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March 22, 2018

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

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 in the above-referenced proceeding is the Reply of the National Railroad Passenger Corporation ("Amtrak") to the filings of Norfolk Southern Railway Company, CSX Transportation, Inc., and the National Industrial Transportation League.

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

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Edward Fishman', is written over a horizontal line.

Edward Fishman
Counsel for National Railroad
Passenger Corporation

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35743

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

**REPLY OF THE NATIONAL RAILROAD PASSENGER CORPORATION TO THE
FILINGS OF NORFOLK SOUTHERN RAILWAY COMPANY, CSX
TRANSPORTATION, INC. AND NATIONAL INDUSTRIAL TRANSPORTATION
LEAGUE**

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BEFORE THE
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APPLICATION OF THE NATIONAL RAILROAD PASSENGER CORPORATION UNDER
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LEAGUE**

The National Railroad Passenger Corporation (“Amtrak”) hereby files this consolidated reply to the filings served on March 2, 2018 in this proceeding by the Norfolk Southern Railway Company (“NS”),¹ CSX Transportation, Inc. (“CSX”)² and the National Industrial Transportation League (“NITL”)³ (collectively, the “Third Party Comments”).⁴

For the reasons discussed in Section I below, the Board should not accept the Third Party Comments into the record at this late stage because they were submitted without advance notice on the very last day of the briefing schedule in this proceeding. In addition, the Railroad Comments are replete with unsupported, inconsistent legal theories that are not helpful or relevant to the Board’s consideration of the disputed issues in this proceeding. The Railroad Comments also contain numerous extraneous, unproven factual assertions that Amtrak has had

¹ NS filed a Motion For Leave to File Reply Comments As Amicus Curiae (“NS Motion”) and a separate pleading entitled Reply Comments of Norfolk Southern Railway Company As Amicus Curiae (“NS Comments”).

² CSX filed a Motion For Leave To File Comments As Amicus Curiae (“CSX Motion”) and a separate pleading entitled Comments of Amicus CSX Transportation, Inc. (“CSX Comments”).

³ NITL filed a letter (“NITL Letter”) pursuant to 49 C.F.R. § 11171 and alternatively states that the letter is being submitted under 49 C.F.R. § 1112.4.

⁴ The NS Comments and CSX Comments are referred to collectively as the Railroad Comments.

no opportunity to evaluate or rebut prior to the close of the evidentiary record. As a result, the acceptance of these Third Party Comments would be highly prejudicial to Amtrak.

In the event the Board decides to accept one or more of the Third Party Comments into the record despite the prejudicial impact of accepting such comments from non-parties at this late stage, such comments should be accorded no weight for the reasons described in Section II below.

I. THE BOARD SHOULD REJECT THE THIRD PARTY COMMENTS BECAUSE THEY COULD HAVE BEEN FILED EARLIER IN THIS PROCEEDING AND THEIR SUBMISSION AT THIS LATE STAGE RESULTS IN UNDUE PREJUDICE TO AMTRAK

A. The Amicus Replies Filed By CSX And NS Should Be Rejected Because They Could Have Been Filed Earlier And Accepting Them Into The Record At This Late Stage Is Highly Prejudicial To Amtrak

CSX does not cite to or rely upon any Board regulation, practice or precedent in its motion for leave to file its amicus comments. Instead, CSX merely claims that the Board's decision in this proceeding "potentially could impact CSX's contractual relationship with Amtrak."⁵ CSX's position is premised on its assumption, without citing to any supporting evidence, that Amtrak "will move to terminate its current contract with other host railroads and seek the same terms in subsequent Board proceedings."⁶ NS makes a similar argument, claiming that "Amtrak has made it clear in its filings that it is seeking to create precedent in this proceeding that it would then seek to apply to its relationships with other host railroads."⁷

⁵ CSX Motion, 1.

⁶ CSX Comments, 1. CSX fails to provide any support for this broad and speculative claim about Amtrak's future intentions, and aside from its observations about specific aspects of the CSX-Amtrak Operating Agreement (which are beyond the scope of relevant issues in this proceeding), CSX fails to provide any evidence that Amtrak has the intention or even the right to terminate its existing agreements with any other host railroads. CSX also implies that Amtrak has a uniform "current contract" with all other host railroads, which is inaccurate.

⁷ NS Motion, 2. NS does not identify what supposed Amtrak filings it is referring to in making this claim.

Amtrak negotiates its operating agreements separately and confidentially with each host railroad based on the specific facts and circumstances of their relationship, including the particular nature of the Amtrak services and the host's overall performance. Amtrak and the respective host railroads each have the opportunity to negotiate specific terms and compensation for any future operating agreement, and the Board prescribes reasonable terms and compensation only if the parties are unable to reach a voluntary agreement and the Board finds it necessary to do so. CSX and NS both acknowledged the distinctiveness of Amtrak's contractual negotiations with host railroads in their respective comments.⁸ Nonetheless, both railroads presume (without any supporting evidence) that Amtrak would seek to terminate its existing contractual relationships with each of them and initiate a Board proceeding to prescribe terms and compensation if Amtrak receives a favorable ruling from the Board in this proceeding. This unsupported and speculative presumption, without more, is insufficient to justify the acceptance of the comments from both railroads at this late stage in the proceeding.

NS also does not cite to or rely upon any Board regulation in support of its motion for leave to file its amicus reply comments. Instead, NS cites to two prior proceedings in which the

CN has made a similar claim (CN Opening Brief, 138) based on a general statement that Amtrak made in response to petitions to intervene in this proceeding that were filed in 2014 by NS, CSX and other host railroads that were seeking to protect the confidentiality of their operating agreements with Amtrak. *See* Amtrak's Reply to Petitions to Intervene and Comments filed February 28, 2014, at 4 ("As the Board is well aware, its decision in this case will set important precedent for future disputes dealing with operating agreements involving Amtrak and other parties"). That Amtrak statement was made in the context of whether the operating agreements between Amtrak and other hosts should be designated as Highly Confidential for purposes of this proceeding. It says nothing about any intention on the part of Amtrak to terminate its contracts with other hosts following the Board's decision in this proceeding. NS also fails to explain how a Board decision in this proceeding adopting Amtrak's delay-based system and rejecting CN's delay cost claim would have any potential impact on the existing Amtrak-NS Operating Agreement.

⁸ CSX Comments, 9 ("each host railroad (and even each route) is differently situated, with different types of terrain, workforce structures, bridges, crossings, tie-decay rates, maintenance procedures, and a myriad of other factors"); NS Comments, 2-3 (acknowledging the "myriad different considerations that must be balanced in shaping" each Amtrak-host operating agreement depending "at least in part on individual characteristics of the host railroad or route").

Board accepted the filing of amicus comments.⁹ However, in both of those proceedings, the filing of the comments by the non-parties was unopposed and was made prior to the end of the briefing schedule so that affected parties would have an ample opportunity to respond to those comments.¹⁰ We are not aware of any proceeding in which the Board has accepted so-called “amicus” filings on the last day of a briefing schedule which did not provide for the filing of “amicus” comments or any further opportunity for an opposing party to respond to such comments.¹¹

NS claims that it is “filing these comments in accordance with the briefing schedule already in place in this case, minimizing any disruption.”¹² This is a preposterous claim, for the briefing schedule in this proceeding did not contemplate the filing of any “amicus” comments. NS and CSX have known about this proceeding since it was initiated in 2013 and could have sought leave to file their comments (at the latest) on the scheduled date for the filing of Opening Briefs, so that Amtrak could have evaluated and addressed their arguments in a comprehensive and integrated manner in its Reply Brief.¹³ Instead, NS and CSX waited until the last possible

⁹ NS Motion, 2-3 (citing to *US Magnesium, L.L.C. v. Union Pac. R.R. Co.*, FD 42114 (STB served Jan. 27, 2010 (“*US Magnesium*”) and to *Canexus Chemicals Canada L.P. v. BNSF Railway Company – Emergency Service Order*, FD 35524 (STB served Oct. 14, 2011)(“*Canexus*”).

¹⁰ In *US Magnesium*, Union Pacific (“UP”) *did not oppose* the filing of amicus comments from three industry associations, which comments were filed after UP’s Opening Evidence but *before* the filing of UP’s reply or rebuttal evidentiary submissions. Thus, UP had ample opportunity to address the arguments made by the industry associations within the confines of the established procedural schedule. Similarly, in *Canexus*, BNSF *did not oppose* the motion for leave to intervene and submit comments filed by non-party Canadian Pacific (“CP”), which comments were filed *before* the Board established the evidentiary briefing schedule in that proceeding.

¹¹ *Cf. North America Freight Car Association v. BNSF Railway Co.*, NOR 42060 (Sub-No. 1)(STB served Aug. 2, 2005)(providing date for amici curiae to file briefs prior to reply and rebuttal statements of the parties to the proceeding); *Arizona Public Service Co. & PacifiCorp v. BNSF Railway Co.*, NOR 41185 (STB served Oct. 14, 2003)(establishing briefing schedule which allowed industry associations to file amicus briefs).

¹² NS Motion, 3.

¹³ As noted above, CSX and NS already filed for leave to intervene in this proceeding in 2014 for the

moment to file their “amicus replies” on the same date that Amtrak filed its Reply Brief, knowing full well that Amtrak would not be able to evaluate and address their specific arguments in its Reply Brief. The Board should not reward the railroads (and prejudice Amtrak) by accepting such late-filed pleadings, which forces Amtrak to make this additional filing and address the points raised by CSX and NS in a piecemeal fashion.¹⁴

NS also asserts, citing *Canexus*, that its participation “will not broaden the issues under consideration in this proceeding” because its comments “*primarily* address legal issues already raised by Amtrak and CN in their opening briefs.”¹⁵ However, the *Canexus* case involved a completely different situation where the relevance of an alternative routing over CP was raised by the complaining shipper and became part of the factual record in the proceeding.¹⁶ In this case, neither NS nor CSX will be a party to the next Operating Agreement between Amtrak and CN that is before the Board in this proceeding, and none of the comments made by NS or CSX about their separate agreements with Amtrak (which were separately and confidentially negotiated) is a relevant part of the factual record before the Board in this dispute between Amtrak and CN.

limited purpose of protecting the confidentiality of their operating agreements with Amtrak (which limited intervention was granted by the Board). They easily could have sought leave to file their amicus comments prior to the last day of the briefing schedule.

¹⁴ If CSX and NS had filed their motions and accompanying comments prior to the due date for Amtrak’s Reply Brief, Amtrak would have had the opportunity to address the arguments made by the non-party railroads in an integrated manner with the reply that Amtrak prepared to CN’s Opening Brief (which addressed many of the same subjects in different ways). By unfairly depriving Amtrak of the opportunity to respond to these arguments in an integrated manner, Amtrak is forced to make this additional filing and to address the points made by CSX and NS separate and apart from the positions taken by CN and without the ability to evaluate the credibility of the factual assertions made by CSX and NS in discovery or otherwise.

¹⁵ NS Motion, 3 (emphasis added).

¹⁶ In *Canexus*, the Board granted CP’s motion to intervene and accepted its comment letter about the validity of its rates into the factual record because the complainant had raised the CP routing as an alternative. The Board also invited CP to submit an Opening Statement in that proceeding.

In fact, the comments from NS and CSX both have the effect of unduly broadening the issues before the Board by making unsupported and inaccurate claims about specific aspects of their separate Operating Agreements with Amtrak. NS complains generally about Amtrak's schedules with NS and also claims that Amtrak's proposed HRD Threshold for the *CN portion* of the *Wolverine* service is not reasonable, without providing any explanation or evidence to support its claims.¹⁷ CSX goes even further, making extraneous and largely unsubstantiated claims about (1) specific aspects of its Operating Agreement with Amtrak, (2) prior arbitration proceedings between Amtrak and CSX, (3) supposed impacts of providing Amtrak with preference based on unspecified modeling of CSX's Richmond, Fredericksburg & Potomac ("RF&P") subdivision,¹⁸ and (4) claims about the on-time performance of the *Auto Train* service.¹⁹ None of these items have any relationship to the dispute between Amtrak and CN. Accordingly, the Board should reject the NS and CSX comments because they seek to unduly broaden the issues before the Board in this proceeding.

¹⁷ NS Comments, 11.

¹⁸ CSX refers to an unidentified internal modeling exercise that supposedly shows that providing Amtrak with what CSX calls "absolute priority" on its RF&P Subdivision "would devastate the service CSX and [Virginia Rail Express] provide to [their] customers and would quickly lead to severe congestion and gridlock far beyond this particular Subdivision." CSX Comments, 14. CSX fails to provide any details about this supposed modeling exercise, which Amtrak has never had the opportunity to review or evaluate during the discovery phase in this proceeding or otherwise. In fact, prior modeling of the I-95 corridor (of which the RF&P Subdivision is a part) that CSX shared with Amtrak about 10 years ago showed that all trains in the corridor were able to operate with minimal delay.

¹⁹ CSX Comments, 1-3, 20. As noted further in Section II below, CSX's claims about the *Auto Train* service fail to mention other significant contributing factors to the improvement in on-time performance which occurred (most notably CSX's reduction of Host Responsible Delays). In addition to being misleading in this respect, CSX's claims about an Amtrak service that is not an issue in this proceeding are, at best, extraneous.

B. The NITL Letter Should Be Rejected As Untimely

The NITL Letter was submitted under 49 C.F.R. § 1117.1, which is the Board’s general petition standard for parties seeking relief that is not provided for under any other Board rule.²⁰ However, nothing in Section 1117.1 permits a non-party to seek unspecified relief at the last stage of a proceeding and outside the bounds of the procedural schedule. NITL does not take a position on the specific proposals at issue in this proceeding.²¹ Instead, NITL makes the unsupported claim that the interests of its rail shipper members “may be directly impacted by the outcome of this proceeding.”²² NITL vaguely refers to “proposed service changes” that could “dramatically alter the use of existing track capacity,” but never explains what proposed service changes it is referring to, what specific track capacity it is concerned about or how any hypothetical service changes or capacity impacts might be caused by the Board’s prescription of terms and compensation for Amtrak and CN.²³ Thus, NITL has not justified its petition for unspecified relief.²⁴

Alternatively, NITL states that its letter is submitted under the petition to intervene regulation set forth in 49 C.F.R. § 1112.4 and claims that consideration of its letter by the Board

²⁰ 49 CFR § 1117.1 provides as follows: “A party seeking relief not provided for in any other rule may file a petition for such relief. The petition shall contain (a) a short, plain statement of the grounds upon which the Board’s jurisdiction is based; (b) a short, plain statement of claim showing that petitioner is entitled to relief; and (c) demand for the relief the petitioner believes is appropriate.” *See Tongue River Railroad Co. – Construction and Operation – Western Alignment*, FD 30186 (Sub-No. 3)(STB served Mar. 11, 2013) (“Section 1117.1 is a “catch all” provision that provides parties with a way to ask the Board to exercise its discretion to remedy unusual situations”).

²¹ NITL Letter, 2.

²² NITL Letter, 1.

²³ For example, the Board’s adoption of Amtrak’s delay-based system would not result in any changes in the scope or frequency of Amtrak service over CN.

²⁴ It also does not appear that NITL is asking for any specific relief from the Board in this proceeding.

“will not disrupt the schedule in this proceeding or broaden the issues under consideration.”²⁵

However, as the Board has ruled in numerous other situations, NITL does not have the right to intervene in a dispute over an operating agreement between two unrelated parties (here, Amtrak and CN).²⁶ Moreover, allowing NITL’s participation as an amicus at this late stage of the proceeding would be unduly prejudicial to Amtrak for the reasons described in Section I. A. above. Therefore, the Board should not accept the NITL Letter into the record.

II. EVEN IF THE BOARD ACCEPTS THE THIRD PARTY COMMENTS, THEY SHOULD NOT BE GIVEN ANY WEIGHT

Even if the Board decides to accept one or more of the Third Party Comments into the record, it should accord such Third Party Comments no weight for the reasons described below.

A. The Unsupported Factual Assertions From CSX and NS About Various Specific Terms of Their Operating Agreements With Amtrak Are Not Relevant To This Proceeding And Only Serve To Muddle The Record With Unreliable Anecdotal Evidence

CSX and NS both make unsubstantiated factual assertions relating to their specific relationships with Amtrak which are irrelevant to the dispute before the Board. For example, CSX makes claims about the purported impact of a schedule adjustment in 2006 on the on-time performance for the *Auto Train* service even though it acknowledges that schedule considerations are inherently fact specific to the particular routes, host railroads and service in question. CSX also mentions its failure to resolve prior scheduling disputes with Amtrak without providing any specifics. These claims are not relevant, unsupported and should be

²⁵ NITL Letter, 1 n.1.

²⁶ See, e.g., *Arizona Public Service Co. & PacifiCorp v. BNSF Railway Co.*, NOR 41185 (STB served Oct. 14, 2003)(industry associations not allowed to intervene in private rate dispute, but would be allowed to participate as amici curiae in accordance with briefing schedule established for upcoming evidentiary phase of the proceeding); *Texas Municipal Power Agency v. BNSF Railway Co.*, NOR 42056 (STB served Sept. 27, 2004)(industry associations “will be allowed to participate as amici, but not intervene in private rate dispute...They will not have access to confidential information, nor will they be allowed to broaden issues in the proceeding.”).

ignored.

NS states at the outset of its filing that it “will not focus on the specific factual or evidentiary disputes in this case, many of which are redacted from the public record.”²⁷

However, it deviates from this principle when it questions the reasonableness of the specific HRD Threshold that Amtrak has proposed for the *CN portion* of the *Wolverine* service.²⁸

Although the *Wolverine* service also operates over portions of NS trackage, NS is subject to an incentive and penalty system with terms and conditions which differ from those that Amtrak has proposed with CN.²⁹ NS fails to explain how its Operating Agreement with Amtrak is relevant to the proposed terms and conditions that Amtrak has proposed with CN and also fails to provide any support for its speculative opinion about the reasonableness of the HRD Threshold proposal that Amtrak has made regarding CN service.

Similarly, citing to previous comments it submitted in the Ex. Parte 726 proceeding, NS expresses its opinion that many of Amtrak’s schedules for routes over NS need to be reconsidered.³⁰ Amtrak responded to those comments from NS in Ex. Parte 726 and rebutted the claims made by NS about Amtrak’s schedules and about the efforts made by the respective parties to consider schedule adjustments.³¹ Moreover, NS fails to mention that it has agreed

²⁷ NS Comments, 3.

²⁸ NS Comments, 11.

²⁹ NS intervened in this proceeding to protect the confidentiality of those terms and conditions in 2014. In the interest of maintaining that confidentiality, Amtrak is precluded from discussing in this public filing specifically how those terms and conditions may differ with respect to the *Wolverine* service. CN has submitted a copy of the Amtrak-NS Operating Agreement into the record in this proceeding and designated it as Highly Confidential. See *Hirsh VS*, Exh. 9; see also Amtrak Reply Brief, 48 (describing NS incentive and penalty system with Amtrak).

³⁰ NS Comments, 11, n. 36. NS does not identify what specific Amtrak schedules it is referring to when making this broad statement.

³¹ Amtrak Reply Comments, *On-Time Performance under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, Ex Parte 726 (filed Mar. 30, 2016).

within the past few years to certain changes to the schedules for most Amtrak services that operate over NS. The adequacy of Amtrak's schedules for Amtrak services that operate over NS is not even remotely relevant to the issues before the Board in this proceeding. The broad statements made by NS about Amtrak's schedules are both unsupported and irrelevant to the Board's determination in this matter.³²

B. CSX and NS Offer Unsupported And Inconsistent Interpretations About The Meaning of Incremental Costs Which Are Not Helpful To The Board's Consideration of the Legal Standards Applicable To The Compensation Dispute Between Amtrak and CN

CSX and NS both make unsupported, broad assertions about the "incremental cost" standard which are in many ways conflicting and inconsistent with what CN is claiming and therefore do not assist the Board in interpreting the relevant statutory language. The railroads introduce numerous different formulations of what they claim to be the "incremental costs" standard, none of which are grounded in the statute. The railroads also mischaracterize Amtrak's position on the "incremental costs" standard, which only serves to distort the record before the Board in this proceeding.

NS offers various different interpretations of what it thinks is covered by the "incremental cost" standard. NS claims that "Amtrak has a legal obligation to reimburse host railroads for *all costs* traceable to its presence."³³ NS also postulates that incremental cost "reaches *all costs* arising out of Amtrak's use of the facilities and services of a host railroad."³⁴ In addition, NS states that a "host railroad shall receive no less than full incremental costs

³² The factual assertions made by CSX and NS about Amtrak's schedules highlight the prejudicial nature of their filings at this stage in the proceeding because Amtrak has had no opportunity to evaluate the reliability of their conclusory assertions during discovery or otherwise.

³³ NS Comments, 2 (emphasis added).

³⁴ NS Comments, 3 (emphasis added).

associated with accommodation of Amtrak's operations."³⁵ NS provides no support for any of these interpretations, none of which is supported by the statute or its legislative history.³⁶ The broad and self-serving musings of NS about the "incremental cost" standard are not helpful to the Board's consideration of whether Congress intended for CN's alleged freight delay costs to be included within the statutory base compensation standard.³⁷

NS also mischaracterizes Amtrak's position on the meaning of "incremental costs," claiming that Amtrak's definition is limited to "direct maintenance costs" and "short-run variable maintenance costs."³⁸ Although Amtrak used incremental track maintenance costs as *an example* of the type of cost category which has been recognized by Amtrak and host railroads as covered by the "incremental costs" standard, Amtrak did not suggest or imply that incremental track maintenance costs are the only types of incremental costs that host railroads may recover under Section 24308(a).³⁹

CSX refers, without support, to a supposed "statutory requirement that a Board-imposed contract leave the freight railroad in as good a position as it would be absent the presence of

³⁵ NS Comments, 3 (emphasis added).

³⁶ See Amtrak Reply Brief, 4-18. The interpretations provided by NS are very similar to the "full cost" standard that even NS acknowledges was rejected by Congress in the Amtrak Improvement Act of 1973 ("AIA"). NS incorrectly argues that Congress only overturned the "full cost" part of the *Penn Central* decision. NS Comments, 4-5.

³⁷ NS also cites to language from the ICC's initial decision in the *Washington Terminal* case which recites language from the Conference Committee report from 1973. NS Comments, 5 n. 10. However, the *Washington Terminal* decision cited by NS was issued *before* Congress amended the statute to make it clear that the "incremental cost" standard applied to both the host railroad's provision of services to Amtrak and Amtrak's use of host railroad facilities (such as the joint passenger terminal at issue in that proceeding). CSX also cites to a broad description of costs recoverable by a host railroad from the D.C. Circuit decision in the *Washington Terminal* case which suffers from the same limitation. CSX Comments, 9, n. 26 (citing *Nat'l R.R. Passenger Corp. v. I.C.C.*, 610 F.2d 865 (D.C. Cir. 1979)).

³⁸ NS Comments, 3, 7.

³⁹ See Amtrak Reply Brief, 71-74, 76-77.

Amtrak services.”⁴⁰ The statute says no such thing. As CSX acknowledges, “the plain text of a statute cannot be ignored in favor of reliance on amorphous understandings of purpose or legislative history.”⁴¹ Nevertheless, CSX proceeds to rely entirely on amorphous references in the Conference Report to the 1973 AIA about the incremental cost standard. Yet even the legislative history cited by CSX does not support its expansive view of incremental costs. The Conference Report passage cited by CSX refers to “all costs which would not be incurred if passenger service were not performed for Amtrak,” but contains no reference to the long-run avoidable costs, capacity expansion costs and other additional costs that CSX apparently thinks are encompassed within the statutory reference to incremental costs.⁴² CSX ignores the Congressional reversal of the *Penn Central* decision, the statements from Senator Magnuson about short-run avoidable costs, and the fact that the very section of the Conference Report cited by CSX contradicts the broad interpretation advocated by CSX through its explicit reference to excluding “common costs” from the incremental cost standard.⁴³

CSX also interprets the statutory base compensation standard to cover alleged costs that go beyond the specific costs that CN is seeking in this proceeding. CSX claims that “costs incurred for capital projects and upgrades required because of Amtrak...should be included in the incremental cost base.”⁴⁴ Even though Amtrak disagrees with CSX’s broad (and incorrect)

⁴⁰ CSX Comments, 8.

⁴¹ CSX Comments, 3.

⁴² CSX Comments, 8. See Amtrak Reply Brief, 16-18 (explaining why the Conference Report language does not support CN’s expansive interpretation of incremental costs).

⁴³ See Amtrak Reply Brief, 10-12. CSX also argues that the 1978 amendments to the statute support its theory. CSX Comments, 8-9. However, these amendments were designed to clarify that the incremental cost standard applied to both the host’s provision of services to Amtrak and to Amtrak’s use of the host’s facilities. *Nat’l R.R. Passenger Corp. v. I.C.C.*, 610 F.2d 865, 878 (D.C. Cir. 1979).

⁴⁴ CSX Comments, 11.

view of the scope of the incremental cost standard,⁴⁵ the Board does not need to reach this issue because CN clarified in its Opening Brief that it is not seeking capital improvement costs from Amtrak.⁴⁶

CSX also theorizes that the “basic framework” of determining incremental costs requires only that the host railroad demonstrate that the costs are “variable” and that “a method exists to measure the cost savings if the host could ‘avoid’ hosting Amtrak.”⁴⁷ On the basis of this theory, CSX asserts that incremental costs “must include expenses that simply would not exist *in any way* if not for Amtrak’s presence.”⁴⁸ There is no support for CSX’s variable cost theory (which again goes beyond the specific delay costs that CN seeks) in the statute, its legislative history or agency precedent. As Amtrak explained in its Opening Brief, CN must prove that it actually incurred freight delay costs and that such costs were incurred as a result of providing facilities or services to Amtrak before it can substantiate any claim that such alleged costs should be part of its base compensation.⁴⁹ CSX’s theory skips over the causation and burden of proof requirements. It also ignores the limitations on incremental cost recovery that were established by Congress in 1973.⁵⁰

Finally, CSX argues that Amtrak and the host railroads “have historically taken the same

⁴⁵ See generally Amtrak Opening Brief, 4-31.

⁴⁶ See Amtrak Reply Brief, 116-117.

⁴⁷ CSX Comments, 10.

⁴⁸ CSX Comments, 10 (emphasis added).

⁴⁹ Amtrak Opening Brief, 56.

⁵⁰ See generally Amtrak Reply Brief, 4-12. The cases cited by CSX (CSX Comments, 10) do not support its variable cost theory. There was no dispute in the *Conrail* case about whether the host railroad could recover for incremental track maintenance costs caused by Amtrak. The issue before the Board in that proceeding was how to best measure such costs. Amtrak Reply Brief, 19 n. 44. Similarly, the Board in the *Springfield Terminal* decision focused on the deficiency of the evidentiary submissions by the parties about how to measure incremental track maintenance costs. *Springfield Terminal Ry. Co., Bos. & Me. Corp., & Portland Terminal Co.*, 3 S.T.B. 157, 166 (S.T.B. 1998).

similarly broad view adopted by the ICC and the Board in setting compensation” in the context of mutually negotiated contracts.⁵¹ CSX proceeds to argue that “Amtrak’s newly circumscribed view of the scope of ‘incremental’ both violates the statute and runs against the long-established and widely accepted understanding of all concerned.”⁵² CSX cites no support for these extremely broad and misleading pronouncements. Amtrak and the host railroads have never agreed to include the purported “freight delay costs” sought by CN in this proceeding as part of the base compensation in prior voluntary agreements, the statute provides no support for CN’s novel and unprecedented delay cost claim, and there is no agency precedent which supports this expansive view of the meaning of incremental costs under Section 24308(a).

C. The Preference Arguments Made By NS In Support of Its Incremental Cost Theories Are Unsupported and Irrelevant

NS argues that the costs incurred by the host railroads in complying with their preference obligations are compensable as incremental costs under Section 24308(a), and that “the more onerous the statutory preference obligation is interpreted to be, the greater the incremental costs to the host railroads.”⁵³ Not surprisingly, NS cites to no authority for this proposition, since neither the incremental cost statute nor the preference statute (which were both enacted as part of the same legislation in 1973) says anything which could be construed to support this theory. Moreover, Amtrak is not asking the Board to define the scope of the preference obligation in this proceeding. NS never explains why it thinks the statutory preference obligation should be subject to varying levels of interpretation, or why such varying levels of interpretation should dictate the level of incremental cost compensation that can be obtained by host railroads under Section 24308(a).

⁵¹ CSX Comments, 11.

⁵² CSX Comments, 11.

⁵³ NS Comments, 9.

D. The Takings Argument Made By NS Is Without Merit

1) A Board Order Under Section 24308(a) Does Not Constitute A *Per Se* Taking

As Amtrak explained in its Reply Brief,⁵⁴ it is well settled that a Board order under Section 24308(a) requiring a railroad to host Amtrak trains does not effectuate a Fifth Amendment taking.⁵⁵ NS's attempt to characterize a Section 24308(a) Board order as effecting a *per se* taking is without merit.

NS cites two cases not already addressed in the briefs of the parties to support its contention 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"⁵⁶ – *W. Union Tel. Co. v. Pa. R. Co.*, 195 U.S. 540, 570 (1904) ("Western Union") and *Pac. Tel. & Tel. Co. v. Eshleman*, 166 Cal. 640, 664 (1913) ("Pacific Telephone"). In *Western Union*, the Supreme Court held that a telegraph company was precluded from erecting telegraph equipment over a railroad's right of way without adequately compensating the railroad in question.⁵⁷ In *Pacific Telephone*, the California Supreme Court considered whether the California Railroad Commission could compel one telegraph company to connect its telephone lines with those of its competitors.⁵⁸ These cases are fundamentally different from the situation here.

⁵⁴ Amtrak Reply Brief, 33-39.

⁵⁵ *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 24308(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/SP") (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").

⁵⁶ NS Comments, 6.

⁵⁷ *Western Union*, 195 U.S. at 563.

⁵⁸ *Pacific Telephone*, 166 Cal. at 646.

First, neither case cited by NS involved a railroad accessing another railroad's tracks and facilities. Therefore, these cases have no relevance to whether a Board order under Section 24308(a) constitutes a taking of railroad property under the Fifth Amendment. Indeed, courts have consistently declined to find that a Board order granting one railroad access to another railroad's tracks and facilities effectuates such a taking.⁵⁹

Second, the cases cited by NS are inapposite because they involved actions beyond the scope of any existing contemplated regulatory scheme. A taking may occur when a governmental regulatory scheme "goes so far beyond ordinary regulation" that it offends a property owner's expectations as to the alienability of his or her property.⁶⁰ But if a party voluntarily enters into an industry that is subject to extensive regulation, that party cannot be said to have a protected Fifth Amendment property right in excluding others that may be permitted to use their property under existing regulations.⁶¹ Allowing passenger trains access to its tracks and facilities is clearly within the scope of a railroad's historically-rooted regulatory expectation and cannot effectuate a taking.⁶²

2) NS's Definition of "Just Compensation" Would Impermissibly Confer A Windfall on the Railroads

Even assuming a Board order under Section 24308(a) effectuates a taking, NS's claim

⁵⁹ See Amtrak Reply Brief, 32 n. 81 (citing cases).

⁶⁰ "The Government's [regulation] goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking." *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979); see also *Am. Cont'l Corp. v. United States*, 22 Cl. Ct. 692, 700 (1991) (noting that a taking only occurs when a regulation goes beyond "the scope of the government's [expected] regulatory authority").

⁶¹ See *Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 216 (Fed. Cir. 1993).

⁶² See Amtrak Reply Brief, 36-39; see also The Interstate Commerce Act of 1887, § 3, available at <https://www.ourdocuments.gov/doc.php?flash=false&doc=49&page=transcript> (last accessed March 2, 2018) (stating "[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.")

that “just compensation” should include a railroad’s lost “economic opportunity costs”⁶³ is directly contradicted by Supreme Court precedent. Specifically, the Supreme Court has held that “not all losses suffered by the owner are compensable under the Fifth Amendment. In absence of a statutory mandate the sovereign must pay only for what it takes, *not for opportunities which the owner may lose.*”⁶⁴ The Supreme Court has further noted that “consequential damages” are not compensable as Fifth Amendment “just compensation” relief.⁶⁵ Accordingly, courts have denied an array of claimed “damages” as not compensable under the Fifth Amendment, including but not limited to: lost profits due to the government taking,⁶⁶ loss of business opportunities due to taking,⁶⁷ and consequential damages “due to delay” such as accrued interest, added utilities, and added taxes.⁶⁸ Thus, even if a Board order effectuated a taking, NS’s definition of “just compensation” would result in a windfall payment that host railroads would not be constitutionally entitled to under the Fifth Amendment.

⁶³ NS Comments, 7-8.

⁶⁴ *U. S. ex rel. & For Use of Tennessee Valley Auth. v. Powelson*, 319 U.S. 266, 281–82 (1943) (emphasis added)(internal citations omitted).

⁶⁵ *U.S. v. Miller*, 317 U.S. 369, 376, 379-80 (1943) (“the Constitution has never been construed as requiring payment of consequential damages [in a takings action]”); *see also United States v. 26.81 Acres of Land, More or Less, in Benton Cty., Ark.*, 244 F. Supp. 831, 841 (W.D. Ark. 1965) (“not all losses suffered by the owner are compensable, under the Fifth Amendment. In absence of a statutory mandate[,], the sovereign must pay only for what it takes, not for opportunities which the owner may lose”) (internal citations omitted).

⁶⁶ *Heydt v. United States*, 38 Fed. Cl. 286, 314 (1997) (“CIDC's claimed lost profits, i.e., the \$500,000 loss in credit on the mortgage, is consequential damages... and is not recoverable.”)

⁶⁷ *Georgia-Pac. Corp. v. United States*, 640 F.2d 328, 360 (Ct. Cl. 1980) (“Since alternative gravel was available to plaintiff, the fact that plaintiff may have had to pay more for said gravel after the taking would suggest a business loss or the loss of future profits on its timber operations. Such losses are not compensable”); *Nat'l Credit Union Admin. Bd. v. Cross Creek Land, LLC*, No. 3:16-CV-1035-SI, 2016 WL 6542838, at *3 (D. Or. Nov. 3, 2016) (“the takings clause does not provide consequential damages, such as lost profits and opportunities.”)

⁶⁸ *Crosby v. Pickaway Cnty. Gen. Health Dist.*, 303 Fed. Appx. 251, 262–63 (6th Cir. 2008) (holding that landowners could not recover “consequential damages” “due to delay” or for the “interest on incurred construction loans, utilities, insurance and real estate taxes” for the period after county agency allegedly effected a regulatory taking by revoking permits previously granted to install sewage system on property).

The 11th Circuit case relied upon by NS, *Klay v. All Defendants*, 425 F.3d 977, 985 (11th Cir. 2005), does not support the proposition that “economic opportunity costs” are compensable under the Fifth Amendment “just compensation” standard. *Klay* was not even a takings case. Rather, *Klay* sought to determine what constituted “reasonable compensation” under FRCP 45 when a party incurred “losses” caused by the unauthorized production of confidential material in the discovery process. Accordingly, NS’s contention that “economic opportunity costs” are compensable under takings jurisprudence is without merit.

E. CSX’s Argument In Favor of the Lookback Provision Is Not Supported By The Statute

CSX argues that the plain text of Section 24308(a) provides that “the only adjustment from incremental costs allowed is *upward*.”⁶⁹ Based on its reading of the statutory text, CSX asserts that the lookback provision is required because host railroads are entitled to no less than their incremental costs on a net basis.⁷⁰ However, the relevant text of Section 24308(a) specifies only that the Board must consider quality of service as a major factor in determining whether to prescribe base compensation in excess of incremental costs.⁷¹ The plain text of the statute says nothing about whether an upward (or downward) adjustment in incremental costs is permissible and says nothing about any net compensation determination. Therefore, there is no basis for CSX’s statutory argument in support of the lookback provision⁷²

⁶⁹ CSX Comments, 4 (emphasis in original).

⁷⁰ CSX Comments, 3-4.

⁷¹ 49 U.S.C. § 24308(a).

⁷² NS and CSX also make other arguments about the lookback provision which are unsupported by the relevant statutes or their legislative histories for the reasons described in Amtrak’s prior briefs. See Amtrak Opening Brief, A-2; Amtrak Reply Brief, 39-46.

F. CSX's Arguments In Opposition To Amtrak's Delay-Based System Proposal Are Unpersuasive

CSX's arguments against the delay-based quality payment and penalty system that Amtrak has proposed to incorporate into its Operating Agreement with CN are based on mischaracterizations about the purpose and structure of Amtrak's proposal.⁷³ As an initial matter, CSX claims that Amtrak's proposal is a "severe departure" from how Amtrak and host railroads historically have measured quality of service.⁷⁴ CSX also claims (without explanation) that Amtrak's delay-based proposal "violates the statute governing this proceeding and would overturn nearly five decades of decisions interpreting it."⁷⁵ CSX fails to recognize that Section 24308(a) does not dictate the specific terms of any incentive/penalty system that the Board may prescribe in this proceeding, as long as it is reasonable and consistent with the statutory goals and purposes of the Rail Passenger Service Act.⁷⁶ Amtrak has proposed the delay-based quality payment and penalty system for its next Operating Agreement with CN precisely because the existing KOTP system has failed to provide adequate motivation for CN to improve its performance (and has unjustly rewarded CN for poor performance).

CSX also argues that the "central measure of 'quality of service' must be actual on-time performance – when trains arrive at stations."⁷⁷ The KOTP system does not, however, measure "actual on-time performance" but instead (i) ignores the experience of Amtrak passengers boarding and detraining at the vast majority of stations; and (ii) for those limited checkpoints that are measured under the KOTP system, measures performance against relief items, tolerances,

⁷³ CSX Comments, 11-16.

⁷⁴ CSX Comments, 12.

⁷⁵ CSX Comments, 1.

⁷⁶ See Amtrak Opening Brief, 4-5, 13-15; Amtrak Reply Brief, 72-76.

⁷⁷ CSX Comments, 12.

separate contract schedules and other provisions that even further disconnect KOTP from the actual impact of the host's performance on Amtrak's passengers. For these reasons, Amtrak has proposed the delay-based system with CN which would more directly and objectively measure CN's contribution to on-time performance than the artificial KOTP system.⁷⁸

CSX also claims that Amtrak's delay-based proposal would impose Amtrak's "unilateral" and supposedly "incorrect" view of preference on CN.⁷⁹ As CSX acknowledges, the preference obligation is incorporated in a separate statutory provision than the "quality of service" provision with separate enforcement mechanisms (including a mechanism for host railroads to seek Board relief from the preference obligation upon a sufficient showing of interference with the quality of service provided to shippers).⁸⁰ Amtrak is not seeking to define or impose any interpretation of the preference obligation upon CN through its delay-based proposal, and (contrary to CSX's suggestion) is not asking the Board to define the preference obligation in this proceeding. Moreover, Amtrak's delay-based system is not based on the premise (as CSX implies) that every delay caused by CN is a violation of the preference statute. Instead, for purposes of assessing the quality of service provided by CN, Amtrak's delay-based system would measure the monthly level of delays caused by CN (whether or not such delays resulted from preference violations). Moreover, Amtrak's delay-based system proposal includes no presumption that freight train

⁷⁸ See Amtrak Opening Brief, 21-25; Amtrak Reply Brief, 72-73. CSX argues that it is "faulty" to presume that delays caused by the host railroad result in actual delays in station arrival. CSX Comments, 12. This defies common sense – a delay from any cause will invariably have an impact on the train's likelihood of arriving on-time at any station.

⁷⁹ CSX Comments, 12-13. CSX repeats the arguments it made in the Board's Ex. Parte 728 proceeding that "preference should not be equated with absolute priority." Comments of CSX Transportation, Inc., *Policy Statement on Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. 24308(c) and (f)*, STB Docket EP 728, at 2, 5 (filed February 22, 2016). The Board did not adopt CSX's position in the Ex. Parte 728 proceeding and instead withdrew its proposed Policy Statement.

⁸⁰ Amtrak Opening Brief, 86-87.

interference or any other type of Host Responsible Delay must be zero; in fact, CN would be able to earn incentives from Amtrak even when CN has caused considerable amounts of Host Responsible Delay. Thus, all of CSX's arguments about preference are beside the point.

CSX also grossly mischaracterizes the delay reporting information that would be used under Amtrak's proposal. CSX inaccurately claims that Amtrak's delay attribution system is based on "the Conductor's determination of the cause of delay based on what he/she can determine out of the train's window" with "no method of verification."⁸¹ In reality, the Amtrak conductor as the employee in charge of the train uses multiple sources of information in making delay attribution decisions, including (i) direct observation, (ii) train bulletins, (iii) radio traffic, and (iv) information related by other railroad personnel with whom he/she is in regular communication, including engineers, dispatchers, maintenance of way employees, signal maintainers, and other train crew members.⁸² Moreover, Amtrak's nationwide delay reporting procedures allow for Amtrak and the host railroad to review, verify and adjust delay attribution data as necessary and appropriate.⁸³ The process is fully transparent – Amtrak transmits all HRD data to the host railroad and the host railroad has login access to view the data in Amtrak's delay database at any time.⁸⁴

⁸¹ CSX Comments, 16.

⁸² Vilter/Maga RVS, 50.

⁸³ Vilter/Maga RVS, 46-47.

⁸⁴ See Vilter VS, 16-17. CSX also criticizes Amtrak's delay coding system and advocates for a so-called "root cause" method of attributing responsibility for Amtrak delays. Amtrak responded to similar arguments in its Opening Brief and Reply Brief. See Amtrak Opening Brief, 48-51; Amtrak Reply Brief, 111-114. CSX's arguments on this point add nothing to the record.

G. CSX's Arguments About Amtrak's Schedules Over CSX Are Both Irrelevant and Unpersuasive

CSX recognizes that it “cannot comment on the appropriateness of CN’s particular schedule proposals” because “whether schedules are appropriate vary by host railroad, and by route.”⁸⁵ Nonetheless, CSX makes the broad, unsupported and irrelevant claim that “many of the Amtrak timetables for CSX-hosted service are simply outdated.”⁸⁶ Yet, CSX also notes that it has engaged in multiple negotiations with Amtrak over schedule issues under the Operating Agreement between Amtrak and CSX.⁸⁷ This proceeding is not the appropriate forum in which to make vague and unsupported claims about Amtrak’s schedules over CSX.

CSX also argues that Amtrak’s primary focus should be on developing “achievable schedules” rather than seeking expedient schedules.⁸⁸ CSX offers no market research or competitive analysis to support its claim that “Amtrak customers would benefit” from slower schedules. Rather, CSX unearthed the statement of an Amtrak cross-country traveler who expressed his personal opinion nearly 45 years ago that schedule reliability was more important to him than expedience.⁸⁹ There is no evidence that Amtrak riders value adherence to KOTP at a checkpoint over competitive schedules with high on-time performance at all stations.⁹⁰

CSX also cites to statements from the ICC’s 1973 decision in the *Adequacy of Intercity Passenger Rail Service* rulemaking which refer to the importance of realistic scheduling and

⁸⁵ CSX Comments, 17.

⁸⁶ CSX Comments, 17. CSX also claims that Amtrak’s schedules are “in many cases outdated and unrealistic” without providing any evidence to support its assertion. CSX Comments, 3.

⁸⁷ CSX Comments, 3. CSX fails to mention that Amtrak and CSX regularly review and modify their schedules as necessary and appropriate.

⁸⁸ CSX Comments, 18.

⁸⁹ CSX Comments, 19-20 (citing to *Adequacy of Intercity Passenger Rail Serv.*, 351 I.C.C. 883, 945 (1976)).

⁹⁰ See Amtrak’s Reply Comments, *On-Time Performance under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, STB Docket No. EP 726, at 3-4 (filed Mar. 30, 2016).

admonishes carriers for making “promises [they] cannot keep.”⁹¹ However, CSX fails to note that the ICC’s statements in that decision were made immediately after the ICC had expressed the view that Amtrak passengers reasonably expect on-time performance to be 100% against published schedules (and not the padded and artificial contract on-time performance system that is reflected in Amtrak’s KOTP incentive system with CN).⁹² With the understanding that host railroads were to strive for 100% on-time performance for Amtrak, it makes sense that the ICC would be emphasizing the importance of establishing realistically achievable schedules.

Finally, CSX suggests that a “moderate schedule adjustment” in 2006 for the *Auto Train* service in and of itself resulted in improved on-time performance.⁹³ CSX ignores the fact that this schedule adjustment was only one part of an overall improvement plan agreed upon by Amtrak and CSX, and that CSX’s senior-level commitment to a significant reduction in Host Responsible Delays for the *Auto Train* service was a substantially more important contributor to the improvement in on-time performance. CSX’s assertion of this type of claim, which only provides part of the relevant picture, is both highly prejudicial to Amtrak (which had no meaningful opportunity to evaluate the credibility of CSX’s claim and provide substantial rebutting evidence) and irrelevant to the issues in dispute between Amtrak and CN. Thus, even if it is accepted into the record, it should be disregarded.

H. NS and NITL Fail To Provide A Complete Picture of the Public Policy Goals That Should Be Considered By The Board In This Proceeding

NS argues that Congress directed the goals and objectives set forth in 49 U.S.C. § 24101

⁹¹ CSX Comments, 19 (citing to *Adequacy of Intercity Passenger Rail Serv.*, 344 I.C.C. 758, 776 (1973)).

⁹² *Adequacy of Intercity Passenger Rail Serv.*, 344 I.C.C. at 776.

⁹³ CSX Comments, 20.

to Amtrak alone.⁹⁴ However, this argument ignores the fact that the Board is required under 49 U.S.C. § 24308(a)(2)(A) to consider those goals and objectives set forth in Chapter 241 of Part C (Passenger Transportation) of Subtitle IV of Title 49 of the U.S. Code as it finds necessary in prescribing reasonable terms and compensation for Amtrak's use of CN's facilities and services.⁹⁵ NS also mischaracterizes the intention and structure of Amtrak's delay-based proposal when it claims that Amtrak is seeking to turn the statutory goals "into a mandate for the freight railroad to deliver."⁹⁶ As explained in Amtrak's Reply Brief, Amtrak's delay-based proposal does not impose any mandate on CN to reach specific ASOTP levels but instead is designed to motivate CN (through incentives and penalties) to reduce delays caused by CN to a level which correlates with improved ASOTP.⁹⁷

Citing to the rail transportation policy set forth in 49 U.S.C. § 10101, NS also argues that the Board must consider its "role in ensuring a safe, sound and efficient freight rail system."⁹⁸ However, the rail transportation policy set forth in Chapter 101 of Part A (Rail) of Subtitle IV of Title 49 of the U.S. Code governs the Board's regulation of rail carriers subject to its jurisdiction and contains no specific reference to passenger rail service. Section 24308(a), by contrast,

⁹⁴ NS Comments, 10. NS also claims that the goals and objectives set forth in Chapter 241 are "aspirational and conflicting" without providing any explanation of the basis for its claim. Although the goals set forth in Chapter 241 originally were enacted by Congress as aspirational, they were amended to make them mandatory goals. Amtrak Opening Brief, 22 n. 55.

⁹⁵ Amtrak Opening Brief, 5-6, 75-76.

⁹⁶ NS Comments, 10.

⁹⁷ Amtrak Reply Brief, 78-79. NS also claims that its position about the statutory goals is "driven home by the *UP/SP* case, which makes repeated reference to Amtrak Reform and Accountability Act of 1997 that revised Section 24101 while calling for Amtrak to become self-sufficient by 2002." NS Comments, 10. The Board's decision in *UP/SP* discusses the statutory goal of minimizing Amtrak's need for federal subsidies in interpreting the permissible scope of Amtrak "express" service that was contemplated by Congress as a means to achieve that goal. The decision contains only one reference to the 1997 legislation in that context and no other references to support the claim made by NS. *UP/SP*, 3 S.T.B. at 148, 151.

⁹⁸ NS Comments, 11.

specifically requires the Board to consider the findings, purpose and goals set forth in Chapter 401 of Part C (the Passenger Rail subchapter) when considering reasonable terms and compensation to prescribe in this proceeding.⁹⁹ Although Amtrak does not dispute that the Board has a role in ensuring a safe, sound and efficient freight rail system when carrying out its regulatory responsibilities under Part A, this proceeding under Section 24308(a) is brought under Part C and the Board cannot ignore the statutory findings, purpose and goals set forth in Chapter 401 which it is specifically instructed to consider in this case. Moreover, NS has failed to provide any evidence that Amtrak's position in this proceeding would have any impact on the safety, soundness or efficiency of the freight rail system.¹⁰⁰

Similarly, the NITL Letter emphasizes the interests of freight rail shippers and urges the Board to take a "balanced approach to resolving the issues in this proceeding ...to serve both freight rail customers and rail passenger interests."¹⁰¹ Although Amtrak acknowledges the interests of shippers in efficient and reliable freight rail service, and recognizes that Amtrak intercity passenger rail service must be part and parcel of a balanced transportation system as envisioned by Congress, Amtrak and its passengers and funding partners have a strong interest in the availability, reliability, efficiency and on-time performance of Amtrak service that is operated over CN. All of these statutory goals and purposes (which Congress recognized as being in the public interest) are directly relevant to the instant proceeding and must be

⁹⁹ Amtrak Opening Brief, 75-76.

¹⁰⁰ To put the scope of Amtrak's operations over NS into perspective, it is worth noting that Amtrak accounted for approximately 2.5% of total train miles operated over NS in 2016. See AMTRAK NATIONAL FACT SHEET FY 2016, at 3 (2016) *available at* <https://www.amtrak.com/content/dam/projects/dotcom/english/public/documents/corporate/nationalfactsheets/National-Fact-Sheet-FY2016-0717.pdf>; Federal Railroad Administration, Office of Safety Analysis, Operational Data Tables 1.02 (2016) *available at* <https://safetydata.fra.dot.gov/OfficeofSafety/publicsite/Query/rrstab.aspx>.

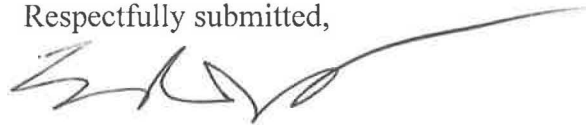
¹⁰¹ NITL Letter, 2.

considered by the Board in its determination.

III. CONCLUSION

For the foregoing reasons, the Board should not accept the NS Comments, CSX Comments or NITL Letter into the record. Alternatively, if the Board decides to accept one or more of these Third Party Comments into the record, it should accord them no weight for the reasons discussed above.

Respectfully submitted,



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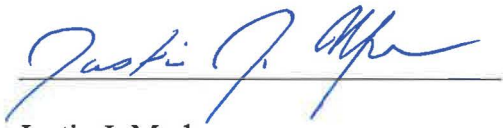
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