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March 2, 2018

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0012

Re: FD 35743, Application Of The National Railroad Passenger Corporation Under 49
U.S.C. § 24308(a) – Canadian National Railway Company

Dear Ms. Brown,

Enclosed for filing in the above-referenced docket is CSX Transportation's Motion for Leave to File Comments as Amicus Curiae, together with its reply to the National Railroad Passenger Corporation's Opening Brief.

Thank you for your assistance with this matter.

Sincerely,



Michael K. Murphy

Counsel for CSX Transportation, Inc.

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. 35743

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

**MOTION OF CSX TRANSPORTATION, INC.
FOR LEAVE TO FILE COMMENTS AS AMICUS CURIAE**

CSX Transportation, Inc. (“CSXT”) respectfully moves for leave to file the accompanying Reply to the National Railroad Passenger Corporation’s Opening Brief in this matter as amicus curiae in support of Canadian National Railway Company. CSXT also hosts Amtrak pursuant to an Operating Agreement. CSXT moves to participate as amicus because the Board’s decision in this matter potentially could impact CSXT’s contractual relationship with Amtrak.

Respectfully submitted,

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Dated: March 2, 2018

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. 35743

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

COMMENTS OF AMICUS CSX TRANSPORTATION, INC.

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INTRODUCTION

The National Railroad Passenger Corporation (“Amtrak”) asks the Board in this matter to impose an operating agreement on Canadian National (“CN”) that could profoundly alter the relationship between Amtrak and its host railroads. Amtrak’s purpose is clear: to increase profits and force its view of preference on the hosts. It seeks to reduce its own costs by paying less than a railroad’s incremental costs, and then further increase its income by imposing harsh penalties if host railroads fail or are unable to comply with Amtrak’s self-defined and unfair delay system.

The Board should reject Amtrak’s contract proposal. It violates the statute governing this proceeding and would overturn nearly five decades of decisions interpreting it. It also ignores financial and operational impacts to the host railroads and their customers, who depend every day on reliable freight rail in order to run their businesses. Amtrak proposes to take valuable track space and resources from the host railroads, without adequate compensation, and impose steep penalties unless their trains move without delay—at the expense of shippers and commuters who also use the same track space. Its proposal is unreasonable and fundamentally unfair to the host railroads and their customers.

Should the Board accept Amtrak’s arguments, and impose a contract with both its view of incremental costs and its delay penalty system, Amtrak has indicated that it will move to terminate its current contract with other host railroads and seek the same terms in subsequent Board proceedings. CSX Transportation Inc. (“CSX”) files this brief to address the most serious problems with Amtrak’s position that may impact it and every other host railroad, and urges the Board to reject Amtrak’s position.

I. CSX’S Operating Agreement With Amtrak.

CSX’s current operating agreement with Amtrak was executed on June 1, 1999. Although it has been amended several times since then, its essential terms and conditions have

remained the same. These terms appear similar to features of CN's former operating agreement, as it was described in the public version of the Opening Briefs, and many terms can be traced back to the original operating agreement that was first negotiated in 1971.

The core compensation under the current operating agreement provides a fixed rate per train mile for the incremental cost of hosting Amtrak trains. Although the agreement contains a mechanism to redetermine the incremental rate, the parties have not been able to agree on an adjustment. The rate established in 1999 therefore has not changed, despite CSX's position that it does not cover even the narrowest possible measure of the costs incurred in hosting Amtrak services. The parties further disagree about what incremental costs are covered by the agreement's provisions, and how to allocate them.

In addition, performance payments are paid by Amtrak for when a train attains an on-time performance ("OTP") at defined checkpoints above a certain negotiated contractual threshold. Penalties are assessed against CSX where the on-time performance at defined checkpoints falls below a second negotiated threshold. Importantly, CSX's agreement also contains a "lookback" provision that operates similarly to the provision described by CN in this matter, meaning that penalties offset performance payments accrued for a given 12-month period, but not the base compensation. The lookback guarantees that CSX receives at least its "incremental" cost of hosting Amtrak—at the outdated rate set forth in the current agreement. Additionally, the contract provides certain tolerances, a list of circumstances in which a given train run is excluded from OTP calculations, and other instructions for properly calculating on-time performance.

CSX and Amtrak also have clashed repeatedly over the appropriate schedules against which on-time performance is measured. CSX's agreement measures performance primarily at

the end-point of each route or at a check-point when the train is handed over to another host railroad. However, these schedules are in many cases outdated and unrealistic. CSX and Amtrak held an arbitration at the National Arbitration Panel concerning amendments to the schedules, and have engaged in multiple negotiations in an attempt to revise them. As the Board has heard from nearly every host railroad in various proceedings, those scheduling discussions have not been resolved to the host railroads' reasonable satisfaction.

At the current time, CSX's operating agreement has no sunset provision. Either party may terminate it simply by providing written notice, which would trigger the renegotiation process and, potentially, a Section 24308(a) proceeding at the Board to set future contractual terms.

II. Incremental Cost Is The Floor For Compensation When The Board Imposes A Contract Under Section 24308(a).

Amtrak asks the Board to impose a contract that may result in the host railroad not receiving its incremental costs and *paying Amtrak*, by eliminating the lookback provision and/or setting base compensation below true incremental costs. This result violates law, and cannot be accepted.

A. The Plain Text of Section 24308(a) Is Clear, And Governs.

The plain text of a statute cannot be ignored in favor of reliance on amorphous understandings of purpose or legislative history. And the text of 49 U.S.C. § 24308(a)(2)(B) is clear that incremental costs are the floor, subject only to *upward* adjustment. The statute provides that “when prescribing reasonable compensation ... the Board 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.”¹ The only adjustment from incremental costs allowed is *upward*.

That is the beginning and the end of the analysis: “As the Supreme Court has repeatedly explained ... neither courts nor federal agencies can rewrite a statute’s plain text to correspond to its supposed purposes.”² And “of course,” “legislative history [cannot] override the statute’s plain text” either.³

B. Reasonable Compensation Always Includes (At Least) Incremental Costs.

The plain text of the statute precludes Amtrak’s suggestions that “reasonable” allows compensation to be below incremental costs.⁴ The plain meaning of the words enacted by Congress is that “quality of service” is a consideration in providing compensation “greater than the incremental costs.” That is to say, “reasonable” means *at least* incremental costs in all instances. Indeed, the Board’s predecessor previously recognized that “cost *plus* incentives for good performance ... is required by Section 402 of the RPSA.”⁵ And Amtrak has previously conceded as much, arguing in a prior proceeding that a host “is entitled to receive ... the incremental costs of providing the involved service” with “any payments *in excess* of incremental costs ... related to the quality of service provided.”⁶ Or, as the D.C. Circuit put it, “[t]here is no legislative intent that would justify forcing a railroad to accommodate Amtrak

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

² *Landstar Exp. Am., Inc. v. Fed. Mar. Comm’n*, 569 F.3d 493, 498 (D.C. Cir. 2009).

³ *In re Sealed Case*, 573 F.3d 844, 850 (D.C. Cir. 2009).

⁴ See Amtrak Br. at 75-76.

⁵ *Amtrak & Wisc. Cent. Ltd.—Use of Tracks & Facilities & Establishing Just Compensation*, Fin. Docket No. 31306, 1988 WL 224574, at *3 (ICC July 29, 1988) (emphasis added).

⁶ *Nat’l R.R. Passenger Corp. Application Under Section 402(a) of the Rail Passenger Services Act*, 1 I.C.C.2d 243, 248 (1984).

operations without the recovery of at least its incremental costs.” *Nat’l R.R. Passenger Corp. v. ICC.*, 610 F.2d 865, 880 (D.C. Cir. 1979).

The evolution of the statutory language confirms the plain-text reading. The original version of Section 402, enacted in 1970, provided simply that the ICC could set compensation it found to be “just and reasonable.”⁷ Three years later, Congress further defined what “just and reasonable” meant, adding an immediately following sentence providing that “[i]n fixing just and reasonable compensation ... 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.”⁸

The legislative history further confirms that Congress “sa[id] what it mean[t] and mean[t] what it sa[id]” when it guaranteed incremental costs.⁹ The conference report for the 1973 amendments explains that “incremental costs” is the floor, the “basic level [which] could be *supplemented* on the basis of quality of service.”¹⁰ To be sure, Congress was concerned about Penn Central’s performance at the time—thus it overruled the ICC’s determination that Penn Central “should receive additional compensation in excess of avoidable costs.”¹¹ But even then, Congress did not create a scheme reducing compensation *below* the total of avoidable costs.

Similarly, in the Amtrak Improvement Act of 1978, Congress explicitly reiterated that “incremental costs [are] the *threshold* for determining ‘just and reasonable compensation’ should

⁷ Rail Passenger Service Act, Pub L. 91-518, § 402(a), 84 Stat. 1335 (1970).

⁸ Amtrak Improvement Act of 1973, Pub L. No. 93-146, 87 Stat. 552 (emphasis added). In a subsequent recodification, Section 402 was broken into more specific subcomponents without substantive change: the basic “just and reasonable” provision became 49 U.S.C. § 24308(a)(2)(A) (*i.e.*, “subparagraph (A)”), and the “incremental cost” language became 49 U.S.C. § 24308(a)(2)(B) (*i.e.*, “subparagraph (B)”), with its reference to the “preceding sentence” changed to “subparagraph (A).” That is the present formulation.

⁹ *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1848 (2016).

¹⁰ H.R. Rep. 93-587 at 16 (1973) (Conf. Rep.) (emphasis added).

¹¹ *Id.*

the Commission have to resolve the matter,” and further noted that, as amended, the law “permit[s] incentives for good quality track and facilities.”¹²

To the extent there is any remaining ambiguity, RPSA’s purpose and history makes clear that the host railroads were not expected to provide a continuing subsidy to Amtrak—the bargain at the core of the statute was that the freight railroads would be relieved of their obligations to support passenger service in exchange for a one-time contribution of capital and compensated access to their tracks. The statute specifically provided that, upon completion of the initial statutory payments, a freight railroad was “reliev[ed]” of “its *entire responsibility* for the provision of intercity rail passenger service.”¹³

Indeed, that was the understanding from the outset: the original Basic Agreement entered into by each of the hosts in the years after RPSA was enacted provided for the payment of “avoidable costs,” without any of the limitations now proposed by Amtrak.¹⁴

C. Penalty Provisions Reducing Compensation Below Incremental Costs Violate RPSA.

Relatedly, Amtrak further errs in arguing that the statutory provision requiring “a penalty for untimely performance” when “Amtrak ... make[s] an agreement with a rail carrier” also applies to Board-imposed contracts, or that such a penalty provision can be used to reduce compensation below incremental costs.

The requirement for a penalty provision is in paragraph 24308(a)(1). It does not appear in paragraph 24308(a)(2), the separate, alternative section that governs Board-imposed contracts,

¹² H.R. Rep. 95-1478 at 20 (1978) (Conf. Rep.).

¹³ RPSA, Pub. L. No. 91-518, § 401(a)(1), 84 Stat. 1334 (1970); *see Penn Central–Compensation for Passenger Service*, 342 I.C.C. 765, 767 (1973) (entry fees were the “total consideration for being relieved of the responsibility for intercity rail passenger service”).

¹⁴ *See* Basic Agreement, Sec. 5.1, *reproduced in National Railroad Passenger Corp.: Hearing Before Subcomm. on Surface Transp. of the S. Comm. On Commerce*, 92nd Cong. 144 (1971).

applying only when “the parties *cannot* agree.” (emphasis added). It is well-established that when “Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”¹⁵ That is what happened here. In 1981, Congress added this language specifically to “the first sentence of section 402(a)” —the present-day 49 U.S.C. § 24308(a)(1).¹⁶ It did *not* amend the immediately following provision covering ICC imposition of contract terms, present-day 49 U.S.C. § 24308(a)(2). Congress “act[ed] intentionally and purposely,”¹⁷ and it would be legal error to conclude a penalty provision is nonetheless required in an Board-imposed contract.

Imposing such a penalty provision without a lookback provision would also risk reducing compensation below the statutory floor of incremental costs, in violation of the plain text of RPSA.¹⁸ Even the negotiated Amtrak contracts, which, as required by statute do have penalty provisions, have long recognized this concern. Those agreements have only allowed any contractual penalties to count against incentive payments over a limited lookback period, avoiding erosion of base compensation.¹⁹

¹⁵ *Dean v. United States*, 556 U.S. 568, 573 (2009) (quotation omitted).

¹⁶ *See* Amtrak Improvement Act of 1981, Pub. L. No. 97-35, § 1181, 95 Stat. 693.

¹⁷ *Dean*, 556 U.S. at 573.

¹⁸ *See supra* pages 4-6.

¹⁹ *See, e.g., Nat’l R.R. Passenger Corp. Application Under Section 402(a) of the Rail Passenger Serv. Act*, 1 I.C.C.2d 243, 248 (1984) (noting that under Amtrak’s contracts with freight railroads, “penalties could not exceed the amount of incentives earned in the preceding 12 months,” in order to ensure that a host is not “exposed to the risk of receiving less than its avoidable costs with respect to operation of Amtrak service”).

III. Amtrak's View Of Incremental Costs Is Inappropriately Narrow.

There is no basis for the extremely narrow definition of incremental cost advanced by Amtrak. Indeed, adopting it would run afoul of the statutory requirement that a Board-imposed contract leave the freight railroad in as good a position as it would be absent the presence of Amtrak service.

A. Incremental Costs Are Not Limited To "Short-Run Avoidable Costs."

Among the most glaring flaws in Amtrak's proposal is the suggestion that "incremental costs" actually means only "short-run avoidable costs" (which are not defined) and excludes any "long-run" avoidable costs, capacity expansion costs, and anything else.²⁰ This is absolutely incompatible with Congress's view of what it meant when it used the term "incremental costs" in the statute. As it explained in the conference report to the Amtrak Improvement Act of 1973, "incremental costs" means "*all* costs which would not be incurred if passenger service were not performed for Amtrak."²¹ Lest be there any doubt, the conference committee further instructed that the term "is to be considered ... 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," including "*total* solely related (or direct) costs of a particular service (both variable and fixed)."²²

Five years later, Congress reiterated this view. In drafting the 1978 amendments, the Senate "emphasize[d]" that "railroads will be compensated for those costs that [they] can show [they] incurred ([they] would not incur if it did not contract with Amtrak) in providing both track usage and services."²³ The full Congress agreed, explaining that "incremental costs [are] the

²⁰ See Frankel RVS at 4, 6, 13; CN Opening Brief at 57.

²¹ See H.R. Rep. 93-587 at 16 (1973) (emphasis added).

²² *Id.* (emphasis added).

²³ S. Rep. 95-782 at 9-10 (1978).

threshold for determining ‘just and reasonable compensation’ should the Commission have to resolve the matter.”²⁴

The ICC, the Board, and the courts have long agreed. For example, Board has “emphasized” that “incremental costs” means “all costs that a freight carrier would not incur but for the operations of Amtrak,” and noted that such “directly attributable costs” includes those incurred when Amtrak service causes “capacity constraints requiring additional infrastructure investment.”²⁵ Or in the words of the D.C. Circuit, those “costs that the supplier railroad would avoid if passenger service were discontinued.”²⁶

B. Incremental Costs Could Vary Considerably Between Railroads, But Certain General Principles Apply Across The Board.

Of course, each host railroad (and even each route) is differently situated, with different types of terrain, workforce structures, bridges, crossings, tie-decay rates, maintenance procedures, and a myriad other factors. Thus the actual costs involved in hosting Amtrak will vary even on a per-mile, per-ton, or similar measure. But regardless of that fact-based variability, the statute requires that incremental costs cover all types of costs which can be quantifiably tied to the presence and/or volume of Amtrak traffic on a given route.

²⁴ H.R. Rep. 95-1478 at 20 (1978) (Conf. Rep.) (emphasis added). At the same time, the final bill rejected a Senate proposal to explicitly exclude “fixed common costs.” See *id.*; S. Rep. 95-782 at 22 (1978) (proposed amended Section 402(a)(1)(B)).

²⁵ *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.*, 3 S.T.B. 143, 145 and 156 n.24 (1998); see also *Application of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. 24309(a)-Springfield Terminal Ry. Co., Bos. & Me. Corp., & Portland Terminal Co.*, 3 S.T.B. 157, 169 (1998) (holding that incremental costs includes those “incur[red] to increase the capacity of its facilities when such an increase would not be necessary in the absence of passenger service”).

²⁶ *Nat’l R. R. Passenger Corp. v. I.C.C.*, 610 F.2d 865, 868 (D.C. Cir. 1979).

In determining incremental costs, this Board and its predecessor have repeated that incremental costs are costs that hosts “would not incur if Amtrak did not operate over its line.”²⁷ These decisions have used different models to allocate costs to Amtrak operations. But they are all based on the same basic framework: the host railroad must demonstrate that the costs are variable (*i.e.*, that the costs would be less without Amtrak’s presence) and that a method exists to measure the costs savings if the host could “avoid” hosting Amtrak.²⁸ For instance, in the 1995 *Conrail* Section 402(a) proceeding, the ICC “reject[ed] Amtrak’s basis for excluding locomotive and car depreciation costs associated with work trains” from incremental costs.²⁹ The ICC also found that roadway machines were properly included in the incremental cost base because they are “needed to maintain the rail system, and they wear out, and must eventually be replaced as a result. Because roadway machines are needed to perform track maintenance, which is caused to some degree by Amtrak’s operations over Conrail’s tracks, it is appropriate that Amtrak contribute toward a portion of the cost of this equipment.”³⁰

Therefore, as a simple example, if a rail tie or bridge must be replaced sooner because of Amtrak tonnage than would otherwise be the case, the material and labor involved are clearly incremental. Incremental costs similarly must include expenses that simply would not exist in any way if not for Amtrak’s presence. For example, if personnel spend any quantifiable portion of their time dealing with Amtrak-related issues, the same proportion of their compensation is an

²⁷ *National R.R. Passenger Corp. and Consol. Rail Corp.—Application Under Section 402(a) of the Rail Passenger Service Act for an Order Fixing Just Compensation*, 10 I.C.C. 2d 863, 865 (1995).

²⁸ *Springfield Terminal Ry. Co., Bos. & Me. Corp., & Portland Terminal Co.*, 3 S.T.B. at 166 (rejecting the parties’ submissions because they were so deficient and did not rely upon “actual” numbers).

²⁹ 10 I.C.C. 2d 863, 865.

³⁰ *Id.*

“incremental” cost.³¹ By the same token, costs incurred for capital projects and upgrades required because of Amtrak, such as positive train control, should be included in the incremental cost base and thus be appropriately allocated to Amtrak.

Indeed, in the context of mutually negotiated contracts, Amtrak and the host railroads have historically taken the same similarly broad view adopted by the ICC and the Board in setting compensation (although often disagreeing over precisely how to measure or allocate a given cost). Amtrak’s newly circumscribed view of the scope of “incremental” both violates the statute and runs against the long-established and widely accepted understanding of all concerned.

IV. Amtrak’s Proposed Quality Of Service Methodology Is Fundamentally Unfair.

Congress directed the Board to “consider quality of service as a major factor when determining whether, and the extent to which, the amount of compensation *shall be greater than the incremental costs* of using the facilities and providing the services.”³² Thus, as explained above, the Board cannot impose contractual terms which would operate, in effect, to provide anything less than incremental costs. For example, penalty provisions can only be assessed against incentive payments, and must be circumscribed by a lookback period.³³

Further, fundamental fairness requires that any assessment of “quality of service” used in compensation be meaningful and accurate, not arbitrary and disconnected from the host railroad’s efforts. Amtrak’s proposal falls squarely in the latter category.

³¹ In the Conrail Section 402(a) matter, the ICC rejected costs associated with supervisory personnel as incremental only because Conrail had failed to explain why they were variable due to Amtrak, not because they could never be incremental. *Id.* As the ICC explained: “Conrail has not shown which of the supervisory personnel are involved directly with MOW activities.” *Id.*

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

³³ *See supra* pages 3-8.

A. The Board Should Reject Amtrak’s Delay-Based Penalty System.

Amtrak’s proposed delay-based penalty system marks a severe departure from how host contracts and decades of ICC and Board precedent have measured performance—which traditionally has been based on whether a train arrives “on-time” or not. Rather, it permits Amtrak to impose, through the backdoor, its view of what is required by the separate statutory “preference,” *and* set the penalties it receives for violating that standard—all based on its conductors’ own assessments of the supposed immediate cause of delay. This approach is more akin to a kangaroo court, and does not satisfy Congress’s “reasonable terms” requirement.

1. Quality of Service Must Be Pegged To Actual Performance.

First, the central measure of “quality of service” under the statute has always been, and must continue to be, actual on-time performance—when trains arrive at stations. That is because it is the standard that Amtrak riders (and thus Amtrak) care most about at the end of the day. But Amtrak’s HRD proposal improperly uses a faulty analysis of supposed correlations between past causes-of-delay and actual arrivals as a proxy for simply actually looking at actual arrival times going forward. Thus it penalizes the host for any delay purportedly caused by the host—regardless of whether that delay actually impacts actual on-time arrival—based on a faulty notion that in the past such in-route delays *did* result in actual delays in station arrival. That obviously makes no sense, and, as more fully described by CN, leads to absurd results.³⁴

2. It Is Not Reasonable To Impose Amtrak’s Unilateral View of Preference and The Cause Of Delays On Hosts.

Second, Amtrak’s proposed delay approach relies upon its unilateral (and incorrect) view of what “preference” means in the form of contractual penalties—a view the Board has previously declined to adopt. Amtrak proposes to count every time an Amtrak train waits on a

³⁴ See CN Opening Brief at 126-31.

siding or to cross a junction against the host—without any regard as to whether that decision actually leads to better performance for that Amtrak train, let alone the overall performance of the entire network (other Amtrak trains included). It is improper to use the penalty provision and the Board’s authority under RPSA Section 402(a) as a backdoor to further Amtrak’s view of the statutory preference requirement.

As a threshold matter, preference is a *separate* statutory provision, which Congress added in 1973 with at least two separate enforcement mechanisms.³⁵ It is not appropriate to define and impose it via a proceeding to establish a contract under Section 24308(a)(2).

Moreover, Amtrak’s view of preference is neither correct under the statute, nor wise as a policy matter. Preference should be interpreted in accordance with its plain meaning—a choice or estimation above another, based on the facts of the situation. It does not mean that every “delay” at a given moment is wrongful.³⁶

Such a practical approach is particularly important on today’s congested railroad network. As the Board recently acknowledged: “[d]ue to increased traffic density, the rail operating environment has become more complex since Congress first established a preference

³⁵ See Amtrak Improvement Act of 1973, Pub. L. No. 93-146, § 10, 87 Stat 552 (adding 45 U.S.C. § 562(e)(1), now codified at 49 U.S.C. § 24308(c)). The statute has long provided a general enforcement mechanism in federal court under RPSA Section 307 (now codified at 49 U.S.C. § 24103), which has been invoked in a preference dispute. Compl., *United States v. S. Pac. Transp. Co.*, No. 79-3394 (D.D.C. Dec. 20, 1979). Second, PRIIA Section 213 provides a preference-specific enforcement mechanism based on certain OTP triggers established under Section 207. See 49 U.S.C. § 24108(f); *Union Pac. R.R. v. STB*, 863 F.3d 816, 826 (8th Cir. 2017) (holding that “on-time performance in § 213(a) means on-time performance as developed by the FRA and Amtrak under § 207(a)”), *cert. denied.*, Feb. 20, 2018; see also 49 U.S.C. § 24308(c) (providing mechanism for Board to provide relief from preference when it “will lessen the quality of freight transportation provided to shippers”).

³⁶ See, e.g., *Antonio P. v. Ariz. Dep’t of Econ. Sec.*, 187 P.3d 1115, 1118 (Ariz. Ct. App. 2008) (“Preference means a ‘choice or estimation above another.’ Preference does not mean that a certain choice or estimation is mandated.” (quoting *Webster’s New International Dictionary* 1787 (3d Ed. 2002))); *Orange Cty. Emps. Ass’n v. Cty. of Orange*, 234 Cal. App. 3d 833, 842 (Cal. Ct. App. 1991) (“Use of the word ‘preference,’ without more, implies the exercise of judgment. Had the Legislature intended the local agencies to ‘select’ or ‘approve’ a particular kind of plan, it could easily have said so. It did not.”).

requirement in 1973.”³⁷ In that environment “ a requirement of absolute preference might not, in the long run, promote efficient passenger service.”³⁸ Rather, a “dispatching decision that may appear, in isolation, to favor freight over passenger efficiency may ultimately promote efficiency and on time service for passenger trains on the network generally.”³⁹

CSX (and others) have extensively demonstrated that Amtrak’s motorcade-like vision of “absolute priority”—*i.e.*, never stopping—would cause gridlock that would materially lessen the quality of freight transportation for shippers. As CSX previously explained “[t]oday’s complex rail environment, which has changed dramatically since the early days of Amtrak, could not function if every dispatch decision was resolved blindly in favor of an Amtrak train.”⁴⁰ For example, modeling of providing such preference on its RF&P Subdivision “demonstrated that providing Amtrak with absolute priority—which it is not entitled to under the statute—would devastate the service CSXT and [Virginia Rail Express] provide to [their] customers and would quickly lead to severe congestion and gridlock far beyond this particular Subdivision.”⁴¹

Indeed, the ICC specifically rejected Amtrak’s view of preference as “absolute priority” in a proceeding to set the terms of an Amtrak-host contract, even in an era with a much less congested network. In the *Texas and Pacific* case, Amtrak “argued strongly” for a severe shortening of the schedules at issue, but the Commission declined to adopt the proposal, reasoning that it was

³⁷ *Policy Statement on Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. § 24308(c) and (f)* at 4, Docket No. EP 728 (STB served Dec. 28, 2015).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ CSXT Comments at 2, Docket No. EP 728 (Feb. 22, 2016); *see also, e.g.*, CSXT Reply Comments, *id.* (Apr. 13, 2016); Grand Trunk W. R.R. et al. Comments, *id.* (Feb. 22, 2016); Ass’n of Am. R.R.s Comments, *id.* (Feb. 22, 2016); Norfolk S. Rwy. Co. Comments, *id.* (Feb. 22, 2016); Ass’n of Indep. Passenger Rail Operator (AIPRO) Comments, *id.* (Apr. 12, 2016).

⁴¹ CSXT Reply Comments at 11, Docket No. EP 728.

not convinced that T & P could consistently meet the 80 percent on-time performance baseline with such abbreviated schedules without adversely affecting its freight operations. In other words, we consider that under the circumstances presented a 20-minute (maximum) schedule reduction represents *the best balancing of the interest of the traveling public in obtaining shorter schedules and the interest of the railroad in providing efficient freight service* over a heavily used line.⁴²

It was not that Amtrak's proposed schedule was physically impossible—it was that it would have an unacceptable detrimental effect on freight service. Thus the Board found it was not reasonable.

As the Board recognized in withdrawing the EP 728 policy statement, evaluating schedules and negotiating proper run-time, dwell, and recovery is a fact-intensive endeavor, which does not easily lend itself to sweeping, general rules.⁴³ Today's complex and congested rail network requires a broader view of "preference" than simply giving every Amtrak train the green light at every possible juncture. There is no need for the Board to define preference in the course of this proceeding, which has a separate purpose and separate statutory basis. And it should decline Amtrak's invitation to incorporate its view of preference into the CN operating agreement in the form of its delay penalty system.

3. Quality of Service Must Be Decided As Objectively As Possible.

Third, any measurement of host railroad performance should be as objective and transparent as possible to provide an adequate mechanism for determining host performance. Whether a train arrives "on-time" at selected stations provides the most verifiable measure of performance, and provides the quality of service that is important to Amtrak's passengers.

⁴² *Amtrak and The Texas & Pacific Railway Use of Tracks and Facilities and Establishment of Just Compensation*, 348 I.C.C. 645, 671 (1976) (emphasis added).

⁴³ See *Policy Statement on Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. § 24308(c) and (f)* at 3, Docket No. EP 728 (STB served July 28, 2016).

Amtrak's HRD proposal, in contrast, links real penalties to a system that is neither transparent or verifiable. It relies on a conductor's determination of the cause of a delay based on what he/she can determine out of the train's window. It would simply ignore the actual root cause of a delay when (as is often the case), it is beyond the conductor's field of vision and immediate awareness, and provides no method of verification.⁴⁴ As the Board acknowledged in EP 728, "conductors are recording what they believe is a cause of delay based on the information available to them at the time and may be unaware of the delay's primary cause, which could have occurred miles away and cascaded across the host carrier's system."⁴⁵

For example, an Amtrak conductor delayed behind a freight train would code the train delay as "freight-train interference" or FTI. But that conductor would have no way of knowing that a stalled Amtrak train or other cause further up the track had caused the offending freight train to block the track. Further, the conductor could not know that a short delay behind a freight train while that train clears a crossing may ultimately help network fluidity, which could aid that train or other Amtrak trains down the line. Under Amtrak's view, *anytime* a freight train appears to interfere with an Amtrak train, it should be labeled as FTI regardless of the root cause, even if Amtrak is the ultimate cause.

The Board should reject an approach that simply accepts the conductor's unilateral assessment of the situation, which is in serious tension with the statutory command in Section 24308(a)(2)(A)(ii) that the Board impose only "*reasonable* terms" in a contract.

⁴⁴ See generally CN Opening Brief at 82-83.

⁴⁵ Policy Statement on Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. § 24308(c) and (f) at 4 n.3, Docket No. EP 728 (STB served Dec. 28, 2015).

B. CN Correctly Requests Schedule Revisions To Its KOTP Terms.

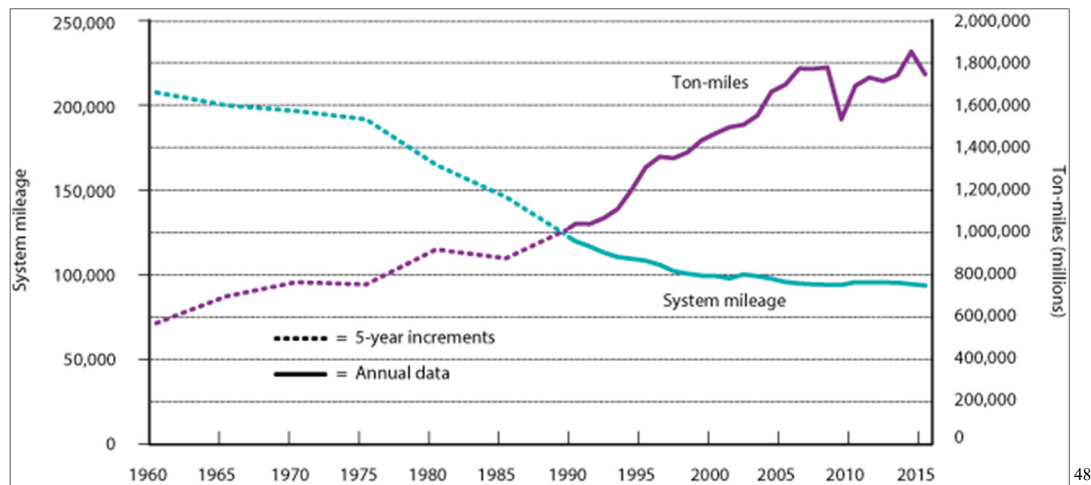
Instead of adopting Amtrak's unfair delay proposal, the Board should retain (with appropriate revisions) the general KOTP framework as urged by CN. Measuring on-time arrivals, with some toleration and exemptions for circumstances outside of the railroad's control, continues to make the most sense for determining whether a host railroad should be paid more than incremental costs. But any on-time performance metric is meaningless if the schedule against which it is measured is not appropriate. CSX's current KOTP arrangements suffer from some of the same basic problems described by CN, and route- and host-specific adjustments are needed to properly implement this framework in the real-world.

CSX cannot comment on the appropriateness of CN's particular schedule proposals. Like incremental costs, whether schedules are appropriate vary by host railroad, and by route. The appropriateness of a schedule depends in large part on how on-time performance is measured (as all stations, only important stations, at the end-point, or some combination). It also depends on whether the schedule is attempting to match a train's realistic performance, or to change behavior—either motivating the host railroad by imposing faster schedules or attracting passengers by promising faster (or more reliable) schedules. Accordingly, CSX instead offers some general points that the Board should consider in approaching the question of the schedule against which performance is measured.

First, it is fundamentally unfair to measure performance against unrealistic and unobtainable goals. Similar to what CN describes,⁴⁶ many of the Amtrak timetables for CSX-hosted service are simply outdated. As the Board itself has recently acknowledged “[d]ue to increased traffic density, the rail operating environment has become more complex since” the

⁴⁶ See CN Opening Brief at 18.

early 1970s.⁴⁷ Department of Transportation statistics show that in that time rail-freight volume has roughly doubled, while track mileage has been cut roughly in half.



In CSX’s experience, Amtrak’s schedules have not kept pace with this changing reality, which directly impacts host railroads’ incentive payments as they work to service both their own freight customers as a common carrier and to host Amtrak.

Second, at bottom, it is not a “reasonable term” under the statute to financially penalize a host for failing to achieve something that was never realistic in the first place. All the more so because Congress has specifically provided that Amtrak should “implement schedules ... that can be achieved with a degree of reliability,”⁴⁹ and explicitly recognized that an agency investigation would be necessary to determine “the extent to which scheduling and congestion contribute to delays.”⁵⁰ Against that backdrop, it is not “reasonable” to allow Amtrak to set

⁴⁷ *Policy Statement on Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. § 24308(c) and (f)* at 4, Docket No. EP 728 (STB served Dec. 28, 2015).

⁴⁸ Bureau of Transportation Statistics, *Class I Railroad System Mileage and Ton-miles of Freight: 1960, 1965, 1970-2015*, <https://www.bts.gov/topics/rail> (last accessed Feb. 22, 2018).

⁴⁹ 49 U.S.C. § 24101(c)(6).

⁵⁰ 49 U.S.C. § 24308(f).

unrealistic goals, measure them against outdated schedules, unilaterally determine that it is the host's fault that they are not being met, and then collect money from the host carrier as a result.

Indeed, in setting contractual terms under this same provision, the ICC took into account what schedule is reasonably achievable, measuring on-time performance under the contract on the basis of what was actually realistic (after also accounting for freight traffic needs, among other criteria). In the *Texas and Pacific* proceeding it rejected Amtrak's proposed schedule as the contractual baseline precisely because it was "not convinced that T & P could consistently meet the 80 percent on-time performance baseline with such abbreviated schedules."⁵¹ And as the D.C. Circuit further explained:

The Commission considered the applicable speed limits, the high volume of freight traffic between Texarkana and Fort Worth, and the limited number of sidings available along the route and established a running time of 345 minutes as the on-time baseline figure to be used in measuring quality of performance.⁵²

Third, achievable schedules benefit Amtrak's passengers, which should be Amtrak's primary focus. The ICC has previously admonished that "[r]ealistic scheduling is more than a mere nicety, inasmuch as the passenger and persons meeting them rely on the published schedules in making their arrangements."⁵³ Thus "[a] carrier should not make promises it cannot keep," and "should not publish ... a schedule" it cannot meet "barring some unforeseen safety hazard."⁵⁴ As one "frequent traveler" explained to the ICC: "In my experience it is not the slowness of the train per se that generates the most anxiety about failure. It is the failure to meet

⁵¹ *Amtrak and The Texas & Pacific Railway Use of Tracks and Facilities and Establishment of Just Compensation*, 348 I.C.C. 645, 671 (1976) (emphasis added).

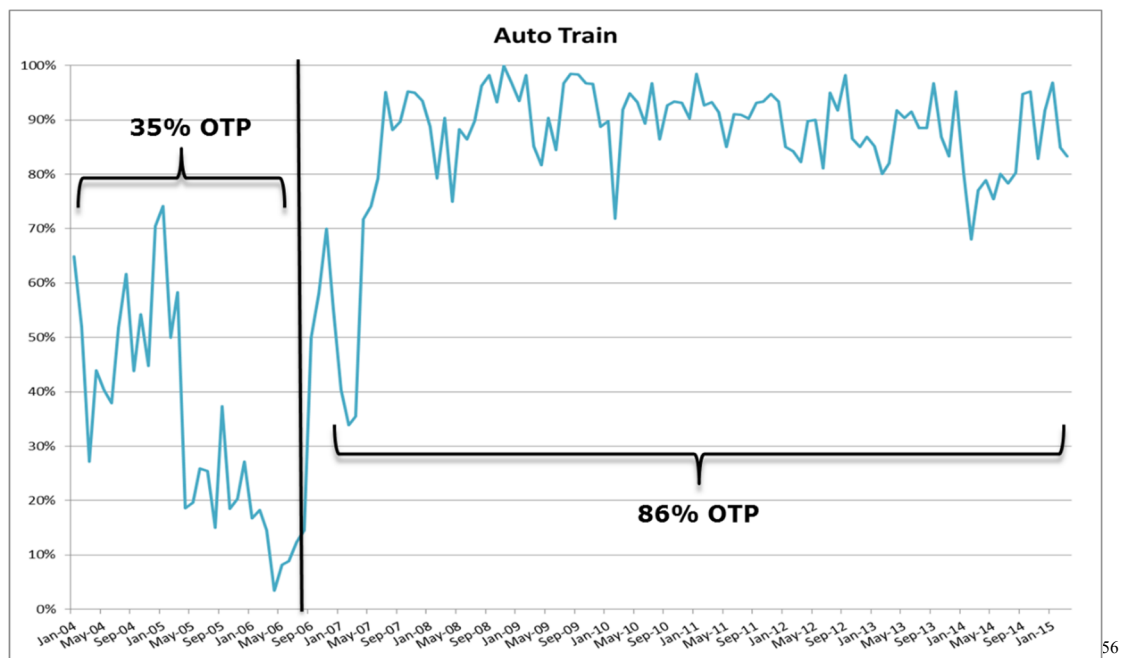
⁵² *Nat'l R.R. Passenger Corp. v. ICC*, 610 F.2d 865, 876 (D.C. Cir. 1979).

⁵³ *Adequacy of Intercity Rail Passenger Serv.*, 344 I.C.C. 758, 776 (1973).

⁵⁴ *Id.*

the schedule on the timetable. Most people gear themselves to an expected lengthy ride. If they expect to drive or ride for 10 hours, then they are geared for that.”⁵⁵

CSX’s experience with the Amtrak Auto Train demonstrates this principle in action. A moderate schedule adjustment in 2006 led to OTP going from 35% to 86%:



The OTP improvement led to a corresponding increase to the Customer Satisfaction Index collected by Amtrak, resulting in one of the highest satisfaction scores in the Amtrak system. Similarly, on-time performance on MBTA commuter service in Massachusetts more than doubled (to 94%) after a 2008 schedule adjustment, “easing the frustration of regular rail commuters.”⁵⁷ These examples prove a direct correlation between customer satisfaction and on-time performance. If schedules are adjusted—in many circumstances less than a 10 percent

⁵⁵ *Adequacy of Intercity Rail Passenger Serv.*, 351 I.C.C. 883, 945 (1976) .

⁵⁶ Chart created from Amtrak’s published reports of host on-time performance.

⁵⁷ Editorial, *Schedule Shifts Don’t Address Commuter-Rail Needs*, Worcester Telegram & Gazette (Feb. 22, 2008), <http://www.telegram.com/article/20080222/NEWS/802220340>.

schedule adjustment would result in large on-time performance increases—Amtrak customers would benefit. For whatever reason, though, Amtrak has rejected working cooperatively with CSX to implement more realistic schedules. Indeed, Amtrak insisted in shortening the Auto Train schedule again in 2016, and on-time performance has unsurprisingly suffered.

CONCLUSION

CSX urges the Board to consider these points as it resolves the current dispute between CN and Amtrak. Although each railroad is differently situated, the contract imposed in this matter has the potential to impact every host railroad. Amtrak's proposal is designed to alter its traditional relationship with its host railroads. Its elimination of the lookback violates Section 24308(a), and should be rejected. Its narrow interpretation of incremental costs is not supported by applicable precedent, and would not fully or reasonably compensate host railroads. And its proposed delay penalty system would not measure actual performance, but rather permit Amtrak to penalize delays without consideration of the actual cause. The Board should reject Amtrak's radical proposal, and uphold the statute and its prior precedent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael K. Murphy, hereby certify that on this date I served by first class mail, postage prepaid, a copy of the foregoing to each party of record via email and/or first-class mail.

Dated: March 2, 2018

s/ Michael K. Murphy
Michael K. Murphy