

MR. WEICHER: Thank you, Chairman Nober, good afternoon, Vice Chairman Burkes, Commissioner Morgan, for the opportunity to address these issues.

I would like to briefly review our position, BNSF, on the proposals and comment on a few of the illustrations that we heard this morning. First, as to the mediation proposal, we do support the proposal for mediation. I don't think we are convinced it will necessarily be successful in very many cases, but that doesn't mean it's not worth trying.

I have been involved in some of these in recent years in other areas. I can think of one where it actually worked. And I am not suggesting that was one out of many, but it's worth getting the principals focused. And we support the idea that principals, not just outside lawyers, nothing against outside lawyers, -- we use a lot of them -- should be involved in that dialogue so that it's realistic.

It's worth a try. We don't think that it unduly delays the process. We do not favor delay of these cases. These cases are a burden on us. They bring a cloud of uncertainty. And they inhibit our rational negotiation with customers and shippers. But we think a reasonable opportunity to force the folks to the table to talk about it could be productive, may not solve many but could be worth doing.

On the issues of discovery, we do favor guidelines on discovery. We favor them strongly. We believe that discovery in these cases has gotten way out of hand and has become very expensive. We are spending millions of dollars a year defending these rate cases, money that is not available for locomotives, for real customer service initiatives. And a lot of it is involved in people grinding out discovery. Our people groan under the burden of this discovery.

There was a tone this morning several times directly directed at our company, others more generally that were stonewalling. They were not giving data. They were not giving

data we use to this kind of stuff. That is simply not true.

We routinely make a massive production, traffic data on a general basis and with specific revenue for a variety of movements, transportation traffics that are confidential, actual wages for crews involved in specific movements, as well as wage rates across the board, -- they already get a vast quantity of generalized data -- financial information for locomotives, AFEs for particular investments, priceless for construction products, all kinds of financial data, all kinds of commercial data.

But where this is going now -- and this is an illustration, but I think it is important if we are going to be facing this kind of issue that there be an understanding where this is now being driven to in the search to get some kind of incredible level of variable cost data, which is also not a controlling factor in these cases or should not be.

We are asked for 24 items on individual locomotives from specific salvage value, accumulated appreciation data purchase, size of the fuel tanks, all kinds of things. This is after you have got all of the aggregate data and the aggregate data for the locomotives in service.

As I said, we have given information on crew wages, actual wages for crews involved, track, all of that kind of thing. Here is a typical request for production number 28 of the over 100 in one of our cases. This is the outer tail case, but this is the pattern set we see that comes from all the cases at least we have that involve a particular consulting firm. And that is all of our cases.

The conductors, we are asked to give these documents relating to each shift of each train crew manning each crew district, the conductor's report, blah blah blah, the train activity report, the train dispatcher report, the crew caller sheet, the electronic or hard copy ticket or time sheet created by each crew member for their shift, the help screens used by each crew member in creating these time sheets, all other

documents and files, hard copy or electronic, created by the train crew or any member of the train crew while on duty. That is why we have discovery disputes.

There are over 100 of these. And there are hundreds of these across with subparts. We do not begrudge or dispute the obligation to give substantial data in these cases. We believe that this has now gotten out of hand. And, for that matter, we heard a theme this morning, and I heard it again now.

We are not against if the Board wants to move forward to adopt some form of pattern discovery that is presumptively what we should do. And it should work both ways because there are things we do ask for that are important in terms of shipper rejections of revenues and tonnage that are going to be at issue in the case.

We are not against that, but we do think this drilling down for relentless backup material to be derived at our expense -- another proposal, if the Board wants to put the burden when a document is going to be, document collection is going to be, asked beyond the ordinary course of what we keep that requires these computer runs, that requires timing people, pay us like you pay a consultant. I am not making that flip. We do the same thing when we ask for something, but this idea that you can just shove on us the idea to do a study or drill into endless tedious documents when the issue should be the URCS average cost for jurisdiction, not driving variable costs to be a ceiling or a floor in our rates.

Another example we heard about at great length this morning was this fixed investment issue in a particular case, the AEPCO case, that you heard about. I think that is still illustrative of an abuse of the discovery process and one that we are not ashamed to say there should be guidelines, that we shouldn't be required to go to these lengths.

The accusation was that we refused to give the data on individual investments and lines. We don't keep the kind of data

we used to. The accounting world has changed. The Board's rules have changed, as Mr. Dowd admitted.

We have a complex fixed asset database. It's called FADB accounting system. It fits with GAAP, fits with our SEC requirements, fits with our cumulative appreciation things for taxes and a bunch of stuff that we have to do. We meet our requirements for keeping our R-1 URCS costs.

We no longer keep the kind of data that once was kept in some hard copy forms for individual pieces of the railroad. We said the data we had was not accurate or reliable for merging with URCS for creating URCS costs, which is what it was being sought for, to drive variable costs.

The Board orders to give what we could. We comply. More expense, more effort. They didn't use it because they found it was unreliable. It is not bad data, but it couldn't be used to mesh with URCS variable costs. They didn't use it. They didn't submit it to the Board.

There are good reasons for the Board to put some structure around this discovery process. We also like the idea that emerged today for either back-end or front-end discovery conferences. We are quite open to that to try to narrow these.

It might be worth the effort to try to have presumptive pattern discovery outlines or structures or lists, I guess. I am struggling for the right word. I don't want to list us all to death, but maybe that is what we are talking about.

There is a standard element of stuff that we do agree be provided. We give it all the time. And maybe there should be a presumption of extra need beyond that.

If I may, there also was a lot of rhetoric as to, especially by Mr. McBride, that there should be more presumptions against our rates or that our rates have all been going up and why these cases are here. I think it is important to recognize that from our standpoint, the assertion that we are raising rates and have driven these cases to the Board is simply inaccurate.

Every one of the complaint cases we have come about in situations where contracts expired, we offered lower rates than the proper contracts with the exception of AEPCO, where we offered virtually basically a continuation of that contract with a certain lower rate and a different type of equipment than they are now using. Nonetheless, negotiations broke down, and the shippers decided to take their chances with the regulatory forum.

We were then compelled to publish a kind of variance, which we did, which reflects the uncertainty and risk associated with the litigation. Our rates have been going down. Our coal rates have been going down. I am not suggesting overall that we are happy with that trend in terms of our need to meet the massive capital needs of our network and the ongoing investment but the presumption that because you filed a complaint, machine-like, you should be entitled to a reduction that was implicit we think is just plain wrong and inappropriate.

And we think processes, as you alluded to, that help some certainty and particularly if that is possible are important to dispelling a climate that the regulatory world can just generate something different. And we vigorously believe -- and this ties in with this emphasis on variable costs -- that the concept that the floor, 180 percent variable cost floor, should be drive as the ceiling and that that is what these cases are all about is simply quite wrong.

One other proposal that we mentioned in our comments I would like to comment upon is that we suggested that there should be more rigor in these cases in holding the complainant to their burden of proof. We think that is important.

We do see a pattern in these cases where loose general assumptions or wrong assumptions are made in an opening case and we had an opportunity to reply and things changed fundamentally and radically on the complainant's rebuttal filing.

We then asked for the opportunity to address those issues. This can lead to what has happened in some Board

proceedings of sort of last word lists of things trailing on.

The statute does say -- and I heard resistance to this earlier this morning -- that the burden of proof is on the complainant and that the complainant does go forward with the design of their stand-alone railroad. That is their privilege and obligation, but that is their right to design it. And if it doesn't work, they're not making their case.

There is nothing unusual in law that I am aware of, in this or any other forum, to address that from the standpoint of has the complainant met their burden of proof, is the situation right for a motion to dismiss, or can they endlessly try and try until they come up with a theory that works.

We understand and appreciate the Board's need to try to make these cases move more quickly. Expedition is important, but expedition can't be at the expense of fairness and a full hearing and record. These are, unfortunately, complex cases, there's a lot going on in these cases. That means there does need to be a balance.

We think some of these procedures, some of the things we were talking about this morning, we were more substance than process. We can address those, but I don't think that is what this is about.

Including the process ones could help it go faster. If there is some more framework for some of these discovery issues and some of these processes that, unfortunately, do increase some of the burden on the Board -- and I know the Board has a lot of obligations to keep plodding along in resolving those disputes.

Thank you.