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**THE WENGER GROUP, INC., AND ESBENSHADE, INC.—PETITION FOR
DECLARATORY ORDER AND INJUNCTIVE RELIEF—RAIL SERVICE TO
PENNSYLVANIA FEED MILLS AND OTHER FACILITIES**

REPLY OF NORFOLK SOUTHERN RAILWAY COMPANY

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INTRODUCTION

On April 24, 2023, The Wenger Group, Inc. and Esbensshade, Inc. (collectively, “Petitioners”) filed a petition for declaratory order and injunctive relief relating to an interruption of rail service due to maintenance work by the National Railroad Passenger Corporation (“Amtrak”), which will prohibit Norfolk Southern Railway Company (“NSR”) from providing freight rail service to Petitioners and other customers for over a month.¹ Subsequently, Kellogg Company (“Kellogg”) filed a petition for leave to intervene in this proceeding, requesting the same declaratory and injunctive relief as Petitioners.² Although the proceeding is now in abeyance with respect to Petitioners, the Board on May 18, 2023, granted Kellogg’s intervention request and set a schedule for the submission of supplemental information, replies to the request for declaratory order, and responses to Kellogg’s request for injunctive relief and directed service order.³ NSR submits this reply comment pursuant to the Board’s May 18, 2023, order.

This proceeding raises two important questions. The first is whether Amtrak can unreasonably interfere with licensed freight rail operations. That answer must be no. The Interstate Commerce Act grants customers like Kellogg, The Wenger Group, and Esbensshade, Inc. a federal right to receive freight rail service, and it requires licensed carriers like NSR to provide reasonable service upon reasonable

¹ Petition for Declaratory Order and Injunctive Relief, *The Wenger Grp., Inc., & Esbensshade, Inc.—Pet. for Declaratory Order & Injunctive Relief—Rail Serv. to Pa. Feed Mills & Other Facilities*, Docket No. FD 36695 (filed Apr. 24, 2023) (“Petition”).

² Petition of Kellogg Company for Leave to Intervene, *The Wenger Grp., Inc., & Esbensshade, Inc.—Pet. for Declaratory Order & Injunctive Relief—Rail Serv. to Pa. Feed Mills & Other Facilities*, Docket No. FD 36695 (filed May 4, 2023) (“Kellogg Petition to Intervene”).

³ Decision, *The Wenger Grp., Inc., & Esbensshade, Inc.—Pet. for Declaratory Order & Injunctive Relief—Rail Serv. to Pa. Feed Mills & Other Facilities*, Docket No. FD 36695 (STB served May 18, 2023).

request. The right of NSR to provide, and for customers to receive, common carrier service is an unimpeachable federal policy that lies at the heart of the federal scheme. No carrier can provide that service without a federal license. That service cannot be abandoned or discontinued without Board approval. And third parties cannot unreasonably infringe on that federal right—whether it be a State or a landowner. For example, third parties that own property over which a common carrier operates by easement cannot terminate that rail easement without Board approval, nor can they otherwise take actions that would deny customers on the line of their federal right to freight service. By voluntarily entering into an exclusive freight rail easement with a federally licensed carrier, property owners agree not to interfere with freight rail service lest they subject themselves to the authority of the Board and their property interests in the line become subservient to the broader public interest. The same rules must apply to Amtrak.

The second question is whether Amtrak’s proposed shutdowns would unreasonably deny Petitioners, Kellogg, and other customers their right to receive freight service. It would, because Amtrak has reasonable alternatives that would allow it to perform its maintenance work without depriving customers on the line of rail service. As explained by the former Chief Engineer for Amtrak, Amtrak has at least two alternative maintenance options that “would preserve customer access and network availability, with likely very little difference in Amtrak’s stated project scheduling, labor requirements, or cost.”⁴ As specifically related to Kellogg,⁵ Amtrak can either (1) remove the equipment from the Line periodically to permit

⁴ Exhibit B, Verified Statement of David J. Hughes (“V.S. Hughes”), at 16.

⁵ Petitioners and Amtrak have reached a confidential settlement in principle. See Letter from Amtrak, *The Wenger Grp., Inc., & Esbenshade, Inc.—Pet. for Declaratory Order & Injunctive Relief—Rail Serv. to Pa. Feed Mills & Other Facilities*, Docket No. FD 36695 (filed May 10, 2023).

sufficient ingredients to be delivered to avoid the significant impacts to Kellogg's operations at its Lancaster facility, or (2) forgo use of its TLM machinery for the portion of the Line at Kellogg and instead perform tie replacement at a later date with industry-standard maintenance-of-way gangs during defined operating windows. Because reasonable alternatives exist for Amtrak to perform its maintenance, Amtrak's threat to continue with a plan that would cut off freight service constitutes unreasonable interference with freight rail service. The Board should take action to protect NSR's customers' federal right to receive freight rail service.

This case is about more than service to the three customers that have appeared thus far in this proceeding. Amtrak plans to use this same approach on the second main line, which serves an additional seven customers. And this proceeding raises national policies that must be addressed by the Board. The Board should make it clear that no third party can unreasonably interfere with federally licensed freight rail service, and it should take steps to protect that service from unreasonable interference here.

I. NSR HAS SERIOUS CONCERNS ABOUT AMTRAK'S PLANNED TRACK WORK AND IS COMMITTED TO FINDING ALTERNATIVE SOLUTIONS.

Petitioners and Kellogg are customers located on a portion of Amtrak's Keystone Line in Pennsylvania. The portion of the line at issue in this proceeding is between Cork Interlocking in Lancaster, Pa., and Rheems Interlocking in Rheems, Pa. (the "Line"). The Line consists of two tracks—Main Track 1 and Main Track 2—over which NSR conducts freight operations and Amtrak runs its passenger operations.⁶

⁶ Exhibit A, Verified Statement of Randall W. Hunt ("V.S. Hunt"), at 1.

The Line (and the larger line of which it is a part) was originally operated by Consolidated Rail Corporation (“Conrail”) pursuant to an easement and operating agreement. Following the Board’s approval of the acquisition of control of Conrail,⁷ NSR took over freight operations on the Line. NSR’s operations on the Line are currently governed by the Amended and Restated Northeast Corridor Freight Operating Agreement (“NEC Operating Agreement”).⁸ Under this agreement,

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Amtrak is planning track replacement work on the Line that involves removing wooden ties and inserting concrete ties. It is NSR’s understanding that, as part of this work, Amtrak plans to require two outages—the first, on Main Track 1, is currently underway. The next outage is set to occur on Main Track 2 at some point in 2024.⁹ As currently contemplated by Amtrak, the first outage will prevent NSR from serving three local NSR customers located on Main Track 1, as well as interchange with the Landisville Railroad shortline (which serves two additional customers), for periods ranging from approximately 38 days to 45 days.¹⁰

⁷ Decision No. 89, *CSX Corp. & CSX Transp., Inc., Norfolk S. Corp. & Norfolk S. Ry.—Control & Operating Leases/Agreements—Conrail Inc. & Consol. Rail Corp.*, 3 S.T.B. 196 (1998).

⁸ The NEC Operating Agreement is attached as Exhibit D. Because it contains a confidentiality provision, NSR is submitting the agreement under seal pursuant to the Protective Order issued on April 26, 2023.

⁹ This proceeding is focused on the first of the planned outages, but the second outage will likewise prevent NSR freight service from reaching multiple customers. NSR serves seven local customers and two shortline railroad interchanges using Main Track 2. *See* V.S. Hunt at 1–2.

¹⁰ *Id.* at 2.

On average, NSR delivers approximately {{ }} railcars per week to those five impacted customers.¹¹

Because of the highly unusual nature of Amtrak’s plans, and the significant impact it would have on NSR’s customers, NSR has repeatedly conveyed its concerns and implored Amtrak to explore alternate means to perform its work while allowing some reasonable level of freight service to continue during the maintenance period.¹² For example, NSR’s Marketing Group consulted with each customer located on Main Track 1, and, based on these conversations, NSR proposed an alternative whereby it would provide service every 10 days, notwithstanding the fact that all of the customers on Main 1 receive service {{

}}. This proposal reflected the maximum length of time that the most vulnerable customer could maintain sufficient inventories between rail service before an alternative transportation option would need to be found. Amtrak rejected this proposal, claiming that it would cost up to \$30 million more, though Amtrak has not explained the basis for this figure. Amtrak also asserts that it considered additional alternatives to its plan, but those alternatives were rejected as either operationally unsafe or “more disruptive to NS[R] and local rail shippers” than its current plan.¹³ Amtrak leaves out any details regarding these alternatives. Thus far, Amtrak has refused to modify its track work plans to allow for the provision of freight service.

¹¹ *Id.*

¹² *Id.* at 4.

¹³ Amtrak’s Reply to Petitioners’ Requests for Injunctive Relief and a Directed Service Order, *The Wenger Grp., Inc., & Esbenshade, Inc.—Pet. for Declaratory Order & Injunctive Relief—Rail Serv. to Pa. Feed Mills & Other Facilities*, Docket No. FD 36695, at 8–9 (filed May 1, 2023) (“Amtrak May 1 Reply”).

II. THERE ARE REASONABLE ALTERNATIVES THAT WOULD ACCOMMODATE THE NEEDS OF CUSTOMERS ON THE LINE.

Because NSR does not use concrete ties on a widespread basis across its network, NSR consulted with experts with experience in concrete tie track projects to determine whether there are reasonable alternatives for completing Amtrak's project while still accommodating customers on the Line. The attached statements of these experts demonstrate that, not only are there reasonable alternatives, but Amtrak's planned use of a track laying machine appears to be "unnecessarily long" and "exceptionally slow."¹⁴ As one expert concludes, "[a]ny engineering service outage . . . which denies customer and network operating access violates an engineering service principle that all railroaders embrace."¹⁵

A. Amtrak's Plan Is "Extreme," "Atypical," and "Does Not Make Sense."

"All railroads conduct track renewal programs" like the one Amtrak is planning in this instance, such that "[i]ndustry standards are well developed."¹⁶ It is standard for railroads to "plan track project equipment and methods based on track availability – not the other way around, as Amtrak appears to have done."¹⁷ Amtrak's plan to shut down freight rail service on the Line for over a month to conduct planned maintenance is "extreme" and has "no precedent."¹⁸ As David Hughes—former interim President and CEO of Amtrak, and former Chief Engineer of Amtrak and a Class I railroad—explains, "[r]ailroads typically do not shut down lines for extended periods even for major track reconstruction," and there are no

¹⁴ See V.S. Hughes, at 18; *see also* Exhibit C, Verified Statement of Montie D. Chapman ("V.S. Chapman"), at 4–5, 10.

¹⁵ V.S. Chapman at 10.

¹⁶ V.S. Hughes at 4.

¹⁷ *Id.*

¹⁸ *Id.* at 4, 14.

special circumstances here that justify Amtrak's plan to do so.¹⁹ In fact, even in extreme circumstances, such as emergency rehabilitation projects to address severe damage from hurricanes, railroads have been able to complete their projects "of large stretches of track in a few weeks."²⁰

Likewise, Montie Chapman, an expert with more than 46 years in the rail industry and extensive experience in railroad maintenance, production, and new construction, explains that, for "out-of-face wood-to-concrete tie replacement programs, it is standard for Class Is to clear the tracks at the end of each work block daily to return the tracks to service nightly," and that, even using Amtrak's preferred method (TLM) here, "track can be reopened for service daily."²¹ Mr. Hughes further notes that Amtrak's belief that it can simply leave the TLM on the line for weeks at a time "may be because Amtrak has successfully used the TLM for track projects on the [Northeastern Corridor ("NEC")], "[b]ut the NEC, with up to four main tracks and frequent crossovers, has enough capacity and routing options that a TLM can be left in place on one line without materially impacting either rail freight or passenger service."²² By comparison, the Line at issue here "does not have either the track capacity or train operating characteristics to support the use of a TLM easily."²³ Ultimately, Amtrak's plan "does not make sense" because "there are viable options to complete the work efficiently within the timeframe allotted by Amtrak while still providing some level of service to customers."²⁴

¹⁹ *Id.* at 4.

²⁰ *Id.*

²¹ V.S. Chapman at 3.

²² V.S. Hughes at 5.

²³ *Id.*

²⁴ *Id.* at 16.

Amtrak's schedule is also "unnecessarily long," planning a "four-month schedule to rehabilitate 14.8 miles of track," which is "an exceptionally slow pace for track work" and "far below the productivity rates that would be expected from . . . a TLM-centered program" or alternative methods that "demonstrate a much higher productivity rate."²⁵ As a result, "Amtrak's justification for using the TLM on efficiency grounds seems mistaken and is not only inefficient for tie insertions [but also] . . . a restriction on other necessary components of the project."²⁶ Indeed, "Amtrak makes much of its good stewardship of public funds, but such a low production figure argues to the contrary."²⁷

Ultimately, "other frequently used options exist for Amtrak to achieve better efficiency and yet maintain network access for rail freight-served shippers on the [Line]."²⁸

B. A Reasonable Alternative Utilizing Mechanized Production Gangs Would Be Faster, More Efficient, and Accommodate Freight Rail Customers.

Despite Amtrak's assertions to the contrary, there are reasonable alternatives to its plan that would not only accommodate freight rail customers on the Line, but that would also be more efficient and thus potentially more cost-effective and quicker. As Mr. Hughes explains, the "most common" approach used by railroads "for large-scale track renewal programs," "accounting for an estimated 95 percent of both concrete and wood ties laid annually, is to use a series of mechanized production gangs to perform tie renewal, rail renewal, and ballast

²⁵ *Id.* at 18.

²⁶ *Id.* at 20.

²⁷ *Id.* at 21 (internal footnote omitted) (citing Amtrak May 1 Reply at 5).

²⁸ *Id.* at 20.

cleaning and replacement.”²⁹ With this method, “railroads achieve both high productivity and low cost for [the replacement of] both wood and concrete ties,” while also being able “to remove all related equipment from the track after each daily work shift to allow train movements and provide switching services to customers.”³⁰ Montie Chapman agrees: “[S]tandard tie gangs and conventional wood tie equipment . . . can clear the track much quicker than a TLM, allowing trains to operate daily once the work block ends for the day.”³¹

Plus, this method would be “far more productive than Amtrak’s TLM would be” and thus “could reduce the duration of the project significantly.”³² In fact, this “approach to track renewal could cut the planned project duration by as much as half by raising the daily production rate to double that planned by Amtrak.”³³ Mr. Chapman observes that Amtrak’s project “requires *more than twice as many employees* and negatively impacts freight customers along the Line” when compared to a wood-to-concrete tie replacement project he worked on while at Canadian National Railway Company (“CN”) utilizing mechanized production gangs.³⁴ He observes that, “[i]f CN had used two crews working simultaneously, then the crew size would have been similar to Amtrak’s plan . . . , but the output would have been 250 to 500 additional concrete ties inserted each day – more than Amtrak’s proposed rate of insertion each day.”³⁵

²⁹ *Id.* at 4.

³⁰ *Id.*

³¹ V.S. Chapman at 7.

³² V.S. Hughes at 5.

³³ *Id.* at 22.

³⁴ V.S. Chapman at 9 (emphasis added).

³⁵ *Id.*

Ultimately, “Amtrak’s plan does not appear to yield better efficiency . . . and other options exist for Amtrak to achieve the same results in the same timeframe and at a reasonable cost – while maintaining some level of network access for rail freight customers on the Harrisburg line.”³⁶

C. Amtrak’s TLM-Approach Could Easily Be Adjusted to Accommodate Freight Rail Customers on the Line.

Even under Amtrak’s current plan to use its TLM, it is possible to accommodate the freight rail needs of customers on the Line. As Mr. Hughes explains, Amtrak likely plans to use the TLM only four days a week while “unnecessarily leav[ing] it in place even on the three days per week it is not used, depriving customers of all rail access.”³⁷ Mr. Hughes describes this plan as “atypical” and “extreme.”³⁸

Instead, the TLM “could be used more productively and cleared off the track periodically, particularly for the days when Amtrak will not be working on the project.”³⁹ This would both “preserve customer access and network availability” while also likely having a “limited impact on Amtrak’s stated project schedule, labor requirements, or cost.”⁴⁰ As Mr. Chapman explains, “it is standard for Class Is to clear the tracks at the end of each work block daily to return the tracks to service nightly.”⁴¹

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³⁶ V.S. Hughes at 16–17.

³⁷ *Id.* at 3.

³⁸ *Id.* at 5, 14–15.

³⁹ *Id.* at 5. Mr. Hughes points out that Amtrak’s “schedule for the project appears to be overly long, with very low expectations for how much work can be done per day.” *Id.* at 6.

⁴⁰ *Id.* at 5–6.

⁴¹ V.S. Chapman at 5.

As Mr. Hughes explains, “Amtrak’s planned infrastructure renewal project on the Harrisburg line is nothing new or unique in the industry – only the rigid requirement for line shutdown and total loss of customer access for many weeks is atypical.”⁴²

It is simply not necessary for Amtrak to impose a full outage on the Line to conduct its planned maintenance. Mr. Chapman, an expert on wood-to-concrete tie replacement projects, agrees. He explains that, regardless of whether Amtrak uses “standard tie equipment or a TLM, track can be reopened for service daily.”⁴³

In short, reasonable alternatives exist that would most likely be quicker and less costly than Amtrak’s current plan, while also accommodating the needs of the freight rail customers on the Line.

III. AMTRAK’S ACTIONS ARE UNREASONABLY AND IMPERMISSIBLY INTERFERING WITH FREIGHT RAIL SERVICE TO CUSTOMERS.

The fundamental question in this case is whether Amtrak as owner of a rail line—or any other entity that owns a rail line over which a licensed rail carrier conducts freight operations—can engage in conduct that unreasonably interferes with interstate commerce. The answer is unquestionably no.

A. Owners of Freight Rail Lines May Not Unreasonably Interfere with Freight Rail Operations.

Petitioners allege that Amtrak has the underlying common carrier obligation as owner of the Line and ask the Board to declare that the cessation of freight rail service during Amtrak’s planned track project would be a *per se* violation of their right to receive service upon reasonable request under 49 U.S.C. § 11101(a).⁴⁴

⁴² V.S. Hughes at 15.

⁴³ *Id.* at 3.

⁴⁴ Petition at 9; *see* Kellogg Petition to Intervene at 1. Although the declaratory relief sought is largely directed at Amtrak, the Petition at times appears to

Section 11101 protects a shipper’s right to receive rail service by imposing an obligation on rail common carriers to provide rail service upon reasonable request.⁴⁵ The statute and the Board further protect the shipper’s right to service by limiting the circumstances in which freight rail service can be curtailed. For example, railroads must receive discontinuance or abandonment authority before ceasing operations⁴⁶; the agency and courts impose limitations on when a railroad can temporarily suspend its operations through an embargo⁴⁷; and agreements can be invalidated if their provisions would unreasonably interfere with common carrier rail operations.⁴⁸

contemplate the possibility that NSR could violate 49 U.S.C. § 11101(a) should Amtrak place the Line out of service. *See, e.g.*, Petition at 10, 17, 19. No authority (or policy) supports such a conclusion. NSR wants to continue serving its customers on the Line and has no desire or intent to stop servicing them unless physically impeded from doing so by Amtrak’s project. Should NSR be required to issue an embargo because Amtrak has unilaterally taken track out of service, such an embargo would be necessary and lawful under long-standing precedent because NSR will be physically “unable” to provide service as a result of “physical conditions . . . or operating restrictions” outside of its control. *See* Decision, *Bar Ale, Inc. v. Cal. N. R.R. & S. Pac. Transp. Co.*, Docket No. FD 32821, at 6 (STB served July 20, 2001) (“*Bar Ale*”); *see also* *GS Roofing Prods. Co. v. Surface Transp. Bd.*, 143 F.3d 387, 392 (8th Cir. 1998).

⁴⁵ 49 U.S.C. § 11101(a); Decision, *Bos. & Me. Corp. & Springfield Terminal R.R.—Pet. for Declaratory Order*, Docket No. FD 35749, at 3–4 (STB served July 19, 2013) (“The Interstate Commerce Act provides any person the right to ask for common carrier rail service and carriers the obligation to provide such service upon reasonable request.”).

⁴⁶ 49 U.S.C. § 10903.

⁴⁷ *See Bar Ale.*

⁴⁸ Decision, *R.R. Ventures—Abandonment Exemption—Between Youngstown, Ohio, & Darlington, Pa., in Mahoning & Columbiana Cntys., Ohio, & Beaver Cnty., Pa.*, Docket No. AB 556 (Sub-No. 2X) et al., at 3 (STB served Jan. 7, 2000) (“While the Board encourages privately negotiated agreements, any contractual restrictions that unreasonably interfere with common carrier operations are deemed void as contrary to public policy.”), *aff’d sub nom. R.R. Ventures v. Surface Transp. Bd.*, 299 F.3d 523, 560–63 (6th Cir. 2002).

The statutory scheme further protects this right by subjecting owners of rail lines—with their unique ability to control freight operations—to the requirements of the statute through Board approval and licensing.⁴⁹ The agency has recognized that, in certain limited circumstances, an entity acquiring a rail line may not incur the obligations of a common carrier.⁵⁰ In order to fall within that exception, however, the licensed railroad must be protected from undue interference with the provision of common carrier freight rail service by the owner of the rail line.⁵¹ Indeed, the Board has in the past examined relationships between line owners and rail carriers to determine whether the owner is a common carrier, based on factors like the owner’s degree of control over the line and its ability to interfere with freight rail operations.⁵² And the Board has emphasized that provisions of agreements “cannot be interpreted or enforced in a way that would affect [the railroad’s] common carrier service.”⁵³ By treating rail line owners who are able to interfere with freight service as common carriers under the statute, the Board further protects a shipper’s right to service.

⁴⁹ See 49 U.S.C. § 10901.

⁵⁰ *State of Me. Dept. of Transp.—Acquisition & Operation Exemption—Me. Cent. R.R.*, 8 I.C.C.2d 835 (1991) (“*State of Maine*”).

⁵¹ Decision, *Mass. Dept. of Transp.—Acquisition Exemption—Certain Assets of CSX Transp.*, Docket No. FD 35312, at 5 (STB served May 3, 2010), *aff’d sub nom. Bhd. of R.R. Signalmen v. Surface Transp. Bd.*, 638 F.3d 807 (D.C. Cir. 2011).

⁵² Decision, *Anthony Macrie—Continuance in Control Exemption—N.J. Seashore Lines, Inc.*, Docket No. FD 35296 (STB served Aug. 16, 2010) (citing *State of Maine*).

⁵³ Decision, *Santa Cruz Reg’l Transp. Comm’n—Pet. for Declaratory Order*, Docket No. FD 35491, at 6 (STB served Dec. 15, 2011); see also Decision, *Hanson Nat. Res. Co.—Non-Common Carrier Status—Pet. for a Declaratory Order*, Docket No. FD 32248, 1994 WL 673712, at *14, *27–28, *31 (ICC served Dec. 5, 1994) (“*Hanson Nat. Res.*”) (emphasizing repeatedly the importance that the owner of a line over which a common carrier railroad operates “not interfere with any common carrier operations that may be undertaken over the [line]”).

Against this backdrop, Amtrak intends to cut off freight rail service to multiple customers for over a month. Just as “any contractual restrictions that unreasonably interfere with [] common carrier operations will be deemed void as contrary to public policy,”⁵⁴ so too can the Board find actions by line owners that unreasonably interfere with freight rail operations to be in violation of the statute. The Board has the authority to both confirm the scope of the customer’s right and to issue injunctions and other orders to protect that right. No entity—whether a state, a public agency, a private landowner, or Amtrak—can own a rail line and unreasonably interfere with freight rail service on that line without itself becoming subject to the obligations of Interstate Commerce Act. Amtrak’s plans are impermissible because they unreasonably interfere with freight rail operations. Neither Amtrak’s Subtitle IV exemption nor the NEC Operating Agreement prevent the Board from so finding, as explained below.

B. Section 24301 Does Not Prevent the Board from Finding Here that Amtrak Is Unreasonably Interfering with Freight Operations.

Amtrak asserts that the Board lacks jurisdiction to enjoin Amtrak, citing 49 U.S.C. § 24301(c),⁵⁵ and the Board has asked for supplemental comment on the impact of section 24301. Section 24301 does not give Amtrak the unfettered right to unreasonably interfere with freight rail operations, and it does not prevent the Board from finding that Amtrak’s actions are unreasonable here.

Amtrak’s Subtitle IV exemption applies to Amtrak’s provision of *passenger rail service*. While the current wording of section 24301(c) provides that Subtitle IV shall not apply to Amtrak, except for certain enumerated sections, the prior wording of the Amtrak exemption was stated in the inverse—that is, it provided that

⁵⁴ *Hanson Nat. Res.* at *14, *27–28, *31.

⁵⁵ Amtrak May 1 Reply at 10–11.

Subtitle IV applied to Amtrak, except for certain enumerated sections.⁵⁶ That language is illustrative. For example, it previously specified that Amtrak was exempt from “the discontinuance or change of *passenger train service operations*” and “abandonment or extension of lines of railroad utilized *solely for passenger service*.”⁵⁷ There is no reason to think that the restructuring of the language in 1997⁵⁸ was intended to extend the scope of the exemption beyond Amtrak’s role as a common carrier of passengers.

Fundamentally, statutory interpretation is about Congressional intent. And it would be extraordinary to interpret section 24301(c) as providing Amtrak—and only Amtrak—with the power to interfere with interstate freight rail service. To do so would give Amtrak *carte blanche* to ignore the obligations that the Board has found attach to entities that have the ability to interfere with freight rail operations—whether that entity is Amtrak or any other owner of a freight line. The Board has jurisdiction here over the Line—regardless of who owns it—because common carrier freight rail operations are conducted over the Line.⁵⁹

Instead, Amtrak should be subject to the same rules to which any other owner of a freight rail line would be subject. At most, section 24301(c) provides that the requirements of Subtitle IV do not apply to Amtrak. But there are States and local governments that likewise are not subject to Subtitle IV by virtue of not being a common carrier under *State of Maine*, but they are still prohibited from engaging in any conduct that unreasonably interferes with interstate commerce. Whether

⁵⁶ See Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327 (Oct. 30, 1970).

⁵⁷ *Id.* at 1332–33 (emphasis added).

⁵⁸ Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134 (1997).

⁵⁹ *E.g., Hanson Nat. Res.*, at *18 (“[s]ection 10901(a), by its terms, applies to every ‘railroad line’ constructed or operated over by any rail carrier providing transportation subject to our jurisdiction . . .”).

the owner of the line is a State (which often under its own constitution cannot be a common carrier) or Amtrak (which under section 24301(c) has a federal exemption), the fundamental federal right of customers to receive freight service must be protected by the Board. Because the Board has jurisdiction over the Line itself and the common carrier operations conducted over it, the Board has the authority to act when those operations are unreasonably impaired absent compelling evidence that Congress granted Amtrak the unique and extraordinary authority to interfere with federally licensed freight rail service.⁶⁰ No such evidence is present here.

C. The NEC Operating Agreement Does Not Prevent the Board from Considering the Reasonableness of Amtrak’s Planned Track Outages.

Amtrak argues that if the Board exercises its jurisdiction here, that would “contravene the contractual remedies” in the NEC Operating Agreement.⁶¹ But the NEC Operating Agreement does not prevent the Board from declaring that Amtrak’s actions would unreasonably interfere with freight service. First, the NEC Operating Agreement provides for {}

⁶⁰ Amtrak suggests that the Board may lack jurisdiction if the movements at issue are pursuant to contract. Amtrak May 1 Reply at 11 n.10. This is a red herring. At the outset, NSR notes that it moves goods to numerous customers on the Line under both tariff and contract rates. But even if every movement on the Line were currently subject to contract, that *still* would not allow Amtrak to exercise such a degree of control that it can unreasonably interfere with interstate freight rail service.

⁶¹ Amtrak May 1 Reply at 12.

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D. Amtrak's Plans Constitute Unreasonable Interference.

The question of whether Amtrak's actions are unreasonably and impermissibly interfering with freight rail service is an inherently fact-specific inquiry. But it is clear from the evidence put forth that Amtrak's plans are unreasonable in these circumstances.

Amtrak plans to completely cut off freight service to multiple customers for over a month—despite the fact that there are reasonable alternatives that will allow freight service to continue while track work is performed. There are established practices that have been used for decades by freight railroads that accommodate the needs of customers on the line, yet Amtrak rejects all of them. A desire to perform track work in a way that is apparently convenient to Amtrak but that will result in the total cessation of freight service—even when reasonable alternatives exist that would allow service to continue—is at odds with industry norms.⁶³

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⁶³ See V.S. Hughes at 5.

Amtrak's reliance on embargo caselaw only underscores the unreasonableness of Amtrak's plans. For example, where a carrier (or here, the Line's owner) is "financially and physically able to [make the needed] repair . . . *and resume service*," not doing so, or "extending [the outage] well beyond any *reasonable* time required to [make the] repair" is unreasonable.⁶⁴ Here, multiple experts have shown that there are reasonable alternatives that are equal to, if not more, efficient than Amtrak's current plan such that Amtrak's total outage for over a month is not reasonable.⁶⁵ Likewise, as here, where the Line can be operated safely without the repair, and where "[r]easonable requests for service . . . could have been met without undue expense," it is "improper[]" to "refuse[]" such requests where there are reasonable alternatives, as there are here.⁶⁶

Similarly, it is well-established that railroads cannot refuse to provide service merely because it is inconvenient or unprofitable.⁶⁷ Yet Amtrak is blocking freight rail service and refusing to consider reasonable alternatives on these very bases. Just as "a carrier is not given a free pass to choose not to serve just because of circumstances that make it difficult or expensive to provide service,"⁶⁸ Amtrak should not be permitted to interfere with freight rail service simply because reasonable alternatives that would permit freight rail service may be more difficult or expensive. (As the verified statements attached to this reply show, in this case,

⁶⁴ *Ethan Allen, Inc. v. Me. Cent. R.R. Co.*, 431 F. Supp. 740, 744 (D. Vt. 1977) ("*Ethan Allen*") (emphasis added).

⁶⁵ *See supra* section II.

⁶⁶ *See id.*; *La. Railcar, Inc. v. Mo. Pac. R.R.*, 5 I.C.C.2d 542, 546–47 (1989).

⁶⁷ *See, e.g., Ethan Allen* at 743 (railroads may not refuse to provide service solely on the grounds that the service would be inconvenient or less profitable); *see also G.S. Roofing Prods.*, 143 F.3d at 393–94 ("An embargo becomes unreasonable if a railroad is physically and financially able to resume service[]").

⁶⁸ Decision, *Cent. Or. & Pac. R.R.—Coos Bay Rail Line*, Docket No. FD 35130, at 3 (STB served Apr. 11, 2008).

the reasonable alternatives would allow this project to be completed efficiently on both a time and cost basis.)⁶⁹

Amtrak's reliance on the Board's typical analysis for determining the reasonableness of an embargo—in particular, that the Board considers “important” “[t]he cost of repairs, relative to the volume of traffic on the line and the financial condition of the carrier”—does not excuse its interference with freight rail service here, either.⁷⁰ Amtrak seems to believe that the mere fact that the track rehabilitation project is estimated to “exceed \$167 million” justifies the total outages for more than a month on the Line.⁷¹ Not so, because, here, multiple experts have shown that there are reasonable alternatives that would achieve Amtrak's purpose with equal, if not more, efficiency while also maintaining access to freight rail service for customers on the Line.

Amtrak further asserts that its plans are reasonable, pointing to two embargo cases where lines were embargoed for lengthy periods.⁷² Neither supports Amtrak's position. Amtrak first points to *Decatur County Commissioners v. Central Railroad Co. of Indiana*, Docket No. FD 33386 (STB served Sept. 29, 2000). In that case, a railroad (CIND) initially embargoed a line because it was unsafe, and CIND did not repair it because it was in precarious financial condition and was “the victim of circumstances beyond its control.”⁷³ Importantly, however:

... CIND took actions to protect shippers while the embargo was in effect. CIND rerouted all overhead traffic without apparent complaint from the affected overhead shippers. CIND also continued to operate the unembargoed portion of the Line. Most importantly, CIND made, or was

⁶⁹ V.S. Hughes at 22–24.

⁷⁰ Amtrak May 1 Reply at 14 (quoting *Decatur Cnty. Comm'rs v. Cent. R.R. Co. of Ind.*, Docket No. FD 33386, slip op. at 7 (STB served Sept. 29, 2000) (“*Decatur*”).

⁷¹ *Id.* at 16.

⁷² *Id.* at 15 (citing *Decatur and Bar Ale*).

⁷³ *Decatur* at 20.

prepared to make, alternative arrangements to assure uninterrupted rail service for originating/terminating traffic, albeit at a higher rate. **At no time was rail service unavailable to the affected shippers.**⁷⁴

Amtrak's situation is not remotely analogous.

Amtrak also cites *Bar Ale, Inc., v. California Northern Railroad Co.*, Docket No. FD 32821 (STB served July 20, 2001), where a railroad imposed an embargo due to an unsafe bridge that posed risks to the public and train crews and kept the embargo in place while it attempted to sell the line for continued rail service.⁷⁵ Here, there are no imminent safety issues requiring Amtrak's planned maintenance. And, importantly, as in *Decatur*, the carrier in *Bar Ale* "made an effort to maintain service" by transloading from track located near the shipper's plant and offering to compensate the shipper for transloading such that "[s]ubstituted service was provided[,] and the shipper was never left without a transportation option."⁷⁶

These cases do not support the reasonableness of Amtrak's planned outage. Rather, they underscore Amtrak's failure to accommodate in any way affected shippers on the line.

⁷⁴ See *Decatur* at 20–21 (emphasis added); see *Decatur Cnty. Comm'nrs v. Surface Transp. Bd.*, 308 F.3d 710, 721 (7th Cir. 2002) (affirming *Decatur* and explaining that "the embargo in the present case was justified based upon other considerations as well—such as [the railroad's] good faith in making alternative shipping arrangements").

⁷⁵ See Amtrak May 1 Reply at 15; *Bar Ale* at 7–8.

⁷⁶ *Bar Ale* at 7–8.

CONCLUSION

Because there are reasonable alternatives to Amtrak's plan that allow customers on the Line to access needed freight service, it is appropriate for the Board to find that Amtrak's plans to cut-off freight service for over a month will unreasonably interfere with freight rail operations.

Respectfully submitted,

/s/ Raymond Atkins

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Dated: May 23, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May 2023, I caused a copy of the foregoing document to be served by U.S. Postal Service or more expeditious means upon the service list for Docket No. FD 36695.

/s/ Morgan B. Lindsay
Morgan B. Lindsay

EXHIBIT A

Verified Statement of Randall W. Hunt

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36695

**THE WENGER GROUP, INC., AND ESBENSHADE, INC.—PETITION FOR
DECLARATORY ORDER AND INJUNCTIVE RELIEF—RAIL SERVICE TO
PENNSYLVANIA FEED MILLS AND OTHER FACILITIES**

VERIFIED STATEMENT OF RANDALL W. HUNT

May 23, 2023

PUBLIC VERSION

My name is Randall W. Hunt. I am the Senior Director – Interline Services for Norfolk Southern Corporation (“Norfolk Southern”) and its subsidiary Norfolk Southern Railway Company (“NSR”). I joined Norfolk Southern in 2004 and have occupied my present position since 2018. The responsibilities of my present position include serving as Norfolk Southern’s National Railroad Passenger Corporation Operations Officer (“NRPC Officer”). As NSR’s NRPC Officer, I regularly communicate with Amtrak regarding our operations over the Amtrak line that is at issue here.

Prior to assuming my present position, I served as Director – Joint Facilities from 2014 to 2018, while also serving as NRPC Officer during that time. I have also worked in various operating capacities at NSR during my career, including as Assistant Trainmaster, Trainmaster, and Assistant Terminal Superintendent. I hold Bachelor of Arts degrees in Political Science and History from Duke University, and a Juris Doctor from Georgia State University College of Law. My business address is 650 W. Peachtree Street NW, Atlanta, Georgia 30308.

In this verified statement, I offer my knowledge and expertise regarding the impact of Amtrak’s plan to make repairs between Cork Interlocking in Lancaster, Pa., and Rheems Interlocking in Rheems, Pa. (the “Impacted Line”) using a method that will prevent freight customers on the Impacted Line from accessing freight rail transportation, which is provided by NSR.

The Impacted Line is a portion of Amtrak’s Keystone Line in Pennsylvania. The Impacted Line consists of two tracks—Main Track 1 and Main Track 2—over which NSR conducts freight operations and Amtrak runs its passenger operations. Amtrak dispatches the Impacted Line. From the Impacted Line, NSR serves four local NSR customers and effects interchange with the Landisville Railroad short line (serving two additional customers) using Main Track 1, and seven local NSR

customers and two short line railroad interchanges (serving multiple additional customers) using Main Track 2.

NSR has been operating over the Impacted Line for more than two decades, and NSR's predecessor Consolidated Rail Corporation provided freight service on the Impacted Line for decades before that. NSR's operations are currently governed pursuant to the Amended and Restated Northeast Corridor Freight Operating Agreement, dated February 1, 2006 ("NEC Operating Agreement"). Under this agreement, {{

.}}

It is my understanding that Amtrak's planned maintenance will require two outages—the first set to occur this year impacting Main Track 1, and the next set to occur in 2024 impacting Main Track 2. Taken together, the planned maintenance will impact all freight customers on the Impacted Line because NSR will be physically unable to operate during the outages. The first of these planned outages will impact NSR customers as shown below in Figure 1. On average, NSR delivers roughly { } railcars per week to the five impacted customers.

Figure 1: NSR Customers Impacted by Amtrak's First Planned Outage

Customer	Milepost	Frequency of Service	Amtrak Outage Dates*	Outage Duration*
Wenger Feed	MP 81.08	Up to 5 days per week	5/17 – 6/30	45 days
Esbensshade Mills	MP 77.79	Up to 5 days per week	6/14 – 7/28	45 days
Landisville Railroad Interchange ({{ }})	MP 75.29	{{ }}	7/12 – 8/21	40 days
Kellogg Company	MP 74.13	Up to 5 days per week	7/25 – 9/01	38 days

*Amtrak Outage Dates and Outage Duration reflect NSR's current understanding of Amtrak's plans based on information provided by Amtrak.

Based on information provided by Amtrak, the second outage will occur at some point in 2024, though NSR has not been provided precise dates for that work.

The second outage will materially impact NSR's freight service with complete track outages impacting the seven NSR customers and two short line railroad interchanges on that portion of the Impacted Line.

As far as I know, no outages of this duration or impact have occurred on the Impacted Line since NSR began operating on the Impacted Line under the NEC Operating Agreement, despite improvements and maintenance having been done continually over the years to maintain a state of good repair. To the best of my knowledge, there are currently no slow orders in place on the Impacted Line and no infrastructure has been removed from service due to safety concerns indicating an emergent need for a complete track replacement from subgrade to top of rail.

As part of my responsibilities to coordinate NSR's operating relationship with Amtrak, I and my team attend regular meetings with Amtrak regarding various interactions between our companies, including any projected track maintenance that might impact Amtrak's passenger operations on NSR lines or NSR's freight operations on Amtrak's lines. It was during one of these routine meetings in late 2022 that I first learned generally from the Host Railroad Group of Amtrak's intention to perform some level of track maintenance on the Impacted Line, but that initial notification did not include any scope of work or share Amtrak's intent to remove the Impacted Line from service entirely. I spoke regularly with Amtrak through the remainder of 2022 in an attempt to obtain more specific details regarding their work plans, including during five teleconference meetings between mid-November and the first week of January that included Amtrak's Host Railroad group and Engineering Department personnel. Notwithstanding the frequency of communication on the subject, NSR first received firm dates for the planned maintenance and customer outages on the Impacted Line on January 9, 2023, with those dates being subsequently revised significantly (including reversing the

geographic direction of the work) for all impacted customers on Main Track 1 on January 20, 2023.

During the many meetings with Amtrak's Host Railroad and Engineering groups in an effort to fully define the scope of work, the dates of customer impacts, and to implore Amtrak to explore alternate means to perform the work while permitting customers to receive some reasonable level of freight service at all times, it ultimately became clear that my efforts to dissuade Amtrak from implementing extended outages would not be successful. Accordingly, I requested that NSR Marketing forces notify the customers located on Main Track 1 of the work and associated impacts in early February. At no time during any discussion with Amtrak personnel did Amtrak express a willingness to consider any alternative to their preferred work plan.

Since first learning of Amtrak's planned outages, I have repeatedly conveyed NSR's concerns about the impact on freight rail service and have attempted to find an alternative path forward. I understand that maintenance work can impact freight rail service, but my concern stemmed from the extent of the interference planned by Amtrak. My company's approach to track maintenance is to keep any service disruption related to track maintenance to an absolute minimum, always seeking to balance maintenance needs with adequate, reasonable customer service. To that end, I have offered on several occasions to make NSR Engineering experts available to consult with Amtrak on alternate potential maintenance practices, with each offer to help being rejected without further discussion.

With information provided by impacted customers on Main 1 to NSR's Marketing Group, NSR proposed an alternative maintenance plan to Amtrak whereby NSR would be able to provide service to each customer every 10 days, notwithstanding the fact that all of the customers on Main 1 receive service {{
}}. This proposal reflects the maximum length of time that the

most vulnerable customer could maintain sufficient inventories between rail service before an alternative transportation option would need to be found. As with other suggestions, Amtrak rejected this proposal on April 14, 2023, claiming that it would cost up to \$30 million more to provide service to each customer even once during the outages, though Amtrak did not provide me with any details to explain this figure.

At one point during discussions, Amtrak suggested that NSR could attempt to run tubes, piping, or hoses from Main Track 2, across out-of-service Main Track 1, and into customer facilities that could be hundreds or more feet away in some cases. Because such a proposal is tantamount to, but even less practical than, the transloading options that have already been fully reviewed by NSR and the impacted customers, NSR has concluded that this was not operationally feasible or realistic as a potential service solution. In fact, it is not clear that such a solution is even physically possible in light of Amtrak's stated need to have complete access to Main Track 1 at all stages of the work.

In addition, and as Petitioners note, NSR and Petitioners engaged in discussions with Amtrak with the assistance of the Board's Office of Public Assistance, Governmental Affairs, and Compliance in an attempt to prevent Amtrak's planned full outage. Along with a colleague, I was a part of those discussions for NSR, which were unfortunately not successful.

During a recent inspection trip of the Keystone Line with Amtrak personnel, I was able to personally observe the Impacted Line and the machinery Amtrak intends to use for its maintenance. Given the specialized nature of the equipment involved, and the fact that NSR does not utilize concrete ties on a widespread basis across its network, NSR retained consultants to confirm that there are reasonable alternatives for completing Amtrak's project while still accommodating customers on the Impacted Line. As explained in their verified statements, there are indeed reasonable alternatives that would allow freight service to continue.

Amtrak's decision to impose a full outage for over a month in order to conduct planned maintenance work on the Impacted Line is highly unusual. When NSR conducts track replacements or maintenance, we do it in a way that accommodates the needs of any affected customers on the relevant line, minimizing service disruptions and balancing customer needs with planned maintenance programs. NSR's approach is the standard practice in the rail industry, as explained in the verified statement of Oliver Wyman. I am seriously concerned about the impacts this outage will have on customers on the Impacted Line, as well as the future impacts to freight service if Amtrak deploys this technology in other locations.

Amtrak has thus far refused to agree to an alternative plan that could accommodate the needs of freight customers on the Impacted Line. As such, Amtrak is proceeding with its planned outages. In fact, Amtrak recently issued a service bulletin that placed Main Track 1 of the Impacted Line out of service at the start of their work on the evening of April 28, 2023. NSR learned about this service bulletin from its customers when NSR was temporarily prevented from serving some customers for approximately 24 hours. I contacted Amtrak and was able to secure their confirmation that NSR will be able to continue serving customers until the official outage dates. Nevertheless, work has commenced and the equipment is moving toward the customers that will be impacted in the very near future. Amtrak has not shown a willingness to consider any alternative solutions that would accommodate some reasonable level of freight service on the Impacted Line, so NSR is currently making every effort to position equipment and protect service until the outages begin to give customers the best chance of weathering this highly unusual situation to the fullest extent possible.

NSR has been actively trying to find an alternative solution that would allow freight service to continue in some fashion. As explained by NSR's outside consultants, there are indeed other reasonable options that Amtrak can pursue. As

such, I believe Amtrak's current planned maintenance is inconsistent with its obligation not to unreasonably interfere with NSR's freight service and does not reasonably accommodate the needs of freight customers on the Impacted Line.

VERIFICATION

I, Randall W. Hunt, declare under penalty of perjury that the foregoing information is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on this 23rd day of May 2023.

A handwritten signature in black ink, appearing to read "Randall W. Hunt", is written over a horizontal line.

Randall W. Hunt

EXHIBIT B

Verified Statement of David J. Hughes

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36695

**THE WENGER GROUP, INC., AND ESBENSHADE, INC.—PETITION
FOR DECLARATORY ORDER AND INJUNCTIVE RELIEF—RAIL
SERVICE TO PENNSYLVANIA FEED MILLS AND OTHER FACILITIES**

**Verified Statement of
David J. Hughes
Oliver Wyman, Inc.**

May 23, 2023

PUBLIC VERSION

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Statement of David J. Hughes, Senior Advisor, Oliver Wyman

I. Qualifications

Oliver Wyman is a leading general management consulting firm. It maintains one of the largest practices in the world dedicated to serving the transportation and logistics sectors. That practice provides a comprehensive set of services and capabilities to transportation carriers across all modes and to the users and regulators of transportation services. Oliver Wyman's transportation clients include national and regional governments on six continents, as well as many of the world's largest users of rail services, freight and passenger railroads, motor carriers, leasing companies, energy companies, and industrial and consumer manufacturing firms.

This verified statement is offered by David J. Hughes, a Senior Advisor to Oliver Wyman. Mr. Hughes has more than 40 years of experience in freight and passenger railroad operations, maintenance, and financial management. Mr. Hughes is a former Chief Engineer of the National Railroad Passenger Corporation (Amtrak) and interim President and CEO of Amtrak. Mr. Hughes also was the Chief Engineer of a Class I U.S. railroad, where he was responsible for planning the reconstruction of the core main line. And as Vice President of Engineering at the Boston & Maine Railroad, he was responsible for all track structures and for planning and carrying out a major federally funded reconstruction of the railroad's principal line.

II. Assignment and summary of findings

On April 24, 2023, the Wenger Group, Inc., and Esbenshade, Inc. (collectively, Petitioners), filed a petition under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, requesting declaratory and injunctive relief. Kellogg Company has intervened in the case, seeking the same declaratory and injunctive relief as Petitioners. Petitioners' and Kellogg's facilities are located on a rail line owned by the National Railroad Passenger Corporation (Amtrak) between Rheems and Lancaster, PA ("the Harrisburg line" or "the line"). Norfolk Southern Railway Company (NSR) provides rail service to Petitioners' and Kellogg's facilities. According to these customers and NSR, Amtrak intends to block rail service to customer facilities on the Harrisburg line for up to 45 days for an infrastructure renewal project that will run from May 17, 2023 to September 1, 2023. According to Amtrak, the planned project involves replacing wood ties with concrete ties and renewing the roadbed.

Oliver Wyman was asked by NSR to provide an expert opinion on 1) whether Amtrak's plan to block all rail freight service on the Harrisburg line for an extended period of time is necessary to conduct the planned infrastructure renewal project; and 2) if there are alternatives for conducting the project without eliminating rail customer access and network availability.

My key findings are:

- Amtrak claims the complete cessation of freight service on the line is necessary due to the equipment and infrastructure renewal methods that Amtrak has chosen, which Amtrak claims will make the track unusable for the duration of the project. Specifically, Amtrak plans to use a track-laying machine (TLM), which Amtrak plans to leave cut into the track for the length of the project. Based on my experience with TLM practices, I believe it is likely that Amtrak will use the TLM four days per week, but will unnecessarily leave it in place even on the three days per week it is not used, depriving customers of all rail access. Even in the unlikely

event that Amtrak works 5 days per week there would be two days per week that the operation would be idle. Outside of Amtrak's use of a TLM on the Northeast Corridor (NEC) – which has a special set of circumstances, as described below – there is no precedent for Amtrak's plan. It is highly unusual for a railroad to adopt equipment and methods for infrastructure renewal that would completely shut down a portion of the network and deny customers access for such an extended period of time.

- All railroads conduct track renewal programs – the largest carriers on a near-continuous basis. U.S. Class I railroads put down 12.9 million ties and laid 546,000 tons of rail in 2021 alone. Industry standards are well developed and focus on using equipment and methods that enable freight service to be preserved, thus limiting the adverse impact on customers who are dependent on rail service. Railroads typically plan track project equipment and methods based on track availability – not the other way around, as Amtrak appears to have done. Track projects are never planned without first considering the needs of freight services (and, if applicable, passenger services). Railroads typically do not shut down lines for extended periods even for major track reconstruction. Even after hurricanes, Class I railroads have completed the rehabilitation and restoration of large stretches of track in a few weeks.
- Two approaches are used by railroads for large-scale track renewal programs, based on the amount of time the line is out of service. The most common, accounting for an estimated 95 percent of both concrete and wood ties laid annually, is to use a series of mechanized production gangs to perform tie renewal, rail renewal, and ballast cleaning and replacement. By employing production gangs, railroads achieve both high productivity and low cost for both wooden and concrete ties. The use of production gangs also allows railroads to remove all related equipment from the track after each daily work shift to allow train movements and provide switching services to customers. And modern, mechanized production gangs can be

far more productive than Amtrak's TLM would be, which could reduce the duration of the project significantly.

- TLMs are used for laying concrete ties in much more limited circumstances, typically where their use does not hinder the commercial operations of the railroad. Because they are complex machines with limited operational flexibility, few Class I railroads even own one, and those that do may park their TLM for years between projects. Amtrak's planned use of a TLM is highly atypical and may be because Amtrak has successfully used the TLM for track projects on the NEC. But the NEC, with up to four main tracks and frequent crossovers, has enough capacity and routing options that a TLM can be left in place on one line without materially impacting either rail freight or passenger service. The Harrisburg line by comparison does not have either the track capacity or train operating characteristics to support the use of a TLM easily.
- In the case of the Harrisburg line project specifically, Amtrak's choice to use a TLM and cut off customer access does not make sense given that there are viable options to complete the work efficiently within the timeframe allotted by Amtrak, while still providing a minimally acceptable level of service to customers. The preferred option would be to use modern, mechanized production gangs, which is the industry standard for installing both wood and concrete ties. But a TLM also could be used more productively and cleared off the track periodically, particularly for the days when Amtrak will not be working on the project (which I estimate to be two to three days per week).¹ These options would preserve customer access and network availability, with likely limited impact on Amtrak's stated project schedule,

¹ Based on my experience and industry knowledge, Amtrak will most likely use a 4-day work week. This was confirmed in discussions with Charles Matlack, former Amtrak Chief Engineer of Production, who retired approximately 3 years ago.

labor requirements, or cost. In fact, Amtrak's schedule for the project appears to be overly long, with very low expectations for how much work can be done per day – a mechanized production gang could easily cut project time in half.

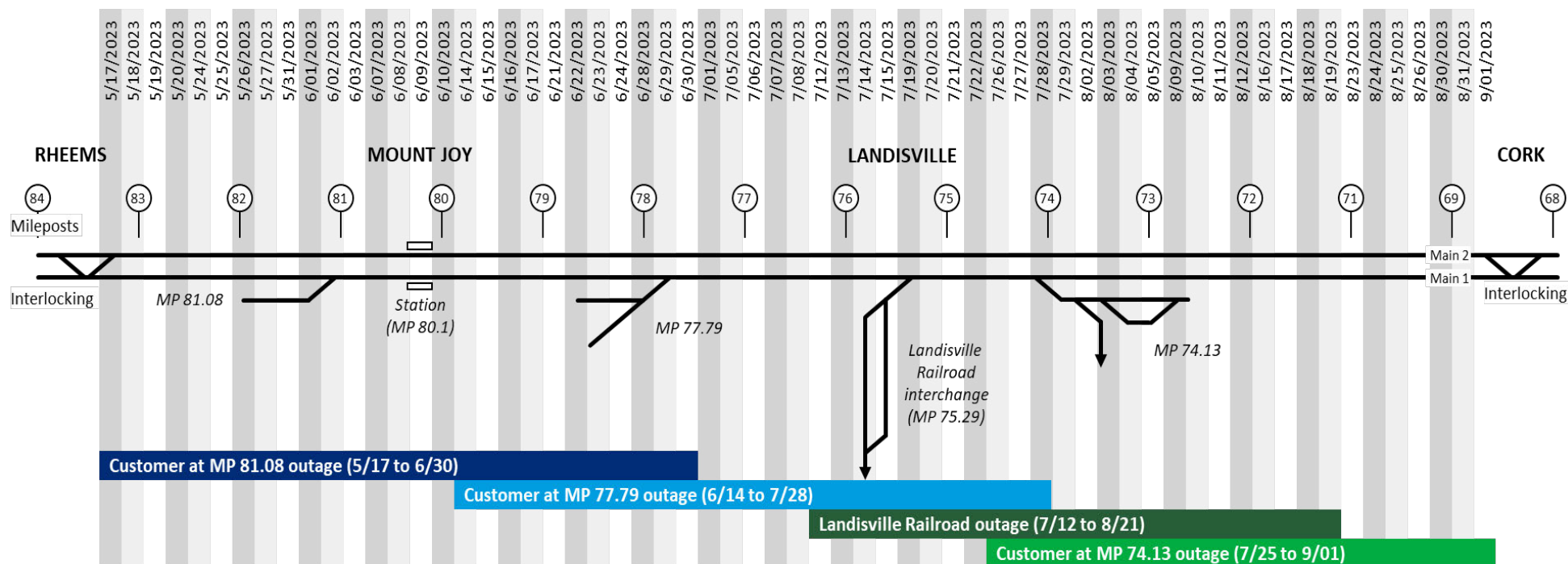
III. Amtrak is planning an unprecedented infrastructure renewal program that will adversely impact freight rail customers

Based on the information provided by NSR, Amtrak intends to block all freight rail service on a portion of the line between Rheems and Lancaster, PA beginning on May 17, 2023, and ending on September 1, 2023, for a planned infrastructure renewal project.² Customers along Main Track 1 of the Harrisburg line will be without service for up to 45 days as the work progresses. Amtrak claims the complete cessation of freight service on the Harrisburg line is necessary due to the equipment and infrastructure renewal methods that Amtrak has chosen, which Amtrak claims will make the track unusable for extended periods during the project.

Outside of Amtrak's use of TLM on the NEC – which has a special set of circumstances, as described below – there is no precedent for Amtrak's plan, as the plan materially interferes with shippers' commercial operations. It is highly unusual for a railroad to adopt equipment and methods for track replacement that would completely shut down a portion of the network for an extended period of time in these circumstances.

Under Amtrak's plan, five freight customers accessed via the track being replaced (Main Track 1) would be cut off from rail service for 38 to 45 days, as shown in Exhibit III-1.

² Verified Statement Randall W. Hunt ("V.S. Hunt") at 2, Figure 1.

Exhibit III-1 : Amtrak Main Track 1 (Harrisburg line) infrastructure renewal plan and the impact on freight customers³

³ This schedule is based on that described in the verified statement of Randall W. Hunt. See V.S. Hunt at Figure 1. Two customers are accessed via the Landisville Railroad. Map is not drawn to scale. The industry track on Main 2 is not shown.

Wenger Feed, for example, located at milepost (MP) 81.08, would be without rail service for 45 days while the Amtrak project covers approximately six miles of track from the Rheems interlocking at MP 83.5 to MP 77.5.⁴ NSR currently provides service up to five days per week to this customer.⁵

The rail freight customers impacted by the Amtrak plan are, among other things, involved in producing animal feed and agricultural food products used to support large numbers of livestock in Pennsylvania and the surrounding region and in manufacturing and selling food products around the world.⁶ NSR delivers inbound corn, soybeans, and distillers mash up to five days weekly to support these customers' operations.⁷ Exhibit III-2 shows the current service received by each customer and the length of time Amtrak has stated that the customer will be cut off from all rail services.

Exhibit III-2: Current freight rail service on the Harrisburg line and projected outage due to the Amtrak infrastructure renewal project⁸

Customer name	Milepost location	Rail service frequency (days per week)	Amtrak-provided outage dates	Outage duration
Kellogg Company	MP 74.13	Up to 5	07/25 - 09/01	38 days
Esbensshade Mills	MP 77.79	Up to 5	06/14 - 07/28	45 days
Wenger Feed	MP 81.08	Up to 5	05/17 - 06/30	45 days
Landisville Railroad Interchange which serves two customers	MP 75.29	{ } { }	07/12 - 08/21	40 days

As described in the verified statement of NSR's witness Randall Hunt, NSR's Marketing Group consulted with each customer located on Main Track 1 to understand the impact Amtrak's plans would have on their service.⁹ Based on those conversations, NSR proposed to Amtrak an

⁴ Outage dates and mileposts are based on the verified statement of Randall W. Hunt. See V.S. Hunt at Figure 1.

⁵ Petition, Verified Statement of David Glock (V.S. Glock) ¶ 4; V.S. Hunt at Figure 1.

⁶ Petition at 3; Kellogg Company Petition to Intervene, Verified Statement of Sherry Brice ¶ 4.

⁷ Petition at 3.

⁸ V.S. Hunt at Figure 1.

⁹ *Id.* at 4–5.

alternative whereby NSR could provide service every 10 days. This proposal reflected the maximum length of time that the most vulnerable customer could maintain sufficient inventories between rail service before an alternative transportation option would need to be found.¹⁰ Under the current Amtrak plan, customers would likely need to utilize trucks to continue providing feed to livestock and supporting their operations. This would not only increase operating costs for these customers but would add approximately {{ }} heavy trucks per week to local roadways.¹¹

IV. The rail industry has developed standard approaches to infrastructure renewal that preserve service

A. Infrastructure renewal is a typical and ongoing activity in the rail industry

All railroads conduct track rehabilitation and maintenance programs – the largest carriers on a near-continuous basis – to ensure the safety and efficiency of the rail network. The industry standard is to use equipment and methods that enable freight service to be preserved, thus limiting the adverse impact on customers who are dependent on rail service for some or all of their incoming or outgoing freight.

In total, U.S. Class I railroads put down 12.9 million ties and laid 546,000 tons of rail in 2021.¹² Class I railroads plan the process steps and sequence of work for a track project by first determining how much track time will be available for the work, *e.g.*, “two 3-hour blocks,” “clear for all trains,” or some other description of how the maintenance operation will have to conform to the demand to move trains. Based on available track occupancy time, the maintenance staff develops a schedule that will conform to that availability. In other words, the

¹⁰ *See id.*

¹¹ NSR delivers roughly {{ }} cars per week to the five customers. *See* V.S. Hunt at 2. At 3.5 trucks per railcar, *see* V.S. Glock ¶ 12, that equates to {{ }} trucks per week.

¹² Association of American Railroads, Analysis of Class I Railroads 2021, lines 351 and 371.

available track time is determined first and then a work process is devised to make the best use of that time.

While there are any number of potential track renewal processes and sequencing that may be available, it is a standard planning requirement that adequate service will be preserved while undertaking track maintenance and rehabilitation projects. Track projects are never planned without first considering the needs of freight services (and, if applicable, passenger services). This is true for track projects involving both wood ties and concrete ties.

Maintaining a safe working environment for maintenance and operating crews is essential. Both NSR and Amtrak are members of the Northeast Operating Rules Committee (NORAC) and both operate trains under NORAC rules. NORAC rules provide, among other things, rules for trains to safely operate on track that is out of service for maintenance. The track must be safe to allow the inbound movement of raw materials (ties, rail, ballast) and the outbound movement of materials removed during the maintenance project. The NORAC rules provide speed limits and operating conditions under which Amtrak can safely move construction materials in and out.

It is typical operating practice during track renewal projects for operating speeds and rules, as defined under NORAC in the Northeast, to be applied not only to construction materials moved during working hours, but also to freight trains moving goods for customers after each daily work period. Freight trains may not be able to move under normal operating speeds and at normal operating times, but by following the NORAC rules, each day after hours freight trains can safely serve customers with minimal interference with work gangs.

Amtrak's plan to close a rail line to rail-served freight customers for 38 to 45 days for a track renewal project is extraordinary. No Class I railroad in recent memory has intentionally shut down a line for such an extended period of time for track work without allowing for any local freight service. Even in the case of hurricanes that have destroyed or inundated track,

necessitating large-scale recovery or reconstruction, railroads have gotten lines back up and running rapidly. For example, after Hurricane Katrina, NSR restored five miles of track that had been washed away in only 16 days.¹³ After Category 4 Hurricane Harvey, which caused washouts and large-scale flooding across nearly all track and many yards and facilities in southeastern Texas, both Union Pacific Railroad Company and BNSF Railway Company (“BNSF”) reported that most service was restored to customers in less than two weeks.¹⁴

B. Types of large-scale track renewal processes

Using ties as an example, while railroads use spot tie replacement to repair individual/small sections of ties,¹⁵ for large-scale tie renewal programs, two processes are typically used, based on available out-of-service time: 1) mechanized production gangs or 2) TLMs (Exhibit IV-1). Production tie gangs are used in the majority of large-scale replacement programs (regardless of whether the ties are wooden or concrete), as they provide high throughput with only occasional and temporary curtailment of service to customers. TLMs also can be used in such a way as to ensure the network is available to serve customers either daily or after a set number of days in a weekly work period.

¹³ *Freight Railroads & Extreme Water*, ASSOCIATION OF AMERICAN RAILROADS, <https://www.aar.org/issue/extreme-water/> (last visited May 20, 2023); *In Katrina’s Wake, Norfolk Southern Shows its Spirit*, Norfolk Southern Corporation Annual Report 21 (2005), https://www.annualreports.com/HostedData/AnnualReportArchive/n/NYSE_NSC_2005.pdf.

¹⁴ See William C. Vantuono, *BNSF speeding post-Harvey progress*, RAILWAY AGE (Sept. 6, 2017), <https://www.railwayage.com/intermodal/bnsf-speeding-post-harvey-progress/>; *Hurricane Harvey: UP earnings to take a hit; BNSF restoring service*, PROGRESSIVE RAILROADING (Sept. 7, 2017), <https://tinyurl.com/restoringservice>; *Hurricane Harvey Info*, NATIONAL WEATHER SERVICE (last visited May 20, 2023), <https://www.weather.gov/hgx/hurricaneharvey> (Hurricane Harvey made landfall on August 25, 2017.).

¹⁵ Spot replacement is generally manual in nature and often done between train movements, so there are limited to no train delays. Depending on the number of ties to be replaced, track may be out of service for as little as half an hour. This type of repair is necessary to meet safety requirements between major tie replacement cycles.

Exhibit IV-1: Comparison of Large-Scale Tie Replacement Methods

Tie replacement method	Mechanization	Track occupancy time	Unit cost	Able to provide service recovery in 12 hours
Production gang	High	Medium	Low	High
Track-laying machine	High	High	Low	Medium-Low

Mechanized production gang

This approach involves the use of a series of one-function maintenance-of-way (MOW) machines over an 8- to 10-hour period, after which they run a short distance to a side track where they can park for the night. Train service is restored, under the approved operating speeds and rules, once the machinery is safely in the clear on a side track. Depending on the level of mechanization, a mechanized gang will use, at a minimum, specialized equipment designed to replace wood ties with concrete ties and will have spike pullers, tie handlers, tie inserters, fastening drivers, and tamping machines. MOW personnel generally will remove rail anchors, tie plates, and other track material in the track structure manually. Additional equipment may be used to position new ties for insertion into the track structure, stack old ties for removal, magnetically pick up metallic track material (spikes, rail anchors, tie plates, etc.), and so on. Each machine is removable from the track individually as its tasks are completed.

Further, as tie replacement on a large scale tends to destabilize the track structure, additional equipment designed to tamp ballast and align the track also will be incorporated into a mechanized production gang. Before the gang goes off duty for the day, it will attempt to move its equipment either from the track completely, using mobile machine set offs, or place it into a siding or spur track to free the main line for train movement.

This is the standard process for major railroads¹⁶ because it provides low maintenance costs and adequate train operating flexibility, both of which are essential. Nearly all of the 12 million ties, both wooden and concrete, installed by the U.S. Class I railroads each year are installed using mechanized tie inserters and associated equipment, which are operated by a high-output production tie gang that can clear the track as needed or at least daily to ensure daily customer access.

Track-laying machine (TLM)

Depending on how it is used, specialized equipment such as a TLM can close access to shippers or use of a line segment for anywhere from 8 hours to more than a day. At the leading end of the TLM machine, the old crossties are separated from the old rails in preparation for removal. As the old crossties are removed and the ballast plowed for receipt of the new crossties, the TLM holds the new rails above the work area. Once the new ties are laid down, the machine lays the new rail atop the new ties and clips them together.

To do all of this, the TLM must be cut into and out of the track structure, a process that can take 3-4 hours to cut in and then another 3-4 hours to cut out again. Railroads typically try to keep a TLM or similar machine cut into the track structure for as long as possible, while still preserving at least some customer access.

While a TLM is cut into a track, the line segment must be closed to through train movements, although nothing prohibits train movements under a Form D train order to operate on the line segment being rehabilitated up to the machine's work limits.¹⁷ In this way, customers with

¹⁶ Every railroad decides what machinery to buy and how to utilize it. However, this general process holds true across railroads as standard practice, with differences only in the details.

¹⁷ The length of the work limits can be 2-3 miles from the front to the back of the parade, so, at least 10 miles should be available for train operation under restrictive conditions. That means customers could be served outside the 2- to 3-mile long work zone.

industrial spurs that are not located directly in the TLM's work zone can still be served by the railroad on either side of the current work zone.

Most Class I railroads do not own a TLM because of their limited application. While TLMs offer the possibility of higher productivity, their operation is complex and they do not provide the flexibility to clear up easily in order to provide continuous service to customers. That said, there is no reason why a TLM cannot be cleared off the track periodically to ensure critical customer needs are met.

Few U.S. Class I railroads even own a TLM, and those that do frequently have them parked. If Class I railroads have occasional applications for a TLM, use of a TLM can be provided by private contractors.

C. Amtrak's planned use of a TLM for the Harrisburg line is atypical

For the Harrisburg line infrastructure renewal program, Amtrak has assumed the extreme case of not clearing the track daily, weekly, or even monthly. Amtrak routinely uses this process of long-term track occupancy when replacing wood ties with concrete ties on the Northeast Corridor (NEC). But the NEC has up to four main tracks, frequent crossovers, and bidirectional signaling – an abundance of facilities, line capacity, and routing options that enable one line to be removed from service for longer periods without material delay to train movements or a reduction in freight or passenger service.

Between the Rheems and Cork interlockings on the Harrisburg line, however, there is no such flexibility. The Harrisburg line has only two tracks, single-direction signaling, and no intermediate crossovers. What Amtrak apparently fail to recognize is what may be possible on the NEC will not work for infrastructure renewal on the Harrisburg line, given the lack of sufficient track capacity and operating alternatives. Effective application of a TLM requires a

very special set of circumstances – such as exist on the NEC – to both perform efficient maintenance and not unduly interfere with rail service.

Amtrak’s planned infrastructure renewal project on the Harrisburg line is nothing new or unique in the industry – only the rigid requirement for line shutdown and total loss of customer access for many weeks is atypical. Such extensive restrictions are rarely used, other than in the case of certain unplanned incidents that require placing a critical piece of the network temporarily out of service during repairs. Even in such extreme cases, it would be highly unusual for customer access to be curtailed for more than a day or two.

V. Infrastructure renewal approaches must balance process efficiency and customer access – Amtrak’s plan does not

A. Railroads typically strive for a balance between process efficiency and customer service during infrastructure renewal projects

Any infrastructure renewal project necessitates making trade-offs between ensuring process efficiency and maintaining customer access and network availability. Railroads typically strive for a balance, such that customer service and network access can continue during track renewal projects. The most common form of tie renewal nationwide, using a mechanized production gang, can be structured so as to have limited or no service impact – gangs work for 8-10 hours at a time and then stop to allow service to resume.

The question is: Is Amtrak choosing the best approach to match maintenance process with service for its planned project on the Harrisburg line? In my opinion the answer is no. Freight railroads, for example, typically do not perform track projects that cut off access for more than 24 hours (except in very rare circumstances) because of the extreme adverse impacts that could result for their customers.¹⁸

¹⁸ See also Verified Statement of Montie D. Chapman (“V.S. Chapman”) at 4–5.

As discussed below, Amtrak is choosing process efficiency entirely, while eliminating shipper access and network availability. Amtrak's schedule also appears to be overly long for the amount of work to be done, based on typical production values for other North American railroads.

Amtrak's choice – to use a TLM that it does not clear from the tracks for the duration of the project while cutting off customer access – does not make sense, given that there are viable options to complete the work efficiently within the timeframe allotted by Amtrak while still providing some level of service to customers. The preferred option would be to use mechanized production gangs, which is the industry standard for both wooden and concrete ties. But a TLM also could be used and cleared off the track for the days when Amtrak will not be working on the project (which, in my experience, is most likely three days based on a four-day-per-week schedule). Either option would preserve customer access and network availability, with likely very little difference in Amtrak's stated project scheduling, labor requirements, or cost.

B. Amtrak is choosing process efficiency entirely and eliminating shipper access and network availability

Amtrak is proposing an infrastructure renewal process that trades off customer access to rail service for the apparent efficiency of a highly mechanized work process that includes up to three down days each week when the maintenance work will be stopped but access to the customers will still be denied. This proposed curtailment of customer service is highly unusual in the rail industry and likely to cause severe disruption to the customers that depend on rail freight service via the Harrisburg line (as well as disruption to the local community, if customers are forced to replace rail service with large numbers of trucks).

Moreover, Amtrak's plan does not appear to yield better efficiency in terms of equipment performance, and other options exist for Amtrak to achieve the same results in the same

timeframe and at a reasonable cost – while maintaining some level of network access for rail freight customers on the Harrisburg line.

Amtrak plans to rehabilitate Main Track 1 between the Cork and Rheems interlockings,¹⁹ a distance of about 14.8 miles.²⁰ The existing wooden ties will be replaced with 37,400 concrete ties and 149,600 feet of rail will be installed and de-stressed, with 74,800 feet of track undercutting, 261,800 feet of track surfacing, and 21,000 tons of stone to be applied to the track.²¹ The existing ballast will be cleaned to remove fine material that inhibits water flow out of the track. Fresh ballast will be added, and the track will be tamped two or three passes and brought into the line and grade established by prior surveying. Following surfacing, the rail will be de-stressed to establish neutral rail stress at an Amtrak-specified temperature to avoid future track buckling.

I understand that Amtrak proposes to close the 14.8-mile section of the Main Track 1 track to all passenger and freight traffic between Cork Interlocking (Lancaster, PA) and Rheems Interlocking (Rheems, PA) during the project in sections, with the shortest planned outage being 38 days and the longest 45 days. Amtrak passenger traffic will need to operate bidirectionally on Main 2 to continue passenger service in both directions. The only trains allowed to operate on the closed stretch of Main Track 1 will likely be Amtrak work trains to support the project (delivering ties and ballast and removing old material). If typical TLM deployment practices and schedules are followed; the TLM team will work 10-hours per day, four days per week (with three days off). As my past experience at Amtrak and with other railroads confirms, after travel

¹⁹ The interlocking switches at both Cork and Rheems are concrete ties. This project fills the gap between the two interlockings by installing concrete ties and removing wooden ones.

²⁰ Amtrak's Reply, Verified Statement of Ray Verelle (V.S. Verelle) ¶ 5 (filed May 1, 2023). Since both the Cork and Rheems interlockings have existing concrete ties, no work is required between switches at the interlockings.

²¹ *Id.*

to and from the job site, safety briefing, and other pre-and post-shift activities, the productive workday likely will be about six hours.

C. Amtrak's schedule is unnecessarily long

Amtrak's track rehabilitation project apparently started on April 28, 2023, with customer outages estimated to begin on May 17, 2023 and run through September 1, 2023.²² This indicates a four-month schedule to rehabilitate 14.8 miles of track using a TLM, as shown above in Exhibit III-1.

Even using the first customer outage date of May 17, 2023, as the start date, this is still an exceptionally slow pace for track work. Between May 17 and September 1, there are 63 working days, based on a four-days-per-week schedule, and 108 calendar days. Exhibit V-1 shows that this equates to less than 600 ties installed and less than a quarter of a mile covered per workday. If Amtrak operates a five-day-per-week schedule, the production would be approximately 475 ties installed per workday for the 37,400 total ties and the May 17 to September 1 scheduled provided by Amtrak.

Exhibit V-1: Average projected Amtrak production per workday and calendar day for the Harrisburg line infrastructure renewal project²³

	Total	Per Workday Avg.	Per Calendar Day Avg.
Ties installed	37,400	594	346
Rail installed (linear feet)	149,600	2,375	1,385
Distance covered (miles)	14.8	0.23	0.14

Averaging less than 600 concrete ties and less than a quarter-mile per workday is far below the productivity rates that would be expected from either production gangs or a TLM-centered program. Experiences at Class I railroads demonstrate a much higher productivity rate.

²² V.S. Hunt at Figure 1.

²³ V.S. Verelle ¶ 5. The number of workdays were calculated from Mr. Hunt's verified statement. See V.S. Hunt at Figure 1.

CN installed 425 to 550 concrete ties per day using standard tie equipment and a gang of 60 employees rather than a TLM, thus allowing full access to all customers each night.²⁴ CN had half the number of employees on the gang as the 120 employees in the Amtrak plan.²⁵ Matching Amtrak's staffing levels would support deploying two gangs working in parallel and could yield 850 to 1,100 concrete ties installed per day, outpacing the 594 average per workday planned by Amtrak with the high-capacity TLM by 250 to 500 ties per workday.

The pace of track rehabilitation can of course be impacted by the terrain and the specifics of the track being repaired, but the Cork to Rheems section on Amtrak is not mountainous, does not contain significant bridges, and does not appear to present any other unusual obstacles beyond the presence of a catenary line, which should not significantly impact productivity. Amtrak is undercutting the line to maintain proper vertical clearance between the track and the catenary. Like tie replacement, undercutting is a common maintenance practice on all Class Is and rarely requires line shut down beyond a typical work shift. There is nothing inherent in undercutting that requires a line shut down as opposed to clearing the track each day. It is therefore surprising that Amtrak's productivity is projected to be nearly equivalent to the productivity CN achieved with half the number of employees (or indeed, less than the productivity CN could have achieved with an equivalent number of employees) using production gangs.²⁶

One might assume that using a TLM is a highly productive process, but in this instance that is not the case. A Federal Railroad Administration (FRA) report identified the production range of the P811 owned by Amtrak in 1980 as 600 to 2,000 track feet per hour.²⁷ Using the low range of

²⁴ V.S. Chapman at 9.

²⁵ *Id.* at 9, Table 2.

²⁶ *See id.*

²⁷ U.S. Department of Transportation, "Track Renewal System and Wood Tie Reuse Analysis," FRA/ORD-80/63, October 1980, Table 83.

600 ft/hour and assuming a 6-hour workday would yield a production rate of 0.68 miles/day and using the high range of 2000 ft/hour for a 6-hour workday would yield 2.3 miles/day. But the planned production rate for the Rheems-Lancaster line is only 0.225 miles per day or less than half of the low-end production rate of an early generation TLM.

The other renewal processes (ballast cleaning and track tamping) that are part of the Harrisburg line project are locked into the pace of the TLM and move behind the TLM. These renewal processes can cover between two and four miles per day under normal conditions, if not paced by the TLM. Amtrak's justification for using the TLM on efficiency grounds seems mistaken and is not only inefficient for tie insertions, but at the projected installation rate will act as a restriction on other necessary components of the project.

As discussed below, other frequently used options exist for Amtrak to achieve better efficiency and yet maintain network access for rail freight-served shippers on the Harrisburg line.

D. Other options for tie rehabilitation exist for Amtrak that would lessen the impact on customers

In Amtrak's Reply to Petitioners, it claims that it "determined that the most practical operational alternative to its existing work plan would increase project costs by up to \$30 million dollars, and still would not allow Amtrak to safely reduce the length of a service disruption to the requested ten-day increments."²⁸ Amtrak also claims that alternatives "would have been more disruptive to NS and local rail shippers, for example by requiring two separate and significant outages rather than one."²⁹ However, Amtrak did not provide any details that could be used to evaluate these claims. Based on my experience, Amtrak does have options, in the form of proven, industry-standard practices that could enable the Harrisburg line infrastructure renewal

²⁸ Amtrak Reply at 8.

²⁹ *Id.* at 8–9.

project to be completed efficiently on a time and cost basis while preserving rail freight customer access. The options available to Amtrak are discussed in more detail below.

Option #1 (preferred): Mechanized production gang

A TLM is not the industry standard for doing heavy track maintenance work, for reasons cited earlier. I estimate, based on my direct experience, industry interviews, and industry research, that standard high-capacity production gangs are used to lay better than 95 percent of the wood ties and some of the concrete ties installed each year.

Amtrak’s use of a TLM may seem to be the highest technology option, but in reality, today’s mechanized production gangs are considered to be state of the art. Freight railroads and track maintenance equipment manufacturers have spent decades honing equipment design and work processes to maximize productivity, while maintaining the flexibility to clear the track quickly when necessary.

That the TLM is no longer the best option is shown by the low production rates planned for the Harrisburg line infrastructure renewal project, which calls for laying only a quarter-mile of track per 10-hour work day.³⁰ In its Reply statement, Amtrak makes much of its good stewardship of public funds,³¹ but such a low production figure argues to the contrary.

Today’s mechanized production tie gang typically consists of a line of 20 to 40 individual machines (depending on the desired production rate). In this case, instead of a TLM to replace ties, conventional tie replacement machinery is used. Track spikes are pulled by a spike puller machine. A tie remover pulls out the old tie and a tie handler picks up a new tie from trackside

³⁰ In actual practice, Amtrak cites one mile per day as the capacity of the machine. *Track Laying Machine*, AMTRAK (archived June 15, 2011, last visited May 20, 2023), history.amtrak.com/archives/track-laying-machine (explaining that the TLM “could replace up to a mile of rails and ties simultaneously per day”). This is consistent with U.S. Department of Transportation, “Track Renewal System and Wood Tie Reuse Analysis,” FRA/ORD-80/63, October 1980, Table 83, which reports 600 track feet/hour to 2,000 track feet/hour production range for the TLM owned by Amtrak in 1980.

³¹ See Amtrak Reply at 5.

and sets it in position for the tie inserter to push under the rail and into the track. Fastenings (Pandrol Fastclip) are pushed home to fasten the rail to the tie. And so the procession of tie machines moves along the track, with each machine performing its specified function. (The machinery for ballast cleaning and replacement and surfacing would be the same as what would be used if Amtrak used a TLM.)

The process described above is for a conventional tie production gang. If that process is modified to split the tie gang into two parts, with one part in front to install gage ties, remove all fasteners, and change the rail between the gage tie operation and the final tie replacement operation, then, when the production tie gang has passed, both new ties and new rail have been installed.

After the ties and rail are installed, the other production functions of ballast screening and tamping to restore smooth track surface follow along. These other production functions are all naturally faster than a quarter-mile per day and could keep up even if ties were installed at a rate of a half-mile per day. Thus, the conventional approach to track renewal could cut the planned project duration by as much as half by raising the daily production rate to double that planned by Amtrak. The cost of the additional manpower would be offset by the higher daily production rate.

Option #2: Use the TLM more productively to permit customer access

The use of a TLM is not typically the preferred method for track rehabilitation projects, but may be used under unique conditions, such as on the NEC. When used, the most common daily work schedule for a TLM is a four-day per week, 10-hour workday, but that is not the only option. A three-day per week, 12-hour day is also sometimes used, where labor agreements allow. Sometimes railroads use two shifts per day, so the job duration is shortened, and the track

is occupied for fewer days. The benefit of long days is that there are fewer morning and evening trips to and from the job site, reducing unproductive time.

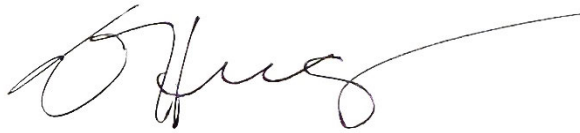
The objective of these options is to maximize working time and reduce the duration of the job. A side benefit of working long days is that there are more days per week where no production work is occurring. That idle time can be used in various ways. For example, it could be used for distributing materials or picking up discarded materials behind the renewal work. It also could be used for the operation of local trains to switch cars and even serve customers – whether up to the limits of the work zone or with the TLM cleared off the track for non-working days and the line opened for service.

As it is, it is likely that Amtrak's current plan calls for the TLM to sit idle for a certain number of days per week (based on my experience, two or three days) with the line closed, when in reality the TLM could be cleared for this extended non-working period each week to permit customers' access to rail service.

Verification

I, David Hughes, declare under penalty of perjury that the foregoing information is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on this 23rd day of May 2023.

A handwritten signature in black ink, appearing to read "D. Hughes", written over a horizontal line.

David J. Hughes

Appendix A. Resume of David J. Hughes

Mr. Hughes, a Senior Advisor to Oliver Wyman, has over 40 years of US and international experience in freight and passenger railroad operations, maintenance, and financial management and as a senior executive in the railway supply industry. He specializes in strategies for improved railroad operations and maintenance and capital investment planning. He served as the senior executive responsible for the infrastructure of a US Class I freight railroad and for the National Railroad Passenger Corporation (Amtrak), which operates the only high-speed passenger train service in North America. Mr. Hughes also served as interim President and CEO of Amtrak.

Mr. Hughes has participated in numerous assignments with several major US railroads leading to overall operations improvements and improved capital spending strategies. He has also participated in projects to facilitate the purchase, sale, or financial restructuring of many short-line and regional railroads. Mr. Hughes experience also includes over 35 international assignments.

Mr. Hughes has had a successful career in private industry. Over a three-year period as chief engineer of Amtrak, Mr. Hughes was responsible for reducing train delay minutes due to signal failures, track defects and traction power by over 40% and raising track speeds that reduced run times by 8 minutes between New York and Washington at nominal cost. At the same time, personal injuries to employees were cut in half, operating expenses decreased, and capital spending increased.

As chief engineer of a Class I US railroad, Mr. Hughes was responsible for planning the reconstruction of core main line. The project included evaluating the costs and benefits of realigning curves, adding a second main track in some locations and eliminating it in others. Computer simulations were used to determine the changes in train transit times under different track configurations. The changes in transit time and train operating costs were compared with the costs of track reconfiguration to determine the most cost-effective track configuration.

In addition, as president of Pandrol, Inc., Mr. Hughes worked with railroads worldwide to develop high-performance track components and maintenance systems for both heavy haul and high-speed passenger applications. During the same period, he was also president of Speno Rail Services, a world leader in maintenance of railroad rails and ballast.

For five years, Mr. Hughes was president of the Bangor & Aroostock Railroad, a regional railroad in the northeastern United States. Previously, he was vice president of engineering at the Boston & Maine Railroad, where he was responsible for all track structures and signal systems maintenance, for supervising more than 1,000 employees, and for planning and carrying out a major federally funded reconstruction of the railroad's principal line on time and on budget. Mr. Hughes began his railway career as a civil engineer and supervisor of track maintenance for the Southern Pacific Railway. Mr. Hughes received a BS in civil engineering from the University of Texas at El Paso and an MBA from the Harvard University Graduate School of Business Administration.

EXHIBIT C

Verified Statement of Montie D. Chapman

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36695

**THE WENGER GROUP, INC., AND ESBENSHADE, INC.—PETITION
FOR DECLARATORY ORDER AND INJUNCTIVE RELIEF—RAIL
SERVICE TO PENNSYLVANIA FEED MILLS AND OTHER FACILITIES**

**Verified Statement of
Montie D. Chapman**

May 23, 2023

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Statement of Montie D. Chapman, Chapman Railway Consulting

I. Qualifications

I am Montie D. Chapman. I have worked for more than 46 years in the rail industry and have extensive experience in railroad maintenance, production, and new construction. Currently, as President of Chapman Railway Consulting, I provide comprehensive appraisals of railroad track and advise on process improvement, cost saving strategies, and budget forecasting.

I started as a trackman and was promoted subsequently to various positions at Canadian National Railway (CN), retiring from the railroad as Assistant Chief Engineer. In this capacity, I was involved in track maintenance and renewal programs for some 3,000 track-miles on the railroad. I also provided crisis and emergency management in the wake of hurricanes and derailments. My education includes management and environmental safety, workplace safety, and U.S. operating rules.

While at CN, I was involved in tie replacement programs using a track-laying machine (TLM) and using standard tie equipment. The TLM work included a June 2009 project on the Bluford subdivision in southern Illinois involving wood tie replacement inside of two tunnels. The standard tie equipment work included wood-to-concrete tie replacement on the McComb Subdivision, described in more detail in this statement.

II. Assignment and summary of findings

On April 24, 2023, the Wenger Group, Inc., and Esbenshade, Inc. (collectively, Petitioners), filed a petition under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, requesting declaratory and injunctive relief. Kellogg Company has intervened in the case, seeking the same declaratory and injunctive relief as Petitioners. Petitioners' and Kellogg's facilities are located on a rail line owned by the National Railroad Passenger Corporation (Amtrak) between Rheems and Lancaster, PA (the Line). Norfolk Southern Railway Company (NSR) provides rail service to

Petitioners' and Kellogg's facilities. According to these customers and NSR, Amtrak intends to block all freight rail service on the Line for over a month, beginning on or around May 17, 2023, for a planned track project. According to Amtrak, the planned track project involves replacing wood ties with concrete ties and renewing roadbed.

I was asked by NSR to provide an expert opinion on options available to railroads for concrete tie installation, including whether those options allow for continued service. In response to this inquiry, I describe the options available to railroads; Class I railroad industry practices for concrete tie installation; and the wood-to-concrete tie replacement program I oversaw on the McComb Subdivision of CN.

My key findings are:

- There are two main options available to railroads when wood ties are removed and concrete ties are installed out of face. One is using a TLM; the other is using the same standard tie equipment that would be used for wood ties.
- Using either standard tie equipment or a TLM, track can be reopened for service daily. Based on my experience at CN and my understanding of other Class I railroads' experiences involving out-of-face wood-to-concrete tie replacement programs, it is standard for Class I railroads to clear the tracks at the end of each work block daily to return the tracks to service nightly.
- For the CN McComb Subdivision project, in which I participated, standard tie gangs and conventional wood tie replacement equipment was used to remove the wood ties and install new concrete ties. The routine use of standard equipment efficiently installed concrete ties and allowed Amtrak and CN trains to operate daily once the work block ended for the day and operations resumed.

In summary, it is my experience that replacement of wood ties with concrete ties can be done while maintaining train operations on a line. While challenges exist, it has been proven time and

again by Class I railroads with extensive track laying experience that the work can be performed efficiently and safely while ensuring that customers do not lose service.

III. Railroad options for concrete tie installation

There are two main options available to railroads when wood ties are removed and concrete ties are installed out of face,¹ as Amtrak is planning to do. One is using a TLM; the other is using the same standard tie replacement equipment that would be used for wood ties. Many factors must be considered before deciding which is best for a given application; some of these include:

- Can the track be removed from service for temporary periods or does it need to be opened daily for train traffic after the work block?
- If the track is not going to be operational daily, how many days can it be closed without adversely impacting the network or service to customers?
- Are there customers that must be served and, if so, how can that be done while still performing the work?
- Can material be placed along the right-of-way prior to installation?
- Will there be other infrastructure replacement or repair groups working within the work block?
- Is there track available to clear the machinery and, if not, can track space be added?

When a TLM is used, the issue often becomes the time it takes to start up and shut down, which in my experience is roughly two to three hours on each end. But a TLM still can be cleared off the tracks daily if required, while maintaining the desired rate of production, by using longer work blocks. Based on my experience at CN and my understanding of Class I experiences

¹ “Out of face” refers to track work that proceeds completely and continuously over a given piece of track (rather than work at disconnected points only).

involving out-of-face wood-to-concrete tie replacement programs, it is standard for Class Is to clear the tracks at the end of each work block daily to return the tracks to service nightly. In describing its track maintenance programs, BNSF has commented that “It’s not feasible or necessary to shut down a section of the railroad for days, weeks or months every year so crews can perform their work.”²

Most concrete ties that have been installed on CN track are in Western Canada. A few have been installed in specific areas in Eastern Canada and the United States. CN uses either a TLM or production gangs to insert concrete ties. Regardless of the method of tie insertion, if service to customers is impacted the track is returned to service at the end of the track work shift each day.

The next section of my statement describes the concrete tie replacement program used by CN on the McComb Subdivision, which used standard tie gang equipment and returned the track to service daily. Standard tie gang equipment in my experience can achieve productivity similar to current TLM technology (and above the productivity Amtrak claims for the Line), while allowing track to be more quickly cleared and returned to service each day.

² “Making the grade: how BNSF maintenance is planned and performed,” BNSF Railway (June 26, 2019), available at <https://www.bnsf.com/news-media/railtalk/service/maintenance-planning.html>.

IV. CN McComb Subdivision concrete tie program

The CN McComb Subdivision operates between Jackson, Mississippi and New Orleans, Louisiana. The subdivision has daily freight and passenger service. Amtrak trains #58 and #59 provide daily service between Chicago and New Orleans. The south portion of the subdivision, which parallels Lake Pontchartrain, had experienced severe damage from hurricanes and tropical storms, disrupting service and substantially impacting CN's financial bottom line. As a result, the decision was made to replace wood ties with concrete ties through a key area of concern (mile 880.5 to 889.5) to add weight to the track structure. The goal was to reduce tie loss and track misalignment in future storms.

During the planning phase of the project, several factors were considered to determine the best option for track replacement. These included:

- Amtrak needed daily access to run its #58 and #59 trains.
- CN network access and customer service could not be compromised.
- Other delays to train operation needed to be kept to a minimum.
- The CN maintenance-of-way group worked 8 hours a day, 5 days a week.

Based on the planning parameters, CN determined what type of equipment to use to minimize service disruptions, the type and amount of material that would be needed, and who would do the work.

- It was decided that to minimize train delay, the track would be opened for service once the work was completed each day. The work block and install plan were established to accommodate both Amtrak and CN train operations.
- CN's track teams would work a schedule that would minimize overtime.
- Concrete ties with fast clips would be installed, and granite ballast would be applied for track lifting.

CN determined that the best approach to maximize efficiency and at the same time preserve network access and customer service would be to use standard tie gangs and conventional wood tie equipment to remove the wood ties and install new concrete ties on this nine-mile section. These machines can clear the track much quicker than a TLM, allowing trains to operate daily once the work block ends for the day. The alternative, using a TLM, was deemed impractical precisely due to the cut in and cut out time that would have been required for the TLM.

Ballast was distributed and surfacing was performed behind the tie gangs, and rail was destressed to meet company standards.

The work sequence for the project followed standard high-productivity practices:

- Brandt truck and car topper using a five-tie grapple head distributed ties from gondolas.
- Gauge tie gang removed two wood ties and installed one concrete tie.
- Tie gang removed the remaining wood ties and installed new fast clip concrete ties.
- Ballast train unloaded rock.
- Tamping set along with stabilizer surfaced track.
- Destressing gang with flash butt welder brought rail to its preferred temperature per CN continuous welded rail (CWR) standards.
- Grapple trucks followed to remove wood ties and scrap.

The gang manpower and consist for this project are shown in Table 1 below. Material used for the program consisted of 23,750 concrete ties with fast clips and a 100-car ballast train.

Table 1: Gang Manpower and Consist: CN McComb Subdivision Concrete Tie Program Used a Total Crew Size of 55 to 60

Group	Equipment and crew requirements by group	
Tie distribution	• Brandt truck (1 operator)	• Tie counters (2 employees)
Gauge tie group	• Spike puller (2 operators) • Tripp (1 operator) • Tie handler (1 operator) • Scratcher or scarifier or backhoe (1 operator)	• Trackman (3 employees) • Tripp (1 operator) • Tie handler (1 employee) • BTI clip machine (1 operator) • Foreman (1 employee)
Tie gang group	• Regulator to plough shoulder (1 operator) • 2 spike pullers (4 operators) • Tripp (1 operator) • Tie handler (1 operator) • Scratcher or scarifier (1 operator) • Tie handler (1 operator)	• Tripp (1 operator) • 2 BTI clip machines (2 operators) • Junior tamper (1 operator) • Ballast plough to pull shoulder (1 operator) • Trackmen to help clip throw plates, etc. (4 employees) • Foreman (1 employee)
Surfacing group	• Ballast plough to pull ballast (1 operator) • Lifting production tamper (1 operator) • Ballast plough to dress track (1 operator)	• Stabilizer (1 operator) • Foreman (1 employee)
Destressing group	• Trackman to remove and install clips (6 employees) • Rail saw (contracted) (2 employees)	• Flash butt welder (contracted) (estimate 3 employees per unit) • Foreman (1 employee)
Support groups	• Signal maintainers, varied (1 or 2 employees) • Work equipment (2 employees)	• Bridges and structures, varied (2 to 4 employees as needed)

A six-hour work block was established but was adjusted as needed to accommodate Amtrak passenger service and CN freight traffic volumes. A program that involves replacing every existing wood tie with new concrete ties requires gauge tie installation. The need for the use of gauge ties to set the installation parameter is due to track standard tie spacing changes. The standard wood tie spacing in this case was 19.6 inches and the new concrete ties required 24-inch spacing between ties. So, to start establishing the new spacing and bring the track to perfect gauge, two wood ties are removed and a new concrete tie is placed in its the proper space. The gauge tie gang first removes every fourth and fifth wood tie and installs one new concrete tie. The gauge sequencing provides perfect gauge for the large gang that follows behind and installs the remainder of the new ties. The gauge tie group installed between 75 to 100 concrete ties

daily, and the large gang average ranged from 350 to 450 concrete ties each day, depending on the block, which led to a total production rate of 425 to 550 installed ties per day. The surfacing and distressing group had no issue keeping up to the tie insertions. The work was completed safely and without incident.

Table 2 provides a comparison of the CN McComb Subdivision project with Amtrak's planned Rheems to Lancaster, PA project. The Amtrak project plan requires more than twice as many employees and negatively impacts freight customers along the Line when compared to the McComb project. If CN had used two crews working simultaneously, then the crew size would have been similar to Amtrak's plan for the Rheems to Lancaster, PA project, but the output would have been 250 to 500 additional concrete ties inserted each day—more than Amtrak's proposed rate of insertion each day.

Table 2: Comparison of completed CN McComb Subdivision project with the planned Amtrak Rheems to Lancaster, PA project³

	CN McComb Subdivision	Amtrak Rheems to Lancaster, PA
Length	9.0 miles	14.8 miles
Method	Standard tie gangs and conventional wood tie equipment	Track Laying System, including TLM and Undercutter
Crew Size	55 to 60	120
Concrete Ties per Workday	425 to 550	Approximately 475 to 600 depending on work schedule
Customer Impact	Maintained daily service	Loss of service for 38 to 45 days

³ David Hughes estimates 600 ties per day for Amtrak's project, assuming a four-days-per-week schedule. *See* V.S. David Hughes at 18. If Amtrak were to operate a five-day-per-week schedule, the production would be approximately 475 ties per workday. *Id.* The crew size total was provided by Amtrak. *See* Amtrak Reply at 19.

V. Conclusion

Across the North American rail network, replacement of wood ties with concrete ties is most often done while maintaining train operations on a line. I know of no infrastructure production programs that resulted in a loss of train service for greater than the daily work period. While challenges exist, it has been proven time and again by Class I railroads with extensive track laying experience that the work can be performed efficiently and safely and the track can remain in service.

Standard tie equipment represents the approach taken for the vast majority of tie replacement (whether wooden or concrete). In my opinion, this is an option that should be considered for Amtrak's Rheems to Lancaster, PA project. If set up properly, there would be no loss of output or productivity. My experience with wood-to-concrete tie replacement production has shown output levels to be similar to using a TLM (and above the productivity Amtrak claims for the Line), using the same manpower and less complicated tie equipment.

At CN and during my 46-year professional career in maintenance-of-way, a guiding principle has always been that shippers and the railroad transportation team are all customers of a railroad's engineering department. Eliminating track outages while making the railroad safer benefits both the railroad providing service on a line and its customers. Any engineering service outage—whether originating from a tie renewal program, rail changeout, or undercutting—which denies customer and network operating access violates an engineering service principle that all railroaders embrace.

Verification

I, Montie D. Chapman, declare under penalty of perjury that the foregoing information is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on this 23rd day of May 2023.

A handwritten signature in cursive script, reading "Montie D. Chapman", is written over a horizontal line.

Montie D. Chapman

Appendix A. Witness Resume

Montie D. Chapman

Mr. Chapman is currently President of Chapman Railway Consulting and a Senior Advisor to Oliver Wyman. Mr. Chapman has worked in the rail industry and have been a consultant to railroads for more than 45 years.

In his consultancy, he provides comprehensive appraisal of railroad track and advises on process improvement, cost saving strategies, and budget forecasting through management development and training.

Mr. Chapman started his railroad career in 1977 as a track laborer, and was subsequently promoted to track inspector, foreman, supervisor, and senior manager. He then served as assistant chief engineer for Canadian National from 2009 until his retirement in 2017, overseeing some 3,000 rail track-miles, and providing crisis leadership and emergency management for hurricane recovery and derailments.

Mr. Chapman's education includes management and environmental safety, workplace safety, and US operating rules.

Mr. Chapman has received several awards from Canadian National: the Derailment Reduction Award, the Safety Improvement Award, and the President's Award.

EXHIBIT D

NEC Operating Agreement

***Withheld as Containing Highly
Confidential Information***