

ENTERED
Office of Proceedings
March 5, 2018
Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 35743

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

**REPLY COMMENTS OF NORFOLK SOUTHERN
RAILWAY COMPANY AS AMICUS CURIAE**

John M. Scheib
Greg E. Summy
Garrett D. Urban
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

Attorneys for Norfolk Southern Railway Company

Dated: March 2, 2018

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 35743

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

**REPLY COMMENTS OF NORFOLK SOUTHERN
RAILWAY COMPANY AS AMICUS CURIAE**

*49 U.S.C. 24308(a)(2)(B) permits freight railroads to recover from Amtrak their “incremental” costs – those costs that the carrier incurs as a result of Amtrak's use of its facilities – **and that term is not as limiting as Amtrak may believe.***

So observed the Surface Transportation Board (the “Board”) in 1998, when considering the National Railroad Passenger Corporation’s (“Amtrak”) plans to expand express service in conjunction with its intercity passenger rail service.¹ Based on Amtrak’s Opening Brief in this proceeding, little has changed in twenty years. The Board must reject Amtrak’s arguments that incremental cost is narrowly limited to “short-run avoidable costs” and affirm, as required by the statute, precedent, and constitutional principles, that Amtrak has a legal obligation to reimburse host railroads for all costs traceable to its presence.

I. OVERVIEW

Norfolk Southern Railway Company (“Norfolk Southern”) recognizes that the Board faces a significant undertaking in this proceeding. Congress no doubt left the specific terms governing Amtrak’s use of the facilities and services to private agreement in the first instance because of the myriad different considerations that must be balanced in shaping such a contract.

¹ See *Application of the Nat’l R.R. Passenger Corp. under 49 U.S.C. 24308(a)*—*Union Pac. R.R. Co. and S. Pac. Transp. Co.*, 3 S.T.B. 143, 145 (1998) [hereinafter *UP/SP*].

Many issues depend at least in part on individual characteristics of the host railroad or route. For that reason, Norfolk Southern will not focus on the specific factual or evidentiary disputes in this case, many of which are redacted from the public record.

However, Amtrak's broad assertions in its Opening Brief about the legal principles underlying its right of access cannot be squared with the governing statute, Board precedent, or constitutional principles of just compensation. Fundamentally, Amtrak asks the Board to make one-sided choices favoring Amtrak's claimed interests over those of the many other users of America's rail network.² But the law does not permit the Board to compromise on the core principles that a host railroad shall receive no less than the full incremental costs associated with the accommodation of Amtrak's operations, and that the host railroad's obligations to Amtrak cannot be enlarged by Amtrak's own failure to achieve Congress's aspirations for it.

II. INCREMENTAL COST INCLUDES "ALL COSTS THAT A FREIGHT CARRIER WOULD NOT INCUR BUT FOR THE OPERATIONS OF AMTRAK"

As codified in 49 U.S.C. § 24308(a), Congress has directed that Amtrak must pay the "incremental cost of using the facilities and providing the services" of the host railroads. Amtrak argues in its Opening Brief that incremental cost is limited to "short-run avoidable costs," essentially direct maintenance costs arising out of its use.³ Past precedent and constitutional principles demonstrate that the statute is not so limited. Irrespective of how the Board decides the specific compensation and evidentiary issues within this case, the Board must affirm that incremental cost reaches all costs arising out of Amtrak's use of the facilities and services of a host railroad.

² See CN Opening Brief at 53 ("Amtrak's principal witnesses, Paul Vilter and Jason Maga, each testified that Amtrak gave no consideration whatsoever to the freight delay and capacity costs it imposes on CN – and indirectly, on shippers – in formulating its limited proposal.").

³ See Amtrak Opening Brief at 71-74.

A. Legislative History and Precedent Confirm That Incremental Costs Are Not Limited to Short-Run Avoidable Costs

Amtrak argues in its Opening Brief that the meaning of incremental cost in 49 U.S.C. § 24308(a) is “short-run avoidable costs” – “the amount of maintenance of way, maintenance of equipment, and transportation expenses which could be saved if a particular service were eliminated.”⁴ Of course, such a restriction cannot be found in the statute. Amtrak’s basis for this proposition rests on the chronology of the passage of the incremental costs standard after the decision of the Interstate Commerce Commission (“ICC”) in a compensation dispute between Amtrak and the Trustees of Penn Central, and the contemporaneous statement of a single Senator.⁵

The actual legislative record exposes the fallacy in Amtrak’s argument. As Illinois Central Railroad Company and Grand Trunk Western Railroad Company (together, “CN”) rightly pointed out in its own Opening Brief, the 1973 Conference Report stated:

The term “incremental costs” is not used by the conferees as a term of art itself. It is intended to provide a basis for payment to the railroad of all costs which would not be incurred if passenger service were not performed for Amtrak. . . . The term “incremental” is to be considered then as meaning **those costs which would not be incurred if a particular service were not rendered or a given amount of traffic were not handled**. This includes total solely related (or direct) costs of a particular service (**both variable and fixed portions of solely related costs**), but does not include any portion of common costs. This is also sometimes referred to as “avoidable costs.”⁶

The House Committee Report similarly described incremental costs as “all costs which would not be incurred if no passenger service were performed for Amtrak.”⁷ Rather than endorsing a short-run avoidable cost standard, congressional action was aimed solely at reversal of *Penn*

⁴ Amtrak Opening Brief at 74.

⁵ *See id.* at 72-73.

⁶ H.R. Conf. Rep. 93-587, at 16 (1973) (emphasis added).

⁷ H.R. Rep. No. 93-415, at 11 (1973).

Central's imposition on Amtrak of "common costs."⁸ Common costs, of course, by definition cannot be attributed to any particular user's operations, and thus are not "incremental" within the meaning of the statute. Far more telling than Amtrak's arguments are its footnotes, which on this point concede that the balance of the legislative history equates "the statutory 'incremental cost' language with 'avoidable costs.'"⁹

Subsequent regulatory and judicial decisions are in accord with this understanding. The ICC cited the 1973 Conference Report two years later when noting it understood incremental costs to be "all costs which would not be incurred if passenger service were not performed by Amtrak."¹⁰ The Board has stated that "as a matter of course, we view all costs that a freight carrier would not incur but for the operations of Amtrak as incremental costs."¹¹ The Board went on to explain that should Amtrak's service "cause capacity constraints requiring additional infrastructure investment, we see no reason why we would not include those directly attributable costs in a compensation order. The same result should likely apply to any other cost the carrier incurs that is traceable to Amtrak's operations."¹² And the Second Circuit described incremental costs as "the costs of the carrier whose facilities are being used that would be avoidable except for Amtrak's use."¹³ Notably absent from these definitions is any restriction to short-run maintenance and transportation costs.

⁸ H.R. Conf. Rep. 93-587, at 16 (1973).

⁹ Amtrak Opening Brief at 73, n.231.

¹⁰ *Amtrak & Wash. Term. Co., et al., Use of Tracks and Facilities and Establishing Just Comp.*, 348 I.C.C. 86, 103 n.15 (1975).

¹¹ *UP/SP*, 3 S.T.B. at 156, n.24.

¹² *Id.* at 156. In *UP/SP*, the Board explicitly distinguished language in the Conrail case cited by Amtrak, *see* Amtrak Opening Brief at 74, n.233, explaining that in that case "the parties did not ask, nor did the ICC address, any costs other than maintenance costs, and the ICC's decision did not find that there are no other costs that are relevant." *UP/SP*, 3 S.T.B. at 156 n.24.

¹³ *Metro. Transp. Auth. v. Interstate Commerce Com.*, 792 F.2d 287, 291 (2d Cir. 1986).

B. Adopting Amtrak's Definition of Incremental Costs Would Give Rise to Takings Claims Under the Fifth Amendment

Amtrak's attempt to restrict the definition to such a small subset of avoidable costs would not only flout the statutory language; it also would run afoul of takings jurisprudence under the Fifth Amendment. As a preliminary matter, it is without question that Congress's grant of rights to Amtrak to use the tracks and facilities of the host railroads constitutes a physical, or per se, taking. Exercising its right to access, Amtrak occupies a permanent presence in stations, on platforms, and on tracks owned by Norfolk Southern. The Supreme Court has held that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."¹⁴ A railroad's right of way "cannot be appropriated **in whole or part** except upon the payment of compensation."¹⁵ The California Supreme Court thus observed that "[i]t follows that one company cannot be authorized to take the joint use of another's tracks, except by an exercise of the eminent domain power."¹⁶

Consequently, to avoid constitutional concerns, host railroads must receive just compensation for Amtrak's access. "The guiding principle of just compensation is reimbursement to the owner for the property interest taken. 'He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more.'"¹⁷ Such principles accord with a definition of incremental cost, so long as that standard reimburses the host railroad for any avoidable costs arising out of Amtrak's presence.¹⁸ If costs attributable to Amtrak's presence are excluded from compensation, the railroad would

¹⁴ *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 426 (1982).

¹⁵ *W. Union Tel. Co. v. Pa. R. Co.*, 195 U.S. 540, 570 (1904) (emphasis added).

¹⁶ *Pac. Tel. & Tel. Co. v. Eshleman*, 166 Cal. 640, 664 (1913).

¹⁷ *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 633 (1961) (citing *Olson v. United States*, 292 U.S. 246, 255 (1934)).

¹⁸ See *UP/SP*, 3 S.T.B. at 156.

not be in the same position as it would have been without the taking, violating the Fifth Amendment.

C. The Board Must Affirm That Incremental Costs May Arise in Several Categories

Under these principles, there is no room for the limitations urged by Amtrak. Incremental costs can arise in many different contexts – indeed, as the Board previously held, they include any “cost the carrier incurs that is traceable to Amtrak's operations.”¹⁹ To be sure, the short-run variable maintenance costs cited by Amtrak are incremental costs subject to recovery. Yet a host railroad is equally entitled to any other costs to its own operations that arise because of Amtrak’s presence. Norfolk Southern will not attempt to evaluate the particular evidence or methodology that CN has submitted to justify its request for certain types of such compensation. But if a host railroad in fact incurs additional crew costs, or burns additional fuel, or uses its locomotives beyond what would be required in the absence of Amtrak’s presence, precedent and constitutional principles necessitate reimbursement.

Amtrak’s use of rail capacity also may give rise to economic opportunity costs that must be compensated under the Constitution. The Eleventh Circuit has instructed that, “[t]he measure of the compensation owed in a takings case depends on the nature of the property.”²⁰ When property is nonrivalrous, that is when “use of the property does not necessarily diminish the use and enjoyment of others,” compensation “will ordinarily be limited to the marginal cost incurred by that use.”²¹ But when property is rivalrous, i.e. “possession by one party results in a gain that precisely corresponds to the loss endured by the other party,”²² that loss must be compensated.

¹⁹ *Id.* at 155

²⁰ *Klay v. All Defendants*, 425 F.3d 977, 985 (11th Cir. 2005)

²¹ *Id.*

²² *Id.*

As the D.C. Circuit recently observed, track capacity often is rivalrous. “While freight operators and Amtrak may not directly compete for customers, they compete for scarce track”²³ The presence of an Amtrak train precludes one or more freight trains from operating over the same stretch of track. Indeed, tightening of track capacity²⁴ puts increased pressure on this rivalry. The Board should reaffirm its guidance from the *UP/SP* case that such costs can fall within incremental cost.

D. Removal of the Lookback Provision Would Impermissibly Prevent Recovery of Incremental Costs

Amtrak’s arguments about the incentive compensation scheme it proposes likewise ignore the statutory and constitutional principles underlying incremental cost. Most notably, Amtrak argues for removal of the “lookback” provision that segregates base compensation from incentive compensation and ensures that CN is, in all cases, reimbursed for no less than what the contract sets as incremental costs.²⁵ Amtrak would have the Board remove that separation, permitting payments to fall below incremental cost, or even paradoxically forcing a host railroad to pay Amtrak for the access the host provides.²⁶ Such cross-subsidization would be contrary to the very goals that caused Congress to create Amtrak in the first instance – namely, extracting the freight railroads from the debilitating burden of their passenger common carrier obligation.²⁷ Such a move would also conflict with the statute’s protection of incremental cost, a point reinforced by the 1973 House Report:

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

²³ *Ass’n of Am. R.R. v. United States DOT*, 821 F.3d 19, 34 (2016).

²⁴ *E.g.*, Amtrak Opening Brief at 84 (discussing “dramatic growth in freight traffic”).

²⁵ *See, e.g., id.* at Appendix A-2.

²⁶ *See* CN Opening Brief at 56.

²⁷ *See id.* at 43-45.

performed; and (2) a recognition that the higher the quality of service, the greater the compensation to be received.²⁸

Moreover, any removal of the lookback provision would violate the constitutional principles discussed above, because in such a circumstance the host railroad would clearly not be made whole for the taking of its property. The Board should reject Amtrak's attempt to eliminate the lookback provision.

E. The Costs of Amtrak's Statutory Right to "Preference" Are One Component of Incremental Cost

Finally, Norfolk Southern read with incredulity Amtrak's suggestion that costs associated with giving Amtrak trains the "preference" to which they are entitled under 49 U.S.C. § 24308(c) are not costs subject to compensation under the statutory scheme. According to Amtrak, "to the extent there were proved any [freight train] delays caused by granting Amtrak preference . . . such costs would not be incremental costs . . ."²⁹ But the statute contains no such exception.

A simple thought exercise demonstrates the nearly direct correlation between the two concepts. If Congress had required only that host railroads accommodate Amtrak trains if and when they could, perhaps host railroads would not suffer any delays as a result of Amtrak's presence. As a consequence, just compensation would be restricted to the direct variable cost of maintenance and services. Conversely, if Congress had mandated that the host railroads set aside daily temporal windows solely for Amtrak's operations, the level of "costs that a freight carrier would not incur but for the operations of Amtrak"³⁰ would be exponentially higher. Without any need to opine on its actual scope, it is clear that the more onerous that the statutory preference obligation is interpreted to be, the greater the incremental cost to the host railroads, and the greater the compensation that Amtrak will be required to pay for its access.

²⁸ H.Rep. No. 93-415, 93d Cong., 1st Sess. at 11 (1973) (emphasis added).

²⁹ Amtrak Opening Brief at 87, n.280; *see also id.* at 81-82.

³⁰ *UP/SP*, 3 S.T.B. at 156, n.24.

III. AMTRAK'S STATUTORY GOALS ARE NOT THE BURDENS OF THE HOST RAILROADS (OR THE BOARD)

Turning from the issue of incremental cost, Norfolk Southern addresses one other brief legal and policy point. Perusing Amtrak's Opening Brief, one would be forgiven if confusion set in about the parties' roles and responsibilities for working towards the passenger goals set out in 49 U.S.C. § 24101. At times, Amtrak describes these provisions as though they impose obligations on CN that the Board must enforce through its determination here:

In order to meet the statutory goal of delivering Amtrak passengers to their stations within 15 minutes of their scheduled arrival time, CN needs to be motivated to reduce HRDs and provide timely performance at all stations for all Amtrak passengers – not just those passengers boarding and alighting at the limited checkpoints reflected in the current KOTP system.³¹

Indeed, an uninformed reader might understandably come to the mistaken conclusion that matters of operations and performance of Amtrak's trains rested entirely outside its control.

Of course, if one actually reviews the goals found in 49 U.S.C. § 24101, Congress clearly directed such objectives to Amtrak alone. The power to affect them rests largely with Amtrak as well, not the least of which through its own decisions on scheduling, equipment, and infrastructure investments. The purpose of this proceeding, and the larger structure of the Amtrak-host railroad relationship, is not to convert aspirational and conflicting guidance from Congress to Amtrak into a mandate for a freight railroad to deliver. This point is driven home by the *UP/SP* case, which makes repeated reference to Amtrak Reform and Accountability Act of 1997 that revised § 24101 while calling for Amtrak to become self-sufficient by 2002.³²

This is not to say that the host railroad relationship does not serve an important role in the provision of Amtrak's intercity passenger service. But this dispute is not merely the resolution of a financial tug-of-war as Amtrak seeks to portray it. Entirely missing from that framing is any

³¹ Amtrak Opening Brief at Appendix A-3.

³² *UP/SP*, 3 S.T.B. 143.

consideration of Amtrak's own responsibilities, the railroad industry as a whole (including the thousands of shippers and millions of consumers who rely on it every day), and the Board's role in ensuring a safe, sound, and efficient freight rail system.³³ This Board hardly needs any reminder of the importance of a fluid and functioning rail system, and the wide-reaching consequences that disruptions can entail. The Board's role here is not to give Amtrak a financial vice to tighten on CN as it sees fit, irrespective of secondary effects. Rather, the Board should act cautiously and balance the needs of all stakeholders in considering this case and its impacts on the capacity, resiliency, and economic vitality of the national rail system.

IV. CONCLUSION

Norfolk Southern's Reply Comments touch only a small fraction of the many important issues at stake in this proceeding. For example, any performance standards that are imposed must be reasonable, which clearly is not the case where Amtrak demands a 411 minute Host Railroad Delay limit for the Wolverine service operating in part over Norfolk Southern.³⁴ Moreover, any penalty provisions that could result in Norfolk Southern or another carrier facing millions of dollars of liability related to hosting a single Amtrak service³⁵ are divorced from reality. Norfolk Southern has also previously submitted its own detailed comments and evidence to the Board about the need for reconsideration of Amtrak's schedules, many of which are neither realistic nor reasonably achievable.³⁶ The issues are many, and Norfolk Southern's focus here on just a few is not meant to minimize the importance of the others raised in the proceeding.

³³ See 49 U.S.C. § 10101.

³⁴ CN Opening Brief at 134.

³⁵ *Id.* at 137, 139.

³⁶ See Opening Comments of Norfolk Southern, *On-Time Performance under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, Ex Parte 726, at 10 (filed Feb. 8, 2016) ("Many Amtrak schedules are antiquated, and Amtrak has been unwilling to adjust its schedules even when they consistently are proven unrealistic over long periods of operation in normal conditions."); Reply Comments of Norfolk Southern, *On-Time Performance under*

Rather, Norfolk Southern has focused its comments primarily because Amtrak's attempts to avoid its statutory (and constitutional) obligations with respect to incremental costs would have far-reaching implications if either endorsed or left unaddressed. The Board should uphold its precedent and affirmatively declare that incremental costs reach all avoidable costs arising out of Amtrak's presence.

Respectfully submitted,



John M. Scheib
Greg E. Summy
Garrett D. Urban
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

Attorneys for Norfolk Southern Railway Company

Dated: March 2, 2018

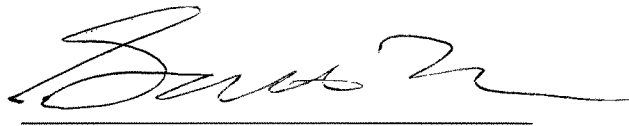
Section 213 of the Passenger Rail Investment and Improvement Act of 2008, Ex Parte 726, at 6 (filed Mar. 30, 2016) ("But Amtrak has consistently rebuffed Norfolk Southern's frequent requests in recent years to reexamine many of those schedules, even in the face of historical data showing that the schedules are unrealistic. In fact, the majority of Amtrak's requests have been to shorten schedules, even for trains that already do not consistently meet their existing schedules.").

CERTIFICATE OF SERVICE

I certify that on March 2, 2018, the foregoing Reply Comments of Norfolk Southern Railway Company as Amicus Curiae were served electronically upon the following counsel for the parties:

David A. Hirsh
Dentons US LLP
1900 K Street, NW
Washington, DC 20006
david.hirsh@dentons.com

Kevin M. Sheys
Justin J. Marks
Nossaman LLP
1666 K Street, N.W., Suite 500
Washington, DC 20006
ksheys@nossaman.com
jmarks@nossaman.com

A handwritten signature in black ink, appearing to read "Garrett D. Urban", written over a horizontal line.

Garrett D. Urban