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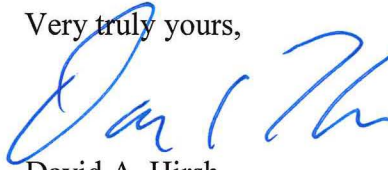
**Re: *Application of the National Railroad Passenger Corporation under 49 U.S.C. §
24308(A) – Canadian National Railway Company (Docket No. FD 35743)***

Dear Ms. Brown:

Enclosed for filing under seal in the above-referenced docket please find the Highly Confidential Version of the Reply Brief of Illinois Central Railroad Company and Grand Trunk Western Railroad Company.

Also enclosed for filing on the public record in this proceeding is a copy of the Public Version of this brief, redacted in accordance with the protective order entered in this proceeding on December 16, 2013.

Very truly yours,



David A. Hirsh

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

Enclosures

cc: Kevin M. Sheys, Esquire

PUBLIC VERSION - REDACTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35743

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

**REPLY BRIEF OF ILLINOIS CENTRAL RAILROAD COMPANY
AND GRAND TRUNK WESTERN RAILROAD**

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March 2, 2018

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Exhibit 1	H.R. Rep. No. 93-587 (Oct. 12, 1973) (“1973 Conference Report”)
Exhibit 2	Amendment Agreement between Illinois Central Gulf Railroad Company and National Railroad Passenger Corporation (May 1, 1983) (selected pages)
Exhibit 3	1971 Basic Agreement (selected pages)

SHORT FORMS FOR FREQUENTLY CITED CASES

The following short form case citations are used herein:

<i>Conrail</i>	<i>Nat'l R.R. Passenger Corp. & Consol. Rail Corp.—Application Under Section 402(a) of the Rail Passenger Service Act for an Order Fixing Just Comp.</i> , 10 I.C.C.2d 863 (1995).
<i>Guilford</i>	<i>Application of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. 24308(a) – Springfield Terminal Ry. Co., Boston & Maine Corp., & Portland Term. Co.</i> , 3 S.T.B. 157 (1998).
<i>Metro-North</i>	<i>National Rail Passenger Corp. Application Under Section 402(a) of the Rail Passenger Service Act</i> , FD No. 30426 (ICC served July 15, 1985).
<i>MTRC</i>	<i>Minnesota Transfer Ry. Co. Order to Provide Servs., Tracks & Facilities for the Operations of Trains of the Nat'l R.R. Passenger Corp. & the Establishment of Just & Reasonable Compensation</i> , 354 I.C.C. 552 (1978).
<i>Penn Central</i>	<i>Baker et al., Trustees of Penn Cent. Transp. Co—Compensation for Passenger Serv.</i> , 342 I.C.C. 765 (1973).
<i>T&P</i>	<i>Amtrak & Texas & Pac. Ry. Co., Use of Tracks & Facilities & Establishment of Just Comp.</i> , 348 I.C.C. 645 (1976)
<i>Texas & Pacific</i>	<i>Nat'l R.R. Passenger Corp. & Tex. & Pac. Ry. Co., Use of Tracks & Establishing Just Comp.</i> , 348 I.C.C. 357 (1975).
<i>TRRA</i>	<i>Nat'l R.R. Passenger Corp. & Terminal R.R. Ass'n of St. Louis, et al., Use of Tracks & Facilities & Establishment of Just Comp.</i> , 348 I.C.C. 901 (1977).
<i>UP/SP</i>	<i>Application of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. 24308(a) – Union Pac. R.R. Co. & S. Pac. Transp. Co.</i> , 3 S.T.B. 143 (1998).

ACRONYMS

AESS	Auto Engine Start Stop
ASOTP	All-Stations On Time Performance
BNSF	BNSF Railway Company
CBT	Contract Basic Tolerance
CN	Illinois Central Railroad Company and Grand Trunk Western Railroad Company (U.S. Operating Subsidiaries of the Canadian National Railway Company)
CSX	CSX Transportation, Inc.
DAI	Delay Avoidance Incentives
DNC	Do Not Count
eDR	Electronic Delay Reporting
EOTP	Endpoint On Time Performance
FRA	Federal Railroad Administration
FTI	Freight Train Interference (a subset of HRD) (except when referring to FTI Consulting)
G&A	General and Administrative
GTW	Grand Trunk Western Railroad Company
HPH	Horsepower per hour
HEP	Head End Power
HPT	Horsepower per ton
HRD	Host Responsible Delay
IC	Illinois Central Railroad Company
ICC	Interstate Commerce Commission
KOTP	Contractual On Time Performance

Metra	Northeast Illinois Regional Commuter Railroad Corporation (a commuter railroad in Chicago)
NS	Norfolk Southern Railway Company
PRIIA	Passenger Rail Investment and Improvement Act of 2008
PRT	Pure Run Time
RCM	Route Capacity Model
RPSA	Rail Passenger Service Act of 1970
RTB	Recovery Time Base
RTC	Rail Traffic Controller
SRS	Service Reliability Strategy
TPC	Train Performance Calculator
UP	Union Pacific Railroad Company

Note regarding record cites:

Statements filed with the parties’ opening evidence are identified by “[Last Name] VS”; those filed with the parties’ rebuttal evidence by “[Last Name] RVS”; and those filed with the parties’ surrebuttal evidence by “[Last Name] SRVS”.

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PUBLIC VERSION - REDACTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35743

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

**REPLY BRIEF OF ILLINOIS CENTRAL RAILROAD COMPANY
AND GRAND TRUNK WESTERN RAILROAD**

Illinois Central Railroad Company and Grand Trunk Western Railroad Company
(together, “CN”) hereby submit their Reply Brief in this proceeding under 49 U.S.C. § 24308(a)
to set the terms and compensation for the use of CN’s tracks and other facilities by National
Railroad Passenger Corporation (“Amtrak”).

SUMMARY

The Board has been presented with only one lawful and reasonable proposal to govern
the future terms under which CN will host Amtrak services – CN’s proposal. That proposal
appropriately balances both the interests of Amtrak’s passengers and the interests of the nation’s
freight rail customers and the many businesses that rely on them. It accommodates Amtrak’s
new emphasis on ASOTP by proposing modest schedule modifications for its key services that
can increase ASOTP to above 80% without significant additional disruption of freight service or
capital investment by Amtrak. In addition, CN’s proposal would add further checkpoints where
they make sense, improve the efficiency and fairness of the incentive/penalty provisions, and
better align the compensation Amtrak pays for CN’s services with the incremental costs
generated by Amtrak’s demands.

By contrast, Amtrak's proposals are one-sided and inconsistent with both CN's legal rights and the public interest in a reasonable, balanced and efficient transportation policy. Combining unrealistic schedules, unreasonable performance standards, and huge new penalties for lawful conduct by CN, they would deny CN its statutory right to incremental cost compensation and even require CN to pay Amtrak for hosting Amtrak.

Amtrak's proposals rest on a misconception of the relationship between itself and CN as its host carrier. They treat Amtrak as if it owned CN's lines or at least had purchased a right to exclusive reserved capacity on CN's lines, entitling it to ignore any concerns about capacity constraints or freight or commuter rail operations. Amtrak thus asserts a right to maintain whatever schedules it wants and to have the Board set whatever performance standards Amtrak demands, without regard to the realities of capacity constraints or the operations of CN and commuter rail carriers. Moreover, it disavows compensating CN even for the incremental costs it would impose through its capacity consumption, leaving it free, as it seeks to do in this proceeding, to set unachievably high service standards, which it would then enforce with enormous net penalties.

Under the statutory provision that governs this proceeding (49 U.S.C. § 24308), however, Amtrak is a tenant, albeit one with a statutory right, enforceable by the Board, to run its passenger trains on CN's railroad and to be accorded preference in dispatching, so long as (but only so long as) it pays at least CN's incremental costs of hosting it, so that CN is no worse off financially than if Amtrak were not its tenant. But Amtrak did not pay for, and does not own, CN's rail lines or exclusive reserved capacity on those lines. Further, Amtrak's right of preference does not create ownership rights for Amtrak and thus does not impose on CN any

duty to add or maintain infrastructure to accommodate Amtrak or to curtail or limit the volume of its freight operations..

Amtrak claims its unbalanced proposals are justified based on the “public bargain” struck 48 years ago in the Rail Passenger Service Act (“RPSA”). But the RPSA was expressly intended to achieve a “balanced transportation system” that serves both freight and passenger interests and, thus, the overall public interest.¹ Its public bargain involved certain freight railroads making large lump sum payments to Amtrak in exchange for Amtrak taking over their passenger common carrier obligations. It did not, as Amtrak suggests, impose ongoing uncompensated performance obligations on freight railroads without regard to their feasibility, to their costs, or to more efficient ways in which Amtrak’s on-time performance goals may be achieved.

Amtrak seeks support in the “goals” Congress assigned to Amtrak. But its failure to take responsibility for those goals is at the root of this dispute. Congress directed Amtrak to aim for high ASOTP (under 49 U.S.C. § 24101(c)(4)) in conjunction with “implement[ing] schedules . . . that can be achieved with a degree of reliability” (under 49 U.S.C. § 24101(c)(6)). Realistic, achievable schedules are the key to achieving on-time performance that satisfies passengers without severely restricting freight operations in a way that harms shippers. CN has shown that high ASOTP could be achieved at modest cost with modest schedule adjustments. But Amtrak insists that the Board “reject any attempts to coerce Amtrak to lengthen its schedules.”² It then seeks to shift the entire responsibility for achieving high ASOTP onto CN, by means of penalty schemes that would compel CN to incur huge freight delay costs and severely curtail its freight operations.

¹ Pub. L. No. 91-518, 84 Stat. 1327, § 101 (1970).

² Amtrak Br. at 41.

Amtrak's proposals are also flatly inconsistent with the compensation requirements of the RPSA. For over 40 years, Amtrak, its hosts, the Board, and its predecessor the ICC, have recognized that any obligation CN has to host Amtrak, or to help Amtrak achieve its goals, is contingent on Amtrak paying full incremental costs as a floor to compensation, and that insofar as penalties and performance payments may be included in an operating agreement, that floor should be protected through a "lookback" provision that limits penalties to offsetting performance payments over a period. Both Amtrak proposals violate this basic legal requirement. They depend on eliminating the lookback protection and, at any reasonable and realistic level of performance, they would impose large net penalties on CN that would reduce its aggregate compensation far below the statutory and constitutional floor of incremental cost, and potentially compel CN to pay Amtrak for hosting Amtrak.

In addition, contrary to the RPSA's "incremental cost" standard, Amtrak proposes to deny CN compensation for CN's incremental costs of freight train delays due to Amtrak's use of CN's lines. Freight delay costs fall within the plain meaning of the statute: CN is entitled to recover from Amtrak all the costs that it would not incur if it were not hosting Amtrak, so that the hosting obligation does not impose a direct financial loss on CN. Amtrak asserts qualifications to the requirement of incremental cost compensation, but those qualifications have no support in the text of the statute, the legislative history, or precedent. Amtrak also argues that that CN should be denied compensation when Amtrak trains delay CN freight trains, because CN controls operations on its rail lines.³ But in doing so, it again ignores the fact that CN, not Amtrak, owns the rail lines. It might in theory be true that CN could achieve high ASOTP for Amtrak under current schedules, and avoid freight delay costs directly attributable to individual

³ See, e.g., *Amtrak Br.* at 9, 83-87.

Amtrak trains, by effectively creating a huge bubble around Amtrak's trains in which CN forgoes its right to provide freight service. But even assuming CN could do so consistent with its legal obligations to shippers, as the owner of railroad lines it built (without any capital contribution from Amtrak), CN has no obligation to do so, and it would be contrary to the public interest to impair freight service in that way.

This is a watershed case. Amtrak has stated that if its proposals are adopted in this proceeding it will use them as a precedent in dealing with its other freight rail hosts. Its proposals, however, are extreme, unprecedented, and unlawful, and they represent a direct threat to maintaining a robust, efficient freight rail transportation system. The Board should reject them, and adopt instead CN's balanced and reasonable proposal.

ARGUMENT

Section I, below, elaborates on two fundamental flaws common to both of Amtrak's proposals: (A) they are premised on requiring that CN achieve 80% ASOTP for Amtrak under schedules that are not realistically compatible with that goal; and (B) they rely on imposing huge net penalties on CN, which would violate CN's statutory and constitutional rights to the "floor" of net incremental cost compensation. Section II demonstrates that in relying on the "public bargain" of 1970 and the supposed "incorporat[ion]" of Amtrak's statutory goals as standards the Board should impose on CN, Amtrak misreads the relevant law and history, and fails to support the one-sided approach to the Board's role that it advocates. Section III (and the Appendix) compare the parties' specific proposals regarding performance payments and penalties, explaining why the KOTP system should be retained and CN's proposals improve it. Section IV rebuts Amtrak's arguments against compensating CN for its incremental freight delay costs. Section V rebuts Amtrak's arguments against CN's schedule proposals. Finally, Section VI addresses the remaining points in dispute between the parties.

**I. AMTRAK’S PENALTY-BASED PROPOSALS MUST BE REJECTED
BASED ON TWO FATAL FLAWS.**

Amtrak offers two alternative proposals,⁴ but they are, at their core, similar, and they are similarly flawed in two key respects. First, both proposals impose unreasonably high performance standards on CN in an effort to ensure that Amtrak achieves 80% ASOTP while retaining outdated schedules under which 80% ASOTP is not realistically achievable. Amtrak abdicates its responsibility to implement realistic schedules – the key to achieving high ASOTP efficiently – and seeks to shift the entire burden of achieving high ASOTP onto CN, thereby imposing huge costs on CN and its freight customers, contrary to the public interest.

Second, both of Amtrak’s proposals rely on the threat – and, given their unrealistically high performance standards, practical certainty – of huge net penalties to motivate CN. By imposing huge penalties (for lawful conduct), and by eliminating the lookback protection against penalties that exceed performance payments, they would reduce CN’s net compensation far below its incremental costs, in violation of the RPSA and the Constitution. Indeed, they would likely result in compelling CN to make a windfall net payment to Amtrak while also being coerced to host it – a patently unlawful, unfair, and unreasonable result.

A. Amtrak Unreasonably Demands High ASOTP With Outdated Schedules Under Which High ASOTP Is Not Reliably Achievable, Even Though CN Has Proposed An Improved Schedule That Can Achieve High ASOTP Without Infrastructure Investment.

If CN does not achieve performance levels Amtrak deems consistent with Amtrak achieving 80% ASOTP, Amtrak’s proposals would penalize CN, even though Amtrak has rarely

⁴ That is, the “Initial Proposal,” made in Amtrak’s Opening Statement and based on Host-Responsible Delay (“HRD”), and the “Rebuttal Proposal,” based on Contractual On-Time Performance (“KOTP”) and offered in Amtrak’s Rebuttal Submission as an alternative to its Initial Proposal.

achieved 80% ASOTP on the services in question or, indeed, on most of its hosted services nationwide. Amtrak's principal basis for claiming that it is entitled to such penalties is Amtrak's own goal of high ASOTP, set for it by Congress in 49 U.S.C. § 24101(c)(4).⁵ But Congress instructed Amtrak to aim for ASOTP that is as high as "feasible," not specifically 80%. And it gave Amtrak that instruction in conjunction with another goal, set forth in 49 U.S.C. § 24101(c)(6), which instructs Amtrak to set public schedules that "can be achieved with a degree of reliability."⁶ Amtrak misreads its own responsibility to achieve ASOTP as high as "feasible" as a duty CN owes to Amtrak, and it refuses to discharge its further responsibility to set schedules under which high ASOTP is, in fact, feasible.

As CN explained in its Opening Brief, what OTP level is feasible and what public timetables are achievable and reliable necessarily depends on available infrastructure, traffic levels, passenger schedules, operating equipment and operating conditions necessary to ensure safety.⁷ For Amtrak's two largest services hosted by CN, it is infeasible and contrary to the public interest to compel CN to achieve 80% ASOTP under Amtrak's current schedules and given current infrastructure. Achieving 80% ASOTP would require schedule changes or additional infrastructure investment, especially under current conditions where safety necessitates speed restrictions and axle requirements to ensure that Amtrak's single-level equipment shunts the circuit sufficiently. Congress did **not** mandate the achievement of 80% ASOTP using outdated schedules not designed for ASOTP, and it did not authorize coercing freight railroads, under threat of penalties, to achieve that unreasonable goal.

⁵ See, e.g., CN Br. at 5, 9, 22, 41, 75-76, 80-81.

⁶ 49 U.S.C. § 24101(c)(6).

⁷ See *generally* CN Br. at 28-29, 34-35.

As CN has demonstrated, the realistic scheduling Congress instructed Amtrak to achieve is the key – the only cost effective and feasible solution given Amtrak’s budget constraints and lack of capital to invest infrastructure – to Amtrak’s goal of high ASOTP. Realistic schedules that take into account actual real-world realities – including accurate pure run-times, recovery times sufficient to accommodate train meets that inevitably occur given real-world traffic levels and infrastructure constraints – “can” and most likely will “be achieved with a degree of reliability”⁸ such that trains will consistently arrive at “all station stops within 15 minutes of the time established in public timetables.”⁹ And, as CN further showed, that can be achieved with modest schedule adjustments that have relatively modest costs for the parties and may well benefit Amtrak’s passengers by making Amtrak’s public timetables more accurate and reliable and their trip times more predictable. Moreover, such modest schedule adjustments would not necessarily increase the actual trip times, since a train that arrives half an hour late under a short schedule does not get a passenger to the destination any sooner than an on-time train under a schedule that is half an hour longer.¹⁰

Section V, below, rebuts the specific arguments Amtrak raises against CN’s schedule proposals. But underlying Amtrak’s arguments is an unprincipled approach. Amtrak insists that 49 U.S.C. § 24101(c)(4)’s call for high levels of on-time performance is a basis for the Board to impose substantial penalties on CN that result in Amtrak paying less than incremental costs. Yet Amtrak simultaneously suggests that 49 U.S.C. § 24101(c)(6)’s goal of adopting schedules that are achievable and reliable, which plainly imposes a responsibility on Amtrak as the publisher of

⁸ 49 U.S.C. § 24101(c)(6).

⁹ 49 U.S.C. § 24101(c)(4).

¹⁰ *See generally* CN Br. at 34-42; *see also* Section V, below.

its own schedules, is outside the Board's authority under 49 U.S.C. § 24308 to prescribe reasonable terms and conditions. Amtrak insists that the Board "should reject any attempts" to lengthen its schedules,¹¹ even if the PRT is insufficient.¹²

Amtrak seeks to justify placing the entire burden of achieving high ASOTP on CN based on the claim that high ASOTP "is largely within the host railroad's power."¹³ But it is not. As CN has demonstrated repeatedly, high ASOTP depends critically on the schedule. Amtrak has the power to achieve high ASOTP in an efficient, low-cost manner through modest schedule changes, but, pending the Board's decision, it has chosen, instead, to exercise the power of veto over such changes. With unrealistic schedules (and no infrastructure investment), that choice by Amtrak unnecessarily creates a situation in which high ASOTP cannot be achieved (if it can be achieved at all) without CN undertaking massive costs, and its shippers potentially suffering severe impairment to freight service. And that is, in effect, what Amtrak's proposals demand.

Nothing in the RPSA justifies Amtrak's approach. Congress instructed Amtrak to "cooperat[e]" with its hosts,¹⁴ in aid of a "balanced transportation system."¹⁵ It did not authorize Amtrak to slough its responsibilities onto its hosts. Nor did Congress authorize the Board to create a punitive regulatory scheme to compel freight railroads to undertake unreasonable and uncompensated costs for Amtrak's benefit.

¹¹ Amtrak Br. at 41.

¹² *See id.* at 47.

¹³ Amtrak Br. at 9.

¹⁴ 49 U.S.C. § 24101(a)(4).

¹⁵ Pub. L. 91-518, § 101, 84 Stat. 1327, 1328 (1970).

B. Amtrak's Proposals Are Premised On Eliminating The Lookback Protection To Generate Net Penalties, But That Would Deprive CN Of The Floor Of Incremental Cost Compensation Required By The RPSA.

CN has demonstrated that the lookback provision of the current Operating Agreement, which prohibits penalties in excess of performance payments over time, is required by the RPSA and the Takings Clause so that CN is not compelled to host Amtrak without being compensated for at least its incremental costs.¹⁶ Amtrak's two proposals, however, are premised on eliminating the lookback provision and designed to generate massive penalties.

Amtrak's proposals set unrealistic, unreasonably high performance standards, and would thus deprive CN of any realistic opportunity to earn substantial performance payments.¹⁷ Employed in conjunction with the requisite lookback provision, they would eliminate CN's financial incentives under the contract to perform well. CN could not realistically earn performance payments, and, due to the lookback provision, could not incur penalties, since there would be no performance payments against which to count them.

Incentive provisions as heavily weighted towards penalties as Amtrak's are either unlawful (without lookback) or ineffectual (with lookback). There is no precedent for such a scheme in Amtrak's prior agreements or the Board's or the ICC's orders, and the Board should not adopt it here.

1. Amtrak's penalty-based approach relies on eliminating the lookback protection.

Under the existing Operating Agreement, CN earns substantial performance payments when it provides high quality, timely service as defined in the operating agreement (KOTP). Symmetrically, CN incurs substantial penalties when it provides low quality, untimely service.

¹⁶ See generally CN Br. at 43-57.

¹⁷ See CN Br. at 116-117; 137-139.

As CN's witnesses explained, the "{ [REDACTED]
[REDACTED]
[REDACTED] }"18

CN has generally earned performance payments under the existing Operating Agreement. When CN has incurred penalties, they have generally not been affected by the lookback provision, since CN has earned enough performance payments over the prior 12 months to ensure that the penalties did not trigger the lookback provision's protection against net negative incentive payments.¹⁹ Thus, as Amtrak concedes, the lookback provision has not significantly affected CN's incentives under the current Operating Agreement.²⁰

Despite that fact, Amtrak has identified the elimination of the lookback provision as the most critical change it seeks to make in the current Operating Agreement.²¹ By proposing to eliminate the lookback provision, Amtrak seeks to impose net penalties on CN as host. Amtrak's proposals would, contrary to the RPSA, compel CN to pay Amtrak to operate on CN's lines. As CN demonstrated in its Opening Brief:

- Amtrak's Initial Proposal would have generated net penalties of over \$13 million per year based on CN's historical performance.²² It would generate comparably large, and in some cases larger, net penalties if it were applied to other host railroads, including Amtrak itself, on the multi-host services at issue in this proceeding.²³

¹⁸ Ladue/Kuxmann VS at 18; *see also* Morehouse VS at 18 (CN "uses the performance payments earned under the agreement as a benchmark to assess our success").

¹⁹ *See* Ladue/Kuxmann VS at 26 ("CN's desire to avoid further penalties" spurred CN to improve its performance following a brief decline in February 2014).

²⁰ *See* Amtrak Br. at 32 n.90.

²¹ *See* Vilter VS at 2.

²² *See* CN Br. at 137.

²³ *See id.* at 139.

- Amtrak’s Rebuttal Proposal would have generated net penalties of almost \$4.5 million if it had applied during 2016 – a year in which CN earned substantial incentives under the existing performance standards agreed to by the parties.²⁴

Amtrak’s proposals ostensibly provide for hosts to earn performance payments as well as incur penalties. For most services, however, Amtrak’s proposed penalty zone would encompass the entire range of likely performance. For example, on the Illini/Saluki service, CN has not been able to reduce delays Amtrak counts as host responsible delay (“HRD”) below Amtrak’s proposed standard of 432 minutes per 10,000 miles,²⁵ which equates to just 13.2 minutes per 307-mile trip.²⁶ CN could not do so even if it eliminated all freight train interference (“FTI”).²⁷

Accordingly, under Amtrak’s proposals, performance payments do not offer a meaningful and effective incentive for CN. Amtrak’s proposals instead rely on net penalties to incentivize CN, but such net penalties are inconsistent with the statutory incremental cost compensation floor and are appropriately prohibited over time by the lookback provision. Simply put, the structure of Amtrak’s proposals is inconsistent with, and fundamentally undermined by, the statutory requirement that hosts be paid no less than their incremental costs of hosting Amtrak.

2. Eliminating the lookback provision would violate 49 U.S.C. § 24308(a)(2).

Amtrak’s proposal to rely on net penalties without a lookback provision is unlawful. The RPSA prohibits penalties that reduce the host’s compensation below the statutory (and constitutional) floor of full incremental cost recovery.²⁸ The statutory text is clear: the Board

²⁴ See *id.* at 117.

²⁵ See CN Br. at 133.

²⁶ See *id.* at 134.

²⁷ See *id.*

²⁸ See CN Br. at 53-57.

“shall consider quality of service as a major factor when determining whether, and the extent to which, the amount of compensation shall be **greater than** the incremental costs of using the facilities and providing the services.”²⁹ So is the legislative history: the 1973 amendment adding this language was “intended to provide . . . a **floor** for the compensation to be paid a railroad for services performed.”³⁰ The Board, the ICC, and the courts have repeatedly affirmed that incremental cost represents the minimum net payment Amtrak must make to a host railroad under the RPSA.³¹ And Congress’s designation of incremental cost as the “floor” was essential to satisfy the Takings Clause and fundamental principles of fairness by ensuring that hosts will not be compelled to cede physical access and control over their private property to Amtrak without just compensation.³²

Over four decades of practice and precedent in the commercial and operating relationships between Amtrak and its host carriers, lookback provisions have ensured that Amtrak pays no less than the incremental cost for access to private freight tracks. When the agency has considered penalties, it has made clear that penalties may offset performance payments earned by the host carrier, but may not reduce compensation below incremental cost. In 1976, the ICC adopted a performance payments and penalties system that included a penalty

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

³⁰ H.R. Rep. No. 93-415, at 11 (1973) (emphasis added); CN Br. at 46-47.

³¹ CN Br. at 48-49; see also *Nat’l R.R. Passenger Corp. & Consol. Rail Corp.—Application Under Section 402(a) of the Rail Passenger Service Act for an Order Fixing Just Comp.*, 10 I.C.C.2d 863, 864 (1995) (“*Conrail*”) (“If the Commission is asked to set compensation, the compensation must cover at least the incremental MOW costs that Amtrak’s trains cause to the other railroad.”); *Nat’l R.R. Passenger Corp. v. ICC*, 610 F.2d 865, 880 (D.C. Cir. 1979) (“There is no legislative intent that would justify forcing a railroad to accommodate Amtrak operations without the recovery of at least its incremental costs.”).

³² See CN Br. at 49-52 (explaining that it would be unconstitutional under the Takings Clause to compel a freight railroad to cede control over its private property to allow Amtrak physical access without Amtrak paying, at a minimum, full incremental costs).

“for lost time on late-delivered trains,” but the agency limited that penalty to offsetting performance payments earned “for recovered time on late-delivered trains.”³³ It explicitly rejected any provision for “penalties [that] could cause the railroad to operate the service at a loss unless the incremental cost level were set as a minimum level of payment.”³⁴

In 1977, Amtrak negotiated the first of its “Second Amendment Agreements” with hosts, adopting a KOTP system with performance payments for KOTP in excess of 80%, penalties for KOTP below 70%, and a 12-month lookback provision.³⁵ For more than 40 years since, that structure, including the lookback, has been in operation throughout most of Amtrak’s services, as the current Operating Agreement terms for the IC Services exemplify. And the ICC approved that structure, including the lookback provision, in the *Metro-North* case in 1985. In that case, Amtrak itself explained, and the ICC agreed, that the standard 12-month lookback provision is appropriate:

Penalties may not exceed the amount of incentives earned by the railroad in connection with the operation of all Amtrak trains in the preceding 12 months, so over time there is no risk that a railroad could ever receive less than its avoidable costs in connection with the operation of Amtrak trains.³⁶

Despite having used the lookback provision for decades and having successfully advocated for it in *Metro-North*, Amtrak has lists the lookback provision among the features of

³³ *Amtrak and Texas & Pac. Ry., Use of Tracks & Facilities & Establishment of Just Compensation*, 348 I.C.C. 645, 672 (1976) (“*T&P*”), *pet. for review denied sub nom. Nat’l R.R. Passenger Corp. v. ICC*, 610 F.2d 865 (D.C. Cir. 1979).

³⁴ *Id.*

³⁵ See U.S. Gen. Acctg. Office, REPORT TO CONGRESS: FURTHER IMPROVEMENTS ARE NEEDED IN AMTRAK’S PASSENGER SERVICE CONTRACTS, BUT THEY WON’T COME EASILY 9 (Jan. 7, 1981), *available at* <https://www.gao.gov/assets/140/131567.pdf> (“1981 GAO Report”).

³⁶ *National Rail Passenger Corp. Application Under Section 402(a) of the Rail Passenger Service Act*, FD No. 30426 (ICC served July 15, 1985), slip op. at 12.

KOTP agreements that it alleges “conflict[] with the statutory framework.”³⁷ It offers no authority in support of that claim, which conflicts with the statute’s text and legislative history, and with *Metro-North*. Amtrak’s Opening Brief simply disregards the statutory and constitutional mandates for maintaining incremental cost as the “floor” of minimum host compensation, and dismisses the more than 40 years in which lookback provisions have been included both in negotiated agreements between Amtrak and host carriers and in terms prescribed by the Board or the ICC.

Amtrak claims that it should be able to pay less than incremental costs to impose penalties on hosts for allegedly poor performance, citing 49 U.S.C. § 24308(a)(1), which states that “terms on which the parties agree . . . shall include a penalty for untimely performance.”³⁸ By its terms, however, that provision applies only to voluntary agreements. As Amtrak concedes, there is no requirement that penalties be imposed in Board orders prescribing terms, which are, instead, governed by 49 U.S.C. § 24308(a)(2).³⁹ The RPSA imposes only one requirement concerning the Board’s prescription of reasonable compensation in the event that host carriers and Amtrak cannot agree – incremental cost must be maintained as a floor for host compensation. While the Board may provide for reasonable penalties in “prescrib[ing] reasonable terms and compensation” under 49 U.S.C. § 24308(a)(2)(A)(ii), it must adhere to the incremental cost compensation floor specifically imposed by 49 U.S.C. § 24308(a)(2)(B). That is precisely the function of a lookback provision.

³⁷ Amtrak Br. at 38; *see also id.*, App. A-2.

³⁸ *See* Amtrak Br. at Appx.A-2.

³⁹ *See* Amtrak Br. at 15. *See also id.* at 5 (listing the principles Amtrak contends apply in a Board proceeding, with no reference to penalties).

Amtrak cites not a single Board or ICC decision – nor, for that matter, a voluntary agreement – that subjected a host to a risk of net penalties without lookback protection. Amtrak cites two cases – *Metro-North* and *Guilford* – in which the Board/ICC prescribed penalties (along with performance payments).⁴⁰ But, as noted above, the prescribed terms in *Metro-North* included Amtrak’s standard 12-month lookback provision, which is substantially identical to the one contained in the current Operating Agreement and CN’s proposal.⁴¹ And in *Guilford*, the Board adopted a performance payment and penalty provision that was “similar to Amtrak’s agreement with other freight railroads” {{ [REDACTED] }}.⁴² The cases cited by Amtrak confirm that lookback is customary under negotiated agreements and ICC/Board precedent, supported by overwhelming authority, and entirely consistent with meaningful penalty provisions in the context of a reasonable, balanced system for performance payments and penalties.

3. Maintaining the lookback is in the public interest and consistent with reasonably balanced performance payment and penalty provisions.

Even if it were lawful to eliminate lookback in the context of Amtrak’s proposals, which it is not, Amtrak provides no valid economic or public policy argument for doing so. Amtrak

⁴⁰ Amtrak Br. at 15.

⁴¹ See *Metro-North*, slip op. at 12. Amtrak’s Opening Brief cited the Second Circuit’s decision in *Metro-North*, but that decision contains no discussion of penalties, so Amtrak likely was referring to the underlying ICC decision.

⁴² *Guilford*, 3 S.T.B. at 168. {{ [REDACTED] }}

argues that the current KOTP system “needs to be replaced because it does not adequately motivate CN to provide quality service to Amtrak and its passengers and unjustly rewards CN for poor quality service,”⁴³ and that substantial penalties are necessary “to act as an effective deterrent to CN from providing untimely service.”⁴⁴ But, as CN has shown, Amtrak has failed to establish the factual premise of its deterrence argument. Amtrak has not shown that CN provides “poor quality service,” and it has not shown that “timely service,” which Amtrak defines in terms of Amtrak’s 80% ASOTP benchmark, is a feasible goal given line capacity limitations, Amtrak’s outdated schedules, and Amtrak’s lack of infrastructure investment.⁴⁵ As Professor Willig explained, from the standpoint of economic incentives, the opportunity to earn performance payments and the risk of incurring penalties are equivalent.⁴⁶ The performance payment/penalty structure in the current Operating Agreement, including its lookback provision, motivates CN to perform well.⁴⁷ Amtrak’s proposed penalty-based systems would not motivate CN more efficiently than the present system; they would just produce windfall payments by CN to Amtrak, in violation of the statutory requirement that incremental cost be the floor for host compensation.

Amtrak’s penalty-oriented scheme is contrary to the public interest. As Professor Willig explains and Amtrak’s own positions reflect, if Amtrak does not internalize (*i.e.*, expect to pay for) the costs its demands generate, it will tend to make unreasonable demands – in the form, for

⁴³ Amtrak Br. at 17.

⁴⁴ *Id.* at 24.

⁴⁵ *See generally* CN Br. §§ I.B & C.

⁴⁶ Willig RVS at 25.

⁴⁷ In the unlikely event that the lookback provision comes into play and has the potential to impact incentives under CN’s proposal, effective incentives can be preserved by other means, such as the reopener provision CN has proposed. *See* CN Br. at 87-88.

example, of unrealistic schedules and performance requirements – that impose costs on CN and its shippers that are disproportionate to the benefits Amtrak’s demands for itself and its passengers. By providing for net penalties that would reduce Amtrak’s payments to CN below CN’s incremental costs, Amtrak’s proposals would shield Amtrak from internalizing the costs it generates and misalign Amtrak’s incentives with the public interest.⁴⁸

The text and legislative history of the RPSA, the Takings Clause, precedent and practice, and sound public policy all require that a performance payments and penalties system be structured to offer a reasonable, realistic prospect of net performance payments, which can be reduced by meaningful penalties, subject to a requirement that the host’s net compensation will not be reduced to less than its incremental costs. Both of Amtrak’s proposals by design eliminate the lookback and are structured to require CN pay large sums to Amtrak such that Amtrak would not be paying a minimum of incremental costs CN incurs to host Amtrak’s services. They must, therefore, be rejected.

⁴⁸ Amtrak makes a strawman argument that CN and Professor Willig seek to arrogate to themselves the “discretion to make the ‘socially optimal decision.’” Amtrak Br. at 28; *see also id.* at 30. CN’s point is, instead, that the Board should consider the public interest, and that in a statute designed to function by “agreement” between the parties, aligning Amtrak’s incentives better with the public interest would help achieve outcomes in the public interest.

While Amtrak’s argument is a strawman, it touches on a central disagreement between the parties. CN believes that the public interest, including interests affected by costs imposed by Amtrak, should be considered in setting Amtrak schedules and performance demands. Based on the “public bargain” argument discussed in the next Section, however, Amtrak contends that the Board should not even consider the possibility of Amtrak modifying its schedules or running fewer trains, *see* Amtrak Br. at 41, 94, and that Amtrak should have unilateral “discretion to establish the target level of service” that CN must achieve to avoid penalties, *id.* at 26, without compensating CN for doing so and without regard to CN’s costs. A pervasive flaw in Amtrak’s arguments is its insistence that its own goals override any consideration of what is reasonable or in the public interest. *See, e.g., id.* at 76.

II. AMTRAK’S AHISTORICAL ARGUMENT ABOUT A GENERAL “PUBLIC BARGAIN” IN 1970 CANNOT OVERRIDE THE PLAIN MEANING OF THE STATUTE THAT CLEARLY GOVERNS THIS PROCEEDING.

A. Section 402 Governs This Proceeding And Requires the Board to Prescribe Reasonable Terms and Compensation Rather Than Engaging In One-Sided Intervention On Amtrak’s Behalf.

This proceeding is governed by Section 402 of RPSA, as amended, codified at 49 U.S.C. § 24308. Section 402(a) calls for an “agreement” to be reached between two independent railroad carriers – here, Amtrak and CN. Each carrier has its own rights and obligations, and its own goals, which are imbued with the public interest. Amtrak’s goals are set by Congress in 49 U.S.C. § 24101 and focus on passenger service. CN’s goals focus on freight service and are informed by Congress’s Rail Transportation Policy (49 U.S.C. § 10101) and the common carrier obligation to provide freight rail transportation upon reasonable request (49 U.S.C. § 11101). Congress expected each carrier to pursue its own goals in negotiations aimed at reaching an “agreement.” That agreement will necessarily reflect the parties’ legal rights:

- (1) CN’s property and constitutional rights;⁴⁹
- (2) Amtrak’s rights to use CN’s facilities and services,⁵⁰ and to be accorded preference in dispatching;⁵¹ and
- (3) CN’s rights to be paid at least its incremental costs of hosting Amtrak,⁵² and to be relieved of the preference requirement if preference “materially will lessen the quality of freight transportation provided to shippers.”⁵³

⁴⁹ See CN Br. at 49-52.

⁵⁰ 49 U.S.C. § 24308(a)(1).

⁵¹ 49 U.S.C. § 24308(c).

⁵² 49 U.S.C. § 24308(a)(2)(B), (a)(3).

Subject to those legal parameters, Congress directed the parties to attempt to reach a negotiated agreement, which would inevitably reflect a compromise – and thus, a balance – between Amtrak’s passenger goals and CN’s freight goals. When things go according to the congressional plan, there is no need for regulatory intervention by the Board.

Amtrak contends, however, that when the parties fail to agree – a state of affairs that Amtrak can create unilaterally, as it did here, by halting negotiations with its host – the Board is assigned a new “mission to ‘carry out’ the precepts of 49 U.S.C. §§ 24101 *et seq.*”⁵⁴ Amtrak asserts that when Amtrak declines the host’s proposal and seeks a prescription from the Board, the Board’s authority in 49 U.S.C. § 24308 to prescribe “reasonable terms and compensation for using the facilities and providing the services” is circumscribed by Amtrak’s mission and goals in 49 U.S.C. § 24101, including specifically the following:

(1) “The mission of Amtrak . . . to provide efficient and effective intercity passenger rail mobility consisting of high-quality service that is trip-time competitive with other intercity travel options . . . ,” and Amtrak’s statutory goal to “operate Amtrak trains, to the maximum extent feasible, to all station stops within 15 minutes of the time established in public timetables,” are transmuted into a “mission” of the Board to compel Amtrak’s host, by threat of financial penalties and without additional compensation, to enable Amtrak to achieve those results; and

(2) Amtrak’s statutory goals to “use its best business judgment” to “improv[e] its contracts with operating rail carriers,” and to “encourage rail carriers to assist in improving

⁵³ 49 U.S.C. § 24308(c).

⁵⁴ *See, e.g.,* Amtrak Br. at 5, 75.

intercity rail and passenger transportation,” are transmuted into a “mission” for the Board to impose on the host terms that are “improved” for Amtrak, at the host’s expense.

Amtrak does not identify any limits to the Board’s supposed “mission” to “improve [Amtrak’s] contract[]” with CN, so Amtrak’s argument appears to amount to interpreting Section 402 as instructing that if Amtrak declines to reach an agreement with a host, the Board shall impose on the host whatever terms Amtrak wants.⁵⁵ Amtrak’s interpretation treats the express statutory requirement that the Board prescribe “reasonable terms and compensation”⁵⁶ as divorced from any notion that reasonableness reflects the rights, goals and interests of both parties to the agreement. Instead, in Amtrak’s view, “reasonable” becomes mandate for a one-sided agreement: “Any award of compensation that conflicts with, or prevents Amtrak from accomplishing, its statutory goals and mission should not be considered ‘reasonable.’”⁵⁷

Amtrak’s argument is inconsistent with the RPSA and the public interest. **First**, nowhere in the RPSA did Congress require the Board carry out the “mission” and “goals” Congress assigned to Amtrak as a federally chartered corporation in 49 U.S.C. § 24101(b) and (c). Amtrak relies on the preconditions to Board action Congress set in 49 U.S.C. § 24308(a)(2)(A): “If the parties cannot agree and if the Surface Transportation Board finds it necessary to carry out this part”⁵⁸ It suggests that the phrase “necessary to carry out this part” “incorporate[s]”

⁵⁵ See generally Amtrak Br. at 5, 75-76; see also *id.* at 41, 94 (suggesting that Amtrak’s decisions on number of trains and schedule should be beyond review) and 26 (suggesting that Amtrak should “have the discretion to establish the target level of service” below which it collects penalties from CN).

⁵⁶ 49 U.S.C. § 24308(a)(2)(A)(ii).

⁵⁷ Amtrak Br. at 76.

⁵⁸ See Amtrak Br. at 41 & n.118.

selected Amtrak goals into the Board’s mandate.⁵⁹ But the language Amtrak relies on merely sets preconditions to the Board’s task of “prescrib[ing] reasonable terms and compensation.” It does not assign the Board an additional – and inconsistent – task of achieving Amtrak’s assigned corporate goals for it. Moreover, the current language on which Amtrak relies – “carry out this part” – is the result of a 1994 codification that was expressly not intended to effect a substantive change in the RPSA.⁶⁰ The language previously read “carry out the purposes of this Act.”⁶¹ The purposes of the RPSA were set out expressly in Section 101 of the 1970 Act (“Findings and declaration of purpose”). They did not include the goals on which Amtrak relies, some of which were enacted later. Instead, they entailed Amtrak becoming “part of a balanced transportation system.”⁶²

Second, Amtrak’s argument is inconsistent with the structure of Section 402, in which Congress expressed a clear preference for an agreement – a well-founded preference given the parties’ expertise in the railroad operations at issue, their ability to make situationally appropriate trade-offs that are mutually beneficial, and the inefficiency, costs, and uncertainties of regulatory litigation. Consistent with that preference, it makes sense for the Board to have a fall-back, arbitral role of prescribing “terms and compensation” to which “reasonable” parties in Amtrak’s and CN’s positions, with their respective rights and goals, would agree.. Under Amtrak’s theory, however, the Board should place a huge thumb on the scales in Amtrak’s favor. As a result,

⁵⁹ *See id.* at 94.

⁶⁰ Pub. L. No. 103-272, § 6(a), 108 Stat. 745, 1378 (1994) (codification “may not be construed as making a substantive change in the laws replaced”).

⁶¹ Pub. L. No. 91-518, 84 Stat. 1327, § 402(a).

⁶² Pub. L. No. 91-518, 84 Stat. 1327, § 101. The “balanced” approach of the RPSA is, of course, consistent with the emphasis in the national Rail Transportation Policy on avoiding excessive regulation and promoting a safe, efficient, and economically sound freight rail system. *See generally* 49 U.S.C. § 10101.

Amtrak would have no incentive to reach a voluntary agreement since by litigating instead, it could recruit the Board to “improv[e]”⁶³ any agreement in its favor. Acceptance of Amtrak’s view would make Congress’s agreement-based design ineffectual, and would lead – as Amtrak has signaled in discussing the use of this case as a precedent⁶⁴ – to replacing balanced agreements with a new regulatory mandate imposed by the Board through litigation.

Third, Amtrak ignores the RPSA’s clear definition of “reasonable” compensation as requiring the Board to include the host’s “incremental costs” plus, potentially, “greater” compensation depending on “quality of service.”⁶⁵ Compensation cannot be “reasonable” unless it provides CN with at least a floor of full incremental cost recovery. “Quality of service” is relevant only to compensation “greater” than that floor; it is not a basis for reducing compensation below that floor.⁶⁶ That direct statutory requirement governs these proceedings, and it cannot be superseded by Amtrak’s references to its own general goals.

Fourth, Amtrak quotes findings under Section 101 of the RPSA that “modern, cost-efficient” passenger service (to be provided by Amtrak) is “a necessary part of a balanced transportation system.”⁶⁷ But Amtrak ignores the central part of that finding and declaration of purpose: Congress did not seek efficient passenger service as a paramount goal to the exclusion

⁶³ 49 U.S.C. § 24101(c)(1)(D).

⁶⁴ See National Railroad Passenger Corporation’s Reply to Petitions to Intervene & Comments at 4 (filed Feb. 28, 2014).

⁶⁵ 49 U.S.C. § 24308(a)(2)(B).

⁶⁶ The ICC made clear its understanding of that instruction in the 1994 report Amtrak quotes (Amtrak Br. at 8 & n.6): it stated that its role was to “evaluate ‘quality of service’ issues in setting a fair trackage rights compensation **above** incremental costs.” Interstate Commerce Commission, STUDY OF INTERSTATE COMMERCE COMMISSION REGULATORY RESPONSIBILITIES PURSUANT TO SECTION 210(A) OF THE TRUCKING INDUSTRY REGULATORY REFORM ACT OF 1994, 1994 WL 639996, *41 (1994) (“1994 ICC Study”) (emphasis added).

⁶⁷ Pub. L. No. 91-518, 84 Stat. 1327, § 101, quoted in Amtrak Br. at 22.

of other goals, but instead, as “part of a **balanced** transportation system.” In fact, Congress has consistently recognized that balance between passenger and freight interests is necessary to serve the public interest:

- Even before the RPSA, Congress provided, in § 13a(1) of the Interstate Commerce Act, for discontinuance of passenger service unless continuance were shown to be in the public interest after weighing, as a major factor in the public interest cost-benefit analysis, any avoidable loss incurred by the hosting freight railroad;
- In the 1970 RPSA, Congress mandated a public interest determination by the Secretary of Transportation, to be made after consultation with freight railroad representatives, of the appropriate scope of the Amtrak “basic system,” based on consideration of “the relationship of public benefits of given services to the costs or providing such services.”⁶⁸ Congress authorized Amtrak to go beyond the “basic system” only if “consistent with prudent management,”⁶⁹ and to discontinue services within the basic system that “are not required by public convenience and necessity, or will impair the ability of [Amtrak] to adequately provide other services.”⁷⁰
- When it granted Amtrak preference in 1973, it qualified the grant by providing that the ICC (now, the Board) may “order otherwise” if passenger transportation “materially will lessen the quality of freight transportation provided to shippers.”⁷¹
- In the Rail Transportation Policy (“RTP”) (originally enacted as part of the Staggers Rail Act of 1980⁷² and revised by the ICC Termination Act of 1995⁷³) Congress declared the policy of the United States Government to “promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board,” and to “foster sound economic conditions in transportation.”⁷⁴

⁶⁸ Pub. L. No. 91-518, 84 Stat. 1327, § 201. The GTW Services at issue in this case did not qualify for inclusion within the basic system.

⁶⁹ Pub. L. No. 91-518, 84 Stat. 1327, § 402(b).

⁷⁰ Pub. L. No. 91-518, 84 Stat. 1327, § 404(b)(3).

⁷¹ 49 U.S.C. § 24308(c).

⁷² Pub. L. No. 96-448, § 101(a), 94 Stat. 1895, 1897-98

⁷³ Pub. L. No. 104-88, § 102(a), 109 Stat. 803, 805-06.

⁷⁴ 49 U.S.C. § 10101(3), (5), (9). The Board has acknowledged its obligation under the RTP to “promote efficiency in freight service,” even while balancing the needs of Amtrak. *Policy Statement on Implementing Intercity Passenger Train On-Time Performance &*

The Board, the ICC and Amtrak have recognized repeatedly that the public interest in passenger transportation is to be balanced with – not as Amtrak now argues to be treated as paramount over – the public interest in freight transportation. The agency and Amtrak have also recognized that costs and burdens imposed by Amtrak operations must be fully taken into account:

- In the 1971 Basic Agreement with host railroads to implement the RPSA (which became the model for its operating agreements with individual host railroads), Amtrak agreed that any service modification requests it might make “shall be subject to the physical and financial capabilities of Railroad and shall give due regard to Railroad’s speed, weight and similar operating restrictions and rules and safety standards **and to the avoidance of unreasonable interference with the adequacy, safety, and efficiency of its other railroad operations.**”⁷⁵ Similar terms have been included in subsequent agreements. For example, { [REDACTED] }⁷⁷
- In the 1994 report on which Amtrak relies, the ICC explained that its role under § 402 entailed “public interest balancing” in service of “the broader public interest in maintaining both the rail freight and passenger services,” given the “inherent tension in providing passenger service and freight transportation over shared track.”⁷⁸
- In its since-withdrawn preliminary statement on Amtrak’s right to preference in *EP 728*, the Board noted, “although Congress established that Amtrak’s mission is to provide ‘efficient and effective service,’ 49 U.S.C. § 24101(b), the rail transportation

Performance Provisions of 49 U.S.C. §24308(c) & (f), Docket No. EP 728, slip op. at 3 (STB served Dec. 28, 2015) (“*EP 728*”).

⁷⁵ Basic Agreement ¶ 3.2 (emphasis added).

⁷⁶ Current Agreement § 3.1.

⁷⁷ *Id.* § 3.2.D.(1).

⁷⁸ 1994 ICC Study, 1994 WL 639996, *41 (1994).

policy also directs the Board to regulate so as to promote efficiency in freight service, 49 U.S.C. § 10101.”⁷⁹

CN and other freight carriers serve vital public interests in funding and operating the rail transportation network in North America that is vital to the functioning of the nation’s economy. Congress was well aware of what the ICC aptly described as the “inherent tension in providing passenger service and freight transportation over shared track,” and enacted the RPSA precisely to serve the public interest in freight rail service by relieving freight railroads of the burdens of devoting scarce track capacity and financial subsidies to passenger service. Balancing the interests of freight transportation and passenger transportation is both essential to the overall public interest and the animating goal of the RPSA.

Amtrak’s goals as a congressionally chartered corporation naturally focus on Amtrak and its passengers. But, as the national Rail Transportation Policy⁸⁰ reflects, the Board has broader responsibilities to serve the overall public interest, which includes freight as well as passenger rail. It should therefore reject Amtrak’s one-sided approach.

B. Amtrak’s Arguments And Proposals Rest On A Misleading Account Of The “Public Bargain” Of 1970.

Amtrak supports its proposals by reference to what it calls the “public bargain” of 1970. Amtrak’s public bargain theory amounts to two related claims.

First, Amtrak claims that in return for being relieved of their pre-1970 passenger common carrier obligations, the freight railroads took on an “ongoing” obligation to participate in “ensuring ‘fast and comfortable’ passenger transportation,” and to help Amtrak achieve its

⁷⁹ *EP 728*, Decision at 3.

⁸⁰ 49 U.S.C. § 10101.

goals.⁸¹ It further claims that this alleged 1970 bargain justifies penalizing CN, thereby reducing CN’s compensation below incremental cost, if CN’s 2018 performance “correlates” to ASOTP below 80% on services CN hosts, without regard to whether Amtrak’s 2018 schedules against which it proposes to make that judgment are reasonable and without regard to the costs to CN and its freight shippers of achieving that level of performance.⁸²

Second, Amtrak claims that Congress implemented that public bargain by “incorporat[ing]”⁸³ certain missions and goals it set for Amtrak in 49 U.S.C. § 24101 into 49 U.S.C. § 24308(a) to make the Board and host railroads responsible for Amtrak’s achievement of its statutory goals and mission.⁸⁴ Amtrak claims that the Board should not prescribe a contractual framework under 49 U.S.C. § 24308 that would incentivize a socially optimal level of freight and passenger performance in 2018, because the Board is constrained by the public bargain in 1970.⁸⁵ And Amtrak claims that the 1970 public bargain similarly precludes reconsideration of Amtrak’s schedules and number of trains in 2018 on a freight host’s lines.⁸⁶

Amtrak’s claims are incorrect.

1. The “Public Bargain” of 1970 does not oblige freight railroads to host Amtrak for less than full incremental cost.

As CN explained in its Opening Brief,⁸⁷ the 1970 RPSA contained two separate provisions addressing the mutual rights and obligations of Amtrak and freight railroads – Section

⁸¹ See generally Amtrak Br. at 7-10.

⁸² See *id.* at 21-22.

⁸³ *Id.* at 94.

⁸⁴ See *id.* at 5, 75-76.

⁸⁵ See *id.* at 28 & n.75, 79-81.

⁸⁶ See *id.* at 94.

⁸⁷ See CN Br. at 44-45; see also Amtrak Br. at 7 n.5.

401 and Section 402. Section 401 embodied a public bargain whereby, in return for a large lump sum payment to Amtrak, certain freight railroads were relieved of intercity passenger obligations. Those obligations were already limited by the right of discontinuance based on a public interest determination in which avoidable losses to freight railroads were weighed heavily under Interstate Commerce Act § 13a(1). Pursuant to that right, the railroads were already successfully “moving toward discontinuing all intercity passenger rail service.”⁸⁸ Section 402 created a separate, forward-looking regulatory regime whereby any freight railroad may be required to host Amtrak intercity passenger service, in return for “just and reasonable” compensation,⁸⁹ which was later specified in 1973 as “incremental cost” compensation plus potential additional compensation based on “quality of service.”

In Section 401, Congress required Amtrak to “tender a contract” to any freight railroad that was hosting intercity passenger service pursuant to a common carrier obligation, under which the freight railroad would be relieved immediately “of its entire responsibility for the provision of intercity rail passenger service.”⁹⁰ “In consideration” for that relief, each such freight railroad was required to pay Amtrak an amount determined by a statutory formula, designed to reflect the railroad’s savings attributable to relief from the intercity passenger common carrier obligation.⁹¹ Illinois Central, for example, ultimately paid Amtrak \$10,910,170 “[i]n consideration of its being relieved by [Amtrak] of its entire responsibility for the provision

⁸⁸ Amtrak Br. at 7; *see generally* CN Br. at 43-44.

⁸⁹ Congress’s initial reference to “just” compensation mirrors the language of the Takings Clause of the Fifth Amendment, suggesting that Congress recognized that constitutionally sufficient compensation is required under Section 402 itself.

⁹⁰ Pub. L. No. 91-518, 84 Stat. 1327, § 401(a)(1).

⁹¹ RPSA § 401(a)(2).

of Intercity Rail Passenger Service.”⁹² Assuming it was paid in 1975, even though most of the payment was due earlier under the 1971 Amtrak-IC agreement, with inflation, IC’s payment to Amtrak exceeds \$50 million in 2018 dollars.⁹³ That represented substantial consideration for relief from intercity passenger obligations. Amtrak offers no theory of why IC would have agreed to pay over \$50 million in 2018 dollars to be relieved of its intercity passenger obligation if IC could later be forced to host Amtrak in exchange for compensation less than the incremental cost of doing so and subjected to a risk of being required to make net payments to Amtrak under the rubric of “penalties,” for conduct not shown to be unlawful.

Amtrak contends that such payments were only part of the consideration required in the public bargain to remove the passenger common carrier obligations from the freight railroads:

Railroads would not be permitted to slough off the ongoing responsibilities and costs of operating passenger service without something in return. Rather, Congress imposed obligations on the railroads in the RPSA, both immediate ***and ongoing***.⁹⁴

Amtrak asserts that the “ongoing” consideration required of the freight railroads involves supporting Amtrak’s “missions and goals.”⁹⁵ The import of Amtrak’s argument is that the freight railroads must do so without compensation – “‘without increasing the Federal expenditure that is required’”⁹⁶ – and regardless of adverse impacts on the freight railroads and their shippers. In other words, according to Amtrak, Section 402 implicitly includes an ongoing collection

⁹² Amendment Agreement between Illinois Central Gulf Railroad Company and National Railroad Passenger Corporation § 2.2 (May 1, 1983) (“1983 Amtrak-IC Operating Agreement”) (attached hereto as Exhibit 2 for the convenience of the Board).

⁹³ See <http://www.usinflationcalculator.com/>.

⁹⁴ Amtrak Br. at 7-8 (emphasis added).

⁹⁵ *Id.* at 8.

⁹⁶ *Id.* at 10 (citation omitted).

mechanism for an indefinite debt that freight railroads still owe Amtrak, after half a century and even after the Section 401 payments, for relieving the intercity passenger obligations.

Amtrak made the same argument to the ICC in 1973, and the ICC rejected it:

Amtrak contends that the abatement of the railroads' loss in being relieved of its intercity passenger obligations is a continuing consideration moving to the railroad, presumably under a section 402 contract, for the use of the railroad's facilities and services. It contends that when Penn Central became a vendor of services under its facilities contract with Amtrak, its performance under the contract is, at least in part, a *quid pro quo* for being relieved of its common carrier obligation.

On the basis of the record as now made it is our view that the entry fee provided for in section 401 is the entire consideration for being relieved of the common carrier responsibilities for providing intercity rail passenger service. It is our further view that just and reasonable compensation for the provision of service and facilities by Penn Central for Amtrak from and after July 1, 1973, should not include a factor reflecting the loss abatement resulting from relief from the said common carrier obligations.⁹⁷

The Board should reject this argument again.

Amtrak also ignores the ICC's decision in *Metro-North*, re-affirming its decision in *Penn Central* in this respect, that "sections 401 and 402(a) are not interdependent."⁹⁸ Whereas the Section 401 public bargain applied only to railroads to the extent that they were serving intercity passengers pursuant to a common carrier obligation in 1969, Section 402 (now 49 U.S.C. §

⁹⁷ *Baker, et al., Trustees of Penn. Cent. Transp. Co.—Compensation for Passenger Serv.*, 342 I.C.C. 765, 767 (1973) ("*Penn Central*").

⁹⁸ *National Rail Passenger Corporation Application Under Section 402(a) of the Rail Passenger Service Act*, 1 I.C.C.2d 243, 246 (1984); *see also Metro. Transp. Auth. v. ICC*, 792 F.2d 287, 294 (2d Cir. 1986) ("The argument that sections 401 and 402(a) are interdependent and that section 402(a) applies only to carriers that terminated service pursuant to section 401 is similarly lacking in merit. The two sections function separately and serve different purposes. Section 401 applies only to railroads, while section 402(a) covers both railroads and regional transportation authorities. Congress did not limit Amtrak applications to the ICC under section 402(a) to those involving railroads that have used section 401, as it easily could have done had it wished to do so. Section 401 provides relief for railroads; section 402(a) assures that Amtrak has available necessary facilities to carry out the purposes of RPSA." (citations omitted)).

24308) applies to any “rail carrier or regional transportation authority” (including one that did not even exist at the time of the 1970 public bargain) over whose tracks Amtrak requests to run. Given that Section 402 applies without differentiation to rail carriers that did not participate in the 1970 public bargain under Section 401, it cannot reasonably or constitutionally be read to impose an indefinite subsidy obligation arising from that bargain.⁹⁹

Amtrak cites one source to support its theory that 49 U.S.C. § 24308 should be read in light of the public bargain in Section 401 instead of in accordance with its plain meaning: the 1994 ICC Study that generally discussed the ICC’s jurisdiction and duties. Amtrak points to nothing more than the 1994 ICC Study’s reference to “a public bargain that was struck with the nation’s freight railroads, whereby the freight railroads were relieved of any duty to provide passenger service in exchange for making their tracks available to Amtrak at incremental costs.”¹⁰⁰ But the “public bargain” described by the ICC is fully consistent with CN’s position. CN fully agrees that it must “mak[e its] tracks available to Amtrak at incremental costs” – that is what the plain language of 49 U.S.C. § 24308 provides, without any need to refer to any public bargain notion. The Study does *not* suggest, as Amtrak claims, that the public bargain imposes any additional obligations on CN or justifies the addition of any subsidies or penalty liabilities that could undermine CN’s right to incremental cost recovery from Amtrak. To the contrary, in elaborating on the public bargain, the Study stresses the need for “public interest balancing” in support of “the broader public interest in maintaining both the rail freight and passenger

⁹⁹ Conversely, Section 401 applied without differentiation to carriers on whom Section 402 has no effect. For example, GTW paid for release from common carrier obligations under Section 401 under the same statutory formula as IC, but GTW services were not included in the “Basic System” established under Section 201, so for years GTW had no Section 402 obligations.

¹⁰⁰ 1994 ICC Study, 1994 WL 639996, *41 (quoted in Amtrak Br. at 8 & n.6).

services,” given the “inherent tension in providing passenger service and freight transportation service over shared track.”¹⁰¹ It also describes the ICC’s (now the Board’s) task as “setting a fair trackage rights compensation **above** incremental costs.”¹⁰² CN agrees completely with the 1994 ICC Report that the Board should balance the public interests in both passenger and freight transportation, bearing in mind the inherent tensions arising from line capacity limitations, which ensuring that CN’s compensation is “above incremental costs.” But, whether or not it is labeled as a public bargain, that understanding is a refutation of – not support for – Amtrak’s approach.

2. Congress did not “incorporate” Amtrak’s § 24101 mission and goals into § 24308 as host railroad obligations.

Under Amtrak’s theory, it is still owed “ongoing” compensation almost half a century after Amtrak relieved some freight railroads -- in exchange for millions of dollars -- of intercity passenger common carrier obligations.¹⁰³ According to Amtrak, Congress has provided for such compensation by:

- (1) setting certain “missions” and “goals” for Amtrak to achieve in 49 U.S.C. § 24101(b) and (c);¹⁰⁴ and
- (2) implicitly “incorporat[ing]” those missions and goals into 49 U.S.C. § 24308(a) as obligations that current hosts owe Amtrak and are enforceable by the Board.¹⁰⁵

¹⁰¹ *Id.*

¹⁰² *Id.* (emphasis added).

¹⁰³ *See* Amtrak Br. at 7-8.

¹⁰⁴ *See* Amtrak Br. at 5.

¹⁰⁵ *Id.* at 94.

Amtrak is wrong. Amtrak's missions and goals are its own. Under the plain language of the statute, the Board must determine "reasonable terms and compensation" and must provide for compensation not less than the host's incremental costs.¹⁰⁶

Amtrak's goals are not susceptible to incorporation as obligations on host railroads in operating agreements or on the Board in prescribing reasonable terms and compensation. Neither Amtrak's hosts nor the Board can "use [Amtrak's] best business judgment."¹⁰⁷ Host railroads cannot "encourage" themselves to assist Amtrak.¹⁰⁸ And the goal of "minimiz[ing] United States Government subsidies" by "improving [Amtrak's] contracts with operating rail carriers"¹⁰⁹ cannot be translated into a performance standard for hosts.¹¹⁰ Moreover, Amtrak's goals are, by their nature, vague, aspirational and somewhat conflicting. For example, Congress instructs Amtrak to improve service while reducing expenditures.¹¹¹

Amtrak's attempt to link the provision of 49 U.S.C. § 24101 on which it principally relies to a "public bargain" made in the RPSA is also inconsistent with the chronology. The RPSA was enacted, and any public bargain involving relieving railroads of passenger common carrier

¹⁰⁶ 49 U.S.C. § 24308(a)(2).

¹⁰⁷ 49 U.S.C. § 24101(c)(1).

¹⁰⁸ 49 U.S.C. § 24101(c)(7).

¹⁰⁹ 49 U.S.C. § 24101(c)(1)(D).

¹¹⁰ See, e.g., Amtrak Br. at 76.

¹¹¹ Amtrak insists that the § 24101 goals are not merely aspirational because Congress amended § 24101 in 1994 to state that "Amtrak **shall**" achieve them. Amtrak Br. at 22 n.55. That codification amendment did not change the nature of the goals, and if Congress had intended in 1994 to transfer new responsibilities to the Board or Amtrak's hosts, providing that "**Amtrak** shall" do something was not an apt way to do so. In any event, amendments made in 1994 provide no support for Amtrak's theory of what was included in the 1970 "public bargain."

obligations was made, in 1970. But the main “goal” Amtrak emphasizes¹¹² – “Amtrak shall . . . operate Amtrak trains, to the maximum extent feasible, to all station stops within 15 minutes of the time established in public timetables,” 49 U.S.C. § 24101(c)(4) – was added in 1994, the same year in which the ICC Report re-affirmed the continuing need to balance competing freight and passenger interests in the public interest. Freight railroads did not make a public bargain in 1970 to undertake responsibility for a new Amtrak goal set by Congress in 1994.

III. CN’S PERFORMANCE PAYMENTS AND PENALTIES PROPOSAL IS REASONABLE AND CONSISTENT WITH THE LAW AND THE PUBLIC INTEREST; AMTRAK’S PROPOSALS ARE NOT.

KOTP with a lookback has been the industry-standard system for the Performance Payments and Penalties provision in Amtrak agreements with host railroads since the Second Amendment Agreement was introduced in 1977. It has been the standard for the Amtrak-IC agreement since 1983. KOTP assesses a host railroad’s actual contribution to Amtrak’s performance on the host railroad’s portion of the overall route, and thus provides the most direct measure of the quality of service provided by a host railroad to Amtrak, because: (i) specific standards and measures negotiated by the parties over time for the specific routes at issue ensure that the system does not unreasonably favor any one party; (ii) relief items ensure that a host is responsible only for delays within its reasonable control; and (iii) treatment of each train on a pass/fail basis ensures that outliers (especially on shorter segments) do not overwhelm the general measure. And, consistent with statutory and constitutional requirements, the lookback provision ensures that penalties do not drive a host’s compensation below its incremental cost.

¹¹² See, e.g., Amtrak Br. at 5, 9, 22, 38, 76, 94 & n.307, Appx. A-3; Amtrak Opening Statement at 17.

Amtrak proposes to fundamentally change the existing Operating Agreement's system of incentives and penalties by imposing far more demanding service standards based on ASOTP, while retaining the current schedules, which were not designed for high ASOTP. It would compel CN, under threat of huge penalties, to undertake costly efforts to reduce delays for which Amtrak refuses to bear the added incremental costs. More specifically, Amtrak's Initial Proposal would: (i) eliminate the lookback; (ii) replace the concept of KOTP with very low permissible levels of HRD set without regard to historical performance, feasibility, or cost (but purportedly "correlated" to 80% ASOTP); and (iii) impose huge penalties for HRD levels above those standards. Amtrak asks the Board to prescribe a radical new incentive/penalty system that is inconsistent with the public interest in a balanced transportation system that addresses the interests of CN and its freight customers as well as those of Amtrak and its passengers.

Absent compelling reasons, the Board should not discard a system that is consistent with the long-standing framework in Amtrak-host agreements and is the product of arm's length negotiations between Amtrak and CN for decades. No such reasons exist here: Amtrak has not shown that KOTP is ineffective as an incentive system,¹¹³ that KOTP systems in general are worse at achieving its stated goal of 80% ASOTP than other performance payment and penalty systems, or that a KOTP system is a hindrance to achieving 80% ASOTP. To the contrary, CN has established that KOTP provides the proper motivation to CN, that services hosted under agreements with similar KOTP-based provisions regularly achieve 80% ASOTP if their schedules are compatible with high ASOTP, and that services hosted under delay avoidance

¹¹³ For example, Amtrak's table in its Opening Brief reflects that for each service, a rise in KOTP (and the corresponding incentives earned by CN) is accompanied by a positive change in the variables Amtrak says matter (an increase in ASOTP and a reduction in HRD). Amtrak Br. at 12.

incentive (“DAI”) systems similar to Amtrak’s Initial Proposal regularly fail to achieve 80% ASOTP.¹¹⁴

A. Amtrak Has Not Demonstrated There Is A Need For Its Radical Proposed Changes To The Performance Payments And Penalties Provision Of The Existing Operating Agreement.

1. The KOTP system properly motivates CN.

Amtrak claims that the current Operating Agreement has failed “to incentivize CN to minimize delays to Amtrak trains,”¹¹⁵ and that “CN’s actual performance demonstrates that the KOTP system needs to be replaced because it does not adequately motivate CN to provide quality service to Amtrak and its passengers and unjustly rewards CN for poor quality service.”¹¹⁶ As CN has repeatedly shown, Amtrak fails to make its case.¹¹⁷

Amtrak mischaracterizes the service provided by CN, and fails to support its claim that the high level of HRD on CN has “resulted in extremely poor performance for Amtrak’s passengers.”¹¹⁸ First, the Blue Water service has **high** ASOTP and **low** HRD.¹¹⁹ Second, for three CN-hosted services (the Lincoln, Texas Eagle, and the Wolverine), delays are largely outside of CN’s reasonable control, and, in any event, CN’s portion of the route is so short that high CN HRD per 10,000 train miles equates to very short actual delays that could not have any

¹¹⁴ CN Br. at 32.

¹¹⁵ Amtrak Br. 10.

¹¹⁶ Amtrak Br. 17.

¹¹⁷ See CN Br. at 15, 30-34; Ladue/Kuxmann VS at 24-27, 34-49; Morehouse VS at 18-19; Ladue/Kuxmann RVS at 12-19, 21-27; Taylor RVS at 2-11;

¹¹⁸ Amtrak Br. at 10.

¹¹⁹ HRD per 10,000 train miles of 834 and ASOTP of 82.1%. See Vilter/Maga RVS at Exhibit 2, n.7.

meaningful effect on ASOTP.¹²⁰ Finally, Amtrak's unrealistic schedules, not CN's performance, are the primary factors limiting ASOTP on the remaining two services, the City of New Orleans and the Illini/Saluki.¹²¹ Amtrak has repeatedly acknowledged that the distribution of recovery time in its schedules for the City of New Orleans and Illini/Saluki services is not compatible with achieving high ASOTP.¹²²

The sole concrete complaint Amtrak makes in its brief about alleged poor performance is that trains on the City of New Orleans service average 100 minutes of delay.¹²³ Amtrak fails to explain, however, that CN's portion of the route is more than 900 miles long, with a scheduled run time of almost 20 hours, and that 100 minutes of delay is well within the amount of recovery time that was negotiated and agreed to by Amtrak and included in the schedule.¹²⁴

2. Amtrak's criticisms of the KOTP system are unfounded.

Amtrak claims the KOTP system has six flaws.¹²⁵ Each claim is without merit.

(1) Amtrak claims that measuring performance at certain designated checkpoints instead of at every station is a flaw of the current system because a checkpoint approach "ignores

¹²⁰ HRD minutes per 10,000 train miles reflected in Table 1 (Amtrak Br. at 12) equates to between 6 and 4 minutes per train for the Lincoln (compared to an average total schedule time of 330 minutes) and between 8 and 6 minutes per train for the Texas Eagle (compared to an average total schedule time of 1,930 minutes). Likewise, the 1,887 HRD minutes per 10,000 train miles incurred on the Wolverine service in 2017 to the date of Amtrak's Rebuttal Submission (Vilter/Maga RVS, Exh. 2, n.7) equates to 5 minutes of delay per train (compared to an average total schedule time of 380 minutes).

¹²¹ See CN Br. at 33; Ladue/Kuxmann VS at 34-44.

¹²² See CN Br. at 27 n. 54 { [REDACTED]

}

¹²³ See Amtrak Br. at 10-11.

¹²⁴ There are 138 minutes and 167 minutes of recovery time in the CN portion of the schedule for trains 58 and 59, respectively.

¹²⁵ Amtrak Br. at 17-21.

the quality of service experienced by the vast majority of passengers traveling on CN's lines."¹²⁶ But CN has shown that adding checkpoints to every station on the route is unnecessary and would lead to absurd results, such as performance measured on unreasonably short segments, and performance at lightly used stations weighed more heavily than performance at stations used by large numbers of riders.¹²⁷ Moreover, on two services – the Illini/Saluki and City of New Orleans – CN has proposed adding new checkpoints in conjunction with necessary schedule adjustments as a compromise to accommodate Amtrak's desire to add additional checkpoints.¹²⁸

(2) Amtrak claims that KOTP has "so much padding" that "there is only a tenuous correlation between contract arrival targets and the actual arrival time of the trains as reflected in public schedules."¹²⁹ But for almost all trains, the contract arrival time is { [REDACTED] [REDACTED] [REDACTED] } and are necessary due to schedule abnormalities, such as negative recovery time, that Amtrak refuses to correct. For a checkpoint that is not a station, such as at Clark Street or Southport Junction, the difference would not appear in the public schedule at all.

Insofar as Amtrak complains that there are tolerances and relief items used in the calculation of KOTP, those were negotiated and agreed to by Amtrak, and are reasonable and necessary features of any OTP-based system. Tolerance is included in Amtrak's own ASOTP and Endpoint OTP metrics, and relief items are necessary to ensure that CN is not penalized if OTP is low due to delays that are outside its reasonable control.

¹²⁶ Amtrak Br. at 18-19 (citing the same table it included in the Vilter/Maga RVS).

¹²⁷ CN Br. at 118-119; Ladue/Kuxmann SRVS at 7-9.

¹²⁸ CN Br. at 32-33, 118.

¹²⁹ Amtrak Br. at 19.

(3) Amtrak claims that the current system does not take into account the degree to which trains are late at a checkpoint, and that CN has no incentive to avoid delays to trains insofar as they are already severely delayed.¹³⁰ However, Amtrak’s single example in support of its claim is misleading. It cites as support a small number of City of New Orleans trains that experienced 160 minutes of delay, without explaining that those minutes are offset by the agreed-to recovery and miscellaneous time in the schedule.¹³¹ Moreover, in response to Amtrak’s earlier arguments about CN allegedly “giving up” on trains on the City of New Orleans and Illini/Saluki services, CN has demonstrated that it does not do so.¹³² For the remaining four services, the CN portion of the route is so short CN cannot “give up” on the train because those trains could never become so severely delayed in the first place.¹³³

(4) Amtrak claims that KOTP skews results when Amtrak runs on multiple hosts because a host gets “relief” for delays that occur prior to its portion of the route.¹³⁴ But that relief is a necessary feature of any system designed to measure the quality of service provided by an individual host. It is needed to ensure that CN is not penalized (and Amtrak is not rewarded by collecting penalties imposed on CN) for delays that occur before the Amtrak train reaches

¹³⁰ Amtrak Br. at 19.

¹³¹ There are 138 and 167 minutes of combined miscellaneous and recovery time on CN’s portion of the route for train 58 and 59, respectively. This means that if train 59 experienced 160 minutes of delay measured against PRT, it could still be on time at every intermediate station depending on where the delay occurred in relation to the distribution of recovery time. With 160 minutes of delay, train 58 would be, at most, a few minutes late, and certainly not the 2.5 hours asserted by Amtrak.

¹³² CN Br. at 124-125; Taylor RVS at 13-16; Ladue/Kuxmann RVS at 12-17.

¹³³ CN’s portion of the Wolverine service is less than 30 miles, its portion of the Lincoln and Texas Eagle services is less than 35 miles, and its portion of the Blue Water is less than 160 miles.

¹³⁴ Amtrak Br. at 19-20.

CN's line. Amtrak's Initial Proposal is far worse in addressing delays on multi-host routes because, in setting its HRD thresholds, Amtrak failed to account for the location where delays tend to occur (*i.e.*, on the CN or non-CN portion of the route, or closer to the beginning of the route, which can affect many stations, or the end of the route, which can affect only one) and made no provision for reassessing the HRD threshold if changes occur on portions of the route hosted by other hosts that alter the correlation between HRD and ASOTP.

(5) Amtrak claims that KOTP rewards CN for matters beyond its control because “if Amtrak does not delay the train for the full number of minutes available to it, CN can delay the train by that ‘unused’ number of additional minutes.”¹³⁵ Amtrak does not specify what it means by “the full number of minutes available to it,” and no provision of the Operating Agreement allocates any particular number of minutes of recovery or miscellaneous time or tolerance exclusively to Amtrak. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }¹³⁶ Contrary to Amtrak's suggestion, the primary purpose and function of miscellaneous time, recovery time, and tolerance is to accommodate freight and other meets, delays at interlockings and slow orders, all of which Amtrak attributes to CN. It is therefore entirely appropriate that otherwise unused miscellaneous, recovery and tolerance minutes be available to offset CN delays.

¹³⁵ Amtrak Br. at 20.

¹³⁶ CN Br. at 122-123.

(6) Amtrak claims that CN's incentives are dulled by the lookback and by the 70-80% KOTP neutral zone.¹³⁷ As discussed in Section I.B, the statute requires the lookback to ensure that CN receives no less than the floor compensation of incremental cost. As Amtrak's own table showing performance and incentive payments over three years reflects,¹³⁸ neither the lookback nor the neutral zone have been significant for services other than the Illini/Saluki, and with properly adjusted schedules and a solution to the Short Shunt problem, they would also be insignificant for the Illini/Saluki service. If Amtrak is troubled by and wishes to eliminate the neutral zone, { [REDACTED]

[REDACTED] }¹³⁹ There is no basis, however, for Amtrak's proposal to convert the entire neutral zone into a penalty zone.

Unable to challenge KOTP on any specific basis, Amtrak claims more generally that any KOTP-based system "conflicts with the statutory framework" because it permits compensation above incremental cost "based on factors *other than* on-time performance."¹⁴⁰ But the statute provides that performance payments must be linked to "quality of service," not "on-time

¹³⁷ Amtrak Br. at 20-21.

¹³⁸ Amtrak Br. at 12; *see also* Ladue/Kuxmann VS at 25 ("CN consistently averages KOTP above 80% across all six services"); *id.* at 26-27 (describing single month in which severe weather conditions caused CN to incur penalties, but the "desire to avoid further penalties and the prospect of increased Performance Payments" motivated CN to improve performance).

¹³⁹ *See* Ladue/Kuxmann SRVS at 35.

¹⁴⁰ Amtrak Br. at 38-39 (emphasis in original); *see also id.* at 36 ("CN's Incentive System Proposal Does Not Meet the Requirements of the Governing Statute"); *id.* ("CN's Attempt to Support its KOTP Proposal Based On the Status Quo Conflicts With the Statutory Purpose of 49 U.S.C. § 24308(a)"); *id.* at 76 ("[a]ny award of compensation that conflicts with, or prevents Amtrak from accomplishing, its statutory goals and mission should not be considered 'reasonable.'").

performance.”¹⁴¹ And CN has shown that KOTP is the best measure of a host railroad’s quality of service because it (i) focuses on the actions of the host – what delays occurred that were within the host’s reasonable control; and (ii) the corresponding consequences for passengers – was the train on time (*i.e.*, did it arrive within tolerance). By contrast, the HRD metric preferred by Amtrak sweeps in delays that are outside the host’s reasonable control, and fails to address whether a particular delay was responsible for making the train late.

If followed to its logical conclusion, Amtrak’s argument in opposition to KOTP-based incentive/penalty provisions would render illegal almost every agreement it has entered into with a host railroad over the past 40 years.¹⁴² But Amtrak itself originally proposed the KOTP system and has argued that a KOTP-based system is appropriate or necessary in multiple contexts, and the Board and ICC have repeatedly approved the KOTP system.¹⁴³

3. Amtrak’s criticisms of CN’s modifications to the current KOTP system are unfounded.

CN proposes to maintain the essential structure of the Performance Payments and Penalties provision, with modest revisions (including several changes intended to address issues

¹⁴¹ 49 U.S.C. § 24308(a)(2)(B).

¹⁴² Amtrak Br. at 36, 38. The KOTP system – with performance payments for performance above 80% KOTP; penalties for performance below 70% KOTP; KOTP judged mainly at endpoints based on host-specific performance including tolerances and relief items; and a lookback provision to limit penalties to offsetting performance payments over a 12-month period – has been in general use between Amtrak and host railroads since 1977, *see* U.S. Gen. Acctg. Office Report to Congress, FURTHER IMPROVEMENTS ARE NEEDED IN AMTRAK’S PASSENGER SERVICE CONTRACTS, BUT THEY WON’T COME EASILY at 9 (Jan. 7, 1981), *available at* <https://www.gao.gov/assets/140/131567.pdf> although it was not adopted between Amtrak and IC until 1983, (1983 Amtrak-IC Operating Agreement § 5.1.C & Appx. V, ¶ D (May 1, 1983).

¹⁴³ *MTRC*, 354 I.C.C. 552, 571 (KOTP system is “appropriate”); *T&P*, 348 I.C.C. at 672 (KOTP system is “the only practicable standard”).

raised by Amtrak) to improve it.¹⁴⁴ CN's proposed modifications would: (i) make the calculation of Performance Payments and Penalties fairer and more economically rational, (ii) implement CN's proposed new schedules for the Illini/Saluki service, (iii) streamline contract administration, and (iv) incorporate the GTW services.

CN's proposal is balanced and consistent with the statute and Amtrak's rights, and would serve the overall public interest. CN's proposal is also consistent with past agreements reached both by these parties and between Amtrak and other hosts¹⁴⁵ – a strong real-world indicator that CN's proposed terms are “reasonable.” CN has sought to accommodate Amtrak in multiple respects – by preserving concessions CN made in past specific negotiated compromises with Amtrak; by proposing ways to achieve Amtrak's stated goal of 80% ASOTP;¹⁴⁶ by incorporating Amtrak's HRD metrics into the operating agreement;¹⁴⁷ and by offering (conditional on reasonable schedules) to add checkpoints.¹⁴⁸ At the same time, CN has sought to make the agreement more fair (by proposing revisions to the list of relief items and items causing the trip of a train to be excluded from the calculation of OTP (“Do Not Count,” or “DNC” items) and the use of root cause attribution),¹⁴⁹ more streamlined (by proposing improved processes for determining delay responsibility),¹⁵⁰ and more collaborative (by proposing the parties work

¹⁴⁴ See CN Br. at 74-87 (describing CN's specific proposed changes to the KOTP system); see *generally* Ladue/Kuxmann SRVS.

¹⁴⁵ See *generally* Ladue SRVS.

¹⁴⁶ See CN Br. at 34-42.

¹⁴⁷ See *id.* at 76.

¹⁴⁸ See *id.* at 85-86.

¹⁴⁹ See *id.* at 75-84.

¹⁵⁰ See *id.* at 86-87.

together on regular schedule review).¹⁵¹ CN has also offered to negotiate further with Amtrak after the parties receive appropriate guidance from the Board.¹⁵²

Amtrak directs three primary arguments at CN's KOTP proposal: (1) that CN's proposed Illini/Saluki schedules are "unjustified,"¹⁵³ (2) that CN's proposal to allow "root cause" too be considered is "subjective" and "vague,"¹⁵⁴ and (3) that CN's proposed changes to Appendix V would be unnecessarily complex.¹⁵⁵ Each argument lacks merit.

First, CN's schedule proposal for the Illini/Saluki service is unrelated to and not dependent on its general KOTP proposal. Rather, it was a common-sense response to Amtrak's stated desire to achieve high ASOTP on that service. CN would advocate for the same basic KOTP system regardless of whether Amtrak agrees to that schedule proposal, and CN believes that that schedule proposal offers the best and most efficient means of achieving 80% ASOTP regardless of the performance payments and penalty system ultimately imposed by the Board.

Second, Amtrak's opposition to the use of root cause misrepresents CN's proposal. Amtrak claims that "CN proposes to dictate Amtrak's process for coding delays to Amtrak trains."¹⁵⁶ CN does not propose to dictate how Amtrak codes its delays, and CN's proposal has nothing to do with how Amtrak codes its delays. In fact, CN has proposed adopting Amtrak's delay codes, which are based on Amtrak's existing nationwide delay coding process, into the agreement. CN proposes only that either party be permitted to adduce evidence of the root cause

¹⁵¹ See *id.* at 111-112.

¹⁵² See *id.* at 141-42.

¹⁵³ Amtrak Br. at 40-48.

¹⁵⁴ Amtrak Br. at 48-51.

¹⁵⁵ Amtrak Br. at 51-53.

¹⁵⁶ Amtrak Br. at 48.

of a delay when applying the relief items or “Do Not Count” items (“DNCs”) that are specific to CN’s contract and that such root-cause evidence be considered the best evidence of the cause of delay in determining the applicability of a particular relief item or DNC.¹⁵⁷

Third, Amtrak dismisses CN’s proposed changes as “administrative complexities” that would “create even more disputes between the parties.”¹⁵⁸ Amtrak is wrong. CN’s proposed changes are designed to clarify and reduce to writing the issues that have been sources of disputes between the parties in the past. The guidance CN has sought is designed to reduce disputes, not increase them. In terms of contract administration, once the terms of the new Operating Agreement are finalized, CN will be responsible for preparing monthly bills. As it has done successfully in the past, CN will use templates and spreadsheets to calculate the monthly Performance Payments and Penalties.

Amtrak’s specific objections to the details of CN’s proposal are likewise unavailing. For example, Amtrak complains about { [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

¹⁵⁷ Amtrak argues that “CN would be relieved of its responsibility to avoid or minimize delays to Amtrak trains if delay attribution was determined under the so-called ‘root cause’ concept.” Amtrak Br. at 50 (footnote omitted). Presumably Amtrak means by this that if CN knew that particular delays would be judged to be the responsibility of Amtrak or a third party, on the basis of what would be determined to be the root cause of the delays, then it would fail to take measures within its control to minimize those delays. This argument assumes that, at the time of a delay, CN’s employees would both (1) know of the immediate and remote causes of the delay, and (2) be able to accurately predict CN’s ability to marshal persuasive evidence of another party’s ultimate responsibility for the delay. Neither assumption is plausible. Moreover, Amtrak has no basis for supposing that root cause attribution would apply only to grant CN relief for a delay; it could just as likely turn a non-HRD delay into an HRD delay.

¹⁵⁸ Amtrak Br. at 51-52.

¹⁵⁹ Amtrak Br. at 40 n.115, 52.

[REDACTED]

[REDACTED]

[REDACTED]

Amtrak claims that { [REDACTED]

[REDACTED]¹⁶¹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁶²

[REDACTED]

[REDACTED]

[REDACTED]¹⁶³ [REDACTED]¹⁶⁴ [REDACTED]

¹⁶⁰ See Operating Agreement, App. V, Table 1, Notes (Ladue/Kuxmann VS, Exh. 1).

¹⁶¹ Amtrak Br. at 40 n.115.

¹⁶² See Operating Agreement, App. II, Table 1.

¹⁶³ Amtrak Br. at 39 n.114; *see also id.* at A-14.

¹⁶⁴ Amtrak Br. at 40 n.116.

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In its Appendix, Amtrak repeats its objections to four allegedly new relief items that CN has proposed.¹⁶⁷ CN has already explained that those items are neither new nor unreasonable.¹⁶⁸ Amtrak also argues that there is redundancy between delay codes on the one hand and relief items and DNC provisions on the other.¹⁶⁹ CN has already explained why these specific provisions work appropriately together.¹⁷⁰ Finally, Amtrak objects to the inclusion of a “catch-all” relief item.¹⁷¹ CN has explained that, given Amtrak’s history of trying to unreasonably narrow and deny relief items, the catch-all provides necessary counterbalance to protect CN from being unfairly penalized.¹⁷²

B. Amtrak’s Initial Proposal Is Unreasonably Punitive, Inefficient, And Inferior To A KOTP System.

In contrast to CN’s proposal, Amtrak has proposed terms that are neither reasonable nor balanced. It disregards specific past agreements with CN and its general model of past

¹⁶⁵ Amtrak Br. at 53 n. 162.

¹⁶⁶ See CN Br. at 80 { [REDACTED] }; 1995 Amtrak-IC Operating Agreement at App. V, § 3 { [REDACTED] }

¹⁶⁷ Amtrak Br. at A-12—A-14.

¹⁶⁸ CN Br. at 78-81; Ladue/Kuxmann SRVS at 23.

¹⁶⁹ Amtrak Br. at A-16—A-17 (relief items); A-17—A-18 (DNCs).

¹⁷⁰ CN Br. at 76-77; Ladue/Kuxmann SRVS at 26-30. Contrary to Amtrak’s assertion, Amtrak Br. at A-17, these relief items are not “redundant and unnecessary” “clutter,” but rather necessary to avoid the inherent limitations in Amtrak’s overly broad HRD codes. Amtrak’s proposed system would be easier to administer only because it would significantly less fair and reasonable.

¹⁷¹ Amtrak Br. at A-19—A-20.

¹⁷² CN Br. at 81.

agreements with the freight industry, proposes to eviscerate CN's statutory right to incremental cost compensation by means of penalties designed to coerce CN to meet standards unilaterally determined by Amtrak, and pays no heed to the costs its proposal would impose on CN and on the freight shipper and broader economic interests that would be impacted by the degradation in freight service that would be driven by Amtrak's Initial Proposal.¹⁷³

1. Amtrak's Initial Proposal is unreasonably and unnecessarily punitive.

Amtrak argues that the Board should compel CN to "minimize" delays to Amtrak, without regard to the costs (to CN, and to the shippers and business that rely on CN's freight service),¹⁷⁴ because it is a "reasonable means of promoting the public policy goals."¹⁷⁵ Far from being reasonable, Amtrak's proposal is an extreme and punitive means of imposing net penalties on CN for conduct which is not unlawful, supported by Amtrak's proposed elimination of the lookback provision. Amtrak's proposal:

- is based on a performance standard unilaterally set by Amtrak without reference to capacity, congestion, or the need to accommodate freight and commuter traffic;¹⁷⁶
- relies entirely on HRD (as identified based on the subjective observations of Amtrak's conductors), which would penalize CN for delays it "has no ability to reduce"¹⁷⁷ or reasonably control;¹⁷⁸

¹⁷³ See Vilter Dep. Tr. at 56:24-57:1; Maga Dep. Tr. at 106:5-18 (attached as Exhibits 2 and 3 to CN's Opening Brief).

¹⁷⁴ Amtrak Br. at 10, 19.

¹⁷⁵ Amtrak Br. at 22.

¹⁷⁶ *Id.* at 26. Amtrak suggests that it should "have the discretion to establish the target level of service that Amtrak is willing to reward through the incentive system."

¹⁷⁷ *Id.* at 27 n.71. By agreeing to relief items, Amtrak has admitted as much in the past.

¹⁷⁸ See CN Br. at 16-17, 75-81. Amtrak makes no attempt to confine penalties to delays CN can reasonably prevent: it claims CN should be penalized for non-FTI delays regardless of whether CN can reduce them (Amtrak Br. at 27 n.71), { [REDACTED] }

- sweeps away decades of negotiated trade-offs reflected in the existing amendments to the Operating Agreement, giving Amtrak the benefit, but not the burden, of those arrangements;¹⁷⁹ and
- flips the statutory scheme on its head by treating CN's incremental costs of serving Amtrak not as a basis for Amtrak to compensate CN but as a basis for imposing penalties that CN must pay Amtrak to coerce CN to meet Amtrak's performance demands.¹⁸⁰

Not surprisingly, this extreme proposal leads to extreme results. It would:

- impose huge penalties on CN (over \$50 million retroactively (\$12 million per year)) at historic performance levels and even \$8 million per year in penalties if CN achieved 900 HRD on every service;¹⁸¹
- impose huge penalties on other hosts (if, as Amtrak proposes, its system is adopted in other host Operating Agreements) (\$4.5 million and \$13 million in penalties to Amtrak and MiDOT, respectively for the Wolverine; \$84 million in penalties for UP for the Texas Eagle alone);¹⁸²
- require CN to reduce FTI to unsustainable (theoretically, even negative) levels in order to meet its standards;¹⁸³
- have Amtrak consume a disproportionate share of CN's capacity, preventing CN from using its own rail lines to serve its customers for 12 to almost 17 hours per day (or between 50 and 70% of the day) making it impossible for CN to adequately meet demand from its freight rail customers;¹⁸⁴ and
- generate more disputes and administrative costs by making every minute of HRD delay count.

} (Amtrak Br. at Appx. A-14).

¹⁷⁹ Amtrak Br. at 36-37; CN Br. at 114, 116.

¹⁸⁰ Amtrak Br. at 24-25, 29-30.

¹⁸¹ CN Br. at 137.

¹⁸² *Id.* at 139.

¹⁸³ *Id.* at 133-134.

¹⁸⁴ *Id.* at 136.

As CN has shown, these extreme measures and costs are not necessary to achieve Amtrak's 80% ASOTP goal.¹⁸⁵ Compelling CN, under threat of large penalties, to incur huge costs, and to impair freight and commuter service, to achieve unnecessarily low HRD levels is patently unreasonable when modest schedule adjustments could achieve the same result with far less cost and disruption to other services.

2. Amtrak's claims about the benefits of its Initial Proposal are misleading.

Amtrak claims its Initial Proposal has seven benefits,¹⁸⁶ but its claims are misleading.

(1) Amtrak states that its proposal "measures performance by minutes of delay caused by CN, as correlated to 80% ASOTP on each route."¹⁸⁷ CN showed that Amtrak violated basic statistical principles in establishing correlation between HRD and ASOTP.¹⁸⁸ Moreover, Amtrak does not purport to show that "correlation" would hold in the future with changed circumstances, such as changed schedules.¹⁸⁹ Nor does Amtrak's analysis account for any number of exogenous factors that could affect ASOTP or for the common-sense reality that *where* delays occur along a route will affect ASOTP as much (if not more) than the total amount of delay.¹⁹⁰

(2) Amtrak claims that ASOTP is the best measure of CN performance because it reflects quality of service to all Amtrak passengers.¹⁹¹ First, Amtrak's proposal is ***not*** an ASOTP

¹⁸⁵ See CN Br. at 34-42.

¹⁸⁶ Amtrak Br. at 23-25.

¹⁸⁷ Amtrak Br. at 23.

¹⁸⁸ CN Br. at 130.

¹⁸⁹ CN Br. at 128-129.

¹⁹⁰ CN Br. at 130. As explained above, delays at the beginning of a route will affect performance for all stations, while delays at the end will affect just one.

¹⁹¹ Amtrak Br. at 23.

proposal, but rather an HRD proposal.¹⁹² Even if ASOTP were the best measure of CN performance, Amtrak's Initial Proposal would not track it. But ASOTP is clearly not the best measure of CN performance: it is also heavily dependent on schedules, Amtrak- and third-party-caused delays on CN's portion of the route, and delays on the non-CN portion of the route. ASOTP may or may not be a good goal for Amtrak, but ASOTP does not focus on what CN can reasonably control and is not a reasonable measure of an individual host's performance.

Amtrak claims that its proposal accounts only for actual minutes of delay caused by CN. Amtrak claims this is a "straight forward" measure that takes no account of, among other things, agreed dwell time, recovery time and miscellaneous minutes, agreed tolerances, and agreed relief items.¹⁹³ But CN's Opening Brief showed that HRD does not account "only for actual minutes of delay caused by CN," but can include many delays that are outside CN's reasonable control.¹⁹⁴ The relief items in the Operating Agreement, which have been negotiated by the parties over the years and in the context of the particular schedules, other circumstances (*e.g.*, congestion levels) of the service, and agreed trade-offs, reflect more accurate judgments as to what is within the host's reasonable control than Amtrak's unilaterally defined, one-size-fits-all measure of HRD. Moreover, taking into account the parties' agreements about such items as recovery time and miscellaneous time is a virtue, not a vice, of the KOTP system – the parties' agreement on those items represents a service-specific agreed judgment as to what level of delays is reasonably to be expected, and by disregarding it, Amtrak's Initial Proposal would wrongly punish CN for delay levels Amtrak has otherwise agreed are reasonable.

¹⁹² CN has also addressed why KOTP is a superior measure of host performance than HRD. See CN Br. at 15-17.

¹⁹³ Amtrak Br. at 23.

¹⁹⁴ CN Br. at 75-78.

(3) Amtrak claims that “HRD minutes are the primary driver of ASTOP.”¹⁹⁵ But CN showed that Amtrak’s analysis was merely one of correlation, and not one of causation.¹⁹⁶ CN discussed many possible exogenous factors that could affect that correlation, and described the common-sense reality that *where* delays occur along a route will affect ASOTP as much (if not more) than the total amount of delay.¹⁹⁷

(4) Amtrak claims its proposed system “accounts for the reality that other hosts on a route also cause delays.”¹⁹⁸ But what Amtrak does not state is that if those other hosts tend to delay the train at the beginning of the route, then the level CN must meet will be lower than would otherwise be necessary. Nor does Amtrak propose to reassess the HRD threshold if performance on those other hosts improves and changes the correlation between HRD and ASOTP in CN’s favor.

(5) Amtrak claims that its proposal “does not require CN to eliminate all HRD to Amtrak trains in order to earn an incentive.”¹⁹⁹ But as CN demonstrated, the HRD reductions necessary to meet Amtrak’s HRD thresholds would have to come primarily from FTI.²⁰⁰ Moreover, meeting those HRD thresholds through reductions in FTI would be impossible for some services because other HRD categories already exceed Amtrak’s proposed limits and would consume so much of CN’s capacity that it would be impossible for CN to adequately meet

¹⁹⁵ Amtrak Br. at 23.

¹⁹⁶ CN Br. at 130-131.

¹⁹⁷ CN Br. at 130.

¹⁹⁸ Amtrak Br. at 24.

¹⁹⁹ Amtrak Br. at 24.

²⁰⁰ CN Br. at 133-135. CN also showed that Amtrak was wrong that CN can meaningfully reduce non-FTI HRD except at great expense, or that, even if it could reduce those categories of non-FTI it would have a substantial effect on overall HRD levels.

demand from its freight rail customers.²⁰¹ CN also showed that Amtrak's thresholds for earning an incentive are so low as to be practically unachievable on most services.²⁰² CN would have to reduce HRD (which, as discussed above, includes delays that CN cannot reasonably prevent) to below 1 minute per train in order to earn an incentive on the Wolverine, 2 minutes per train on the Texas Eagle, and 4 minutes on the Lincoln. On the roughly 300-mile Illini/Saluki service, CN would have to reduce HRD to 13 minutes in order to earn an incentive. To the extent these demands are even feasible, they would impose excessive, uncompensated costs on CN and severely impair its ability to serve its freight customers.

(6) Amtrak claims that its proposed penalty amounts “were reasonably calculated to incentivize CN to provide better performance.”²⁰³ But as CN showed, this aspect of Amtrak's proposal is unprincipled under basic economic theory and is based on the implausible assumption that the perceived costs of reducing HRD are linear.²⁰⁴ Moreover, it subverts the statutory scheme by treating CN's incremental costs of serving Amtrak not as basis for payment from Amtrak to CN, but rather as a basis for penalties that CN must pay to Amtrak.

(7) Amtrak claims that removal of the lookback is necessary to “actually incentivize” better performance.²⁰⁵ CN has shown that it is not.²⁰⁶ In any event, eliminating the lookback would be unlawful.²⁰⁷

²⁰¹ CN Br. at 136.

²⁰² CN Br. at 136-140.

²⁰³ Amtrak Br. at 24.

²⁰⁴ CN Br. at 130-131.

²⁰⁵ Amtrak Br. at 25.

²⁰⁶ Ladue/Kuxmann VS at 26-27; Willig VS at 7-8.

²⁰⁷ See Section I; CN Br. at 53-57.

3. Amtrak has not addressed the fundamental flaws of its Initial Proposal.

CN's Opening Brief described a number of fundamental flaws with Amtrak's initial proposal: (i) it is unnecessary to achieve 80% ASOTP; (ii) it is unable to accommodate foreseeable future changes in the relationship between HRD and ASOTP; (iii) it is unprincipled and imposes unrealistic and unreasonably burdensome standards; and (iv) it is unreasonably punitive.²⁰⁸ In addition, Amtrak's proposed HRD thresholds vary widely between services, implying dramatically inconsistent notions of what is acceptable performance by CN. Moreover, these HRD thresholds do not represent CN HRD levels at which 80% ASOTP would be expected to be achieved even under historical schedules. Amtrak's responses to CN's criticisms²⁰⁹ fail to address these fundamental flaws.

- a. Using an 80% ASOTP goal is infeasible given current schedules and irrational on multi-host routes.

CN has criticized Amtrak's use of an 80% ASOTP goal as "infeasible under current back-loaded schedules" and as having "little to do with CN's performance" on multi-host routes.²¹⁰ Amtrak ignores these criticisms and instead asserts that CN "fails to explain why Amtrak should not have the discretion to establish the target level of service that Amtrak is willing to reward through the incentive system."²¹¹ The explanation is obvious: the "target level of service" is, under Amtrak's proposal, the level below which Amtrak collects penalties from CN. At least unless it pays for CN's incremental costs of improving service – which, under Amtrak's proposals, it does not – Amtrak has every incentive to set that level unreasonably high

²⁰⁸ CN Br. at 127-140.

²⁰⁹ See Amtrak Br. at 25-36.

²¹⁰ See Ladue/Kuxmann RVS at 5-7.

²¹¹ Amtrak Br. at 25-26.

in order to secure for itself a huge penalty windfall. Moreover, Amtrak's argument ignores CN's common carrier obligation and the interests of shippers, which would be unreasonably prejudiced if standards entailing trade-offs between freight and passenger interests were determined unilaterally by Amtrak.

CN's Opening Brief showed that Amtrak ignores the statutory framework and unreasonably treats the goal of 80% ASOTP as a duty CN owes to Amtrak, without compensation, rather than a public interest objective for Amtrak to achieve.²¹² Moreover, CN has consistently held – and Amtrak has never disputed – that there are ways to achieve Amtrak's goals that would not result in huge costs being unilaterally and unreasonably imposed on either party.²¹³ But placing the entire burden of achieving 80% ASOTP on HRD reductions by a single host railroad is infeasible and contrary to the statutory requirement to set "reasonable terms and compensation."

Amtrak's Initial Proposal is also fatally flawed because it cannot adapt to schedule changes (including even the inadequate schedule change Amtrak has proposed for the Illini/Saluki), which would alter the HRD/ASOTP relationship on which Amtrak's Initial Proposal was predicated.²¹⁴ Amtrak claims that it "has committed to recalculate the applicable HRD Thresholds in the event of a material schedule change agreed upon by the parties."²¹⁵ But Amtrak has committed to nothing meaningful – its proposal only requires it to consider whether

²¹² CN Br. at 131. Neither is it accurate to say that Amtrak's proposal is rewarding CN through incentives; instead, it is designed to punish CN through penalties, which in combination with the removal of the lookback would deny CN incremental cost compensation for hosting Amtrak. Moreover, insofar as Amtrak's goals cause CN to incur costs that it would not incur but for Amtrak, those costs must be reimbursed.

²¹³ *See, e.g.*, CN Br. at 35-36

²¹⁴ CN Br. at 128-30.

²¹⁵ Amtrak Br. at 35.

it believes the HRD threshold needs to be revised, leaving it with complete control not only over the decision about whether any change is necessary, but also over any change itself.²¹⁶ In any event, the Sacks methodology relies on empirical data generated under a particular schedule to identify the relevant “correlation,” and thus cannot be used to establish a new correlation under a new schedule for which there are no empirical data.²¹⁷

In addition, basing a penalty system imposed on a single host – CN – on a “correlation” between HRD and ASOTP across an entire multi-host route makes no sense. Amtrak flatly ignores CN’s argument that *where* a delay occurs on the route is just as, if not more, important to its effect on ASOTP as *how much* delay occurs.²¹⁸ Amtrak then attempts to sidestep CN’s argument that reducing delays on other hosts may be a more efficient way to achieve a whole-route HRD target by asserting that “applying the same delay-based system on other hosts is not even under consideration in this proceeding.”²¹⁹ But that response supports CN’s argument that the proper, efficient way to set HRD targets is to set low HRD targets on those hosts where it is less costly to reduce HRD below the mean, and higher HRD targets on those hosts where it is more costly to do so.²²⁰

²¹⁶ See CN Br. at 129 (Amtrak’s provision “includes no actionable process or criteria” and is “not a remotely reasonable commercial term”).

²¹⁷ And Amtrak’s proposal would apply only to schedule changes agreed to by the parties, and not to other events that could have a significant effect on the relationship between HRD and ASOTP, such as schedule changes that do not affect CN’s portion of the route, sustained decreases in HRD on a non-CN portion of the route, or sustained decreases in Amtrak or third-party delays.

²¹⁸ Dubin RVS at 6-7 (delay that occurs early in a train trip is likely to have more effect on ASOTP than delay that occurs later in the trip because earlier delay can affect OTP at more stations).

²¹⁹ Amtrak Br. at 29.

²²⁰ Dubin RVS at 6.

- b. Using HRD without relief items to assess CN performance is unreasonable.

Contrary to Amtrak's mischaracterization of CN's argument,²²¹ CN does not object to the general use of all categories of HRD. Indeed, CN's proposed adjustments to the KOTP proposal would use HRD codes as an initial screen. But CN does have two objections to the use of HRD, neither of which is addressed by Amtrak. **First**, CN objects to the use of HRD codes without also including relief items for delays that Amtrak codes as HRD but that are outside CN's reasonable control.²²² For example, delays at interlockings that CN does not control are coded as "FTI" by Amtrak, even though CN has no reasonable ability to avoid those delays. CN also provided examples of Amtrak miscoding some types of delays (such as copying track authorities or joint efficiency testing) by using HRD codes instead of the more appropriate Amtrak delay codes.²²³ Thus, CN has demonstrated that relief items remain necessary when HRD codes form the initial screen for determining CN-responsible delays.

Second, CN objects to the use of unreasonably low HRD thresholds. In response, Amtrak argues that CN can meet its HRD targets through reductions in non-FTI HRD, and it makes much of the fact that there is some historic variation in non-FTI HRD.²²⁴ CN never claimed non-FTI HRD is invariable. What it did demonstrate is that non-FTI HRD can be difficult, if not impossible, to reduce without significant cost and/or investment for which Amtrak is either unwilling or unable to pay.²²⁵ In some cases, CN showed that it would have to

²²¹ Amtrak Br. at 27.

²²² CN Br. at 76-77.

²²³ CN Br. at 77

²²⁴ Amtrak Br. at 27 n.71.

²²⁵ CN Br. at 133-136.

reduce non-FTI HRD practically to nothing, which would be nearly impossible and could be accomplished only at enormous expense and with significantly reduced service to freight customers. For example, if a Wolverine train experienced only 2 minutes of delay due to a temporary slow order, its HRD per 10,000 train miles would be 711, or 54% higher than the 411 HRD threshold for penalties for that service under Amtrak's Initial Proposal. In effect, Amtrak's proposal would require CN to never impose a slow order on the portion of its network used by the Wolverine service lest it incur significant penalties. Amtrak provides no answer. Its claims that CN can significantly reduce HRD and meet Amtrak's targets by reducing non-FTI HRD are hollow.

- c. Amtrak's methodology for establishing the penalty levels in its proposal is unreasonable and economically unsound.

Amtrak makes three unavailing arguments in response to CN's criticisms of its proposed methodology for establishing the penalty levels in its proposal.²²⁶ First, Amtrak's response to CN's criticism of the use of CN's "perceived costs"²²⁷ ignores CN's arguments that: (i) { [REDACTED] };²²⁸ (ii) the proposal is based on an inappropriate extrapolation of CN's increased costs of freight delays necessary to achieve higher levels of Amtrak service to CN's costs of reducing all types of HRD to achieve higher levels of Amtrak service,²²⁹ and (iii) the proposal is based on the wholly implausible assumption that the "perceived" costs of reducing FTI are linear.²³⁰

²²⁶ See Amtrak Br. at 28-31. CN's response to Amtrak's criticisms of the lookback provision, Amtrak Br. at 31-33, is addressed in Section I.

²²⁷ Amtrak Br. at 29-30.

²²⁸ CN Br. at 131.

²²⁹ Dubin RVS at 8.

²³⁰ CN Br. at 131.

Second, Amtrak's response to CN's economic argument regarding the appropriate price signals²³¹ is based on Amtrak's flawed interpretation of the statutory framework. Amtrak's reference to a "penalty system" completely ignores the incentive portion of the statutory framework. CN's argument is not that it should have the "sole discretion" to decide the level of Amtrak service. Amtrak will choose the level of passenger service it wants CN to host, but it must pay for the full incremental costs of added passenger service. Amtrak's "penalty system" proposal contravenes Congressional intent and fails to provide that necessary price signal to Amtrak.²³²

Finally, Amtrak's arguments for its asymmetrical proposal in favor of penalties are wrong.²³³ The same asymmetries do not exist in the KOTP system, which equally matches each percentage point difference from the neutral zone. Amtrak's proposed asymmetry is inconsistent with the statutory requirement to set "reasonable terms and compensation." Coupled with Amtrak's proposal to eliminate the lookback provision, which is unlawful in itself, it would be unnecessarily punitive and force CN to subsidize Amtrak.²³⁴

- d. Amtrak's statistical analysis for determining the HRD thresholds was flawed and unprincipled.

Amtrak responds to CN's criticisms of its methodology for establishing the relationship between whole route HRD and ASOTP by arguing that its regression analysis was not intended to be mathematically rigorous, but was instead designed only to generate a "reasonably

²³¹ Amtrak Br. at 30-31.

²³² CN Br. at 136-140.

²³³ Amtrak Br. at 31.

²³⁴ CN Br. at 137-139.

congruent relationship between CN performance and incentives/penalties.”²³⁵ Amtrak states that it was “entirely appropriate for Mr. Sacks to extrapolate” beyond the range of the data for three of the six services he analyzed.²³⁶ However, the ICC has recognized that “[a]pplying regression results to circumstances outside the relevant range of data upon which the regression equations are based may not produce valid results.”²³⁷

Amtrak believes that running a multivariate regression analysis, which CN has done multiple times in this proceeding, instead of a linear regression would “create unnecessary complexity.”²³⁸ However, Amtrak ignores the fact that such analyses can readily be performed by desktop computers. And Amtrak provides no support for its assertion that the parties would be “unable to agree upon” the assumptions required for a multivariate regression analysis.²³⁹ In fact, CN has proposed several such variables in its evidence.²⁴⁰

Amtrak provides no response to CN’s argument that the use of a simplistic linear regression “ignores relevant properties of the variables studied and omits other relevant variables, and it cannot generate robust conclusions about the HRD/ASOTP relationship.”²⁴¹

²³⁵ Amtrak Br. at 33. Amtrak states in a footnote that it was “entirely appropriate for Mr. Sacks to extrapolate” beyond the range of the data for three of the six services he analyzed. Amtrak Br. at 34 n.99. However, the ICC has recognized that “[a]pplying regression results to circumstances outside the relevant range of data upon which the regression equations are based may not produce valid results.” *Conrail*, 10 I.C.C.2d at 877.

²³⁶ Amtrak Br. at 34 n.99.

²³⁷ *Conrail*, 10 I.C.C.2d at 877.

²³⁸ Amtrak Br. at 33.

²³⁹ Amtrak Br. at 34-35.

²⁴⁰ Dubin RVS at Appendix A & Appendix B.

²⁴¹ Dubin RVS at 16; *see also id.* at 16-20 (describing the additional properties and variables that could be analyzed, such as the aggregation of multiple endogenous variables or the location along the route where HRD (and other delays) occur), and Appendix A (providing a

While Amtrak asserts that there is a “common sense linear relationship between HRD and ASOTP,”²⁴² it has submitted no actual evidence or analysis to prove that assertion.

Amtrak also fails to explain how its “potential solution” to the fact that future schedule changes would change the relationship between HRD and ASOTP²⁴³ is anything other than “hopelessly unprincipled and indeterminate” procedure that provides “no actionable process or criteria.”²⁴⁴ CN has shown that it is not “a remotely reasonable commercial term”²⁴⁵ and Amtrak’s Opening Brief provides no argument to the contrary.

IV. AMTRAK’S ARGUMENTS AGAINST FULL INCREMENTAL COST COMPENSATION, AND AGAINST CN’S PROPOSAL FOR COMPENSATION FOR FREIGHT DELAY COSTS ARE MERITLESS.

As CN’s Opening Brief explained, as a matter of law, CN is entitled to compensation from Amtrak for “all costs which would not be incurred if passenger service were not performed for Amtrak.”²⁴⁶ Amtrak mischaracterizes CN’s argument on incremental cost compensation as “rest[ing] entirely on the economic theories presented in the . . . testimony of Professor Willig.”²⁴⁷ While Professor Willig provides a compelling explanation of why full incremental cost compensation, including compensation for incremental freight delay costs, is essential for

simple mathematical model that captures the relationships between HRD and ASOTP that accounts for the complexities that Mr. Sacks ignored).

²⁴² Amtrak Br. at 34.

²⁴³ Amtrak Br. at 35.

²⁴⁴ See CN Br. at 129.

²⁴⁵ CN Br. at 129.

²⁴⁶ H.R. Rep. No. 93-587, at 16 (Oct. 12, 1973) (“1973 Conference Report”); *accord*, e.g., *Wash. Term.*, 348 I.C.C. at 103 n.15 (incremental costs are “all costs which would not be incurred if passenger service were not performed for Amtrak”); *UP/SP*, 3 S.T.B. at 145 & 156 n.24 (noting that the term “incremental costs” “is not as limiting as Amtrak may believe”); see *generally* CN Br. at 43-73.

²⁴⁷ Amtrak Br. at 77.

economic efficiency and the public interest,²⁴⁸ CN's argument is based on the law – the text and legislative history of the RPSA, precedent, and constitutional principles.²⁴⁹

CN has proposed that it be compensated, both retroactively and under appropriate operating agreement provisions going forward, for the practically quantifiable costs of delays to CN's freight trains that would not occur but for the presence of Amtrak trains CN is required to host – CN's incremental freight delay costs. Those costs include (i) costs of extra fuel consumed when CN freight trains have to stop and re-start and spend extra time in transit because of delays caused by Amtrak trains, (ii) costs of extra crew time expended onboard freight trains because of delays caused by Amtrak trains, and (iii) costs of extra freight locomotives and cars needed because of extra time spent in transit because of delays caused by Amtrak trains. And they are caused by delays that may be due to (i) Amtrak trains breaking down on CN's lines, (ii) Amtrak's trains stopping on CN's lines because of Amtrak crew or passenger problems, (iii) Amtrak trains arriving late to CN's lines, (iv) measures taken by CN dispatchers to implement Amtrak's rights to preference, (v) measures taken by CN dispatchers to accommodate Amtrak's performance demands under the Operating Agreement, and (vi) other causes of delay that would not have occurred but for CN's obligation to host Amtrak.²⁵⁰

CN has presented detailed evidence, including specific, individual delay records, on the past delays its proposal encompasses, on its past fuel, crew, locomotive, and car costs, and on the methodology it proposes to identify and quantify those costs both retroactively and prospectively, and Amtrak has had ample opportunity to review that evidence and take

²⁴⁸ See CN Br. at 52-53, 62,

²⁴⁹ See *id.* at 43-52, 53-61, 63-73.

²⁵⁰ See *generally* CN Br. at 57-73, 89-111.

discovery.²⁵¹ CN has also explained that while its proposal would bring CN's compensation closer to its statutory entitlement to full incremental cost compensation, it still falls substantially short of reaching that point because (i) it does not include delays to CN freight trains due to Amtrak that fall below SRS's recording thresholds or that result from the network effect of cascading delays caused by Amtrak, (ii) it resolves in Amtrak's favor doubts and ambiguities with respect to the attribution and quantification of delays, and (iii) it entails no compensation at this time for CN's less readily quantifiable costs associated with Amtrak's consumption of CN's capacity.²⁵²

Amtrak could have responded to CN's proposal by identifying particular delays or costs, or particular types of delay or cost, that it believes should not be included. Alternatively, it could have proposed an different methodology for identifying and quantifying CN's incremental freight delay costs.

Instead, Amtrak argues for a categorical rule prohibiting CN from recovering any freight delay costs from Amtrak, whether incurred during the 2013-18 timeframe of this proceeding or in the 2018-28 timeframe Amtrak proposes for a new agreement. Under Amtrak's proposal,

²⁵¹ See *generally* Baranowski/Fisher VS (and accompanying workpapers); Summerfield/Girard/Morehouse VS.

²⁵² See CN Br. at 90-93, 96-101. Amtrak advances a lengthy but misguided argument against "CN's proposed requirement" that Amtrak pay CN hundreds of millions of dollars for infrastructure improvements to compensate for the line capacity Amtrak consumes. Amtrak Br. at 95-100; *see also id.* at 54. (Amtrak also re-hashes criticisms of CN's infrastructure modeling that CN has already rebutted. See CN Br., Appx. A-19—A-29.) Although the Board has recognized infrastructure needed to accommodate Amtrak as an incremental cost recoverable under the RPSA, *see UP/SP*, 3 S.T.B. at 155, CN has made no such proposal. Instead, CN provided evidence of the cost of infrastructure that would be necessary to restore CN's freight operations to the level of efficiency (measured in total freight delays) they would achieve in Amtrak's absence in order to illustrate the magnitude of the costs to CN and its freight customers imposed by Amtrak's demands, and to highlight the conservatism of CN's actual proposal. See CN Br. at 92-93.

there is no scenario under which CN could recover any freight delay costs – even if, for example, Amtrak’s preferred “windshield view” of causation established clearly that a freight train was delayed for an hour, and forced to burn additional fuel stopping and starting, because a defective Amtrak train broke down directly in front of it on a single-track main line.

As demonstrated below, none of Amtrak’s arguments justifies that categorical rule. Indeed, Amtrak fails to show that any of the past costs claimed by CN should be excluded from its entitlement to incremental costs, or that CN’s proposal to identify and quantify its future incremental freight delay costs is unreasonable, over-inclusive, or unreliable.

A. The Board Should Declare That A Host Can Recover Incremental Freight Delay Costs From Amtrak.

CN’s Opening Brief asked the Board to affirm that CN is entitled to its full incremental costs, including its “freight delay costs due to hosting Amtrak.”²⁵³ That legal principle has been a central issue in the negotiations and litigation between the parties for five years now, and its resolution will affect not just CN’s immediate claim for several million dollars of freight delay costs retroactive to the start of this proceeding, but also the terms to govern the parties’ relationship going forward and future negotiations between Amtrak and CN and, potentially, Amtrak and its other hosts.²⁵⁴

²⁵³ CN Br. at 73.

²⁵⁴ As Professor Willig has explained, a ruling that incremental freight delay costs are compensable would, by requiring Amtrak to internalize a significant portion of the costs its demands generate, better align Amtrak’s incentives with the public interest and motivate Amtrak to seek more reasonable and realistic schedules and performance standards, which would, in turn, reduce the probability that Amtrak will make unreasonable demands in the future. *See Willig VS* at 4-5; *Willig RVS* at 4, 6-10.

Amtrak argues that the Board need not address “the legal question of whether [freight delay] costs would be compensable as a matter of law,” because of what it claims is a total failure of proof on CN’s behalf.²⁵⁵ Amtrak claims that CN has not proven:

- “that it actually incurred *delays* to its freight trains;”
- “that any such delays were *caused by Amtrak*,” or
- “that it *incurred actual costs* as a result of actual delays to its freight trains caused by Amtrak.”²⁵⁶

Amtrak’s claim that there has been a ***total*** failure of proof on those points is necessary to its argument that any legal ruling on the issue of whether any freight delay costs can ever be recovered under the RPSA “would amount to an advisory opinion.”²⁵⁷ But Amtrak cannot, and makes no serious effort to, sustain it.

First, the two cases Amtrak relies on in support of its “advisory opinion” argument stand only for the trite proposition that the Board “need not” resolve hypothetical questions not raised on the record before it.²⁵⁸ Whether freight delay costs are compensable incremental costs under 49 U.S.C. § 24308(a) is not hypothetical. It is central to the issues the parties have been litigating for years and dispute in their briefs, central to both the retroactive and the prospective

²⁵⁵ Amtrak Br. at 54; *see also id.* at 55-57.

²⁵⁶ Amtrak Br. at 56 (emphasis in original).

²⁵⁷ *Id.*

²⁵⁸ Amtrak Br. at 56-57 (citing *Cargill, Inc. v. BNSF Ry.*, STB No. NOR 42120, slip op. at 6-7 n.11 (served Aug. 12, 2013); *City of Ozark, AK—Pet. for Decl. Order*, STB No. FD 36104, slip op. at 6 n.5 (served July 28, 2017)). In the *Cargill* case, the Board did not address a legal issue (the degree of fuel surcharge overcharging required to constitute an unreasonable practice) that did not arise given the evidence (the Board found no overcharge); in the *Ozark* case, the Board did not address a legal issue (preemption relating to crossing installation at other locations) that did not arise because it had nothing to do with the relief the parties sought (neither party “presented an alternative location for the crossing,” *id.*).

relief CN seeks, and clearly raised by the record. While Amtrak disputes CN's quantification of its incremental freight delay costs, the fact that CN incurs costs from freight train delays due to actual and potential meets with Amtrak trains cannot be reasonably disputed.

CN presented detailed evidence of 19,346 specific freight delays it attributed to Amtrak's presence on its lines.²⁵⁹ After ample opportunity for discovery, Amtrak has raised issues about only eight of those delays.²⁶⁰ While it raises general arguments about CN's freight schedules, Amtrak does not and cannot deny a fact that is self-evident even without CN's extensive evidence: there have been multiple occasions over the past four-and-a-half years when CN freight trains have had to stop or slow down to let an Amtrak passenger train proceed ahead of them or because an Amtrak train is stopped ahead of them. And while Amtrak raises various arguments about CN's calculation of the resulting costs, it concedes that "fuel costs may qualify in appropriate circumstances as short-run avoidable costs,"²⁶¹ and it cannot deny the equally self-evident fact that when a CN freight train is required to make an extra stop, CN incurs, at the very least, immediate, "short-run" costs by burning the additional fuel necessary to accelerate the freight train from its stopped position back up to its running speed. Thus, even if all of Amtrak's other arguments about CN's quantification of its freight delay costs had merit – and none of them do, as demonstrated in Subsection C, below – they would not establish a total failure of proof on CN's part of past incremental freight delay costs.

Moreover, Amtrak's "advisory opinion" claim ignores the fact that this proceeding is not just – or even primarily – about past events. The Board's primary responsibility is to prescribe

²⁵⁹ See Baranowski/Fisher VS at 9, Table FTI-4 (and accompanying workpapers).

²⁶⁰ See Crowley/Mulholland RVS at 8, 11 (Tables 1 and 2).

²⁶¹ Crowley/Mulholland RVS at 24.

terms to govern CN's hosting of Amtrak for at least the next three (under CN's proposal) or the next ten (under Amtrak's proposal) years. Regardless of any flaws Amtrak claims in CN's quantification of its past incremental freight delay costs, it is inevitable that hosting Amtrak will cause CN to incur freight delays and consequent costs going forward. CN's markup of the Operating Agreement proposes a mechanism for compensating CN for those costs; Amtrak's would ensure that CN would receive no compensation for those costs. While Amtrak may argue that CN's proposed compensation mechanism is flawed or specify a different compensation mechanism, the Board may not categorically exclude freight delay costs from CN's statutory right to full incremental cost compensation. Amtrak's proposal that CN be precluded for years from receiving any compensation for such costs must be rejected.

B. Amtrak's Legal Arguments Against Compensating Incremental Freight Delay Costs Are Meritless.

Amtrak claims that freight delay costs cannot be incremental costs "as a matter of law."²⁶² It offers several arguments, some of which address only a subset of the freight costs CN is claiming, and none of which is persuasive.

1. History does not preclude CN's claim.

Amtrak asserts that claims for freight delay costs due to Amtrak have "never [been] previously recognized by the parties or the Board."²⁶³ The specific issue of incremental freight delay costs does not appear to have been raised before the Board or the ICC, and there is no specific decision ruling that such costs can, or cannot, qualify as compensable incremental costs. But that absence of directly on point precedent indicates only that the Board should address the

²⁶² Amtrak Br. at 54.

²⁶³ Amtrak Br. at 55.

issue as one of first impression, based on the text of the statute and applicable principles of statutory construction.

To the extent Amtrak hints at a consensus against the recovery of incremental freight delay costs, no such consensus exists.²⁶⁴ While it is true that nothing similar to CN's proposed system for freight delay cost compensation was included in early operating agreements under the RPSA, that likely reflects practical considerations – sophisticated and reliable delay tracking systems like SRS did not exist in the 1970s. It certainly does not reflect any general acceptance by host railroads that freight delay costs were not, in principle, compensable. Indeed, according to information Amtrak provided to the General Accounting Office in 1981, Amtrak agreed in the 1970s to compensate at least some hosts for incremental freight delay costs:

In some cases the railroads asserted that they incur additional costs in their freight service as a result of their obligation to operate passenger trains. Such costs have not been quantified or clearly recognized by Amtrak as avoidable costs to the railroads. However, Amtrak has agreed to pay the railroads amounts to cover all costs not specifically identifiable, including increased freight service costs.²⁶⁵

Given the greater accuracy and ability to quantify such costs that can now be achieved, CN has proposed that the same principle now be effectuated by means other than a flat fee.²⁶⁶

2. Amtrak's "short-run" limitation is not legally sound and is not relevant to some of CN's incremental freight delay costs.

Amtrak's primary legal argument is that CN's freight delay costs do not qualify as "incremental costs" within 49 U.S.C. § 24308(a)(2)(B) because Congress intended "incremental

²⁶⁴ CN understands that other hosts share CN's view of the law.

²⁶⁵ 1981 GAO Report at 24.

²⁶⁶ While CN prefers its own proposal, CN is open to attempting to negotiate with Amtrak a flat fee to represent freight delay incremental costs. Such negotiations could be informed by the extensive evidence CN has produced of the magnitude of its past incremental costs, but adjustments would be necessary to reflect the additional incremental costs expected if a more onerous performance standard were imposed on CN.

cost” to mean a particular subset of avoidable costs: “short-run avoidable costs.”²⁶⁷ That argument suffers from two fatal flaws.

First, Amtrak misreads the law. Amtrak’s argument begins with a point on which the parties agree: Congress inserted the “incremental cost” language into the RPSA in 1973 in reaction to the ICC’s *Penn Central* decision.²⁶⁸ In that case, the ICC was asked to choose between a fully allocated cost standard and an avoidable cost standard as the basis for compensation under RPSA § 402:

Penn Central urges us to adopt, as the ‘benchmark’ of the compensation formula promulgated herein the fully allocated costs of its intercity passenger operations. Amtrak urges us instead to adopt as the ‘benchmark’ the avoidable cost of such intercity passenger operations.²⁶⁹

The ICC:

- (1) selected fully allocated cost as the standard applicable where passenger trains represented a large percentage of the traffic on the line (on the Northeast Corridor); and
- (2) selected avoidable cost as the standard applicable where passenger trains represented a smaller percentage of the traffic on the line.²⁷⁰

Amtrak is partly correct that Congress inserted “incremental cost” into the RPSA in 1973 to “overturn the result of *Penn Central*.”²⁷¹ But it did so only with respect to the first of those rulings – it acted to eliminate the use of the fully allocated cost standard to determine base compensation, and to adopt the avoidable cost standard. The Conference Report on the 1973

²⁶⁷ See Amtrak Br. at 70-71; see also *id.* at 71-74, 82-83, 88-91.

²⁶⁸ See Amtrak Br. at 71-73; CN Br. at 57-60 (both discussing *Penn Centra*).

²⁶⁹ *Penn Central*, 342 I.C.C. at 831.

²⁷⁰ *Id.* at 833.

²⁷¹ Amtrak Br. at 73.

amendments to Section 402 explained that what Congress intended by its reference to “incremental costs” “is also sometimes referred to as ‘avoidable costs,’” and that Congress’s goal was to overturn the ICC’s “determin[ation] that the Penn Central Transportation Company should receive additional compensation in excess of avoidable costs in the Boston-Washington Corridor.”²⁷²

Amtrak, however, relies on a different aspect of the ICC’s ruling. Having determined to apply an avoidable cost standard to non-Northeast Corridor services, the ICC added some specificity to its avoidable cost standard. It distinguished between two alternative measures of avoidable cost:

Avoidable cost in the short run, hereinafter referred to as the incremental cost, represents that amount of maintenance of way, maintenance of equipment, and transportation expenses which could be saved if a particular service were eliminated. Avoidable cost in the long run, hereinafter referred to as the avertable cost, represents the variable and fixed costs directly traceable to the particular service, as well as the common costs which vary with the level of traffic attributable to that particular service.²⁷³

Having done so, the ICC said nothing further about “incremental cost,” and it selected “avertable cost” – *i.e.*, long-run avoidable cost – as the appropriate measure of avoidable cost, and as the baseline for compensation off the Northeast Corridor.²⁷⁴

²⁷² H.R. Rep. No. 93-587, at 16 (Oct. 12, 1973). The 1973 Conference Report is attached as Exhibit 1. Amtrak quotes at length Congressman Dingell’s floor statement affirming the intent to overturn the *Penn Central* decision and stating that doing so would save Amtrak millions of dollars. See Amtrak Br. at 73 & n.230 (quoting 119 Cong. Rec. 34481 (daily ed. Oct. 17, 1973)). But Congressman Dingell said nothing different from what is set forth on page 16 of the Conference Report, which he specifically referenced as authoritative. Congressman Dingell said nothing about “short-run” avoidable costs or “incremental costs;” instead, he expressed the intent that the governing standard be “avoidable costs” (without any qualification). Moreover, he did not indicate any intent to overturn the ICC’s decision with respect to non-Northeast Corridor services, which, as discussed below, adopted a long-run avoidable cost standard.

²⁷³ *Penn Central*, 342 I.C.C. at 832.

²⁷⁴ *Id.* at 833.

Amtrak argues that although the text of the RPSA states no temporal limitation on the costs it encompasses, Congress should be understood to have adopted **short-run** avoidable cost as the standard under Section 402 because it adopted the term – “incremental cost” – that the ICC used to refer for purposes of its decision to the more technical concept of short-run avoidable cost.²⁷⁵ But the 1973 Conference Report directly refutes that notion.

The Conference Report makes clear that Congress was not parsing or adopting the ICC’s technical use of incremental cost as a standard, but instead using “incremental cost” in a broad, non-technical, widely understood, common sense way to indicate that the host should be made whole, without any limitations:

The committee of conference recognized the difficulties inherent in costing terminology. The term ‘incremental costs’ is not used by the conferees as a term of art itself. It is intended to provide basis for payment to the railroad of all costs which would not be incurred if passenger service were not performed for Amtrak.²⁷⁶

Congress did not adopt the ICC’s technical usage – had it wished to do so, it could have copied it or incorporated it by reference rather than spend half a page explaining what it meant by “incremental cost” – and it did not endorse a “short-run” limitation – rather it expressly included “**all** costs which would not be incurred” but for Amtrak.

Moreover, rather than following the ICC in equating “incremental cost” with “short-run avoidable cost,” Congress equated it with “avoidable costs” without qualification, and described it in terms (including “fixed” costs, which are not apt to be “short-run”) that much more closely

²⁷⁵ See Amtrak Br. at 72-73.

²⁷⁶ 1973 Conference Report at 16. The focus on “service . . . performed for Amtrak” as opposed to facilities made available for Amtrak reflects the practical realities of 1973, when Amtrak largely relied on its hosts to operate its service on its behalf. As Amtrak took over operations, Congress made clear, particularly in the 1978 amendments to the RPSA, that the compensation principles applicable to host service provision apply equally to use of host facilities.

resemble the ICC’s description of “avertable costs” than its narrower usage of “incremental costs:”

The term “incremental” is to be considered then as meaning those costs which would not be incurred if a particular service were not rendered or a given amount of traffic were not handled. This includes solely related (or direct) costs of a particular service (both variable and fixed portions of solely related costs), but does not include any portion of common costs. This is also sometimes referred to as “avoidable costs.”²⁷⁷

CN’s Opening Brief cited a large volume of additional congressional statements and subsequent precedents that, consistent with the plain language and the Conference Report, treat “incremental cost” as not being limited to the short-run.²⁷⁸ Amtrak does not deny that those authorities are unfavorable to its position; it dismisses some of them as imprecise,²⁷⁹ while failing to address others, including directly contrary Board precedent. For example, Amtrak does not address the Board’s decisions in *UP/SP* and *Guilford*, both of which construe the incremental cost compensation standard as encompassing, in appropriate cases, costs of adding infrastructure and capacity, or the ICC’s decision in *Conrail*, which assessed costs using a 7-year – hardly “short-run” – horizon.²⁸⁰

The only legislative history Amtrak cites as a counterbalance is a single floor statement from Senator Magnuson in which he referred to the Conference Report and Congressman Dingell’s statement (neither of which supports a short-run limitation, as discussed above) as authoritative, but used the term “short-run avoidable costs” (without any definition or

²⁷⁷ 1973 Conference Report at 16.

²⁷⁸ See generally CN Br. at 57-63.

²⁷⁹ Amtrak Br. at 73 n. 231, 74 n. 233.

²⁸⁰ See CN Br. at 61.

elaboration) in paraphrasing them.²⁸¹ Amtrak provides no basis for treating a single Senator’s statement, made six days after release of a Conference Report, as more “precise” and authoritative than the Conference Report which it purported to summarize.²⁸²

Amtrak’s case on precedent is similarly weak. While dismissing the multiple precedents that support CN’s position, Amtrak cites a single statement by the D.C. Circuit that the statutory term incremental cost “appears to coincide with” the ICC’s “short-run” definition of the standard the ICC did not use.²⁸³ The D.C. Circuit’s passing remark to that effect was made without any explanation or elaboration, and it occurred in a case in which “short-run” versus “long-run” was not at issue. It cannot counterbalance the weight of authority that reads “incremental cost” naturally, with no temporal limitation.

Amtrak also cites various cases for the proposition that “[w]hen a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation.”²⁸⁴ That proposition has nothing to do with the issue at hand. Congress did not “voice its approval” of *Penn Central* – quite the opposite; it did not “voice its approval” of the definition of “incremental cost” stated in *Penn Central* – instead, it explained the term in its own, different terms in the 1973 Conference Report; and the ICC’s definition of “incremental

²⁸¹ See Amtrak Br. at 73 (quoting 119 Cong. Rec. 34591 (Oct. 18, 1973)).

²⁸² “Because a conference report represents the final statement of terms agreed to by both houses, next to the statute itself it is the most persuasive evidence of congressional intent.” *Ry. Labor Execs. Ass’n v. ICC*, 735 F.2d 691, 701 (2d Cir. 1984) (citation omitted). A floor statement that is inconsistent with the statutory language and other legislative history is afforded no weight. *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1387 (10th Cir. 1990) (citations omitted).

²⁸³ Amtrak Br. at 73 (quoting *Nat’l R.R. Passenger Corp. v. ICC*, 610 F.2d 865, 872 (D.C. Cir. 1979)).

²⁸⁴ Amtrak Br. at 73-74.

cost” was not an interpretation of the statute – it was a brief mention of a term that did not at the time appear in the statute, and which the ICC did not employ in its order.

Amtrak is simply wrong on the law. Its proposed “short-run” limitation on “incremental cost” is contrary to the plain language of the statute, the overwhelming weight of the legislative history, and the overwhelming weight of precedent. Moreover, as CN demonstrated in its Opening Brief, Amtrak’s proposed limitation is contrary to normal economic usage and unrelated to the statutory goal of compensating the host for the costs properly attributable to Amtrak. Limiting compensation to “short-run” costs would tend to encourage inefficient “short-run” solutions to problems that could be better solved using “long-run” or “capacity” solutions.²⁸⁵ Doing so would be particularly inappropriate in the context of the ten-year agreement term Amtrak proposes and in the context of a hosting relationship that has already spanned several decades.

Second, Amtrak fails to cite or provide any clear legal delineation of its proposed “short-run” limitation, and even Amtrak appears to concede that it would not bar all of the incremental freight delay costs CN claims. Amtrak does not specify any particular time horizon as constituting the “short- run,” and it cites no legal authority on point. Instead, relying on its economic consultants, it claims that the phrase “incremental cost,” inserted into the RPSA in 1973, should be defined by reference to accounting definitions included in a report issued by the Railroad Accounting Principles Board (“RAPB”) 14 years later, which does not itself define the term “incremental cost” or mention the RPSA.²⁸⁶

²⁸⁵ See CN Br. at 62-63.

²⁸⁶ See Amtrak Br. at 88-89 (citing Crowley/Mulholland VS, which in turn cites RAILROAD ACCOUNTING PRINCIPLES BOARD – FINAL REPORT (September 1, 1987) (“RAPB Report”), *available at* <http://archive.gao.gov/t2pbat20/134005.pdf>).

Based on the RAPB Report, Amtrak argues that “incremental cost” in the RPSA should not include any changes in “capacity-limiting input factors,” which the RAPB Report defines as “existing plant and equipment.”²⁸⁷ With no supporting authority whatsoever, Amtrak and its consultants then proceed to re-define “capacity-limiting input factors” to include personnel, as well as “existing plant and equipment.”²⁸⁸ And on that basis, they claim that the statutory term “incremental costs” excludes any crew, locomotive, or car costs associated with freight delays.²⁸⁹

Even on Amtrak’s theory, the RAPB Report definitions do not disqualify CN’s fuel costs associated with freight delays from inclusion as incremental costs, a point Amtrak seemingly concedes.²⁹⁰ Nor should they disqualify CN’s personnel costs, since personnel is not “plant and equipment.” Nor is there any reasonable sense in which the cost of an hour’s delay, or the cost of per diem equipment rentals, fall outside the “short-run.”²⁹¹

Moreover, insofar as relevant, the RAPB Report counsels that costs should be determined over “the length of time pertinent to an activity or service affected by a decision.”²⁹² The decisions at issue in this case are the Board’s order in 2013 instructing CN to host Amtrak pursuant to the existing Operating Agreement terms with a potential retroactive adjustment – a decision which has been in place for four-and-a-half years – and the Board’s ultimate decision to prescribe terms under which CN will host Amtrak for at least three, or potentially ten, years. The

²⁸⁷ Amtrak Br. at 89 (quoting 2 RAPB Report 10, 117).

²⁸⁸ Amtrak Br. at 89-90.

²⁸⁹ *Id.* at 76-77.

²⁹⁰ *See* Crowley/Mulholland RVS at 24.

²⁹¹ The existence of “fixed” (2 RAPB Report 117) plant and equipment may reasonably be used to distinguish the “short-run” from the “long-run.” But, unlike rail lines and yards, locomotives and cars are not fixed, and they can be rented (or rented out) on a short-run basis.

²⁹² 2 RAPB Report 10.

increment of costs that CN incurs due to those decisions cannot be accurately measured on a time-frame that assumes that there will be no changes in CN's personnel or equipment. On a reasonable reading, the RAPB Report, which does not address the meaning of "incremental cost" in the RPSA, is entirely consistent with the 1973 Conference Report, which is authoritative on the subject and instructs that "incremental costs" include "all costs which would not be incurred if passenger service were not performed for Amtrak."²⁹³

3. Amtrak's "quality of service" and "reasonableness" arguments rest on an erroneous definition of "incremental cost" and misread the RPSA.

Starting from the false premise that CN's freight delay costs do not qualify as incremental costs because they are not "short-run" avoidable costs, Amtrak argues that (1) "compensation above incremental costs, if awarded, must be based on quality of service," and (2) "the total amount of compensation awarded must satisfy an overall 'reasonableness' standard."²⁹⁴ The RPSA says as much,²⁹⁵ but those two propositions provide no support for Amtrak's conclusion that freight delay costs are not compensable.

First, the compensation CN seeks for its freight delay costs due to Amtrak is not "compensation **above** incremental costs" – it is compensation **for** incremental costs. CN does not "conflate[] base compensation with quality payment compensation."²⁹⁶ It is Amtrak who does so. Freight delay costs are part of the incremental costs CN incurs to serve Amtrak at any level of service, and compensation for them is necessary to make CN whole. Performance payments serve the separate function of motivating CN to perform above the base level of

²⁹³ 1973 Conference Report at 16.

²⁹⁴ Amtrak Br. at 74-76; *see also id.* at 87-88.

²⁹⁵ 49 U.S.C. § 24308(a)(2).

²⁹⁶ Amtrak Br. at 87.

service set in the Operating Agreement. CN incurs substantial freight delay costs even when it does not meet the level of service required to earn performance payments. And under Amtrak's proposals, CN would have to incur huge freight delay costs and impair the quality of service to its freight customers, not merely to earn performance payments, but even to avoid huge penalties.

Second, while compensation must be "reasonable," Congress instructed the Board that "[w]hen prescribing reasonable compensation," it is to start from the incremental cost floor.²⁹⁷ Because CN's freight delay costs belong in that floor, compensation for them is, *ipso facto*, reasonable. Moreover, Amtrak's main argument in favor of deeming such compensation unreasonable is premised on its assertion that 49 U.S.C. § 24101 is "incorporated" into 49 U.S.C. § 24308 such that, notwithstanding the plain language of the latter, "[a]ny award of compensation that conflicts with, or prevents Amtrak from accomplishing, its statutory goals and mission should not be considered reasonable."²⁹⁸ That unfounded and limitless assertion is refuted in Section II above, and Amtrak's "reasonableness" argument based on it is meritless.

4. Amtrak mischaracterizes some of CN's incremental costs as "opportunity costs."

Amtrak mislabels some of CN's incremental freight delay costs as "opportunity costs."²⁹⁹ Most of the costs CN claims cannot be characterized as "opportunity costs." For example, the cost of fuel burned when a freight train is stopped because of an Amtrak train, the cost of an hour

²⁹⁷ 49 U.S.C. § 24308(a)(2)(B).

²⁹⁸ Amtrak Br. at 76.

²⁹⁹ Amtrak does not and cannot claim that all the costs CN claims are "opportunity costs," so, even if it had merit, its argument about opportunity costs would not render the broader issue of the compensability of freight delay costs "hypothetical."

of overtime, the cost of an additional salary, or the cost of leasing an additional locomotive are indisputably direct and immediate out-of-pocket costs.

Moreover, Amtrak concedes that “costs incurred in connection with *certain types* of crew, fuel and equipment costs have traditionally been treated as incremental costs, [and] have long been included in the parties’ Operating Agreement.”³⁰⁰ For example, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

}³⁰¹

³⁰⁰ Amtrak Br. at 76, citing Current Operating Agreement, App. IV, Items 1(a), (b).

³⁰¹ Operating Agreement, App. IV-7, IV-8, IV-10—IV-11 (Items 1(a), 3, and 7, respectively).

As these terms reflect, and as Amtrak has recognized, there is a real, quantifiable cost incurred when CN crews and equipment perform work for Amtrak. Moreover, the current Operating Agreement specifically include as compensable incremental costs both { [REDACTED] }, rebutting Amtrak’s claims that such costs are not properly compensable.³⁰² Such costs are real costs for CN regardless of whether they arise because Amtrak is directly using CN’s resources or because Amtrak is making those resources unavailable to CN by delaying them on the line.

Nor do the terms of the Operating Agreement require CN to identify “some alternative [that] was not taken,” “other required duties” that could have been performed by the crew, or a “specific ‘other CN train’ it was unable to move” before CN is reimbursed for the hourly cost of its crews and locomotives that are used by Amtrak.³⁰³ That is because these costs are not opportunity costs – they are direct costs to CN that arise whenever and however Amtrak makes CN’s productive assets unavailable to CN.

Amtrak also claims (without citing any legal authority) that including these misidentified “opportunity costs” would make incremental cost “equivalent to charging market price.”³⁰⁴ Amtrak fails to show that any of the costs CN claims includes an element of profiting from Amtrak. Performance payments apart, CN would be no better off hosting Amtrak and being paid the incremental freight delay costs it claims than not hosting Amtrak and receiving none of those

³⁰² See Amtrak Br. at 66-67.

³⁰³ Cf. Amtrak Br. at 91.

³⁰⁴ Amtrak Br. at 77; see also *id.* at 79-80, 91.

payments.³⁰⁵ CN's proposal is consistent with an incremental cost standard and is not based on a market price.³⁰⁶

5. Amtrak's right to preference does not excuse it from reimbursing CN's incremental costs, including CN's freight delay costs.

Amtrak argues that freight delay costs cannot be attributed to Amtrak and therefore qualify as incremental costs because of Amtrak's statutory right to preference.³⁰⁷ Even if it had merit (which it does not), this argument would only apply to some of CN's freight delay costs, because many delays due to Amtrak's presence are attributable to factors other than preference, such as operating agreement requirements that exceed preference requirements or unanticipated Amtrak breakdowns. Amtrak recognizes that reality, but appears to suggest that all of CN's incremental freight delay costs should be deemed attributable to preference unless and until CN proves them not to be.³⁰⁸ Amtrak offers no justification for imposing that burden on CN.

Nor is there any basis or merit to Amtrak's legal argument. Amtrak provides no authority, and no rational basis, for concluding that its right to preference precludes compensation for freight delay costs. As CN explained at pages 63-67 of its Opening Brief, under 49 U.S.C. § 24308, the provision of preference is an aspect of the provision of facilities and services for which Amtrak must pay incremental cost compensation; if it does not pay, it has no right to use (including be accorded preference in using) those facilities and services.³⁰⁹ When

³⁰⁵ In fact, because of the unquantifiable costs not included in its proposal and the conservatism of its methodology for identifying and quantifying freight delay costs, CN would be much better off financially without Amtrak than under CN's proposal.

³⁰⁶ See generally CN Br. at 62-63.

³⁰⁷ Amtrak Br. at 81-82, 86-87.

³⁰⁸ Amtrak Br. at 87 n.280.

³⁰⁹ See 49 U.S.C. § 24308(a)(3).

Congress enacted the preference requirement and the incremental cost standard at the same time in 1973, it did not suggest that the former was an exception to the latter, and when the ICC promulgated regulations to implement hosts' statutory right to seek relief from preference, it provided for reduction in host compensation as a condition of such relief, reflecting an understanding that normal compensation includes compensation for preference.³¹⁰

Amtrak claims that “[t]he preference relief provision would be a nullity if CN could simply recover freight train delay costs from Amtrak under Section 24308(a) as part of its base compensation.”³¹¹ Amtrak is wrong. CN has shown that incremental freight delay cost compensation is far from complete economic compensation for freight delays due to Amtrak. It is limited to incremental cost, and thus precludes economic profit, and as a practical matter, there are incremental freight delay costs that cannot be quantified and recovered. Moreover, freight delay cost compensation also does not directly address the animating concern behind the preference relief provision – whether preference will “materially affect the quality” – not the cost – “of freight transportation.”³¹² The preference relief provision is necessary to protect the interests of shippers.

Conversely, because it focuses on the interests of shippers, the preference relief provision does not, as Amtrak implies, make freight delay cost compensation unnecessary.³¹³ The preference relief provision only applies at the point when the “quality of freight transportation” is affected, but CN incurs freight delay costs – for example, it pays overtime, hires extra crewmen, and buys or rents extra equipment – precisely to prevent that from occurring. The preference

³¹⁰ See 49 C.F.R. § 200.5(c)(3).

³¹¹ Amtrak Br. at 87.

³¹² See 49 U.S.C. § 24308(c).

³¹³ See Amtrak Br. at 82, 86-87.

relief provision provides no protection or compensation for these costs. Moreover, the statutory provision only provides relief from preference. It provides no relief insofar as onerous demands are imposed through operating agreement performance standards as Amtrak proposes here.

6. CN should not be denied compensation for its incremental costs because CN “controls” its own freight railroad.

Amtrak’s final general argument against compensation for incremental freight delay costs is that “CN, not Amtrak, controls the factors that affect the performance of, and delays to, CN trains.”³¹⁴ Obviously CN controls its rail lines, but what CN cannot control – because these are statutory rights – is Amtrak’s right to use CN’s lines and its right to preference. These rights, not CN’s control, drive freight delay costs.

Moreover, insofar as Amtrak suggests that CN could prevent freight delays due to Amtrak by building a dedicated new line for Amtrak to run on, or by eliminating every freight train that has the potential to be delayed by Amtrak, doing so would merely substitute greater costs – massive infrastructure costs, or a massive loss of freight revenues – for the freight delay costs CN incurs due to Amtrak. As the owner of the railroad, CN has no duty to fund massive infrastructure costs that would not be required but for Amtrak, and it has a right – and a common carrier obligation – to run its freight trains. CN has the right to operate its railroad (as is) in a reasonable and efficient manner, and it should not be penalized for doing so by being denied compensation for costs that it would not incur if it was not required to host Amtrak.

As a matter of law, the RPSA is clear. It provides compensation for the host’s full incremental costs – “all costs which would not be incurred if passenger service were not

³¹⁴ Amtrak Br. at 83-86.

performed for Amtrak,”³¹⁵ such that CN will be “put into the same position monetarily as it would have occupied” if it did not incur costs to host Amtrak.³¹⁶ Under that standard, Amtrak is not entitled to deny CN compensation because, decades ago, CN chose, for sound business reasons, to single-track some of its lines; or because it chooses, for sound business reasons, to run more freight trains than it did in the 1970s; or because it chooses, for sound business reasons, to run long trains.³¹⁷ So long as those decisions are consistent with what would have occurred “if passenger service were not performed for Amtrak” – and Amtrak does not suggest, or offer any evidence, that they do not – their consequences represent the appropriate baseline condition against which to measure CN’s incremental costs.³¹⁸

C. CN’s Proposal For Quantification Of Freight Delay Costs Is Reasonable And Conservative.

Notwithstanding its hyperbolic and unfounded claims of a total failure of proof,³¹⁹ Amtrak’s remaining arguments³²⁰ address only the quantification of CN’s incremental freight

³¹⁵ 1973 Conference Report at 16.

³¹⁶ *Metro Transp. Auth. v. ICC*, 792 F.2d at 297.

³¹⁷ See generally Amtrak Br. at 83-86. In complaining about CN’s removal of double track in the 1990s, Amtrak fails to note that (1) CN did so in conjunction with major investments in improvements to its signaling system that substantially offset the reduction in capacity due to removal of double track, see CN Br. at 89, and (2) Amtrak neither contributed to the funding of that double track when it was installed nor offered to contribute to its retention before it was removed. Amtrak does not have the right to demand that CN retain double track for decades for Amtrak’s benefit without compensation. See 49 U.S.C. § 24309(d)(2) (Amtrak can object to the removal of facilities that would be removed but for Amtrak, but must then pay their avoidable costs).

³¹⁸ CN’s proposed agreement language provides Amtrak with appropriate audit rights to ensure that CN does not make improper incremental cost claims. In any event, CN has every reason to run its freight railroad efficiently, and Amtrak has made no attempt to demonstrate CN has not done so.

³¹⁹ See Amtrak Br. at 56, discussed in Subsection A, above.

³²⁰ Amtrak Br. at 57-70.

delay costs. Amtrak complains about how CN “measured” delays;³²¹ it claims that SRS is “imprecise;”³²² it asserts that “flawed methodologies” were used “to estimate the amount of delay minutes attributable to Amtrak;”³²³ and it criticizes CN’s cost “estimation methodologies.”³²⁴ If they were well-founded – which they are not – those complaints might be grounds for adjustments to CN’s calculations and methodology,³²⁵ but they do not bear on whether CN has demonstrated substantial, legally compensable, incremental costs.

Amtrak offers no suggestions for adjustment, and no alternative proposal. It simply claims that because CN’s estimates are (allegedly) “imprecise,” CN should be denied all compensation, both for the amounts it has estimated and for any incremental freight delay costs for the next ten years. While, given the nature of the exercise, CN’s estimate of its freight delay costs is not perfectly precise, it is certainly a far more accurate representation of CN’s statutory rights than the zero compensation for incremental freight delay costs that Amtrak proposes. Amtrak’s nihilistic approach to freight delay costing should be rejected.³²⁶

³²¹ Amtrak Br. at 57.

³²² *Id.* at 61.

³²³ *Id.* at 63.

³²⁴ Amtrak Br. at 65.

³²⁵ To the extent that the Board finds any of Amtrak’s methodological criticisms persuasive, the appropriate course for the Board would be to affirm CN’s right in principle to its incremental freight delay costs, and then either make an appropriate adjustment to CN’s proposal or guide the parties on the criteria to be applied in doing so. CN stands ready to refine its methodology and calculations as appropriate, and intends anyway to propose refinements to Amtrak during the course of the agreement whenever new technology and CN’s ongoing efforts to refine SRS enable it to improve the precision of its freight delay cost calculations. CN is also open to attempting to negotiate alternative means to effectuate its right to full incremental cost compensation, including potentially an agreed flat fee representative of freight delay costs at an agreed performance level.

³²⁶ *See, e.g., Conrail*, 10 I.C.C.2d at 871-872 (Board is looking “for a model that is reliable . . . but that is not so cumbersome (by attempting to mimic every possible detail of the

On the merits of quantification, CN demonstrated that its proposal is reasonable and conservative.³²⁷ Amtrak claims that: (1) CN's delay measurements are compromised by the nature of CN's freight schedules;³²⁸ (2) CN's methodology for determining which delays were caused by Amtrak is unreliable;³²⁹ and (3) CN's estimates of its delay costs are unreliable.³³⁰ Amtrak's claims are unfounded.

1. CN's delay measurements are reliable.

Amtrak claims that CN has failed to "demonstrate[]" that its freight trains did, in fact, experience delays."³³¹ Taken literally, this claim is absurd. Of course trains experience delays. And of course CN's trains experience delays when an Amtrak train stops in front of them, or when they are required (by preference or to meet Amtrak's contractual performance demands) to wait to let an Amtrak train proceed before them. Delaying freight trains is the essence of providing preference to passenger trains. No reference to CN's freight schedules is necessary to understand this obvious, common-sense point.

Restated more realistically, Amtrak's claim is that CN measures its delays using its freight schedules as a baseline, and Amtrak does not trust those measurements because, for four

real world) as to be practically unusable in a real case."); *Calculation of Variable Costs in Rate Complaint Proceedings Involving Non-Class I Railroads*, STB Ex Parte No. 589, slip op. at 6 (STB served Apr. 30, 2002) ("precision in rail costing is a desirable goal, but the 'best should not be the enemy of the good'" and the "infeasible perfect [should not] oust the feasible good.") (citations omitted).

³²⁷ See CN Br. at 89-107, Appx. A-17—A-19.

³²⁸ Amtrak Br. at 57-60.

³²⁹ Amtrak Br. at 60-65.

³³⁰ Amtrak Br. at 65-70.

³³¹ Amtrak Br. at 57.

reasons, it does not trust CN's schedules as a baseline. There is no substance to Amtrak's concerns.

First, Amtrak complains that CN's schedules are not published, and are set "without any input from Amtrak."³³² Having had ample opportunity for discovery, Amtrak cannot claim that CN's freight schedules are a mystery. But in any event, delays to CN's freight trains can be reliably measured without their schedules being "published" or being subject to Amtrak's prior "input." Amtrak offers no evidence that CN based its delay measurements on schedules that reflect anything other than CN's realistic expectation of the normal, unimpeded movement of its freight trains. CN's freight schedules were not fabricated to serve as a basis for claiming costs against CN; those schedules, and CN's SRS delay recording system, are, as CN's witness Anne Morehouse made clear, at the core of its "precision" railroading model, and critical to CN's management of its freight operations to "make the most of [CN's] limited capacity."³³³ CN has every interest in making sure its schedules are accurate, because they form the baseline for generating the data that drives CN's critical business decisions.³³⁴ There is no reason to infer that publication, or Amtrak review, is necessary to make them reliable.

Second, Amtrak claims that CN's schedules "are not based on actual run-time or any other disclosed principles."³³⁵ Again, despite having had extensive opportunity for discovery,

³³² Amtrak Br. at 57.

³³³ Morehouse VS at 2, 5.

³³⁴ See CN Br. at 93-95.

³³⁵ Amtrak Br. at 58. Amtrak cites deposition testimony by CN witness Harald Krueger that, it suggests, demonstrates the deficiencies of the procedures by which CN develops its train schedules and thus the inappropriateness of measuring freight train delays against such schedules. Amtrak Br. 58. Mr. Krueger's statement that there is "no hard detailed scientific or consistent approach" to developing those schedules reflects the common-sense proposition that schedule design is not the mechanical output of a pre-determined algorithm, but rather that it

Amtrak provides no evidence that CN's schedules are inconsistent with expected unimpeded run-time, and no theory of why CN would not design business-critical schedules to be as realistic as possible. Moreover, on the rare occasion when a CN freight schedule has been mis-set and is too short, CN's dispatchers would properly record such delays as unable to make schedule run time. When that occurs, the delay will not be attributed to Amtrak.

Third, Amtrak complains that {

[REDACTED]

Finally, Amtrak claims that CN's freight trains do not follow their schedules.³³⁷ By this, Amtrak appears to mean nothing more than that CN's freight trains are delayed by multiple causes. That does not make CN's schedules any less reliable as a baseline of unimpeded

requires human judgment by individuals who are familiar with railroad operations and the needs of CN's system.

³³⁶ Amtrak Br. at 58-59. Amtrak provides no analysis of (i) the frequency of such changes, (ii) whether the changes occur to trains that operate on the same subdivisions as Amtrak and/or those trains that are frequently delayed by Amtrak, or (iii) whether the changes occur on the portion of the route of those trains that is shared with Amtrak.

³³⁷ Amtrak Br. at 59.

operations. And it does not make additional delays any less costly. As discussed below, CN's methodology properly isolates the delays due to Amtrak. That its freight trains suffer other delays, too, is irrelevant to an accurate assessment of the incremental costs CN claims.

2. CN's SRS-based method for quantifying delays attributable to Amtrak is reasonable and reliable.

Amtrak challenges the reliability of SRS data on the bases that { [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] }³⁴¹ In fact, SRS data are highly reliable.

First, { [REDACTED]

[REDACTED] }³⁴² That does not in any way affect the reliability of the delay records it does generate. It simply makes SRS delay totals – including the total Amtrak-caused delays included in CN's claim – conservative.

Second, dispatchers need not be physically present on a train in order to reliably determine the cause of a delay. CN's dispatchers are in constant verbal contact with CN train crews, and have complete information about the train, including current real-time information about locations and times that the train stopped, started, and was idling. Thus, CN's dispatchers are in a better position to attribute delay to CN's freight trains than Amtrak's own conductors

³³⁸ Amtrak Br. at 61-62.

³³⁹ Amtrak Br. at 62.

³⁴⁰ Amtrak Br. at 62.

³⁴¹ Amtrak Br. at 63.

³⁴² CN Br. at 96.

(who lack knowledge of the big picture outside their direct line of sight) are to attribute delay to Amtrak trains.

Third, Amtrak’s complaint about root cause coding of delays is unfounded. Root cause is a logical and objective means for attributing delay; it allows the dispatcher to provide more information about the cause of the delay than Amtrak provides in its delay coding system; and it has no inherent bias, for or against Amtrak. Among the thousands of SRS delay records CN provided to Amtrak, Amtrak does not identify a single instance of CN’s “root cause” delay attribution leading to a less accurate outcome than some other method for attributing delay.

Fourth, errors in SRS are rare, are regularly caught and corrected by CN, and, insofar as they relate to Amtrak delays, can be reduced further through procedures proposed by CN. Amtrak cites no evidence that such allegedly erroneous delay records are a significant problem, or that they cannot be caught and fixed by CN or Amtrak. That Amtrak found a few examples of CN employees identifying and fixing errors in SRS reflect the seriousness with which CN treats the data and the fundamental reliability of that data.

Amtrak’s brief also reiterates criticisms its witnesses Crowley and Mulholland leveled at FTI Consulting’s delay attribution methodology.³⁴³ Amtrak claims that FTI Consulting improperly attributed “AO” delays to Amtrak, that FTI Consulting over-allocated some delays, and that FTI Consulting erred in including some delays that were not coded as either FP or AO. CN’s Opening Brief fully rebutted each of those arguments.³⁴⁴

³⁴³ Amtrak Br. at 63-65.

³⁴⁴ CN Br. at 98-101.

3. CN has rebutted Amtrak's criticisms of FTI Consulting's delay cost methodology.

With respect to FTI Consulting's delay cost methodology, Amtrak's brief again merely reiterates the arguments made by its witnesses Crowley and Mulholland.³⁴⁵ Amtrak claims that CN failed to demonstrate incremental crew or equipment costs,³⁴⁶ and that it overstated its fuel costs by using a fuel simulation study and failing to account for AESS technology.³⁴⁷ Again, CN's Opening Brief rebutted each of these arguments,³⁴⁸ but three points merit some elaboration.

First, Amtrak objects to CN's quantification of its incremental crew, fuel, and equipment costs by using CN's average cost of particular inputs,³⁴⁹ rather than documenting each cost individually.³⁵⁰ Amtrak would require CN, instead of relying on system averages, to identify "additional crew personnel" retained or "additional crew on-duty time resulting from delays,"³⁵¹ specific locomotives acquired or leased, or for which CN owed HPH payments to other carriers, as a result of such delays,³⁵² and to provide evidence that particular cars remained longer on CN

³⁴⁵ Amtrak Br. at 65-70.

³⁴⁶ Amtrak Br. at 66-67, 68-70.

³⁴⁷ Amtrak Br. at 67-68.

³⁴⁸ CN Br. at 101-02.

³⁴⁹ CN quantified hourly wage and constructive allowance costs on the basis of CN's Wage Form A&B reports, hourly fringe benefits on the basis of its Form R-1 reports, fuel consumption per gallon on the basis of CN's Fuel Surcharge reports to the Board, hourly locomotive costs on the basis of horsepower-per-hour ("HPH") costs incurred under CN horsepower equalization agreements (plus a HPH equivalent of return on investment of delayed CN locomotives), and hourly car expenses on the basis of average car hire rates payable for individual pieces of equipment delayed (or, in the case of cars for which specific per diem records were unavailable, CN's average car hire rates for the particular equipment type). See Baranowski/Fisher VS at 11-14, 19, 21-22, 24-25.

³⁵⁰ See Amtrak Br. 76-77.

³⁵¹ Crowley/Mulholland RVS at 15, 16-17.

³⁵² *Id.* at 25.

lines, resulting in higher total car-hire charges to CN, as a result of such delays.³⁵³ In addition, selectively citing the current Operating Agreement, which requires that CN document expenditures for diesel fuel provided directly to Amtrak with “invoices and metered fuel tickets for delivery points ... or by proper usage estimates based upon appropriate engineering studies for other points,” Amtrak suggests that similar specificity should be required for fuel costs claimed as a result of Amtrak-caused freight delays.³⁵⁴

Amtrak’s objection is unfounded, and would impose hugely burdensome (and uncompensated) requirements of detailed proof with little, if any, resulting gain in accuracy. CN has demonstrated that it used well-established, Board-approved methodologies for railroad costing that are reasonable and reliable.³⁵⁵ As the ICC established long ago, the use of “models and recent historic data” to estimate incremental costs is appropriate where “direct measurement of those costs ... is practically not possible.”³⁵⁶ And while the current Operating Agreement requires { [REDACTED] }, outside of that context it generally provides for { [REDACTED] }. For example, it provides for { [REDACTED] },³⁵⁷ and for { [REDACTED] },³⁵⁸ and for { [REDACTED] }

³⁵³ *Id.* at 31-32.

³⁵⁴ Amtrak Br. 76 (quoting Operating Agreement, App. IV, Section III, Item 1(b)).

³⁵⁵ CN Br. at 103-104.

³⁵⁶ *See Conrail*, 10 I.C.C.2d at 871.

³⁵⁷ Operating Agreement, App. IV-8 (Section III, Item 3). { [REDACTED] }

³⁵⁸ *Id.*, Item 7.

[REDACTED]

[REDACTED]

[REDACTED] }³⁵⁹

Second, Amtrak argues that some of CN's incremental costs should be disallowed because they involve the use of CN resources that Amtrak characterizes as excess capacity. Amtrak argues that CN provided no evidence it paid additional crew wages, paid overtime, or hired additional crews, or that it was required to acquire or lease additional locomotives or cars or, that it was precluded from using locomotives or cars to perform necessary services.³⁶⁰ But CN showed that it right sizes its work force and equipment based on its current and anticipated operations, and that there is no basis for Amtrak's insistence that CN conduct an alternative operating plan to describe in detail which employees and equipment CN would jettison in Amtrak's absence.³⁶¹ Moreover, what Amtrak characterizes as excess capacity includes vital productive assets that CN needs, and in which CN has invested heavily, in order to enable it to adjust efficiently to changes in demand and operating conditions. Amtrak has not contributed to CN's investment in that capacity, and Amtrak has no right to consume that capacity and jeopardize CN's ability to adjust without paying for it.³⁶²

Finally, Amtrak argues that CN's fuel cost estimates failed to account for potential fuel savings by using AESS technology.³⁶³ However, CN has shown that AESS was unlikely to affect fuel consumption of locomotives operating on the mainline during meet/pass events.³⁶⁴

³⁵⁹ *Id.*, Items 6, 15, 17.

³⁶⁰ Amtrak Br. at 66; Amtrak Br. at 69-70.

³⁶¹ CN Br. at 103-104.

³⁶² CN Br. at 103-104.

³⁶³ Amtrak Br. at 67-68.

V. AMTRAK UNREASONABLY REFUSES TO IMPROVE ITS SCHEDULES AND REFUSES TO AGREE TO ROUTINELY REVIEW SCHEDULES TO CONFIRM THEY ARE ACHIEVABLE AND RELIABLE.

Realistic schedules that account for the operational challenges faced by a particular service are essential to reliably achieving high ASOTP. CN has explained why the existing Illini/Saluki schedules are ill-suited to regularly achieving high ASOTP.³⁶⁵ Yet despite the substantial evidence provided by CN, Amtrak proposed a minimal schedule adjustment for the Illini/Saluki service, merely reallocating a few minutes of recovery time from the endpoint to intermediate stations. Amtrak claims that its schedule proposal was made in response to the Board's remark in EP 726 that schedules should be subject to "reevaluation and potential reallocation of recovery time" to be compatible with ASOTP.³⁶⁶ However, there is no evidence that Amtrak performed any serious "reevaluation" of its schedules, any analysis of how ASOTP would likely change in response to its proposal, or any analysis of whether alternative reallocations of recovery time would result in superior ASOTP.

Contrary to Amtrak's assertion,³⁶⁷ and despite Amtrak's failure to provide additional information requested by CN about its schedule proposal,³⁶⁸ CN seriously evaluated Amtrak's proposal, and found it lacking.³⁶⁹ As a result, CN undertook the significant (and uncompensated) work of designing a schedule that comprehensively addresses all the known problems with the

³⁶⁴ CN Br. at 105-106.

³⁶⁵ CN Br. at 35.

³⁶⁶ Amtrak Br. at 42 & n.124.

³⁶⁷ See Amtrak Br. at 42-43.

³⁶⁸ Krueger RVS at 6-7.

³⁶⁹ See CN Br. at 35-36 (describing how Amtrak's schedule proposal failed to address insufficient PRT, failed to address speed restrictions required by the Short Shunt problem, and would increase ASOTP by only 12.3 percentage points (to an average of 45.3%)).

Illini/Saluki schedules and that could be expected, based on historical performance, to reliably achieve ASOTP above 80%.³⁷⁰

CN's schedule proposal includes small adjustments to account for: (i) deficient PRT (an average of 3.3% of total run time), (ii) the amount and distribution of recovery and other miscellaneous time in order to reliably achieve 80% ASOTP based on historical performance (an average of 4.8% of total run time) and (iii) delays caused by the Short Shunt problem (3.6% of total run time). On average, CN's proposed schedule would increase schedule time by just over 8% once the Short Shunt problem is resolved and still less than 12% insofar as an adjustment for the Short Shunt problem must remain in effect.³⁷¹ These adjustments are summarized on the following table.

		CN's Proposed Adjustments to Current Illini/Saluki Schedule in Minutes (Adjustment as a Percent of Total)				
Train	Current total schedule time	PRT adjustment	Other adjustments	Total Adjustments	Short Shunt adjustment	Total Adjustments (including Short Shunt)
390	330	10 (3.0%)	10 (3.0%)	20 (6.0%)	12 (3.6%)	32 (9.7%)
391	330	13 (3.9%)	7 (2.1%)	20 (6.0%)	12 (3.6%)	32 (9.7%)
392	330	10 (3.0%)	32 (9.7%)	42 (12.7%)	12 (3.6%)	54 (16.4%)
393	330	13 (3.9%)	14 (4.2%)	27 (8.1%)	12 (3.6%)	39 (11.8%)
Average	330	11 (3.3%)	16 (4.8%)	27 (8.1%)	12 (3.6%)	39 (11.8%)

CN showed that these adjustments would, assuming historical performance, increase ASOTP by almost 50 percentage points, to an average of 82.9%.³⁷²

³⁷⁰ CN Br. at 35-36.

³⁷¹ CN Br. at 36; Krueger RVS at 14.

³⁷² CN Br. at 36.

Rather than seek to negotiate or work cooperatively with CN regarding schedule improvements, Amtrak has refused to consider any of CN's proposed schedule modifications.³⁷³ Amtrak's dismissal of CN's proposed schedule adjustments is based on objections³⁷⁴ that are unsupported and unreasonable, and Amtrak has not rebutted the central point of CN's analysis – that CN's proposed schedule reliably achieves 80% ASOTP.

A. Amtrak's Criticisms Of CN's Proposed Illini/Saluki Schedule Revisions Are Meritless.

Amtrak claims that § 24101 prohibits the Board from requiring “Amtrak to lengthen its schedules.”³⁷⁵ The amorphous and conflicting goals addressed to Amtrak in § 24101, do not, as Amtrak implies, insulate its schedules from scrutiny. Indeed, § 24101(c)(6) instructs Amtrak to

³⁷³ CN Br. at 37. Other carriers have described Amtrak's consistent objection to and refusal to consider reasonable schedule adjustments. See, e.g., *On-Time Performance under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, Docket No. EP 726, Opening Comments of Norfolk Southern Railway Company at 10 (Feb. 8, 2016) (“Many Amtrak schedules are antiquated, and Amtrak has been unwilling to adjust its schedules even when they consistently are proven unrealistic over long periods of operation in normal conditions.”); *id.* at 11 (“Amtrak has steadfastly refused to modify its schedules in any meaningful manner in response to changing conditions in the industry.”); *id.* at 18 (repeated requests by NS for schedule changes “have been constantly rejected despite the objective evidence based on historical performance that the schedules are unrealistic.”); *On-Time Performance under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, Docket No. EP 726, Comments of CSX Transportation, Inc. at 5 (Feb. 8, 2016) (“Amtrak has rebuffed CSXT's approach to scheduling at every turn—even demanding removal of time from certain schedules with the full understanding that doing so would materially affect that train's performance.”).

³⁷⁴ Amtrak Br. at 40-46.

³⁷⁵ Amtrak Br. at 41. Amtrak also claims that CN's Illini/Saluki schedule proposal was raised too late for the Board to consider it. Amtrak Br. at 40-41. The proposal is (1) directed in part to Short Shunt issues that have emerged since the parties filed their Statements of Disputed Issues more than four years ago; (2) responsive to Amtrak's demand, first made in its Opening Submission in 2015, for a means to achieve 80% ASOTP through the Operating Agreement; and (3) responsive to Amtrak's own 2017 proposal to change the Illini/Saluki schedule. Arguments parsing the content of pleadings in 2013 cannot justify adhering in 2018 and beyond to a schedule that both parties have proposed to change because of changed circumstances and Amtrak's newly announced 80% ASOTP goal.

publish schedules that “can be achieved with a degree of reliability” – which Amtrak has failed to establish is true of its current Illini/Saluki schedules. The Board has the authority under § 24308(a) to determine what terms are “reasonable.” Schedules are part of the operating agreement, and the Board cannot determine whether the “terms and compensation” provided for in the operating agreement are “reasonable” without addressing clear issues of whether the combination of Amtrak’s proposed schedules and its proposed performance demands places unreasonable burdens on CN.

Amtrak claims that the current Illini/Saluki schedules include “ample time” and that CN’s proposal would “needlessly lengthen” them.³⁷⁶ To the contrary, CN has demonstrated that: (i) there is insufficient PRT in the current Illini/Saluki schedule given the consists that are required to operate on that service; (ii) speed restrictions caused by the Short Shunt safety issue require additional time; and (iii) minor adjustments to the amount and location of recovery time are necessary to allow the service to regularly achieve 80% ASOTP. In response, Amtrak questions CN’s evidence,³⁷⁷ but provides no evidence of its own to support its claim that schedules have ample time, that current PRT is sufficient, that an adjustment for Short Shunt-

³⁷⁶ Amtrak Br. at 42-44. Amtrak does not address CN’s arguments about other schedules, including CN’s evidence that PRT on the City of New Orleans is insufficient and that recovery time has not been set to reliably achieve high ASOTP.

Amtrak says that it is “amenable to conducting joint PRT field checks,” together with CN, to test PRT for trains on the Illini/Saluki and City of New Orleans services, *id.* at 48 (citing Vilter/Maga RVS 72-73), but it makes no commitment to adjust the schedules for those trains if they turn out to have demonstrably insufficient PRT. In any event, as CN has pointed out, use of a field or check ride has many disadvantages compared to use of a TPC as a method of verifying PRT. CN Br. 12-13 & n.29.

³⁷⁷ Amtrak misleadingly truncates CN’s statement that “both parties agree that there is insufficient schedule recovery time ***to achieve high OTP at certain stations***” by leaving out the bold italics portion of the statement. *Compare* Amtrak Br. at 43 n.125 with Ladue/Kuxmann SRVS at 5. By proposing to increase schedule recovery time at some stations, Amtrak concedes that there is insufficient schedule recovery time at those stations.

related delays is unnecessary,³⁷⁸ or that the amount and distribution of recovery time is sufficient to accommodate the delays that regularly occur. And CN has already shown that Amtrak's various technical critiques of CN's schedule modeling are unsupported, misleading, and meritless.³⁷⁹

Amtrak assumes that longer schedules would cause ridership to decline, but provides no evidence to support that assertion.³⁸⁰ It also disregards the countervailing benefits to passengers of greater reliability and predictability, even though this is one of the goals Congress has established for Amtrak.³⁸¹ Amtrak's Opening Brief includes a chart showing Illini/Saluki ridership over time, presumably to suggest Amtrak's argument that ASOTP is the primary driver of ridership. But that chart ignores other factors, such as gas prices, that are understood to be more influential to ridership than ASOTP.³⁸² The following chart illustrates how ridership for the Illini/Saluki has generally risen and fallen with gas prices in Illinois.

³⁷⁸ Amtrak's suggestion that the speed restrictions were "unilaterally imposed by CN . . . based on unsubstantiated allegations about Amtrak's equipment," Amtrak Br. at 46, ignores the fact that CN's decision has been supported by the FRA and is necessary for the safe operation of Amtrak's trains. Amtrak's desire to remove the restriction without a full understanding of the causes of and solutions to the problem is particularly concerning given its recent safety record. See, e.g., National Transportation Safety Board, News Release, *Ignored Safety Procedures, Fractured Safety Program Led to Fatal Amtrak Derailment*, 11/14/2017, available at <https://www.nts.gov/news/press-releases/Pages/pr20171114.aspx> ("Amtrak's safety culture is failing, and is primed to fail again, until and unless Amtrak changes the way it practices safety management," quoting NTSB Chairman Robert L. Sumwalt).

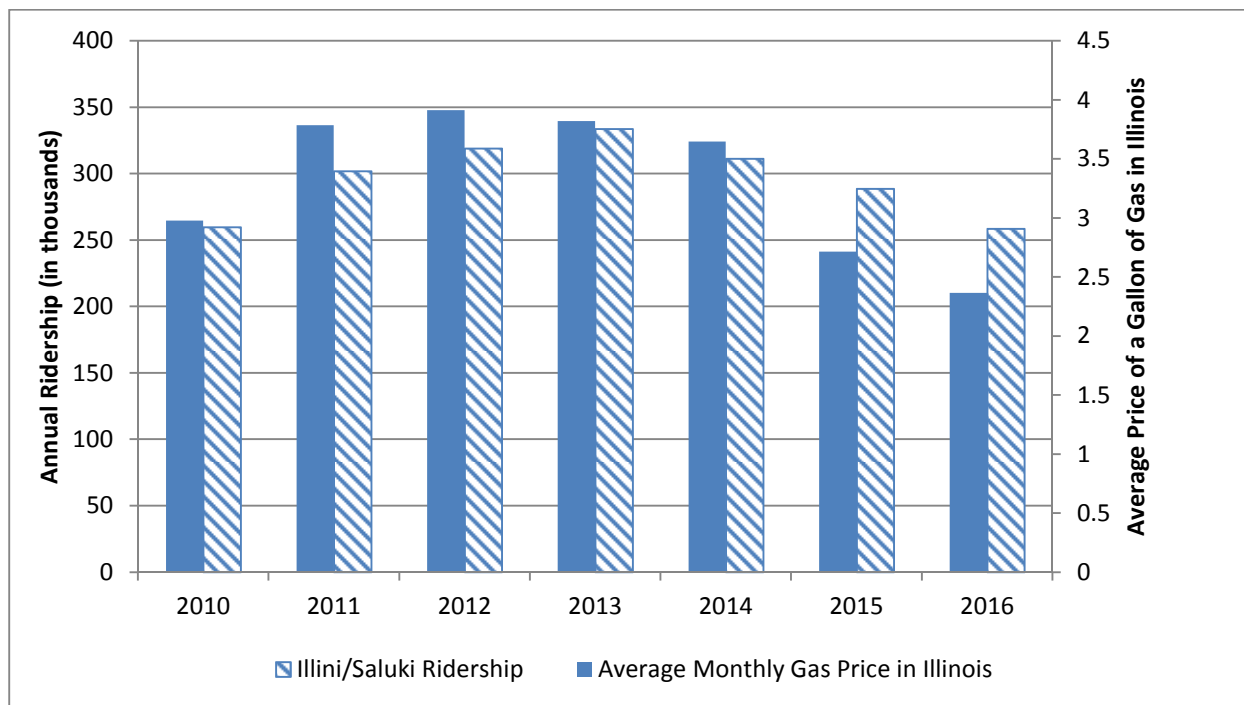
³⁷⁹ Compare Amtrak Br. at 44-46 with CN Br. Appx. A-10-17.

³⁸⁰ Amtrak Br. at 42-44. Amtrak also ignores the fact that adjusting the schedule time to better match the actual operation of a train would have little to no effect on the actual time it takes the train to traverse the corridor.

³⁸¹ 49 U.S.C. § 24101(c)(6) (Amtrak shall "implement schedules . . . that can be achieved with a degree of reliability and passenger comfort.").

³⁸² See, e.g., Jason Laughlin, *How gas prices are driving Amtrak's ridership problems*, PHILADELPHIA INQUIRER, Mar. 2, 2016, <http://www.philly.com/philly/blogs/in-transit/How-gas-prices-are-driving-Amtraks-ridership-problems.html> (quoting a memo to employees from

Changes in Illini/Saluki Ridership and Illinois Gas Prices, 2010 - 2016³⁸³



Amtrak also argues that CN would benefit from lengthening the Illini/Saluki schedules.³⁸⁴

However, the effect of an additional checkpoint for the Illini/Saluki service on CN's compensation is at best indeterminate and Amtrak has supplied no evidence suggesting it would have a positive effect. Whether it does or not, however, provides no excuse for perpetuating inaccurate, unreliable schedules that ill serve Amtrak's passengers solely to extract penalties

Amtrak CEO and President Joseph Boardman: "Continued low gas and oil prices are hurting our ridership levels. . . . When gas prices are cheap, many customers who normally ride with Amtrak are either choosing to drive for shorter trips, or choosing to fly for longer trips" and noting "a surprisingly consistent correlation between" gas prices and Amtrak ridership). Other possible explanatory factors include a drop in demand caused by a generalized population decline in the Chicago area and a significant drop in enrollment and employees at the Southern Illinois University and Eastern Illinois University.

³⁸³ Data for Illini/Saluki ridership comes from the National Association of Railroad Passengers, <https://www.railpassengers.org/site/assets/files/3470/23.pdf>, and for gas prices from the Energy Information Administration, http://www.eia.gov/dnav/pet/pet_pri_gnd_dcus_yord_m.htm

³⁸⁴ Amtrak Br. at 39.

from CN. In any event, Amtrak fails to address the potentially significant countervailing increases to CN's costs the schedule proposal would generate.³⁸⁵ Insofar as CN's schedule proposal adjusts deficient PRT, it means that CN has historically been judged against schedules with a baseline run time that was too short, making it more difficult than necessary for CN to earn Performance Payments. Correcting such a flaw is overdue – not undue. As for the Short Shunt adjustment, it is intended to be temporary, is required for the safe operation of Amtrak's trains, and whatever effects this may have on compensation under the Operating Agreement will be the subject of negotiation or arbitration between the parties.

Amtrak also complains that CN provides no “assurance” that its proposed schedule changes would result in improved OTP.³⁸⁶ This is a red herring. As Amtrak knows, CN can no more “assure” Amtrak OTP than Amtrak can itself. CN can agree to a reasonable system of incentives and penalties, and that is what it has done. Nor has Amtrak proposed to modify the Operating Agreement to pay CN a premium for “guaranteed” service. CN has provided compelling evidence that substantially improved performance is likely with realistic schedules based on historic performance,³⁸⁷ which Amtrak has failed to rebut. Further, CN has shown such evidence is consistent with other services whose schedules were adjusted to increase OTP, and that Amtrak's few proffered counterexamples were inapt.³⁸⁸

³⁸⁵ For example, Amtrak ignores the substantial and uncompensated costs CN incurs by devoting significant resources to generating its schedule analysis and proposals, adapting its freight operations to revised Amtrak schedules, and to instances of Amtrak blocking main lines by sitting at intermediate stations when it occasionally arrives there early because recovery time is no longer back-loaded.

³⁸⁶ Amtrak Br. at 42.

³⁸⁷ CN Br. at 35-36; Krueger RVS at 13-14.

³⁸⁸ CN Br. at 36 n.85 (citing the dramatic improvements to the Auto Train's OTP resulting from “experience-based scheduling”); *id.* at 39 n.94.

CN's schedule proposal offers a reliable and cost-effective means of achieving Amtrak's stated goal of 80% ASOTP. Amtrak's objections to that proposal are unreasonable, and exemplify Amtrak's broader refusal to realistically address unavoidable trade-offs between schedule length, reliability, infrastructure investment, and cost, in contravention of a cooperative solution in the public interest.

B. Amtrak's Resistance To Regular Schedule Review Is Unreasonable.

CN has proposed a new contractual term that, absent agreement of both parties, would require annual review of one service schedule, making use of appropriate and objective modeling techniques.³⁸⁹ CN has explained, and Amtrak does not deny, that the current contractual process for reviewing and updating schedules has serious limitations.³⁹⁰ CN's proposal would increase collaboration between the parties (schedule review would be a joint process, rather than requiring a single party to tender a full revised schedule at the outset of the process), would not be "mandatory" in the sense of requiring a full analysis (if the parties agree during annual review that the schedule is acceptable, they would not need to go further), and would require review of only one service per year (minimizing its burden). It is a reasonable proposal addressed at a concrete problem.

Amtrak's objections to CN's proposal are unavailing. First, Amtrak claims that modeling-based review "will invariably lead to disputes."³⁹¹ But there are already disputes

³⁸⁹ Amtrak Br. at 46-48. CN's proposal would require the review of each of the five categories of trains at least once every five years on a staggered basis, so that each service's schedules would be subject to review once every five years. The parties would remain capable of proposal schedule changes to any train's schedule at any time.

³⁹⁰ CN Br. at 112; Ladue/Kuxmann VS at 66-68; *see also supra* note 362 (describing other carriers' difficulties in negotiating schedules with Amtrak).

³⁹¹ Amtrak Br. at 47.

between the parties as to what schedules are reasonable, and Amtrak offers no mechanism for resolving them other than giving Amtrak a veto over changes proposed by CN.³⁹² And exchanges between the parties about appropriate approaches to modeling could lead to a greater understanding of each party's positions and concerns about modeling. Amtrak's position that the status quo of outdated, unreliable, and unachievable schedules is preferable to a system that may require it to undertake good faith discussions concerning a limited number of modeling inputs in the service of creating reliably achievable schedules should be rejected.

Second, Amtrak claims that CN's proposal for a regular schedule review is unnecessary because it is "premised on [an] assertion that PRT's in Amtrak's schedules" are too short, but that CN would not be prejudiced by insufficient PRT and that CN has not alleged insufficient PRT on some services.³⁹³ CN's proposal is not premised on short PRT, but on the need to ensure on a regular basis that PRT and other schedule elements are accurate and reasonable. In addition to PRT, this includes sufficiency of recovery time and all aspects of the schedule to ensure account for the current operational realities of the service.

Third, Amtrak claims that CN cannot now maintain that regular schedule review is necessary because CN has not initiated the schedule adjustment mechanism in the existing

³⁹² See Amtrak Br. at 48 n.147. Amtrak does not explain how the status quo (reliance on unreliable and unachievable schedules) is preferable to a system with potential disputes leading to negotiated compromise over modeling inputs and resulting in more reliably achievable schedules.

³⁹³ Amtrak Br. at 46-47. Amtrak is also wrong that CN is not prejudiced by insufficient run time, as it could lead to overstatement of HRD by Amtrak's conductors. Amtrak conductors should be coding delays due to insufficient run time as "OTH," but they have an incentive to miscode delays actually due to short PRT as HRD, in order to avoid the suggestion that they did not operate their train efficiently. That risk is particularly great insofar as Amtrak denies that PRT is short. See Ladue/Kuxmann RVS at 22 n.29.

Operating Agreement.³⁹⁴ In fact, CN's schedule proposal for the Illini/Saluki service was made pursuant to those procedures. Amtrak's flat and unwarranted objection to that proposal underscores CN's point that the existing procedures are ineffective and invoking them in light of Amtrak's refusal to objectively consider changes would have been a futile exercise.³⁹⁵

VI. AMTRAK'S REMAINING ARGUMENTS ARE MERITLESS.

A. Amtrak's Proposed Ten-Year Term Is Excessive And Would Inhibit Necessary Flexibility.

Amtrak asserts that its proposed 10-year term for the parties' next agreement is driven by the length of time it has taken to negotiate a potential successor agreement and to litigate this dispute.³⁹⁶ But it was Amtrak that chose to halt negotiations, initiate this litigation, seek a radical overhaul parties' performance incentive and penalty system, and extend the litigation (which by statute is to be no more than 90 days long³⁹⁷) by delaying its discovery compliance and seeking an extra round of discovery. In any event, the Board is being asked to, and should, provide guidance that will put an end to the wide-ranging disputes that exist between the parties and enable the parties to return their prior pattern of cooperative renewals that existed for 40 years.

More fundamentally, Amtrak's proposed 10-year term is too long and inflexible. The real world of railroad operations is dynamic. Demand and traffic levels, regulatory requirements, technology, equipment, infrastructure and funding opportunities change over time, and the CN-

³⁹⁴ Amtrak Br. at 48.

³⁹⁵ Amtrak's response to CN is remarkably similar to its treatment of other carriers who have sought to work with Amtrak on scheduling adjustments to improve OTP. *See supra* note 362 (describing other carriers' difficulties in negotiating schedules with Amtrak).

³⁹⁶ Amtrak Br. at 100.

³⁹⁷ 49 U.S.C. § 24308(a)(2)(C).

Amtrak relationship needs the flexibility to adapt to those changes. The need for a shorter term that would provide recourse to the Board if necessary to address changing circumstances is exemplified by Amtrak’s refusal to consider changes to public schedules that no longer reflect the present real-world circumstances. CN’s proposed renewable 3-year term provides the necessary flexibility to adapt to changing circumstances, and the Board should prescribe it.

B. CN’s Position On Retroactivity Is Principled; Amtrak’s Is Not, And It Misstates The Record.

Amtrak incorrectly claims that: “Both Amtrak and CN initially asked the Board to make its decision in this proceeding . . . retroactive to . . . August 9, 2013” and that CN is now being “inconsistent” in arguing that any change to performance payments and penalties should be prospective only.³⁹⁸ Amtrak offers no citation for its erroneous claim that CN requested that all compensation terms be revised retroactively, because CN never did make such a request.

Throughout its filings in this proceeding, CN’s position on retroactivity has been consistent and logical.³⁹⁹ **First**, CN is entitled to retroactive incremental cost compensation because such compensation is reimbursable in nature. Since August 9, 2013, CN has been compelled by the Board’s order to incur incremental costs by hosting Amtrak, and while CN consented to do so subject to appropriate compensation, it did not waive its statutory (and constitutional) entitlement to full reimbursement for its incremental costs. **Second**, changes to

³⁹⁸ Amtrak Br. at 101.

³⁹⁹ CN has addressed retroactivity in three different filings in this proceeding, first noting that the Board “has the power to order retroactive relief as appropriate,” then proposing retroactive compensation for CN’s freight delay costs due to Amtrak, and finally thoroughly addressing the issue of retroactivity with respect to performance payments and penalties. See CN’s Response To Amtrak’s Reply To CN’s Motion For Extension Of Procedural Schedule at 5 (Sep. 23, 2014); Ladue/Kuxmann VS at 51-52; Ladue/Kuxmann SRVS at 47; CN Br. at 88-89, 110-11. Cf. *Metro-North*, slip op. at 12 (ICC decision applying base compensation provisions retroactively and incentive payments prospectively only).

the performance payment and penalty system should not be retroactive because its function is inherently forward-looking; it is meant to incentivize CN's future conduct. Retroactive imposition of penalties for conduct not subject to penalties at the time it occurred would also be contrary to due process and fundamental fairness.⁴⁰⁰

It is Amtrak that is taking inconsistent and illogical positions. Amtrak chose to initiate this litigation, knowingly taking the risk that the Board would order it to pay CN more in base compensation, and Amtrak admits that in doing so, it asked the Board to make changes retroactive.⁴⁰¹ Amtrak has no principled basis for opposing retroactivity with respect to its obligation to compensate CN for its incremental costs.

C. The Board Should Permit CN To Keep Terms Relating To Its Costs and Trade Secrets Confidential, But Should Otherwise Issue A Transparent, Public Decision.

Amtrak asks the Board to impose a new provision compelling CN to keep its entire operating agreement with Amtrak confidential "in order to avoid prejudicing Amtrak in future negotiations with other host railroads."⁴⁰² The Board has never issued secret precedents on important issues in § 402 proceedings, and it would be contrary to due process and open government principles to do so here. A principled operating agreement proposal should

⁴⁰⁰ See CN Br. at 110.

⁴⁰¹ See Amtrak Br. at 101; Amtrak Application at 1 (filed July 30, 2013). Amtrak has even been inconsistent with regard to the date of the retroactivity it proposes. Amtrak initially proposed making any terms and conditions prescribed by the Board retroactive to August 12, 2013. Application at 1, 4 In its Opening Submission, however, Amtrak for the first time called for retroactivity to the date of the Board's initial order (August 9, 2013) (which would have the effect of overriding the terms Amtrak had previously agreed would stay in effect through August 11, 2013). Amtrak Opening Statement at 18.

⁴⁰² Amtrak Br. at 102.

withstand public scrutiny,⁴⁰³ and a principled decision should be applicable, with appropriate adjustments, to other relationships formed under the same § 402 statutory framework.

Moreover, Amtrak is a Government corporation, chartered to serve the public interest and subject to the Freedom of Information Act.⁴⁰⁴ It derives its competitive advantages from the RPSA, and seeks to impose terms on CN in this proceeding not by means of a confidential commercial negotiation, but by Board order. The outcome of that effort is a matter of public interest, and CN should be free to address it publicly.

CN, on the other hand, is a private corporation, and certain terms of the operating agreement relating to incremental cost recovery (but not performance payments and penalties) implicate CN's costs and (in the details of the SRS system) its trade secrets. CN should have the right to insist on confidentiality for those terms, and the parties should be free to agree on whether terms determined by commercial negotiation, as opposed to terms prescribed by the Board, should be treated as confidential.

D. Amtrak's Unsupported Changes to the Text of the Operating Agreement Should Be Rejected.

Amtrak's Opening Submission includes a markup of the Operating Agreement with additional extensive and unnecessary changes to the Operating Agreement.⁴⁰⁵ Amtrak has failed to explain its changes, failed to relate them to its Statement of Disputed Issues, failed to raise them in negotiations before filing its Application, failed to provide any evidence supporting

⁴⁰³ CN Motion to Remove the Confidentiality Designations for Portions of Amtrak's Opening Submission at 2 (Oct. 28, 2015).

⁴⁰⁴ See 49 U.S.C. § 24301(e).

⁴⁰⁵ Vilter VS, Attachment 3.

them, and failed to defend them in its Opening Brief.⁴⁰⁶ If the Board does not deem these proposed changes as waived, it should reject them as lacking any basis or merit.⁴⁰⁷

One of Amtrak's proposed changes warrants further discussion. Amtrak claims that it has "proposed eliminating unnecessary references to the defined term 'incremental cost' in the Operating Agreement given the contentious dispute between the parties about the precise meaning of the term."⁴⁰⁸ But Amtrak's proposed changes would actually eliminate the Operating Agreement definition of incremental cost (which is consistent with precedent under the RPSA) while adding more references to what would then be an undefined term – a change that would only lead to more disputes. Amtrak proposes to add a provision "specifying" that the enumerated "cost categories specified in Appendix IV of the Operating Agreement include all of the incremental costs that CN will be entitled to receive from Amtrak."⁴⁰⁹ In other words, Amtrak seeks to replace CN's statutory and contractual right to be compensated for all of its incremental costs with a contractual term limiting CN's incremental cost compensation to a limited set of enumerated costs. That is not, as Amtrak implies, a clarification; it is a substantive change that is contrary to CN's statutory right to full incremental cost compensation.

⁴⁰⁶ See generally Ladue/Kuxmann RVS at 51-60. Amtrak's only attempted defense of these changes is found in a single footnote that is on its face limited to only a single provision, and that mischaracterizes CN's objection as limited to arguing only that that single provision should be rejected because it is outside the disputed scope of issues. As CN has made clear, Amtrak's evidence and argument offer nothing to support its proposed changes, and Amtrak's Opening Brief provides no defense to CN's reasonable objections.

⁴⁰⁷ CN has no objection to Amtrak's proposed addition to Section 4.2.B. that states {
[REDACTED]
} However, Amtrak's other proposed changes to Section 4.2.B. are unwarranted and unexplained.

⁴⁰⁸ Amtrak Br. at 102-03.

⁴⁰⁹ Amtrak Br. 103.

E. CN's Proposal to { [REDACTED] } Is Reasonable And Reflects the Parties' Agreements.

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

{ [REDACTED]

[REDACTED]

⁴¹⁰ Amtrak Br. at 103. The Side Letters are attached as Exh. 14 to Ladue/Kuxmann VS.

compensate CN. The Board becomes involved only if the parties cannot reach agreement. No Board authority was required to set the meaning of the existing undisputed incremental cost items in Section IV, as those items were all agreed to by the parties over the decades that CN has hosted Amtrak.

CONCLUSION

CN's proposal properly aligns CN's compensation with the statutory requirement of full incremental cost compensation, improves the existing performance payment and penalty system by making it more efficient and fair, helps achieve Amtrak's goal of 80% ASOTP in a cost-effective manner through reasonable schedule changes, and is consistent with the RPSA and with a reasonable and balanced transportation policy. Amtrak's proposals do none of those things. They would drive CN's compensation below the statutory floor, illogically penalize CN for events over which it has no control, and reject CN's modest schedule changes in favor of a system that disrupts, impedes, and imposes massive costs on freight service while achieving no benefits for Amtrak's passenger service. Amtrak's proposals are thus inconsistent with the RPSA and a reasonable and balanced transportation policy.

Accordingly, and for the reasons set forth in CN's Opening and Reply Briefs, the Board should (i) adopt CN's proposed changes to the current Operating Agreement, (ii) reject Amtrak's proposed changes to the current Agreement, (iii) adopt CN's revised schedules for the Illini/Saluki Service, and (iv) order Amtrak to pay CN its retroactive incremental freight delay costs.⁴¹³ Alternatively, if the Board declines to fully adopt CN's proposed changes and reject

⁴¹³ See CN Br. at 140.

Amtrak's proposed changes, the Board should provide the parties with guidance to negotiate an agreement by ruling on the disputed issues as CN requested in its Opening Brief.⁴¹⁴

Respectfully submitted,

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⁴¹⁴ CN Br. at 141-142.

APPENDIX

AMTRAK'S REBUTTAL PROPOSAL IS FUNDAMENTALLY FLAWED AND SHOULD BE REJECTED.

Amtrak consigns to an Appendix its Rebuttal Proposal, which it argues the Board should adopt if it declines to adopt its Initial Proposal.¹ Amtrak's Rebuttal Proposal shares several key flaws with its Initial Proposal, and for that and other reasons, it should be rejected. In particular, it (i) relies on extreme net penalties to achieve Amtrak's objectives and thus seeks to eliminate, and depends on the unlawful elimination of, the lookback provision; (ii) does not allocate responsibility for delays using relief items negotiated by the parties reflecting the specific history and operating conditions of the services at issue; and (iii) is premised on Amtrak's unrealistic, unfair, and uneconomic effort to make CN solely responsible for Amtrak achieving 80% ASOTP under Amtrak's existing outdated schedules, and with no additional infrastructure or base compensation. Like its Initial Proposal, Amtrak's Rebuttal Proposal would dramatically and unreasonably raise the standards by which CN's service is measured, and require CN to subsidize Amtrak by millions of dollars annually.²

Notwithstanding these fundamental flaws, CN has incorporated certain aspects of Amtrak's Rebuttal Proposal into its own KOTP proposal. As discussed below, the other specific elements of Amtrak's proposal that were not adopted by CN are unnecessary, unreasonable, and should be rejected.

¹ Amtrak Br. at 53 n.163.

² CN Br. at 115-117.

A. Making Every Station A Checkpoint Would Be Counterproductive And Generate Unnecessary Complications, Disputes, And Administrative Costs.

Amtrak's Rebuttal Proposal would establish every station on CN as a checkpoint, regardless of how many passengers board or depart at that station, and regardless of the distance between stations.³ CN has repeatedly demonstrated that Amtrak's proposal: is unnecessary to motivate CN to provide timely performance at all stations; would result in measurement of performance over unreasonably short segments; would cause performance at lightly used stations to weigh more heavily than stations used by large numbers of travelers; and would result in exponentially more disputes between the parties.⁴

As a reasonable compromise, rather than distort the operating agreement's performance measure, overweigh stations with few passengers, or engender unnecessary disputes, CN has proposed adding three checkpoints at the additional major stations on the Illini/Saluki and City of New Orleans services, once the schedules on those services have been adjusted to reliably achieve 80% ASOTP (as CN has already proposed for the Illini/Saluki service).⁵

B. Discrepancies With The Published Schedule Must Be Accounted For In The Contract Schedule.

{ [REDACTED]

[REDACTED]

³ Amtrak Br. at A-4—A-5; CN Br. at 118-119. Amtrak claims this is necessary to “motivate” CN to provide timely performance at all stations, Amtrak Br. at A-3, but it provided no evidence to substantiate its claim. CN has already explained that additional checkpoints are not required for adequate motivation. *See, e.g.*, Ladue/Kuxmann SRVS at 6.

⁴ CN Br. at 118-119; Ladue/Kuxmann SRVS at 6-12.

⁵ CN Br. at 118.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

C. The Current Recovery Time Base Should Not Be Adjusted.

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁶ CN Br. at 120; *see also* Operating Agreement at App. II, Table 1.

⁷ CN Br. at 120-121.

⁸ Amtrak Br. at A-5.

⁹ Amtrak Br. at A-5.

¹⁰ { [REDACTED]

¹¹ CN Br. at 121; Amtrak Br. at A-6—A-7.

¹² CN Br. at 122; Amtrak Br. at A-7.

[REDACTED]

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

D. Amtrak’s Proposal To { [REDACTED] [REDACTED] Is Unreasonable And Should Be Rejected.

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹³ CN Br. at 122-123.

¹⁴ CN Br. at 122-123.

¹⁵ CN Br. at 123.

¹⁶ Amtrak Br. at A-9.

¹⁷ CN Br. at 123-124.

[REDACTED]

[REDACTED]

[REDACTED]

E. Amtrak’s Proposal To Penalize KOTP Below 80% Should Be Rejected.

Amtrak correctly notes that there is a “neutral zone” in the current Agreement – when CN’s monthly KOTP is above 70% and below 80% there is no Penalty or Performance Payment.¹⁸ Amtrak’s Rebuttal Proposal would eliminate this neutral zone, and impose penalties for KOTP below 80%. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁸ Amtrak Br. at A-10.

¹⁹ Amtrak Br. at A-10—A-11.

²⁰ Ladue/Kuxmann VS at 24-27.

[REDACTED]

[REDACTED]

F. Adding Penalties Based On How Late Trains Are Is Not Necessary To Effectively Incentivize CN And Would Add Complications And Asymmetry.

Amtrak's Rebuttal Proposal would { [REDACTED]

[REDACTED] }²¹ Amtrak claims this is necessary "to help ensure that CN is motivated to not exacerbate delays to Amtrak trains that are unlikely to be 'makes' for CN incentive purposes."²² However, CN has submitted unrebutted evidence demonstrating that (a) its dispatchers do not and could not know whether a train would be a "win" or a "loss" under the Operating Agreement (and thus could not "give up" on trains that are likely to be "losses"),²³ (b) on a largely single-track railroad, CN cannot afford to give up on an Amtrak train and leave it blocking its main line,²⁴ and (c) the minimal evidence submitted by Amtrak in support of its contention is clearly refuted by years worth of data.²⁵

Moreover, this change would be particularly unfair given the other changes sought by Amtrak. CN demonstrated that delays on the Joliet Sub caused by cross traffic at interlockings that CN does not control can regularly reach 15 to 20 minutes, yet under Amtrak's Rebuttal Proposal, CN would not receive relief for these delays.²⁶ CN therefore would not only be subject

²¹ Amtrak Br. at A-11.

²² Amtrak Br. at A-11

²³ Taylor RVS at 13-16.

²⁴ Taylor RVS at 16; Ladue/Kuxmann RVS at 15-16.

²⁵ Ladue/Kuxmann RVS at 12-17; *see also* CN Br. at 125 n.352 (citing an Amtrak study that concluded that "trains are generally not abandoned from a dispatching perspective once they become late").

²⁶ Ladue/Kuxmann SRVS at 36.

to penalties for these delays, but to *enhanced* penalties. Likewise, Amtrak's proposal to make excess dwell and late arrivals subject to the RTB means that trains could arrive substantially late at a checkpoint for reasons having nothing to do with CN's performance, again subjecting CN not only to unreasonable penalties, but to *enhanced* penalties. Amtrak's proposal for a penalty multiplier should be rejected.

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EXHIBIT 1

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AMTRAK IMPROVEMENT ACT OF 1973

OCTOBER 12, 1973.—Ordered to be printed

Mr. STAGGERS, from the committee of conference,
submitted the following

CONFERENCE REPORT

[To accompany S. 2016]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 2016) to amend the Rail Passenger Service Act of 1970 to provide financial assistance to the National Railroad Passenger Corporation, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following:

That this Act may be cited as the "Amtrak Improvement Act of 1973".

Sec. 2. Section 102 of the Rail Passenger Service Act of 1970 (45 U.S.C. 502), relating to definitions, is amended—

(1) by striking out paragraph (5), relating to the definition of intercity rail passenger service, and inserting in lieu thereof the following:

"(5) 'Intercity rail passenger service' means all rail passenger service other than commuter and other short-haul service in metropolitan and suburban areas, usually characterized by reduced fare, multiple-ride and commutation tickets, and by morning and evening peak period operations."; and

(2) by adding at the end thereof the following new paragraph:

"(9) 'Auto-ferry service' means intercity rail passenger service characterized by transportation of automobiles and their occupants."

SEC. 3. (a) Section 303(a) of the Rail Passenger Service Act of 1970 (45 U.S.C. 543(a)), relating to the board of directors, is amended to read as follows:

"(a) (1) The Corporation shall have a board of directors consisting of seventeen individuals who are citizens of the United States selected as follows:

"(A) The Secretary of Transportation, *ex officio*.

"(B) Nine members appointed by the President, by and with the advice and consent of the Senate, to serve for terms of four years or until their successors have been appointed and qualified, of whom not more than five shall be appointed from the same political party.

"(C) Three members elected annually by the common stockholders of the Corporation.

"(D) Four members elected annually by the preferred stockholders of the Corporation, which members shall be elected as soon as practicable after the first issuance of preferred stock by the Corporation.

"(2) Any vacancy in the membership of the board shall be filled in the same manner as in the case of the original selection; except that any member appointed by the President under paragraph (1) (B) of this subsection to fill a vacancy shall be appointed only for the unexpired term of the member he is appointed to succeed.

"(3) The board shall elect one of its members annually to serve as Chairman.

"(4) Not less than three members appointed by the President shall be designated by him, at the time of their appointment, to serve as consumer representatives, of whom not more than two shall be members of the same political party.

"(5) Each member not employed by the Federal Government shall receive compensation at the rate of \$300 for each meeting of the board he attends. In addition, each member shall be reimbursed for necessary travel and subsistence expenses incurred in attending meetings of the board.

"(6) No member elected by railroads shall vote on any action of the board relating to any contract or operating relationship between the Corporation and a railroad, but he may be present at meetings of the board at which such matters are voted upon, and he may be included for purposes of determining a quorum and may participate in discussions on any such meeting.

"(7) No member appointed by the President may—

"(A) have any direct or indirect financial or employment relationship with any railroad, nor

"(B) have any significant direct or indirect financial relationship, or any direct or indirect employment relationship, with any person engaged in the transportation of passengers in competition with the Corporation, during the time that he serves on the board.

"(8) Pending the election of the four members by the preferred stockholders of the Corporation under paragraph (1) (D) of this subsection, seven members shall constitute a quorum for the purpose of conducting the business of the board.

"(9) Any vacancy in the membership of the board of directors required to be filled by appointment by the President under paragraph (1)(B) of this subsection shall be filled by the President not more than one hundred and twenty days after such vacancy occurs."

(b) (1) Notwithstanding any other provision of law, the term of each member of the board of directors appointed by the President under section 303(a) of the Rail Passenger Service Act of 1970 (as in effect on the day before the date of enactment of this Act) who is serving under such appointment on such date of enactment, shall expire on the thirtieth day after such date of enactment, except that each such member so serving shall continue to serve until his successor is appointed and qualified or until the expiration of the one-hundred-twenty-day period beginning on the thirtieth day after such date of enactment, whichever first occurs. No member of the board of directors referred to in the preceding sentence shall be ineligible for appointment as such a member after the date of enactment of this Act solely by reason of the enactment of such preceding sentence.

(2) Notwithstanding section 303(a) (1)(B) of the Rail Passenger Service Act of 1970, of the members of the board of directors first appointed by the President under such section 303(a) (1)(B), three shall be appointed to serve for terms of two years and three shall be appointed to serve for terms of three years.

SEC. 4. (a) Section 305(a) of the Rail Passenger Service Act of 1970 (45 U.S.C. 545(a)), relating to general powers of the Corporation, is amended by striking out the second sentence thereof.

SEC. 5. Section 305(b) of the Rail Passenger Service Act of 1970 (45 U.S.C. 545(b)), relating to general powers of the Corporation, is amended by striking out the second sentence and inserting in lieu thereof the following: "In order to increase revenues and to better accomplish the purposes of this Act, the Corporation is authorized to modify its services to provide auto-ferry service as a part of the basic passenger services authorized by this Act, except that nothing contained in this Act shall prevent any other person, other than a railroad (except that for purposes of this section a person primarily engaged in auto-ferry service shall not be deemed to be a railroad), from providing such auto-ferry service over any route in accordance with a certificate issued by the Commission if—

"(1) the Commission finds that such auto-ferry service—

"(A) will not impair the ability of the Corporation to reduce its losses or to increase its revenues, and

"(B) is required to meet the demands of the public, or

"(2) such auto-ferry service is being performed by such person on the date of enactment of this paragraph under contracts entered into before October 30, 1970.

Nothing in this section shall be construed to restrict the right of a railroad that has not entered into a contract with the Corporation for the provision of rail passenger service from performing auto-ferry service over its own lines. The Corporation is authorized to acquire, lease, modify, or develop the equipment and facilities required for the efficient provision of mail, express, and auto-ferry service, or to enter into contracts for the provision of such service."

SEC. 6. Section 305 of the Rail Passenger Service Act of 1970 (45 U.S.C. 545), relating to general powers of the Corporation, is amended by adding at the end thereof the following new subsections:

"(c) The Corporation is authorized to take all steps necessary to insure that no elderly or handicapped individual is denied intercity transportation on any passenger train operated by or on behalf of the Corporation, including but not limited to, acquiring special equipment and devices and conducting special training for employees; designing and acquiring new equipment and facilities and eliminating architectural and other barriers in existing equipment and facilities to comply with the highest standards for the design, construction, and alteration of property for the accommodation of elderly and handicapped individuals; and providing special assistance while boarding and alighting and in terminal areas to elderly and handicapped individuals.

"(d) (1) The Corporation is authorized, to the extent financial resources are available, to acquire any right-of-way, land, or other property (except right-of-way, land, or other property of a railroad or property of a State or political subdivision thereof or of any other governmental agency), which is required for the construction of tracks or other facilities necessary to provide intercity rail passenger service, by the exercise of the right of eminent domain, in accordance with the provisions of this subsection, in the district court of the United States in which such property is located or in any such court if a single piece of property is located in more than one judicial district: Provided, That such right may only be exercised when the Corporation cannot acquire such property by contract or is unable to agree with the owner as to the amount of compensation to be paid.

"(2) The Corporation shall file with the complaint, or at any time before judgment, a declaration of taking containing or having annexed thereto—

"(A) a statement of the public use for which the property is taken;

"(B) a description of the property taken sufficient for the identification thereof;

"(C) a statement of the estate or interest in the property taken;

"(D) a plan showing the property taken; and

"(E) a statement of the amount of money estimated by the Corporation to be just compensation for the property taken.

"(3) Upon the filing of the declaration of taking and the depositing in the court of the amount of money estimated in such declaration to be just compensation for the property, the property shall be deemed to be condemned and taken for the use of the Corporation. Title to such property shall thereupon vest in the Corporation in fee simple absolute or in any lesser estate or interest specified in the declaration of taking, and the right to the money deposited as estimated just compensation shall immediately vest in the persons entitled thereto. The court, after a hearing, shall make a finding as to the amount of money which constitutes just compensation for such property and shall make an award and enter judgment accordingly. Such judgment shall include, as part of the just compensation awarded, interest on the amount

finally awarded as the value of the property on the date of taking minus the amount deposited in the court on such date, at the rate of 6 per centum per annum from the date of taking to the date of payment.

"(4) Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in the proceeding. If the compensation finally awarded exceeds the amount of the money received by any person entitled to compensation, the court shall enter judgment against the Corporation for the amount of the deficiency.

"(5) Upon the filing of a declaration of taking, the court may fix the time within which, and the terms upon which, the parties in possession are required to surrender possession to the Corporation. The court may make such orders in respect to encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

"(e) The Corporation is authorized to take all steps necessary to—

"(1) establish improved reservations systems and advertising;

"(2) service, maintain, repair, and rehabilitate railroad passenger equipment;

"(3) conduct research and development and demonstration programs respecting new rail passenger services;

"(4) develop and demonstrate improved rolling stock;

"(5) establish and maintain essential fixed facilities for the operation of passenger trains on lines and routes included in the basic system, over which no through passenger trains are being operated at the time of enactment of this Act, including necessary track connections between lines on the same or different railroads;

"(6) purchase or lease railroad rolling stock;

"(7) develop and operate international intercity rail passenger service between points within the United States and points in Canada and Mexico, including Montreal, Canada; Vancouver, Canada; and Nuevo Laredo, Mexico (for purposes of section 404(b) of this Act, such international rail passenger service is service included within the basic system); and

"(8) to carry out other corporate purposes."

Sec. 7. Section 306 of the Rail Passenger Service Act of 1970 (45 U.S.C. 546), relating to the applicability of the Interstate Commerce Act and other laws, is amended by adding at the end thereof the following new subsection:

"(h) No common carrier by railroad may refuse to participate with the Corporation in providing auto-ferry service on the grounds that a State or local law or regulation makes the service unlawful; and neither the Corporation nor such railroad shall be subject to any fine, penalty, or other sanction for violation of a State or local law or regulation which has the effect of prohibiting or impairing the provision of auto-ferry service."

Sec. 8. Section 308(b) of the Rail Passenger Service Act of 1970 (45 U.S.C. 548(b)), relating to reports to the Congress, is amended by striking out "January 15" and inserting in lieu thereof "February 15".

Sec. 9. Section 401(c) of the Rail Passenger Service Act of 1970 (45 U.S.C. 561(c)), relating to the prohibition against other persons conducting intercity rail passenger service, is amended by striking out "No railroad or any other person" and inserting in lieu thereof "Except as provided in section 305(b) of this Act concerning auto-ferry service, no railroad or any other person".

Sec. 10. Section 402 of the Rail Passenger Service Act of 1970 (45 U.S.C. 562), relating to facility and service agreements, is amended—

(1) by inserting immediately after the second sentence of subsection (a) the following new sentence: "In fixing just and reasonable compensation for the provision of services ordered by the Commission under the preceding sentence, the Commission shall, in fixing compensation in excess of incremental costs, consider quality of service as a major factor in determining the amount (if any) of such compensation."; and

(2) by adding at the end thereof the following new subsections:
"(d) (1) If the Corporation and a railroad are unable to agree upon terms for the sale to the Corporation of property (including interests in property) owned by the railroad and required for the construction of tracks or other facilities necessary to provide intercity rail passenger service, the Corporation may apply to the Commission for an order establishing the need of the Corporation for the property at issue and requiring the conveyance thereof from the railroad to the Corporation on reasonable terms and conditions, including just compensation. Unless the Commission finds that—

"(A) conveyance of the property to the Corporation would significantly impair the ability of the railroad to carry out its obligations as a common carrier; and

"(B) the obligations of the Corporation to provide modern, efficient, and economical rail passenger service can adequately be met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to the Corporation, or available to the Corporation by the exercise of its authority under section 305(d) of this Act;

the need of the Corporation for the property shall be deemed to be established and the Commission shall order the conveyance of the property to the Corporation on such reasonable terms and conditions as it may prescribe, including just compensation.

"(2) The Commission shall expedite proceedings under this subsection and, in any event, issue its order within one hundred and twenty days from receipt of the application from the Corporation. If just compensation has not been determined on the date of the order, the order shall require, as part of just compensation, interest at the rate of 6 per centum per annum from the date prescribed for conveyance until just compensation is paid.

"(e) (1) Except in an emergency, intercity passenger trains operated by or on behalf of the Corporation shall be accorded preference over freight trains in the use of any given line of track, junction, or crossing, unless the Secretary has issued an order to the contrary in accordance with paragraph (2) of this subsection.

"(2) Any railroad whose rights with regard to freight train operation are affected by paragraph (1) of this subsection may file an application with the Secretary requesting appropriate relief. If, after hearing under section 553 of title 5 of the United States Code, the Secretary finds that adherence to such paragraph (1) will materially lessen the quality of freight service provided to shippers, the Secretary shall issue an order fixing rights of trains, on such terms and conditions as are just and reasonable.

"(f) If, upon request of the Corporation, a railroad refuses to permit accelerated speeds by trains operated by or on behalf of the Corporation, the Corporation may apply to the Secretary for an order requiring the railroad to permit such accelerated speeds. The Secretary shall make findings as to whether such accelerated speeds are unsafe or otherwise impracticable, and with respect to the nature and extent of improvements to track, signal systems, and other facilities that would be required to make such accelerated speeds safe and practicable. After hearing, the Secretary shall issue an order fixing maximum permissible speeds of Corporation trains, on such terms and conditions as he shall find to be just and reasonable."

SEC. 11. (a) Section 403 of the Rail Passenger Service Act of 1970 (45 U.S.C. 563), relating to new service, is amended by adding at the end thereof the following new subsection:

"(d) The Corporation shall initiate not less than one experimental route each year, such route to be designated by the Secretary, and shall operate such route for not less than two years. After such two-year period, the Secretary shall terminate such route if he finds that it has attracted insufficient patronage to serve the public convenience and necessity, or he may designate such route as a part of the basic system."

(b) Section 404(b) of the Rail Passenger Service Act of 1970 (45 U.S.C. 564(b)), relating to discontinuance of service, is amended—

(1) by striking out "July 1, 1973" in paragraph (1) and inserting in lieu thereof "July 1, 1974";

(2) by amending paragraph (2) to read as follows:

"(2) Except as otherwise provided in this paragraph and in section 403(a) of this Act, service beyond that prescribed for the basic system undertaken by the Corporation upon its own initiative may be discontinued at any time. No such service undertaken by the Corporation on or after January 1, 1973, shall be discontinued until the expiration of the one-year period beginning on the date of enactment of this sentence."; and

(3) by striking out "July 1, 1973" in paragraph (3) and inserting in lieu thereof "July 1, 1974".

SEC. 12. Section 601 of the Rail Passenger Service Act of 1970 (45 U.S.C. 601), relating to Federal grants, is amended to read as follows:

"SEC. 601. AUTHORIZATION FOR APPROPRIATIONS.

"(a) There are authorized to be appropriated to the Secretary for the benefit of the Corporation in fiscal year 1971, \$40,000,000, and in subsequent fiscal years a total of \$334,300,000. Funds appropriated pursuant to such authorization shall be made available to the Secretary

during the fiscal year for which appropriated and shall remain available until expended. Such sums shall be paid by the Secretary to the Corporation for expenditure by it in accordance with spending plans approved by Congress at the time of appropriation and general guidelines established annually by the Secretary.

"(b) (1) Whenever the Corporation submits any budget estimate or request to the President, the Department of Transportation, or the Office of Management and Budget, it shall concurrently transmit a copy of that estimate or request to the Congress.

"(2) Whenever the Corporation submits any legislative recommendation, proposed testimony, or comments on legislation to the President, the Department of Transportation, or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress. No officer or agency of the United States shall have any authority to require the Corporation to submit its legislative recommendations, proposed testimony, or comments on legislation to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress."

SEC. 13. Section 602 of the Rail Passenger Service Act of 1970 (45 U.S.C. 602), relating to guarantee of loans, is amended—

(1) by inserting "and with the approval of the Secretary of the Treasury," immediately after "prescribe," in subsection (a);

(2) by amending the first sentence of subsection (d) to read as follows: "The aggregate unpaid principal amount of securities, obligations, or loans outstanding at any one time, which are guaranteed by the Secretary under this section, may not exceed \$500,000,000."; and

(3) by adding at the end thereof the following new subsection:

"(g) Notwithstanding any other provision of this Act, a guarantee may not be made of any security, obligation, or loan, if the nature of such security, obligation, or loan is such that the income therefrom is not includable in gross income for the purposes of chapter 1 of the Internal Revenue Code of 1954."

SEC. 14. Section 801 of the Rail Passenger Service Act of 1970 (45 U.S.C. 641) is amended to read as follows:

"SEC. 801. ADEQUACY OF SERVICE

"(a) The Commission shall promulgate, within 60 days from the date of enactment of the Amtrak Improvement Act of 1973, and shall from time to time revise, such regulations as it considers necessary to provide adequate service, equipment, tracks, and other facilities for quality intercity rail passenger service. The Corporation may contract with railroads or with regional transportation agencies for the improvement of service, equipment, tracks and other facilities necessary to meet such regulations promulgated by the Commission. In the event of a failure to agree, the Commission shall by rule establish procedures for allocating between the Corporation and a railroad any costs required to be incurred to meet the regulations establishing adequate service, equipment, tracks, and other facilities.

“(b) Any person who violates a regulation issued under this section shall be subject to a civil penalty of not to exceed \$500 for each violation. Each day a violation continues shall constitute a separate offense.”.

And the House agree to the same.

HARLEY O. STAGGERS,
JOHN JARMAN,
JOHN D. DINGELL,
BROCK ADAMS,
BERTRAM L. PODELL,
RALPH H. METCALFE,
JAMES HARVEY,
DAN KUYKENDALL,
J. SKUBITZ,
DICK SHOUP,

Managers on the Part of the House.

WARREN MAGNUSON,
VANCE HARTKE,
ADLAI STEVENSON,
M. W. COOK,
J. G. BEALL,

Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 2016) to amend the Rail Passenger Service Act of 1970 to provide financial assistance to the National Railroad Passenger Corporation, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendment struck out all of the Senate bill after the enacting clause and inserted a substitute text, and the Senate disagreed to the House amendment.

The committee of conference recommends that the Senate recede from its disagreement to the amendment of the House, with an amendment which is a substitute for both the Senate bill and the House amendment.

The difference between the Senate bill, the House amendment thereto, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by reason of agreements reached by the conferees, and minor drafting and clarifying changes.

Unless otherwise indicated, in this joint explanatory statement "existing law" refers to the "Rail Passenger Service Act of 1970".

SHORT TITLE

Senate bill

The Senate bill provided that this legislation should be cited as the "Amtrak Improvement Act of 1973".

House amendment

No provision.

Conference substitute

The conference substitute is the same as the Senate bill.

DEFINITIONS

The Senate bill, the House amendment and the conference substitute contained provisions amending section 102 of existing law to redefine the term "intercity rail passenger service" to exclude references to auto-ferry service characterized by transportation of automobiles and their occupants.

The term auto-ferry service is defined to mean intercity rail passenger service characterized by transportation of automobiles and their occupants.

BOARD OF DIRECTORS

Senate bill

No provision.

House amendment

The House amendment amended section 303(a) of existing law to restructure the board of directors of Amtrak as follows:

(1) The number of directors was increased from fifteen to seventeen consisting of the Secretary of Transportation, ex officio, nine directors appointed by the President, and confirmed by the Senate, three directors elected annually by common stockholders of Amtrak (railroads), four directors to be elected annually by preferred stockholders. Directors appointed by the President would serve four-year terms, or until their successors have been appointed and qualified, and not more than five could be appointed from the same political party.

(2) Any vacancy was required to be filled in the same manner as the original selection was made, except that any director appointed by the President would be appointed only for the unexpired term of the director he succeeds.

(3) The directors were required to elect one of their number annually to serve as chairman.

(4) Three of the directors appointed by the President were required to be designated to serve as consumer representatives and not more than two of them could be members of the same political party.

(5) Each director would receive \$300 for each board meeting he attended, plus reimbursement for travel and subsistence expenses incurred in attending each meeting.

(6) No member elected by railroads (common stockholders) could vote on any contract or operating relationship between Amtrak and a railroad but he could be present at the meeting, participate in the discussion, and be counted for purposes of a quorum.

(7) No director appointed by the President could have any direct or indirect financial or employment relationship with any railroad. Also, no such director could have any direct or indirect employment relationship, or any significant direct or indirect financial relationship, with any person engaged in the transportation of passengers in competition with Amtrak.

(8) Seven directors would constitute a quorum to conduct business until the election of the four directors by preferred stockholders.

(9) The President was required to fill any vacancy, occurring among directors appointed by him, within 120 days after the vacancy occurs.

The House amendment also provided that the term of each director of Amtrak serving on the date of enactment of the proposed legislation would expire on the 30th day after such date of enactment, except that each such director would continue to serve until his successor was appointed and qualified or until the expiration of the 120-day period beginning on the day his term expired under this subsection, whichever first occurred. No director would be ineligible for reappointment solely because his term expired under this provision of the House amendment. Notwithstanding the fact that the President appoints directors to serve four-year terms, of the nine directors first appointed by the President under legislation three were required to be appointed to serve for two years and three to serve for three years.

Conference substitute

The conference substitute is the same as the House amendment. The committee of conference expressed its confidence that the President would make timely appointments to the board of directors to be newly constituted so as to permit Senate consideration and confirmation of the appointees within the hundred and twenty day period. Without such timely appointment and confirmation the board could be prevented from acting due to a lack of a quorum on the board.

The committee of conference is concerned that representatives of the common stockholders serving on the board are not always able to divorce themselves from their railroad responsibilities when serving on the board. If the commitment of the railroad representatives on the board to the success of Amtrak remains in doubt, members of the committee of conference will seek a legislative solution to the problem.

USE OF RAILROAD EMPLOYEES

Senate bill

The Senate bill amended section 305 of existing law to delete the second sentence of subsection (a), relating to use of railroad employees, which reads as follows:

The Corporation shall, consistent with prudent management of the affairs of the Corporation, rely upon railroads to provide the employees necessary to the operation and maintenance of its passenger trains and to the performance of all services and work incidental thereto, to the extent the railroads are able to provide such employees and services in an economic and efficient manner.

House amendment

No provision.

Conference substitute

The conference substitute is the same as the Senate bill.

AUTO-FERRY SERVICE

Senate bill

The Senate bill authorized Amtrak to provide auto-ferry service as part of the basic passenger services authorized by existing law. The Corporation was authorized and directed to acquire, modify, or develop the equipment and facilities required for the efficient provision of mail, express, and auto-ferry service. The Senate bill further provided that nothing in existing law would prevent any other person from engaging in auto-ferry service over any route, whether or not such route was a part of the basic system.

House amendment

The House amendment also amended section 305(b) of existing law to authorize Amtrak to provide auto-ferry service as a part of the basic passenger services authorized by existing law. It further provided that nothing contained in existing law would prevent any other person (other than a railroad) from engaging in auto-ferry service over any route if such person satisfied the Interstate Commerce Com-

mission that such service was required to meet the demands of the public and would not impair the ability of Amtrak to increase its revenues or reduce its losses. The House amendment also contained a so-called grandfather clause permitting any person performing auto-ferry services on the date of enactment of the proposed legislation under contracts entered into before October 30, 1970, to engage in such services over such routes. The House amendment also provided that nothing in this section of existing law would be construed to restrict the right of a railroad that has not entered into a contract under section 401 of existing law to be relieved of responsibility for performing intercity rail passenger service from performing auto-ferry service over its own lines. Amtrak was further authorized to acquire or develop equipment and facilities to provide mail, express, and auto-ferry service or to contract for such services.

Conference substitute

The committee of conference agreed to a substitute provision which confirms Amtrak's authority to institute auto-ferry service as part of the intercity rail passenger service authorized in existing law. Railroads which have entered into contracts with Amtrak for the provision of rail passenger service would not be permitted to perform non-Amtrak auto-ferry service over their own lines. Any railroad which has not entered into contracts with Amtrak for the provision of rail passenger service would not be prevented from performing auto-ferry service over its own lines. Any railroad primarily engaged in auto-ferry service or any other person which is not a railroad can provide auto-ferry service over any route in accordance with a certificate issued by the Commission.

The Commission would issue a certificate if the auto-ferry service is required to meet the demands of the public and the Commission finds that such auto-ferry service (needed to meet the demands of the public) will not unduly impair the ability of Amtrak to reduce its losses or increase its revenues. The burden of proving that such impairment would not occur would not be on the applicant for the certificate.

Any railroad primarily engaged in auto-ferry service or any other person who is performing auto-ferry service in accordance with a certificate issued by the Commission on the date of enactment of this legislation under contracts entered into before October 30, 1970 may continue to operate such auto-ferry service.

HANDICAPPED AND ELDERLY

Senate bill

The Senate bill authorized Amtrak to take all steps necessary to assure that elderly and handicapped individuals have equal access to rail passenger transportation facilities. This provision enumerated a number of actions which could be taken to achieve this goal; for instance, the installation of special equipment and devices designed to assist the handicapped or elderly, and the elimination of architectural and other barriers that exist in equipment and facilities; as illustrative of the types of actions Amtrak was authorized to take to insure that all travelers have equal access to intercity rail transportation facilities.

House amendment

No provision.

Conference substitute

The conference substitute is the same as the Senate bill.

STATE AND LOCAL LAW PROHIBITING AUTO-FERRY SERVICE

Senate bill

The Senate bill amended section 306 of existing law to provide that Amtrak, or any railroad or government agency contracting for the operation of intercity trains would not be subject to any State or local law interfering with efficient provision of mail, express, or auto-ferry service.

House amendment

No provision.

Conference substitute

The conference substitute clarifies the scope of the preemption of State law. The provision agreed to prevents a common carrier by railroad from refusing to participate with Amtrak in providing auto-ferry service on the grounds that a State or local law or regulation makes *service* unlawful. State or local laws not making service *per se* unlawful—e.g., train crew sizes—would not be preempted by this provision.

ANNUAL REPORT DATE CHANGED

Senate bill

The Senate bill amended section 308(b) of existing law to change the date on which Amtrak would be required to submit its annual report to Congress from January 15 to March 15 so that it would coincide with the date the Department of Transportation and ICC are required to submit their reports on Amtrak to the Congress.

House amendment

No provision.

Conference substitute

The conference substitute follows the Senate bill, but requires Amtrak to submit its annual report on February 15 so that the Department of Transportation and ICC will have that report available before filing their own reports on Amtrak with the Congress on March 15.

FACILITY AND SERVICE AGREEMENTS

Senate bill

No provision.

House amendment

The House amendment amended section 402(a) of existing law to require the Interstate Commerce Commission, in fixing compensation for the provision of services ordered by the Commission, to consider quality of service as a major factor in determining the amount (if any) of compensation to be paid in excess of incremental costs.

Conference substitute

The conference substitute is the same as the House amendment.

The term "incremental costs", as used by the conferees, is intended to provide a basic level of compensation to be paid a railroad for services provided. It is assumed that this basic level could be supplemented on the basis of quality of service.

The committee of conference recognized the difficulties inherent in costing terminology. The term "incremental costs" is not used by the conferees as a term of art itself. It is intended to provide a basis for payment to the railroad of all costs which would not be incurred if passenger service were not performed for Amtrak. It is anticipated that the railroad and Amtrak would agree on a system of bonuses or penalties that would vary the level of payments according to the quality of service provided. In the absence of agreement, the Commission would fix this amount under section 402(a) of existing law, taking into account the quality of service regulations issued under section 801, as amended. The term "incremental" is to be considered then as meaning those costs which would not be incurred if a particular service were not rendered or a given amount of traffic were not handled. This includes total solely related (or direct) costs of a particular service (both variable and fixed portions of solely related costs), but does not include any portion of common costs. This is also sometimes referred to as "avoidable costs".

The committee of conference notes that the Interstate Commerce Commission, in rendering its decision in Finance Docket 27353 (Sub-No. 1) "Determination of Compensation under Section 402(a) of the Rail Passenger Service Act, as Amended", determined that the Penn Central Transportation Company should receive additional compensation in excess of avoidable costs in the Boston-Washington Corridor. The Commission also decided that the "quality of services to be rendered must be an integral part of the compensation formula".

Present levels of performance by the Penn Central are below acceptable standards. The parties should establish (and if they cannot agree, the Commission should set) standards requiring substantial improvement in those performance aspects that are subject to the Penn Central's control, consistent with the equipment and other capital improvements provided by or required by Amtrak. It is the conference committee's view that, at present performance levels, the railroads are not entitled to the compensation base that could be established under the Commission's ruling.

The committee of conference expects the Commission, in resolving a compensation dispute between Amtrak and a railroad, to establish incentives both for performance and cost reductions. The costs of achieving improved performance should not be excessive; and, if costs can be reduced without impairing performance, incentives for achieving such reductions should be provided.

EMINENT DOMAIN

Senate bill

The Senate bill amended section 305 of existing law to give Amtrak the power of eminent domain so that it could acquire any right-of-way, land, or other property or interest in property (except in any interest

in property owned by a railroad or State or political subdivision thereof or any other government agency), which is required for the construction of tracks or other facilities necessary to provide intercity rail passenger service. Amtrak was authorized to exercise this right only to the extent financial resources were available to pay just compensation for the property taken, and the right could be exercised only when Amtrak could not acquire the property by contract, or was unable to agree with the owner as to the amount of compensation to be paid. The procedures to be followed when the power of eminent domain is exercised by the Corporation were set out with specificity.

The Senate bill also amended section 402 of existing law to allow Amtrak to apply to the Interstate Commerce Commission for an order establishing the need of Amtrak for property (including any interest in property) owned by railroad or governmental entity and to seek an order directing that such railroad or entity convey such property to Amtrak on reasonable terms and conditions, including just compensation. The procedures that are to be followed in carrying out this power were also set out in detail.

House amendment

The House amendment also amended section 305 of existing law to authorize Amtrak to acquire any right-of-way, land, or other property required to construct tracks or other facilities necessary to provide intercity rail passenger service through the exercise of the right of eminent domain in the Federal district court for the district in which the property is located, if Amtrak cannot acquire such property by contract, or is unable to agree with its owner as to the amount of compensation to be paid. The right of eminent domain would not apply to any right-of-way, land, or other property of a railroad or of a State or local government or other public agency.

In order to exercise its right of eminent domain, Amtrak would be required to file a declaration of taking setting forth—

- (1) a description of the property to be taken, together with a plan showing such property;
- (2) a statement of the interest to be taken in the property;
- (3) a statement of the public use for which it is taken; and
- (4) a statement of the amount of money estimated by Amtrak to be just compensation therefor.

Title to the property interest to be taken would vest in Amtrak, and the right to just compensation therefor would vest in the persons entitled thereto, upon the filing of the declaration of taking by Amtrak and the deposit in the court of the amount estimated by Amtrak as just compensation therefor. The judgment of the court would establish and award just compensation, and include as a part of such compensation interest from the date of taking to the date of payment at the rate of 6 percent per annum on the amount awarded. Interest would not be allowed on the amount deposited in the court by Amtrak. If the compensation awarded by the court exceeded the amount of Amtrak's deposit, the court would be required to enter judgment against Amtrak for the deficiency. The court could order all or any part of Amtrak's deposit to be paid immediately for or on account of the just compensation to be determined by the court.

The court could make such orders with respect to liens, taxes, assessments, and other charges as would be just and equitable. At the time Amtrak files a declaration of taking, the court could fix the time within which, and the terms under which, possession of the property must be surrendered to Amtrak.

The House amendment also amended section 402 of existing law to provide for the method of acquisition of railroad property. This amendment to section 402 of existing law, like the Senate bill, also authorized Amtrak to apply to the Interstate Commerce Commission for an order establishing Amtrak's need for railroad property and requiring its conveyance to Amtrak on reasonable terms and conditions, including just compensation, in any case in which Amtrak and the railroad concerned cannot agree upon terms for the sale of such property to Amtrak. Amtrak's need for the property would be deemed to be established, and the Commission would be required to order the conveyance, unless it found that such conveyance would significantly impair the ability of the railroad to carry out its obligations as a common carrier and that Amtrak's obligations to provide rail passenger service could be met by the acquisition of alternative property available for sale to Amtrak on reasonable terms, or available by the exercise of the authority of eminent domain given it under the proposed legislation.

The Commission was authorized to expedite proceedings under this provision and issue its order within 120 days after receiving Amtrak's application. If, on the date of the order, just compensation has not been fixed, the order would require payment of interest at the rate of 6 percent per annum from the date prescribed for conveyance until payment of just compensation.

Conference substitute

Both the Senate bill and the House amendment contained many substantially identical provisions which are included in the conference substitute. The major differences are as follows:

1. The conference substitute, like the Senate bill, limits Amtrak's condemnation authority to the financial resources available to Amtrak. The House amendment contained no such specific limitation.

2. The conference substitute, like the Senate bill, provides that the right to the money desposited as estimated compensation will vest immediately in the persons entitled thereto. The House amendment provided that the right to "just compensation" would vest immediately in the persons entitled thereto. This provision of the conference substitute is not intended to imply that anyone is entitled to more than "just compensation". Rather, it is intended to assure that persons entitled to compensation will have an immediate right thereto. If the amount deposited and paid is more than "just compensation", the judgment of award can require refunding of any excess amount.

CORPORATE POWERS

Senate bill

The Senate bill restated already existing powers of Amtrak contained in existing law and also consolidated all corporate powers which were formerly contained in the authorization section of existing law.

House amendment

No provision.

Conference substitute

The conference substitute is the same as the Senate bill. No substantive change is intended in the restatement and consolidation of these provisions.

PASSENGER TRAIN PREFERENCE; MAXIMUM SPEEDS

Senate bill

No provision.

House amendment

The House amendment added a new subsection (e) to section 402 of existing law providing that, except in an emergency, Amtrak passenger trains must be accorded preference over freight trains unless the Secretary of Transportation, after a hearing held under section 553 of title 5 of the United States Code, made a finding that such preference would materially lessen the quality of freight service provided to shippers. In case of any such finding, the Secretary was required to issue an order fixing rights of trains on such terms and conditions as he determined to be just and reasonable.

The House amendment also added a new subsection (f) to section 402 of existing law providing that Amtrak could apply to the Secretary of Transportation for an order requiring a railroad to permit accelerated speeds by Amtrak trains if a railroad refused to permit such accelerated speeds at Amtrak's request. The Secretary was required, after hearing, to issue an order fixing maximum permissible speeds of Amtrak trains on such terms and conditions as he determined to be just and reasonable. The Secretary was also required to make findings as to whether such accelerated speeds were unsafe or otherwise impracticable, and also with respect to the nature and extent of track and other improvements necessary to make such speeds safe and practicable.

Conference substitute

The conference substitute is the same as the House amendment.

NEW SERVICE; EXTENDING SERVICE IN BASIC SYSTEM

Senate bill

The Senate bill amended section 403 of existing law to add a new subsection that required Amtrak to initiate at least one experimental route each year, to be designated by the Secretary of Transportation. These experimental routes were to operate for no less than a period of two years, at which time the Secretary could decide whether to continue the experimental route. Such determination was to be made at least partially upon the basis of whether or not the route has attracted sufficient patronage to serve the public convenience and necessity. If the route was continued, it would become part of the basic system.

House amendment

The House amendment also added a new subsection to section 403 of existing law requiring Amtrak to initiate at least one experimental route each year. Such route is to be designated by the Secretary and operated by Amtrak for not less than two years. If, after such two-

year period, the Secretary found that such route had attracted insufficient patronage to serve the public convenience and necessity, he was required to terminate the route. The Secretary was also authorized, after such two-year period, to designate such route as a part of the basic system.

The House amendment also amended section 404(b) of existing law to provide that no service, beyond that prescribed for the basic system, undertaken by Amtrak on its own initiative on or after January 1, 1973, could be discontinued until the expiration of one year after the enactment of the proposed legislation. This amendment also provided that Amtrak must continue to provide service within the basic system until July 1, 1974. Under existing law, service within the basic system could be discontinued after July 1, 1973.

Conference substitute

The conference substitute is the same as the House amendment.

FEDERAL FINANCIAL ASSISTANCE TO AMTRAK

Senate bill

The Senate bill amended section 601 of existing law to authorize an appropriation of \$185 million for fiscal year 1974 for the use of Amtrak. All funds appropriated pursuant to this authorization would be made available by the Secretary for payment to Amtrak during the fiscal year for which appropriated, and would remain available until expended. It further provided that funds paid to Amtrak by the Secretary would be available for expenditure by Amtrak in accordance with spending plans approved by the Congress at the time of appropriation.

House amendment

The House amendment amended section 601(a) of existing law to authorize an appropriation of \$107.3 million for the fiscal year 1974 for the purpose of enabling the Secretary of Transportation to make grants to Amtrak to carry out its corporate purposes.

Conference substitute

The conference substitute increases the \$227 million authorization contained in existing law to \$334.3 million. This is an increase of only \$107.3 million, but there is \$47 million of the previous authorization remaining unappropriated which is contained in the conference substitute. Thus, the total authorization available to Amtrak is \$154.3 million.

The conference substitute also assures that appropriated funds will remain available until expended. It also prohibits the use of grant agreements to manage the disposition of funds between the Secretary of Transportation and Amtrak. Amtrak would expend such sums in accordance with spending plans approved by Congress at the time of appropriation and with general guidelines established annually by the Secretary. The committee of conference believes that the elimination of grant agreements will permit Amtrak to operate more freely of Government control so as to test the for-profit concept in the provision of intercity rail passenger service. This provision will also enable the

Congress to carry out more effectively its oversight functions by pinpointing responsibility for successes or failures in the provision of rail passenger service.

LOAN GUARANTEES

Senate bill

The Senate bill amended section 602 of existing law to increase the maximum permissible loan guarantee authority from \$200 million to \$500 million. The Senate bill also prohibited guarantee of securities, obligations, or loans, the income from which is not includable in gross income for purposes of chapter I of the Internal Revenue Code of 1954.

House amendment

The House amendment amended section 602(a) of existing law to require the approval of the Secretary of the Treasury of any guarantee issued by the Secretary of Transportation to any lender against loss of principal and interest on loans or other obligations to finance certain capital expenditures by Amtrak.

The House amendment also amended section 602(d) of existing law to increase from \$200 to \$250 million the limit on the total unpaid principal amount of guaranteed obligations or loans which may be outstanding at any one time under this section.

The House amendment also added a new subsection (g) to such section 602 prohibiting the making of a guarantee with respect to any obligation or loan if the income therefrom is not included in gross income for Federal income tax purposes.

Conference substitute

The conference substitute follows the Senate bill in increasing the loan guarantee authority from \$200 million to \$500 million. It follows the House amendment in requiring the approval of the Secretary of the Treasury of any guarantee issued under existing law. The conference substitute also includes the provision referred to above under both the Senate bill and House amendment prohibiting any guarantee if the nature of the instrument guaranteed is such that income therefrom is not includable in gross income for Federal income tax purposes.

ADEQUACY OF SERVICE

Senate bill

The Senate bill amended section 801 of existing law to direct the Commission to promulgate, and when appropriate to revise, such regulations as it deemed necessary to provide adequate service, equipment, tracks, and other facilities for rail passenger service. It also provided for assessment of a civil penalty of \$5,000 for each violation and permitted the Commission to compromise any penalty so assessed. In case of a failure to pay an assessed penalty, the Commission was authorized to seek recovery through its own attorneys or in cooperation with the Attorney General.

House amendment

The House amendment also amended section 801 of existing law to authorize the Interstate Commerce Commission to issue necessary regulations to assure that the quality of service and accommodations on trains and other facilities used in intercity rail passenger service is

adequate, taking into account applicable safety regulations. The Commission was specifically prohibited from prescribing regulations applicable to Amtrak relating to the scheduling or frequency of service, or the number or type of cars in a train, or that otherwise conflict with service characteristics established for the basic system by the Secretary of Transportation. It also provided for a civil penalty of not more than \$500 for each violation of a regulation issued by the Commission under this section, and provides that each day a violation continued would constitute a separate offense.

Conference substitute

The conference substitute rewrites section 801 of existing law to clarify the jurisdiction of the Department of Transportation and the Interstate Commerce Commission over safety related and service related issues. First, this provision resolves a possible legislative inconsistency which results from the fact that section 801 of existing law, as presently worded, authorizes the ICC to "prescribe such regulations as it considers necessary to provide safe and adequate service, equipment, and facilities for intercity rail passenger service". The Federal Railroad Safety Act of 1970, enacted only two weeks prior to the Rail Passenger Service Act, defined the Secretary of Transportation's jurisdiction over railroad safety to include "all areas of railroad safety". It is the intent of the committee of conference to make clear that the Secretary's jurisdiction over railroad safety is exclusive. The ICC, in prescribing its own regulations with respect to the adequacy of service, should take account of safety regulations prescribed by the Secretary of Transportation.

The conference substitute directs the Commission to promulgate, and when appropriate to revise, such regulations as it considers necessary to provide adequate service, equipment, tracks, and other facilities for rail passenger service. The intent of this provision is to help foster high quality rail passenger service. It is anticipated, for instance, that in appropriate situations this would enable the Commission to promulgate rules and regulations requiring tracks to be upgraded beyond the standard they were in when Amtrak commenced operations in 1971. Presently existing contractual relationships between Amtrak and the operating railroads typically do not permit renegotiation over any issues except compensation. Unfortunately, this means Amtrak is, in many instances, restricted in its attempts to upgrade the quality of service being delivered to the public even though it may be required to increase its payments for such service. The only presently existing alternative is for Amtrak to operate directly all aspects of rail passenger operations, which could be even more expensive. Another simultaneously existing barrier to high quality rail transportation has been the failure of Congress to charge directly any regulatory body with the responsibility for seeing to it that the various requisite elements of high quality rail passenger service are present. This provision is designed to give the Commission this responsibility, and the committee of conference expects immediate action from the Commission in this regard.

The Corporation may contract with railroads or with regional transportation agencies for the improvement of service, equipment, tracks, and other facilities necessary to at least meet such regula-

tions promulgated by the Commission. In the event of a failure to agree, the Commission shall by rule establish procedures for allocating between the Corporation and a railroad any costs required to be incurred to at least meet the regulations establishing adequate service, equipment, tracks, and other facilities.

The conference substitute follows the House amendment in providing that any person who violates rules or regulations issued by the Commission shall be subject to a civil penalty of not to exceed \$500 for each day of violation.

SIMULTANEOUS SUBMISSION OF LEGISLATIVE RECOMMENDATIONS, PROPOSED TESTIMONY, OR COMMENTS ON LEGISLATION

Like both the Senate bill and the House amendment, the conference substitute contains a provision requiring Amtrak to submit simultaneously to the Congress any legislative recommendation, proposed testimony, or comments on legislation which it submits to the President, the Department of Transportation, or the Office of Management and Budget. There is also a prohibition against any officer or agency of the United States requiring Amtrak to submit such information prior to submission to Congress. The committee of conference does not intend this provision to prevent any member of the Amtrak Board of Directors who is an officer of the United States from receiving such information as a Board member prior to its simultaneous submission to Congress and the executive branch.

HARLEY O. STAGGERS,
JOHN JARMAN,
JOHN D. DINGELL,
BROCK ADAMS,
BERTRAM L. PODELL,
RALPH H. METCALFE,
JAMES HARVEY,
DAN KUYKENDALL,
J. SKUBITZ,
DICK SHOUP,

Managers on the Part of the House.

WARREN MAGNUSON,
VANCE HARTKE,
ADLAI STEVENSON,
M. W. COOK,
J. G. BEALL,

Managers on the Part of the Senate.

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EXHIBIT 2

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REDACTED

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EXHIBIT 3

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THE
NATIONAL RAILROAD PASSENGER CORPORATION
AGREEMENT

Received and Entered with
Suffolk Deeds, Book 8533 Page 495.
Attest: *Joseph D. Caughlin*
Register

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P. X. 126

M.B.T.

SUFFOLK REGISTER OF DEEDS
MAY 12 10 36 AM 1972
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FEB 11 1972

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ARTICLE THREETHE SERVICESSection 3.1. Right to Services.

Subject to and in accordance with the terms and conditions of this Agreement, Railroad hereby agrees to provide NRPC, over Rail Lines of Railroad, with the services requested by NRPC for or in connection with the operation of NRPC's Intercity Rail Passenger Service, including the carrying of mail and express on Intercity Rail Passenger Trains to the extent authorized by the Act. The initial services with respect to Railroad shall be as provided in Appendix B and shall be compatible with the physical capabilities of Railroad.

Section 3.2. Modification of the Services.

NRPC shall have the right from time to time to request, and subject to and in accordance with the terms and conditions of this Agreement Railroad hereby agrees to provide, modified or additional services. Such requests shall be made by filing an amendment to Appendix B with Railroad on a date sufficiently in advance of the date upon which such amendment is to become effective to permit adequate joint planning and joint preparation for the modified or additional services provided for in such amendment. The services requested in any such amendment shall be subject to the physical and financial capabilities of Railroad and shall give due regard to Railroad's speed, weight and similar operating restrictions and rules and safety standards and to the avoidance of

unreasonable interference with the adequacy, safety and efficiency of its other railroad operations. In applying the foregoing, recognition shall be given to the importance of fast and convenient schedules and passenger comfort and convenience to the success of NRPC's Intercity Rail Passenger Service.

Section 3.3. Provision of the Services.

Railroad further agrees to provide and furnish all labor, materials, equipment and facilities necessary to perform the services to be provided under Sections 3.1 and 3.2 (except as the same are provided by NRPC), but shall not, except as is otherwise provided in this Agreement or upon agreement with NRPC, be required to purchase, construct, rebuild or replace Rail Lines, locomotives, cars, rolling stock or ancillary facilities (as defined in Section 3.8).

Railroad shall provide services hereunder in an economic and efficient manner and shall give appropriate recognition to the importance of on-time passenger train operations and passenger comfort and convenience. Railroad shall make every reasonable effort to maintain the schedules established by NRPC for its Intercity Rail Passenger Service. From time to time NRPC will deliver to Railroad, pursuant to Section 3.2, requests regarding manner and standards of operation designed to refine and make precise the foregoing and to bring about nationally high and uniform standards of intercity rail passenger operations.

CERTIFICATE OF SERVICE

I certify that I have on this 2nd day of March, 2018, caused a true copy of the Highly Confidential and Public versions of the foregoing Reply Brief of Illinois Central Railroad Company and Grand Trunk Western Railroad Company to be served electronically upon the following counsel for the National Railroad Passenger Corporation:

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