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

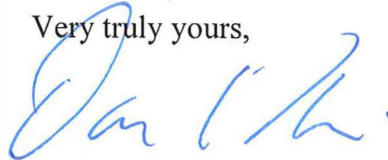
**Re: *Application of the National Railroad Passenger Corporation under 49 U.S.C.
§ 24308(a) – Canadian National Railway Company (Docket No. FD 35743)***

Dear Ms. Brown:

Enclosed for filing under seal in the above-referenced docket please find the Highly Confidential Version of the Limited Surrebuttal Submission 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 submission, 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

**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

**SURREBUTTAL SUBMISSION OF ILLINOIS CENTRAL RAILROAD COMPANY
AND GRAND TRUNK WESTERN RAILROAD COMPANY**

Pursuant to the Board’s order in this proceeding served October 11, 2017, Illinois Central Railroad Company (“IC”) and Grand Trunk Western Railroad Company (“GTW”) (together, “CN”)¹ hereby submit their surrebuttal evidence. CN’s surrebuttal evidence consists of the following two verified statements (with supporting exhibits).

**A. Joint Surrebuttal Verified Statement of Paul E. Ladue and
Scott Kuxmann.**

Messrs. Ladue and Kuxmann Joint Surrebuttal Verified Statement responds to the new Amtrak contract on-time performance (“KOTP”)-based proposal made as part of its rebuttal submission and described in the joint rebuttal verified statement of Messrs. Vilter and Maga (“RVS Vilter/Maga”) (at Section IV), including an accompanying redline (at Exhibit 28). Messrs. Ladue and Kuxmann discuss the unjustified changes and serious problems with Amtrak’s new proposal and why most of its proposed changes should be rejected. They explain, however, that there appear to be some areas of common ground between the parties and that

¹ IC and GTW are indirect wholly owned subsidiaries of Canadian National Railway Company (“CNR”). For convenience, we use the term “Canadian National” to refer collectively to CNR and its subsidiaries, including IC and GTW.

some of the changes proposed by Amtrak can be incorporated with CN's proposed revisions to the Operating Agreement.

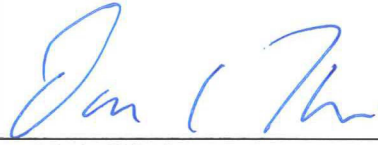
CN's proposed revisions to the Operating Agreement to implement its proposed changes, including the modifications made in consideration of Amtrak's new KOTP-based proposal, are attached to the Joint Surrebuttal Verified Statement as a blackline (Exhibit 1) and a clean version (Exhibit 2). The Joint Surrebuttal Verified Statement is designated as Confidential under the protective order. We have also prepared a public redacted version.

B. Surrebuttal Verified Statement of Paul E. Ladue.

In his Surrebuttal Verified Statement, Mr. Ladue discusses the major inconsistencies between Amtrak's new KOTP-based proposal and its operating agreements with other host railroads. Mr. Ladue also explains why Amtrak's new proposal would significantly increase disputes between the parties.

The Surrebuttal Verified Statement of Paul E. Ladue is designated as Highly Confidential under the protective order; however, because the only Highly Confidential information contained in the statement was produced by Amtrak, it may be viewed by any Amtrak employee.

Respectfully submitted,



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October 30, 2017

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

**JOINT SURREBBUTAL VERIFIED STATEMENT OF
PAUL E. LADUE AND SCOTT KUXMANN**

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PUBLIC VERSION – REDACTED
BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35743

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

**JOINT SURREBUTTAL VERIFIED STATEMENT
OF PAUL LADUE AND SCOTT KUXMANN**

We are Paul E. Ladue and Scott Kuxmann. On September 4, 2015, we filed a verified statement (“VS Ladue/Kuxmann”) in this case, which set forth our qualifications in more detail.¹ In that statement, we discussed Amtrak’s operations on CN’s lines (including Amtrak’s existing and historical train volumes, failure to contribute to infrastructure, and scheduling issues), the terms of the current Operating Agreement (including the disputed terms governing compensation and the assessment of CN’s performance), CN’s history of strong performance under the Operating Agreement, and CN’s proposal for the terms and conditions of a new Operating Agreement. On September 14, 2017 we filed a rebuttal verified statement (“RVS Ladue/Kuxmann”) responding to the evidence and proposals submitted by Amtrak as part of its Opening Statement, which included the verified statements of Mr. Benjamin Sacks (“VS Sacks”) and Mr. Paul Vilter (“VS Vilter”).

We have been asked in this statement to respond to what is essentially a new Amtrak proposal made as part of its rebuttal submission. That proposal is outlined primarily in the joint

¹ Since that statement was filed, Paul Ladue has retired from his position as Region Director Contracts and Administration, Southern Region, for CN. He is now working as a consultant to CN.

rebuttal statement of Messrs. Vilter and Maga (“RVS Vilter/Maga”) (at Section IV), including an accompanying redline (at Exhibit 28), with cross references to the rebuttal verified statements of Mr. Sacks (“RVS Sacks”) and Dr. Frankel (“RVS Frankel”).

INTRODUCTION

Amtrak’s proposed changes to the Operating Agreement would profoundly modify that agreement in Amtrak’s favor and to CN’s detriment without justification and without provision for adequate compensation for the major new burdens Amtrak would impose on CN. The major features of Amtrak’s new proposal² are the following:

- Checkpoints would be indiscriminately added at every station, regardless of station ridership or spacing between checkpoints.
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- Various existing and proposed provisions providing relief for delays beyond CN’s control, or allowing trains subject to such delays not to count for purposes of penalties would be eliminated, because Amtrak views those provisions as “redundant” or “obsolete.”

² Like Amtrak’s ASOTP proposal, its new KOTP proposal would eliminate the “lookback” provision, which ensures that CN will be reimbursed for at least those incremental costs identified in the Operating Agreement for hosting Amtrak service. See RVS Vilter/Maga at 38-39 and VS Ladue/Kuxmann at 19-21.

- [REDACTED]
- Amtrak would reject CN's proposal that root cause be accepted as the best information in determining the reason for various delays.

Although there are some features of Amtrak's new proposal that CN is willing to accept, most of its proposed changes must be rejected as unjustified, unreasonable, and contrary to sound economic principles. Amtrak's proposal fails to acknowledge the importance of appropriate schedules or alternative means of improving its performance, and shows no regard for what is reasonably achievable by CN under existing schedules or the additional costs it would impose on CN by raising service standards rather than adjusting its schedules. Further, rather than seeking to hold both parties responsible for the delays within their reasonable control, one of the key effects of Amtrak's proposed changes to the Operating Agreement would be to shield Amtrak from the consequences of delays for which it logically should bear responsibility. For example, it would reward Amtrak for [REDACTED] by reducing the incentives it must pay CN. Such changes undermine Amtrak's incentives to avoid delay.

More broadly, like its ASOTP proposal, the essential premise underlying Amtrak's proposal is that CN has not been performing adequately and that CN should be required to reduce Amtrak delays, even those beyond its control, so that Amtrak can achieve its desired levels of on time performance. As we've shown in our prior statements, however, CN has performed very well under the only metric agreed to by the parties – KOTP under the Operating Agreement.³ [REDACTED]

[REDACTED]

³ VS Ladue/Kuxmann at 24-27.

[REDACTED]⁴ This is a fact that even Amtrak has now acknowledged in proposing schedules that, while flawed and inadequate in a variety of ways, at least attempt to spread recovery time for those services in order to improve ASOTP. As Mr. Krueger showed, with modest appropriate adjustments to schedule, high levels of ASOTP can in fact be achieved without any change in past levels of performance.

As discussed further below, CN has estimated the performance payments it would receive under Amtrak's new KOTP-based proposal, and those results underscore the unreasonable and flawed nature of that proposal. CN earned [REDACTED] on its two primary services for Amtrak in 2016 – the Illini/Saluki and the City of New Orleans.⁵ Because Amtrak's new proposal would measure performance at every station for those services, if it were applied without the necessary schedule adjustments to spread recovery time for interim stations, it is to be expected that it would result in penalties for CN. And, indeed, that is what CN's analysis shows– instead of earning incentives, CN would incur penalties of \$4.3 million, a difference of [REDACTED].

But even with some adjustment to schedules to spread recovery time, CN would be required to pay large penalties to Amtrak for hosting it. Under Amtrak's proposal to spread recovery time for these services, at 2016 levels of performance, CN's net incentive payments would turn into a penalty of \$4.77 million, a swing of over [REDACTED]

Despite the many flaws in Amtrak's new KOTP-based proposal, there appear to be some areas of common ground between the parties.

- Neither party has proposed any change in the basic Incentive/Penalty compensation amounts shown on page App V-9 in the current Operating

⁴ VS Ladue/Kuxmann at 41-42.

⁵ [REDACTED]

Agreement, although Amtrak has proposed scaling up penalties and eliminating the existing neutral zone (i.e., no penalties or incentives) for contract on time performance between 70% and 80%.

- Both parties agree that there is insufficient schedule recovery time to achieve high OTP at certain stations, and therefore that a schedule change would be necessary for purposes of such a measure.
- Although CN believes that additional checkpoints are unnecessary, and that it makes no sense to add checkpoints indiscriminately as Amtrak has proposed, in light of Amtrak's concerns, CN would agree to add three new checkpoints so long as schedules are appropriately modified.
- Both parties agree that [REDACTED] of tolerance may be used for measuring KOTP performance over relatively short segments, although CN disagrees with Amtrak's claim that is entitled to [REDACTED] or that [REDACTED] is reasonable for application of KOTP over lengthy segments.
- Both parties recognize the value of considering root cause in key situations, or at least going beyond a so-called "windshield view." CN has proposed that root cause information be used where available, while Amtrak, despite its opposition to that proposal, concedes that it presently goes beyond direct or proximate cause (i.e., a "windshield view" from the Amtrak locomotive) in implementing certain delay codes, relief items, and DNCs (do not counts—delays which cause the trip of a train to be disregarded in computing OTP).
- Both parties agree that Amtrak's codes may be useful for distinguishing host- and non-host responsible delays, that Northeast Corridor codes should never be used for Amtrak trains on CN's rail lines, and that there is some overlap and inconsistencies between codes and relief items that should be addressed.

Although the Operating Agreement must ultimately be viewed as an integrated whole, these areas of common ground may be useful for identifying modifications to the Operating Agreement that would be consistent both with improvements CN has proposed and with Amtrak's new proposal. Accordingly, CN has tried to take these into account in the proposed revised Operating Agreement attached hereto as Exhibits 1 and 2.

In Part 1, below, we discuss specific aspects of Amtrak's new KOTP-based proposal, including those aspects that should be rejected outright, those that should be modified, and those that CN has incorporated into its own proposal. In Part 2, we discuss our proposed revised

Operating Agreement, which is attached as a blackline in Exhibit 1 and as a clean draft in Exhibit 2 to our statement. The markup implements the changes to the Operating Agreement proposed by CN, including certain modifications made in consideration of Amtrak's new proposals.

**PART 1: CN'S RESPONSE TO AMTRAK'S NEW
KOTP-BASED PROPOSAL**

**I. AMTRAK'S PROPOSAL TO ADD CHECKPOINTS AT EVERY STATION
SHOULD BE REJECTED**

Amtrak proposes that KOTP be measured at "all stations as well as all exit points on CN,"⁶ arguing (without support) that doing so "improves . . . the chance that CN would be motivated to provide adequate service."⁷ CN has already explained that additional checkpoints are not required for adequate motivation, and absent schedule changes, there is no reason to expect systematically improved performance at interim stations through adding checkpoints to the Operating Agreement. Moreover, increasing segmentation of these services as Amtrak proposes will serve to increase the burden and expense of implementing the agreement; as segments get shorter, individual minutes of delay take on much greater significance (because a much smaller delay can be enough to tip a train from a win to a loss on a short segment) and therefore increase the chances that the parties will dispute the accuracy of each delay.

Amtrak provides no evidence that additional checkpoints are necessary or useful, or that its proposal to add them to all stations makes sense. Instead, Amtrak cites a misleading table, purporting to show that "the vast majority of passengers ride to and/or from intermediate stations." Because the table compares passengers who travel "endpoint to endpoint" with those who travel "to or from intermediate stations," it compares apples (riders between one station

⁶ Under the current Operating Agreement, KOTP is already assessed at all CN exit points, an aspect that CN's proposal would not change.

⁷ RVS Vilter/Maga at 39.

pair) to oranges (riders, without regard to station pairs, who either originate or terminate at any intermediate station). The misleadingly high percentages cited by Amtrak for intermediate stations (ranging from 74.5% to over 90%) are therefore based on lumping together all intermediate stations, [REDACTED], and doing so without regard to the fact that many of these riders will also use or pass through endpoint checkpoints.

The following table shows Amtrak ridership data disaggregated to the level of the stations that Amtrak would propose to add as a new checkpoint under its proposal (the Texas Eagle is excluded from this table because Amtrak does not propose to add new checkpoints on this service).⁸ Even this overstates the importance of adding these individual stations as checkpoints because it includes passengers who already travel to or from checkpoints on the other end of their trip.

Service	% of Passengers Traveling To or From Stations Amtrak Proposes as Checkpoints		
	High	Low	Average
Blue Water	18.1%	2.6%	8.1%
City of New Orleans	9.5%	0.3%	2.5%
Illini/Saluki	23.7%	0.5%	5.2%
Lincoln	1.0%	1.0%	1.0%
Wolverine	6.2%	2.9%	4.1%

Insofar as one might consider adding additional checkpoints, there are two important issues to consider: (1) whether the new checkpoints would be geographically dispersed and cover a reasonable route segment, and (2) whether they would be placed at locations where meaningful numbers of passengers board or depart a train. Amtrak's proposal ignores these critical issues,

⁸ Data for the columns showing ridership at Amtrak's proposed checkpoints comes from <https://www.narprail.org/site/assets/files/1038/trains-1.pdf>.

and, in fact, its proposal to add intermediate checkpoints on 3 of the 5 services would fail under both of these criteria.⁹ The distance operated on CN for these services is so short that adding additional checkpoints is clearly unnecessary, and many of the stations where Amtrak would add checkpoints are lightly-used.

- On the Lincoln service, Amtrak would break the existing 35.7-mile segment into two segments of 10.3 and 25.4 miles for the 7 of 8 trains that stop at the Summit station (train #301 does not stop at Summit, so, like the two Texas Eagle trains, its checkpoints would not change). Moreover, according to NARP data, the Summit station had the 3rd lowest ridership on the Lincoln service in 2016 (averaging 4.3 riders per train and only 1.0% of the total ridership of the Lincoln service).¹⁰
- On the Wolverine service, Amtrak would turn the existing 1.2 mile-segment between the Gord and Baron interlockings into two segments of 0.9 and 0.3 miles due to the location of the Battle Creek station in the middle. Amtrak would also turn the 26.3-mile segment from West Detroit to Pontiac into 4 segments of 3.5, 10.2, 4.2, and 8.4 miles due to the close proximity of 4 stations in the greater Detroit area. Moreover, these stations tend to have low ridership: Pontiac (1.6% of total ridership); Troy (2.9%); Royal Oak (3.2%); and Detroit (6.2%).¹¹
- On the Blue Water service, CN hosts 158.7 miles of the 319 total miles and 6 of the 11 stations. However, those stations account for only 41% of the ridership. Adding a checkpoint at each of these lightly used stations would be arbitrary, and would also create a very short 0.9-mile segment between Battle Creek and Gord. Moreover, the service regularly achieves ASOTP over 80% under the terms of the existing agreement, and it is therefore unlikely that increasing the checkpoints would meaningfully increase ASOTP.

There is no reason to further subdivide these already short segments, especially where doing so would create checkpoints at lightly-used stations.

⁹ There are no stations on CN's portion of the Texas Eagle service. Therefore, no additional checkpoint could be added there, and no station-by-station data is available for the service.

¹⁰ See <https://www.narprail.org/site/assets/files/3462/20.pdf>

¹¹ See <https://www.narprail.org/site/assets/files/3465/22.pdf>

Likewise, Amtrak has not justified its proposal to add checkpoints at every interim station for the two remaining services – the City of New Orleans and Illini/Saluki. Many of the stations on these two services also have very low ridership: on the Illini/Saluki service, 8 of 11 stations each average 2.9% of the total ridership,¹² while on the City of New Orleans service, 13 of the 19 stations each average 1.4% of the total ridership.

Further, because performance payments are based on mileage between checkpoints, Amtrak’s proposal would create the perverse situation where long segments leading into lightly used stations would be “worth” much more than short segments leading into heavily used stations. For example, for the southbound Illini/Saluki trains, the 53.2-mile segment from Effingham to Centralia would be “worth” 3.8 times as much as the 14.0-mile segment from Rantoul to Champaign, despite the fact that ridership at Champaign is over 7 times higher than at Centralia.¹³ Likewise, for the northbound City of New Orleans train, the 86.2-mile segment from Memphis to Newbern is “worth” 3.9 times as much as the 22.1-mile segment from Homewood to Clark Street (a checkpoint at the end of CN’s line and just 2.2 miles from Chicago’s Union Station), despite the fact that ridership at Chicago is over 35 times greater than at Newbern.¹⁴

Instead of adding checkpoints at every station, with the precondition regarding schedules discussed below, CN proposes adding three new checkpoints for these services: at Carbondale and Jackson on the City of New Orleans, and at Champaign on the Illini/Saluki. These locations would create segments of roughly equal length, and would ensure that the most-heavily used

¹² See <https://www.narprail.org/site/assets/files/3471/23.pdf>.

¹³ See <https://www.narprail.org/site/assets/files/3471/23.pdf>. 2016 ridership at Centralia was 17,045 riders, compared to 122,348 riders at Champaign.

¹⁴ See <https://www.narprail.org/site/assets/files/3451/30.pdf>. 2016 ridership at Newbern was 3,690 compared to 131,719 riders at Chicago.

stations, used by a substantial majority of passengers, would be a checkpoint location. In each case, however, because the existing schedules for these services have recovery time that is poorly allocated for assessing performance at locations other than the existing checkpoints, a precondition for adding any such checkpoints is the adoption of revised schedules, such as the new schedule for the Illini/Saluki service CN has proposed to Amtrak, and which CN has included in its proposed Operating Agreement.

Subject to adoption of its proposed schedule, CN proposes adding Champaign as a new checkpoint on the Illini/Saluki service because it is a large station (it has the second highest ridership of all stations on the service) and it is roughly at the midpoint of the route (it is 126.4 miles from Clark Street and 180.3 miles from Carbondale). The stations at (or near) the existing endpoint checkpoints for this service are used by 53% of riders. With the addition of Champaign as a checkpoint, that number would increase to almost 77%.

CN's proposed schedule adjustment is a necessary precondition for adding a new Champaign checkpoint, as there is insufficient recovery time in the present schedule prior to Champaign. The current schedules were negotiated under a system of endpoint-based checkpoints, in which recovery time is backloaded to the segment just prior to the checkpoint. Thus, in the current Illini/Saluki schedules, there is no recovery time prior to the final endpoint segment on CN (and only 5 minutes of miscellaneous time near the midpoint).¹⁵ For a system like KOTP that is based on run time, this means that the only minutes to offset CN-responsible delays would be the contractual tolerance (plus the 5 minutes of miscellaneous time) on the segment for any checkpoint other than the endpoint. Notably, because contractual tolerance is

¹⁵ Miscellaneous time is the functional equivalent of recovery time in a schedule, but is often added with the intention of addressing a specific circumstance that results in delays.

below the tolerance Amtrak uses to assess ASOTP, this would make it possible for a train to be on time at every station up to the checkpoint, yet for CN to incur penalties for the final checkpoint segment.

CN has proposed new schedules for the Illini/Saluki, which were discussed by Mr. Krueger in his rebuttal verified statement and which are shown in Appendix II of our proposed revised Operating Agreement. See attached Exhibits 1 (blackline) and 2 (clean). If these schedules are adopted, CN would agree to the addition of a checkpoint at Champaign.

Subject likewise to revisions to the existing schedule for the City of New Orleans service, CN proposes adding two more checkpoints – at Jackson and Carbondale. The existing checkpoints for this service (Chicago, New Orleans, and Memphis) are used by 60% of riders. Adding these two new proposed checkpoints would increase that number to approximately 75%. Jackson is a large station roughly at the midpoint of the New Orleans to Memphis segment (it is 179.6 miles from Southport Junction and 222.1 miles from Memphis), while Carbondale is the largest station close to the middle of the Memphis to Chicago segment (219.5 miles from Memphis and 306.7 miles from Chicago). However, as with the Illini/Saluki service, the current schedules for the City of New Orleans service are not designed for checkpoints at these locations, and therefore have insufficient recovery time prior to the stations that would be added as checkpoints. Once these schedules are adjusted to add sufficient recovery time before these checkpoints and to correct other issues, such as deficient pure run time, that is hampering on time performance, CN agrees these locations may reasonably be added as checkpoints.

As noted above, adding checkpoints at the locations proposed by CN would cover a significant majority of passengers on these services, as can be seen from the following table.

Service	% of Passengers Traveling To or From		
	All Intermediate Stations	Existing Checkpoints	CN's Proposed Checkpoints
Illini/Saluki	82.2%	53.0%	76.7%
City of New Orleans	92.1%	60.1%	74.7%

II. AMTRAK’S PROPOSAL TO ADOPT UNIFORM TOLERANCE IS UNNECESSARY AND WOULD NOT IMPROVE THE OPERATING AGREEMENT.

In order to measure on time performance, whether for general reporting purposes or for KOTP under the Operating Agreement, one must decide how to define what is “on time.” “Tolerance” is a key aspect of this definition. It is an established number of minutes added to scheduled arrival time to establish the time by which a train must arrive in order to be treated as “on time.” For purposes of its measure of ASOTP, for example, Amtrak has adopted the use of a standard 15 minutes of tolerance, meaning that trains arriving at stations within 15 minutes of their scheduled arrival time are counted as “on time.” Because ASOTP measures performance at every station, it tends to be based on performance on segments that are relatively similar in length. By contrast, for Endpoint OTP, which is based on performance over the entire routes, which can vary greatly in length, Amtrak has adopted mileage-based tolerances, ranging from 10 to 30 minutes.¹⁶

¹⁶ Amtrak’s tolerance for Endpoint OTP is 10 minutes for trips up to 250 miles, 15 minutes for trips 251-350 miles, 20 minutes for trips 351-450 miles, 25 minutes for trips 451-550 miles, and 30 minutes for trips in excess of 551 miles. Federal Railroad Administration, Metrics and Standards for Intercity Passenger Rail Service at 16 (Docket No. FRA-2009-0016) (“Metrics and Standards”), available at <https://www.fra.dot.gov/Elib/Document/1511>.

The current Operating Agreement provides a specific number of basic tolerance minutes for each train.¹⁷ It generally provides for [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]¹⁸ As part of its new KOTP-based proposal, Amtrak would set tolerance [REDACTED].¹⁹ [REDACTED]

[REDACTED]
[REDACTED]²⁰

As the number of minutes of contract basic tolerance is clearly established in Appendix V, Table 1, and has not been the subject of dispute between the parties, there is no need to “simplify” tolerance by adopting a uniform number of minutes. Moreover, Amtrak has provided no evidence to support its proposal to [REDACTED]. [REDACTED]

[REDACTED]
[REDACTED]²¹

Nonetheless, for its trains making relatively short movements, CN agrees that [REDACTED]
[REDACTED] is desirable and has adopted this aspect of Amtrak’s proposal in its markup of the

¹⁷ See Operating Agreement, App. V, Table 1 (“Contract Basic Tolerance”).

¹⁸ In Table 4 in Appendix V of the Operating Agreement, which is a separate provision that Amtrak does not directly address, but that Amtrak strikes in its new blackline, the Operating Agreement provides for [REDACTED]. *Id.* at Table 4.

[REDACTED] Amtrak provides no reasoned basis for striking it. Accordingly, this provision should be maintained.

¹⁹ RVS Vilter/Maga at 40 & Ex. 28, App. V ¶ A.1.

²⁰ RVS Vilter/Maga at 40, n. 104)

²¹ See generally Section III, below [REDACTED]
[REDACTED]

Operating Agreement. This includes [REDACTED]. (These change are reflected in Appendix V, Table 1 of CN's markups.) For the longer movement segments for its City of New Orleans, Illini/Saluki, and Blue Water trains, however, it is more appropriate to [REDACTED]. Doing so is consistent with Amtrak's use of mileage-based tolerance for Endpoint OTP, and it is also more consistent with Amtrak's lower historic proportion of delays.

III. AMTRAK'S PROPOSALS TO FUNDAMENTALLY ALTER HOW KOTP IS CALCULATED AND EFFECTIVELY REDUCE CN'S BARGAINED-FOR CONTRACT RUN TIMES SHOULD BE REJECTED AS UNJUSTIFIED, UNFAIR, AND CONCEPTUALLY FLAWED.

KOTP is designed to measure CN's effect on Amtrak's performance. Thus, it is based on the scheduled run time over the segment, with adjustments to account for delays that are outside of CN's reasonable control (including those due to Amtrak or third parties). The specifics of that required run time and the particular delays that have been determined to be outside of CN's reasonable control were developed and modified under the Operating Agreement over the years, and have been subject to numerous tradeoffs, facts Amtrak ignores.²² The result of these years of renegotiation is a baseline level of service that CN is expected to provide; performance above that baseline earns CN incentives, while performance below that baseline incurs penalties.

Amtrak's proposal would fundamentally alter how KOTP is calculated, effectively increasing the baseline level of service required for CN, without increasing the compensation paid to CN.²³ These changes include: (a) [REDACTED]; (b) [REDACTED]

²² Mr. Sacks, a key Amtrak witness in support of its proposed KOTP changes, lacks our background and understanding of the history and tradeoffs in the agreement.

²³ Indeed, as discussed below, we estimate that Amtrak's proposed changes would result in CN incurring significant penalties.

[REDACTED]; (c) [REDACTED]

[REDACTED]

[REDACTED]; and (d) [REDACTED]

[REDACTED].

Amtrak's proposals would fundamentally shift responsibility from Amtrak to CN for achieving OTP, ignoring the balance struck in the Operating Agreement and negotiated tradeoffs and failing to compensate CN for the increased service standards Amtrak would impose. It would have the general effect of unreasonably and without compensation shifting Amtrak responsibility for reducing delays to CN.

Amtrak seeks to justify doing so based in part on Mr. Sacks' observation that [REDACTED]

[REDACTED]

[REDACTED].²⁴ But that fact does not lead to the conclusion that the Operating Agreement is flawed. To the contrary, it reflects the intention of the parties. There is nothing dysfunctional about the parties agreeing upon [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Further, Amtrak's proposal goes too far in relieving Amtrak of responsibility for delays. For example, its proposal would reduce Amtrak's present incentive to [REDACTED]
[REDACTED], because it would force CN either to compensate for those delays by reducing its own run time or to pay Amtrak penalties. In addition to being

²⁴ RVS Sacks at 10, ¶ 28.

unwarranted and unfair, that self-serving proposed reduction in Amtrak's responsibility for good performance would be contrary to the public interest in timely Amtrak service.

A.

[illegible][illegible]

B. Responsibility For Late Arrivals From Other Hosts and for Excess Dwell Should Not Be Shifted From Amtrak To CN.

Incentives and penalties under the Operating Agreement are based on Amtrak's run times moving over the host carrier because this is a basic measure of how well a host carrier has done in keeping the train on its schedule. The agreement provides for relief for delays that are clearly outside the control of the host carrier, because a host cannot be incentivized to avoid (nor should it be penalized for failing to avoid) delays it cannot reasonably control. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

C. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

IV. AMTRAK’S PROPOSALS REGARDING THE DETERMINATION OF RESPONSIBILITY FOR DELAYS WOULD WRONGLY SHIFT RESPONSIBILITY TO CN FOR DELAYS OUTSIDE ITS REASONABLE CONTROL.

Amtrak does not merely reject CN’s proposals to make the definition and determination of the applicability of relief items more closely adhere to CN responsibility for such delays; it proposes to eliminate almost all existing relief items and provide what amounts only to partial relief for delays Amtrak codes as Amtrak-responsible for non-contractual, PRIIA metric and other reporting purposes.⁴⁰ For example, contrary to the current Operating Agreement, Amtrak proposes to hold CN entirely responsible for [REDACTED]

[REDACTED]⁴¹ Amtrak also mischaracterizes CN’s position regarding root cause, which even Amtrak indirectly admits should be considered.

A. CN’s Four Supposedly “New” Proposed Relief Items Are Reasonable and Should Not Have Been Eliminated by Amtrak.

Amtrak objects to four purportedly “new” relief items that CN proposes to add to Appendix V because, according to Amtrak, “they would unreasonably shift responsibility for delays from CN to Amtrak.”⁴² However, only two of these relief items are actually “new,” and none is unreasonable.

First, CN proposed a new relief item for delays for crossover moves that exceed 2 minutes. Amtrak mischaracterizes the relief sought by CN, which is not for every crossover move but just those for which Amtrak’s conductor claims the crossover delayed a train more than 2 minutes. Such delays in excess of 2 minutes would almost always be an excessive

⁴⁰ RVS Vilter/Maga at 51-60, & Ex. 28, Appx. V ¶ B.1.

⁴¹ *Id* at 54-55.

⁴² *See* RVS Vilter/Maga at 51-55.

attribution of delay for a crossover move, a fact Amtrak's own Service Standards Manual⁴³ and employees⁴⁴ recognize.

Second, CN proposed a new relief item for delays caused when Amtrak is delayed in entering CN's lines because of freight traffic when Amtrak arrives late and unannounced to the entry point of CN's line. CN cannot control other hosts and does not have a dispatching view of their lines. Amtrak on the other hand has an engineer and conductor on each of its trains and has a direct contractual relationship with the hosts delivering its trains. There is no reason Amtrak cannot and should not assure that CN has notice of late arrivals for its trains. If Amtrak really believed that other hosts regularly inform CN of Amtrak late arrivals, then it would not object to this relief item as it would have no effect.

Third, CN proposed making an existing relief item [REDACTED] that applied to the GTW trains applicable to all trains. Thus, this is not a "new" provision, and Amtrak's arguments that it is unreasonable is belied by the fact that such relief is already included in the agreement for GTW trains. It is equally appropriate for IC trains.

Finally, Amtrak objects to an existing relief item for [REDACTED]. This is not a new provision, but was added to the agreement in 2006 as part of a negotiated agreement to add 6 additional Amtrak trains (2 Illini/Saluki and 4 Lincoln service trains).⁴⁵ Therefore, it should not be eliminated unless Amtrak agrees to stop running the 6 trains that were added in exchange for adopting the relief item.

⁴³ [REDACTED]

⁴⁴ See VS Ladue/Kuxmann at 61 n.77.

⁴⁵ RVS Ladue/Kuxmann at 44.

In any event, Amtrak has not shown that it is reasonable or necessary to [REDACTED]
[REDACTED]. Amtrak argues that “[i]t is the host
railroad whose dispatcher needs to notify the other railroad what trains are approaching.”⁴⁶ But
that is a red herring, because CN already does so. It is already standard operating procedure for
CN [REDACTED]
[REDACTED]
[REDACTED]. CN makes every reasonable effort to [REDACTED]
[REDACTED] Particularly with the short distances covered by
CN’s Joliet Sub, [REDACTED]
[REDACTED]
[REDACTED]. CN strongly denies Amtrak’s assertion that CN is disengaged. To the
contrary, CN has urged Amtrak to follow the lead of other passenger operators in the Chicago
area, particularly Metra, and become more engaged itself. To the limited extent Amtrak has
done so, the performance of the controlling carriers has improved.

At bottom, the fact that Amtrak seeks to sidestep is that despite its best efforts CN cannot
[REDACTED]
[REDACTED]. It is a part of Amtrak’s route that CN cannot control. Accordingly, as the parties
have long recognized, if and when such delays occur, they should not be charged against CN.

⁴⁶ RVS Vilter/Maga at 54.

B. CN Agrees with Some of Amtrak’s Proposed Refinements and Conforming Changes Relating to the Adoption of Delay Codes and Elimination of Certain Relief Items, but Others Are Unjustified and Unsupported.

The parties appear to agree that Amtrak’s delay codes may be used in conjunction with relief items as an initial screen for delays that should not be attributed to CN and that some relief items can be removed as redundant when those codes are appropriately applied.⁴⁷ Using the codes as a screen and eliminating redundant relief items should make the agreement easier to administer and reduce disputes between the parties. These changes are reflected in CN’s proposed revised Operating Agreement.

But Amtrak’s new proposal makes many modifications under the guise of “refinements” and “conforming changes” that are unjustified, would fundamentally alter the attribution of delays, and would greatly increase the likelihood of significant and protracted disputes between the parties. Those self-serving changes would confer unjustified financial benefits on Amtrak at CN’s expense and undermine key aspects of the Operating Agreement. They should be rejected.

1. Use of delay codes as a screen

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁴⁷ With respect to relief codes themselves, CN does not object to the removal of those that apply only on the NEC corridor, so long as it is made clear, as CN does in the attached revised Operating Agreement, that those codes cannot be applied to Amtrak trains on CN’s lines. See Exhibits I and II, at App. V.A.1.l.(1) & App. XI.

⁴⁸ [REDACTED]

[REDACTED]

[REDACTED]⁴⁹

The parties agree that delays coded as OTH are not host responsible delays. Further, Amtrak has emphasized in its arguments the importance of CN not being charged with OTH delays. It has stated that CN should not care about insufficient run time in the schedule because any delays caused by insufficient run time “would be accounted for under delay code OTH, which is an Amtrak Responsible Delay,” and that “Amtrak (and not CN) would be responsible for any delays resulting from PRT shortfalls, and under neither system would CN be penalized for such delays.”⁵⁰ While CN disagrees that it should be indifferent to insufficient run time in Amtrak’s schedules, it agrees with Amtrak that delays from insufficient run time should not count against it. [REDACTED]

[REDACTED] See Exhibits 1 and 2 at App.V.A.1.d.

This provision for OTH allows for the elimination of the following existing relief items:⁵¹

- [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁵⁰ RVS Vilter/Maga at 68.

⁵¹ We have previously explained that Amtrak cannot be relied upon to properly code all insufficient run time delays as OTH. RVS Ladue/Kuxmann at 22 n. 29. [REDACTED]

[REDACTED] See Exhibits 1 and 2, Appendix V.A.

- [REDACTED]
- [REDACTED]
- [REDACTED]

As CN has previously proposed, it would also adopt delay codes [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Using these codes would permit the elimination of the following relief

items:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

Other changes CN proposes to the relief section of Appendix V of the Operating Agreement are to incorporate existing GTW relief items that are not redundant with existing IC relief items, adopt the relief items discussed in our opening verified statement, and clarify the

language of existing relief items to reduce the likelihood of future disputes. These relief items are necessary because they apply to situations in which Amtrak normally codes the delay as HRD, even though the delay is outside the reasonable control of CN. For example, the relief item [REDACTED] is necessary because Amtrak occasionally codes such delays as “RTE” (which is an HRD code), as shown in the following examples:

Train	Origin Date	From	To	Host RR	Type	Mins	Delay Reason
351	5/13/2011	ROY	DET	CC	RTE	9	[REDACTED]
354	6/28/2012	DET	ROY	CC	RTE	9	[REDACTED]
365	7/5/2012	LPE	LPE	CC	RTE	9	[REDACTED]
350	8/19/2011	DET	DET	CC	RTE	8	[REDACTED]
365	6/23/2015	FLN	FLN	CC	RTE	5	[REDACTED]
391	2/19/2014	KKI	GLM	CC	RTE	4	[REDACTED]
391	9/9/2014	CHM	MAT	CC	RTE	4	[REDACTED]
391	5/16/2013	DQN	DQN	CC	RTE	4	[REDACTED]
59	12/15/2013	MCB	HMD	CC	RTE	10	[REDACTED]
58	2/26/2014	XSU	HMD	CC	RTE	10	[REDACTED]
59	11/19/2014	MCB	HMD	CC	RTE	10	[REDACTED]
59	2/14/2011	MCB	HMD	CC	RTE	9	[REDACTED]

Likewise, the relief item [REDACTED] is still necessary because these delays are occasionally coded as DCS, as shown by the following examples:

Train	Origin Date	From	To	Host RR	Type	Mins	Delay Reason
393	6/29/2011	GLM	GLM	CC	DCS	7	[REDACTED]
351	1/18/2011	HMI	XTF	NS	DCS	11	[REDACTED]
355	2/7/2011	DER	ARB	NS	DCS	15	[REDACTED]
353	3/2/2011	DOA	NLS	AM	DCS	8	[REDACTED]
392	11/16/2011	XCS	CHI	AM	DCS	4	[REDACTED]
391	12/19/2011	MAT	EFG	CC	DCS	8	[REDACTED]

The specific relief items that CN proposes to maintain in the Operating Agreement are reflected in our attached proposed revised Operating Agreement.

2. Do Not Count provisions, which are not “obsolete” and should be retained

The Operating Agreement specifies a number of situations in which a trip of a train would not be counted for purposes of performance payments or penalties (frequently referred to as “Do Not Count” or “DNCs”). These DNC provisions deal with unusual circumstances beyond CN’s control that can cause major operating disruptions that may not be fully accounted for through ordinary relief items. Amtrak claims that “adding checkpoints and adopting delay codes” render these provisions “obsolete.”⁵² Amtrak appears to believe that delays related to events covered by the DNC provision are adequately covered by relief items and that their related delays will be contained within individual station-to-station segments.

Amtrak fails to appreciate that a fundamental issue created by such lengthy and unpredictable delays is the difficulty of assessing the downstream effects they may have. This

⁵² RVS Vilter/Maga at IV.I.iii.

problem is likely to be exacerbated, not cured by increasing the number of checkpoints.

Amtrak's coding ignores such effects and allows Amtrak to deny relief for downstream effects.

In order to account for such effects, CN must have the option to count a train as a DNC.

Further, Amtrak is wrong in suggesting that its relief codes fully overlap with the bases for DNCs. For example, the DNC for broken rail in connection with severe weather is not adequately covered by Amtrak's WTR code. Amtrak generally insists on ignoring the root cause of a delay, and its description of the types of events covered by a WTR delay provides no indication that a broken rail related to weather would be covered by the code.⁵³ Moreover, Amtrak has frequently refused to credit as weather-related infrastructure problems caused by weather events, such as signal outages caused by high water. A DNC for such delays is necessary to protect CN.⁵⁴

[REDACTED]

⁵³ See RVS Vilter/Maga at 58, Table 2, Row 3.

⁵⁴ As another example, the DNC for heat and cold orders is not adequately covered by Amtrak's WTR code. Amtrak has made clear it does not cede to CN the right to decide when such codes are warranted and that it reserves to itself the right to deny that such orders were necessary or appropriate. As a result, the parties agreed upon the criteria for such orders as reflected in the DNC. Eliminating that level of specificity would remove a valuable protection for CN.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

C. Amtrak Misstates CN's Position Regarding "Root Cause."

CN proposed a reasonable addition to the provision governing attribution of delays (Appendix V, Section 3) to provide that, "In determining the cause of a particular delay, evidence of root cause, as opposed to proximate cause, shall be taken as the best evidence of the cause of a delay." Amtrak interprets that proposal as if it requires an in depth root cause investigation of every delay, rather than simply permitting the use of root cause information insofar as a party can and does adduce it. Amtrak advocates instead the general use of its "windshield view" from the locomotive cab as the basis for establishing causation.

CN is not proposing to require analysis of root cause in all cases, just to allow for its use where appropriate. In most cases, root cause will be the same as direct or proximate cause, or will not matter enough for either party to raise an issue concerning root cause. In other cases, even if there is a different root cause, the alternative cause would still be coded as HRD, so it would make no difference.⁵⁵ In still other cases, delay attribution may have no effect on whether

⁵⁵ Thus, Amtrak's example on page 44-45 of the Vilter/Maga RVS does not demonstrate any inconsistency or problem in administration – all the causes are HRD, so which one Amtrak chooses as the direct cause does not matter for purposes of calculating KOTP.

a train is on time or late, and thus neither party would have an incentive to contest it. But where reference to root cause would make a difference, there is no legitimate basis for excluding it.

For example, if there is a signal failure caused by vandalism to CN's signal system, the root cause of the delay is the vandalism, not the signal failure. Likewise, if a dispatcher imposes a slow order due to flooding on the rail lines, the root cause is a weather-related delay, not the slow order. Many times Amtrak codes these delays correctly, but where there is a disagreement between the parties in these situations, and if evidence of root cause is available, it should be considered. Amtrak would generally preclude that and thus hold CN responsible for delays that are outside its reasonable control. In short, root cause can attribute responsibility to the right party, so provision should be made for its use in the limited circumstances where it makes a difference.

Even Amtrak, which argues against root cause, concedes it can be necessary in certain cases. Use of root is implicit not only in many existing relief or Do Not Count items, but also in certain delay coding practices described in its Service Standards Manual. In the Amtrak Service Standards Manual, Amtrak states that:



This belies Amtrak's exaggerated claims that root cause cannot practically be determined and should generally be ignored. Similarly, a current Do Not Count item applies when "a trip of the train is delayed due to broken rails where the broken rail occurred in connection with severe

⁵⁶ Service Standards Manual at 7-115 (attached as Exhibit 31 to RVS Vilter/Maga)

weather.”⁵⁷ The direct cause may be a broken rail – which would be likely coded as DSR – but the root cause is the extreme weather that caused the broken rail. Further, it is a DNC if an Amtrak train “arrives late due to being delayed by another Amtrak train experiencing delays from ... a force majeure provision.” In this case, the direct cause would be the delay caused by another Amtrak train – PTI – but the root cause would be the force majeure event that delayed that Amtrak train.

There is no justification for selectively including and excluding consideration of root cause. The Operating Agreement should allow for its general use when a party decides correction of an error in attribution must be made.

V. AMTRAK'S PROPOSED CHANGES RELATED TO PERFORMANCE RATES AND THEIR APPLICATION SHOULD BE REJECTED.

While Amtrak and CN agree that the basic rates in the Performance Rate chart are not at issues and should not change, Amtrak proposes a number of unsupported and unwarranted changes related to the application of the performance rates to the calculation of KOTP. These changes include: (a) [REDACTED]; (b) [REDACTED]; and (c) elimination of the lookback provision and CN’s proposed reopening provision. These proposed changes should be rejected.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁵⁷ App. V-6, § 4.c.(4).

⁵⁸ RVS Vilter/Maga at 42, Ex. 28, Appx. V ¶ D, Table 1.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

B. Amtrak’s Unjustified Proposal to Impose a Multiplier on Penalties Should Be Rejected.

The current Operating Agreement determines penalties and performance payments on the basis of percent KOTP. Amtrak proposes to [REDACTED]

[REDACTED]

[REDACTED]

Such added penalties would serve no useful purpose because, as CN has already shown, CN does

⁵⁹ RVS Vilter/Maga at 42, & Ex. 28, Appx. V ¶ D.2.

not give up on late Amtrak trains.⁶⁰ CN is already motivated, by operational and reputational concerns, to avoid additional delays to already-delayed trains.

Moreover, these additional penalties would be particularly unfair given the other changes sought by Amtrak.⁶¹ For example, delays [REDACTED] [REDACTED] can regularly reach 15 to 20 minutes. Under Amtrak's proposal, CN would no longer receive any relief for these delays. As a result, trains could be significantly late due to [REDACTED], yet CN would not only be penalized for the allegedly "poor performance" caused by those delays, it would also be subject to additional penalties for those same delays. Likewise, Amtrak's proposal to [REDACTED] [REDACTED], could cause trains to arrive substantially late at a checkpoint for reasons having nothing to do with CN's performance. Thus, for a train that [REDACTED], CN would only receive partial relief for that delay. As a result, the excessive delay that occurred [REDACTED] would contribute to the imposition of a penalty multiplier at a checkpoint.

C. Lookback and a Reopening Provision.

Amtrak adds nothing of substance to its prior argument for elimination of the lookback provision. Its arguments on lookback and CN's proposed reopener⁶² ignore CN's explanation

⁶⁰ RVS Taylor at 15-16.

⁶¹ Such scaling would also be unfair because Amtrak does not propose additional compensation should be provided to CN as an offset for the added risk CN would be asked to assume. And, because early arrivals at intermediate stations are generally disfavored, there would be no equivalent way for CN to offset the additional penalties through additional incentives for early arrivals.

⁶² See RVS Vilter/Maga at IV.A. & IV.I.v.; see also RVS Frankel at 16-19.

that (a) this has not been an issue in the past, except in the limited short shunt area, (b) CN's proposed reopener effectively addresses Amtrak's concern about lengthy periods of allegedly poor performance, and (c) under a properly structured Operating Agreement, the reliance on the denial of incentives is a sufficient motivator to a host railroad.⁶³

VI. THE OVERALL EFFECT OF AMTRAK'S PROPOSED CHANGES WOULD BE TO RADICALLY ALTER THE INCENTIVE/PENALTY PROVISIONS OF THE AGREEMENT TO CN'S DISADVANTAGE, YIELDING SUBSTANTIAL PENALTIES EVEN WHEN CN PERFORMS WELL.

As discussed above, Amtrak's revised KOTP proposal is a sweeping, one-sided proposal that would shift responsibility from Amtrak to CN for achieving OTP, greatly increase the service levels required of CN (effectively seeking to make CN a guarantor of Amtrak's on-time performance), while failing to provide for added compensation to CN for added costs on CN that Amtrak would impose.

The unreasonable one-sided effect of Amtrak's proposal can be demonstrated by applying it to past performance and estimating the incentives and penalties it would generate. To do so, with the help of Cornerstone Research, we estimated the incentives and penalties that would be generated by Amtrak's proposal assuming: (a) the same schedules and level of delay that occurred in 2016, and, (b) for the City of New Orleans and Illini/Saluki services, the estimated incentives and penalties that would be generated if Amtrak's proposed schedules (which Amtrak asserts would spread recovery time for the sake of increasing ASOTP) had been in place for 2016. The analysis was done by replicating the KOTP proposal described in RVS Vilter/Maga and running it against arrival/departure data found in Amtrak's Train/Station Study

⁶³ VS Willig at 7-8.

Report and delay data from the Categorized Delay Details report to estimate KOTP and performance payments and penalties under Amtrak’s revised proposal.

The results of this analysis, which are summarized on the following table, demonstrate the significant effects of Amtrak’s proposal.

Service	Amount billed in 2016 ⁶⁴	Amtrak’s KOTP-based proposal ⁶⁵	Difference
City of New Orleans		(\$2,983,848)	
Illini/Saluki		(\$1,709,550)	
Lincoln		\$85,409	
Texas Eagle		(\$75,263)	
Blue Water		\$205,818	
Wolverine		\$101,262	
Total		(\$4,447,449)	

As the table shows, on all services, Amtrak’s proposal would significantly reduce the amount of incentives earned by CN. On others, it would lead to the imposition of large penalties for performance that currently earns incentives. The net effect of Amtrak’s proposal would be an annual subsidy of over \$4 million that CN would have to pay for the “privilege” of hosting Amtrak.

⁶⁴ [REDACTED]

⁶⁵ Results shown for the City of New Orleans and Illini/Saluki services are based on the schedules proposed by Amtrak in February 2017, which would increase recovery time (and therefore contract run time) at some intermediate stations. Full results, including results under different schedules and for each train at each checkpoint, are included with our workpapers.

PART 2: PROPOSED OPERATING AGREEMENT LANGUAGE

In accordance with the Board's decision served October 11, 2017, attached as Exhibits 1 and 2 are a blackline and clean draft, respectively, of the current Operating Agreement, showing the specific revisions CN proposes.

This markup is a revision and expansion of the draft "Mark Up of Appendices" which we attached as Exhibit 15 to the VS Ladue/Kuxmann.⁶⁶ In that markup, we proposed revisions to Appendix V of the existing Operating Agreement that would implement our proposals to (1) simplify existing relief items, by using Amtrak's delay codes and combining relevant portions of Appendix V (relating to compensation for Amtrak's use of CN's IC lines) and Appendix VI (relating to compensation for its use of CN's GTW lines), (2) ensure that CN is not penalized for various delays to Amtrak trains that are outside CN's reasonable control, by adding several additional relief items, (3) improve the process for determining responsibility for delays, by modifying the provisions of the Agreement regarding implementation of the relief items.

In this expanded markup, we show all of the revisions CN proposes to the Agreement, including some additions to and modifications of our prior proposed language. We have limited our revisions to modifications that address the specific matters identified by the parties at the outset of this proceeding as disputed issues, and that we found necessary for a new Operating Agreement incorporating our specific proposals. We request that the Board adopt our markup if

⁶⁶ That exhibit showed proposed amendments to Appendix V as amended through August 11, 2013 (the date the Operating Agreement expired by its own terms). The Board, by order served in this proceeding on August 9, 2013, continued the Operating Agreement in force during the pendency of this proceeding. Since that order continuation, the parties have agreed to several additional amendments to the Agreement and are adhering to the Agreement as if it had been so amended at the time of its expiration. Accordingly, the markup submitted as Exhibit 1 shows proposed changes to the Agreement, incorporating all amendments through the date of this Surrebuttal Submission (other than amendments adopting temporary schedule changes).

it chooses to adopt a complete Agreement rather than leave the parties to work out the details of the new Operating Agreement themselves.

In the remainder of this Part 2, we explain where and how we have implemented various aspects of our proposed changes to the Operating.

I. REVISED SCHEDULES AND RELATED CHANGES

In its Rebuttal Submission, CN explained that Amtrak’s professed goal of achieving 80% ASOTP could better be achieved by modification of existing schedules than by adoption of Amtrak’s extreme proposal for HRD-based incentives and penalties, which would substantially increase the subsidy CN provides Amtrak, by effectively requiring CN to pay Amtrak out of pocket for the “privilege” of hosting Amtrak’s services.⁶⁷ CN reported that it had proposed to Amtrak a revision to the schedules for the Illini/Saluki service, “comprehensively address[ing] all issues with the schedules so that Amtrak trains can reliably achieve high ASOTP,” and offering to develop a similar revision to the City of New Orleans service, if Amtrak were willing to address ASOTP in that way.⁶⁸ In this Section I, we explain the proposed to modifications to the Operating Agreement to (i) incorporate CN’s proposed schedule changes (as well as to add an additional checkpoint along the route), (ii) adopt a procedure (proposed in our opening Verified Statement (at 66-68)) for periodically reviewing and, if necessary, adjusting, the schedules for Amtrak trains operating on CN lines, and (iii) revise various schedule-related tables in Appendix V that relate to the computation of contractual incentives and penalties.

⁶⁷ See, e.g., RVS Ladue/Kuxmann at 21-25, 41-42; RVS Krueger at 2-14.

⁶⁸ RVS Krueger at 3.

A. New Illini/Saluki Schedules

The Operating Agreement incorporates “schedule skeletons,” showing scheduled arrival and departure times along the route, as well as minutes of pure run time (“PRT”), recovery time, dwell time, and miscellaneous adjustments for each relevant segment of the route. In order for a new schedule to take effect, its schedule skeleton must be incorporated into Appendix II of the Operating Agreement. In his Rebuttal Verified Statement, CN’s Harald Krueger explained how CN had developed new schedules for the Illini/Saluki trains that, by redistributing backloaded recovery time and making certain other adjustments, can be expected to raise ASOTP on those trains to 80%. We included the schedule skeletons for the Illini/Saluki trains discussed by Mr. Krueger, which we propose to incorporate into Appendix II in lieu of the present schedule skeletons for those trains.

We present two alternative versions of the Illini/Saluki schedule skeletons, representing two alternative ways of addressing the ongoing problem of “loss of shunt” in connection with Amtrak’s Horizon/Amfleet equipment presently being used on the Illini/Saluki service. That equipment can fail to timely activate highway-rail grade crossing warning equipment (such as gates and flashing lights) when operating at track speed. The first set of schedule skeletons is to be used unless and until Amtrak ceases to use Horizon/Amfleet equipment or the grade crossing shunting issues caused by that equipment are resolved. The second set would only take effect after that time.

B. Annual schedule review process

In our initial Verified Statement, we discussed how Amtrak’s train schedules contribute to the problem Amtrak has identified of the failure of its trains to attain the 80% ASOTP standard to which Amtrak aspires and how the Operating Agreement contains no procedure for

regular joint schedule review. We called for amending the Operating Agreement to provide such a procedure.

In our proposed markup, we have included a contractual provision (Section 3.2.G), which requires the parties to jointly review each Amtrak service's schedules at least once every five years.

C. Remedial Measures for Inadequate Performance

As discussed in our initial Verified Statement (at 65-66), the parties have a mutual interest in establishing an agreement under which CN's performance will generally meet or exceed base performance requirements. In order to help assure that the parties' expectations are not disappointed, we stated that we would develop a new provision to assure if CN's performance results in net performance penalties for six consecutive months for a category of trains, the parties will work together to determine why and develop remedial measures to address the issue. We have added that provision as Section 8.13.

D. Changes to Appendix II, Table 1

Table 1 to Appendix II sets out all instances where, for various historical reasons, the

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Along with the proposed revision to the Illini/Saluki schedules, we have [REDACTED]

[REDACTED], making it possible

to remove all rows in Appendix II, Table 1 relating to the Illini/Saluki trains. We also [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

II. CHANGES IN FACTORS FOR CALCULATING PERFORMANCE PAYMENTS

A. Revision of Table 1 of Appendix V

Incorporating the GTW trains into Appendix V and adopting our proposal for [REDACTED] requires certain conforming changes to Appendix V Table 1. First, we have added the GTW trains to Appendix V, Table 1 and [REDACTED]

[REDACTED].⁶⁹ We have also changed [REDACTED]

[REDACTED] We have also added conforming notes for the determination of on-time performance at the checkpoints for the GTW trains.

B. New Illini/Saluki Checkpoint

In addition to proposing to adjust contractual run time and to redistribute recovery time on the Illini/Saluki service, CN proposes to modify the way performance-based incentives and penalties are calculated for that service, by establishing a new checkpoint at Champaign. This new checkpoint would be in addition to existing checkpoints at the locations where the Illini/Saluki trains begin and end their runs on CN's lines.

To implement the new schedules and the addition of this checkpoint, we have revised Appendix V Table 1, for each of the four Illini/Saluki trains. In particular, we (1) adjusted the arrival and departure times at each checkpoint (and run time between checkpoints) to match the new schedules we propose, (2) maintained the [REDACTED]

⁷⁰ R.V.S. Vilter/Maga at 40.

[REDACTED]

Moving the GTW trains into Appendix V from Appendix VI required conforming edits to Tables 2, 3, and 4 of Appendix V. In doing so, CN does not intend to make substantive changes (other than the addition of the GTW trains).

Finally, we have proposed a new Appendix XII which would list the delay codes (and their definitions) that are used in the body of Appendix V in calculating relief minutes for delays outside of CN's responsibility.

III. ELEMENTS OF BASE COMPENSATION (INCREMENTAL COSTS OF HOSTING AMTRAK SERVICE)

A. Freight delay costs.

In this proceeding, CN seeks to ensure that it is contractually entitled to full compensation for its incremental freight delay costs. To that end, we have added a line item (Item 2) in Appendix IV (which details the elements of base compensation (as opposed to

incentives and penalties)) and corresponding detailed description of that item. The detailed description provides that CN is entitled to compensation for the actual incremental freight delay costs it incurs. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

B. Additional Incremental Costs⁷²

As discussed in our initial Verified Statement (at 53-55), the parties have [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁷² Appendix IV, Item 13(d) is shown as a blackline addition in CN's revisions to the Operating Agreement (Exhibit 1), but it is simply a move of an existing provision in Appendix VI and not a new provision.




IV. OTHER IMPLEMENTING CHANGES

A. Term and retroactivity

Amtrak has proposed a 10 year term for a new Operating Agreement which may thereafter be canceled on one year's written notice of either party. CN believes it would be inappropriate to impose such a lengthy term. Accordingly, we have proposed in Section 8.8 what is in effect an initial minimum contract term of three years. In particular, we provide that a 12-month notice of termination could be served at any time after the end of an initial two-year period.

We have proposed that any new terms prescribed by the Board regarding base compensation be retroactive to the expiration of the current Operating Agreement on August 12, 2013. However, because there is no way that Net Performance Charges (defined in Article I of the Operating Agreement) awarded at the time of the Board's decision imposing terms and compensation can provide any incentive for service that was provided in the past, we have proposed that incentives and penalties under the new Operating Agreement be prospective only.

B. Single Point of Contact for Disputes over Coding and Billing

Consistent with our initial Verified Statement (at 64), our markup proposes that each party be required to appoint a person who will serve as a single point of contract for the other party regarding disputes over billing matters, including delay coding and determination of relief items, and that that person have authority to resolve such disputes on behalf of all departments. We further propose a three-step escalation procedure, culminating in referral to CN's Senior Vice President, Southern Region, and Amtrak's Vice President Operations, in the event that personnel at a lower level cannot resolve the matter. We also propose that the resolution of

disputes may serve as precedent for future disputes presenting the same or similar issues, a position that Amtrak has repeatedly rejected.

VERIFICATION

I, Paul E. Ladue, declare under penalty of perjury that I have read the foregoing Surrebuttal Verified Statement, that I know the facts asserted therein, and that the same are true as stated. Further, I certify that I am qualified to and authorized to submit this Verified Statement on behalf of Canadian National Railway Company and its subsidiaries.

Executed on October 30, 2017.

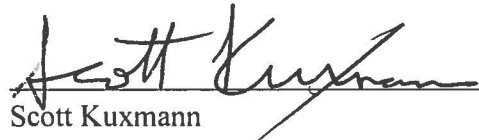


Paul E. Ladue

VERIFICATION

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

Executed on October 30, 2017.



Scott Kuxmann

All exhibits redacted

[Surrebuttal Verified Statement of Paul E. Ladue redacted in its entirety.]

CERTIFICATE OF SERVICE

I certify that I have this 30th day of October, 2017, caused true copies of the foregoing Limited Surrebuttal Submission to be served upon all known parties of record in this proceeding by first-class mail or a more expeditious method.



Spencer R. Leroux