



BY E-FILING

December 19, 2016

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 in the above-referenced docket is the Highly Confidential version of the National Railroad Passenger Corporation's ("Amtrak") Reply to the Motion to Compel of the Illinois Central Railroad Company and Grand Trunk Western Railroad Company. Amtrak's Reply is designated Highly Confidential and filed under seal. Also enclosed is the redacted Public version of Amtrak's Reply to be submitted for the public record.

Sincerely,

A handwritten signature in blue ink, reading 'Justin J. Marks'.

Justin J. Marks
Attorney for National Railroad
Passenger Corporation

ATTORNEYS AT LAW

1666 K Street, NW
Suite 500
Washington, DC 20006
T 202.887.1400
F 202.466.3215

Justin J. Marks

242288

ENTERED
Office of Proceedings
December 19, 2016
Part of
Public Record

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35743

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

NATIONAL RAILROAD PASSENGER CORPORATION

**REPLY TO THE MOTION TO COMPEL OF THE ILLINOIS CENTRAL RAILROAD
COMPANY AND GRAND TRUNK WESTERN RAILROAD COMPANY**

Kevin M. Sheys
Reed W. Neuman
Justin J. Marks
Hubert T. Lee
Nossaman LLP
1666 K Street, NW, Suite 500
Washington, DC 20006
(202) 887-1400

William H. Herrmann
Christine E. Lanzon
National Railroad Passenger Corporation
60 Massachusetts Avenue, NE
Washington, DC 20002
(202) 906-3971

Counsel for National Railroad Passenger Corporation

December 19, 2016

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35743

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

NATIONAL RAILROAD PASSENGER CORPORATION

**REPLY TO THE MOTION TO COMPEL OF THE ILLINOIS CENTRAL RAILROAD
COMPANY AND GRAND TRUNK WESTERN RAILROAD COMPANY**

The National Railroad Passenger Corporation (“Amtrak”) hereby submits this Reply to the Motion to Compel (“CN Motion”) of the Illinois Central Railroad Company and the Grand Trunk Western Railroad Company (together referred to herein as “CN”). Amtrak respectfully requests that the Board deny CN’s motion to compel because (1) Amtrak has submitted a full and complete response to the interrogatory CN posed; (2) the additional material CN would like to access is neither responsive to the interrogatory posed by CN nor necessary for an understanding of Amtrak’s response; (3) CN is requesting new discovery by seeking additional materials not within the scope of its interrogatory; and (4) CN’s belated and opportunistic claim of relevance is unfounded and in any event outweighed by the substantial prejudice Amtrak would suffer from production of the requested additional materials.

BACKGROUND

On July 30, 2013, Amtrak filed an application under 49 U.S.C. § 24308(a) requesting the Board to determine reasonable terms and compensation for Amtrak’s use of the lines of the

Illinois Central Railroad Company and Grand Trunk Railway Company (together referred to herein as “CN”). In September 2015, the parties submitted opening statements and evidence.

Amtrak’s proposal seeks to change the incentive/penalty payment system prescribed in the current Operating Agreement because, in Amtrak’s view, the current system fails to incentivize CN to provide Amtrak with adequate service.¹ Amtrak proposes to create a Quality Payment/Penalty system under which CN would receive compensation for its incremental costs, plus an additional payment based on the quality of service or minus a penalty for untimely performance.² Amtrak’s quality payment and penalties proposal is based on the magnitude of minutes of host responsible delay (“HRD”) suffered by Amtrak trains on CN’s hosted lines; it is designed to incentivize CN to minimize delays to Amtrak trains that are within CN’s control.³ Amtrak’s proposal does not seek to account for changes in its revenue, costs or ridership related to fluctuations in on-time performance.

As CN notes, in October 2015 the parties served on one another requests for discovery for developing evidence in rebuttal to each other’s initial evidence. The Parties had previously agreed to a discovery protocol under which production of documents responsive to document requests generally was limited to a two-and-a-half year period ending October 31, 2013.⁴ CN and Amtrak served rebuttal requests for documents within that agreed time period. CN also propounded Interrogatory 8, which requested Amtrak to:

Identify and describe with particularity all **studies or analyses** conducted by you or on your behalf since October 31, 2013 that discuss the value of ASOTP,

¹ Amtrak’s Congressionally mandated goals are to “use its best business judgment in acting to minimize United State Government subsidies, including...improving its contracts with operating rail carriers” and to operate Amtrak trains, to the maximum extent feasible, to all station stops within 15 minutes of the time established in public timetables.” 49 U.S.C. § 24101(c).

² Appendix A, Amtrak’s Opening Statement at 11-12 (Sept. 4, 2015).

³ Appendix A, Amtrak’s Opening Statement at 12 (Sept. 4, 2015).

⁴ On January 30, 2014, the parties entered into the Joint Discovery Protocol (“JDP”), generally establishing May 1, 2011 to be the starting date and October 31, 2013 to be the ending date for production of documents responsive to the Parties’ document requests.

including without limitation the effect of changes in [All Stations On-Time Performance] (“ASOTP”) on Amtrak revenues, ridership, public benefits, or costs associated with the Relevant Services. (emphasis added).

Amtrak’s narrative response to CN’s Interrogatory 8 identified and described the only two sets of “studies or analyses” it possessed that were responsive to the request:

(i) SDG Reports. The first set was a pair of reports that Amtrak commissioned from the professional consulting firm Steer Davies Gleave (“SDG”). In May 2015 SDG provided to Amtrak its *Study of the Impact of on-Time Performance on Amtrak’s Operating Costs* (“OTP Cost Study”) and *Impact of OTP and Fuel Prices on Amtrak Ridership and Revenue* (“OTP/Fuel Price and Ridership/Revenue Study”) (collectively, the “SDG Reports”). Amtrak produced both SDG Reports to CN as part of its response to Interrogatory 8.⁵

Amtrak’s narrative interrogatory response summarized how SDG conducted its analyses.

[REDACTED]

The SDG Reports contained conclusions about the costs savings Amtrak would realize from improved on-time performance. For example, SDG estimated [REDACTED]

[REDACTED]

⁵ Appendix D, *OTP/Fuel Price and Ridership/Revenue Study* at 1.

[REDACTED]

[REDACTED]

[REDACTED]

The SDG Reports also described the proprietary [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁰

SDG also provided to Amtrak a [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(ii) Amtrak ASOTP Analyses. The other set of responsive analysis Amtrak identified and

[REDACTED]

[REDACTED]

[REDACTED]

⁸ Appendix C, *OTP Cost Study* at 1-2.

⁹ See, Appendix C, *OTP Cost Study* at 10-11; Appendix D, *OTP/Fuel Price and Ridership/Revenue Study* at 9-10.

[REDACTED]

[REDACTED]

[REDACTED] Appendix C, *OTP Cost Study*; Appendix D,

OTP/Fuel Price and Ridership/Revenue Study.

¹⁰ Appendix C, *OTP Cost Study* at 26.

¹¹ Appendix D, *OTP/Fuel Price and Ridership/Revenue Study* at 13, 37.

¹² [REDACTED]

[REDACTED]

[REDACTED] See

Appendix C, *OTP Cost Study* at 1.

interrogatory response is said to be sufficient.” *Vazquez-Fernandez v. Cambridge Coll., Inc.*, 269 F.R.D. 150, 155 (D.P.R. 2010)

CN’s Interrogatory 8 requested Amtrak to “identify and describe” all “studies or analyses” since October 31, 2013 that discuss the value of ASOTP on Amtrak revenues, ridership, and costs for the Relevant Services. In response, Amtrak provided a narrative answer explaining the SDG studies of ASOTP that were prepared for Amtrak within the requested timeframe, and produced those reports. In fact, the SDG Reports contain responsive information discussing the value of ASOTP not only with respect to the Relevant Services but system wide.

For example, SDG states that it [REDACTED]

[REDACTED] and [REDACTED]

Amtrak also provided the Amtrak ASOTP Analyses, which reflected the results generated from Amtrak’s use of the Tool within the time frame specified by Interrogatory 8. [REDACTED]

[REDACTED]. See Appendix B. Additionally, these spreadsheets include forecast results for costs on the Relevant Services related to passenger

[REDACTED]. *Id.*

In its interrogatory response, Amtrak confirmed that these documents comprised all the “studies and analyses” on ASOTP that were conducted by or on behalf of Amtrak since October

¹³ Appendix C, *OTP Cost Study* at 1-2.

31, 2013. Amtrak’s response to the Interrogatory thus is complete on its face and in fact.¹⁴

b. The Tool And Related User Materials Are Not “Studies Or Analyses”.

SDG’s descriptions in the Reports make clear what the Tool is and what it is not.¹⁵ It is a device to perform studies and analysis; it is not itself a “study or analysis” as requested by the Interrogatory. For example, the OTP Cost Study describes the Tool [REDACTED]

[REDACTED]¹⁶ The Tool itself does not contain *any* analysis of ASOTP; it is a software program loaded with various [REDACTED] that allows the user to analyze various cost and revenue scenarios by selecting a [REDACTED]

[REDACTED] Therefore, the Tool itself is not a “study or analysis” within the scope of CN’s Interrogatory 8; it is a means to conduct studies or analyses.

Tellingly, CN fails to explain how the Tool is responsive to Interrogatory 8 beyond the fact that it is referenced in the SDG Reports. Indeed, effectively conceding that the Tool is not a “study”, CN instead argues that the Tool [REDACTED]

[REDACTED] Further scrambling for a foothold, CN argues that a “full and complete” Amtrak response would include the “findings” and “conclusions” of its analyses of ASOTP impacts on ridership and finances. CN Motion at 6. Again, none of the information loaded into the Tool is responsive to the request as drafted by CN or is necessary for CN to comprehend the response provided by Amtrak, nor does its absence make Amtrak’s response less than fully sufficient.

¹⁴ [REDACTED]

¹⁵ See Appendix D, *OTP/Fuel Price and Ridership/Revenue Study* at 37.

¹⁶ *Id.* at 26.

(i) The Tool contains financial data that is not responsive to the stated request. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Certainly, were CN at this point requesting that information as a standalone discovery request, Amtrak would justifiably refuse to produce it as untimely and beyond the scope of rebuttal discovery. That, by happenstance, the information is embedded in the Tool that CN seeks as a follow-up to Amtrak's production of the SDG Reports does not transform CN's request into a timely and appropriate one. In whatever form it exists, that information is not responsive to an interrogatory seeking "studies and analyses".

Moreover, CN's argument that its interrogatory instructions obligated Amtrak to provide "information" in addition to its responsive "analysis" stretches the plain meaning of "analysis" beyond logical boundaries and would render the Interrogatory unduly overbroad and burdensome. Courts are not necessarily bound to definitions set forth in a party's written discovery's preamble. *See, e.g., Diversified Prod. Corp. v. Sports Ctr. Co.*, 42 F.R.D. 3, 4 (D. Md. 1967) (noting that while the use of definitions is not prohibited by the FRCP, "the use of unreasonable 'definitions' may render the interrogatories so burdensome to the answering party and to the Court, that objections to the entire series should be sustained with sanctions, whether or not an occasional interrogatory might be reasonable."). As a general matter, expanding by bootstrap Amtrak's obligation beyond "studies or analyses" to a vastly broader universe of "information" – that CN did not ask for directly – would materially increase Amtrak's burden to respond.¹⁷ As noted below, even CN's more limited request for the additional "information" loaded into the Tool is unreasonable.

¹⁷ In its response, Amtrak objected to Interrogatory 8 as vague and overbroad.

(ii) The Tool itself contains no “analysis”. As noted above, the Tool itself does not contain any analyses of ASOTP or other OTP metrics; rather, it is a device to allow such analyses. When the analyst chooses inputs and objectives, the Tool can be used to generate an analysis for ASOTP. Amtrak produced the only items comprising existing “studies or analyses” of ASOTP that it possessed within the interrogatory period.

Accordingly, Amtrak has provided all the “studies and analyses” it has that are responsive to CN’s Interrogatory.

c. **CN’s Is Attempting To Obtain New Discovery Beyond What It Requested In Interrogatory 8.**

CN is seeking to use the Tool, either by its own hands or Amtrak’s on CN’s behalf, to conduct new analysis outside of data parameters of Interrogatory 8. Contrary to CN’s assurance that it [REDACTED]

[REDACTED] CN is in fact seeking new analysis.

As reflected in CN’s Exhibit 9, and reiterated in its Motion, CN seeks more than just to [REDACTED] information from the Tool. If allowed to obtain the Tool, CN clearly could use it to run whatever analysis it chooses [REDACTED]

[REDACTED] However characterized, it is clear that CN seeks information that does not now exist, i.e., output from new runs using the Tool. Such a request plainly goes beyond the scope of Interrogatory 8 as stated and goes beyond seeking a more complete interrogatory response. Rather, CN clearly hopes to mine, opportunistically, a trove of Amtrak’s business information that CN believes will be helpful to its cause. Again, Amtrak has fully and completely responded to Interrogatory 8; no

other responsive information is available, and CN's eagerness to use the Tool does not make the Tool responsive to Interrogatory 8.

2. **The Board Should Not Allow New Discovery Without a Showing of Relevance and Need Sufficient to Outweigh The Prejudicial Effect Of Production On Amtrak**

Recognizing that the Tool and related materials cannot reasonably be seen as responsive to the requests that CN drafted, CN argues more generally that the Tool and its embedded information are relevant and useful to arguments CN may wish to make in support of its proposal and to attack Amtrak's. How CN would use that information is not clear; in any event, as noted above, the Tool's contents are not necessary to understand Amtrak's discovery responses nor is it germane in rebuttal to Amtrak's initial evidence. Rather, CN is looking to obtain, through fortuity, highly sensitive Amtrak financial information that it did not seek in discovery. When considering the lack of need and harm to Amtrak, the Board should deny CN's request for this new discovery.

Of course, discovery requests must be narrowly drawn, directed toward a relevant issue, and not used for a general fishing expedition. *See, e.g., Trailer Bridge, Inc. v. Sea Star Lines, LLC*, STB Docket No. WCC-104, slip op. at 6 (STB served Oct. 27, 2000) (finding that an interrogatory that "is very narrowly focused and seeks information directly related to complainant's argument" is acceptable, unlike movant's unnecessary "fishing expedition"); *see Duke Energy Corp. v. Norfolk Southern Ry.*, STB Docket No. 42069 *et al.*, slip op at 11 (STB served July 26, 2002) (party seeking motion to compel discovery failed to demonstrate a "need" for discovery when, *inter alia*, the opposing party's opening evidence did not address the issue for which discovery is being sought).

Moreover, the Board has denied motions to compel due to the sensitive nature of data even though the proceedings were being conducted under a protective order. *CSX Corp. et al.* –

Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corp., STB Finance Docket No. 33388, slip op at 8, fn. 28 (STB served October 3, 1997) (“We cannot allow discovery of extraordinarily sensitive information simply to permit movants the ability to conduct what amounts to a ‘fishing expedition’” and “even the existence of the protective order applicable to this proceeding cannot justify the forced production of applicants' [information].”)

Nowhere in Amtrak’s opening statement does Amtrak cite to or utilize the Tool or the information it contains. Neither the SDG Reports nor the Tool’s content is part of Amtrak’s evidence in this case, and Amtrak is not proffering or relying on the SDG analyses or the Tool as a basis for any claim or issue in this case. CN thus has no need for the Tool to evaluate or test the results of the estimates that Amtrak provided as part of its production for Interrogatory 8.

CN has established no need for the Tool or its information for whatever issues or purposes it would have the Board believe are relevant in this proceeding. CN states that it [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] CN already has a substantial amount of information, produced by Amtrak, regarding ridership and revenue on the Relevant Services lines.¹⁸ CN also has access to publicly available on-time performance data. CN is fully capable of generating its own analyses of ASOTP or other metrics, through its own knowledge, expert advice or even commissioning its own software applications; and it has no compelling need for the Tool or its contents to make its proportionality argument.

Even with a protective order governing this proceeding, the Board should still weigh the highly sensitive nature of the information against CN’s alleged need for the Tool, especially

¹⁸ We note that some of the data that we understand CN is seeking from the Tool appears to have already been produced by Amtrak in the first round of discovery. Amtrak produced spreadsheets detailing ridership and revenue data for the relevant discovery period of May 1, 2011- October 31, 2013.

considering that Amtrak did not rely upon it for its opening evidence. Weighed against the lack of any need on CN's part for the information, the highly sensitive nature of the Tool and the commercial information contained in the Tool suggests that the balance be struck against disclosure. The Tool, which Amtrak purchased to better understand the impacts of poor on-time performance by its host railroads and the impacts of fuel prices on Amtrak costs and revenues, is loaded with 10 years of system-wide Amtrak cost and revenue data. That highly sensitive information is germane to Amtrak's dealings with all of its host railroads, in numerous commercial and regulatory settings and therefore, even with a protective order in place, Amtrak should not be compelled to produce it.

CONCLUSION

For the aforementioned reasons, Amtrak respectfully requests that the Board deny CN's motion to compel production of the Tool and the associated documents.

Respectfully submitted,



Kevin M. Sheys
Reed W. Neuman
Justin J. Marks
Hubert T. Lee
Nossaman LLP
1666 K Street, NW, Suite 500
Washington, DC 20006
(202) 887-1400

William H. Herrmann
Christine E. Lanzon
National Railroad Passenger Corporation
60 Massachusetts Avenue, NE
Washington, DC 20002

Counsel for National Railroad Passenger Corporation

Dated: December 19, 2016

APPENDIX A

WITHOUT EXHIBITS

PUBLIC VERSION-REDACTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35743

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

OPENING STATEMENT

Linda J. Morgan
Kevin M. Sheys
Justin J. Marks
Nossaman LLP
1666 K Street, NW
Suite 500
Washington, DC 20006

Counsel for National Railroad Passenger Corporation

William H. Herrmann
Christine E. Lanzon
National Railroad Passenger Corporation
60 Massachusetts Avenue, NE
Washington, DC 20002

Dated: September 4, 2015

TABLE OF CONTENTS

I.	Procedural History	1
II.	Overview	3
III.	The STB's Broad Statutory Authority Under Section 24308(a)	5
IV.	The Allowance-Based System In The Current Agreement Is Not Effective	7
V.	Amtrak's Proposed Terms And Compensation Will Motivate CN To Minimize Delays To Amtrak Trains	11
A.	The Key Elements Of Amtrak's Proposed Terms	12
B.	Amtrak's Proposed Terms Meet All Of The Requirements Of Section 24308(a) And Would Advance The Statutory Goal Of Section 24101(c)(4)	17
VI.	Effective Date and Term.....	18

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35743

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

OPENING STATEMENT

The National Railroad Passenger Corporation (“Amtrak”) submits this Opening Statement in support of its application, pursuant to 49 U.S.C. § 24308 (a)(2), for a determination of reasonable terms and compensation for Amtrak’s continued receipt of services from, and use of tracks and facilities of, Grand Trunk Western Railroad Company (“GTW”) and Illinois Central Railroad Company (“IC”).¹

I. Procedural History

In anticipation of the expiration of the contract entered into by Amtrak and CN in May 2011 to govern the terms and compensation of Amtrak’s access to CN tracks and facilities (as amended, the “Current Agreement”), Amtrak and CN began negotiations on a new operating agreement in 2012. After months of negotiating, key issues remained unresolved between the parties. Accordingly, on July 30, 2013, Amtrak filed an application under 49 U.S.C. § 24308(a)(2), seeking the institution of a proceeding to determine reasonable terms and compensation for Amtrak’s use of CN’s tracks and other facilities and CN’s provision of services to Amtrak.

¹ GTW and IC are indirect subsidiaries of CN and are collectively referred to herein as “CN.”

In a decision served August 9, 2013, the Surface Transportation Board (the “Board” or the “STB”) instituted this proceeding.² Pursuant to a stamp decision served August 21, 2013, the STB adopted a procedural schedule proposed by the parties. Per that schedule, CN and Amtrak filed separate statements identifying disputed issues on October 24, 2013. Amtrak’s statement of disputed issues included the following:³

1. Compensation. The amount of compensation CN receives under the Operating Agreement, including whether, and if so, under what terms, CN should receive compensation in excess of CN’s incremental costs for quality of service, including the formulation of such compensation and the administration thereof.

2. Penalties. To ensure a penalty program that effectively promotes improved operating performance of Amtrak trains, under what terms CN should be subject to penalties for untimely performance, including the formulation of such penalties and the administration thereof.

* * *

4. Length of Contract. The establishment of a date and terms for expiration or termination of the Operating Agreement, and, if so, what that date and those terms should be.

Following the filing of Statements of Disputed Issues, the Board granted several extensions of the procedural schedule to facilitate the parties’ discovery. On September 23, 2014, the Board served a revised procedural schedule that would become effective upon completion of discovery, and, on March 26, 2015, the Board indicated that the procedural schedule had not yet begun due to outstanding discovery disputes.

Thereafter, the Board assigned and authorized Administrative Law Judge John P. Dring of the Federal Energy Regulatory Commission to rule upon discovery matters and resolve all disputes concerning discovery in this case. Judge Dring held a discovery

² Application of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308 — Canadian Nat’l Ry Co., STB Finance Docket 35743 (STB Served Aug. 9, 2013).

³ Amtrak’s statement of disputed issues also listed the geographic scope of the Operating Agreement as an issue. In a letter dated July 27, 2015, Amtrak informed the Board that the geographic scope issue will not be before the Board.

conference on June 1, 2015, and ruled on all the remaining discovery disputes by order served June 4, 2015. On July 6, 2015, Amtrak notified the Board that discovery was completed and Amtrak and CN filed a joint request that opening statements for both parties be due on September 4, 2015. In a decision served July 14, 2015, the Board adopted a new proposed procedural schedule, which set the deadline as September 4, 2015 for this Opening Statement.

II. Overview

The crux of Amtrak's proposed terms and compensation is a restructuring of the quality payment and penalty terms to motivate CN to minimize delays to Amtrak trains and meet the statutory goal to "operate Amtrak trains, to the maximum extent feasible, to all station stops within 15 minutes of the time established in public timetables."

49 U.S.C. § 24101(c)(4). Amtrak measures this performance at "all station stops" with a measurement called All Stations On Time Performance or "ASOTP." ASOTP measures the percentage of station arrivals (or departures, in the case of the origin station) on an Amtrak train that occur within 15 minutes of the time established in public timetables.⁴

Whatever its hoped-for merits at the time it was adopted in 1983, and as it has been carried forward into the incentive/penalty system in place today, the Current Agreement has failed to cause CN to minimize delays to Amtrak trains.⁵ Amtrak trains

⁴ For example, if a given trip of an Amtrak train has ten stations on its route (the origin station plus nine subsequent stations) and that trip left its origin station within 15 minutes of the scheduled time and arrived at five of the subsequent stations within 15 minutes of the scheduled time, it would have ASOTP of 60% (6 stations within 15 minutes divided by 10 total stations = 60% ASOTP).

⁵ There are 26 Amtrak trains that operate on seven Amtrak routes over CN rail lines: the City of New Orleans, Illini/Saluki, Wolverine, Blue Water, Lincoln, Sunset Limited and Texas Eagle routes. The Sunset Limited route is excluded from Amtrak's incentive and penalty proposal, because it operates over just 2 route miles of CN lines.

[REDACTED]

on CN have high levels of delays that are the responsibility of CN and since such host responsible delays are the primary driver of ASOTP, Amtrak routes operating primarily or substantially on CN lines have very poor ASOTP.⁶ To make matters worse, under the Current Agreement Amtrak has paid CN substantial incentive payments during times of poor ASOTP. For example, in Amtrak's Fiscal Year 2014,⁷ Amtrak paid CN [REDACTED] in incentive payments under the Current Agreement for Amtrak's City of New Orleans route, which operates almost entirely on CN. Yet during this time the City of New Orleans route had ASOTP of 52.7%. Clearly, an incentive system is broken if it obligates Amtrak to pay CN incentives in exchange for such poor ASOTP.

Based on its experience with the shortcomings of the current incentive/penalty system, Amtrak is proposing a different quality payment and penalty system — one based on the number of minutes of host responsible delay to Amtrak trains. Amtrak's proposal retains some of the aspects of the current system. For example, for many years, Amtrak has categorized and recorded the causes of all delays to Amtrak trains. Delays caused by host railroads are recorded as Host Responsible Delay minutes ("HRD minutes"). Amtrak makes CN's HRD minutes available for CN to review, and CN has an opportunity to take exception to Amtrak's designation of a particular delay as a CN HRD. Amtrak's proposal retains all of these current processes and procedures.

⁶ Mr. Sacks concludes that the proportion of the variation in ASOTP that is explained by variation in HRD minutes is significant. See Verified Statement of Ben Sacks ("Sacks V.S.") at 11.

⁷ October 1, 2013 to September 30, 2014.

Amtrak's delay-based quality payment and penalty proposal also has the following new features:

- Amtrak would pay CN a quality payment when CN HRD minutes on an Amtrak route during a month are less than a defined threshold level of HRD minutes for that Amtrak route.
- CN would pay Amtrak a penalty when CN HRD minutes on an Amtrak route during a month are greater than the same threshold level of delay.
- The threshold level of HRD minutes for the quality payments and penalties on each Amtrak route would be correlated to 80% ASOTP on that route.
- Penalties would be calculated with reference to the amount of operating costs that CN perceives it saves by operating Amtrak trains at a low level of on-time performance and a high level of CN HRD minutes. Unlike the Current Agreement, the amount of the penalties due would not be capped at the amount of incentives paid.
- Quality payments would be based on the same relationship between HRD minutes and payments as the penalty amounts.

III. The STB's Broad Statutory Authority Under Section 24308(a)

The requirements for an Amtrak-host railroad operating agreement and the statutory standard for STB-prescribed terms and compensation for Amtrak's continued receipt of services from, and use of tracks and facilities of, a host railroad when Amtrak and the host cannot reach such an agreement are set forth in 49 U.S.C. § 24308(a), which provides in pertinent part as follows:

(a) General Authority —

- (1) Amtrak may make an agreement with a rail carrier or regional transportation authority to use facilities of, and have services provided by, the carrier or authority under terms on which the parties agree. The terms shall include a penalty for untimely performance.
- (2)
 - (A) If the parties cannot agree and if the Surface Transportation Board finds it necessary to carry out this part, the Board shall —

- (i) order that the facilities be made available and the services provided to Amtrak; and
 - (ii) prescribe reasonable terms and compensation for using the facilities and providing the services.
- (B) When prescribing reasonable compensation under subparagraph (A) of this paragraph, 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.

Section 24308(a) places no limits on the terms and compensation the Board may impose, other than to specify that: (1) they must be “reasonable,” (2) the compensation must be based on “the incremental costs” of Amtrak’s use of facilities and the host railroad’s provision of services, (3) the terms must include a penalty provision for untimely performance, and (4) if there is a provision for payments in excess of incremental costs, that provision must consider quality of service as a major factor. Notably, the existence of penalty payments for poor performance is *mandatory*, while the existence of any payments above incremental costs is entirely *discretionary* and dependent on quality service.

In prescribing terms and compensation, the STB also should consider the statutory goal to “operate Amtrak trains, to the maximum extent feasible, to all station stops within 15 minutes of the time established in public timetables.”

49 U.S.C. § 24101(c)(4).

Amtrak’s proposed terms and compensation are reasonable because they would meet all of the specific requirements of section 24308(a) and would motivate CN, acting in its own economic interest, to minimize delays to Amtrak trains and thereby advance the on-time performance goal of section 24101(c)(4).

Amtrak is proposing new terms and compensation because the current incentive and penalty system, which originated in 1983 and has been carried forward into the Current Agreement, is ineffective. CN has not minimized Amtrak train delays (HRD minutes). Under the current incentive/penalty system, CN has been operating Amtrak trains on the IC lines with a high level of HRD minutes with resulting low levels of ASOTP and all the while earning substantial incentive payments, as shown below for Amtrak's most recently concluded fiscal year:

	Fiscal Year 2014 ⁸		
Service	CN HRDs per 10K TM	All Stations OTP	Incentive Paid to CN
City of New Orleans	1182	52.7%	
Illini/Saluki	1248	48.7%	
Lincoln Service	1366	60.7%	
Texas Eagle	2157	33.3%	
Total:			

On the IC lines, CN's performance is currently measured by adherence to arrival time at the endpoint of CN's portion of the Amtrak route, or in the case of the longer City of New Orleans route, an intermediate location and at the endpoint, plus certain additional allowances.⁹ CN earns an incentive payment if 80 percent or more of the

[REDACTED] CN has been operating Amtrak trains on the GTW lines with a high level of HRD minutes with resulting low levels of ASOTP. For Fiscal Year 2014, the Blue Water route had average monthly HRD minutes per 10,000 train miles of 1073 and ASOTP of 55.6 %; the Wolverine had average monthly HRD minutes per 10,000 train miles averaging 2149 and ASOTP of 49.9 %.

7

trips in a month arrive “within tolerance” at the designated checkpoints.¹⁰ Generally, a train is within tolerance if it arrives at a designated checkpoint at or before a prescribed arrival time plus additional allowances. Checkpoint segments where more than 80 percent of trips of Amtrak trains in a month arrive within tolerance contribute to monthly incentive payments and checkpoint segments where fewer than 70 percent of Amtrak trains in a month arrive within tolerance contribute to monthly penalties.¹¹

Measuring performance by arrival times at CN checkpoints has not resulted in reduced CN HRD minutes. Instead, it has led to a situation where CN receives incentive payments even though Amtrak trains have levels of ASOTP nowhere near the statutory goal to “operate Amtrak trains, to the maximum extent feasible, to all station stops within 15 minutes of the time established in public timetables.” 49 U.S.C. § 24101(c)(4). Amtrak’s levels of ASOTP are far below what Amtrak passengers should be expected to tolerate. Furthermore, during periods of sustained poor performance when CN earns no incentives, it is possible for CN to pay no penalties regardless of how poor the service becomes due to the fact that penalties are capped at the level of incentive payments. Several aspects of the current system contribute to this result.

First, the Current Agreement does not reward CN for minimizing HRD minutes, but only for doing “good enough” to arrive at a checkpoint within tolerance.¹² CN can allow a significant number of HRD minutes, but few enough to arrive within the tolerance, and still receive an incentive payment. Paul Vilter’s Verified Statement and

¹⁰ Verified Statement of Paul Vilter (“Vilter V.S.”), at 7-8.

¹¹ Vilter V.S. at 9. Segments within tolerance at or above 80 percent earn a performance rate per mile and those at or below 70 percent generate a penalty rate per mile. The performance and penalty rates are then multiplied by the number of trips counted during the month and that product is multiplied by the applicable segment miles. Vilter V.S. at 5-6. [REDACTED]

¹² Vilter V.S. at 9.

Attachment 4 thereto document 45 examples where Amtrak trains ran “within tolerance” under the Current Agreement even though they had poor ASOTP.¹³

[REDACTED]

Second, CN has no contractual incentive to provide on-time performance at any station stops that are not checkpoints. This means that CN has no contractual incentive to minimize delays within its control between the many intermediate Amtrak station stops.¹⁶ In other words, the Current Agreement does not foster the statutory goal of section 24101(c)(4) to operate Amtrak trains to all station stops within 15 minutes of the time established in public timetables.

Third, the current system creates a perverse disincentive to minimize HRD minutes on Amtrak trains that are significantly behind schedule. When CN HRD

¹³ Vilter V.S. at 10-14 and Attachment 4.

¹⁴ See Attachment 1, at A-1.

¹⁵ Id.

¹⁶ Vilter V.S. at 9-10.

minutes cause an Amtrak train's travel time to exceed the sum of contractual trip time plus additional allowances,¹⁷ the train can no longer contribute to CN earning an incentive and may contribute to CN incurring a penalty. Whether this contractual trip time is exceeded by one minute or by many hours makes no difference in CN's incentive or penalty payments — once a train is late for incentive purposes there is no consequence to it becoming even later. At this point, additional CN HRD minutes do not have consequences for CN incentive/penalty purposes. However, the additional HRD minutes do have a significant impact on Amtrak and its passengers.¹⁸

Fourth, in another perverse disincentive under the Current Agreement, when CN has a period of consistently poor performance and ceases earning performance incentives, it no longer has to pay any performance penalties. This is because of a “lookback” provision in the Current Agreement that caps penalties at the level of total incentive payments CN earned in the previous 12-month period. See Current Agreement, Section 5.2.A and Appendix V, Section D, at App. V-10 and V-11. This lookback reduces even more CN's motivation to minimize delays within its control and provide quality service to Amtrak, because CN knows that no matter what the level of HRD minutes on Amtrak trains, penalties will never do more than offset any incentive payments earned in the previous 12 months.

Finally, and relevant to all of the foregoing points, CN's failure to minimize delays to Amtrak trains is not because CN *cannot* do so. CN has the ability to minimize train delays, including HRD minutes on Amtrak trains. CN managers and dispatchers give particular attention to moving intermodal freight trains without delay. [REDACTED]

¹⁷ Vilter V.S. at 11-12.

¹⁸ Vilter V.S. at 11-12.

A. The Key Elements Of Amtrak's Proposed Terms

Under Amtrak's proposal, CN would receive compensation above its incremental costs based on the quality of service it provides to Amtrak, and CN would pay a penalty for untimely performance. Both quality payments and penalties would be based on the level of CN HRD minutes to Amtrak trains, which generally relate to delays caused by host railroad dispatching decisions and the condition of host railroad track and signals. CN HRD minutes would be categorized using Host Responsible Delay codes ("HRD codes"), which record delays within CN's control and which CN and Amtrak already use to measure and record delays, and which they mutually review today. Delays that are not within CN's control, such as delays caused by Amtrak equipment failure, are not counted as HRD minutes.

The Quality Payment/Penalty Threshold. Amtrak would pay CN a quality payment on an Amtrak route when CN HRD minutes are equal to or less than a prescribed number of HRD minutes per 10,000 train miles for the Amtrak Route during a month. As CN HRD minutes decrease below this level, the quality payment received by CN would increase. Conversely, CN would pay Amtrak a penalty when CN HRD minutes are more than the same prescribed number of HRD minutes per 10,000 train miles during a month. As CN HRD minutes increase above this level, the penalty payment made by CN would increase. The "Threshold" — the prescribed number of HRD minutes per 10,000 train miles where payments turn from a quality payment to a penalty (or vice versa) — would be set for each Amtrak route on CN at the point where

the HRD minutes per 10,000 train miles correlates to 80 percent on-time performance averaged across all Amtrak stations on that Amtrak route.²⁴

Calculation of 80 Percent ASOTP. The proposed Thresholds have been derived from an analysis correlating (1) ASOTP at all stations under existing schedules on Amtrak routes on which CN is a host, to (2) HRD minutes on each route. Mr. Sacks has identified a statistically significant correlation between HRD minutes and ASOTP. When HRD minutes go up, ASOTP goes down, and vice versa.²⁵ To determine the Threshold for each of the six Amtrak routes on CN included in Amtrak's proposal,²⁶ Mr. Sacks calculated the number of CN HRD minutes per 10,000 train miles on each Amtrak route during each of the 48 months within the period of the review.²⁷ He then calculated the ASOTP on each Amtrak route for each month within the review period.²⁸ Next, Mr. Sacks plotted the CN HRD minutes per 10,000 train miles against the ASOTP for each of the 48 months on a separate graph for each of the six Amtrak routes.²⁹

From these data, Mr. Sacks then identified the number of HRD minutes per 10,000 train-miles that are statistically correlated to 80 percent ASOTP for each Amtrak route.³⁰ For each Amtrak route, the resulting Threshold is set forth in Table 1 of Mr.

²⁴ Vilter V.S. at 14-16.

²⁵ Sacks V.S. at 5-11.

²⁶ Mr. Sacks excluded the Sunset Limited route, where CN is a host for approximately 2 route miles.

²⁷ Sacks V.S. at 4-5 (calculation method) and 2-3 (analysis parameters and definitions).

²⁸ Sacks V.S. at 5-7.

²⁹ Sacks V.S. at 5-7 and Appendix B.

³⁰ Sacks V.S. at 7-11. In order to avoid reliance on skewed data, Mr. Sacks excluded trains on Amtrak routes with schedule changes due to major temporary track work and, if there were 10 or more days with such trains, he excluded the month. Mr. Sacks only considered periods after those schedule changes since he found there to be a substantial change in the HRD minutes – ASOTP relationship using statistical significance testing. For the same reason, he only used data on the Blue Water and Wolverine routes from the period after schedule changes were made on those Amtrak routes. Sacks V.S. at 9-10 and Appendix B at B-2, B-4.

Sacks' Verified Statement and in the proposed Operating Agreement, Appendix V, Table 1.

The Penalty. For CN HRD minutes above the Threshold, CN would pay a penalty at a level 20 percent greater than the cost savings CN has said it realized during a period of poor performance compared with a period of better performance. The penalty structure provides for increasing levels of penalties for increasing levels of HRD minutes above the Threshold.³¹ Although Amtrak does not agree with CN's attribution of its costs, CN's perception of its costs is an appropriate basis for a penalty framework.³² The goal of this penalty rate would be to nullify the CN perceives it receives by providing substandard performance to Amtrak.

As the Sacks Verified Statement sets forth in more detail, CN has said that it incurred additional annual costs of \$9.7 million to provide service to all Amtrak routes on CN during the period beginning in February of 2013 (during which time service was less poor than usual) and lower additional annual costs of \$2.4 million to provide such service during the period before February of 2013 (when service was poor).³³ These amounts can be expressed as a cost per Amtrak train mile of \$6.94 and \$1.72, respectively, and the difference between the two is \$5.22. In other words, CN believes that it saved \$5.22 per Amtrak train mile when its service to Amtrak was comparatively poor.³⁴

CN's perceived cost savings can be expressed as a rate per additional HRD minute per 10,000 train miles for each Amtrak route by calculating the ratio of the

³¹ Vilter V.S. at 15-16.

³² Vilter V.S. at 16-17 and n.24.

³³ Sacks V.S. at 11-14.

³⁴ Sacks V.S. at 15.

perceived cost savings per train mile, computed as \$5.22 above, to the difference between the number of HRD minutes per 10,000 train miles during the two periods of time. The perceived cost savings rate per HRD minute per 10,000 train miles for each Amtrak route is set forth in Table 2 of the Sacks Verified Statement.³⁵

Because the goal is to motivate CN to minimize HRD minutes, it would not be sufficient to set the penalty to match the perceived cost savings. As between a penalty of “x” and a cost savings of “x,” CN would be indifferent because the net effect would be a financial wash.³⁶ The penalty rate for each additional HRD minute per 10,000 train miles on each Amtrak route must *exceed* CN’s perceived savings rate. Amtrak’s proposed penalty rates exceed the corresponding perceived savings rate by 20 percent, because in the judgment of Mr. Sacks, 20 percent is the smallest margin that ensures that CN perceives minimizing HRD minutes to Amtrak trains to be in its economic self-interest on all Amtrak routes.³⁷ Thus, in preparing the table of penalty payments, Mr. Sacks added a margin of 20 percent to CN’s perceived savings rate per HRD minute per 10,000 train miles for each Amtrak route.

As noted above, under the “lookback” provisions of the Current Agreement on IC lines, penalties are capped at the total incentive payments CN earns in the previous 12-month period. The Amtrak proposal does not include such a lookback, because doing so would defeat the effectiveness of the penalty; indeed, a penalty that is incurred but not paid is not a penalty at all. If penalties are capped at the level of earned quality payments, once penalties reach the level of earned quality payments, CN would have no

³⁵ Sacks V.S. at 15-16 and 17 (Figure 6).

³⁶ Sacks V.S. at 17-19.

³⁷ Sacks V.S. at 16. Mr. Sacks also explains and calculates maximum penalties per Amtrak route. Sacks V.S. at 19. The Penalty Table is incorporated into the Proposed Agreement Appendix V, at V-6.

further economic incentive to minimize HRD minutes on Amtrak routes. Moreover, CN would avoid penalties entirely by having sustained poor performance, earning no quality payments and thereby capping penalties at zero.

However, Amtrak's proposed system does not continue to increase penalties indefinitely on a particular Amtrak route. As Mr. Sacks explains, at a certain point on each Amtrak route the HRD minutes per 10,000 train miles are so high (*i.e.*, service is so poor) that CN perceives no additional costs on that route attributable to operating Amtrak trains. This is the appropriate point for a maximum monthly penalty, because CN perceives no more costs to avoid through the provision of poorer service to Amtrak.³⁸ Thus, under Amtrak's proposal, depending on CN's level of performance, penalties are not capped by quality payments, but Amtrak proposes a monthly cap on penalties on a per Amtrak route basis.³⁹

The Quality Payment. As discussed above, Section 24308(a)(2)(B) does not require that the terms and conditions include any payment above incremental cost. Nonetheless, for performance better than the Threshold, Amtrak proposes to pay CN a quality payment. The quality payment structure provides for increasing levels of payments for decreasing levels of HRD minutes below the Threshold, based on the same relationship between payments and HRD that Amtrak proposes for penalty payments. So if CN HRD minutes decrease below the Threshold, the quality payments increase at the same rate that CN's penalty payments decrease, in relation to a decline in CN HRD minutes.⁴⁰

³⁸ Sacks V.S. at 15-15.

³⁹ Vilter V.S. at 18 and Sacks V.S. at 16-17.

⁴⁰ Vilter V.S. at 18-19.

[REDACTED]

although it would need to provide better service to reach the maximums. Quality payments increase on each Amtrak route for each minute of reduction of HRD minute per 10,000 train miles, up to the point where such earnings equal [REDACTED]

[REDACTED] [REDACTED] [REDACTED]. These quality payments are designed to provide an inducement to CN to provide quality service to Amtrak.

B. Amtrak's Proposed Terms Meet All Of The Requirements Of Section 24308(a) And Would Advance The Statutory Goal Of Section 24101(c)(4)

One of the statutory goals of the Rail Passenger Service Act is to "operate Amtrak trains, to the maximum extent feasible, to all station stops within 15 minutes of the time established in public timetables." 49 U.S.C. § 24101(c)(4). Amtrak's proposal uses HRD minutes, the primary driver of ASOTP, to establish on-time performance thresholds on a route by route basis. Thus, Amtrak's proposed terms and compensation advance this Congressional goal.

STB-prescribed terms must include a penalty provision for untimely performance. 49 U.S.C. § 24308(a)(1). Under Amtrak's proposed terms, CN would pay a penalty for untimely performance, beginning at the point where HRD minutes per 10,000 train miles on each Amtrak route rise above the amount correlated to 80 percent ASOTP averaged across all stations on that Amtrak route. The penalty would be set at a level to ensure that CN perceives minimizing HRD minutes to Amtrak trains to be in its economic interest.

Section 24308(a) provides that if there is a provision for payments in excess of incremental costs, that provision must consider quality of service as a major factor.

Amtrak would pay CN a quality payment beginning at the point where HRD minutes on each Amtrak route fall below the amount correlated to 80 percent ASOTP averaged across all stations on that Amtrak route. This payment is based on quality service — avoidance of delays — and thus meets the requirement of 49 U.S.C. § 24308(a)(2)(B).

The penalties and the quality payments would start from the same thresholds, and both be based on the correlation of HRD minutes to ASOTP and on the same cost of service perceptions of CN. Amtrak's penalty and quality payment proposal meets the overarching goal of reasonableness set forth in section 24308(a).

VI. Effective Date and Term

Amtrak requests that the Board make the prescribed terms and compensation effective as of August 9, 2013, the date the Board served its decision commencing this proceeding, and effective for ten years from the date of the final decision.⁴¹

There is ample Board precedent for applying any new terms and compensation retroactively.⁴² By making the terms and compensation retroactive, the Board can ensure that neither party in this case benefits from any delay in reaching a final agency decision. Moreover, a retroactive decision in this case would encourage both Amtrak and other host railroads to make every effort to negotiate agreements before Amtrak is compelled to seek the Board's prescription of terms.

⁴¹ *Application of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. 24308(a) – Canadian Nat'l Ry. Co.*, STB Docket No. FD 35743, slip op. at 3 (STB Served Aug. 9, 2013). This is a slight change from Amtrak's initial filing in this proceeding, which asked that the new terms and compensation be made effective as of August 12, 2013. *Application of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. 24308(a) – Canadian National Ry. Co.*, 4 (Served July 30, 2013).

⁴² See e.g. *Application of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. 24308(a) – Order to Require Service and Set Compensation Terms*, 1996 STB LEXIS 139, *4 (STB Served April 29, 1996) ("In prior proceedings, the ICC has found that compensation awards should be applied retroactively to the effective date of the order requiring access.").

Amtrak also requests that the Board make the terms and compensation effective for ten years from the date of the final decision. The level of effort required of the parties and the STB and expense incurred for this proceeding justify imposition of a term of ten years in order for the parties to benefit from the investment necessary for the Board to establish such terms.

CONCLUSION

For the foregoing reasons, Amtrak's proposal is consistent with section 24308(a), the statutory goal embodied in section 24101(c)(4), and should be ordered by the Board.

[This space intentionally left blank]

Respectfully submitted,

By: Linda J. Morgan

Linda J. Morgan
Kevin M. Sheys
Justin J. Marks
Nossaman LLP
1666 K Street, NW
Suite 500
Washington, DC 20006

Counsel for National Railroad Passenger Corporation

William H. Herrmann
Christine E. Lanzon
National Railroad Passenger Corporation
60 Massachusetts Avenue, NE
Washington, DC 20002

Dated: September 4, 2015

APPENDIX B

REDACTED

APPENDIX C

REDACTED

APPENDIX D

REDACTED

CERTIFICATE OF SERVICE

I certify that on December 19, 2016, a true copy of the foregoing National Railroad Passenger Corporation's Reply to the CN motion to compel, was served via email and first class mail upon the following parties of record:

Paul A. Cunningham
David A. Hirsh
James M. Guinivan
Harkins Cunningham LLP
1700 K Street, N.W., Suite 400
Washington, DC 20006-3817
pac@harkinscunningham.com
dhirsh@harkinscunningham.com
jguinivan@harkinscunningham.com

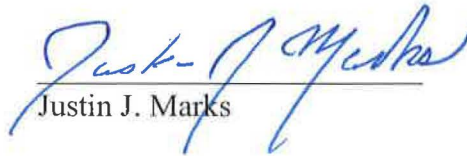
John P. Dring
Federal Energy Regulatory Commission
Office of Administrative Law Judges
888 First Street, N.E.
Washington, DC 20426
John.Dring@FERC.gov

Mark C. Hansen
Union Pacific Railroad Company
1400 West 52nd Avenue
Denver, CO 80221
mchansen@up.com

James A. Hixon
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-2191
james.hixon@nscorp.com

Paul G. Moates
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005
pmoates@sidley.com

David T. Rankin
BNSF Railway Company
P.O. Box 961039
Fort Worth, TX 76161
david.rankin@bnsf.com


Justin J. Marks