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Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20423-0001

Re: *Application of the National Railroad Passenger Corporation Under 49 U.S.C. § 24308(a)—
Canadian National Railway Company* (Finance Docket No. 35743)

Dear Ms. Brown:

Attached for filing in the above-referenced docket are (1) a Confidential version of the Post-Interim Decision Rebuttal Submission of Illinois Central Railroad Company and Grand Trunk Western Railroad Company and (2) a public version of the Rebuttal Submission, to be placed on the public record.

The Confidential version of the Rebuttal Submission is designated as such under the protective order in this proceeding, and is therefore being filed under seal.

Sincerely,

/s/ David A. Hirsh

David A. Hirsh

*Counsel for Illinois Central Railroad Company
and Grand Trunk Western Railroad Company*

Enclosures

cc: All Parties of Record

PUBLIC VERSION – REDACTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35743

APPLICATION OF THE NATIONAL RAILROAD PASSENGER CORPORATION UNDER
49 U.S.C. § 24308(a) – CANADIAN NATIONAL RAILWAY COMPANY

**POST-INTERIM DECISION REBUTTAL SUBMISSION OF
ILLINOIS CENTRAL RAILROAD COMPANY
AND GRAND TRUNK WESTERN RAILROAD**

Kathryn J. Gainey
CN
Suite 500 North Building
601 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 347-7840

David A. Hirsh
James M. Guinivan
Vineeta Kamath
DENTONS US LLP
1900 K Street, N.W.
Washington, DC 20006
(202) 496-7500
david.hirsh@dentons.com

Tobias S. Loss-Eaton
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20006
(202) 736-8000

August 25, 2022

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Tab C – Rebuttal Verified Statement of Michael Baranowski

Tab D - Joint Rebuttal Verified Statement of Simon Lizotte and Timothy Robinson

ACRONYMS

ADA	Passenger Related (Amtrak delay code)
ASOTP	All-Stations On Time Performance
BNSF	BNSF Railway Company
CAR	Car Failure (Amtrak delay code)
CCR	Cab Car Failure (Amtrak delay code)
CN	Illinois Central Railroad Company and Grand Trunk Western Railroad, indirect wholly-owned subsidiaries of CNR
CNR	Canadian National Railway Company
COTP	Customer On-Time Performance
CON	Hold for Connection (Amtrak delay codes)
CSX	CSX Transportation, Inc.
CTC	Centralized Traffic Control
CTI	Commuter Train Interference (Amtrak delay code)
CUI	Customs (Amtrak delay code)
DBS	Debris (Amtrak delay code)
DCS	Signal Delays (Amtrak delay code)
DMW	Maintenance of Way (Amtrak delay code)
DNC	Do Not Count
DSR	Slow Order Delays (Amtrak delay code)

DTR	Detour (Amtrak delay code)
DW	Data Warehouse
ENG	Locomotive Failure (Amtrak delay code)
FRA	Federal Railroad Administration
FTI	Freight Train Interference (Amtrak delay code) (except when referring to FTI Consulting)
GPS	Global Positioning System
GTW	Grand Trunk Western Railroad Company
HLD	Passenger-Related (Amtrak delay code)
HPH	Horsepower hour
HPT	Horsepower per ton
HRD	Host Responsible Delay
IC	Illinois Central Railroad Company
ICC	Interstate Commerce Commission
INJ	Injury Delay (Amtrak delay code)
ITI	Initial Terminal Delay (Amtrak delay code)
MBO	Drawbridge Opening (Amtrak delay code)
Metra	Commuter Rail Division of the Regional Transportation Authority d/b/a Metra (a commuter agency in and near Chicago)
MiDOT	Michigan Department of Transportation
MP	mile marker post

MW	Maintenance of Way
NOD	Unused Recovery Time (Amtrak delay code)
NRPC	National Railroad Passenger Corporation (Amtrak)
NS	Norfolk Southern Railway Company
OTH	Miscellaneous Delays (Amtrak delay code)
OTP	On-Time Performance
POL	Police-related (Amtrak delay code)
PRIIA	Passenger Rail Investment and Improvement Act of 2008
PRT	Pure Run Time
PTC	Positive Train Control
PTI	Passenger Train Interference (Amtrak delay code)
RCPA	Rail Customer and Public Assistance
RPSA	Rail Passenger Service Act of 1970
RTB	Recovery Time Base
RTC	Rail Traffic Controller
RTE	Routing (Amtrak delay code)
SRS	Service Reliability Strategy
SVS	Servicing (Amtrak delay code)
SYS	Crew & System (Amtrak delay code)

TJS	Train Journal Schedule
TPC	Train Performance Calculator
TRS	Trespasser Incidents (Amtrak delay code)
TSP	Train Service Plan
UP	Union Pacific Railroad Company
WCL	Wisconsin Central Limited
Wi-PU	Wireless Processing Unit
WTR	Weather-Related (Amtrak delay code)

Notes regarding record cites:

Verified statements filed in this proceeding by either party before the Board’s Interim Decision¹ are identified by “VS [Last Name] (filed Sept. 4, 2015)” if filed with the party’s opening evidence, by “RVS [Last Name] (filed Sept. 14, 2017)” if filed with the party’s rebuttal evidence; and by “SRVS [Last Name] (filed Oct. 30, 2017)” if filed with the party’s surrebuttal evidence.

CN’s Post-Interim Decision filings on the merits are identified by “CN Opening Submission (PID),” “CN Reply Submission (PID),” and “CN Rebuttal Submission (PID)” for the filings submitted May 27, 2022, July 26, 2022, and today, respectively.

Amtrak’s Post-Interim Decision filings on the merits are identified by “Amtrak Br. (PID)” and “Amtrak Reply Br. (PID)” for the filings submitted May 27, 2022 and July 26, 2022, respectively.

Verified statements filed with CN’s Post-Interim Decision Opening Submission are identified by “VS (PID) [Last Name]”; those filed with CN’s Post-Interim Decision Reply Submission are identified by “RVS (PID) [Last Name]”; those filed with this Post-Interim Decision Rebuttal Submission are identified by “Rebuttal VS (PID) [Last Name].”

Verified statements filed with Amtrak’s Opening Brief are identified by “VS [Last Name]”; those filed with Amtrak’s Reply Brief are identified by “RVS [Last Name].”

¹ Decision served Aug, 9, 2019.

Citations to the redline version of CN’s proposed Operating Agreement, showing changes from the current Operating Agreement and submitted as Tab E, Exhibit 1 to CN’s Post-Initial Decision Reply Submission, are in the form “CN Rev’d Operating Agreement (Redline), Sec. [#]” or “CN Rev’d Operating Agreement (Redline), App. [#], Sec. [#].” Citations to the clean version of the same proposal, submitted as Tab E, Exhibit 2 to CN’s Post-Initial Decision Reply Submission, are in the form “CN Proposed Operating Agreement (Rev’d), Sec. [#]” or “CN Proposed Operating Agreement (Rev’d), App. [#], Sec. [#].”

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35743

APPLICATION OF THE NATIONAL RAILROAD PASSENGER CORPORATION UNDER
49 U.S.C. § 24308(a) – CANADIAN NATIONAL RAILWAY COMPANY

**POST-INTERIM DECISION REBUTTAL SUBMISSION OF
ILLINOIS CENTRAL RAILROAD COMPANY
AND GRAND TRUNK WESTERN RAILROAD**

OVERVIEW

The Board’s statutory task in this proceeding is to determine “reasonable terms” for the Operating Agreement between CN and Amtrak, which must compensate CN for the incremental costs it incurs due to the presence of Amtrak trains on its lines and limit the extent to which CN and its freight customers are compelled to subsidize Amtrak. The Board’s task is ***not*** to re-write section 402 of the Rail Passenger Service Act, to crudely cut-and-paste FRA regulations cherry-picked by Amtrak into the Operating Agreement. Nor is there any basis for the Board to ignore what is and what is not within CN’s control and place the entire burden of achieving Amtrak’s objectives on CN’s shoulders, and to do so without compensation, or to impose punitive remedies on CN for alleged failures to provide preference that Amtrak has not even attempted to prove. Yet that is the essence of Amtrak’s proposal.

CN’s approach gives effect to the rights and obligations of both parties consistent with how freight railroads nationwide have hosted Amtrak for 50 years, and consistent with the Board’s precedent and its Interim Decision. The Board provided guidance on how to improve the traditional checkpoint-based incentives and penalties system; CN has implemented that

guidance. The Board called for a “reopener”; CN has provided for one which includes binding arbitration. The Board held that incremental freight delay costs CN incurs due to hosting Amtrak would be recoverable if “specific, verifiable and quantifiable.” Using a methodology that is both rigorous and conservative, CN has demonstrated and quantified those costs.

Amtrak takes a fundamentally different approach. Amtrak disregards the Board’s direction and abandons the traditional checkpoint-based system in favor of an incentives-and-penalties proposal based on a metric that Amtrak unilaterally defined – HRD – and that every freight railroad has strongly criticized as inaccurate and misleading. Amtrak seeks huge financial penalties and unprecedented rights to interfere in and even take over CN’s freight railroad operations, based on a vague, non-CN-specific, and entirely unsupported suggestion that “high” (actually, historical normal) HRD (most of which has nothing to do with freight trains) somehow indicates a (wholly unproven) failure to give Amtrak preference. Amtrak does not provide for a reopener and asserts baseless legal objections to the Board’s authority to provide for effective dispute resolution mechanisms. And Amtrak makes objections to CN’s claim for incremental freight delay cost compensation that are mainly founded on baseless legal claims that preference displaces Amtrak’s legal obligation to compensate its hosts and that the “but for” standard does not mean “but for” and instead requires a distorted and plainly unworkable version of an entirely different standard – “proximate cause” – that, according to Amtrak, entails second-guessing every aspect of how CN operates its freight railroad.

More generally, Amtrak clouds the issues and attempts to justify its extreme positions through unfounded claims concerning host dispatching and preference. According to Amtrak: low on-time performance is due to the failure of freight railroads to provide preference; contractual incentives should be replaced by contractual penalties because freight railroads

generally fail to provide preference; Amtrak should take over freight railroad dispatching because freight railroads fail to provide preference; incremental freight train delay costs should be disallowed because they are associated with preference; schedules and other issues need not be addressed because everything is about preference. But Amtrak's central premise is false.

This is not a case about preference. Amtrak has not attempted to prove a failure to provide preference,² and this is not a PRIIA Section 213 case.³ Instead, this is a case about how much CN should be compensated for Amtrak's use of **CN's property**. But even more fundamentally, Amtrak's on-time performance concerns are not about preference. Amtrak would have the Board believe that denial of preference is central to its on-time performance because "[t]he largest cause of delay to our customers is 'freight train interference.'" Amtrak Reply Br. (PID) at 59 (quoting Amtrak's own CEO). That is highly misleading for at least two reasons.

First, as can be seen from the table below, delays Amtrak attributes to so-called "interference" between CN's freight trains and Amtrak's trains (delays that Amtrak's conductors

² As discussed in Section I.C., below, Amtrak has provided no evidence supporting its vague suggestions that CN is (or other hosts are) failing to provide preference to its trains. It quotes one line from an Inspector General's report (Amtrak Reply Br. (PID) at 36 n.29 (*quoting Union Pac. R.R. v. STB*, 863 F.3d 816, 820 (8th Cir. 2017) (*quoting* Fed. R.R. Admin., Root Causes of Amtrak Train Delays, Rept. No. CR-2008-076, at 4 (Sept. 8, 2008)); Amtrak Opening Br. at 27 (same)) as if it supports its vague claims, but far from doing so, the line merely says host railroads "*can* adjust their dispatching practices" to give their own trains an advantage over Amtrak, which is a far cry from concluding that they do so, and an even farther cry from concluding that CN does so.

³ Amtrak voluntarily dismissed the only prior Section 213 litigation it brought against CN. *Nat'l R.R. Passenger Corp.—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat'l Ry.*, Docket No. NOR 42134 (STB served Apr. 13, 2018) (granting CN's unopposed motion to dismiss).

code as freight train interference (“FTI”) excluding cross traffic delays at interlockings CN does not control) – the delays for which “preference” is even arguably in play – are ***consistently below 15%, and often below 10%***, of delays to Amtrak trains on CN’s lines as recorded by Amtrak.⁴

Table 1
Breakdown of Total Delay Minutes for Amtrak Services on CN Lines
(2021)

Absolute Delay Minutes Breakdown Summary: 2021

HOST	Service	Total Minutes of Delay	FTI	FTI (Cross Traffic)	FTI minus Cross Traffic	% of Total Delay	
						FTI	FTI minus Cross Traffic
CN	Blue Water	24,470	3,371	NA	NA	14%	14%
ALL	City of New Orleans	87,779	13,171	46	13,125	15%	15%
ALL	Illini/Saluki	40,502	6,936	767	6,169	17%	15%
CN	Lincoln Service	16,718	9,650	9,007	643	58%	4%
CN	Texas Eagle	5,065	3,718	3,540	178	73%	4%
CN	Wolverine	17,063	1,290	NA	NA	8%	8%

Second, even those delays do not demonstrate a failure to give preference. Many of the CN lines used by Amtrak in the United States are single-track main line with passing sidings, which means that meets and passes involving Amtrak trains and freight trains are bound to occur multiple times every day. FTI in such circumstances will never be zero. Such meets and passes ***inevitably*** delay both the Amtrak trains and CN’s freight trains, although, because CN gives Amtrak preference, they delay the CN trains far more than the Amtrak trains, including almost 700 hours of delay to CN freight trains in the single month of December 2019. Even Amtrak

⁴ The current operating agreement recognizes that interlocking delays should not be counted against CN. As discussed by Messrs. Matteucci and Kuxmann, that treatment is appropriate. See Rebuttal VS (PID) Matteucci/Kuxmann ¶¶ 28-29.

trains regularly experience delays from freight train interference: in the second quarter of fiscal year 2022, Amtrak trains hosted by Amtrak on the Northeast Regional service totaled 1,029 FTI delay minutes, presumably for reasons unrelated to failure to show preference.⁵ FTI delays do not suggest – much less, prove – that CN fails to afford Amtrak its statutory preference.

Even more obviously, HRD delays, most of which do not involve CN’s freight trains, are not indicative of a preference violation. That has not stopped Amtrak, however, from arguing that levels of HRD it deems high (but that are in keeping with historic norms) are grounds for ultimately depriving CN of its right to dispatch its own line, despite the fact that on CN’s lines most of the HRD recorded by Amtrak has nothing to do with CN’s dispatching. The Board should not allow Amtrak to color the clear issues in this proceeding with its baseless innuendo regarding preference.

CN responds to Amtrak’s latest submission in detail below, but a few examples will serve to illustrate how self-serving and unreasonable Amtrak’s entire approach is:

- Amtrak criticizes CN’s incentives and penalties proposal for “failing” to adjust CN’s compensation based on the on-time performance experience of Amtrak passengers on multi-host routes who have completed their trip before the Amtrak train ever reaches CN’s lines;
- Amtrak proposes to impose financial penalties on CN – and presumably freight railroads nationwide – and even take over the dispatching and scheduling of maintenance of the freight railroads – to punish them for HRD levels that are normal by historical standards and far lower than Amtrak’s own HRD levels on many lines;
- In its “Tier 3,” Amtrak proposes to control CN’s dispatching – presumably to implement a “Presidential motorcade” approach for Amtrak trains – in ways that could inflict on CN and its freight customers massive freight train delays and impair freight service, with no accountability, and with no suggestion Amtrak would pay CN either its resulting freight delay costs or any incentives;

⁵ Federal Railroad Administration, FY22 Q2 Delay Metrics, available at: <https://railroads.dot.gov/elibrary/fy22-q2-delay-metrics>.

- o Amtrak wrongly equates every delay its trains incur in connection with a “meet” with a freight train as failure to receive preference, while claiming that it is entitled to preference for free. In other words, it claims the right to delay CN freight trains, or even exclude CN’s trains from CN’s rail lines for hours on end, to whatever extent is necessary to prevent any delays to Amtrak trains, without paying anything for doing so; and
- o Amtrak responds to the Board’s call for a “reopener” and to CN’s substantial concerns about the realism and feasibility of Amtrak’s schedules by baselessly declaring that the Board cannot provide for an effective dispute resolution mechanism without Amtrak’s consent.

There is one proposal before the Board that is consistent with the statutory mandate for “reasonable terms” and with the Board’s Interim Decision: CN’s. The Board should adopt it.

ARGUMENT

I. THE BOARD SHOULD ADOPT CN’S INCENTIVES/PENALTIES PROPOSAL, INCLUDING THE EXISTING LOOKBACK PROVISION AND CN’S PROPOSED REOPENER.

A. CN’s Incentives and Penalties Proposal Is Appropriately Balanced and Focused on CN’s Contribution to Amtrak Performance, While Amtrak’s Proposal Is Not.

CN’s prior submissions demonstrated that CN’s incentive/penalty provision is reasonable, balanced, and appropriate, while Amtrak’s is not. CN Opening Submission (PID) at 22-30; CN Reply Submission (PID) at 15-18, 25-59. CN’s proposal closely adheres to the Board’s guidance in the Interim Decision, appropriately focuses on and accounts for CN’s contribution to Amtrak’s on-time performance (“OTP”), and provides for balanced and symmetrical incentives and penalties, with reopening and lookback provisions that ensure that CN remains incentivized and accountable to avoid any sustained period of poor performance. CN Reply Submission (PID) at 16-18. By contrast, Amtrak’s proposal, among other shortcomings, (i) fails to determine whether incentives or penalties will be awarded based on a direct measure of OTP (using Customer OTP instead as a multiplier regardless of whether incentives or penalties are awarded), (ii) fails to integrate CN responsibility for delays with

actual OTP, (iii) wrongly treats CN as responsible for OTP at stations unaffected by CN's hosting and for changes in number of passenger miles having nothing to do with CN's performance, (iv) applies an asymmetric and unbalanced "adjustment factor" to create huge penalties for performance that would earn incentives under the current Operating Agreement, and (v) relies on an unfounded, self-serving, unworkable tiered "reopener," that is not actually a reopener and that would quickly allow Amtrak to oversee and intrude on CN's dispatching, and ultimately assume control of dispatching and scheduling of maintenance of way from CN — and allow it to do the same with most of its other Class I hosts if applied to them.⁶ CN Reply Submission (PID) at 25-88. Amtrak's proposal flouts the guidance provided by the Board in its Interim Decision, which, among other things, explained why an HRD-based incentive/penalty provision is flawed, and called for greater consideration of degrees of lateness for individual trains and for a true reopener.

CN also responded to Amtrak's claim that FRA's adoption of metrics and standards for STB investigations under Section 213 of PRIIA⁷ compels the Board to adopt Amtrak's proposal, despite its inefficiency, imbalance, and irrationality. CN Reply Submission (PID) at 19-22. As CN explained, that argument was not only wrong as a matter of law — because Amtrak ignores

⁶ Amtrak set the threshold between positive and negative "Delay Adjustment Factors" (determining whether CN receives incentives or penalties) at 925 minutes of "host-responsible delay" per 10,000 train-miles, based on an analysis of all hosted Amtrak trains that shows a purported "association between 80% Customer OTP and approximately 900 minutes of HRD per 10,000 train-miles." VS Weiss ¶¶ 83-85; *see also* VS Blair ¶¶ 49-52. The use of a nationwide "association" between HRD and Customer OTP, rather than one based on the correlation of those factors on CN-hosted trains, CN (or even on individual services, as Amtrak initially proposed (*see* Amtrak Opening Statement at 13 (filed Sept. 4, 2015)) suggests an intention to make that threshold more broadly applicable than in just CN's Operating Agreement.

⁷ FRA, *Metrics and Minimum Standards for Intercity Passenger Rail Service*, 85 Fed. Reg. 72,971 (Nov. 16, 2020) ("FRA Metrics and Standards"), *codified at* 49 C.F.R. pt. 273.

the standards governing this proceeding about operating agreement terms and the qualification “to the extent practicable” in Section 207 of PRIIA – but also wrong as a matter of fact. Only CN’s proposal faithfully and meaningfully integrates the metrics and standards. *Id.* at 18-20. CN’s proposal rationally combines and adapts three key elements of the metrics and standards (including run time) in order to meaningfully reflect CN’s contribution to OTP, while Amtrak’s proposal does not reasonably capture that contribution, including because it ignores run time and fails to integrate the metrics and standards rationally in order to create a reasonable measure of CN’s contribution to Amtrak’s OTP.

We will not repeat these arguments that were made in CN’s Reply submission. Instead, in this submission we reply to the key aspects of Amtrak’s Reply that attack CN’s incentive/penalty proposal for focusing on its contribution to Amtrak’s OTP and claim that Amtrak’s proposal to incorporate OTP at stations unaffected by CN’s performance was endorsed by the Board or is dictated by FRA’s Metrics and Standards.

1. CN’s proposal accounts for Customer OTP more faithfully and rationally than Amtrak’s proposal.

Amtrak frames the fact that CN’s incentive/penalty proposal is based on a calculation of OTP that includes “relief” items for delays that should not be attributed to a host – a common and longstanding feature of existing Amtrak-host operating agreements – as a redefinition of Customer OTP or fundamentally inconsistent with Customer OTP as experienced by passengers. It then characterizes as “absurd” the possibility that CN (or any other host) could ever earn incentives when either (i) Customer OTP for a train is below 80% or (ii) the STB investigates a train under PRIIA. Amtrak Reply Br. (PID) at 15-17. But there is nothing “absurd” or improper about these aspects of CN’s proposal, both of which are consistent with how CN, Amtrak, and other freight hosts nationwide have agreed to organize their relationships for decades. Customer

OTP is a measure of ***results for a train achieved by Amtrak*** for its customers. Operating agreements should measure – and always have measured – ***the quality of service provided to Amtrak*** by a host. Those are related, but very different, things. Indeed, the very result Amtrak derides would often occur under its own proposal.

- a) *“Relief items” do not redefine OTP or “tolerance”; they recognize that hosts are not responsible for all delays and align incentives/penalties with host contribution to OTP.*

Amtrak mischaracterizes relief items’ purpose and effect. OTP is solely a measure of Amtrak train performance, and as such it does not account for different causes of delays. Relief items do not redefine OTP; they reflect the undeniable fact that some delays are outside of a host’s reasonable control and, as such, irrelevant to assessing the quality of host performance. In Amtrak’s operating agreements with CN and other host railroads, relief items are used to determine if aggregate delays to run time that cause a train to be late can and should be attributed to the host. “Tolerance,” on the other hand, is the amount of time by which a train must arrive within its scheduled arrival time in order to be considered on time. In defining Customer OTP, for example, FRA defined on-time performance as arrival within 15 minutes of scheduled arrival time; in other words, it adopted 15 minutes of tolerance.⁸ 49 C.F.R. § 273.5(a)(1).

In its post-Interim Decision Reply Brief (at 11-12), Amtrak suddenly drops the term “relief items” and starts calling them “additional tolerances,” as if their function is to modify the definition of OTP.⁹ Based on that fiction, it then argues “CN’s proposed approach to add

⁸ As discussed below, CN’s proposal uses less basic tolerance (8-10 minutes depending on the service) for on-time performance.

⁹ Amtrak knows that “relief items” and “tolerance” are distinct things, but in its Reply it disingenuously mislabels relief items as “added tolerance.” In their commercial relations and throughout this proceeding prior to Amtrak’s post-Interim Decision Reply, the parties have used the common parlance of “relief items” to describe types of Amtrak delays that would not be

‘tolerances’ artificially extends the scheduled arrival times published to Amtrak’s passengers,” allows CN to “add minutes to the scheduled arrival time of a delayed Amtrak train,” and “disregards the experiences of the passengers” (*id.* at 12-13), all supposedly in violation of the FRA Metrics and Standards.

But as CN has explained, Amtrak conflates measuring the OTP of Amtrak’s trains – the essential task of FRA’s Metrics and Standards – and assessing the contribution of a host to Amtrak’s OTP – the essential task of an incentive/penalty provision under an Amtrak/host operating agreement. FRA was well aware of the difference. FRA not only rejected efforts to substitute operating agreement measures of host performance for measures of Amtrak train performance,¹⁰ but also it likewise stated that it was *not* requiring that the measures it was adopting of Amtrak performance be substituted for measures of host performance under Amtrak/host operating agreements.¹¹

In any event, when it comes to integrating the concept of OTP into the Operating Agreement, CN’s proposal does a far better job than Amtrak’s. CN Reply Submission (PID) at 100-02; RVS (PID) Peterson ¶¶ 19-29. CN’s proposal directly measures for each individual train whether delays due to the host caused the train to be late for its scheduled arrival. Moreover,

counted against a host for purposes of determining incentives/penalties. *See, e.g.*, Mr. Blair’s Reply Verified Statement Exhibit 3 (attaching Rebuttal Joint Verified Statement of Paul Vilter and Jason Maga at 55-61 (filed Sept. 14, 2017) (discussing “relief items”)).

¹⁰ *See* FRA Metrics and Standards, 85 Fed. Reg. at 72,984.

¹¹ *Id.* at 72,976 (stating in response to concerns raised by a commenter about the potential “impact of the customer OTP metric and standard on the host railroads’ various operating agreements with Amtrak, including the performance incentive payments made under such agreements,” that “this final rule does not require a change to the performance incentive payment provisions in these operating agreements; Amtrak and the host railroads may continue to maintain those provisions as they see fit.”)

CN's revised proposal also measures the degree to which those delays contributed to the train being late. Like FRA's Customer OTP metric, CN's proposal does so for every station and end point on CN's lines (for this purpose, the relevant route) and actually allows for less basic tolerance for OTP than FRA's 15 minutes.¹² By contrast, Amtrak's proposal awards incentives and penalties without *any* direct consideration of whether a train is on time or not, much less any consideration of whether its OTP was driven by the host. While Amtrak touts the direct integration of Customer OTP into the Operating Agreement, its proposal does not even use that standard to determine whether incentives or penalties will be awarded; instead, it irrationally applies the Customer OTP metric only as a multiplier, regardless of the resulting contradictory effects, such as the fact that higher Customer OTP increases penalties and lower Customer OTP decreases incentives. Moreover, far from being applied meaningfully on a train-by-train basis, Customer OTP is only used as a multiplier on a quarterly, combined train "service" basis.

This fact also undermines Amtrak's claim that "real world experience" – meaning Amtrak's failure in some cases to achieve 80% Customer OTP – somehow demonstrates that the way to improve that result is to incorporate Customer OTP as a multiplier of incentives/penalties, as in Amtrak's proposal. Amtrak Reply Br. (PID) at 2-3. In addition to the many failings of the rote incorporation approach that CN has detailed, Amtrak's data does not support its implication that CN's incentive/penalty proposal will necessarily result in deficient Customer OTP. First, Amtrak is fighting the wrong battle. CN's proposal is not in effect, nor was it in effect during the period of low Customer OTP that Amtrak cites, and CN's proposal includes the many

¹² As can be seen from the "tolerance" column in the schedule skeletons included with CN's proposed revised operating agreement, CN has proposed basic tolerance ranging from 8 to 10 minutes. See CN Opening Submission (PID), Tab B, Exhibit 1, Appendix II.

significant modifications recommended by the Board that can reasonably be expected to raise Customer OTP, not the least of which is refocusing the agreement on Customer OTP rather than Endpoint OTP by adding every station as a checkpoint and weighting them according to number of passengers disembarking and more closely aligning performance measures and incentives under the agreement with achievement of that goal. Second, and leaving aside Amtrak and third-party influence over Customer OTP, the Customer OTP cited by Amtrak is not representative of the quality of CN's performance under even the existing incentive/penalty provision. Customer OTP for the Illini/Saluki and City of New Orleans services is, by Amtrak's own admission, significantly below optimal levels because recovery time for the trains in those services has not been redistributed after the FRA's adoption of the Customer OTP metric (though the parties continue to discuss an agreement to do so), and Customer OTP for the remaining services is more of a function of performance by hosts other than CN, given that most of the routes (and most of the delays) for those services are on the lines of other hosts. Finally, Amtrak's effort to impugn the existing Operating Agreement also fails because Amtrak cannot explain why the City of New Orleans service, for which CN is the exclusive Class I host, has been and remains one of Amtrak's best performing long-distance services (even though its backloaded recovery time still requires redistribution).

- b) *Far from leading to "absurd" results, CN's incentive/penalty proposal does a better job than Amtrak's of aligning incentives/penalties with CN's contribution to Amtrak's OTP.*

Amtrak asserts that CN's proposal has two "absurd practical implications." Amtrak Reply Br. (PID) at 15-17. First, it argues CN's proposal would allow it to earn incentives even when CN has "itself *caused* the poor OTP on an Amtrak route" through its "own operational decisions," such as the scheduling of MOW work or conduct of efficiency testing (i.e.,

operational tests and inspections required by FRA). *Id.* at 16. Amtrak claims that scenario is “very unlikely” to occur under its own proposal. *Id.* at 16 n.12. Second, Amtrak argues it could pay CN incentives on a route for which Customer OTP is less than 80% and which is subject to STB investigation under Section 213 of PRIIA. *Id.* at 16-17.

Overlooked in Amtrak’s first argument is the larger question of which proposed incentive/penalty provision – CN’s or Amtrak’s – does a better job of rewarding and penalizing CN in accordance with its contribution to Amtrak’s OTP. The answer is CN’s, as it has detailed. See CN Reply Submission (PID) at Sections I and II; RVS (PID) Peterson ¶¶ 19-29. Under CN’s proposal, whether incentives or penalties are due is determined by whether CN-responsible delays for individual trains exceed the run time necessary for on-time arrival, whereas Amtrak’s proposal makes that determination on the basis of a total quarterly HRD figure for an entire service, regardless of actual on-time performance and regardless of the failure of Amtrak’s HRD category and the assignment of codes by its conductors to attribute delays to a host accurately. The most fundamental question regarding the efficacy of an incentive/penalty provision is how well it measures a host’s contribution to Customer OTP, and the answer to that question decidedly favors CN’s proposal.

Amtrak’s argument opposing relief for what it describes as “operational decisions” focuses on efficiency testing and MOW. But its arguments do not withstand scrutiny.

Amtrak’s supposed concern with “efficiency testing” is a red herring. Not only is such testing mandatory under FRA regulations (49 C.F.R. § 217.9), but it results in very few delays in practice and has not been the subject of a single disagreement between the parties over the past year (i.e., no related delays were coded as CN responsible). See Rebuttal VS (PID) Matteucci/Kuxmann ¶ 17. Moreover, [REDACTED]

[REDACTED]

[REDACTED]

CN's only proposed change to the Operating Agreement is to assure that CN is not penalized for such mandatory testing for purposes of determining incentives and penalties, whether or not it is conducted jointly with Amtrak. *See* CN Revised Operating Agreement (Redline), App.V.A.1.(e)(4), at App. V-6. And CN proposes to make relief for delays caused by such testing subject to the recovery time base ("RTB"), so the portion of any such delays that does not exceed the applicable RTB would not be subject to relief. Based on past history, the effect of such change will be *de minimis* at most and, as CN explained in its opening submission, it is appropriate that CN "not be penalized or given a disincentive for conducting tests that are necessary to ensure the safe operation of Amtrak's trains" (CN Opening Submission (PID) at 45-46).

Amtrak also says CN is "asking the Board to approve 'additional tolerances' when CN has decided to perform MOW." Amtrak Reply Br. (PID) at 16. That claim, however, is completely unfounded. CN proposed *no* change to the current treatment of MOW under the operating agreement. *See* CN Revised Operating Agreement (Redline), App.V.A.2. at App. V-6. That provision was agreed to by Amtrak and has been part of the Operating Agreement for years. Contrary to Amtrak's suggestion, it provides for additional tolerance for MOW only if Amtrak agrees to provide it following a request by CN. And in exchange for any added tolerance, CN is required to accept a reduction in incentive rates. Far from being "absurd," this is a fair and balanced provision which, at least outside this proceeding, has not led to controversy between the parties. RVS (PID) Taylor ¶ 23.

Amtrak's second "absurd[ity]" argument is that CN's proposal could result in Amtrak "paying CN incentives for a route, [while] the Board is concurrently investigating poor performance caused by CN on the same route." Amtrak Reply Br. (PID) at 16-17. Amtrak argues that "CN effectively would be receiving incentive payments for falling below the standard that FRA adopted." *Id.* This argument is nonsense.

To start, this argument is circular because Amtrak wrongly assumes that a host must be at fault (and thus unworthy of earning incentives) if one of Amtrak's trains is subject to investigation under Section 213. But the very purpose of an investigation under Section 213 is to determine *why* an Amtrak train has fallen below 80% Customer OTP for two quarters. Congress provided for a broad factual inquiry as part of a Section 213 investigation; that investigation might well find that the key problems lie in Amtrak's unreliable equipment, its schedules, delays caused by Amtrak, and/or delays due to other factors off of CN's lines. A Section 213 investigation is not an investigation into a host's "poor performance," and does not involve a host "falling below" FRA's Customer OTP standard. It is an investigation into the performance of an Amtrak *train* and *that train's* failure to meet FRA's Customer OTP standard. The Customer OTP standard does not apply to hosts; it only applies to Amtrak trains.

Nor can Amtrak's route-level failures to meet FRA's 80% Customer OTP standard be laid at the feet of CN and other individual hosts. That is especially true for CN, which hosts less than 50% of the route miles for four of the six regularly scheduled Amtrak services that operate on its lines, including three services for which it hosts under 13% of the route miles. See CN Opening Submission (PID) at 3 (Table 1). For those services, Customer OTP is far more a measure of issues off of CN's lines than issues on CN's lines.

And even for services that operate primarily over CN, it is wrong to assume that sub-80% Customer OTP is due to poor CN service. Using Amtrak's own HRD-based standard of performance, it is easy to identify counterexamples. In June 2022, for example, Illini/Saluki train #393 had Customer OTP of just 37%. The main cause of delay for #393 was Amtrak – with a total of 1070 minutes of Amtrak-responsible delay (equal to 5,195 minutes per 10,000 train-mile) compared to CN HRD of 747 minutes (812 minutes per 10,000 train-miles). CN's HRD was thus well within the range qualifying for incentives under Amtrak's own proposal (i.e., below 924 minutes per 10,000 train-miles). Yet Amtrak would unfairly reduce its incentive payments to CN due to low Customer OTP – which was primarily due to Amtrak itself. Awarding host incentives for that train is not absurd and instead is appropriate given the service CN provided.

Neither is this an isolated example. Even on a full quarterly basis there are many instances of Amtrak's services on CN failing to meet the 80% Customer OTP standard, even while CN HRD minutes per 10,000 train-miles remains within the range qualifying for incentives under Amtrak's proposal. Below in Table 2 are a number of examples, all of which are instances where Amtrak would pay incentives under its own proposal:

Table 2

**Examples of CN Qualifying For Incentives Under Amtrak's Proposal
Despite COTP Below 80%**

Year	Quarter	Amtrak Routes	COTP	CN HRD minutes per 10K train-miles
2019	4	Blue Water	39%	800
2020	1	Blue Water	64%	585
2020	1	Illini/Saluki	64%	906
2020	2	Illini/Saluki	76%	692
2020	3	Illini/Saluki	75%	888
2021	1	Blue Water	71%	427
2021	2	Blue Water	75%	363
2021	3	Blue Water	58%	376
2021	4	Blue Water	66%	438
2021	1	City of New Orleans	77%	736
2021	3	Illini/Saluki	74%	826
2021	4	Illini/Saluki	60%	811

Far from demonstrating that CN's proposal leads to absurd results, the fact that CN's proposal allows for the possibility of rewarding a host for strong performance despite Amtrak failing to achieve 80% Customer OTP underscores that the proposal properly measures the host's contribution to Amtrak's performance, rather than blindly assigning all responsibility for Amtrak's performance to each of its individual hosts. A host railroad should only be measured by its effect on the performance of the Amtrak train on that host's own railroad.

c) Amtrak has not shown that CN's proposed "relief items" are unreasonable, unnecessary, or overly complex.

Amtrak acknowledges that many delays are not due to CN and should not count against it (i.e., delays that Amtrak itself codes as non-HRD). Under Amtrak's proposal, whether CN earns incentives or penalties is determined solely by its HRD – i.e., it is entirely unaffected by delays that Amtrak accepts are not CN's fault. But, according to Amtrak, its HRD would exclude many if not most delays covered by CN's relief items. That is untrue, but it underscores that the key issue between the parties regarding relief items is which delays are not CN's responsibility.

CN's Opening Submission reviewed in detail the need to supplement Amtrak's HRD categories with more specific and accurate relief items. CN Opening Submission (PID) at 34-36. In reply, Amtrak says little about these specific items. It attaches as Exhibit 3 to Mr. Blair's Reply Verified Statement the 2017 Joint Rebuttal Verified Statement of Messrs. Vilter and Maga, which argued that "certain refinements and conforming changes" should be made to CN's proposed relief items, particularly in light of CN's agreement to use Amtrak's HRD codes as a screen. RVS Vilter/Maga at 55-61 (filed Sept. 14, 2017). Messrs. Vilter and Maga argued that some Amtrak relief codes should be excluded as inapplicable by definition, and others were unnecessary or "obsolete" because they were allegedly already encompassed by Amtrak's HRD codes. *Id.* at 57-61.

In its revised proposal, CN made a number of adjustments to reduce and refine relief items consistent with Amtrak's earlier comments and the Interim Decision. CN clarified that Amtrak's relief items for the Northeast Corridor should not be used under the operating agreement. *Compare* RVS Vilter/Maga at 56 *with* CN Proposed Operating Agreement (Rev'd) App. XI, at App. XI-2 – XI-3. Further, rather than add new relief items where Amtrak claimed its existing codes covered delays, CN added notes to the table of Amtrak codes in Appendix XI of its proposed Operating Agreement to confirm those interpretations. *See* CN Proposed Operating Agreement (Rev'd), App. XI, at App. XI-3 (notes). As CN has explained, however, additional relief items are clearly necessary to cover specific situations that are not adequately or properly dealt with under Amtrak HRD codes. Absent including these relief items, delays will be inaccurately and unfairly attributed to CN.

Table 3, below, lists the modest changes to en route relief items that are included in CN's proposal because they are not adequately covered by Amtrak's codes.

Table 3

**En Route Relief Items
Other than Amtrak Codes**

Source (same or similar provisions)	Description & Location in Operating Agreement (Subsection in App. V, Sec. A.1.)	Why Needed?
Existing, App. V. (IC)	The amount of time at Joliet a westbound trip of a train is delayed by the operator at Joliet. (A.1.d).	Avoid incorrect coding until schedule revised as per agreement
Existing, App. V. (IC) and App. VI (GTW)	Delay caused when a wayside detector stops a train because no reading was achieved and the detector is found to be working properly. (A.1.e(2)).	No CN control or fault as confirmed by working detector
New	The amount of time by which the trip of a train is delayed in order to pick up or drop off rail equipment provided by CN to Amtrak to substitute for failed Amtrak equipment. (A.1.e(3)).	Delay related to CN assisting
Existing, App. V. (IC) and App. VI (GTW)	The amount of time by which the trip of a train is delayed en route by efficiency testing performed by CN alone in accordance with FRA rules, provided that CN gives advance notification to Amtrak for testing performed by CN. (A.1.e(4)).	Delay based on safety testing
New	The amount of time freight train interference delays an Amtrak train from entering CN's line when that Amtrak train arrives at an entry point to a CN line more than 15 minutes after its scheduled arrival time without Amtrak or another host railroad having provided CN with notification of such late arrival at least 30 minutes in advance. (A.1.e(5)).	Amtrak at fault if no notice when arriving out of slot
New	If an Amtrak train is operating 10 or more minutes late when it arrives at an entry point on IC's Joliet Subdivision, the amount of time commuter train interference delays the Amtrak train from entering or operating over IC's Joliet Subdivision. (A.1.e(6)).	Unavoidable delay if Amtrak arrives out of slot behind Metra
Existing, App. V. (IC) and App. VI (GTW)	The amount of time a trip of an Amtrak train is delayed at interlockings not controlled by CN, after CN's dispatcher has transmitted the electronic indicator lining the signals for the CN route. (A.1.g).	No CN control or fault – requires signal request
Existing, App. V. (IC); Amtrak Proposed Redline, App. V (9/14/2017)	The amount of time a trip of a train is delayed due to the operation of an Amtrak Special Train or a detour train. (A.1.h).	Delay based on Amtrak issue
Existing, App. V. (IC); Amtrak Proposed Redline App. V (9/14/2017)	The amount of time by which the trip of a train is delayed by the movement of Amtrak maintenance of way trains. (A.1.i).	These non-passenger trains move at CN's discretion; CN should not be penalized if delay results

Source (same or similar provisions)	Description & Location in Operating Agreement (Subsection in App. V, Sec. A.1.)	Why Needed?
Existing, App. VI. (GTW) (Modified); Amtrak Proposed Redline App. V (9/14/2017)	In single track territory on the GTW Lines, and also for (i) Battle Creek Station, (ii) GTW trackage between Baron and Gord, and (iii) the Conrail CN West Detroit Connection, the first 15 minutes of delay to a trip of a train due to meeting another Amtrak train. (A.1.j).	Line specific issue reflects negotiated solution between parties
Existing, App. VI (GTW): Amtrak Proposed Redline App. V (9/14/2017)	The amount of time a trip of a train is delayed at Wesson Street in Pontiac, MI (i) for causes reported as “lining switches, derails, slow gates,” or similar variants or (ii) or due to such causes. (A.1.k).	Line specific issue negotiated between the parties (avoid coding errors)
New	The amount of time by which the trip of a train is delayed by operating restrictions, including without limitation slow orders, imposed to address safety issues related to Amtrak’s equipment. (A.1.l).	Delay based on Amtrak equipment issue (clarify proper attribution)

These changes are important in order to properly assign responsibility for delays, and also as clarifications that will reduce future coding disputes between the parties, in light of Amtrak’s frequently inconsistent and inaccurate coding.¹³

Apart from attaching the outdated 2017 statement of Messrs. Vilter and Maga, Amtrak’s Reply makes no serious effort to show that CN’s proposed changes to “relief items” are unreasonable or unnecessary. We discuss in Subsection I.A.1.b., above, why there is no basis for Amtrak’s complaints about the treatment of efficiency testing and MOW under CN’s proposal. The other relief item Amtrak cites disapprovingly covers “slow orders imposed to address safety issues related to Amtrak’s equipment.”¹⁴ *See, e.g.,* Amtrak Reply Br. (PID) at 11.

Amtrak fails to explain that the need for such safety slow orders at road grade crossings was prompted by Amtrak’s use of single-level equipment that does not adequately shunt

¹³ Amtrak’s failure to code consistently and accurately has been described in detail in various of CN’s prior submissions. *See, e.g.,* VS (PID) Matteucci/Kuxmann at 30-34, 39-40, 62 n.136.

¹⁴ The applicable relief item for safety slow orders is found in CN Proposed Operating Agreement (Rev’d), App. V, Sec. A.1.l.

roadway grade crossing warning devices, delaying their activation (the “short shunt” issue). *See* Rebuttal VS Matteucci/Kuxmann ¶ 33 & n.6. The use of slow orders for safety in this situation is not optional – it prevents Amtrak crossing accidents – and is broadly supported by the team investigating short shunt delays, including FRA, Amtrak, and other Class I railroads. Rebuttal VS (PID) Matteucci-Kuxmann ¶ 33. In any event, Amtrak can control whether or not this slow order must be imposed by its own choice of equipment, and for the past year or two Amtrak has generally been using double-level equipment to which no slow order applies. If Amtrak reverts to prior equipment assignments or otherwise uses non-conforming equipment that requires a slow order for safe operation, the resulting delays should not be counted against CN.

Amtrak finally says CN’s relief items are overly complex and will invite disputes. Amtrak Reply Br. (PID) at 17-18. Precisely the opposite is true. A key purpose of the relief items in Appendix V and added notes to Amtrak’s delay codes in Appendix XI is to avoid repeated errors in Amtrak coding and to clarify areas of ambiguity in order to eliminate disputes. Further, the parties have a long history of using relief items, including now, without any undue administrative burden.

Amtrak tries to contrast this process to FRA’s use of Customer OTP to determine on-time arrival (*id.* at 18), but that is the wrong comparison. Amtrak overlooks the fact that its HRD-based proposal involves detailed coding and dispute resolution. In order to reasonably determine responsibility for delays, both Amtrak’s and CN’s proposals require a process for review and correction of delay attribution.

Amtrak’s other complaint is that “continued inclusion of Recovery Time Base (‘RTB’)” creates “unnecessary complexity and administrative burden.” *Id.* CN closely followed the Board’s guidance and revised the RTB based on the percentage of actual delays in specific

segments. It presented the results integrated directly into individual train schedule skeletons and provided complete workpapers, making the process entirely transparent. There was nothing particularly complex about that process, and Amtrak has identified no fault in it.

Instead, Amtrak implies that the Board is required “to vet” CN’s work, but that was Amtrak’s job as a litigant, not the Board’s. Amtrak also complains about the potential burden of updating the RTB, but there is no reason to anticipate that the RTB would need to be modified over the life of the agreement, and if it does, it can readily be recalculated.

d) The “DNC” (do not count) provision is well grounded, has long been accepted, and affects only a very small fraction of trains.

The “Do Not Count” or “DNC” provisions in the Operating Agreement exclude certain train runs from the determination of incentives/penalties if they are cancelled/annulled or experience disruptive extraordinary delays. CN has explained these provisions’ importance and the minor changes it proposes to them. *See, e.g.*, CN Opening Submission (PID) at 59-63. In its Reply, Amtrak claims that the existing DNC provisions cover some circumstances CN can control, and that not counting each train that starts or is scheduled to start is inconsistent with FRA’s Customer OTP metric. Amtrak Reply Br. (PID) at 18-20. Amtrak’s arguments are not focused on the minor changes to the DNC provision proposed by CN, but on provisions that Amtrak itself agreed to when it entered into the existing Operating Agreement and even prior agreements. Moreover, at least with respect to a checkpoint system, this is a direct reversal of position by Amtrak, which in the previous round of evidence and argument [REDACTED]

[REDACTED]. *See* VS (PID) Matteucci-Kuxmann, Ex. 4 (Amtrak’s redline to CN’s revised operating agreement, App.V, Sec. B.4).

It should first be noted that Amtrak's complaints about the DNC provisions is a tempest in a teapot. Of the 3,152 Amtrak trains that ran over CN's IC lines in 2021, a DNC was applied to only 68 (less than 2.2%). The DNC provisions have obviously not been a source of abuse or major controversy.

In any event, Amtrak's complaints are baseless and speculative. For example, Amtrak speculates that a delay due to an emergency vehicle could "be as a result of an issue that has been directly *caused* by CN," (Amtrak Reply Br. (PID) at 19), or a broken rail that occurs in connection with severe weather could be attributable to a failure to inspect or repair (*id.*), ignoring that CN's inspection and repair procedures must follow FRA regulations. Amtrak even argues CN should be responsible for vandalism to crossing signals or gates, because CN may have failed to repair the damage. *Id.* at 20. These speculations ignore the reality that emergencies, severe weather, and vandalism are unplanned events that affect CN no less than Amtrak, and that CN has every incentive to rapidly repair its key infrastructure any time there is an outage that interferes with the operation and use of its rail lines. It would be an absurd waste of time to inquire into the record of inspections or repairs related to such events.

More broadly, while one can always spin out wild theories, general provisions in the Operating Agreement should accept (as the parties have for years) that in some scenarios, it is appropriate to adopt a neutral stance toward whether or not a particular run of a train should be counted as a "on time" or late.

Amtrak also complains that DNCs do not "specify how long an Amtrak train must be delayed," and that they could include "an Amtrak train held by civil authorities for *five minutes*." Amtrak Reply Br. (PID) at 20. The types of events covered by the DNCs are not short-term interruptions, however; they are major disruptions that cause trains to stop, including pedestrian

strikes, crossing accidents, emergency vehicle blockages, acts of terrorism, and major weather events such hurricanes and tornadoes. Their rarity underscores that they are not applied to minor delays.

Finally, there is also no merit to Amtrak's argument that the continued use of DNCs in an operating agreement clashes with FRA's adoption of a Customer OTP standard. Amtrak's argument once again confuses the purpose of Customer OTP, which is to measure the performance of Amtrak's trains, and the purpose of incentive/penalty provisions of the Operating Agreement, which are intended to measure CN's contribution to Amtrak's performance. It is entirely consistent with the purposes of the incentive/penalty provision to exclude – as the DNC provisions do – extraordinary circumstances and delays that could otherwise distort the measure of host performance.¹⁵ As DNCs are small in number, they can be large in individual effect. Failure to exclude them would needlessly distort the performance metrics under the agreement.

2. CN's proposal properly accounts for CN delays that may affect OTP at stations off its lines, whereas Amtrak's proposal wrongly makes CN responsible for OTP at stations on other hosts.

Amtrak claims that CN's incentive/penalty proposal fails to account properly for stations on other hosts for multi-host services in which CN participates. Amtrak Reply Br. (PID) at 22-29. In fact, CN's proposal does account for off-line stations, and it does so in a far more rational and efficient manner than Amtrak's proposal.

¹⁵ Further, the DNCs cover circumstances in which a train did not run at all (i.e., it was annulled or cancelled) and therefore would not and could not be counted either toward Customer OTP or for incentives/penalties. In such cases, DNCs necessarily reflect the fact that there is no record of performance.

Amtrak's proposal adopts Customer OTP – applicable to a train's entire route, across all hosts – as a multiplier for CN's incentives/penalties. Customer OTP does not determine whether a host earns incentives or penalties under Amtrak's proposal; it only changes the amount. As CN has previously discussed, there are two fundamental problems with Amtrak's approach. CN Reply Submission (PID) at 48-50; RVS (PID) Matteucci/Kuxmann ¶¶ 63-65. First, use of overbroad Customer OTP introduces irrelevant information into the determination of CN's incentives/penalties, diluting its efficacy, fairness, and value. Second, Amtrak's rote multiplication of separately determined incentives/penalties by Customer OTP entirely fails to measure or integrate CN's actual influence on Amtrak's OTP in determining incentives penalties.

Two examples illustrate the deficiency of Amtrak's approach:

- Because Amtrak's proposed HRD standard is untethered from CN's contribution to OTP, Amtrak's incorporation of Customer OTP as a multiplier will incongruously result in *increasing* penalties on CN as Customer OTP rises, and *decreasing* penalties as Customer OTP falls. This is the exact opposite of faithfully integrating the concept of Customer OTP.
- For the 4 of 6 Amtrak services hosted by CN that run for the majority of their routes on other hosts (the Blue Water, Wolverine, Lincoln, and Texas Eagle services), the level of incentives and penalties for trains received by CN will depend on OTP at stations prior to ever reaching CN. Texas Eagle train #22, for example, originates in San Antonio, Texas, and travels approximately 1,270 miles before reaching CN at Joliet, Illinois, with over two dozen station stops along the way. Rather than focus on CN's influence over OTP for the one station that follows (Chicago), Amtrak's proposal would hold CN responsible for Amtrak performance to all of the preceding stations that had nothing to do with CN's performance.

By contrast, CN's proposal appropriately focuses first and foremost on delays within its control to Amtrak passenger trains at stations on its lines. However, in order to account for downstream stations that may be affected by CN's performance, CN's proposal goes further, and where the endpoints of its route are not a station, CN uses those endpoints as an additional checkpoint. CN Opening Submission (PID) at 20. This assures that any late handoffs from CN that could affect subsequent Amtrak stations are accounted for. This is the same approach Amtrak took in its alternative checkpoint proposal in the earlier phase of this proceeding.¹⁶ Amtrak is therefore incorrect in claiming that CN's proposal does not account for its effects on OTP downstream from its lines.¹⁷

¹⁶ See Rebuttal Joint VS of Vilter/Maga at 39-40 ("CN's Performance Should be Measured at All Amtrak Stations and Exit Points **on CN Lines**") (emphasis added), attached as Exhibit 3 to RVS Blair. See also VS (PID) Matteucci-Kuxmann, Ex. 4 (Amtrak's redline to CN's revised operating agreement, App.V, Sec. A (

) Amtrak filed the referenced redline for its alternative checkpoint proposal on September 14, 2017, as part of its original reply submission. The Appendix II schedule skeletons in effect at that time, which are referenced in Amtrak's redline, are attached as Exhibit 1 to the Joint Rebuttal VS (PID) of Messrs. Matteucci and Kuxmann. They include as checkpoints only the stations on CN's lines, not those on the lines of other hosts.

¹⁷ One can debate the appropriate relative weight to be assigned to endpoint checkpoints preceding multiple downstream stations versus other checkpoints, but for most of CN's services this makes no difference. Under CN's proposal, a final checkpoint on CN is weighted in accordance with actual ridership when that checkpoint is a station, and when it is not, it is weighted based on the next passenger station on the receiving host's lines. CN's proposal would fully weigh all stations for its two largest services – the Illini/Saluki and City of New Orleans services – and there is no relative weighting issue for the Texas Eagle trains or for train #301 of the Lincoln service, as they have only a single checkpoint (i.e., their endpoint), avoiding any weighting issues. Further, there is no meaningful weighting issue for the other Lincoln service trains. Each has only two checkpoints, and their endpoint checkpoints are already uniformly weighted at above 90%.

In any event, CN's approach to weighting for the two services where that issue is even relevant – the Blue Water and Wolverine – is rational and efficient. Overweighting endpoints for these services would devalue earlier stations, and giving equal weight to all downstream stations

Amtrak disputes that “measuring OTP only at those stations on [CN’s] system” is consistent with the Interim Decision. Amtrak Reply Br. (PID) at 22. “To the contrary,” it claims “the Board found that an appropriate OTP metric in a new OA would measure ‘whether all passengers arrived on time’ at *all stations* along the route in its entirety – not just on those stations on CN’s system.” *Id.* (quoting Interim Decision at 10). *See also id.* at 1-2 (making the same argument, and citing the Interim Decision (at 11) to the effect that “passenger experience at *all* Amtrak stations on a route should be the focus of an OTP metric in a new OA”). Amtrak is flatly wrong.

In citing the Board’s discussion of this issue at page 11 of the Interim Decision, Amtrak wrongly assumes the Board’s reference to “route” means the full multi-host route, including the portion off CN’s lines. But in context, it is evident that the Board was speaking approvingly of including all stations **on CN’s lines**, not the routes of other hosts. The entire debate between the parties was over how more checkpoints on CN’s lines might be added – neither party suggested the addition of all checkpoints off CN’s lines. Ultimately, the Board stated that it found reasonable the addition of checkpoints “generally consistent with the alternative proposed by Amtrak.” Interim Decision at 11 n.26. As discussed above, Amtrak’s alternative was the addition only of checkpoints for stations on CN’s lines. *See* note 14, above (citing Rebuttal Joint VS of Vilter/Maga at 39-40 (“CN’s Performance Should be Measured at All Amtrak Stations and Exit Points on CN Lines”).¹⁸

makes no sense because CN’s contribution to on-time arrivals for downstream stations on other hosts becomes progressively attenuated. Nonetheless, if the Board believes additional weight should be accorded endpoint stations for those services, CN would be amenable to such a change.

¹⁸ Amtrak’s erroneous interpretation similarly undermines its other arguments concerning the guidance in the Interim Decision. (Amtrak, for example, wrongly suggests the Board’s

Amtrak also reprises its argument that FRA’s adoption of Metrics and Standards, which was for an entirely different purpose, under an entirely different statutory provision, dictates the outcome of this proceeding. In its Reply, Amtrak makes an even more extreme and irrational version of that argument, now claiming that “the Board may not impose terms inconsistent with or contrary to the Final Rule” (Amtrak Reply Br. (PID) at 7), which Amtrak apparently interprets as requiring direct incorporation of full-route Customer OTP and adoption of an HRD minutes per 10,000 train-miles standard not found in the Metrics and Standards.

Amtrak’s argument is wrong as a matter of law. Its view would render the qualifying language of Section 207 of PRIIA – “to the extent practicable” – a nullity. The Board must adhere to the “reasonableness” standard of Section 402 of the RPSA, and given the qualifying language of Section 207, it clearly has the discretion to reject Amtrak’s poorly designed proposal. If Section 207 required rote adoption of whatever was in the FRA’s rule, much of this proceeding would have been a waste of time. The Board and the parties could have simply awaited conclusion of the Metrics and Standards rulemaking. But that’s not what the statute says, not what the Board did, and not the position Amtrak advocated, despite its direct participation with FRA in the Metrics and Standards rulemaking.

Further, as noted in Section I.A.1.a., above, FRA does not share Amtrak’s view. It has stated unequivocally (85 Fed. Reg. at 72,976), “this final rule does not require a change to the performance incentive payment provisions in [Amtrak-host] operating agreements.”

concerns with accounting for all Amtrak passengers were focused on stations off CN’s routes, rather than stations along CN’s route. Amtrak Reply Br. (PID) at 22.) Read correctly in context, the Board’s references to providing incentives for service to additional stations and passengers along the “route” must similarly be understood as referring to the relevant route – the one for which CN is host.

In any event, even if Amtrak's argument were correct, it would not support adoption of its incentive/penalty proposal. As CN has discussed at length (*see* CN Reply Submission (PID) at 62-83), Amtrak did not adopt all relevant metrics from the FRA Metrics and Standards; it ignored the host running time metric (*see* 49 C.F.R. § 273.5(g)), as well as other metrics, and it created an HRD standard of 924 HRD per 10,000 miles, which FRA neither supported nor adopted.¹⁹ CN's proposal, by contrast, rationally incorporates all three key metrics in the FRA Metrics and Standards – including Customer OTP, adjusted to focus on CN's portion of each train's total route and to discount delays not properly attributed to CN, so that incentives/penalties under CN's proposal closely align with CN's contribution to Amtrak's relevant OTP performance. CN's proposal thereby more faithfully integrates the elements and principles underlying FRA's Metrics and Standards than does Amtrak's.

3. There is no basis for Amtrak's attack on the very "degree of lateness" provision it proposed, the Board recommended, and CN includes in its proposal, and there is no excuse for Amtrak's own failure to include any "degree of lateness" factor in its own proposal.

Amtrak makes the remarkable argument that the Board should reject CN's proposed incorporation of a "degree of lateness" provision as part of its incentive/penalty proposal – even though Amtrak itself proposed a substantively identical provision²⁰ and the Interim Decision (at 14) found merit in it. Amtrak Reply Br. (PID) at 32-34. Its argument, however, merely

¹⁹ FRA established various metrics to track "train delays," but adopted no standard by which to judge those delays as either high or low.

²⁰ Despite Amtrak's misleading emphasis on CN's degree of lateness being based on "minutes above . . . 'tolerance'" (Amtrak Reply Br. (PID) at 33), Amtrak cannot and does not argue that there is a substantive difference between CN's and Amtrak's proposals. Amtrak's proposal references [REDACTED]

[REDACTED] See Amtrak's redline to CN's revised operating agreement, App.V, Sec. D, n.3 (attached to VS (PID) Matteucci-Kuxmann as Exhibit 4).

highlights the inconsistency of its own current proposal with the Interim Decision and the absurdity of Amtrak's position that all prior consideration of how to refine the incentive/penalty provisions of the Operating Agreement must be jettisoned in light of FRA's adoption of a variety of Metrics and Standards for a different purpose.

Based on Amtrak's own prior arguments, the Interim Decision was concerned that CN continue to be incentivized to avoid additional delays for Amtrak trains that had already been so delayed it was clear they would be late, and thus count against CN for purposes of incentives/penalties. As part of its alternative checkpoint proposal, Amtrak proposed [REDACTED]. See Amtrak's redline to CN's revised operating agreement, App.V, Sec. D (attached to VS (PID) Matteucci-Kuxmann as Exhibit 4). In the Interim Decision (at 14), the Board found "merit to Amtrak's argument regarding impacts of the current system not incorporating a degree of lateness factor," and it determined "the parties should incorporate the degree of lateness into their penalty calculation in some manner, perhaps through a degree-of lateness multiplier in the penalty provision, or in another manner to which the parties agree."

As CN explained in its Opening Submission, in accordance with the Board's guidance, and in accordance with Amtrak's own alternative checkpoint proposal, CN proposed adoption of a degree of lateness provision that was [REDACTED]. That provision may be found in Section C.3 of Appendix V of CN's Proposed Operating Agreement.²¹

²¹ Based on the same principles, CN likewise proposed a timeliness multiplier (see CN Proposed Operating Agreement (Rev'd), App. V, Sec.B.3), which Amtrak has not opposed.

Amtrak now attacks [REDACTED] as supposedly inconsistent with the FRA's Metrics and Standards. But again, the FRA Metrics and Standards were not developed for the purpose of measuring a host's contribution to Amtrak's OTP, and they do not purport to do so. By contrast, the Board is charged with considering the appropriate elements of the incentive/penalty provisions to be included in the Amtrak/CN Operating Agreement, and it found that including a lateness multiplier has merit. Only CN's proposal does so.

Amtrak argues that its use of an HRD per 10,000 train-miles standard for awarding incentives and penalties should be considered an equivalent lateness multiplier, but it clearly is not. As CN has pointed out, one of the great failings of Amtrak's proposal is precisely that it does not consider the individual effects of delays on the OTP of individual trains. Its HRD per 10,000 train-miles standard is not a lateness multiplier; it is only a delay "accumulator." It totals supposed host-responsible delays without any regard to whether those delays are related to early or late trains, and thus does a poor job of matching actual host contribution to OTP with incentives/penalties.

B. Amtrak's Proposed Changes to the "Lookback" Provision Would Reduce or Eliminate CN's Positive Incentives to Provide High Quality Service and CN's Opportunity to Cover Its Incremental Costs of Hosting.

The "lookback" provision in the current Operating Agreement, like that in the 1995 Operating Agreement before it, provides that penalties assessed against CN in any month cannot exceed the amount of incentives earned by CN, and not previously set off against incentive payments, during the preceding 12 months (the "look back" period). In 2011, the parties added the further provision that incentives and penalties be considered separately for each of three

categories of trains operating on IC,²² and that penalties assessed in any one category be capped at the total amount of incentives earned in that category during the 12-month lookback period.²³ This limits the impact of extreme but atypical poor performance in one service, or in related services in a single category, so that CN would retain a financial incentive to ensure good performance by the trains in the other categories.

Amtrak initially proposed eliminating the lookback provision entirely, but the Board rejected that proposal.²⁴ Amtrak's new proposal would extend the lookback period to equal the full term of the new Operating Agreement and, although Amtrak has yet to acknowledge it, eliminate the use of separate service categories for purposes of applying the lookback provision.²⁵

CN has previously explained that the lookback provision plays an important role helping to assure that CN at least has an opportunity to be compensated for the incremental costs of hosting Amtrak and to provide CN with meaningful incentives to provide high quality service to Amtrak, and that Amtrak's proposal undermines the lookback provision in both respects.²⁶ Amtrak's responses lack merit.

Amtrak argues first, without a shred of support, that the "lookback" provision is contrary to the requirement that Amtrak-host operating agreements "include a penalty for untimely

²² Those categories are: (1) the City of New Orleans (Train Nos. 58 and 59); (2) the Chicago-Carbondale trains (Train Nos. 390, 391, 392, and 393); and (3) Chicago-Joliet trains (Train Nos. 21, 22, 300, 301, 302, 303, 304, 305, 306, and 307). Operating Agreement, App. V, Sec. D.

²³ Operating Agreement, App. V, Sec. D).

²⁴ Interim Decision at 16.

²⁵ See Amtrak Opening Br. (PID) 61-66; Amtrak Reply Br. (PID) at 48-50.

²⁶ CN Reply Submission (PID) at 54-59.

performance.”²⁷ In other words, Amtrak claims that everyone – Amtrak, all freight hosts, the Board, and the ICC before it – has been doing it wrong for decades.²⁸ As evidenced by Board precedent and Amtrak-host longstanding practice, however, the lookback provision is not contrary to the penalty requirement, it simply balances the penalty provision with the statutory requirement that hosts be paid no less than their incremental costs. (Moreover, Amtrak’s own lookback proposal fails to implement the statutory penalty mandate because it implements Amtrak’s HRD-based system of incentives and penalties. As CN has explained (*e.g.*, CN Reply Submission (PID) at 26-27), that system penalizes not “untimely performance,” as required by the statute, but any delays that are unilaterally characterized by Amtrak as “host-responsible,” whether or not they cause late arrival of Amtrak’s trains.)

Amtrak further argues that a 12-month lookback period could fail to incentivize CN through penalties when it operates to prevent their application (*i.e.*, if there are no net incentives left to offset additional penalties).²⁹ According to Amtrak, this means a longer lookback period is necessarily better. It claims that allowing incentives to be clawed back over the entire life of the agreement should be of no concern to CN, because it could still “immediately collect incentives that it properly earns.”³⁰ Finally, it claims that including any lookback, including one that extends for the entire term of the agreement, fully protects CN from the “risk of receiving

²⁷ See 49 U.S.C. § 24308(a)(1).

²⁸ When Amtrak proposed a lookback provision in *Metro-North II* (decided in 1985), it made no suggestion that its proposal was in tension with the penalty requirement, which had been part of the statute since 1981. See *Nat’l Rail Passenger Corp. Application Under Section 402(a) of the Rail Passenger Serv. Act*, Finance Docket No. 30426, 1985 ICC Lexis 318, at *1 (ICC July 5, 1985) (“*Metro-North II*”); *cf.* Amtrak Improvement Act of 1981, Pub. L. No. 97-35, tit. XI, subtit. F, § 1181, 95 Stat. 357, 687, 693.

²⁹ Amtrak Reply Br. (PID) at 49.

³⁰ *Id.*

compensation that is less than its ‘incremental costs’ (which was the Board’s expressed concern).”³¹

Amtrak’s arguments miss the forest for the trees. Its sole focus is on maintaining the ability to impose net penalties, but that should be a rarity under any properly functioning operating agreement and it has been a rarity under Amtrak/CN operating agreement. Moreover, a key purpose for CN’s proposed reopener is to assure that if net penalties accrue for sustained period of time, the parties will confer and develop solutions that will make the Operating Agreement work more effectively and avoid any absence of incentives. *See* Section I.C, below. Ironically, Amtrak opposes such a reopener, while it claims to be concerned about potential sustained net penalties.

The Board’s predecessor has affirmed that an operating agreement with a well-designed compensation system is one that gives the host railroad a reasonable opportunity to earn incentive payments. In a decision regarding compensation to be paid Union Pacific Railroad Company for hosting Amtrak, the Board set 80% as the OTP threshold for incentive payments on the ground that, among other reasons, a higher threshold “might well prove counterproductive, if the level were so high that meaningful bonuses could not be earned, in which case the railroad would have little or no incentive to surpass the baseline.”³² As that decision indicates, a well-designed system will rely primarily on positive net incentive payments to motivate the host’s performance. By contrast, Amtrak’s proposal appears calculated, not so much to preserve CN’s

³¹ *Id.*

³² Nat’l R.R. Passenger Corp. & Union Pac. R.R., Use of Tracks & Facilities & Establishment of Just Comp., 348 I.C.C. 926, 950 (1977) (“UP”).

incentives to provide good service to Amtrak, as to minimize any possibility that Amtrak might have to pay any net incentive payments over the life of the Agreement.³³

More to the point, the way to assure adequate compensation and incentives for CN to provide high-quality service is not to place all incentives at perpetual risk throughout the term of the operating agreement. Amtrak's claim that its proposal would eliminate the "risk" of CN receiving less than full incremental costs for hosting Amtrak is wrong, as CN must earn positive incentives to do so, since the Operating Agreement does not provide for compensation of incremental costs not specifically identified. Similarly, it makes no sense to claim that CN will somehow be incentivized because it can "collect" incentives even though it knows they can be clawed back (and under Amtrak's incentive/penalty proposal that is heavily weighted to penalties likely will be clawed back). Under such a system, the host "would have little or no incentive to surpass the baseline," *UP*, 348 I.C.C. at 950, and would rationally seek only to earn its base compensation, devoting its resources to more promising uses. Amtrak's proposal is a recipe for a dysfunctional CN-Amtrak relationship.

Amtrak also proposes an important additional change that it neither acknowledges nor supports in its Opening Submission or its Reply Submission, and which should therefore be rejected. It would eliminate the use of separate categories of Amtrak trains for purposes of pooling net incentives and net penalties. As CN argued in its Reply Submission (PID) (at 104-05)³⁴, any such unsupported proposals for changes in the Operating Agreement should be

³³ This is far from merely a theoretical speculation, given Amtrak's proposal for calculation of incentives and penalties primarily on the basis of "host-responsible delays," as defined and determined by Amtrak. That proposal virtually guarantees that the new Operating Agreement, immediately upon taking effect, would subject CN to massive penalties. CN Reply Submission (PID) at 42-47, 52-53.

³⁴ CN Reply Submission (PID) at 104-05.

rejected out of hand. Amtrak's goal in eliminating these separate categories appears simply to be maximizing its ability to eliminate incentives through penalties. But the purpose and effect of applying the lookback individually to specific services is to assure that service failures for one service do not result in a loss of incentives for another. This efficient siloing, which was agreed to by Amtrak when the Operating Agreement was renegotiated in 2011, in order to more closely align performance payments and penalties with individual services, should be retained. *See* Rebuttal VS Ladue/Kuxmann ¶ 59.

In sum, CN's proposed lookback provision, unlike Amtrak's, is designed to offer the prospect not only of earning incentive payments, but also of keeping them, and thus to motivate appropriate CN conduct in administering the Operating Agreement. It signals to CN that incentives earned in one year will not be taken away because of unexpectedly bad performance in another year, and that incentives earned on one category of Amtrak trains will not be taken away because of unexpectedly bad performance for another train category. It should be prescribed in the new Operating Agreement to govern CN's future hosting of Amtrak's trains.

C. The Board Should Approve CN's Reopener and Reject Amtrak's Tiered Intervention Provisions for Dispatching and Scheduling Maintenance-of-Way.

In its Interim Decision, the Board encouraged CN and Amtrak to include a reopener provision in their Operating Agreement to address "sustained poor performance" that, given inclusion of a "lookback" provision, could result in CN having no performance incentives.³⁵ Instead of heeding this guidance, Amtrak has proposed a punitive, three-tier scheme under which Amtrak could (i) oversee and eventually take over dispatching of any train (and thus of any CN

³⁵ Interim Decision at 16-17.

rail segment over which that train operates) incurring what Amtrak characterizes as excessive HRD, and (ii) veto any maintenance-of-way or right-of-way projects that can be “reasonably expected” to affect an Amtrak train’s OTP.³⁶ CN, on the other hand, has proposed a true reopener. The Board should adopt CN’s reopener proposal.

1. Amtrak’s Proposed “Reopener” Is No Such Thing, and Inappropriately Intervenes In Critical Railroad Functions Based Solely on An Unsupported “Standard” Using a Disputed HRD Measure.

Amtrak’s tiered intervention provision is not a true “reopener” and is unlawful, unreasonable, and unsound, as discussed in CN’s Reply Submission (PID), Section III. Amtrak’s new claims only highlight this proposal’s utter lack of foundation.

Amtrak’s reply doubles down on its claim that CN and other hosts are failing to give it preference and are solely responsible for any failure to meet its Customer OTP standard. It refers to “CN’s culpable conduct” and states that CN’s “misconduct” primarily takes the form of faulty dispatching decisions.³⁷ These claims are baseless. Amtrak cites a fragment from an old report of the Department of Transportation’s Inspector General (“IG”) as if it proves Amtrak’s claim of widespread host violations of preference.³⁸ But the cited report did not find evidence of preference violations. It merely noted that host railroads “*can* adjust their dispatching practices” to favor their own trains³⁹ – not that they did so. Amtrak’s misplaced reliance on the IG report

³⁶ Amtrak Proposed Operating Agreement (PID), App. V, Sec. IV.2.a.3.

³⁷ Amtrak Reply Br. (PID) at 36, 44 (emphasis omitted).

³⁸ Amtrak Reply Br. (PID) at 36 n.29 (*quoting Union Pac. R.R.*, 863 F.3d at 820 (*quoting* Fed. R.R. Admin., Root Causes of Amtrak Train Delays, Rept. No. CR-2008-076, at 4 (Sept. 8, 2008))).

³⁹ Fed. R.R. Admin., Root Causes of Amtrak Train Delays, Rept. No. CR-2008-076, at 4 (Sept. 8, 2008) (emphasis added) (*quoted in Union Pac. R.R. v. STB*, 863 F.3d at 820 (*quoted in* Amtrak Reply Br. (PID) at 36 n.29))).

underscores the lack of evidence for its foundational claim in support of its proposed tiered intervention.

In a similarly misleading vein, Amtrak quotes its current chief executive officer, Stephen J. Gardner, who states “the largest cause of delay to our customers is ‘freight train interference,’ typically caused by a freight railroad requiring an Amtrak passenger train to wait so that its freight trains can operate on the tracks ahead.”⁴⁰ But the data tell another story. As can be seen from Table 4, freight train interference (“FTI”) is a small part of total Amtrak delay for services on CN’s lines. Moreover, it is also a small subset of HRD. And when FTI is adjusted to exclude delays due to cross traffic at interlockings CN does not control (so that it better reflects actual CN dispatching), for most services it becomes a very small subset of total delays (4-15%) and for some services a much smaller subset of HRD (as little as 4%).

Table 4 Breakdown of HRD and Total Delay (2021)					
Service	% of HRD		% of Total Delay		
	FTI	FTI Minus Cross Traffic	HRD	FTI	FTI Minus Cross Traffic
Blue Water	73%	73%	19%	14%	14%
City of New Orleans	36%	36%	42%	15%	15%
Illini/Saluki	27%	24%	64%	17%	15%
Lincoln Service	69%	5%	84%	58%	4%
Texas Eagle	78%	4%	94%	73%	4%
Wolverine	21%	17%	35%	8%	6%

NOTE: "Cross Traffic" means only cross traffic coded by Amtrak as CN FTI at interlockings controlled by non-CN railroads.

⁴⁰ Amtrak Reply Br. (PID) at 59.

These data forcefully rebut the notion that FTI is the major cause of Amtrak's delays on CN's lines or of deficiencies in Amtrak's Customer OTP. And they undermine Amtrak's effort to treat HRD – whatever its level – as an indicator or proof of a preference violation that justifies its imposition of large penalties or its proposed tiered intervention based on its unsupported HRD per 10,000 mile standard.

2. CN's reopener provides for concrete action to promptly and efficiently address any extended period of poor performance.

The Interim Decision called for a reopener to “acknowledge[] and address[], as appropriate” “periods of sustained poor performance” in a manner that will “result in concrete action in order to resolve potential future performance disputes and to prevent sustained poor performance” (Interim Decision at 17). Contrary to Amtrak's assertion,⁴¹ that is what CN's proposed reopener does. It adopts the Board's suggestion that the reopener provide for referral to the Board's Rail Customer and Public Assistance (“RCPA”) office, and it provides for “concrete action” in the form of arbitration under Article VI of the Operating Agreement if the parties are at impasse.⁴²

In its Reply, Amtrak makes misleading and unfounded attacks on the trigger, timing, and concrete action under CN's proposed reopener.

CN's reopener is appropriately triggered by a sustained excess of performance penalties over incentive payments. When the Board encouraged the parties to address “periods of

⁴¹ Amtrak Reply Br. (PID) at 42.

⁴² The certainty that the process proposed by CN will result in concrete action, either by agreement of the parties or by order of an arbitrator, distinguishes CN's current reopener proposal from the one that it offered in the earlier phase of this proceeding. *Compare* CN Proposed Operating Agreement (Rev'd), App. V, Sec. G *with* CN Rebuttal Submission, Ex. 1 at 42 (filed Jan. 19, 2018) (CN Proposed Operating Agreement (2018 version) § 8.13).

sustained poor performance,” it was responding to Amtrak’s concern that a lookback provision would create a “perverse disincentive,” allowing CN performance to deteriorate to the point where CN would have no effective incentive to improve its performance.⁴³ CN’s reopener proposal is triggered by exactly that situation.

Amtrak responds that CN’s proposed trigger does not apply when “CN’s incentive payments . . . *exceed penalties* for a route even though Amtrak trains are frequently arriving *after* their scheduled arrival times (perhaps long after it [*sic*]).”⁴⁴ This amounts to an unjustified attack on the Operating Agreement’s use of “relief items,” discussed in Section I.A.1.c, above, which appropriately provide that CN may be credited with on-time arrival of a train that arrives at a checkpoint later than its scheduled arrival time *when CN is not the cause of that late arrival*.

Amtrak also says CN’s reopener “unreasonably postpones implementing any action”⁴⁵ In fact, CN’s proposal appropriately treats six months as a “sustained period” of “Deficient Performance,” and then requires swift movement to define the issues, escalate dispute resolution, and finally permit binding arbitration (those steps, the “Remedial Process”).⁴⁶ Only after about a six-month period is there any serious threat that performance penalties may exceed incentive payments for a full 12 months so that the lookback may be invoked against the application of additional penalties. Initiating action prior to that would be premature and inefficient.

⁴³ *E.g.*, Amtrak Opening Statement at 10 (filed Sept. 4, 2015).

⁴⁴ Amtrak Reply Br. (PID) at 38.

⁴⁵ Amtrak Reply Br. (PID) at 39 (initial capitals omitted).

⁴⁶ Amtrak faults CN’s proposal for including referral to RCPA as part of the Remedial Process. Amtrak claims that providing for such referral is “duplicative” of the provisions requiring the parties to first consult with each other on their own (Amtrak Reply Br. (PID) at 45), even though CN included that proposal under the specific guidance of the Interim Decision (at 17).

Amtrak exaggerates the timing of the reopener by including the period prior to a party's invocation of the reopener and by repeatedly and misleadingly referring to maximum time periods ("as much as") even when Amtrak can itself force action without delay.⁴⁷ Amtrak is free to launch the Remedial Process by serving a notice of Deficient Performance *immediately* after the initial six-month period (i.e., it need not wait the maximum two months, which it includes in its timing argument). Following that notice, the steps in the Remedial Process come in rapid succession, so that in as little as 95 days, either party may initiate arbitration under Article VI of the Operating Agreement to compel concrete action if agreement has not been reached by then.

While CN's Remedial Process would investigate the causes of deficient performance under the Operating Agreement, Amtrak insists that no such investigation would be required, as "CN's culpable conduct" would already be "known to be the cause of Amtrak's poor performance"⁴⁸ Amtrak's prejudgment of the issue undermines its arguments. Particularly given the changes being proposed to the operating agreement, there are a variety of factors that could lead to CN failing to earn positive net incentives over a sustained period. If the parties are to make a serious effort to find remedies for that failure, they must be allowed to raise relevant issues.⁴⁹

⁴⁷ See, e.g., Amtrak Reply Br. (PID) at 39.

⁴⁸ Amtrak Reply Br. (PID) at 44 (emphasis omitted).

⁴⁹ For example, changes being proposed for calculation of incentives and penalties could lead to an imbalance of incentive/penalty payments. Similarly, agreed-upon changes in start times of Amtrak trains' operation on CN could turn out unexpectedly to result in inconvenient meets with other Amtrak trains, requiring delays to at least one of them. Schedule changes by Metra or operational changes by freight railroads controlling interlockings crossing the CN line could lead to longer blockages for cross-traffic that, depending on whether the Operating Agreement provided relief for such delays, could reduce contractual OTP. And implementation and administration of positive train control ("PTC") could cause changes in operation and running time that would affect Amtrak's OTP.

Finally, Amtrak bizarrely objects that CN's reopener fails to "result in concrete action" (Amtrak Reply Br. (PID) at 17), but then objects to the concrete action it provides. CN's proposal provides for binding arbitration under Article VI of the Operating Agreement.⁵⁰ Amtrak argues that "[n]either Article IV [presumably a misprint for Article VI] nor the [National Railroad Passenger Corporation Arbitration Agreement ('Amtrak Arbitration Agreement'), incorporated by reference in Article VI] contains the terms CN is asking the Board to impose as to the arbitrators' authority."⁵¹ These objections are frivolous.

The Amtrak Arbitration Agreement provides for referral to arbitrators under its authority of "any claim or controversy between [Amtrak] and any Participating Railroad [including CN]" when such arbitration is provided for under "a Basic Agreement," which under Article VI includes the CN/Amtrak Operating Agreement.⁵² It further provides that the arbitrators "shall, in reaching a decision, be governed by the provisions and language of the applicable Basic Agreement or Agreements."⁵³ Once CN's proposed reopener provision—including the provision listing examples of possible relief to be ordered through arbitration—has been made part of the

⁵⁰ Under CN's proposal, the arbitrators would be authorized:

to modify the Operating Agreement (including Appendices, other than [the lookback provision, which ensures that CN receives the incremental costs to which it is entitled by statute] insofar as necessary to address the Deficient Performance and to require the Parties to: (i) produce reasonable material information, conduct additional investigations, modeling, or experiments, (ii) undertake interim measures to improve performance and monitor the effectiveness of such measures, and (iii) implement additional employee training and/or monitoring of employee performance.

CN Proposed Operating Agreement (Rev'd), App. V, Sec. G(4).

⁵¹ Amtrak Reply Br. (PID) at 47.

⁵² RVS Blair, Ex. 2, at 3, 9 (Amtrak Arbitration Agreement, art. 2; *id.* § 4.5).

⁵³ *Id.*

new Operating Agreement, then that Agreement *will* contain those terms, providing all the authority needed by an arbitrator under Article VI to impose such relief.⁵⁴

D. Amtrak's Arguments for Withholding Its Relevant Locomotive Operating Data Are Unfounded.

Amtrak objects to CN's proposed Section A.4 of Appendix V, which would require Amtrak to provide CN with "locomotive data (including data from Wi-Tronix, or other sources) showing the speed, braking, and location of each Amtrak Train operating on the Rail Lines." Amtrak opposes this requirement, alleging that "CN has not proffered any reasonable basis for the Board to impose this term as part of a new OA." Amtrak Reply Br. (PID) at 115. The reasons should be evident: to ensure that Amtrak is operating its trains safely in accordance with CN's rules and orders (e.g., abiding by speed limits, slowing in accordance with speed restrictions, applying its brakes to clean them as required for safety) and to validate Amtrak's claims regarding train operating delays, which directly relates to delay coding and CN's incentives/penalties under the Agreement. For example, the data will show if Amtrak engineers have accurately recorded their own sub-optimal performance – i.e., failure to make normal speed – as "OTH," something they have an incentive not to do insofar as it is a reflection of their own performance.⁵⁵

⁵⁴ Amtrak's suggestion that the Board cannot impose the arbitration provisions of the reopener (Amtrak Reply Br. (PID) at 47) is equally frivolous. So long as if the terms of arbitration are reasonable, the Board has the necessary authority to impose it in this proceeding under 28 U.S.C. § 24308(a)(2)(A)(ii). Amtrak has cited no precedent to the contrary.

⁵⁵ Amtrak's failure to run at maximum speeds has become a more significant issue with the activation of positive train control ("PTC"). Amtrak engineers appear to be operating below maximum speed in order to avoid an overspeed PTC violation that would force the train to stop and require the crew to obtain authority to restart and proceed. Rebuttal VS (PID) Matteucci/Kuxmann at ¶ 75.

Amtrak's objects on the ground that it regards this data as proprietary and does not typically share it, and that it does not maintain processes to collect and share it. Amtrak Reply Br. (PID) at 115. It suggests that CN is acting inconsistently in asking for Amtrak's proprietary Wi-Tronix data, "data which CN itself guards and protects as proprietary and does not provide to Amtrak." *Id.* But CN has provided this information in this very proceeding because there is a legitimate need for it to verify CN's arguments regarding its incremental freight train delay costs. Just as CN shared this data subject to confidentiality protections, and would continue to share it as part of demonstrating its incremental freight delay costs, Amtrak's data can and should be shared on a confidential basis. As CN's experience has shown, there is nothing overly challenging about collecting and sharing such data, even if Amtrak does not regularly do so today. And CN agrees to maintain the confidentiality of Amtrak's data with the same security with which it safeguards its own data. There is no legitimate basis for Amtrak's effort to withhold this important operational data.

II. INCREMENTAL COST COMPENSATION FOR FREIGHT TRAIN DELAYS.

A. Amtrak's Repeated Legal and Policy Arguments about Preference and "Proximate Cause" Are Inconsistent with the Board's Interim Decision and Meritless.

In its reply brief, Amtrak reprises two arguments it made – and the Board rejected – before. First, Amtrak argues that it must pay CN only for the incremental costs related to hosting it and not the (supposedly distinct, although Amtrak entirely fails to distinguish them) incremental costs stemming from preference, which substantially contribute to freight train delay costs.⁵⁶ Amtrak's preference-for-free argument is contrary to the Board's Interim Decision and

⁵⁶ Amtrak Reply Br. (PID) at 54-64.

finds no support in statutory text, legislative history, or precedent. As CN explained in 2018, Amtrak relies entirely on a misleading account of the “public bargain” Congress struck in 1970, at the creation of Amtrak, with certain freight railroads.⁵⁷

Second, Amtrak argues that the “but for” standard for recovery of incremental costs is the same as a “proximate cause” standard that might apply in, say, a common-law negligence case, and that the “proximate cause” standard somehow requires attributing freight train delay costs to, *inter alia*, infrastructure investment decisions IC made decades ago instead of an Amtrak train that is standing directly in front of a freight train and blocking it.⁵⁸ Again, the Board’s Interim Decision and statutory text, legislative history, and precedent, are all against Amtrak. And again, the distinctions Amtrak attempts to draw would be unworkable, as well as wrong in principle. Both of Amtrak’s meritless legal arguments ostensibly seek to disqualify a subset of incremental costs. But Amtrak makes no effort to delineate that subset. In reality, Amtrak’s legal arguments seek to nullify the Board’s Interim Decision and prevent any CN recovery for the incremental costs of freight train delays caused by Amtrak.

1. CN is entitled to compensation for the incremental costs of hosting Amtrak, including the costs of affording it preference.
 - a) *Amtrak’s preference-for-free argument is contrary to the Board’s Interim Decision, the plain meaning of the statute, and other Board and ICC precedent.*

Amtrak made its preference-for-free argument before.⁵⁹ In ruling, without qualification, that “***incremental costs are those costs that CN has actually incurred, and that CN would not***

⁵⁷ CN Reply Br. at 26-33 (filed Mar. 2, 2018); see Amtrak Opening Br. at 6-10 (filed Jan. 19, 2018).

⁵⁸ Amtrak Reply Br. (PID) at 67-76.

⁵⁹ See Interim Decision at 20 (“Amtrak asserts that § 24308(c), which guarantees Amtrak preference over freight transportation, implies that incremental costs do not include those costs

*have incurred ‘but for’ the presence of Amtrak,”*⁶⁰ the Board plainly and unequivocally rejected Amtrak’s argument. “[B]ut for’ the presence of Amtrak,” there would be no Amtrak trains for CN to give preference to, so the costs of giving preference would not be incurred. And were there any doubt at all as to the implications of the Board’s definition of incremental cost—and there is none—its context would resolve it. The Board was specifically addressing “freight delay costs,”⁶¹ costs which Amtrak says generally arise due to preference.⁶²

Amtrak’s proposed limitation of incremental costs to exclude the incremental costs of providing preference is also incompatible with the plain meaning of the Rail Passenger Service Act (“RPSA”). Section 402(e) of the RPSA makes preference part of the hosting service to which Amtrak is entitled,⁶³ Section 402(a)(3) provides that Amtrak’s entitlement to hosting service is conditioned on payment to the host,⁶⁴ and Section 402(a)(2) provides that such payment be on “reasonable terms.”⁶⁵ Nothing in the text of the statute suggests a special exemption from Amtrak’s responsibility to reimburse hosts for the incremental costs it imposes

associated with providing such preference”); Amtrak Opening Br. at 81-82, 86-87 (filed Jan. 19, 2018).

⁶⁰ Interim Decision at 22.

⁶¹ Interim Decision at 21.

⁶² Amtrak Reply Br. (PID) at 54.

⁶³ 49 U.S.C. § 24308(c) (“Except in an emergency, intercity and commuter rail passenger transportation provided by or for Amtrak has preference over freight transportation in using a rail line, junction, or crossing unless the Board orders otherwise under this subsection.”).

⁶⁴ 49 U.S.C. § 24308(a)(3) (“Amtrak’s right to use the facilities or have the services provided is conditioned on payment of the compensation”).

⁶⁵ 49 U.S.C. § 24308(a)(2) (“If the parties cannot agree... the Board shall—prescribe reasonable terms and compensation for using the facilities and providing the services.”).

on them when those costs are associated with preference, even if it were possible to distinguish between hosting costs associated with preference and those that are not.

Consistent with the plain language of the statute, the ICC and the Board have held that Section 402(a)(2)(B) establishes incremental cost, defined as all costs that the host would not have incurred but for Amtrak's presence on its lines, as the floor for reasonable compensation for hosting Amtrak services, without ever suggesting a preference-based exception.

"The Board [has] emphasize[d] that, as a matter of course, [it] view[s] all costs that a freight carrier would not incur but for the operations of Amtrak as incremental costs."⁶⁶ The ICC likewise explained that "[t]he statutory compensation standard in section 402(a) proceedings is incremental cost, commonly called avoidable cost. Avoidable costs are those costs that would not be incurred if the minority user's service (here, Amtrak) were eliminated. Use of avoidable costs put the dominant user, [the host], in no better or worse position than if the minority user were not present."⁶⁷ A host would clearly be in a much worse position than if Amtrak were not present if, as Amtrak claims, the host were obliged to incur the substantial costs involved in granting Amtrak preference without any reimbursement for these costs.

⁶⁶ *Application of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. 24308(a)-Union Pac. R.R. Co. & S. Pac. Transp. Co.* ("UP/SP"), 3 S.T.B. 143, 156 n.24 (1998); see also *Nat'l R. R. Passenger Corp. v. ICC*, 610 F.2d 865, 868 (D.C. Cir. 1979) ("Incremental costs are costs that the supplier railroad would avoid if passenger service were discontinued. Non-incremental costs would remain even if Amtrak service were halted.").

⁶⁷ *Nat'l R.R. Passenger Corp.—Section 402(a) of the Rail Passenger Serv. Act—Order to Require Serv. & Set Comp. Terms*, Finance Docket No. 31895, 1992 MCC Lexis 21, at *4 (ICC Mar. 2, 1992) (citing *Metro-North II*).

- b) *The 1970 “public bargain” does not oblige freight railroads to host Amtrak with preference for less than full incremental cost.*

As it did in 2018, Amtrak focuses on an account of 1970 history as embodying a “public bargain,” rather than the statutory language and precedent that stand in the way of its argument. But Amtrak’s account of 50-year-old history is wrong, and it certainly cannot change the plain meaning of the RPSA and the well-established law interpreting it.

The RPSA indeed embodied a public bargain, but not as Amtrak presents it. That bargain was contained in Section 401, which gave specific railroads that had existing passenger common carrier obligations as of 1970 an option to shed those obligations by paying specific—individualized—statutory fees, which were used to provide initial funding for Amtrak. The public bargain embodied in Section 401 did not include any general ongoing obligation for today’s freight railroads to host Amtrak for less than full incremental cost. And the separate provision that remains important 50 years later, and governs this proceeding, Section 402, does not turn that one-time cash-payment-for-release-from-obligations public bargain into a perpetual subsidy obligation.

Illinois Central was one of the railroads that participated in the Section 401 public bargain of 1970. It paid \$10,910,170—a sum that, with inflation, would now amount to over \$60 million⁶⁸—“[i]n consideration of its being relieved by [Amtrak] of its entire responsibility for the provision of Intercity Rail Passenger Service.”⁶⁹ That relief of “entire responsibility” in exchange for a major payment did not come with a caveat that Illinois Central would be obliged to subsidize Amtrak for decades. Any such caveat would have undermined the essential purpose

⁶⁸ See <http://www.usinflationcalculator.com/> (using base year 1975).

⁶⁹ Amendment Agreement between Illinois Central Gulf Railroad Company and National Railroad Passenger Corporation § 2.2 (May 1, 1983).

of the RPSA, which was to protect freight railroads from the unsustainable financial burden of continuing to provide passenger service, while at the same time creating a statutory scheme to enable freight and passenger transportation to coexist efficiently.

Instead, Section 402 (as amended, principally in 1973) embodies a separate, ongoing regulatory arrangement under which, on the one hand, freight railroads are obliged to host and provide preference to Amtrak, but on the other hand, Amtrak must at least reimburse them for their full incremental costs. As recognized by the ICC, “[t]he Committee of Conference report on the Amtrak Improvement Act of 1973, which added ‘incremental costs’ to section 402(a) as a guideline for... fixing of compensation, stated they were intended ‘to provide a basis for payment to the railroad of **all** costs which would not be incurred if passenger service were not performed for Amtrak.’”⁷⁰ The 1973 congressional Conference Report explained that “[t]he term ‘incremental’ is to be considered then as meaning those costs which would not be incurred if a particular service were not rendered or a given amount of traffic were not handled. This includes solely related (or direct) costs of a particular service (both variable and fixed portions of solely related costs), but does not include any portion of common costs. This is also sometimes referred to as ‘avoidable costs.’”⁷¹ In other words, Congress explicitly adopted the same “but for” standard later stated by the Interim Decision. Congress’s all-encompassing description of incremental costs reflects RPSA’s goal of compensating hosts for all costs properly attributable to Amtrak; there is no basis for an artificial limitation that excludes the incremental costs that arise from providing preference to Amtrak trains.

⁷⁰ *Amtrak & Wash. Term., et al, Use of Tracks & Facilities & Establishing Just Compensation* (“*Wash. Term.*”), 348 I.C.C. 86, 103 n.15 (1975) (emphasis added) (quoting H.R. Rep. No. 93-587, at 16 (1973)).

⁷¹ H.R. Rep. No. 93-587, at 16 (1973).

Binding precedent makes clear that, while Section 401 codified an initial subsidy-based public bargain, Section 402 created a separate, forward-looking regulatory arrangement not based on freight railroads subsidizing Amtrak. The ICC made clear in 1973 that Section 402 is entirely separate from the public bargain: “the entry fee provided for in section 401 is the ***entire consideration for being relieved of the common carrier responsibilities for providing intercity rail passenger service.***”⁷² It reaffirmed in 1984 that “sections 401 and 402(a) are not interdependent.”⁷³ And the Second Circuit affirmed that conclusion in 1986: “[t]he argument that sections 401 and 402(a) are interdependent and that section 402(a) applies only to carriers that terminated service pursuant to section 401 is... lacking in merit. The two sections function separately and serve different purposes.”⁷⁴ The authorities are clear: those railroads that were relieved of passenger common carrier obligations in 1970 fully paid for that relief under Section 401, and Section 402—the provision at issue in this case—does not embody any ongoing obligation to subsidize Amtrak in order to pay for relief that was fully paid for in 1970.

Nor could it be otherwise, given how Congress enacted Sections 401 and 402. As noted above, Section 401 applied only, and on an individualized basis, to railroads with existing passenger common carrier obligations as of 1970. In contrast, Section 402 applies to all freight railroads, including those operating routes that did not have pre-1970 passenger service and never had a passenger common carrier obligation from which they needed relief. Moreover, the Section 402 preference obligation on which Amtrak relies was not even enacted as part of the

⁷² *Baker, et al., Trustees of Penn. Cent. Transp. Co.—Compensation for Passenger Serv.* (“Penn Central”), 342 I.C.C. 765, 768 (1973) (emphasis added).

⁷³ *Nat’l Rail Passenger Corp. Application Under Section 402(a) of the Rail Passenger Serv. Act.* (“Metro-North I”), 1 I.C.C.2d 243, 246 (1984).

⁷⁴ *Metro. Transp. Auth. v. ICC*, 792 F.2d 287, 294 (2d Cir. 1986).

1970 public bargain; the preference provision was added in 1973.⁷⁵ By that time, the railroads with passenger common carrier obligations had already discharged their obligations under 401 to pay for relief from those obligations. And at the same time as it inserted the preference requirement into the statute, in 1973 Congress also added the incremental cost standard to the RPSA,⁷⁶ Had Congress intended to make the simultaneously enacted preference provision an exception to the requirement that Amtrak reimburse a host railroad for its incremental costs, it would have said so. It did not.

Finally, when it implemented the relief from preference provision in Section 402(c), the FRA made clear that preference is not for free. The FRA's implementing regulation provided that if a host railroad availed itself of the opportunity to seek (under current law, from the Board) an exemption from the preference obligation on the grounds that preference "materially will lessen the quality of freight transportation provided to shippers," its application must "[i]nclude an analysis of whether and by how much Amtrak's compensation to the railroad should be reduced if the preference requirement is altered."⁷⁷ Had the FRA agreed with Amtrak's view that statutory preference should be given for free, it would not have required such a reduction in compensation for host railroads who are relieved from providing preference to Amtrak.

⁷⁵ Amtrak Improvement Act of 1973, Pub. L. No. 93-146, § 10, 87 Stat. 548, 552 (1973).

⁷⁶ *Id.*

⁷⁷ 49 C.F.R. § 200.5(c)(3) (promulgated by FRA at 45 Fed. Reg. 64,192 (Sept. 29, 1980), amended at 74 Fed. Reg. 25,171 (May 27, 2009)).

c) *Full incremental cost recovery does not render the preference relief provision a nullity*

Amtrak also argues (as it did in 2018⁷⁸) that the Section 402(c) relief from preference provision would become a legal “nullity” if host railroads were given compensation for preference.⁷⁹ Amtrak’s theory appears to be that if hosts are compensated for the freight train delay costs they incur due to providing preference, they will have no need for relief from preference.

Amtrak is wrong for at least four reasons. First, relief from preference under Section 402(c) serves a different function than freight train delay cost compensation for the incremental costs of providing preference. The former is, as the RPSA expressly provides, intended to protect “*shippers*” from a “material[] lessen[ing of] the *quality* of freight transportation”⁸⁰; the latter is intended to protect *host railroads* from incurring uncompensated *costs* and thus being compelled to subsidize Amtrak.

Second, incremental cost compensation will inevitably be incomplete. As Dr. Peterson has explained, incremental cost compensation, as proposed by CN, would not be sufficient to motivate a host railroad to provide preference to Amtrak (or, indeed, to host it at all) absent the Section 402(c) obligation, since incremental cost compensation is far below the market price of such services.⁸¹ That is especially true given the limitations on incremental cost compensation

⁷⁸ Amtrak Opening Br. at 87 (filed Jan. 19, 2018).

⁷⁹ Amtrak Reply Br. (PID) at 62.

⁸⁰ 49 U.S.C. §24308(c) (emphasis added).

⁸¹ See VS (PID) Peterson ¶¶ 13-15, 19-20 (“The incremental cost of Amtrak’s access to CN’s network is less than the competitive market price for CN’s grant of access to Amtrak”), 24 (“CN’s methodology for quantifying incremental costs focuses on only three categories of incremental costs resulting from Amtrak-related freight delays: crew, fuel, and equipment”).

imposed by the Board's Interim Decision and implemented in CN's conservative methodology for determining incremental costs.⁸²

Third, as discussed above, the FRA regulation providing for host railroads to be excused from preference obligations in exchange for reduction in their compensation presupposes that Amtrak is wrong: host railroads may well prefer to be excused from preference rather than compensated at incremental cost for providing it.

Finally, Amtrak's argument is, at best, a tail-wags-the-dog argument. As Amtrak well knows, the Section 402(c) provision for host railroads to apply for relief from preference has never been invoked—in no small part because there is no authoritative definition clarifying what exactly preference requires. Amtrak is arguing for an artificially narrow interpretation of a core RPSA provision—the provision requiring that Amtrak reimburse its hosts for their incremental costs—based on a relief-from-preference provision that has never been invoked. That is simply not a reasonable approach to statutory interpretation.

d) Freight train delay cost recovery is not a substitute for incentive payments.

Amtrak also claims (again, as it did before, in 2018⁸³) that recovery of incremental freight train delay costs duplicates recovery of incentive payments.⁸⁴ This is equally unfounded. Full

⁸² See VS (PID) Peterson ¶¶ 13-15 (“CN’s methodology takes a conservative approach that understates the full actual incremental freight train delay costs Amtrak imposes on CN,” and “will result in less compensation by Amtrak than an approach that aims to calculate the most accurate cost estimate.”); 2015 Willig VS at 5 (“Where CN’s witnesses demonstrate additional incremental costs due to Amtrak’s consumption of capacity that cannot be practicably measured, the quantifiable costs for freight delay and capacity loss will not fully cover CN’s incremental costs”).

⁸³ Amtrak Opening Br. at 87-88 (filed Jan. 19, 2018).

⁸⁴ Amtrak Reply Br. (PID) at 74-75.

incremental cost recovery is an irreducible statutory minimum. This is made clear in the statutory text—which requires the Board to “consider quality of service as a major factor when determining whether, and the extent to which, the amount of compensation shall be **greater than** the incremental costs of using the facilities and providing the services”⁸⁵—and the legislative history—which reiterates that the amendment was “intended to provide ... a **floor** for the compensation to be paid a railroad for services performed.”⁸⁶ Compensation cannot be reasonable under the statute unless it provides CN with at least a baseline of full incremental cost recovery, which include freight train delay costs; Congress intended any net incentive payments to be extra.

CN incurs substantial incremental costs by hosting Amtrak even when it accrues no incentives, and even incremental cost recovery—subject to proof standards and far below free market compensation—is far from complete. Compensation for freight train delay costs—which are part of the incremental costs that CN incurs to serve Amtrak with or without preference and at any level of service—is necessary to make CN at least closer to economically whole. Incentive payments serve the separate function of motivating CN to perform above the base level of service in the Operating Agreement; penalties also address issues that have nothing to do with freight train delays, such as non-FTI delays attributable to CN. Under Amtrak’s proposal, CN would have to incur substantial uncompensated freight train delay costs and impair the quality of service to its freight customers even to avoid penalties. That is not the reasonable balancing of interests that Congress intended, and it is not consistent with the statutory language that Congress enacted.

⁸⁵ 49 U.S.C. § 24308(a)(2)(B) (emphasis added).

⁸⁶ H.R. Rep. No. 93-415, at 11 (1973) (emphasis added).

- e) *Amtrak's premise that virtually all freight delay costs are due to preference is clearly wrong.*

Amtrak's argument also assumes either that all incremental freight train delay costs are attributable to preference or that those due to preference can be separated (and incurred for free) while those not due to preference are compensated. Neither of those premises is true.

On the one hand, even absent the preference obligation, CN would inevitably incur substantial freight train delay costs due to the presence of Amtrak trains on CN's lines. Even absent preference, some delays due to train meets are inevitable on a predominantly single-track rail line. Even with preference, Amtrak trains incur some delays due to meets with CN trains—albeit far fewer than CN trains occur due to meets with Amtrak trains. Amtrak trains delay freight train delays in numerous ways that are not necessarily premised on preference, for example, when Amtrak trains block CN's lines because of Amtrak station stops, Amtrak crew changes, or breakdowns, and when dispatchers allow Amtrak trains to delay CN trains because it is necessary to preserve network fluidity or meet provisions of the Operating Agreement.

On the other hand, any attempt to separate (supposedly non-compensable) preference-based freight train delay costs from (compensable) other incremental freight train delay costs would be unworkable. Any such effort would require a clear and authoritative definition of preference, which does not exist. And even with such a definition, it would still be the case that the efforts that CN undertakes to host Amtrak, give Amtrak trains preference, secure incentives and avoid penalties under the Operating Agreement, and maintain fluid and safe network operations are, in practice, all inextricably intertwined. CN's incremental freight train delays are simultaneously attributable to preference and non-preference reasons: by delaying a freight train to allow an Amtrak train to pass unimpeded, CN satisfies its preference obligations while at the same time satisfying its Operating Agreement obligations.

Notably, Amtrak makes no effort to delineate between (compensable) freight train delay costs due to hosting and (supposedly non-compensable) freight train delay costs due to preference (or, even, to define preference). Any such effort would be unworkable, and it is plainly not Amtrak's true goal. Instead, Amtrak's "preference-is-free" argument is a recipe for turning this Operating Agreement case into a preference case, and for imposing a rule that CN must always, without compensation, clear its tracks for every Amtrak train. That would be flatly contrary to the Interim Decision, the statute, and precedent. Further, it should be rejected on constitutional avoidance grounds, as discussed below, in Section II.A.3.

2. Amtrak's arguments about "proximate cause" and fault are contrary to the governing "but for" standard.

The Board in its Interim Decision agreed with CN "that incremental costs are those costs that CN has actually incurred, and that CN would not have incurred 'but for' the presence of Amtrak," and explicitly "reject[ed] Amtrak's contention that incremental costs are limited to 'avoidable costs in the short run' because § 24308 contains no such temporal limitation."⁸⁷ The Board thus implicitly rejected the application of a "proximate cause" standard and joined the chorus of precedent that upholds the "but for" standard.⁸⁸ Although Amtrak's Reply Brief

⁸⁷ Interim Decision at 22.

⁸⁸ *Application of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. 24308(a)-Union Pac. R.R. Co. & S. Pac. Transp. Co.* ("UP/SP"), 3 S.T.B. 143 at n.26 (1998) (emphasizing "that, as a matter of course, we view all costs that a freight carrier would not incur but for the operations of Amtrak as incremental costs."); *see also* *Petition by the Nat'l R.R. Passenger Corp.) for Proceeding Under 49 U.S.C. S 24903(c)(2)*, No. FD 36332, 2021 WL 3641579, at *6 n.11 (Aug. 17, 2021) (citing to the Interim Decision for the proposition that under Section 402(a) "incremental costs are those costs that are actually incurred, and that would not have been incurred 'but for' the presence of Amtrak"); *Metro-North II*, 1985 ICC Lexis 318, at *6-*7 ("[T]he proper costing standard to be used in section 402(a) proceedings is avoidable costs. By avoidable costs we mean the costs that would not be present if a minority user's service were eliminated. The use of an avoidable costing approach puts the dominant user in a position of no better or worse than if the minority user has not been present.").

nominally acknowledges the “but for” standard, the crux of its argument is an effort to replace it with “proximate cause” or fault criteria, as if this were a common law negligence case, and then to contort those criteria into a biased standard that is not even recognizable as “proximate cause.”⁸⁹

a) *Amtrak conflates “but for” causation with the fundamentally different “proximate cause” standard.*

Amtrak’s claim that “but for” causation requires establishing “proximate cause” is meritless. It is black-letter law that “but for” and “proximate cause” are separate legal standards: the latter requires policy judgments about responsibility and qualitative judgments about proximity, but the former does not.⁹⁰ Recognizing that events can have many causes, “but for” causation only requires Amtrak to be **one of the necessary causes** of a freight train delay; it does not entail an inquiry into other causes.

Amtrak would prefer that compensation be contingent on a finding of proximate causation, a standard borrowed (before Amtrak distorts it) from common law negligence cases.⁹¹

⁸⁹ Amtrak Reply Br. (PID) at 5 (“[I]n its 2019 Decision, the Board decided that ‘incremental costs’ are only those expenses that CN: (1) would not have incurred ‘but for’ Amtrak’s presence; and (2) incurred due to delays *caused* by Amtrak.”).

⁹⁰ See, e.g., *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004); *BancInsure, Inc. v. Highland Bank*, 779 F.3d 565, 569 (8th Cir. 2015); *United States v. George*, 949 F.3d 1181, 1187 (9th Cir. 2020) (“But-for causation is a relatively undemanding standard: a but-for cause of a harm can be anything without which the harm would not have happened. Proximate causation is a more restrictive requirement that excludes some of the improbable or remote causal connections that would satisfy a pure but-for cause standard. Generally, proximate causation exists only when a harm was a foreseeable result of the wrongful act.” (citations omitted)); *Rupert v. Daggett*, 695 F.3d 417, 425 (6th Cir. 2012) (describing how proximate causation is distinct from “but for” causation, and only issues of proximate causation call for inquiry into whether the result of conduct that created a risk of harm and any intervening causes were foreseeable).

⁹¹ 65 C.J.S. Negligence § 190.

But “but for” means “but for”; that is the standard the Board adopted in this case and the Board, the ICC, and the courts have adopted in prior Section 402 cases; and that is the standard that is consistent with the statutory “incremental cost” criterion. The Board should reject Amtrak’s implicit request that it reverse the Interim Decision and discard 50 years of precedent.⁹²

b) *“But for” is the appropriate standard and yields economically efficient decision-making.*

Application of the “but for” standard stated in the Board’s Interim Decision is also supported by sound economic reasons. As Dr. Peterson explains, “[e]conomic efficiency is enhanced when firms internalize the costs of the inputs that they use to provide goods or service. Therefore, it is economically efficient for Amtrak to pay CN the full amount of the incremental costs that result from Amtrak’s use of CN’s network. Incremental costs are the difference between the total cost that CN incurs when Amtrak uses its network and the total cost CN would incur if Amtrak did not use its network.”⁹³ There is no economically principled reason—just as there is no legally principled reason—for Amtrak to only be accountable when it is deemed the

⁹² Even if the Board were to adopt the inapplicable proximate cause standard, Amtrak’s arguments would still fail. Any reasonable understanding of proximate cause would recognize that in-the-moment conflicts between Amtrak trains and CN’s trains are more “proximate” to the outcome of freight delay than decisions IC made decades earlier regarding infrastructure spending. Yet Amtrak would attribute freight delay to decisions related to CN’s allegedly insufficient infrastructure investment. Amtrak Reply Br. (PID) at 71-72. Likewise, the Amtrak train immediately in front of a CN train is a much more “proximate” cause of the delay suffered by the CN train than an event that may have occurred hours earlier that caused one or other of those trains to be at that point on the line at that time. In reality, Amtrak is not advocating for a principled—albeit inapplicable—proximate cause standard. It is arguing for an impossible standard under which CN could never recover the incremental costs Amtrak imposes on it unless it could prove that nothing it had done in its history—from infrastructure decisions decades ago to scheduling decisions days ago to dispatching decisions hours ago—could have prevented it from incurring the costs that it plainly would not have incurred “but for” Amtrak’s presence. Adoption of such a standard would entirely reverse the Board’s Interim Decision and conflict with the plain meaning of the RPSA and decades of precedent.

⁹³ VS (PID) Peterson ¶¶ 4-6.

“proximate” cause of incremental costs. “Requiring Amtrak to recognize when it imposes a cost on CN from its use of CN’s network provides Amtrak efficient incentives to choose whether to adjust its use of the network resources it shares with CN in order to reduce those costs.”⁹⁴ CN’s proposal recognizes that the railroad Amtrak is impacting is CN’s, and provides adequate internalization to incentivize Amtrak to make efficient choices; Amtrak’s does not.⁹⁵

Amtrak’s proposed substitution of proximate causation for the proper “but for” standard would fail to serve the important cost internalization economic function of the “but for” standard.⁹⁶ Amtrak’s preferred proximate cause standard would entail second-guessing CN and speculating about how CN might fundamentally restructure its freight railroad—altering its infrastructure, freight schedules, and train lengths—all to accommodate Amtrak. Once again, Amtrak seeks to turn this proceeding about the compensation it owes CN into an intrusive, unnecessary, and unmanageably wide-ranging investigation of how CN operates its freight railroad. The proper “but for” standard avoids this needless inquiry. As a rational economic enterprise, CN can be assumed to be structuring the operations of its railroad in a way that most

⁹⁴ VS (PID) Peterson ¶ 16.

⁹⁵ Amtrak also attempts to evade full incremental cost recovery (and therefore economic internalization) by arguing that freight train delay costs are not incremental costs because they are not incurred from Amtrak’s use of CN’s “facilities” or from CN’s provisions of “services” to Amtrak. Amtrak Reply Br. (PID) at 64-66, Blair ¶¶44-47. Amtrak argues that these costs “are of an entirely different character” because “these costs are associated with CN’s use of its own facilities and equipment” and “in connection with CN’s provision of services to its customers.” Amtrak Reply Br. (PID) at 66. However, no principled difference exists between, for example, maintenance costs caused by Amtrak’s use of CN’s lines and freight train delay costs caused by Amtrak’s use of CN’s lines. These are all costs that would not exist but for Amtrak’s use of CN’s facilities and services. See Rebuttal VS (PID) Matteucci/ Kuxmann ¶ 77.

⁹⁶ VS (PID) Peterson ¶ 17 (“The reason Amtrak is the party that internalizes costs imposed on CN... follows directly from the definition of incremental cost. Incremental costs are measured relative to the costs that CN would have incurred ‘but for’ the presence of Amtrak”).

efficiently meets the needs of its customers. It is perfectly entitled to do so: CN's railroad is CN's property, and CN is not obliged to restructure its freight operations for Amtrak's sake.

Amtrak argues that it cannot reasonably be understood to be the cause of CN's delays when CN's allegedly flawed scheduling and out-of-slot trains result in freight delays.⁹⁷ In other words, Amtrak claims that the statutory mandate for incremental cost compensation cannot be implemented until, and must depend on, a comprehensive examination of how CN schedules and operates its freight trains. Coupled with the Board's requirement for clear proof of incremental costs, that is transparently a recipe for making it impossible for CN to recover any incremental costs, thereby nullifying a central ruling the Board made in its Interim Decision.

As the Board has made clear, the relevant legal question under Section 402(a) is how Amtrak's presence **changes** the operational decisions and outcomes that would have existed "but for" Amtrak. That entails taking host railroads "as it finds them."⁹⁸ As rational economic actors accountable to their customers, host railroads should be presumed to be structuring their freight operations efficiently. In any event, CN's railroad is its property and it is entitled to conduct its freight business on that railroad as it deems appropriate, consistent with regulatory obligations and customer demands, without Amtrak second-guessing every aspect of its freight operations.

Moreover, Amtrak's proposal that CN should be judged against a hypothetical perfect railroad in which every train runs on schedule unreasonably ignores the realities of railroading. As Amtrak well knows, out-of-slot trains and deviations from schedule are an inevitable aspect of interconnected railroad networks. CN takes all reasonable measures to minimize delays from such causes. CN has ample motivation to do so without the addition of being penalized for

⁹⁷ Amtrak Reply Br. (PID) at 72-73, 79; RVS Blair ¶¶ 48-58.

⁹⁸ Rebuttal VS (PID) Peterson ¶¶ 3.b., 10.

unscheduled freight operations by being denied reimbursement of its incremental costs whenever they occur, as Amtrak proposes. There is simply no legal, economic, or practical basis for second-guessing CN's freight operations and penalizing CN—by denying CN compensation for its incremental costs and thereby compelling it to subsidize Amtrak—whenever Amtrak deems those operations imperfect.

Giving CN the freight train delay cost compensation it is entitled to under the statute will not, as Amtrak argues, eliminate CN's incentives to operate efficiently.⁹⁹ CN retains ample incentive to avoid freight train delay costs because compensation for freight train delay costs will always fall short of full compensation given that the proof requirements of the Interim Decision make full recovery impossible and CN's methodology uses conservative elements.¹⁰⁰ If CN can avoid freight train delay costs efficiently, and at the same time avoid disruption to its freight service and network fluidity for which it is not compensated, it will do so regardless of whether it receives partial incremental cost compensation (as proposed by CN) from Amtrak for those costs. And a rule that required CN to avoid those costs inefficiently—for example, through excessive expenditure on additional infrastructure, or by running shorter freight trains that cannot serve CN's freight customers efficiently—or else be forced to subsidize Amtrak would be highly economically inefficient.

Congress chose a clear rule—incremental cost, *i.e.*, the “but for” standard. That rule requires Amtrak to internalize the costs of its presence on host lines, and it provides an efficient baseline from which the parties can negotiate: for example, if and insofar as infrastructure investment would be a more efficient solution than CN continuing to incur freight train delay

⁹⁹ Amtrak Reply Br. (PID) at 74-75.

¹⁰⁰ See VS (PID) Peterson ¶¶ 13-15; VS Willig at 5 (filed Sep. 4, 2015).

costs for which Amtrak must pay, Amtrak could offer to share in infrastructure funding.¹⁰¹

Elsewhere in RPSA, Congress recognized the importance of requiring Amtrak to internalize the costs it imposes on host railroads when it provided that host railroads may downgrade or dispose of their facilities if Amtrak does not pay the avoidable costs of retaining or maintaining the facility in the condition Amtrak requests.¹⁰² The pseudo “proximate cause” carve-out from incremental cost recovery that Amtrak proposes has no basis in law or economics, and goes against the sound economic judgment of Congress.

3. Amtrak’s Proposal Must Be Rejected Under the Takings Clause.

Amtrak’s proposal to deny CN its demonstrated incremental freight train delay costs is not only inconsistent with the plain meaning of the RPSA and the Board’s Interim Decision, but would deny CN the just compensation to which it is entitled under the Takings Clause.¹⁰³ CN acknowledges, of course, that precedent and the Board’s Interim Decision reflect that incremental cost compensation based on a “but for” standard suffices as a constitutional “just compensation.”¹⁰⁴ But the essential premise of the Section 402 precedents that have denied Takings claims has been that by compelling a railroad to allow Amtrak trains, passengers, and crews to occupy miles of its property for hours on end—on the Illini/ Saluki route, Amtrak routes

¹⁰¹ See VS (PID) Peterson ¶ 18 (“[W]hen Amtrak internalizes some portion of the costs it imposes on CN, there will generally be opportunities for further negotiations to increase efficiency to both parties”).

¹⁰² 49 U.S.C. § 24309(d).

¹⁰³ U.S. Const., amend. V.

¹⁰⁴ See *Metro. Transp. Auth. v. I.C.C.*, 792 F.2d 287, 297 (2d Cir. 1986) (“[A]ssuming arguendo that there has been a taking, compensation is adequate since MTA, in obtaining avoidable costs, will receive what it would have had but for the taking.”).

are scheduled to be present for about 20 hours a day¹⁰⁵—and to displace the hoist railroad’s own operations by giving Amtrak preference, the RPSA takes railroad property, for which just compensation is due.¹⁰⁶ Takings claims have failed only because the host railroad has not demonstrated that just compensation has been denied. Amtrak’s proposal calls for a much higher proximate cause standard and arbitrarily excludes the incremental costs of providing Amtrak preference. This would deny CN just compensation by foreclosing CN from recovering the incremental cost compensation to which the Board has stated CN is entitled.¹⁰⁷

At a minimum, Amtrak’s proposal raises grave constitutional concerns. Consistent with the well-established canon of constitutional avoidance,¹⁰⁸ were they any doubt about the fact that Congress’s “incremental cost” standard calls for a “but for,” not “proximate cause,” approach, the RPSA should be read to avoid constitutional issues and, consistent with precedent and the Board’s Interim Decision, to adopt the “but for” standard, and not Amtrak’s proposed pseudo-“proximate cause” standard.

¹⁰⁵ CN Reply Submission (PID) at 73.

¹⁰⁶ CN will not repeat here the takings argument it already made in its prior brief, in the context of discussing Amtrak’s “reopener” proposal that would entail compelling CN to allow Amtrak to occupy part of CN’s dispatching offices. See CN Reply Submission (PID) at 86-87. It suffices to note that, as explained in that brief, compelling a business to allow a third party to physically occupy its business premises generally constitutes a *per se* taking under *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2080 (2021). Imposing whole trains with hundreds of passengers and CN crews on CN’s lines for many hours every day is an even clearer and more substantial taking than imposing Amtrak personnel on CN’s dispatching offices.

¹⁰⁷ Interim Decision at 22 (“[T]he Board finds that incremental costs are those costs that CN has actually incurred, and that CN would not have incurred ‘but for’ the presence of Amtrak.”).

¹⁰⁸ See, e.g., *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018).

B. Amtrak Seeks to Impose Unrealistic and Inapplicable Standards of Proof that are Contrary to the Standards Set Forth in Interim Decision.

1. The “reasonable” proof standard in the Interim Decision appropriately tolerates imprecision within a conservative approach.

Amtrak seeks to nullify the Board’s ruling that incremental freight train delay costs are compensable in principle by imposing unrealistic and inapplicable standards of proof that far exceed the standards set forth in the Board’s Interim Decision. The Interim Decision states that “the burden would be on CN to show that [incremental freight train delay] costs could be included **in a reasonable manner**, consistent with the ‘but for’ standard and the need for specificity, verifiability, and quantifiability.”¹⁰⁹ This standard, while rigorous, falls short of demanding perfect precision. It is reasonable and consistent with Board and court precedent to prove costs in a practical manner, so long as a methodology is used that makes full use of available, reliable information, and estimates are well-reasoned and, insofar as imperfectly accurate, conservative.

Precedent requires that quantification of incremental freight train delay costs be reasonable and reliable, but Amtrak’s extreme evidentiary and proof demands conflict with ICC precedent establishing that statistical estimation based on real-world verifiable historical data is an acceptable methodology used by experts (and accepted by courts) to calculate monetary loss in the transportation context.¹¹⁰ The ICC explained that “[b]ecause direct measurement of

¹⁰⁹ Interim Decision at 23 (emphasis added).

¹¹⁰ See, e.g., *Nat’l R.R. Passenger Corp. & Consol. Rail Corp.—Application Under Section 402(a) of the Rail Passenger Serv. Act for an Order Fixing Just Comp.*, 10 I.C.C.2d 863, 871-72 (1995); see also *CRST Expedited, Inc. v. Swift Transp. Co. of Arizona*, , No. 17-CV-25-CJW-KEM, 2019 WL 2929516, at *11-14 (N.D. Iowa July 8, 2019) (discussing in detail the permissible methods of calculating contractual damages based on unpredictable and highly

[incremental] costs (and other costs) is practically not possible, we have traditionally used models and recent historic data to calculate a best estimate of the costs at issue ... No formula or methodology can perfectly determine” the incremental costs at issue.¹¹¹ According to ICC precedent, proof is properly provided by “a model that is reliable ... but that is not so cumbersome (by attempting to mimic every possible detail of the real world) as to be practically unusable in a real case.”¹¹² Without making any concrete adjustments to CN’s well-documented calculations and methodology—Amtrak offers no constructive suggestions for improvement—Amtrak makes vague, unfounded claims that elements of CN’s calculation of its freight train delay costs are flawed and unreliable.¹¹³ Amtrak in essence urges the Board to go against precedent and make the perfect the enemy of the reasonable.

CN recognizes that estimates often entail uncertainties, and has taken a conservative approach within the bounds of reasonableness. In practice this does not mean—and precedent does not call for—always calculating and applying the lowest possible cost estimate for every available element. CN’s experts instead apply a reasonable and transparent methodology that minimizes the risk of overcompensation because, by using all available information, it is highly accurate and any marginal judgments err on the side of conservatism.¹¹⁴

variable factors, and finding analysis that relies on averages of historical real-world data not ‘purely speculative and unreliable’).

¹¹¹ *Nat’l R.R. Passenger Corp. & Consol. Rail Corp.—Application Under Section 402(a) of the Rail Passenger Serv. Act for an Order Fixing Just Comp.*, 10 I.C.C.2d 863, 871 (1995).

¹¹² *Nat’l R.R. Passenger Corp. & Consol. Rail Corp.—Application Under Section 402(a) of the Rail Passenger Serv. Act for an Order Fixing Just Comp.*, 10 I.C.C.2d 863, 872 (1995).

¹¹³ Amtrak Reply Br. (PID) at 87.

¹¹⁴ VS (PID) Peterson ¶¶ 13-15, 19-20, 24.

2. Baranowski properly relied on business records.

Amtrak objects to expert Michael Baranowski's use of business records that were maintained and used by CN in the ordinary course of business and provided and explained by CN fact witnesses. According to Amtrak, an expert who relies upon statements or data of others must confirm their validity by independently scrutinizing and investigating the data and not merely adopting it.¹¹⁵ Because Baranowski allegedly fails to independently corroborate or verify the accuracy of CN's record on which he relies, Amtrak would reject his conclusions.

Amtrak bases this unfamiliar and demanding standard on a Third Circuit case, *In re TMI Litigation*.¹¹⁶ That tort case does not support Amtrak's argument. *TMI* merely held that an expert could not rely on the unverified **opinion** of another expert: one expert relied on literature outside his field to formulate his opinion, and another expert relied on high-level health summaries by counsel and not medical examinations or hospital records.¹¹⁷ By contrast, experts routinely rely on **factual data** in the form of business records supplied by parties who testify to the source and meaning of the record.¹¹⁸ By definition, an expert witness is not a fact witness, and so must rely on others for factual data. And business records are an exception to hearsay rules, even in court, when they were made in the regular course of business to document a

¹¹⁵ Amtrak Reply Br. (PID) at 78.

¹¹⁶ Amtrak Reply Br. (PID) at 78, 85.

¹¹⁷ *In re TMI Litig.*, 193 F.3d 613, 680, 698 (3d Cir. 1999).

¹¹⁸ See, e.g., *Total Control, Inc. v. Danaher Corp.*, 338 F. Supp. 2d 566, 570 (E.D. Pa. 2004) (finding that an expert report that primarily relied on financial and business records is admissible under Federal Rule of Evidence 702, which "does not require that experts have personal experience with the object of the litigation in which they testify" or "require that experts eschew reliance on a plaintiff's account of factual events that the experts themselves did not observe") (citation omitted).

regularly conducted activity, as Amtrak does not dispute is the case with CN's data, and introduced through qualified testimony, as here.¹¹⁹

Not only are all the data on which Baranowski relied maintained and used by CN in the ordinary course of business, but as explained in CN's prior submissions, including witness testimony, those data are reliable and subject to quality controls.¹²⁰ Specifically:

- Baranowski relied on delay data from CN's SRS database [REDACTED], and supplemented and cross-checked SRS data with Wi-Tronix data and Playbacks;¹²¹
- Baranowski relied on payroll data that are used and maintained by CN in the ordinary course of business and contemporaneously updated;¹²²
- Baranowski relied on Train Performance Calculator ("TPC") simulation runs, which are a recognized modeling procedure CN employs in the ordinary course of business, to determine incremental fuel consumption, and used data published by locomotive manufacturers, to determine incremental fuel consumption;¹²³
- Baranowski relied on locomotive run-through and car hire agreements, which are commercial agreements negotiated at arm's-length, and which in turn rely on R-1 data, to determine locomotive and car costs.¹²⁴

¹¹⁹ See Fed. R. Evid. 803(6) (conditions for business records to qualify as an exception to the rule against hearsay). The Board's rules of evidence similarly treat business records as admissible evidence. 49 C.F.R. § 1114.3 ("Any... record... will be admissible as evidence thereof if it appears that it was made in the regular course of business, and that it was the regular course of business to make such memorandum or record at the time such record was made, or within a reasonable time thereafter.").

¹²⁰ The only data of which Amtrak specifically questions the reliability are the SRS data, discussed at Section II.C.1 below.

¹²¹ See Rebuttal VS (PID) Baranowski ¶ 9(a) (citing VS (PID) Summerfield *et al.* at 4, 7-20; VS (PID) Lizotte at 1-6); VS (PID) Matteucci/ Kuxmann at 77-79.

¹²² See Rebuttal VS (PID) Baranowski ¶ 9(b) (citing VS (PID) Whiteman at 1).

¹²³ See Rebuttal VS (PID) Baranowski ¶ 9(c) (citing VS (PID) Baranowski at 14-15; VS (PID) Matteucci/ Kuxmann at 81; VS (PID) Lizotte at 6-7).

¹²⁴ See Rebuttal VS (PID) Baranowski ¶ 9(d) (citing VS (PID) Matteucci/Kuxmann at 82; VS (PID) Baranowski at 16-19).

Amtrak's objection to Baranowski's use of these reliable, ordinary course of business records is entirely meritless.

C. CN's Methodology Specifically Verifies and Quantifies Freight Train Delays that Would Not Have Occurred But For Amtrak.

1. CN's use of SRS data, in conjunction with Wi-Tronix and Playback data, is reliable and conservative, and makes the best use of the available data.

With respect to the specifics of CN's Incremental Cost Methodology, Amtrak's first objection is to the data used to identify and quantify delays – principally, a reprise to CN's of Amtrak's 2018 objections to use of SRS data. *See* Amtrak Reply Br. (PID) at 77-79; RVS (PID) Crowley/Mulholland ¶¶ 12-15. As CN's witnesses have explained, CN made significant adjustments informed by Amtrak's 2018 criticisms and the evidentiary standards set forth in the Board's Interim Decision, that ensure that conclusions derived using SRS and other delay data are reliable and used conservatively. Specifically:

- Any concerns regarding the accuracy of delay attribution have been addressed by CN's implementation of improved instructions to dispatchers to code delays directly due to Amtrak trains, and only those delays, using the FA code, and to provide appropriate delay explanations supporting that coding. *See* VS (PID) Matteucci/Kuxmann at 77-78 & Ex. 14; VS (PID) Summerfield *et al.* at 13-15;
- Any concerns regarding delay quantification for multiple-cause delays have been addressed in two ways. First, dispatchers have been specifically instructed to code FA delays first and assign delay times to them based on direct observation of how long the CN train was delayed by the Amtrak train, using Playbacks and other sources as necessary. *See* VS (PID) Summerfield *et al.* at 18-19. That eliminates any concerns regarding use of schedules as a baseline to determine the length of delay. Second, to add an extra element of conservatism in multiple-cause scenarios, the new Incremental Cost Methodology uses the lesser of FA delay recording in the SRS system or Idle Time delay recorded by Wi-Tronix data. *See* Rebuttal VS (PID) Baranowski ¶ 15;
- Any concerns regarding delay quantification for single-cause FA delays have been addressed by using the SRS system only as a screen for including such delays, and then using automated data sources -- Wi-Tronix where available, Playbacks where Wi-Tronix data are not available – to quantify the delay. CN's Incremental Cost Methodology makes the best use of the available data: SRS data is the best data for

delay attribution; Wi-Tronix data (where available) or Playback data is the best data for single-cause delay quantification. *See* Rebuttal VS (PID) Baranowski ¶ 13;

- While SRS delay coding is, like Amtrak’s coding of delays to its own trains, a human system subject to the potential for human errors, efforts by a highly-trained and experienced dispatcher team, subject to on-going feedback, supervision and close review by CN supervisors, and objective (Wi-Tronix and Playback) data available for use in auditing, ensure reliability. *See generally* VS (PID) Summerfield *et al.* at 12-20; VS (PID) Matteucci/Kuxmann at 77-80; and
- As Mr. Baranowski demonstrates, close correspondence between overall delay quantification based on SRS FA delay data and the automated Wi-Tronix system provides further assurance of reliability. *See* Rebuttal VS (PID) Baranowski ¶ 14 & Table 1.

In short, SRS data, along with other delay data, used by CN are reliable, and used conservatively. Amtrak’s vague criticisms that the SRS system is subject to “human errors” and that Mr. Baranowski could not directly validate every item of data, Amtrak Reply Br. (PID) at 78, demand too much and fail to identify specific and significant flaws. Mr. Baranowski is, of course, an expert witness, not a fact witness, so he relies on evidence provided by others, and there is nothing wrong with relying on a rigorous, albeit human, data-gathering system that is employed for key business functions in the ordinary course of business.

Moreover, there is no basis for Amtrak’s expressed skepticism about whether CN’s use of SRS data to determine incremental freight train delay costs is conservative. *See, e.g., id.* As CN witnesses have explained, SRS data are inherently conservative because they do not record delays to certain freight trains, or when total delays incurred by a train on a segment are below certain thresholds. *See* VS (PID) Summerfield *et al.* at 12-13. That makes CN’s SRS data “unreliable,” Amtrak Reply Br. (PID) at 78, only in a very specific sense: they reliably identify and quantify the delays for which CN makes incremental cost claims, but do not reliably identify and quantify other delays, for which CN makes no claim. In sum, CN’s delay identification and quantification methodology is specific and verifiable with respect to delays for which CN makes

claims, and conservative with respect to other delays. Further, Amtrak cannot deny that CN's quantification of delays is highly conservative in other respects. For example, for multiple-cause delays, CN (1) counts the lesser of FA delay recorded in the SRS system and Wi-Tronix delay, and (2) counts no V-Time (delay due to stopping and starting instead of proceeding as normal), based on the conservative – and often unrealistic – assumption that the CN train would have had to stop and start even absent the delay caused by the Amtrak train.¹²⁵

Amid Amtrak's broad, vague complaints, it is striking that its experts, Messrs. Crowley and Mulholland, conducted a detailed review of the approximately 1,000 FA delay events encompassed in CN's incremental cost claim for December 2019, aided by CN's and Mr. Baranowski's detailed and transparent workpapers, and identified only a handful of alleged errors. See RVS (PID) Crowley/Mulholland ¶¶ 44-51 & Exs. 8-10. As Mr. Baranowski explains, a further review based on Crowley and Mulholland's criticisms determined that there were just four potential delay identification and quantification errors, affecting less than \$1,800 – less than 1% – of CN's December 2019 incremental cost claim. See Rebuttal VS (PID) Baranowski ¶¶ 16, 25. That low error rate, coupled with the significant elements of

¹²⁵ Citing Dr. Peterson's initial verified statement, Amtrak argues that conservatism demands using the lesser of Idle Time recorded by Wi-Tronix and FA delay recorded in the SRS system for single-cause delays. Amtrak Reply Br. (PID) at 83-85; RVS (PID) Crowley/Mulholland ¶¶ 35-51. As Dr. Peterson explains, that may generously be described as a misreading of the principles he articulated: the correct principle is that when reliable data enable an accurate assessment, those data should be used, and a default to conservative assumptions is appropriate only insofar as necessary to address significant uncertainty. See Rebuttal VS (PID) Peterson ¶¶ 22-25. Amtrak offers no reason for doubting the accuracy of automated Wi-Tronix data with respect to how long a train is stationary. For multiple-cause events, recourse to SRS data is useful to determine how much of the delay was attributable to Amtrak. For single-cause delays, SRS data have served their function once they establish that the entire delay was due to Amtrak; Wi-Tronix data are then the best data to quantify the delay. See Rebuttal VS (PID) Baranowski ¶ 13.

conservatism built into CN's Incremental Cost Methodology, provides strong assurance that the delays determined by the methodology are specific, verifiable, quantifiable, and not overstated.

2. Amtrak's arguments about out-of-slot and long trains are premised on its meritless "proximate cause" argument.

Amtrak argues at length that CN's methodology for identifying and quantifying incremental delays overstates those delays because it includes delays involving out-of-slot CN and Amtrak trains and CN trains that are longer than certain sidings. Amtrak Reply Br. (PID) at 78-82; RVS (PID) Crowley/Mulholland ¶¶ 16-30. The simple answer to this argument is that it has nothing to do with data and methodology; it is premised on the wrong legal standard. As stated in the Board's Interim Decision and elaborated in Section II.A.2 above, the applicable standard to identify incremental delays and incremental costs is where they would have occurred "but for" Amtrak's presence on CN's lines – not whether arguments can be constructed about multiple other factors that may also have affected the delay and the cost. In other words, Amtrak must take CN's operations and train lengths as it finds them. Amtrak's arguments about whether CN successfully adhered to its freight schedules, whether trains were out of slot, and how long CN freight trains were are simply irrelevant; Amtrak does not dispute that the delays it questions would not have happened **but for** the presence of Amtrak trains on CN's lines. And it cannot do so. Amtrak's argument regarding out-of-slot Amtrak trains (Amtrak Reply Br. (PID) at 81; RVS (PID) Crowley/Mulholland ¶¶ 23-26) is particularly revealing: in arguing that delays **caused by Amtrak trains** that are out-of-slot should be excluded, Amtrak utterly refuses to follow the Board's instruction that incremental costs should be determined based on what delays CN incurred that it would not have occurred **but for the presence of Amtrak trains**.

3. CN's methodology specifically, verifiably and conservatively quantifies V-time.

Amtrak offers four main criticisms of Mr. Baranowski's calculation of V-Time delays. As CN's witnesses explain, those criticisms are unfounded.

First, Amtrak argues that V-Time should not be counted at all, because CN dispatchers are instructed to count only Idle Time when quantifying an FA delay. As discussed above, Amtrak's premise is wrong. For multiple-cause delays, neither CN's dispatchers nor Mr. Baranowski count V-Time. For single cause delays, CN's dispatchers do not quantify the delay – the SRS system does, automatically, and it quantifies total delay, without excluding V-Time, consistent with Mr. Baranowski's approach. See Rebuttal VS (PID) Baranowski ¶17; Rebuttal VS (PID) Matteucci/Kuxmann ¶ 87.

Second, Amtrak complains that Mr. Baranowski used “two separate methodologies” – based on Wi-Tronix data where available, and TPC modeling data where Wi-Tronix data were not available. Amtrak Reply Br. (PID) at 85; RVS (PID) Crowley/Mulholland ¶ 55. Doing so is entirely appropriate. As Dr. Peterson explains, the governing principle should be to use the best available data. See Rebuttal VS (PID) Peterson ¶ 25. Wi-Tronix data are the best available data concerning train deceleration and acceleration where available, but where they are not available, TPC modeling provides the best available data. See VS (PID) Baranowski at 5-8.

Third, Amtrak complains generally about simplifying assumptions used in Mr. Robinson's TPC modeling. Amtrak Reply Br. (PID) at 86-87; RVS (PID) Crowley/Mulholland ¶¶ 56-59. As he and Mr. Lizotte explain, those assumptions were reasonable, conservative, and consistent with how CN addresses such issues in its ordinary course of business. See Rebuttal VS (PID) Lizotte/Robinson ¶ 20. Amtrak's general arguments amount to nothing more than a resistance to the use of any modeling – an unreasonable, unnecessary, and unsupported approach.

Finally, Amtrak raises one specific complaint – about the assumption used by Mr. Robinson that however many locomotives were included in a train’s consist, only a maximum of two locomotives would be active. Amtrak Reply Br. (PID) at 86-87; RVS (PID) Crowley/Mulholland ¶¶ 57-59. Amtrak provides no specific data falsifying that assumption, and it is consistent with CN’s fuel consumption principles and operating practices, as Messrs. Lizotte and Robinson have explained. See VS (PID) Lizotte at 6-7; Rebuttal VS (PID) Lizotte/Robinson ¶¶ 3-4. In any event, Mr. Robinson (modeling) and Mr. Baranowski (costing) combined to test what would happen to CN’s assessment of incremental costs if Crowley and Mulholland’s logic were followed and a third locomotive were assumed to be active in those scenarios in which an assumption would be relatively plausible. Mr. Robinson’s modeling showed that that adjustment would reduce recorded V-Time for just 25 minutes for the entire month, and Mr. Baranowski determined that the minimal cost reduction that would flow from that reduction of V-Time would be outweighed by a countervailing increase in fuel costs. See Rebuttal VS (PID) Lizotte/Robinson ¶¶ 7-10; Rebuttal VS (PID) Baranowski ¶¶ 18, 33-34. In other words, following the approach Crowley and Mulholland suggest would **increase** CN’s net incremental costs.

4. Amtrak’s claim that it is responsible for less than 3% of delays to CN freight trains is misleading and irrelevant.

One final point about Amtrak’s arguments regarding delays bears noting, although it is irrelevant to the identification and quantification of CN’s incremental costs under the governing “but for” standard. Amtrak argues that its trains are responsible for a relatively small percentage of delays to CN’s trains. Amtrak Reply Br. (PID) at 82-83; RVS (PID) Crowley/Mulholland ¶¶ 30-34. What is relatively large or small depends on context. Like Amtrak trains, CN trains experience various delays that have nothing to do with other trains; delays due to weather, track

conditions, maintenance, *etc.* are simply part of railroading. Whether delays due to Amtrak trains are large or small relative to those delays is irrelevant. Relative to delays due to other – mainly CN trains, delays due to Amtrak trains are disproportionately high, which is not surprising since CN gives Amtrak trains preference. That they are not high as an absolute percentage of delays is entirely unremarkable: the vast majority of trains on CN’s network are not Amtrak trains, so even while Amtrak trains cause disproportionate delays on a per-train basis, their contribution to the overall level of delay is limited.

In any event, Amtrak’s arguments are irrelevant to the exercise at hand. The nature and amount of other delays on CN’s network has nothing to do with the ***incremental*** amount of delays that would not have occurred but for Amtrak’s presence. And, in accordance with the Board’s Interim Decision, CN is seeking recovery of incremental costs only for delays and costs that are specific, verifiable and quantifiable; CN is not seeking recovery of shared, systemic costs jointly caused by Amtrak and non-Amtrak delays.

D. Amtrak’s Criticisms of CN’s Freight Train Delay Cost Identification and Quantification Methodologies Are Unfounded.

1. CN’s claim for crew overtime is conservative in nature, and Amtrak’s criticisms are largely unfounded, although CN now offers a correction to ensure that no overtime costs are claimed without justification.

As CN has previously explained, its claim for crew overtime costs is highly conservative in nature. Not only does the SRS screen mean that the delays for which CN claims are undercounted; CN makes no claim for the significant costs it incurs both for lost crew time during shifts that does not result in overtime and for re-crew events. CN claims merely the incremental costs it actually incurs in the form of direct and immediate liability for overtime payments to crews whose work time was extended into overtime by delays caused by Amtrak.

Amtrak raises two objections, one of which is baseless and one of which provides grounds for a small adjustment, which CN, through Mr. Baranowski, has now made. First, Amtrak argues that overtime should be allocated proportionately, *i.e.*, that if a crew earns overtime due to multiple delays – some attributable to Amtrak and some not – the overtime should be attributed proportionate to those delays. Amtrak Reply Br. (PID) at 89-90; RVS (PID) Crowley/Mulholland ¶¶ 63-73. That argument is meritless. Once again, Amtrak ignores the governing “but for” test. If a crew would have completed its work in 9 hours but for delays, but incurred a 1-hour delay attributable to Amtrak and a 1-hour delay attributable to non-Amtrak causes, and thus earned 1 hour of overtime at the end of a 10-hour scheduled shift, then the amount of overtime the crew would have earned but for Amtrak – without the 1-hour Amtrak delay – is zero. In that simple example, contrary to Amtrak’s arguments, the entire hour of overtime – not just 50% of it or 30 minutes -- is an incremental cost CN would not have incurred but for Amtrak. See Rebuttal VS (PID) Peterson ¶ 19-21.

Amtrak’s argument that does have some merit is based on an evidently detailed review Messrs. Crowley and Mulholland were able to conduct, based on CN’s detailed and transparent explanations and workpapers, of CN’s specific overtime cost claims. Based on that review, Crowley and Mulholland identified instances in which they could not discern from Mr. Baranowski’s workpapers a clear match between the crew that incurred overtime and the delay, or there was a potential double-count. See Amtrak Reply Br. (PID) at 90; RVS (PID) Crowley/Mulholland ¶¶ 75-79. As Mr. Baranowski explains and documents, he examined not merely the specific errors alleged by Crowley and Mulholland but all relevant data, including additional payroll data he obtained from CN (and produced in workpapers) that enhanced the accuracy and verification of his incremental crew overtime assessments. Based on that re-

assessment, he concluded that his initial assessment of CN's December 2019 incremental crew overtime costs should be reduced by \$757, and CN is reducing its claim accordingly. *See* RVS (PID) Baranowski ¶¶ 25-26, 44-45. Since the issue has now been clarified and CN's payroll data enables precise matches between crews and delays, this one-time correction is not indicative of any problem that would arise applying the methodology to other months.¹²⁶

2. Contrary to Amtrak's claims, CN's methodology for identifying and quantifying incremental fuel costs is sound and conservative.

CN's proposal for recovery of its incremental fuel costs is sound and conservative, for reasons CN has explained before. Among other things, it is premised on CN's inherently conservative identification and quantification of delays attributable to Amtrak, it includes no Stop-Start Fuel Burn for multiple-cause delays, and it includes Idle Fuel Burn only for locomotives equipped with Wi-Tronix, and only insofar as specific Wi-Tronix data demonstrate that the locomotive was active. *See* Rebuttal VS (PID) Baranowski ¶ 37. Amtrak raises several objections to CN's fuel cost claims; they are meritless.

First, Crowley and Mulholland argue that CN's fuel cost claims neglect the fuel-saving impacts of AESS technology, which in some instances deactivates locomotives when a train is stationary. RVS (PID) Crowley/Mulholland ¶¶ 83-84. As Messrs. Baranowski, Lizotte and Robinson explain, that is simply wrong: AESS technology would be relevant only to Idle Fuel Burn, and CN counts Idle Fuel Burn only for locomotives shown directly by Wi-Tronix data to be activated. *See* Rebuttal VS (PID) Baranowski ¶ 31; Rebuttal VS (PID) Lizotte/Robinson ¶ 15.

¹²⁶ As an accommodation to Amtrak's objection to the unbiased use of rounding in Mr. Baranowski's methodology, he has also eliminated rounding, resulting in a trivial adjustment to the revised crew overtime claim. *See* Rebuttal VS (PID) Baranowski ¶¶ 27, 44.

Second, Amtrak argues that Wi-Tronix fuel level data should have been used in place of, or to supplement, fuel burn modeling. Amtrak Reply Br. (PID) at 91; RVS (PID) Crowley/Mulholland ¶¶ 85, 87-91. As Messrs. Lizotte and Robinson demonstrate, that would entail substituting a much less granular and accurate data source for data that are highly reliable. See Rebuttal VS (PID) Lizotte/Robinson ¶¶ 16-19 & Figure 1.

Third, as noted above, Amtrak objects to the two-locomotive cap assumption Mr. Robinson used in his TPC modeling. Amtrak Reply Br. (PID) at 91-92; RVS (PID) Crowley/Mulholland ¶¶ 92-99. As noted above, Mr. Robinson conducted test runs to determine how fuel consumption would be affected if a third locomotive were assumed to be active, as suggested by Crowley and Mulholland. He determined that that adjustment would invariably lead to **increased** fuel consumption, which would lead to **increased** incremental costs. See Rebuttal VS (PID) Lizotte/Robinson ¶¶ 7-10; Rebuttal VS (PID) Baranowski ¶¶ 18, 33-34.

Finally, Crowley and Mulholland offer a vague suggestion that CN's incremental fuel costs due to excess fuel burn during Stop-Start and Idle events caused by Amtrak might somehow be recouped through fuel surcharges. RVS (PID) Crowley/Mulholland ¶¶ 106-07. As Mr. Baranowski explains, that is inconsistent with how fuel surcharges work – they cover excess per-gallon costs when the price of fuel rises, not excess fuel burn. See Rebuttal VS (PID) Baranowski ¶ 36.

3. Contrary to Amtrak's claims, CN's methodology for identifying and quantifying incremental fuel costs is sound and conservative.

Amtrak argues that CN's claims for the costs of delays to the locomotives and cars it owns and to foreign locomotives and cars for which it is responsible under HPH and car hire agreements constitute "opportunity costs" for which CN cannot recover under the Board's Interim Decision. Amtrak Reply Br. (PID) at 93; RVS (PID) Crowley/Mulholland ¶¶ 110-13.

That is not what the Interim Decision says: it says that certain “non-quantified or otherwise amorphous costs” claimed by CN, which included some “opportunity costs,” did not qualify for compensation. Interim Decision at 22. And the context of that statement was a distinction between, on the one hand, freight train delay costs, including locomotive and car costs, and, on the other hand, lost revenue opportunities, including “opportunity costs.” *See id.* at 18. Further, as Dr. Peterson explains, labeling a cost an “opportunity cost” because it does not entail an immediate cash payment does not make it any less of a real and actually incurred economic cost, and it is fundamentally unsound as a matter of economics to apply different rules to costs that are actually incurred merely because they can be labeled as “opportunity costs.” Rebuttal VS (PID) Peterson ¶¶ 31-33.

CN actually incurs the locomotive and car costs it claims. As Messrs. Matteucci, Kuxmann and Peterson explain, locomotives and railcars are essential business assets for a freight railroad like CN. *See* Rebuttal VS (PID) Matteucci/Kuxmann ¶ 89; Rebuttal VS (PID) Peterson ¶ 28. Thus, when Amtrak disables CN from putting locomotives and cars to productive use, or from returning them to their owners and thus avoiding charges, by delaying them during their trips, Amtrak imposes a direct cost on CN in the form of ownership and rental costs – CN needs to purchase or rent more locomotives and cars to do the same work – or contract costs – CN incurs liabilities, to pay in cash or in-kind, to the locomotive or car owner. Notwithstanding Amtrak’s invocation of nominal and unexplained “utilization rates,” *see* Amtrak Reply Br. at 93; RVS (PID) Crowley/Mulholland ¶¶ 114-17, the reality – as the Board well knows, as reflected by substantial rates charged by railroads to each other for locomotive and car hire in arm’s length agreements, and as reflected by CN’s substantial ongoing investment in locomotives and cars – is that the locomotives and cars that Amtrak delays on CN’s lines would not be sitting idle if

Amtrak did not delay them, and CN incurs significant incremental costs as a result of those delays. *See generally* Rebuttal VS (PID) Matteucci/Kuxmann ¶ 89; Rebuttal VS (PID) Peterson ¶¶ 27-28.

Finally, Amtrak's objections to how Mr. Baranowski quantifies CN's locomotive and car costs are also meritless. *See* Amtrak Reply Br. (PID) at 94-95; RVS (PID) Crowley/Mulholland ¶¶ 119-23, 128. That Amtrak is not party to the HPH and car hire agreements Mr. Baranowski used for quantification is irrelevant: those agreements set real costs per hour that CN pays and collects for hours of car and locomotive time, and they may be taken as accurately representing the value of that time since they were negotiated at arm's-length between independent and sophisticated economic actors and are based on costs of ownership – not mileage-based costs – as reported in R-1 reports. *See generally* Rebuttal VS (PID) Baranowski ¶ 89; Rebuttal VS (PID) Peterson ¶¶ 27-28.

E. CN's Revised Quantification of Incremental Costs for December 2019.

As described above and detailed in Mr. Baranowski's statement, in light of Amtrak's criticisms and based on a re-examination of delay events which found just five instances (out of almost 1,000) of duplicate delay claims, and a detailed review and verification of incremental crew overtime costs informed by additional CN payroll data (which are fully disclosed in workpapers), he has revised his quantification of CN's incremental costs due to freight train delays that would not have occurred but for the presence of Amtrak trains on CN's lines in December 2019, reducing it from \$219,691 to \$217,798. *See* RVS (PID) Baranowski ¶¶ 44-45. That modest (less than 1%) adjustment after extensive efforts by Crowley and Mulholland to find flaws in CN's Incremental Cost Methodology reflects that it is both transparent and auditable, and highly reliable. In addition, as explained above, it is highly conservative.

F. CN's Mode of Proof, Using a Sample Month, Is Appropriate, and the Board Should Approve CN's Methodology, Subject to Appropriate Auditing and/or Agreed Means of Estimation Going Forward.

Amtrak raises one more general complaint: that CN has only applied its methodology to one sample month of data, and Amtrak should have an opportunity to audit it. See Amtrak Reply Br. at 95-96; RVS (PID) Crowley/Mulholland ¶¶ 132-34. Insofar as Amtrak's point is that CN has not yet proven its incremental costs for other months and Amtrak should have a fair opportunity to audit its proof when it does so, CN does not dispute that. But insofar as Amtrak's argument goes beyond that, it is unreasonable obstructionism.

First, it was entirely reasonable and appropriate for CN to describe its new methodology in detail and then apply it to one month of data, providing detailed workpaper support. As expected, Amtrak has raised many arguments regarding CN's methodology, which the Board has yet to resolve. While, as explained above, CN considers Amtrak's arguments almost entirely unfounded, it would have been a waste of time and effort for CN to apply its methodology to years of data before the Board resolves whether the methodology should be refined in any way, and before the Board resolves the disputed issue of retroactivity. The approximately 1,000 CN freight train delays due to Amtrak in December 2019 provide an ample sample to test the methodology, as the parties' arguments and statements reflect.

Second, while CN agrees that Amtrak should have a full and fair opportunity to audit and challenge incremental costs data CN presents in the future, Amtrak has already had, and taken, that opportunity with respect to the December 2019 delays, as the Rebuttal Verified Statement and Exhibits of Messrs. Crowley and Mulholland reflect. (CN has no objection to their auditing the *changes* made in CN's claims in the present submission.)

Finally, the rigorous methodology CN has presented requires substantial work to implement it, but once it is set and approved, CN can implement it efficiently, and, as CN's

evidence and workpapers have demonstrated, it is transparent and auditable. That said, CN remains amenable to a reasonable simplification that would be consistent with the principles underlying the methodology. For example, while Amtrak's demands on CN may give rise to significant variations in how much delay it causes to CN's freight trains, on a systemic level, the average cost per hour of those delays may be relatively consistent, subject to inflationary factors that could be efficiently addressed to determine per-hour costs of delays. CN stands ready to implement its full methodology, or a simplified methodology, as appropriate.

G. The Board Should Award CN Incremental Freight Train Delay Cost Compensation Retroactive to the Date of the Board's Interim Decision.

Amtrak initiated this proceeding with an Application requesting that any new terms and compensation prescribed by the Board be retroactive to August 12, 2013 (the date after the last extension of the 2011 Operating Agreement expired).¹²⁷ Now, however, Amtrak asks that the terms and compensation prescribed by the Board apply prospectively only.¹²⁸ CN, on the other hand, while proposing that any new Board-prescribed terms for incentives and penalties apply prospectively, maintains its position that any new terms regarding base compensation (*i.e.*, compensation for the incremental costs CN incurs in hosting Amtrak's trains) should be applied retroactively to September 1, 2019 (the beginning of the first full month after the Board's Initial Decision).¹²⁹

¹²⁷ Amtrak App. at 1 (filed Jul. 30, 2013).

¹²⁸ Amtrak Opening Br. (PID) at 32.

¹²⁹ CN also proposes that terms of the new Operating Agreement providing for compensation of Incremental PTC Costs and Incremental Safety Appliance Costs (as defined in the Proposed Operating Agreement and in the PTC Letter Agreement and the Safety Appliance Letter Agreement (RVS (PID) Matteucci/Kuxmann, Exs. 15 & 16)) be made retroactive, so that the termination of those letter agreements upon their incorporation into the Operating Agreement (as provided in the letter agreements themselves) would not affect CN's substantive rights to

CN's position is fair and consistent, and supported by Board precedent. Amtrak argues that it is illogical for the Board to award incremental costs, but not incentive payments and penalties, retroactively.¹³⁰ This ignores the difference between incentive payments and cost compensation. Incentive payments must be applied prospectively in order to motivate conduct. "Retroactive incentives" is an oxymoron. By contrast, the purpose of incremental cost compensation—to reimburse host railroads for the baseline of costs incurred from hosting (and showing preference to) Amtrak trains, and thereby reduce subsidization of Amtrak by host railroads and freight customers—is not forward-looking. Furthermore, CN's retroactive incremental costs are supported by data, which is unavailable for the new incentives and penalties scheme. And Amtrak has been long put on notice by precedent, CN's submissions, and the Interim Decision that it may appropriately be required to reimburse CN for incremental costs incurred hosting Amtrak. Amtrak's consent is not needed for the Board to award what Amtrak reasonably owes CN.

1. Amtrak's claim that awarding freight delay costs retroactively is inconsistent with not altering incentives and penalties retroactively is baseless.

Amtrak asserts that CN's position on retroactive base compensation is "irreconcilable" with its position regarding incentives and penalties.¹³¹ But there is no contradiction. Incentives and penalties cannot serve their purpose—encouraging good performance and deterring poor performance—when applied to past conduct. They are by their nature forward-looking. Paying

compensation. It does not appear that Amtrak disagrees, although it proposes merely attaching those letters to the new Operating Agreement rather than incorporating their terms (including [REDACTED]) into the Agreement, as contemplated by the letters.

¹³⁰ Amtrak Reply Br. (PID) at 101-03.

¹³¹ Amtrak Reply Br. (PID) at 97.

incentives or imposing penalties for past performance against new targets makes no sense, as even Amtrak has now conceded.

In contrast, compensation for incremental costs is essentially backward-looking. Retroactive compensation for such costs would merely reimburse CN for expenses it has already incurred fulfilling its obligation, under RPSA and the Board's initial order in this case,¹³² to host Amtrak's services on its lines. As Dr. Peterson and Professor Willig described, this reimbursement is necessary to prevent cross-subsidization of Amtrak by CN and, indirectly, its freight customers.¹³³

Another important difference is that calculating incentive payments retroactively would be meaningless and unfair. Incentive payments under Amtrak's proposal are based on a Customer OTP standard that assumes adjusted train schedules that did not exist before issuance of the FRA Metrics and Standards. CN's proposal conceptually incorporates Customer OTP and also requires schedule changes for the Illini/ Saluki service and City of New Orleans service. It is also infeasible to calculate retroactive incentive payments because data do not exist: the new incentive/penalty scheme that CN proposes is based on a Customer OTP metric, and assumes adjustments to Amtrak train schedules to bring in line with that metric, which were not in place until after the PRIIA performance standard was adopted in November 2020.¹³⁴ By contrast,

¹³² Initial Decision at 3 (served Aug. 9, 2013) (“[T]he Board will order that the current arrangement between the parties, as provided in their contract, continue pending completion of a proceeding to determine reasonable terms and compensation for CN's provision of facilities and services.”).

¹³³ VS (PID) Peterson ¶ 5; VS Willig at 2, 4 (filed Sept. 4, 2015); RVS Willig at 2, 8 (filed Sept. 14, 2017).

¹³⁴ And the schedules for six of the Amtrak trains operating on CN's lines have still not been adjusted to align with the Customer OTP standard. Rebuttal VS (PID) Matteucci/Kuxmann ¶¶ 91 n.45, 94-95.

CN's retroactive incremental cost calculations are supported by readily available data and transparent and reliable methodology. CN maintains ample data regarding both past delays to its trains because of Amtrak and expenses incurred as a result of those delays, so that it can readily calculate its incremental freight train delay costs with the specificity and verifiability required by the Interim Decision. This is illustrated in CN's analysis of CN and Amtrak train operations in December 2019. There is simply no basis for the comparison between incremental costs (which must be awarded retroactively and prospectively) and incentive payments (which must be applied only prospectively).

2. Amtrak had ample notice of CN's claim for incremental cost compensation for Amtrak-caused freight train delays.

Amtrak contradicts the record by arguing that it is unfair for the Board to require retroactive reimbursement of CN's incremental costs for crew overtime, fuel, and equipment because, it claims, it was not on notice that it was required to reimburse CN for these costs.¹³⁵ Amtrak seems to believe that it is not properly on notice because it has consistently rejected CN's definition of incremental costs. But being on notice requires only awareness, not agreement. And Amtrak has known for nearly seven years (*i.e.*, since CN submitted its original Opening Submission on September 4, 2015) that CN maintains that it is entitled to be fully compensated for its incremental costs. Since the Board's Interim Decision of August 9, 2019—which is supported by well-established principles requiring incremental cost compensation—Amtrak has known that the Board regards incremental costs as “those costs that CN has actually incurred, and that CN would not have incurred ‘but for’ the presence of Amtrak” and that this definition could extend to the kind of labor, fuel, and equipment costs that CN claims, provided

¹³⁵ Amtrak Reply Br. (PID) at 98.

that such costs are “specific, verifiable, and quantifiable.”¹³⁶ Amtrak has therefore known that such costs, once adequately established, are compensable.¹³⁷

Amtrak asserts that retroactively applying new incremental cost terms “would deny Amtrak any chance to implement any sort of operational cost-control measures as to those costs.”¹³⁸ If this is true regarding incremental freight train delay costs incurred since September 1, 2013, it can only be because Amtrak did not respond to the clear indications that it might be required to “bear responsibility”¹³⁹ for such costs. Furthermore, Amtrak has never offered any suggestion as to what it would have done differently.

The fact that incremental freight train delay costs “were never considered reimbursable during the Parties’ past course of conduct under the 2011 OA”¹⁴⁰ is irrelevant. That Agreement expired on August 11, 2013, and since then no agreement between CN and Amtrak has dictated the terms and compensation for Amtrak’s use of CN’s lines. Instead, CN has been required by the Board’s order of August 9, 2013 to provide facilities and services to Amtrak, on the same terms as the 2011 Agreement, “on an interim basis” pending prescription by the Board of new terms and compensation.¹⁴¹ Amtrak itself had requested that the terms prescribed by the Board

¹³⁶ Interim Decision at 22-23 (footnote omitted).

¹³⁷ Amtrak’s argument that the Board’s Interim Decision “did not decide that any of the costs CN was seeking (and still is seeking) actually met the definition of ‘incremental costs’” (Amtrak Reply Br. (PID) at 98) misses the point. In the absence of a new, binding Operating Agreement (either agreed to by the parties or prescribed by the Board), Amtrak knew that the compensability of the costs being sought by CN were still on the table, and had no grounds for assuming that CN would be required to incur those costs during the interim period without compensation.

¹³⁸ Amtrak Opening Br. (PID) at 73.

¹³⁹ Amtrak Reply Br. (PID) at 102.

¹⁴⁰ Amtrak Reply Br. (PID) at 102.

¹⁴¹ Initial Decision at 3 (served Aug. 9, 2013).

be made retroactive to August 12, 2013, and the Board announced upon the initiation of this proceeding that its final decision would address the issue of retroactivity.¹⁴² Amtrak thus had no reason to assume that the interim compensation it has been paying after expiration of the 2011 Agreement would not be subject to a retroactive adjustment.

3. Amtrak's consent is not required for retroactive compensation.

Amtrak asserts that “prescribed terms and compensation could be given retroactive effect only if both Amtrak and the host railroad consented,”¹⁴³ and claims to be unaware of any authority that incremental costs may be ordered retroactively. In fact, the Board and its predecessor have a long history of ordering that incremental cost compensation be applied retroactively to the effective date of the initial order compelling access to the host's tracks.¹⁴⁴

¹⁴² *Id.*

¹⁴³ Amtrak Opening Br. at 101 n.333 (filed Jan. 19, 2018); *see also* Amtrak Reply Br. (PID) at 97 (Amtrak's invocation of the Board's decision in *New England Cent. R.R.—Trackage Rights Order—Pan Am S. LLC (“NECR/PAS”)*, Docket No. FD 35842 (STB served Oct. 31, 2017) is also beside the point. Amtrak cites *NECR/PAS* for the proposition that “compensation will not be applied retroactively, absent consent of all parties.” But while the Board declined to impose new compensation terms retroactively in that case, it did so not because it believed it had no authority to do so, but because of the particular “circumstances of [the] case,” including the host railroad's alleged “actions delaying the proceeding,” for which the Board decided the tenant should not be “unfairly penalized.” *NECR/PAS*, slip op. at 27-28.)

¹⁴⁴ *E.g., Nat'l R.R. Passenger Corp.—Application Under Section 402(a) of the Rail Passenger Serv. Act for Order Requiring Bay Colony R.R. to Provide Serv. & Fixing Just & Reasonable Terms of Comp.*, Finance Docket No. 31473, 1989 ICC Lexis 119, at *10 (May 24, 1989); *Amtrak & Boston & Me. Corp.—Use of Tracks & Facilities & Establishing Just Comp.*, Finance Docket No. 31257, 1988 ICC Lexis 117, at *7 (Apr. 4, 1988); *Amtrak & Chicago & W. Inc. R.R. & Belt Ry.—Use of Tracks & Facilities & Establishing Just Comp.*, Finance Docket No. 31204, slip op. at 4 (ICC served Mar. 18, 1988); *Nat'l R.R. Passenger Corp. & Union Pac. R.R., Use of Tracks & Facilities & Establishment of Just Comp.*, 348 I.C.C. 926, 936 (1977) (“UP”); *Nat'l R.R. Passenger Corp. & Terminal R.R. Ass'n, Use of Tracks & Facilities & Establishment of Just Comp.* (“TRRA”), 348 I.C.C. 901, 909, 912 (1977); *see also Application of Nat'l R.R. Passenger Corp. Under 49 U.S.C. 24308(a)—Order to Require Serv. & Set Comp. Terms (“BNSF”)*, STB Finance Docket No. 32911, 1996 WL 210680, at *2 (STB served Apr. 30, 1996) (“In prior proceedings, the ICC has found that compensation awards should be applied retroactively to the effective date or the order requiring access.”); *Nat'l R.R. Passenger Corp. &*

The sole authority Amtrak cites for its absurd claim, *Nat'l Rail Passenger Corp. Application Under Section 402(a) of the Rail Passenger Serv. Act*, 1 I.C.C. 2d 243 (1984) (“*Metro North I*”), undermines rather than supports its position. Amtrak cites *Metro-North I* for the proposition that “[i]n the absence of consent by the parties, this Commission is without jurisdiction to fix compensation retroactively.”¹⁴⁵ But the issue in that case (as well as in the *UP* case cited therein) was whether the agency could require retroactivity to a date long before initiation of the case.

In none of the cases cited above did the Board or the ICC give Amtrak a right to veto retroactive compensation by retracting consent after seeking retroactive terms at the outset, as is the case here where Amtrak asked unambiguously asked the board to make “new terms and compensation retroactively effective to August 12, 2013.”¹⁴⁶ To the contrary, these decisions order compensation terms that are retroactive to the effective date of the agency’s initial order, or refer to the agency’s general practice of doing so. Amtrak is now asking for the right to limit CN’s compensation and unilaterally extend the term of an expired Operating Agreement. If Amtrak were correct in its claim that the Board may not make prescribed compensation terms retroactive without Amtrak’s consent, that would lead to the absurd conclusion that Amtrak can

Consolidated Rail Corp.—Application Under Section 402(a) of the Rail Passenger Serv. Act for Order Fixing Just Comp., Finance Docket No. 32467, slip op. at 7 n. 18 (ICC served July 25, 1995) (recognizing ICC’s “general policy of making section 402(a) orders retroactive to the date of an initial order establishing a schedule to resolve such disputes”); *Nat’l R.R. Passenger Corp. & Tex. & Pac. Ry., Use of Tracks & Facilities & Establishing Just Comp.* 348 I.C.C. 357, 374 (1977) (“*T&P*”) (in case under RPSA § 402(c), setting compensation retroactive to date of initial service order).

¹⁴⁵ 1 I.C.C.2d at 248.

¹⁴⁶ Amtrak App. at 1 (filed Jul. 30, 2013).

negate retroactive compensation at any stage of a dispute when Amtrak changes its mind about the favorability of retroactive terms.

CN—recognizing the length of time that has passed in this case since the Board’s initial order, acknowledging the impracticality of calculating incremental freight train delay costs back to the date of that order, and taking note of Amtrak’s claims of potential unfairness of requiring compensation for unanticipated claims of incremental costs going back that far—is calling for a much more limited retroactivity period than the Board is legally authorized to order. CN’s proposal is reasonable and should be approved.

III. OTHER CONTRACT PROVISIONS.

A. Amtrak’s Schedules Should Be Subject to Periodic Review and, if Necessary, Arbitration.

Appendix II of the current Operating Agreement sets out the schedules agreed upon by the parties for the Amtrak trains that operate on CN’s lines. Those schedules are not only important to Amtrak’s passengers, they are a central component of the Operating Agreement, as they are the basis for determining contractual On-Time Performance and, in turn, any incentives or penalties. Any mismatch between the structure of a schedule and the measure of performance under the Operating Agreement—as both parties agree would exist for the Illini/Saluki and City of New Orleans schedules under either party’s proposal until those schedules are properly modified—must be addressed. Likewise, as future issues that affect the relationship between schedules and the Operating Agreement arise over time (e.g., changes in infrastructure, equipment, schedules, safety and operating rules or measures), those must be addressed.¹⁴⁷

¹⁴⁷ As a concrete example of why dispute resolution is necessary, the parties were unable for years to agree on an adjustment to schedules to recognize the time lost due to the slow order CN had to impose for safety due to Amtrak’s use of single-level equipment on the Illini/Saluki

To help address present and future schedule issues, CN has proposed adding new Section 3.2.G to the Operating Agreement. This provision provides for the regular review of Amtrak's schedules by the parties, on a staggered timetable,¹⁴⁸ and clarifies the timing and availability of any arbitration.¹⁴⁹ It also lays out these basic considerations for the arbitrators: (i) using "objective modeling, along with any other means deemed reliable, to ensure the accuracy of PRT" (i.e., pure run time, the basic building block of schedules), (ii) taking into account operational realities, (iii) reallocating or adjusting schedule time so that OTP performance standards are "reasonably achievable during periods of normal operation," and (iv) ensuring that CN "has a reasonable opportunity" – not a guarantee – "to earn net Performance Payments."

Amtrak raises several objections to these provisions: (i) that the Board "should not consider" these proposals because it claims the Initial Decision did not leave these matters "as an

service that failed to properly shunt road grade crossing warning devices. That failure not only created an unnecessary dispute about incentives or penalties, but it also meant that Amtrak passengers were knowingly provided with inaccurate anticipated arrival times.

Another example, which CN discussed in its Reply Submission (PID) (at 92-93), is Amtrak's refusal to date to lengthen the schedules for the Illini/Saluki, despite its recent admissions that PRT in various segments for that service is currently inadequate.

¹⁴⁸ In light of the need to reallocate recovery time on the Illini/Saluki and City of New Orleans services, CN also proposed a special review provision in the event the parties are unable to agree on that reallocation (Section 3.2.G.(2)(a)). Those negotiations were updated in CN's Reply Submission (*see generally* Section IV). On August 11, 2022, Amtrak responded to CN's last proposal (*see* Rebuttal VS Matteucci/Kuxmann, Ex. 2), and it appears the parties are moving closer to agreement. If this issue is resolved before the effective date of a new Operating Agreement, it will moot this special provision.

¹⁴⁹ Neither party has proposed that the Board instead serve this function. To do so, the Board would likely have to act within the context of a Section 402 compensation case, which is neither a practical or efficient solution. For example, for a host to invoke the Board's authority, it would have to terminate the agreement (assuming its provisions allowed its unilateral cancellation), deny Amtrak use of its tracks, and thereby force Amtrak to initiate a proceeding under 49 U.S.C. § 24308(a)(2)(A).

open issue to be addressed”¹⁵⁰; (ii) that review of Amtrak’s schedules “is contrary to and inconsistent with the [FRA Metrics and Standards’] detailed process for Amtrak and its Host Railroads to review and certify Amtrak’s schedules”¹⁵¹; (iii) that the proposal is “unnecessary and duplicative” of other provisions in the Operating Agreement¹⁵²; and (iv) that the Board lacks authority to “impose conditions on arbitrators” under the operating agreement.¹⁵³ Notably, Amtrak nowhere disputes that schedules are integral to the Operating Agreement, that they need to be updated over time, or that a compulsory process may be necessary to address them effectively. In any event, its objections are unfounded.

Amtrak’s claim that schedule review and arbitration issues are off the table finds no support in the Interim Decision. That decision stated only that it was “issu[ing] interim findings and guidance on the *main* disputed issues”.¹⁵⁴ It never purported to identify all open issues, and it made clear that the Board would ultimately determine “*any* remaining unresolved issues”.¹⁵⁵ Schedule review issues were raised by CN in the earlier phases of the proceeding and remain unresolved. And these issues are important, have now been fully briefed, and are ripe for decision.

Amtrak’s reliance on FRA’s Metrics and Standards is again misplaced. FRA established a one-time, non-binding process that was not compulsory. *See* FRA Metrics and Standards, 85 Fed. Reg. at 72,978-80. The only consequence of failing to participate is that schedules might

¹⁵⁰ Amtrak Reply Br. (PID) at 104.

¹⁵¹ *Id.* at 105.

¹⁵² *Id.* at 107-108.

¹⁵³ *Id.* at 108-109.

¹⁵⁴ Interim Decision at 2.

¹⁵⁵ Interim Decision at 2 (emphasis added).

remain uncertified. *See* 49 C.F.R. Part 273. Further, nothing in the Metrics and Standards suggested that Amtrak and hosts could not or should not include separate processes in their operating agreements or elsewhere for reviewing and resolving schedule issues. (And even if it had, the final authority over the reasonable terms of an operating agreement rests with the Board, not FRA.) To the contrary, FRA emphasized the importance of maintaining updated schedules. *See, e.g.*, FRA Metrics and Standards, 85 Fed. Reg. at 72,979 n.25.

CN's experience invoking FRA's dispute resolution process with Amtrak underscores these points. FRA's voluntary process of non-binding dispute resolution provided for issuance of a written decision on schedule issues should the parties fail to reach agreement, and described the decision-makers as arbitrators.¹⁵⁶ Nonetheless, after CN invoked FRA's process, Amtrak refused to agree to a written decision as clearly provided for in FRA Metrics and Standards decision and insisted on a one-day "mediation," leaving Amtrak free to do as much or as little as it wished.¹⁵⁷ Clearly FRA's one-time, voluntary, and non-binding process is no substitute for schedule review and arbitration provisions within the Operating Agreement.

Nor do existing provisions of the Operating Agreement make schedule review and arbitration superfluous. Amtrak claims these proposals are "duplicative" of Section 3.2.D, which provides a procedure by which either party may propose changes to a schedule.¹⁵⁸ But CN has

¹⁵⁶ *See* Fed. Reg. at 72,780 ("The non-binding dispute resolution process **will produce a written decision** that will inform Amtrak and a host railroad in aligning the schedule with the customer OTP metric." (emphasis added)); *id.* at 72,995 (referring to "arbitration fees and compensation for the arbitrators").

¹⁵⁷ Rebuttal VS Matteucci/Kuxmann ¶ 95; Letter from Jim Blair to Michael Matteucci (May 12, 2021) (Rebuttal VS Matteucci/Kuxmann, Ex. 3); Letter from Michael Matteucci to Jim Blair (May 18, 2021) (Rebuttal VS Matteucci/Kuxmann, Ex. 4); Letter from Jim Blair to Michael Matteucci (June 4, 2021) (Rebuttal VS Matteucci/Kuxmann, Ex 5).

¹⁵⁸ Amtrak Reply Br. (PID) at 107-08.

previously explained that the procedures under Section 3.2.D, which require a party to develop and present a new train schedule as a starting point for the process, are not a substitute for a cooperative process of regular review.¹⁵⁹ CN believes that the most efficient and mutually beneficial way to approach schedule development is through a mandatory joint, cooperative process that engages the attention and resources of both parties.¹⁶⁰ Proposed new Section 3.2.G provides for that. By itself, current Section 3.2.D does not.

Furthermore, while Amtrak suggests that Section 3.2.D “directs the parties to arbitration under Article VI” in the event of “a continuing dispute”¹⁶¹, Amtrak stops short of acknowledging that the operating agreement authorizes an arbitrator to modify a schedule (as opposed to ruling that the proper contractual procedures for modification have been followed). CN’s proposal would resolve this ambiguity by making clear that a schedule may be modified through arbitration under Article VI, and by providing criteria to guide the arbitrators in making their decisions.

Finally, Amtrak objects to the requirement in proposed new Section 3.2.G(4) that arbitrators consider the criteria listed there, because “Amtrak has not agreed to the conditions on the arbitrators’ authority in connection with scheduling-related disputes”.¹⁶² But it makes no

¹⁵⁹ CN Opening Submission (PID) at 70-71.

¹⁶⁰ While Amtrak suggests that Section 3.2.D “directs the parties to arbitration under Article VI” in the event of “a continuing dispute” (Amtrak Reply Br. (PID) at 107), Amtrak stops short of acknowledging that the provision authorizes an arbitrator to modify a schedule (as opposed to ruling that the proper contractual procedures for modification have been followed). CN’s proposal for a systematic schedule review process, on the other hand, makes clear that a schedule dispute under proposed new Section 3.2.G may be resolved by arbitration under Article VI.

¹⁶¹ Amtrak Reply Br. (PID) at 107.

¹⁶² Amtrak Reply Br. (PID) at 109.

sense to refer schedule issues to arbitration without some guidance regarding the parties' understanding as to how schedules should properly be structured, the factors that should be taken into account in structuring them, and the goals they are meant to further. If Amtrak had better or different criteria to guide the arbitrators on these matters, it should have provided them. But having failed to do, it cannot cite its failure as grounds for omitting any such guidance from the Operating Agreement.

In any event, by filing its petition in this proceeding, Amtrak has invoked the Board's authority to dictate the terms that Amtrak must accept as a condition of obtaining access to CN's tracks and other facilities.¹⁶³ Amtrak cites no authority limiting the authority of the Board to condition such access on arbitration of disagreements over schedule revisions and on basic criteria to guide the arbitrators. Having so invoked the Board's authority, Amtrak does not somehow retain veto power over Board-imposed revisions to the Operating Agreement, whether arbitration-related or otherwise, on the ground that it has not agreed to them.

Furthermore, Amtrak **has** agreed to the "Amtrak Arbitration Agreement,"¹⁶⁴ which provides for arbitration of "any claim or controversy between [Amtrak] and any Participating

¹⁶³ Amtrak's only substantive objection to the criteria CN has proposed to guide the arbitrators is that they would be required to "ensure, in light of objective modeling and past performance data, that CN has a reasonable opportunity to earn net Performance Payments." Amtrak Reply Br. (PID) at 103 n.85 (citing CN Proposed Operating Agreement (Rev'd), Sec. 3.2.G(4)(d)). But as argued above in connection with CN's proposed reopener, the reasonable opportunity to earn incentive payments (not, as noted above, a guarantee of such payments) is essential to a well-designed compensation system. See Section I.C, above. Conversely, if the host does not have such an opportunity, that is a sign that the compensation system is badly designed and fails to motivate the host to provide Amtrak with good service.

¹⁶⁴ Article VI of the Operating Agreement provides for disputes arising under the Agreement to be resolved pursuant to the provisions of the National Railroad Passenger Corporation Arbitration Agreement of April 16, 1971 (the "Amtrak Arbitration Agreement"), which was attached as Exhibit 2 to the Reply Verified Statement of James A. Blair.

Railroad, which, in accordance with the terms of a Basic Agreement, is to be submitted to arbitration under [the Amtrak Arbitration] Agreement”.¹⁶⁵ And Amtrak has agreed to Article VI of the current Operating Agreement, providing that the Operating Agreement shall be deemed to be the “Basic Agreement” referred to in the Amtrak Arbitration Agreement, and providing further that any claim or controversy regarding the interpretation, *application*, or *implementation* of the Operating Agreement shall be arbitrated in accordance with the Amtrak Arbitration Agreement. Therefore, once a revised Operating Agreement is executed, Amtrak will have agreed to arbitration implementing the terms of the new Operating Agreement, including any provisions prescribed by the Board for schedule review, which in turn will include any specific instructions or guidelines that the Board may prescribe at CN’s request governing arbitration of disputes arising in connection with that review.

B. CN’s Proposal to Strengthen Procedures for Resolving Delay Code and Other Disputes Is Necessary, Fair, and Efficient.

As explained in CN’s Post-Interim Decision Opening Submission (at Section I.D.2), the administration of the Operating Agreement can be simplified by incorporating Amtrak’s HRD delay codes as a screen. But Amtrak’s delay codes cannot be the final word for those purposes, given the frequency of Amtrak miscoding and Amtrak’s self-interest in coding delays as host-responsible. At present, CN’s only recourse in cases of incorrect coding is to attempt to persuade Amtrak that the assigned code should be changed. And even when Amtrak agrees to change the coding for a particular delay, it often insists that its agreement constitutes no precedent for similar future instances. That might arguably be tolerable if the codes were simply used for Amtrak’s own evaluation and public reporting of its performance, but it is not acceptable in the

¹⁶⁵ RVS (PID) Blair, Ex. 2 at 3 (Amtrak Arbitration Agreement, Art. Two).

context of determining OTP, and thus incentives and penalties, under the Operating Agreement, where coding delays as host-responsible would reduce contractual OTP and thus CN's compensation.

While it is true that the Operating Agreement currently includes a dispute resolution provision (Article VI, providing for arbitration under the Amtrak Arbitration Agreement) that CN could theoretically invoke if Amtrak miscoding were to affect compensation under the Agreement, CN's disputes with Amtrak over incorrect coding are too frequent, the monetary consequence of any such dispute taken individually too small, and the arbitration process too lengthy, for invocation of Article VI to be a practical option for resolution of such disputes. Amtrak proposes a "Daily Process" and a "Quarterly Process" under which CN can challenge Amtrak's delay coding and other matters relating to billing. But those processes suffer from the same deficiency as under the current Agreement: they leave the decision whether to correct a delay code subject to Amtrak's exclusive discretion, with no appeal to an impartial third party.¹⁶⁶

CN has therefore proposed a more realistic process for considering and resolving disputes over delay coding, application of relief items, and other matters affecting billing. This process would call for consideration at successively higher levels in CN's and Amtrak's organizations, with the option of resorting to arbitration of those (presumably relatively few) disputes that cannot be resolved at a lower level. CN Proposed Operating Agreement (Rev'd), Sec. 5.2.a.¹⁶⁷

¹⁶⁶If Amtrak believes the process Amtrak advocates is fair and reasonable, it should be willing to undertake the same burden it argues should be placed on CN, by agreeing that disputed delays shall be recategorized as CN specifies, unless and until the parties jointly agree to a further change or one is ordered by an arbitrator. CN doubts Amtrak would be willing to take on this burden. However, if the Board orders this change, CN would be willing to accept it.

¹⁶⁷ Amtrak argues that CN's proposed incentive/penalty system, based on Amtrak's own delay codes, would "proliferate monthly and quarterly disputes between the Parties, and perhaps may cause them to be more frequent" (Amtrak Reply Br. (PID) at 111). In so arguing, Amtrak

Amtrak further suggests that CN's proposal is inferior to its own proposal, involving "real-time, early-stage collaboration between Amtrak and CN to resolve disputes over delay data that might impact the calculation of incentives and penalties under Appendix V".¹⁶⁸ But Amtrak's proposal for "collaboration" is illusory, because Amtrak would retain ultimate authority to decide such disputes, and CN's role would be limited to one of supplication, seeking to persuade Amtrak to act against its own interest and find itself or a third party responsible for a disputed delay. Swift dispute resolution under such circumstances would not be a virtue of Amtrak's system, but a product of its one-sidedness.

An important advantage of CN's proposed system for resolving coding and other billing disputes is that any resolution reached through that system would be binding precedent in similar situations arising in the future. As CN has explained,¹⁶⁹ this provision is necessary to prevent the waste of resources occurring when (as often happens under the current Operating Agreement), CN challenges Amtrak's coding and persuades Amtrak to revise it, but must go through the same process of challenge and persuasion the next time the same kind of delay occurs. Amtrak argues that making resolutions precedential would deter parties from agreeing to any resolution, especially in instances where the amount of money at stake is small.¹⁷⁰ But there is nothing in CN's proposal that would prevent the parties from agreeing in an individual case providing that the resolution of that case will not have precedential effect, notwithstanding the general rule in

appears to agree that disputes over its delay codes have been frequent. But Amtrak's incentives/penalties proposal is equally dependent on Amtrak's delay codes, so there is no reason to expect disputes to be any more frequent under CN's proposed system.

¹⁶⁸ Amtrak Reply Br. (PID) at 111.

¹⁶⁹ CN Opening Submission (PID) at XX.

¹⁷⁰ Amtrak (PID) Reply Submission at 113.

the Operating Agreement providing that such resolutions will operate as binding precedents. Such an agreement, coming after the Operating Agreement, would trump the general rule set out in the Agreement, but that rule would appropriately continue to apply by default to succeeding cases.

C. The Board Should Adopt CN's Proposals on Confidentiality.

Amtrak makes no argument in support of its over-reaching original claim that the Operating Agreement should require that Appendices IV, V, and IX in their entirety be treated as confidential rather than, as CN has proposed, that only the monetary values in those appendices be made confidential. The dollar amounts set out in the appendices are based on CN's internal costing; their disclosure could therefore compromise CN's sensitive business information, and it would be appropriate for the Board to restrict their disclosure. There is no similar concern extending to the structure of the compensation system under the Operating Agreement, as provided in the remainder of Appendices IV, V, and IX. In this case, the Board's prescription of the basic structure of the appendices would be a determination by the Board of what compensation structure is "reasonable," 49 U.S.C. § 24308(a)(2)(A)(ii). As such, it is likely to serve as a precedent for future cases under 49 U.S.C. § 24308(a)(2). For that reason, and because the Board's determination would reflect its judgment as to what contract structure is in the public interest, the public should be entitled to see the structure and general terms of the Agreement, including Appendices IV, V, and IX.¹⁷¹

¹⁷¹ Amtrak maintains that the PTC Side Letter and the Safety Appliance Side Letter should continue to be kept confidential. Although CN does not believe the side letters contain sensitive confidential information at this point, it does not object.

D. The PTC Side Letter and the Safety Appliance Side Letter Must Be Correctly Incorporated Into the Operating Agreement, Not Simply Attached As Amtrak Proposes.

The PTC Side Letter and the Safety Appliance Side Letter, both executed by CN and Amtrak simultaneously with execution of the 2011 Operating Agreement, require the parties to incorporate their basic terms into the Operating Agreement. The parties did not do so before the expiration of the 2011 Operating Agreement, but CN has proposed in this proceeding to carry out the mandate of the letters by inserting the operative terms of the letters at appropriate places in the new Agreement to be prescribed by the Board. Amtrak, on the other hand, has steadfastly opposed CN's proposal, raising trivial objections but failing to propose any alternative, until its Opening Submission in the current round of filings, in which it proposes simply to tack the letters on to the back of the Operating Agreement as an exhibit. As explained in CN's Reply (PID) Submission, simply attaching the letters as an exhibit is not sufficient to discharge the obligation to incorporate the basic terms of the letters into the Operating Agreement, which the parties took on when they executed the letters. (If it were, the parties could easily have done so on May 1, 2011, when they executed the Operating Agreement along with the side letters, and would not have needed to agree to do so some time in the future.)

Amtrak accuses CN of "cherry-picking certain language from the Side Letters" in its effort to carry out the parties' obligation to incorporate the terms of those letters into the Operating Agreement. But Amtrak has not identified any operative terms of the letters that CN has failed to incorporate. In fact, what CN has done is select the portions of the letters that constitute their legally binding terms, and only those portions, in order to carry out the intent of

those letters “ [REDACTED] ”¹⁷² and “ [REDACTED] [REDACTED] ”.¹⁷³ If Amtrak

has a better proposal than CN’s for carrying out that intent, it should have presented it to the Board. In the absence of such a proposal, the Board should adopt CN’s.

E. The Board Should Adopt CN’s Proposals for Modification of Items 4(a) and 4(b) of Appendix IV.

1. An Increase in the Monetary Threshold for Station Work Requiring Amtrak Approval Is a Reasonable Reflection of Inflation Since 2011.

CN has proposed raising the monetary threshold in Item 4(a) of Appendix IV so that, at stations where CN performs maintenance for Amtrak, CN can implement maintenance projects costing up to \$4,000 without getting Amtrak’s prior approval, rather than up to \$2,000 as at present. Amtrak opposes this reasonable proposal, which does no more than acknowledge that maintenance projects that could be carried out for \$2,000 when the Operating Agreement was executed in 2011 will cost more today, and that failure to raise the threshold will mean that CN will need to seek Amtrak’s consent more often for projects of the same value.

It is a matter of common knowledge that inflation has eroded the value of \$2,000 since 2011, and is likely to continue doing. Amtrak’s insistence that CN provide “evidence that any requests for approval to Amtrak imposed an ‘inconvenience’ on CN” or that it provide “evidence of its related expenses” serves no purpose other than simple obstruction (but is consistent with its practice, with respect to other proposed Operating Amendment changes, of making extraordinary evidentiary demands). Some increase in the threshold is clearly warranted after 12 years, and if Amtrak believes that \$4,000 is too much of one, then it should have proposed a different, more

¹⁷² VS (PID) Matteucci/Kuxmann, Ex. 15 at 3.

¹⁷³ *Id.*, Ex. 16 at 3.

appropriate value. Most other monetary provisions in the Operating Agreement are adjusted on a yearly basis, though operation of automatic escalation provisions. Amtrak has provided no reason that this single provision should not also be adjusted, for the first time in 12 years. The Board should order the revision of Item 4(a) as requested.

2. CN Should Not Be Required to Serve as Amtrak's Snow Remover of Last Resort.

Amtrak objects to CN's proposal to amend Item 4(b) of Appendix IV to remove a provision that requires CN to provide snow removal services at Amtrak stations if Amtrak is unable to arrange such service. Amtrak provides no reason to believe that CN will be better able to arrange such service than Amtrak. Whatever reason there may have been to do so earlier in Amtrak's history, there is no longer any reason to make CN Amtrak's snow remover of last resort. Freight rail transportation, not snow removal, is CN's business. As CN pointed out in its Opening Submission (at 100), "[S]now removal, whether arranged by Amtrak or CN, is done through contractors. If Amtrak is having difficulty locating a contractor, CN simply provides Amtrak with information regarding additional contractors." Amtrak provides no evidence to refute this statement, which confirms that CN is in no better position than Amtrak itself to arrange snow removal. The Board should approve the removal of the provision requiring CN to do so.

CONCLUSION

CN followed the guidance in the Interim Decision item-by-item, adhering to the Board's direction and accommodating Amtrak's alternative proposed checkpoint system to create a new Operating Agreement more closely tied to Customer OTP and the interests of all passengers affected by matters within CN's control as a host. Amtrak followed a different path. It seized upon the FRA's Metrics and Standards as a pretext for abandoning the Board's guidance and its

own prior checkpoint-based proposal to advocate an extreme, impractical, self-serving proposal premised on holding CN solely responsible for any failure by Amtrak to achieve 80% Customer OTP, despite delay data that forcefully undermines that claim.

Regarding incentive/penalties, Amtrak's proposal:

- relies on an overbroad, unilaterally defined categorization of supposed "host responsible delays," that clearly does a poorer job of discerning host responsibility for delays than the customized provisions agreed to by the parties in their operating agreement;
- relies on a new HRD-based standard, which is not integrated with actual on-time performance and thus treats delays to early and late trains alike, is unsupported by any statistical model or even workpapers, but rather based on a scattergram that even from a cursory view (as explained by Dr. Peterson) undermines the vague "association" Amtrak's non-expert witness claims to have discerned, and which is admittedly not based on either the individual or collective trains or services hosted by CN;
- includes multipliers for Customer OTP and passenger-miles that irrationally increase penalties when Customer OTP is higher and when passenger-miles rise;
- is skewed so that it effectively guarantees CN will receive no net incentive payments over the life of the operating agreement, thus failing to provide any positive incentive for strong host performance and denying CN an opportunity to earn even its incremental costs of hosting; and
- instead of a "reopener" as directed by the Board, includes an unprecedented, unworkable, self-serving "tiered" dispatching and maintenance-of-way intervention and takeover provision that is premised on the unfounded notion that CN denies Amtrak preference, and would immediately harm CN and its labor workforce and its rail customers.

Amtrak's position on incremental cost compensation for freight delays due to Amtrak is no less extreme. It would deny CN compensation for any such costs based on arguments that fail to adhere to the Board's "but for" standard (long-established by decades of precedent), disregard the Board's implicit rejection of Amtrak's "preference for free" argument, and seek to impose impossible standards of proof, all of which would allow Amtrak to make unreasonable demands of its hosts without cost constraints.

CN would like to work cooperatively with Amtrak to meet their mutual goals and strike a reasonable and appropriate balance between serving the country's broad interests in both freight service and passenger service that is timely, efficient, and reliable. CN in good faith followed the Board's direction and has fashioned a proposal designed to achieve that goal. Amtrak, by contrast, has fashioned a new proposal that would not serve that goal and which conflicts with the Board's guidance, the law, and principles of economics and sound public policy. It must be rejected.

Respectfully submitted,

/s/ David A. Hirsh

David A. Hirsh
James M. Guinivan
Vineeta Kamath
DENTONS US LLP
1900 K Street, N.W.
Washington, DC 20006
(202) 496-7500
david.hirsh@dentons.com

Tobias S. Loss-Eaton
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20006
(202) 736-8000

Kathryn J. Gainey
CN
Suite 500 North Building
601 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 347-7840

August 25, 2022

Tab A

PUBLIC VERSION - REDACTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35743

APPLICATION OF THE NATIONAL RAILROAD PASSENGER CORPORATION UNDER
49 U.S.C. § 24308(a) – CANADIAN NATIONAL RAILWAY COMPANY

**POST-INTERIM DECISION JOINT REBUTTAL VERIFIED STATEMENT
OF MICHAEL MATTEUCCI AND SCOTT KUXMANN**

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PUBLIC VERSION - REDACTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35743

APPLICATION OF THE NATIONAL RAILROAD PASSENGER CORPORATION UNDER
49 U.S.C. § 24308(a) – CANADIAN NATIONAL RAILWAY COMPANY

**POST-INTERIM DECISION JOINT REBUTTAL VERIFIED STATEMENT
OF MICHAEL MATTEUCCI AND SCOTT KUXMANN**

1. We are Michael Matteucci and Scott Kuxmann. On May 27, 2022, we submitted a verified statement (“VS (PID) Matteucci/Kuxmann”) as part of CN’s Opening Submission in this proceeding. We set forth our qualifications in that statement. On July 26, 2022, we submitted a further verified statement (“RVS (PID) Matteucci/Kuxmann”) as part of CN’s Reply Submission.

2. In our opening statement, we discussed the principal changes which CN proposes to make in its existing Operating Agreement with Amtrak.¹ In our reply statement, we addressed

¹ CN and Amtrak executed an Operating Agreement in 2011, which by its terms expired at the end of August 11, 2013. An order of the Board served in this proceeding on August 9, 2013 directed CN to continue to provide facilities and services (including rail lines) to Amtrak on an interim basis under the terms and conditions of the Operating Agreement in effect on August 11, 2013. We refer to that Agreement as the “2011 Operating Agreement” or, because it has been continued in force by Board order, as the “current” or “present” Agreement. A copy of the 2011 Agreement, incorporating all amendments made by the parties, is the base document for the CN’s comparisons submitted as Exhibit 2 of Tab B of CN’s Post-Interim Decision Opening Submission and as Exhibit 1 of Tab E of CN’s Post-Interim Decision Reply Submission (“CN Proposed Operating Agreement (Rev’d)”).

various arguments and proposals made in Amtrak's Opening Brief (including the supporting verified statements of James Blair and Yoel Weiss).

3. In this Rebuttal Verified Statement, we respond to arguments and evidence presented by Amtrak in its Reply Brief (including the supporting Reply Verified Statement of James A. Blair and the Reply Verified Statement of Thomas D. Crowley and Robert D. Mulholland) in order to provide further support for CN's proposal (as modified in its Reply Submission) and to demonstrate its superiority over Amtrak's competing proposal.

4. In Part I of this Rebuttal Verified Statement, we respond to Amtrak's criticisms of the system of incentives and penalties that CN has proposed to motivate CN to provide good service while hosting Amtrak's trains, as well as to Amtrak's arguments in support of its own HRD-based incentives/penalties system. In doing so, we respond to Amtrak arguments regarding CN's proposed lookback provision, which prevents penalties from exceeding incentive payments in the long run and thus ensures that CN earns at least its incremental costs, as identified in the Operating Agreement. We also respond to Amtrak's arguments regarding CN's proposed reopener provision, which prevents the lookback from causing the Operating Agreement's incentives/penalties system from breaking down (as might happen during a period of sustained poor performance by CN, in which CN is unable to earn incentives but protected by the lookback from being penalized), providing instead that the parties will "reopen" the Operating Agreement to consider the possible causes of the poor performance and to institute remedies for it. In Part II of this statement, we address certain specific issues raised by Amtrak's criticisms of CN's proposal for the recovery of its incremental freight train delay costs. (We defer to CN's expert witnesses, Michael Baranowski and Dr. Steven Peterson, for more complete defenses of CN's incremental costs proposal.) Finally in Part III, we address miscellaneous

Operating Agreement issues, primarily including CN's proposal for establishment of a procedure for systematic review and, if appropriate, modification of the schedules of Amtrak trains operating on CN's lines, the confidentiality of certain portions of the new Operating Agreement, and incorporation of the substantive terms of two side letter agreements into the Operating Agreement, as agreed in those side letters.

I. ON-TIME PERFORMANCE, INCENTIVES AND PENALTIES, LOOKBACK, AND REOPENER

A. Computation of On-Time Performance; Incentives and Penalties.

5. CN's proposal for calculation of on-time performance ("OTP") closely adheres to the Board's guidance in the Interim Decision, appropriately focuses on and accounts for CN's contribution to Amtrak's OTP, and provides for balanced and symmetrical incentives and penalties, with reopening and lookback provisions that ensure that CN remains incentivized and accountable to avoid any sustained period of failed CN performance and also meaningfully protect CN from long-term net penalties that would prevent it from recovering the incremental costs of hosting Amtrak.

6. By contrast, Amtrak's proposal, among other shortcomings, (i) fails to determine whether incentives or penalties will be awarded based on a direct measure of OTP (using Customer OTP instead as a multiplier regardless of whether incentives or penalties are awarded), (ii) fails to integrate CN responsibility for delays with actual OTP, (iii) wrongly treats CN as responsible for OTP at stations unaffected by CN's hosting and for changes in number of passenger miles having nothing to do with CN's performance, (iv) applies an asymmetric and unbalanced "adjustment factor" to create huge penalties for performance that would earn incentives under the current Operating Agreement, and (v) relies on an unfounded, self-serving,

unworkable tiered “reopener,” that is not actually a reopener and that would quickly allow Amtrak to oversee and intrude on CN’s dispatching, and ultimately assume control of dispatching and scheduling of maintenance of way from CN—and allow it to do the same with most of its other Class I hosts if applied to them.² CN Reply Submission (PID) at 59-60. Amtrak’s proposal flouts the guidance provided by the Board in its Interim Decision, which, among other things, explained why an HRD-based incentive/penalty provision is flawed, and called for greater consideration of degrees of lateness for individual trains and for a true reopener.

7. Amtrak frames the fact that CN’s incentive/penalty proposal is based on a calculation of OTP that includes “relief” items for delays that should not be attributed to a host – a common and longstanding feature of existing Amtrak-host operating agreements – as a redefinition of Customer OTP or fundamentally inconsistent with Customer OTP as experienced by passengers. It then characterizes as “absurd” the possibility that CN (or any other host) could ever earn incentives when either (i) Customer OTP for a train is below 80% or (ii) the STB investigates a train under PRIIA. Amtrak Reply Br. (PID) at 15-17. But there is nothing “absurd” or improper about these aspects of CN’s proposal, both of which are consistent with how CN, Amtrak, and other freight hosts nationwide have agreed to organize their relationships

² Amtrak set the threshold between positive and negative “Delay Adjustment Factors” (determining whether CN receives incentives or penalties) at 925 minutes of “host-responsible delay” per 10,000 train-miles, based on an analysis of all hosted Amtrak trains that shows a purported “association between 80% Customer OTP and approximately 900 minutes of HRD per 10,000 train-miles.” VS Weiss ¶¶ 83-85; *see also* VS Blair ¶¶ 49-52. The use of a nationwide “association” between HRD and Customer OTP, rather than one based on the correlation of those factors on CN-hosted trains CN (or even on individual services, as Amtrak initially proposed (*see* Amtrak Opening Statement at 13 (filed Sept. 4, 2015))) suggests an intention to make that threshold more broadly applicable than in just CN’s Operating Agreement.

for decades. Customer OTP is a measure of *results for a train achieved by* Amtrak for its customers. Operating agreements should measure – and always have measures – *the quality of service provided to Amtrak* by a host. Those are related, but very different, things. Indeed, the very result Amtrak derides would very often occur under its own proposal.

8. Amtrak mischaracterizes relief items' purpose and effect. OTP is solely a measure of Amtrak train performance, and as such it does not account for different causes of delays. Relief items do not redefine OTP; they reflect the undeniable fact that some delays are outside of a host's reasonable control and, as such, irrelevant to assessing the quality of host performance. In Amtrak's operating agreements with CN and other host railroads, relief items are used to determine if aggregate delays to run time that cause a train to be late can and should be attributed to the host.

9. In any event, when it comes to integrating the concept of OTP into the Operating Agreement, CN's proposal does a far better job than Amtrak's. CN Reply Submission (PID) at 100-02; RVS (PID) Peterson ¶¶ 19-29. CN's proposal directly measures for each individual train whether delays due to the host caused the train to be late for its scheduled arrival. Moreover, CN's revised proposal also measures the degree to which those delays contributed to the train being late. Like FRA's Customer OTP metric, CN's proposal does so for every station and end point on CN's lines (for this purpose, the relevant route) and actually allows for less basic tolerance for OTP than FRA's 15 minutes.³

³ As can be seen from the "tolerance" column in the schedule skeleton's included with CN's proposed revised operating agreement, CN has proposed basic tolerance ranging from 8 to 10 minutes. See CN Opening Submission (PID), Tab B, Exhibit 1, Appendix II.

10. By contrast, Amtrak's proposal awards incentives and penalties without *any* direct consideration of whether a train is on time or not, much less any consideration of whether its OTP was driven by the host. While Amtrak touts the direct integration of Customer OTP into the Operating Agreement, its proposal does not even use that standard to determine whether incentives or penalties will be awarded; instead, it irrationally applies the Customer OTP metric only as a multiplier, regardless of the resulting contradictory effects, such as the fact that higher Customer OTP increases penalties and lower Customer OTP decreases incentives. Moreover, far from being applied meaningfully on a train-by-train basis, Customer OTP is only used as a multiplier on a quarterly, combined train "service" basis.

11. This fact also undermines Amtrak's claim that "real world experience" – meaning Amtrak's failure in some cases to achieve 80% Customer OTP – somehow demonstrates that the way to improve that result is to incorporate Customer OTP as a multiplier of incentives/penalties, as in Amtrak's proposal. Amtrak Reply Br. (PID) at 2-3. In addition to the many failings of the rote incorporation approach that CN has detailed, Amtrak's data does not support its implication that CN's incentive/penalty proposal will necessarily result in deficient Customer OTP. First, Amtrak is fighting the wrong battle. CN's proposal is not in effect, nor was it in effect during the period of low COTP that Amtrak cites, and CN's proposal includes the many significant modifications recommended by the Board that can reasonably be expected to raise Customer OTP, not the least of which is refocusing the agreement on Customer OTP rather than Endpoint OTP by adding every station as a checkpoint and weighting them according to number of passengers disembarking and more closely aligning performance measures and incentives under the agreement with achievement of that goal.

12. Second, and leaving aside Amtrak and third-party influence over Customer OTP, the Customer OTP cited by Amtrak is not representative of the quality of CN's performance under even the existing incentive/penalty provision. Customer OTP for the Illini/Saluki and City of New Orleans services is, by Amtrak's own admission, significantly below optimal levels because recovery time for the trains in those services has not been redistributed after the FRA's adoption of the Customer OTP metric (though the parties continue to discuss an agreement to do so), and Customer OTP for the remaining services is more of a function of performance by hosts other than CN, given that most of the routes (and most of the delays) for those services are on the lines of other hosts.

13. Finally, Amtrak's effort to impugn the existing Operating Agreement also fails because Amtrak cannot explain why the City of New Orleans service, for which CN is the exclusive Class I host, has been and remains one of Amtrak's best performing long-distance services (even though its backloaded recovery time still requires redistribution).

14. Amtrak asserts that CN's proposal has two "absurd practical implications." Amtrak Reply Br. (PID) at 15-17. First, it argues that CN's proposal would allow it to earn incentives even when CN has "itself *caused* the poor OTP on an Amtrak route" through its "own operational decisions," such as the scheduling of MOW work or conduct of efficiency testing (i.e., operational tests and inspections required by FRA). *Id.* at 16. Amtrak claims that scenario is "very unlikely" to occur under its own proposal. *Id.* at 16 n.12. Second, Amtrak argues it could paying CN incentives on a route for which Customer OTP is less than 80% and which is subject to STB investigation under Section 213 of PRIIA. *Id.* at 16-17.

15. Overlooked in Amtrak's first argument is the larger question of which proposed incentive/penalty provision – CN's or Amtrak's – does a better job of rewarding and penalizing

CN in accordance with its contribution to Amtrak's OTP. The answer is CN's, as it has detailed. *See* CN Reply Submission (PID), Secs. I-II; RVS (PID) Peterson ¶¶ 19-29. Under CN's proposal, whether incentives or penalties are due is determined by whether CN-responsible delays for individual trains exceed the run time necessary for on-time arrival, whereas Amtrak's proposal makes that determination on the basis of a total quarterly HRD figure for an entire service, regardless of actual on-time performance and regardless of the failure of Amtrak's HRD category and the assignment of codes by its engineers to attribute delays to a host accurately. The most fundamental question regarding the efficacy of an incentive/penalty provision is how well it measures a host's contribution to Customer OTP, and the answer to that question decidedly favors CN's proposal.

16. Amtrak's argument opposing relief for what it describes as "operational decisions" focuses on efficiency testing and MOW. But its arguments do not withstand scrutiny.

17. Amtrak's supposed concern with "efficiency testing" is a red herring. Not only is such testing mandatory under FRA regulations (49 C.F.R. § 217.9), but it results in very few delays in practice and has not been the subject of a single disagreement between the parties over the past year (i.e., no related delays were coded as CN-responsible). Moreover, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. CN's only proposed change to the Operating Agreement is to ensure that CN is not penalized for such mandatory testing for purposes of determining incentives and penalties, whether or not it is conducted jointly with Amtrak. *See* CN Revised Operating Agreement (Redline), App.V.A.1.(e)(4), at App. V-6. And CN proposes to make relief for delays caused by such testing subject to the recovery time base ("RTB"), so the

portion of any such delays that does not exceed the applicable RTB would not be subject to relief. Based on past history, the effect of such change will be *de minimis* at most and, as we explained in our statement submitted as part of CN's Opening Submission, it is appropriate that CN "not be penalized or given a disincentive for conducting tests that are necessary to ensure the safe operation of Amtrak's trains" (VS (PID) Matteucci/Kuxmann at 45).

18. Amtrak also says that CN is "asking the Board to approve 'additional tolerances' when CN has decided to perform MOW." Amtrak Reply Br. (PID) at 16. That claim is completely unfounded. CN proposed *no* change to the current treatment of MOW under the operating agreement. *See* CN Revised Operating Agreement (Redline), App.V.A.2. at App. V-6. That provision was agreed to by Amtrak and has been part of the Operating Agreement for years. Contrary to Amtrak's suggestion, it provides for additional tolerance for MOW only if Amtrak agrees to provide it following a request by CN. And in exchange for any added tolerance, CN is required to accept a reduction in incentive rates. Far from being "absurd," this is a fair and balanced provision which, at least outside this proceeding, has not led to controversy between the parties. RVS (PID) Taylor ¶ 23.

19. Amtrak's second "absurd[ity]" argument is that CN's proposal could result in Amtrak "paying CN incentives for a route, [while] the Board is concurrently investigating poor performance caused by CN on the same route." Amtrak Reply Br. (PID) at 16-17. Amtrak argues that "CN effectively would be receiving incentive payments for falling below the standard that FRA adopted." *Id.* This argument is nonsense.

20. To start, this argument is circular because Amtrak wrongly assumes that a host must be at fault (and thus unworthy of earning incentives) if one of Amtrak's trains is subject to investigation under Section 213. But the very purpose of an investigation under Section 213 is to

determine *why* an Amtrak train has fallen below 80% Customer OTP for two quarters. Congress provided for a broad factual inquiry as part of a Section 213 investigation; that investigation might well find that the key problems lie in Amtrak's unreliable equipment, its schedules, delays caused by Amtrak, and/or delays due to other factors off of CN's lines. A Section 213 investigation is not an investigation into a host's "poor performance," and does not involve a host "falling below" FRA's Customer OTP standard. It is an investigation into the performance of an Amtrak *train* and *that train's* failure to meet FRA's Customer OTP standard. The Customer OTP standard does not apply to hosts; it only applies to Amtrak trains.

21. Nor can Amtrak's route-level failures to meet FRA's 80% Customer OTP standard be laid at the feet of CN and other individual hosts. That is especially true for CN, which hosts less than 50% of the route miles for four of the six regularly scheduled Amtrak services that operate on its lines, including three services for which it hosts under 13% of the route miles. *See* VS (PID) Matteucci-Kuxmann at 6 (Table 1). For those services, Customer OTP is far more a measure of issues off of CN's lines than issues on CN's lines.

22. And even for services that operate primarily over CN, it is wrong to assume that sub-80% Customer OTP is due to poor CN service. Using Amtrak's own HRD-based standard of performance, it is easy to identify counterexamples. In June 2022, for example, Illini/Saluki train #393 had Customer OTP of just 37%. The main cause of delay for #393 was Amtrak – with a total of 1070 minutes of Amtrak-responsible delay (equal to 5,195 minutes per 10,000 train-miles) compared to CN HRD of 747 minutes (812 minutes per 10,000 train-miles). CN's HRD was thus well within the range qualifying for incentives under Amtrak's own proposal (i.e., below 924 minutes per 10,000 train-miles). Yet Amtrak would unfairly reduce its incentive payments to CN due to low Customer OTP – which was primarily due to Amtrak itself.

Awarding host incentives for that train would not be absurd and instead is appropriate given the service CN provided.

23. Neither is this an isolated example. Even on a full quarterly basis there are many instances of Amtrak’s services on CN failing to meet the 80% Customer OTP standard, even while CN HRD minutes per 10,000 train-miles remains within the range qualifying for incentives under Amtrak’s proposal. Below in Table 1 are a number of examples, all of which are instances where Amtrak would pay incentives under its own proposal:

Table 1
Examples of CN Qualifying For Incentives Under Amtrak’s Proposal
Despite COTP Below 80%
(A Scenario Under CN’s Proposal That Amtrak Calls “Absurd”)

Year	Quarter	Amtrak Routes	COTP	CN HRD minutes per 10K train-miles
2019	4	Blue Water	39%	800
2020	1	Blue Water	64%	585
2020	1	Illini/Saluki	64%	906
2020	2	Illini/Saluki	76%	692
2020	3	Illini/Saluki	75%	888
2021	1	Blue Water	71%	427
2021	2	Blue Water	75%	363
2021	3	Blue Water	58%	376
2021	4	Blue Water	66%	438
2021	1	City of New Orleans	77%	736
2021	3	Illini/Saluki	74%	826
2021	4	Illini/Saluki	60%	811

24. Far from demonstrating that CN’s proposal leads to absurd results, the fact that CN’s proposal allows for the possibility of rewarding a host for strong performance despite Amtrak failing to achieve 80% Customer OTP underscores that the proposal properly measures the host’s contribution to Amtrak’s performance, rather than blindly assigning all responsibility

for Amtrak's performance to each of its individual hosts. A host railroad should only be measured by its effect on the performance of the Amtrak train on that host's own railroad.

25. Amtrak acknowledges that many delays are not attributable to CN and should not count against it (i.e., delays that Amtrak itself codes as non-HRD). Under Amtrak's proposal, whether CN earns incentives or penalties is determined solely by its HRD – i.e., it is entirely unaffected by delays that Amtrak accepts are not CN's fault. But, according to Amtrak, its HRD would exclude many if not most delays covered by CN's relief items. That is untrue, but it underscores that the key issue between the parties regarding relief items is which delays are not CN's responsibility.

26. CN's Opening Submission, including our Joint Verified Statement, reviewed in detail the need to supplement Amtrak's HRD categories with more specific and accurate relief items. CN Opening Submission (PID) at 34-36; VS (PID) Matteucci/Kuxmann at 42-56. In reply, Amtrak says little about these specific items. It attaches as Exhibit 3 to Mr. Blair's Reply Verified Statement the 2017 Joint Rebuttal Verified Statement of Messrs. Vilter and Maga, which argued that "certain refinements and conforming changes" should be made to CN's proposed relief items, particularly in light of CN's agreement to use Amtrak's HRD codes as a screen. RVS Vilter/Maga at 55-61 (filed Sept. 14, 2017). Messrs. Vilter and Maga argued that some Amtrak relief codes should be excluded as inapplicable by definition, and others were unnecessary or "obsolete" because they were allegedly already encompassed by Amtrak's HRD codes. *Id.* at 57-61.

27. In its revised proposal, CN made a number of adjustments to reduce and refine relief items consistent with Amtrak's earlier comments and the Interim Decision. CN clarified that Amtrak's relief items for the Northeast Corridor should not be used under the operating

agreement. *Compare* RVS Vilter/Maga at 56 with CN Proposed Operating Agreement (Rev'd) App. XI, at App. XI-2 – XI-3. Further, rather than add new relief items where Amtrak claimed its existing codes covered delays, CN added notes to the table of Amtrak codes in Appendix XI of its proposed Operating Agreement to confirm those interpretations. *See* CN Proposed Operating Agreement (Rev'd), App. XI, at App. XI-3 (notes). As CN has explained, however, additional relief items are clearly necessary to cover specific situations that are not adequately or properly dealt with under Amtrak HRD codes. Absent including these relief items, delays will be inaccurately and unfairly attributed to CN.

28. One such specific situation is delay to Amtrak trains at interlockings controlled by non-CN (“foreign”) railroads. Such delays regularly and misleadingly drive up the numbers Amtrak reports for “freight train interference”⁴ on CN’s lines. Nevertheless, CN and Amtrak have agreed that these delays should not count against CN in computation of OTP for purposes of the Operating Agreement. They have therefore included a relief item in the Agreement for “[t]he amount of time a trip of an Amtrak train is delays at interlockings not controlled by CN, after CN’s dispatcher has transmitted the electronic indicator lining the signals for the CN route.”⁵ It is perfectly appropriate that they do so, since delays of this kind are, by definition, outside of CN’s reasonable control. Many foreign interlockings are automatically controlled, so the first train arriving is allowed to proceed and there is no human intervention that could be rationally incentivized (or penalized). And at other foreign interlockings, CN has no practical

⁴ Freight train interference, or “FTI,” is one of the categories of delay that Amtrak regards as “host-responsible delay” (“HRD”).

⁵ 2011 Operating Agreement, App. V, Sec. A.1.g.

means to force other carriers to provide Amtrak with priority rights to which it is not entitled under existing agreements.

29. CN makes every reasonable effort to provide adequate notice the controlling carriers (even if it sometimes is unable to get through to them).⁶ If Amtrak believes that insufficient effort is being made to contact the foreign dispatchers, it should make its own efforts to do so. And even when CN is able to get through, the fact remains that, while CN has ongoing relationships with those railroads, it has little or no leverage to compel them to hold their traffic and clear a path for Amtrak. CN cannot reasonably do more to motivate the controlling railroad than to provide electronic and verbal notice of Amtrak's approach, short of offering to pay the other railroad to hold the interlocking for Amtrak, or to transfer control of it to CN. But either would constitute an incremental cost to which CN would be entitled to compensation by Amtrak, and Amtrak has shown no interest in making such an investment. Accordingly then, the parties have recognized that these delays are not within CN's reasonable power to avoid or control, and have appropriately provided that they not be charged against CN for purposes of the Operating Agreement. That provision should be kept in the new Agreement prescribed by the Board.

30. Table 2 lists the modest changes to en route relief items that are included in CN's proposal because they are not adequately covered by Amtrak's codes.

⁶ Particularly with the short distances covered by CN's Joliet Sub, where interlocking delays are the greatest issue, delays can occur at foreign-carrier-controlled interlockings even when CN's dispatchers have done everything they can to provide timely notice.

If Amtrak wants CN to set apart one of its employees for the specific task of contacting non-CN dispatchers to inform them of the need to hold interlockings open for Amtrak, that would constitute yet another incremental cost of hosting Amtrak, and Amtrak has shown no interest in assuming such expenses.

Table 2**En Route Relief Items
Other than Amtrak Codes**

Source (same or similar provisions)	Description & Location in Operating Agreement (Subsection in App. V, Sec. A.1.)	Why Needed?
Existing, App. V. (IC)	The amount of time at Joliet a westbound trip of a train is delayed by the operator at Joliet. (A.1.d).	Avoid incorrect coding until schedule revised as per agreement
Existing, App. V. (IC) and App. VI (GTW)	Delay caused when a wayside detector stops a train because no reading was achieved and the detector is found to be working properly. (A.1.e(2)).	No CN control or fault as confirmed by working detector
New	The amount of time by which the trip of a train is delayed in order to pick up or drop off rail equipment provided by CN to Amtrak to substitute for failed Amtrak equipment. (A.1.e(3)).	Delay related to CN assisting
Existing, App. V. (IC) and App. VI (GTW)	The amount of time by which the trip of a train is delayed en route by efficiency testing performed by CN alone in accordance with FRA rules, provided that CN gives advance notification to Amtrak for testing performed by CN. (A.1.e(4)).	Delay based on safety testing
New	The amount of time freight train interference delays an Amtrak train from entering CN's line when that Amtrak train arrives at an entry point to a CN line more than 15 minutes after its scheduled arrival time without Amtrak or another host railroad having provided CN with notification of such late arrival at least 30 minutes in advance. (A.1.e(5)).	Amtrak at fault if no notice when arriving out of slot
New	If an Amtrak train is operating 10 or more minutes late when it arrives at an entry point on IC's Joliet Subdivision, the amount of time commuter train interference delays the Amtrak train from entering or operating over IC's Joliet Subdivision. (A.1.e(6)).	Unavoidable delay if Amtrak arrives out of slot behind Metra
Existing, App. V. (IC) and App. VI (GTW)	The amount of time a trip of an Amtrak train is delayed at interlockings not controlled by CN, after CN's dispatcher has transmitted the electronic indicator lining the signals for the CN route. (A.1.g).	No CN control or fault – requires signal request
Existing, App. V. (IC); Amtrak Proposed Redline, App. V (9/14/2017)	The amount of time a trip of a train is delayed due to the operation of an Amtrak Special Train or a detour train. (A.1.h).	Delay based on Amtrak issue
Existing, App. V. (IC); Amtrak Proposed Redline App. V (9/14/2017)	The amount of time by which the trip of a train is delayed by the movement of Amtrak maintenance of way trains. (A.1.i).	These non-passenger trains move at CN's discretion; CN should not be penalized if delay results

Source (same or similar provisions)	Description & Location in Operating Agreement (Subsection in App. V, Sec. A.1.)	Why Needed?
Existing, App. VI. (GTW) (Modified); Amtrak Proposed Redline App. V (9/14/2017)	In single track territory on the GTW Lines, and also for (i) Battle Creek Station, (ii) GTW trackage between Baron and Gord, and (iii) the Conrail CN West Detroit Connection, the first 15 minutes of delay to a trip of a train due to meeting another Amtrak train. (A.1.j).	Line specific issue reflects negotiated solution between parties
Existing, App. VI (GTW): Amtrak Proposed Redline App. V (9/14/2017)	The amount of time a trip of a train is delayed at Wesson Street in Pontiac, MI (i) for causes reported as “lining switches, derails, slow gates,” or similar variants or (ii) or due to such causes. (A.1.k).	Line specific issue negotiated between the parties (avoid coding errors)
New	The amount of time by which the trip of a train is delayed by operating restrictions, including without limitation slow orders, imposed to address safety issues related to Amtrak’s equipment. (A.1.l).	Delay based on Amtrak equipment issue (clarify proper attribution)

31. These changes are important in order to properly assign responsibility for delays, and also as clarifications that will reduce future coding disputes between the parties, in light of Amtrak’s frequently inconsistent and inaccurate coding.⁷

32. Apart from attaching the outdated 2017 statement of Messrs. Vilter and Maga, Amtrak’s Reply makes no serious effort to show that CN’s proposed changes to “relief items” are unreasonable or unnecessary. We discuss above why there is no basis for Amtrak’s complaints about the treatment of efficiency testing and MOW under CN’s proposal.

33. The other relief item Amtrak cites disapprovingly covers “slow orders imposed to address safety issues related to Amtrak’s equipment.”⁸ *See, e.g.,* Amtrak Reply Br. (PID) at 11. Amtrak fails to explain that the need for such safety slow orders at road grade crossings was

⁷ Amtrak’s failure to code consistently and accurately has been described in detail in various of CN’s prior submissions. *See, e.g.,* VS (PID) Matteucci/Kuxmann at 30-34, 39-40, 62 n.136.

⁸ The applicable relief item for safety slow orders is found in CN Proposed Operating Agreement (Rev’d), App. V, Sec. A.1.l.

prompted by Amtrak's use of single-level equipment that does not adequately shunt roadway grade crossing warning devices, delaying their activation (the "short shunt" issue).⁹ The use of slow orders for safety in this situation is not optional – it prevents Amtrak crossing accidents – and is broadly supported by the team investigating short shunt delays, including FRA, Amtrak, and other Class I railroads. In any event, Amtrak can control whether or not this slow order must be imposed by its own choice of equipment, and for the past year or two Amtrak has generally been using double-level equipment to which no slow order applies. If Amtrak reverts to prior equipment assignments or otherwise uses non-conforming equipment that requires a slow order for safe operation, the resulting delays should not be counted against CN.

34. Amtrak finally says CN's relief items are overly complex and will invite disputes. Amtrak Reply Br. (PID) at 17-18. Precisely the opposite is true. A key purpose of the relief items in Appendix V and added notes to Amtrak's delay codes in Appendix XI is to avoid repeated errors in Amtrak coding and to clarify areas of ambiguity in order to eliminate disputes. Further, the parties have a long history of using relief items, including now, without any undue administrative burden.

35. Amtrak tries to contrast this process to FRA's use of Customer OTP to determine on-time arrival (*id.* at 18), but that is the wrong comparison. Amtrak overlooks the fact that its HRD-based proposal involves detailed coding and dispute resolution. In order to reasonably determine responsibility for delays, both Amtrak's and CN's proposals require a process for review and correction of delay attribution.

⁹ See VS Ladue/Kuxmann at 43-44 (filed Sept. 4, 2015); VS (PID) Matteucci/Kuxmann at 58-59.

36. Amtrak's other complaint is that "continued inclusion of Recovery Time Base ('RTB') creates "unnecessary complexity and administrative burden." *Id.* CN closely followed the Board's guidance and revised the RTB based on the percentage of actual delays in specific segments. It presented the results integrated directly into individual train schedule skeletons and provided complete workpapers, making the process entirely transparent. There was nothing particularly complex about that process, and Amtrak has identified no fault in it.

37. Instead, Amtrak implies that the Board is required "to vet" CN's work, but that was Amtrak's job as a litigant, not the Board's. Amtrak also complains about the potential burden of updating the RTB, but there is no reason to anticipate that the RTB would need to be modified over the life of the agreement, and if it does, it can readily be recalculated.

38. The "Do Not Count" or "DNC" provisions in the Operating Agreement that exclude certain train runs from the determination of incentives/penalties if they are cancelled/annulled or experience disruptive extraordinary delays. CN has explained these provisions' importance and the minor changes it proposes to them. *See, e.g.*, CN Opening Submission (PID) at 59-63.

39. In its Reply, Amtrak claims that the existing DNC provisions cover some circumstances CN can control, and that not counting each train that starts or is scheduled to start is inconsistent with FRA's Customer OTP metric. Amtrak Reply Br. (PID) at 18-20.

40. Amtrak's arguments are not focused on the minor changes to the DNC provision proposed by CN, but on provisions that Amtrak itself agreed to when it entered into the existing Operating Agreement. Moreover, at least with respect to a checkpoint system, this is a direct reversal of position by Amtrak, which in the previous round of evidence and argument [REDACTED]

[REDACTED]

[REDACTED]. See VS (PID) Matteucci-Kuxmann, Ex. 4 (Amtrak’s redline to CN’s revised operating agreement, App.V, Sec. B.4).

41. It should first be noted that Amtrak’s complaints about the DNC provisions is a tempest in a teapot. Of the 3,152 Amtrak trains that ran over CN’s IC lines in 2021, a DNC was applied to only 68 (less than 2.2%). The DNC provisions have obviously not been a source of abuse or major controversy.

42. In any event, Amtrak’s complaints are baseless and speculative. For example, Amtrak speculates that a delay due to an emergency vehicle could “be as a result of an issue that has been directly *caused* by CN,” (Amtrak Reply Br. (PID) at 19), or a broken rail that occurs in connection with severe weather could be attributable to a failure to inspect or repair (*id.*), ignoring that CN’s inspection and repair procedures must follow FRA regulations. Amtrak even argues CN should be responsible for vandalism to crossing signals or gates, because CN may have failed to repair the damage. *Id.* at 20. These speculations ignore the reality that emergencies, severe weather, and vandalism are unplanned events that affect CN no less than Amtrak, and that CN has every incentive to rapidly repair its key infrastructure any time there is an outage that interferes with the operation and use of its rail lines. It would be an absurd waste of time to inquire into the record of inspections or repairs related to such events.

43. Morebroadly, while one can always spin out wild theories, general provisions in the Operating Agreement should accept (as the parties have for years) that in some scenarios, it is appropriate to adopt a neutral stance toward whether or not a particular run of a train should be counted as “on time” or late.

44. Amtrak also complains that DNCs do not “specify how long an Amtrak train must be delayed,” and that they could include “an Amtrak train held by civil authorities for *five*

minutes.” Amtrak Reply Br. (PID) at 20. The types of events covered by the DNCs are not short-term interruptions, however; they are major disruptions that cause trains to stop, including pedestrian strikes, crossing accidents, emergency vehicle blockages, acts of terrorism, and major weather events such as hurricanes and tornadoes. Their rarity underscores that they are not applied to minor delays.

45. Finally, there is also no merit to Amtrak’s argument that the continued use of DNCs in an operating agreement clashes with FRA’s adoption of a Customer OTP standard. Amtrak’s argument once again confuses the purpose of Customer OTP, which is to measure the performance of Amtrak’s trains, and the purpose of incentive/penalty provisions of the Operating Agreement, which are intended to measure CN’s contribution to Amtrak’s performance. It is entirely consistent with the purposes of the incentive/penalty provision to exclude – as the DNC provisions do – extraordinary circumstances and delays that could otherwise distort the measure of host performance.¹⁰ As DNCs are small in number, they can be large in individual effect. Failure to exclude them would needlessly distort the performance metrics under the agreement.

46. Amtrak claims that CN’s incentive/penalty proposal fails to account properly for stations on other hosts for multi-host services in which CN participates. Amtrak Reply Br. (PID) at 22-29. In fact, CN’s proposal does account for off-line stations, and it does so in a far more rational and efficient manner than Amtrak’s proposal.

47. Amtrak’s proposal adopts Customer OTP – applicable to a train’s entire route, across all hosts – as a multiplier for CN’s incentives/penalties. Customer OTP does not

¹⁰ Further, the DNCs cover circumstances in which a train did not run at all (i.e., it was annulled or cancelled) and therefore would not and could not be counted either toward Customer OTP or for incentives/penalties. In such cases, DNCs necessarily reflect the fact that there is no record of performance.

determine whether a host earns incentives or penalties under Amtrak's proposal; it only changes the amount. As CN has previously discussed, there are two fundamental problems with Amtrak's approach. CN Reply Submission (PID) at 48-50; RVS (PID) Matteucci/Kuxmann ¶¶ 63-65. First, use of overbroad Customer OTP introduces irrelevant information into the determination of CN's incentives/penalties, diluting its efficacy, fairness, and value. Second, Amtrak's rote multiplication of separately determined incentives/penalties by Customer OTP entirely fails to measure or integrate CN's actual influence on Amtrak's OTP in determining incentives penalties.

48. Two examples illustrate the deficiency of Amtrak's approach:

- Because Amtrak's proposed HRD standard is untethered from CN's contribution to OTP, Amtrak's incorporation of Customer OTP as a multiplier will incongruously result in *increasing* penalties on CN as Customer OTP rises, and *decreasing* penalties as Customer OTP falls. This is the exact opposite of faithfully integrating the concept of Customer OTP.
- For the 4 of 6 Amtrak services hosted by CN that run for the majority of their routes on other hosts (the Blue Water, Wolverine, Lincoln, and Texas Eagle services), the level of incentives and penalties for trains received by CN will depend on OTP at stations prior to ever reaching CN. Texas Eagle train #22, for example, originates in San Antonio, Texas, and travels approximately 1,270 miles before reaching CN at Joliet, Illinois, with over two dozen station stops along the way. Rather than focus on CN's influence over OTP for the one station that follows (Chicago), Amtrak's proposal would hold CN responsible for Amtrak performance to all of the preceding stations that had nothing to do with CN's performance.

49. By contrast, CN's proposal appropriately focuses first and foremost on delays within its control to Amtrak passenger trains at stations on its lines. However, in order to

account for downstream stations that may be affected by CN's performance, CN's proposal goes further, and where the endpoints of its route are not a station, CN uses those endpoints as an additional checkpoint. CN Opening Submission (PID) at 20. This assures that any late handoffs from CN that could affect subsequent Amtrak stations are accounted for. This is the same approach Amtrak took in its alternative checkpoint proposal in the earlier phase of this proceeding.¹¹ Amtrak is therefore incorrect in claiming that CN's proposal does not account for its effects on OTP downstream from its lines.¹²

¹¹ See Rebuttal Joint VS of Vilter/Maga at 39-40 ("CN's Performance Should be Measured at All Amtrak Stations And Exit Points **on CN Lines**") (emphasis added), attached as exhibit 3 to RVS Blair. See also VS (PID) Matteucci-Kuxmann, Ex. 4 (Amtrak's redline to CN's revised operating agreement, App.V, Sec. A (

) Amtrak filed the referenced redline for its alternative checkpoint proposal on September 14, 2017, as part of its original reply submission. The Appendix II schedule skeletons in effect at that time, which are referenced in Amtrak's redline, are attached as Exhibit 1 to this statement. They include as checkpoints only the stations on CN's lines, not those on the lines of other hosts.

¹² One can debate the appropriate relative weight to be assigned to endpoint checkpoints preceding multiple downstream stations versus other checkpoints, but for most of CN's services this makes no difference. Under CN's proposal, a final checkpoint on CN is weighted in accordance with actual ridership when that checkpoint is a station, and when it is not, it is weighted based on the next passenger station on the receiving host's lines. CN's proposal would fully weigh all stations for its two largest services – the Illini/Saluki and City of New Orleans services – and there is no relative weighting issue for the Texas Eagle trains or for train #301 of the Lincoln service, as they have only a single checkpoint (i.e., their endpoint), avoiding any weighting issues. Further, there is no meaningful weighting issue for the other Lincoln service trains. Each has only two checkpoints, and their endpoint checkpoints are already uniformly weighted at above 90%.

In any event, CN's approach to weighting for the two services where that issue is even relevant – the Blue Water and Wolverine – is rational and efficient. Overweighting endpoints for these services would devalue earlier stations, and giving equal weight to all downstream stations makes no sense because CN's contribution to on-time arrivals for downstream stations on other hosts becomes progressively attenuated. Nonetheless, if the Board believes additional weight should be accorded endpoint stations for those services, CN would be amenable to such a change.

50. Amtrak makes the remarkable argument that the Board should reject CN's proposed incorporation of a "degree of lateness" provision as part of its incentive/penalty proposal, even though Amtrak itself proposed a substantively identical provision¹³ and that the Interim Decision found (at 14) there was merit to it. Amtrak Reply Br. (PID) at 32-34. Its argument, however, merely highlights the inconsistency of its own current proposal with the Interim Decision and the absurdity of Amtrak's position that all prior consideration of how to refine the incentive/penalty provisions of the Operating Agreement must be jettisoned in light of FRA's adoption of a variety of Metrics and Standards for a different purpose.

51. Based on Amtrak's own prior arguments, the Interim Decision was concerned that CN continue to be incentivized to avoid additional delays for Amtrak trains that had already been so delayed it was clear they would be late – and thus count against CN for purposes of incentives/penalties. As part of its alternative checkpoint proposal, Amtrak proposed [REDACTED]. See Amtrak's redline to CN's revised operating agreement, App.V, Sec. D (attached to VS (PID) Matteucci-Kuxmann as Exhibit 4). In the Interim Decision (at 14), the Board found "merit to Amtrak's argument regarding impacts of the current system not incorporating a degree of lateness factor," and it determined "the parties should incorporate the degree of lateness into their penalty calculation in some manner, perhaps through a degree-of lateness multiplier in the penalty provision, or in another manner to which the parties agree."

¹³ Despite Amtrak's misleading emphasis on CN's degree of lateness being based on "minutes above . . . tolerance" (Amtrak Reply Br. (PID) at 33), Amtrak cannot and does not argue that there is a substantive difference between CN's and Amtrak's proposals. Amtrak's proposal references [REDACTED]

[REDACTED] See Amtrak's redline to CN's revised operating agreement, App.V, Sec. D, n.3 (attached to VS (PID) Matteucci-Kuxmann as Exhibit 4).

52. As CN explained in its Opening Submission, in accordance with the Board’s guidance, and in accordance with Amtrak’s own alternative checkpoint proposal, CN proposed adoption of a degree of lateness provision that was [REDACTED]. That provision may be found in Section C.8 of Appendix V of CN’s Proposed Operating Agreement.¹⁴

53. Amtrak argues that its use of an HRD per 10,000 train-miles standard for awarding incentives and penalties should be considered an equivalent lateness multiplier, but it clearly is not. As CN has pointed out, one of the great failings of Amtrak’s proposal is precisely that it does not consider the individual effects of delays on the OTP of individual trains. Its HRD per 10,000 train-miles standard is not a lateness multiplier; it is only a delay “cumulator.” It totals supposed host-responsible delays, without any regard to whether those delays are related to early or late trains, and thus does a poor job of matching actual host contribution to OTP with incentives/penalties.

B. “Lookback” Provision.

54. The “lookback” provision in the current Operating Agreement, like that in the 1995 Operating Agreement before it, provides that penalties assessed against CN in any month cannot exceed the amount of incentives earned by CN, and not previously set off against incentive payments, during the preceding 12 months (the “look back” period). In 2011, the parties added the further provision that incentives and penalties be considered separately for each of three categories of trains operating on IC,¹⁵ and that penalties assessed in any one category be

¹⁴ Based on the same principles, CN likewise proposed a timeliness multiplier (*see* CN Proposed Operating Agreement (Rev’d), App. V, Sec.B.3), which Amtrak has not opposed.

¹⁵ Those categories are: (1) the City of New Orleans (Train Nos. 58 and 59); (2) the Chicago-Carbondale trains (Train Nos. 390, 391, 392, and 393); and (3) Chicago-Joliet trains

capped at the total amount of incentives earned in that category during the 12-month lookback period.¹⁶ This limits the impact of extreme but atypical poor performance in one service, or in related services in a single category, so that CN would retain a financial incentive to ensure good performance by the trains in the other categories.

55. Amtrak initially proposed eliminating the lookback provision entirely, but the Board rejected that proposal.¹⁷ Amtrak's new proposal would extend the lookback period to equal the full term of the new Operating Agreement and, although Amtrak has yet to acknowledge it, eliminate the use of separate service categories for purposes of applying the lookback provision.¹⁸

56. CN has previously explained that the lookback provision plays an important role helping to assure that CN at least has an opportunity to be compensated for the incremental costs of hosting Amtrak and to provide CN with meaningful incentives to provide high quality service to Amtrak, and that Amtrak's proposal undermines the lookback provision in both respects.¹⁹ Amtrak's responses lack merit.

57. Amtrak argues first, without a shred of support, that the "lookback" provision is contrary to the requirement that Amtrak-host operating agreements "include a penalty for untimely performance."²⁰ In other words, Amtrak claims that everyone – Amtrak, all freight

(Train Nos. 21, 22, 300, 301, 302, 303, 304, 305, 306, and 307). Operating Agreement, App. V, Sec. D.

¹⁶ Operating Agreement, App. V, Sec. D).

¹⁷ Interim Decision at 16.

¹⁸ See Amtrak Opening Br. (PID) 61-66; Amtrak Reply Br. (PID) at 48-50.

¹⁹ CN Reply Submission (PID) at 54-59.

²⁰ See 49 U.S.C. § 24308(a)(1).

hosts, the Board, and the ICC before it – has been doing it wrong for decades.²¹ As evidenced by Board precedent and Amtrak-host longstanding practice, however, the lookback provision is not contrary to the penalty requirement, it simply balances the penalty provision with the statutory requirement that hosts be paid no less than their incremental costs. (Moreover, Amtrak’s own lookback proposal fails to implement the statutory penalty mandate because it implements Amtrak’s HRD-based system of incentives and penalties. As CN has explained (*e.g.*, CN Reply Submission (PID) at 26-27), that system penalizes, not “untimely performance,” as required by the statute, but any delays that are unilaterally characterized by Amtrak as “host-responsible,” whether or not they cause late arrival of Amtrak’s trains.)

58. Amtrak further argues that a 12-month lookback period could fail to incentivize CN through penalties when it operates to prevent their application (*i.e.*, if there are no net incentives left to offset additional penalties).²² According to Amtrak, this means a longer lookback period is necessarily better. It claims that allowing incentives to be clawed back over the entire life of the agreement should be of no concern to CN, because it could still “immediately collect incentives that it properly earns.”²³ Finally, it claims that including any lookback, including one that extends for the entire term of the agreement, fully protects CN from

²¹ When Amtrak proposed a lookback provision in *Metro-North II* (decided in 1985), it made no suggestion that its proposal was in tension with the penalty requirement, which had been part of the statute since 1981. *See Nat’l Rail Passenger Corp. Application Under Section 402(a) of the Rail Passenger Serv. Act*, Finance Docket No. 30426, 1985 ICC Lexis 318, at *1 (ICC July 5, 1985); *cf.* Amtrak Improvement Act of 1981, Pub. L. No. 97-35, tit. XI, subtit. F, § 1181, 95 Stat. 357, 687, 693.

²² Amtrak Reply Br. (PID) at 49.

²³ *Id.*

the “risk of receiving compensation that is less than its ‘incremental costs’ (which was the Board’s expressed concern).”²⁴

59. Amtrak’s arguments miss the forest for the trees. Its sole focus is on maintaining the ability to impose net penalties, but that should be a rarity under any properly functioning operating agreement, and it has been a rarity under Amtrak/CN operating agreement. Moreover, a key purpose for CN’s proposed reopener is to assure that if net penalties accrue for sustained period of time, the parties will confer and develop solutions that will make the Operating Agreement work more effectively and avoid any absence of incentives. *See* ¶¶ 63-76, below. Ironically, Amtrak opposes such a reopener, while it claims to be concerned about potential sustained net penalties.

60. More to the point, the way to assure adequate compensation and incentives for CN to provide high-quality service is not to place all incentives at perpetual risk throughout the term of the operating agreement. Amtrak’s claim that its proposal would eliminates the “risk” of CN receiving less than full incremental costs for hosting Amtrak is wrong, as CN must earn positive incentives to do so, since the Operating Agreement does not provide for compensation of incremental costs not specifically identified. Similarly, it makes no sense to claim that CN will somehow be incentivized because it can “collect” incentives even though it knows they can be clawed back (and under Amtrak’s incentive/penalty proposal that is heavily weighted to penalties likely will be clawed back). Under such a system, the host “would have little or no incentive to surpass the baseline,” *Nat’l R.R. Passenger Corp. & Union Pac. R.R., Use of Tracks & Facilities & Establishment of Just Comp.*, 348 I.C.C. 926, 950 (1977), and would rationally

²⁴ *Id.*

seek only to earn its base compensation, devoting its resources to more promising uses.

Amtrak's proposal is a recipe for a dysfunctional CN-Amtrak relationship.

61. Amtrak also proposes an important additional change that it neither acknowledges nor supports in its Opening Submission or its Reply Submission and which should therefore be rejected. It would eliminate the use of separate categories of Amtrak trains for purposes of pooling net incentives and net penalties. Amtrak's goal in eliminating these separate categories appears simply to be maximizing its ability to eliminate incentives through penalties. But the purpose and effect of applying the lookback individually to specific services is to assure that service failures for one service do not result in a loss of incentives for another. This efficient siloing, which was agreed to by Amtrak when the Operating Agreement was renegotiated in 2011, in order to more closely align performance payments and penalties with individual services, should be retained.

62. In sum, CN's proposed lookback provision, unlike Amtrak's, is designed to offer the prospect not only of earning incentive payments, but also of keeping them, and thus to motivate appropriate CN conduct in administering the Operating Agreement. It signals to CN that incentives earned in one year will not be taken away because of unexpectedly bad performance in another year, and that incentives earned on one category of Amtrak trains will not be taken away because of unexpectedly bad performance for another train category. It should be prescribed in the new Operating Agreement to govern CN's future hosting of Amtrak's trains.

C. Reopener Provision.

63. In its Interim Decision, the Board encouraged CN and Amtrak to include a reopener provision in their Operating Agreement to address "sustained poor performance" that,

given inclusion of a “lookback” provision, could result in CN having no performance incentives.²⁵ Instead of heeding this guidance, Amtrak has proposed a punitive, three-tier scheme under which Amtrak could (i) oversee and eventually take over dispatching of any train (and thus of any CN rail segment over which that train operates) incurring what Amtrak characterizes as excessive HRD, and (ii) veto any maintenance-of-way or right-of-way projects that can be “reasonably expected” to affect an Amtrak train’s OTP.²⁶ CN, on the other hand, has proposed a true reopener, which requires the parties to consult and, without prejudging the reasons for sustained poor performance under the Operating Agreement, develop and implement remedies for that performance. The Board should adopt CN’s reopener proposal.

i. Amtrak’s Proposed “Reopener” Is No Such Thing, and Inappropriately Focuses on HRD (as Determined by Amtrak).

64. Amtrak’s tiered intervention provision is not a true “reopener” and is unlawful, unreasonable, and unsound, as discussed in CN’s Reply Submission (PID), Section III. Amtrak’s new claims only highlight this proposal’s utter lack of foundation.

65. Amtrak’s reply doubles down on its claim that CN and other hosts are denying it preference and are solely responsible for any failure to meet its Customer OTP standard. It refers to “CN’s culpable conduct” and states that CN’s “misconduct” primarily takes the form of faulty dispatching decisions.²⁷ These claims are baseless. Amtrak cites a fragment from an old report of the Department of Transportation’s Inspector General (“IG”) as if it proves Amtrak’s

²⁵ Interim Decision at 16-17.

²⁶ Amtrak Proposed Operating Agreement (PID), App. V, Sec. IV.2.a.3.

²⁷ Amtrak Reply Br. (PID) at 36, 44 (emphasis omitted).

claim of widespread host violations of preference.²⁸ But the cited report did not find evidence of preference violations. It merely noted that the host railroads “*can* adjust their dispatching practices” to favor their own trains,”²⁹ not that they do so. Amtrak’s misplaced reliance on the IG report underscores the lack of evidence for its foundational claim in support of its proposed tiered intervention.

66. In a similarly misleading vein, Amtrak quotes its current chief executive officer, Stephen J. Gardner, who states “the largest cause of delay to our customers is ‘freight train interference,’ typically caused by a freight railroad requiring an Amtrak passenger train to wait so that its freight trains can operate on the tracks ahead.”³⁰ But the data tell another story. As can be seen from Table 3, Mr. Gardner’s confusing characterization notwithstanding, freight train interference (“FTI”) is a small part of total Amtrak delay for services on CN’s lines. Moreover, it is also a small subset of HRD. And when FTI is adjusted to exclude delays due to cross traffic at interlockings CN does not control (so that it better reflects actual CN dispatching), for most services it becomes a very small subset of total delays (4-15%) and for some services a much smaller subset of HRD (as little as 4%).

²⁸ Amtrak Reply Br. (PID) at 36 n.29 (*quoting Union Pac. R.R. v. STB*, 863 F.3d 816, 820 (8th Cir. 2017) (*quoting* Fed. R.R. Admin., Root Causes of Amtrak Train Delays, Rept. No. CR-2008-076, at 4 (Sept. 8, 2008) (“2008 DOT IG Report”))).

²⁹ 2008 DOT IG Report at 4 (emphasis added).

³⁰ Amtrak Reply Br. (PID) at 59.

Table 3 Breakdown of HRD and Total Delay (2021)					
Service	% of HRD		% of Total Delay		
	FTI	FTI Minus Cross Traffic	HRD	FTI	FTI Minus Cross Traffic
Blue Water	73%	73%	19%	14%	14%
City of New Orleans	36%	36%	42%	15%	15%
Illini/Saluki	27%	24%	64%	17%	15%
Lincoln Service	69%	5%	84%	58%	4%
Texas Eagle	78%	4%	94%	73%	4%
Wolverine	21%	17%	35%	8%	6%

NOTE: "Cross Traffic" means only cross traffic coded by Amtrak as CN FTI at interlockings controlled by non-CN railroads.

67. These data forcefully rebut the notion that FTI is the major cause of Amtrak's delays on CN's lines or of deficiencies in Amtrak's Customer OTP. And they undermine Amtrak's effort to treat HRD – whatever its level – as an indicator or proof of a preference violation that justifies its imposition of large penalties or its proposed tiered intervention based on its unsupported HRD per 10,000 mile standard.

ii. CN's reopener provides for concrete action to promptly and efficiently address any extended period of poor performance.

68. The Interim Decision called for a reopener to "acknowledge[] and address[], as appropriate" "periods of sustained poor performance" in a manner that will "result in concrete action in order the resolve potential future performance disputes and to prevent sustained poor performance" (Interim Decision at 17). Contrary to Amtrak's assertion,³¹ that is what CN's proposed reopener does. It adopts the Board's suggestion that the reopener provide for referral

³¹ Amtrak Reply Br. (PID) at 42.

to the Board's Rail Customer and Public Assistance ("RCPA") office, and it provides for "concrete action" in the form of arbitration under Article VI of the Operating Agreement.³²

69. In its Reply, Amtrak makes misleading and unfounded attacks on the trigger, timing, and concrete action under CN's proposed reopener.

70. CN's reopener is appropriately triggered by a sustained excess of performance penalties over incentive payments. When the Board encouraged the parties to address "periods of sustained poor performance," it was responding to Amtrak's concern that a lookback provision would create a "perverse disincentive," allowing CN performance to deteriorate to the point where CN would have no effective incentive to improve its performance.³³ CN's reopener proposal is triggered by exactly that situation.

71. Amtrak responds that CN's proposed trigger does not apply when "CN's incentive payments . . . *exceed penalties* for a route even though Amtrak trains are frequently arriving *after* their scheduled arrival times (perhaps long after it [*sic*])."³⁴ This amounts to an unjustified attack on the Operating Agreement's use of "relief items," discussed in ¶¶ 8, 25-34, above, which appropriately provide that CN may be credited with on-time arrival of a train that arrives at a checkpoint later than its scheduled arrival time *when CN is not the cause of that late arrival*.

³² The certainty that the process proposed by CN will result in concrete action, either by agreement of the parties or by order of an arbitrator, distinguishes CN's current reopener proposal from the one that it offered in the earlier phase of this proceeding. Compare CN Proposed Operating Agreement (Rev'd), App. V, Sec. G with CN Rebuttal Submission, Ex. 1 at 42 (filed Jan. 19, 2018) (CN Proposed Operating Agreement (2018 version) § 8.13).

³³ E.g., Amtrak Opening Statement at 10 (filed Sept. 4, 2015).

³⁴ Amtrak Reply Br. (PID) at 38.

72. Amtrak also says CN's reopener "unreasonably postpones implementing any action."³⁵ In fact, CN's proposal appropriately treats six months as a "sustained period" of "Deficient Performance," and then requires swift movement to define the issues, escalate dispute resolution, and finally permit binding arbitration (those steps, the "Remedial Process").³⁶ Only after about a six-month period that there is any serious threat that performance penalties may exceed incentive payments for a full 12 months so that the lookback may be invoked against the application of additional penalties. Initiating action prior to that would be premature and inefficient.

73. Amtrak exaggerates the timing of the reopener by including the period prior to a party's invocation of the reopener and by repeatedly and misleadingly referring to maximum time periods ("as much as") even when Amtrak can itself force action without delay.³⁷ Amtrak is free to launch the Remedial Process by serving a notice of Deficient Performance *immediately* after the initial six-month period (i.e., it need not wait the maximum two months, which it includes in its timing argument). Following that notice, the steps in the Remedial Process come in rapid succession, so that in as little as 95 days, either party may initiate arbitration under Article VI of the Operating Agreement to compel concrete action if agreement has not been reached by then.

³⁵ Amtrak Reply Br. (PID) at 39 (initial capitals omitted).

³⁶ Amtrak faults CN's proposal for including referral to RCPA as part of the Remedial Process. Amtrak claims that providing for such referral is "duplicative" of the provisions requiring the parties to first consult with each other on their own (Amtrak Reply Br. (PID) at 45), even though CN included that proposal under the specific guidance of the Interim Decision (at 17).

³⁷ See, e.g., Amtrak Reply Br. (PID) at 39.

74. While CN's Remedial Process would investigate the causes of deficient performance under the Operating Agreement, Amtrak insists that no such investigation would be required, as "CN's culpable conduct" would already be "known to be the cause of Amtrak's poor performance."³⁸ Amtrak's prejudgment of the issue undermines its arguments. Particularly given the changes being proposed to the operating agreement, there are a variety of factors that could lead to CN failing to earn positive net incentives over a sustained period. If the parties are to make a serious effort to find remedies for that failure, they must be allowed to raise relevant issues.³⁹

75. Finally, Amtrak bizarrely objects that CN's reopener fails to "result in concrete action" (Amtrak Reply Br. (PID) at 17), but then objects to the concrete action it provides. CN's proposal provides for binding arbitration under Article VI of the Operating Agreement.⁴⁰

³⁸ Amtrak Reply Br. (PID) at 44 (emphasis omitted).

³⁹ For example, changes being proposed for calculation of incentives and penalties could lead to an imbalance of incentive/penalty payments. Similarly, agreed-upon changes in start times of Amtrak trains' operation on CN could turn out unexpectedly to result in inconvenient meets with other Amtrak trains, requiring delays to at least one of them. Schedule changes by Metra or operational changes by freight railroads controlling interlockings crossing the CN line could lead to longer blockages for cross-traffic that, depending on whether the Operating Agreement provided relief for such delays, could reduce contractual OTP. And implementation and administration of positive train control ("PTC") could cause changes in operation and running time that would affect Amtrak's OTP.

⁴⁰ Under CN's proposal, the arbitrators would be authorized:

to modify the Operating Agreement (including Appendices, other than [the lookback provision, which ensures that CN receives the incremental costs to which it is entitled by statute] insofar as necessary to address the Deficient Performance and to require the Parties to: (i) produce reasonable material information, conduct additional investigations, modeling, or experiments, (ii) undertake interim measures to improve performance and monitor the effectiveness of such measures, and (iii) implement additional employee training and/or monitoring of employee performance.

CN Proposed Operating Agreement (Rev'd), App. V, Sec. G(4).

Amtrak argues that “[n]either Article IV [presumably a misprint for Article VI] nor the [National Railroad Passenger Corporation Arbitration Agreement (‘Amtrak Arbitration Agreement’), incorporated by reference in Article VI] contains the terms CN is asking the Board to impose as to the arbitrators’ authority.”⁴¹ These objections are frivolous.

76. The Amtrak Arbitration Agreement provides for referral to arbitrators under its authority of “any claim or controversy between [Amtrak] and any Participating Railroad [including CN]” when such arbitration is provided for under “a Basic Agreement,” which under Article VI includes the CN/Amtrak Operating Agreement.⁴² It further provides that the arbitrators “shall, in reaching a decision, be governed by the provisions and language of the applicable Basic Agreement or Agreements.”⁴³ Once CN’s proposed reopener provision—including the provision listing examples of possible relief to be ordered through arbitration—has been made part of the new Operating Agreement, then that Agreement *will* contain those terms, providing all the authority needed by an arbitrator under Article VI to impose such relief.⁴⁴

D. Amtrak Data Needed to Verify Details of Amtrak’s Operations Affecting Calculation of CN’s Compensation

77. Amtrak objects to CN’s proposed Section A.4 of Appendix V, which would require Amtrak to provide CN with “locomotive data (including data from Wi-Tronix, or other sources) showing the speed, braking, and location of each Amtrak Train operating on the Rail

⁴¹ Amtrak Reply Br. (PID) at 47.

⁴² RVS Blair, Ex. 2, at 3, 9 (Amtrak Arbitration Agreement, art. 2; *id.* § 4.5).

⁴³ *Id.*

⁴⁴ Amtrak’s suggestion that the Board cannot impose the arbitration provisions of the reopener (Amtrak Reply Br. (PID) at 47) is equally frivolous. So long as the terms of the arbitration are reasonable, the Board has the necessart authority to impose it in this proceeding under 49 U.S.C. § 24308(a)(2)(A)(ii). Amtrak has cited no precedent to the contrary.

Lines.” Amtrak opposes this requirement, alleging that “CN has not proffered any reasonable basis for the Board to impose this term as part of an new OA.” Amtrak Reply Br. (PID) at 115. The reasons should be evident: to ensure that Amtrak is operating its trains safely in accordance with CN’s rules and orders (e.g., abiding by speed limits, slowing in accordance with speed restrictions, applying its brakes to clean them as required for safety) and to validate Amtrak’s claims regarding train operating delays, which directly relates to delay coding and CN’s incentives/penalties under the Agreement. For example, the data will show if Amtrak engineers have accurately recorded their own sub-optimal performance – i.e., failure to make normal speed – as “OTH,” something they have an incentive not to do insofar as it is a reflection of their own performance.⁴⁵

II. CN’S INCREMENTAL COSTS FROM FREIGHT TRAIN DELAYS RESULTING FROM HOSTING AMTRAK’S TRAINS

78. Mr. Baranowski responds in detail to criticisms of CN’s incremental cost proposal leveled principally by Amtrak witnesses Crowley and Mulholland, while Dr. Steven Peterson addresses the applicable economic principles. In this statement we briefly address specific issues raised by Amtrak that relate to our operational responsibilities for CN.

A. General Operating Agreement Principles and Practice

79. Mr. Blair argues that CN should not recover any incremental costs of freight train delays caused by Amtrak because, he asserts, they are different in kind from other incremental

⁴⁵ Amtrak’s failure to run at maximum speeds has become a more significant issue with the activation of positive train control (“PTC”). Amtrak engineers appear to be operating below maximum speed in order to avoid an overspeed PTC violation that would force the train to stop and require the crew to obtain authority to restart and proceed.

costs covered by the existing Operating Agreement.⁴⁶ In particular, he asserts that freight train delay costs are not incurred “because Amtrak is using CN’s ‘facilities.’”⁴⁷ That is simply wrong. Mr. Blair acknowledges “wear and tear caused by Amtrak’s use of CN’s rail lines” creates a compensable incremental cost,⁴⁸ and to our knowledge, CN-Amtrak operating agreements have always included incremental cost compensation for such wear and tear in the form of a contribution to CN’s maintenance costs. CN incurs freight train delay costs because of the same use of its facilities – “Amtrak’s use of CN’s rail lines.” There is no principled difference between maintenance costs and freight delay costs caused by Amtrak’s use of CN’s rail lines.

80. Mr. Blair is also incorrect to suggest that Amtrak bears the incremental costs of activities it causes CN to undertake only when those activities are directly for Amtrak’s benefit. The CN-Amtrak Operating Agreement has long provided for Amtrak to pay CN the cost of employing staff responsible for administering the CN-Amtrak relationship on CN’s behalf, and Amtrak is responsible for paying that staff salary regardless of whether CN’s staff is assisting Amtrak or working, for example, to generate bills to Amtrak for CN’s compensation. The principle followed in the CN-Amtrak Operating Agreement and, to the best of our knowledge, Amtrak-host operating agreements generally, has always been that that if the host can reliably prove that it incurred a cost that it would not have incurred but for Amtrak’s presence on its lines, it is entitled to compensation for that cost, estimated in a reasonable and practical way.

81. Under the existing Operating Agreement and traditionally, many incremental costs are not precisely and specifically quantified, but instead estimated based on reasonable

⁴⁶ RVS (PID) Blair ¶¶ 44-47; *see also* Amtrak Br. (PID) at 64-66.

⁴⁷ RVS (PID) Blair ¶ 46.

⁴⁸ *Id.*, ¶ 44.

principles and proxies. For example, as can be seen from Table 1 of Appendix IV of the current Operating Agreement, numerous costs [REDACTED]. Once the Board establishes in more detail the principles governing incremental cost recovery for freight train delay costs, it may be in the interests of both parties, and CN would be willing, to establish a similarly simplified means of estimating some or all of those costs (*e.g.*, on a per-hour basis).

82. Likewise, Amtrak seeks to invent a new principle for operating agreements when it argues at length that freight train delay costs do not qualify as incremental costs because “CN has exclusive operational control over many of the factors that have caused the very CN freight train delays for which CN is seeking reimbursement from Amtrak, including its decisions with respect to scheduling, infrastructure and prioritization of velocity of its freight trains and cars (by, for example, running longer freight trains).”⁴⁹ Many of the incremental costs CN incurs due to Amtrak are impacted by CN’s decisions about how to run its railroad – for example, costs associated with emergency services, running repairs, clearing of Amtrak wrecks and many others are impacted by CN’s decisions regarding its operations, equipment pre-positioning and movement, timing, and personnel. Regardless of whether CN could theoretically have avoided them – or, more likely, substituted greater costs in a different form (*e.g.*, disruption of operations instead of immediate cash costs) for them – those costs are incremental costs for which Amtrak must compensate CN. In accordance with the “but for” principle, the practice and common understanding under Amtrak operating agreements has been that Amtrak cannot object to every expense on the basis that the host could have structured its freight business differently; instead,

⁴⁹ *Id.* ¶ 48; *see generally id.* ¶¶ 48-56; Amtrak Br. (PID) at 67-76; RVS (PID) Crowley/Mulholland ¶¶ 16-30.

Amtrak takes the host as it finds it, and pays for the actual incremental costs CN would not have incurred but for Amtrak's presence.

B. Use of CN Ordinary Course of Business Data to Determine Freight Train Delays Due to Amtrak

83. Mr. Baranowski has explained in detail how he determined which freight train delays were due to Amtrak and the various sources of data we and other CN employees provided to him for that purpose and how he used them. We emphasize two points on which Amtrak is mistaken, and which relate specifically to our knowledge of how dispatchers are instructed to, and do, record FA (Amtrak-responsible) delays.

84. First, Amtrak argues that Mr. Baranowski has no sound basis to rely on SRS data regarding FA delays, or to infer that SRS data report FA delays conservatively.⁵⁰ Our testimony, along with the verified statement of our colleagues John Summerfield, My-Thanh Nguyen-Hung, and Craig Zarembka, provides that basis. As we explained before, in 2017, Mr. Kuxmann provided a written instruction to CN's dispatchers to code delays due to Amtrak trains consistently under the FA code, and dispatchers enter delay codes, descriptions, and times into SRS based on a rigorous and closely supervised and scrutinized process informed by objective, contemporaneous data, including Playbacks.⁵¹ Summerfield *et al.* (including Craig Zarembka, who now directly supervises CN's dispatchers) explained that process in more detail.⁵²

85. As we and Summerfield *et al.* explained, SRS systematically under-records delays to CN's freight trains. That is because it does not record delays to certain freight trains (those

⁵⁰ See, e.g., RVS (PID) Crowley/Mulholland ¶¶ 12-16.

⁵¹ See VS (PID) Matteucci/Kuxmann 77-79 & Ex. 14.

⁵² See VS (PID) Summerfield *et al.*, pt. III.

without Train Service Plans) at all, and because it only records delays if delay (versus schedule) on a given segment exceeds certain minimum minutes thresholds (which are, in many cases, as high as [REDACTED]).⁵³ Crowley and Mulholland express doubt that the delay reporting thresholds mean that SRS reports FA delays conservatively.⁵⁴ Their skepticism is unfounded. It is true that not all delays below the reporting threshold are FA (Amtrak-responsible) delays, but a significant proportion of them are. And, to be clear, there is no circumstance in which the non-reporting of a non-FA delay below the reporting threshold would cause the time attributable to that delay to be wrongly attributed to an FA delay. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

86. Further, as Summerfield *et al.* explained,⁵⁵ and we can reaffirm based on our experience overseeing dispatchers and data entry in the SRS system, dispatchers are instructed to, and do, follow a specific protocol in a multiple-cause delay scenario involving an FA delay. In such a scenario, the dispatcher first determines the absolute number of delay minutes properly attributable to Amtrak – the FA delay. That determination is not made based on proportionate allocation of deviation from schedule between different causes or any other comparative principle; it simply involves determining the number of minutes for which the CN train was delayed, stationary, because of the Amtrak train. Only after that determination is made is

⁵³ *See id.* at 12.

⁵⁴ RVS (PID) Crowley/Mulholland ¶ 16.

⁵⁵ VS (PID) Summerfield *et al.* at 19.

remaining delay time versus the train's schedule, as automatically recorded by the SRS system, assigned to other causes. This protocol means that any criticisms Amtrak has leveled against the SRS delay recording system based on its using train schedules as a benchmark do not apply to FA delay records that are part of multiple-cause delay events, since those records are not dependent on the accuracy of the train's schedule, but instead depend on direct assessment of how many minutes Amtrak delayed the train for. That means that Mr. Baranowski's reliance on SRS delay records to determine delay duration in multiple-cause delay scenarios is particularly well-grounded.

87. Second, Crowley and Mulholland misunderstand the instructions provided to dispatchers with respect to V-Time.⁵⁶ It is true that dispatchers are instructed to include only Idle (stationary) Time when they determine the length of a FA delay in the context of a multiple-cause delay event. Underlying that instruction is a conservative principle: we do not attribute stopping and starting delays to Amtrak if other causes of the multiple-cause delay might have caused the train to stop and start anyway. In assessing incremental cost, Mr. Baranowski followed the same principle: he did not record any V-Time for multiple-cause delays. Moreover, Crowley and Mulholland are wrong to criticize Mr. Baranowski as being inconsistent with CN's SRS delay-recording practices insofar as he does count V-Time for single-cause FA delays. For single-cause delays, a dispatcher takes the delay time automatically generated by the SRS system based on deviation from schedule within a segment, and does not manually adjust it, and the SRS system records total delay, without any algorithm for excluding V-Time. In other words, V-Time is implicitly included in CN's ordinary course of business quantification of single-cause

⁵⁶ See RVS (PID) Crowley/Mulholland ¶ 52.

FA delays through the SRS system. Contrary to Crowley and Mulholland’s criticism, counting V-Time for single-cause FA delays is consistent with CN’s normal business practices, and it makes sense – insofar as Amtrak was the only cause of delay, the delay involved in the process of stopping and starting must be attributable to it.

C. Use of CN Ordinary Course of Business Data to Determine Crew Overtime Costs Due to Amtrak

88. We understand that after reviewing the verified statement of Messrs. Crowley and Mulholland, Mr. Baranowski determined that there are a few instances in which he could not verify from the CN business records initially provided by ourselves and our colleague Catherine Whiteman that a specific CN freight train crew that earned overtime at the end of a shift was onboard a specific CN train earlier in that shift when it was delayed by an Amtrak train. In order to rectify that issue, we consulted with Ms. Whiteman to ensure that Mr. Baranowski received supplemental CN payroll records and instructions regarding what they indicate so that he can identify and correct any mismatches. We have reviewed Mr. Baranowski’s revised analysis of crew overtime records and confirm that the CN data on which he relies indicates that his revised analysis correctly matches crews to trains, times, and locations.⁵⁷

D. Amtrak’s Argument Against Recovery for Locomotives and Cars and CN’s Use of Its Business-Critical Assets

89. Amtrak argues that because industry “utilization rates” for locomotives and cars are allegedly low, it may be inappropriate to assign a monetary value to CN’s loss of the productive use of its own, and rented, locomotives and cars when they are delayed en route by

⁵⁷ See generally Rebuttal VS (PID) Baranowski ¶¶ 26, 44.b., and related workpapers.

Amtrak.⁵⁸ We defer to counsel and to Mr. Peterson to address that argument as a matter of law and economics. But we can attest to the practical railroading reality: locomotives and railcars are valuable and mission-critical assets for CN. While nominal “utilization rates” may reflect that locomotives and cars are sometimes being maintained, repaired, or re-deployed, the reality is that CN does not have systemic excess locomotive or railcar capacity. CN works constantly to right-size its fleet to meet ongoing and anticipated future demand. On CN’s scheduled railroad, locomotives and railcars in transit are not merely performing valuable functions currently, but are also moving to locations where further productive work awaits. Locomotive and car time has real and substantial value, as reflected in HPH agreements, car rental agreements, and recent and continuing substantial investment by CN in additional locomotives and cars.⁵⁹

III. OTHER ISSUES

A. Schedule Review Process

90. Appendix II of the current Operating Agreement sets out the schedules agreed upon by the parties for the Amtrak trains that operate on CN’s lines. Those schedules are not

⁵⁸ See Amtrak Br. (PID) at 93; RVS (PID) Crowley/Mulholland ¶¶ 114-17.

⁵⁹ See Press Release, CN News, CN Drives North American Economic Growth, Purchasing 1,000 New Generation, High-Capacity Hopper Cars to Enable Record Grain Shipments (May 7, 2021), <https://www.cn.ca/en/news/2021/05/cn-drives-north-american-economic-growth-purchasing-1000-new-gen/>; Press Release, CN News, (Globe Newswire), CN to Purchase 1,500 New Hopper Railcars in North America to Encourage Economic Recovery and Expand Grain Export (July 21, 2020), <https://www.cn.ca/en/news/2020/07/cn-to-purchase-1500-new-hopper-railcars-in-north-america-to-encon/>; Press Release, CN News (Globe Newswire), CN to purchase 350 lumber cars to meet growing demand in forest products business (May 2, 2018), <https://www.cn.ca/en/news/2018/05/cn-to-purchase-350-lumber-cars-to-meet-growing-demand-in-forest/>; Press Release, CN News (Globe Newswire), CN orders 60 more locomotives from GE Transportation (Sept. 5, 2018), <https://www.cn.ca/en/news/2018/09/cn-orders-60-more-locomotives-from-ge-transportation/>; Press Release, CN News, CN to purchase 200 new locomotives from GE Transportation over the next three years (Dec. 22, 2017), https://www.cn.ca/en/news/2017/12/pressrelease_20171222091521_9829/.

only important to Amtrak's passengers, they are a central component of the Operating Agreement, as they are the basis for determining contractual On-Time Performance and, in turn, any incentives or penalties. Any mismatch between the structure of a schedule and the measure of performance under the Operating Agreement—as both parties agree would exist for the Illini/Saluki and City of New Orleans schedules under either party's proposal or until those schedules are properly modified—must be addressed. Likewise, as future issues that affect the relationship between schedules and the Operating Agreement arise over time (e.g., changes in infrastructure, equipment, schedules, safety and operating rules or measures), those must be addressed.⁶⁰

91. In our opening and reply statements, we discussed the need for a regular process by which Amtrak's train schedules could be reviewed and, if appropriate, modified in light of changed circumstances or errors in the assumptions underlying the current schedules. To address such present and future schedule issues, CN has proposed adding new Section 3.2.G to the Operating Agreement. This provision provides for the regular review of Amtrak's schedules by the parties, on a staggered timetable,⁶¹ and clarifies the timing and availability of any

⁶⁰ As a concrete example of why dispute resolution is necessary, the parties were unable for years to agree on an adjustment to schedules to recognize the time lost due to the slow order CN had to impose for safety due to Amtrak's use of single-level equipment on the Illini/Saluki service that failed to properly shunt grade crossing warning devices. That failure not only created an unnecessary dispute about incentives or penalties, but it also meant that Amtrak passengers were knowingly provided with inaccurate anticipated arrival times.

Another example, which CN discussed in its Reply Submission (PID) (at 92-93), is Amtrak's refusal to date to lengthen the schedules for the Illini/Saluki, despite its recent admissions that PRT in various segments for that service is inadequate.

⁶¹ In light of the need to reallocate recovery time on the Illini/Saluki and City of New Orleans services, CN also proposed a special review provision in the event the parties are unable to agree on that reallocation (Section 3.2.G.(2)(a)). Those negotiations were updated in CN's Reply Submission (*see generally* Section IV). On August 11, 2022, Amtrak responded to CN's

arbitration.⁶² It also lays out these basic considerations for the arbitrators: (i) using “objective modeling, along with any other means deemed reliable, to ensure the accuracy of PRT” (i.e., pure run time, the basic building block of schedules), (ii) taking into account operational realities, (iii) reallocating or adjusting schedule time so that OTP performance standards are “reasonably achievable during periods of normal operation,” and (iv) ensuring that CN “has a reasonable opportunity” – not a guarantee – “to earn net Performance Payments.”

92. Amtrak raises several objections to these provisions: (i) that the Board “should not consider these proposals because it claims the Interim Decision did not leave these matters “as an open issue to be addressed”;⁶³ (ii) that review of Amtrak’s schedules “is contrary to and inconsistent with the [FRA Metrics and Standards’] detailed process for Amtrak and its Host Railroads to review and certify Amtrak’s schedules”;⁶⁴ (iii) that the proposal is “unnecessary and duplicative” of other provisions in the Operating Agreement;⁶⁵ and (iv) that the Board lacks authority to “impose conditions on arbitrators” under the operating agreement.⁶⁶ Notably, Amtrak nowhere disputes that schedules are integral to the Operating Agreement, that they need

last proposal (*see* Letter from Jim Blair to Michael Matteucci (Aug. 11, 2022) (attached as Exhibit 2)), and it appears the parties are moving closer to agreement. If this issue is resolved before the effective date of a new Operating Agreement, it will moot this special provision.

⁶² Neither party has proposed that the Board instead serve this function. To do so, the Board would likely have to act within the context of a Section 402 compensation case, which is neither a practical or efficient solution. For example, for a host to invoke the Board’s authority, it would have to terminate the agreement (assuming its provisions allowed its unilateral cancellation), deny Amtrak use of its tracks, and thereby force Amtrak to initiate a proceeding under 49 U.S.C. § 24308(a)(2)(A).

⁶³ Amtrak Reply Br. (PID) at 104.

⁶⁴ *Id.* at 105.

⁶⁵ *Id.* at 107-108.

⁶⁶ *Id.* at 108-109.

to be updated over time, or that a compulsory process may be necessary to address them effectively. In any event, its objections are unfounded.

93. Amtrak's claim that schedule review and arbitration issues are off the table finds no support in the Interim Decision. That decision stated only that it was "issu[ing] interim findings and guidance on the *main* disputed issues."⁶⁷ It never purported to identify all open issues, and it made clear that the Board would ultimately determine "*any* remaining unresolved issues."⁶⁸ Schedule review issues were raised by CN in the earlier phases of the proceeding and remain unresolved. And these issues are important, have now been fully briefed, and are ripe for decision.

94. Amtrak's reliance on FRA's Metrics and Standards is again misplaced. FRA established a one-time, non-binding process that was not compulsory. *See* FRA Metrics and Standards, 85 Fed. Reg. at 72,978-80. The only consequence of failing to participate is that schedules might remain uncertified. *See* 49 C.F.R. Part 273. Further, nothing in the Metrics and Standards suggested that Amtrak and hosts could not or should not include separate processes in their operating agreements or elsewhere for reviewing and resolving schedule issues. (And even if it had, the final authority over the reasonable terms of an operating agreement rests with the Board, not FRA.) To the contrary, FRA emphasized the importance of maintaining updated schedules. *See, e.g.,* FRA Metrics and Standards, 85 Fed. Reg. at 72,979 n.25.

95. CN's experience invoking FRA's dispute resolution process with Amtrak underscores these points. FRA's voluntary process of non-binding dispute resolution provided

⁶⁷ Interim Decision at 2.

⁶⁸ Interim Decision at 2 (emphasis added).

for issuance of a written decision on schedule issues should the parties fail to reach agreement, and described the decision-makers as arbitrators.⁶⁹ Nonetheless, after CN invoked FRA’s process, Amtrak refused to agree to a written decision as clearly provided in the FRA Metrics and Standards decision and insisted on a one-day “mediation,” leaving Amtrak free to do as much or as little as it wished.⁷⁰ Clearly, FRA’s one-time, voluntary, and non-binding process is no substitute for schedule review and arbitration provisions within the Operating Agreement.

96. Nor do existing provisions of the Operating Agreement make schedule review and arbitration superfluous. Amtrak claims these proposals are “duplicative” of Section 3.2.D, which provides a procedure by which either party may propose changes to a schedule.⁷¹ But CN has previously explained that the procedures under Section 3.2.D, which require a party to develop and present a new train schedule as a starting point for the process, are not a substitute for a cooperative process of regular review.⁷² CN believes that the most efficient and mutually beneficial way to approach schedule development is through a mandatory joint, cooperative process that engages the attention and resources of both parties. Proposed new Section 3.2.G provides for that. By itself, current Section 3.2.D does not.

⁶⁹ See Fed. Reg. at 72,780 (“The non-binding dispute resolution process ***will produce a written decision*** that will inform Amtrak and a host railroad in aligning the schedule with the customer OTP metric.” (emphasis added)); *id.* at 72,995 (referring to “arbitration fees and compensation for the arbitrators”).

⁷⁰ Letter from Jim Blair to Michael Matteucci (May 12, 2021) (attached as Exhibit 3); Letter from Michael Matteucci to Jim Blair (May 18, 2021) (attached as Exhibit 4); Letter from Jim Blair to Michael Matteucci (June 4, 2021) (attached as Exhibit 5).

⁷¹ Amtrak Reply Br. (PID) at 107-08.

⁷² CN Opening Submission (PID) at 70-71.

97. Furthermore, while Amtrak suggests that Section 3.2.D “directs the parties to arbitration under Article VI” in the event of “a continuing dispute”⁷³, Amtrak stops short of acknowledging that the operating agreement authorizes an arbitrator to modify a schedule (as opposed to ruling that the proper contractual procedures for modification have been followed). CN’s proposal would resolve this ambiguity by making clear that a schedule may be modified through arbitration under Article VI, and by providing criteria to guide the arbitrators in making their decisions.

98. Finally, Amtrak objects to the requirement in proposed new Section 3.2.G(4) that arbitrators consider the criteria listed there, because “Amtrak has not agreed to the conditions on the arbitrators’ authority in connection with scheduling-related disputes.”⁷⁴ But it makes no sense to refer schedule issues to arbitration without some guidance regarding the parties’ understanding as to how schedules should properly be structured, the factors that should be taken into account in structuring them, and the goals they are meant to further. If Amtrak had better or different criteria to guide the arbitrators on these matters, it should have provided them. But having failed to do, it cannot cite its failure as grounds for omitting any such guidance from the Operating Agreement.

B. Process for Resolution of Coding/Billing Disputes

99. As explained in CN’s Post-Interim Decision Opening Submission (at 34-36), the administration of the Operating Agreement can be simplified by incorporating Amtrak’s HRD delay codes as a screen. But Amtrak’s delay codes cannot be the final word for those purposes,

⁷³ Amtrak Reply Br. (PID) at 107.

⁷⁴ Amtrak Reply Br. (PID) at 109.

given the frequency of Amtrak miscoding and Amtrak's self-interest in coding delays as host-responsible. At present, CN's only recourse in cases of incorrect coding is to attempt to persuade Amtrak that the assigned code should be changed. And even when Amtrak agrees to change the coding for a particular delay, it often insists that its agreement constitutes no precedent for similar future instances. That might arguably be tolerable if the codes were simply used for Amtrak's own evaluation and public reporting of its performance, but it is not acceptable in the context of determining OTP, and thus incentives and penalties, under the Operating Agreement, where coding delays as host-responsible would reduce contractual OTP and thus CN's compensation.

100. While it is true that the Operating Agreement currently includes a dispute resolution provision (Article VI, providing for arbitration under the Amtrak Arbitration Agreement) that CN could theoretically invoke if Amtrak miscoding were to affect compensation under the Agreement, CN's disputes with Amtrak over incorrect coding are too frequent, the monetary consequence of any individual dispute too small, and the arbitration process too lengthy, for invocation of Article VI to be a practical option for resolution of such disputes. Amtrak proposes a "Daily Process" and a "Quarterly Process" under which CN can challenge Amtrak's delay coding and other matters relating to billing. But those processes suffer from the same deficiency as under the current Agreement: they leave the decision whether to correct a delay code to Amtrak's exclusive discretion, with no appeal to an impartial third party.⁷⁵

⁷⁵ If Amtrak believes the process Amtrak advocates is fair and reasonable, it should be willing to undertake the same burden it argues should be placed on CN, by agreeing that disputed delays shall be recategorized as CN specifies, unless and until the parties jointly agree to a further change or one is ordered by an arbitrator. CN doubts Amtrak would be willing to take on this burden. However, if the Board orders this change, CN would be willing to accept it.

101. CN has therefore proposed a more realistic process for considering and resolving disputes over delay coding, application of relief items, and other matters affecting billing. This process would call for consideration at successively higher levels in CN's and Amtrak's organizations, with the option of resorting to arbitration of those (presumably relatively few) disputes that cannot be resolved at a lower level.⁷⁶ CN Proposed Operating Agreement (Rev'd), Sec. 5.2.A.

102. Amtrak further suggests that CN's proposal is inferior to its own proposal, involving "real-time, early-stage collaboration between Amtrak and CN to resolve disputes over delay data that might impact the calculation of incentives and penalties under Appendix V".⁷⁷ But Amtrak's proposal for "collaboration" is illusory, because Amtrak would retain ultimate authority to decide such disputes, and CN's role would be limited to one of supplication, seeking to persuade Amtrak to act against its own interest and find itself or a third party responsible for a disputed delay. Swift dispute resolution under such circumstances would not be a virtue of Amtrak's system, but a product of its one-sidedness.

103. An important advantage of CN's proposed system for resolving coding and other billing disputes is that any resolution reached through that system would be binding precedent in similar situations arising in the future. As CN has explained,⁷⁸ this provision is necessary to

⁷⁶ Amtrak argues that CN's proposed incentive/penalty system, based on Amtrak's own delay codes, would "proliferate monthly and quarterly disputes between the Parties, and perhaps may cause them to be more frequent" (Amtrak (PID) Reply Submission at 111). In so arguing, Amtrak appears to agree that disputes over its delay codes have been frequent. But Amtrak's incentives/penalties proposal is equally dependent on Amtrak's delay codes, so there is no reason to expect disputes to be any more frequent under CN's proposed system.

⁷⁷ Amtrak Reply Br. (PID) at 111.

⁷⁸ CN Opening Submission (PID) at 64-66; VS (PID) Matteucci/Kuxmann at 65-66.

prevent the waste of resources occurring when (as often happens under the current Operating Agreement), CN challenges Amtrak's coding and persuades Amtrak to revise it, but must go through the same process of challenge and persuasion the next time the same kind of delay occurs. Amtrak argues that making resolutions precedential would deter parties from agreeing to any resolution, especially in instances where the amount of money at stake is small.⁷⁹ But there is nothing in CN's proposal that would prevent the parties from agreeing in an individual case providing that the resolution of that case will not have precedential effect, notwithstanding the general rule in the Operating Agreement providing that such resolutions will operate as binding precedents. Such an agreement, coming after the Operating Agreement, would trump the general rule set out in the Agreement, but that rule would appropriately continue to apply by default to succeeding cases.

⁷⁹ Amtrak (PID) Reply Submission at 113.

VERIFICATION

I, Michael Matteucci, declare under penalty of perjury that I have read the foregoing joint verified statement, that I know the facts asserted therein, and that the same are true as stated. Further, I certify that I am qualified to and authorized to submit this joint verified statement on behalf of Canadian National Railway Company and its subsidiaries.

Executed on August 25, 2022.

A handwritten signature in blue ink, appearing to read 'Michael Matteucci', is written over a horizontal line.

Michael Matteucci

VERIFICATION

I, Scott Kuxmann, declare under penalty of perjury that I have read the foregoing joint verified statement, that I know the facts asserted therein, and that the same are true as stated. Further, I certify that I am qualified to and authorized to submit this joint verified statement on behalf of Canadian National Railway Company and its subsidiaries.

Executed on August 25, 2022.



Scott Kuxmann

EXHIBITS

- | | |
|-----------|---|
| Exhibit 1 | The Appendix II schedule skeletons in effect at that time, which are referenced in Amtrak's redline |
| Exhibit 2 | Letter from Jim Blair to Michael Matteucci (Aug. 11, 2022) |
| Exhibit 3 | Letter from Jim Blair to Michael Matteucci (May 12, 2021) |
| Exhibit 4 | Letter from Michael Matteucci to Jim Blair (May 18, 2021) |
| Exhibit 5 | Letter from Jim Blair to Michael Matteucci (June 4, 2021) |

Exhibit 1

Schedule Skeletons in effect on date of Amtrak Reply
Submission (September 14, 2017)

Showing, Under “Stations” Heading, that the Checkpoints to Be
Used for Measuring OTP under Amtrak’s Alternative
Checkpoint/Relief Proposal Were Only Those on CN’s Lines

Exhibit C

Schedule Effective June 22, 2017 as shown below.

[illegible]

Exhibit E

Schedule Effective June 23, 2017 as shown below

[illegible]

Lincoln Service				Remarks and Changes	Schedule Skeleton - Lincoln Service/Train 301(Daily)							November 8, 2010		Check Point		
Train 301					RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart		Station	
Effective 5/10/10 Daily	Days of Operation				Effective 11/8/10 Daily											
07:00 AM	Dp	Chicago, IL	CT	07:00 AM	No schedule changes.	CNIC	1.6						07:07 AM	07:07 AM	XTF - 21st Street	X
---	Dp	Summit, IL	---			CNIC	7.9		15				07:22 AM	07:22 AM	Lemoine	
						CNIC	11.9		4				07:26 AM	07:26 AM	Summit, IL	
07:57 AM	Dp	Joliet, IL		07:57 AM		CNIC	13.1		1				07:27 AM	07:27 AM	CP Canal	
						UP	37.3		23	5			07:55 AM		Joliet, IL	X

[illegible]

CN Ed.

Exhibit A

[illegible]

Exhibit A

[illegible]

Exhibit A

[illegible]

Exhibit A

[illegible]

Exhibit A

[illegible]

[illegible]

Exhibit 2



August 11, 2022

Mr. Michael Matteucci
Regional Director Contracts and Administration
Canadian National Railway
17641 South Ashland Avenue
Homewood, IL 60430-1345

Dear Mike:

Thank you for your letter dated June 28, 2022, regarding the City of New Orleans and Illini/Saluki train schedules and offering to implement the CN proposed schedules immediately ("CN June 28th Proposal").

Amtrak has reviewed the CN June 28th Proposal and is willing to accept CN's City of New Orleans proposal if CN agrees to certify these train schedules in accordance with the Metrics and Minimum Standards for Intercity Passenger Rail Service final rule published by FRA on November 16, 2020 (Final Rule). Please advise if this is acceptable to CN.

With regard to the Illini/Saluki schedules, Amtrak performed additional analysis using actual train performance data for the past year and continues to recommend certain modifications to the Illini/Saluki schedules to improve performance under the customer on-time performance ("COTP") metric as outlined in the Final Rule. Amtrak's revised proposed Illini/Saluki schedules are attached. In developing these revised schedules, we utilized Amtrak's "LASER" tool to determine the optimal placement of the existing recovery time to maximize the potential for these trains to meet the COTP performance standard reflected in the Final Rule.

As stated previously, the Illini/Saluki COTP has consistently averaged above 80% over the previous twelve months, demonstrating that the schedules are currently aligned with the COTP metric, with their performance repeatedly exceeding the minimum standard. Reallocating existing recovery time only improves upon this performance. CN's proposal to add more time to the schedules would merely result in unnecessary delays for the majority of Amtrak passengers.

Attached please find Amtrak's revised proposal for the Illini/Saluki train schedules which includes a reconciliation of the proposed Amtrak changes as compared to the CN June 28th Proposal. Amtrak approves the attached train schedules for certification and recommends CN approve these train schedules for immediate implementation and certify their alignment with the Final Rule.

Mr. Michael Matteucci
August 11, 2022
Page 2

Please advise if CN is willing to approve the attached schedules and certify them in accordance with the Certified Schedule Metric reflected in the Final Rule.

Sincerely,



Jim Blair
AVP Host Railroads
Amtrak

cc:	Dennis Newman	-	Amtrak
	Lizabeth Brubeck	-	Amtrak
	Yoel Weiss	-	Amtrak
	Scott Kuxmann	-	CN

Amtrak Proposed Skeleton - Train 390

Amtrak August 2022 Proposed Schedule - Saluki/Train 390									
RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
CNIC	0.0	t,e,l						7:30 AM	Carbondale, IL CT
CNIC	20.3		19	1		1	7:50 AM	7:51 AM	Du Quoin, IL
CNIC	55.7		30	1		1	8:22 AM	8:23 AM	Centralia, IL
CNIC	108.9		43	2		1	9:08 AM	9:09 AM	Effingham, IL
CNIC	135.7		22	1		1	9:32 AM	9:33 AM	Mattoon, IL (Charleston)
CNIC			30		5		10:08 AM	10:08 AM	XTI - Tolono
CNIC	180.3		8	5		3	10:21 AM	10:24 AM	Champaign-Urbana, IL
CNIC	194.3		12	1		1	10:37 AM	10:38 AM	Rantoul, IL
CNIC	227.0		25	1		1	11:04 AM	11:05 AM	Gilman, IL
CNIC	252.2		21	4		1	11:30 AM	11:31 AM	Kankakee, IL
CNIC	284.6		27	10		2	12:08 PM	12:10 PM	Homewood, IL
AMT	306.7		28	0			12:38 PM	12:38 PM	XCS - 16th Street
AMT	308.9	T,E	17	0	5		1:00 PM		Chicago, IL CT
				Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time	
				282	26	10	12	330	

Reconciliation of Proposed Schedules - Saluki/Train 390									
RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
CNIC	0.0	t,e,l							Carbondale, IL CT
CNIC	20.3		1	-1	0	0			Du Quoin, IL
CNIC	55.7		1	-1	0	0			Centralia, IL
CNIC	108.9		0	0	0	0			Effingham, IL
CNIC	135.7		1	-1	0	0			Mattoon, IL (Charleston)
CNIC			-3	3	0	0			XTI - Tolono
CNIC	180.3		0	0	0	0			Champaign-Urbana, IL
CNIC	194.3		0	0	0	0			Rantoul, IL
CNIC	227.0		0	0	0	0			Gilman, IL
CNIC	252.2		0	0	0	0			Kankakee, IL
CNIC	284.6		0	0	0	0			Homewood, IL
AMT	306.7		0	0	0	0			XCS - 16th Street
AMT	308.9	T,E	0	0	0	0			Chicago, IL CT
				Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time	
				0	0	0	0	0	

Amtrak Proposed Skeleton - Train 391

Amtrak August 2022 Proposed Schedule - Saluki/Train 391									
RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
AMT	0.0	t,e,FA,W,I						8:15 AM	Chicago, IL
CNIC	2.2		13				8:28 AM	8:28 AM	XCS - 16th Street
CNIC	24.3		26	0		2	8:54 AM	8:56 AM	Homewood, IL
CNIC	56.7		25	5		1	9:26 AM	9:27 AM	Kankakee, IL
CNIC	81.9		21	3		1	9:51 AM	9:52 AM	Gilman, IL
CNIC	114.6		25	2		1	10:19 AM	10:20 AM	Rantoul, IL
CNIC	128.6		12	14		3	10:46 AM	10:49 AM	Champaign-Urbana, IL
CNIC			10		5		11:04 AM	11:04 AM	XTI - Tolono
CNIC	173.2		28	0		1	11:32 AM	11:33 AM	Mattoon, IL
CNIC	200.0		23	0		1	11:56 AM	11:57 AM	Effingham, IL
CNIC	253.2		46	0		1	12:43 PM	12:44 PM	Centralia, IL
CNIC	288.6		31	1		1	1:16 PM	1:17 PM	Du Quoin, IL
CNIC	308.9	T,E	18	10	0		1:45 PM		Carbondale, IL
			Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time		
			278	35	5	12	330		

Reconciliation of Proposed Schedules - Saluki/Train 391									
RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
AMT	0.0	t,e,FA,W,I							Chicago, IL
CNIC	2.2		0	0	0	0			XCS - 16th Street
CNIC	24.3		0	0	0	0			Homewood, IL
CNIC	56.7		0	0	0	0			Kankakee, IL
CNIC	81.9		0	0	0	0			Gilman, IL
CNIC	114.6		0	0	0	0			Rantoul, IL
CNIC	128.6		0	0	0	0			Champaign-Urbana, IL
CNIC			0	0	0	0			XTI - Tolono
CNIC	173.2		-4	4	0	0			Mattoon, IL
CNIC	200.0		0	0	0	0			Effingham, IL
CNIC	253.2		0	0	0	0			Centralia, IL
CNIC	288.6		1	-1	0	0			Du Quoin, IL
CNIC	308.9	T,E	3	-4	1	0			Carbondale, IL
			Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time		
			0	-1	1	0	0		

Amtrak Proposed Skeleton - Train 392

Amtrak August 2022 Proposed Schedule - Saluki/Train 392									
RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
CNIC	0.0	T,E,I						4:15 PM	Carbondale,IL CT
CNIC	20.3		19	1		1	4:35 PM	4:36 PM	Du Quoin, IL
CNIC	55.7		30	1		1	5:07 PM	5:08 PM	Centralia, IL
CNIC	108.9		43	2		1	5:53 PM	5:54 PM	Effingham, IL
CNIC	135.7		22	2		1	6:18 PM	6:19 PM	Mattoon, IL (Charleston)
CNIC			30		5		6:54 PM	6:54 PM	XTI - Tolono
CNIC	180.3		8	3		3	7:05 PM	7:08 PM	Champaign-Urbana, IL
CNIC	194.3		12	3		1	7:23 PM	7:24 PM	Rantoul, IL
CNIC	227.0		25	1		1	7:50 PM	7:51 PM	Gilman, IL
CNIC	252.2		21	1		1	8:13 PM	8:14 PM	Kankakee, IL
CNIC	284.6		27	12		2	8:53 PM	8:55 PM	Homewood, IL
AMT	306.7		28	0			9:23 PM	9:23 PM	XCS - 16th Street
AMT	308.9	t,e	17	0	5		9:45 PM		Chicago, IL CT
			Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time		
			282	26	10	12	330		

Reconciliation of Proposed Schedules - Saluki/Train 392									
RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
CNIC	0.0	T,E,I							Carbondale,IL CT
CNIC	20.3		1	-1	0	0			Du Quoin, IL
CNIC	55.7		1	-1	0	0			Centralia, IL
CNIC	108.9		0	0	0	0			Effingham, IL
CNIC	135.7		1	-1	0	0			Mattoon, IL (Charleston)
CNIC			-3	3	0	0			XTI - Tolono
CNIC	180.3		0	0	0	0			Champaign-Urbana, IL
CNIC	194.3		0	0	0	0			Rantoul, IL
CNIC	227.0		0	0	0	0			Gilman, IL
CNIC	252.2		0	0	0	0			Kankakee, IL
CNIC	284.6		0	0	0	0			Homewood, IL
AMT	306.7		0	0	0	0			XCS - 16th Street
AMT	308.9	t,e	0	0	0	0			Chicago, IL CT
			Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time		
			0	0	0	0	0		

Amtrak Proposed Skeleton - Train 393

Amtrak August 2022 Proposed Schedule - Saluki/Train 393									
RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
AMT	0.0	T,E,FA,W,I						4:05 PM	Chicago, IL
CNIC	2.2		13				4:18 PM	4:18 PM	XCS - 16th Street
CNIC	24.3		26	0		2	4:44 PM	4:46 PM	Homewood, IL
CNIC	56.7		25	3		1	5:14 PM	5:15 PM	Kankakee, IL
CNIC	81.9		21	3		1	5:39 PM	5:40 PM	Gilman, IL
CNIC	114.6		25	2		1	6:07 PM	6:08 PM	Rantoul, IL
CNIC	128.6		12	13		3	6:33 PM	6:36 PM	Champaign-Urbana, IL
CNIC			10		5		6:51 PM	6:51 PM	XTI - Tolono
CNIC	173.2		28	3		1	7:22 PM	7:23 PM	Mattoon, IL
CNIC	200.0		23	0		1	7:46 PM	7:47 PM	Effingham, IL
CNIC	253.2		46	0		1	8:33 PM	8:34 PM	Centralia, IL
CNIC	288.6		31	1		1	9:06 PM	9:07 PM	Du Quoin, IL
CNIC	308.9	t,e	18	10	0		9:35 PM		Carbondale, IL
				Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time	
				278	35	5	12	330	

Reconciliation of Proposed Schedules - Saluki/Train 393									
RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
AMT	0.0	T,E,FA,W,I							Chicago, IL
CNIC	2.2		0	0	0	0			XCS - 16th Street
CNIC	24.3		0	0	0	0			Homewood, IL
CNIC	56.7		0	0	0	0			Kankakee, IL
CNIC	81.9		0	0	0	0			Gilman, IL
CNIC	114.6		0	0	0	0			Rantoul, IL
CNIC	128.6		0	0	0	0			Champaign-Urbana, IL
CNIC			0	0	0	0			XTI - Tolono
CNIC	173.2		-4	4	0	0			Mattoon, IL
CNIC	200.0		0	0	0	0			Effingham, IL
CNIC	253.2		0	0	0	0			Centralia, IL
CNIC	288.6		1	-1	0	0			Du Quoin, IL
CNIC	308.9	t,e	3	-8	5	0			Carbondale, IL
				Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time	
				0	-5	5	0	0	

CN Letter to Amtrak dated June 28, 2022



Michael A. Matteucci
Senior Director – Interline Services

17641 So. Ashland Avenue
Homewood, IL 60430-1345
T 708.332.3598

June 28, 2022

Jim Blair
Senior Director, Host Railroads
National Railroad Passenger Corporation
30th Street Station
4th Floor, 4N-163
Philadelphia, PA 19104

Dear Jim:

Thank you for your May 3, 2022 letter responding to my proposal that we redistribute recovery time for the trains in the City of New Orleans (CNO) and Illini/Saluki services immediately, rather than waiting to reach agreement concerning added run time for those services. We are pleased that you agree that redistribution of recovery time is critical to the meaningful application of the FRA's new Customer OTP performance standard and such redistribution should be done immediately.

Your letter proposes modifications to CN's proposed schedule changes, and provides a high level description of Amtrak's review process. That process is elaborated on in your opening submission in Finance Docket No. 35743, filed May 27, 2022 ("Opening Submission"). CN uses a similar data driven process based on running proposed schedules against actual past performance data (using scheduled and actual arrival and departure times, actual ridership data, the location and duration of delays), but rather than focus solely on the period April 2021 to March 2022, as Amtrak has apparently done (see Opening Submission, VS Weiss at ¶¶ 44-79), we tested schedules against both recent and earlier pre-pandemic periods to develop a broader view that is more likely to accurately represent future performance. We ask Amtrak to likewise test proposed revised schedules against both pre- and post-Covid periods. Doing so is important because recent and current operations are not representative of normal operations. Likewise, the train performance you cite as having met 80% COTP standard during this period is misleading because it is not representative of performance during a period of normal operations. Amtrak is continuing to run partial schedules. For example, CNO trains are not running 7 days a week and two of the four Illini-Saluki trains are suspended. In addition, Amtrak ridership remains well below pre-pandemic levels. Reduced numbers of trains and passengers results in reductions in delay, including, for example, reductions in passenger train interference and passenger-related

CN Letter to Amtrak dated June 28, 2022 (cont.)

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delays. As a result, premising schedules and performance expectations on current performance risks setting the trains up for failure in future circumstances in which more normal, higher levels of those delays are likely.

Turning first to the revised CNO schedules, based on our broader analysis, we suggest some further refinements to the allocation of recovery time to produce higher COTP. Our proposed changes can be seen in the attached skeletons for the CNO trains (58 & 59). The thrust of those proposed changes is to more efficiently allocate recovery time away from some of the larger stations where Amtrak appears to have overallocated recovery time with the result that trains would regularly arrive early. The improvements in COTP resulting from CN's proposed changes are modest for train 58 and more substantial for train 59.

The schedules for the Illini/Saluki trains (390, 391, 392 & 393) present a different issue. Your proposal acknowledges that PRT is too short for these schedules, and you propose increasing PRT by 9 minutes for each of the northbound trains (390, 392) and by 7 minutes for each of the southbound trains (391, 393). Notably, your 2020 schedule proposals went further; they recognized that PRT was too short by 15 minutes for the northbound trains and 14 minutes for the southbound trains. CN, of course, has been arguing for years that PRT is too short for these schedules and has pressed for greater increases in run time. Given our agreement that PRT is too short for these schedules, in addition to reallocating existing recovery time, it would clearly be appropriate to increase PRT so these trains have a reasonable opportunity to regularly achieve 80% COTP during periods of normal operation. (As noted above, achieving 80% COTP during recent times of abnormal, diminished operations is not meaningful and cannot be relied upon.)

We are disappointed that despite Amtrak's recognition that PRT – a central building block of its schedules – needs to be lengthened, its proposal would not increase schedule length at all. Instead, it would re-label a portion of existing recovery/miscellaneous time as PRT. There is no principled basis for doing that. PRT should be increased to at least what Amtrak concedes is necessary, although CN does not agree that that will suffice. PRT and recovery/miscellaneous time are not interchangeable. They serve different functions within a schedule. PRT is intended to cover minimum required run time, while recovery/miscellaneous time is intended to cover a baseline of anticipated delay above PRT in order to support solid OTP performance. Recovery/miscellaneous time must be adequate to serve its function. Amtrak has provided no basis for deeming the existing level of recovery/miscellaneous time excessive, so there is no basis for reducing it. Indeed, scheduling principles typically dictate that recovery time should increase, not decrease, as PRT increases. A refusal to consider any increase in total schedule time is a recipe for failure in the context of trains that have historically had inadequate PRT and COTP consistently below the 80% standard.

Even if Amtrak remains unwilling to agree to the complete schedules CN has proposed for certification, CN urges Amtrak to at least address the deficiency in PRT that Amtrak has itself conceded exists, and to do so without tying those changes to an unjustified reduction in recovery/miscellaneous time.

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CN Letter to Amtrak dated June 28, 2022 (cont.)

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If Amtrak is unwilling to do that, we again propose that we leave disagreements over PRT and schedule length aside for now, and focus instead on an appropriate reallocation of existing recovery time. To that end, in the attached proposed schedules CN has replicated Amtrak's proposed redistribution of run time, but without shifting time between recovery/miscellaneous time and PRT. That means CN's revised interim proposal would not change total run time, total PRT, or total recovery/miscellaneous time from the current schedule, leaving disputes over total run time and other schedule components for another day.

We hope that at a minimum the redistribution of recovery time may be completed right away. As pointed out in my last letter, doing so will immediately improve COTP, and immediately benefit Amtrak's passengers by providing them with more accurate and meaningful scheduled station arrival times. We appear to be close to agreement on a redistribution of recovery time for the CNO trains and, even if we must put aside our disagreements on how to deal with insufficient PRT, we should be able to agree on redistribution of recovery time for the Illini/Saluki trains. Further, if Amtrak wishes to add PRT in particular segments without a reduction recovery/miscellaneous time, we would not object (e.g., time might be added for trains 391 and 393 to compensate for Amtrak delays due to the St. Charles Airline Bridge being out of service after Amtrak's contractor cut its underwater signal cable). Finally, we continue to hope that our exchange of proposals may bring us closer to a full agreement on these schedules that would allow us to "certify" them in accordance with FRA's final rule.

Sincerely,



Michael Matteucci

Enclosures

Mr. Michael Matteucci
August 11, 2022
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CN Letter to Amtrak dated June 28, 2022 (cont.)

[illegible]

CN June 2022 Proposed Schedule - City of New Orleans/Train 58									
NO	Mileage	Stations	PMET	Revenue Minutes	Sched. Actual	Travel Minutes	Arrive	Depart	Station
1	0.0	NEW ORLEANS							
2	1.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
3	2.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
4	3.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
5	4.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
6	5.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
7	6.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
8	7.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
9	8.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
10	9.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
11	10.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
12	11.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
13	12.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
14	13.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
15	14.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
16	15.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
17	16.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
18	17.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
19	18.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
20	19.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
21	20.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
22	21.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
23	22.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
24	23.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
25	24.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
26	25.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
27	26.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
28	27.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
29	28.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
30	29.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
31	30.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
32	31.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
33	32.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
34	33.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
35	34.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
36	35.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
37	36.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
38	37.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
39	38.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
40	39.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
41	40.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
42	41.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
43	42.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
44	43.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
45	44.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
46	45.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
47	46.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
48	47.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
49	48.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
50	49.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
51	50.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
52	51.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
53	52.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
54	53.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
55	54.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
56	55.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
57	56.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
58	57.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
59	58.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
60	59.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
61	60.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
62	61.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
63	62.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
64	63.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
65	64.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
66	65.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
67	66.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
68	67.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
69	68.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
70	69.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
71	70.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
72	71.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
73	72.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
74	73.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
75	74.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
76	75.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
77	76.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
78	77.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
79	78.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
80	79.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
81	80.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
82	81.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
83	82.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
84	83.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
85	84.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
86	85.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
87	86.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
88	87.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
89	88.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
90	89.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
91	90.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
92	91.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
93	92.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
94	93.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
95	94.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
96	95.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
97	96.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
98	97.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
99	98.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
100	99.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
101	100.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
102	101.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
103	102.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
104	103.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
105	104.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
106	105.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
107	106.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
108	107.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
109	108.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
110	109.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
111	110.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
112	111.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
113	112.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
114	113.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
115	114.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
116	115.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
117	116.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
118	117.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
119	118.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
120	119.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
121	120.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
122	121.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
123	122.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
124	123.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
125	124.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
126	125.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
127	126.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
128	127.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
129	128.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
130	129.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
131	130.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
132	131.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
133	132.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
134	133.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
135	134.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
136	135.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
137	136.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
138	137.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
139	138.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
140	139.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
141	140.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
142	141.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
143	142.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
144	143.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
145	144.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
146	145.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
147	146.0	LAKE CHARLES	14			1:00 PM	1:00 PM	1:05 PM	LAKE CHARLES
148	147.0								

Difference Between CN and Amtrak Proposed Schedules							
PMT	Revenue Miles	Mile Adjust	Over Miles	Actual	Depart	Station	
0	0	0	0	0	0	San Antonio, LA 01	
0	0	0	0	0	0	0017 - San Antonio, LA	
0	0	0	0	0	0	0100 - Jol	
0	0	0	0	0	0	0101 - Jol	
0	0	0	0	0	0	0102 - Jol	
0	0	0	0	0	0	0103 - Jol	
0	0	0	0	0	0	0104 - Jol	
0	0	0	0	0	0	0105 - Jol	
0	0	0	0	0	0	0106 - Jol	
0	0	0	0	0	0	0107 - Jol	
0	0	0	0	0	0	0108 - Jol	
0	0	0	0	0	0	0109 - Jol	
0	0	0	0	0	0	0110 - Jol	
0	0	0	0	0	0	0111 - Jol	
0	0	0	0	0	0	0112 - Jol	
0	0	0	0	0	0	0113 - Jol	
0	0	0	0	0	0	0114 - Jol	
0	0	0	0	0	0	0115 - Jol	
0	0	0	0	0	0	0116 - Jol	
0	0	0	0	0	0	0117 - Jol	
0	0	0	0	0	0	0118 - Jol	
0	0	0	0	0	0	0119 - Jol	
0	0	0	0	0	0	0120 - Jol	
0	0	0	0	0	0	0121 - Jol	
0	0	0	0	0	0	0122 - Jol	
0	0	0	0	0	0	0123 - Jol	
0	0	0	0	0	0	0124 - Jol	
0	0	0	0	0	0	0125 - Jol	
0	0	0	0	0	0	0126 - Jol	
0	0	0	0	0	0	0127 - Jol	
0	0	0	0	0	0	0128 - Jol	
0	0	0	0	0	0	0129 - Jol	
0	0	0	0	0	0	0130 - Jol	
0	0	0	0	0	0	0131 - Jol	
0	0	0	0	0	0	0132 - Jol	
0	0	0	0	0	0	0133 - Jol	
0	0	0	0	0	0	0134 - Jol	
0	0	0	0	0	0	0135 - Jol	
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0	0	0	0	0	0	0137 - Jol	
0	0	0	0	0	0	0138 - Jol	
0	0	0	0	0	0	0139 - Jol	
0	0	0	0	0	0	0140 - Jol	
0	0	0	0	0	0	0141 - Jol	
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0	0	0	0	0	0	0144 - Jol	
0	0	0	0	0	0	0145 - Jol	
0	0	0	0	0	0	0146 - Jol	
0	0	0	0	0	0	0147 - Jol	
0	0	0	0	0	0	0148 - Jol	
0	0	0	0	0	0	0149 - Jol	
0	0	0	0	0	0	0150 - Jol	
0	0	0	0	0	0	0151 - Jol	
0	0	0	0	0	0	0152 - Jol	
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0	0	0	0	0	0	0157 - Jol	
0	0	0	0	0	0	0158 - Jol	
0	0	0	0	0	0	0159 - Jol	
0	0	0	0	0	0	0160 - Jol	
0	0	0	0	0	0	0161 - Jol	
0	0	0	0	0	0	0162 - Jol	
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0	0	0	0	0	0	0164 - Jol	
0	0	0	0	0	0	0165 - Jol	
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0	0	0	0	0	0	0167 - Jol	
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0	0	0	0	0	0	0200 - Jol	
0	0	0	0	0	0	0201 - Jol	
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0	0	0	0	0	0	0240 - Jol	
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0	0	0	0	0	0	0265 - Jol	
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0	0	0	0	0	0	0267 - Jol	
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0	0	0	0	0	0	0277 - Jol	
0	0	0	0	0	0	0278 - Jol	
0	0	0	0	0	0	0279 - Jol	
0	0	0	0	0	0	0280 - Jol	
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0	0	0	0	0	0	0283 - Jol	
0	0	0	0	0	0	0284 - Jol	
0	0	0	0	0	0	0285 - Jol	
0	0	0	0	0	0	0286 - Jol	
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0	0	0	0	0	0	0291 - Jol	
0	0	0	0	0	0	0292 - Jol	
0	0	0	0	0	0	0293 - Jol	
0	0	0	0	0	0	0294 - Jol	
0	0	0	0	0	0	0295 - Jol	
0	0	0	0	0	0	0296 - Jol	
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0	0	0	0	0	0	0299 - Jol	
0	0	0	0	0	0	0300 - Jol	
0	0	0	0	0	0	0301 - Jol	
0	0	0	0	0	0	0302 - Jol	
0	0	0	0	0	0	0303 - Jol	
0	0	0	0	0	0	0304 - Jol	
0	0	0	0	0	0	0305 - Jol	
0	0	0	0	0	0	0306 - Jol	
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0	0	0	0	0	0	0310 - Jol	
0	0	0	0	0	0	0311 - Jol	
0	0	0	0	0	0	0312 - Jol	
0	0	0	0	0	0	0313 - Jol	
0	0	0	0	0	0	0314 - Jol	
0	0	0	0	0	0	0315 - Jol	
0	0	0	0	0	0	0316 - Jol	
0	0	0	0	0			

Mr. Michael Matteucci
August 11, 2022
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CN Letter to Amtrak dated June 28, 2022 (cont.)

Amtrak May 2022 Proposed Schedule - City of New Orleans/Train 89									
ACS	mileage	Stations	AMT	Recovery Minutes	Min. Adjunct	Load Minutes	Arrive	Depart	Station
AMT	0.0	City of New Orleans	0				8:07 AM	8:07 AM	Chicago, IL
CHN	0.0	City of New Orleans	0				8:07 AM	8:07 AM	Chicago, IL
CHN	0.0	City of New Orleans	0				8:07 AM	8:07 AM	Chicago, IL
CHN	24.3	St. Louis	1			3	8:30 AM	8:33 AM	St. Louis, MO
CHN	58.1	St. Paul	2			2	8:35 AM	8:38 AM	St. Paul, MN
CHN	110.8	St. Paul	2			1	9:00 AM	9:03 AM	St. Paul, MN
CHN	179.2	St. Paul	3			1	11:20 AM	11:23 AM	St. Paul, MN
CHN	205.0	St. Paul	3			1	11:40 AM	11:43 AM	St. Paul, MN
CHN	250.2	St. Paul	4			2	12:05 AM	12:08 AM	St. Paul, MN
CHN	300.0	St. Paul	5			1	1:30 AM	1:33 AM	St. Paul, MN
CHN	320.0	St. Paul	5			2	2:00 AM	2:03 AM	St. Paul, MN
CHN	347.1	St. Paul	5			2	2:27 AM	2:30 AM	St. Paul, MN
CHN	388.0	St. Paul	5			2	2:53 AM	2:56 AM	St. Paul, MN
CHN	408.0	St. Paul	5			2	3:20 AM	3:23 AM	St. Paul, MN
CHN	444.1	St. Paul	5			2	3:46 AM	3:49 AM	St. Paul, MN
CHN	508.8	St. Paul	6			1	4:12 AM	4:15 AM	St. Paul, MN
CHN	527.7	St. Paul	6			1	4:39 AM	4:42 AM	St. Paul, MN
CHN	570.0	St. Paul	6			1	5:05 AM	5:08 AM	St. Paul, MN
CHN	578.1	St. Paul	6			1	5:32 AM	5:35 AM	St. Paul, MN
CHN	590.0	St. Paul	6			1	6:00 AM	6:03 AM	St. Paul, MN
CHN	594.1	St. Paul	6			1	6:27 AM	6:30 AM	St. Paul, MN
CHN	608.8	St. Paul	6			1	6:53 AM	6:56 AM	St. Paul, MN
CHN	627.7	St. Paul	6			1	7:20 AM	7:23 AM	St. Paul, MN
CHN	670.0	St. Paul	6			1	7:46 AM	7:49 AM	St. Paul, MN
CHN	678.1	St. Paul	6			1	8:13 AM	8:16 AM	St. Paul, MN
CHN	690.0	St. Paul	6			1	8:40 AM	8:43 AM	St. Paul, MN
CHN	694.1	St. Paul	6			1	9:07 AM	9:10 AM	St. Paul, MN
CHN	708.8	St. Paul	6			1	9:33 AM	9:36 AM	St. Paul, MN
CHN	720.0	St. Paul	6			1	10:00 AM	10:03 AM	St. Paul, MN
CHN	724.1	St. Paul	6			1	10:27 AM	10:30 AM	St. Paul, MN
CHN	738.8	St. Paul	6			1	10:53 AM	10:56 AM	St. Paul, MN
CHN	750.0	St. Paul	6			1	11:20 AM	11:23 AM	St. Paul, MN
CHN	754.1	St. Paul	6			1	11:47 AM	11:50 AM	St. Paul, MN
CHN	768.8	St. Paul	6			1	12:13 PM	12:16 PM	St. Paul, MN
CHN	780.0	St. Paul	6			1	12:40 PM	12:43 PM	St. Paul, MN
CHN	784.1	St. Paul	6			1	1:07 PM	1:10 PM	St. Paul, MN
CHN	798.8	St. Paul	6			1	1:33 PM	1:36 PM	St. Paul, MN
CHN	810.0	St. Paul	6			1	2:00 PM	2:03 PM	St. Paul, MN
CHN	814.1	St. Paul	6			1	2:27 PM	2:30 PM	St. Paul, MN
CHN	828.8	St. Paul	6			1	2:53 PM	2:56 PM	St. Paul, MN
CHN	840.0	St. Paul	6			1	3:20 PM	3:23 PM	St. Paul, MN
CHN	844.1	St. Paul	6			1	3:47 PM	3:50 PM	St. Paul, MN
CHN	858.8	St. Paul	6			1	4:13 PM	4:16 PM	St. Paul, MN</

CN June 2022 Proposed Schedule - City of New Orleans/Train 59										
NO	Mileage	Stations	POST	Planned Minutes	Actual Minutes	Actual Miles	Depart	Station	Arrive	Station
NOPT	0.0	LA, I-10, I-55, I-10, I-55, I-10, I-55								
NO	0.1	LA, I-10, I-55, I-10, I-55, I-10, I-55					8:00 PM	Thibodaux, LA		
NO	0.2	LA, I-10, I-55, I-10, I-55, I-10, I-55					8:05 PM	Thibodaux, LA		
NO	0.3	LA, I-10, I-55, I-10, I-55, I-10, I-55					8:10 PM	Thibodaux, LA		
NO	0.4	LA, I-10, I-55, I-10, I-55, I-10, I-55					8:15 PM	Thibodaux, LA		
NO	0.5	LA, I-10, I-55, I-10, I-55, I-10, I-55					8:20 PM	Thibodaux, LA		
NO	0.6	LA, I-10, I-55, I-10, I-55, I-10, I-55					8:25 PM	Thibodaux, LA		
NO	0.7	LA, I-10, I-55, I-10, I-55, I-10, I-55					8:30 PM	Thibodaux, LA		
NO	0.8	LA, I-10, I-55, I-10, I-55, I-10, I-55					8:35 PM	Thibodaux, LA		
NO	0.9	LA, I-10, I-55, I-10, I-55, I-10, I-55					8:40 PM	Thibodaux, LA		
NO	1.0	LA, I-10, I-55, I-10, I-55, I-10, I-55					8:45 PM	Thibodaux, LA		
NO	1.1	LA, I-10, I-55, I-10, I-55, I-10, I-55					8:50 PM	Thibodaux, LA		
NO	1.2	LA, I-10, I-55, I-10, I-55, I-10, I-55					8:55 PM	Thibodaux, LA		
NO	1.3	LA, I-10, I-55, I-10, I-55, I-10, I-55					9:00 PM	Thibodaux, LA		
NO	1.4	LA, I-10, I-55, I-10, I-55, I-10, I-55					9:05 PM	Thibodaux, LA		
NO	1.5	LA, I-10, I-55, I-10, I-55, I-10, I-55					9:10 PM	Thibodaux, LA		
NO	1.6	LA, I-10, I-55, I-10, I-55, I-10, I-55					9:15 PM	Thibodaux, LA		
NO	1.7	LA, I-10, I-55, I-10, I-55, I-10, I-55					9:20 PM	Thibodaux, LA		
NO	1.8	LA, I-10, I-55, I-10, I-55, I-10, I-55					9:25 PM	Thibodaux, LA		
NO	1.9	LA, I-10, I-55, I-10, I-55, I-10, I-55					9:30 PM	Thibodaux, LA		
NO	2.0	LA, I-10, I-55, I-10, I-55, I-10, I-55					9:35 PM	Thibodaux, LA		
NO	2.1	LA, I-10, I-55, I-10, I-55, I-10, I-55					9:40 PM	Thibodaux, LA		
NO	2.2	LA, I-10, I-55, I-10, I-55, I-10, I-55					9:45 PM	Thibodaux, LA		
NO	2.3	LA, I-10, I-55, I-10, I-55, I-10, I-55					9:50 PM	Thibodaux, LA		
NO	2.4	LA, I-10, I-55, I-10, I-55, I-10, I-55					9:55 PM	Thibodaux, LA		
NO	2.5	LA, I-10, I-55, I-10, I-55, I-10, I-55					10:00 PM	Thibodaux, LA		
NO	2.6	LA, I-10, I-55, I-10, I-55, I-10, I-55					10:05 PM	Thibodaux, LA		
NO	2.7	LA, I-10, I-55, I-10, I-55, I-10, I-55					10:10 PM	Thibodaux, LA		
NO	2.8	LA, I-10, I-55, I-10, I-55, I-10, I-55					10:15 PM	Thibodaux, LA		
NO	2.9	LA, I-10, I-55, I-10, I-55, I-10, I-55					10:20 PM	Thibodaux, LA		
NO	3.0	LA, I-10, I-55, I-10, I-55, I-10, I-55					10:25 PM	Thibodaux, LA		
NO	3.1	LA, I-10, I-55, I-10, I-55, I-10, I-55					10:30 PM	Thibodaux, LA		
NO	3.2	LA, I-10, I-55, I-10, I-55, I-10, I-55					10:35 PM	Thibodaux, LA		
NO	3.3	LA, I-10, I-55, I-10, I-55, I-10, I-55					10:40 PM	Thibodaux, LA		
NO	3.4	LA, I-10, I-55, I-10, I-55, I-10, I-55					10:45 PM	Thibodaux, LA		</

[illegible]

CN Letter to Amtrak dated June 28, 2022 (cont.)

Amtrak May 2022 Proposed Schedule - Saluki/Train 390

RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
CNIC	0.0	T,E,I						7:30 AM	Carbondale, IL CT
CNIC	20.3		19	1		1	7:50 AM	7:51 AM	Du Quoin, IL
CNIC	55.7		30	1		1	8:22 AM	8:23 AM	Centralia, IL
CNIC	108.9		44	1		1	9:08 AM	9:09 AM	Effingham, IL
CNIC	135.7		22	1		1	9:32 AM	9:33 AM	Mattoon, IL (Charleston)
CNIC			30		5		10:08 AM	10:08 AM	XTI - Tolono
CNIC	180.3		8	5		3	10:21 AM	10:24 AM	Champaign-Urbana, IL
CNIC	194.3		13	0		1	10:37 AM	10:38 AM	Rantoul, IL
CNIC	227.0		26	0		1	11:04 AM	11:05 AM	Gilman, IL
CNIC	252.2		22	3		1	11:30 AM	11:31 AM	Kankakee, IL
CNIC	284.6		27	10		2	12:08 PM	12:10 PM	Homewood, IL
AMT	306.7		28	0			12:38 PM	12:38 PM	XCS - 16th Street
AMT	308.9	T,E	20	0	2		1:00 PM		Chicago, IL CT
				Total Pure Run	Total Recovery Minutes	Total Short Shunt Adj.	Total Dwell	Total Schedule Time	
				289	22	7	12	330	

CN June 2022 Proposed Schedule - Saluki/Train 390

RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
CNIC	0.0	T,E,I						7:30 AM	Carbondale, IL CT
CNIC	20.3		20			1	7:50 AM	7:51 AM	Du Quoin, IL
CNIC	55.7		31			1	8:22 AM	8:23 AM	Centralia, IL
CNIC	108.9		43	2		1	9:08 AM	9:09 AM	Effingham, IL
CNIC	135.7		23			1	9:32 AM	9:33 AM	Mattoon, IL (Charleston)
CNIC			27	3	5		10:08 AM	10:08 AM	XTI - Tolono
CNIC	180.3		8	5		3	10:21 AM	10:24 AM	Champaign-Urbana, IL
CNIC	194.3		12	1		1	10:37 AM	10:38 AM	Rantoul, IL
CNIC	227.0		25	1		1	11:04 AM	11:05 AM	Gilman, IL
CNIC	252.2		21	4		1	11:30 AM	11:31 AM	Kankakee, IL
CNIC	284.6		27	10		2	12:08 PM	12:10 PM	Homewood, IL*
AMT	306.7		28				12:38 PM	12:38 PM	XCS - 16th Street
AMT	308.9	T,E	17	0	5		1:00 PM		Chicago, IL CT
				Total Pure Run	Total Recovery Minutes	Total Short Shunt Adj.	Total Dwell	Total Schedule Time	
				282	26	10	12	330	

Difference Between CN and Amtrak Proposed Schedules - Saluki/Train 390

PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
0	0	0	0	0	0	Carbondale, IL CT
1	-1	0	0	0	0	Du Quoin, IL
1	-1	0	0	0	0	Centralia, IL
-1	1	0	0	0	0	Effingham, IL
1	-1	0	0	0	0	Mattoon, IL (Charleston)
-3	3	0	0	0	0	XTI - Tolono
0	0	0	0	0	0	Champaign-Urbana, IL
-1	1	0	0	0	0	Rantoul, IL
-1	1	0	0	0	0	Gilman, IL
-1	1	0	0	0	0	Kankakee, IL
0	0	0	0	0	0	Homewood, IL
0	0	0	0	0	0	XCS - 16th Street
-3	0	3	0	0	0	Chicago, IL CT
Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time		
-7	4	3	0	0		

CN Letter to Amtrak dated June 28, 2022 (cont.)

Amtrak May 2022 Proposed Schedule - Illini/Train 392

RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
CNIC	0.0	T,E,I						4:15 PM	Carbondale, IL CT
CNIC	20.3		19	1		1	4:35 PM	4:36 PM	Du Quoin, IL
CNIC	55.7		30	1		1	5:07 PM	5:08 PM	Centralia, IL
CNIC	108.9		44	1		1	5:53 PM	5:54 PM	Effingham, IL
CNIC	135.7		22	2		1	6:18 PM	6:19 PM	Mattoon, IL (Charleston)
CNIC			30		5		6:54 PM	6:54 PM	XTI - Tolono
CNIC	180.3		8	3		3	7:05 PM	7:08 PM	Champaign-Urbana, IL
CNIC	194.3		13	2		1	7:23 PM	7:24 PM	Rantoul, IL
CNIC	227.0		26	0		1	7:50 PM	7:51 PM	Gilman, IL
CNIC	252.2		22	0		1	8:13 PM	8:14 PM	Kankakee, IL
CNIC	284.6		27	12		2	8:53 PM	8:55 PM	Homewood, IL
AMT	306.7		28	0			9:23 PM	9:23 PM	XCS - 16th Street
AMT	308.9	Le	20	0	2		9:45 PM		Chicago, IL CT
				Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time	
				289	22	7	12	330	

CN June 2022 Proposed Schedule - Illini/Train 392

RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
CNIC	0.0	T,E,I						4:15 PM	Carbondale, IL CT
CNIC	20.3		20			1	4:35 PM	4:36 PM	Du Quoin, IL
CNIC	55.7		31			1	5:07 PM	5:08 PM	Centralia, IL
CNIC	108.9		43	2		1	5:53 PM	5:54 PM	Effingham, IL
CNIC	135.7		23	1		1	6:18 PM	6:19 PM	Mattoon, IL (Charleston)
CNIC			27	3	5		6:54 PM	6:54 PM	XTI - Tolono
CNIC	180.3		8	3		3	7:05 PM	7:08 PM	Champaign-Urbana, IL
CNIC	194.3		12	3		1	7:23 PM	7:24 PM	Rantoul, IL
CNIC	227.0		25	1		1	7:50 PM	7:51 PM	Gilman, IL
CNIC	252.2		21	1		1	8:13 PM	8:14 PM	Kankakee, IL
CNIC	284.6		27	12		2	8:53 PM	8:55 PM	Homewood, IL
AMT	306.7		28	0			9:23 PM	9:23 PM	XCS - 16th Street
AMT	308.9	Le	17		5		9:45 PM		Chicago, IL CT
				Total Pure Run	Total Recovery Minutes	Total Short Shunt Adj.	Total Dwell	Total Schedule Time	
				282	26	10	12	330	

Difference Between CN and Amtrak Proposed Schedules - Illini/Train 392

PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
0	0	0	0	0	0	Carbondale, IL CT
1	-1	0	0	0	0	Du Quoin, IL
1	-1	0	0	0	0	Centralia, IL
-1	1	0	0	0	0	Effingham, IL
1	-1	0	0	0	0	Mattoon, IL (Charleston)
-3	3	0	0	0	0	XTI - Tolono
0	0	0	0	0	0	Champaign-Urbana, IL
-1	1	0	0	0	0	Rantoul, IL
-1	1	0	0	0	0	Gilman, IL
-1	1	0	0	0	0	Kankakee, IL
0	0	0	0	0	0	Homewood, IL
0	0	0	0	0	0	XCS - 16th Street
-3	0	3	0	0	0	Chicago, IL CT
Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time		
-7	4	3	0	0	0	

CN Letter to Amtrak dated June 28, 2022 (cont.)

Amtrak May 2022 Proposed Schedule - Illini/Train 393

RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
AMT	0.0	T,E,FA,W,I						4:05 PM	Chicago, IL
CNIC	2.2		15				4:20 PM	4:20 PM	XCS - 10th Street
CNIC	24.3		26	0		2	4:46 PM	4:46 PM	Homewood, IL
CNIC	56.7		27	1		1	5:16 PM	5:17 PM	Kankakee, IL
CNIC	81.9		22	2		1	5:41 PM	5:42 PM	Gilman, IL
CNIC	114.6		27	0		1	6:09 PM	6:10 PM	Rantoul, IL
CNIC	128.6		14	11		3	6:35 PM	6:38 PM	Champaign-Urbana, IL
CNIC			10		5		6:53 PM	6:53 PM	XTI - Tolono
CNIC	173.2		28	3		1	7:24 PM	7:25 PM	Mattoon, IL
CNIC	200.0		23	0		1	7:48 PM	7:49 PM	Effingham, IL
CNIC	253.2		46	0		1	8:35 PM	8:36 PM	Centralia, IL
CNIC	288.6		31	0		1	9:07 PM	9:08 PM	Du Quoin, IL
CNIC	308.9		18	9	0		9:35 PM		Carbondale, IL
			Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time		
			287	26	5	12	330		

CN June 2022 Proposed Schedule - Illini/Train 393

RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
AMT	0.0	T,E,FA,W,I						4:05 PM	Chicago, IL
CNIC	2.2		13				4:18 PM	4:18 PM	XCS - 10th Street
CNIC	24.3		26	0		2	4:44 PM	4:46 PM	Homewood, IL
CNIC	56.7		25	3		1	5:14 PM	5:15 PM	Kankakee, IL
CNIC	81.9		21	3		1	5:39 PM	5:40 PM	Gilman, IL
CNIC	114.6		25	2		1	6:07 PM	6:08 PM	Rantoul, IL
CNIC	128.6		12	13		3	6:33 PM	6:36 PM	Champaign-Urbana, IL
CNIC			10		5		6:51 PM	6:51 PM	XTI - Tolono
CNIC	173.2		24	7		1	7:22 PM	7:23 PM	Mattoon, IL
CNIC	200.0		23	0		1	7:46 PM	7:47 PM	Effingham, IL
CNIC	253.2		46	0		1	8:33 PM	8:34 PM	Centralia, IL
CNIC	288.6		32	0		1	9:06 PM	9:07 PM	Du Quoin, IL
CNIC	308.9	te	21	2	5		9:35 PM		Carbondale, IL
			Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time		
			278	30	10	12	330		

Difference Between CN and Amtrak Proposed Schedules - Illini/Train 393

PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
0	0	0	0	0	0	Chicago, IL
-2	0	0	0	-2	-2	XCS - 10th Street
0	0	0	0	-2	-2	Homewood, IL
-2	2	0	0	-2	-2	Kankakee, IL
-1	1	0	0	-2	-2	Gilman, IL
-2	2	0	0	-2	-2	Rantoul, IL
-2	2	0	0	-2	-2	Champaign-Urbana, IL
0	0	0	0	-2	-2	XTI - Tolono
-4	4	0	0	-2	-2	Mattoon, IL
0	0	0	0	-2	-2	Effingham, IL
0	0	0	0	-2	-2	Centralia, IL
1	0	0	0	-1	-1	Du Quoin, IL
3	-7	5	0	0	0	Carbondale, IL
Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time		
-9	4	5	0	0		

CN Letter to Amtrak dated June 28, 2022 (cont.)

Amtrak May 2022 Proposed Schedule - Saluki/Train 391

RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
AMT	0.0	T,E,F,A,W,I						8:15 AM	Chicago, IL
CNIC	2.2		15				8:30 AM	8:30 AM	XCS - 10th Street
CNIC	24.3		26	0		2	8:56 AM	8:58 AM	Homewood, IL
CNIC	56.7		27	3		1	9:28 AM	9:29 AM	Kankakee, IL
CNIC	81.9		22	2		1	9:53 AM	9:54 AM	Gilman, IL
CNIC	114.6		27	0		1	10:21 AM	10:22 AM	Rantoul, IL
CNIC	128.6		14	12		3	10:48 AM	10:51 AM	Champaign-Urbana, IL
CNIC			10		5		11:06 AM	11:06 AM	XTI - Tolono
CNIC	173.2		28	0		1	11:34 AM	11:35 AM	Mattoon, IL
CNIC	200.0		23	0		1	11:58 AM	11:59 AM	Effingham, IL
CNIC	253.2		46	0		1	12:45 PM	12:46 PM	Centralia, IL
CNIC	288.6		31	0		1	1:17 PM	1:18 PM	Du Quoin, IL
CNIC	308.9		18	9	0		1:45 PM		Carbondale, IL
				Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time	
				287	26	5	12	330	

CN June 2022 Proposed Schedule - Saluki/Train 391

RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
AMT	0.0	T,E,F,A,W,I						8:15 AM	Chicago, IL
CNIC	2.2		13				8:28 AM	8:28 AM	XCS - 10th Street
CNIC	24.3		26	0		2	8:54 AM	8:56 AM	Homewood, IL
CNIC	56.7		25	5		1	9:26 AM	9:27 AM	Kankakee, IL
CNIC	81.9		21	3		1	9:51 AM	9:52 AM	Gilman, IL
CNIC	114.6		25	2		1	10:19 AM	10:20 AM	Rantoul, IL
CNIC	128.6		12	14		3	10:46 AM	10:49 AM	Champaign-Urbana, IL
CNIC			10		5		11:04 AM	11:04 AM	XTI - Tolono
CNIC	173.2		24	4		1	11:32 AM	11:33 AM	Mattoon, IL
CNIC	200.0		23	0		1	11:56 AM	11:57 AM	Effingham, IL
CNIC	253.2		46	0		1	12:43 PM	12:44 PM	Centralia, IL
CNIC	288.6		32	0		1	1:16 PM	1:17 PM	Du Quoin, IL
CNIC	308.9	t,e	21	6	1		1:45 PM		Carbondale, IL
				Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time	
				278	34	6	12	330	

Difference Between CN and Amtrak Proposed Schedules - Saluki/Train 391

PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
0	0	0	0	0	0	Chicago, IL
-2	0	0	0	-2	-2	XCS - 10th Street
0	0	0	0	-2	-2	Homewood, IL
-2	2	0	0	-2	-2	Kankakee, IL
-1	1	0	0	-2	-2	Gilman, IL
-2	2	0	0	-2	-2	Rantoul, IL
-2	2	0	0	-2	-2	Champaign-Urbana, IL
0	0	0	0	-2	-2	XTI - Tolono
-4	4	0	0	-2	-2	Mattoon, IL
0	0	0	0	-2	-2	Effingham, IL
0	0	0	0	-2	-2	Centralia, IL
1	0	0	0	-1	-1	Du Quoin, IL
3	-3	1	0	0	0	Carbondale, IL
		Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time
		-9	8	1	0	0

Exhibit 3



May 12, 2021

Mr. Michael Matteucci
Regional Director Contracts and Administration
17641 South Ashland Avenue
Homewood, IL 60430-1345

Re: Amtrak Response to Notification of Disputed Schedules Pursuant to the Metrics and Minimum Standards for Intercity Passenger Rail Service

Dear Mike:

I am writing to confirm receipt of your letter dated April 15, 2021, initiating a non-binding dispute resolution process to resolve the disputed schedules identified in your letter, pursuant to the Metrics and Minimum Standards for Intercity Passenger Train Operations final rule published on November 16, 2020, 49 C.F.R. § 273.3 (the "Final Rule"). This letter serves as Amtrak's consent to participate in a non-binding dispute resolution process with respect to the disputed schedules you have identified.

Notwithstanding Amtrak's consent, it is Amtrak's desire to continue to work collaboratively and efficiently with you to resolve the disputed schedules without resort to a non-binding dispute resolution process. We look forward to continuing our discussions with you, and such discussions will not constitute a waiver of the parties' right to participate in a non-binding dispute resolution process as contemplated in the Final Rule. In the event we are unable to reach an agreement with respect to all of the disputed schedules by the end of this month, Amtrak proposes that the parties proceed expeditiously with the non-binding dispute resolution process such that we can reach resolution on any remaining disputed schedules before the customer on-time performance standard ("OTP") goes into effect on October 1, 2021.

Amtrak proposes a non-binding dispute resolution process that includes the following provisions:

- The parties will have thirty (30) days (*i.e.*, until June 30, 2021) to select one (1) professional mediator. If the parties are unable to agree on one (1) professional mediator, the parties agree to select a JAMS mediator through the process outlined in Rule 15 of the JAMS rules.
- Within thirty (30) days of selection of a mediator, the parties will simultaneously exchange opening briefs, stating their positions with respect to all disputed schedules and providing any supporting evidence. Within fifteen (15) days of exchange of the opening briefs, the parties simultaneously will file any reply briefs. There will be no discovery.

- A virtual mediation session to last no more than a day (unless otherwise agreed to by the parties) will be scheduled no earlier than thirty (30) days after the reply brief deadline. During these thirty (30) days prior to the mediation session, the mediator may reach out to the parties to discuss their respective positions.
- In the event the parties are unable to reach resolution with respect to any disputed schedule(s) at the mediation session, it will be at the discretion of the mediator whether to issue a written decision memorializing the parties' positions with respect to the disputed schedules.
- The parties will split equally the cost of mediation.
- The parties may agree to consolidate mediation proceedings in the event any disputed schedules involve more than one host railroad.

If you would like to discuss revising any part of Amtrak's proposed process, please let me know as soon as possible. We look forward to working with you and your team on these issues.

Sincerely,



Jim Blair
Senior Director, Host Railroads

Cc: Dennis Newman - Amtrak
Scott Kuxmann - CN

Exhibit 4



United States Region

Michael A. Matteucci

Region Director Contracts and Administration

17641 So. Ashland Avenue
Homewood, IL 60430-1345
T 708.332.3598
F 708.332.3673

May 18, 2021

Jim Blair
Senior Director, Host Railroads
National Railroad Passenger Corporation
30th Street Station
4th Floor, 4N-163
Philadelphia, PA 19104

Dear Jim:

Thank you for your May 12, 2021 letter agreeing to continue working collaboratively on schedule issues for the *Illini/Saluki* and *City of New Orleans* services, and consenting to participate, if necessary, in the non-binding dispute resolution CN proposed for those schedules in my letters to you dated April 15, 2021.

We are pleased that we have been able to certify the schedules for 20 of the 26 regularly scheduled daily Amtrak trains that operate over CN's lines in the United States, and that Amtrak wishes to continue working together toward resolving outstanding issues for the remaining 6. In my April 7 letter to you I provided specific, detailed compromise proposals for each of the remaining schedules. Your May 12 letter did not respond to those proposals. Nonetheless, you proposed proceeding with dispute resolution by the end of this month if we do not reach agreement for all disputed schedules, which now leaves us less than two weeks to resolve our differences. We are concerned that such a cutoff may provide too little time to meaningfully conduct our discussions unless Amtrak intends to accept our last proposal. CN believes we can continue making progress and favors continued negotiations rather than resorting prematurely to dispute resolution.

For non-binding dispute resolution, CN included a set of proposed "Rules and Procedures for the Non-Binding Dispute Resolution Process" in Attachment 3 to my April 15 letters ("Rules and Procedures"). Your response does not discuss that proposal, but instead proposes provisions of your own. Some elements of your proposal are irrelevant to our dispute (e.g., consolidation for multi-host routes) or the same as our proposal (e.g., no discovery; 30 days for opening statements; split costs). Other elements are reasonable and we are willing to partially or fully accommodate them (e.g., using JAMS as a backstop for selecting the Lead Arbitrator; splitting the difference in time provided for reply filings). In Appendix A you will find a markup of our proposed Rules and Procedures that shows the aspects of Amtrak's proposal that we are willing to accept.

There are some aspects of Amtrak's proposal, however, that we see as contrary to the FRA rule or the concept of dispute resolution and cannot accept.

- CN disagrees with Amtrak's proposal to have the process led by a single "professional mediator." CN believes the panel should include at least some individuals with substantive knowledge of railroad operations and scheduling. By requiring the process be led by a single professional mediator, Amtrak's proposal could preclude that. We are agreeable, however, to having the panel potentially led by a professional mediator/arbitrator. Therefore, we've modified the procedures to provide that if the two party-appointed panel member are unable to agree on the Lead Arbitrator, the Lead Arbitrator shall be appointed in accordance with JAMS Rule 15.
- CN disagrees with Amtrak's proposal to require a mandatory mediation session. The parties will have already engaged in extensive discussions prior to the start of the dispute resolution process, and there is nothing preventing them from continuing negotiations, with or without a mediator. By contrast, the FRA rules call for non-binding dispute resolution, not mediation. Further, CN's Rules and Procedures provide ample opportunity for the Panel to encourage and guide discussion and debate between the parties, if it believes that would be productive. It invests the Panel with the discretion to hold oral argument and also to adopt procedural rules as it deems appropriate (provided they do not conflict with the Rules and Procedures themselves or with an agreement of the parties). See Rules and Procedures, Sections 1 and 5.
- Amtrak proposed that the neutral be permitted to initiate *ex parte* discussions as part of Amtrak's proposed mandatory mediation session. It is unclear if Amtrak would advocate such *ex parte* contacts in the absence of a mediation session, but CN would oppose such a suggestion. Except for purposes of retention, such communications with a neutral are impermissible under JAMS Rule 14(a). However, we have modified the procedures to allow for *ex parte* contacts with the neutral panel member for the limited purpose of retention, and also to make clear that each party may have *ex parte* communications with their appointed panel member, which is consistent with JAMS Rule 14(c).
- CN disagrees with Amtrak's proposal to leave issuance of a "written decision memorializing the parties' positions with respect to the disputed schedules" up to the discretion of the neutral. The FRA's decision makes clear that a key purpose of dispute resolution is to produce a written decision that can guide the parties and also be used in any subsequent STB proceeding. In rendering any meaningful decision it will be important for the Panel to recount the opposing positions of the parties.

I look forward to receiving your response to CN's schedule proposals and continuing to work with your team on these important issues.

Sincerely,



Michael Matteucci

Exhibit 5



June 4, 2021

Mr. Michael Matteucci
Regional Director Contracts and Administration
17641 South Ashland Avenue
Homewood, IL 60430-1345

Dear Mike:

I am writing in response to your May 18, 2021, letter. Amtrak is, of course, available to continue discussion with respect to the six schedules that have not been certified and we welcome any further substantive dialogue. However, Amtrak believes that the parties should simultaneously be preparing to commence non-binding dispute resolution and that this process should commence immediately. In that regard, I will respond to the points made in your letter and then provide a revised Amtrak proposal in an attempt to narrow any disagreements.

First, you propose a multi-member panel, with what you refer to as a "Lead Arbitrator." As should be clear, Amtrak does not consider the dispute resolution process to be "arbitration," which suggests a formal litigation process that would result in a binding decision. Rather, the dispute resolution process described in the Final Rule is structured so the parties will not be bound unless they agree. We believe that a single individual (the "Neutral") is more likely to have success in bringing the parties together. You also suggest that the dispute resolution process must include an individual with substantive knowledge of railroad operations. Amtrak's proposal does not limit who the parties can agree to select, but we do not agree that the selection of an individual without such knowledge undermines the effectiveness of the dispute resolution process in any way.

Second, you disagree with Amtrak's suggestion to require a mandatory mediation session. While we do not agree with the substance of your comments, we have revised our proposal to allow the Neutral to structure the dispute resolution procedure as he or she deems appropriate, so long as any formal proceedings last no longer than a single day.

Third, you disagree with Amtrak's proposal to permit ex parte communications. Your concerns may be appropriate with respect to a litigated, binding arbitration, but the process outlined in the Final Rule is neither. We do not understand your concerns in the context of the non-binding procedure at issue here. Nonetheless, we have eliminated this from our original proposal and will agree to leave the structure of the dispute resolution procedure, including when and if ex parte communications are permitted, to the selected Neutral.

Fourth, you propose that a written decision be required. Amtrak cannot agree to that condition. Again, we believe that the question whether to provide a written decision should be within the discretion of the selected individual and based on the effectiveness of the proceeding.

Amtrak's modified proposal for a non-binding dispute resolution process includes the following provisions:

- The parties will have thirty (30) days (*i.e.*, until June 30, 2021) to select one (1) individual to preside over the dispute resolution process (the "Neutral"). If the parties are unable to agree on one Neutral, the parties agree to select a JAMS mediator to serve as the Neutral through the process outlined in Rule 15 of the JAMS rules.
- During the thirty (30) day period for selecting the Neutral, the parties shall meet and confer in an attempt to define, eliminate and/or narrow the scheduling issues between the parties that will be presented during the dispute resolution process.
- Within thirty (30) days of selection, the parties will simultaneously exchange opening briefs, stating their positions with respect to all disputed schedules and providing any supporting evidence. Within thirty (30) days of exchange of the opening briefs, the parties simultaneously will file any reply briefs.
- There will be no discovery. The Neutral has the discretion to consider any information, documents, or exhibits presented by the parties, and will not be bound in this regard by any restrictions which are encountered under any rules of evidence applying in courts of law or administrative agencies. The weight and value of the information, documents, or exhibits presented will be wholly within the discretion of the Panel.
- The Neutral shall have the sole discretion as to the conduct of the dispute resolution process, including whether to engage in separate communications with each party. Notwithstanding the foregoing, any joint session shall be virtual, shall last no more than one day (unless otherwise agreed to by the parties), and will be scheduled no earlier than thirty (30) days after the reply brief deadline.
- In the event the parties are unable to reach resolution with respect to any disputed schedule(s), it will be at the discretion of the Neutral whether to issue a written decision memorializing the parties' positions with respect to the disputed schedules.
- The parties will split equally the cost of the dispute resolution proceeding.
- The parties may agree to consolidate proceedings in the event any disputed schedules involve more than one host railroad.

Sincerely,



Jim Blair
Sr. Director, Host Railroads
Amtrak

cc: Dennis Newman - Amtrak
Scott Kuxmann - CN

Tab B

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35743

APPLICATION OF THE NATIONAL RAILROAD PASSENGER CORPORATION UNDER
49 U.S.C. § 24308(a) – CANADIAN NATIONAL RAILWAY COMPANY

**REBUTTAL VERIFIED STATEMENT
OF STEVEN PETERSON**

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Qualifications

1. My name is Steven R. Peterson. I previously submitted a verified statement in this matter, which includes a description of my qualifications.

B. Assignment

2. I have been asked by counsel for Illinois Central Railroad Company and Grand Trunk Western Railroad (collectively “CN”) to analyze certain of Amtrak’s economic arguments regarding the parties’ competing incentives and penalties proposals, Amtrak’s “reopener” proposal to take over CN’s dispatch and control of scheduling maintenance-of-way, and CN’s case for compensation for incremental costs of delays to CN freight trains due to the presence of Amtrak trains on CN’s rail lines. In particular, I have been asked to address from an economic standpoint the Verified Statement of Messrs. Crowley and Mulholland.

C. Summary of Conclusions

3. I have reached the following conclusions regarding the economics underlying Amtrak’s brief and the analysis of Messrs. Crowley and Mulholland.

- a. Amtrak criticizes CN for not proposing to make CN’s incentive payments directly dependent on Amtrak’s COTP for the train, despite COTP depending on factors that CN does not control. That criticism is unfounded. An effective system of incentive payments should depend on factors under CN’s control, a principle

Amtrak itself advances to support its inclusion of HRD as the principal component in its own incentive formula. CN's incentive proposal, which is based on relief items, ties incentive payments to factors within CN's control to facilitate its support of Amtrak's COTP goals.

- b. CN's incremental cost of hosting Amtrak is the difference between CN's total costs when Amtrak is and is not present on CN's network. Amtrak's effort to attribute freight train delays to CN's failure to invest in the past or to operate differently today (*i.e.*, asserted "proximate causes") is economically unfounded. The economic definition – and the Board's definition -- of incremental cost implies that Amtrak must accept its hosts' networks and operations as it finds them, and the baseline against which CN's costs should be measured is CN's total cost in the scenario where Amtrak is not present on CN's rail lines.
- c. Economic efficiency is enhanced when Amtrak internalizes the costs it imposes on its hosts. CN will continue to have incentives to minimize freight train delays if Amtrak compensates CN for incremental freight train delay costs under CN's proposal. CN's proposal would not lead to inefficiencies even if it recovered CN's full freight train delay costs, which it does not.
- d. Amtrak's experts' proposal to allocate incremental costs for certain delays proportionally to all delays are economically flawed and violates the economic definition of incremental cost.
- e. CN's car hire and HPH agreements are arm's-length agreements that establish payments for the use of CN's and other railroads' cars and locomotives. Arm's-length agreements are sound economic benchmarks for estimating CN's incremental cost of freight train delays.
- f. Opportunity costs are true economic costs incurred by firms. They should not be ignored or treated as zero in any economic analysis.

II. AMTRAK'S CLAIMS REGARDING INCENTIVES AND PENALTIES ARE ECONOMICALLY FLAWED AND INTERNALLY INCONSISTENT

A. Amtrak Ignores Basic Economic Principles in Its Critique of CN's Proposal for Allowing CN to Earn Incentives for Its Host Performance when Amtrak's COTP For a Train Is Low

4. Amtrak claims that Amtrak's customer on-time performance (COTP) should be used in determining CN's incentives and penalties because it was adopted by the Federal Railroad Administration as a measure of the "quality of *all* Amtrak passengers' experiences at *every* station along an Amtrak route."¹ Amtrak goes on to criticize CN for proposing incentives and penalties rules under which CN could earn positive incentives when Amtrak's COTP is below 80%.² Amtrak's position on incentives fails to recognize that even if COTP is a sound measure of its customers' experience, it is not a measure that should be used to determine individual hosts' incentive payments, particularly on services that involve multiple hosts. COTP is a measure of Amtrak's train performance, not of host performance, and it can bear little relation to the performance of a host, especially on routes with multiple hosts (such as four of the six Amtrak services at issue) or routes where Amtrak hosts a portion of the route to a station (such as in Chicago). Even for route sections hosted by CN, Amtrak itself recognizes in its delay coding that COTP may be affected by delays beyond CN's reasonable control. An effective incentive program focuses on matters within the reasonable control of the incentivized agent, not metrics that it cannot be incentivized to improve because it has little or no control over them.

5. Amtrak appears to recognize this to some extent. It argues that it is appropriate to use a minutes of host-responsible delay ("HRD") per 10,000 miles standard to determine whether CN earns incentives or penalties because (in Amtrak's view) HRD focuses exclusively on CN's performance as a host.³ While Amtrak is incorrect regarding CN's ability to control all of the delays that Amtrak labels as HRD,⁴ Amtrak's argument shows that it recognizes, in principle, the importance of focusing incentives on factors CN can control. This principle undermines

¹ Amtrak Reply Brief at 1 (emphasis in original).

² *See id.* at 15-16.

³ Amtrak Opening Brief at 50-51.

⁴ Reply VS (PID) of Steven R. Peterson ("Peterson RVS (PID)") at ¶39.

Amtrak's critique of CN for calibrating its incentive proposal based on factors that it can control rather than on COTP. There is no economic basis to focus an incentives and penalties proposal on COTP because even Amtrak's preferred measure of factors CN can purportedly control, HRD, is not predictive of COTP for individual trains, services, or schedules. As I explained in my prior statement, there is no economic justification for Amtrak's including a train's COTP and ridership factors – over which CN generally has little influence – in a program designed to incentivize CN (*i.e.*, influence CN's actions).

B. CN's Relief Items Directly Account for Factors Outside of CN's Control in the Incentive System

6. Amtrak complains that CN proposes that an “Amtrak train should be considered ‘on time’ for purposes of its incentive and penalty system if it arrives ‘on or before the scheduled arrival time’ at a station on its system, plus the sum of minutes attributable to certain enumerated delays (*i.e.* ‘additional tolerances’).”⁵ The economic importance of “relief items” (as I understand the parties have historically called them) or “additional tolerances” (as Amtrak now labels them) is that they use the available information to focus the incentive system directly on CN's performance and things within CN's control. For example, if a train reaches CN's rail lines 20 minutes late, but transits CN's rail lines in the allotted time, CN's performance is good and supports Amtrak's COTP, even if the train is late. In short, relief items introduce reliable information into the incentive payment formula so that CN is rewarded (or penalized) for its contribution to Amtrak's COTP. One feature of focusing on CN's performance is to exclude the impact of events outside of CN's control and the under performance of others, including Amtrak, from the determination of CN's incentives and penalties.

7. Amtrak complains that CN's incentive proposal would treat a train as on time even when “Amtrak passengers have been delayed by CN's actions.”⁶ Amtrak's complaint, however, focuses on maintenance-of way, safety slow orders, and efficiency testing,⁷ all of

⁵ Amtrak Reply Brief at 11.

⁶ Amtrak Reply Brief at 14.

⁷ Amtrak Reply Brief at 13 and 15-17.

which are mandatory actions that are critical to the safe operation of CN's lines and should not be disincentivized, much less penalized.

III. AMTRAK'S EFFORTS TO REDEFINE INCREMENTAL COSTS ARE ECONOMICALLY UNFOUNDED

8. As I described in my initial verified statement, as a matter of economics, CN's incremental cost of hosting Amtrak is the difference between CN's total costs when Amtrak is and is not present on CN's network.⁸ That economic definition matches the definition in the Board's Interim Decision of CN's incremental costs of hosting Amtrak.⁹ While the Board's proof requirements exclude from recovery certain costs that may not be adequately quantifiable, the definition is otherwise consistent with economic principles and would create efficient incentives to guide Amtrak's use of CN's network by leading Amtrak to internalize the costs its network use imposes on CN.

9. Amtrak recognizes the Board's definition of incremental costs but declines to accept it, arguing that in many circumstances in which Amtrak's passenger trains delay CN's freight trains, CN cannot "reasonably claim that Amtrak is the 'cause' of the delays that allegedly led to those costs."¹⁰

10. I will leave to counsel the debate regarding whether Amtrak's asserted "proximate cause" standard is legally required or appropriate in this circumstance. The economic and the Board's definition of incremental cost, however, treats the total cost of CN's operation of its rail network *without Amtrak present* as the baseline level of cost, reflecting CN's ownership of its network. What is clear is that a definition of incremental costs that treats CN's costs *without Amtrak* present as its baseline precludes Amtrak's speculation over whether and how the world could have turned out differently so that its passenger train might not have occupied a section of CN's lines that caused the delay of a CN freight train. The definition of incremental cost directly

⁸ Peterson VS (PID) ¶ 11.

⁹ Interim Decision at 22 ("As to the definition, the Board finds that incremental costs are those costs that CN has actually incurred, and that CN would not have incurred 'but for' the presence of Amtrak.").

¹⁰ Amtrak Reply Brief at 67.

implies that Amtrak must take its hosts as it finds them as the baseline for determining CN's incremental cost of hosting Amtrak.

11. Amtrak's description of alternative causes for CN freight train delays exemplifies the inefficient results that would be generated by Amtrak's view on cost causation. For example, Amtrak complains that freight traffic is growing on CN's system and that CN "is in exclusive control of the infrastructure on its system."¹¹ As an example of alternative choices about CN's infrastructure, Amtrak complains that Illinois Central Railroad Company (ICRR) –before Canadian National Railway Company (CNR) acquired ICRR— converted "its mostly double track main line between Chicago and Memphis to single track with passing sidings in the early 1990s."¹² Amtrak asserts that "where CN decides for its own operational reasons to *reduce* the capacity of its system in the face of traffic growth, the resulting delays are caused by CN, not Amtrak."¹³

12. Amtrak's effort to transfer cost responsibility to CN is economically unfounded. ICRR presumably made an efficient decision regarding the appropriate infrastructure for CN's freight business. For Amtrak to assert that ICRR should have made a different choice is to assume that CN has an obligation to subsidize Amtrak by operating and investing in its network and infrastructure for the benefit of Amtrak, even where Amtrak pays only incremental costs and does not contribute to the fixed and sunk costs of the railroad. Obviously, a claim that ICRR should have taken an action that it found against its own interest, in order to benefit Amtrak, fails to respect the definition of incremental costs. Amtrak's approach would require ICRR to invest in inefficient infrastructure for Amtrak's benefit, without compensation from Amtrak.

13. That Amtrak's solution to the freight train delays caused by its passenger trains comes solely at CN's expense is also illustrative of Amtrak's overall view of CN's obligation to invest or make costly changes to operations on Amtrak's behalf. For example, Amtrak argues that freight train delays are increased because CN runs trains that are longer than some sidings,

¹¹ Amtrak Reply Brief at 72.

¹² Amtrak Reply Brief at 72. Note that CNR purchased Illinois Central in 1999, after the early 1990s when the changes to IC's mainline were made.

¹³ Amtrak Reply Brief at 72.

reducing opportunities for freight trains to allow Amtrak trains to pass.¹⁴ The length of CN's trains, and its sidings, minimizes its costs given the traffic it carries. Amtrak's implied solution to delays caused by long freight trains is either that CN should run shorter trains or lengthen its sidings. Of course, either of these alternatives implies that CN should operate its business inefficiently, thereby incurring additional incremental costs for the benefit of Amtrak. Unpacking Amtrak's analysis shows that its proposed approach to assigning costs is nothing but a poorly disguised demand for direct subsidies to Amtrak from CN.

14. Again, while the legal relevance of a proximate cause standard is for the parties' counsel to debate, it is analytically undisciplined to argue that a business decision from 30 years ago is the more important "cause" of the costs of a freight-train delay than the Amtrak passenger train occupying the tracks in front of the freight train. If Amtrak is justified, within its framework, in reaching back 30 years to find the "fix" for today's CN freight-train delays, clearly either party could look to innumerable alternative decisions of the other to create a scenario in which a given delay is caused by the other. Such musings are not reliable economic analysis of cost attribution of Amtrak delays to CN freight trains and are inconsistent with the definition of incremental costs that forms the foundation of any economic analysis of costs and which party caused them.

IV. ECONOMIC EFFICIENCY IS ENHANCED WHEN AMTRAK INTERNALIZES FREIGHT-TRAIN DELAY COSTS

A. CN Has Strong Incentives to Avoid Freight Train Delays

15. A policy that assesses Amtrak the freight train delay costs its passenger trains cause is economically efficient and would reduce the amount that CN subsidizes Amtrak. When Amtrak internalizes costs that it imposes on hosts, it is incentivized to use network resources only when the benefits exceed the costs of the resources used.¹⁵

16. Receiving compensation for freight train delays will not "eliminate" CN's incentive to avoid delays as Amtrak claims.¹⁶ With compensation in place, Amtrak trains would

¹⁴ Amtrak Reply Brief at 81.

¹⁵ Peterson VS (PID) ¶ 16.

¹⁶ Amtrak Reply Brief at 75.

continue to have a higher priority of dispatch than CN's freight trains, and CN would continue to operate its network efficiently. Moreover, even with full incremental-cost compensation for freight train delays, CN could not possibly benefit from freight-train delays, and the risk of negative effects on the network and CN's customers would remain.

17. Within the context of CN's proposal and the Board's Interim Decision, which places some constraints on the incremental costs that CN can recover, CN will not be able to recover the full incremental cost of freight-train delays. As a result, CN will continue to bear net costs when its freight trains are delayed by Amtrak's passenger trains, and CN will continue to have the incentive to minimize its uncompensated costs by reducing freight train delays. Amtrak's paying the incremental cost of freight train delays will improve the efficient use of CN's network. Moreover, if further efficiencies are possible, Amtrak and CN could negotiate a side agreement with CN to realize the potential gains to be had through more efficient joint use CN's rail network.

B. Amtrak's Critique of CN's Incremental Cost Proposal is Economically Unfounded

18. The relevant economic issue for measuring CN's incremental freight-train delay costs is the change in CN's total costs as the result of Amtrak's presence on CN's network. Both Amtrak and its experts Crowley and Mulholland fail to apply the correct economic principles in their critique of CN's proposal for measuring freight-train delay costs.¹⁷

19. Crowley and Mulholland propose an alternative to the method developed by CN's expert Baranowski for *assigning* crew overtime costs resulting from freight train delays. Crowley and Mulholland claim that when a crew earns overtime as the result of a delayed train, all of the delays affecting the train are responsible for the crew's overtime. Therefore, according to Crowley and Mulholland, a reasonable approach to allocating overtime costs is to assign them proportionally to the delays the train experienced (as illustrated in their example).¹⁸

¹⁷ I address only certain economic issues related to Amtrak's and its experts' critique of CN's proposal. CN expert Michael Baranowski addresses criticism of the data used to measure incremental costs and other issues.

¹⁸ Crowley/Mulholland RVS (PID), ¶¶71-72 and n. 70.

20. In Crowley and Mulholland's example, a train experiences a 10-minute delay unrelated to Amtrak and a 30-minute delay related to meeting an Amtrak passenger train. The crew of the train were paid for 28 minutes of overtime. Crowley and Mulholland assert that since only 75% (30 minutes of 40 minutes) of total delay is attributable to Amtrak, only 21 minutes of overtime ($0.75 \times 28 = 21$) should be allocated to Amtrak.

21. Crowley and Mulholland's analysis misses the point of the relevant economic exercise, which is to estimate how Amtrak's presence on CN's network incrementally increases CN's costs, which implies that costs attributable to Amtrak are the consequence of the relevant *incremental change* resulting from Amtrak's presence. In their example, had the Amtrak train not been present on CN's network, there is no basis to assume that the CN train would have experienced the 30-minute delay due to the passenger train meet, implying the train would have had a total of 10 minutes of delay and the crew would have arrived at the final station 30 minutes earlier. In this case, the crew would have earned *no overtime*. Thus, if the analysis follows the correct economics and isolates the relevant increment, the incremental cost directly attributable to Amtrak's presence on CN's network is readily calculated as 28 minutes of overtime. The approach here follows the definition of incremental cost discussed above and the principle that Amtrak must take its host railroads as it finds them. In this case, the 10-minute delay experienced by the train is part of the but-for baseline against which the consequences of Amtrak's presence are to be measured. It is not part of the impact of Amtrak's presence on CN's network and none of the overtime costs attributable to delays should be assigned to the 10-minute delay.

22. Crowley and Mulholland assert that assigning Amtrak "minute-for minute" [sic] responsibility for costs conflicts with my earlier testimony, which they assert "would require the use of a lower bound of a possible range."¹⁹ This critique reflects a misunderstanding of my earlier testimony, but more importantly, reflects a misunderstanding of incremental costs and how to calculate them.

23. The Board has raised concerns about compensation for costs that are difficult to quantify, potentially ignoring them entirely. I testified in that context that "[i]t makes no economic sense to exclude such a cost, thereby valuing it as \$0, because of uncertainty as to

¹⁹ Crowley and Mulholland RVS (PID), ¶69. See Peterson VS (PID) ¶14.

whether it should be precisely quantified at \$200,000 or \$190,000.”²⁰ I continued the example indicating that it would be preferable to insert a conservative estimate in this case and give *an example* of choosing the lower bound of \$190,000 “if the risk of overcompensation is a major policy concern.”²¹

24. Nothing in the recommendation to treat difficult-to-quantify costs conservatively rather than as zero supports Crowley and Mulholland’s argument regarding the treatment of crew overtime costs. Incremental crew overtime costs can be measured using CN’s business systems and the incremental amount of overtime due to Amtrak’s presence on CN’s network can readily be calculated. Moreover, in the example above, there is not a range of results to evaluate. Thus, the choice between a conservative estimate and ignoring the cost is not relevant here. In addition, treating a cost conservatively in circumstances where it is difficult to quantify does not imply a uniform policy of choosing the lower bound of a range, as Crowley and Mulholland suggest by improperly generalizing a quite specific example.

25. More generally, the primary goal when estimating a cost is to use the available data to develop an accurate and unbiased estimate of the relevant cost, recognizing that perfect accuracy is not always possible. This is why it is economically inappropriate to ignore non-zero incremental costs simply because they are difficult to quantify. Doing so champions downward bias over an effort to achieve an unbiased and accurate result. For the same reason, it is equally incorrect to always choose the lower bound of a range. Instead, the analyst should make use of the most reliable data and estimates available. It is only when data leave a significant degree of uncertainty that secondary principles such as erring on the side of conservatism – in order to ensure that only reasonably certain costs are included – may come into play. Crowley and Mulholland’s critique that certain of Mr. Baranowski’s estimates contradict my testimony is wrong and fails to recognize the most basic principles of cost estimation.

26. Crowley and Mulholland reject CN’s direct attribution of crew overtime costs based on evidence of Amtrak-related delays. Instead, they assert that in order to demonstrate that delays resulting from Amtrak passenger trains are the result of the Amtrak-related delays, CN

²⁰ Peterson VS (PID) ¶14.

²¹ Peterson VS (PID) ¶14.

should be required to show that it pays greater overtime to crews that experience Amtrak-related delays relative to crews that do not experience Amtrak-related delays. Crowley and Mulholland's assertion is incorrect in the context where an observed Amtrak-related delay was long enough to lead to some or all of the overtime that a crew was paid. Absent the Amtrak-related delay, the necessary conclusion is that the train would have arrived earlier by the amount of the Amtrak-related delay, which would lead to a measurable reduction in overtime. The data available directly supports the conclusion that Amtrak caused the incremental overtime expense in this circumstance. Where Amtrak-related delays and resulting overtime (if it occurs) can be directly observed as here, that is a superior and sufficient method of assigning the responsibility for crew overtime, as opposed to the type of study proposed by Crowley and Mulholland.

C. Crowley and Mulholland's Suggestion that Locomotives and Cars Are in Excess Supply and Valueless Is Economically Baseless

27. Amtrak suggests that any recovery for lost availability of locomotives and railcars should be denied or reduced on the basis that their "utilization rates" are less than 100%.²² The underlying idea is that if there are "unutilized" locomotives and rail cars, there is no cost to CN as the result of a passenger train delaying the cars or locomotives the train comprises. That assertion, however, is economically untenable. During the period of the delay, Amtrak rather than CN effectively directs the use of CN's assets, and there is no doubt that CN's assets have value, whether they are CN-owned or provided by a foreign railroad. Most obviously, the value is apparent from the fact that railroads account for the time and/or mileage of locomotives and cars that are used by other railroads and have agreements that place a dollar value on the time that cars or locomotives spend on other railroads' networks when the back-and-forth of equipment becomes unbalanced. Thus, there are arm's-length agreements that value locomotive and car time that are sound economic benchmarks to use to value CN's lost use of its productive assets when Amtrak's presence dictates that CN divert the use of its assets from their productive use.

28. Moreover, as a practical matter, Amtrak's claims regarding the low utilization of some locomotives and cars are misplaced. As rational economic actors, freight railroads strive to

²² Amtrak Reply Brief at 93; *See, e.g.*, Crowley and Mulholland RVS at ¶¶115-117.

“right size” their locomotive and rolling stock fleets to match customer demand and promote network fluidity. Thus, without some evidence to the contrary, there is no basis to assert that the industry or any particular railroad has too much or “extra” rolling stock. Amtrak has adduced no such evidence, and, in fact, my understanding is that there is substantial ongoing investment in cars and locomotives, including by CN.²³ That a railcar or locomotive is not being continuously “utilized,” as narrowly defined, does not mean that the railroad has more railcars or locomotives than it needs or that delays to railcars or locomotives are cost free. As Crowley and Mulholland state, all railroads “structure their locomotive pools to account for *efficient* asset management, including accommodating down time, mechanical failures and operational delays.”²⁴ Of course, if CN manages its fleets of locomotives and cars to be “efficient,” there are, by definition, no surplus locomotives or cars. Therefore, the fact that CN is denied use of those assets due to delays caused by Amtrak’s use of CN’s lines is costly to CN.

D. CN’s Proposal Uses Car-Hire and HPH Agreements as Arm’s-Length Benchmarks

29. Amtrak asserts that it should not be made party to CN’s car-hire and HPH agreements.²⁵ CN’s proposal, of course, does no such thing. Rather, the rates in CN’s arm’s-length car-hire and HPH agreements are used as market benchmarks for the value of CN’s cars and locomotives (owned and foreign) that are diverted from their productive use by Amtrak

²³ See Press Release, CN News, CN Drives North American Economic Growth, Purchasing 1,000 New Generation, High-Capacity Hopper Cars to Enable Record Grain Shipments (May 7, 2021), <https://www.cn.ca/en/news/2021/05/cn-drives-north-american-economic-growth-purchasing-1000-new-gen/>; Press Release, CN News, (Globe Newswire), CN to Purchase 1,500 New Hopper Railcars in North America to Encourage Economic Recovery and Expand Grain Export (July 21, 2020), <https://www.cn.ca/en/news/2020/07/cn-to-purchase-1500-new-hopper-railcars-in-north-america-to-enco/>; Press Release, CN News (Globe Newswire), CN to purchase 350 lumber cars to meet growing demand in forest products business (May 2, 2018), <https://www.cn.ca/en/news/2018/05/cn-to-purchase-350-lumber-cars-to-meet-growing-demand-in-forest/>; Press Release, CN News (Globe Newswire), CN orders 60 more locomotives from GE Transportation (Sept. 5, 2018), <https://www.cn.ca/en/news/2018/09/cn-orders-60-more-locomotives-from-ge-transportation/>; Press Release, CN News, CN to purchase 200 new locomotives from GE Transportation over the next three years (Dec. 22, 2017), https://www.cn.ca/en/news/2017/12/pressrelease_20171222091521_9829/.

²⁴ Crowley and Mulholland RVS (PID), ¶116 (emphasis added).

²⁵ Amtrak Reply Brief at 93.

passenger trains. As Baranowski describes, the agreements are arm's-length agreements negotiated between unrelated railroads.²⁶

30. Further, Amtrak's observation that railroads often compensate other railroads in kind instead of paying hourly rates does not undermine the valuation in those agreements because the agreements commit the parties to cash settlements when in-kind transfers are out of balance.²⁷ Thus, the rates contained in the car-hire and HPH agreements reflect amounts that railroads have committed themselves to pay for the use of unrelated railroads' cars and locomotives.

E. Opportunity Costs Are True Economic Costs and Should Not Be Ignored

31. Amtrak apparently reads the Interim Decision as broadly barring recovery of any "opportunity cost."²⁸ But I understand it bars recovery only of certain "non-quantified or otherwise amorphous costs" that CN had proposed "such as freight rate suppression, capacity costs, foregone volume, and lost opportunity costs," which could not be specifically verified and quantified. In any event, from an economic perspective, a bright-line rule barring recovery of all "opportunity costs" would be economically irrational.

32. One of the key teachings of economics is that opportunity costs are real and that firms *actually incur* them whether they write a check or not. In Mankiw's leading textbook *Principles of Economics*, he offers ten principles of economics.²⁹ Principle number 2 is that "the cost of something is what you give up to get it" and the discussion of this principle addresses the importance of opportunity costs.³⁰ Opportunity costs are real costs that firms and other economic agents regularly incur, and they should not be ignored in any economic analysis.

²⁶ Baranowski VS (PID) at 16 and 18.

²⁷ Baranowski VS (PID) at 17 and 18-19.

²⁸ See, e.g., Amtrak Reply Brief at 93.

²⁹ N. Gregory Mankiw, *Principles of Economics*, 6th Ed. (Cengage Learning, 2012), 3-16.

³⁰ The first principle is the "people face trade-offs." Thus, the first two principles of economics, according to Mankiw, are that people and firms have to make choices and that opportunity costs are important to the choices they make.

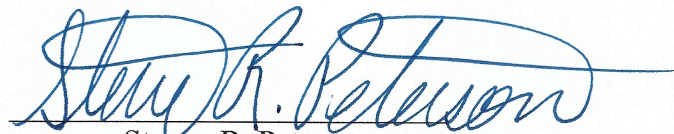
33. While the proof standards imposed by the Board may preclude compensation for certain unquantifiable or amorphous costs that are opportunity costs, there is no basis from an economic standpoint to categorically exclude incremental costs on the basis that they may be characterized as opportunity costs.

VERIFICATION

I, Steven R. Peterson, declare under penalty of perjury that I have read the foregoing verified statement, that I know the facts asserted therein, and that the same are true as stated.

Further, I certify that I am qualified to and authorized to submit this verified statement.

Executed on August 25, 2022.



Steven R. Peterson

Tab C

PUBLIC VERSION – REDACTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35743

APPLICATION OF THE NATIONAL RAILROAD PASSENGER CORPORATION UNDER
49 U.S.C. § 24308(a) – CANADIAN NATIONAL RAILWAY COMPANY

**POST-INTERIM DECISION
REBUTTAL VERIFIED STATEMENT
OF MICHAEL R. BARANOWSKI**

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Qualifications

1. My name is Michael R. Baranowski. On May 27, 2022, I submitted a verified statement (hereinafter, “VS (PID) Baranowski”) in this proceeding as part of CN’s Post-Interim Decision Opening Submission; I also submitted verified statements jointly with Benton A. Fisher earlier in this proceeding. My position and qualifications remain as stated in VS (PID) Baranowski and Exhibit FTI-1 attached thereto.

B. Assignment

2. In VS (PID) Baranowski, I described a methodology I developed and implemented in consultation with CN to quantify the incremental freight train delay costs CN incurs because of the presence of Amtrak trains on CN’s rail lines (the “Incremental Cost Methodology”), and the application of that methodology and the results of applying it to the sample month of December 2019. I supported my statement with various exhibits and detailed workpapers.

C. Summary of Conclusions

3. Briefly recapping my findings:

a) Based on CN's SRS records, there were at least 973 instances of delay to CN freight trains on CN's rail lines due to the presence of Amtrak trains in December 2019;

b) Those delays included 503 single-attribution (caused solely by Amtrak and no other cause) delay instances, resulting in 20,703 Idle Time delay minutes and 4,011 V-Time delay minutes, for a total of 24,714 delay minutes;

c) The remaining 470 delay instances involved multiple causes. For those delays, I counted Idle Time only, and only that part of Idle Time due to Amtrak (as opposed to other causes), finding a total of 16,936 minutes;

d) That amounts to a total of 41,680 delay minutes, or almost 695 hours;

e) I identified 634 instances of CN freight train crewmembers earning overtime at the end of a shift during which their train was delayed by Amtrak, which caused CN to incur in a total of \$58,255 in incremental overtime costs in the month of December 2019;

f) I found that the 503 single-attribution delay instances caused CN freight trains to burn an additional 6,922 gallons of fuel in the process of stopping and starting due to the presence of Amtrak on CN's lines. (I did not count any incremental fuel consumption in the process of stopping and starting for multiple-cause delays);

g) I identified 26,699 locomotive-minutes when CN locomotives equipped with Wi-Tronix were stationary in idle mode due to delays caused by Amtrak, which caused those locomotives to burn an additional [REDACTED] gallons of fuel;

h) I calculated the incremental costs of additional fuel burned by CN locomotives due to delays caused by Amtrak at [REDACTED];

i) I identified 734 locomotive-hours during which locomotives included in CN trains were delayed in transit by Amtrak, which, based on hourly cost formulas employed in arm's-length locomotive run-through agreements, caused CN to incur an incremental cost of [REDACTED];

j) I identified 951 car-hours during which railcars owned by CN or hired by CN from other Class I railroads were delayed on CN's rail lines by Amtrak trains, which, again based on hourly rates included in CN's agreements, caused CN to incur an incremental cost of [REDACTED];

k) Summing the foregoing, I identified a total of \$219,691 in specific, verified and quantified incremental costs incurred by CN due to freight train delays that would not have occurred but for the presence of Amtrak trains on CN's rail lines in December 2019.

4. I have reviewed Amtrak's Post-Interim Decision Reply Submission, which includes criticism of the Incremental Cost Methodology and my statement and findings (principally in the statement submitted by Messrs. Crowley and Mulholland ("RVS (PID) Crowley/Mulholland"), and also a copy of a 2017 verified statement (by Messrs. Vilter and Maga ("RVS (2017) Vilter/Maga")), which criticized a different methodology for identifying and quantifying incremental freight train delay costs that I employed at an earlier stage of this proceeding. I will now address Amtrak's Reply Submission, demonstrating that Amtrak's criticisms are, with minimal exceptions, unfounded. I will first rebut four general points made by Amtrak and its witnesses, and then turn to more specific criticisms.

II. AMTRAK'S GENERAL ARGUMENTS ARE UNFOUNDED.

A. Amtrak's "Proximate Cause" Arguments Ignore the Board's Interim Decision and Propose an Unworkable Standard.

5. I defer to legal counsel on points of law. However, I was instructed to devise and implement a methodology to identify and quantify CN's incremental costs associated with freight train delays due to Amtrak that conforms to the Board's Interim Decision. The Interim Decision instructs that "incremental costs are those costs that CN has actually incurred, and that CN would not have incurred '*but for the presence of Amtrak.*'" Interim Decision at 22 (emphasis added). That is what the Incremental Cost Methodology does, and in accordance with the Interim Decision, it includes only costs that are "specific, verifiable, and quantifiable," *id.* at 22 n.41, as proven "in a reasonable manner, consistent with the 'but for' standard," *id.* at 23.

6. I did not attempt to determine "proximate cause," which I understand to be an entirely different standard. In any event, as a matter of common sense, an Amtrak train that

blocks a CN train or for which a CN train is held in a siding would appear to be a much more “proximate” cause of the delay to the CN train than, say, infrastructure investment decisions made by IC decades earlier. But I understand Messrs. Crowley and Mulholland to propose a “proximate cause” test that would depend on wide-ranging value judgments about the merits of a host’s decisions regarding infrastructure investment, freight train schedules, freight train lengths, freight train horsepower per ton (“HPT”) ratios, siding lengths, and dispatching. *See* RVS (PID) Crowley/Mulholland ¶¶ 16-30; see also Amtrak Reply Br. (PID) at 68-74, 78-82. Based on my 42 years of experience with railroad regulatory costing issues in proceedings before the Board and the ICC, I can confidently state that that is not a normal approach to determining system-wide costs in the regulatory context. Nor can I conceive of any objective way to do so, given the value judgments involved. Messrs. Crowley and Mulholland’s “proximate cause” standard would be impossible to implement without endless argument about who is responsible for what. If adopted, it would effectively nullify the Board’s decision to allow for compensation of incremental costs of CN freight train delays that would not occur “but for” Amtrak’s presence on CN’s lines.

B. Amtrak’s “Preference” Arguments Ignore the Board’s Interim Decision and Propose an Unworkable Standard.

7. Much the same applies to Amtrak’s argument that CN should only be compensated for delays due to hosting Amtrak trains and not for (allegedly separate) delays due to giving Amtrak trains preference. *See* Amtrak Reply Br. (PID) 54-66. Again, I followed the Board’s Interim Decision, which calls for identification and quantification of costs of CN freight train delays “that CN would not have incurred ‘but for’ the presence of Amtrak,” without any suggestion that costs of delays attributable to preference should be subtracted out. Interim Decision at 22. Again, Amtrak proposes an undefined and unworkable standard that would turn the task of proof “in a reasonable manner” that the Board set, Interim Decision at 23, into an impossible task, which would result in a null set.

C. Contrary to Amtrak’s Claims, I Properly Relied on Information Provided to Me by CN and Maintained by CN in the Ordinary Course of Business.

8. Amtrak accuses me of failing to “confirm the[] validity” of data I relied on, specifically with respect to CN’s coding of delays in its SRS system as “FA,” or attributable to

Amtrak. Amtrak Reply Br. (PID) 78; *see also id.* at 76-77; RVS (PID) Crowley/Mulholland ¶¶ 12-15. I address my use of SRS data in more detail below, but Amtrak’s complaint raises another unfounded, unworkable demand. I am testifying as an expert, not a fact witness. Due to many years of consulting work on railroad regulatory matters, I am familiar with the general types of data involved. But as an expert witness, I necessarily I relied on data CN provided to me, which have been produced to the Board in my workpapers (in contrast to Amtrak’s witness, who produced no workpapers to support their initial filing in May), and on testimony from CN witnesses regarding the sources of those data, which is also before the Board.

9. In doing so, I verified in each case that the data were provided and attested to by a CN employee with relevant expertise/responsibilities, and that there was a sound basis, in light of CN fact witnesses’ testimony, to consider the data reliable. In most cases, I relied on CN data as maintained and regularly used by CN in the ordinary course of business, many of which are generated by automated systems. Specifically:

a) for data regarding delays to CN trains and CN train consists, I relied on records CN witnesses John Summerfield, My-Thanh Nguyen-Hung, and Craig Zarembka provided to me from CN’s SRS database – specifically, the [REDACTED]. As those witnesses explain, “SRS is the core transportation data system for managing and recording most aspects of CN’s rail operations.” VS (PID) Summerfield *et al.* 3. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]; *see also* VS (PID) Matteucci/Kuxmann 77-79 (explaining how instructions, supervision, review and feedback, and cross-checking with other data are used to minimize human error in SRS data). To supplement and cross-check SRS data, I relied on data CN supplied to me that were automatically generated by the Wi-Tronix system, which is widely used by CN and other railroads and described in detail by Simon Lizotte, CN’s subject matter expert for the Wi-Tronix system. *See* VS (PID) Lizotte 1-6. To

further supplement and cross-check SRS data, I relied on Playbacks – data from CN’s [REDACTED] that automatically and contemporaneously record the locations and movements of multiple trains on CN’s system and that CN uses regularly in the ordinary course of business, including to cross-check SRS data, as explained by Messrs. Matteucci and Kuxmann. *See* VS (PID) Matteucci/Kuxmann 78-79;

b) to identify which CN crews were assigned to particular trains on which days, and any overtime liability CN incurred to those crews with respect to those shifts, I relied on payroll data provided to me by CN’s Senior Manager, Crew Systems and Planning, Catherine Whiteman, who testified that the data I used are maintained by her and used by CN in the ordinary course of business, “are contemporaneously updated and rigorously maintained, and form a core element of CN’s payroll system.” VS (PID) Whiteman 1;

c) to determine CN’s incremental fuel consumption due to the presence of Amtrak trains on CN’s lines, I (1) in consultation with Messrs. Lizotte and Robinson, defined representative scenarios based on the available train delay data, and then used the outputs of Train Performance Calculator (“TPC”) simulation runs for each scenario conducted by Mr. Robinson, who has expertise in the definition and operation of TPC simulations, which he conducts for CN in the ordinary course of business, to determine stop/start fuel burn, *see generally* VS (PID) Robinson; VS (PID) Lizotte 6-7; VS (PID) Baranowski 13-14; and (2) derived a weighted average idle fuel burn weight from the locomotive manufacturers’ published idle fuel burn rates, to determine idle fuel burn, *see* VS (PID) Baranowski 14-15, which Mr. Lizotte, who has expertise on fuel consumption, verified as yielding a conservative estimate, *see* VS (PID) Lizotte 7-8. To determine CN’s average fuel cost, I relied on data provided to me by Mr. Kuxmann, which, he testified, “CN maintains in the ordinary course of business and uses, among other purposes, as part of its regulatory reporting of fuel costs to the Board.” VS Matteucci/Kuxmann 81. I verified that the average fuel cost I used was conservative relative to contemporaneous U.S. Government data. *See* VS (PID) Baranowski 15;

d) to determine CN's hourly costs of delays to locomotives and cars, I relied on contract rates set by locomotive run-through agreements and car hire data (with which I am familiar from my experience with the industry, and know to be consistent with R-1 regulatory costing principles), reflecting actual agreements between CN and other Class I railroads, which were provided to me by Mr. Kuxmann. *See* VS (PID) Matteucci/Kuxmann 82; VS (PID) Baranowski 16-19.

10. Having obtained reliable data from CN which CN uses in the ordinary course of business, I then used my professional judgment to determine what those data establish, and which data are best suited for which purpose. For example, Messrs. Crowley and Mulholland criticize me for using Wi-Tronix data in some circumstances and not others. *See* RVS (PID) Crowley/Mulholland ¶¶ 35-51, 55. In general, for reasons explained by Mr. Lizotte, I consider Wi-Tronix data to be the best source to establish the location and speed of a train and how long it is stationary. *See* VS (PID) Lizotte at 1-5.¹ Thus, for a single-cause delay event for which Wi-Tronix data are available, I use Wi-Tronix data to determine the length of time the train was stopped and the length of time the train took to decelerate and to re-accelerate to and from the stop. Where Wi-Tronix data are not available, I use other reliable sources of data (*e.g.*, Playbacks and TPC modeling) as appropriate. Wi-Tronix does not, however, provide any information as to how much of a multiple-cause delay is attributable to Amtrak versus other causes, so I use SRS data for that purpose. My use of the data best suited for each purpose, subject to availability, does not, as Crowley and Mulholland allege (*see, e.g.*, RVS (PID) Crowley/Mulholland ¶ 51), mean that I consider other data unreliable.

D. Contrary to Amtrak's Claims, the Incremental Cost Methodology Is Highly Conservative.

11. Amtrak and its witnesses claim that my statements regarding the conservatism of the Incremental Cost Methodology are merely "speculative." *See, e.g.*, RVS (PID) Crowley/Mulholland ¶ 16. They are not. Here are just some of the ways in which the Incremental Cost Methodology is conservative, *i.e.*, it simplifies or resolves doubts in favor of

¹ Wi-Tronix data are not, however, as reliable as TPC modeling and manufacturers' data to establish fuel consumption, as Messrs. Lizotte and Robinson explain. *See* Rebuttal VS (PID) Lizotte/Robinson ¶¶ 16-18.

assumptions that will tend to yield a lower assessment of incremental delay costs attributable to Amtrak:

- a) It uses SRS as a screen, not counting any delays caused by Amtrak that are not recoded in the SRS system. Since CN's SRS system has thresholds below which it does not trigger recording of delays, that no doubt means that a number of delays caused by Amtrak are excluded and thus not quantified;
- b) For multiple-cause delay events, where SRS and Wi-Tronix delay measurements may appear to conflict, it uses the lower amount of delay;
- c) It counts only Idle Time and not V-Time, in multiple-cause delay scenarios, notwithstanding that in many of those cases, the train might not have stopped at all but for Amtrak;
- d) It counts only crew overtime, and not the costs incurred by CN in connection with lost crew time within shift or in connection with re-crew events;
- e) It counts Idle Fuel Burn only for locomotives equipped with Wi-Tronix, and assumes minimum fuel burn rates, and does not count Stop-Start Fuel Burn in multiple-cause cases; and
- f) It counts only hourly costs of locomotives and cars with no return on investment component to reflect the full costs of ownership.

III. AMTRAK'S ARGUMENTS ABOUT INCREMENTAL DELAY IDENTIFICATION AND QUANTIFICATION ARE UNFOUNDED.

12. Crowley and Mulholland first assert that the new delay time calculations are "flawed" because CN has not offered detailed proof that its freight schedules assume delays caused by Amtrak and because, they allege, delays caused by Amtrak trains constitute a small percentage of delay to CN freight trains (which is hardly surprising, given that Amtrak trains constitute a small percentage of the trains on CN's lines). RVS (PID) Crowley/Mulholland ¶¶ 31-34. Those points are irrelevant to the delay and incremental cost calculations I presented.

13. I explained above and in my prior statement that I used SRS, Wi-Tronix and Playbacks data in combination to arrive at an accurate assessment of delays CN freight trains incur due to Amtrak trains. SRS data are well-suited to determine delay causes and to determine

the Idle Time delay (only) attributable to Amtrak in multiple-cause delay scenarios; that is what dispatchers are instructed to do. SRS data are less well-suited to determine delay duration in a single-cause scenario. Wi-Tronix data are well-suited to determine delay times, but not to address issues of attribution. Since they measure different things using different methods, Crowley and Mulholland’s observation that SRS and Wi-Tronix frequently record different delay times for an individual delay event is unremarkable, and does not indicate “mismatched events, double counted event times, and application of inappropriate surrogate data” as they claim. RVS (PID) Crowley/Mulholland ¶ 39. And since Amtrak previously argued that SRS data were unreliable to measure single-cause delays because they measure them against schedules, it is unreasonable now for Amtrak to argue that SRS data should be used to measure single-cause delays if they happen to indicate a delay shorter than is indicated by Wi-Tronix. *See, e.g., id.*, ¶ 41. Other than divergences from the SRS data, Amtrak offers no reason for questioning the accuracy of Wi-Tronix delay data.

14. Further, insofar as Crowley and Mulholland suggest that use of Wi-Tronix data to quantify single-cause delays entails an overstatement of delays, because Wi-Tronix sometimes records longer delays than SRS, *see, e.g., id.*, ¶ 44 & Ex. 10, attention should be paid to the bigger picture. As their own graph on page 17 of their statement shows, in the vast majority of cases SRS and Wi-Tronix data record similar lengths of delay, and exceptions are roughly evenly distributed in both directions. In fact, on net, SRS and Wi-Tronix data record remarkably similar delay totals. As Table 1 reflects, a purely SRS-based approach, counting all time and only the time assigned in the SRS system to the FA code, would yield a total incremental delay time for December 2019 that is within 2% of the total time determined by the Incremental Cost Methodology’s use of the best available data for each purpose (40,949 total minutes versus 41,680 total minutes).

Table 1²

² *See* workpaper: CN_Delays_Due_To_Amtrak_Dec_2019_Rebuttal_Calculations.xlsx”, tab “Summary_Original.” The numbers provided in this table reflect the analysis prior to the corrections made in and with this Rebuttal Statement, but those small corrections do not affect the major implication of this table: SRS data and the Incremental Cost Methodology are

Minutes of Delay Time for Different Categories of Delay Determined by the Incremental Cost Methodology versus Reported in the SRS Database

Delay Type	Calculation Method	Counts	Total	SRS "FA" Time
Amtrak Only	Wi-Tronix	381	19,028	16,062
Amtrak Only	Playback Reviews	122	5,716	5,303
Multi-Attribution	Wi-Tronix	118	2,681	5,329
Multi-Attribution	SRS Captured Time	352	14,255	14,255
	Total	973	41,680	40,949

15. That fact, along with the improvements in the SRS delay recording system described by CN's witnesses, provides substantial assurance that concerns previously expressed by Amtrak and noted by the Board (*see* Interim Decision at 23 n.42) have now been addressed. That is certainly the case for multiple-cause delays, in which the concern previously expressed by Amtrak that delays are measured against schedule does not arise, since CN's dispatchers are instructed to measure the Amtrak component of a multiple-cause delay directly rather than against the schedule. Accordingly, using SRS as the primary means to determine delay length in a multiple cause scenario is appropriate. For the same reason, Crowley and Mulholland's proposal that delay in a multiple-cause should be determined based on the lesser of delay attributed to Amtrak by SRS and idle time recorded by Wi-Tronix, multiplied by the proportion of FA delay to other delay recorded in the SRS system (*see* RVS (PID) Crowley/Mulholland ¶ 44(b)-(c) & Ex. 10) is baseless: since dispatchers record FA time in a multiple-cause scenario based on the absolute length of delay caused by Amtrak rather than by assigning delays against schedule proportionally, applying a proportional reduction would distort the data. However, to address Amtrak's concerns, I added an extra element of conservatism into the Incremental Cost Methodology by using the lower of the delay recorded by Wi-Tronix and the delay recorded by SRS when quantifying Amtrak delays in multiple-cause scenarios. It is that extra conservatism, implemented to address Amtrak's overstated concerns, that Crowley and Mulholland now criticize as "inconsistent." *Id.* ¶ 43.

generally consistent, and the Incremental Cost Methodology does not reflect any "cherry picking," as Amtrak alleges.

16. At paragraphs 46-50 of their statement and in their Exhibits 8-9, Crowley and Mulholland purport to show “examples” in which I miscounted or double-counted delays to CN freight trains due to Amtrak. Although they have provided only two such “examples” for the whole month, I have reviewed all the December 2019 FA delays in light of their arguments. As detailed in my workpapers,³ I conclude that Crowley and Mulholland are correct that I double-counted a delay in their first “example” (Train G89971-30), and, out of almost 1000 delay entries for the month, I have found four similar examples. I have revised my conclusions accordingly; corrections with respect to those five delays result in a total reduction of \$1,782 to the incremental freight train delay costs I calculated. However, Crowley and Mulholland are wrong with respect to their second example, involving train M39931-03. It was entirely correct, and entirely consistent with the Incremental Cost Methodology, to adopt the dispatcher’s determination, in the context of a multiple-cause delay, that the specific amount of time the train was delayed by Amtrak when it first stopped was 50 minutes. It was equally correct, and equally consistent with the Methodology (and with Amtrak’s criticisms of SRS single-cause delay quantifications determined from a schedule baseline), to count the second, separate delay as included 32 minutes of Idle Time due to Amtrak, since there is no basis to question the dispatcher’s decision to code the entire delay that occurred at Rantoul as an FA delay, and no basis to question the quantification by Wi-Tronix of how long the train was stationary as a result of that delay.

17. Finally, Crowley and Mulholland’s criticism of my V-Time calculations is unfounded. First, they claim that V-Time should not be counted at all, because dispatchers are instructed to only count Idle Time when quantifying an FA-coded delay. *Id.*, ¶ 52. They neglect to note that CN’s dispatchers only **quantify** FA-coded delays in multiple-cause cases; in single cause cases, the quantification of the delay is set by the SRS system based on comparison to schedule – again, the feature that was a central focus of Vilter and Maga’s criticisms of the prior methodology – and dispatchers merely **attribute** the delay to Amtrak by applying the FA code. In other words, in the normal course of business, CN counts V-Time for single-cause delays (since the SRS system measures the whole delay, not just Idle Time, against the schedule), but not for multiple-cause delays (since dispatchers quantifying Amtrak’s share of multiple-cause

³ See workpaper: Delay_Exclusion.xlsx.

delays are instructed to count Idle Time only). The new Methodology mirrors that precisely: I counted V-Time for single-cause delays only, based on the (highly conservative) assumption that in a multiple-cause delay case, the stop-start event should not be counted against Amtrak.

18. Second, Crowley and Mulholland raise specific objections to Mr. Robinson's TPC modeling of V-Time – principally the claim that in some cases the assumption that only two locomotives were operational during the stop-start event might be inaccurate and might lead to an over-estimation of V-Time. *See generally* RVS (PID) Crowley/Mulholland ¶¶ 53-59. Messrs. Robinson and Lizotte refute those objections in their rebuttal statement. *See* Rebuttal VS (PID) Lizotte/Robinson ¶¶ 2-10. Moreover, as detailed in paragraph 34 below, assuming a third locomotive to be operational, as Crowley and Mulholland's criticism suggests, would actually increase CN's net incremental cost, since the costs associated with an increase in total Fuel Burn would more than offset the reduction in costs associated with a marginal reduction in total V-Time.

IV. AMTRAK'S ARGUMENTS ABOUT INCREMENTAL DELAY COST IDENTIFICATION AND QUANTIFICATION ARE UNFOUNDED.

A. The Incremental Cost Methodology Reliably and Conservatively Determines Specific, Verifiable and Quantifiable Incremental Crew Overtime Costs.

19. Amtrak's main argument against the Incremental Cost Methodology with respect to crew overtime cost amounts to the proposition that I focused on delays caused by Amtrak – as opposed to other delays – that led to a crew earning overtime. *See* Amtrak Br. (PID) 88-90; RVS (PID) Crowley/Mulholland ¶¶ 65-74. That is true, but it is also entirely appropriate.

20. Consistent with the Board's Interim Decision, my task was to identify and quantify overtime costs that CN actually incurred, but would not have incurred but for Amtrak's presence on CN's lines. Crowley and Mulholland argue that most delays suffered by CN trains – and the crews on them – are due to non-Amtrak causes; CN constructs its schedules with the expectation of delays; and SRS does not record all delays. *Id.* ¶ 67. Assuming every point in their favor for the sake of argument, that is irrelevant to my task.

21. A hypothetical example can clarify the point. Assume that a crew that has a fixed ten-hour shift before it begins to earn overtime is assigned to a train that would complete its trip

in six hours if there were no delays, but that is scheduled for an eight-hour trip because, as Crowley and Mulholland say, CN's schedules assume delays. Assume further that, consistent with Crowley and Mulholland's arguments, the train incurs three and a half hours of delays due to non-Amtrak causes, some of which are recorded in SRS and some of which are not, and one hour of FA delay (attributable to Amtrak), so the crew is in service for 10.5 hours and earns 30 minutes overtime. But for Amtrak, the crew would be in service for 9.5 hours (6 hours scheduled time plus 3.5 hours of delays), so it would not earn any overtime. Given Amtrak's presence on CN's lines, the crew earns 0.5 hours overtime. Therefore, applying the "but for" standard set forth in the Board's Interim Decision, the incremental overtime cost of Amtrak's presence on CN's lines is the cost of 0.5 hours of overtime.

22. As the above example demonstrates, the proportion of FA to other delays, and the recording of other delays, is simply irrelevant to an assessment of CN's incremental overtime cost.

23. Likewise, Crowley and Mulholland's suggestion that I should have attempted to determine the average amount of overtime attributable to Amtrak by using a "control group" of crews that were not delayed by Amtrak (*id.* ¶ 74) simply misses the point. Under the Board's Interim Decision, my task was to identify and quantify "specific" costs CN "actually incurred," that it would not have incurred but for Amtrak's presence. If no specific data were available, one could perhaps attempt to infer average effects of FA delays on overtime based on comparison with a control group that did not experience FA delays, but any such effort would be complex and potentially unreliable. The control group with no FA delays might differ from the group with FA delays in myriad ways. For example, the group with no FA delays could be working higher or lower priority freight trains, or they could be working different hours or in different locations when and where there is more or less traffic on the line, and thus be susceptible to less or more freight/freight meet delays; they could have more or less allowance built into their schedules for potential delays; or delays could have cascading effects, leading to other delays.

24. Here, specific data were available: I was able to identify specific crews assigned to specific trains subject to specific FA delays on specific days who had earned specific amounts of overtime at the end of those shifts. The specific data I used reliably identify and quantify specific overtime costs that CN actually incurred and would not have incurred "but for"

Amtrak's presence. Given that direct proof, control studies that would be more complex and less reliable would serve no purpose. As Crowley and Mulholland say (in another context), in general, "[d]ata collected in the field is more reliable than model outputs, because data collected in the field reflects real world operations." *Id.* ¶ 85.

25. Amtrak's second argument regarding crew overtime costs is that I allegedly "double counted" incremental overtime costs in some "instances" in which a crew experienced multiple FA delays and erroneously linked a few crews that incurred overtime with delays. *See id.* ¶¶ 75-77 & Exs. 11-12. Crowley and Mulholland's detailed analysis of individual examples from my workpapers reflects that they found my analysis transparent and readily auditable. As discussed above in ¶ 16, I confirmed that a handful of crews were inadvertently counted twice and have removed the double counts from my analysis.

26. To address Crowley and Mulholland's criticisms regarding matching of crews with delays, I obtained additional payroll data from Ms. Whiteman at CN to identify a more complete dataset of December 2019 crew wages,⁴ including start and end of shift data that were omitted in the original dataset. Using the augmented crew data, and implementing an additional check to ensure accurate matching based on using crew on-duty and off-duty time in combination with location data and train IDs, I was able to confirm that some instances identified as "mismatches" by Crowley and Mulholland were, in fact, proper matches, while some were, indeed, mismatches. Using the expanded dataset and additional verification procedures, I identified the appropriate matches – instances where crews were delayed by Amtrak and then incurred overtime at the end of the same shift – for the affected delays. The data, process and results are detailed in my workpapers.⁵ The net result was a modest reduction (\$757) in the quantified incremental overtime costs for December 2019.

27. Amtrak's third objection to my analysis of crew overtime incremental costs is trivial: Crowley and Mulholland complain about my rounding overtime to the nearest 0.1 hours.

⁴ *See* workpaper: Southern Wages and OT IC,GT 2019-11-29 to 2020-01-02.xlsx.

⁵ *See* workpaper: CN_Delays_Due_To_Amtrak_Dec_2019_Rebuttal_Calculations.xlsx, tab "Summary."

Id., ¶ 78. Of course, rounding both up and down to the nearest 0.1 has no inherent bias and tends to cancel out over time. However, to put the issue to rest, I have re-calculated CN's incremental crew overtime cost without rounding. As expected, doing so alters the calculation only minimally – by just \$54.⁶

28. In its fourth and final objection to the crew overtime analysis, Amtrak complains that I counted overtime in cases where the FA delay attributable to Amtrak occurred on the first leg of a two-train (in some cases, back and forth) crew shift. *Id.*, ¶ 79. Crowley and Mulholland neither quantify this issue nor provide any specific examples. And more importantly, they provide no reason to believe that it is a flaw in the methodology. Rail crews are scarce and valuable assets, and CN presumably does not have crews waste time between trips. If a crew is delayed in completing its first scheduled trip, it will generally be delayed in beginning, and therefore in completing the second/return trip included in its shift.

29. Finally, based on their unfounded and overstated objections, Crowley and Mulholland claim that the Incremental Costs Methodology overstates “the crew expenses CN incurred due to Amtrak.” *Id.*, ¶ 80. In doing so, they again ignore the fundamental conservatism of the methodology. Not only are the crew overtime costs claimed premised on an understatement of actual delays caused by Amtrak, as explained above; as I explained in my prior statement, they also omit non-overtime incremental crew costs actually incurred by CN that are undoubtedly significant, albeit difficult to quantify. For example, my calculations do not include costs CN incurs for in-shift crew time, notwithstanding that loss of crew productivity within shift will inevitably require a right-sized railroad to hire more crews, and they do not include costs CN incurs in transporting and accommodating crews when, because of delays caused by Amtrak, a re-crew must occur in an unplanned location.

B. The Incremental Cost Methodology Reliably and Conservatively Determines Specific, Verifiable, and Quantifiable Incremental Fuel Costs.

30. Crowley and Mulholland acknowledge that in response to their criticisms of a methodology used to quantify fuel costs prior to the Interim Decision, I used a revised fuel cost

⁶ *See id.*

methodology in the Incremental Costs Methodology that led to an estimate of monthly incremental fuel costs that was about half the prior estimate. *See id.*, ¶¶ 81-82. But they raise several criticisms of the new methodology, none of which is well-founded.

31. First, they argue that it fails to take account of Auto Engine Start Stop (“AESS”) technology. *Id.*, ¶¶ 83-85. Their argument misunderstands or misrepresents AESS and the Incremental Cost Methodology. As Crowley and Mulholland acknowledge (*id.*, ¶ 83), AESS technology functions to save fuel by automatically turning off locomotives when the train is **idling** and does not need the power they provide.⁷ So it is simply not relevant to the incremental Stop-Start Fuel Burn analysis conducted by Timothy Robinson, which quantifies how much more fuel is burned during a stop-start event because a train needs **more** power to accelerate from a stop. *See* Rebuttal VS (PID) Lizotte/Robinson ¶ 15. AESS technology comes into play when the train is idling. Crowley and Mulholland concede that the Incremental Costs Methodology “implicitly” takes AESS into account in counting Idle Time fuel burn by relying on Wi-Tronix data to determine whether and when a locomotive has been switched off (by AESS or otherwise). RVS (PID) Crowley/Mulholland ¶ 84. But what they ignore is that the Methodology errs significantly on the side of conservatism by *only* counting Idle Time fuel burn for locomotives equipped with Wi-Tronix.

32. Second, Crowley and Mulholland argue that to determine Fuel Burn, I should have used fuel level data transmitted by fuel sensors and recorded in the Wi-Tronix system. *Id.*, ¶¶ 85-91. As Messrs. Lizotte and Robinson explain and illustrate, doing so would have led to a less specific, accurate and reliable estimate of Fuel Burn. The methods I used – relying on Mr. Robinson’s TPC modeling for Stop-Start Fuel Burn, and on manufacturers’ published minimum idle fuel burn rates for Idle Fuel Burn – are both reliable and conservative. *See* Rebuttal VS (PID) Lizotte/Robinson ¶¶ 16-19.

33. Third, Crowley and Mulholland argue that Mr. Robinson’s TPC modeling is flawed because it assumes that only a maximum of two locomotives were operational on a train even if more locomotives were present on the train. RVS (PID) Crowley/Mulholland ¶¶ 91-100.

⁷ *See, e.g.*, <https://www.wabteccorp.com/freight-services/performance-upgrades/automatic-engine-start-and-stop-systems>.

Again, Lizotte and Robinson rebut their claim, showing that the two locomotive cap assumption is realistic and consistent with CN's operating principles, and that assuming a third locomotive to be operational would, in every scenario, increase the fuel burn that would be calculated. *See* Rebuttal VS (PID) Lizotte/Robinson ¶¶ 2-8 & Table 1.

34. The increase in incremental costs associated with that increase in fuel consumption – 78 gallons based on Robinson's re-run of his TPC modeling with a three-active-locomotive assumption – would more than offset the marginal decrease in incremental costs associated with a marginal decrease in V-Time – of just 25 minutes – based on that same modeling.⁸ At the per-gallon rate stated in my opening statement of [REDACTED], the additional 78 gallons would add [REDACTED] to the incremental costs I quantified; the 25 minute reduction in V-Time would only reduce the incremental cost calculation by \$105. Thus, the change implied by Crowley and Mulholland's critique would, net, increase incremental costs by [REDACTED]. That is further evidence that the Incremental Cost Methodology is sound and conservative.

35. Fourth, Crowley and Mulholland criticize other assumptions (involving line gradient and air braking) employed by Mr. Robinson. RVS (PID) Crowley/Mulholland ¶¶ 101-04. Again, Messrs. Robinson and Lizotte demonstrate that the modeling assumptions were reasonable, realistic, and conservative. *See* Rebuttal VS (PID) Lizotte/Robinson ¶ 20.

36. Finally, Crowley and Mulholland speculate that CN might recoup the Incremental Fuel Costs Amtrak causes it to incur through fuel surcharges to CN's freight customers. RVS (PID) Crowley/Mulholland ¶¶ 105-07. But in any event, Crowley and Mulholland ignore the nature of fuel surcharges. As the Board knows, fuel surcharges are commonly charged in the freight rail industry and other industries as the price of fuel rises above benchmark price levels, and they are generally determined *ex ante* without separately accounting for unexpected delays and stops. In other words, fuel surcharges have nothing to do with, and do not compensate for, excess fuel consumption that occurs from unexpected stops and starts, including those that occur when a freight train makes an unexpected stop because of an Amtrak train.

⁸ *See* workpaper: CN_Delays_Due_To_Amtrak_Dec_2019_Rebuttal_Calculations.xlsx, tab "Summary."

37. Again, Crowley and Mulholland fail to acknowledge the multiple layers of conservatism built into the Incremental Cost Methodology. My Incremental Fuel Cost calculation is conservative insofar as it (1) is premised on an under-statement of actual delays caused by Amtrak; (2) omits any assessment of Stop-Start Fuel Burn Costs for multiple-cause delays, notwithstanding that many of those stop-start events would likely not have occurred but for Amtrak; (3) if and insofar as Crowley and Mulholland are right and some trains had three rather than two operational locomotives, understates Stop-Start Fuel Burn; (4) omits any assessment of Idle Fuel Burn for non-Wi-Tronix-equipped locomotives; (5) uses minimum Idle Fuel Burn rates published by manufacturers that tend to be low; and (6) uses fuel prices lower than those published by the Energy Information Administration, while omitting non-fuel costs of the fueling process.

C. The Incremental Cost Methodology Reliably and Conservatively Determines Specific, Verifiable and Quantifiable Locomotive and Car Costs.

38. I defer to counsel to respond to what amount to legal arguments made by Crowley and Mulholland in opposition to CN's claim for recovery of the costs associated with delays to its own locomotives. *See* RVS (PID) Crowley/Mulholland ¶¶ 110-118. But they ignore the straightforward economic and railroading logic underlying the claims. CN's locomotives are critically valuable business assets; CN can only operate its freight rail business insofar as it has locomotives available to pull freight. When Amtrak delays CN's locomotives en route, it delays them from performing their next job, and when it does so for hundreds of hours every month, as my opening statement demonstrated, that means that CN needs more locomotives – whether purchased or rented – to sustain its business. That is not simply abstract economic theory; it is railroading reality. I understand that CN has purchased substantial numbers of locomotives every year for the past several years, and that CN is making additional investments in refurbishing and upgrading existing locomotives. *See* Rebuttal VS (PID) Matteucci/Kuxmann ¶ 87 & n.43. CN is incurring actual costs to meet its locomotive needs, needs that would be less were Amtrak not delaying its locomotives for hundreds of hours every month. Crowley and Mulholland's discussion of locomotive "utilization rates" (RVS (PID) Crowley/Mulholland ¶¶ 115-16) does not prove the contrary. They themselves concede that "[a]ll railroads, including

CN, structure their locomotive pools to account for efficient asset management.” *Id.*, ¶ 116. So whatever is counted in nominal utilization rates, an efficiently run railroad like CN, especially one that is continuously acquiring more locomotives, should be presumed not to have functioning locomotives sitting around doing nothing.⁹

39. Crowley and Mulholland’s objection that I rely on a “bilateral . . . agreement” to establish the value of an hour of a given locomotive’s productive time (*id.*, ¶ 111) also misses the point. They previously objected to calculating that value based on standard components of the cost of ownership of an asset, including return on investment, which led to a higher valuation. *See* Rebuttal VS Crowley/Mulholland 29-30 (filed Sept. 14, 2017); *see also* RVS (PID) Crowley/Mulholland ¶ 108. HPH agreements, in which railroads negotiating at arm’s length – and thus, presumably without bias – set the value of a locomotive horsepower-hour, provide a reasonable and objective basis for quantifying that value. And as I explained in my prior statement, the values I used are not simply the product of “bilateral . . . agreement.” While arm’s-length agreements reinforce that those values are real and unbiased, the values used in HPH agreements are actually derived from specific R-1 expense items – *i.e.*, from real costs, actually incurred, calculated in accordance with accounting principles approved by the Board for other regulatory purposes. *See* VS (PID) Baranowski at 16-18.

40. In addition, Crowley and Mulholland are simply wrong insofar as they imply that I am guilty of double-counting because “a large portion of CN’s locomotive operating expense is covered by the fuel component in its contracts.” *Rebuttal VS (PID) Crowley/Mulholland* ¶ 112. The formulae in the HPH agreements that I used employ R-1 cost line items representing locomotive operating expenses such as locomotive repair and maintenance, depreciation and lease rentals. They do not include locomotive fuel costs, which are separately reported in the R-1 as transportation expenses.¹⁰

⁹ Nominal utilization rates may consider locomotives that are being repaired or repositioned not in use, and include locomotives that are not currently functional. The locomotives that are moving on CN’s system such that they are delayed en route by Amtrak are, presumably, functional.

¹⁰ *See* workpaper: 2019 R1 Loco Costs.xlsx.

41. Essentially the same points apply to Crowley and Mulholland's objections to incremental cost recovery based on delays to foreign locomotives on CN's lines. *See* RVS (PID) Crowley/Mulholland ¶¶ 119-24. For those, the appropriateness of incremental cost recovery based on costs recognized in HPH agreements is even more clear, since for every horsepower-hour a foreign locomotive is delayed on CN's lines, CN actually and directly incurs liability under those agreements. Crowley and Mulholland appear to argue that only a cash payment under an HPH agreement, and only one that CN incurred because Amtrak not only delayed the foreign locomotive, but also delayed a CN locomotive that could have been provided to the foreign railroad as an in-kind payment, should be compensable. *See id.* ¶ 124. But the simple reality is that when Amtrak delays a foreign locomotive on CN's lines, CN incurs a liability to pay the foreign railroad either under the cash terms of the HPH agreement or in-kind. In other words, it incurs either a cash loss or the loss of an hour of CN locomotive time, which is itself an economically significant loss.

42. Crowley and Mulholland's arguments against CN's incremental car costs simply duplicate their arguments against CN's incremental locomotive costs. They are wrong in principle, for the same reason. Additionally, for cars, as for locomotives, it is notable that despite having detailed workpapers, Crowley and Mulholland have found nothing at all to criticize in my implementation of the methodology.

43. Finally, for locomotive and car costs, as for other incremental costs, Amtrak once again fails to acknowledge the conservatism inherent in the Incremental Cost Methodology. As with other costs, the locomotive and car costs claimed are conservative because they are premised on delays screened by the SRS system, which omits short, but nonetheless cumulatively significant, delays. Moreover, by excluding certain economic components of the cost of ownership of productive assets, such as return on investment, the Incremental Cost Methodology tends to understate the value of each hour of asset time.

V. CORRECTIONS

44. As explained above, the vast majority of Amtrak's criticisms are unfounded, but there are a few instances in which refinements to my calculation of CN's incremental freight train delay costs in December 2019 are appropriate. Specifically:

- a. Eliminating five instances of possible duplicate delay claims reduces the total incremental cost by \$1,782;
 - b. Re-checking crew overtime in light of the above adjustment and Crowley and Mulholland's criticisms, using a more complete payroll data-set and factoring in payroll timestamps, leads to the elimination of some instances of overtime previously included but also the off-setting inclusion of some instances of overtime not previously included, resulting in a net reduction of total crew overtime incremental cost from \$58,255, to \$57,552;¹¹
 - c. Eliminating rounding of crew overtime costs further reduces the total crew overtime incremental cost by \$54, to \$57,499.
45. In aggregate, these revisions reduce CN's total incremental freight train delay costs to December 2019 from \$219,691 to **\$217,798**.

¹¹ Because the duplicate delay and crew mismatch instances overlap, the total deduction indicated (in paragraph 45) is less than the sum of those two deductions viewed separately (in paragraph 44).

VERIFICATION

I, Michael Baranowski, declare under penalty of perjury that I have read the foregoing verified statement, that I know the facts asserted therein, and that the same are true as stated.

Further, I certify that I am qualified to and authorized to submit this verified statement.

Executed on August 25, 2022.


Michael Baranowski

Tab D

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35743

APPLICATION OF THE NATIONAL RAILROAD PASSENGER CORPORATION UNDER
49 U.S.C. § 24308(a) – CANADIAN NATIONAL RAILWAY COMPANY

**POST-INTERIM DECISION
REBUTTAL VERIFIED STATEMENT
OF SIMON LIZOTTE AND TIMOTHY ROBINSON**

1. Our names are Simon Lizotte and Timothy Robinson. We previously filed individual verified statements in this proceeding as part of CN's Post-Interim Decision Opening Submission, and the description of our credentials and jobs at CN we provided in those statements remains accurate, as does the rest of those statements. We submit this statement jointly to respond to certain criticisms of CN's Incremental Cost Methodology made in Amtrak's Reply Verified Statement of Messrs. Crowley and Mulholland. Crowley and Mulholland assert that the Methodology is unreliable and over-estimates both V-Time (delays CN freight trains incur while decelerating to and accelerating from a stop caused by an Amtrak train) and Incremental Fuel Burn (additional fuel burned by locomotives on CN trains both during that stop-start process ("Stop-Start Fuel Burn") and while stationary in idling mode due to a delay caused by an Amtrak train ("Idle Fuel Burn")). As we explain, Crowley and Mulholland's criticisms are unfounded.

I. The Two-Locomotive Cap

2. We first address what appears to be Crowley and Mulholland's main critique, applicable to both the V-Time and Stop-Start Fuel-Burn: they argue that the two-locomotive cap

assumption we imposed for purposes of Mr. Robinson’s Train Performance Calculator (“TPC”) modeling is both unrealistic and non-conservative.¹ They are wrong on both points.

3. The two-locomotive cap is realistic: it is both consistent with CN’s operating practices and representative of what would occur in the vast majority of cases. Crowley and Mulholland point out that many trains included in the study sample had more than two locomotives in the consist.² That is true, but irrelevant. CN includes excess locomotives in its trains for many reasons, including to re-position them. Their inclusion in the consist does not mean that they are active and consuming fuel. As Mr. Lizotte previously explained, subject to ensuring that trains are adequately powered, “CN strives to operate its trains with no more operational horsepower than necessary, in order to optimize fuel consumption.”³ That means that not all “horsepower” – locomotives – on a train will necessarily be “operational.” The determination of what level of operational horsepower is appropriate for a train over a specific segment is made using horsepower/ton (“HPT”) ratios set in the train schedule. This HPT ratio is defined by the Service Design group as part of the train base schedule and is set based on factors such as train type, priority, and terrain, with consideration for fuel efficiency. Systems (HPTA) designed by Mr. Lizotte’s team then generate train-specific operational instructions to crews to ensure every train runs as close to this HPT ratio as possible to maximize fuel efficiency, without affecting train operations.⁴ Based on those criteria, which CN employs in the ordinary course of business, and that CN would have employed for the trains at issue, no

¹ See RVS (PID) Crowley/Mulholland ¶¶ 57-59, 93-99.

² *Id.* ¶ 58.

³ VS (PID) Lizotte at 6.

⁴ See *id.* at 6-7.

more than two locomotives would have been operational in the vast majority of cases in the study sample.

4. Crowley and Mulholland offer only speculation to the contrary, mischaracterizing efficiently powered trains as “grossly underpowered.”⁵ They offer no analysis whatsoever to support that assertion and they ignore some key points. First, it is a basic and well-known principle of locomotive operation that locomotives operate most efficiently – they produce the most horsepower for a given level of fuel burn – at higher throttle settings. In other words, two locomotives operating at full throttle are more fuel efficient than three locomotives operating at a lower power setting. Second, contrary to Crowley and Mulholland’s apparent assumption,⁶ locomotives that are switched off for a trip consistent with CN’s fuel optimization principles cannot just be switched on instantly to add extra power when an unexpected stop-start event occurs. In those circumstances, activating a locomotive that was inactive for the trip would, for most locomotive models, involve a crew member walking the train to the locomotive to manually switch it on (and later, doing the same to switch it off). That process would likely add far more delay time than any time that the addition of extra power to enable the train to accelerate from the stop would save.⁷

⁵ RVS (PID) Crowley/Mulholland ¶ 90.

⁶ *See id.* ¶ 98 & n.89.

⁷ Crowley and Mulholland also misunderstand Mr. Robinson when they assert that the three instances in his TPC study output of trains not modeled “due to technical limitations” reflect that train models were under-powered. *Id.* ¶ 99 & n.91. There was just one scenario – which was not run, and for which no V-Time or Stop-Start Fuel Cost was claimed – in which there appeared to be a mismatch between horsepower and train consist. In the other scenarios involving technical limitations, the model did not reach observed speeds (which may have been affected by downhill gradients, wind, *etc.*), so Mr. Robinson modeled those instances using lower speeds, resulting in lower V-Time and Stop-Start Fuel Burn outputs.

5. In any event, use of the two-locomotive cap assumption is conservative. Fewer locomotives burn less fuel.⁸ Further, the reduced fuel costs associated with operating fewer locomotives outweighs any marginal increase in V-Time costs that might occur because a train powered by fewer locomotives takes more time to re-accelerate from a stop.

6. Crowley and Mulholland deny this, claiming that “there are many operational situations in which more locomotive power will move a particular train more efficiently (and burn less fuel) than less locomotive power.”⁹ But again, they provide no support for that assertion, and while there may be extreme scenarios in which a train is grossly under-powered and adding a locomotive would reduce net fuel burn, no such extreme scenarios are included in the scenarios modeled by Mr. Robinson.

7. In any event, their claim is readily tested, and refuted. Mr. Robinson re-ran the TPC model on a sample of 8 scenarios (which he selected based on there being more than two locomotives present, and on the horsepower/ton ratio being relatively low – in other words, selecting scenarios for which Crowley and Mulholland’s proposal that more locomotives should be assumed active would be relatively plausible), this time assuming that 3 locomotives instead of 2 were active during deceleration to and acceleration from a stop. As Table 1 below shows, in every instance, adding the third locomotive as operational increased the Stop-Start Fuel Burn recorded by the TPC:

⁸ See VS (PID) Lizotte at 7.

⁹ RVS (PID) Crowley/Mulholland ¶ 97.

Table 1

Consist Locos	Train	IC/GTW	Amtrak Only Count	Amtrak Only using TPC V-time	Locos Capped = 2		Locos Capped = 3	
					V-time (min)	Start-Stop Gallons	V-time (min)	Start-Stop Gallons
3	Commodity-Load	IC	16	12	60	508	38	527
3	Grain-Load	IC	6	0	-	159	-	175
3	Manifest	IC	30	6	12	437	9	467
4	Commodity-Load	IC	1	0	-	35	-	37
4	Manifest	IC	7	0	-	103	-	110
5	Manifest	IC	3	0	-	36	-	39
6	Manifest	IC	1	0	-	3	-	3
7	Manifest	IC	1	1	2	14	1	15
Total			65	19	74	1,294	49	1,372
Difference							-25	+78

8. That increase in Stop-Start Fuel Burn would increase CN's incremental costs in 65 single-cause delay incidents, leading to an increase of 78 gallons of total incremental fuel burn in December 2019.¹⁰

9. As Crowley and Mulholland point out, it could have a contrary effect – decreasing CN's incremental costs because V-Time could be decreased based on the assumption that an additional locomotive was powering acceleration from a stop – in the subset of incidents in which TPC modeling was used to determine V-Time. However, that effect applies only in the subset of single-delay cases – approximately 25% – in which Mr. Baranowski determined V-Time based on Mr. Robinson's TPC modeling. (In the approximately 75% of cases where Wi-Tronix data were available, he determined V-Time based on Wi-Tronix data instead.) Mr. Robinson's re-runs included scenarios representing 19 such instances; re-running the TPC

¹⁰ See workpapers: Primary_Run_Request_Details_Sheet_v3.xlsx; Summary_Tables_R2; CN_Delays_Due_To_Amtrak_Dec_2019_Rebuttal_Calculations.xlsx, tab "Adjusted_Loco."

modeling based on a three-locomotives assumption resulted in a total net decrease of just 25 minutes of V-Time.¹¹

10. As Mr. Baranowski elaborates in his separate statement, the net effect of those two offsetting effects of assuming three active locomotives instead of two would be to marginally *increase* CN's overall incremental costs.

II. Other V-Time Issues

11. Crowley and Mulholland first argue that CN must believe that “costs stemming from V-Time are [not] quantifiable and allocable” because it does not calculate V-Time in the ordinary course of business.¹² Their argument reflects a misunderstanding of how CN operates and how the Incremental Cost Methodology relates to CN's ordinary business practices.

12. As explained in Mr. Baranowski's statement, the Incremental Cost Methodology calculates V-Time and attributes it to Amtrak *only* in cases where data from CN's SRS system indicate that an Amtrak train was the sole cause of a CN freight train delay. For multiple-cause delays, the Methodology does not count V-Time or Stop-Start (as opposed to Idle) Fuel Burn.

13. Contrary to Crowley and Mulholland's claims, that is entirely consistent with how CN assesses delay in the ordinary course of business. For single-cause delay events, the SRS system generates Delay Reports based on deviation from scheduled run-time, which would naturally include all delay, whether V-Time or Idle Time. For multiple-cause delay events, as Crowley and Mulholland note, CN's dispatchers are instructed to code as FA only Idle Time due to Amtrak. That exclusion of V-Time for multiple-cause events reflects a reasonable decision to err on the side of conservatism – to under-count delays attributable to Amtrak – given difficulties

¹¹ *See id.*

¹² RVS (PID) Crowley/Mulholland ¶ 52.

in assessing whether a stop-start event would have occurred anyway in Amtrak's absence, a rationale that has no application to single-cause FA delays. Contrary to Crowley and Mulholland's claim, the Incremental Cost Methodology mirrors what CN does in the ordinary course of business, attributing the whole delay (including V-Time) to Amtrak for single-cause delays and just attributing Idle Time to Amtrak for multiple-cause delays. The only difference is that in order to be more rigorous and precise for purposes of this proceeding, CN has used specific data to determine Idle Time, and rigorous and detailed modeling to determine V-Time, rather than relying solely on SRS data, which captures the same delays but may do so less precisely since, in single-cause cases, it assesses them based on deviation from schedule rather than by direct measurement.

14. Crowley and Mulholland next complain that the Incremental Cost Methodology "assumes train speeds would not vary absent a stop."¹³ Not so. As Mr. Robinson explained in his original statement, and as reflected in his workpaper "Train_Group_Characteristics_Dec.2019_Excerpt_Summary.xlsx," the TPC modeling he conducted to assess V-Time and Stop/Start Fuel Burn included separate variables for "approach speed" and "departure speed."¹⁴ Thus, if, for example, there were a special track speed limitation that applied somewhere between the point where the train began to decelerate and the point at which it completed its re-acceleration from a stop – the only scenario in which a uniform "but for" speed assumption would potentially lead to a significant over-estimation of V-Time and Stop/Start Fuel Burn – it would be reflected in the modeling. (We acknowledge that the TPC modeling was based on average observed speeds within defined ranges rather than precise

¹³ RVS (PID) Crowley/Mulholland ¶ 53.

¹⁴ See VS (PID) Robinson at 8.

speeds as part of the effort to turn the assessment of hundreds of individual scenarios into a manageable 51 scenarios, but there is no reason – and Crowley and Mulholland offer none – to suppose that that reasonable estimation methodology would yield a biased estimate.)

III. Other Fuel Burn Issues

15. Crowley and Mulholland raise other issues regarding Mr. Robinson’s fuel burn calculations, but they are all unfounded. First, they claim that Mr. Robinson failed to consider the effects of Auto Engine Start Stop (AESS) technology in conducting his modeling.¹⁵ However, there was no reason for Mr. Robinson to adjust his modeling based on AESS. As Crowley and Mulholland state, in some circumstances, “AESS automatically shuts an *idle* diesel when an equipped locomotive *stops*.”¹⁶ Mr. Robinson was not involved in modeling Idle Fuel Burn for stationary trains – his modeling addresses the incremental Stop-Start Fuel Burn that occurs when a CN freight train decelerates to a stop (but not during the stop) and re-accelerates from a stop caused by an Amtrak train. That incremental fuel burn occurs because re-acceleration from a stop burns more fuel than is burned while moving without interruption. In other words, it occurs when locomotives are far from idle, and when AESS plays no role.

16. Second, Crowley and Mulholland argue that fuel data obtained from Wi-Tronix would provide a more reliable indication of Fuel Burn than Mr. Robinson’s TPC modeling (for Stop-Start Fuel Burn) or Mr. Baranowski’s use of manufacturer’s minimum idle fuel burn rates (for Idle Fuel Burn).¹⁷ That is wrong for multiple reasons. Contrary to Crowley and

¹⁵ RVS Crowley/Mulholland ¶¶ 83-84.

¹⁶ *Id.* ¶ 83 (emphasis added).

¹⁷ *Id.* ¶¶ 85-91.

Mulholland's speculation,¹⁸ CN regularly uses TPC modeling in the ordinary course of business to obtain specific and reliable information about fuel consumption. For example, CN regularly uses TPC modeling in setting train schedules of priority freight services, to model fuel costs for financial planning purposes, to compare scenarios as part of operations planning, and to evaluate the benefits of potential infrastructure investments. And it uses TPC rather than fuel data obtained from Wi-Tronix for good reasons. Wi-Tronix data from fuel sensors are only available on some locomotives, and fuel sensors vary. At best, Wi-Tronix reports fuel consumption in 10-gallon increments, which means that events involving small amounts of fuel consumption (including the vast majority of Idle Fuel Burn events addressed by Mr. Baranowski) would not register. Crowley and Mulholland speculate that the resulting errors in fuel sensor data recorded in Wi-Tronix would even out over time,¹⁹ but that is pure speculation, and, in light of the Board's direction that costs must be "specific, verifiable and quantifiable," Amtrak would presumably object to an effort to even out fuel burn over time.

17. Moreover, lack of granularity is not the only problem with fuel sensor data recorded in Wi-Tronix.²⁰ There is a reason why Wi-Tronix does not record data at a more granular level: any such recording would suggest a false precision. Fuel sensors work by measuring how high the top of the fuel is in the tank. That means that they effectively assume an even fuel level. At least when the train is moving or has recently been moving, that assumption is, more often than not, false: fluid motion of the liquid fuel while the train is in motion may

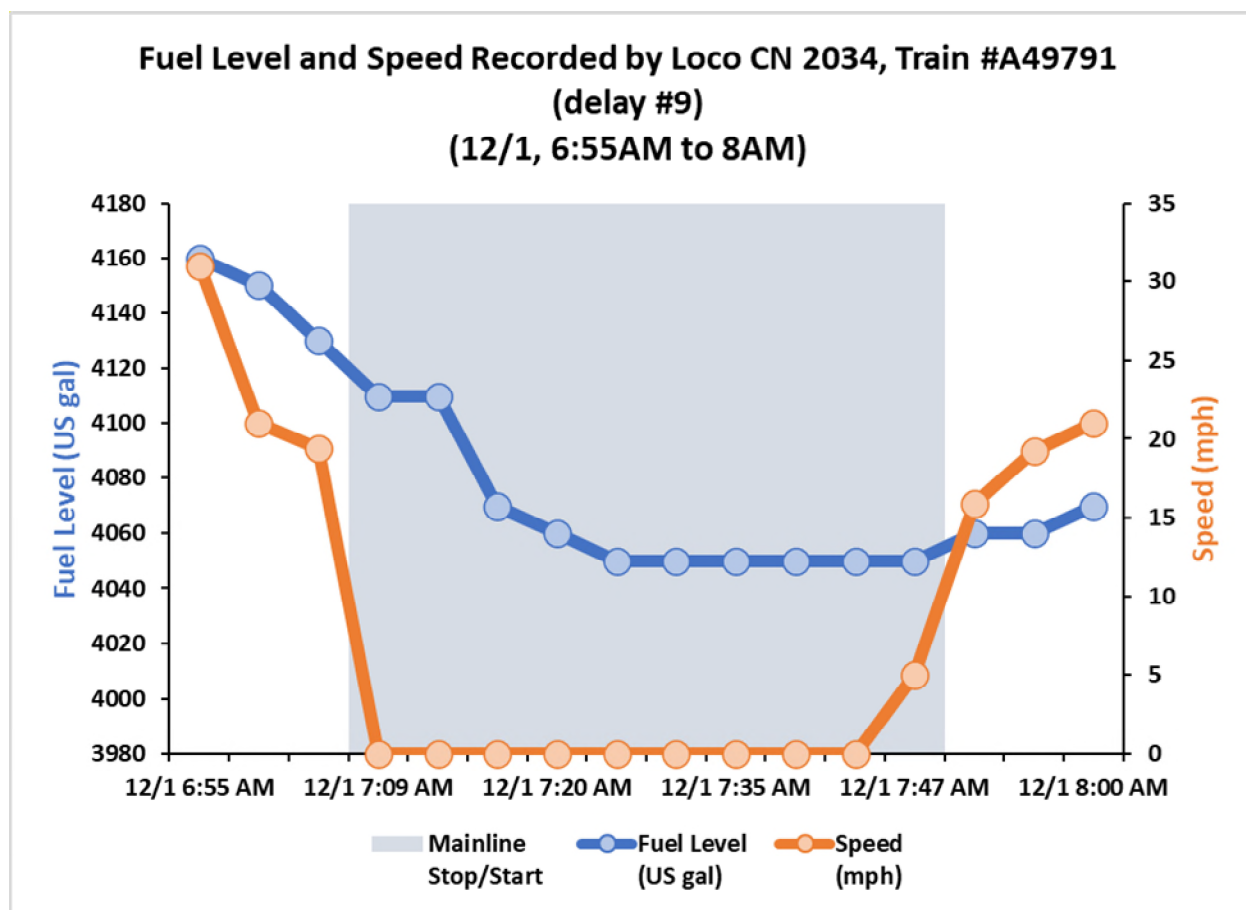
¹⁸ *Id.* ¶ 88.

¹⁹ *Id.* ¶ 91.

²⁰ It is important to note that the Wi-Tronix data system gathers data from different sources, including fuel sensors. Fuel sensor data are significantly imprecise and unreliable; other data, gathered from different sources such as GPS systems, are highly precise and reliable. *See* VS (PID) Lizotte 1-5 & n.4.

result in sensors readings significantly higher or significantly lower than the level that would accurately indicate the actual amount of fuel in the tank. Figure 1 below shows an actual example from the December 2019 data-set (Delay #9), which aptly illustrates the reduced accuracy of using fuel sensor data recorded in Wi-Tronix to determine fuel consumption specific to individual delay events, when, as here, better information is available. As it shows, if Wi-Tronix data were used as Crowley and Mulholland propose, the absurd conclusion would be reached that the locomotive burned 60 gallons of fuel while idle for a little over half an hour, then, burned minus 20 gallons of fuel in the process of accelerating from a stop to 21 mph:

Figure 1²¹



18. Fuel sensor data recorded in Wi-Tronix have some utility on a macro level and to determine whether an engine is largely full or largely empty – much like a fuel gauge on a car dashboard. But they are not useful, and CN does not use them, for fuel optimization functions that require more precision and reliability. Crowley and Mulholland’s proposal that fuel consumption should be determined based on Wi-Tronix data that are neither granular nor reliable makes no sense. Instead, it makes sense, and is consistent with what CN does in the ordinary course of business, to use TPC modeling and manufacturer’s fuel idling data.

²¹ See workpaper: Wi_Tronix_Fuel_Charting_Delay_#9.xlsx.

19. Crowley and Mulholland offer no concrete reason to suspect that Mr. Robinson's TPC modeling or Mr. Baranowski's use of manufacturers' published minimum idle fuel consumption data would tend to lead to an over-statement of incremental fuel consumption. In fact, the opposite is true: CN's fuel consumption quantification methodology is conservative, since (1) CN includes no Stop-Start Fuel Burn for multiple-cause delay events; (2) (as explained above) insofar as CN might have used 3 locomotives rather than 2 on some trains, the 2-locomotive cap assumption would understate fuel consumption; and (3) as Mr. Lizotte explained before, the manufacturers' published minimum idle fuel consumption rates used by Mr. Baranowski are generally under-stated.²²

20. Finally, Crowley and Mulholland suggest "other problems" with Mr. Robinson's modeling – specifically, Mr. Robinson's assumptions of level (zero gradient) track and use of air braking instead of dynamic braking.²³ Both assumptions are reasonable simplifying assumptions which, if anything, will tend to make Mr. Robinson's fuel burn calculations conservative. If anything, the zero gradient assumption will tend to under-state fuel consumption since fuel consumption generally increases more with uphill gradient than it decreases with downhill gradient. And as a fuel optimization matter, air braking will yield more conservative results than dynamic braking because it consumes less fuel; CN's ordinary course of business general assumption is that seven gallons per hour are consumed during dynamic braking and zero during air braking.

²² See VS (PID) Lizotte at 7-8.

²³ RVS Crowley/Mulholland ¶¶ 101-04.

VERIFICATION

I, Simon Lizotte, declare under penalty of perjury under the laws of the United States that I have read the foregoing Verified Statement, that I know the facts asserted therein, and that the same are true as stated. Further, I certify that I am qualified to and authorized to submit this Verified Statement on behalf of Canadian National Railway Company and its subsidiaries.

Executed on August 25, 2022.

A handwritten signature in blue ink, appearing to read 'Simon Lizotte', is written over a horizontal line.

Simon Lizotte

VERIFICATION

I, Timothy Robinson, declare under penalty of perjury under the laws of the United States that I have read the foregoing Verified Statement, that I know the facts asserted therein, and that the same are true as stated. Further, I certify that I am qualified to and authorized to submit this Verified Statement on behalf of Canadian National Railway Company and its subsidiaries.

Executed on August 25, 2022.


Timothy Robinson

CERTIFICATE OF SERVICE

I, James M. Guinivan, hereby certify that I have, on August 25, 2022, caused the foregoing Post-Interim Decision Rebuttal Submission of Illinois Central Railroad Company and Grand Trunk Western Railroad to be served upon all parties of records via electronic mail, as indicated below.

**Confidential
and Public Versions:**

Timothy J. Collazzi
Jerry A. Cuomo
LANDMAN CORSI BALLAINE & FORD, P.C.
One Gateway Center
22nd Floor
Newark, New Jersey 07102
tcollazzi@lcbf.com
jcuomo@lcbf.com

Mark S. Landman
LANDMAN CORSI BALLAINE & FORD, P.C.
120 Broadway
13th Floor
New York, New York 10271
mlandman@lcbf.com

Public Version:

OTHER PARTIES OF RECORD

Arun Rao
arun.rao@dot.wi.gov

David Rankin
david.rankin@BNSF.com

Hanna Chouest
hanna.chouest@nscorp.com

Karyn Booth
karyn.booth@thompsonhine.com

Michael Murphy
mmurphy@gibsondunn.com

Jim Mathews
narp@narprail.org

Josephine S. Jordan
jjordan1@up.com

/s/ James M. Guinivan
James M. Guinivan