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March 2, 2018

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395 E Street, S.W.  
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March 5, 2018  
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Re: STB Finance Docket No. 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 under seal in the above-referenced proceeding is the Highly Confidential Reply Brief of the National Railroad Passenger Corporation (“Amtrak”).

Also enclosed for filing on the public record in this proceeding is a Public version of Amtrak’s Reply Brief, which has been redacted in accordance with the applicable protective order.

If you have any questions about this filing, please contact me.

Respectfully submitted,

Edward Fishman  
Counsel for National Railroad  
Passenger Corporation

cc: David Hirsh, Dentons US LLP

**PUBLIC VERSION - REDACTED**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35743

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

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**REPLY BRIEF OF NATIONAL RAILROAD PASSENGER CORPORATION**

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

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**REPLY BRIEF OF NATIONAL RAILROAD PASSENGER CORPORATION**

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**I. Summary of Amtrak's Position**

The two key issues in dispute in this proceeding involve compensation. The first issue involves how much base compensation Amtrak is required to pay CN for Amtrak's use of CN's facilities and CN's provision of services to Amtrak. The second issue involves how to measure the quality of CN's performance for purposes of establishing the incentive and penalty provisions of the Operating Agreement. The evidentiary record and the Opening Briefs illustrate that the parties have diametrically opposed views on the law, facts and policy regarding both of these issues.

CN has proposed vastly increased base compensation predicated upon its assertion that alleged freight train "delay and interference costs" are "incremental costs" for which it should be compensated by Amtrak under Section 402(a) of the Rail Passenger Service Act ("RPSA").<sup>1</sup>

CN's proposal would require Amtrak to pay over \$3 million more per year in base compensation,

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<sup>1</sup> Section 402(a) of the Rail Passenger Service Act of 1970 was enacted by Pub. L. No. 91-518, § 402(a), 84 Stat. 1327, 1335 (1970). Section 402(a) is now codified (as it has been amended) at 49 U.S.C. §24308(a). We refer herein to the current version of the statute as Section 24308(a), or it may be referred to as Section 402(a) depending on the context.

although CN offers to accept as an “alternative” an estimated \$377 million to \$534 million in payments from Amtrak in order to fund capacity improvements on CN’s tracks, largely for the benefit of CN’s own freight business.<sup>2</sup>

Almost 50 years after the Illinois Central Railroad Company (“IC”) and Grand Trunk Western Railroad Company (“GTW”) voluntarily accepted a “public bargain” by which they were immediately relieved of their passenger common carrier obligations in exchange for preferential Amtrak access to their lines and reimbursement for what was always intended (and later codified) to be the “incremental costs” of providing their facilities and services to Amtrak – essentially a government bailout -- they now ask the Board to unravel the public bargain on base compensation. That is, CN asks the Board to rule either that Amtrak must be compelled to pay it – without any regard to quality of service – base compensation sufficient to put CN in the same position as if it were pricing access to its facilities and services in an arms-length transaction between a willing buyer and seller in a free market, or that Amtrak should degrade the service it provides passengers on CN’s lines by reducing the number of trains it runs or running them with longer schedules than those already agreed to by CN.

CN’s new-found definition of “incremental costs” is unprecedented; no court decision or agency case has ever defined it in the expansive way CN proposes, and the parties’ Operating Agreement has never included any compensation for the “freight train delay costs” and other categories which CN now claims is self-evidently due to it. CN’s definition of “incremental costs” is built on a distorted and revisionist narrative about the origin and purpose of the base compensation standard in the context of the “public bargain” struck with host railroads and the

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<sup>2</sup> Amtrak Opening Brief, 1, 95-100; CN Opening Brief, 58.

goals of the RPSA, and ignores the plain language and meaning of the term “incremental cost” as understood by Congress when it adopted that specific term into Section 24308(a).

A further fatal flaw to CN’s claim is the failure to demonstrate that it has actually incurred any of the “losses” it claims Amtrak should now be compelled to pay it as a guaranteed element of its base compensation. CN acknowledges that the vast majority of those claimed “losses” – such as price suppression, capacity constraints, and foregone revenue – are not practically quantifiable. And as to the category CN calls “freight train delay costs” allegedly due to Amtrak’s presence, CN still has not demonstrated that it has actually incurred a single additional cost in fuel, equipment, or crew expenses as a result of Amtrak trains.

On incentive and penalty compensation, CN disclaims any responsibility for its last place performance among Amtrak’s Class I host railroads, and proposes that the Board perpetuate the essential structure of the existing system that pays CN well<sup>3</sup> but neither measures the actual impact of CN’s performance on Amtrak and its passengers, nor incentivizes CN to provide better service (as other host railroads are demonstrably able to do). But the fact that under the current system CN has been earning hefty payments above incremental cost, without contributing to on-time service more than 50% of the time, shows that the current system is not working and is therefore not a “reasonable” implementation of the purpose for which the “quality of service” provisions were adopted.

Amtrak’s proposal redesigns the incentive/penalty system, to create a better alignment between performance and payment, with the intention of motivating CN to provide better service to Amtrak trains (or relieving Amtrak of the obligation to pay for poor service – the choice is

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<sup>3</sup> In fiscal year 2016, CN was Amtrak’s worst-performing host railroad but was paid [REDACTED] in incentives. Amtrak Opening Brief, 2.

ultimately up to CN). The heart of this redesign is the substitution of a “minutes of delay” measurement instead of the arbitrary, complex, and difficult to administer checkpoint/relief-based system in the current contract. Although CN lodges certain specific criticisms about the parameters of Amtrak’s delay-based system, CN does not articulate any substantive reason why it is opposed to the implementation of an incentive/penalty system which measures the levels of delays caused by CN. Amtrak’s proposal also addresses a glaring weakness in the current system by removing the elements that render the penalty provisions ineffective. CN postulates an array of speculative and irrelevant arguments about the impact of Amtrak’s proposal if it were applied to CN’s past performance, or to other host railroads. But CN cannot rebut the fact that Amtrak’s proposal is consistent with all of the relevant statutory goals and requirements of the RPSA and should therefore be adopted by the Board.

## **II. CN Is Not Entitled To Base Compensation In Excess Of The Short-Run Avoidable Costs That CN Incurs From Amtrak’s Use Of CN’s Facilities And CN’s Provision Of Services To Amtrak**

CN’s argument is that the base compensation payable by Amtrak (before any quality of service payments are added) should consist of a bundle of economic principles or asserted adverse effects on its freight business, including what CN terms “freight delay and interference costs,” “capacity restraints,” lost opportunities, foregone revenues, price suppression and more generally “long-run costs.”<sup>4</sup> CN lumps these categories under the rubric of “all avoidable costs,” and then asserts that this is what Congress meant to say when it specified in Section 24308(a) that Amtrak was only obligated to pay a host railroad its “incremental costs.”

In offering this theory to the Board, CN must either ignore or twist explicit authority, each building upon the other, holding that “incremental costs” does not include compensation for

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<sup>4</sup> CN Opening Brief, 60, 63, 64.

the bucket of perceived adverse effects that CN would like to obtain from Amtrak, but is limited to “avoidable costs in the short run,” a much more limited definition that accords perfectly with the types of costs that CN and Amtrak have historically agreed constitute the base compensation owed by Amtrak to CN. That explicit authority includes the following:

- In *Penn Central*, the ICC held that “incremental cost” equals “avoidable costs in the short run,” which in turn equated to maintenance of way, maintenance of equipment, and transportation expenses that could be avoided in the absence of a service.<sup>5</sup> All of the elements included by the ICC in its definition of incremental cost/short run avoidable cost could be eliminated immediately upon cessation of the service (*i.e.*, in the short run rather than in the long run), and represented actual costs paid out by the host railroad, rather than “losses” in the form of foregoing revenues or other value.

- When Congress enacted amendments in 1973 to Section 24308(a) with the intent of overturning *Penn Central*’s conclusions about the compensation payable by Amtrak, it chose to incorporate into the statute the term “incremental cost.” It did not incorporate any of the other terms used in *Penn Central* to define costing benchmarks other than “incremental cost” – *i.e.*, “avertable cost,” “avoidable cost in the long run,” or “fully allocated costs.”

- Congress’s adoption of the term “incremental cost” into the statute to define Amtrak’s obligation to compensate host railroads was deliberate and done with the knowledge that, in using the term “incremental cost,” it was using a term synonymous with “short run avoidable cost,” thus ratifying the ICC’s definition. It is an accepted principle that when

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<sup>5</sup> *Determination of Compensation under Section 402(a) of the Rail Passenger Service Act of 1970 (“Penn Central”)*, ICC Finance Docket No. 27353 (Sub-No. 1), 342 I.C.C. 820, 831-832 (1973).

Congress “voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation.”<sup>6</sup>

- Although the plain language of the statute does not require further inquiry into the meaning of “incremental cost,” to the extent the Board takes account of legislative history to divine Congressional intent, it is clear that Congress used the term “incremental cost” deliberately and with full knowledge of the meaning it was importing into Section 24308(a). Thus, Congress made known its intent that “payments in excess of **short-run avoidable costs** are to be based on quality of service.”<sup>7</sup> See *Nat’l R. R. Passenger Corp. v. ICC*, 610 F.2d 865, 873 (D.C. Cir. 1979)(“Congress mandated use of the term ‘incremental costs,’ which appears to coincide with the Commission’s definition: ‘Avoidable cost in the short run’.”).

- In the same amendment that added the specific “incremental cost” term to Section 24308(a), Congress also provided that any payment by Amtrak to a host railroad in excess of that base compensation could only be based on “quality of service” provided by the host to Amtrak trains. The distinction between base “incremental cost” compensation, and “quality of service” compensation, means that Congress understood that any costs that the host might incur in providing “quality of service,” or that varied with the level of service provided, were *not* a part of the “incremental cost” base compensation.

- The most recent Operating Agreement between CN and Amtrak does not include compensation for any of the costs that CN now claims is so clearly included within the definition

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<sup>6</sup> *Hooks v. Clark Cty. Sch. Dist.*, 228 F.3d 1036, 1040 (9th Cir. 2000); see *Cooper Hosp. / Univ. Med. Ctr. v. Burwell*, 179 F.Supp.3d 31, 49 (D.D.C. 2016), *aff’d sub nom. Cooper Hosp. Univ. Med. Ctr. v. Price*, 688 F. App’x 11 (D.C. Cir. 2017) (“This doctrine unquestionably applies where Congress indicates not only an awareness of the administrative view, but also takes an affirmative step to ratify it.”).

<sup>7</sup> Statement of Senator Magnuson, 119 CONG. REC. 34591 (daily ed. October 18, 1973)(emphasis added).

of “incremental costs,” and CN acknowledged that the base compensation amounts specified in the Operating Agreement represent reimbursement of CN’s incremental costs resulting from Amtrak’s operation of trains over CN.<sup>8</sup>

CN’s argument that “incremental costs” means anything other than what the ICC, Congress, and the courts have plainly held it to mean cannot prevail. CN claims that what it is seeking is “all avoidable costs,” but that formulation begs the question, because it does not specify what is included within that definition, or whether the avoidable costs are long-run or short-run – both of which are in dispute. For purposes of this brief, however, Amtrak will refer to CN’s conglomeration of claimed capacity restraints, foregone revenue, interference with freight traffic, and other “long-run” costs as “All Avoidable Costs,” to account for the fact that CN’s definition does not correspond to any recognized definition of the economic term “avoidable costs.”

**A. Congress Clearly Expressed The Meaning of “Incremental Cost” When It Adopted That Term Into Section 24308(a)**

CN first tries to dispute that the plain language of the statute means what it says, and then goes on to advocate for a novel and unprecedented interpretation of Section 24308(a) based on its perception of the greatest economic recovery to CN. Both arguments are specious.

**1. CN’s Argument Regarding The Meaning Of Incremental Costs Conflicts With The Plain Language Of The Statute**

The Board does not need to look beyond the language of the statute itself to reject CN’s argument that “incremental costs” equals “All Avoidable Costs.” If in enacting the Amtrak

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<sup>8</sup>

[REDACTED]

Improvement Act of 1973 (“AIA”),<sup>9</sup> Congress had intended the cost standard for base compensation to be “avoidable costs,” it would have used that term “avoidable costs” in the statute, and CN offers no explanation for why it failed to do so. Congress has used and explicitly defined the term “avoidable costs” in other unrelated sections of Title 49, demonstrating that Congress would have used the term if it had intended for “avoidable costs” to be the applicable standard under Section 24308(a).<sup>10</sup>

## **2. CN Misconstrues the Importance of *Penn Central* In Defining “Incremental Cost” As That Definition Ultimately Was Adopted Into the Statute**

When the ICC was asked to establish compensation principles governing the relationship between Amtrak and host railroads in the *Penn Central* case, one of the compensation standards it considered was “[a]voidable cost in the short run,” which the ICC defined as “incremental cost” consisting of “that amount of maintenance of way, maintenance of equipment, and transportation expenses which could be saved if a particular service were eliminated.”<sup>11</sup> The ICC also defined two other compensation standards: “full cost” and “avertable cost/long-run avoidable cost.” The ICC decided to apply the latter two cost standards, but did not apply the “incremental cost” standard, to Amtrak’s operations over two separate portions of the Penn Central’s network.<sup>12</sup>

Since *Penn Central* defines “incremental cost” in exactly the way urged by Amtrak, CN attempts to minimize its importance by arguing that the issue in *Penn Central* was simply a choice between fully allocated costs or “avoidable costs (with no temporal limitation)” –

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<sup>9</sup> Pub. L. No. 93-146, § 10, 87 Stat. 548, 552 (1973).

<sup>10</sup> See Section II.B.6 below.

<sup>11</sup> *Penn Central*, 342 I.C.C. at 831-32.

<sup>12</sup> *Id.* at 832.

presumably in order to imply that the ICC's definition of "incremental cost" is dicta that should be ignored.<sup>13</sup> But that is a tortured reading of the *Penn Central* decision, which never stated any such limitation in its consideration. In *Penn Central*, the ICC noted and relied on findings from an earlier advisory report which, among other things, "rejected Amtrak's contention that section 101 of the RPSA requires a payment of no greater than *incremental costs*," and that in certain circumstances, "compensation under section 402 of the RPSA might reasonably be geared to an *incremental* or avoidable cost basis."<sup>14</sup> And while Amtrak argued that base compensation should consist of "avoidable costs," it is clear from the context that Amtrak meant the kinds of costs traditionally described as incremental; *i.e.*, maintenance of right of way and structures, maintenance of equipment, and other similar expenses.<sup>15</sup> Therefore, CN's assertion that the concept of incremental costs was not at issue in *Penn Central* is demonstrably wrong.

CN's interpretation is further belied by the fact that the ICC went to the trouble not only to carefully distinguish between short-run avoidable costs (incremental costs) and long-run avoidable costs (avertable costs), but also to define the types of costs that were incorporated within the category of incremental costs. It makes no sense to characterize the ICC's ultimate *decision not to apply* the incremental cost standard as meaning that the ICC "*did not address* whether host compensation should be so limited."<sup>16</sup>

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<sup>13</sup> CN Opening Brief, 59.

<sup>14</sup> *Penn Central*, 342 I.C.C. at 821-822.

<sup>15</sup> *Id.* at 824-827.

<sup>16</sup> CN Opening Brief, 59.

### 3. CN Misconstrues the Importance of Congress's Adoption of the Exact Terminology of *Penn Central*'s Definition of "Incremental Cost" Into the Statute

Following the issuance of the ICC's decision in the *Penn Central* case in September 1973, Congress moved swiftly to (1) amend Section 24308(a) in order to legislatively reverse the *Penn Central* decision, (2) adopt the term "incremental costs" as the base compensation standard, and (3) provide that any compensation above incremental cost must be based on quality of service.<sup>17</sup> In other words, Congress rejected the two cost standards applied by the ICC in *Penn Central* and imported into the statute the "incremental cost" standard that was not applied by the ICC in *Penn Central*.<sup>18</sup>

CN argues that Congress in the 1973 amendment "could have specified that only 'short-run' costs or only out-of-pocket 'expenses' should be recovered but it did not do so."<sup>19</sup> Congress did not need to add the words "short run" or "expenses" to the "incremental cost" reference in the statute because it was *explicitly* importing the incremental cost definition from the *Penn Central* decision -- which used both of those terms. Specifically, the *Penn Central* decision used the terms "short run" and "expenses" in the following definition of "incremental costs": "Avoidable cost in the **short run**, hereinafter referred to as incremental cost, represents that amount of maintenance of way, maintenance of equipment and transportation **expenses** which could be saved if a particular service were eliminated."<sup>20</sup> Equally fatal to CN's argument is the fact that Congress could have specified that it was obligating Amtrak to pay "All Avoidable

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<sup>17</sup> *Nat'l R.R. Passenger Corp. v. ICC*, 610 F. 2d 865, 872 (D.C. Cir. 1979) ("Congress mandated use of the term 'incremental costs,' which appears to coincide with the Commission's definition: 'Avoidable cost in the short run'").

<sup>18</sup> See Amtrak Opening Brief, 74.

<sup>19</sup> CN Opening Brief, 59.

<sup>20</sup> *Penn Central*, 342 I.C.C. at 832 (emphasis added).

Costs” over any time period, or “long-run costs” to use CN’s terminology, or “avertable costs” which *Penn Central* equated with long-run avoidable costs.

Thus, Congress imported into the base compensation statute the very term that CN now says the Board should ignore, and in doing so Congress made two things clear:

*First*, Congress imported the term “incremental cost” with full knowledge of what that term meant – i.e., “short-run avoidable costs.” During the Senate floor debate on the legislative amendment just prior to enactment, Senator Magnuson (one of the Senate Managers of the Conference Committee that produced the final version of the legislation) provided the following explanation:

The conferees inserted report language which ***specifically*** spells out the way in which railroads are to be compensated for operating trains for Amtrak. The conferees specified no level of maximum payment, but made clear that payments in excess of ***short-run avoidable costs*** are to be based on the quality of service. It is anticipated that quantity of service would also enter into these calculations, but quality of service is to be the major determinant of any payments in excess of ***short-run avoidable costs***.<sup>21</sup>

*Second*, Congress not only explicitly adopted the incremental cost standard as defined in *Penn Central*, but also it made clear its intent to specifically *reject* the two other cost methodologies that *Penn Central* had identified. Representative Dingell, on behalf of himself as the author of the amendment and the Conference Committee members, spoke in support of the 1973 amendment emanating from the Conference Committee and subsequently enacted into law:

[I]t is the intention of myself as the author of the amendment, a member of the conferees, and I now express also the same intention of the conferees, that the [*Penn Central*] proceedings referred to would be vacated thereby, and it is the intent of the conferees to so vitiate that particular unwise action of the ICC.<sup>22</sup>

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<sup>21</sup> 119 CONG. REC. 34591 (daily ed. Oct. 18, 1973)(emphasis added).

<sup>22</sup> 119 CONG. REC. 34481 (daily ed. Oct. 17, 1973). *See also* Statement of Sen. Magnuson, 119 CONG. REC. 34591 (daily ed. October 18, 1973)( “The conferees accepted the provision in the House-passed bill (cont’d)

CN's claim that Congress rejected only the ICC's holding with respect to fully allocated costs on certain segments of the Penn Central's network, but did not "complain about" the absence of a temporal limitation in the avertable cost standard adopted for other segments,<sup>23</sup> is meaningless in light of this clear language expressly indicating an intent to "vacate" and "vitate" the *Penn Central* decision. In any event, it was not necessary for Congress to "complain" in legislative history about the lack of a time horizon for the avertable cost standard, when it explicitly rejected that standard in favor of an incremental cost/short-run avoidable cost standard.

**B. CN's Arguments That Other Considerations Trump The Plain Language And Meaning Of The Statute Are Unsupported And Wrong**

**1. CN's Argument That The RPSA Was Never Intended to Compel Host Railroads To Incur "Uncompensated Losses" Ignores – And Contradicts -- What Congress Has Said It Intended**

The main thrust of CN's attack on the plain language of Section 24308(a)'s incremental cost standard is the assertion that the RPSA "was never intended to compel host railroads to incur uncompensated losses by hosting Amtrak."<sup>24</sup> The simple answer to this assertion is that, regardless of Congress's intent in 1970, its intent in 1973 was to reject any compensation scheme based on "fully allocated costs" and to adopt instead a standard that limits base compensation to the host railroad's incremental costs, and permits payment above that amount based only on quality of service. By this definition, any host railroad that does not earn "quality of service" payments is limited to incremental costs, which again by definition is something less than fully

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which defined "just and reasonable compensation" in section 402 of the Rail Passenger Service Act of 1970. Acceptance of this definition *legislatively reverses* the Interstate Commerce Commission's recent decision in Finance Docket 27353")(emphasis added).

<sup>23</sup>

CN Opening Brief, 60.

<sup>24</sup>

CN Opening Brief, 43.

allocated costs. In addition, however, each element of CN's purported support for its assertion is wrong.<sup>25</sup>

First, CN purports to derive the intent of the 1970 version of the RPSA from its requirement that Amtrak pay "just and reasonable" compensation to host railroads. But because that language alone says nothing about the level of compensation payable, CN takes it a step further and asserts: "A 'just and reasonable' commercial agreement does not involve compelling one party – the host – to incur a net loss in serving the other party – Amtrak."<sup>26</sup> The answer to that unsupported assertion is that the regulated relationship between Amtrak and host railroads is not a "commercial agreement." As stated in *Metro. Transp. Auth. v. ICC*, 792 F.2d 287, 298 (2d Cir. 1986), "The model of negotiation between a willing buyer and a willing seller is inappropriate to the instant case: Amtrak is the only passenger railroad that has or seeks to have access to [the host railroad's] lines, and it is required by statute to provide service over [its] lines." Congress of course was aware of this when it adopted the "just and reasonable" language of the original RPSA, so there can be no argument that it imagined it was importing into that language any implications from commercial agreements.<sup>27</sup>

Second, CN asserts that the purpose of the "public bargain" that resulted in the formation of Amtrak was concern about "the railroads' financial viability."<sup>28</sup> While that was a concern under discussion, Congress made clear that its paramount objective was to preserve the viability

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<sup>25</sup> For the same reasons, CN's assertions that payment of the "incremental cost" specified by Congress would force CN to "subsidize" Amtrak (CN Opening Brief, 47) are misplaced, especially since Section 24308(a) – unlike other portions of the RPSA – does not mention the concept of subsidization.

<sup>26</sup> CN Opening Brief, 43.

<sup>27</sup> The issue of whether the proper compensation level can be determined by reference to pricing mechanisms applicable to arms-length commercial contracts also arises in connection with Professor Willig's testimony on CN's behalf, which Amtrak discusses more fully below.

<sup>28</sup> CN Opening Brief, 44.

of the passenger rail service that the host railroads were discontinuing in ever-increasing numbers. As the Supreme Court found in *Nat'l R. Passenger Corp. v. Atchison, T. & S. F. R. Co.*, 470 U.S. 451, 454 (1985)(“*Atchison*”), “The Rail Passenger Service Act of 1970 ... was Congress’ effort to ‘revive the failing intercity passenger train industry and retain a high-quality rail passenger service for the Nation.’”

*Third*, CN attempts to refer the Board to the “broader context of the 1970 Act” by referencing the pre-1970 right of freight railroads under Section 13a(1) of the Interstate Commerce Act to shed their passenger service responsibilities, and claiming that the ICC in interpreting that provision was required to “weigh[] heavily any net ‘avoidable loss’ that the railroad would prevent by discontinuing service.” Of course, post-1970 the freight railroads were given the right to shed *all* of their passenger service, not by discontinuing it, but by transferring the risks and burdens of operating that service onto Amtrak, so the use of a “net avoidable loss” standard to determine whether discontinuation pre-1970 was required by public convenience and necessity is inapplicable. In any event, CN does not explain how the “net avoidable loss” concept was interpreted under former section 13a(1), why that concept was relevant to the pre-1973 version of Section 24308(a) which did *not* specify a “net avoidable loss” compensation standard, or how that abandonment concept is at all relevant following the explicit adoption of the “incremental cost” standard.

*Finally*, CN asserts that the payments made by CN’s predecessors<sup>29</sup> under former Section 401(a)(1) constituted “full and complete consideration” for relieving them from their passenger

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<sup>29</sup> We refer herein and throughout our pleadings for convenience to CN’s “predecessors” as the IC and GTW as the context may require. CN has represented to the Board that the IC and GTW are indirect subsidiaries of CN and remain the real parties in interest to this proceeding despite CN’s acquisition of control of each entity. See August 1, 2013 letter filed by Canadian National Railway Company, Illinois (cont’d)

service obligations.<sup>30</sup> While former Section 401(a)(1) specified that upon payment of the prescribed fee the participating railroads would be relieved of their “entire responsibility for the provision of intercity rail passenger service,” it did not specify that the payment of that fee was the entire consideration owed for that benefit. As the Supreme Court held in *Atchison*, rejecting an argument similar to the one CN makes here, “To obtain relief from their common carrier obligations, the railroads had to agree to **several conditions**,” including not only payment of one-half of that railroad’s financial losses from intercity passenger service, but also the requirement to “provide Amtrak with the use of tracks, other facilities, and services at rates to be agreed upon by the parties or, in the event of disagreement, to be set by the ICC.”<sup>31</sup>

## **2. The Plain Meaning of The Term “Incremental Costs” Is Not Subject to Revision Through Semantics**

CN asserts:

In the 44 years since the 1973 Act, the ‘incremental cost’ provision has consistently been understood – by Congress, the Board, the ICC, and Amtrak itself – as affirming that Amtrak is obligated to pay hosts, at a minimum, their full ‘incremental’ or ‘avoidable’ costs; *i.e.*, all the costs they incur due to hosting Amtrak that they would not incur in Amtrak’s absence.<sup>32</sup>

Amtrak does not dispute that it is required to pay “all” of the incremental costs required by Section 24308(a). The issue, rather, is whether “incremental costs” is equal to CN’s

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Central Railroad Company and Grand Trunk Western Railroad Company in Finance Docket No. 35743. The IC and GTW both elected to join Amtrak and remain subject to any obligations they have under the RPSA as host railroads.

<sup>30</sup> CN Opening Brief, 44.

<sup>31</sup> *Atchison*, 470 U.S. at 455 (emphasis added). Indeed, the requirement to provide Amtrak with access to host railroads facilities and services embodied in Section 402(a), now Section 24308(a), was and remains a crucial element of the public bargain because it “assures that Amtrak has available necessary facilities to carry out the purposes of RPSA,” and “play[s] a necessary role in facilitating Amtrak’s operations.” *MTA*, 792 F.2d at 295.

<sup>32</sup> CN Opening Brief, 46.

definition of “All Avoidable Costs” (which, as shown above, includes such items as compensation for reduced capacity, foregone revenue, and other perceived “losses” that do not represent short-run costs actually incurred by CN in providing facilities and services to Amtrak). CN cannot shortcut this difference simply by asserting that it is entitled to “all” or “full” costs; it is the *nature* and *extent* of the costs embraced within the term “incremental costs” that is at issue.

CN also asserts that the term “incremental cost” was not used by Congress as a “term of art” but was used in its “common-sense meaning of ‘avoidable costs’.”<sup>33</sup> This does not help CN’s argument. Congress left no room for these types of distinctions because it specified what it meant by “incremental costs” – *i.e.*, short-run avoidable costs as defined in *Penn Central*. Whether that is a term of art or a common-sense definition is beside the point.

### **3. The Legislative History Relied Upon By CN Does Not Support CN’s Position<sup>34</sup>**

CN refers to portions of the legislative history of the Amtrak Improvement Act of 1973 (“AIA”) that it claims support its argument that “incremental costs” means “All Avoidable Costs” arising from Amtrak’s presence on its network over any time horizon and including a bundle of “adverse impacts” such as opportunity costs and capacity costs.<sup>35</sup> The legislative history relied upon by CN does not support CN’s argument and in one important respect (discussed further below) weighs heavily against CN’s position.

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<sup>33</sup> CN Opening Brief, 47.

<sup>34</sup> As a preliminary matter, the STB does not need to (and should not) resort to the legislative history of the AIA to address CN’s argument that “incremental costs” equals “avoidable costs” because the plain language of the statute indicates otherwise.

<sup>35</sup> CN Opening Brief, 19 (“adverse effects...on CN’s customers and operations”), 31 (“adverse effects on freight service quality”).

None of the legislative history relied upon by CN speaks to the time horizon (short run or long run) applicable to the “incremental costs” standard.<sup>36</sup> The logical inference from this silence is **not** that Congress meant avoidable costs over any time horizon. No inference in favor of CN’s position can be drawn from Congressional silence in this context.<sup>37</sup>

*Second*, none of the legislative history relied upon by CN says anything about compensation for lost opportunity, capacity constraints, price suppression, or any other purported “adverse impacts” on CN’s business due to Amtrak’s presence (as opposed to costs incurred by CN in providing facilities and services to Amtrak). The Board can reasonably conclude that in using the word “costs,” Congress meant the ordinary meaning of that word, i.e., the amount that is paid for something – the expense.<sup>38</sup> As CN has acknowledged, it cannot practically quantify the “lost opportunities” or “capacity restraints” or other concepts that it espouses relating to foregone benefits, lost revenues, or effects on its freight transportation – and this is because they

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<sup>36</sup> For example, the Conference Report reference to “all costs which would not be incurred if passenger service were not performed for Amtrak” and “costs which would not be incurred if a particular service were not rendered or a given amount of traffic were not handled” are silent regarding “avoidability” over time. The same is true of the parallel House Report references cited by CN. Also, the Conference Report references to inclusion of “solely related (or direct) costs of a particular service (both variable and fixed portions of solely related costs)” and exclusion of “any portion of common costs” are fully consistent with the “incremental cost” definition from *Penn Central*.

<sup>37</sup> Even CN’s summary of the legislative history begs the question on time horizon. CN says Congress favored “a simple factual inquiry – whether the cost would *disappear* (is it ‘savable’ or ‘avoidable’) if Amtrak’s passenger trains did not operate on the freight line.” CN Opening Brief, 47 (emphasis added). If CN means “disappear” in the ordinary sense, then perhaps there is no real dispute about time horizon. Only short-run avoidable costs would disappear once Amtrak stops operating over CN. Longer-term costs would take longer for CN to avoid.

<sup>38</sup> The Merriam-Webster dictionary defines a “cost” as “the amount or equivalent paid or charged for something;” see Frankel RVS, E-13, E-14 (concluding that CN’s “delay and interference cost” claims relate to foregone revenue or profit rather than “host railroad *expenses*”). Statutory phrases that are not terms of art must be read in context and “with a view to their place in the overall statutory scheme.” *United States v. Shaffer*, 807 F.3d 943, 946 (8th Cir. 2015) citing *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989); see also *In re Sleep Prod., Inc.*, 141 F. Supp. 463, 467–68 (S.D.N.Y. 1956), *aff’d sub nom. Local 140 Sec. Fund v. Hack*, 242 F.2d 375 (2d Cir. 1957) (noting that a statutory term not deemed a “term of art” should be “interpreted in its lay and colloquial meaning.”)

are not “costs” in the ordinary meaning of the term, unlike the “maintenance of way, maintenance of equipment, and transportation expenses” that *Penn Central* recognized constituted “incremental costs” or “short-run avoidable costs.” With respect to the inclusion of opportunity costs and capacity costs within “incremental costs,” it is CN that is advocating use of a “term of art” definition of incremental costs which is not supported by the statute or the legislative history.

#### **4. The ICC And STB Decisions Relied Upon By CN Do Not Support CN’s Position**

CN does not cite any ICC or STB decision where the incremental cost standard was construed or applied to prescribe compensation for costs that were construed as beyond “short-run” costs or that were defined as capacity or opportunity costs, and Amtrak is not aware of any such cases.<sup>39</sup>

Nor does CN address or attempt to reconcile its “All Avoidable Costs” argument with *Nat’l R. R. Passenger Corp. v. ICC*, 610 F.2d 865, 872 (D.C. Cir. 1979), in which this issue was squarely faced and the Court determined: “Congress mandated use of the term ‘incremental costs,’ which appears to coincide with the Commission’s definition: ‘Avoidable cost in the short run’.”

Instead, CN relies heavily on the *Metro North* case to support its assertion that the ICC and the STB have defined incremental costs as equivalent to “All Avoidable Costs.”<sup>40</sup> But *Metro North* cannot support CN’s redefinition of “incremental costs” because the distinction between

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<sup>39</sup> Amtrak is not aware of any ICC or STB decisions expressly prescribing base compensation for costs construed as beyond short-run costs or defined as capacity or opportunity costs, or any decisions expressly limiting incremental costs to short-run costs or disallowing capacity or opportunity costs.

<sup>40</sup> *National Rail Passenger Corp. Application Under Section 402(a) of the Rail Passenger Service Act*, 1985 ICC LEXIS 318 (ICC decided July 5, 1985)(“*Metro North*”); see CN Opening Brief, 49, 63, 71.

“avoidable costs” and “short run avoidable costs” was not relevant to, or at issue in, the case.<sup>41</sup>

The ICC disposed of two of the issues presented – rent recovery for Amtrak’s use of terminal facilities, and recovery for the cost of retaining additional tracks – without resort to any discussion of incremental cost issues. That left the host railroad’s proposal to charge Amtrak for costs incurred in providing electricity to Amtrak, for Amtrak’s use of certain shared facilities, and for certain services that the host railroad’s employees provided to Amtrak. The ICC agreed with the host on the “avoidability” of some of the host’s proposed charges and disagreed on others, but none of the ICC’s determinations in *Metro North* turned on the distinction between avoidable costs over any time horizon (CN’s view of incremental costs) and short run avoidable costs (the definition adopted in 24308(a)). For example, the ICC determined that two of four switching crews employed by the host railroad at Grand Central Terminal were required only to provide switching services for Amtrak trains.<sup>42</sup> Since the host would *immediately* avoid such switching crew costs once Amtrak stopped operating on its facilities, they would be an incremental cost under either CN’s view or Amtrak’s view.<sup>43</sup> Thus, *Metro North* sheds no light on the incremental cost issues raised by CN’s claim for freight delay costs in this proceeding.<sup>44</sup>

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<sup>41</sup> The primary cost issues in *Metro North* were whether the host could recover rent for Amtrak’s use of Grand Central Terminal facilities or recover the cost for retaining certain additional tracks that the host alleged it would not be required to retain in the absence of Amtrak. The ICC disposed of both questions without ruling on incremental cost issues. The ICC held that the host did not own or lease the Grand Central Terminal facilities for which it wanted to collect rent from Amtrak and did not prove it had the right from the owner (Penn Central) or freight operator (Conrail) to dispose of the additional tracks it said it would not keep in the absence of Amtrak. *Metro North* at \*8-\*20.

<sup>42</sup> *Metro North* at \*22-\*24.

<sup>43</sup> Likewise, the trash removal service provided by the host for Amtrak, metered Grand Central Station electricity, and avoidable timetable printing charges would meet either CN’s or Amtrak’s view of incremental cost in this case. *Metro North* at \*24-\*29.

<sup>44</sup> The same can be said for the cases cited by CN (CN Opening Brief, 48-49, n. 116), which shed no light on the incremental cost issues in the present case. For example, the entire controversy over maintenance of way expenses in *Nat’l R.R. Passenger Corp. & Consol. Rail Corp.—Application Under Section 402(a)* (cont’d)

CN frequently cites the statement from the *Metro North* decision that the incremental cost standard functions to “put[] the dominant user in a position no better or worse than if the minority user had not been present.”<sup>45</sup> That statement was drawn from the ICC’s rulemaking in *Costing Methodologies, N.E. Corridor: Commuter Serv.*, 367 I.C.C. 192 (1983). The ICC explained in *Metro North* that it used the procedures from the *Costing Methodologies* rulemaking (including the requirement that each party develop facility and employee utilization plans) “only as a basis to determine those costs that are avoidable.”<sup>46</sup> The ICC did not apply the dominant/minority paradigm expressed in the *Costing Methodologies* rulemaking in the *Metro North* decision to decide the level of any particular cost sought by the host railroad; thus, the dominant user/minority user dichotomy did not change the outcome on either the “avoidability” or the level of costs addressed in the *Metro North* decision.

Moreover, the ICC would have been wrong to apply the dominant user/minority user dichotomy to award greater incremental cost compensation in *Metro North*. It is well settled (and was uncontested in the *Metro North* case) that incremental costs are something less than fully allocated costs. Congress clearly did *not* intend the incremental costs standard to put the host in a position no worse than if Amtrak were not present since Congress rejected the fully allocated cost standard adopted in part of the *Penn Central* decision.<sup>47</sup>

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*of the Rail Passenger Service Act for an Order Fixing Just Comp.*, 10 I.C.C.2d 863, 888 (1995)(“*Conrail*”) was about how to measure maintenance of way expenses attributable to Amtrak, not whether such expenses were an incremental cost in the first place.

<sup>45</sup> *Metro North* at \*7, see also CN Opening Brief, 5, n. 9, 49, 69, 71 n. 89.

<sup>46</sup> *Metro North* at \*7 and \*8.

<sup>47</sup> The portion of the legislative history to the AIA cited by CN also explicitly provides that the “incremental cost” standard does not include any portion of the host railroad’s common costs. H.R. Conf. Rep. No. 93-587, at 16 (1973). The dominant/minority user dichotomy expressed in *Metro North* seems (cont’d)

CN's reliance on *Metro North* extends well beyond the unsupported (and unsupportable) notion that the ICC applied CN's "avoidable costs over any time horizon" view to the cost issues decided in the case. CN cites *Metro North* for the proposition that "capacity costs" and "forgo[ne] revenues" are incremental costs.<sup>48</sup> But those concepts were never discussed in the case; rather, *Metro North* addressed only host railroad-provided electricity, facilities and services for Amtrak trains, issues not even remotely related to capacity costs or forgone revenue (or freight train delay costs).

CN also relies on the *UP/SP* decision for the proposition that the Board views all costs that a host would not incur but for Amtrak as incremental costs as long as they are "directly traceable" to Amtrak operations.<sup>49</sup> This would include, in CN's view, the cost of infrastructure investments.<sup>50</sup> In the *UP/SP* case, the Board held that Union Pacific Railroad Company and Southern Pacific Transportation Company were required to provide Amtrak with access to their facilities for increased Amtrak "express" (or "premium freight at a premium price") service.<sup>51</sup> The service involved was not existing service or passenger service. And whether any specific cost might meet the statutory definition of incremental costs was not before the Board in that proceeding.<sup>52</sup> Thus, the Board's discussion about the potential bounds of the incremental cost

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to directly contravene this expression of Congressional intent about the meaning of the "incremental cost" standard as well.

<sup>48</sup> CN Opening Brief, 63, n. 165.

<sup>49</sup> CN Opening Brief, 5 n. 9; 49 n. 118; 60 n. 159 (*quoting UP/SP* at 145).

<sup>50</sup> CN Opening Brief, 61 (*quoting UP/SP* at 145 and 155-56 n. 24).

<sup>51</sup> *UP/SP*, 3 S.T.B. at 156. The Board defined "express" service in that proceeding as premium freight service at premium rates that is provided as an adjunct to Amtrak's passenger service. *Id.* at 144.

<sup>52</sup> *Id.* at 147. ("We are not considering in this proceeding the level of compensation that Amtrak must pay to UP ... other than to indicate that, with respect to express service, we intend to apply the standard in a way that permits a host railroad to recover the costs that it incurs due to Amtrak service.") For the same (cont'd)

standard was dicta. Moreover, the *UP/SP* case must be understood within its unique context. It was as much about competition as it was about capacity. The freight railroad industry was concerned that Amtrak planned to “dramatically expand its express service nationwide with the goal of producing close to \$1 billion in annual revenue, compared with only \$3 million in express revenue” that Amtrak earned at the time of the case.<sup>53</sup> As a result, the freight industry was concerned that it would be “forced to subsidize its own competition.”<sup>54</sup> The Board’s admonitions to Amtrak about how it intended to construe the statutory standard were intended to dissuade Amtrak from assuming that it would be able to dramatically expand its express service on host lines without consideration of the competitive impacts.

**5. CN’s Argument That The “Incremental Cost” Standard Must Be Interpreted To Prevent CN From Incurring Any “Uncompensated Losses” From Hosting Amtrak Is Both Unsupported and Invalid**

CN asserts without any support whatsoever that the “RPSA was never intended to compel host railroads to incur uncompensated losses by hosting Amtrak.”<sup>55</sup> CN has failed to prove that

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reason, CN’s reliance on *Application of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. 24308(a) – Springfield Terminal Ry. Co., Boston & Maine Corp., & Portland Term. Co.*, 3 S.T.B. 157 (1998) is misplaced. The Board did not award Guilford any costs that could be construed as beyond short run avoidable costs. *Id.* at 169.

<sup>53</sup> *UP/SP*, 3 S.T.B. at 153.

<sup>54</sup> *Id.* at 155.

<sup>55</sup> CN Opening Brief, 43. CN similarly claims without support that the RPSA “did not impose an obligation on hosts to subsidize Amtrak.” *Id.* Congress enacted legislation in 1981 (the Northeast Rail Service Act) which explicitly prevents any cross-subsidization between intercity passenger rail and commuter rail service. Northeast Rail Service Act of 1981, Pub. L. No. 97-35, § 1138, 95 Stat. 357, 652. Congress has never, by statute or through legislative history, indicated any intent to insulate host railroads from any obligation to subsidize Amtrak’s intercity passenger rail service. *See National R.R. Corp. v. Atchison, Topeka Co.*, 470 U.S. 451, 475-477 (1985) (“Initially, it is far from evident that the railroads have a private contractual right to be free from all obligations to make financial payments to subsidize Amtrak, which is the way the railroads view any payments in excess of Amtrak’s incremental costs. The railroads were unambiguously relieved [in the RPSA] only of burdensome intercity rail responsibilities imposed by the federal and state common carrier regulatory regimes.” The Supreme Court made this finding in a decision overturning the 7<sup>th</sup> Circuit’s determination that the Basic Agreements provided the

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it incurs any “uncompensated losses” as a result of its hosting of Amtrak.<sup>56</sup> Therefore, the underlying predicate for CN’s argument about so-called “uncompensated losses” is unsupported.

Moreover, neither the relevant statutory provisions of the RPSA (as amended) nor the legislative history contains any reference to prohibiting host railroads from incurring any level of “losses,” uncompensated or otherwise. None of the host compensation standards either actually incorporated into Section 24308(a), or considered in *Penn Central* but rejected by Congress, or applicable in other contexts, refers to “losses” as opposed to costs. Substitution of the term “losses” for “costs” by CN is an attempt to obscure the fact that the short-run avoidable costs that constitute incremental costs as adopted in Section 24308(a) are represented by “that amount of maintenance of way, maintenance of equipment, and transportation expenses which could be saved if a particular service were eliminated.”<sup>57</sup> The term “costs” is a limitation on the compensation due under 24308(a) that CN cannot elide simply by equating them with the more expansive term “losses.”

The plain text of 24308(a) also rebuts CN’s claim that Amtrak must compensate host railroads for all of their short and long term “losses” of whatever nature as part of base compensation. The statute explicitly states that any compensation to host railroads above their “incremental costs” of providing services and facilities to Amtrak must be based on “quality of service.” CN acknowledges that some part of the costs they seek to be compensated for as base compensation is attributable to, and varies with, the “quality of service” provided to Amtrak. For

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railroads with a contractual right to be free from having to “finance aspects of [Amtrak] operations that were once part of the railroads’ entire responsibility for the provision of intercity rail passenger service.” *Id.* at 456 (quoting underlying 7<sup>th</sup> Circuit decision).

<sup>56</sup> See Amtrak Opening Brief, 55-70 (discussing CN’s failure to meet burden of proof applicable to its delay cost claim).

<sup>57</sup> *Penn Central*, 342 I.C.C. at 832.

example, CN affirmatively asserts that it is entitled to recover for providing Amtrak with “preference” over its freight transportation, thereby giving Amtrak trains better “quality of service” than if no preference were granted, and that if Amtrak does not want to pay high base compensation, it can simply sign away its right to preference over freight transportation.<sup>58</sup> CN also admits that it sometimes operates its freight network without regard to whether or not those operations cause the “freight train delays” it wants to compel Amtrak to pay for: “Sometimes it is more efficient to adhere to a particular schedule or run a longer train notwithstanding that doing so may increase the likelihood of Amtrak-related delays.”<sup>59</sup> While CN is free (within the constraints of federal law requiring preference) to make such choices, it cannot thereafter be able to shift the cost of those decisions to Amtrak.<sup>60</sup> Since by CN’s own admission at least some part of the “losses” CN claims are related to the quality of service CN provides to Amtrak, the statute is clear that they cannot also be included in the base compensation measured by incremental cost.<sup>61</sup>

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<sup>58</sup> CN Opening Brief, 65, 66 n. 176. CN claims that it incurs “freight delay and interference costs” due to factors other than granting preference, but it does not attempt to quantify which of their claimed “freight delay and interference costs” are due to providing preference and which are not. CN Opening Brief, 66-67.

<sup>59</sup> CN Opening Brief, 70-71.

<sup>60</sup> Forcing Amtrak to pay for the costs of CN’s decisions has the adverse effect of making CN indifferent to whether those decisions increase delays or not, provided the “costs” of those delays are compensated by Amtrak. Vilter/Maga RVS, 21.

<sup>61</sup> Congress mandated that Amtrak would have preference over CN’s freight trains in using CN’s facilities. Congress also mandated that, to the extent that CN can demonstrate that complying with its preference obligation results in material “delay and interference” with its freight trains, CN’s recourse is to seek relief from the Board in a separate proceeding under 49 U.S.C. 24308(c). It is unlikely that Congress would have added this statutory remedy for “effects on freight transportation” in 24308(c), if it had *also* included a requirement for Amtrak to pay for that very same “interference” as part of base compensation in 24308(a).

**6. The Plain Meaning of “Incremental Costs” In 24308(a) Cannot Be Altered By Different Terms Used In Different Statutory Provisions.**

CN claims that the enactment of Section 406 of the RPSA in 1979, which established procedures and standards applicable to a host railroad’s proposed disposal or downgrading of facilities previously used by Amtrak, somehow “re-affirmed” that Congress did not intend to impose any limitations on the time horizon applicable to the interpretation of “incremental costs” under Section 402(a).<sup>62</sup> Section 406 provides no support for CN’s claim.

Section 406 uses the “avoidable cost” standard to define how much Amtrak would have to pay rail carriers for retaining and maintaining facilities that otherwise would be eliminated. This is a completely different context from Section 402(a), which applies to ongoing Amtrak operations using host railroad facilities and services pursuant to the “incremental cost” standard of compensation.<sup>63</sup> The fact that Congress used the term “avoidable costs” in Section 406 does not have any relevance to how the Board should interpret the term “incremental costs” in Section 402(a).

In addition, cases not cited by CN make it clear that even in the abandonment context, concepts like “opportunity costs” are **not** included within the definition of “avoidable costs” but rather are factored into weighing the “public convenience and necessity” determination. For example, in *Missouri Pac. R.R. Co., v. United States*, 625 F.2d 178, 179-82 (8th Cir. 1980), the

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<sup>62</sup> CN Opening Brief, 48.

<sup>63</sup> The legislative history makes it clear that the “avoidable cost” language in Section 406 was used to refer primarily to the ongoing track maintenance costs that Amtrak would have to pay the railroads if it wanted to “rail bank” their tracks on Amtrak routes that had been slated for discontinuance. See Statement of Sen. Dole, 125 CONG. REC. 21767-21768 (August 1, 1979): “... it is important that we have the option of reinstating passenger service on some of the routes now scheduled to be discontinued this fall. My amendment would preserve that option by insuring that passenger track is available in adequate condition should the need for additional service arise. This could be a relatively inexpensive way of maintaining flexibility while rail use is changing...The cost of maintaining this track is a small price to pay to insure that our rail passenger service is adequate to meet the potential demands of the future.”

8th Circuit directed the ICC to consider opportunity costs separate and apart from the “avoidable cost” calculation in its balancing of factors that are relevant to the “public convenience and necessity” in abandonment proceedings.<sup>64</sup>

Finally, the use by Congress of the “avoidable cost” standard in another part of the RPSA provides another indication that Congress could have (but did not) use the avoidable cost language in Section 402(a). Congress also used the term “avoidable cost” in the abandonment statute which was enacted as part of the Regional Rail Reorganization Act of 1973 (the “3-R Act”) which is now codified at 49 U.S.C. § 10904. The 3-R Act was enacted in December 1973 shortly after enactment in November 1973 of the AIA (which incorporated the “incremental cost” standard into Section 402(a)). There is nothing in these other statutes or their legislative history which suggests that the meaning of the term “incremental costs” should be equated with the meaning of the term “avoidable costs” as used in other contexts.

**C. CN’s Economic and Policy Arguments Are Inapplicable to the Amtrak-Host Relationship and Conflict With The Expressed Language and Goals of The RPSA**

CN argues that its theory of “full incremental cost compensation” is warranted by “economic and public policy principles.”<sup>65</sup> Relying on the testimony of Professor Willig, CN argues that “full incremental cost compensation” would force Amtrak to “internalize the costs

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<sup>64</sup> See also *Revision of Abandonment Regulations*, Ex Parte No. 274 (Sub-No. 5), 367 ICC 831, 838 (ICC 1983) where the ICC concluded that opportunity costs are to be considered “as a separate, distinct factor to be balanced with (rather than added to) other factors in the abandonment equation.” Under the Board’s current abandonment regulations, opportunity costs are a factor for the Board to consider but must be submitted separately from avoidable cost evidence. 49 CFR § 1152(p).

<sup>65</sup> CN Opening Brief, 52.

generated by its service demands, and thus to weigh the social costs of its decisions against their social benefits”.<sup>66</sup>

As Amtrak explained in its Opening Brief,<sup>67</sup> CN’s argument that Amtrak must internalize the costs of its service completely disregards and in fact would defeat the statutory goals and public policies of the RPSA.<sup>68</sup> The Amtrak-CN relationship is **not** a market-based commercial relationship and must be understood and evaluated in the context of the “public bargain,” the “incremental cost” limitation and other parameters set forth in the RPSA, and the enumeration by Congress of specific public policies and goals in support of promoting fast and efficient Amtrak passenger rail service.<sup>69</sup> The economic principles of price suppression, capacity constraints, and other similar effects might be relevant to reaching a determination of efficient pricing in a free market context between a willing buyer and a willing seller. But Section 24308(a) is not a

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<sup>66</sup> CN Opening Brief, 52. Professor Willig posited that if Amtrak “internalized the costs it [allegedly] generates – as it would be compelled to do through the process of rate negotiation in an ordinary commercial context – it would think carefully about whether and up to what point the benefits of improved performance are worth the costs, and what are the most efficient way(s) to achieve improved performance.” Willig RVS, 12.

<sup>67</sup> Amtrak Opening Brief, 79.

<sup>68</sup> *Id.* at 79. In *Penn Central*, the ICC noted that in determining whether the proportion of Amtrak’s service on a relevant portion of the Penn Central’s network in relation to freight service was significant enough so that it might be “justifiable” for Amtrak to be responsible for its share of common fixed costs, it would consider “both the profitability” and “the social benefit” of Amtrak’s service on that portion of the network. 342 I.C.C. at 832. This resulted in the ICC adopting different costing standards for the Boston-Washington corridor and the remainder of Penn Central’s network. *Id.* at 833. However, because Congress vitiated the *Penn Central* decision in the AIA of 1973 and established “incremental costs” as the lone standard for determining host compensation under Section 402(a), the *Penn Central* decision’s reliance on the concept of “social benefits” has no relevance today to the interpretation of “incremental costs.”

<sup>69</sup> CN also argues that Amtrak’s alleged failure to internalize its costs will result in Amtrak running “too many trains” and demanding “unreasonable” performance levels. CN Opening Brief, 52; *see also* Willig RVS, 9 (arguing that Amtrak makes “a socially harmful trade-of between passenger and freight service by demanding service levels that are too high.”). These arguments may reflect CN’s desired interpretation of the statutory “incremental cost” standard, but CN’s position has no legal or factual basis. Amtrak is only authorized to operate the number of trains that have been agreed upon with CN in the Operating Agreement and in accordance with Amtrak’s statutory preference rights.

*pricing mechanism*, but instead a compensation requirement that has been defined to include only short-run expenses.

In support of its argument, CN blatantly mischaracterizes testimony submitted by Amtrak's witness, William J. Baumol, in the *Penn Central* litigation. CN claims that Professor Baumol's position was that "a host must 'be able to sell its services at prices sufficiently above its incremental costs' to permit it to cover, overall, the residue of the total costs necessary for the services it provides, plus an acceptable rate of return on its investment."<sup>70</sup> But that sentence of Professor Baumol's testimony did **not** refer to "a host" railroad in a relationship with Amtrak under the RSPA. Rather, he was explicitly referring to "[f]irms operating in free markets,"<sup>71</sup> which he then proceeded to distinguish from host railroads providing services and facilities to Amtrak, stating:

In a non-market arrangement, such as that at issue, a similar pricing principle is appropriate. The pricing arrangement must offer the supplier the opportunity for financial viability, and permit him to achieve it if his performance is reasonably satisfactory.<sup>72</sup>

And to make his meaning perfectly clear, Professor Baumol went on to add:

However, ***it is quite inappropriate for such a level of compensation to be guaranteed and automatic, no matter how poorly the supplier happens to choose to fulfill the terms of his contract.*** ... In the particular case under consideration, there is an additional and highly critical reason why built-in inducements for efficiency are essential. We have here a situation in which the revenues of the purchaser (Amtrak) depend upon the magnitude of the public demand. But public demand in turn is largely determined by the quality of service, which is essentially controlled by the supplier (Penn Central). Thus,

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<sup>70</sup> CN Opening Brief, 64 (quotation marks as in the original).

<sup>71</sup> Statement of William J. Baumol ("Baumol Statement") at 8, filed in *Determination of Compensation under Section 402(a) of the Rail Passenger Service Act of 1970* ("*Penn Central*"), ICC Finance Docket No. 27353 (Sub-No. 1), 342 I.C.C. 820, (1973).

<sup>72</sup> *Id.* at 9 (emphasis in the original).

unless there are some strong provisions for the enforcement of efficiency and quality of service, Amtrak will continue to find itself at the mercy of its supplier.<sup>73</sup>

CN makes the startling claim that “[w]hether a cost can be categorized as “long-run” or “capacity” or “opportunity” is irrelevant to whether it would exist in Amtrak’s absence,” which CN asserts is the “decisive question under the statute.”<sup>74</sup> This turns the inquiry on its head. The decisive question – resolved in this case by reference to the plain language of 24308(a) – is what costs are included within the term “incremental costs.” As *Penn Central* (and later Congress) recognized, including short-run costs produces a different result than long-run costs; as does including perceived effects on transportation rather than costs or expenses. The requirement that such incremental costs must be “due to Amtrak’s services on CN’s lines,” or “caused by Amtrak,” as CN variously formulates it,<sup>75</sup> is not an *expansion* of the types of costs included within base compensation, but instead a *limitation*. That is, the Board must first identify what costs are included within “incremental costs” as adopted by Congress, and then ask if those costs were “caused by Amtrak.” The importance of this limiting factor was explained more specifically in Amtrak’s Opening Brief. For example, the fact that Amtrak does not dispatch its own trains, and CN’s admission that it will sometimes choose to allow delays to its own trains to be caused, means that those delay costs cannot be attributed to Amtrak. Unlike maintenance of way, maintenance equipment, and other transportation expenses that arise whenever and solely because Amtrak operates on CN’s tracks (and are therefore compensable as incremental costs), “freight delay costs” arise because of CN’s scheduling decisions and dispatching actions, and are not therefore “caused by Amtrak” in the sense required.

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<sup>73</sup> *Id.* at 9-10. While Amtrak is not advocating here that the Board adopt any specific portion of the pre-AIA testimony of Professor Baumol, CN’s attempt to mischaracterize his observations must be rejected.

<sup>74</sup> CN Opening Brief, 62.

<sup>75</sup> CN Opening Brief, 43, 63.

In addition, Congress mandated that Amtrak would have preference over CN's freight trains in using CN's facilities. Congress also mandated that, to the extent that CN can demonstrate that complying with its preference obligation results in material "delay and interference" with its freight trains, CN's recourse is to seek relief from the Board in a separate proceeding under 49 U.S.C. 24308(c). It is unlikely that Congress would have added this statutory remedy for "adverse effects" on CN's business in 24308(c), if it had *also* included a requirement for Amtrak to pay for those very same "effects" as part of base compensation in 24308(a).

Finally, requiring Amtrak to pay any "delay and interference costs" as part of CN's base compensation "is economically equivalent to requiring Amtrak to pay full arms-length market prices to induce CN to voluntarily provide Amtrak access to CN's facilities."<sup>76</sup> This is inconsistent (and would defeat) the statutory goals and public policies of the RPSA, which is designed to promote Amtrak's provision of "efficient and effective intercity passenger rail mobility consisting of high quality service that is trip-time competitive with other intercity travel options."<sup>77</sup> CN attempts to rebut this argument by asserting: "CN's definition of incremental costs **generally** falls far short of market price and **generally** does not contain an element of coverage of a railroad's substantial common costs."<sup>78</sup> CN's qualification of this assertion by inserting the term "generally" indicates that this is not always the case, and in fact may not be the

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<sup>76</sup> Frankel RVS, E-14.

<sup>77</sup> 49 U.S.C. § 24101. CN's argument about "sound economic policy" (CN Opening Brief, 52) which may be applicable in a purely commercial relationship also ignores the fact that the Amtrak-CN relationship is bounded by Amtrak's statutory preference rights. As Dr. Frankel concluded that "it is not economically reasonable to attribute to Amtrak [CN's] delay and interference costs" because they "are costs that flow from CN's own operational decisions, in the context of Amtrak's Congressionally granted preference." Frankel RVS, E-8, 9.

<sup>78</sup> CN Opening Brief, 64.

case with the “All Avoidable Costs” compensation CN is demanding of Amtrak, but CN does not provide any further guidance to Amtrak or the Board. To the extent that CN’s broad definition of incremental costs would *sometimes* require Amtrak to pay full arms-length market prices to CN, it should be rejected as contrary to the purposes, goals, and language of the statute.

To the extent that CN believes that an expansion of the base compensation standard is warranted by economic and public policy reasons to cover alleged freight interference, capacity constraints, price suppression, etc., CN’s recourse is with the legislature.<sup>79</sup>

**D. CN’s Expansive Statutory Construction Argument Should Be Rejected Because It Is Well Settled That A Board Order Pursuant To Section 402(a) Does Not Effectuate A Taking Of Private Property**

CN claims that the Board should prescribe the base compensation that CN seeks in order to avoid “serious constitutional concerns” because 24308(a)’s “compulsion of private railroads to host Amtrak is a commandeering of private property and resources that the Constitution does not permit without just compensation” – *i.e.*, that an order entered under 24308(a) constitutes a “taking.”<sup>80</sup>

To begin with, the canon of constitutional avoidance has no place in a takings case. And that is just the first of the several flaws in CN’s argument. CN cites no case for the proposition that the exercise of the Board’s authority to order access and set compensation under 24308(a) constitutes a taking. It ignores caselaw, including *MTA*, that squarely addressed this issue and

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<sup>79</sup> CN Opening Brief, 53. See Frankel RVS, 3 (“Professor Willig appears to disagree with the compensation framework established by Congress, but rather than advocating a legislative expansion of compensation beyond incremental costs, he instead recharacterizes other costs as incremental costs to obtain the same result.”)

<sup>80</sup> CN Opening Brief, 49.

decided that 24308(a) *does not* effectuate a compensable taking.<sup>81</sup> And it does not address or distinguish a century of Supreme Court caselaw holding that the railroad industry is so historically and pervasively regulated that a common carrier has no expectation that it has a “right to exclude” others from its property. Thus, the Board is free to exercise its authority to determine the reasonable compensation due under section 24308(a) without regard to any constitutional concerns.

### **1. The Canon of Constitutional Avoidance Has No Application Here**

The canon of constitutional avoidance, which instructs that courts should, where appropriate, avoid a construction of a statute that would invite a constitutional violation, is not appropriate here. The canon does not apply when the alleged constitutional issue is a takings claim, because (unlike other constitutional violations), there is a built-in remedy for such claims: affected parties have a remedy against the federal government under the Tucker Act.<sup>82</sup> Moreover, executive branch agencies such as the Board are not required to apply the canon of

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<sup>81</sup> *Metro. Transp. Auth. v. I.C.C.*, 792 F.2d 287, 296 (2d Cir. 1986) (“MTA”) (“we agree with Amtrak that proceeding by way of section 402(a) is not a taking”); *see also National Railroad Passenger Corporation Application Under Section 402(a) of the Rail Passenger Service Act*, 1 ICC 2d. 243, 247 (ICC decided Oct. 25, 1984) (concluding that MTA’s claim that section 402(a) violates the Fifth Amendment was without merit); *Application of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. 24308(a)-Union Pac. R.R. Co. & S. Pac. Transportation Co.*, 3 S.T.B. 143 at \*8 (1998) (“UP”) (citing *MTA* for its determination that “the courts have already determined that ‘incremental cost’ compensation, pursuant to RPSA, does not effect a compensable taking under the Fifth Amendment”).

<sup>82</sup> *United States v. Riverside Bayview Homes*, 474 U.S. 121, 127–29 (1985) (“*Bayview*”)(“the possibility that the application of a regulatory program may in some instances result in the taking of individual pieces of property is no justification for the use of narrowing constructions to curtail the program if compensation will in any event be available [under the Tucker Act] in those cases where a taking has occurred”); *see also Presault v. I.C.C.*, 494 U.S. 1, 12 (1990) (“the critical question in this case, therefore, is whether a Tucker Act remedy is available for claims arising out of takings pursuant to the [statute].” The only exception to this rule (in the case of *per se* takings that create “an identifiable class” of claimants that would have takings claims, *Bayview*, 474 U.S. at 128 n. 5), has no application here, where no *per se* taking can be demonstrated and no identifiable “class” of claimants has been alleged to, or can be found to, exist. *Cellco P’ship v. F.C.C.*, 700 F.3d 534, 549 (D.C. Cir. 2012) (“Because regulatory-taking claims require ad hoc, factual inquiries, we have followed the [*Bayview* exception] only in the context of *per se* physical takings.”)

constitutional avoidance in their decision-making process.<sup>83</sup> The Board should reject the argument that constitutional concerns compel it to adopt CN’s interpretation of the term “incremental costs,” and should exercise its statutory jurisdiction to enter 24308(a) orders as it has traditionally done.

**2. An Order Under Section 24308(a) Does Not Constitute A Taking, Regardless of the Amount of Compensation Awarded, Because It Does Not Interfere With Any Cognizable Protected Property Interest of CN**

CN argues that the mandate of Section 24308(a) that CN host Amtrak trains is a taking, or a “commandeering of private property and resources that the Constitution does not permit without just compensation.”<sup>84</sup> The essential element of a taking is the existence of a cognizable protected property interest.<sup>85</sup> But CN does not have (and never had) the protected property interest it claims is at issue here – the “right to exclude Amtrak” from its tracks and facilities.<sup>86</sup>

CN is overlooking the long-standing and well-settled proposition that a party who voluntarily enters into a heavily regulated industry does not possess an inviolable “right to exclude.”<sup>87</sup> “The reason enforceable rights sufficient to support a taking claim cannot arise in such an area is that when a citizen voluntarily enters such an area, the citizen cannot be said to

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<sup>83</sup> See *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) (finding “no precedent” for applying the canon of constitutional avoidance “to limit the scope of authorized executive action”).

<sup>84</sup> CN Opening Brief, 49.

<sup>85</sup> To establish a violation of the takings clause, a party must first show that it has a property interest protected by the Fifth Amendment. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000–01 (1984).

<sup>86</sup> CN Opening Brief, 50 (“Section 402 of the RPSA authorizes the Board, and Amtrak in this proceeding has asked the Board, to issue an order overriding the most fundamental element of CN’s bundle of private property rights – its right to exclude a stranger – Amtrak, a Government corporation – from its physical property.”)

<sup>87</sup> *Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 216 (Fed. Cir. 1993) (“enforceable rights sufficient to support a taking claim against the United States cannot arise in an area voluntarily entered into and one which, from the start, is subject to pervasive Government control.”).

possess the right to exclude ... and the reason the citizen cannot be said to possess ‘the right to exclude’ is that the citizen is in an area subject to government control.”<sup>88</sup>

This bedrock principle has been repeatedly applied specifically in the railroad context, where regulation has traditionally been “among the most pervasive and comprehensive of federal regulatory schemes.”<sup>89</sup> The right of railroads such as CN to possession, use and disposal of its property has *always* been subject to a litany of restrictions under federal law and agency regulations, including not only the obligation to accommodate passenger trains on its tracks, but also in other contexts as well – for example, in Board orders granting terminal trackage rights or authorizing reciprocal switching or directed service arrangements which would enable other freight rail carriers to operate over CN’s tracks;<sup>90</sup> orders requiring CN to grant trackage rights over its property to other freight rail operators as a condition of a merger or other transaction;<sup>91</sup> orders approving the construction or abandonment of rail lines on its property;<sup>92</sup> and orders revoking trackage and operating easement rights granted to other railroads.<sup>93</sup> Thus, “[t]he rights

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<sup>88</sup> *Id.* See e.g., *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1075 (Fed. Cir. 1994) (finding no taking where the aggrieved party, operating in the highly regulated banking industry, “did not possess the right to exclude others”, thus holding “[a]nd the reason the Bank did not possess the right to exclude others—most notably the Comptroller—was that the Bank was a member of a highly regulated industry”); *Piszel v. United States*, 833 F.3d 1366, 1374 (Fed. Cir. 2016), *cert. denied*, 138 S. Ct. 85 (2017) (“Because Mr. Piszel voluntarily entered into a highly regulated area, he lacked a right to exclude the government from his property”).

<sup>89</sup> *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981).

<sup>90</sup> 49 U.S.C. § 11102.

<sup>91</sup> 49 U.S.C. § 11324.

<sup>92</sup> 49 U.S.C. § 10901.

<sup>93</sup> 49 U.S.C. § 10903.

of the owners of railroads have never been considered absolute; they are qualified by consideration of the public's interest in continued essential rail service.”<sup>94</sup>

As a common carrier, CN is obligated to provide service to shippers upon reasonable request, and thus has different rights and obligations than a private landowner.<sup>95</sup> This restraint on railroad property usage has included requiring passenger trains to have access to their trackage – a requirement that dates back to the 19<sup>th</sup> century. The original Interstate Commerce Act of 1887 restricted a railroad’s “right to exclude” passenger trains from using its tracks, providing that “[e]very common carrier subject to the provisions of this act shall according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines.”<sup>96</sup>

Thus, when the RSPA was enacted, CN had already been a participant in a heavily regulated industry with no reasonable expectation that it had any power to “exclude” other railroads, including passenger trains, from use of its property. And when the RSPA was enacted, Amtrak became the operator of passenger train service with access to CN’s facilities and services. Such access was, in fact, an essential and inseparable part of the “public bargain.” “To obtain relief from their common carrier obligations ... the railroads had to agree to several

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<sup>94</sup> *Lehigh & New England Ry. Co. v. I. C. C.*, 540 F.2d 71, 82–83 (3d Cir. 1976) (collecting cases).

<sup>95</sup> 49 U.S.C. § 11101(a) (“A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request.”).

<sup>96</sup> The Interstate Commerce Act of 1887, § 3, *available at* <https://www.ourdocuments.gov/doc.php?flash=false&doc=49&page=transcript> (last visited March 1, 2018).

conditions,” including providing “Amtrak with the use of tracks, other facilities, and services at rates to be agreed upon by the parties or, in the event of disagreement, to be set by the ICC.”<sup>97</sup>

All of this is why a court has already addressed precisely the same argument raised by CN here, and concluded that “a proceeding by way of section 402(a) [now 24308(a)] is not a taking.”<sup>98</sup> The court found that the situation fell squarely within that line of cases holding that no taking occurs when the government directs one railroad to facilitate service by another railroad or otherwise imposes restrictions on the use of railroad property rights in order to protect the public interest in rail service:

Since *Munn v. Illinois*, 94 U.S. (4 Otto) 113, 24 L.Ed. 77 (1876), railroad companies have been held subject to regulation so that, for example, a Commission order directing one carrier to receive and transport the cars of a second carrier over its terminal is not a taking, *Pennsylvania Co. v. United States*, 236 U.S. 351, 369-72, 35 S.Ct. 370, 376-77, 59 L.Ed. 616 (1915); requiring railroads to disgorge half of their income in excess of 6% of the value of their property is not a taking, *Dayton-Goose Creek Railway Co. v. United States*, 263 U.S. 456, 484, 44 S.Ct. 169, 174, 68 L.Ed. 388 (1924); and imposing a ceiling on particular rates is not a taking so long as it does not cause the railroad to lose money on its overall business, *Baltimore & Ohio Railroad Co. v. United States*, 345 U.S. 146, 148, 73 S.Ct. 592, 593, 97 L.Ed. 912 (1953).<sup>99</sup>

Against this backdrop of extensive regulation, and the specific holding in *MTA*, CN cannot credibly claim that it has the requisite protected property interest that would support a takings claim.

### **3. CN Cannot Avoid The Application of *MTA* and Other Long-Standing Precedent By Putting a “Per Se” Label on its Claim**

CN does not cite or attempt to distinguish the controlling precedents discussed above. Instead, CN asks the Board to avoid them entirely by framing the Board’s exercise of its

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<sup>97</sup> *Atchison*, 470 U.S. at 455, 468.

<sup>98</sup> *MTA*, 792 F.2d at 296.

<sup>99</sup> *MTA*, 792 F.2d at 296-97.

statutory jurisdiction under 24308(a) as a *per se* taking – meaning one where the government has effectuated a permanent physical occupation of CN’s property.<sup>100</sup> CN’s argument is meritless.

Generally, a law or ordinance granting access rights and setting compensation is appropriately scrutinized as a “regulatory taking,”<sup>101</sup> which involves weighing three primary factors: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.<sup>102</sup> In cases where the third factor – the character of the governmental action – amounts to a “permanent physical occupation” of the private property, courts may hold that there is a *per se* taking without inquiry into any other factors.<sup>103</sup> But when presented with the question whether a statutory scheme effectuates a taking, courts strongly disfavor applying *per se* scrutiny, however, only applying it in “narrow circumstances.”<sup>104</sup>

There are at least three fundamental reasons why CN cannot make out a “per se” taking claim here. *First*, there can be no taking claim *of any kind* – whether labelled regulatory or *per se* – without the requisite protected property interest, and as discussed above CN simply does not have such a protected property interest in excluding Amtrak from its facilities. *Second*, the *per se* approach does not apply to “a regulatory action in a highly regulated industry in which the

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<sup>100</sup> CN Opening Brief, 50.

<sup>101</sup> *MTA*, 792 F.2d at 297.

<sup>102</sup> *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

<sup>103</sup> *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (“government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster – and that such [taking] may be compensable....”); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35 (1982) (finding *per se* violation where the government action amounted to a “permanent physical occupation of property”).

<sup>104</sup> *Loretto*, 458 U.S. at 441. *See also Lost Tree Vill. Corp. v. United States*, 115 Fed. Cl. 219, 228 (2014), *aff’d*, 787 F.3d 1111 (Fed. Cir. 2015) (“per se rules are disfavored in takings law”).

government took actions that reasonably should have been expected,”<sup>105</sup> such as the 24308(a) order at issue here and in *MTA*. And third, presented with the same question, the *MTA* court concluded that claims relating to 24308(a) orders were (if a taking at all) properly characterized as regulatory takings. And that holding makes sense; 24308(a) orders do not accomplish any kind of “permanent physical occupation” of CN’s property akin to the television equipment affixed to the private building in *Loretto*.

CN, for its part, does not cite a single case in which the *per se* label has been applied in the railroad regulatory context. Instead, it borrows heavily from cases involving other industries and inapposite facts. But the aggrieved parties in the cases relied on by CN were not railroads operating in a heavily regulated industry, such CN; they were private citizens with no historically-rooted expectation that their property would be commandeered for government purposes. CN attempts to elide this fact by citing to *Presault v. U.S.* for the proposition that “the property of railroads such as CN” is protected by takings law.<sup>106</sup> That is a misleading characterization of *Presault*. The property owners in *Presault* were not a “railroad[] such as CN,” but private citizens who woke up one day to find a heavily-travelled bike and walking path laid down on their property 60 feet from their front door, over a former railroad easement that had not been used since before they purchased the property. The issue in *Presault* was “the question of the compensability of state-defined rights of *private citizens who own land subject to*

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<sup>105</sup> *Am. Cont’l Corp. v. United States*, 22 Cl. Ct. 692, 701 (1991) (“the *Loretto per se* approach should not facilely be extended in cases where the historically rooted expectations that underlie the *Loretto* decision do not remotely apply.”).

<sup>106</sup> *Presault v. U.S.*, 100 F.3d 1525, 1537-40 (Fed. Cir. 1996)(emphasis added).

*an easement for railroad use,”*<sup>107</sup> not, as CN would have it, “the property of railroads such as CN.”

In sum, CN cannot distinguish, and does not present a persuasive case for ignoring, the settled authority holding that an order under Section 24308(a) does not constitute a taking and that CN does not have a protected property interest in “excluding Amtrak” from using its tracks and facilities under such an order. The Board should exercise its unfettered discretion to determine “reasonable” compensation in this case, without regard to the takings argument raised by CN.

**E. The Board Must Interpret The Statutory Penalty Provision To Effectuate Its Intended Purpose And Ignore CN’s Unsupported Theory That It Is Entitled To A Guaranteed Minimum Level of “Net” Compensation**

Amtrak has explained that the Board should not prescribe any lookback provision in Appendix V of the new Operating Agreement because inclusion of a lookback (in any effective incentive and penalty system) would erase penalties that are incurred by the host railroad during periods of sustained untimely performance. This would contravene the statutory requirement to have a penalty for untimely performance in the Operating Agreement.<sup>108</sup>

CN argues that the mandatory penalty for untimely performance does not apply if it would cause CN’s “net” compensation for hosting Amtrak to fall below its base compensation, even if CN *never* meets the baseline level of performance specified in the Operating Agreement. CN’s “net” compensation theory is based on its view that the base compensation it receives from Amtrak under the “incremental cost” standard *plus* incentive payments *minus* penalties can never

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<sup>107</sup> *Id.* at 1552.

<sup>108</sup> Amtrak Opening Brief, 16, 20-21, 25, App. A-2. In fact, the inclusion of a lookback provision vitiates the protections of the statutory penalty provision when it makes the most sense to assess penalties – during periods of sustained poor performance by the host railroad. *Vilter VS*, 2.

be lower than its base compensation.<sup>109</sup> CN never specifies over what specific time period this “net” compensation calculation (which is not mentioned in the statute or its legislative history) is supposed to be evaluated. Indeed, if CN’s argument is taken literally then one would have to net the penalties from the incentives paid over the entire life of the contract, or perhaps the entire life of the relationship between Amtrak and CN.<sup>110</sup>

CN’s argument in support of the lookback provision is based upon (1) the lack of any specific reference to reducing host compensation in the statutory penalty provision, (2) the legislative history of the AIA (which was enacted 8 years before the statutory penalty provision) and (3) CN’s claim that the statutory penalty provision was intended only to codify a contemporaneous practice of including penalty provisions in voluntary Amtrak/host operating agreements.<sup>111</sup> None of these arguments provides any support for CN’s contention that the inclusion of a lookback provision is required as a matter of law.

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<sup>109</sup> See, e.g., CN Opening Brief, 5,6,11, 21, 45.

<sup>110</sup> In urging the Board to adopt the current lookback provision in the Amtrak/CN Operating Agreement that was voluntarily agreed upon by Amtrak and CN, CN argues that its “net” overall compensation from hosting Amtrak cannot be lower than the base compensation it receives from Amtrak during any 12-month period. However, the 12-month time period set forth in the existing lookback provision voluntarily agreed to by Amtrak and CN has no basis in the statute, and CN never identifies the supposed parameters of its “net” compensation theory.

<sup>111</sup> CN Opening Brief, 45, 55 (statutory silence), 4, 46-47 (AIA legislative history), 54-55 (codification). CN’s suggestion that Amtrak opposes the lookback in order to increase the punitive effect of its penalty proposal (CN Opening Brief, 56) ignores the fact that Amtrak has proposed to cap penalties under its delay-based system once CN performance reaches a maximum level of penalty minutes where CN would no longer perceive any cost savings from providing Amtrak with even worse service. Sacks VS, 13, 18.

**1. CN’s Interpretation of the Statutory Interplay Between The Mandatory Penalty Provision And The Incremental Cost Standard Would Nullify The Purpose of the Penalty Provision**

Section 24308(a)(1) mandates that Amtrak’s agreements with host railroads “shall include a penalty for untimely performance.”<sup>112</sup> Congress enacted this provision in 1981, in response to ongoing concerns about poor performance by host railroads that handle Amtrak trains over their networks.<sup>113</sup> The parties agree that the next Operating Agreement should include a penalty provision (although they have different views about its precise design). CN argues, however, that the inclusion of a “lookback” provision is required as a matter of law to ensure that CN never pays penalties that would reduce its overall compensation for hosting Amtrak to an amount less than its “incremental costs” – at least during a random 12-month period -- under Section 24308(a)(2)(B).<sup>114</sup>

The statutory text of Section 24308(a)(2)(B) provides no support for CN’s position. It does not state or even imply that “incremental cost” compensation is a guaranteed minimum level of compensation for hosting Amtrak. Instead, it specifically provides that “whether, and the extent to which” CN’s compensation for costs that it incurs in providing services to Amtrak, or from Amtrak’s use of its facilities, may *exceed* “incremental costs” depends (in large part) on the quality of service provided by CN. The “incremental costs” provision makes no reference to any “net” compensation determination, and says nothing about whether a host railroad could receive overall compensation that is *less than* its “incremental costs” for providing poor service.

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<sup>112</sup> 49 U.S.C. § 24308(a)(1).

<sup>113</sup> *Omnibus Budget Reconciliation Act of 1981* P.L. 97-35, § 1172, 95 Stat. 688 (1981)(currently codified as amended at 49 U.S.C. § 24101(c)(4)).

<sup>114</sup> 49 U.S.C. § 24308(a)(2)(B).

In 1981, Congress amended the RPSA to include the mandatory penalty provision for untimely performance. CN argues that the lack of any reference in the statutory penalty provision to its impact on the “incremental cost” standard means that CN is guaranteed a minimum level of compensation based on its incremental costs.<sup>115</sup> On the contrary, the lack of any such reference in the 1981 amendment corroborates the fact that Congress did not intend to offset the penalty provision against any such “net” compensation determination.

As Amtrak has demonstrated, the objective of the statutory penalty provision would be negated if a lookback provision is adopted because it would allow CN to avoid incurring any penalties during periods of sustained poor performance. This would lead to anomalous and incongruous results that directly contravene the plain language of the statutory penalty for untimely performance. The Board must interpret the statutory penalty requirement in a manner which effectuates its intended purpose and reject CN’s unsupported negative inferences about the statutory interplay between the penalty provision and the “incremental cost” provision.<sup>116</sup>

## **2. The Legislative History of the AIA Fails To Provide Any Support For CN’s Contention That It Is Entitled To A Guaranteed Minimum Level of “Net” Compensation**

The legislative history of the penalty and “incremental cost” provisions also provides no support for CN’s argument in favor of the lookback provision. There is no reference in the 1981 penalty amendment’s legislative history reflecting any Congressional intent to preserve any

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<sup>115</sup> CN Opening Brief, 55.

<sup>116</sup> *King v. Burwell*, 135 S. Ct. 2480, 2493 (2015) (quoting *New York State Dept. of Social Servs. v. Dublino*, 413 U. S. 405, 419-420 (1973) (“We cannot interpret federal statutes to negate their own stated purposes.”)).

minimum level of base compensation regardless of performance, much less any guaranteed level of “net” compensation for hosting Amtrak.<sup>117</sup>

CN asserts that a portion of the legislative history of the AIA of 1973 shows that Congress intended “‘incremental cost’ to be ‘a floor’ – an absolute minimum – for the compensation Amtrak must pay hosts.”<sup>118</sup> That is CN’s characterization of the legislative history, and it is not an accurate one; the statement cited by CN makes no reference at all to an “absolute minimum.” Rather, the actual legislative history of the AIA of 1973 is much more circumscribed than CN claims. The House Report accompanying the initial bill that was approved by the House relating to Amtrak contains the following language: “The committee’s amendment of section 402(a) is intended to provide the following: (1) a floor for the compensation to be paid a railroad for services performed; and (2) a recognition that the higher the quality of service, the greater the compensation to be received.” The context makes clear that use of the term “floor” is interchangeable with the concept of “base” or “basic” compensation; *i.e.*, a starting point upon which additional payments based on quality of service could be added, rather than an inviolable minimum.

Other legislative history from the AIA makes this clear. For example, Representative Dingell’s comments on the function of the incremental cost provision show that it was designed to be a **ceiling** on base compensation for providing services to Amtrak absent consideration of the quality of service provided by the host:

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<sup>117</sup> We can only presume that Congress was aware of the “incremental cost” provision enacted in 1973 (which was amended in 1978 to include facilities) when it enacted the penalty provision in 1981. The legislative history of the 1981 amendment contains no discussion of any impact that the penalty requirement would have on the “incremental cost” standard.

<sup>118</sup> CN Opening Brief, 47.

Mr. Speaker, I rise to create legislative history. As a member of the managers on the part of the House, I would refer my colleagues to [the section of the Conference Report pertaining to the compensation issue and the Penn Central decision]. The function of the language referred to is set out clearly, and that is that the conferees intend, that the railroads shall be paid above avoidable costs only on the basis of quality of service afforded.<sup>119</sup>

This is consistent with the overarching concern of Congress with the hoped-for effect of the new legislation on quality of service. During the Senate floor debate on the amended legislation eventually approved by Congress, Senator Magnuson discussed the pervasive importance of quality of service:

[I]f there is any theme which runs throughout the Amtrak Act of 1973, it is a consistent emphasis on the need for quality of service. Almost every provision in this act springs from the desire to see higher quality rail passenger service in the United States.<sup>120</sup>

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<sup>119</sup> 119 CONG. REC. 34481 (daily ed. Oct. 17, 1973).

<sup>120</sup> 119 CONG. REC. 34591 (daily ed. Oct. 18, 1973). During floor debate in the House on October 17, 1973, Chairman Staggers noted the following about quality of service and federal subsidies to Amtrak:

The House bill contained a provision which would direct the Interstate Commerce Commission – in fixing the just and reasonable compensation Amtrak must pay to railroads providing it with passenger service – that the quality of service those railroads provide must be considered. This is important if we are to hold down the annual subsidies Congress grants to Amtrak.

119 CONG. REC. 34480 (daily ed. Oct. 17, 1973).

On the same day, Representative Harvey offered the following comments on quality service and federal subsidies:

All in all, the conference agreement goes a long way to help Amtrak solve many of the problems that have plagued it during its first 3 years, without increasing the Federal expenditure that is required. The agreement will assist in the alleviation of such difficulties as poor track quality that requires slow speeds, and priority of freight service over passenger service on shared lines. Therefore, it is a positive step towards the improvement of the passenger rail system that serves the vital transportation needs of our Nation's citizens.

119 CONG. REC. 34480 (daily ed. Oct. 17, 1973).

(cont'd)

Given all of the concern expressed by Congress regarding quality of service considerations, it would be a mistake to seize on the “floor” reference in the House Report (as CN has) and conclude that the legislative history of the AIA intended to establish a guaranteed minimum level of host compensation regardless of performance.

**3. CN Fails To Cite Any Agency Precedent Supporting Its Interpretation of the Interplay Between The Mandatory Penalty And The Incremental Cost Standard**

None of the ICC decisions cited by CN in support of its lookback argument discuss the interplay between the “incremental cost” provision and the mandatory penalty provision and therefore offer no support for CN’s position on the lookback provision.<sup>121</sup> Two of the three cited decisions were issued before the enactment of the mandatory penalty provision in 1981 and therefore could not have ruled on this issue in any event. The only agency decision cited by CN in support of its lookback argument issued after 1981 is the ICC’s 1985 decision in the *Metro North* case.<sup>122</sup> However, the question of whether to prescribe a lookback provision was not at

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(cont’d)

During the floor debate in the House on September 6, 1973, Representative Harvey said the following about quality of Amtrak service:

Another basic question which has caused considerable concern and debate here in Congress and within the industry deals with the quality of service which Amtrak has been receiving from the railroads. Obviously [Amtrak] can only perform as well as the railroads with which it contracts will allow it to. Although [Amtrak] can spend money for all kinds of equipment and train personnel to render better service to the passengers, the trains must operate over the tracks of the railroads which desperately wanted to get rid of passenger service in the first place. On-time performance and smoothness of the ride depend upon the railroads.

119 CONG. REC. 28746, House Debate on H.R. 8351 (Sept. 6, 1973).

<sup>121</sup> CN Opening Brief, 54 n. 135 (citing *Nat’l R.R. Passenger Corp. & Union Pac. R.R. Co. Use of Tracks & Facilities & Establishment of Just Comp.*, 348 I.C.C. 926-927 (1977) (“*Union Pacific*”) and *Amtrak & Texas & Pac. Ry. Co., Use of Tracks & Facilities & Establishment of Just Comp.*, 348 I.C.C. 645, 672-673 (1976) (“*Texas & Pacific*”); CN Opening Brief, 55 (citing the ICC’s 1985 decision in *Metro North*).

<sup>122</sup> CN Opening Brief, 55.

issue in that case. Instead, in dicta, the ICC purported to describe the rationale for the lookback provision that had been voluntarily agreed to by Amtrak and the host railroad. The ICC’s passing statement has no bearing on the issue of whether a lookback provision must be prescribed by the Board in this proceeding.<sup>123</sup>

**4. CN’s Argument That The Mandatory Penalty Provision Merely Codified A Prevailing Contractual Practice Of Incorporating Incentive And Penalty Provisions Is Without Merit**

CN’s argument that the 1981 enactment of the mandatory penalty provision was intended solely to codify a contemporaneous practice of voluntarily incorporating penalty (and incentive) provisions in Amtrak/host operating agreements is pure conjecture. The mandatory penalty provision does not say so; and CN cites no legislative history or case law supporting its claim.<sup>124</sup> In any event, the statutory penalty provision did not codify the lookback provision, so there is no support for CN’s argument that it must remain sacrosanct in all future agreements.

**5. CN’s Proposed “Reopener” Provision Fails To Address Amtrak’s Concerns About The Lookback Provision**

CN claims that it can address Amtrak’s concerns about how the lookback provision would nullify penalties during sustained periods of poor performance through its proposed “reopener” provision.<sup>125</sup> [REDACTED]

[REDACTED]

[REDACTED]

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<sup>123</sup> Whatever Amtrak may have agreed to do in another host agreement (and the reasons therefor) when the issue is *not* contested should have no bearing on the issue when it is contested in a different proceeding before the Board.

<sup>124</sup> The cases cited by CN (CN Opening Brief, 54 n. 135) merely reflect that contemporaneous agreements contained voluntary penalty and incentive provisions, but are not offered by CN as support for its codification theory.

<sup>125</sup> CN Opening Brief, 87-88.



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**III. CN Cannot Overcome The Significant Deficiencies Of Using SRS And Various Costing Estimates As A Substitute For Actually Proving It Incurred Any Freight Train “Delay” Costs**

In addition to the legal deficiencies of CN’s claim for freight delay costs, the Board should reject CN’s claim for millions of dollars in additional base compensation based entirely on deviations reflected in SRS between CN’s actual freight train arrival times and CN’s phantom internal freight schedules. CN uses flawed methodologies to attribute the unreliable “delay” minutes reflected in SRS to Amtrak, and then employs various costing estimates to calculate the purported costs associated with such delay minutes, despite the lack of any evidence that CN incurred any additional costs as a result of any schedule deviation that could reasonably be attributed to Amtrak. For the reasons highlighted below, CN’s proposal to use SRS and various costing estimates to measure and then charge Amtrak for purported freight train “delay” costs is arbitrary and capricious, inequitable and rife for potential abuse.

**A. The Board Must Reject CN's Costing Estimates Because CN Has Failed To Prove It Incurred Any Additional Costs From Schedule Deviations That It Blames On Amtrak**

CN's Opening Brief complains that Amtrak is being unreasonable in rejecting CN's proposed delay costing estimates and methodologies.<sup>129</sup> But CN's complaint puts the cart before the horse. Before the Board should entertain the propriety and reliability of the methodologies and tools used by CN to estimate the purported freight delay costs that it seeks to charge Amtrak, CN first must prove the "fact of injury"; *i.e.*, that it actually incurred any such costs as a result of Amtrak's presence on its tracks.<sup>130</sup> This CN has failed to do.

In a situation where a freight train is "scheduled" by CN to arrive at a destination in 12 hours, but in order to avoid an Amtrak train CN waits in a siding for 10 minutes, and then incurs 2 hours of delay having nothing to do with Amtrak, in what sense can the "delay" attributable to Amtrak be said to have caused CN harm, much less actual costs? CN never directly addresses this important question. In cases where it is beyond dispute that Amtrak's presence imposes an actual cost that must be borne by the host railroad – for example, in the case of additional maintenance of way costs, extra equipment provided to Amtrak, and the other truly incremental cost categories contained in the current Operating Agreement – it may be logical and acceptable to simplify the process by accounting for the known costs and extrapolating from them through reliable modeling or other methodologies. But here Amtrak disputes that CN has incurred, or logically would incur, any cost at all due to Amtrak's "interference" with CN's freight trains, and

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<sup>129</sup> CN Opening Brief, 107-109.

<sup>130</sup> See *McCarty Farms, Inc., et al.*, 2 S.T.B. 460 n. 81 (1997) (rejecting BN's proposed appraisal method to estimate the reasonable value of an easement BN asserted it was owed when the Board found that as a threshold matter, "BN has not submitted evidence indicating that any cost was incurred in obtaining the easements or that it pays a fee for the continued use of the properties"); *Arizona Pub. Serv. Co. & PacifiCorp*, 2 S.T.B. 367 at \*9-10 (1997) (noting that cost estimates are not included in SAC cases when the claiming party failed to demonstrate that it "ever incurred those costs").

the burden thus falls on CN to establish the fact of injury before it may estimate or model the amount of injury. This CN has singularly failed to do.<sup>131</sup>

CN refers to the Morehouse and Murray Verified Statements, but neither of these establishes that any singular incident of “interference” by Amtrak with CN’s freight trains has resulted in any expense to CN. These witnesses purport to describe how, *in the aggregate*, Amtrak’s very presence on CN’s tracks constitutes an interference with CN’s preferred operation of its freight business. But that alleged effect on CN’s business operations is not a “cost” or “expense” compensable under the definition of incremental costs; and CN has failed to provide any proof of costs actually expended to the Board. To the extent that CN complains about the aggregate effects of Amtrak’s presence on CN’s lines, its recourse is either to seek relief from its preference obligations under 24308(c), or to seek to change the law which permits Amtrak to operate on CN’s tracks in exchange for reimbursing CN for its actual additional costs that CN incurs in providing facilities and services to Amtrak. CN has failed to satisfy this threshold requirement and the Board need not evaluate the propriety of any delay costing estimates and methodologies submitted by CN.<sup>132</sup>

**B. SRS’s Measurement Of Freight Train “Delays” Is A Fiction Based On An Arbitrary And Shifting Baseline**

As discussed in Amtrak’s Opening Brief, CN has failed to establish that CN’s trains incur delays as a result of Amtrak trains. That is because CN’s concept of a “delay” entails a failure to

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<sup>131</sup> See Amtrak Opening Brief, 55-57 (“CN has not entered into the record a single freight train “schedule” against which delays caused by Amtrak allegedly occurred, or a single document showing that it incurred or paid any actual out-of-pocket expense as a result of any such delays”).

<sup>132</sup> See, e.g., *Nat’l R.R. Pass. Corp. & Consol. Rail Corp. – Application Under Section 402(a) of the Rail Passenger Serv. Act for an Order Fixing Just Comp.*, 10 I.C.C. 2d 863, 871 (I.C.C. Dec. 29, 1995) (“*Conrail*”) (rejecting a proposed MOW costing methodology offered by the host railroad (the so-called “Willig Factor”) when the underlying “basic assumptions” are “plainly incorrect.”).

meet a baseline schedule, but the schedules against which CN measures purported delays are arbitrary, subject to frequent change, and are set at the whim of CN. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

CN nonetheless claims that these opaque, inconsistent, and ever-changing internal freight schedules should be trusted as a “baseline” to measure deviations (or “delays”) that allegedly cause CN to incur costs that CN would like to shift to Amtrak. This is a dangerous proposition that the Board must reject.

CN tries to downplay the fact that its internal freight schedules are opaque, arbitrary and subject to frequent modifications. Instead, CN contends that regardless of changes that may be made to a CN freight train’s schedule, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>134</sup> But there is no evidence of this in the record, and it is contradicted by the evidence CN did submit.<sup>135</sup>

[REDACTED]

[REDACTED]

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<sup>133</sup> Amtrak Opening Brief, 57-60.

<sup>134</sup> CN Opening Brief, A-18.

<sup>135</sup> [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

*Second*, CN fails to account for the fact that its freight train schedules are [REDACTED]

[REDACTED]

*Third*,

[REDACTED]

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<sup>136</sup> CN states, without any supporting evidence, that “[t]he required time to travel between individual points is well established.” CN Opening Brief, A-18. CN has produced no evidence or supporting documentation explaining how these travel times are established, verified or adjusted for factors that are likely to impact the anticipated pure run time of its freight trains (such as the number and type of locomotives and cars on each trains and whether the cars are loaded or empty).

<sup>137</sup> Vilter/Maga RVS, Exh. 3 (excerpt from Krueger Dep. 299:12-25).

<sup>138</sup> [REDACTED]

<sup>139</sup> Vilter/Maga RVS, Exh. 16 (excerpt from Kuxmann Dep. 56:2-5)

<sup>140</sup> CN Opening Brief, A-18.



**C. CN Has Not Demonstrated That SRS Is A Reliable System For Measuring And Charging “Delays” To Amtrak**

While CN’s opening brief and witness statements tout SRS as a necessary business tool that helps it manage and streamline its network traffic,<sup>146</sup> CN does little to address Amtrak’s primary concern with SRS – that SRS cannot be used with any degree of reliability to measure and assign responsibility for the causes of “delays” to CN freight trains. If SRS cannot be used to reliably account for the cause or duration of purported delays to CN freight trains, it cannot be used as a system for charging Amtrak for the purported costs associated with such delays that CN seeks to attribute to Amtrak.<sup>147</sup>

CN urges the Board to view SRS as a suitable tool to quantify and assign responsibility for delays to its trains simply because SRS was designed to manage rail traffic.<sup>148</sup> [REDACTED]

[REDACTED]

[REDACTED] But there is nothing about the design or structure of SRS that ensures it can be used reliably to measure and assign responsibility and causes to explain *why* the train took a certain amount of time to travel from reporting point A to reporting point B, or which factors should be responsible for which proportion of any schedule deviation reflected in SRS.

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<sup>146</sup> CN Opening Brief, 93-97.

<sup>147</sup> This is particularly important given the magnitude of the alleged “delay” costs that CN seeks to charge Amtrak based on SRS data.

<sup>148</sup> CN Opening Brief, 93-95.

<sup>149</sup> [REDACTED]



SRS is not a reliable or proven system for recording delay minutes that can be reasonably attributed to Amtrak – instead, SRS is an unreliable, error prone, and highly subjective system for these purposes.<sup>155</sup> CN’s attempt to retrofit SRS for the purpose of tracking freight train delays that CN seeks to attribute to Amtrak (a purpose for which it was not intended) should be rejected by the Board.

**D. CN’s Assertion That SRS And Amtrak’s eDR System Have Similar Characteristics Is Both Overstated And Inapplicable**

Finally, CN claims that SRS has characteristics similar to the electronic delay reporting (“eDR”) system used by Amtrak for measuring and determining responsibility for delays to Amtrak trains. On the basis of these allegedly similar characteristics, CN argues that SRS should be reliable enough to use for measuring and determining responsibility for delays to CN freight trains. CN’s analogy is both overstated and inapplicable for a number of reasons.

*First*, and perhaps most significantly, delays in the eDR system are measured against the pure run time (“PRT”) that has been agreed upon by Amtrak and CN and that is reflected in the schedule skeleton in the Operating Agreement for each relevant segment of each Amtrak train that operates over CN – a schedule which is agreed to by both parties, remains unchanged without the agreement of both parties, and published so that it is transparent to all.<sup>156</sup> Although

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<sup>155</sup>

[REDACTED]

<sup>156</sup> The Amtrak conductor is prompted to enter a delay code on a handheld device any time there is a deviation between the PRT and the actual run time of the Amtrak train in any given segment.

CN asserts that the PRT's in certain Amtrak schedules need to be revised (which Amtrak disputes), there is no ambiguity or uncertainty about how delays are measured or their significance under the Amtrak system.<sup>157</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

*Second*, Amtrak's eDR system records the "direct cause" of a delay, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

*Third*, when an Amtrak conductor records a delay in eDR, the conductor is recording the delay in real time, as he or she is observing the proximate cause of that delay from their position on the train and informed by other sources of relevant information.<sup>159</sup> [REDACTED]

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<sup>157</sup> In other words, both parties recognize that any deviation between the PRT and the actual run time of an Amtrak train in any given segment represents a delay that should be attributed to one of three causes for purposes of the incentive/penalty system: Host Responsible Delays, Amtrak Delays and Third Party Delays.

<sup>158</sup> Vilter/Maga RVS, 45-47.

<sup>159</sup> Amtrak Opening Brief, 51 n. 159.

[REDACTED]

[REDACTED]

**E. Amtrak Has Exposed Serious Errors In CN’s Methodology For Using Unreliable SRS Data To Attribute Alleged Freight Train “Delays” To Amtrak**

Amtrak’s Opening Brief summarized the serious flaws in CN’s proposed methodology for using the unreliable data in SRS to attribute purported freight train “delays” to Amtrak. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>160</sup> [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

<sup>161</sup> CN Opening Brief, 98-99.

<sup>162</sup> Summerfield/Girard/Morehouse VS, 18.

<sup>163</sup> Summerfield/Girard/Morehouse VS, 18. [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

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<sup>164</sup> CN Opening Brief, 99 n. 268.

<sup>165</sup> Crowley/Mulholland RVS, 8 (Table 1).

<sup>166</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**F. CN's Accusation That Amtrak Discounts The Value Of Modeling And Costing Tools Is An Attempt To Sidestep The Unpersuasiveness of CN's Own Cost Evidence**

Although CN maintains that it used “established railroad costing tools” to allocate the alleged costs arising from freight train “delays” that CN attributes to Amtrak, CN fails to adequately respond to Amtrak’s criticisms of CN’s cost estimates.<sup>175</sup>

*First*, as discussed in section II.A above, Congressional intent clearly indicates that “incremental costs” under Section 402(a) means “short-run avoidable costs.” Therefore, Crowley/Mulholland’s criticism of CN’s failure to limit its delay cost estimates to “short-run avoidable costs” under railroad accounting principles<sup>176</sup> is entirely warranted. The Board must reject CN’s claimed delay costs in light of CN’s failure to apply the appropriate definition of “incremental costs.”

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<sup>173</sup> Vilter/Maga RVS, 33; Baranowski/Fisher VS, 9, Table FTI-4.

<sup>174</sup> CN also asserts that its SRS delay attribution methodology must be accepted because Amtrak offered no alternative methodology. CN Opening Brief, 101. . There is no appropriate alternative because it is impossible to measure “delays” to freight trains against a phantom schedule. Amtrak was not obligated to offer an alternative methodology given that CN has failed to meet *its burden* of proving that it is entitled as a matter of law to any alleged freight train delay costs, and given CN’s failure to provide any plausible evidence that SRS can be used to reliably measure such purported freight delays.

<sup>175</sup> CN Opening Brief, 103-107.

<sup>176</sup> Crowley/Mulholland RVS, 12.

*Second*, CN concedes that it has excess capacity which can absorb the purported freight train “delays” that CN claims are caused by Amtrak.<sup>177</sup> As explained by Crowley/Mulholland, an innate characteristic of CN’s *existing capacity* (i.e., train crews, plant and equipment) is that it provides for slack time, which essentially allows CN’s existing level of assets to absorb freight train delays.<sup>178</sup> CN argues that Amtrak must pay CN for consuming part of that “excess capacity.”<sup>179</sup> However, there is no basis in the “incremental cost” standard or otherwise for CN’s claim that Amtrak must pay for so-called “costs” related to excess capacity, or to assume any such “costs” exist and CN could prove them.<sup>180</sup>

*Third*, CN argues that (1) Amtrak failed to show that CN “has been imprudently retaining excess capacity,” and that (2) under Section 402(a), a host railroad is permitted to pro rate a portion of an employee’s or locomotive’s cost without having to show it could avoid the entire cost of a full employee or locomotive.<sup>181</sup> Both positions are fatally flawed. Regarding part (1), CN misstates Amtrak’s argument – in fact, Amtrak expresses no opinion (and does not have the visibility to determine) whether CN is retaining a sufficient level of excess capacity for its operations. Rather, Amtrak’s witnesses Crowley and Mulholland state:

Railroads are staffed and equipped to move variable levels of traffic on a day-to-day basis and their pay structures accommodate variable levels of production from shift to shift, both in their basic pay format and in their provisions for

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<sup>177</sup> CN Opening Brief, 103 (explaining that CN maintains “appropriate capacity in excess of its minimum needs, so that, in the fluid environment in which it competes, it can adjust to both seasonal and unpredictable changes in demand, and both regulator and episodic operating difficulties...”).

<sup>178</sup> Crowley/Mulholland RVS, 14 (“In the real world, railroads anticipate incidents and delays and build slack time into crew schedules to accommodate them.”)

<sup>179</sup> CN Opening Brief, 103.

<sup>180</sup> The negative public policy implications of requiring Amtrak to pay for CN’s excess capacity costs are obvious, for it would provide CN with no incentive to manage its capacity investment in a prudent manner.

<sup>181</sup> CN Opening Brief, 103-104.

overtime. Baranowski/Fisher offer no proof for their claim that Amtrak delays resulted in CN retaining additional crew personnel.<sup>182</sup>

CN has not proven that it had to hire additional crews as a result of the purported freight train delays that CN attributes to Amtrak.<sup>183</sup> Moreover, CN's witnesses Baranowski and Fisher's methodology is theoretically flawed because they make no distinction between extra hours purportedly worked by existing crews (which would not result in increased constructive allowances) and extra hours worked by extra crews they assert CN had to retain as a result of alleged delays they attributed to Amtrak. Likewise, Baranowski/Fisher provided no evidence that CN actually incurred any additional costs for acquiring or leasing additional locomotives as a result of specific delays that they attribute to Amtrak, nor have they provided any evidence that CN had to use locomotives owned by other carriers to move their trains specifically as a result of delays that they attribute to Amtrak.<sup>184</sup>

Regarding part (2), CN impermissibly conflates costing guidelines promulgated through STB regulations applicable to abandonment cases<sup>185</sup> with the "incremental cost" standard set forth by statute under 49 U.S.C. § 24308(a). Here, Amtrak is statutorily required to compensate

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<sup>182</sup> Crowley/Mulholland RVS, 17.

<sup>183</sup> Even assuming that CN had made such a demonstration, changes in CN staffing levels would be changes capacity-limiting input factors. Therefore, any costs related to new hires would not be short-run avoidable costs. Crowley/Mulholland RVS, 19.

<sup>184</sup> Crowley/Mulholland RVS, 25-27.

<sup>185</sup> CN contends that its pro rata approach to assigning Amtrak with a proportionate share of purported freight delay costs is supported by the fact that the Board permits this approach in abandonment cases. CN Opening Brief, 104. This argument presumes that CN actually incurred any such costs, which must be established before any proration techniques would be relevant. Furthermore, this approach is only authorized in the context of abandonment or discontinuance proceedings. 49 C.F.R. § 1152.30(a)(1) ("49 U.S.C. 10904 directs the Board to determine the extent to which the avoidable costs of providing rail service plus a reasonable return on the value of the line exceed the revenues attributable to the line. This subpart contains the methodology for such determinations and the standards necessary for application of those terms in the context of a particular proceeding. Such data will be used in reaching the Board's findings on the merits of an abandonment or discontinuance proceeding.").

CN only for incremental costs – i.e. “short-run avoidable costs.” CN must demonstrate that its claimed freight delay costs meet the applicable statutory requirement, not a different regulation applicable to abandonment cases.<sup>186</sup>

*Fourth*, CN’s responses to Amtrak’s critiques of Baranowski/Fisher’s estimates of the three specific cost categories claimed by CN fail to meaningfully address Amtrak’s concerns for the reasons discussed below.

**a) Train crew costs**

The evidence and testimony submitted by Amtrak demonstrates that: (1) CN has not provided any evidence that additional train crew hours allegedly due to the presence of Amtrak caused CN to *actually incur* additional crew wages; (2) even if CN had proven that it in fact incurred additional crew wages, it failed to provide any evidence distinguishing additional hours worked by newly hired crew members from additional hours worked by existing crew members (which invalidates CN’s application of the constructive allowance and fringe benefit additives to its wage estimate).<sup>187</sup>

CN responds to the above points by: (1) noting that the Board has accepted the practice of using average costs to estimate fringe benefits and constructive allowances in other contexts (including standalone-rate cases); and (2) claiming that refusal to adopt its costing estimates

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<sup>186</sup> See *Texas & Pacific*, 348 I.C.C. at 379 (Board refusing to allow host railroad to recover prorated supervisory costs when it failed to establish those costs were actually attributable to Amtrak); *Nat’l R.R. Pass. Corp.-Section 402(a) of the Rail Passenger Serv. Act - Order to Require Serv.& Set Comp. Terms*, I.C.C. Finance Docket 31895, 1992 WL 41630, at \*4 (I.C.C. Mar. 2, 1992) (“proration of fully allocated costs... is an unacceptable substitute for the statutorily required avoidable cost determination” when the railroad has failed to show these costs were avoidable).

<sup>187</sup> Crowley/Mulholland RVS, 18-20. As explained by Crowley/Mulholland, CN had no basis to presume that health care and other fringe benefit and constructive allowance costs of existing employees necessarily would have increased because they had to work additional hours that CN blames on Amtrak. *Id.*



**b) Fuel costs**

CN's effort to rehabilitate its flawed methodology for estimating fuel costs purportedly attributable to Amtrak is similarly unavailing. Amtrak's expert witnesses Crowley and Mulholland identified the following problems with CN's fuel cost estimate: (1) the number of freight train stop/restart events that CN attributes to Amtrak is greatly overstated as CN's workpapers reveal that many of these delays would have occurred even without the presence of Amtrak; (2) CN's fuel cost estimate is based on unsubstantiated and potentially overstated fuel consumption rates and also fails to account for CN's locomotives being equipped with Auto Engine Start Stop ("AESS") technology; (3) CN improperly relied on a proprietary fuel simulation model when actual CN locomotive fuel consumption data (from Wi-Tronix) exists; and (4) CN failed to demonstrate that its model inputs reflect the current fuel efficiency of the CN locomotive fleet.<sup>192</sup>

CN responds to these critiques by: [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] CN's responses are unavailing for the reasons discussed below.

First, in response to Crowley/Mulholland's determination that the number of stop/restart events CN attributed to Amtrak is greatly overstated,<sup>195</sup> [REDACTED]

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<sup>192</sup> Crowley/Mulholland RVS, 20-24.

<sup>193</sup> CN Opening Brief, 105, n. 288.

<sup>194</sup> CN Opening Brief, 104-106.

<sup>195</sup> Crowley/Mulholland RVS, 21 ("Baranowski/Fisher explicitly acknowledge that [REDACTED] CN freight train stop/restart events ([REDACTED] percent) that they included in their analysis would have occurred regardless of the (cont'd)

[REDACTED]

[REDACTED]

[REDACTED].

Second, with regard to Auto Engine Start Stop (“AESS”) technology, Amtrak has no basis to dispute CN’s claim that “[t]he value of AESS is predominantly in yards and terminals...”<sup>196</sup> However, CN’s use of the word “predominantly” is an admission that AESS technology has fuel consumption benefits outside of yards and terminals, which fuel reductions CN completely ignored in its fuel cost estimates.

Moreover, CN states that “AESS must keep the engine running to meet the demands of the train, including maintaining proper brake pipe pressure, safety systems, and HVAC for crew comfort.”<sup>197</sup> This statement is only partially correct. AESS documentation shows that locomotives equipped with AESS must perform these tasks *only* under certain conditions. Documentation on GE DASH-9 locomotives equipped with AESS shows that maintaining HVAC for crew comfort means the ambient temperature must be between 45 and 110 degrees Fahrenheit for the AESS to engage. Similarly, AESS monitors the brake pressure, battery voltage and other safety systems, but this does not prevent AESS from shutting down the locomotive. In fact, the conditions that require the engine to start are an ambient temperature

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(cont’d)

presence of Amtrak trains. Because these [REDACTED] trains would have stopped and restarted (and burned the fuel associated with that activity) regardless of the presence of Amtrak trains, all of them should have been excluded from Baranowski/Fisher’s analysis.”).

<sup>196</sup> CN Opening Brief, 105.

<sup>197</sup> CN Opening Brief, 106.

less than 40 degrees Fahrenheit, battery voltage falling below 62 volts, or the main reservoir (“MR”) falling to less than 15 PSI above the brake pressure.<sup>198</sup>

None of these conditions prevent AESS from functioning during a meet-pass event. On the contrary, 40 CFR § 1033.155(g), which CN cites in support of its position, provides that “[a]ll new locomotives must be equipped with automatic engine stop/start” and that with the exception of the conditions mentioned above, “the stop/start systems must shut off the main locomotive engine(s) after 30 minutes of idling (or less).” In other words, federal regulations dictate that AESS must be activated during meet/pass events greater than 30 minutes.

Third, CN criticizes Amtrak’s contention that CN “should have used Wi-Tronix data showing actual fuel consumption rather than TPC-based estimation” as being “unduly onerous and unnecessary for a reliable cost estimate.”<sup>199</sup> However, CN readily concedes that “CN is able, and willing if required, to demonstrate actual fuel consumption using Wi-Tronix data going forward.”<sup>200</sup> Because CN cites no support for its contention that using Wi-Tronix data is “unduly onerous” and is nonetheless willing to assent to its use, CN’s argument to the contrary should be disregarded.<sup>201</sup>

### **c) Locomotive and freight car costs**

CN also has failed to vindicate its flawed methodology in estimating locomotive and freight car costs that it attributes to delays allegedly caused by Amtrak. The evidence and

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<sup>198</sup> Crowley/Mulholland RVS, 23 n. 43 (referencing NS\_Smart\_Start.pdf. included in the Crowley/Mulholland workpapers). CN has provided no evidence about the prevalence of any of these conditions in connection with the alleged locomotive delays it seeks to attribute to Amtrak.

<sup>199</sup> CN Opening Brief, 106.

<sup>200</sup> CN Opening Brief, 106 n. 293.

<sup>201</sup> CN is estopped from providing any such evidence at this late stage in the proceeding, when the evidentiary record has closed.

testimony submitted by Amtrak demonstrates that: (1) CN failed to prove that it actually acquired additional locomotives or enlisted the services of locomotives owned by other carriers to move its trains as a result of delays caused by Amtrak; (2) CN's estimate of additional locomotive costs is based on the unsupportable premise that CN's locomotive fleet is fully utilized at all times; (3) these claimed costs are not short-run avoidable costs recoverable under the statute; and (4) using per diem charges as a proxy for costs CN allegedly incurs when its own freight cars are delayed on its own rail system is inappropriate.<sup>202</sup>

CN's only briefly responds to these criticisms – arguing that (1) locomotive and freight car costs are recoverable under CN's broad interpretation of the “incremental cost” statute; and (2) per diem rates are an appropriate proxy to measure “costs” incurred by CN's freight cars as a result of alleged Amtrak delays and Amtrak has provided no better alternative measure.<sup>203</sup> Again, CN's arguments fail to adequately address Amtrak's valid criticisms of CN's costing estimates with respect to locomotive and freight car costs.

With respect to locomotive costs due to purported Amtrak delays, CN's objections to Crowley/Mulholland's criticisms of CN's use of the HPH formula in estimating those alleged costs are unavailing. First, as discussed above in Section II.A, Congress intended “incremental costs” to mean “short-run avoidable costs.” Thus, it is inappropriate for CN to include any of these alleged costs in the incremental cost claim that it asserts against Amtrak.<sup>204</sup> Second, CN appears to concede that the HPH formula is inclusive of opportunity costs in the form of

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<sup>202</sup> Crowley/Mulholland RVS, 25-32.

<sup>203</sup> CN Opening Brief, 106-107.

<sup>204</sup> Amtrak Opening Brief, 88-91.

locomotive ownership costs.<sup>205</sup> Because opportunity costs are not short-run avoidable costs, CN's use of the HPH formula to estimate equipment costs would enrich CN beyond the scope of the incremental costs standard set forth in Section 402(a).

With respect to CN-owned freight car costs, CN completely ignores Crowley/Mulholland's determination that "CN does not incur per diem charges when its own cars are [delayed] on its own system."<sup>206</sup> CN's belief that it is somehow entitled to recover per diem charges for every minute its own rail cars are purportedly delayed on its own system is nonsensical – CN does not incur per diem costs when its own cars are delayed on its own system.

To the extent CN believes it is entitled to per diem costs at market rates for such delays pursuant to an "opportunity cost" theory, such a theory also fails for two reasons. First, opportunity costs are beyond the scope of "short-run avoidable costs" and accordingly are not recoverable as "incremental costs."<sup>207</sup> Second, allowing CN to recover per diem costs at market rates for every minute of alleged delay necessarily assumes that its freight cars would have been otherwise used in a fully productive manner were it not for Amtrak's presence. CN has failed to prove that any of its equipment is used at all times in a fully productive manner, and therefore it is not entitled to recover any lost productivity costs from Amtrak under the "incremental cost" standard.<sup>208</sup> Accordingly, the Board must disregard CN's claim for market-based per diem rates for the alleged delays to CN's own freight cars on its system that CN seeks to attribute to Amtrak.

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<sup>205</sup> CN Opening Brief, 106 n. 295 (not denying that the HPH formula includes an opportunity costs component).

<sup>206</sup> Crowley/Mulholland RVS, 32.

<sup>207</sup> Amtrak Opening Brief, 90-91.

<sup>208</sup> Amtrak Opening Brief, 69-70.

**G. The Board Should Reject CN’s Unreasonable Request To Impose An Open-Ended Obligation On Amtrak To Pay For Unspecified Incremental Costs That CN May Identify And Demand In The Future**

CN claims that it seeks base compensation only for “readily quantifiable” freight train delay costs.<sup>209</sup> However, CN also asserts that it “should be allowed to reserve the right to seek any incremental costs that become quantifiable.”<sup>210</sup> Thus, CN’s proposal would allow CN to unilaterally determine (and automatically charge Amtrak for) these unspecified future incremental costs once CN identifies them as incremental costs. As explained in Amtrak’s Opening Brief, given CN’s inability to prove the existence of the alleged freight delay costs that CN has deemed “practically quantifiable,” the Board should reject CN’s request to impose an open-ended obligation on Amtrak to pay CN whatever additional compensation CN may demand in the future.<sup>211</sup>

**IV. CN’s KOTP Incentive System Proposal Promotes CN’s Interests Over Its Obligations Under the RPSA and Conflicts With the Statutory Goals Furthered By Amtrak’s Delay-Based Quality Payment and Penalty System**

By any objective measure, CN’s performance as a host railroad for Amtrak has been dismal. The average ASOTP of the two primary Amtrak services that operate almost exclusively over CN has been well below 50% since 2015.<sup>212</sup> CN has been the worst-performing Class I host railroad for several years, and has caused the highest level of Freight Train Interference and other

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<sup>209</sup> CN Opening Brief, 90.

<sup>210</sup> *Id.* Although CN’s Opening Brief refers to quantifying these unspecified future costs, CN’s actual proposal contains no reference to proving, substantiating or even quantifying these alleged costs. Instead, it would give obligate Amtrak to pay CN for unspecific future incremental costs “upon demonstration by CN that the costs identified constitute Incremental Costs.” CN Opening Brief, Exh. 1, App. IV-7 – IV-8.

<sup>211</sup> Amtrak Opening Brief, 93.

<sup>212</sup> Amtrak Opening Brief, 12 (reflecting poor ASOTP on the *City of New Orleans* and *Illini/Saluki* services since fiscal year 2015).

Host Responsible Delays to Amtrak trains.<sup>213</sup> At the same time, the incentive/penalty provisions of the current contract have required Amtrak to pay CN [REDACTED] per year for this poor (and worsening) service. The simple fact is that Amtrak's proposed new delay-based system contains the elements necessary to either incentivize CN to improve performance, or, failing that, to relieve Amtrak of the obligation to pay for "quality of service" it does not receive. CN's proposal, on the other hand, exacerbates all the worst elements of the current system by allowing CN to earn higher incentives for slower service.

**A. CN's Attacks on Amtrak's Delay-Based System Proposal Ignore The Statutory Goals And Purposes That Amtrak's Proposal Is Reasonably Designed To Promote**

The purpose of Amtrak's delay-based quality payment and penalty system is to rectify the significant deficiencies which plague the existing KOTP system (which rewards CN with significant incentive payments despite its poor performance) while meeting the three primary guideposts and goals provided in the statute: (i) the proposed system must be "reasonable" and "necessary to carry out the purposes" of the Rail Passenger Service Act,<sup>214</sup> which include promoting fast and efficient Amtrak service to all stations within 15 minutes of scheduled arrival times;<sup>215</sup> (ii) the system should measure the "quality of service" provided by CN to Amtrak;<sup>216</sup> and (iii) the system must include a penalty for untimely performance.<sup>217</sup> Amtrak's proposal meets all of the foregoing statutory guideposts:

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<sup>213</sup> Amtrak Opening Brief, 17.

<sup>214</sup> 49 U.S.C. § 24308(a)(2)(A).

<sup>215</sup> 49 U.S.C. § 24101(c)(4).

<sup>216</sup> 49 U.S.C. § 24308(a)(2)(B).

<sup>217</sup> 49 U.S.C. § 24308(a)(1).

- Amtrak’s proposal is reasonably designed to motivate CN to reduce the delays for which it is responsible (HRDs) and contribute to improved on-time performance at all stations (ASOTP) by providing a system of quality payments and penalties based on HRD Thresholds that have been correlated with 80% ASOTP on each of the Amtrak routes over CN. This promotes the statutory goals relating to fast and efficient Amtrak service, including the goal of providing service to all stations within 15 minutes of the arrival times set forth in published schedules.<sup>218</sup>
- Amtrak’s proposal is reasonably designed to measure the “quality of service” provided by CN because it ties incentives and penalties only to CN’s own contribution to the total delays experienced by Amtrak’s passengers on a monthly basis. It does not include any delays caused by Amtrak or third parties, nor does it include the numerous relief items, tolerances, recovery time, and other padding that disconnects the compensation payable under the current system from the poor quality of CN’s performance in handling Amtrak trains – which would be exacerbated by adoption of CN’s proposal.<sup>219</sup>
- Finally, Amtrak’s proposal includes a penalty for untimely performance based on the level of monthly delays caused by CN that would not be vitiated by an artificial limit of never exceeding the amount of incentives earned by CN in the prior 12 months (the “lookback” provision of the current agreement).<sup>220</sup>

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<sup>218</sup> Amtrak Opening Brief, 15-20.

<sup>219</sup> Amtrak Opening Brief, 15-17

<sup>220</sup> Amtrak Opening Brief, 24-25.

CN sidesteps these fundamental features of Amtrak’s proposal without precisely articulating a specific conceptual reason why it would be opposed to the implementation of an incentive/penalty system which measures the level of delays caused by CN.<sup>221</sup> Instead, CN attacks Amtrak’s determination that the current system based on KOTP is broken and must be replaced.<sup>222</sup> But CN’s assertions are either unproven or untrue.

First, the underlying premise for CN’s belief that the current system should be maintained is CN’s assertion that it has “consistently performed well as Amtrak’s host.”<sup>223</sup> In support of this claim, CN touts the fact that it has earned “significant net incentive payments” under the current KOTP incentive system.<sup>224</sup> However, the current incentive/penalty system does not establish a performance standard but simply triggers additional compensation to CN when certain benchmarks are met. The undisputed disparity between the “significant net incentive payments” made to CN on the one hand, and CN’s poor handling of Amtrak trains under a variety of objective measures, only proves that the current system does not adequately incentivize, reward, or penalize the actual impact of CN’s performance on Amtrak’s passengers, and therefore should be scrapped.<sup>225</sup>

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<sup>221</sup> CN argues that Amtrak’s proposal to measure the monthly level of HRD caused by CN would take into account certain delays that are outside of CN’s “reasonable control.” CN Opening Brief, 75-76. However, given the fact that CN has only challenged an extremely small percentage of Amtrak’s HRD coding decisions and has prevailed in most of those challenges (*see Vilter VS, 17*), its expressed concern about being held responsible for delays outside of its reasonable control appears to be overstated.

<sup>222</sup> CN also launches technical criticisms against the specific parameters of Amtrak’s delay-based proposal (including how the penalty levels have been established), which criticisms are discussed in Section IV.B below.

<sup>223</sup> CN Opening Brief, 30.

<sup>224</sup> CN Opening Brief, 14.

<sup>225</sup> *See* Amtrak Opening Brief, 10-13, 17.

Second, CN essentially argues that it cannot improve its host performance for Amtrak without significantly impairing or halting its freight operations because the delays that CN causes to Amtrak's trains are largely "unavoidable" without "extreme subordination" of its freight service, which CN asserts could make it "impossible for CN to serve its customers."<sup>226</sup> This assertion is belied by the undisputed fact that CN improved the quality of its performance and reduced all categories of HRD during the first six months in 2013 when it made a concerted effort to reduce Amtrak delays.<sup>227</sup> Moreover, CN has provided no evidence that the level of freight service it provided to customers during this period was impaired, never mind rendered "impossible." On the contrary, publicly available information reflects that during this period CN's overall revenues actually increased, and overall operating ratio decreased, on a year-over-year basis.<sup>228</sup> Thus, CN has failed to demonstrate that it is unable to improve the quality of service that it provides to Amtrak.

Rather than provide any probative evidence for its claimed inability to, for example, dispatch two Amtrak trains a day on the *City of New Orleans* route anywhere close to the schedule it contractually agreed upon without completely shutting down its network,<sup>229</sup> CN resorts to accusing Amtrak of "manipulating" the bar charts Amtrak provided that illustrate CN's

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<sup>226</sup> CN Opening Brief, 127, 133, 136.

<sup>227</sup> CN was able to reduce HRD's and contribute to improved ASOTP for both the *City of New Orleans* and *Illini/Saluki* services (which operate almost exclusively over CN) during this period. Amtrak Opening Brief, 27.

<sup>228</sup> Canadian National Railway Company's Form 6-K filed April 22, 2013 (covering the 1<sup>st</sup> quarter of 2013); Canadian National Railway Company's Form 6-K filed July 22, 2013 (covering the 2<sup>nd</sup> quarter of 2013). Both of these financial statements are available at [www.sec.gov](http://www.sec.gov).

<sup>229</sup> CN bases this exaggerated claim on the "bubble analysis" that was discredited by Amtrak's expert witnesses because it is based on extreme, unfounded assumptions about the purported impact of Amtrak's operations on CN's freight service. See Williams/Roberts SVS, 8-24.

improved performance in 2013.<sup>230</sup> But CN pointedly does not dispute that the reduced HRD levels shown in those bar charts are accurate, or that they demonstrate the fallacy of CN's claim that it would be "impossible" to do what it already did when it had the motivation to do so.

Third, and as an adjunct to its "impossibility" argument, CN contends that "temporary slow orders, signal malfunctions, [and] maintenance-of-way work blocks [are] inherent to and unavoidable on a largely single-track railroad."<sup>231</sup> Even if this were true, it ignores the fact that (1) the delay thresholds in Amtrak's proposal contain tolerances for delays and do not require that delays be reduced to zero in order for CN to earn incentives, and (2) Amtrak's delay-based proposal specifically includes a mechanism which would adjust the HRD Thresholds and associated quality payment and penalty rates to account for any expected increase in HRD resulting from Major Maintenance and Construction projects.<sup>232</sup> In any case, it is undisputed that CN is the only party with control over the extent to which slow orders, signal malfunctions and maintenance-of-way work blocks impact both freight and passenger train operations over its network, and any effective incentive/penalty system should incentivize CN to reduce delays attributable to these causes.<sup>233</sup> Nor does the fact that some Amtrak trains operate over largely single-track between Chicago and Memphis – a decision made by CN's predecessors to eliminate the second track over Amtrak's objections – change the calculus, because CN has not

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<sup>230</sup> CN Opening Brief, 134. See Maga SVS, 32-36 (containing factually accurate bar charts submitted by Amtrak).

<sup>231</sup> CN Opening Brief, 133.

<sup>232</sup> Vilter VS, Attachment 2, Amtrak's Proposed Operating Agreement, App. V, V-2 to V-3.

<sup>233</sup> One of the explicit goals of Congress in enacting the Amtrak Improvement Act of 1973 was "to help Amtrak solve many of the problems that have plagued it during its first 3 years, without increasing the Federal expenditure that is required, [by assisting] in the alleviation of such difficulties as poor track quality that requires slow speeds, and priority of freight service over passenger service on shared lines." 119 CONG. REC. 34480 (daily ed. Oct. 17, 1973).

provided evidence that non-FTI delays cannot be avoided on its single-track territory, especially where only a handful of scheduled passenger trains operate per day. Amtrak operates over large portions of single-track territory on other host railroads (including CP and BNSF, which have demonstrated that they can avoid non-FTI delays on a consistent basis).<sup>234</sup>

Finally, CN's hypothesis that it would not be able to earn incentives under the Amtrak proposal without "significantly impairing or halting its freight operations"<sup>235</sup> ignores the fact that CN is already legally obligated to provide Amtrak with preference over its freight trains.<sup>236</sup> To the extent that providing quality service to Amtrak in a particular location actually has such a substantial impact on CN's network, the statute permits it to alleviate this issue if it can meet its burden of showing that preference "materially will lessen the quality of freight transportation provided to shippers."<sup>237</sup> The existence of an explicit remedy under Section 24308(c) confirms that CN's hypothetical difficulties in providing preference is not a basis for shackling Amtrak to an ineffective incentive/penalty scheme under 49 U.S.C. § 24308(a).

Rather than acknowledge that it could take steps to improve the quality of its service, as it did in the first six months of 2013, CN argues that if Amtrak wants to improve the ASOTP Amtrak trains on CN routes, then Amtrak should (instead of looking to the owner of the tracks

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<sup>234</sup> See Maga/Vilter RVS, 10; Maga SVS, Exh. 3.

<sup>235</sup> CN Opening Brief, 21; *see also* CN Opening Brief, 137 (claiming that CN can only provide good performance "by radically subordinating its freight operations to Amtrak").

<sup>236</sup> 49 U.S.C. § 24308(c). CN may disagree with the policy decisions supporting the statutory preference, but it has a legal obligation to comply with the preference. Although it may not view any economic impacts of complying with the preference as "cost effective" or consistent with its profit motives, it cannot obtain immunity from its compliance obligations because of these economic impacts. Otherwise, CN could absolve itself of responsibility for complying with scores of environmental, safety, employment and other regulatory requirements based on similar cost considerations.

<sup>237</sup> *Id.* See CN Opening Brief, 38 (claiming, without any supporting evidence, that efforts CN made to reach 80% ASOTP on the *City of New Orleans* service in 2013 "was ultimately unsustainable without materially lessening the quality of CN's freight service").

and dispatcher of the trains for improvements) focus on lengthening Amtrak's schedules, replacing Amtrak's equipment, paying for the restoration of CN's infrastructure and improving Amtrak operations – apparently while continuing to pay CN millions of dollars in excess of incremental cost for the same untimely performance.<sup>238</sup> This argument misses the point. It is a goal expressed by **Congress** that Amtrak trains arrive at all stations within 15 minutes of their scheduled arrival time, and one of the means that Congress contemplated to accomplish that goal was to allow Amtrak to pay hosts incentives, and to require Amtrak to assess penalties, based on the “quality of service” provided by the host receiving or making the payments. Amtrak's delay-based system measures only the quality of service provided by CN, so the resulting quality payments and penalties are not dependent on the performance of Amtrak or other hosts. Under Amtrak's proposal, CN is not penalized if Amtrak (or another host) causes a delay nor rewarded if Amtrak (or another host) avoids a delay.<sup>239</sup>

## **B. CN's Specific Criticisms Of Amtrak's Delay-Based Proposal Are Invalid**

In addition to the conceptual fallacies about the purpose and function of the incentive and penalty system discussed above, CN lodges a number of specific criticisms about the design and perceived impact of Amtrak's delay-based proposal. However, for the reasons described below, these specific criticisms are without merit.

### **1. CN's Primary Criticism Of Amtrak's Proposal Is Based On The False Premise That CN Would Be Responsible For Achieving 80% ASOTP**

CN's primary criticism of Amtrak's delay-based proposal is based on the false premise that CN would be responsible for achieving 80% ASOTP under Amtrak's system.<sup>240</sup> That is

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<sup>238</sup> CN Opening Brief, 127.

<sup>239</sup> Amtrak Opening Brief, 23.

<sup>240</sup> CN Opening Brief, 1, 28.

demonstrably not the case. Amtrak's proposal does not require CN to achieve 80% ASOTP or for that matter any other level of ASOTP. Rather, Amtrak's proposal takes into account only the minutes of delay caused by CN on a monthly basis in order to determine whether CN is eligible for quality payments or subject to penalties. In other words, Amtrak's proposal only rewards or penalizes CN based on its own contribution to overall route performance.

## **2. CN's Claims About the Effect of Amtrak's Proposal on Other Host Railroads Under Other Contracts Are Specious**

CN also claims that the HRD Thresholds established in Amtrak's delay-based system are unreasonable because, if those HRD Thresholds were applied to the historical performance of the other hosts on the four Amtrak services over CN which have multiple hosts, it would result in substantial penalties being applied to those hosts.<sup>241</sup> But these calculations – purported to assess penalties against other hosts based on their historical performance – are not only speculative but irrelevant. Amtrak's contractual relationship with each host is different, as is each host's history of performance and cooperation. If and when other host's contracts come up for renegotiation, there will be a series of proposals, counterproposals, and tradeoffs made with each of them, as there was in negotiations with CN. Those negotiations may be resolved without resort to the Board. In any event, any such future, hypothetical situations are not relevant to the issue at hand in this proceeding; namely, what if any compensation above incremental cost Amtrak should pay CN based on the "quality of service" provided on CN's segments of Amtrak routes.<sup>242</sup>

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<sup>241</sup> CN Opening Brief, 138-139. The four Amtrak services with multiple hosts are the *Blue Water*, *Lincoln*, *Texas Eagle* and *Wolverine*.

<sup>242</sup> CN purports to divine from Section 24308(a) a requirement that Amtrak may not "discriminate" against CN by agreeing to terms that differ from the terms in other host contracts, and that any incentive/penalty system must meet a "golden rule" of being equally applicable to Amtrak as it is to the host railroad. CN Opening Brief, 138, 139. Neither of these arguments finds any support in the law, and they defy logic. Amtrak does not have to seek CN's permission to negotiate a contract term with another (cont'd)

### **3. CN's Technical Criticisms Of The Design And Structure Of Amtrak's Delay-Based Quality Payment And Penalty System Are Invalid**

CN asserts a number of technical criticisms about the design and structure of Amtrak's delay-based quality payment and penalty system. These technical criticisms are unsupported for the reasons described in Amtrak's Opening Brief and summarized below.

As a preliminary matter, it is important to point out that CN's technical criticisms are all premised on the notion that the correlation analysis performed by Amtrak to establish the HRD Thresholds and the associated quality payment and penalty rates should have been based on mathematically precise calculations which take into account all potentially relevant factors which could have an impact on the future relationship between HRD and ASOTP. This was not the purpose of the correlation analysis performed by Amtrak to develop the delay-based quality payment and penalty system proposal. Instead, Amtrak used to most relevant data available to it regarding the relationship between HRD and ASOTP with respect to the Amtrak services that operate over CN and used that data (which generally exhibited a linear relationship) in order to develop an incentive and penalty system that would be reasonably designed to motivate CN to reduce HRD in order to contribute to improved ASOTP. Even assuming the validity of CN's technical criticisms (which Amtrak disputes in turn below), none of them individually or in the aggregate demonstrate that CN's KOTP system (based on its limited checkpoints and artificial

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(cont'd)

host that differs from the terms in CN's contract. In addition, since the host railroads transferred to Amtrak the risks associated with declining passenger traffic from bad service, without reducing the amount of base compensation paid to the hosts, Amtrak does not need the kind of incentive that CN does to be motivated to improve its own performance. See Baumol Statement at 7-8 (describing transfer of passenger traffic demand risk from host railroads to Amtrak as conferring a "net benefit" on the hosts because Amtrak guaranteed to pay them compensation "fixed by agreement and not subject to the vagaries of changes in consumer demand.").

“padded” measurements of CN performance) is more reasonably designed than Amtrak’s delay-based proposal.

*First*, CN claims that Amtrak’s HRD Thresholds do not account for any future schedule adjustments that may be agreed upon by the parties.<sup>243</sup> However, Amtrak has addressed CN’s concern by agreeing to recalculate the HRD Thresholds in the event that the parties agree upon schedule changes that are likely to have an impact on the correlation between HRD and 80% ASOTP.<sup>244</sup> CN criticizes Amtrak’s proposed contractual solution as lacking an “actionable process,” but offers no alternative proposal and fails to explain what it believes is missing from Amtrak’s proposal.<sup>245</sup>

*Second*, CN claims that Mr. Sacks mistakenly “assumed that the relationship between ASOTP and HRD is linear and then extrapolated far beyond the range of historical data.”<sup>246</sup> However, as explained in Amtrak’s Opening Brief and illustrated by the statistical analysis from the Sacks VS incorporated below reflecting the data used by Mr. Sacks in his regression analysis, the relationship between ASOTP and HRD **is in fact linear**.<sup>247</sup> Moreover, it was entirely

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<sup>243</sup> CN Opening Brief, 128.

<sup>244</sup> Maga SVS, 41 n. 66.

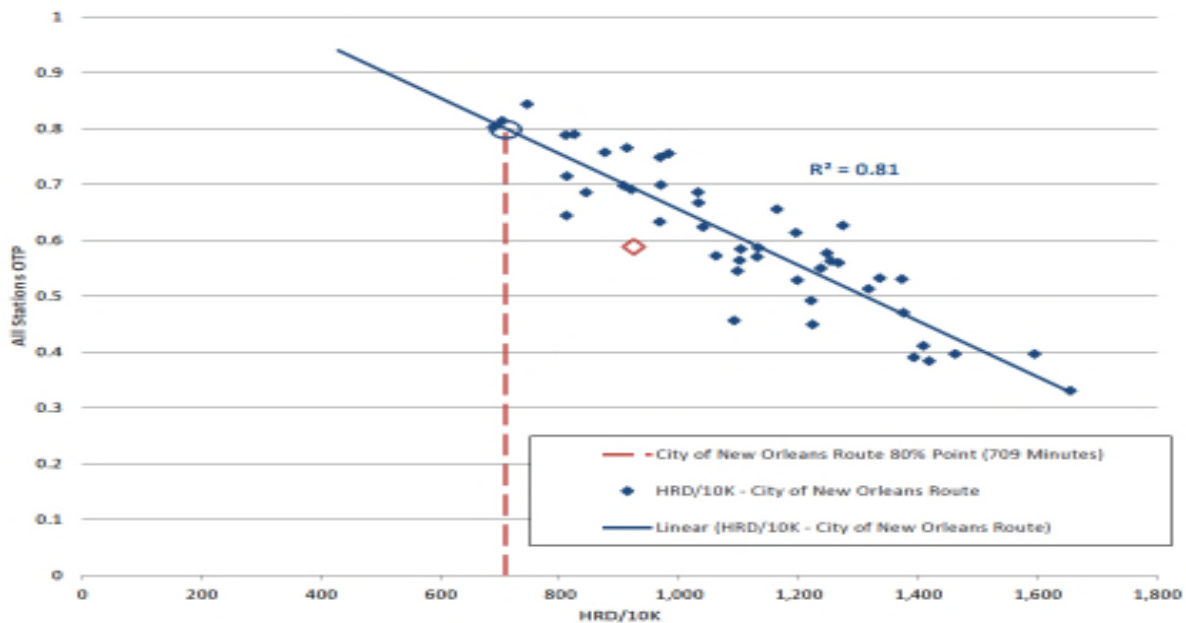
<sup>245</sup> CN states that there is no existing data to use for the correlation if schedule changes are agreed upon in the future. CN Opening Brief, 129. It would not be difficult for the parties to agree upon (or for the Board to prescribe) a mechanism for performing any necessary recalculation after sufficient performance data has been generated (*e.g.*, 3 to 6 months) and then applying the resulting HRD Thresholds retroactively, which CN presumably would not oppose since it believes the HRD Thresholds would be increased if the existing recovery time in Amtrak schedules is adjusted (as Amtrak has proposed) to better align with the ASOTP goal.

<sup>246</sup> CN Opening Brief, 130.

<sup>247</sup> We have included here for illustrative purposes Figure 3 (*City of New Orleans*) and Figure 20 (*Illini/Saluki*) from the Sacks VS. The corresponding Figures in the Sacks VS for the other Amtrak services show the same linear relationship between HRD and ASOTP.

appropriate for Mr. Sacks to extrapolate from his linear regression analysis to estimate HRD at 80% ASOTP.<sup>248</sup>

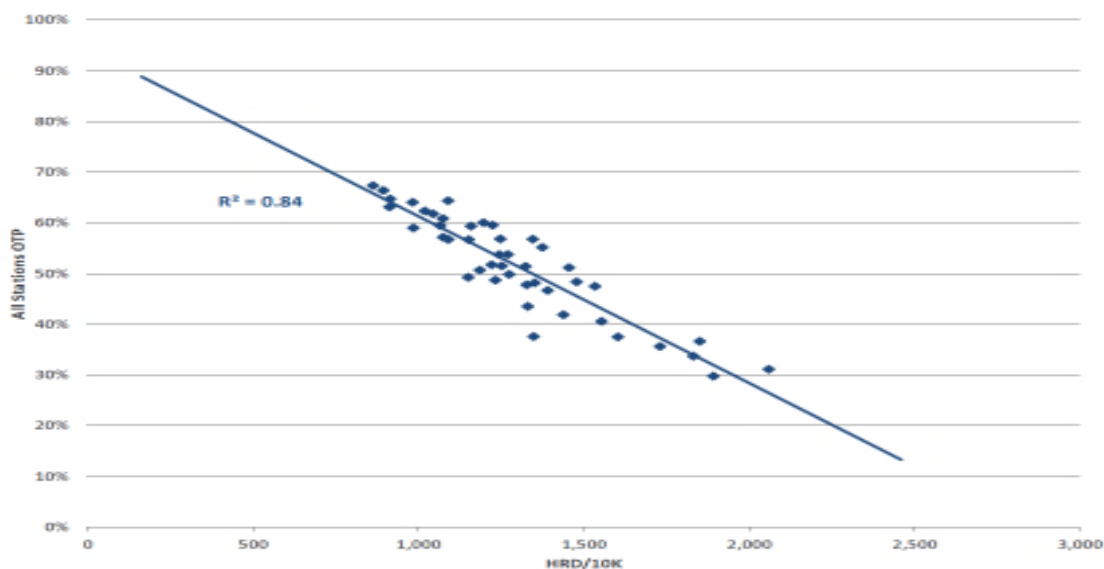
#### Statistical Analysis of the Relationship between HRD and ASOTP for the *City of New Orleans* Route<sup>249</sup>



<sup>248</sup> The concern raised by CN about Amtrak extrapolating beyond the range of data does not apply to three of the relevant Amtrak services (the *City of New Orleans*, the *Lincoln* and the *Blue Water*) because ASOTP was at or near 80% during the period analyzed by Mr. Sacks and thus no extrapolation was required. For the remaining three Amtrak services (the *Illini/Saluki*, the *Texas Eagle*, and the *Wolverine*), it was entirely appropriate for Mr. Sacks to extrapolate from a linear regression analysis to estimate HRD at 80% ASOTP because (i) there is no reason to suspect that the data as it approaches 80% ASOTP for these three Amtrak services would be non-linear, particularly when the recorded data exhibits clear linearity at 80% ASOTP; and (ii) because Mr. Sacks was extrapolating data to estimate HRD up to 80% ASOTP (and not beyond that point), the “bending” that theoretically occurs as the HRD data approaches 100% ASOTP is simply irrelevant. Amtrak Opening Brief, 34 n. 99.

<sup>249</sup> Sacks VS, 9.

Statistical Analysis of the Relationship between HRD and ASOTP for the *Illini/Saluki* Route<sup>250</sup>



*Third*, CN claims that Mr. Sacks failed to transform a proportional value (% of ASOTP) into absolute terms before using it in his correlation analysis.<sup>251</sup> However, it was entirely reasonable for Mr. Sacks to use the ASOTP% in his correlation analysis here without transforming it into absolute values given the linear nature of the relationship between HRD and ASOTP (as illustrated above).

*Fourth*, CN criticizes Mr. Sacks for performing a correlation analysis between HRD and ASOTP rather than what CN calls a “causation” analysis.<sup>252</sup> CN’s argument about causation also ignores the common sense principle that if CN delays an Amtrak, that delay will “cause” the Amtrak train to be late against whatever benchmark is used to measure its performance. There is no mystery associated with causation in such circumstances. CN fails to explain how it would propose to conduct any such “causation” analysis or why such an analysis (assuming it could be

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<sup>250</sup> Sacks VS, B-8.

<sup>251</sup> CN Opening Brief, 130.

<sup>252</sup> CN Opening Brief, 130.

conducted in a reliable manner) would be relevant to the incentive/penalty system applicable to delays caused by CN.<sup>253</sup> Moreover, CN's claim that Amtrak's regression analysis should have accounted for "exogenous factors" that could impact the HRD/ASOTP correlation or for the location along a route where the CN delays occurred<sup>254</sup> would result in an overcomplicated regression model that would be impractical to implement in any reasonable incentive system. While Amtrak agrees that multiple factors could impact ASOTP, the purpose of the regression analysis conducted by Mr. Sacks was to determine the correlation between HRD and ASOTP in order to establish the HRD Thresholds for its delay-based quality payment and penalty system. The purpose was not to evaluate all potential factors which could improve ASOTP. Thus, CN's suggestion about including additional "exogenous factors" in the analysis is unnecessary given the objectives.

*Fifth*, CN complains that the penalty rates in Amtrak's proposal are based on the "perceived" savings rate that CN reported to Amtrak in 2013.<sup>255</sup> CN tries to downplay the significance of the cost data that it previously represented to Amtrak as the results of a CN study of the actual cost differential from providing varying levels of service.<sup>256</sup> CN previously asserted that it was entitled to receive these additional costs from Amtrak because they supposedly reflected all of the costs associated with the higher level of service provided by CN. CN has not provided Amtrak or the Board with any further evidence of the alleged additional costs that it

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<sup>253</sup> CN's position on this point once again reflects its false premise that Amtrak's incentive/penalty system makes CN fully responsible for achieving 80% ASOTP. CN questions whether Amtrak's HRD Thresholds represent a "reasonable approximation of the HRD levels at which 80% ASOTP would be achieved" (CN Opening Brief, 130) but has not submitted any evidence to prove or suggest otherwise.

<sup>254</sup> CN Opening Brief, 130.

<sup>255</sup> CN Opening Brief, 131.

<sup>256</sup> Amtrak Opening Brief, 29-30.

saves in providing different levels of service to Amtrak. CN also has not provided Amtrak or the Board with more detailed or supplemental data showing that its initial cost estimates were understated or incorrect. Therefore, CN should be estopped from trying to disavow the cost data that it previously provided to Amtrak.

CN also now complains several years later that this cost data only reflected its purported costs of reducing FTI and allegedly did not account for costs associated with reducing non-FTI HRD (which CN elsewhere claims it has no ability to reduce). The documentation that CN provided to Amtrak in 2013 about these costs says nothing about being so limited. However, even if one overlooks the inconsistencies in CN's claims about its cost data, this would mean that the penalty levels under Amtrak's proposal should be established at higher rates to reflect the allegedly higher costs that CN claims it incurs in reducing HRD.<sup>257</sup>

CN also claims that Mr. Sacks improperly assumed that CN's "perceived costs" of reducing HRD are linear.<sup>258</sup> The marginal costs of reducing delays at lower levels of HRD could be higher than the marginal costs of reducing delays at higher levels of HRD when the host railroad prioritizes the elimination of "low hanging fruit" delays that may cost less to eliminate.<sup>259</sup> However, even if one presumes that the "perceived costs" of reducing HRD may not be strictly linear as a result of the diminishing marginal cost dynamic, this presumption would result in an understatement of the penalty levels set forth in Amtrak's proposal. In other words, by using the average cost of reducing HRD, Mr. Sacks may have established the penalty

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<sup>257</sup> Amtrak Opening Brief, 29-30.

<sup>258</sup> CN Opening Brief, 131.

<sup>259</sup> In other words, the cost to eliminate another minute of delay at low levels of HRD could be higher than the average cost (which was used by Mr. Sacks) to eliminate any minute of HRD.

rate at a level that is too low to negate CN's perception that it would benefit economically by allowing more delay.

Finally, CN complains that Amtrak established the penalty levels at 20% above CN's perceived cost savings from providing poor service to Amtrak.<sup>260</sup> As Mr. Sacks explained, the penalty levels were established at a level 20% above cost savings in order to ensure that CN would not be indifferent to the financial consequences of causing delays to Amtrak trains.<sup>261</sup> CN has failed to offer any alternative proposal on this point or provide any specific reason to question the reasonableness of this explanation from Mr. Sacks.<sup>262</sup>

**C. CN's Efforts To Significantly Lengthen Amtrak Schedules In Order To Increase CN's Chances Of Obtaining Contractual Incentive Payments Disregard The Public Interest In Fast And Convenient Amtrak Service**

Through its unwarranted (and untimely) proposal to drastically lengthen the schedules of the *Illini/Saluki* trains, its unsupported claims that the PRTs in the schedules for the *City of New Orleans* and *Illini/Saluki* trains need to be increased, and its effort to incorporate a binding, model-drive "schedule review" mechanism into the Operating Agreement, CN has made various efforts to lengthen Amtrak's schedules in order to make it even easier for CN to earn incentive payments while degrading service. CN has failed to meet its burden of proving that any of these

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<sup>260</sup> CN Opening Brief, 131.

<sup>261</sup> Sacks VS, 17.

<sup>262</sup> CN also claims that Mr. Sacks added "arbitrary limits" to the penalty rate which, according to CN, makes penalties more likely than quality payments under Amtrak's proposal. CN Opening Brief, 131 (citing Willig RVS, 20-30). Under Amtrak's proposal, incentives are capped at the maximum level of incentives that could be earned by CN under the existing Operating Agreement (Sacks VS, 22) and penalties are capped at the point where CN would no longer perceive any cost savings from handling Amtrak trains in an untimely manner (Sacks VS, 18). CN has failed to show that these limitations are arbitrary or unreasonable, and has failed to offer any alternative approach. Moreover, CN's claim that this creates "more room for penalties than for incentives" (Willig RVS, 29) merely reflects the fact that the HRD Thresholds are correlated to 80% ASOTP (which by definition creates imbalance between the incentive performance curve between 80% and 100% and the penalty performance curve between 0% and 80%). Amtrak Opening Brief, 31.

efforts to lengthen Amtrak's schedules are necessary or appropriate in light of the public interest in fast, convenient and competitive Amtrak service. Therefore, the Board should reject any attempts by CN to coerce Amtrak into lengthening its schedules without supporting evidence.

**1. CN's Repeated Insistence That It Has Proposed "Modest" Schedule Adjustments Ignores The Substantial Harm It Would Inflict On Amtrak and Its Passengers**

Unable to find any other adjective to describe its proposal, CN repeatedly insists that it has proposed what it deems to be "modest" adjustments to the schedules for the *Illini/Saluki* trains.<sup>263</sup> CN's perspective undoubtedly has been clouded by its desire to downplay the impact of these schedule changes, which would lengthen the *Illini/Saluki* train schedules by between 32 and 54 minutes.<sup>264</sup> This would lengthen the scheduled *Illini/Saluki* trip to over 6 hours, threatening the trip-time competitiveness of this state-supported corridor service which has experienced steady ridership decline since CN imposed speed restrictions in 2009.<sup>265</sup> This is by no stretch of the imagination a "modest" change, despite CN's protestations to the contrary.<sup>266</sup>

As noted in Amtrak's Opening Brief, CN introduced its proposed to substantially lengthen the *Illini/Saluki* train schedules for the first time in its rebuttal evidentiary submission.<sup>267</sup> These schedule lengthening proposals were not previously negotiated by the

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<sup>263</sup> CN Opening Brief, 22-23.

<sup>264</sup> Amtrak Opening Brief, 42.

<sup>265</sup> Vilter/Maga RVS, Exh. 33 at 15.

<sup>266</sup> CN asserts that its proposed schedules for the *Illini/Saluki* trains would result in an average scheduled speed of 51.9 mph, which CN claims is higher than most Amtrak corridor services. CN Opening Brief, A-4, A-5. The relevance of CN's apples-to-oranges comparison of the average speeds of these corridor services is not clear. CN's schedule lengthening proposal directly contravenes the statutory goal of establishing Amtrak schedules of at least 60 mph (49 U.S.C. § 24101(c)(6)), which is one of the statutory goals that the Board must consider in carrying out its responsibilities under Section 24308(a).

<sup>267</sup> Amtrak Opening Brief, 40.

parties or mentioned in CN's statement of disputed issues in this proceeding.<sup>268</sup> Moreover, CN fails to cite any statutory, judicial or agency authority for the proposition that the Board has the authority to order any **lengthening** of Amtrak's schedules in this proceeding.<sup>269</sup> Therefore, the Board should not consider CN's late-filed proposal to substantially lengthen Amtrak's schedules.

Even if the Board considers CN's schedule lengthening proposal, it should reject CN's attempts to extend the *Illini/Saluki* schedules because of the harm that CN's proposal would impose on Amtrak's passengers. In the midst of steadily declining ridership on the *Illini/Saluki* service,<sup>270</sup> CN seeks to increase the scheduled trip time from 5 ½ hours to over 6 hours.<sup>271</sup> CN's schedule adjustment comes with no assurance of improved performance by CN. In fact, CN's proposal would create a **disincentive** for CN to handle the *Illini/Saluki* trains in a more timely manner under the revised schedules because, by moving the baseline against which its performance would be judged under the KOTP system, CN would still be able to earn incentive payments for handling the *Illini/Saluki* trains in a similar or **less timely** fashion than it does today.<sup>272</sup> Some of these Amtrak passengers also might miss their connections to other Amtrak trains in Chicago.<sup>273</sup> CN attempts to dismiss this negative impact by claiming that Amtrak could

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<sup>268</sup> Amtrak Opening Brief, 40-41.

<sup>269</sup> The ICC in *Texas & Pacific* determined that Amtrak's schedule had to be shortened because any incentive system based on "quality of service" would not be meaningful without more expeditious schedules. See Amtrak Opening Brief, 41 n. 120.

<sup>270</sup> Amtrak Opening Brief, 44 n. 128.

<sup>271</sup> Amtrak Opening Brief, 42. Even under CN's alternative schedule proposals which presume resolution of the grade crossing activation failures, the overall trip time for each of the *Illini/Saluki* trains is nearly six hours.

<sup>272</sup> CN's current handling of the *Illini/Saluki* trains, which operate almost exclusively over CN, has resulted in the lowest levels of ASOTP of all the Amtrak services that operate over CN. Amtrak Opening Brief, 18, Table 2.

<sup>273</sup> Maga SVS, 7.

merely adjust the train departure times,<sup>274</sup> without any regard to the myriad of factors that must be accounted for when developing and synchronizing passenger train schedules.

The damaging impact of CN's proposal to drastically lengthen the *Illini/Saluki* train schedules would not be limited to Amtrak's passengers (who already have experienced years of poor handling of the *Illini/Saluki* trains by CN). It also would have a harmful impact on Amtrak from a financial and operational perspective as well. It would create operational challenges for Amtrak, as a result of tighter windows for crew and equipment turns, which would result in additional expenditures for Amtrak.<sup>275</sup> These additional expenditures would be in addition to the extra costs that Amtrak already has incurred as a result of the operating restrictions that CN has imposed on the *Illini/Saluki* service.<sup>276</sup>

## **2. CN Failed To Meet Its Burden of Proving That Amtrak Schedule Adjustments For Insufficient PRT Are Necessary**

In its Opening Brief, CN takes every opportunity to blame Amtrak's schedules (instead of CN's industry-leading level of Host Responsible Delays) for the consistently poor ASOTP on the Amtrak routes over CN.<sup>277</sup> However, CN has only claimed that the schedules for two of the six Amtrak services (the *City of New Orleans* and *Illini/Saluki*) have insufficient PRT. Thus, CN has not submitted any evidence that schedule adjustments are necessary for those other four

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<sup>274</sup> CN Opening Brief, A-9.

<sup>275</sup> Maga SVS, 6. CN once again attempts to dismiss this negative impact by suggesting that it be resolved by changing train departure times, ignoring the fact that the problems would be created in the first place because of the schedule adjustments sought by CN. CN Opening Brief, A-9.

<sup>276</sup> The minimum axle count requirements that CN imposed on the *Illini/Saluki* service in 2008 have resulted in additional wear and tear on the empty baggage cars that Amtrak is required to attached to its train consists, resulting in the need for Amtrak and/or its funding partners to spend over [REDACTED] rehabilitating that equipment. Maga SVS, 16 n. 34.

<sup>277</sup> See, e.g., CN Opening Brief, 27.

Amtrak services.<sup>278</sup> In addition, Amtrak’s expert witnesses have demonstrated that the TPC modeling conducted by CN in support of its PRT arguments is unreliable.<sup>279</sup> Therefore, CN has failed to meet its evidentiary burden of proving that any adjustment is necessary to the PRT in Amtrak’s schedules.

**3. CN’s Speculation That Lengthening The *Illini/Saluki* Schedules Could Have A Positive Impact On Amtrak Ridership And Revenue Defies Common Sense**

CN preposterously claims that its proposal to dramatically lengthen the *Illini/Saluki* train schedules “could well be positive” for Amtrak and its passengers.<sup>280</sup> CN offers no evidence to support this illogical prediction other than mere speculation about the preferences of Amtrak’s passengers.<sup>281</sup> CN attempts to argue that Amtrak passengers might prefer a higher level of ASOTP which *could* (but is not guaranteed to) result from lengthening the *Illini/Saluki* schedules to nearly 6 hours. The fallacy in CN’s argument is that CN presumes the Amtrak passengers would be indifferent to the lengthening of the schedule because of CN’s assumption that the actual run times of the trains would not change.<sup>282</sup> However, CN’s substantial lengthening of the

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<sup>278</sup> [REDACTED]

<sup>279</sup> Williams/Roberts RVS, 70-77; Amtrak Opening Brief, 44-46.

<sup>280</sup> CN Opening Brief, A-2.

<sup>281</sup> CN also criticizes Amtrak for not submitting evidentiary studies which disprove that longer schedules would not have a negative effect on Amtrak’s ridership and revenue. CN Opening Brief, A-2, A-9, A-10. CN’s attempt to shift an evidentiary burden onto Amtrak in order to mask the insufficient support for its schedule proposals should not be countenanced by the Board.

<sup>282</sup> CN ironically points out that more than 50% of *Illini/Saluki* trains were over 30 minutes late arriving at their endpoints (either Chicago or Carbondale) in 2016-2017, since those trains operate almost exclusively over CN and are subject to CN’s almost exclusive handling of the trains from a dispatching perspective. CN Opening Brief, A-3. Thus, the fact that these trains are often behind schedule reflects (cont’d)

schedules would create the perverse incentive of enabling CN to further delay the actual run times of the Amtrak trains and still qualify for incentive payments under the KOTP system. This is because CN's schedule lengthening proposal would merely shift the artificial baseline against which CN's performance under the KOTP system is measured in a manner favorable to CN, without any guarantee or incentive that CN's handling of the Amtrak trains would improve.<sup>283</sup>

In light of the untimely performance that historically has been provided by CN for the *Illini/Saluki* trains, and the steadily declining ridership on that service along with rising operational costs,<sup>284</sup> Amtrak, its passengers and its funding partners would not benefit in any way from the substantial lengthening of the *Illini/Saluki* schedules proposed by CN. Despite CN's various attempts to minimize or downplay the harmful impact of its proposal, it is reasonable to conclude that adding between 32 and 54 minutes to the public schedules for the *Illini/Saluki* trains will make the service less attractive to potential customers in light of other transportation alternatives and will result in even slower actual trip times given the additional buffer that CN create for itself under the KOTP system before facing the prospect of penalties (which may not even apply if the lookback provision advocated by CN is incorporated into the Operating Agreement).

#### **4. CN Fails To Rehabilitate Any Of The Substantial Flaws Identified By Amtrak In CN's Scheduling Modeling Exercises**

CN's claims about the *Illini/Saluki* and *City of New Orleans* schedules are based on Train Performance Calculator ("TPC") and other scheduling modeling exercises that have been

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(cont'd)

both CN's untimely performance and the deficiencies of the KOTP system which have failed to motivate CN to improve the actual run times of these trains.

<sup>283</sup> This shows the deficiencies of the KOTP system and its reliance on differences between scheduled run time and actual run time.

<sup>284</sup> Amtrak Opening Brief, 42-44.

conducted by CN for purposes of this proceeding. However, Amtrak's expert witnesses have established that the scheduling modeling exercises conducted by CN are unreliable because they are based on flawed assumptions and fictitious data inputs.<sup>285</sup>

**a) CN's PRT Calculations Are Flawed For the Reasons Discussed In Amtrak's Evidentiary Submissions**

CN various attempts to dismiss Amtrak's criticisms of CN's PRT calculations are unpersuasive. *First*, CN claims that the Train Performance Calculator ("TPC") used by CN to develop its PRT estimates is "public" and "was provided to Amtrak."<sup>286</sup> However, CN's claim about the public availability of its TPC was contradicted by CN's own modeling witness, who made it clear that while the modified tractive resistance formula used in CN's TPC (the "Davis equation") may be publicly available, the remainder of CN's TPC is proprietary (including the CN plant specifications that are an essential component of using the TPC to calculate PRT).<sup>287</sup> Thus, CN's claim that Amtrak should have run its own calculations using CN's TPC is disingenuous. There was no way that Amtrak could have generated its own version of the PRT results that were generated by CN without access to the proprietary aspects of CN's TPC.<sup>288</sup>

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<sup>285</sup> Amtrak Opening Brief, 44-46.

<sup>286</sup> CN Opening Brief, A-11.

<sup>287</sup> Fishman RVS, Attachment 1, Krueger Dep 38:16-39:16. Even CN's claim that the Davis equation used in CN's TPC is "well-known" and "widely-used" (CN Opening Brief, A-11) was called into question by Mr. Krueger, who was unfamiliar with how the Davis equation had been modified by CN. Fishman RVS, Attachment 1, Krueger Dep 57:6-57:25. CN failed to provide any support for its claim that the modified Davis equation used in CN's TPC is publicly available. An explanation of the modified Davis equation may have been buried in CN's workpapers, which were designated by CN as Highly Confidential and therefore not accessible by Amtrak employees. CN's Highly Confidential designation of the modified Davis equation in the workpapers also is inconsistent with CN's completely unsupported claim that the formula is publicly available.

<sup>288</sup> As Mr. Krueger testified, CN's proprietary TPC and commercially available TPC's are not like basic calculators that will produce the same result for a specified math problem. Fishman RVS, Attachment 1, Krueger Dep 39:17-41:11.

Second, CN disputes Amtrak's assertion that CN made inappropriate assumptions regarding the Amtrak consists that CN used in its PRT calculations for the *Illini/Saluki* and *City of New Orleans* trains. However, CN fails to provide a reasonable explanation for why it modeled the *City of New Orleans* trains using a consist of 1 locomotive and 9 passenger cars, which is two extra passenger cars than Amtrak typically operates in that service.<sup>289</sup> CN also fails to explain why it used the more typical Amtrak consist (1 locomotive + 7 passenger cars) in its separate capacity modeling exercise.<sup>290</sup> Similarly, CN fails to provide a reasonable explanation for why it modeled the *Illini/Saluki* trains using a consist of 1 locomotive and 7 passenger cars. As Amtrak has explained, if not for the minimum axle count requirement imposed by CN as a result of the CN grade crossing activation failures, Amtrak would operate the *Illini/Saluki* service

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<sup>289</sup> CN now argues that adding the two cars to its PRT calculation is consistent with a recommendation from an Amtrak internal document published in 1996. CN Opening Brief, A-12. This Amtrak document merely reflects the author's view, based on "thousands of hours of making field checks," that it is "good practice to allow for one or two additional cars in building a schedule so that extra cars can be operated without adversely affecting the performance of the train." Hirsh RVS, Ex. 67, 1, 4. The portion of this document quoted by CN contains no reference to using a Train Performance Calculator to calculate PRT. More importantly, CN has failed to establish that the parties agreed to add two cars to each consist in calculating the PRT's for the Amtrak services operating over CN. In fact, CN concedes as much since it offers to work with Amtrak to select the appropriate consist to use for purposes of establishing PRT's in the schedules. CN Opening Brief, A-12 n. 31. Moreover, the post-facto explanation provided by CN about the rationale for calculating the PRT on the *City of New Orleans* using a longer train is inconsistent with the explanation given by Mr. Krueger in his deposition. Fishman RVS, Attachment 1, Krueger Dep 170:16-173:1.

<sup>290</sup> See Williams/Roberts RVS, 73-74 ("the 1 locomotive and 7 car consist that the CN modelers used in the RCM capacity modeling is consistent with CN's own analysis of the average Amtrak consist on the *City of New Orleans* trains for the relevant period. CN has provided no rational explanation for why it increased the length of the consist of the *City of New Orleans* trains that was used for the TPC simulation results.") CN also argues that the 1+9 consist is equivalent to the "base consist" specified in Appendix V of the Operating Agreement. As Amtrak explained in its Opening Brief, the "base consist" provision is not relevant to the question of what consist should be used for the PRT calculations generated through a TPC. Amtrak Opening Brief, 53 n. 162.

using a consist of 1 locomotive and 4 passenger cars.<sup>291</sup> This is the appropriate consist to use for calculating the PRT, instead of the 1+7 consist used by CN, because any delay associated with the run time of the longer *Illini/Saluki* trains mandated by CN should be attributed as a delay caused by CN.<sup>292</sup>

*Third*, CN disagrees with Amtrak's determination that CN inappropriately assumed in its PRT calculations for the *Illini/Saluki* that the Amtrak trains would slow to a stop at numerous interlockings along the route.<sup>293</sup> However, CN fails to provide any reasonable explanation for why its PRT calculations (which are supposed to calculate the pure run time of the Amtrak trains without delay) would assume that the Amtrak trains are slowing through the interlockings. CN's assumption defeats the entire purpose of calculating PRT, which is to have a baseline of theoretical run time against which to measure any delays that occur along the route (including delays at interlockings).

*Fourth*, CN quibbles with some of the other methodological flaws identified by Amtrak in CN's PRT calculations. For example, CN concedes that it intentionally lowered the HPT input it used for the PRT calculations it developed for its rebuttal evidentiary submission,

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<sup>291</sup> CN's characterization of Amtrak's preferred 1+4 consist as a "newly stated preference" is hard to believe in good faith since Amtrak has been attaching 3 empty baggage cars to its *Illini/Saluki* trains since CN imposed the minimum axle count requirement.

<sup>292</sup> Contrary to CN's claims, there is no evidence that the equipment used by Amtrak in the *Illini/Saluki* service caused the CN grade crossing activation failures. In fact, CN's own technical consultant concluded that the failures likely occurred from a combination of factors, some of which are attributable to CN. Recent joint tests conducted by the parties have confirmed this by showing no appreciable difference in the shunting performance of Amtrak's equipment compared to CN's freight trains. Thus, CN should be held responsible for the delays associated with operating longer trains (with 3 empty baggage cars) in the *Illini/Saluki* service and any additional run time associated with the longer trains should not be included in the PRT for this service. Amtrak Opening Brief, 45-46, 53 n. 162.

<sup>293</sup> CN Opening Brief, A-14.

resulting in slightly higher PRT estimates for the *Illini/Saluki* trains.<sup>294</sup> CN also admits that it inflated the same PRT estimates through the use of rounding techniques.<sup>295</sup> Although CN argues that each of these flaws individually did not have a material impact on the PRT estimates, it does not address Amtrak's conclusion that each of these flawed assumptions and inputs collectively would have a significant impact on the reliability of the PRT estimates developed by CN.<sup>296</sup>

**b) CN Fails To Rebut Amtrak's Other Valid Criticisms of CN's Self-Serving Schedule Lengthening Proposals**

CN also attempts to salvage the methodology it used to develop its proposed schedule extensions for the *Illini/Saluki* trains. However, none of CN's arguments are persuasive enough to rehabilitate CN's flawed scheduling modeling process. As Amtrak demonstrated, CN's schedule lengthening proposals are based on a number of flawed assumptions. *First*, CN applied a 5% schedule extension factor for operating allowances and a 4% schedule extension factor for temporary slow orders ("TSO's"). CN claims that its approach is consistent with how it establishes schedules for VIA passenger trains and its own freight trains.<sup>297</sup> However, CN never offers an explanation of why it would be reasonable to include an allowance in the schedule for

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<sup>294</sup> CN Opening Brief, A-15.

<sup>295</sup> CN Opening Brief, A-15.

<sup>296</sup> See Amtrak Opening Brief, 45 ("The evidence and testimony submitted by Amtrak in this proceeding raises serious questions about the reliability and accuracy of the PRT estimates produced by CN's TPC modeling.")

<sup>297</sup> CN Opening Brief, A-16. CN's claim that this is consistent with industry standards and Amtrak practices for establishing recovery time is misleading. The TRB Guidebook cited by CN refers to increasing PRT by 7% to account for all of the factors that may increase run time above the perfect run time estimated by the TPC. Similarly, Amtrak's witness indicated that Amtrak typically develops recovery time from a "starting point" between 6 and 8% of PRT and then it may be increased or decreased depending on unique characteristics of the route. Here, CN is starting off with a 9% allowance for operational factors (including TSO's) and then adding additional allowances to extent the length of the schedule even further.

TSO when one of the primary purposes of the incentive/penalty system (which uses the schedule to measure performance) is to motivate CN to reduce Host Responsible Delays such as TSO's.<sup>298</sup>

*Second*, CN states (without any supporting explanation or elaboration) that it “applied recovery time in specific segments in order to account for specific delays likely to occur in the segment due to either crossover movements or meets with freight or passenger trains.”<sup>299</sup> This may sound plausible in the abstract, but it makes no sense. As Amtrak pointed out in its Opening Brief, it was unreasonable for CN to incorporate into the proposed *Illini/Saluki* schedules seven additional (7) minutes of delay for each anticipated meet between Amtrak and other freight trains.<sup>300</sup> This once again defeats the entire purpose of the incentive/penalty system, which is designed to measure CN's ability to prevent Freight Train Interference with Amtrak passenger trains (in accordance with the statutory preference).<sup>301</sup> CN glosses over this massive defect in its scheduling extension proposal.

*Third*, CN claims (again without any supporting explanation or elaboration) that it “adjusted recovery time in order to meet Amtrak's stated ASOTP goal of 80% without causing significant unneeded idling at interim stations.”<sup>302</sup> This explanation, once again, lacks any meaningful support or clarification. Without any account as to what “adjustments” were made or

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<sup>298</sup> Amtrak Opening Brief, 27.

<sup>299</sup> CN Opening Brief, A-16.

<sup>300</sup> Amtrak Opening Brief, 46.

<sup>301</sup> Similarly, CN should not be able to incorporate additional time into the schedule for crossover moves initiated by CN dispatchers that are handling the *Illini/Saluki* trains over CN's network. Any delays associated with such crossover moves should be accounted for in determining whether CN is providing quality service and handling the Amtrak trains in a timely manner.

<sup>302</sup> CN Opening Brief, A-16.

how “significant unneeded idling” was avoided, CN’s explanation is devoid of any merit or probative value.<sup>303</sup>

*Finally*, CN attempts to justify its failure to reallocate substantial amounts of backloaded recovery time from the endpoints of the *Illini/Saluki* (despite CN’s claim to have ostensibly reallocated recovery time from the endpoints).<sup>304</sup> CN argues that “backloading raises concerns only insofar as it is an obstacle to ASOTP” and claims that its significantly lengthened schedules are expected to result in 80% ASOTP.<sup>305</sup> CN fails to provide any assurance or guarantee that this improvement in ASOTP (against the much easier schedule baseline proposed by CN) will occur, and the claimed benefits that it touts are tainted by the fact that Amtrak passengers would be scheduled to arrive more than 30 minutes later under CN’s proposed schedules.<sup>306</sup>

#### **5. CN’s Claim That Amtrak’s Equipment Is To Blame For Untimely Performance Is Not Supported By The Evidence**

In its Opening Brief, CN continues to propagate the unsupported myth that the equipment operated by Amtrak is responsible for the poor ASOTP experienced by Amtrak’s passengers on the Amtrak services that operate over CN.<sup>307</sup> However, the only specific claim that CN makes about Amtrak’s equipment relates to the CN grade crossing activation failures that occurred on the approximately 50-mile portion of the line between Chicago and Centralia that is used by

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<sup>303</sup> Amtrak does not dispute CN’s contention that its schedule extension proposals were “carefully engineered” (CN Opening Brief, A-16), for it is evident to Amtrak that CN prepared the adjustments with the specific objective of adding more time to the schedules.

<sup>304</sup> CN Opening Brief, A-17.

<sup>305</sup> CN Opening Brief, A-17.

<sup>306</sup> CN also argues that under its proposal, backloaded recovery time would be reduced from 100% to an average of 30%. CN further acknowledges that if high ASOTP is the goal, “backloading must be avoided.” Krueger RVS, 10.

<sup>307</sup> CN Opening Brief, 13-14; CN Opening Brief, A-3 (claiming that Amtrak could resolve the CN grade crossing activation failure issue “immediately by changing the equipment it uses on the *Illini/Saluki* service”).

Amtrak's *Illini/Saluki* trains. CN provides no supporting evidence for its claim that Amtrak's Horizon/Amfleet equipment "causes the Short Shunt problem."<sup>308</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>309</sup> More recent joint tests conducted by Amtrak and CN have confirmed that Amtrak's Horizon/Amfleet equipment (operating at normal track speed) properly activated the CN grade crossings in the relevant segment of the *Illini/Saluki* route to the same extent as CN freight trains.<sup>310</sup> Therefore, there is no evidentiary basis for CN's claim that Amtrak's equipment causes the grade crossing activation failures. As a result, CN's proposal to add time to the *Illini/Saluki* schedules to account for this issue is unjustified since CN is responsible for maintaining its grade crossing activation devices in suitable condition under the Operating Agreement and appropriately has been held responsible for the delays to the *Illini/Saluki* trains caused by the speed restrictions and minimum consist requirements imposed on Amtrak by CN.<sup>311</sup>

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<sup>308</sup> CN Opening Brief, 41.

<sup>309</sup> Maga SVS, 11-12.

<sup>310</sup> [REDACTED]

<sup>311</sup> Amtrak Opening Brief, 44-46.

**D. CN's Proposed Adjustments To The KOTP System Would Not Resolve The Fundamental Problems That Amtrak's Delay-Based Proposal Is Designed To Rectify**

CN argues that the “essential structure” of the KOTP system should be retained, but proposes to make “modest revisions...including several changes intended to address issues raised by Amtrak.”<sup>312</sup> However, CN's proposal ignores the fundamental problems of the KOTP system (described in pp. 15-21 of Amtrak's Opening Brief) and is inconsistent with the statutory framework governing the Amtrak-host relationship. Moreover, the adjustments proposed by CN to the KOTP system would only serve to exacerbate the existing deficiencies of the system and enable CN to avoid even further responsibility for delays, which in turn would allow CN to obtain even greater incentive payments for worse service.

**1. CN's Attempt To Frame The Relationship Between Amtrak And CN As A Market-Based, Commercial Relationship Ignores The Statutory Framework**

One of the central themes of CN's position is that the incentive and penalty system that is developed for the Amtrak-CN Operating Agreement must be “cost effective” and consistent with “sound economic principles.”<sup>313</sup> In support of its proposed conceptual framework, CN claims that Congress instructed Amtrak in Section 101 of the RPSA to “cooperat[e]” with “other rail carriers.”<sup>314</sup> This statutory goal focuses on cooperative efforts to improve intercity passenger rail service in order to justify taxpayer-funded appropriations to Amtrak rather than any cost savings to CN and other rail carriers. It provides no support for (and actually militates against) CN's

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<sup>312</sup> CN Opening Brief, 73.

<sup>313</sup> CN Opening Brief, 2.

<sup>314</sup> CN Opening Brief, 28. The complete language of the statutory goal referenced by CN is as follows: “a greater degree of cooperation is necessary among Amtrak, other rail carriers, State, regional, and local governments, the private sector, labor organizations, and suppliers of services and equipment to Amtrak to achieve a performance level sufficient to justify expending public money.” 49 U.S.C. § 24101(a)(4).

efforts to improve its own cost effectiveness at the expense of Amtrak and its funding partners. CN fails to cite any other statutory support for the notion that the incentive system prescribed by the Board must be “cost effective” and consistent with the “sound economic principles” identified by Professor Willig, who incorrectly advocates that the Board should consider the competing incentive system proposals within the prism of a market-based, commercial relationship between Amtrak and CN.

The notion that “cost effective” and “sound economic” principles should be considered in evaluating the relative merits of an incentive and penalty proposal in a pure commercial context is not unreasonable, but here these principles must be considered within the broader regulatory framework that governs the Amtrak-CN relationship. Amtrak and CN are required by statute to enter into a contractual relationship which provides Amtrak with access to CN’s facilities and services (either on a voluntary, negotiated basis or as prescribed by the Board) because of the public policy goals and purposes of the RPSA. Since Amtrak has little choice but to operate its trains on CN tracks, the Board is authorized by statute to exercise its jurisdiction in the event the parties are unable to reach agreement and prescribe “reasonable” terms and compensation with this broader regulatory framework (where the principles of cost effectiveness and sound economics should not trump the public policy goals and purposes of the RPSA). This is vastly different from the market-based, commercial negotiation posited by Professor Willig.

Although CN speaks vaguely in terms of the public interest in “cost effective” systems, it is clear that from CN’s perspective, the KOTP system is “cost effective” precisely because it allows CN to reap the highest incentive payments from Amtrak at the lowest possible cost to CN. CN criticizes Amtrak for not conducting any “cost-benefit analysis” when Amtrak established

the HRD Thresholds,<sup>315</sup> but the costs and benefits are self-evident: whereas the statute envisions that Amtrak may pay hosts more than incremental cost only based on “quality of service,” in actuality the current KOTP system has cost taxpayers millions of dollars to pay CN for the “benefit” of the worst on-time performance of all Class I host railroads, which in turn reduces Amtrak’s passenger revenues and increases operating expenses.<sup>316</sup> Conversely, the penalty rates in Amtrak’s proposal are based on a cost-benefit analysis calculated from CN’s own admissions about CN’s perceived cost savings from providing poor Amtrak service.<sup>317</sup>

CN selectively mischaracterizes or ignores the other statutory goals and purposes of the RPSA in order to defend its KOTP proposal. Although the statute directs Amtrak to “operate Amtrak trains, to the maximum extent feasible, to all station stops within 15 minutes of the time established in public schedules,”<sup>318</sup> CN attempts to downplay this requirement by claiming that the statute does not specify an 80% requirement.<sup>319</sup> CN is correct, because the statute contemplates that Amtrak will strive to operate 100% of its trains in accordance with this standard (unlike the KOTP system, which does not trigger the application of penalties until 30% of Amtrak trains fail to meet the performance standard at the limited checkpoints). CN also attempts to argue that the statute only “suggests that all stations matter” but does not mandate

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<sup>315</sup> CN Opening Brief, 132-133.

<sup>316</sup> Effects of Amtrak’s Poor On-Time Performance, FRA Report (CR-2008-047)(March 28, 2008), available at [https://www.oig.dot.gov/sites/default/files/effects\\_of\\_otp\\_report\\_FINAL.pdf](https://www.oig.dot.gov/sites/default/files/effects_of_otp_report_FINAL.pdf) (last visited February 20, 2018).

<sup>317</sup> Sacks VS, 12-22. On the other hand, CN itself failed to conduct any “cost-benefit” analysis of its KOTP proposal which would require Amtrak to pay substantially more money to CN for poor service.

<sup>318</sup> 49 U.S.C. § 24101(c)(4).

<sup>319</sup> CN Opening Brief, 29. CN complains that the statutory goal does not contain a specific reference to the 80% level of ASOTP, but CN’s own proposal based on limited checkpoint and artificial on-time performance measurements would move the parties even further away from the all-stations goal reflected in the statute.

treating all stations equally in the incentive and penalty system. CN is correct to the extent that the statute does not “mandate” any particular method of achieving the statutory goals, provided the method is reasonably calculated to do so.<sup>320</sup>

**2. CN’s Proposed “Collaboration” With Amtrak Consists Of Offering To Add Limited Checkpoints To The KOTP System But Only If Schedules Are Lengthened And Adopting Other Non-Controversial Edits To The Operating Agreement**

CN claims that its proposed revisions to the KOTP system are “designed to accommodate Amtrak’s stated preferences and proposals.”<sup>321</sup> Most prominently, CN claims that it is offering to add two checkpoints to the *City of New Orleans* service and one checkpoint to the *Illini/Saluki* in the spirit of “compromise in response to Amtrak’s call for more checkpoints.”<sup>322</sup> CN downplays the fact that its offer to add checkpoints is contingent on substantially lengthening the schedules for each of these services.<sup>323</sup> For the reasons explained in Section IV.C above, CN’s offer to add limited checkpoints to the KOTP system offers little consolation to the Amtrak

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<sup>320</sup> CN also claims that the statutory mandate to provide timely service to all stations is “one of multiple competing goals to be achieved subject to feasibility.” CN Opening Brief, 29. CN provides no support for this claim, fails to explain why it believes feasibility should be overriding factor in this analysis, and fails to explicitly describe those supposed “competing goals” other than the general cooperation language cited above. Moreover, CN omits any mention of the other relevant statutory goals and purposes, including Amtrak’s mission to provide service that is trip-time competitive with other modes of transportation and to promote fast and convenient intercity passenger rail service. See Amtrak Opening Brief, 5 (citing numerous RPSA statutory provisions, including Amtrak’s statutory goals and missions).

<sup>321</sup> CN Opening Brief, 75.

<sup>322</sup> CN Opening Brief, 85.

<sup>323</sup> CN Opening Brief, 85 (“Subject to adoption of its proposed revisions to the Illini/Saluki schedules, CN proposes to add Champaign as a new checkpoint on the Illini/Saluki service...CN is also amenable to adding two checkpoints on the City of New Orleans service, provided that revisions are made to the existing schedules for that service comparable to those CN has proposed for the Illini/Saluki trains.”).

passengers who would be saddled with significantly longer scheduled trip times and the increase in Amtrak operating costs that would result from CN's schedule extension proposal.<sup>324</sup>

CN claims that some of the other adjustments it is seeking to the KOTP system "incorporate modifications proposed by Amtrak."<sup>325</sup> However, CN's only support for this claim is **CN's proposal** to incorporate certain of Amtrak's existing delay codes as relief items.<sup>326</sup> This is an audacious claim since CN itself proposed to use the Amtrak delay codes as relief items and Amtrak does not object in principle (except to the extent noted in Section IV.D.3.a below).

### **3. CN's Other Proposed Adjustments Would Further Exacerbate The Existing Deficiencies Of The KOTP System**

In addition to its conditional checkpoint proposal, CN's other proposed adjustments to the KOTP system would further exacerbate many of the existing deficiencies of that system that Amtrak's delay-based proposal is designed to rectify. For example, the KOTP system includes numerous relief items, tolerance and other allowances which result in CN's performance being measured against an artificial contract schedule that includes substantial "padding" for delays. Many of CN's proposed adjustments to the KOTP system are designed to further expand CN's eligibility for relief items, which would create further misalignment between the incentives and penalties assessed under the artificial KOTP system and the actual impact of CN's performance on Amtrak's passengers. CN fails to justify its request for these proposed adjustments to the KOTP system for the reasons summarized below.

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<sup>324</sup> See Amtrak Opening Brief, 42-44.

<sup>325</sup> CN Opening Brief, 74.

<sup>326</sup> CN Opening Brief, 75 ("A number of these changes, such as CN's proposal to incorporate Amtrak's delay codes and to add new checkpoints, are designed to accommodate Amtrak's stated preferences and proposals.") The delay codes that CN proposes to incorporate as relief items include Amtrak Responsible Delay codes such as ADA (Passenger Related), CON (Hold for Connection), HLD (Passenger Related), INJ (Injury Related) and SYS (System & Crew). CN Opening Brief, Exh. 1, App. V-2.

**a) CN Fails To Prove That Separate Relief Items Are Necessary If Amtrak Delay Codes Are Incorporated Into The Relief Provision**

As noted above, CN proposes to adopt certain Amtrak delay codes as a “screen” for relief items under Appendix V of the Operating Agreement.<sup>327</sup> Amtrak does not object in principle to CN’s proposal, but has noted that the incorporation of these Amtrak delay codes as relief items would render other existing and proposed relief items redundant.<sup>328</sup> For example, the Amtrak delay code SYS duplicates two existing relief items that CN seeks to maintain as separate and independent relief items in Appendix V— [REDACTED]

[REDACTED]

[REDACTED]<sup>329</sup> [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>331</sup> Thus, CN proposes to add [REDACTED]

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<sup>327</sup> Ladue/Kuxmann VS, 56; CN Opening Brief, 76. This means that the parties would use certain Amtrak delay codes as relief items instead of separately defining relief items in Appendix V involving circumstances which are covered by those Amtrak delay codes.

<sup>328</sup> Amtrak Opening Brief, A-14 through A-19; Vilter/Maga RVS, Exh. 31.

<sup>329</sup> *Id.*

<sup>330</sup> CN Opening Brief, 77. [REDACTED]

<sup>331</sup> CN Opening Brief, 77.

[REDACTED]

[REDACTED]

Amtrak does not accept CN's contention that Amtrak "regularly" codes items that should be SYS as either RTE or DCS.<sup>333</sup> Moreover, although it is entirely possible that Amtrak conductors may make coding errors from time to time that could impact these specific coding categories, it is unclear how CN's proposed additional relief item addresses CN's concern. If Amtrak conductors inadvertently make a mistake and use the RTE or DCS code instead of the SYS code, CN has the right to request a correction under the existing procedures set forth in the existing Operating Agreement.<sup>334</sup> CN has failed to show that the procedure for correcting coding errors is insufficient, and therefore has provided no support for retaining any of these redundant relief items in Appendix V of the Operating Agreement.

**b) CN Fails to Justify Its Request For Crossover Relief**

CN seeks relief for a "[d]elay of more than two minutes for each instance of delay caused by movement of an Amtrak train over a crossover between tracks."<sup>335</sup> CN argues that the

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<sup>332</sup> [REDACTED]

<sup>333</sup> The examples submitted by CN to support this contention (Ladue/Kuxmann SVS, 29-30) fail to show any error in the manner in which Amtrak coded these delays. CN fails to provide any evidence that the six DCS examples from 2011, only two of which occurred on CN, involved *joint* efficiency tests as opposed to efficiency tests required solely by the host railroad (which would warrant designation as DCS delays). CN also fails to provide any evidence that the eleven RTE examples between 2011 and 2015 were coded improperly, and almost all of those examples indicate or imply that the Amtrak train was stopped to copy a new directive issued by the CN dispatcher (thus warranting designation as RTE delays). Moreover, CN would have had an opportunity to challenge the propriety of each of these delay coding decisions by Amtrak under the process set forth in the Operating Agreement, and provides no indication about whether it did so at the time.

<sup>334</sup> Vilter VS, 17 ("[F]rom July 2013 through June 2014, CN requested changes to 1.6 percent of host-responsible delay records, accounting for 4.2 percent of host-responsible delay minutes. Amtrak accepted 85.3 percent of CN's change requests"). See also Vilter VS, Attachment 7.

<sup>335</sup> Ladue/Kuxmann VS, Exh. 15, CN Proposed Appendix V Section A.1.e.11; Ladue/ Kuxmann SVS, 23-24, Exh. 1, App. V-2.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>336</sup> CN's proposal is unreasonable because CN (not Amtrak) determines which tracks are used by which trains operating over CN's network. When a CN dispatcher elects to cross over an Amtrak train (*e.g.*, to avoid a conflict with another train) and that Amtrak train incurs a delay as a result of executing the crossover move ordered by the CN dispatcher, CN should be responsible for any resulting delay under the incentive/penalty system and should not receive relief. This is necessary so that CN dispatchers are not incentivized to delay Amtrak trains through crossovers in order to clear track for freight trains, which must yield to Amtrak's preference in using CN's facilities.

**c) CN Is Not Entitled To Relief For Late Amtrak Arrivals**

CN proposes a new relief item for delays caused when Amtrak arrives later than its scheduled arrival time and is unable to move onto CN's line at the entry point due to CN freight train interference.<sup>337</sup> CN asserts (without any evidentiary support) that GPS technology allows Amtrak to know the exact location of its trains and that it could inform CN directly of late

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<sup>336</sup> [REDACTED]

<sup>337</sup> Ladue/Kuxmann VS, Exh. 15, CN Proposed Appendix V Section A.1.e.13. ( "delays caused by freight train interference that prevents Amtrak from entering CN's line when an Amtrak train arrives at an entry point to a CN line more than 15 minutes after its scheduled arrival without having provided CN with notification of such arrival at least 30 minutes in advance.").

arrivals at least 30 minutes in advance.<sup>338</sup> CN also asserts (without any evidentiary support) that Metra purportedly has reduced delays on CN by communicating the status of late trains to CN in some manner.<sup>339</sup>

CN's proposal for additional relief ignores the existing communication protocols that are used when an Amtrak train operates across the rail lines of multiple hosts. Host railroads regularly hand off Amtrak and freight trains from one railroad to another. CN's proposal is unreasonable because it would require Amtrak to insert itself into the communication process as an intermediary between the two hosts which are actually responsible for dispatching and handing off the Amtrak train and managing other rail traffic on their lines.<sup>340</sup> Instead of remaining accountable under the incentive/penalty system for allowing one of its freight trains to occupy track in front of a scheduled Amtrak arrival, which could constitute a violation of its preference obligation, CN seeks to give itself an "out" by claiming relief if Amtrak fails to comply with arbitrary arrival and notification standards. The Board should not countenance CN's unreasonable attempt to expand its eligibility for relief in this manner.

#### **d) CN Seeks Duplicative Relief for Maintenance-of-Way Projects**

CN seeks additional relief for delays caused by Programmed Maintenance of Way projects.<sup>341</sup> However, CN does not provide any evidence that an additional relief item is

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<sup>338</sup> CN Opening Brief, 79.

<sup>339</sup> CN Opening Brief, 79.

<sup>340</sup> Amtrak Opening Brief, A-12, A-13. CN also fails to explain why it should be entitled to relief in such circumstances based on the arbitrary 15 and 30 minute standards that are incorporated into CN's proposal.

<sup>341</sup> Ladue/Kuxmann VS, Exh. 15, CN Proposed Appendix V Section A.1.e.9 (Relief for "[u]p to a maximum of three minutes of delay per 100 scheduled miles per trip of a train or portion thereof (*i.e.*, 157 miles would equate to a 6-minute maximum), caused by Programmed Maintenance of Way projects when Amtrak is given 90 days advanced notice detailing the dates, the line segment to be affected, and the amount of delay anticipated.").

necessary given that Appendix V of the Operating Agreement contains an existing tolerance provision dealing with the same subject of programmed maintenance work.<sup>342</sup> CN unpersuasively claims that its proposed relief item is not redundant with the existing 30 minute tolerance provision for programmed maintenance-of-way work currently applicable to Amtrak services over the IC lines because the current tolerance provision does not apply automatically.<sup>343</sup> Although Amtrak has the discretion to grant tolerance to CN under this provision, it would apply automatically because the parties must agree in advance on the amount of tolerance granted for specified projects.

CN does not provide any evidence that the tolerance provision has been ineffective or fails to adequately account for the types of programmed maintenance work it typically conducts.<sup>344</sup> Further, CN's proposed relief item would give CN "carte blanche" to claim the maximum amount of relief for any delays to Amtrak trains that may occur during the periods of CN's programmed maintenance projects, without any mechanism for Amtrak to motivate CN to take steps to minimize delays that may be avoidable.<sup>345</sup>

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<sup>342</sup> [REDACTED]

<sup>344</sup> Current Operating Agreement, Appendix V, Section A.2.

<sup>345</sup> Amtrak Opening Brief, A-13, A-14.

**e) CN's Request For Relief At Foreign Interlockings Disregards Its Responsibility For Coordinating With Connecting Railroads**

CN seeks relief for “the amount of time a trip of an Amtrak train is delayed at an interlocking not controlled by CN, after CN’s dispatcher has transmitted the electronic indicator lining the signals for the CN route.”<sup>346</sup> CN’s primary argument is that Amtrak agreed to this relief item during a previous negotiation with CN and therefore it should remain in the Operating Agreement. CN also argues that it should receive this relief item because it claims that Amtrak delays at foreign interlockings are beyond its control.<sup>347</sup>

Amtrak is asking the Board to establish reasonable terms and compensation under 49 U.S.C. § 24308(a) in this proceeding precisely because the KOTP system and certain other provisions of the existing Operating Agreement are defective and the parties were unable to negotiate a successor Operating Agreement. In prescribing reasonable terms and compensation on the issues in dispute, the Board is not bound by the existing provisions of the Operating Agreement or prior negotiations between the parties.<sup>348</sup> Therefore, CN’s primary argument about Amtrak’s prior agreement to this relief provision in voluntary negotiations is irrelevant.

With respect to the issue of control, Amtrak is dependent on its host railroads to dispatch Amtrak’s trains across their rail lines. It is the CN dispatcher who, for efficiency and safety reasons, coordinates Amtrak’s crossing of a foreign interlocking with the dispatcher of the controlling railroad. CN’s proposed relief item at foreign interlockings is unreasonable because

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<sup>346</sup> Ladue/Kuxmann VS, Exh. 15, CN Proposed Appendix V Section A.1.g. In its Opening Brief, Amtrak inadvertently described this provision as one of the “new relief items” sought by CN. This relief provision exists in the current Operating Agreement, but Amtrak objects to its inclusion in the new Operating Agreement for the reasons described in Amtrak’s Opening Brief and this subsection. See Amtrak Opening Brief, A-14.

<sup>347</sup> CN Opening Brief, 80-81.

<sup>348</sup> Amtrak Opening Brief, 37.

the host railroads are in the best position to control their own interlockings through communication with each other.<sup>349</sup> CN's proposed relief provision would remove an incentive for CN to work with other host railroads to reduce Amtrak delays at foreign interlockings, and therefore would allow CN to delay Amtrak trains at those interlockings through inaction and without consequence.<sup>350</sup>

**f) CN's Request For "Catch-all" Relief Is Unreasonable**

CN seeks to add a "catch-all" relief item to the KOTP system which would enable CN to claim relief for "[a]ny delay resulting from causes, not listed above, which are normally not within the ability of CN to control."<sup>351</sup> Amtrak has pointed out that adopting CN's proposal to use certain Amtrak delay codes as relief items makes this "catch-all" provision superfluous.<sup>352</sup> Moreover, CN's reference in the proposed catch-all provision to delays "normally" not within CN's ability to control is unreasonably vague and prone to varying interpretations which will result in further disputes between the parties about its potential applicability.

CN seeks through this provision to further expand its ability to obtain relief under the KOTP system for delays that CN unilaterally deems to be beyond its control. There is an existing provision in Appendix V relating to "special relief" which gives Amtrak the discretion

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<sup>349</sup> In support of its position, CN also makes an unsubstantiated claim that Metra has become "more engaged" at foreign interlockings and implies (without any supporting evidence) that such engagement has improved the handling of Metra trains at these unspecified locations. Ladue/Kuxmann SVS, 25. These unsupported observations disregard CN's responsibility as the host railroad to coordinate the passage of Amtrak trains through foreign interlockings.

<sup>350</sup> Amtrak Opening Brief, A-14.

<sup>351</sup> CN Opening Brief, 81; Ladue/Kuxmann VS, Exh. 15, CN Proposed Appendix V Section A.1.e.15. CN's proposed language specifies that it would be entitled to such relief as long as it supplies "such information as may be reasonably requested by Amtrak to support such a claim for relief." Although CN speculates that its proposed "catch-all" provision could be administered fairly through negotiation or arbitration, the vague nature of the proposal and the interpretational disputes it will create between the parties outweighs the benefit of recourse to administrative remedies.

<sup>352</sup> Vilter/Maga RVS, 57; Amtrak Opening Brief, A-19, A-20.

to determine whether CN is entitled to relief in such circumstances.<sup>353</sup> CN has not provided any evidence demonstrating that it has ever invoked or been denied recourse under this “special relief” provision. Therefore, CN’s proposal to flip the burden of proof and allow it to claim additional relief as long as it provides Amtrak with *post facto* information supporting its position should be rejected as unreasonable.<sup>354</sup>

**g) CN Fails to Justify Its Demand For “Root Cause” Delay Attribution**

CN advocates for a so-called “root cause” approach for attributing responsibility for Amtrak delays instead of the “direct cause” system used for all of Amtrak’s operations over host railroad track. Despite CN’s assertions to the contrary, CN’s proposal would introduce unnecessary subjectivity into the delay attribution process and would be difficult to manage (leading to ongoing disputes between the parties about delay causation).

CN asserts that its proposal “would not require analysis of root cause in all cases, but would allow for its use where appropriate and clarify that information about root cause carries relatively more weight than information about proximate cause.”<sup>355</sup> CN further claims that “in most cases” its proposal “will be the same as direct or proximate cause, or the difference will be immaterial to determining CN’s incentives/ penalties, so no dispute will arise.”<sup>356</sup>

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<sup>353</sup> The existing provision provides as follows: “CN may request special relief for delays not specifically listed above, supplying such information as may be reasonably requested by Amtrak to support such a claim for special relief.” Current Operating Agreement, App. V, A.1.e.13.

<sup>354</sup> Amtrak Opening Brief, A-19, A-20.

<sup>355</sup> CN Opening Brief, 82. CN proposes to amend Appendix V of the Operating Agreement to specify that “evidence of root cause, as opposed to proximate cause, shall be taken as the best evidence of the cause of a delay.” CN Opening Brief, Exh. 1, App. V-6.

<sup>356</sup> *Id.* CN never explains why it would seek to change the existing system and process used for coding Amtrak delays if “in most cases” it will make no difference.

In advocating for the use of so-called “root cause” evidence, CN has proposed a solution in search of a problem.<sup>357</sup> The parties have already established an effective mechanism for CN to contest Amtrak’s decisions about delay coding. CN has not demonstrated that Amtrak’s current system of coding delays based on “direct cause” is inadequate. The direct cause is reported by Amtrak using a uniform set of written, published coding rules and practices applied across all Amtrak trains on all host railroad lines nationwide.<sup>358</sup> Those rules provide CN with an opportunity to supplement the direct cause delay data with information from other sources, and to receive, review, and request changes to delay data for every run of every Amtrak train before that data becomes final.<sup>359</sup>

CN’s proposal for the determination of “root cause” is entirely subjective and would lead to frequent disputes. CN makes this proposal without defining what it means by the phrase “root cause” or how delay attribution under a “root cause” principle would function.<sup>360</sup> As explained in the Vilter/Maga RVS, “one would have to arbitrarily choose how far back in time to look for contributing factors; how far away in distance to look for contributing factors; whether to include unconnected contributing factors or only those in a direct chain; to what extent the host railroad could have prevented the delay by responding differently to each contributing factor; and how

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<sup>357</sup>

C [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

<sup>358</sup>

Vilter/Maga RVS, 45-47.

<sup>359</sup>

See Chapter 7 of the Amtrak Service Standards Manual (Version 10, effective April 30, 2017), attached as Exh. 29 to the Vilter/Maga RVS. From July 2013 through June 2014, CN submitted change requests to 1.6 percent of host-responsible delay records which accounted for 4.2 percent of host-responsible delay minutes. Amtrak agreed with these requests 85.3 percent of the time. Vilter VS, 15.

<sup>360</sup>

Vilter/Maga RVS, 43.

much each contributing factor may have ultimately been related to the delay. As a practical matter it would be difficult, if not impossible, to unravel which factors played a role surrounding each and every delay.”<sup>361</sup> This approach inevitably would lead to more protracted disputes between the parties about Amtrak delay coding decisions.

Further, CN’s proposal to use so-called “root cause” evidence limits its responsibility to avoid or minimize delays to Amtrak trains. CN has control over its tracks and the trains operating over those tracks, including the ability to respond to the many events and conditions that such trains encounter every day. It is CN which has the greatest ability to control whether an unplanned event will result in a freight train operating ahead of and delaying an Amtrak train.<sup>362</sup> CN should not be allowed to avoid accountability under the incentive/penalty system for failing to avoid or minimize delays by pointing to external factors that may have played a contributing role in the circumstances leading to the delay.

Lastly, CN’s proposal would enable CN dispatchers to “self-report” on their own performance to the extent that Amtrak delays are the direct result of their dispatching decisions and CN’s dispatchers are able to proffer extrinsic evidence pointing to other potentially

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<sup>361</sup> Vilter/Maga RVS, 47. Further complicating matters, CN has proposed language for the Operating Agreement which would require Amtrak determinations about specific delay events to have precedential effect. CN’s proposed revision to Section 5.2.A of the Operating Agreement includes the following language: “

[REDACTED]

<sup>362</sup> For example, a weather event might be a factor contributing to an unplanned meet between a CN freight train and an Amtrak train; but regardless of why the trains are where they are, it is up to CN to decide which train will be allowed to go first. Vilter/Maga RVS, 49. CN’s performance under the incentive/penalty system should reflect the dispatching and operational decisions that CN makes in such circumstances to avoid or minimize unanticipated delays.

contributing factors. Under the current delay reporting system, delays to an Amtrak train are recorded by the conductor of the train, who is in charge of the train and therefore in the best position to determine the direct cause of delays to his or her train and has access to information from multiple sources.<sup>363</sup> The Amtrak conductor, in almost all cases, is not reporting on the quality of their performance when recording the direct cause of delays. However, CN's dispatchers would be incentivized to point to other contributing factors as the "root cause" of the delays that they may have been able to avoid or minimize.

**h) CN Fails to Support Its Proposed Adjustments to the Do Not Count Provisions**

CN's proposal to adopt Amtrak delay codes as relief items and Amtrak's proposal to add checkpoints to the KOTP system renders certain existing "Do Not Count" provisions redundant.<sup>364</sup> However, CN objects to the elimination of these provisions (while proposing modifications for the "Do Not Count" provisions related to weather)<sup>365</sup> because it claims that the situations addressed by the redundant provisions "can cause major operating disruptions that may not be fully accounted for through ordinary relief items."<sup>366</sup> CN's argument is unavailing, principally because CN should remain accountable under the KOTP system for any delays that follow the initial delay covered by the relief item represented by the Amtrak delay code (otherwise CN would have the ability to cause further extensive delays to that train and its

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<sup>363</sup> Contrary to CN's suggestion that an Amtrak conductor codes delays based simply on his or her "windshield view" (Ladue/Kuxmann VS, 64-65), the Amtrak conductor uses multiple sources of information, including (1) direct observation, (2) train bulletins, (3) radio traffic, and (4) information relayed by engineers, dispatchers, maintenance of way employees, signal maintainers, and other train crew members. Vilter/Maga RVS, 50.

<sup>364</sup> Amtrak Opening Brief, A17-A18. The "Do Not Count" provisions specify situations in which a train trip is not counted at all for purposes of calculating incentives and penalties under the KOTP system.

<sup>365</sup> CN Opening Brief, 84.

<sup>366</sup> CN Opening Brief, 83.

passengers with the assurance that the trip would not count for purposes of the KOTP system).<sup>367</sup>

In fact, if CN's proposal to adopt Amtrak delay codes is accepted, the applicable codes fully capture the effect of a train delay due to a litany of reasons, including all weather-related incidents.<sup>368</sup> This necessarily renders many of the "Do Not Count" provisions redundant (including the provisions accounting for weather-related delays).<sup>369</sup>

**E. CN's Other Proposed Changes To The Operating Agreement Are Not Reasonable Or In The Public Interest**

CN has proposed certain other changes to the Operating Agreement which are not reasonable and should not be prescribed by the Board. First, CN argues that the Board should adopt a 3-year term for the new Operating Agreement between Amtrak and CN instead of the 10-year term proposed by Amtrak.<sup>370</sup> CN's argument that the "parties are more likely to work cooperatively to find constructive solutions to issues if it is understood that recourse to the Board is possible"<sup>371</sup> after 3 years makes no sense. Given the amount of time and resources that have been spent litigating this matter before the Board following Amtrak's filing of the Application in August 2013, CN's proposal to adopt a 3-year term for the Operating Agreement is woefully

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<sup>367</sup> Amtrak Opening Brief, A-19.

<sup>368</sup> Vilter/Maga RVS, 59-60 (noting Amtrak has a specific delay code for weather-related delays).

<sup>369</sup> Amtrak agrees with CN that the force majeure "do not count" provision should continue to be used in any KOTP system. However, it is not reasonable for CN to expand the scope of this provision to include "actions taken in response to warnings, threats or alerts related to such conditions." CN's proposed expansion is unjustified because mere actions taken by CN in preparation for possible force majeure events should not trigger discounting train trips under the incentive system before the actual force majeure event occurs. Vilter/Maga RVS, 60. Otherwise, CN could benefit under the KOTP system for imposing operating restrictions on Amtrak that turn out to be unnecessary.

<sup>370</sup> CN Opening Brief, 112.

<sup>371</sup> CN Opening Brief, 112.

short and would provide little incentive for the parties to work together cooperatively if they can exercise termination rights after 3 years.<sup>372</sup>

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

## **V. CN's Capacity Modeling Evidence Is Both Irrelevant and Unpersuasive**

### **A. CN's Capacity Modeling Evidence Is Not Relevant to the Specific Terms And Compensation Sought By CN In This Proceeding and Should Be Disregarded By The Board**

CN now asserts for the first time in its Opening Brief that it is *not* seeking capital improvement costs from Amtrak in this proceeding.<sup>375</sup> CN expressly denies that it is requesting a Board order requiring Amtrak to pay for infrastructure costs despite previous statements to that effect.<sup>376</sup> In light of CN's clarification of its position, all of the capacity modeling evidence submitted by CN on this subject is not relevant to the specific terms and compensation sought by

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<sup>372</sup> See Amtrak Opening Brief, 100.

<sup>373</sup> CN Opening Brief, 113.

<sup>374</sup> Amtrak Opening Brief, 103-104.

<sup>375</sup> CN Opening Brief, 25, n. 50 ("CN refutes criticisms leveled in Amtrak's rebuttal evidence against CN's modeling of the infrastructure that would be necessary to restore the CN line capacity Amtrak consumes. CN is not asking the Board to order Amtrak to pay the cost of that infrastructure..."); CN Opening Brief, 58 ("Nor does CN assert 'a requirement that Amtrak contribute towards CN's capacity.'").

<sup>376</sup> Ladue/Kuxmann VS, 52 ("Alternatively, as a way to eliminate or reduce these costs, the Board could order Amtrak...to fund the capital projects necessary to restore the capacity Amtrak consumes on CN's lines"); Ladue/Kuxmann VS, 53 ("CN would accept funding from Amtrak for this infrastructure as fully discharging Amtrak from further responsibility for the incremental cost of CN freight train delays due to Amtrak's existing services.").

CN in this proceeding.<sup>377</sup> It is not clear why CN thought it would be appropriate to require Amtrak and the Board to expend the resources necessary to review the substantial amounts of capacity modeling evidence that CN submitted into the record (including a detailed Verified Statement from CN's capacity modelers and numerous workpapers associated with the capacity modeling studies) when CN is not even claiming that Amtrak should be required to pay for the infrastructure costs that result from those capacity modeling studies.<sup>378</sup> But even if this evidence was deemed to be relevant in some respect to the issues raised in this proceeding, Amtrak has demonstrated that CN's capacity modeling studies are fundamentally flawed and therefore unreliable.<sup>379</sup>

**B. CN Has Failed To Refute Any Of Amtrak's Valid Criticisms Of CN's Capacity Modeling Flaws**

**1. CN's Use Of A Freight-Only Base Case Ignores The Historical Fact That The Lines Modeled By CN Have Always Included Passenger Traffic**

First of all, CN's inability to substantively justify its failure to include Amtrak traffic data in developing the "baseline" for its capacity modeling studies casts serious doubt on the reliability of those modeling efforts. CN readily admits that it did not consider Amtrak traffic in calculating the baseline for any of its capacity modeling studies; yet CN willingly acknowledges that doing so would have been "customary" in any capacity modeling study.<sup>380</sup> Instead, CN

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<sup>377</sup> CN claims that its capacity modeling evidence is "indicative of the full incremental costs Amtrak imposes on CN." CN Opening Brief, 25, n. 50. However, in the absence of any claim by CN that the Board should order Amtrak to pay for the purported capacity costs, the relevance of CN's evidence is illusory.

<sup>378</sup> In addition to efforts expended by Amtrak to review and evaluate CN's capacity modeling evidence, Amtrak also prepared for and conducted the deposition of CN witness Harald Krueger in part to discuss the results of CN's capacity modeling studies.

<sup>379</sup> Amtrak Opening Brief, 96-100.

<sup>380</sup> CN Opening Brief, A20.

attempts to justify omitting Amtrak traffic from the base case by claiming that the purportedly broad “incremental cost” standard under Section 402(a) allows CN to make this omission.<sup>381</sup>

This excuse fails for two reasons.

*First*, CN’s excuse for omitting Amtrak traffic in developing the baseline for its capacity modeling studies fails to account for the fact that passenger traffic on CN’s lines prior to the initiation of Amtrak service in 1971 was significantly more voluminous than it is today. Prior to Amtrak’s creation, CN’s predecessors operated almost three times the daily train miles that Amtrak operates over CN’s network today.<sup>382</sup> CN’s use in its capacity modeling studies of “a hypothetical baseline case in which Amtrak is not present on CN’s lines” does not account for the fact that CN’s own passenger trains were consuming even more capacity on CN’s lines prior to Amtrak’s arrival.

*Second*, by considering a “baseline” that only includes freight traffic, CN’s capacity modeling does not establish a realistic baseline for the current performance of trains and thus becomes unverifiable. A capacity model that does not reflect “real world” operations (i.e. include all traffic that exists on a network) cannot subsequently be verified with a “reality check” to ensure that the traffic and infrastructure proposed in the model would perform effectively in the real world.<sup>383</sup> CN’s excuse – that it was only trying to evaluate Amtrak’s consumption of capacity on its network - does nothing to rehabilitate the impropriety of CN’s “baseline” calculation that omits Amtrak traffic from its capacity modeling. Even CN obliquely

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<sup>381</sup> CN Opening Brief, A20. CN claims that the question “posed by the statutory incremental cost standard” is “what are the costs that CN incurs that it would not incur if Amtrak did not consume a substantial part of its capacity?” *Id.* For the reasons explained in Section II above, there is no support in either the statute or the legislative history for such an expansive interpretation of the incremental cost standard in Section 402(a).

<sup>382</sup> Vilter/Maga RVS, 8; Morehouse VS, 3-4.

<sup>383</sup> Williams/Roberts RVS, 13.

acknowledges this concern, noting that Amtrak’s proposed baseline calculations are customarily performed.<sup>384</sup> Because CN’s capacity modeling studies cannot be reliably verified with real world conditions, they should be disregarded by the Board.

**2. CN Does Not Substantiate Its Claim That The Infrastructure Improvements Identified Through Its Capacity Modeling Studies Are Necessary To Alleviate Freight Train Delays That CN Seeks To Attribute To Amtrak**

Next, CN has offered no evidence justifying its recommended capacity improvements that it claims are necessary to replace the purported capacity consumed by Amtrak. CN claims that these recommendations will “return[] the capacity consumed by Amtrak’s presence on CN’s lines and operation at the stated service goals.”<sup>385</sup> But in reality, CN’s self-serving recommendations are little more than an attempt to identify infrastructure improvements that would alleviate delays caused by freight traffic on CN’s network.

CN openly acknowledges that some of its proposed capital improvements do nothing to help alleviate freight train delays that it attributes to Amtrak in its capacity modeling studies—rather, CN explains that it would be willing to tolerate alleged Amtrak interference with its freight operations in exchange for Amtrak funding of infrastructure that alleviates congestion in other areas of CN’s network.<sup>386</sup> In other words, CN believes Amtrak should pay for improvements to CN’s network even if those improvements would not alleviate freight-passenger days or otherwise provide any direct benefit to Amtrak.

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<sup>384</sup> CN Opening Brief, A20.

<sup>385</sup> CN Opening Brief, A20.

<sup>386</sup> CN Opening Brief, A29-30.

CN also failed to proffer any evidence demonstrating how it chose the specific infrastructure improvements it recommended.<sup>387</sup> Therefore, there is no reliable way to evaluate the relevance of any of the proposed infrastructure improvements it recommends (but is not seeking in this proceeding).<sup>388</sup>

Likewise, CN has failed to cite or otherwise advance any justification in support of the infrastructure proposals that CN acknowledges will not be “heavily used” or used “sparsely.”<sup>389</sup> While CN dismisses this concern by noting that “[s]ome plant is critically important for the fluidity of the system, even if it is only used sparsely,”<sup>390</sup> CN offers no supporting evidence showing that its “sparsely” used infrastructure recommendations are in fact “critically important for the fluidity” of its network. Contrast this absence of support with Amtrak’s analysis, which evaluated CN’s infrastructure recommendations and concluded that in addition to the fact that many of the CN infrastructure proposals are only sparsely used in CN’s model, many such improvements also would not alleviate freight traffic delays that the model attributed to Amtrak traffic.<sup>391</sup>

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<sup>387</sup> Williams/Roberts RVS, 38; Amtrak Opening Brief, 99.

<sup>388</sup> CN also mischaracterizes the Williams/Roberts observations about the lack of alignment between the capacity improvements identified by CN and the locations where CN’s capacity studies show Amtrak causing delays to CN’s freight operations as a “proposed solution” from Amtrak to install “infrastructure only in locations where freight trains are delayed by Amtrak.” CN Opening Brief, A-29. Amtrak has offered no such solution because it is not required to fund additional capacity for CN.

<sup>389</sup> CN Opening Brief, A30.

<sup>390</sup> CN Opening Brief, A30.

<sup>391</sup> Williams/Roberts RVS, 54-61.

3. **CN's Capacity Modeling Results Are Tainted By Their Numerous Design and Methodological Flaws**

- a) **CN's capacity model is based on a built-in design flaw – namely, its baseline does not consider existing Amtrak traffic.**

CN's attempt to defend the propriety of its capacity modeling studies is unavailing because CN refuses to acknowledge that assuming a baseline level of traffic without Amtrak is problematic.<sup>392</sup> As Amtrak's expert witnesses Williams and Roberts observed:

CN's simulation is founded on a built-in design flaw **that derives from its faulty base case:** that is, regardless of the traffic and infrastructure on the line, CN's model will always lead to the conclusion that additional infrastructure is necessary to mitigate what CN asserts is the "incremental delay" that is "attributable to Amtrak." Put another way, CN's study is designed such that it is impossible to conclude that no infrastructure is needed.<sup>393</sup>

In other words, CN's capacity model exercises are flawed because they are premised on a faulty baseline– a freight-only scenario. Modeling capacity using a "freight-only" baseline scenario ignores the fact that passenger traffic on the CN lines at issue was even more voluminous before Amtrak began service on CN's network and makes testing CN's capacity modeling results against a "real world" scenario infeasible. As a result, CN's modeling exercise will *always* lead to the conclusion that more infrastructure is needed as a result of Amtrak.<sup>394</sup>

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<sup>392</sup> CN Opening Brief, A24.

<sup>393</sup> Williams/Roberts RVS, 14 (emphasis added).

<sup>394</sup> CN fails to rebut Amtrak's assertion that the property capacity modeling tool used by CN, known as the Route Capacity Model or RCM, "is not widely known, utilized, or accepted elsewhere within the railroad industry." Williams/Roberts RVS, 9. Almost all of the entities mentioned by CN as having used RCM are affiliated with CN or CSX. CN Opening Brief, A-22. This hardly refutes Amtrak's assertion that RCM is not used with the same widespread acceptance that other capacity modeling tools (such as RTC) are used in the industry.

**b) CN's conversion of monthly delay targets into daily delay targets and its measurement of delays by train number (as opposed to by service) distorts CN's modeling efforts and results in an overstatement of the infrastructure requirements necessary to alleviate delays**

CN attempts to downplay the distortive effect of converting monthly delay targets into daily targets is unconvincing and misstates Amtrak's primary concern with this issue. To clarify, the concern expressed by Williams/Roberts with this conversion is as follows: meeting daily delay targets is much more difficult than meeting a monthly delay target, even if the sum total of all daily delay minutes for a month equals the allowable monthly delay minutes.<sup>395</sup>

For the same reasons, measuring delay by individual Amtrak train number as opposed to measuring delay by Amtrak service similarly results in finding more "delays." Measuring delay events by train service allows for variance across individual trains where one bad run with abnormally high minutes does not skew the results.<sup>396</sup> CN's Opening Brief fails to acknowledge or otherwise address this distortive effect.<sup>397</sup>

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<sup>395</sup> Williams/Roberts RVS, 20-30. This is because, as Williams and Roberts describes, monthly delay targets allows for variance across days – so long as Amtrak meets the monthly delay minute target, it does not matter if some days experience substantial delays while other days had no delays. But if the monthly target was divided into daily delay targets, days with substantial delays suddenly become problematic when they otherwise would not be under a monthly delay target scheme. Williams/Roberts RVS, 24-27.

<sup>396</sup> Williams/Roberts RVS, 24-25 ("In contrast, the modeling approach selected by CN's modelers measures delay minutes separately for each Amtrak train number. This additional requirement further constricts the permitted variability within the data and is likely to have resulted in an additional overstatement of the freight delay and the resulting infrastructure "required" to mitigate that delay.")

<sup>397</sup> CN Opening Brief, A25-26 (falsely stating that Amtrak "fails to explain why modeling delays" at the individual train number as opposed to the service level would be less reliable). CN also failed to rebut Amtrak's assertion that its two chosen "sample weeks" did not adequately represent CN's traffic levels. CN fails to account for the fact that Amtrak was operating on a modified schedule during the two purportedly "representative" sampling weeks. Williams/Roberts RVS, 30. This necessarily impacts overall traffic on CN's network during the two sampling weeks.

**c) CN's adjustments to the freight traffic data used in its capacity modeling exercises were not appropriate and reduce real-world relevancy**

CN's Opening Brief attempts to dismiss Amtrak's concerns that CN's exclusion of irregular freight train movements and "smoothing" of freight train lengths in the freight traffic data used for its capacity modeling exercises were inappropriate. Instead, CN suggests that these adjustments may even have had a conservative effect on the modeling results, leading to lower levels of recommended infrastructure.<sup>398</sup> This suggestion is unsupported and without merit. First, smoothing freight train consists does not necessarily lead to more conservative outcomes. In fact, it can increase the "perceived delay to freight trains that are actually shorter and lighter than the 'average' figures plugged into the model."<sup>399</sup> Second, selectively removing anomalous data and smoothing train lengths ultimately does not reflect real world data and is effectively data manipulation. Therefore, CN's adjustments to the freight traffic data are problematic and impugn the reliability of the results from its capacity modeling studies.

**d) CN improperly modeled parallel routes, which understates CN's existing capacity**

CN misconstrues Amtrak's primary concern with how CN modeled parallel track on the IC Corridor. Williams/Roberts conclude that had the CN modelers used "the same technique [as it did with the Memphis Harrison Yard] to address parallel track[, it] would have provided a more accurate assessment of current line capacity than manual inputs."<sup>400</sup> Williams/Roberts further observed that the modelling approach taken by CN with respect to the Memphis Harrison

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<sup>398</sup> CN Opening Brief, A27-28.

<sup>399</sup> Williams/Roberts RVS, 33.

<sup>400</sup> Williams/Roberts RVS, 34- 35 ("To address the south side of Memphis Harrison Yard, where there is a double track with two mains that are not parallel and have different distances, [CN] modeled the lines such that all trains operated on it as if it were double track.").

Yard is more realistic and provides for more routing options, necessarily providing for more line capacity.<sup>401</sup> CN argues that even if it had utilized this approach, “there is no evidence demonstrating that alternative routings would have changed the results of the model.” However, Amtrak’s position is that had CN adopted the technique addressing parallel track in the Memphis yard (which more accurately captures CN’s line capacity on parallel tracks), the results of the model would have necessarily changed. Because CN failed to properly characterize parallel routes on the IC Corridor, it underestimated existing capacity on those tracks.

**e) CN failed to justify the simplifying assumptions it used to model the 17-mile track used exclusively by Amtrak to access the Memphis station**

To account for a 17-mile portion of track leading up to the Memphis station that is only used by Amtrak and not freight trains, CN applied “simplifying assumptions” rather than including this portion of track in its capacity model.<sup>402</sup> CN claims this was appropriate because the simplifying assumptions were “conservative.”<sup>403</sup> But CN does not explain why it used these simplifying assumptions or how these simplifying assumptions result in a more conservative outcome. Moreover, some of CN’s simplifying assumptions appear to be inaccurate. For example, the south side of Harrison Yard was modeled as double track – an error that CN admits resulted in an inaccuracy in the run time for the route.<sup>404</sup> CN provides no evidence to rebut the logical presumption that erroneous run time would have a corresponding impact on the results of the capacity model.

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<sup>401</sup> Williams/Roberts RVS, 35.

<sup>402</sup> CN Opening Brief, A28.

<sup>403</sup> CN Opening Brief, A28.

<sup>404</sup> Williams/Roberts RVS, 36.

**VI. CN Grossly Mischaracterizes Amtrak's Position On The Minimum Changes Necessary To Make The Implementation Of Any KOTP System Functional And More Consistent With The Statutory Framework**

Amtrak has submitted evidence in this proceeding demonstrating that the KOTP system has failed to motivate CN to provide Amtrak with adequate service, let alone quality service worthy of the substantial incentive payments that CN has obtained under the KOTP system.<sup>405</sup> If the STB ordered the parties to continue using the KOTP system despite its substantial problems and complexities, Amtrak has proposed the following minimum modifications that are necessary to make the KOTP system more functional and consistent with the statutory goals relevant to incentive and penalty systems: (i) the KOTP system should not include a lookback limitation on penalty payments;<sup>406</sup> (ii) the KOTP system should measure CN performance at all Amtrak stations and exit points on CN; (iii) Amtrak should be permitted to use its share of the available recovery time in the schedules to account for station dwell delays and lateness from origin; (iv) CN should not earn additional incentive payments when it causes delays but the Amtrak train arrives within tolerance at the checkpoint anyway due to the lack of delays caused by Amtrak or third parties; (v) the penalty provisions should be triggered when CN's monthly on-time performance drops below 80 percent; (vi) the penalty provisions should increase the later Amtrak trains arrive at checkpoints as a result of CN responsible delays; and (vii) the KOTP system should continue to determine attribution for Amtrak train delays based on direct cause, rather than so-called "root cause."<sup>407</sup>

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<sup>405</sup> Vilter/Maga RVS, Exh. 2 (reflecting recent on-time performance and incentive payment data).

<sup>406</sup> The basis for Amtrak's opposition to the lookback provision is set forth in Section II.E above.

<sup>407</sup> The basis for Amtrak's opposition to CN's "root cause" proposal is set forth in Section IV.D.3.g above.

In its Opening Brief, CN continues to assert that various terms and conditions in the existing KOTP system should be retained because they were “bargained for” by the parties in prior negotiations and therefore should not be altered by the Board in this proceeding. Amtrak is asking the Board to establish reasonable terms and compensation under 49 U.S.C. § 24308(a) in this proceeding precisely because the KOTP system and certain other provisions of the existing Operating Agreement are defective and the parties were unable to negotiate mutually acceptable terms and compensation for a new Operating Agreement. Amtrak has the statutory right to invoke the Board’s jurisdiction to propose new and different terms and the Board, in evaluating the specific terms and compensation proposed by the parties, is not bound by any of the contested provisions of the existing Operating Agreement.<sup>408</sup>

CN proposes to incorporate the Amtrak services that operate over the GTW lines under the same incentive payment and penalty system as the Amtrak services that operate over the IC lines.<sup>409</sup> Although Amtrak agrees that the Amtrak services over the GTW lines and IC lines should be subject to Amtrak’s delay-based quality payment and penalty system proposal, Amtrak objects to CN’s proposal to incorporate the Amtrak services that operate over the GTW lines into the modified KOTP system proposed by CN (or any version of the KOTP system prescribed by the Board which does not incorporate all of the necessary adjustments proposed by Amtrak).

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<sup>408</sup> CN asserts that Amtrak’s proposed adjustments to the KOTP system “lack[] key elements of the substance of such a system.” CN Opening Brief, 115. CN appears to define such key elements as those reflected by the current KOTP system, which Amtrak has demonstrated are inconsistent with the statutory goals and allow CN to reap substantial incentive payments for poor quality service. Amtrak Opening Brief, 17-21.

<sup>409</sup> CN Opening Brief, 84.

**A. CN Fails To Support Its Opposition To Measuring The Quality Of Service Under A KOTP System At All Amtrak Stations**

CN objects to measuring CN's performance under a KOTP system at all Amtrak stations.<sup>410</sup> CN claims that any new checkpoints that are added to the Operating Agreement "should be selected based on whether they would be widely enough spaced to define reasonable segments and whether a meaningful number of passengers board or disembark at those points."<sup>411</sup> On that basis, CN proposes adding two checkpoints (for a total of four) to the *City of New Orleans* service and one checkpoint (for a total of two) on the *Illini/Saluki* services – **but only** if Amtrak agrees to or the Board adopts CN's proposal to significantly lengthen the schedules for these Amtrak services.<sup>412</sup>

Amtrak's proposal to measure CN's performance at all Amtrak stations on CN under the KOTP system represents an effort on Amtrak's part to incorporate the statutory goal of operating Amtrak trains to "all station stops within 15 minutes of the time established in public timetables."<sup>413</sup> Additionally, Amtrak presented evidence demonstrating the significant number of passengers traveling to or from intermediate stations (which are not included as checkpoints under the KOTP system) compared to the number of passenger traveling between endpoint stations on CN (which are included as checkpoints under the KOTP system).<sup>414</sup> CN has failed to provide any reasonable explanation for why the interests of Amtrak's intermediate station passengers should be ignored in the evaluation of the quality of CN's service under the KOTP

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<sup>410</sup> CN Opening Brief, 118.

<sup>411</sup> *Id.*

<sup>412</sup> *Id.* The basis for Amtrak's opposition to CN's scheduling lengthening proposals is set forth in Section IV.C above.

<sup>413</sup> 49 U.S.C. § 24101(c)(4).

<sup>414</sup> Vilter/Maga RVS, 39.

system. CN asserts that Amtrak's proposal to include checkpoints at all stations and exit points on CN represents the "indiscriminate identification of checkpoints."<sup>415</sup> Far from indiscriminate, Amtrak's proposal is consistent with the statutory goal of operating Amtrak trains to all stations in a timely manner and is a reasonable basis upon which to measure the impact of CN's performance on Amtrak's passengers.

In addition, the adoption of checkpoints at all stations would incorporate into the incentive and penalty system a contractual provision that is not in dispute. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**B. CN's Opposition To Amtrak's Proposal For [REDACTED]  
[REDACTED] Would Unjustly Provide CN With Incentive Payments Despite  
Poor Service**

Amtrak proposes a basic tolerance of [REDACTED] at each checkpoint in order to simplify checkpoint calculations under the already complex structure of a KOTP system. CN agrees that some "relatively short segments" s [REDACTED]

[REDACTED]

[REDACTED].<sup>417</sup> CN fails to provide any specific justification for why it should be entitled to [REDACTED] on these segments, or how Amtrak's computation of endpoint OTP is even relevant [REDACTED] established for a system based on KOTP.

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<sup>415</sup> *Id.*

<sup>416</sup> Current Operating Agreement, §3.4.B.1.

<sup>417</sup> CN Opening Brief, 119. Amtrak's measurement of endpoint OTP considers whether a train arrives at its endpoint within 10 to 30 minutes of its scheduled arrival time (depending on the distance), without any of the additional relief, tolerance and other "padding" mechanisms incorporated into the KOTP system.

**C. CN Fails To Explain Why Its Performance Under A KOTP System Should Not Be Judged Against The Arrival Times In Amtrak’s Published Schedules**

CN faults Amtrak for proposing to measure CN’s performance “against scheduled arrival times, rather than scheduled run times.”<sup>418</sup> Amtrak proposes to match the “scheduled run times used for quality payment and penalty calculations [under the KOTP system] to the Schedule Skeletons already agreed to by Amtrak and CN in the current Operating Agreement.”<sup>419</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] However, CN’s claim is

inaccurate and misconstrues the purpose of the current schedule structure for the Amtrak trains in question.<sup>421</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>418</sup> CN Opening Brief, 114-115.

<sup>419</sup> Vilter/Maga RVS, 40.

<sup>420</sup> CN Opening Brief, 120.

<sup>421</sup> [REDACTED]

<sup>422</sup> Amtrak Opening Brief, A-5, A-6, n. 358.

[REDACTED]

[REDACTED]

**D. CN Does Not Explain Why CN Should Be Able To Consume Greater Than 50% Of Recovery And Miscellaneous Time In The Schedule Skeletons For Delays That Are Subject To Relief Under The KOTP System**

Under the existing KOTP system, the evaluation of CN's performance is subject to various "relief" allowances for delays caused by certain events described in Appendix V of the Operating Agreement.<sup>423</sup> Some of the "relief" items that CN is entitled to claim under the existing KOTP system to erase delays from the incentive/penalty calculation provide [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>423</sup> Contrary to CN's claim (CN Opening Brief, 121), Amtrak has never agreed with CN that the relief items in existing Appendix V apply only to delays that have been deemed by the parties to be outside of CN's reasonable control. Neither Appendix V nor the internal Amtrak document cited by CN reflects any such agreement between the parties.

<sup>424</sup> [REDACTED]



u

[REDACTED] The Board should not adopt CN's proposal to maintain the status quo [REDACTED]

[REDACTED] Otherwise, CN will only continue to reap substantial incentive payments under the KOTP system despite contributing to poor on-time performance for Amtrak's passengers.

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<sup>428</sup> CN Opening Brief, 122-123.

<sup>429</sup> Vilter/Maga RVS, Exh. 28, App. V, section B.4.c.

<sup>430</sup> CN Opening Brief, 123. [REDACTED]

[REDACTED]

[REDACTED]

**E. CN Cannot Explain Why It Should Continue To Receive [REDACTED]**

Amtrak proposes to modify the KOTP system to make [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] CN complains that this proposal is inconsistent with the terms of the existing KOTP system and with Amtrak's other host railroad agreements.<sup>433</sup> However, provisions that may have been previously negotiated by the parties, or that appear in Amtrak's other agreements with host railroads, are not relevant to the Board's determination of reasonable terms and compensation in this proceeding.<sup>434</sup> CN has failed to specify any reason why it should be entitled to use disproportionate amounts of

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>431</sup> Vilter/Maga RVS, Exh. 28, Sections A.3, B.1. [REDACTED]

[REDACTED]

[REDACTED]

<sup>432</sup> Amtrak Opening Brief, A-6 to A-9.

<sup>433</sup> CN Opening Brief, 121-122.

<sup>434</sup> Amtrak Opening Brief, 36-37.

<sup>435</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Additionally, Amtrak's proposed modification [REDACTED] would incorporate into the KOTP system a contractual requirement that is currently in the Operating Agreement and not in dispute. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**F. CN's Argument Against Amtrak's Proposal To [REDACTED]**

[REDACTED]

[REDACTED]

[REDACTED] Under the current KOTP system, when an Amtrak train cannot arrive at a checkpoint within tolerance, additional delays to that train caused by CN do not harm CN for incentive/penalty purposes and CN therefore has no economic incentive to try to minimize further delays to that Amtrak train.<sup>438</sup>

[REDACTED]

[REDACTED]

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<sup>436</sup> Current Operating Agreement, §3.4.B.1.

<sup>437</sup> Vilter/Maga RVS, Exh. 28, Section D.2.

<sup>438</sup> Vilter VS, 8.

<sup>439</sup> Amtrak cannot determine the veracity of CN's [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Finally, Amtrak's proposed adjustment would incorporate into the KOTP system a contractual requirement that is currently in the Operating Agreement and not in dispute. [REDACTED]

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

**G. CN Does Not Justify Its Position That The Operating Agreement Should Maintain A "[REDACTED]"**

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

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<sup>439</sup> CN Opening Brief, 124.

<sup>440</sup> Current Operating Agreement, §3.4.B.1.

[REDACTED]

**VII. Conclusion**

For all of the reasons set forth in Amtrak's Opening Brief and this Reply Brief, the Board should issue an order prescribing the terms and compensation that are reflected in Amtrak's proposed Operating Agreement and summarized on pp. 104-106 of Amtrak's Opening Brief.

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<sup>441</sup> CN Opening Brief, 125.

<sup>442</sup> See Amtrak Opening Brief, 36-37 (discussing irrelevance of CN's arguments that certain existing provisions of the Operating Agreement must be maintained by the Board in this proceeding).

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I certify that on March 2, 2018, a Highly Confidential and Public version of the foregoing National Railroad Passenger Corporation's Reply Brief was served electronically upon the following counsel for Canadian National Railway Company:

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