it's 7 percent. Seven percent. December 16 over December. I give you the index 17 numbers in my submission.</p> <p>18 So it's not 1.2 and 4.7. It's 1.4 19 and 7. If you're going to use the CPI-U, 20 which I think is inappropriate, I think it 21 should be the CPI-W as the parties have 22 agreed to over time, but that makes it --</p>	<p style="text-align: right;">Page 1742</p> <p>1 I think that's not just a methodological 2 differences between us, I just think it's 3 wrong. I think it's an error. That's not 4 the increase in the first year of the 5 contract. Our agreement this was 6 amendable January of 2020. The increase 7 in that first year is measured, is 8 captured, that is to say the exposure to 9 the worker on inflation is measured from 10 December to December. There is no debate 11 about that.</p> <p>12 The second problem I have with Dr. 13 David is that he says that relying upon 14 the rejections by OMB that -- for 2022 15 that inflation will be in the third year 16 of the collective bargaining agreement, 17 which is calendar '22, will be 6.1 18 percent. Well, thus far December through 19 June of 2022, the CPI-U went up by 6.3 20 percent, 6.8 percent for the CPI-W as I 21 show, but if you were to look at the first 22 six months on this table and plot in the</p>

<p style="text-align: right;">Page 1743</p> <p>1 actual increase of the CPI-U in the first 2 six months of the collective bargaining 3 agreement in 2022, it would be 6.3 4 percent. Fact. 5 I want to know how you can forecast 6 for the year of 2022 on increase of 6.1 7 when you already know that it went up by 8 6.3. It takes more than statistical 9 gymnastics to get me over that one. 10 Inflation is going to eBate 11 hopefully, but it's not going to be zero 12 for the rest of the calendar year. So it 13 just can't be relied upon. So what I am 14 suggesting is anything the Carrier said 15 about inflation forecast and maintenance 16 of real pay under anybody's proposal has 17 to be thrown out. It's just wrong. 18 I want to flip to ahead because I'm 19 running out of time, and I'm not going to 20 be able to cover all this, but I have 21 another aspect of the wage chronology 22 under the respected proposals is shown on</p>	<p style="text-align: right;">Page 1744</p> <p>1 page 33 of my submission. So I direct 2 your attention to that table on page 33, 3 Member Twomey, of the submission. 4 There's a whole another aspect to 5 your understanding of the implications on 6 real wages for workers when you consider 7 and combine the effects of health care. 8 Everyone knows -- let me just explain what 9 I've done on this table. On the left-hand 10 side, we have the effective dates of the 11 NCCC's proposal, and we have their general 12 wage increase proposal in the next column 13 over; and then we have in the third column 14 on the body of the table we have the 15 health insurance contribution per month 16 incremental increase, that's on top of 17 what we're currently paying. 18 So this is what the worker looks at 19 when they -- if they were to consider the 20 ratification of the Carriers' proposal, 21 this is the picture that I would show 22 them. This is what they would be voting</p>
<p style="text-align: right;">Page 1745</p> <p>1 on. 2 So the gross hourly wage, as I show 3 in the next column over, but the net of 4 health insurance column subtracts from 5 that the effects of cost sharing and 6 cost-shifting from the plan to the 7 employee in a form of increases and 8 contributions and from the plan to the 9 patient in the terms of health care design 10 changes. Those numbers are lifted out of 11 the Cheiron testimony and report that has 12 been submitted. Those are not my numbers. 13 I just plugged them in there. 14 So the upshot is pretty clear. I 15 mean, we have in the gross hourly wage 16 increase column the numbers that you had 17 seen before, 17 percent over term and 3.2 18 percent per year increase. In the right- 19 hand column you have the impact of the 20 Carriers' proposal on the workers wage 21 when you consider they have to come out of 22 pocket for extra contributions and on</p>	<p style="text-align: right;">Page 1746</p> <p>1 average they're going to be paying more in 2 health care every month in the form of 3 design changes, and so that brings their 4 17 percent proposal down to 10 percent, 5 10.6 to be exact and that's 2 percent per 6 year. 7 And again that's the consequence. 8 By the way the total value over the 5-year 9 term, that's that second metric that I 10 talked about, that gives weight to the -- 11 enables you to compare the bid and ask on 12 a apples-to-apples basis by all measures. 13 Couple of points here, everybody 14 understands that the increase in employee 15 contribution that is paid by everybody 16 every month is nothing more than a wage 17 cut if it goes up. That's wages 18 On the other hand, the health 19 insurance design per month, as was 20 explained yesterday, is going to vary 21 depending on your utilization. It could 22 be anywhere from zero to \$15,000 a year</p>

<p style="text-align: right;">Page 1747</p> <p>1 for an employee, depending on your 2 utilization of plan. So I'm showing the 3 average, and I just want to remind you of 4 her comments on what averages mean; this 5 would be the average person. 6 So the other thing you have to note 7 is there's interplay between those two 8 columns. The lower the health insurance 9 design number the higher the contribution 10 obligation to the employee. So if you 11 plan is cheapened enough, 15 percent 12 cheaper the price is going to be -- have a 13 lower contribution impact and vice versa, 14 so I wanted to remind you of that. 15 How does this position play in 16 terms of maintenance of real pay? This is 17 the impact of the NCCC wage and health 18 care proposal on real pay. So I just took 19 the numbers down I just showed you and 20 plotted them against changes in the 21 consumer price index and the forecast that 22 you have here; that's 25.8 percent</p>	<p style="text-align: right;">Page 1748</p> <p>1 chronology of change in the CPI-W that 2 I've shown you several times. 3 Next over, you have their proposed 4 17 percent increase, and you can see that 5 these are numbers I have given you before. 6 I calculate a real wage increase or 7 decrease over five years of 7 percent or 8 minus 7 percent; that's a cut of 1.47 9 percent per year, but when you add the 10 impact of their changes on health care, 11 that 7 percent becomes 12 percent, and 12 that's a negative 2.5 percent per year. 13 This is what the employees look at when 14 they're considering the ratification of 15 the Carriers' proposal. This is out of 16 pocket. This is what's happening to me; 17 they understand this. I prepare 18 ratification materials I do this for 19 dozens of separate classifications so 20 individuals can see what's happening to 21 them, that what they vote on. 22 Page 10 of my submission I have</p>
<p style="text-align: right;">Page 1749</p> <p>1 comments on wage level comparisons and I'm 2 not going to go over this. I will make 3 the following comment, it's kind of 4 developed in more detail in my submission, 5 but I agree with Dr. David when he said 6 that he said he was not making value 7 judgements about the so-called premiums. 8 He stated it was not his -- his 9 comparisons were not intended to suggest 10 what is fair and appropriate. He was just 11 presenting to you what these premiums are 12 based upon his analysis. 13 So it's not a question of what is, 14 it's a question of what should be and for 15 that purpose, I would ask the Board to 16 reflect on the parties practice and ask 17 yourself the following: Any time an 18 individual expert observes that a railroad 19 worker is paid a compensation premium, and 20 I quote 59 percent to 114 percent, 21 unquote, over workers and, quote, 22 comparator occupational categories,</p>	<p style="text-align: right;">Page 1750</p> <p>1 unquote. That's Dr. David's conclusion. 2 114 percent premium. 3 Now the first thing that comes to 4 my mind is that if this data and if this 5 factor and if this set of facts were 6 important to the Carriers in making 7 collective bargaining agreements, how does 8 a premium of that size develop? How does 9 it happen ? 10 Well, and why are the Carriers 11 paying 59 to 114 percent more than what 12 they're academic friends say they need to. 13 Well, the answer is clear to me. These 14 comparisons are ignored by the parties in 15 the real world of railroad collective 16 bargaining they are ignored by the parties 17 because no one believes the comparisons 18 are valid. 19 And moreover the so-called 20 premiums, as large as they are, have grown 21 considerably over last few years, and when 22 those agreements were reached without</p>

<p style="text-align: right;">Page 1751</p> <p>1 regard to what I believe the parties find 2 are meaningless and invalid, and I give 3 you a whole bunch of examples, and I can 4 pull off my shelf the testimony, exhibits 5 in 20 cases where the Carriers have come 6 in both here and the airline industry and 7 the chairman might remember what happened 8 in a United Airline case where they 9 marched in a bunch of folks who said 10 mechanics are overpaid, nothing in that 11 opinion that reflects any reliance on that 12 kind of observation. But I give you a 13 bunch of examples. PEB 220, Dr. Evans 14 shows up and says railroad machinists are 15 overpaid by 13 percent compared to similar 16 jobs included in the bureau of census 17 current population survey. 18 So using that same source, same 19 methodology he shows up in PEB 243 and 20 says well the premium is now 29 percent. 21 Okay it goes from 13 percent to 29 percent 22 by 2010, and if you look at this</p>	<p style="text-align: right;">Page 1752</p> <p>1 agreement, we're overpaid now. 2 How does that happen if that's a 3 relevant consideration. And I do the same 4 exercise for you in a TCU case and again 5 PEB 229 it's always the same story. This 6 premium is big, and it gets bigger after 7 the deal is made and we're really not 8 motivated by that. 9 Before PEB 243 the Carriers' argued 10 that a 54 percent premium over the average 11 worker in transportation and material 12 moving would expand to 58 percent under 13 their own proposal, that's what they argue 14 before you in the 243. If this is a 15 meaningful important, quote, benchmark why 16 ignore it in even making your own 17 proposal. 18 I can give you another example of 19 Dr. David's work in a BRS and Northeastern 20 Illinois Regional Commuter Railroad 21 Corporation case in 2017 which I 22 participated in as a Board member along</p>
<p style="text-align: right;">Page 1753</p> <p>1 with Don Munro and in that case, he said 2 BRS maintainers are 65 percent overpaid 3 and guess what, there was a wage award of 4 18 percent and the premium got bigger. 5 You add to this entire history of - 6 - bargaining history of where the parties 7 have agreed to special skill adjustments 8 for BRS, BMW and shop crafts in 9 particular. So they reach agreement 10 saying well, we're going to have a special 11 adjustment for these particular crafts, 12 and you got to ask yourself if they're 13 overpaid to begin with, why are you 14 agreeing to extra additional increases to 15 the GWI's that are already negotiated for 16 everybody else. 17 I'll just end it with this, the 18 record in the Carriers' case of 243 19 contains about 180 pages, and this is just 20 of the exhibit material, that was placed 21 before the Board on wage and compensation 22 comparisons by the NCCC.</p>	<p style="text-align: right;">Page 1754</p> <p>1 And they were based upon CPS and 2 sources all other data sources of the kind 3 that are used in this case. The analysis 4 of all of that material was dismissed by 5 the Board in a footnote and I hesitate to 6 read it to you because you can read it 7 yourself but it's in here. It was 8 dismissed. 9 On the subject of wage trend, which 10 is my next topic, I'm going to skip over 11 this because I, kind of, covered some of 12 it in my affirmative case. There's 13 differences between us on how you measure 14 wage trends and whether or not you should 15 control for the next and so on and so 16 forth, but I think because directionally 17 we're in agreement, the real question is 18 whether or not what basis you look at and 19 I guess Dr. David takes issue with my 20 using -- going back to the 1980, 1979 21 being the base right before deregulation 22 and my purpose for that and I thought I</p>

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1 was clear about this in my affirmative
 2 presentation that it was to bring to your
 3 attention the fact that much of then
 4 increase that we occurred after -- in 2004
 5 and after was accounted for by the beating
 6 that rail labor took following 2019 and I
 7 wanted to give you an entire history so
 8 you judge for yourself what wage progress
 9 was or was not, but again we can move on
 10 from that.

11 My next topic here is on manpower
 12 shortages, and I just want to make a
 13 couple of brief remarks --

14 **CHAIRMAN JAFFE:** Can I ask one
 15 question before you shift gears from
 16 general wages to manpower. There's
 17 obviously a difference in the parties'
 18 proposals as to the effective date of the
 19 general wage increases. If you could
 20 comment briefly on the history as to
 21 whether the parties have traditionally
 22 used July 1, January 1, some other date,

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1 **BOARD MEMBER DEINHARDT:** Have the
 2 increases generally been on annual basis
 3 rather than on January and July?

4 **MR. ROTH:** They've been annually
 5 but not necessarily on the first day of
 6 the contract year may have been deferred
 7 sometimes in between.

8 **BOARD MEMBER DEINHARDT:** But it's
 9 usually once a year, not twice a year.

10 **MR. ROTH:** Correct. Except for
 11 those contracts that had cost of living
 12 escalator clauses but that's been some
 13 time back. 2007 was the last.

14 **CHAIRMAN JAFFE:** Or some lump sums,
 15 right?

16 **MR. ROTH:** Correct.

17 With respect to manpower shortage,
 18 the Board has in its record a ton of
 19 information and very opinions on quick
 20 rates and rest, but I would make a couple
 21 of observations. First, whatever the
 22 current circumstances are regarding

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1 was there a change at some point in
 2 general practice at the bargaining table
 3 or the like, I'd like to at least get on
 4 the record a better understanding of the
 5 history --

6 **MR. ROTH:** Clearly, I have all of
 7 that information, but I don't have it all
 8 on the top of my head. I can say that on
 9 the last agreement, the parties deferred
 10 that first GWI to July and had used July
 11 thereafter. So I think there's evidence
 12 of it going both ways. I would rather not
 13 strain my memory, but I certainly can get
 14 all that information to you.

15 **CHAIRMAN JAFFE:** It's clearly a
 16 difference, and not a substantial
 17 difference. I just needed to understand
 18 better, that's all.

19 **MR. ROTH:** I think the record will
 20 show that there's been instances in which
 21 there has been an amenable date and
 22 instances which GWIs have been deferred.

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1 recruiting and retention, the problems for
 2 the railroads have gotten worse. Whatever
 3 role this fact played in the making of the
 4 agreement following PEB 243, things have
 5 certainly gotten worse since then.

6 So 10 years ago in PEB 243 the
 7 Carriers' reported that there were 172
 8 hires for every -- I'm sorry, 172
 9 applicants for every hire, 172. That same
 10 number for the same railroads in this
 11 record is 42.5, so it's clearly gotten a
 12 lot worse since you last heard a case
 13 between these parties, Mr. Chairman.

14 They also say that the quit rate in
 15 2010 for the big four railroads was and I
 16 quote, less than .15 percent, unquote.
 17 Now in this record the Carriers report
 18 that in 2021 the quit rate on some
 19 railroads is nearly fifty times that. So
 20 I don't think there's any quarrel about
 21 the fact that things have gotten a lot
 22 worse, but how that bears on your decision

<p style="text-align: right;">Page 1759</p> <p>1 depends on how the same facts bore on your 2 decision in 243.</p> <p>3 Second observation I would make is 4 that we've heard a lot of testimony from 5 the Carriers here about their retention 6 and hiring bonuses, but they were 7 targeted, and they're not universally 8 applied. We heard additional testimony 9 about how a permanent across the Board 10 increase in wages is not going to solve 11 the problem, but that belies the practice. 12 Because I can report that as recently as 13 last week on CSX, President Ferguson and 14 his folks at SMART-TD negotiated the 15 elimination of a 5 year wage progression. 16 So now new hires, conductors start at a 17 maximum rate. That's a 25 percent across 18 the Board, across all locations, permanent 19 increase in the hiring rate for 20 conductors.</p> <p>21 That doesn't sound like a temporary 22 thing. It doesn't sound like it's</p>	<p style="text-align: right;">Page 1760</p> <p>1 targeted to a certain location because 2 it's not. It's going across the Board.</p> <p>3 By the way, this was negotiated at 4 the initiative of CSX management. Jeremy 5 didn't go to them, they came to him and 6 said we got to give you a big across the 7 board increase. That kind of was contrary 8 to what we heard from the compensation Mr. 9 Allen, I guess Dr. Allen who said you 10 can't fix this by increase in pay across 11 the Board, that won't work. Tell that to 12 your client. In addition, by the way, CSX 13 gave a \$2,000 bonus to all employees and 14 that was also regardless of location. And 15 if you go on the website of BNSF today, 16 they are offering hiring bonuses in every 17 state in their entire network except for 18 one, Arizona. Now if this is targeted, 19 why are the hiring bonuses universal? It 20 doesn't square.</p> <p>21 The third point I make, and I have 22 some attachments to support this but you</p>
<p style="text-align: right;">Page 1761</p> <p>1 have to -- there are a lot of conflicting 2 information about the role of the hiring 3 bonuses and I ask you to look at the CEO's 4 and other executives comments in this 5 regard. I'm out of time so we're going to 6 have to skip.</p> <p>7 I have -- there's one section in 8 here Mr. Chairman, that I think you need 9 to focus on. There's some testimony about 10 the risks going forward, we might be 11 facing a recession there are other 12 constraints on the Carriers' building 13 revenue in traffic and the nature of the 14 so-called coal problem, changing 15 composition of the traffic mix and so on, 16 and there was a table like this on the 17 board that was put up by one of the 18 witnesses showing what happened during the 19 great recession and I'm using the same 20 dates, 2007, 2009 and describing what 21 happened from the employees' view and I 22 think they were noting that wages went up</p>	<p style="text-align: right;">Page 1762</p> <p>1 by 14 percent and that was for the 2 survivors. But they're discounting the 3 fact that 15,300 jobs were abolished 4 permanently, they never came back, and 5 that's 100 percent cut in my pay. So you 6 have to look at the whole picture.</p> <p>7 What happened during the great 8 recession is that demand fell 13 and a 9 half percent revenue miles declined, 10 carloads were down 17 percent, capacity 11 was immediately reduced, how, by cutting 12 the workers. What happened then is that 13 you cut labor costs by 8.2 percent, the 14 operating revenue declines by 12.4, 15 expenses go down by 12.9, but profit -- 16 the margins -- the revenue margin improves 17 from fifty-eight cents to fifty-nine 18 cents, net income profit margin goes up 19 from 12.5 percent to 13 percent, and, of 20 course, the all mighty shareholder is 21 protected during the great recession. 22 Share prices rose 7.7 percent. Total</p>

Page 1763	Page 1764
<p>1 shareholder return was up by 12 percent.</p> <p>2 My point being that when you look</p> <p>3 at the great recession, when you look at</p> <p>4 what happened during the COVID crisis,</p> <p>5 when you look at what happened during the</p> <p>6 so-called cold problem era, which is</p> <p>7 outlined in here, you can -- don't tell me</p> <p>8 that the employees were not at risk.</p> <p>9 They're the ones who took the brunt of the</p> <p>10 pain that was associated and inflicted on</p> <p>11 the railroad industry during that period</p> <p>12 of time. I'm going to use my last amount</p> <p>13 of time here, because I'm out of time, to</p> <p>14 deal with one role issue and that is paid</p> <p>15 sick leave.</p> <p>16 I was not called upon by any of the</p> <p>17 crafts to manage a presentation or the</p> <p>18 negotiations over any of the their rule</p> <p>19 issues with the exception of sick leave.</p> <p>20 The BMW smart mechanical coalition asked</p> <p>21 me to prepare their position on that</p> <p>22 subject matter. So when I heard from the</p>	<p>1 Carriers in this record that well, the</p> <p>2 Unions didn't describe their proposal,</p> <p>3 they didn't provide any support for it,</p> <p>4 they didn't gauge us over the issue and</p> <p>5 therefore you should -- it wasn't really</p> <p>6 bargaining over it so you should just</p> <p>7 remand it back or ask or recommend that it</p> <p>8 be dropped.</p> <p>9 Well I take offense of that with</p> <p>10 respect to the sick leave issue only</p> <p>11 because I was tasked with making that</p> <p>12 presentation, and I made a substantial</p> <p>13 presentation to the Carriers to the NCCC</p> <p>14 in support of the Union's position. And</p> <p>15 in that I articulated all of the detail of</p> <p>16 the Union's position on is this manner;</p> <p>17 the number of days that we were</p> <p>18 requesting, there would be no waiting</p> <p>19 period, it would be accumulated from year</p> <p>20 to year without limitation, and notably</p> <p>21 what I said was this is not extra personal</p> <p>22 days. This is not a vacation.</p>
Page 1765	Page 1766
<p>1 This is not time that we're going</p> <p>2 to use for -- to go fishing which was the</p> <p>3 insinuation that you get from the</p> <p>4 Carriers' reading of the Union's position.</p> <p>5 What I specifically said in that</p> <p>6 proceeding was any day -- any absence</p> <p>7 beyond three consecutive workdays would be</p> <p>8 subject to a doctor's certification, a</p> <p>9 doctor documentation.</p> <p>10 In fact that was said on behalf of</p> <p>11 BMW but the CBC in its original notice</p> <p>12 and articulation of a sick leave proposal</p> <p>13 had the same rule.</p> <p>14 So I knew that was the intention</p> <p>15 not only of the BMW but of all the</p> <p>16 crafts. Nobody was looking for a sick</p> <p>17 leave program that would be enable</p> <p>18 employee to recover pay for anything but a</p> <p>19 legitimate sick absence. So this notion</p> <p>20 that we're just going to go out and use</p> <p>21 this for any purpose is false, and it's</p> <p>22 not only false but it was to say that we</p>	<p>1 had -- we didn't articulate that, and we</p> <p>2 weren't specific about it is wrong because</p> <p>3 I'm the one that said it.</p> <p>4 Secondly, as I -- when I presented</p> <p>5 this material, the Carriers' politely said</p> <p>6 thank you for your information and we'll</p> <p>7 take it under advisement and get back to</p> <p>8 you and they never did. Now we're being</p> <p>9 accused of only spending so much time in</p> <p>10 bargaining over a subject in which they</p> <p>11 refuse to engage. It takes two to have a</p> <p>12 dialogue. They didn't respond at all.</p> <p>13 As counsel Edelman said, they're</p> <p>14 entitled to say no, but don't then come to</p> <p>15 the Board and say because there was a lack</p> <p>16 of bargaining, you have to recommend that</p> <p>17 the issue be withdrawn because there's a</p> <p>18 lack of bargaining over sick leave only</p> <p>19 because they refuse to bargain over it.</p> <p>20 They said see you later.</p> <p>21 Apart from what they said, I</p> <p>22 inferred that was a big no and we're not</p>

<p style="text-align: right;">Page 1767</p> <p>1 doing it. We're not talking to you about 2 it. Part of that presentation involved 3 the replacement rate issue. In their 4 presentation, they're saying that well, 5 don't worry you have RUIA what are you 6 worried about. It's 70 percent coupled 7 with supplemental sickness for those who 8 have it, you have 70 percent your 9 earnings. 10 What they're forgetting is the fact 11 that the waiting period is unpaid. You 12 only get that replacement when you're 13 actually eligible for the RUIA and 14 supplemental sickness benefit which you 15 don't get it before 4 days in the absence. 16 So when you put that all together -- if I 17 can find it -- this is exactly the chart 18 that I gave them in my presentation a year 19 ago. 20 And I said look, the waiting period 21 has a permanent regressive intact on 22 replacement rates regardless of the</p>	<p style="text-align: right;">Page 1768</p> <p>1 duration of illness and that's because you 2 never recover those lost four days. So 3 the notion that you hit a replacement rate 4 of 70 percent is an illusion. You never 5 get that back. You can never get back 6 more than 50 percent and that's why we 7 need it. 8 Then of course I went into the 9 other reasons, there was a second chart 10 and that was in the presentation as well 11 and this is for someone who has both RUIA 12 plus supplemental sickness and in this 13 example, it was the BWE craft but it 14 applies to everybody. 15 I also talked about prevailing 16 practice. We hear in this record with 17 regard to certain management proposals 18 that we should look at the benchmark. We 19 should look at what's mainstream. Well 20 apply that standard to sick leave and 21 there is no other conclusion, but that 22 sick leave has to be recommended because</p>
<p style="text-align: right;">Page 1769</p> <p>1 94 percent of all other Union employees 2 have it and as many in the nonunion sector 3 as well. 4 Everybody has sick leave, and this 5 is not to be confused with short-term 6 insured disability benefits like 7 supplemental sickness, which is in the 8 short plan. When we quote the BLS numbers 9 on the frequency of and workers who are 10 covered by sick leave programs, that's for 11 what the BLS finds is the sick leave 12 program which is a payroll-based benefit 13 that is not insured. People have, in 14 addition to sick leave, short-term 15 disability insurance coverage because you 16 know what, they're not additive. 17 Sick leave programs and the 18 adequacy of sick leave programs are a 19 function of your service and your sick 20 record or utilization whereas an insured 21 short-term disability insurance program or 22 sickness and accident insurance program is</p>	<p style="text-align: right;">Page 1770</p> <p>1 renewable with each disability. 2 So in many industry, and I can show 3 you at least what the transit practice is, 4 they can combine both as we're proposing 5 here. The other thing that I made clear, 6 by the way, in my presentation to the NCCC 7 was that we weren't looking for more than 8 100 percent of pay of 8 hours pay. 9 So to the extent that you have 10 these other benefits, they're simply 11 offset. We're just looking to fill in the 12 gaps, to fill in the difference between 13 what is 50 percent replacement rate and 14 100 percent. So there's no duplication 15 here. 16 By the way, these same studies from 17 the BLS and from other sources that I 18 cited and the presentation to them 19 supported the other elements of the 20 Union's proposals in terms of unlimited 21 accumulation, in terms of no waiting 22 period.</p>

<p style="text-align: right;">Page 1771</p> <p>1 So to -- again, I think to say that 2 this should not be recommended because 3 there wasn't bargaining on it is a bit 4 unfair to the organizations who 5 specifically approach the management and 6 sought some interaction from them over the 7 subject matter. 8 In terms of need, I said the 9 following back in when I made the 10 presentation, I'll repeat it here. The 11 Carriers are valuing their pricing this 12 proposal as though every person in the 13 bargaining unit is going to get 15 days of 14 -- 15 days paid per year. That's how they 15 get that big number. Think about that. 16 They say well, you didn't support a 17 need for sick leave. Well, if you're 18 going to assume, as they do, that there 19 are 15 days per year that a person is sick 20 and unpaid, that means they're not getting 21 RUIA, that means they're not using a 22 vacation day, that means they're not using</p>	<p style="text-align: right;">Page 1772</p> <p>1 a holiday or personal day, that means they 2 don't have supplemental sickness. 3 These are fifteen unpaid days; that 4 means they're filling in the waiting 5 periods or they exhausted their other 6 benefit stream. So their only assumption 7 for the valuation and cost of the proposal 8 speaks to the need, because if you have -- 9 if your entire work force has 15 days of 10 sickness that are uncompensated for every 11 year in addition for those days that 12 they're sick and out on RUIA and 13 supplemental sickness and personal days, 14 you have a health crisis on your hands. 15 You got a pandemic. 16 So clearly one thing, it's got to 17 be one thing or the other. Either you're 18 exaggerating the cost of the plan, or you 19 have a sick crisis that needs to be 20 remedied. It can't be both. 21 The other thing that I saw this 22 morning I thought was interesting on BNSF</p>
<p style="text-align: right;">Page 1773</p> <p>1 at least, they said there were twenty- 2 three unpaid sick days a year on average 3 in their T&E force. That speaks volumes 4 as to the need for a sick leave program. 5 These are unpaid days, twenty-three on 6 average. They're not getting personal 7 days; they're not using their vacations. 8 These are unpaid days. These are the days 9 they're looking to be compensated for 10 because I'm sick like the rest of American 11 workers. 12 If the Board wants to do 13 mainstreaming and benchmarking, you can't 14 not recommend a sick leave program. One 15 last -- I think I had one last thought. 16 I've got to talk about one other thing. 17 Another Carrier defense, and we heard it 18 again this morning, if you have a sick 19 leave program where people who are 20 actually sick have to book off that's 21 going to cause operational problems. 22 Well, that's only true if the</p>	<p style="text-align: right;">Page 1774</p> <p>1 employer hasn't properly staffed the extra 2 board. In the back of this book I did do 3 the wage maintenance programs for both 4 sick leave and sickness and accident 5 programs for the twenty major urban 6 transit systems in the country. These are 7 covering bus operators and motor persons 8 and light rail and heavy rail operators. 9 They are performing a perishable service. 10 When a trip is dropped it causes -- 11 that trip is gone forever. It can't be 12 replaced. The passenger is standing on 13 the corner waiting for the next trip. So 14 it can have a very disruptive effect on 15 operations. 16 Yet when you look at my attachment 17 I, there's twenty major transit systems 18 which cover about 75 percent of all 19 workers in the industry. Nineteen of the 20 twenty have a sick leave program. Fifteen 21 of the twenty provide twelve days or more 22 per year.</p>

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<p>1 Eighteen of the twenty have sick 2 leave plus short-term disability in the 3 nature of a sick leave -- of a sickness in 4 accident or statutory benefit such as they 5 do in New Jersey or New York and 6 California for short-term disabilities, 7 those are statutes much like our RUIA. 8 So how did this develop? How can 9 they handle this? They've got the same 10 operational constraints as railroads do. 11 Well, it's true that when you have 12 a staffing model, a manpower model you are 13 planning for scheduled absences. You know 14 what your vacation liability is. You know 15 how many holidays are going to be taken, 16 and it's true that there are unscheduled 17 absences like personal emergencies and 18 sick absences. 19 So what are transit systems do 20 about that. Well, they look at their 21 experience. Just because they are not 22 scheduled doesn't mean you can't plan for</p>	<p>1 it, and transit systems will built into 2 their manpower and staffing models 3 experience based upon sick absences and 4 other unscheduled events and other 5 contingencies of that kind and they will 6 build their extra boards in a manner so 7 that they can assure themselves that they 8 can cover the service. 9 So this defense that it's going to 10 create operational problems is phony. It 11 just means that you don't want to spend 12 the money to staff up your extra board 13 like they do in other industry. That's 14 just a money thing. That's just cost. I 15 has nothing to do with operations. Ask 16 the airlines how they do it. Every 17 airline pilot contract has a quality sick 18 leave program. How do they get their work 19 out? 20 Well the managements are smarter. 21 They staff up, they have reserves, they 22 spend the money because they know that's</p>
Page 1777	Page 1778
<p>1 the proper balance between the management 2 interests and the public's interest to get 3 the service out and the employees interest 4 to be compensated for unforeseen absences 5 for causes beyond their control. 6 So don't tell me it's an 7 operational problem. I've been 8 negotiating sick leave programs in the 9 transit industry for 45 years, and I've 10 heard this defense before but its never 11 held up. Its never held up. Witness the 12 attachment I and the quality sick leave 13 programs that bus operators have. 14 I think I mentioned it but in 15 connection with -- let me just identify 16 what's in back here. We talked about 17 attachment C. Before I get to that, 18 attachment A and B have some 19 reconstructions of my cross team model and 20 again, I heard Jeff talk this morning. It 21 is true that the more we talk, the more 22 reconciliation we can have between our</p>	<p>1 respective assumptions in modelling. 2 There's some information that he has that 3 -- particularly that is based upon payroll 4 experience that I didn't have access to, 5 so I had to invent other means for 6 developing my assumptions. He may have 7 superior intelligence on those things that 8 I would agree to, but we haven't had that 9 opportunity, but in any event, I wanted to 10 give the Board an attachment A, a complete 11 accounting of all of our proposals 12 including our rules. 13 So this is my last -- the latest 14 work that I have done and compare it with 15 attachment B which where I value the 16 Carriers' proposal and you can compare the 17 two and if at any point in your 18 deliberations this becomes critical that 19 you have a reconciliation between us, I 20 would be more than happy to meet with the 21 Carriers to help out in that endeavor. 22 Lastly, just to identify, I think</p>

<p style="text-align: right;">Page 1779</p> <p>1 counsel wants me to bring your attention 2 to the fact that we have included in here 3 in attachment F recent news articles and 4 the Carriers' public comments about labor 5 shortages, and this kind of supports all 6 of our comments regarding what -- the 7 differences between what the railroads are 8 reporting in the public domain as a 9 contrast what they're reporting to you and 10 its become very confusing. 11 One last thing. I'm sorry. I 12 apologize for this but every time the 13 Carriers' throw something up on the Board 14 that show for training employees, the 15 number of days that they have available to 16 them, I get very confused because they 17 show well, you have eleven personal days 18 and you have eleven holidays and they have 19 all this vacation, so what's the problem. 20 You can use all this stuff to cover your 21 sick absences, that's what I was getting 22 out of it.</p>	<p style="text-align: right;">Page 1780</p> <p>1 But I want the Board to understand 2 that when they show those 11 personal days 3 and 11 holidays they're mutually 4 exclusive. You don't get both. If you 5 worked in the yard, you're going to get 6 the eleven holidays pretty much paid and 7 used like nonoperating folks, but if 8 you're on the road, you don't get the 9 eleven holidays. You get the eleven 10 personal day, which by the way are 11 graduated by service so you have a whole 12 bunch of people who have none and then 13 some of the folks at the top with 20 years 14 of service that might have eleven, but 15 they don't have holidays. 16 The other thing about using single 17 day vacations, that's all well and good 18 but then I don't have a vacation. 19 Vacations are dedicated compensation for a 20 purpose; it's leisure time, it's not sick 21 time. And by the way, all these transit 22 systems that I've laid here, every one of</p>
<p style="text-align: right;">Page 1781</p> <p>1 them have a better vacation program than 2 what we find in the railroad industry. 3 So the notion that you can use 4 leisure time to cover your sick absences 5 is just an anathema except for the 6 Carriers. Thank you for your indulgence, 7 Mr. Chairman, Board Members. I'm told 8 that I'm finished. 9 CHAIRMAN JAFFE: Thank you, again, 10 Mr. Roth. You have our assurance, like 11 all of the other exhibits, we'll read this 12 one in full as well. 13 MR. ROTH: Thank you, sir. 14 CHAIRMAN JAFFE: Can I ask one 15 clarifying question? It's very focused. 16 And this hopefully won't derail your 17 timeline too badly, the latest costing 18 estimate in the back, and I think it was 19 attachment B, cost of the sick leave 20 proposal at 7 days usage, I understand 21 that you previewed it yesterday that you 22 were going to revise that estimate down</p>	<p style="text-align: right;">Page 1782</p> <p>1 from fifteen. 2 Do you have any succinct 3 explanation for why you chose seven 4 instead of 6 or 8 or 3 or 9 or whatever 5 the number may have been? 6 MR. ROTH: I think it's going to be 7 in the end of the day an arbitrary 8 decision, but I was just pointing out that 9 it can't possibly be fifteen, so its got 10 to be less than that. I think even seven 11 is generous because the costing that both 12 Jeff and I have done does not involve any 13 offsets for benefits that you might 14 already have. So these are seven 15 uncompensated days, and so I think the 16 answer -- the direct answer is it's just a 17 guess. 18 CHAIRMAN JAFFE: That's fine. I 19 just wanted to understand it, that' all. 20 MR. ROTH: Right. 21 CHAIRMAN JAFFE: Thank you very 22 much. We're good. Thank you.</p>

<p style="text-align: right;">Page 1783</p> <p>1 MS. ROMA: So the Union would 2 propose a brief 15-minute break, hopefully 3 a true 15-minute break so we can resume 4 with our health and welfare rebuttal. 5 CHAIRMAN JAFFE: That's fine. Off 6 the record. We'll stand in adjournment 7 until 2:00 promptly. 8 (A break was taken at 1:45 p.m.) 9 (Proceedings resumed at 2:01 p.m.) 10 CHAIRMAN JAFFE: Back on the 11 record. At your convenience, Ms. Roma. 12 MS. ROMA: Okay. I think we're in 13 the final stretch here today. 14 Just before turning over to our 15 health and welfare rebuttal witnesses, I 16 just wanted to do a little bit of 17 housekeeping matter to draw attention to 18 certain things. 19 The first is that the NBTA 20 decisions relied upon and discussed by Mr. 21 Roth appear in the Union's online 22 appendix, there are nine hundred pages</p>	<p style="text-align: right;">Page 1784</p> <p>1 long, so we did not produce paper copies. 2 They're available should you want to see 3 them, and they were provided to you last 4 night. 5 Additionally, any online appendix 6 we added full copies of the collective 7 bargaining agreements that we have at 8 Union Exhibit 8. Union Exhibit 8 only 9 contained the excerpts in these 10 agreements. We were focused on health and 11 welfare, but the full agreements are now 12 on the online appendix as well and 13 included in those are two agreements, I 14 just wanted to bring the board's attention 15 to. 16 The first is the DM&E contract with 17 the BLET in which they achieved 27 percent 18 GWI's compounded and status quo on health 19 and welfare, and the second is the CMQ 20 SMART-TD agreement in which they also 21 achieved status quo on health and welfare 22 and 30 percent GWIs.</p>
<p style="text-align: right;">Page 1785</p> <p>1 So with those two matters taken 2 care of, I want to turn it over to our 3 health and welfare witnesses and again 4 will be Ms. Mallet from Cheiron and Gaelle 5 Gravot from Cheiron as well. 6 CHAIRMAN JAFFE: Thank you very 7 much. 8 Welcome, I do need to remind you 9 you're still under oath. I don't need to 10 swear you back in again. 11 Thank you. 12 THEREUPON: 13 KAREN MALLET and GAELLE GRAVOT 14 were called for examination, and, having 15 been previously duly sworn, testified as 16 follows: 17 MS. MALLET: Good afternoon again. 18 Today we're going to have three sections 19 of our rebuttal. 20 The first section is going to be 21 directly related to the comments that we 22 heard from the Carrier's expert witnesses</p>	<p style="text-align: right;">Page 1786</p> <p>1 this morning. The second section is going 2 to be on whether or not cost shifting such 3 as the area proposal (inaudible) morbidity 4 or the health of the membership. 5 And the last section will be on 6 responses to the questions that you asked 7 about yesterday. So I'm going to flip 8 over to the Carriers' presentation and 9 we're going to go the pages that I wanted 10 to make points that they made about our 11 materials. The first one on slide one, 12 Mr. Duncan is a renowned actuary in our 13 field. However he is not a renowned 14 actuary for being a health and welfare 15 plan sponsored actuary. 16 What he is known for is predictive 17 modeling and risk scores. He said that 18 actuaries only use actual values and 19 rates, they don't use aggregate numbers. 20 In the health and welfare planned sponsor 21 business is very important to have 22 aggregate numbers. You need to know what</p>

<p style="text-align: right;">Page 1787</p> <p>1 your budget is going to be, you need to 2 know what your projected amount is going 3 to be so you can make sure you have enough 4 contributions. 5 We do things like project counts 6 and the rates and we make all kinds of 7 adjustments on them so having advocate 8 numbers and for most CFO having aggregate 9 numbers is critical. I've never heard a 10 CFO say tell me what our actuary value is, 11 tell me what your premium rate is. 12 They've asked us tell us what our cost per 13 employee is regardless of whether they 14 opting in or out so we know when we hire 15 someone how much it's going to cost and 16 they definitely ask us every single year, 17 usually four times a year, sometimes 18 every, single month, what the projected 19 budget is going to be. What the cost is 20 going to be in aggregate. 21 So aggregate is a very important 22 tool, and as such for the Carriers knowing</p>	<p style="text-align: right;">Page 1788</p> <p>1 that their cost has decreased is important 2 because its helped their balance sheet, 3 its helped their operating expenses go 4 down in this component. 5 BOARD MEMBER DEINHARDT: Ms. 6 Mallet, I'm having trouble finding where 7 your presentation is. 8 MS. MALLET: This isn't my 9 presentation. This is their presentation. 10 I'm responding to their points. 11 BOARD MEMBER DEINHARDT: So I don't 12 have paper on this. 13 MS. MALLET: This is from this 14 morning, what they showed. I'm showing 15 you what they showed so I can respond to 16 their comments. Sorry for the confusion. 17 This is definitely not ours. 18 BOARD MEMBER DEINHARDT: That's all 19 right. 20 MS. MALLET: Going on to this 21 chart. Mr. Duncan points out that the 22 railroad cost is \$17,000 compared to a</p>
<p style="text-align: right;">Page 1789</p> <p>1 Union cost of \$13,644 and \$10,443. He 2 said -- he mentioned two items that can 3 contribute to it. One is richer benefits. 4 He doesn't quantify it, he just says it 5 could. So he assumes these benefits are 6 richer than these two. I don't know if 7 they are. I haven't done the actual 8 values to determine that. 9 He then also says that this high 10 number of members per contract or members 11 per employee is contributing to it. The 12 number 325 is going to be really close to 13 what Gaelle is going to share with you 14 later that you asked -- 15 BOARD MEMBER DEINHARDT: Which is 16 part of your response to when we had 17 during break. 18 MS. MALLET: We don't have any 19 issue with 325, but the issue is it's 20 important to remember when we showed you 21 the spouses cost of claims probability 22 distribution 20 percent that goes out</p>	<p style="text-align: right;">Page 1790</p> <p>1 they're going to hardly change how many 2 costs. So we can get this number down but 3 it's not going to lower the cost per 4 employee per se. It might, a little bit, 5 but not like they're implying. 6 The most disappointing item that 7 Mr. Duncan didn't mention on this slide 8 and this is his area of expertise is the 9 risk score or the morbidity of the 10 railroad workers. Several years ago, at 11 least 5, I used a predictive modeler just 12 like Mr. Duncan is an expert on and I 13 found that the risk were -- back then, 14 it's different now, but back then was 1.29 15 or almost 30 percent more than an average 16 person because of a variety of reasons but 17 basically they weren't as healthy, that 18 what's it says. 19 If you take the 17,219 and divide 20 by 1.29 then you get 1,348. So that one 21 factor alone can bring you down below the 22 Union benchmark that they're providing.</p>

<p style="text-align: right;">Page 1791</p> <p>1 I'm disappointed that he didn't do that 2 because he would have had great expertise 3 on that fact. Going to the next item, we 4 agreed with him. Health care is not 5 average business, people's cost are going 6 to be all over the place. 7 On survey. During bargaining we 8 try to understand what each other is 9 saying. We try to relate to them. We 10 show things to try to make sure we're 11 understanding their points, but we're not 12 saying that we agree that that should be 13 what we our target is, or our goal is. 14 So regardless of what the CBCs or 15 the BMWED smart mechanics consultants say, 16 they never agreed to say that these are 17 our goals. As I mentioned yesterday our 18 goal is on the Union side. They want to 19 be competitive in the rail and 20 transportation industry. So that the 21 workers they're going to go to another 22 employer, they're not going to go work and</p>	<p style="text-align: right;">Page 1792</p> <p>1 suddenly become a doctor or a nurse or a 2 retail clerk worker, they're going to stay 3 most likely in the railroad and 4 transportation industry and that's what 5 they want to be competitive to. 6 The Carrier say they want to be 7 competitive to the broad United States 8 employee base. That's what their goal is. 9 They're entitled to their goal but that is 10 not the Union's goal. So I'm not sure 11 what the purpose is of arguing over which 12 survey is best because the goals are 13 different, and what one of the key issues 14 is. We just don't have the same goals. 15 For these slides, slides 8 to 11, 16 I'm going to address all of these during 17 the second half out of my presentation 18 because that's where they are coming from. 19 I think the last one that I wanted to talk 20 about was slide 12. 21 So they bought an expert witness, 22 and they said the BMWED commissioned these</p>
<p style="text-align: right;">Page 1793</p> <p>1 surveys because they wanted to know more 2 about musculoskeletal, a variety of 3 things, COPD, that impacted their members. 4 Okay. Well, the integral seed (ph.) 5 commission heard to come and look at what 6 they did. I'm missing the importance of 7 that. People hire people so they can 8 understand stuff. 9 The other important point is that 10 we did not use in any of our analysis item 11 number 1 or number 3. We only used the 12 land, etc. analysis to say that 13 musculoskeletal was impacted by the 14 working conditions. 15 I called our clinical researcher, 16 who is a medical doctor, and I said okay, 17 we used that survey. Are there any other 18 ones you can provide me, and within an 19 hour we had three other ones. I don't 20 think it's a stretch to say that people 21 that work can stand on their feet and 22 don't sit in a chair have related</p>	<p style="text-align: right;">Page 1794</p> <p>1 musculoskeletal problems. It's the number 2 one spin in this plan, and it's not 3 because these people are sitting all day, 4 it's because they're working, they're 5 lifting things, they have vibrations, or a 6 variety of reasons. 7 So regardless of whether you 8 believe this study or not, I think that 9 our conclusion is the working conditions 10 contribute to the cost is a valid 11 conclusion. Going on to page 22. 12 Actuarial values. First of all, 13 I'm very disappointed that Mr. Scofield 14 used this after he was clearly told that 15 the consultant did not feel comfortable 16 and felt she was being misrepresented if 17 even we used it. 18 And secondly, it's disappointing to 19 say that he wanted to point out the top 20 bullet when she clearly said there was a 21 bottom bullet that she was trying to point 22 out. And we don't have her here to</p>

<p style="text-align: right;">Page 1795</p> <p>1 explain why these two items exist, but we 2 do know that she did put in a second 3 bullet that says that you can take this 4 one and this together and compare to 90 5 percent plus the 228. 6 So I don't understand what his 7 really point is on this, but again it 8 seems irrelevant to me because the goals 9 are different 10 BOARD MEMBER DEINHARDT: This was 11 the slide that you were not permitted to 12 putting in our presentation yesterday. 13 MS. MALLET: That's what we wanted 14 to say about that. And I think we are 15 ready to go on -- no, page 28. This slide 16 after Mr. Ross again that applies to some 17 other comment we're try to understanding. 18 We make points that don't say we're 19 agreeing to them. 20 And that's a really key point. 21 Even Ms. -- even if she was saying this is 22 88 percent, she wasn't saying that she</p>	<p style="text-align: right;">Page 1796</p> <p>1 agreed that the Unions wanted to go to 88 2 percent. Mr. Roth wasn't saying -- it 3 wasn't a proposal. He wasn't saying we 4 agree we want to go to 15 percent. It was 5 just pointing out information in the 6 exchange. It wasn't an agreement, and I 7 think that's important, and he portrays it 8 as one. 9 Going to page 28. Employee 10 contribution proposal. Mr. Scofield acts 11 like this is a very simple calculation, 12 and we're not disagreeing with the 13 calculation, but he seemed to completely 14 miss Mr. Cook's point, which is a really 15 important point. 16 The administration of this eludes 17 us. The payment rate, the four categories 18 that he's talking about, that's set at the 19 end of October, beginning of November. 20 This year is going to be set by November 21 3rd. The open enrollment period is the 22 entire month of October. So if the</p>
<p style="text-align: right;">Page 1797</p> <p>1 workers aren't going to know what their 2 contribution rates are for their spouses 3 until some time mid November because 4 that's when it's said United Healthcare 5 has to put together the communication 6 piece and send it out, then how are they 7 going to decide whether or not to enroll 8 their spouses in October. We just don't 9 see how this is going to work, and he 10 doesn't explain it. He also keeps saying 11 well, we can have alternative options. 12 We're in the rebuttal of a PEB and 13 now he's telling us he wants the 14 differential to be fixed at \$150.00. This 15 is the first time we've heard of that. 16 We're just kind of a little bit shocked by 17 this new information at this late stage in 18 the game. 19 Again to us it's confusing to have 20 him throw out these items. So that's the 21 points we wanted to make on those two 22 slides. Going on to the annual indexing.</p>	<p style="text-align: right;">Page 1798</p> <p>1 I've said and I've heard over and over 2 again that the intricacy and the Unions' 3 have difficulties even between bargaining 4 coming up with agreements. 5 Mr. Scofield pointing out that if 6 they want every year they can go and 7 decide what the benefits are going to be. 8 So it's going to take them a year to 9 figure out what equals 88 percent of 10 actual value because they're probably not 11 going to agree on it and certainly you 12 have two different actuaries in the room. 13 They're probably going to have two 14 different tweaks on what benefit designs 15 are going to actually get you to 88 16 percent. 17 So it's, kind of, okay, that 18 doesn't seem like a real plausible thing 19 that's going to happen because again 20 during open enrollment if you don't know 21 what the plan design is, how are the 22 members going to decide what they want to</p>

<p style="text-align: right;">Page 1799</p> <p>1 do. So they kind of need to know what it 2 is. We're going to stick with the 50 and 3 500 because that's the only analysis that 4 we can do.</p> <p>5 So we're a little bit concerned by 6 that and we just wanted to point out again 7 while the prices are flexible, it's 8 actually quite confusing. The next thing 9 we want to go to is -- this was great that 10 he laid this out, it was really simple, 11 but it made me realize that one of the 12 things I forgot to point out yesterday is 13 this lab for \$25.00.</p> <p>14 Okay, I'm going to go to my doctor 15 and I need a blood test or I need some 16 other kind of test from pathology. Wait a 17 minute, I can't get it while I'm there 18 because I got to call United Healthcare or 19 Highmark or Aetna and I got to get 20 permission because I have to have prior 21 authorization to get that test or 22 otherwise I have to pay an extra \$25.00.</p>	<p style="text-align: right;">Page 1800</p> <p>1 I don't get how it's going to work 2 and then the members are going to be 3 really upset when they go ahead and get 4 the test because they were already there 5 and they have to pay an extra \$25.00. 6 It's just like trying to put the wool over 7 their eyes, because it's a simple blood 8 test that's taken all the time at doctors 9 offices.</p> <p>10 And then the members, they don't 11 send the test out to the lab to -- they 12 don't know what lab. When you get a blood 13 test or some other test that gets sent to 14 a lab, you don't know where it's going, so 15 how are you supposed to control that. Why 16 is that your responsibility as a 17 nonclinical a person and a noninsurance 18 person to know how to direct that test to 19 go to the right place</p> <p>20 CHAIRMAN JAFFE: Sorry for 21 interrupting, but I had understood that 22 the gravamen of the site of care proposal</p>
<p style="text-align: right;">Page 1801</p> <p>1 related to items that could either be done 2 in a hospital on the one hand or in 3 essentially a clinic on the other at lower 4 cost, and the question really was the 5 proposal was to make it more expensive to 6 have it done in the hospital. We had some 7 back and forth. I'm sure you heard about 8 potentially incentivizing the other way.</p> <p>9 Prior auths wasn't really a central 10 aspect of it. Is that inextricably linked 11 to site of care management prior 12 authorization?</p> <p>13 MS. MALLET: This is an example. I 14 need a sonogram, okay. So additional 15 coverage if outpatient hospital is used. 16 Okay. It's a sonogram on there, is that 17 one of them? Is that a high-tech 18 radiology? Really depends on the -- 19 exactly. I don't know. It depends on the 20 sonogram, maybe some are or some aren't, I 21 don't know, but the only place I can get 22 one is at outpatient hospital because</p>	<p style="text-align: right;">Page 1802</p> <p>1 that's the only place that has a sonogram. 2 It's very common for radiology and 3 pathology for you to go get a test than at 4 an outpatient hospital. Additional co- 5 pays at outpatient hospital.</p> <p>6 CHAIRMAN JAFFE: If it's addressed 7 by way of the incentive rather than -- the 8 carrot rather than the stick, do you have 9 any of these issues still in place?</p> <p>10 MS. MALLET: I don't know.</p> <p>11 CHAIRMAN JAFFE: Fair answer.</p> <p>12 MS. MALLET: If all our members 13 were in Los Angeles and New York and 14 Chicago, the answer would be no, because I 15 would know they can do it. In order to 16 actually know that, the thing that Dave 17 Scofield said he didn't know on the first 18 day about how many people had access to 19 it, then I would need to know. In 20 addition --</p> <p>21 CHAIRMAN JAFFE: But if there's no 22 access, the member just doesn't get the</p>

<p style="text-align: right;">Page 1803</p> <p>1 benefit of the carrot. There's no 2 punishment by way of the stick, right? 3 MS. MALLET: Right, but I would 4 have to defer to the Union leaders to know 5 that. 6 CHAIRMAN JAFFE: Fair enough. 7 MR. COOK: Chairman Jaffe, if I 8 may. 9 CHAIRMAN JAFFE: Sure. 10 THEREUPON: 11 DAN COOK 12 was called for examination, and, having 13 been previously duly sworn, testified as 14 follows: 15 MR. COOK: Dan Cook, for the record. 16 If I understand your question, 17 you're asking about the first two things 18 you understood in the pathology not being 19 something that was linked in there? 20 CHAIRMAN JAFFE: Yes. 21 MR. COOK: According to that slide, 22 it looks like it's linked in there and</p>	<p style="text-align: right;">Page 1804</p> <p>1 there's a \$25.00 surcharge if you have 2 outpatient pathology or lab because 3 currently we have issues within our plan 4 because just as Karen had said, you go to 5 the doctor, get a blood draw, they send 6 that to some lab. You don't know, you 7 don't see, you don't say. 8 CHAIRMAN JAFFE: I understand. 9 MR. COOK: They'll get -- even with 10 an in-network provider, sometimes they 11 send those to out of network labs. You 12 don't know that until you get the denial 13 from the insurance, and then that's 14 usually either the member or the member 15 contacting one of us subcommittee members, 16 contacting the insurance company and they 17 adjust it because it's not the member's 18 fault. 19 But to your point, this is a third 20 prong to that proposal, and I don't know 21 if I've seen that before, I don't remember 22 it, but my understanding was your</p>
<p style="text-align: right;">Page 1805</p> <p>1 understanding until we saw this slide. 2 CHAIRMAN JAFFE: Fair enough. 3 Thank you both. I'm sorry for the 4 interruption. I know you got side -- 5 MS. MALLET: Oh, no. Please 6 interrupt any time. I'm good with that. 7 Dave said that United Healthcare was not 8 confused. Okay. Well, maybe since I got 9 that e-mail on July 16 they worked out all 10 the answers to those four questions, but 11 Mr. Scofield didn't tell us what the 12 answers to those four questions were that 13 United Healthcare posed. So I'm not -- 14 that's confusing to me why he says they're 15 not confused. I'm confused for sure. 16 I think that that completes the 17 comments that we wanted to make right now 18 on the proposal. But I do want to point 19 out on the proposal looking at these 20 items, they are, to your point, Chairman 21 Jaffe, these are all sticks, these are all 22 cost (inaudible) benefits with the</p>	<p style="text-align: right;">Page 1806</p> <p>1 exceptions of the hospice benefits, the 2 speech therapy benefit and the dental and 3 the vision benefits. The rest of them are 4 all sticks. Adding the ABA is adding a 5 benefit. It's not a stick or a cherry, 6 it's just adding a benefit coverage. 7 Okay. Going on to whether or not 8 changing cost-sharing shifting will impact 9 our members' morbidity, their health. We 10 start off in this presentation by first 11 reminding you -- and I'm not going to 12 reread this slide of what consumerism is 13 versus incentives. Remember incentives is 14 used for guiding people, not trying to 15 change our behavior by punishing them for 16 something they're doing wrong, but guiding 17 people to a new type of service, a new 18 type of way. 19 Our next slide from the American 20 Journal of Public Health. Requiring 21 patients to pay a portion of their medical 22 bill out of pocket, also known as cost-</p>

<p style="text-align: right;">Page 1807</p> <p>1 sharing, sharply reduces their use of 2 health resources. Use of this strategy by 3 health insurance plans to lower 4 expenditures is controversial. Proponents 5 argue that health care consumers will 6 appropriately ration their use of medical 7 and critics will fear that it will 8 disincentives and lead patients to less 9 care than may be necessary and result in 10 worse health outcomes 11 This is from 2001, which is not a 12 new topic; it's been around for a while, 13 but we are going to show you new evidence. 14 Before we do that we are going to remind 15 you in the RAND study they said that you 16 increase cost-sharing utilization 17 decreases. We agree with that. The 18 question is whether that utilization 19 decrease is going to hurt whether they're 20 going to view only high cost, low value or 21 whether they're -- them being patients -- 22 patients are going to also reduce their</p>	<p style="text-align: right;">Page 1808</p> <p>1 low class, high value options. Mr. 2 Newhouse, years after the study, said we 3 believe there are several reasons why the 4 RAND findings should not be used to 5 justify higher cost sharing across the 6 board. We're going to talk about those 7 reasons. 8 First, we want to share a study and 9 this is one that Professor Boldman had 10 questions and so we'll talk about his 11 questions as well. For years health 12 policy researchers incorrectly believe 13 that health insurance has minimal impact 14 on enrollee's health. Disbelief has been 15 overturned by new research that has shown 16 to have a sizable impact. 17 This first study I love; we 18 wouldn't have had it without the 19 Affordable Care Act and the expanded 20 Medicaid and so they brought in more 21 people into Medicaid. 22 I was confused completely by</p>
<p style="text-align: right;">Page 1809</p> <p>1 Professor Goldman's characterization of 2 Medicaid and it's not a rich plan. When I 3 looked it up online to confirm my 4 understanding it's quite a rich plan. I 5 think it's platinum plus plan. You can't 6 spend more than 5 percent of your income. 7 So in our members that make \$70,000 8 straight time pay with no overtime work, 5 9 percent is \$3,500.00. They're already 10 spending on cost sharing almost \$2,800.00, 11 so that leaves only \$700.00 left that they 12 could spend that. That sounds like a 13 pretty good deal to me. I think we can 14 bargain with something like that, so I 15 don't know what he's talking about. 16 In addition, if you don't -- for 17 Medicaid people if you don't have income, 18 then you're going to have a pay even less 19 than that. So most of these people are 20 definitely getting platinum plus plans. 21 The point is they did go from nothing to 22 very rich plans. And the impact since it</p>	<p style="text-align: right;">Page 1810</p> <p>1 was substantial it was important. It was 2 a big deal to have no health care to go to 3 having a platinum plus plan, a big deal, 4 and the results were huge. 9.5 percent 5 fewer deaths, that's a big deal. 6 Ours isn't going to be that big a 7 deal, and that's what Goldman points out. 8 He says if you look at the Affordable Care 9 Act which Professor Goldman said the 10 average is around 70 to 80 percent, I 11 don't know if that's true. I heard it was 12 a little closer to eighty but it's 13 significantly less than the platinum plus 14 plan and the results were significantly 15 less. They were still positive, one out 16 of every fifteen fewer deaths, that's a 17 really good result but it's less, it's 18 significantly less. 19 So the larger -- we agree the 20 larger the change, the bigger the impact, 21 and that's what our point was on this 22 slide. So he's trying to say it didn't</p>

<p style="text-align: right;">Page 1811</p> <p>1 apply but it applies to the point that it 2 shows, medical insurance makes a big deal 3 and the magnitude of change also has the 4 impact. 5 The new advance is done by Dr. 6 Brot-Goldberg of the University of Chicago 7 and Dr. Kolstad. And the new evidence on 8 economics of cost-sharing and high- 9 deductible health plans, and I'm going to 10 talk about that next, especially with 11 regard to the effects on enrollee health 12 showed, in contrast to older consensus, 13 that increased cost-sharing lowers health 14 care utilization, but it does so in a way 15 that is contrary to traditional 16 assumptions used to support cost-sharing - 17 - or cost shifting in insurance on 18 efficiency grounds in that it risks the 19 enrollee's health. 20 So they're saying that it makes a 21 difference. The lower your actual value, 22 the bigger your risks are because you're</p>	<p style="text-align: right;">Page 1812</p> <p>1 going to use the health care not as much 2 and some of those things you really need 3 to use. Now the Carriers' are saying the 4 problem is that was done with a high- 5 deductible plan. So we reached out to Dr. 6 Brot-Goldberg and we asked him. 7 We said give an example of exactly 8 what the Carriers were proposing, and we 9 said would that make a difference in what 10 -- does your study apply, because we 11 wanted to know because we agree its 12 significantly less. It's still very 13 significant, but it's significantly less 14 than a \$2 or \$3,000.00 deductible. 15 This is what he shared with us. 16 First, we are making the point that if 17 cost sharing is large enough to change 18 behavior which is one of the things that 19 the Carriers said they wanted is to change 20 behaviors, presumably that's the objective 21 of all cost sharing, those changes may 22 come from clinically valuable care, as</p>
<p style="text-align: right;">Page 1813</p> <p>1 well as from low value care. 2 Their stance that being the 3 Carriers' stance and the lessons from the 4 older literature and the RAND study also 5 are not about magnitude. It's just 6 utilization share, that's what the RAND 7 study said. It didn't say how much 8 utilization. The Carriers' are arguing 9 that cost sharing reduces moral hazard and 10 that's going to be my next slide. 11 Our result in a new literature 12 argued that that may not be true. 13 Essentially we are making -- we being Dr. 14 Brot-Goldberg and Dr. Kolstad -- are 15 making a broad point that cost sharing at 16 any level does not generate efficient 17 reductions in spending because -- and this 18 is the important part -- because 19 enrollees/consumers are not well equipped 20 to make the trade-offs needed. 21 That means we don't know. Even 22 when we're just now talking about the</p>	<p style="text-align: right;">Page 1814</p> <p>1 sonogram, neither one of us know -- we 2 know a lot about health care. We don't 3 know. It's hard to know. It's such a 4 complex system. Plus if cost-sharing is 5 reducing spending our results suggest 6 those spending deductions need not come 7 from the care that is low value or 8 wasteful. 9 It is true that larger changes in 10 cost sharing will induce larger reductions 11 in care, but we do not have evidence its 12 those small changes do not have -- they 13 are simply small. 14 Second, it is worth noting that 15 much of the effect in RAND is based on the 16 changes from zero cost sharing to 17 substantially higher, thus the RAND study 18 is also looking at much larger changes. 19 So if they want to use the RAND study then 20 he's saying okay, why can't you guys use 21 my study. 22 So the same question in extreme</p>

<p style="text-align: right;">Page 1815</p> <p>1 validity should apply to RAND study as 2 it's being argued is not -- is a problem - 3 - RAND study to argue that there's not a 4 problem with the proposed changes as it 5 was being argued it will be a problem. 6 Finally, another useful point is 7 that it seems not to depend on the actual 8 magnitude of cost sharing but -- and this 9 is a really important point -- but on the 10 knowledge that cost sharing exist at 11 higher level. Brot-Goldberg demonstrated 12 these impacts happened even in classes on 13 cure for which there is no actual cost 14 sharing. 15 For example, preventative care that 16 was explicitly excluded from the cost 17 sharing. Remember I told you yesterday 18 that I've talked to people and they said 19 they don't want to go get their free 20 preventative care because they don't want 21 to hear that they have a problem and have 22 to spend more money.</p>	<p style="text-align: right;">Page 1816</p> <p>1 He's saying that they know -- and 2 maybe not because of my anecdotal reason - 3 - but they know from their analysis that 4 that's true. That because there's other 5 cost sharing elsewhere that people don't 6 get the preventative care. They've done 7 the study and they've prove that; that's 8 what he's saying. 9 That suggest that it's not about 10 the specific magnitude but the existence 11 of cost sharing in the broader plan, which 12 goes to my other point that I made 13 yesterday, which was an anecdotal one. 14 All of our members know of those sickest 15 members because we pass the hat to help 16 them out. 17 They know that they can't afford 18 that care. So that is impacting the 19 membership and their decisions about 20 health care 21 CHAIRMAN JAFFE: Pardon the 22 interruption, but I'm trying to follow,</p>
<p style="text-align: right;">Page 1817</p> <p>1 Ms. Mallet. If that argument is actually 2 correct, wouldn't it suggest that if you 3 change the magnitude of the cost sharing 4 that's already in the plan that it's not 5 going to effect members' behavior in terms 6 of using or not using health care. 7 MS. MALLET: The smaller the change 8 you make, the smaller impact it's going to 9 have. 10 CHAIRMAN JAFFE: Okay. I thought I 11 had heard you say the opposite that -- 12 fair enough. I thought I heard you say 13 the magnitude didn't matter according to 14 the study you were saying. 15 MS. MALLET: What he was saying and 16 I may have read it wrong -- I'm sorry if I 17 did. What he was saying is that the RAND 18 study is being used and it has a large 19 magnitude, too, and so what -- my 20 interpretation of it is that when these 21 health economists are going out and doing 22 studies they want to see if it's a true</p>	<p style="text-align: right;">Page 1818</p> <p>1 impact. So they use a large magnitude to 2 see the impact, but that doesn't mean that 3 it doesn't apply to the small changes. 4 It just means if they're not going 5 to be as visible and when they're not as 6 visible maybe it's just fluctuation, maybe 7 it's not real. 8 CHAIRMAN JAFFE: I thought I heard 9 you say something else. Fair enough. 10 MS. MALLET: I'm sorry. I may have. 11 The theory of moral hazard has previously 12 found economists to recommend cost sharing 13 as a way of reducing the use of wasteful 14 care. Moral hazard has relied on the 15 critical assumption about economic 16 rationality of the patient. They have to 17 have two things; perfect information about 18 cost and perfect information about 19 benefits. 20 New evidence points to a 21 substantial risk for judgment errors in 22 the enrollees response to higher cost</p>

<p style="text-align: right;">Page 1819</p> <p>1 sharing. So what they're saying is a 2 patient typically doesn't have perfect 3 information about cost or about benefits. 4 And now we're going to look at some 5 studies that point that out. 6 First, perfect information about 7 cost and medical care. In order to do 8 that Dr. Kolstad points out in his paper, 9 you have to understand the plans provision 10 and the plan's provision have highly 11 technical terms. You have to understand - 12 - be able to have the ability to translate 13 cost of care into responsibility. You 14 have to know, okay, what's my -- how does 15 the out of pocket work, how does the 16 deductible work. 17 Gaelle and I were experts, both of 18 us made the same mistake thinking that the 19 out of network deductible was part of the 20 out of pocket max. When we reread the plan 21 provision we were wrong. It would be so 22 easy for a patient to not understand</p>	<p style="text-align: right;">Page 1820</p> <p>1 whether their deductible is part of the 2 out of pocket max or not part of the out 3 of pocket max. It's very confusing for 4 people. 5 The plan -- this plan document is 6 pretty clear about it, but you have to 7 pick up that plan document, read it, and 8 then remember it. That's a big ask. The 9 one study done in 2013 did some surveys of 10 customers and they found that only 58 11 percent can answer basic terms like what 12 is co-insurance, what is a deductible. 13 Handel & Kolstad in 2015 did survey 14 only white collar employees thinking they 15 were better educated than the average 16 American and they would understand their 17 insurance better. However, they asked 18 them only about their plan; they didn't 19 ask them about the general terms; they 20 asked them stuff like, what's your 21 deductible, what's your co-insurance, 22 what's your out of pocket max, and only 30</p>
<p style="text-align: right;">Page 1821</p> <p>1 percent of them got it right. Only 30 2 percent knew those basic questions. 3 It's a big stretch to think that 4 people understand the cost of medical 5 care. Perfect information about medical 6 benefits: In the first study here, what 7 we're saying is we have a high-deductible 8 plan and members are going to go and their 9 going to cut their benefits. And what did 10 they find? We found that they cut the -- 11 the ones that are high cost, low-value by 12 23 percent. Good day, no problem, but 13 they also cut the high-value care by 18.5 14 percent. Bad choice. 15 The point of this is they don't 16 understand what to do and what not to do 17 and they just cut all of it. Some of them 18 knew it. 19 MS. GRAVOT: To add, the definition 20 of medical benefit here is not your 21 deductible or your co-insurance it's 22 basically understanding the benefit of</p>	<p style="text-align: right;">Page 1822</p> <p>1 medical care. So in a specific example 2 with a surgery after a heart attack, if 3 you're co-insurance or your co-pay for 4 your beta blockers goes up, you decide to 5 cut down on your medication not realizing 6 how much you put yourself at risk by 7 making that decision. 8 MS. MALLET: So the point is while 9 patients -- exposing patients cost share 10 will get them to cutback on care. We all 11 agree. RAND agrees our study agrees. We 12 all agree. They have no meaningful 13 capacity to target their cutbacks to 14 medically unnecessary care, it's really 15 hard. Conclusion of study: Enrollees 16 lack information to effectively navigate 17 cost sharing. Increasing patient cost- 18 sharing reduces their utilization and 19 overall contact with the health care 20 system. 21 Three, reductions in utilization 22 from higher cost sharing include</p>

<p style="text-align: right;">Page 1823</p> <p>1 reductions in the use of high-value and 2 low-cost expenses such as preventative 3 care and prescription drugs. 4 Four, savings from increased cost- 5 sharing largely comes from reduced 6 utilization from the sickest enrollees. 7 Remember the sickest people are making the 8 biggest cost. We saw it over and over 9 again. So if you're going to get a real 10 savings, which is what the Carriers want, 11 you're going to -- those are the people 12 that are going to be paying more. 13 Reduction in health insurance 14 coverage can increase cost sharing are 15 associated with increased mortality. 16 Mortality I'm agreeing its got to be 17 pretty big, and other health events such 18 as heart attacks. So that's the beta 19 blocker example. And Dr. Goldman said 20 that this slide didn't apply because it 21 was a high-deductible plan, but it was the 22 point that we were trying to make. So I</p>	<p style="text-align: right;">Page 1824</p> <p>1 just wanted to point that out. 2 Our issue here is that Carriers 3 goal of lower utilization of better 4 consumers is inconsistent with the goal of 5 more engagement and I skipped a slide up 6 here where I show from the writing what 7 the goals are. They say the plan is 8 inadequate cost-sharing results and 9 overutilization of health care. So they 10 want the members to reduce the unnecessary 11 costs. The problem is, is it going to 12 reduce their unnecessary costs but they 13 won't get -- they'll also reduce their 14 necessary costs. They say they 15 incentivize cost efficient yet safe 16 medical care decisions. 17 We just went through this whole 18 bit. Our members, they're experts in -- 19 you've heard how complicated the railroad 20 business is. I mean, it's complicated. 21 And done all that switching and all that 22 stuff. They're supposed to be experts in</p>
<p style="text-align: right;">Page 1825</p> <p>1 the railroad business, they're not 2 supposed to be experts in the medical 3 business, so it's really hard for our 4 members to be -- they're going to become 5 less engaged because that's putting in 6 more cost sharing. 7 I want to talk about Professor 8 Buckman's (ph.) analysis because he used 9 this plan's data and he said hey, the last 10 change back in 2018, it didn't cause any 11 problems with health and he said I'm going 12 to rely on a couple of things. The first 13 thing I'm going to rely on is I'm going to 14 use my predicted modeling tool, but then 15 later he choose the predictive modeling 16 tool has no plan similar to this plan. 17 He's going to assume that's okay, 18 the utilization patterns will be the same. 19 Maybe they will, maybe they won't, I'm not 20 really sure but that's what he said. So 21 that's one issue. In this chart right 22 here he's taking without cautionary</p>	<p style="text-align: right;">Page 1826</p> <p>1 changes, so this is the actual data, and 2 he's comparing it I'm sorry, with 3 customary changes and this is the actual 4 data to without cost sharing changes. And 5 he's saying so therefore, all the hospital 6 admissions decrease 6 percent. 7 Now his point was -- I'm going to 8 look at two things, hospital admissions 9 and prescription drugs, and that's what 10 I'm going to make my choice on, whether or 11 not it impact morbidity. Is hospital 12 mentions and prescription drugs and what 13 do I want to see? 14 I want to see that hospital 15 admissions didn't go up because if 16 hospital admissions went up then I've hurt 17 the patient and I want to see that 18 prescription drugs didn't go down because 19 if prescription drug utilization went 20 down, I've hurt the patient. So he wants 21 hospitals to be lower and he wants 22 prescription drugs to be the same or</p>

Page 1827	Page 1828
<p>1 better.</p> <p>2 So we look at this and we see this</p> <p>3 analysis and now, let's look at the actual</p> <p>4 inpatient admission and he's saying they</p> <p>5 went down 6 percent and I'm confused by</p> <p>6 this 2015 because I thought he was doing</p> <p>7 2018 but ignore that. This is what</p> <p>8 actually happened for your totally</p> <p>9 impatient admissions per thousands and</p> <p>10 it's for both the national plan and the</p> <p>11 UTU plan combined.</p> <p>12 You can see regardless of cost</p> <p>13 shifting there's been a whole big</p> <p>14 reduction in inpatient admissions and my</p> <p>15 opinion primarily because of the way --</p> <p>16 and the incentives that are being given</p> <p>17 there, but let's look at the 2018 year.</p> <p>18 Minus 1.7. Let's look at the year before,</p> <p>19 minus 4, and the year after it still</p> <p>20 getting big cost and the changes incurred</p> <p>21 both 2018 and 2019.</p> <p>22 Let's look at the year going back</p>	<p>1 after the impact has happened. It's</p> <p>2 negative almost 6 percent. So right here</p> <p>3 it's a lower rate. It's easier to see.</p> <p>4 It's flat right here. Its inconclusive</p> <p>5 but it makes me cause pause and say I'm</p> <p>6 wondering if there was an impact by these</p> <p>7 changes.</p> <p>8 I want to look more. I want to</p> <p>9 look at that prescription drugs but I'm</p> <p>10 not convinced. The other thing that</p> <p>11 worries me about the hospital is if you</p> <p>12 look at his report, the 30 day readmission</p> <p>13 which is a really key analysis to do and</p> <p>14 it's done for almost all of my quality</p> <p>15 metrics, in his report it says that it's</p> <p>16 not statistically accurate.</p> <p>17 So he's saying that he doesn't have</p> <p>18 enough data to make that number be okay.</p> <p>19 So let's look at prescription drugs. The</p> <p>20 thing that struck me most odd about this</p> <p>21 is again actual with BlueCross change in</p> <p>22 2019 and this is his prediction and what</p>
Page 1829	Page 1830
<p>1 it would be without question. So he's</p> <p>2 saying there was a 1 percent increase in</p> <p>3 total but there was a 2 percent increase</p> <p>4 in brand and 1 percent increase in</p> <p>5 generics, that's not efficient care.</p> <p>6 You want the generic to go up and</p> <p>7 the ground to go down. You don't want it</p> <p>8 to be that way. So I said okay, I'm going</p> <p>9 to look at generic brand and I want to</p> <p>10 look at the number of strips. So I'm going</p> <p>11 to do that. So I look at the generic</p> <p>12 brand, and I see not much happening in</p> <p>13 2018 and 2019, it doesn't look like a big</p> <p>14 impact, both going up a little bit, but</p> <p>15 I'm pointing out this number over here in</p> <p>16 2012 and 2013 because in July of 2012 what</p> <p>17 happened was the generic co-pay it went</p> <p>18 from \$10.00 to \$5.00, and when that</p> <p>19 happened you can see it's a big impact.</p> <p>20 We suddenly got 4.9 percent almost</p> <p>21 5 percent increase and that didn't occur</p> <p>22 until this last half of the year followed</p>	<p>1 by the next year of 4 percent increase,</p> <p>2 that saved the plan money. That was a big</p> <p>3 deal. That was good deal. This -- okay</p> <p>4 it's just cost shifting which is not</p> <p>5 really conclusive yet. It's not telling</p> <p>6 me that people are sicker or healthier, so</p> <p>7 let's look at the total scripts.</p> <p>8 The number of adjusted Rx's per</p> <p>9 person I've got a dip here, it looks like</p> <p>10 it's going down but I'm not sure that's</p> <p>11 fair because I'm look at the number of</p> <p>12 scripts. Let's do the days per person</p> <p>13 because you can have 90-day prescription.</p> <p>14 I don't want to mislead, so I'm going to</p> <p>15 do the number of days per member per year.</p> <p>16 Unfortunately I still had a little</p> <p>17 dip here. I don't like that. It's not</p> <p>18 conclusive. It's just saying I'm tracking</p> <p>19 date where no one was hurt with the</p> <p>20 changes in 2019. I can't prove they are</p> <p>21 yet because I don't have enough data, but</p> <p>22 I'm not convinced they're not hurt. But I</p>

<p style="text-align: right;">Page 1831</p> <p>1 want to look at some other sources. Let's 2 look at primary care visits. 3 Well this looks not promising. 4 I've got all my primary care visits per 5 thousand going down every year? That's a 6 problem because you want your primary care 7 visits to be high, they're your low cost 8 doctors are going to help. 9 So let's see what's happening here 10 in 2018. I'm going to plan it out in '16 11 and '17 hasn't gone down as much. I'm 12 still going to kind of high in '19 but 13 look at 2018 my primary care visits went 14 down. I don't like that, not conclusive. 15 Let's take a deeper dive, this is COVID we 16 all know about that. 17 Let's look at diabetics person 18 because a diabetic person he said hey, 19 their primary care visits they need to 20 stay the same, they shouldn't drop. So I 21 looked at the period July 1, 2016 to June 22 30, 2017. So before -- well before any</p>	<p style="text-align: right;">Page 1832</p> <p>1 implementation of the 2018 changes, and 2 then I look at after the implementation of 3 the changes from 7/1/18 to 6/30/2019 for 4 just diabetics and what do I have? I have 5 minus seven percent or three and a half 6 percent reduction per year. It's all 7 going to be in the last year because it's 8 this year that was causing the problem. 9 I'm not liking it. So I have a lot 10 of doubts about what Professor Goldman 11 said. I think that he's (inaudible) but 12 he looked at two factors and he looked at 13 them over a shorter period of time and his 14 whole goal was to see whether or not it 15 caused harm. The goal wasn't to come up 16 with this ideal benefit designer to change 17 like that. His goal was to see if the 18 patients were harmed and those were the 19 two things he said he could do with the 20 data he received. 21 But he did go on and say ideally in 22 the last page, he said ideally you would</p>
<p style="text-align: right;">Page 1833</p> <p>1 look at AIC factors, things like that, and 2 he had a whole list of them and that was 3 where you noticed that one was 4 statistically incorrect, cholesterol 5 screenings, covered therapy days, 6 inpatient hospitalizations from diabetes, 7 all those factors. What's showing here on 8 Exhibit 11, there's -- 9 CHAIRMAN JAFFE: I had a question. 10 Was slide 36 that we just looked at per 11 member or was that aggregate data? 12 MS. MALLET: Per thousand. So 13 adjusting for the number of people in the 14 plan. Utilization for a thousand. That' 15 how we do it. We can also look at it per 16 patient. I didn't do that. 17 CHAIRMAN JAFFE: It's fine. It 18 wasn't clear initially. I got it. Thank 19 you. 20 MS. MALLET: There's 32 categories 21 that Medicare uses to determine a star 22 rating about quality of care and here are</p>	<p style="text-align: right;">Page 1834</p> <p>1 the thirty-two categories. Ideally, if 2 you're going to really determine whether 3 or not a plan design change caused members 4 to get sicker, you would be using some of 5 those categories; you wouldn't just be 6 using hospitalization or prescription 7 drugs. You wouldn't be using just that. 8 So you would want to use a much 9 broader approach. The other thing I 10 wanted to point out that I skipped over -- 11 MS. GRAVOT: I'll just intervene 12 for a minute. The list is twenty-seven 13 categories, so don't look for the actual 14 parts. 15 MS. MALLET: Thank you. Professor 16 Goldman told us in his presentation that 17 small changes in prescription drug co-pays 18 for Medicare people could be significant, 19 but that's for Medicare people. And one 20 of the reasons why people think their 21 different from the Medicare people versus 22 active people is because Medicare people</p>

<p style="text-align: right;">Page 1835</p> <p>1 used so many more drugs. 2 But we would think that it would be 3 the same for the really sick people 4 because they need more drugs too, so a 5 small change in the co-pay makes a bigger 6 different for someone who has a lot of 7 prescriptions. Most active members they 8 don't have any prescriptions, so \$5.00 is 9 \$5.00 but if you have twenty 10 prescriptions, then \$5.00 is \$100.00 and 11 it boils up. He's showing that with just 12 a \$5.00 co-pay change, the utilization is 13 significantly lower. Then he goes on and 14 shows the correlation, which is this is a 15 really great graph that he did. 16 He shows that in a \$5.00 co-pay the 17 people on their medication it's still less 18 than 80 percent, which is sad, but as you 19 go to \$30.00 co-pays it gets to be 65 20 percent significantly worse that people 21 aren't taking their cholesterol, and I bet 22 this is really important and it may not be</p>	<p style="text-align: right;">Page 1836</p> <p>1 contractually the same but our sickest 2 people and its relative they may be a 3 little bit flatter but still very relative 4 points on his analysis. 5 Lastly, we just threw in here an 6 explanation from Kaiser Permanente of best 7 practice health plans to let you know that 8 a low day like positive outcomes from 9 different strategies, low co-pays for 10 generic drugs, plan designs that steer out 11 members toward appropriate care and higher 12 treatment compliance. 13 So we're not seeing that in the 14 plan design offering. We're not seeing 15 that -- we're seeing penalties on site 16 management stuff that we can't quite 17 figure out. 18 In summary the penalties are 19 significant in this plan, and we went 20 through the financial impact. That 21 completes this part of our presentation. 22 Gaelle's going to go on and answer your</p>
<p style="text-align: right;">Page 1837</p> <p>1 questions. 2 MS. GRAVOT: I'll start with the 3 first question which was the per cap here 4 is health and welfare cost and slide 3. 5 In here we show you the historical care 6 cost from 2001 through. 7 BOARD MEMBER DEINHARDT: Can you 8 give me one second. Where is this chart? 9 MS. GRAVOT: This is part of our 10 presentation and slide No. 3 the, the 11 rebuttal. 12 BOARD MEMBER DEINHARDT: Thank you. 13 MS. MALLET: We're sorry. We went 14 out of order. We changed our -- 15 BOARD MEMBER DEINHARDT: It's okay. 16 I found it. 17 MS. MALLET: -- order based on new 18 information. 19 MS. GRAVOT: So this addresses the 20 request for the historical Carriers' cost 21 from 2001 to 2022. The bars representing 22 the Carriers cost per qualified employee</p>	<p style="text-align: right;">Page 1838</p> <p>1 per year and what we define as a qualified 2 employee here includes any qualified 3 employee engaged -- enrolled in the 4 hospital (inaudible) or the railroad 5 plans, the non-hospitalization plans as 6 well as the opt out. So we decided not to 7 join the plan. 8 MS. MALLET: I do want to mention 9 something, this qualified employee is a 10 little bit confusing because typically in 11 our other presentation we were using the 12 qualified employees that are enrolled and 13 then we looked back at United Healthcare's 14 terminology and they have enrolled 15 qualified employees and qualify employees 16 who opt out. 17 So that's why now we're saying 18 qualified employee there. It's a little 19 bit -- 20 MS. GRAVOT: The workforce slide 21 from yesterday had the opt-outs, they were 22 that little red slip, so they were</p>

<p style="text-align: right;">Page 1839</p> <p>1 included in there. But any slide from 2 yesterday that was showing any per 3 employee, per month was solely on 4 basically members engaged enrolled in the 5 health plan so opt outs were not included 6 in that case in the denominator. 7 When we get to question two you 8 asked for the number of household hitting 9 the out of pocket max, so to give you a 10 little bit of information, the data is 11 coming from one database and then we have 12 from UHC being one of the vendors, 13 Highmark being another vendor, Aetna being 14 a third vendor and UHC also again being 15 the mental health vendor. 16 So when we look at the data, we got 17 to put everything together and we have the 18 links to link the members. There are some 19 issues with regard to the identifiers for 20 relationships and member -- and when I say 21 member in that case I'm talking about 22 individual, I'm not talking about the</p>	<p style="text-align: right;">Page 1840</p> <p>1 subscriber, I'm not talking about the 2 worker. 3 So with regard to determining the 4 number of individuals who hit the out of 5 pocket max for 2018 we're still working on 6 getting numbers. We have 5 minimum and it 7 can be up to 15, but we're still working 8 tying up all the different databases and 9 making sure that we having the right -- 10 because sometimes it's giving like a 11 different identifier in one database 12 versus another one, so working on having 13 that title. 14 It was not an impact on our CPD 15 curve. This curve was not impacted by the 16 issue because in here we didn't look at 17 the individual specific. We looked at 18 who's the spouse, who is an employee. Who 19 is a child when we put these together. So 20 going back to slide 4. 21 The identifier for families for the 22 employer is much cleaner than the</p>
<p style="text-align: right;">Page 1841</p> <p>1 identifier for the individual so we were 2 able to identify three families that hit 3 the ACA out of pocket max of \$14,700 in 4 2018. 5 So on the next slide we'll actually 6 show you the top twenty families paid 7 amount. Those are ranging from at the 8 bottom \$5,143 up to \$15,938. 9 MS. MALLET: The monthly 10 contribution would be in addition to this. 11 So that top person paid nearly \$16,000 in 12 claim also paid the \$2,800 in 13 contributions. 14 MS. GRAVOT: The next request was 15 about the family size ratio. The slide 16 that we showed yesterday explaining what 17 was happening or at least showing you what 18 -- the comment from UHC who is one of the 19 Carriers' vendor that the family size is 20 overstated in their report. 21 So in their report, what we have or 22 what we would have is basically a 3.48</p>	<p style="text-align: right;">Page 1842</p> <p>1 factor. When we take into account all the 2 employees that are in the hospital 3 association and we use -- we count them in 4 the denominator and in the numerator, then 5 we get to an adjusted contract size at 6 3.18. 7 Request No. 4 the number of 8 household with other insurance. We 9 reached out to United Healthcare and their 10 answer was we retract other entrants at 11 the claim level, not at the individual 12 level. Providing the requested 13 information is not part of our standard 14 reporting. We could do an add-on analysis 15 but it will take us a couple of months to 16 respond. 17 Request No. 5 was for the impact of 18 working condition linked to the top 19 diagnosis. So we looked at you would see 20 a claim detail experience summary for 2021 21 and picked the ten conditions that were 22 listed on that report and similar to the</p>

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1 table that we had yesterday showing across
 2 all the Unions down the lines in the
 3 columns basically all the conditions, this
 4 time -- the working conditions, this time
 5 we replaced the Unions with the top
 6 condition and show you the correlation or
 7 the impact of each of the working
 8 condition on these.

9 So it doesn't mean that somebody
 10 has -- it doesn't necessarily mean that
 11 somebody has a circulatory system is --
 12 it's because of the diesel chemical fume
 13 exposure, but there's definitely factors
 14 coming from these working conditions that
 15 can cause or increase the risk of these
 16 conditions.

17 **CHAIRMAN JAFFE:** Where does the
 18 factors come from that linked it to the
 19 particular medical conditions? Was that
 20 done by the med -- treating medical
 21 personnel? Was it from some -- I'm just
 22 trying to understand the linkage.

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1 And the vendor analysis had
 2 submitted \$11.8 million. Of course it
 3 will have estimated savings of their
 4 program higher than what we would.

5 **BOARD MEMBER DEINHARDT:** That was a
 6 3.5 million savings for what? For doing
 7 what?

8 **MS. MALLET:** Per year. What that
 9 program did and that program has changed -
 10 - the owners have changed for it. What
 11 that program did is it had the members
 12 call in and ask for where they should go.
 13 So it wasn't just any site that they
 14 really should go and the program was set
 15 up through appointment and they would get
 16 a small amount, like \$20.00 back for going
 17 to that specific vendor.

18 So the 3.5 included in a net
 19 figure, it was called Smart Shopper, but
 20 that program doesn't -- I don't think it's
 21 available like in the same format. It
 22 would have to be re-evaluated before it

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1 **MS. MALLET:** So Cheiron employs a
 2 medical doctor and he's a clinical
 3 researcher and he's the one who gathered
 4 all the studies, and we asked him to tell
 5 us from using the studies and his
 6 expertise which of these --

7 **CHAIRMAN JAFFE:** I was trying to
 8 understand if it was aggregated individual
 9 or if it was studied.

10 **MS. MALLET:** Just general
 11 information, and Gaelle and I are both
 12 having a really tough time counting rows.

13 **MS. GRAVOT:** You also requested
 14 information about the prior analysis that
 15 we've done on creating incentive to use
 16 some site of care. So this is a study
 17 that was done in 2018 -- 2017 for an
 18 effective date of 1/1/18. Cheiron in a
 19 Highmark analysis led to \$3.5 million
 20 estimated savings for the railroad plan,
 21 that was on the national plan on the -- at
 22 that time.

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1 could work. And I do want to say again
 2 what I said before, this example of simple
 3 approach of a incentive would be too have
 4 free-standing locations like centers --
 5 treated like centers of excellence whereas
 6 the patient's co-insurance is waived,
 7 however again because this plan is so
 8 remote, I wouldn't want to do that without
 9 doing the analysis and then talking to the
 10 Union leaders about whether or not that
 11 would work for the members.

12 **CHAIRMAN JAFFE:** That option would
 13 be a function of where people live as much
 14 as anything else and have diverse or
 15 concentrated, right?

16 **MS. GRAVOT:** You also asked to see
 17 what a two-tier contribution at 15 percent
 18 would look like if the employee without
 19 spouse tier was not frozen at the \$228.89.
 20 So this is what we calculated here.
 21 Please note that the last column is 2025
 22 and not 2024 again. We have the employee

<p style="text-align: right;">Page 1847</p> <p>1 without spouse by 2025 reaching a monthly 2 contribution of \$253.30 and the employee 3 plus spouse would be at \$355.23. 4 So these calculations are based on 5 the assumptions that are listed below. 6 But we do have concerns with this type of 7 contribution tiering. First of all, this 8 is against the Union's philosophy when it 9 comes to contribution, but also we are at 10 a time where we're dealing with inflation 11 that as Mr. Ross said we have not seen 12 levels that high in 42 years. 13 The world is trying to recover from 14 pandemic we're dealing with a pandemic 15 that we don't know how it will end. We're 16 dealing with supply and demand issue, 17 labor shortage, everything is coming 18 together and on one side you have your 19 employee contribution that is actually not 20 capped and will be subject to inflation 21 versus the wages are capped because it 22 will be -- the crease on the wages will be</p>	<p style="text-align: right;">Page 1848</p> <p>1 set by the contract. So that's definitely 2 a big concern of us. 3 BOARD MEMBER DEINHARDT: What is 4 that last line under key assumptions? 5 MS. GRAVOT: The per qualified 6 employee per month available fund. 7 There's some money going back to the plan 8 and that money is netting and 9 redistributing as a reduction of the rate 10 that the Carriers have to pay. 11 MS. MALLET: So mostly it's 12 rebates, RX rebates. So they calculate 13 what the rate is going to be before the 14 rebates and then they take the rebates and 15 divide by the number of qualified enrolled 16 qualified people and get the 144. 17 CHAIRMAN JAFFE: Before we leave 18 that slide, I would just like to confirm 19 that I have a good understanding of what 20 the assumptions are or the methodology. 21 The employee without spouse includes both 22 employees and employees with children, the</p>
<p style="text-align: right;">Page 1849</p> <p>1 two categories we were talking about. 2 MS. GRAVOT: Correct. 3 CHAIRMAN JAFFE: It's just a 4 shorthand. And the employee with spouse 5 includes family? 6 MS. GRAVOT: Correct. 7 CHAIRMAN JAFFE: And then the 8 methodology was you looked at the cost for 9 each of those two groups separately and 10 then applies 15 percent to each or you 11 allocated it some other way, that's really 12 what I wanted to -- 13 MS. GRAVOT: No, so we start with a 14 2023 proposed -- 15 MS. MALLET: Estimated health care. 16 MS. GRAVOT: Proposed rate. The 17 228 -- we start with the \$228.89 and the 18 \$321.00 which is in the proposal. And 19 then from there, we basically -- we have 20 the calculation of the composite rate, and 21 we trend forward with the assumption of 22 the 6.8 percent annual trend. We trend</p>	<p style="text-align: right;">Page 1850</p> <p>1 forward that rate -- 2 CHAIRMAN JAFFE: Okay. Got it. 3 MS. GRAVOT: And we just apply 4 pretty much the same increase here. So 5 the ratio between the first tier and the 6 second tier actually stays constant year 7 after year in this case. 8 CHAIRMAN JAFFE: And those numbers 9 came from the Carrier's presentation, the 10 initial 2023 numbers that were then -- 11 MS. GRAVOT: Correct. We take the 12 same starting point. 13 CHAIRMAN JAFFE: I simply wanted to 14 understand what it was. Thank you. 15 MS. GRAVOT: And we're not looking 16 at specific costs to create the 17 differential here. We started with the 18 differential that was in the intricacies 19 proposal. 20 CHAIRMAN JAFFE: I understand. 21 MS. MALLET: So it's important to 22 realize that just as Mr. Scofield</p>

<p style="text-align: center;">Page 1851</p> <p>1 explained, we're going to do the normal 2 rate that all the employers pay. We're 3 going to project that forward like United 4 Healthcare does with medical, life, 5 dental, and vision, and we're going to 6 project it forward with the trend that 7 United Healthcare is currently 8 recommending which is an aggregate 6.8 9 percent. 10 And we're going to come up with a 11 rate and then we're going to take 15 12 percent of that, and then the next year 13 we're going to trim that aggregate rate 14 forward and we're going to go this is 15 fifteen, whatever that percentage is for 16 the aggregate, then it would be impacted. 17 CHAIRMAN JAFFE: I understand. 18 MS. MALLET: Now, if you have a 19 different mix between the two categories, 20 then you can easily get it to be skewed 21 and have to increase it more than the same 22 as the rate it's increased.</p>	<p style="text-align: center;">Page 1852</p> <p>1 MS. GRAVOT: For instance, with the 2 same assumption, if we had -- so this is 3 also keeping 71 percent of the -- 71 4 percent of the employees having spouses. 5 If that changes to 60 percent, then 6 instead of having a rate at \$253.30 and 7 \$355.23 by 2025, you'll be at \$262.97 and 8 \$368.78. 9 CHAIRMAN JAFFE: Thank you. 10 MS. GRAVOT: With regard to COVID 11 future impact, so we broke down your 12 request to the first one being how has 13 COVID impacted the railroad plans. We 14 don't have detailed data about this only 15 basically what has been reported by 16 (inaudible) Highmark, there's no real 17 standard in the reporting, so what we show 18 you here on this table is specifically the 19 experience period that they have recorded. 20 So this covers January 2020 through 21 April 1st, 2022. Aetna has about the same 22 period January 2020 to March 2022,</p>
<p style="text-align: center;">Page 1853</p> <p>1 Highmark had only reported for the 2 information we had January 2022 through 3 April 2nd, 2022. 4 When we look at things we see about 5 \$35 million pay basically per quarter. So 6 we would really need more data to be able 7 to assess how COVID will have an impact on 8 this going forward. 9 MS. MALLET: This also doesn't 10 include the ESI component of over the 11 counter test. So it was getting the data 12 and putting it all together we couldn't do 13 in the time frame. 14 MS. GRAVOT: Next contribution. So 15 UHC provided the following information. 16 It breaks down for 2020 and 2021 the Cobra 17 contribution or paid received. For 2021 18 there was also some federal subsidies. So 19 the 2021 line includes the federal 20 subsidies but they broke down how much was 21 the federal subsidies for the 2021 line 22 and looking at this we think it's pretty</p>	<p style="text-align: center;">Page 1854</p> <p>1 low, would have expected bigger, higher 2 federal subsidies. 3 MS. MALLET: Higher because of 4 furloughs. 5 MS. GRAVOT: The reason is because 6 of the furloughs. Staying in the program, 7 staying in the plan and that gives us -- 8 that gives them time to find coverage 9 somewhere else and then in that case they 10 don't have to go on Cobra, the plan. So 11 you asked us how many furloughs Cobra 12 were. We can't back in two numbers but 13 what we know is we have a number of QEs 14 that are in the NHA plan and this is the 15 railroad plan and we have a number of 16 enrollees who were in the plan. 17 So the QEs are the enrollees but -- 18 let me back out. Includes in the 19 enrollees are the QEs but also the 20 furloughs, people that are disabled and 21 people on Cobra whether they are the 22 former employee or they may also be the</p>

<p style="text-align: right;">Page 1855</p> <p>1 former spouse of a current employee due to 2 divorce.</p> <p>3 So the top graph here shows you the 4 enrollment from 2001 to 2022. The bars 5 are what's called the estimated 6 participating employee in the NHA plan, so 7 that's the employee headcount in the NHA 8 plan. The green line bar is the 9 participating QE, so if you would not mind 10 and scratch the NHA that is written next 11 to it. This is actually the total key. 12 It includes the nonhospital association 13 and the hospital association QE, that's 14 why that line is above the number of 15 participating employees.</p> <p>16 The table below the column that has 17 the ratio to the QE to the employee this 18 is only for the nonhospital association so 19 only for the railroad plan. And so in 20 here we see that 2018 shows 5 years. 2018 21 and there was a ratio of 94.6 so we had 22 about 5 percent more employees in the plan</p>	<p style="text-align: right;">Page 1856</p> <p>1 than QE so that difference is your 2 furlough, your Cobras and your disabled.</p> <p>3 That spread increase in 2020 to .9 4 in the table. 90.2 percent and it jumped 5 back. By 2022 it's at 93.1 percent which 6 is close to the 2019 level.</p> <p>7 The column next to it decreasing 8 QE, and I apologize for the lack of 9 clarity on the header but the decreasing 10 QE from previous year is showing you the 11 ratio of the total QE so now we're back to 12 basically that green line from one year to 13 the next. So we see that in 2021 you're 14 losing 14.3 percent of your -- not 15 necessarily in 2020, not necessarily of 16 your workforce but of your workforce 17 enrolled in the plan. And that was it.</p> <p>18 CHAIRMAN JAFFE: Thank you. Any 19 questions you want to propose? I have 20 just one. I don't know if Mr. Cook's the 21 best person or whether it's Ms. Mallet or 22 Ms. Gravot. We had heard some testimony</p>
<p style="text-align: right;">Page 1857</p> <p>1 this morning from Dr. Scofield that the 2 changes in the plan to deductible out of 3 pocket max and the like that were last 4 implemented were agreed to be designed to 5 achieve an AV 90 indexing and I'd like to 6 find out whether in fact you agree with 7 that, disagree with that, something else. 8 Essentially explain what the linkage was.</p> <p>9 MR. COOK: Dan Cook, for the 10 record, and to my comments yesterday to 11 the Board, we never agreed to any AV. We 12 bargain for real benefits. Real things 13 that we can touch and see. Real numbers 14 that we know the effects AV, just as one 15 of the good doctors said earlier today, is 16 something that came out of the Affordable 17 Care Act as a new measure and the Carriers 18 love it because it has no real face, it's 19 just a number. That's not our approach. 20 We will not find actuarial value in our 21 agreements because that's not our model. 22 The problem with that is just as</p>	<p style="text-align: right;">Page 1858</p> <p>1 you've seen in the Carriers' proposal is 2 the fact that it doesn't care what levers 3 you flip, it just matters that you hit 4 that number. We care what levers you 5 flip. It's very important to us. So I 6 disagree with that. That may have been 7 the Carriers' intentions, but that was not 8 the verbiage of the agreement.</p> <p>9 CHAIRMAN JAFFE: Putting aside the 10 verbiage of the agreement, did you 11 understand when you were doing it that the 12 Carriers wanted to maintain or hit AV 90 13 and that that was the effect of those 14 precise plan design changes.</p> <p>15 MR. COOK: They continually use AV 16 with it and because of the end of 17 bargaining that we did in that round of 18 it, we understood what the actuarial value 19 was. Yes.</p> <p>20 CHAIRMAN JAFFE: So what I'm 21 hearing is you understood what you were 22 doing but you didn't commit to continue</p>

<p style="text-align: right;">Page 1859</p> <p>1 that in any way or make it an agreement. 2 MR. COOK: We understood that -- 3 sort of. We understood that those changes 4 in real benefits of moving those levers 5 led to that AV, but it was never about the 6 AV that we were speaking to. 7 CHAIRMAN JAFFE: Fair enough. 8 Thank you for the clarification. I just 9 didn't want that unaddressed back and 10 forth. 11 Did you have anything else? We're 12 good. Thank you all very much. 13 MS. MALLET: Thank you. 14 MS. ROMA: So during our final few 15 minutes of the Union's rebuttal, I just 16 wanted to briefly respond to an issue that 17 came up this morning, kind of, for the 18 first time in these proceedings, and this 19 is, kind of, the interaction of some of 20 the Carriers' proposals with the Plan's 21 administrative process. 22 So I thought it might be helpful to</p>	<p style="text-align: right;">Page 1860</p> <p>1 just speak on that briefly. And 2 specifically, as I understand it, this 3 relates to their proposals involving the 4 vendor network and also their proposals 5 about their drug design changes and 6 program changes. 7 And first of all, I wanted to just 8 say for the recorded that they barely 9 discussed them in their written materials 10 at all or during their affirmative case, 11 and they only raised them really briefly 12 in rebuttal among many, many other health 13 and welfare issues that they raised for 14 the first time in rebuttal to this Board. 15 This matter is fully addressed in 16 our written materials, and it gets a 17 little complicated, and so I would refer 18 you to the written submissions for more 19 detailed explanation. But I just wanted 20 to do a brief summary for the Board's 21 convenience and if you have any questions 22 you can pose them to me.</p>
<p style="text-align: right;">Page 1861</p> <p>1 The Carriers have spent such little 2 time discussing the proposals to the board 3 about how important these proposals are to 4 their overall case. I also note this 5 particular issue becomes problematic 6 because the Carriers tremendously 7 oversimplify it and drastically overreach 8 in what they seek here. The last few 9 years have been very, very busy for the 10 parties predominantly outside of 11 bargaining and while you've heard some of 12 this in these proceedings before this 13 Board, not all of it has been fully 14 presented. 15 Shortly after serving their Section 16 6 notices this round, the Carrier served a 17 proposal for consideration of the joint 18 governance committees for the plans, this 19 would be the joint -- the JPC for the 20 National Plan and the governing plan or 21 the NRCUTU plan. 22 Among a few other things they</p>	<p style="text-align: right;">Page 1862</p> <p>1 proposed adopting the advanced or the 2 management program we've heard them speak 3 about today. I note this was not at the 4 bargaining table but rather through the 5 Plan's administrative process. As you 6 recall both the rail and labor service the 7 plan's joint sponsors and as their joint 8 administrators for these two plans and these 9 distinctions become important here. 10 Plan sponsors are settlers, decide 11 such things as whether have a plan at all 12 and what those plan terms should be. They 13 decide on what's called plan design 14 matters. Plan administrators are 15 responsible for administering the plans as 16 they are written by the plan sponsors. 17 Plan sponsors do not have an authority to 18 amend the collective bargaining agreement 19 or to amend the terms of the plans 20 themselves. 21 The terms of these self-designed 22 plans are found in the summary plan</p>

<p style="text-align: right;">Page 1863</p> <p>1 description or SPD for the plans and for 2 the National Plan that's found at Union 3 Exhibit 4, and the NRCUTU Plan is very 4 similar, that's in the online appendices 5 provided by the Union but we didn't submit 6 it as a separate exhibit. 7 In the employee benefits world it's 8 very common, and I'm sure many of the 9 Board members have experience in this 10 regard, for employers and Unions to serve 11 multiple functions for the plans, either 12 for pension plans or health and welfare 13 plans. 14 And the important issue here is 15 what hat they're wearing at any given time 16 when the person makes the decision. This 17 is known as ERISA's two hats doctrine. 18 Because the parties were multiple hats 19 here, it's important to know what that 20 they're wearing when they make certain 21 decisions, because some of these standards 22 are held to a risk of fiduciary standard</p>	<p style="text-align: right;">Page 1864</p> <p>1 which the Carriers reference in passing in 2 their very last PowerPoint rebuttal slide 3 but didn't really fully explain. 4 When administering the plans, the 5 parties are held to the highest fiduciary 6 standard and must do so with loyalty to 7 the plan and its members and in the sole 8 interest of the participants in the plan. 9 When deciding what the plan terms are the 10 parties are not acting as fiduciaries and 11 I think they wouldn't want to be. 12 Instead, they are acting as employers or 13 Unions; they are called settler. 14 This came up before Presidential 15 Emergency Board 243. It wasn't a huge 16 issue, but it did come up and I just 17 reference it for the benefit of the Board, 18 and this is when the Unions actually said 19 to the Board, oh, no, you don't need to 20 decide on all these health and welfare 21 changes before this Board, we'll just 22 refer it to the joint administration</p>
<p style="text-align: right;">Page 1865</p> <p>1 process. 2 And in response the Carrier's 3 argued very strongly that the problem with 4 deferring these issues to the 5 administrative process is that they 6 couldn't implement plan design changes 7 through the plan's administrative process; 8 that had to be done through the collective 9 bargaining. 10 They also argued that you could not 11 submit plan design changes to the deadlock 12 neutral, which I know the chairman 13 referenced earlier today. Against that 14 background, the parties sought in late 15 2019, early '22 to adopt their advance -- 16 against that background the Carriers 17 thought to adopt in early '22 their 18 advance opioid management program through 19 this joint administrative process. 20 The Unions heard their proposal, 21 they went with Express Scripts, they got 22 more information about the program, and</p>	<p style="text-align: right;">Page 1866</p> <p>1 after listening to the presentations, the 2 Unions decided that it added significant 3 benefits restrictions on members access to 4 lawfully prescribed opioid drugs including 5 significant restrictions on 6 preauthorization, dosage, permissible use, 7 and tight restrictions on quantity limits 8 and where a member could get the 9 prescriptions filled 10 Importantly this would change the 11 terms of the collectively bargained-for 12 plans outside of bargaining. This was 13 also on top of the fraud waste and abuse 14 restrictions the party had already agreed 15 to last round. 16 The Unions wrote the Carriers back 17 and said we consider your proposal but we 18 are deciding not adopt at this time as 19 part of plan administration, we think this 20 is better left for the bargaining table. 21 Shortly thereafter, the Unions 22 received a letter from the Carriers</p>

<p style="text-align: center;">Page 1867</p> <p>1 demanding that we adopt their program 2 immediately and accused us of violating 3 our fiduciary duty under ERISA. This is 4 not plan administration; this argument was 5 nonsense. 6 Keep in mind this program involved 7 plan design changes and therefore it was 8 not subject to ERISA's fiduciary 9 standards. The Carriers went on to 10 demand that if we did not adopt a program 11 outside of bargaining, they would dust off 12 this never used before provision following 13 PED 219 to submit it to the administrative 14 neutral. 15 The Union again wrote back and said 16 this was an issue for the bargaining 17 table, not plan administration. I also 18 would just remind you that that parties 19 were engaged in bargaining at that time. 20 Shortly thereafter, the Carriers made 21 another proposal to the Unions as part of 22 the plan administrative process and this</p>	<p style="text-align: center;">Page 1868</p> <p>1 proposal involved substantial changes to 2 the bargained-for network design of the 3 plans. 4 As stated by Mr. Cook during his 5 remarks yesterday these parties have a 6 lengthy, lengthy bargaining history of 7 bargaining over every single detail of 8 these plans, including over network 9 design. At Union Exhibit 13, pages 10 10 through 16, Bates No. 864 to 870 you can 11 find a chart summarizing some of those 12 bargained-for changes to network design 13 and employee choice over same. 14 The current vendor network as 15 memorialized in the collective bargaining 16 agreement and the plans themselves include 17 United Healthcare, Aetna, and Highmark. 18 As stated in our submission, the very 19 reason the NRCUTU plan was created because 20 at the time SMART-TD then UTU wanted to 21 add Highmark as an additional vendor 22 network option for their members.</p>
<p style="text-align: center;">Page 1869</p> <p>1 At the time the Carriers insisted 2 they had to create an entirely separate 3 plan because now the benefit plan and 4 design plan would be different; that is 5 why we have two different plans today. 6 Later on for bargaining I just add 7 that the National Plan also agreed to add 8 Highmark as an additional third-party 9 option. The Plan's current network design 10 including importantly employee choice over 11 same, reciprocity between networks among 12 other designs have all been bargained over 13 by the parties over the years. 14 The Carriers' proposal before the 15 JPC and the governing committee in the 16 case of the NRCUTU plan over network 17 design changes would essentially rewrite 18 this design as memorialized in the 19 collective bargaining agreements and the 20 planned documents themselves. 21 Well, the merits at that proposal 22 is not before this Board. I note that the</p>	<p style="text-align: center;">Page 1870</p> <p>1 Union's rejected the proposal, not just to 2 be difficult as the Carriers seem to 3 imply, but because it would cause 4 significant disruptions to the member's 5 current in-network provider options and 6 the only factor considered by the Carriers 7 in their proposal was plan cost. 8 Those familiar with these issues 9 know that they are complicated, but plan 10 costs are only one of many, many factors 11 to consider in examining network design. 12 Again none of this was at the 13 bargaining table. To make a long and 14 complicated story short, the Carriers 15 ultimately decided not to advance their -- 16 progress or advance opioid management 17 program through the plan's administrative 18 process. They did however pursue the 19 matter of their network's design proposal 20 through that, and ultimately sought to 21 force these changes to the existing 22 collective bargaining agreements and</p>

<p style="text-align: right;">Page 1871</p> <p>1 existing plan terms to the Union through 2 binding arbitration before the deadlock 3 neutral 4 The Unions continued to maintain 5 this is not administrative matter and 6 neutral did not have jurisdiction over it. 7 Again plan administrators have to administer 8 the plans, terms and the collective 9 bargaining agreements as written; they do 10 not have authority to change it. In fact, 11 plan administrators violate ERISA when 12 they deviate from the express terms of the 13 plans that they are supposed to be 14 quote/unquote administering. 15 The threshold jurisdictional matter 16 of whether or not the Carrier's proposal 17 constituted plan administration was 18 ultimately submitted to deadlock neutral 19 Joshua Javitz. 20 In October of 2021, neutral Joshua 21 Javitz issued a decision in this matter. 22 In it he decided, as is relevant here,</p>	<p style="text-align: right;">Page 1872</p> <p>1 that indeed significant parts of the 2 Carriers proposal involved changing the 3 terms of the collective bargaining 4 agreement outside of bargaining and 5 changing the terms of the plans themselves 6 and he found that this could not be done 7 to the plans administrative process. 8 To be fair, the deadlock neutral 9 also found that some of the network 10 changes the Carriers proposed could be 11 done through the administrative process. 12 Specifically those parts that did 13 not involve change of the collective 14 bargaining agreement or changing the 15 terms of the plan. I note that this was 16 the first and only time in its 30 year 17 history that the deadlock neutral has ever 18 been asked and heard a decision regarding 19 plan administration. 20 Mr. Scofield's representations 21 about how the deadlock neutral works 22 should be considered with that in mind.</p>
<p style="text-align: right;">Page 1873</p> <p>1 Following this decision, the 2 Carriers spent some time rewriting their 3 proposal which they didn't (inaudible) 4 this year. The Union's reviewed the 5 proposal rewrite and agreed to some of 6 their terms, but wanted additional time to 7 examine some parts of their proposal to 8 fully understand how it impacted the 9 members and specifically the disruption it 10 might cause to their current medical 11 providers. 12 I note that this happened during 13 the same time as the super mediation 14 session, the release, and the start of 15 this PEU process. So needless to say the 16 parties have been very busy and the issues 17 still remains open. But to say we're 18 simply being obstructionists here is 19 frankly irresponsible. Here -- 20 BOARD MEMBER DEINHARDT: Now are 21 you talking primarily about the vendor 22 bidding proposal?</p>	<p style="text-align: right;">Page 1874</p> <p>1 MS. ROMA: Also it carries over 2 into the drug design. Their proposal 3 involving drugs involves changing the plan 4 terms and collective bargaining 5 agreements; they're not administrative 6 issues, they are plan design issues. When 7 you're talking about limiting prior 8 authorization or limiting amount, quality 9 access to certain prescription drugs, 10 those are plan design functions, they are 11 not administrative functions. 12 So this idea that the plan through 13 plan administration could adopt drug 14 design changes is contrary to ERISA. 15 BOARD MEMBER DEINHARDT: In terms 16 of the vendor proposal, are there any of 17 the vendor proposals that would not impact 18 on networks and thereby become matters of 19 collective bargaining? 20 MS. ROMA: So I guess the issue 21 here is that we don't disagree that the 22 vendor network should be rebid; that's</p>

<p style="text-align: right;">Page 1875</p> <p>1 fine. But the result of that is I don't 2 know what this means. What are they 3 looking to do? Who are they looking to 4 substitute? One of the things they were 5 trying to do through their network 6 proposal to the JPC in the governing 7 committee that we dealt with last summer 8 is they were trying to eliminate employee 9 bargained-for choice over network. 10 It's very important -- we saw a lot 11 of testimony, we saw a lot of maps, many 12 of rail members are in rural locations and 13 they do not have -- sometimes they don't 14 have a lot of choices of receiving care 15 with an in-network provider and so it's 16 very important -- and this is one of the 17 reasons Highmark was added to the plan, at 18 the time UTU now SMART-TD had a 19 significant number of members who lived in 20 areas where Highmark had a strong 21 presence, which is why UTU now SMART-TD 22 sought to add them to the plan to begin</p>	<p style="text-align: right;">Page 1876</p> <p>1 with. 2 So these are kind of elements that 3 are considered. So to the extent that 4 it's just you send it out and you rebid 5 it, okay, that's fine but what do they 6 want to do with it. That's the issue. 7 And to tell you the truth, I have no idea 8 what they want to do with it. 9 They never explained it, and the 10 proposal offers no details. But I'm going 11 to assume they might want to do something 12 like they were trying to do last summer, 13 and I just want to raise to the Board the 14 concerns we have with that process and why 15 this couldn't simply be deferred to the 16 plans as per plan administration. That 17 was my main concerns here. 18 CHAIRMAN JAFFE: You don't 19 understand their proposal to be limited to 20 simply rebidding to kind of keep the 21 vendors honest in terms of their 22 arrangements in pricing with the plan</p>
<p style="text-align: right;">Page 1877</p> <p>1 rather than taking the next step which 2 would be to potentially change either in a 3 material or even a not material way the 4 networks. 5 MS. ROMA: Correct and there's 6 nothing to stop them from doing that 7 today, so I don't know why they need this 8 Board to even take that action. It's just 9 what they do with it, and this is the part 10 that I was particularly concerned with in 11 their proposal that I wanted to flag is 12 that they also add the sentence that says 13 that you should adopt this proposal and 14 give them the authority to make any 15 changes to the collective bargaining 16 agreements and plan terms that are 17 required to implement the changes they 18 seek through that process. 19 CHAIRMAN JAFFE: Got it. 20 MS. ROMA: And this is where we get 21 into a dangerous crossroads. That was my 22 main concern.</p>	<p style="text-align: right;">Page 1878</p> <p>1 CHAIRMAN JAFFE: That's fine and 2 Javitz's decision was put in the record 3 already. We have it. 4 MS. ROMA: That's Union Exhibit 14. 5 CHAIRMAN JAFFE: I know. I read 6 it. Thank you. 7 MS. ROMA: So likewise there are 8 ramifications for both the network design 9 proposal and also the plan design -- the 10 prescription drug proposals. So if you 11 have any questions on that issue, I'm 12 happy to answer. 13 CHAIRMAN JAFFE: We're good. Thank 14 you very much. 15 MS. ROMA: Okay. And I just have 16 one final remark and then we will close 17 our rebuttal case. 18 I just wanted to take a moment to 19 briefly respond to something that Dr. 20 Duncan said this morning about what he 21 called Cheiron's extreme examples when 22 they presented their Armstrong family</p>

<p style="text-align: right;">Page 1879</p> <p>1 hypothetical, and I was particularly -- 2 this was particularly off-putting to me. 3 In just my own personal family of six, we 4 deal with multiple autoimmune disorders, 5 high blood pressure, cardiac issues, food 6 allergies, anxiety, ADHD, and asthma, to 7 name a few. 8 We also have very active children 9 who seem to make it a hobby of visiting 10 the emergency room. We recently have done 11 stitches, two broken arms and last week my 12 son had an emergency appendectomy. 13 I'm sure most of the people in this 14 room have very similar experiences. 15 Thankfully these are not catastrophic 16 events, but the medical bills add up, and 17 I am personally grateful every day for my 18 firm's platinum level health benefits. On 19 behalf of working families everywhere, I 20 just wanted to state on the record that I 21 was offended by their callus dismissal of 22 the real health issues and the real health</p>	<p style="text-align: right;">Page 1880</p> <p>1 cost that the very average family space 2 every day. 3 And that concludes the Union's 4 affirmative case if the Board doesn't have 5 any questions. 6 CHAIRMAN JAFFE: I think we're 7 good. Thank you again, Ms. Roma. 8 We'll take the fifteen as we had 9 suggested before. 10 Off the record please. 11 (A break was taken at 3:40 p.m.) 12 CHAIRMAN JAFFE: Okay. On the 13 record, please. 14 At your convenience, Mr. Munro. 15 CLOSING STATEMENT ON BEHALF OF THE CARRIERS 16 MR. MUNRO: Thank you, Mr. 17 Chairman, members of the Board. 18 In my closing remarks to 19 Presidential Emergency Board 243, I 20 started with the principle that the proper 21 basis for finding a fair and reasonable 22 settlement is objective indicators, facts,</p>
<p style="text-align: right;">Page 1881</p> <p>1 data, modern benchmarks, and historical 2 markers. Eleven years later, that is the 3 central theme of our case to this Board as 4 well. 5 We contend that each element of our 6 case is supported by history; by current 7 benchmarks; by objective indicators. On 8 crew size, there's a history of process 9 recommendations; on work rules, the 10 history of incremental change; in 11 healthcare, we point to both modern 12 benchmarks and a history of change; and 13 the same for compensation, current 14 benchmarks and history. 15 There is no pattern; in this case, 16 there is no lead settlement. But in this 17 case, history is the pattern. 18 The central theme of the Union's 19 case, by contrast, is, as I predicted 20 outrage, the Union's first witness made a 21 presentation founded on the premise that 22 the employees are angry. We heard the</p>	<p style="text-align: right;">Page 1882</p> <p>1 conditions are the worst they've ever 2 been. We heard how the Carrier's position 3 is, and I quote, "insulting, absurd, 4 ridiculous, outlandish, and bogus." There 5 were a lot of anecdotes, hypotheticals, a 6 lot of emotion. 7 And the outrage, more than anything 8 else, is focused on one thing, headcount 9 decline. The number of employees in the 10 industry. The drop, especially in the 11 last five years. It underlies their 12 grievances and arguments about PSR, about 13 productivity, labor share, unit labor 14 cost, attendance, scheduling, the supposed 15 decline in industry healthcare costs, 16 claims of overwork, fatigue, increased 17 health risk, asserted inability to retain 18 employees, service problems, supply chain 19 issues, and even Mr. Roth's rather strange 20 argument that labor takes a risk because 21 they're exposed to furlough during 22 downturns.</p>

<p style="text-align: right;">Page 1883</p> <p>1 They're all premised on the idea 2 that the Carriers cut headcount too much. 3 That is not the issue before this Board, 4 there is no proposal before you to set a 5 minimum headcount. We are not here to 6 restore staffing levels that the Unions 7 would prefer, nor are we bargaining over 8 total labor spending. We bargain over 9 compensation for individuals, not the 10 aggregate. So while their grievance 11 overhead count is no doubt strongly felt, 12 it is a distraction. 13 We are here to find a fair 14 settlement of the parties' disagreement 15 over crew size, compensation, health care, 16 and work rules. Not to find a way to 17 return the industry to the way it was 20 18 or 30 or 50 years ago when half a million 19 people worked for the Railroads. 20 So let's review the evidence that 21 is now in the record about the issues that 22 are actually before the Board. Here they</p>	<p style="text-align: right;">Page 1884</p> <p>1 are on this slide: compensation, crew 2 size, healthcare, and work rules. These 3 are the topics that we suggest the Board 4 should address in its recommendations. 5 So let me start with compensation. 6 This is wages. This is the biggest dollar 7 item in dispute. Now, the headline here 8 is, as we've shown, that the party's own 9 history provides the benchmark for 10 bargaining outcomes. There is no debate 11 on what the range of structural change has 12 been. We heard from Ken Gradia, and his 13 testimony is not disputed. The range of 14 structural change since deregulation is 10 15 percent to 17.7 percent. There's also no 16 dispute that the party's history is to use 17 lump sums to address special issues, such 18 as abnormal inflation. Now, we heard from 19 the Union's expert that they don't like 20 lump sums. But they exist. They've been 21 used. That's been the methodology. 22 So what is in debate about the</p>
<p style="text-align: right;">Page 1885</p> <p>1 history? Well, this afternoon, we heard 2 from the Unions expert that the real 3 pattern should be real wage change, that 4 pay no attention to nominal change; it's 5 real wages that matter. The Union has not 6 pointed to a single agreement, not one, 7 where the party is bargained for real wage 8 change. It doesn't happen; they bargain 9 over GWIs rise. 10 Second, there's a dispute over the 11 base year. They complain that we're 12 relying on 2005 to the present. Well, 13 that's not true. We look back over the 14 course of post-regulation bargaining, 15 which Mr. Gradia reviewed. It's only for 16 benchmarking that we've used 2005 and Dr. 17 David explained why that is. And while 18 the Unions object to the selection of 19 2005, we heard all about how the modern 20 railroad renaissance began in 2004. 21 There was considerable focus on 22 that period when it comes to subjects that</p>	<p style="text-align: right;">Page 1886</p> <p>1 the Unions want to highlight, such as 2 profitability. It's only when we get the 3 compensation change, that we're told to 4 use a much longer period. We heard from 5 the Unions expert, that there is no basis 6 for assessing historical change unless you 7 look all the way back. I believe the 8 earliest round on his slide was 1947. 9 We've been over this before. The 10 experience prior to deregulation is not 11 informative. The outcomes of bargaining 12 were different when the Railroads were a 13 regulated industry that could pass on 14 their costs to their customers. 15 Now, the other Union historical 16 debate is also familiar. They're re 17 arguing PEB 219, once again. The extent 18 of grievance over the results in that 19 round are very high. They've been high 20 for as long as I've been in practice. And 21 despite the fact that even under the 22 Union's analysis, the employees have</p>

<p style="text-align: right;">Page 1887</p> <p>1 caught up, they will not let it go. PEB 2 219 was 30 years ago; it's not the issue 3 today. 4 Now aside from history, we rely on 5 recent settlements, the other settlements 6 that have been negotiated at arm's length 7 in other industries. And we've pointed to 8 both the public surveys, the BNA and 9 Bloomberg materials, as well as our data 10 set, which I believe has now been provided 11 to the Board. And we heard from Jerry 12 Glass, who explained that our proposal is 13 well within the range of the settlements. 14 Mr. Glass also explained that parties in 15 other areas are not agreeing to 16 extraordinary structural compensation 17 change in response to recent financial 18 conditions. But just as the Railroads 19 have done in their own history, they're 20 relying on lump sums. This is an excerpt 21 from a Bloomberg article from just a 22 couple of days ago, pointing to how lump</p>	<p style="text-align: right;">Page 1888</p> <p>1 sums are gaining traction in union 2 contracts. 3 Now, they don't deny what the 4 numbers are in these other settlements, 5 instead, we're refighting this 6 comparability issue that you see on the 7 slide here. We've pointed to the notion 8 that railroad workers are comparable to 9 other workers, and therefore, it's fair to 10 look to external benchmarks. And we're 11 told in response, no, we're not. We're 12 not comparable to anybody else. We heard 13 this from Mr. Cook, Mr. Roth, Mr. Baldwin; 14 pay no attention to those BLS job codes, 15 except, of course, when they draw 16 comparisons when it's convenient for their 17 purposes. On healthcare, for example, 18 they benchmark the fourteen selected small 19 switching railroads, commuters, and public 20 transit companies. I'll come back to this 21 one when we get to healthcare. 22 Moreover, Mr. Roth, in his</p>
<p style="text-align: right;">Page 1889</p> <p>1 presentation today, repeatedly referenced 2 references transit. Why? Well, because 3 that's what he's familiar with. And 4 because it's convenient for him to point 5 to certain selected items where they have 6 a favorable comparison to make. Moreover, 7 as Dr. David noted, the Union's expert 8 relies on ECI. Well, that is a comparison 9 to other workers. 10 So comparability benchmarking is 11 important. It's important to both sides. 12 And in any event, Dr. David addressed this 13 question of comparability. These jobs are 14 comparable, and they're not made-up 15 comparisons. The BLS has been doing this 16 for a very long time. These are its job 17 codes, it's occupational classifications. 18 It is a neutral source; its opinion should 19 matter on this point. And in any event, 20 benchmarking is not based on the idea that 21 two jobs are identical. It's based on the 22 idea that there are similarities between</p>	<p style="text-align: right;">Page 1890</p> <p>1 them. It's based on the idea that if 2 someone is choosing employment, they have 3 certain options, depending on their skills 4 and their background. 5 So if a new worker is choosing 6 whether to work for the Railroad or 7 another job, what are those options? Or 8 if someone leaves, where do they go? The 9 compensation offered by those other jobs, 10 those alternatives, tells us something 11 about what compensation should be, tells 12 us something about what the labor market 13 is, which as Kevin Murphy explained, 14 should inform, not control, inform the 15 process of collective bargaining. 16 There's been a related idea that 17 the Unions have mentioned, that because 18 all railroad employees cannot be instantly 19 replaced if they all suddenly left. Well, 20 that doesn't undercut the benchmarking 21 analysis at all. It's true of any 22 business. Ford, Boeing, Caterpillar, none</p>

<p style="text-align: right;">Page 1891</p> <p>1 of them could replace their entire 2 workforce in an instant. It doesn't mean 3 that the jobs aren't comparable. 4 Benchmarking is the very foundation 5 of collective bargaining. Whether it is 6 done by statute, in the transit context 7 that Mr. Roth referenced, or by the 8 parties. This is how they account for the 9 context in which their negotiations occur. 10 Mr. Roth also made the same 11 argument we heard in 243, that 12 comparability is a flawed concept. That 13 there's simply no basis for comparing them 14 to anybody else. And he points in 15 particular to this idea of the premium, 16 this idea that, well, how could there be a 17 premium that exists for this long? Where 18 did it come from? Why did the negotiators 19 allow it to persist? Well, Chuck Hopkins 20 explained this back in 219, as I mentioned 21 in my opening argument, and what he 22 explained was, it's a function of the fact</p>	<p style="text-align: right;">Page 1892</p> <p>1 that when it was a regulated industry, the 2 Railroads could pay a premium. 3 And that brings me to this related 4 point, the existence of this, this 5 premium. And so we've shown that there's 6 no need to recommend an extraordinary 7 structural increase, something beyond 8 historical experience and modern external 9 benchmarks because railroad workers 10 already have a compensation advantage. So 11 as I said at the outset, what this tells 12 you is that there isn't a problem here 13 that needs to be fixed. 14 Now, in addition to questioning the 15 origin of the premium, the Union's expert 16 response, is to obscure it. He doesn't 17 actually deny that there's a compensation 18 premium. Rather, what he says is, well, 19 look at the rate of growth, rather than 20 the actual dollars. 21 And let's look at it since 1979. 22 That's the chart on the left.</p>
<p style="text-align: right;">Page 1893</p> <p>1 But it ignores the existence of the 2 premium that predates 1979. If there's a 3 premium in place, before that index 4 begins, then of course, it can persist, 5 that doesn't tell you anything, that 6 there's this lag over time that he 7 asserts. 8 Moreover, the reason he picks 1979 9 is that there are very few base years that 10 work for this indexing exercise, you have 11 to pick a period just before PEB 219 to 12 make the argument, and as Dr. David shows, 13 on the right-hand side here, for the last 14 three rounds, the rate of the premium has 15 grown; the advantage has widened. And so, 16 in other words, in 2005, there was already 17 a substantial compensation premium, and 18 after the last 15 years, it's even larger. 19 I'll make one sort of related point 20 about this. I think what this 21 illustrates, these two charts together, is 22 that the Board should be cautious about</p>	<p style="text-align: right;">Page 1894</p> <p>1 what is depicted in any party's indexing 2 analysis. As the Chairman noted in 3 connection with the Union's analysis of 4 industry profits, the selection of 5 different base years makes a difference. 6 I'll also note that the Union's own 7 analysis shows that railroad wages have, 8 over the long term, and this is the Unions 9 experts chart, kept up with other US 10 business. So, in other words, the 11 historical practice is to maintain the 12 premium. There's one that's already 13 there, and we're proposing to keep it. 14 Now, the existence of a premium is 15 confirmed by the Railroads continued 16 ongoing recruiting and retention advantage 17 over other employers. There's no real 18 debate -- excuse me -- that we are doing 19 much better than other employers. Both in 20 terms of applicants, and in terms of 21 average tenure, as reflected in slide 12. 22 We heard from Dr. Allen about both of</p>

<p style="text-align: right;">Page 1895</p> <p>1 these points.</p> <p>2 Now, we've showed you that there is</p> <p>3 a large attrition rate in the first couple</p> <p>4 of years, that's reflected on this BNSF</p> <p>5 tenure slide, as people figure out whether</p> <p>6 they liked the job. This is true in</p> <p>7 virtually every business. And it was true</p> <p>8 in this industry before 243. It's been</p> <p>9 true throughout our history. If you go</p> <p>10 back and look at our materials that we</p> <p>11 submitted 11 years ago, you'll see the</p> <p>12 same trend. But then, if they stay, they</p> <p>13 stay for a career. None of that's debate;</p> <p>14 rather, the debate is over the meaning to</p> <p>15 attribute to current labor shortages. And</p> <p>16 what it says about the need for</p> <p>17 extraordinary compensation change.</p> <p>18 There's really two related questions here.</p> <p>19 First, there's a debate over</p> <p>20 whether labor shortages exist because of</p> <p>21 inadequate compensation. In the Union's</p> <p>22 opening argument, and throughout their</p>	<p style="text-align: right;">Page 1896</p> <p>1 case-in-chief, they argue that shortages</p> <p>2 exist. They point to any number of</p> <p>3 Carrier officer statements, acknowledging</p> <p>4 that there are shortages, that it is a</p> <p>5 tight labor market. That just begs the</p> <p>6 question as to why?</p> <p>7 There is zero evidence before this</p> <p>8 Board that the shortages are a function of</p> <p>9 widespread and adequate compensation, that</p> <p>10 we're not paying enough. Rather, the</p> <p>11 evidence is that railroad hiring</p> <p>12 challenges are a function of patterns in</p> <p>13 the labor market as a whole, increased</p> <p>14 employee mobility, not a problem for</p> <p>15 railroads specifically. In fact, as I</p> <p>16 said, railroad hiring is far better than</p> <p>17 other employers; were doing better than</p> <p>18 the market.</p> <p>19 Now, there's also the fact that</p> <p>20 we're proposing a wage increase eleven</p> <p>21 percent upon signing. So if you think</p> <p>22 that there is an advantage to adding</p>
<p style="text-align: right;">Page 1897</p> <p>1 compensation, well, our proposal does</p> <p>2 that. They want to widen the premium that</p> <p>3 already exists. But that doesn't address</p> <p>4 the nature and source of any hiring</p> <p>5 shortages, as Dr. Allen explained.</p> <p>6 Now, this afternoon, the Union</p> <p>7 pointed to a particular example on CSX.</p> <p>8 They said, well, they raise wages by 25</p> <p>9 percent. Yeah, it was the hiring rate.</p> <p>10 It was the entry rate. It's targeted</p> <p>11 specifically to hiring. Just as lump sums</p> <p>12 are the answer to short periods of unusual</p> <p>13 inflation, hiring incentives, and</p> <p>14 adjustment of entry rates are the answer</p> <p>15 to spot labor market shortages. And that</p> <p>16 implicates the second related debate on</p> <p>17 this point; on whether the hiring</p> <p>18 shortfalls are localized or widespread.</p> <p>19 We've shown that they are localized. So</p> <p>20 even if you thought that shortages exist</p> <p>21 because railroads aren't paying enough, a</p> <p>22 national GWI is not the proper tool to</p>	<p style="text-align: right;">Page 1898</p> <p>1 address it.</p> <p>2 It's also worth noting that the</p> <p>3 vast majority of the Union's evidence on</p> <p>4 this subject is anecdotal. There were a</p> <p>5 lot of opinions offered about hiring and</p> <p>6 crew shortages, but not a lot of evidence.</p> <p>7 One particular piece of empirical evidence</p> <p>8 that they did point to was a report from</p> <p>9 Luke Capitol. But if you look at the</p> <p>10 formula behind that report, it doesn't</p> <p>11 account for weather or any of the other</p> <p>12 reasons for variations in crew starts,</p> <p>13 which in turn, drives the analysts</p> <p>14 conclusions about crew shortages.</p> <p>15 As Mr. Garlan testified, the actual</p> <p>16 current deficit at BNSF is, right now, is</p> <p>17 3 percent. Three percent in TY&E crews.</p> <p>18 And they're in the midst of active hiring,</p> <p>19 they have already brought in more than one</p> <p>20 thousand new employees in all crafts this</p> <p>21 year. And as he further explained it, it</p> <p>22 makes no sense to over hire in these</p>

<p style="text-align: right;">Page 1899</p> <p>1 situations, because then you're just going 2 to end up furloughing people when the 3 market changes. 4 The Union's additional claims about 5 hiring challenges, discharges, and 6 furlough returns are either wrong or 7 mischaracterized. For example, one of the 8 Union witnesses testified in that in first 9 half of this year, since January 15th, 10 BNSF lost, "2,156 employees, including 11 1,109 resignations," and he suggested his 12 craft has been decimated. 13 Well, I have several responses to 14 that. First of all, the witness was 15 purported to be speaking about the 16 SMART-TD conductor craft, but that number 17 that he gave you, that's for all crafts. 18 It's not SMART-TD, not even all operating 19 crafts. As Mr. Garlan noted, if you want 20 to look at TY&E only, the number of 21 resignations this year is 395. 22 There's also the furlough question.</p>	<p style="text-align: right;">Page 1900</p> <p>1 And as Judy Carter and David Allen 2 explained, the rate of recall response 3 depends on the length of the furlough, the 4 longer one is out, the fewer employees 5 return. The total refuse recall rate, 6 this year, at BNSF is two hundred people. 7 And these are all tenure. These are not 8 mid-career employees, as the Unions have 9 told the STB. In fact, the vast bulk of 10 resignations, as explained by our 11 witnesses, are new employees, which, as I 12 mentioned, is nothing new. And none of 13 this is out of the ordinary. The total 14 aggregate attrition rate is in the same 15 range it's been in the past. It is still 16 a fraction of other employers. So again, 17 there is no problem here that the Board 18 needs to fix, and certainly not a problem 19 that can be fixed with some form of 20 extraordinary compensation change. 21 Alright, profitability. We 22 continue to disagree about the ability to</p>
<p style="text-align: right;">Page 1901</p> <p>1 pay, and these are several interrelated 2 disputes. First, the Unions 3 mischaracterize our argument as suggesting 4 the profits are irrelevant or can't be 5 considered at all. That's not our 6 argument. We agree that when an employer 7 is healthy, there is no, what Mr. Roth 8 called, a moderating effect on wage 9 growth. What we disagree with is whether 10 that has an accelerating effect. Because 11 as Mr. Roth himself has argued, in the 12 past, there isn't a relationship in 13 Railroad collective bargaining history. 14 The fact is, we just don't see this 15 dynamic that they're suggesting should 16 exist. We don't see it in our history, 17 and we don't see it in other bargaining. 18 If it were true, that company performance 19 drives compensation, then the most 20 profitable companies would have the 21 highest wages and the biggest settlements, 22 and they don't.</p>	<p style="text-align: right;">Page 1902</p> <p>1 Second, they have no real response 2 to our point, that if you want to realize 3 the benefits of performance, you need to 4 take downside risk. The best they can do 5 is this notion that labor in the aggregate 6 takes the risk of furlough, or headcount 7 decline, as a result of bad times. Mr. 8 Roth made this argument again today. It's 9 not an apples-to-apples comparison, 10 because, as I said at the outset, they're 11 not asking to increase minimum staffing 12 levels. They're asking to increase 13 individual wage rates. And they reject 14 the idea that those individual rates 15 should fluctuate with performance, because 16 they want the upside and not the downside. 17 As Union Pacific CFO Jennifer 18 Heyman testified, it is the very fact that 19 labor wages are fixed by contract that 20 requires railroads to modulate labor costs 21 through furloughs. 22 As Kevin Murphy pointed out, that's</p>

<p style="text-align: center;">Page 1903</p> <p>1 not a surprise, when you increase the 2 price of labor, you increase the incentive 3 to reduce headcount. The Union's don't 4 want variable pay, but they don't want 5 variable headcount either. 6 Underlying this whole profits 7 question is a philosophical debate. The 8 Union's presentation contains multiple 9 references to Milton Friedman. And the 10 point seems to be that the Railroads have 11 become too greedy; they refuse to share 12 with the employees. 13 Now, we understand, and we respect 14 the fact that the parties come at the 15 world from different perspectives. Now, I 16 would dispute their assertion that our 17 side cares only about profit, or that 18 there is some fundamental moral failing 19 and capitalism. Nor do I know anyone on 20 our side who was an acolyte of Dr. 21 Friedman. 22 But in any event, I respectfully</p>	<p style="text-align: center;">Page 1904</p> <p>1 submit that it is beyond this Board's 2 capacity to change either sides 3 philosophy, and that there is no need to 4 try. We are here to reach agreement on 5 compensation and work rules not to decide 6 whether corporate practices on stock 7 buybacks and similar matters are proper. 8 And we also disagree with their 9 characterization of how it works. As Ms. 10 Hamann testified, the Railroads invest 11 dollar one back into their networks. Then 12 they cover operating expenses, including 13 paying top level wages and benefits for 14 their employees, and only then, with what 15 is left over, do they return profits to 16 their owners. So the very premise of 17 their theory, that we are unduly favoring 18 stockholders is flawed. Both sides agree, 19 employees should be fairly compensated, we 20 just disagree on what that is. 21 Productivity. As I said at the 22 outset, this is just a repeat dispute. We</p>
<p style="text-align: center;">Page 1905</p> <p>1 went through this before PEB 243, we have 2 done it again, here. This is nothing new, 3 it didn't move the needle then it 4 shouldn't move it now. We have the same 5 disagreement over what productivity is, 6 the Union continues to point to unit labor 7 costs with no real response to our point, 8 that the proper measure is total factor 9 productivity. In fact, the Union's 10 experts admit, again, that there are lots 11 of factors that determine productivity. 12 And our witness, Chief Operating Officer 13 Cindy Sanborn, gave a good, if perhaps not 14 an exciting example, of what productivity 15 change really looks like when she 16 described the ballast train, and how it 17 used to be that there were lines of 18 employees up and down the track just 19 spread the ballast. Now there's just the 20 crew on the train, it does it 21 automatically. That's productivity 22 change.</p>	<p style="text-align: center;">Page 1906</p> <p>1 Again, this is just another version 2 of the headcount grievance. Labor 3 productivity is up because headcount is 4 down, it doesn't mean that the, what they 5 call the survivors, are owed more. And 6 that's because the fact is, as Lance Fritz 7 explained, the Carrier's eliminated work. 8 So the consequence is that a smaller 9 workforce is not working any harder than 10 historic averages, as reflected here. So 11 the change in size of the workforce is not 12 a justification for pay increases. 13 All right. So this brings me to a 14 subject that I want to address carefully. 15 We heard a lot today from the Unions 16 expert on inflation. And I have, 17 actually, enormous respect for the Unions 18 expert, I have opposed him in multiple 19 cases, I think he is a tremendous 20 advocate. But I disagree with virtually 21 every word he says in a forum like this. 22 And let me -- let me explain sort of some</p>

<p style="text-align: right;">Page 1907</p> <p>1 of the disagreements we have. 2 First, we disagree about what the 3 measure of inflation should be. We rely 4 on PCE, they rely on CPI, and they bounce 5 back and forth between whether it's the 6 CPI-U the CPI-W. Now, we think PCE is 7 better, and the Federal Reserve agrees 8 with us. And their response is, well, you 9 admitted, Carriers, that CPI-W is the 10 proper measure of inflation. And you 11 admitted that in the proceedings before 12 PEB 243. But if you go and look at what 13 we said, we were responding to his 14 argument. And by the way, we were talking 15 about CPI-U, not CPI-W. Again, there's 16 this sort of mushy, wavering back and 17 forth about which CPI we're talking about. 18 Now, the Union's expert also says, 19 well, we use CPI-W in bargaining, as 20 recently in 2007. Well, sure, I mean, if 21 you have a negotiated agreement, and you 22 agree to a particular measure of</p>	<p style="text-align: right;">Page 1908</p> <p>1 inflation, fine. That's not a surprise, 2 but they don't have a negotiated agreement 3 here. They don't even have a proposal to 4 use an inflation measure. And as for this 5 notion that you can derive something from 6 the MBTA arbitrations, I -- sorry, I 7 didn't follow that at all. We are not the 8 MBTA. 9 Now, second, we have a dispute over 10 what even CPI inflation is. And the 11 Unions' expert became rather exercised 12 about this, accusing the Carriers expert 13 of making multiple mistakes. Now, let me 14 make sure I get this right. The first 15 thing that he says is the two numbers in 16 the red box on the left are wrong. 17 They're wrong. You made a mistake in the 18 math. Dr. David is clearly incompetent, 19 you can't trust anything that they're 20 saying about this. Well, that's not Dr. 21 David's number that's the BLS number. The 22 BLS calculates inflation, to be 1.2</p>
<p style="text-align: right;">Page 1909</p> <p>1 percent in 2020, and 4.7 and 2021. Why? 2 Well, because unlike the Unions expert, 3 BLS uses average CPI, they don't do with 4 this December-to-December calculation that 5 they prefer. And the reason they don't do 6 it is because the December-to-December 7 number is volatile. And as our experts 8 said, the only reason that that number 9 would matter, that December number would 10 matter, is if you only got one paycheck a 11 year, at the end of the year in December. 12 Otherwise, the BLS methodology is better. 13 So, so much for the math error in the 14 first two years. 15 Now, the second thing that they 16 complain about is the forecast. I 17 mentioned this in my opening, but we still 18 got a dose of outrage about the absurdity 19 of using 6.1 percent when the number is 20 already higher. Well, that's not true. 21 The actual number, the seasonally 22 adjusted, actual inflation number for 2022</p>	<p style="text-align: right;">Page 1910</p> <p>1 is 5.4 percent. It's right there in the 2 BLS June reports. And the reason why we 3 are not changing that 6.1 is because, as I 4 argued at the outset, the Fed has already 5 acted to bring down inflation, it added 6 seventy-five basis points yesterday. And 7 so, it is certainly reasonable to suggest 8 that inflation will come down. In fact, 9 as we pointed out, it already has. So 10 there is no reason to speculate on a 11 different number, as the Union's expert 12 does. 13 This implicates a related debate 14 about projections. In my opening, I 15 warned about recency bias, about this 16 assumption that the larger economy and the 17 labor market would just continue on the 18 current path that they are. I pointed to 19 warning signs that are flashing. And if 20 you continue to read media reports, they 21 continue to suggest that there are bad 22 times ahead. In an article yesterday, the</p>

<p style="text-align: center;">Page 1911</p> <p>1 Washington Post noted, "in some sectors, 2 job cuts already are happening. Some 3 companies that hired rapidly during the 4 pandemic have realized that their business 5 models are not a fit for the post pandemic 6 economy," and then listed companies that 7 are already laying off workers including 8 Microsoft, Netflix, Tesla, Wells Fargo, 9 and others.</p> <p>10 Fourth, we heard a theory that it 11 has always been the parties intends to 12 match or exceed inflation. Well, that's 13 simply not true. There's no evidence of 14 that we're not using COLA indexes anymore. 15 If they wanted to match inflation, or tie 16 compensation to inflation, they would be 17 here asking for that kind of variable 18 approach. And they're not. They don't 19 want it.</p> <p>20 Fifth, there's this related theory 21 that there's a .1 percent -- point, I'm 22 sorry, .9 percent real wage change per</p>	<p style="text-align: center;">Page 1912</p> <p>1 year, and that that's the intent. But 2 it's notable; they can't point to any 3 historical material showing that there's 4 no CBA that says we agree to .9 percent 5 real wage growth; they reverse engineer it 6 based on selective use of indexing. The 7 actual evidence on this point comes from 8 Mr. Gradia, who said unequivocally that 9 predicting inflation or guaranteeing real 10 wage change has never been the way the 11 parties bargain.</p> <p>12 Sixth, we heard from Dr. David to 13 explain that even if you accept their 14 premise, even if you agree that CPI is 15 correct, the numbers are wrong because 16 they fail to account for timing. If you 17 account for the timing, the real number, 18 to get to the result that the Unions want, 19 which we don't agree with. But if you 20 wanted to get to that number, it would be 21 eighteen -- between eighteen and 22 twenty-two percent, not twenty-eight. And</p>
<p style="text-align: center;">Page 1913</p> <p>1 the Board asked about this timing 2 question, asking what the historical 3 practice was.</p> <p>4 Well, we went and checked, and 5 seventeen out of the last eighteen wage 6 increases were in July. The last one that 7 wasn't was in 2001, which was a leftover 8 from the period of time prior to 2000, 9 when the when the numbers were different, 10 but in modern history, for the last 20 11 years. It's all been July.</p> <p>12 Alright, that's probably enough 13 about inflation indexing. Let's talk for 14 a bit about the alternative wage proposal 15 and the crew size process.</p> <p>16 Our proposal to this Board is to 17 adopt the historic process for resolution 18 of the same kind of proposal that you have 19 before you were asking the Board to follow 20 the same approach as PEB 219 and recommend 21 that the parties continue the local 22 process with a binding arbitration</p>	<p style="text-align: center;">Page 1914</p> <p>1 backstop. Now, this is a very limited 2 issue for the Board. We agree, for 3 purposes of this round only, that crew 4 size can and should be bargained at the 5 local level, meaning the Carrier level. 6 And as shown here, the parties agree, 7 we're in local handling; that process is 8 ongoing. And SMART-TD does not deny that 9 Boards have addressed through size, in 10 national handling, as a process issue, not 11 the merits, just process, in response to 12 an alternative wage proposal.</p> <p>13 Now, you heard, the Union's 14 attorney yesterday referred to the 15 alternative wage proposal as a ploy, a 16 trick, or a gimmick. Now, it's notable, 17 when they say that, they're saying, well, 18 it's because you're relying on this 19 alternate southern case from the Southern 20 District of Illinois. Well, no we're 21 relying on PEB 219. That's the lead 22 precedent on this issue. That's the</p>

<p style="text-align: center;">Page 1915</p> <p>1 precedent from the last time a 2 Presidential Emergency Board, like this 3 one, was confronted with this issue. 4 And they've all done something 5 along these lines, they've all provided 6 something like what we're proposing here, 7 a pathway for final resolution. And as 8 was true in 1991, we need a process. The 9 Unions and the Carriers will not get to 10 agreement if it's left open-ended. When 11 the Board asked me what would happen if 12 there's no backstop, I said, we will end 13 up before PEB, and the Union has said 14 something similar here. In their own 15 statement yesterday, they effectively 16 admit that there would have to be another 17 Presidential Emergency Board to get this 18 done if this Board takes no action. And 19 that's of course, if the process doesn't 20 just languish in mediation forever, with 21 no actual resolution. 22 Why would we subject this country</p>	<p style="text-align: center;">Page 1916</p> <p>1 to another Emergency Board, expose the 2 parties to that kind of disruption, when 3 we can just send the process off to 4 binding arbitration. As much as I love 5 this process, I'm willing to pass on it. 6 And letting it sit is not a good idea 7 either. 8 We've heard a great deal of anger 9 from the Unions about the fact that it's 10 taken us two and a half years, to get to 11 this point in the national process, we 12 still don't have an agreement. But the 13 local process started at the same time. 14 It's still not resolved. It's not even 15 this Barwon we need a way to get this done 16 in a timely and certain manner. There is 17 no path to the ultimate resolution of this 18 bargaining round without a final and 19 binding process on crew size. 20 Okay, healthcare. Here, again, 21 we're following a well paved road. We're 22 revisiting many of the same issues that we</p>
<p style="text-align: center;">Page 1917</p> <p>1 addressed before PEB 243. Although we may 2 have set a new record for combined expert 3 testimony from both sides. The Carrier's 4 proposal, summarized here, and we've seen 5 this multiple times now, I won't dwell on 6 it. But it's a proposed package of 7 reasonable changes that are designed to 8 bring the plan into closer alignment with 9 market norms. And we've showed that those 10 changes, both in terms of total cost and 11 actuarial value, are justified by, once 12 again, history and benchmarks to achieve a 13 more reasonable level of cost sharing. 14 And we put before you extensive evidence 15 that the plan benefits are well above 16 market. This is one example from Carrier 17 Submission Number 3, and Mr. Scofield's 18 report. 19 Now the Union's experts says those 20 broad survey benchmarks, they should be 21 rejected because they're not comparable to 22 railroads. It's the same argument they</p>	<p style="text-align: center;">Page 1918</p> <p>1 made to PEB 243. They're wrong for the 2 same reasons. I refer the Board to the 3 report of 243. You're familiar with that 4 argument, I don't need to repeat it. But 5 the really remarkable point here is that 6 the Union's own expert admitted that the 7 actuarial value benchmark is below what 8 we're proposing, and then they told this 9 Board that they can't disclose it. Well, 10 we're not shy about it. I mean, our 11 healthcare team showed it to the Board, 12 and here it is again. This is what their 13 experts said the benchmark is. And they 14 say, well, we're not saying anything about 15 what it should be, well fine. But we 16 agree what the benchmark is, 86.5 17 actuarial value. I don't think there's 18 any ambiguity in their expert slide. 19 Also, as I mentioned, they've now 20 switched to these fourteen hand-selected 21 properties, none of which are remotely 22 comparable to a Class I, most of which are</p>

<p style="text-align: right;">Page 1919</p> <p>1 public, and have tiny employee 2 populations. If I put up these properties 3 as evidence of what wages should be, Mr. 4 Roth would have a lot to say about that. 5 I'm sure. The phrases small sample size 6 and hand selected come to mind. And he'd 7 be right. 8 Now parenthetically, before, I am 9 accused of hypocrisy, because we put the 10 Montana Rail Link agreement before you as 11 a benchmark. I'll note, that when it 12 comes to wages, we rely on the BNA data 13 and Mr. Glass's large dataset. The MRL is 14 an anecdotal example that is responsive to 15 the Board's questions about recent wage 16 trends. We are not suggesting that these 17 kinds of anecdotes carry the same weight 18 as broad surveys for purposes of 19 benchmarking. That's true of the 20 anecdotes offered by both sides. And as 21 for the implication that we heard for the 22 first time this afternoon, that perhaps</p>	<p style="text-align: right;">Page 1920</p> <p>1 the Board should look at the DM&E 2 agreement. Well, we're happy to play that 3 game. That twenty-seven percent was 4 agreed to in circumstances where that DM&E 5 money had been purchased by a larger 6 railroad, and they were increasing the 7 wage rates to be the same as the larger 8 road completely in opposite. 9 There is, also in getting back to 10 healthcare, this debate about erosion and 11 indexing. Look, I don't think that 12 there's any disagreement that there's this 13 sort of promethium quality to our 14 negotiations over healthcare. There's a 15 great deal of angst and effort, sometimes 16 involving a Presidential Emergency Board, 17 to push the AV down to an acceptable 18 level. And then over time, it just creeps 19 back up, and then we're right back to 20 where we started or worse. They don't 21 deny that this happens, but rather they 22 complain that the mechanism to maintain an</p>
<p style="text-align: right;">Page 1921</p> <p>1 eighty-eight AV. And the Carrier's 2 proposal is too vague. 3 Well, the point here is to maintain 4 an AV that we bargained for. The Carriers 5 are flexible about the best way to achieve 6 that. We think the proposed mechanism in 7 the Carrier's proposal is the most 8 straightforward way to do that. But if 9 the Board wants to recommend an 10 alternative, that's fine. Again, the 11 point is to avoid having this fight in 12 every round. 13 While I'm on the subject of 14 actuarial value, the Board asked a 15 question about whether the parties had 16 bargained for AV in the past. And I heard 17 the Union's witness say no. Well, I have 18 evidence to the contrary, that the 19 settlement terms that the parties passed 20 back and forth in the 2017 round of 21 bargaining, specifically referred to a 22 ninety percent AV. Now, I will provide</p>	<p style="text-align: right;">Page 1922</p> <p>1 these to Union Council and to the Board 2 upon request, but the fact of the matter 3 is, that the Union's testimony on that 4 point was a mischaracterization. 5 Tiering. We're having similar 6 debate about tiering. Tiering is how 7 health care plans operate in the modern 8 world; it is a more equitable way to 9 distribute the burden of plan costs. They 10 consume more plan resources if you're in a 11 family, so you should bear more of the 12 costs. It helps to incentivize spouses to 13 seek coverage under their own plan, when 14 and where appropriate. Now we've shown, 15 and I think the other side agrees, that 16 four tiers are the norm. But we propose 17 going with only two. We've also proposed 18 a graduated mechanism to achieve tiering 19 rather than jumping all the way to full 20 spread needed to obtain the purposes of 21 hearing. Now, they don't deny that 22 tiering is common, they just quibble about</p>

<p style="text-align: center;">Page 1923</p> <p>1 the mechanism. They're arguing that it's 2 unfair; that it's unworkable; that will 3 lead to a death spiral. Now, we disagree. 4 We think it makes perfect sense if what 5 you want to do is ease into this for the 6 reasons that Mr. Schofield explained, but 7 if the Board has a better idea on how to 8 implement tiering, we're all ears. 9 There's the debate that we heard 10 again today about whether costs are up or 11 down. Cheiron claims that aggregate cost 12 is down, which is what both the Chairman 13 and Dr. Duncan noted is a function of 14 fewer covered lives. So this is just the 15 headcount grievance, again, there are 16 various other flaws in the Union's health 17 care objections that are addressed by our 18 experts regarding site of care, pharmacy 19 rules, and the like. I'm not going to 20 dwell on them. But I will highlight just 21 one other point here. 22 This is Slide 43, from the Cheiron</p>	<p style="text-align: center;">Page 1924</p> <p>1 deck, where they raise again, this idea 2 that railroad workers need better health 3 care because they're exposed to greater 4 risks from diesel fumes, lead, and bird 5 droppings. This was discussed before PDB 6 243 in some detail. The short and 7 sufficient answer is that there are far 8 higher claims and costs experienced with 9 spouses than the employees. It remains 10 thirty percent higher today. So their 11 argument makes no sense. If this was 12 driving health care costs, you would 13 expect the people who are actually working 14 on the Railroad to exhibit the higher 15 costs, and it's not true. 16 I've got one more comment on health 17 care, and it relates to this 18 administrative practice issue. This is 19 the suggestion that, well, we could go to 20 the deadlock neutral on vendor rebates and 21 related issues. And Ms. Roma and I both 22 devoted substantial time over the last</p>
<p style="text-align: center;">Page 1925</p> <p>1 year to litigating and arbitrating over 2 these questions, about whether related 3 vendor network questions could or could 4 not be referred to the deadlock neutral. 5 I'm not going to get into an 6 extended debate over all the things that I 7 think are wrong with her summary of what 8 happened. I will simply note that the 9 course of events was, that first we went 10 to court to litigate whether we could 11 refer the matter to the deadlock neutral 12 to determine whether there could be an 13 arbitration over the vendor realignment 14 question. So we had a fight over about 15 whether we could have a fight over whether 16 we could have a fight. 17 The point that I want to make here 18 is that there is an enormous amount of 19 friction in the deadlock neutral process. 20 And while I appreciate the work, both 21 sides need a cleaner and easier path to 22 getting these issues resolved. That's</p>	<p style="text-align: center;">Page 1926</p> <p>1 what this rebidding process would do. We 2 wouldn't need to have all of these 3 disagreements that Ms. Roma described. 4 All right, work rules is the last 5 of the subjects that I need to touch on. 6 And let me begin with this sort of 7 meta-debate that you've heard throughout 8 these proceedings, about who's at fault, 9 that this didn't get bargained; who was 10 the obstructionist? We think the record 11 is clear, that there was little or no 12 bargaining over work rules. Mr. Rodgers 13 showed the Board the record of our 14 bargaining proposals, showing we did give 15 them details and we think the record 16 speaks for itself on what we received from 17 the other side. There isn't any record of 18 negotiation in substance. Now Mr. Roth, 19 for example, said, oh, well, I did spend 20 time in bargaining on that. Well, yeah, 21 you spent thirty minutes reading what it 22 was they want it. But is there contract</p>

<p style="text-align: right;">Page 1927</p> <p>1 language that was offered? Were there 2 details of implementation? Was there a 3 quid pro quo? No. 4 Moreover, it's not like that they 5 ever articulated the details of this 6 proposal. If you look at what's in their 7 July 11th proposal, the one that they're 8 making to this Board, you will not find 9 that proposal anywhere in this record. 10 They didn't make. Many of these issues 11 were barely discussed. Attendance, for 12 example, wasn't raised until January of 13 this year, in the meeting in which the 14 Union cancelled further negotiations in a 15 rage over the High-Vis policy. 16 I don't want to dwell on this. But 17 there's a real policy problem here, 18 because PEB's are supposed to be a last 19 resort. That's why it's called an 20 Emergency Board. And the Board should 21 hesitate before issuing recommendations on 22 topics that haven't been adequately</p>	<p style="text-align: right;">Page 1928</p> <p>1 addressed, because it incentivizes 2 parties, on both sides, to just skip over 3 that process and get to the end game. But 4 that obscures the real problem, over which 5 there is no debate, and that is the lack 6 of quid pro quos for any of their 7 proposals. Not one. They don't deny it. 8 All of this is just a demand for more; 9 nothing in exchange. No way, Josh said 10 [sic]. Nothing. 11 There's also this problem with 12 incremental change. This is true of their 13 proposals on attendance on sick leave, and 14 scheduling, and holidays, and expenses 15 away from home. Their attendance 16 proposals are especially egregious, they 17 just want to throw out the system that 18 we've had in place for years. This is way 19 too radical and should be withdrawn. 20 Their scheduling proposal. Well, 21 again, they want guaranteed rest days, but 22 without any quid pro quo of</p>
<p style="text-align: right;">Page 1929</p> <p>1 self-supporting pools or any of the other 2 mechanisms that the parties have mutually 3 agreed to in local handling. And they 4 admit, they admit that there have been 5 those local disagreements. 6 On a related note here on the 7 scheduling point, I just want to say that 8 we respectfully disagree with some of the 9 Union's testimony and the details of this. 10 I'll just give you one example. Mr. 11 Pierce made a big deal about the 12 cancellation of agreements on work-rest 13 after the passage of the RSIA. He took 14 the time to click through six slides 15 showing you all of the agreements that 16 have been cancelled. But what he didn't 17 say is that it was no longer possible to 18 proceed with those agreements after the 19 RSIA was passed, and he didn't say, as Mr. 20 Macedonio explained, that they'd been 21 replaced with modernized work-rest 22 agreements where the parties have been</p>	<p style="text-align: right;">Page 1930</p> <p>1 able to work that out in local bargaining. 2 On sick leave, same problem. We've 3 told them there's -- about the operational 4 problems. But their proposal makes no 5 accounting for that. They simply say, 6 well, you can't say no. We heard a 7 suggestion yesterday that, well, they hope 8 that there won't be abuse. I'm afraid 9 that hope is not a reasonable basis for 10 managing attendance and the Railroad 11 industry. 12 Holidays. Again, they ignored that 13 we're well above benchmarks. We heard 14 some high-minded rationales for the days 15 that they wanted, including Veterans Day, 16 but that's not the issue. As Mr. Rodgers 17 testified, they had Veterans Day, they 18 gave it up; they wanted New Year's Eve 19 instead. So this is just an example of 20 wanting more. 21 The same is true with respect to 22 expenses away from home. As Mr. Rodgers</p>

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<p style="text-align: center;">Page 1931</p> <p>1 explained, the reason there isn't full 2 reimbursement is because the Union has 3 negotiated for a different system, one 4 where they get compensation while they are 5 home, or other patterns that are 6 negotiated at the local level. And the 7 Union admitted that after 243, they did go 8 and bargain for local agreements with an 9 exchange of quid pro quos, they now say 10 those agreements are inadequate, but 11 that's because they prefer this sort of 12 one-sided deal that they're seeking here. 13 Our affirmatives on operating craft 14 proposals, in contrast to the Union's 15 proposals, are in place and proven to 16 work, including the automated bid, 17 self-supporting pools, and methods of pool 18 regulations. We've heard that these 19 systems are in place; they do work, and 20 they're designed to respond to the Union's 21 concerns. 22 So that brings me almost to the</p>	<p style="text-align: center;">Page 1932</p> <p>1 end. I do want to -- have one final 2 remark. And that relates to this concept 3 of acceptability that you've heard both 4 sides reference in these proceedings. And 5 the Union's argument, as I understand it, 6 is anything short of what they've proposed 7 will never be ratified. That is a problem 8 that the Unions have created. They have 9 set expectations sky high, and they now 10 want this Board to save them. But it 11 misses the more fundamental point, the 12 Board's task is to recommend a settlement 13 that both sides can accept. The way to do 14 that is through the time-tested principles 15 that PEBs have used for decades: 16 historical settlements, comparison to 17 peers, benchmark settlements, an eye 18 toward the course of bargaining, and what 19 the parties actually did to engage in 20 give-and-take with fair trades on both 21 sides. 22 I'd like to thank the Board for</p>
<p style="text-align: center;">Page 1933</p> <p>1 their time and attention. 2 I'd also like to acknowledge the 3 usual, expected now, professionalism and 4 courtesy of opposing Counsel. It is a 5 pleasure to work with them. It has been 6 for my entire 25-year career. I couldn't 7 ask for a better job as a lawyer than to 8 work in the real -- under the Railway 9 Labor Act. It is a tremendous spar and I 10 very much value our colleagues on the 11 other side. 12 Thank you. 13 CHAIRMAN JAFFE: Thank you, Mr. 14 Munro, and your whole team. 15 Off the record. 16 (Thereupon, a brief recess was 17 taken.) 18 CHAIRMAN JAFFE: We'll go back on 19 the record. 20 And at your convenience, Mr. 21 Edelman. 22</p>	<p style="text-align: center;">Page 1934</p> <p>1 CLOSING STATEMENT ON BEHALF OF THE UNIONS 2 MR. EDELMAN: First thing I want to 3 do is thank the Board for your time and 4 attention and willing to take this on -- 5 on short notice. We know this is a lot. 6 We appreciate your help in attempting to 7 facilitate and end to this round of 8 bargaining and again, it's overwhelming 9 and we know it is. 10 I'm going to review the Union's 11 case, but first, I'll start by repeating 12 Ms. Roma's observation that the role of an 13 emergency Board is to make recommendations 14 that conform the basis of a voluntary 15 settlement between the parties, thereby 16 avoiding interruption to commerce caused 17 by a strike or a lockout. 18 As part of formulating a 19 settlement, it can lead to a voluntary 20 agreement, pass PEB and place emphasis on 21 acceptability of the settlement terms to 22 the parties. In determining</p>

<p style="text-align: right;">Page 1935</p> <p>1 acceptability, the key component is the 2 reasonable expectations to the parties 3 based on such considerations of past 4 bargaining, historical relationship to 5 other employee groups, and current 6 industry trends. 7 Additionally past PEBs are 8 generally rejected proposals from either 9 side that represent significant departure 10 from current contract terms or industry 11 norms. In the normal course of 12 bargaining, changes and agreements are 13 typically incremental. Now in this round, 14 what is acceptable in terms of reasonable 15 expectations, current trends, and the 16 status quo. 17 Well, with respect to wages, that 18 includes the Carriers' run of 19 extraordinary profits and recent 20 inflation. With respect to health and 21 welfare benefits, the Carriers seek 22 radical transformation of the National</p>	<p style="text-align: right;">Page 1936</p> <p>1 Plans, and that means they have a very 2 high burden of persuasion with respect to 3 their proposals. 4 And with respect to work rules, 5 that includes the recent history of 6 efforts in the Unions to try to negotiate 7 the changes that they seek. 8 Now, on wages, you just heard from 9 Mr. Roth, I won't repeat what he said but 10 I want to emphasize a few points. Our 11 proposal accomplishes the goal of not 12 losing ground to the cost of living plus 13 modest wage growth in real dollars. 14 We submit the Carriers' 15 extraordinary profits must be a 16 consideration. The Carriers' don't deny 17 their phenomenal profits, but they deny 18 their relevance. But it must be 19 recognized that what we are looking at 20 here is not something that could just be 21 described as a mere bump that might not 22 last.</p>
<p style="text-align: right;">Page 1937</p> <p>1 Unlike 2011 when we all just got 2 out of a recession, here there has been a 3 consistent and escalating run of profits. 4 This is not the result of luck or 5 coincidence but a result of 6 government-authorized consolidation that 7 gave the railroads pricing authority. 8 Putting aside whether 9 profitability should always be a 10 consideration or sometimes be a 11 consideration or rarely be a 12 consideration, we are dealing here with 13 landmark profits. We heard from Mr. Fritz 14 the other day. In the spring, he 15 announced that Union Pacific, a 16 160-year-old railroad had its best year 17 ever. 18 Other railroads are having 19 excellent if not record years all after 20 dramatically cutting the work force and 21 requiring a work force that is seventy 22 percent of the work force from 5 or 6</p>	<p style="text-align: right;">Page 1938</p> <p>1 years ago to move amount the same amount 2 of freight. 3 Mr. Munro said the railroads don't 4 necessarily dispute the relevance of 5 profits. The point here is we are talking 6 about phenomenal profits on a steady run. 7 The Carriers cited on the slides some 8 prior Union statements that profitability 9 should be taken into account. 10 I think an attempt to show that 11 the Unions have said this before, as if 12 that shows it shouldn't be considered, but 13 we submit that if anything it shows that 14 after this record role, it should 15 definitely be taken into account. 16 As we described, we reject the 17 Carriers' assertion that only markets 18 supply and demand for labor dictates 19 wages. As I said the other day, there is 20 no law, rule, mathematical formula, or 21 scientific proof that supports this, it's 22 just a set of values, but the Board</p>

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<p>1 doesn't have to accept that set of values.</p> <p>2 Mr. Munro eluded to us having a</p> <p>3 philosophical difference, that's right, we</p> <p>4 do. We think that the employees have</p> <p>5 ability to call on this run. And again</p> <p>6 the notion that general labor market must</p> <p>7 control rail wages is refuted by the RLA</p> <p>8 itself which was designed to allow workers</p> <p>9 to use their collective strength to gain</p> <p>10 more than the market would normally</p> <p>11 allocate them.</p> <p>12 And Mr. Munro again said if wages</p> <p>13 go up, employment goes down. I didn't</p> <p>14 think I'd have to answer that again after</p> <p>15 the other day, but plainly the increase in</p> <p>16 wages can come out of that phenomenal run</p> <p>17 of profits that Mr. Fritz is so proud</p> <p>18 about.</p> <p>19 The Carriers' also relied on the</p> <p>20 point of Dr. Jessie David which rail</p> <p>21 workers are paid a wage premium over</p> <p>22 allegedly comparable workers. I'm not an</p>	<p>1 expert in job classifications and</p> <p>2 rankings, but I do know rail jobs. I've</p> <p>3 been a labor lawyer for over 40 years, and</p> <p>4 I find the comparators for several of</p> <p>5 those crafts to be highly dubious. And I</p> <p>6 think the Board members who have</p> <p>7 familiarity with rail jobs, they also find</p> <p>8 these comparisons to be dubious.</p> <p>9 I'm not saying I'm necessarily</p> <p>10 right or I can figure out what some</p> <p>11 comparators were, but I do suggest that</p> <p>12 Dr. David's conclusions at Exhibit 3</p> <p>13 should be reviewed with skepticism when</p> <p>14 you look at his table 19 which he said</p> <p>15 this morning was the foundation of his</p> <p>16 analysis and his paper says is the basis</p> <p>17 for asserting the existence of a wage</p> <p>18 premium.</p> <p>19 Let's look at some actual job</p> <p>20 qualifications he used for his matching in</p> <p>21 Table 19. Signalmen. He lists</p> <p>22 telecommunications equipment installers</p>
Page 1941	Page 1942
<p>1 and repair linemen, electrical electronics</p> <p>2 installers and repairers, transportation</p> <p>3 equipment electronics installers and</p> <p>4 repairers, commercial industrial</p> <p>5 equipment.</p> <p>6 Basically those are cable</p> <p>7 installers, fiberoptic installers, phone,</p> <p>8 and computer equipment installers.</p> <p>9 Signalmen are in safety-sensitive</p> <p>10 positions that do a lot of very</p> <p>11 complicated and varied work. They are</p> <p>12 subject to federal regulations and hours</p> <p>13 of service laws, and they are subject to</p> <p>14 civil and criminal penalties with regard</p> <p>15 to how they do the work.</p> <p>16 I submit that those comparisons</p> <p>17 are absurd. Conductors. Dr. David</p> <p>18 actually talked about this this morning.</p> <p>19 He used sailors and marine oilers and</p> <p>20 bridge and lock tenders and subway and</p> <p>21 streetcar operators.</p> <p>22 Subway and streetcar operators</p>	<p>1 were also referred to compare engineers.</p> <p>2 I have no idea how conductors are compared</p> <p>3 to marine oilers and bridge and lock</p> <p>4 tenders. Subway and streetcar operators</p> <p>5 don't drive subway cars, those are</p> <p>6 automated. They don't manage the work in</p> <p>7 the flow of the train and handle the</p> <p>8 responsibilities as conductors.</p> <p>9 Dispatchers, Dr. David used</p> <p>10 first-line supervisors of transportation</p> <p>11 and cargo moving workers like carbo</p> <p>12 handling specialist and air-filled</p> <p>13 operation specialists. He didn't even</p> <p>14 compare them to aviation flight</p> <p>15 dispatchers and flight planners which are</p> <p>16 real aviation jobs.</p> <p>17 Electrical workers: he used</p> <p>18 construction workers generally, which is</p> <p>19 very big difference between Unionized and</p> <p>20 non-Unionized construction workers in pay.</p> <p>21 In some instances, Dr. David said</p> <p>22 he added categories so they wouldn't be</p>

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<p style="text-align: center;">Page 1943</p> <p>1 only a rail-to-rail comparison, there's 2 nobody other than a locomotive engineer. 3 But one can't arbitrarily add 4 noncomparable jobs into a category in 5 order to make a comparison because you 6 don't have any other comparison to make. 7 Mr. Munro said this is objective 8 stuff. It's the BLE standards for God's 9 sake, it's the BLE listing of all those 10 numbers on the side. But the question is 11 not whether locomotive engineer or a cable 12 installer is item number 606 or something, 13 but it's Dr. David did the choosing among 14 those things to create the comparison that 15 leads to the finding that he has of a wage 16 premium. 17 So these several comparisons just 18 suggest the Board should view the wage 19 premium argument skeptically. One other 20 point -- yeah, Dr. David said I'm not 21 saying the jobs are comparable to rail 22 jobs, but a major point of his</p>	<p style="text-align: center;">Page 1944</p> <p>1 presentation was to say that the rail 2 workers were made of premium based on that 3 comparison. 4 I also note in this argument, in 5 the Carriers' argument they had a slide 6 that compared trucks diesel mechanics to 7 locomotive mechanics, to which I asked; 8 have you seen the truck? Have you seen 9 the locomotive? And the notion in other 10 slide that aviation employee compensation 11 is below that of railroad employees 12 performing comparable jobs is not credible 13 either. 14 Mr. Roth, Mr. Guerrieri, Ms. Roma, 15 and I have all represented aviation 16 workers, some of us for decades and none 17 of us think that's right. I mean, for 18 example, airline mechanics have longer and 19 higher compensation than railroad 20 mechanics. Now perhaps the Carriers 21 included nonunion workers on regional 22 airlines and probably even contract</p>
<p style="text-align: center;">Page 1945</p> <p>1 fuelers and cabin cleaners were often paid 2 at the minimum wage or that's what went 3 into that category, I don't know, but I 4 again suggest in discrepancy to suggest 5 you view these conclusions with 6 skepticism. 7 There's a larger point about 8 comparing rail jobs with jobs in other 9 industries. As Ms. Roma said in her 10 opening, there are many aspects of rail 11 employment that are unique, even different 12 from the aviation industry, the only other 13 one under the RLA. I'm going to add to 14 that. S Supreme Court decision, 15 California versus Taylor, 353 US 553, 556, 16 the Court said, quote, the railroad world 17 for which the act was designed has been 18 described as, quote, a state within a 19 state, unquote. Its population of some 20 three million if we include the families 21 of workers, has its own customs, its own 22 vocabulary and lives making -- according</p>	<p style="text-align: center;">Page 1946</p> <p>1 to rules of its own making. 2 Now the industry was bigger then, 3 but the industry is still a world apart. 4 In comparisons of rail jobs to those 5 outside the industry should be made with 6 the utmost care. The Carriers also argue 7 that profitability shouldn't be a 8 consideration in setting pay because the 9 Union allegedly doesn't have any downside 10 risk other than in a profit-sharing 11 arrangement and that wages are a one way 12 up. 13 The concern about labor costs, 14 it's not just wages, but more broadly 15 labor costs, and the Carriers have 16 repeatedly argued the courts that wages 17 and work rules are inherently tied 18 together because one could be traded for 19 the other. Just this round, the Carriers 20 again prevailed in court in arguing that 21 work rules must be bargained with wages 22 because they are both labor costs and</p>

Page 1947	Page 1948
<p>1 tradeable.</p> <p>2 And there have been instances</p> <p>3 where Carriers of the paint work rule</p> <p>4 changes that result in the labor cost</p> <p>5 savings from bargaining and from PEBs when</p> <p>6 the Carriers' experience financial</p> <p>7 setbacks, they got concessions from labor</p> <p>8 that saved them money relying on their</p> <p>9 financial condition.</p> <p>10 And in particular in my</p> <p>11 declaration and as Mr. Roth explained, the</p> <p>12 Carriers received labor savings from the</p> <p>13 statute enacting the recommendation of PEB</p> <p>14 219 and Mr. Munro says we have a phobia or</p> <p>15 a fixation on that. The fact was it is an</p> <p>16 example. It is an example of the Carriers</p> <p>17 using their financial condition to assert</p> <p>18 that there need to be concessions from</p> <p>19 labor on matters that have financial</p> <p>20 consequence.</p> <p>21 So you can't say that extreme</p> <p>22 profitability isn't grounds for a factor</p>	<p>1 paying into the GWIs here. Mr. Roth also</p> <p>2 explained, and this was dismissed by my</p> <p>3 friend Mr. Munro, but we look -- we're</p> <p>4 Unions. All of these people or members of</p> <p>5 the Union. People who are furloughed,</p> <p>6 they are part of the Union. So that</p> <p>7 Carriers, when they adonize them, say</p> <p>8 that's good you, you, you, and you, and</p> <p>9 whatever wage rate you get.</p> <p>10 But to the Unions these are</p> <p>11 members and when the members are</p> <p>12 furloughed, that's what the Carriers do to</p> <p>13 inflate themselves from risk.</p> <p>14 And that -- the damage from that</p> <p>15 is born by working people who are members</p> <p>16 of these Unions and that cannot be</p> <p>17 discounted. It is wrong to suggest that</p> <p>18 labor doesn't have a downside risk from</p> <p>19 finance circumstances in the industry.</p> <p>20 Another significant consideration</p> <p>21 with respect to compensation is the</p> <p>22 Carriers retention and recruitment problem</p>
Page 1949	Page 1950
<p>1 which we documented at the STB and here</p> <p>2 and again so did the shippers. I mean</p> <p>3 they're not labor partisans.</p> <p>4 The Carriers claim that our</p> <p>5 evidence does not show compensation, it</p> <p>6 was a factor in the particular quiz we</p> <p>7 documented. But the point was to show</p> <p>8 that mid-career quits which were</p> <p>9 previously rare in the industry are</p> <p>10 occurring with some frequency now.</p> <p>11 That's what we were going to show</p> <p>12 there. Now the Carriers contend there was</p> <p>13 no inherent link between quick rates and</p> <p>14 compensation. Now, of course there can be</p> <p>15 multiple considerations for quits but the</p> <p>16 notion, the compensation is not a major</p> <p>17 factor in recruitment and retention</p> <p>18 defines logic.</p> <p>19 And by the way, if it isn't a</p> <p>20 major factor why are the Carriers offering</p> <p>21 huge recruitment bonuses and eliminating</p> <p>22 entry rates. If it's a factor in</p>	<p>1 recruiting, why isn't it a factor in</p> <p>2 retention. The rail jobs have always been</p> <p>3 hard, dangerous, difficult, demanding,</p> <p>4 unpredictable and interfering with one's</p> <p>5 personal lifestyle.</p> <p>6 Compensation has always been a way</p> <p>7 of keeping people in jobs of that type.</p> <p>8 Now oddly, the Carriers are telling a</p> <p>9 different story to the Board than they</p> <p>10 told the STB and a different story than</p> <p>11 they're telling investors.</p> <p>12 Mr. Carter was asked at the STB,</p> <p>13 the CEOS were talking about local lodge</p> <p>14 problems, and she answered yes. I was</p> <p>15 there. I didn't hear that; you don't see</p> <p>16 that in the record. It's not in the</p> <p>17 statements that were reported in the</p> <p>18 press.</p> <p>19 And even before this Board the</p> <p>20 Carriers have been inconsistent. They</p> <p>21 have tempted to say that the massive</p> <p>22 headcount reductions reflect the reduce</p>

<p style="text-align: center;">Page 1951</p> <p>1 need for employees because of inflammation 2 of PTC and PSR. So then they acknowledge. 3 But they acknowledge if they can't because 4 they don't have enough employees, and Ms. 5 Carter at BNSF said the Carrier was 6 experiencing a higher-than-average number 7 of retirements and resignation. 8 And as we noted hardly a day 9 passes lately without some article in the 10 trade press and financial press describing 11 the Carrier service problems and relating 12 it to labor shortages and quoting Carrier 13 representatives acknowledging the 14 shortages without saying they're all 15 localized. 16 And examples of such stories are 17 in our rebuttal documents. I also note 18 that Dr. Allen's report had to account for 19 furloughed employees who refused recall 20 and again that's a glaring and significant 21 omission. He dismissed that as a concern 22 and maybe he doesn't have experience in</p>	<p style="text-align: center;">Page 1952</p> <p>1 this industry. Furloughs have long been a 2 fact of life in this industry and 3 employees waited them out. In other 4 words, furloughed employees are not 5 nonemployees. In the past they have 6 waited them out and the idea that 7 employees are saying no to recall to this 8 industry is very different from the past. 9 Dr. Allen said he also thought 50 10 percent returning was a good number, well, 11 not for the rail industry. With respect 12 to applicants Dr. Allen showed -- with 13 respect to quits, he shows a sharp 14 reduction in quits -- I'm sorry. I 15 fumbled that. 16 If you look at his graph it shows 17 a steep incline in quits. I'll stop 18 there. One of the other funny things 19 about that graph is it ends in 2021 when 20 the trend seems inconsistent with the 21 story that carries one -- and this is a 22 problem with a number of their graphs,</p>
<p style="text-align: center;">Page 1953</p> <p>1 much of the data presented by the Carriers 2 cuts off on dates where the trends don't 3 support their narrative. 4 A number of them stop in 2019, 5 2020, 2021 when they clearly would have 6 had the data for 2022, the number of quits 7 would have been up, the number of 8 applications would have been down, 9 inflation would have been up, and the data 10 would show rail workers losing ground in 11 terms of real dollars. 12 UP referred to their refer a 13 friend program that's indicative of 14 current employee happiness. People won't. 15 They wouldn't refer a friend. We suggest 16 you not give that any weight. According 17 to UP its referral program pays workers 18 \$500.00 to refer people based on 33,000 19 employees and 8,000 referrals, even if 20 that represented one referral for employee 21 that means only 24 percent of their 22 employees make referrals.</p>	<p style="text-align: center;">Page 1954</p> <p>1 One could also say that means that 2 over 75 percent of UP's workforce said I 3 wouldn't tell my friend to work here even 4 if you paid me. Dr. Allen mentioned going 5 to social media and looking at Glass Door, 6 which was funny because Tom Loftin, one of 7 our mediation sessions, produced a 8 screenshot from Glass Door that shows 9 employee rankings of their feelings 10 towards companies, and Tom said, look, 11 this isn't scientific, but as long as 12 they're using Glassdoor, I'm going to 13 refer to Glassdoor. 14 Glass Door last year had a rating 15 of the twenty worst companies to work for, 16 and three of the Class 1s were among the 17 five worst. You want to talk about what 18 social media says. He said, well, I look 19 at Glass Door; it says they're not unhappy 20 with their compensation because I asked 21 that 22 Class 1 railroads were never that</p>

Page 1955	Page 1956
<p>1 highly ranked as a worst companies to work 2 for. Also want to talk about the 3 Carriers' outing or hiring. We're BS; let 4 me just say it's strange to act like 5 there's not a problem. We're seeing an 6 exodus of experienced workers and then 7 respond to say not to worry.</p> <p>8 We're going to make a frantic 9 effort to fill jobs with people off the 10 street. The Carriers have also asserted 11 that recruitment and tension problems are 12 localized programs, but as we noted, 13 various Carrier programs can boost 14 staffing or system-wide, not local. Ms. 15 Carter rattled off a bunch of states where 16 BNSF is experiencing staffing problems, 17 including California, Nebraska, and the 18 entire Pacific Northwest; that's not a 19 local problem.</p> <p>20 Additionally, she said we're 21 having problems in rural areas recruiting 22 people. Funny thing about that, the other</p>	<p>1 day the Carriers' criticized the Union 2 because they said most our people live 3 more heavily in rural areas, but 4 apparently, they're not paying enough to 5 hire people the rural areas.</p> <p>6 With respect to the significance 7 of supply and demand for labor as a 8 compensation factor, we say that wages are 9 not solely determined by supply and demand 10 but it's a factor whereas the Carrier say 11 it's determinant, but even under their 12 view they're having a recruitment and 13 retention problem that indicates a need to 14 increase wages.</p> <p>15 Another argument to they made is 16 that the Union's proposal would set wages 17 too high which would negatively impact 18 their ability to borrow or issue equity 19 but as Mr. Roth explained the Carriers' 20 have made necessary investments in their 21 system and they still have that billions 22 of dollars left over for stock buybacks.</p>
Page 1957	Page 1958
<p>1 58 billions in stock buybacks after 2 investment over five years.</p> <p>3 In our proposal we see worker 4 participation in the profits available 5 after the investments are made before that 6 fifty-eight billion goes out. Now the 7 Carriers' also argue while increased wages 8 will be passed through the shippers which 9 will cause them to move their freight to 10 other modes. As I said the other day, the 11 Board should not refrain from recommending 12 the fair and appropriate wage increases 13 sought by the Unions because the Carriers' 14 threatened to pass the increase cost onto 15 consumers rather than pay for the workers 16 from the record profits they've been 17 getting.</p> <p>18 We also pointed out that many of 19 the shippers have no viable alternative to 20 rail transportation, and frankly, if the 21 Carriers are concerned about not losing 22 shippers, they should get their service</p>	<p>1 back up to reasonable levels. Mr. Fritz 2 was here the other day talking about how 3 the new business model supposedly improved 4 service. But Union Pacific is the subject 5 of, and STB directed service order for a 6 poultry business called Foster Farms where 7 UP's failure to consistently deliver feed 8 was going to lead to the loss of millions 9 of chickens, they were all going to be put 10 to death.</p> <p>11 We have provided copies of the STB 12 decision, that's Union's Exhibit 33. Just 13 for context, I practice for STB and ICC 14 for a long time. The only other service 15 order I can remember was when Delaware and 16 Hudson was in bankruptcy, and the New York 17 Susquehanna and Western was brought in to 18 run the railroad.</p> <p>19 I recall no directed service order 20 against the driving Class 1. Then there's 21 the Sanomax Company whose business which 22 you don't want to know because it's fairly</p>

112 (Pages 1955 to 1958)

<p style="text-align: right;">Page 1959</p> <p>1 disgusting, but the fact is their business 2 requires daily (inaudible) but UP said no, 3 you're only getting three days a week now. 4 Sanomax said that the reduced service 5 results in spoilage of its supplies and 6 products. There is now open to proceeding 7 at the STD over UP service of that 8 customer. Then there were embargoes of 9 shippers on BNSF and UP line. 10 We submit knowing that -- Sanomax 11 item is at Exhibit 34. We submit that the 12 effect of proper and adequate wage 13 increases for workers will have far enough 14 impact on shipper retention than the poor 15 service the Carriers are currently 16 providing the customers. 17 We submit the proper and adequate 18 GWIs are not a problem with respect to 19 customer relations. In fact, we submit 20 the proper and adequate GWIs are the 21 solution to that problem. The Carriers 22 argue the Board shouldn't be fooled by the</p>	<p style="text-align: right;">Page 1960</p> <p>1 good times. There are risks that militate 2 against proper wage increases. 3 Again there are inconsistencies. 4 The Carriers' forecast to investors is 5 blue skies. To the Unions and the Board 6 it's storms on horizon. Then there's the 7 argument that shareholders took the risk, 8 so they get all the goodies. This sort of 9 public description of the shareholders is 10 sort of based on this eighth-grade civics 11 notion of mom and pop buying a stock 12 certificate in their twenties and letting 13 the company hold onto their money and use 14 it to build the business and then cashing 15 it in when they retire. 16 What we have here the people who 17 are the shareholders driving this industry 18 is different, not long-term shareholders 19 but speculators. Now when I said that a 20 couple of days ago it may have seemed like 21 just a rhetorical flourish but it's not. 22 In my declaration, I laid a lot of</p>
<p style="text-align: right;">Page 1961</p> <p>1 this out, but it bears emphasis because 2 that's who we're talking about is getting 3 the money that could be going to increased 4 GWIs. In 2016 Purging Square Hedge Fund, 5 which controlled the CP, attempt at a 6 hostile takeover of Norfolk Southern with 7 a promise to install Hunter Harrison, 8 which would bring this PSR job-cutting 9 business model to NS. 10 The industry didn't support that, 11 NS opposed it. Part of what NS did to 12 defend itself was to cut -- lower the 13 Hedge Fund in order to reduce the 14 operating ratio. Matt Rose, the CEO of 15 BNSF, came to meet with the rail's Unions 16 at their annual Florida meeting, I was 17 there. 18 He said this would be bad for the 19 industry. Urge the Unions to oppose this 20 hostile takeover. The Unions agreed; we 21 oppose this leveraged hostile takeover. 22 That effort was unsuccessful, but the new</p>	<p style="text-align: right;">Page 1962</p> <p>1 approach didn't go away. 2017 a different 2 Hedge Fund Mantle Ridge (ph.), acquired a 3 5 percent stake in CSX and said we'll 4 bring you Hunter Harrison and his cost- 5 cutting business model. This time the 6 gamut succeeded. Mr. Harrison became the 7 CEO, and the cost-cutting began, sales of 8 lines furloughs and workers. 9 The point is that Mantle Ridge was 10 not an existing investor; it was not a 11 long-term investor. It acquired a state 12 to install the cost-cutting above-all 13 business model to drive operating ration 14 down and stock price up, and it succeeded 15 for its own benefit. 16 Of course the service tent as I 17 have described and once the operating 18 ratio went down to 60 Mantel Ridge sold a 19 lot of its stock. It worked because CSX 20 is part of a lightly regulated duopoly, 21 and it was not much the customers could do 22 about it. So this is a value extraction</p>

<p style="text-align: right;">Page 1963</p> <p>1 model, extraction from the business 2 enterprise. 3 So when you were told these stock 4 buybacks are deserved due to the risks 5 incurred, and the employees have no 6 legitimate claim on the profits, that's 7 the rhetorical flourish and it lacks 8 basis. 9 Final point on the risks assumed. 10 As Mr. Roth said, the employees run the 11 risk of furloughs, that's what they do. 12 Regarding a point that the Wage Cage being 13 a 1 percent real wage growth , Mr. Munro 14 said, well, you just reverse engineered 15 that from the last several -- results from 16 the last several rounds. 17 But the Carriers say that, 18 according to Mr. Gradia, there's a pattern 19 from prior rounds of bargaining. If so, 20 it's then property will infer a pattern 21 from the results of those prior rounds. 22 The last point on wages, our proposal</p>	<p style="text-align: right;">Page 1964</p> <p>1 assumes status quo on the health 2 insurance, that would maintain real pay. 3 If there was a change in health insurance, 4 then the GWIs would have to increase 5 because then that would not retain real 6 pay on health and welfare. 7 While the nature and effect that 8 carries proposals that is still not 9 entirely clear to us, even after a full 10 hearing on the matter, what is clear they 11 want to push significant and far-reaching 12 cost sharing onto employees and their plan 13 is particularly punitive to families. And 14 today, by the way, they've offered us 15 additional alternatives that are entirely 16 new to us and seem to be more bargaining 17 with the Board at the last minute. 18 The Carriers seek to increase 19 every form of cost-sharing possible, 20 including immediately seeking to increase 21 monthly cost sharing for families by 70 22 percent, increased copays by 20 to 100</p>
<p style="text-align: right;">Page 1965</p> <p>1 percent, out of pocket maximums will 2 increase by 75 percent from us members. 3 The cost of members of various 4 prescription drugs would increase 50 5 percent to 225 percent. And they don't 6 just seek to do this now. They seek to 7 increase these costs every year through 8 their annual and uncapped indexing. 9 They advance these multiple major 10 changes, even though the Union first saw 11 this detailed proposal on July 11. When 12 the Unions protest the extent and scope of 13 the changes, the Carriers insist they are 14 appropriate, and they properly be 15 considered by the Board. 16 Okay. Mr. Rodgers said we spent a 17 lot of time talking about health care and 18 he pointed to a stack of paper but louding 19 presentations about goals -- setting goals 20 and reasons isn't actually providing a 21 detailed proposal. 22 With respect to the work rule</p>	<p style="text-align: right;">Page 1966</p> <p>1 proposals the Carriers argue proposals 2 were not extensively bargained through the 3 normal give and take of bargaining and 4 have no place before a PEB and they say 5 the Union must carry a high burden of 6 showing compelling need to change a status 7 quo by a PEB. While under the standards, 8 the Carriers would apply to the Union's 9 work rule proposals, the health and 10 welfare proposal should be withdrawn. 11 Again, the Carriers might say, 12 well, there's a lot of discussion over the 13 desire to change the health plan, but 14 concrete proposals went on single-spaced; 15 multiple pages were first provided on July 16 11. And again, they propose radical 17 change for which a very compelling case is 18 required. 19 Now, Cheiron has also shown that 20 the comparators on which they rely are 21 really just general, and they're not 22 applicable for the railroad industry, and</p>

114 (Pages 1963 to 1966)

<p style="text-align: center;">Page 1967</p> <p>1 they've sent that out. I won't repeat 2 this. Also I won't repeat this in detail, 3 but I want to again note that there is a 4 significant difference in the way the 5 workers look at health benefits change and 6 the way the Carriers do. 7 As I said the other day, they can 8 smooth out the increases among the whole 9 of the covered participants and all the 10 employers, but employees look at what 11 might happen to them and their families 12 and the financial impacts. And this was 13 illustrated in concrete terms by Cheiron, 14 which showed these changes what they would 15 have on a so-called average family, and 16 they would have a very significant impact 17 on an employee with a family with greater 18 than average health needs. 19 Dr. Ian Duncan criticized Cheiron 20 for its focus on the Armstrong family. 21 Now, putting aside whether or not that 22 example is extreme, a bunch of us -- you</p>	<p style="text-align: center;">Page 1968</p> <p>1 heard from Ms. Roma -- have families with 2 clusters of different problems. The 3 members of the Union worry about 4 developing sets of these problems or what 5 might happen to them and what will their 6 insurance be like. 7 They can't just assume that 8 they'll be the mean or median family 9 referred to by Dr. Duncan. And throughout 10 from the beginning of bargaining a major 11 problem we have is that the Carriers as I 12 said made this their hill to die on, but 13 Cheiron showed the health and welfare 14 costs of 4.1 percent of their operating 15 expenses and 2.8 percent of their 16 operating revenue and the Carriers want to 17 change this by a fraction. The change 18 they want would change their operating 19 expenses by 0.65percent. We feel and we 20 said this to them, that the continued 21 insistence on concession on health and 22 welfare benefits when it's not a</p>
<p style="text-align: center;">Page 1969</p> <p>1 significant cost factor to then round, 2 after round, after round, has impeded the 3 making of agreements because they are 4 insisting on something that makes very 5 little difference to them and a great deal 6 of difference to the employees. 7 Now, the Carriers argue forcefully 8 for indexing the AV rating when they say 9 they are being adversely affected by 10 inflation, but when it comes to wages, 11 they tell the Board to ignore the effects 12 of inflation on rail workers. Carriers 13 also say historical pattern of health and 14 welfare concessions citing PEB 243, but 15 again that was a pattern case. 16 Now, a major part of the Carrier's 17 argument in support of the proposal is the 18 consumerism theory is (inaudible) or the 19 skin in the game theory; that shifting 20 costs to users makes them better consumers 21 of health care, and they will be as a 22 plus, no adverse effects on health care</p>	<p style="text-align: center;">Page 1970</p> <p>1 outcomes. 2 But the Unions have showed that 3 this theory is promised on erroneous 4 assumptions about consumers being able to 5 make informed and rational choices. In 6 making the consumerism argument, the 7 Carriers again rely on the RAND study and 8 Dr. Joseph Newhouse's 2011 paper that was 9 submitted to PEB 243 and actually again 10 several years later to Arbitration Board 11 602, but Dr. Newhouse changed his tune in 12 2008 before he submitted his paper to PEB 13 243. 14 The 2008 paper, which is in our 15 rebuttal exhibits, the paper he wrote 16 said, as health care spending has risen, 17 patients have been required to pay more 18 when they seek care. This trend is 19 exemplified by increases in deductibles, 20 co-payments, and coinsurance rates. As 21 well as increased enrollment in 22 high-deductible health plans.</p>

115 (Pages 1967 to 1970)

<p style="text-align: right;">Page 1971</p> <p>1 Now, let me stop there for a 2 minute. Note that his statement was not 3 limited to high deductible plans as Dr. 4 Goldman said. They also referred to -- he 5 also referred to plans that just increased 6 deductibles, copayments, and coinsurance. 7 The paper then confirmed the RAND 8 finding that no surprise cost shifting 9 leads to decreased use of health benefits. 10 But the paper's discussion of the second 11 finding in the RAND study regarding health 12 care outcomes is significant and it stated 13 and I'm going to quote, the impact of 14 cost-sharing on health status has been 15 much more controversial. 16 The RAND health insurance 17 experiment study found that on average 18 there were minimal or no adverse health 19 consequences associated with high-cost 20 sharing. The estimates were not only 21 statistically insignificant but the 22 associated confidence in the intervals</p>	<p style="text-align: right;">Page 1972</p> <p>1 that at any true effect was clinically 2 small. 3 So it was acknowledged in the 4 paper as a conclusion that cost shifting 5 does not affect outcomes was based on 6 statistically insignificant data and was 7 somewhat dubious at the time it was made 8 in the '70s. 9 Then the paper said yet, both the 10 health insurance experiment and 11 considerable current work, current 2008, 12 reports that greater cost sharing is 13 associated with reductions in use of 14 clinically important services. 15 For example, recent research 16 documented that relatively modest increase 17 in cost sharing reduced utilization of 18 important medications for managing chronic 19 disease. The paper then cites a study by 20 Goldman, who I believe was the Dr. Goldman 21 who was here the other day and this 22 morning.</p>
<p style="text-align: right;">Page 1973</p> <p>1 A copy of the Newhouse papers is 2 provided with our rebuttal materials at 3 Exhibit 34. Dr. Goldman today said Dr. 4 Newhouse's remarks were taken out of 5 context. I submit not. But rather than 6 continue this debate I invite you to read 7 the 2008 paper, it's not long. 8 Why do I spend so much time on 9 this? Because I think that given the 2008 10 paper it was ethically questionable for 11 Dr. Newhouse to present a paper to PEB 243 12 that purported to validate the results of 13 the RAND study with respect to the impact 14 of the health care outcomes at that time. 15 2008 said was statistically insignificant 16 and dubious but in 2011 there's a paper 17 that validates that outcome. 18 It was the 2008 paper that caused 19 us to seek another assessment from 20 Professors Kolstad and Brot-Goldberg and 21 their report has been provided to you at 22 Union's Exhibit 21. Dr. Goldman today</p>	<p style="text-align: right;">Page 1974</p> <p>1 challenged our reliance on the 2015 2 Kolstad, Brot-Goldberg paper which looked 3 broadly to the impact of deductibles. 4 Now, that was actually the paper 5 that caused us to reach out to them, not 6 the paper that's submitted to this Board. 7 But that paper reflected a changing 8 understanding of the effects of cost 9 shifting and provided you with a new 10 report. Dr. Goldman didn't address the 11 report that Professors Kolstad and Brot- 12 Goldberg provided to this Board that they 13 wrote that comes 7 years later, and it 14 isn't limited to high-deductible plans. 15 Karen Malta and I discussion of 16 this which I won't repeat other than the 17 point in their paper was that if cost 18 sharing is large enough to actually change 19 behavior, those changes may come from 20 clinically valuable care as well as low 21 value care, and that cost sharing at any 22 level doesn't generate efficient</p>

116 (Pages 1971 to 1974)

<p style="text-align: right;">Page 1975</p> <p>1 reductions in spending because enrollees 2 and consumers are not well equipped to 3 make the trade-offs needed. 4 Thus if cost sharing is reduced, 5 spending reductions don't necessarily come 6 from care that is of low value or 7 wasteful. 8 Now, we don't expect the Board to 9 resolve the dispute over the effect of 10 cost shifting on healthcare outcomes, but 11 we do urge the Board to view the 12 assurances of the Carriers and Dr. Goldman 13 with a high degree of skepticism given 14 their reliance on the 2011 Newhouse paper 15 that the Carriers' presented to Board 243 16 and five years later to Board 602. As for 17 indexing, again the Carriers wanted index 18 health and welfare payments to insulate 19 themselves from expenses, but they don't 20 want to index expense allowances and they 21 say there should be no consideration off 22 inflation for GWIs.</p>	<p style="text-align: right;">Page 1976</p> <p>1 I want to close this section by 2 reiterating that the members tell the 3 Union this is an extremely important issue 4 for them and the Carriers' consistence on 5 further concessions has not only torpedoed 6 a chance to reach an agreement, it has 7 made a potential ratification, let's say 8 extremely difficult. 9 Sick leave and holidays. We 10 submit that it's unacceptable today that 11 so many rail workers have no sick leave. 12 Sick leave is not only good for employees, 13 it's good for employers and the pandemic 14 showed a need for paid sick leave. And 15 the Carriers acted unilaterally to provide 16 it, they showed a need for sick leave. 17 The flu and other illnesses would 18 have similar impacts and produce the same 19 need for sick leave. The Carriers have 20 argued that this should not matter because 21 rail employees have railroad unemployment 22 insurance and supplemental sickness, but</p>
<p style="text-align: right;">Page 1977</p> <p>1 these are not substitutes or alternatives 2 for sick leave; those are short-term 3 disability plans, not sick leave. 4 As Mr. Roth explained, an employee 5 can't rely on RUIA or SSI for a cold or a 6 three-day flu, so the assertions that rail 7 workers already have sick leave because 8 they have RUIA and SSI or that one is 9 somehow the substitute for another is 10 based on a false premise. Also Carriers 11 object that providing sick leave will 12 leave will lead to staffing shortages and 13 they simply can't cover that by increased 14 staffing or that it would be somehow 15 inappropriate for them to do so. 16 This is similar to their reaction 17 to issues arising from the new business 18 model. They're staffed as if all will be 19 blue skies. Nobody gets sick or injured 20 but people do get sick or injured and that 21 should be built into a staffing model 22 because people do get sick and they get</p>	<p style="text-align: right;">Page 1978</p> <p>1 hurt and rather than force them to work, 2 there should be the capacity to cover for 3 them, just as Mr. Roth said transit 4 systems do. 5 On sick leave, the Carriers' have 6 also objected to the Union's trying to 7 seek coverage under state and municipal 8 leave laws for railroad workers but as we 9 noted, the Carriers' have defeated those 10 efforts through litigation and threats of 11 litigation, and Mr. Munro and I have been 12 traveling the country litigating this and 13 they keep succeeding and I recently got a 14 decision in the 9th circuit just the other 15 day affirming a decision that California 16 sick leave law application to railway 17 workers is granted. 18 One other thing, the Carriers say 19 that benchmarking and comparison should 20 control your decision, but they don't want 21 to benchmark sick leave. If you're 22 looking for norms, they're way below it on</p>

<p style="text-align: right;">Page 1979</p> <p>1 sick leave.</p> <p>2 Craft specific issues. First,</p> <p>3 some general observations. The Carriers</p> <p>4 say the Board shouldn't address work rules</p> <p>5 issues that were not intensively</p> <p>6 negotiated, but the Carriers' consistently</p> <p>7 refuse on many of these proposals, round</p> <p>8 after round on some subjects. The</p> <p>9 Carriers' note that some proposals were</p> <p>10 raised before prior to PEBs and they</p> <p>11 weren't recommended, so the same should</p> <p>12 happen here.</p> <p>13 We submit this is not an argument</p> <p>14 against action by this PEB on those</p> <p>15 issues. The lack of results from the last</p> <p>16 actually militates for this PEB to address</p> <p>17 these issues. The Carriers' say the Board</p> <p>18 can't recommend on an issue where there is</p> <p>19 no intensive bargaining when a party</p> <p>20 consistently says no over multiple rounds,</p> <p>21 there's no reason to expect the answer to</p> <p>22 change when the issue is raised again.</p>	<p style="text-align: right;">Page 1980</p> <p>1 Let's go to the question of quid</p> <p>2 pro quo. The Carriers' say there must be</p> <p>3 a quid pro quo for any change, but on some</p> <p>4 issues the Union's proposals have their</p> <p>5 own merit and the Carriers' have already</p> <p>6 benefit. For example, if job</p> <p>7 responsibilities and skill requirements</p> <p>8 change, an increase is supported by those</p> <p>9 facts. There's no need to trade an</p> <p>10 existing right for that, they've already</p> <p>11 got the benefit. Then there were changes</p> <p>12 in circumstances such as increased weekend</p> <p>13 work and long overtime shifts that result</p> <p>14 from their operating decision that</p> <p>15 supports a response to those changes.</p> <p>16 And then there's an issue where</p> <p>17 there's a new hardship to employees</p> <p>18 because of the Carrier's business</p> <p>19 decision. In these situations it</p> <p>20 shouldn't be a matter of the Union</p> <p>21 parading priorities for the Carrier to get</p> <p>22 something in return because the Carrier's</p>
<p style="text-align: right;">Page 1981</p> <p>1 already gotten something in return.</p> <p>2 Likewise, regarding the claim need</p> <p>3 to bargain work rules on a Carrier basis</p> <p>4 and then fighting the backup negotiations</p> <p>5 of National handling I have to say this is</p> <p>6 really rich. The BMW has tried to</p> <p>7 bargain on a Carrier basis, single Carrier</p> <p>8 basis in order to address work rules but</p> <p>9 the Carriers' keep repeatedly litigating</p> <p>10 to force them into national handling.</p> <p>11 The Union argued it never gets to</p> <p>12 bargain over important items like away</p> <p>13 from home expenses and National handling</p> <p>14 that Carriers' have argued but work rules</p> <p>15 have to be bargained nationally. Then</p> <p>16 when we're in National handling with the</p> <p>17 other Unions, it becomes very difficult to</p> <p>18 address craft specific issues.</p> <p>19 Then the Carriers argue the Board</p> <p>20 shouldn't handle the rules, when it wasn't</p> <p>21 discussed extensively and nationally. The</p> <p>22 Carriers' argument is heads we win; tails</p>	<p style="text-align: right;">Page 1982</p> <p>1 you lose. You can't bargain work rules in</p> <p>2 RLA bargaining on a single Carrier basis,</p> <p>3 but when you're a national dealing with</p> <p>4 coalitions and Carriers and Unions, it's</p> <p>5 hard to bargain the individual work rules.</p> <p>6 The Carriers are going to say,</p> <p>7 well, yeah, you can still bargain locally</p> <p>8 after National is over, but the problem</p> <p>9 with that is they insist on quid pro quo</p> <p>10 bargaining on that but here's the thing,</p> <p>11 under the Railway Labor Act nothing says</p> <p>12 we have to give a quid for a pro quo. We</p> <p>13 can bargain under the Railway Labor Act</p> <p>14 and say that's what we think it should be.</p> <p>15 But once the National is done and</p> <p>16 it's a moratorium, we're under the</p> <p>17 moratorium; there's no right to mediation;</p> <p>18 there's no right to a proffer of</p> <p>19 arbitration. So that's not really an</p> <p>20 answer, is it, for our ability to bargain</p> <p>21 these issues thorough RLA bargaining.</p> <p>22 Now I also do want to say before</p>

<p style="text-align: right;">Page 1983</p> <p>1 discussing the individual proposals 2 because it's a lot of proposals, but the 3 Union's had many more of these proposals 4 and they pretty much reduced it to one 5 rule per Union. 6 To the operating crafts, their 7 issues are attendance policies, scheduled 8 work and rest days away from home 9 expenses. With respect to attendance 10 policies this issue is one of the main 11 reasons that after slashing operating 12 craft head counts, the Carriers now 13 complaint they don't have enough crews to 14 operate the train s. 15 Under the Carriers' unilateral and 16 attendance policies employees are forced 17 to work when sick and injured and you've 18 heard stories about the consequences some 19 employees have experienced as a result, 20 but when faced with these policies, 21 employees have no choice but to go to work 22 even when they should not, or they face</p>	<p style="text-align: right;">Page 1984</p> <p>1 discipline. 2 The railroads claim the Unions' 3 are requesting unlimited days off; that 4 the Unions no longer want to work 5 weekends. Nowhere in the Union's proposal 6 is that requested. The Unions' ask 7 protected sick leave days to use when an 8 employee is sick that needs to go to a 9 medical or dental appointment, that's not 10 a request for unlimited days off. 11 SMART-TD and BLET I'm really 12 asking the opportunity to bargain over the 13 Carriers' attendance policies and the way 14 to do that in good faith is to abolish the 15 existing policies and start from zero. 16 With respect to scheduled days 17 off, this is yet another proposal that's 18 needed now more than ever due to the 19 Carrier's own headcount cuts. The 20 Carriers deserve to know when they can 21 schedule a doctor's appointment. They 22 deserve to know when they're guaranteed</p>
<p style="text-align: right;">Page 1985</p> <p>1 time to be with their families. 2 President Pierce explains you have 3 employees that scheduled days off since 4 1952 and it's far past time for all 5 operating employees to have them as well. 6 Also the parties have routinely negotiated 7 scheduled days off prior to the passage of 8 the RSIA in 2008 and even after on some 9 Carriers. 10 With respect to away from home 11 expenses the National agreement allowances 12 have not been increased from \$12.00 13 maximum for BLE members set in 1994 and 14 \$16.00 for a SMART-TD, members agreed to 15 in 2010. Both those amounts are paid when 16 the employee is away from home 12 to 30 17 hours. 18 The away-from-home meal allowance 19 provision contained in the BLE CSX 20 agreement is reasonable; it adjusts for 21 future increases and should be recommended 22 by the Board. With regard to yardmasters,</p>	<p style="text-align: right;">Page 1986</p> <p>1 President Ferguson explained the proposal 2 for changes to the yardmaster scope rule 3 and vacation provision. The Unions urge 4 the Board to recommend the adoption of 5 that proposal. 6 Crew consist. Briefly address the 7 crew consist question. This issue has 8 been briefed and argued by both parties. 9 I don't want to get too deeply into it, 10 but I want to repeat the compelling 11 argument the Carriers' proposals are not 12 properly before this Board because the 13 issue is one for local handling under the 14 Atlantic Coastline decision. And it is 15 currently in local handling. And I can 16 add something to this because I've heavily 17 litigated on the Coastline decision with 18 Mr. Munro twice in 25 years. 19 The Atlantic Coastline decision 20 says crew sizes are local or single 21 carrier handling issue. So Atlantic 22 Coastline requires BMW to be in National</p>

119 (Pages 1983 to 1986)

Page 1987	Page 1988
<p>1 handling. If a Carrier says it doesn't 2 bother them for being in National handling 3 on the very issue addressed in that 4 decision, then like I said it had to be in 5 local handling. Again it's heads, I win; 6 tails, you lose.</p> <p>7 Now, the Carriers -- if they get 8 there by a clutter of disingenuous 9 arguments for National handling by crew 10 consist issues by claiming they have an 11 alternative paid proposal and that sort of 12 back door of the National handling crew 13 consist when they're not supposed to be.</p> <p>14 But they gave up the game this 15 week in answer to Member Deinhardt's 16 question about whether the Carriers' were 17 actually advancing an alternative wage 18 proposal and the answer was no.</p> <p>19 And here's what they said. The 20 proposal is that you simply say go 21 negotiate it locally. If it doesn't work 22 out, take it to binding interest</p>	<p>1 arbitration. We're not asking this Board 2 or any other Board to actually reduce 3 wages; we simply want this process.</p> <p>4 So in the end, they're not here 5 with an ultimate wage proposal, they're 6 pursuing a crew consist process proposal 7 and that proposal doesn't belong here. 8 And furthermore, there is a process; 9 they're in it now; they're in mediation.</p> <p>10 A few other observations about the 11 operating craft issues. The Carriers' 12 cited the MRL agreement, just be aware the 13 MRL is ceasing operations in a couple of 14 months and is part of that process. They 15 just wrapped up an agreement to transition 16 the employees out.</p> <p>17 On the high biz dispute resolution 18 BNSF continues to refuse to create a 19 special Board of adjustment or a public 20 law Board to arbitrate the reasonableness 21 of the policy. As part of that, they 22 refuse to accept the Union's notice that a</p>
Page 1989	Page 1990
<p>1 grievance exists and are attempting to 2 force resolution on a case-by-case basis 3 once applying. This is like a -- you're 4 always like you need to go arbitrate, and 5 we go, fine, let's set up a special Board 6 of adjustment and resolve this problem. 7 Let's get an arbitration decision quickly. 8 And they go no, we don't want you to do 9 that we need you to file 250 claims and do 10 them years and years out, through the NRAB 11 (ph.).</p> <p>12 Rest days, regardless of the BNSF's 13 assertions, that's the same thing you're 14 dealing with this here. Rest days are 15 only available to roughly a third of the 16 pool engineers and less than one percent 17 of the extra boards. Meal allowances are 18 non-taxable expenses. NS says there are 19 other payments that are in their away from 20 home terminal. But by national agreement, 21 accrues in hotel over sixteen hours go on 22 under taxable pay for the next eight hours</p>	<p>1 until their cold. That is pay for time 2 that expenses.</p> <p>3 BMW away from home expenses. This 4 is an issue for his roiled this industry 5 for decades, and the PEB should recommend 6 a real and lasting resolution. It's 7 important to recognize that this issue 8 arises from the Carrier's preference as to 9 how to perform maintenance of way work, 10 and the authority given them by PEBs to 11 alter and expand seniority districts and 12 allow for regional and system gangs, and 13 by New York dock arbitrations, which 14 allowed for consolidations of districts 15 across the lines of previously separate 16 railroads.</p> <p>17 While it may make sense for the 18 Carriers to deploy large gangs of 100, 150 19 people with heavily mechanized equipment, 20 specialized gangs and have them travel all 21 over multiple states, rather than have the 22 work done by local gangs, that choice,</p>

120 (Pages 1987 to 1990)

Page 1991	Page 1992
<p>1 that decision, that strategy, gain to the 2 Carriers, came at a loss to the 3 maintenance of way employees. Over half 4 of them now have to travel long distance 5 just to get to work and they have to stay 6 away from home for a week or more to work 7 in order to earn their living.</p> <p>8 Harkening back to Award 298 does 9 the Carrier's no good, and they said, 10 look, here's Award 298, let's just project 11 forward, you know, if we adjust for 12 inflation, stuff like that, the Carriers 13 had a totally different maintenance of way 14 operations back then. The overwhelming 15 number of maintenance of way employees 16 back then were headquartered. And if 17 there was travel, one could only go so 18 far. They were to the border of two 19 hundred Carriers, seventy-four Class I, no 20 one then had to travel from Illinois to 21 Spokane, from Phoenix to Billings, are 22 Albany to Mobile to work. To say that</p>	<p>1 reimbursement rates are close to the 2 amounts in Award 298 are adjusted for 3 inflation means nothing because Award 298 4 was written for a completely different 5 industry.</p> <p>6 Mr. Karov's last slide contained a 7 line that away-from-home expense 8 reimbursement rates are adequate. They 9 are not. The employee statements read by 10 Mr. Kennedy show that; there are many more 11 statements from maintenance of way 12 employees and BMW submissions that are 13 consistent with the ones Mr. Kennedy read. 14 These employees are pleading for help. 15 For many, it's costing them hundreds of 16 dollars per month just to get to work. 17 Hopefully, some are ashamed that they said 18 these reimbursements are adequate once 19 they actually read the statement.</p> <p>20 No one should have to stay in 21 lodging with bedbugs and drug users in 22 order to work. Grown men with family</p>
Page 1993	Page 1994
<p>1 should not have to bunk with other men 2 night after night because their expense 3 reimbursement isn't enough that covers 4 single-room occupancy and women shouldn't 5 have to take home less pay because they 6 can't room with male co-workers. And to 7 dispel one question, if the Carrier 8 provides decent lodging, of course, we're 9 not asking for the allowance on top of 10 that.</p> <p>11 Mr. Rodgers briefly addressed BMWs 12 proposal this morning. One thing he did 13 not do was refute the sort of situations 14 described by Mr. Kennedy. Mr. Rodgers 15 just said this was never intended to be a 16 one-to-one reimbursement. Well, the 17 question for this Board is, why? 18 Especially when it's so inadequate. And 19 Mr. Rodgers didn't attempt to show that 20 the amounts were adequate. He just said 21 that's the way it is. And that's the 22 problem.</p>	<p>1 They say that Union, well, they 2 bargained for these current levels. But 3 let's look -- actually, Mr. Kennedy put 4 out the history, a lot of it was done by 5 PEBs and an arbitration award. You know, 6 and again, and again, as I pointed out, 7 BMW got forced into national bargaining 8 where it's hard to deal with issues like 9 this. And Mr. Rodgers said, well, what's 10 the difference between the Carrier. Yeah, 11 that's one reason BMW wanted to bargain 12 on a single-Carrier basis with some of 13 them, but the Carriers said, no.</p> <p>14 The BMW members shouldn't have to 15 subsist on fast food or bologna sandwiches 16 because they're not reimbursed enough for 17 a healthy meal. The BMW is not asking 18 for its members to be reimbursed for 19 travel and meals the way Mr. Karov is when 20 he travels. We're not asking for the same 21 accommodations and amenities he received 22 from the company.</p>

121 (Pages 1991 to 1994)

<p style="text-align: center;">Page 1995</p> <p>1 The Union is asking that they be 2 lodged or be reimbursed enough to lodge in 3 decent, clean lodging; to be able to have 4 healthy meals and to be reimbursed for 5 their actual costs of travel to faraway 6 locations that the Carrier sends them 7 because of the way it chooses to do 8 maintenance of way work.</p> <p>9 We urge the Board to recommend BMW 10 proposal. We urge the Board not to send 11 them back for further pointless 12 negotiation.</p> <p>13 BRS skill differential. I think 14 one thing that Carrier economists and I 15 probably agree on is that wage increases 16 are merited when the skill and 17 responsibility requirements of the job 18 increase. Not only is that appropriate to 19 the sort of job-matching the Carriers 20 experts rely on, but it's also consistent 21 with their notions relating compensation 22 to value received by the employer in the</p>	<p style="text-align: center;">Page 1996</p> <p>1 form of improved work productivity. Well, 2 that's the situation with signal 3 maintainers, inspectors, and technicians.</p> <p>4 BRS has shown that over nearly 5 twenty years there has been a clear and 6 significant change in the technology they 7 work with. That has made their jobs more 8 technically demanding that more has been 9 required for the have them in performing 10 the responsibilities they've historically 11 performed.</p> <p>12 BRS has also shown that their 13 responsibilities increased because their 14 work territories have expanded as the 15 workforce has been diminished. This has 16 been shown through the testimony of BRS 17 President Mike Baldwin, through the joint 18 responsibility study, and statements of 19 signalman that have been provided to the 20 Board, and survey summaries which have the 21 actual responses.</p> <p>22 In situations like this, there is</p>
<p style="text-align: center;">Page 1997</p> <p>1 no need for quid pro quo value exchange in 2 the form of a union concession on 3 something else, because the Carriers have 4 obtained the value of higher skill, higher 5 responsibility work of the employees. 6 BMW has pursued this issue over several 7 rounds of bargaining, but it has not been 8 resolved. As noted, the issue was brought 9 to PEB 243. That Board directed the 10 parties to engage in a joint study, the 11 study was done, but it didn't read to lead 12 to a resolution. And Mr. Rodgers said 13 there was provision in there for an 14 interest arbitration but that was not in 15 the PD 243 award. It was for a 16 non-binding study in fact-finding.</p> <p>17 The Carrier say they asked the BRS 18 to take a next step of writing report. 19 And the Unions didn't do that. As 20 President Baldwin explained, the Union was 21 unaware of such request. The main 22 takeaway, the Carriers weren't interested</p>	<p style="text-align: center;">Page 1998</p> <p>1 in addressing the issue at all. Mr. 2 Rodgers repeated that again today.</p> <p>3 President Baldwin checked with his 4 predecessors, and they said they were 5 unaware of such a request. Karov also 6 said that the Union somehow waived this 7 issue in this round because it wasn't 8 included in the March 2021 Rules 9 presentation. But that was a work rules 10 presentation, the issue of appropriate pay 11 for maintainers is a compensation issue, 12 not under the work rules umbrella. 13 Carriers also claim the issue isn't 14 somehow right for resolution because the 15 proposal for a \$5 an hour wage 16 differential was a new one this July, but 17 the original proposal was for a 18 twenty-five percent differential which 19 might have been eight or \$9. The Carriers 20 had fair notice on the issue; they also 21 knew it to be a long-running unresolved 22 issue.</p>

122 (Pages 1995 to 1998)

Page 1999	Page 2000
<p>1 The Carrier say well, this 2 shouldn't be addressed by his Board 3 because it's been previously raised and 4 not resolved. We think to the contrary, 5 that the issue is festered without 6 resolution, means it should be resolved by 7 this Board. 8 Firemen are oilers. Like BRS, NCFO 9 asks for differential because of an 10 increase in responsibilities and skill 11 requirements. The NCFO President, Dean 12 DaVita, explained to Carriers have been 13 increasingly using the incidental work 14 rule and simple task rules to direct 15 firemen and oilers to perform work that 16 has been performed by higher paid Shot 17 Mechanics. This is unlike when the rules 18 are used to have a machinist do a sheet 19 metal worker job or an electrical worker 20 do a machinist job, because in those 21 situations, the employees receive the same 22 rate of pay. But when a shop mechanic</p>	<p>1 work is assigned to a fireman or oiler, 2 the Carrier's gain advantage of having a 3 lower paid employee do the work of a 4 higher paid employee. 5 We submit two conclusions flow from 6 this. First, there was a basis for upward 7 adjustment of pay because the employees 8 are being asked to do higher skill higher 9 responsibility work. Second, there is no 10 need for a quid pro quo, or an NCFO rules 11 concession because the Carriers are 12 already getting the value from having a 13 higher paid employees work performed by a 14 lower paid employee. 15 And it's important to recognize 16 because they say this, we're not talking 17 about instances when a fireman and oiler 18 hostlers locomotives, when that happens, 19 there's already an additional payment. 20 This proves two things. 21 First, the availability of such 22 payments is not an answer to the</p>
Page 2001	Page 2002
<p>1 assignment of other higher skilled shop 2 mechanic work to fireman and oilers. 3 Second, the existence of such payments for 4 hosteling work shows that such payments 5 are appropriate when the firemen and 6 oilers are assigned to higher skilled 7 work. 8 TCU/IM. As explained in TCU/IM 9 submission, it represents employees who do 10 have sick days, but the Carriers penalize 11 and discipline them when they take sick 12 days, even if they have a doctor's note. 13 The Carrier's practice effectively 14 undermines the contractually negotiated 15 right to sick leave. The Union submit 16 that to resolve this problem the Board 17 should adopt TCU/IMs proposal that 18 Carriers be barred from penalizing or 19 disciplining employees for use of 20 contractually provided sick leave. 21 I'm getting near the end in case 22 you're wondering.</p>	<p>1 Each shop craft, each of the seven 2 shop craft organizations, came together to 3 this round with specific work rule 4 proposals important to their craft and 5 their members. All of their proposals 6 came from real-world concerns from the 7 organization members have regarding their 8 day-to-day work. Despite their different 9 priorities, they came together before this 10 Board to present a united proposal for a 11 ten percent differential for weekend and 12 shift work and a meal period allowance for 13 those instances in which employees are 14 required to work three hours beyond their 15 bulletin shift. 16 The Carrier's claim the Board 17 should recommend to the shop crafts 18 withdraw this proposal because the Unions 19 haven't offered any quid pro quo, however, 20 is IBW Director Russo explained in his 21 testimony, these proposals are justified 22 by the sharp increase in overtime and</p>

123 (Pages 1999 to 2002)

Page 2003	Page 2004
<p>1 unfavorable shifts worked by shop craft 2 employees because of the Carrier's 3 furloughs in the shops. In these 4 circumstances where working conditions 5 have changed because of the Carrier's 6 unilateral actions, the Unions have no 7 obligation to provide concessions to 8 mitigate the impact of the changed 9 circumstance.</p> <p>10 Finally, given the impact of these 11 operations and the reduction of total shop 12 craft workers, we urge the Board to 13 recommend the shift differential and meal 14 period allowance.</p> <p>15 And last, EDTA has a proposal for 16 supplemental sickness plan, like the other 17 unions have, we urge the Board to adopt 18 this proposal.</p> <p>19 I won't belabor the points any 20 longer. I may have gone on past the hour, 21 I don't know. We urge you to recommend 22 the adoption of the Unions proposals and</p>	<p>1 reject the Carrier's proposals. 2 I want to again, thank the Board 3 for its time for its patients for its 4 attention.</p> <p>5 I want to thank the NFB for their 6 help. Thanks to the Court Reporter for 7 doing this. I appreciate my colleagues on 8 the other side with whom we have 9 cooperated in trying to make things work 10 here, as in flow as easily as it can, 11 which we normally managed to do even if we 12 don't agree about whatever we're fighting 13 about.</p> <p>14 I'll be glad to answer any 15 questions the Board and I have</p> <p>16 CHAIRMAN JAFFE: I think we're in 17 good shape, but thank you, Mr. Edelman. 18 With that these proceedings, at 19 least the hearing phase of these 20 proceedings are over.</p> <p>21 On behalf of the Board, I would 22 like to thank everyone for their</p>
Page 2005	Page 2006
<p>assistance in terms of facilitating this week going fairly seamlessly, at least from our end.</p> <p>We recognize that it took an awful lot of work, frankly, under fairly abbreviated timeframes, including a lot of late-night work responding both to each other's presentations and to questions that we may have posed in terms of asking the parties for additional information. And you did it all with with -- with courtesy and with appropriate attention and with occasional appropriate humor. And we thank them.</p> <p>We thank everyone for that that goes for the audience as well. It's not easy to go ahead and sit where you all are for as long as you did and listen to what's been going on.</p> <p>We look forward to continued discussions with the parties, preliminary to the preparation and issuance ultimately</p>	<p>of our report to the President.</p> <p>I'd also like to echo the other speakers. I also want to specifically recognize and thank the NMB Counsel who were here supporting the Board.</p> <p>The Court Reporter, who is the only one here doing manual labor today will be at skilled manual labor, and also the A/V and support staff from the hotel.</p> <p>With that, I believe we're done for today. We'll stand an adjournment and thank you all very much.</p> <p>(Thereupon, at 6:01 p.m., the proceedings were concluded.)</p>

Page 2007

CERTIFICATE OF NOTARY

I, OKEEMAH HENDERSON, the officer before whom the foregoing arbitration was taken, do hereby certify that the proceedings which appear in the foregoing arbitration was duly taken by me in shorthand and thereafter reduced to typewriting by me; that said arbitration is a true record of the proceedings; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this arbitration was taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

Dated this day of , 2022.

OKEEMAH HENDERSON
Notary Public in and for the
District of Columbia

A	1669:21	accept 1534:19	1550:5 1842:1	1933:2 1951:2
A-13985	1743:20	1537:5 1576:2	1891:8	1951:3
1514:14	1819:12	1912:13	1898:11	acknowledged
A-13986	1841:2 1853:6	1932:13	1912:16,17	1649:19
1514:13	1930:1 1970:4	1939:1	1938:9,15	1664:20
A-13998	1995:3	1988:22	1951:18	1678:19
1514:13	abnormal	acceptability	accounted	1688:14,18
A-13999	1884:18	1709:4 1932:3	1664:14	1972:3
1514:13	abolish 1984:14	1934:21	1714:18	acknowledging
A-14000	abolished	1935:1	1755:5	1541:22
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