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SERVICE DATE - MAY 29, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33381

APPLICATION OF THE NATIONAL RAILROAD PASSENGER CORP.
UNDER 49 U.S.C. 24308(a)--SPRINGFIELD TERMINAL RAILWAY COMPANY, BOSTON
AND MAINE CORPORATION, AND PORTLAND TERMINAL COMPANY

Decided: May 28, 1998

The Surface Transportation Board sets the terms and compensation for the National Railroad Passenger Corporation's operation over track owned by railroads in the Guilford Rail System.

BY THE BOARD:

Pursuant to 49 U.S.C. 24308(a)(2), we are prescribing the terms and compensation for the National Railroad Passenger Corporation's access to facilities of railroads within the Guilford Rail System.

BACKGROUND

By application filed March 19, 1997, under 49 U.S.C. 24308(a)(2), the National Railroad Passenger Corporation (Amtrak) requests that we set the terms and compensation for its use of certain facilities owned by the Springfield Terminal Railway Company, the Portland Terminal Company, and the Boston and Maine Corporation (B&M), which are part of the Guilford Rail System and will be referred to collectively as "Guilford." Amtrak seeks authority to operate passenger rail service over Guilford lines between Plaistow, NH, and Portland, ME in order to

reintroduce passenger rail service between Boston, MA and Portland.¹ Amtrak will operate the Boston-to-Portland service pursuant to an agreement with the Northern New England Passenger Rail Authority (NNEPRA).²

As contemplated by 49 U.S.C. 24308(a)(1), Amtrak and Guilford have reached agreement on certain issues regarding Amtrak's use of Guilford facilities. Consequently, in this decision, we discuss only those significant terms and conditions in the Amtrak proposal on which the parties disagree.³

Amtrak has submitted proposed terms and conditions for access to Guilford facilities and Guilford has submitted reply evidence. Each party has also submitted both opening and reply briefs, and NNEPRA has filed a brief as well. In addition, Guilford submitted two supplemental verified statements, which we accepted into the record in a decision served September 12, 1997. Amtrak has filed two reply statements, which we also accept into the record.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 24308(a)(2)(B), Guilford is entitled to be compensated for the incremental costs that it will incur as a result of Amtrak's operations. The parties have raised numerous disputes as to what should be considered as incremental costs and how they should be measured. The disputes center around: (1) liability costs; (2) maintenance-of-way expenses; (3) capital expenditures; (4) incentives for on-time performance; (5) administrative costs; and (6) future incremental costs. In addition, Guilford questions our authority to impose certain conditions needed to permit the commencement of passenger service on the Plaistow-Portland line. Each of these issues is discussed below.

I. Liability Costs

A. Liability for Damages

Amtrak has agreed to assume full responsibility for the following types of damages: (a) injuries or death to Amtrak employees or damage to their property; (b) injuries or death to Amtrak

¹ Between Boston and Plaistow, Amtrak's trains will operate over track owned by the Massachusetts Bay Transportation Authority (MBTA).

² NNEPRA was established by, and is governed by, laws of the State of Maine.

³ Both Amtrak and Guilford have introduced proposed agreements to govern Amtrak's use of Guilford's facilities. For administrative convenience, we use the Amtrak proposal for the matters on which the parties agree as the basis for prescribing the terms and conditions for Amtrak's access.

passengers and so called 'meeters and greeters' of such passengers, as well as damage to these persons' property; (c) damage to Amtrak locomotives, passenger cars, or other Amtrak property or equipment; and (d) injuries or death to any person or damage to property (other than Guilford property and property of its employees) proximately caused as a result of collision of a vehicle or a person with an Amtrak train at a grade crossing.⁴

Amtrak proposes a different arrangement for other types of damages that could occur because of Amtrak's presence on Guilford's track, including: (a) injury to trespassers and licensees; (b) general indirect damages, such as environmental damage to houses near the tracks; and (c) injuries or death to Guilford employees or damage to their property or to the property of Guilford. For these "residual damages," Amtrak proposes what it claims is its standard arrangement throughout the national railroad system with host carriers, under which the host carrier (in this case, Guilford) assumes liability for those damages in return for a set payment by Amtrak. Specifically, Amtrak proposes to pay Guilford \$0.0734 per passenger train-mile to assume liability for these residual damages, an amount which would result in a total compensation of about \$17,000 per year.

The \$0.0734 per train-mile figure is a privately negotiated figure that has apparently been used for decades. While we do not question its use in other contexts, neither the Board nor its predecessor, the Interstate Commerce Commission (ICC), has adopted any privately negotiated compensation agreement as a standard to apply broadly to all railroads.⁵ Rather, compensation issues have been addressed on a case-by-case basis. On the record before us here, there is no evidence to support the adequacy of the \$0.0734 per passenger train-mile figure.⁶

⁴ The specific liability provisions proposed by Amtrak are set forth in its proposed compensation agreement contained in vol. 2 of its opening evidentiary submission filed on April 14, 1997.

⁵ To the contrary, the ICC found that \$0.0734 per passenger train-mile was not sufficiently compensatory for occasional movements or small railroads in Minnesota Transfer Ry. Co. — Operation of Trains, 354 I.C.C. 552, 559 (1978).

⁶ On its face, \$17,000 per year appears to be inadequate. Amtrak witness Marvin Smith, who oversees liability claims for Amtrak, admitted in deposition that, on Amtrak's northeast corridor, the average trespasser claim is settled or litigated at a value of between \$15,000 to \$17,000, exclusive of legal costs. Thus, the annual payment of \$17,000 under the \$0.0734 per passenger train-mile formula could be swallowed-up by a single trespasser accident.

Amtrak notes that Guilford has incurred no losses associated with either trespasser claims or derailments on the Plaistow-Portland Line in the last 5 years. However, Guilford's fortunate past experience does not insure that such claims will not arise in the future or will not occur in connection with Amtrak operations.

Guilford maintains that Amtrak's proposed level of compensation would be woefully inadequate. Guilford obtained a quotation of \$514,800 per year from a group of insurers headed by the Lexington Insurance Company—based on a \$500,000 deductible and a liability limit of \$100 million—for insurance against the residual damages that it might be required to absorb under Amtrak's proposal.⁷ Amtrak argues that the Lexington quotation—which would translate to about \$2.20 per train-mile, or 10 times more than the \$0.216 per train-mile that Amtrak pays to insure its operations nationwide—is too high. Moreover, Amtrak points out that the amount that Guilford currently pays for liability insurance for its entire system is only \$637,500.⁸

None of the insurance coverages cited by the parties establishes what Amtrak should pay to cover residual damages liability here. Guilford's own insurance only covers claims from \$5 million to \$50 million, and the fact that Guilford chooses to self-insure a portion of its own operations does not mean that it should assume the same liability for Amtrak's operations.⁹ Amtrak's existing insurance policy is also limited in coverage—it applies only to claims between \$10 million and \$200 million. Even the Lexington quotation would not cover the first \$500,000 of every claim.

We conclude that the liability for residual damages arising out of Amtrak operations is an incremental cost for which Guilford is entitled to compensation.¹⁰ However, we do not believe that

⁷ Guilford alleges that it was unable to obtain additional quotations because Amtrak had urged insurance providers not to provide quotations for residual damages insurance. Guilford further asserts that Amtrak refused to respond to discovery requests about quotations that Amtrak may have received from insurance carriers. We need not address these allegations here, as other quotations are not necessary to our resolution of liability for residual damages, as discussed infra.

⁸ Amtrak suggests that Guilford's existing insurance already covers the incremental liability exposure related to Amtrak's operation. However, Guilford's existing coverage was obtained on the express representation to its insurance carriers that there was no passenger service on its lines.

⁹ The mere fact that no catastrophic accidents occurred over Guilford track from Amtrak's past operations in its "Montrealer" service does not justify forcing Guilford to bear the risk that none will occur in the future.

¹⁰ We recognize, as pointed out by Amtrak, that these residual damage categories involve areas where host carriers can exercise a large amount of control, through, for example, the barriers that they choose to erect against trespassers, their timing of freight movements that could cause environmental damage in a collision with a passenger train, and their control over the behavior of their own employees. Accordingly, host carriers have the opportunity to affect the incremental risks arising from Amtrak's presence. So that Guilford will have the proper incentive to avoid residual damages, Amtrak may return to the Board and claim an appropriate adjustment in compensation where it can show that Guilford's own conduct is causing its indemnity risk, or its insurance

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either side has provided a method by which we could reasonably calculate a precise dollar amount of compensation. Furthermore, we do not believe that it is necessary for us to attempt to prescribe the specific level of compensation necessary to cover the risk of residual damages here. Instead, we direct Amtrak to either:

(1) fully indemnify B&M for the residual damage categories, as it has agreed to do for other damage categories;

(2) purchase appropriate insurance or other surety to cover Guilford's assumption of liability for all such losses (i.e., without deductibles or low caps¹¹), even if that requires the purchase of more than one policy; or

(3) a combination of the first two methods (for example, by purchasing insurance with a deductible or low cap, but agreeing to indemnify Guilford for damages that are subject to the deductible or cap).

Amtrak must select its approach no later than 6 months before service is scheduled to begin and communicate the details to Guilford. If Guilford can show that the approach selected by Amtrak does not, in fact, provide full indemnification or insurance, it may petition the Board for relief, and the Board will take appropriate actions including, if necessary, an interim order mandating full indemnification for any losses that may occur while Guilford's petition is being heard.

B. Damages for Gross Negligence or Misconduct

Guilford also seeks to be compensated for any punitive damages that may be linked to Amtrak's presence on the line, but are based on Guilford's own gross negligence, recklessness or wanton or willful misconduct. Guilford cites Amtrak's successful avoidance of indemnification for punitive damages in National R.R. Passenger Corp. v. Consolidated Rail Corp., 689 F. Supp. 951,

¹⁰(...continued)
payments to cover residual damages, to rise.

¹¹ We are not requiring that the insurance have no cap at all, for few insurers would be willing to agree to open-ended liability. But any caps must be large enough to protect against the reasonably expected outer limits of liability.

971-972 (D.D.C. 1988), vacated on other grounds, 892 F.2d 1066 (D.C. Cir. 1990) “(Conrail)”,¹² and asks us to declare that any state laws that may bar such total indemnification are preempted.

Amtrak argues that: (1) under agency precedent, Amtrak is not required to do more than insure against its own negligence; (2) indemnification of another party’s gross negligence or willful and wanton misconduct would contravene public policy, citing the Conrail case; (3) sound policy requires that Guilford have an incentive to avoid conduct that leads to punitive damages; and (4) trackage rights agreements (including those to which Guilford is a party) generally do not require the tenant carrier to provide full indemnity for such damages.

With respect to public policy, Guilford argues that: (1) Amtrak has been the beneficiary of liability and punitive damage limits in Massachusetts, the District of Columbia (imposed by Congress), and New Hampshire; and (2) the willful or reckless conduct of railroad employees should not be imputed automatically to their employers because the continuous supervision of operating employees is not possible in the railroad industry.

We will not require Amtrak to reimburse Guilford for damages due to Guilford’s gross negligence or willful and wanton misconduct. The statute requires that compensation levels reflect safety considerations,¹³ and thus Guilford should be encouraged to conduct its operations safely. Moreover, public policy generally disfavors requiring one party to be responsible for another’s gross negligence or willful and wanton misconduct. Guilford argues that this policy should not apply where, as here, the uninsurable risk is not voluntarily assumed. However, because this policy is well grounded in our statutory framework and general insurance law precedent, we are not free to depart from it.

C. Security For Amtrak’s Indemnity Obligations

Guilford is not satisfied with an unsecured indemnification arrangement for liability. Guilford voices concern that, in view of Amtrak’s precarious financial condition, Amtrak would

¹² In that case, a Consolidated Rail Corporation (Conrail) locomotive operated by a Conrail engineer over Amtrak-owned lines collided with an Amtrak passenger train. The engineer eventually pleaded guilty to manslaughter and obstruction of a federal investigation. In a declaratory judgment action, Amtrak asked the district court to determine that it was not required to indemnify Conrail for actions resulting from the Conrail engineer’s gross negligence or willful misconduct. The district court ruled that (a) the operating agreement did not require such indemnification and, alternately, (b) under District of Columbia law, public policy would not allow such indemnification. On appeal, the court of appeals held that the lower court should have required arbitration of the scope of the operating agreement and refrained from addressing the legality of such an indemnification arrangement prior to arbitration. The case was then settled, at a cost to Conrail of about \$94 million.

¹³ See, e.g., 49 U.S.C. 10101(3) & (8), 10501(c)(3)(A)(i), and 24313; 45 U.S.C. 421.

not be able to satisfy its indemnity obligations. Accordingly, Guilford asks that we (1) require Amtrak to purchase appropriate insurance or other security and (2) condition access upon Massachusetts, New Hampshire, and Maine enacting limits on liability in excess of insurance coverage.

Taking these suggestions in reverse order, we find that making Amtrak's operations dependent upon future state limitations on liability is wholly inappropriate. Under the statute, Amtrak has a right to operate over the lines of other carriers, so long as it does so under reasonable terms, including compensation for the incremental costs incurred by the host carrier. We may not deny Amtrak that right by holding Amtrak hostage to legislative initiatives.

Turning to Guilford's first suggestion (requiring that Amtrak secure its indemnity obligations), we find that the request is unsupported. Guilford has not demonstrated a strong likelihood of Amtrak going out of business. It has shown nothing more than that Amtrak's operations remain dependent in large measure on the Congressional appropriations process—a process that Amtrak has endured from the date it first commenced operations in 1970.

As noted above, Amtrak has existing, nationwide insurance that presumably will cover its operations over this line. Its amount of insurance coverage, incorporating sizable deductibles and caps, is fairly conventional for the railroad industry and has been acceptable for every other railroad with which Amtrak has line usage agreements. We find that requiring Amtrak to absorb the costs of additional insurance or security for Guilford is unnecessary. Guilford has shown no reason why it should be given more preferential treatment than all other carriers hosting Amtrak operations.

II. Maintenance-of-Way Expense

The parties agree that Amtrak must compensate Guilford for the incremental maintenance-of-way (MOW) costs of running passenger trains over the Plaistow-Portland line. Further, the parties agree that the MOW expenditures must be sufficient to maintain the track at Federal Railroad Administration (FRA) class 3 level, to allow passenger trains to achieve speeds of 60 miles per hour (mph) and provide a comfortable ride for passengers. However, the parties disagree on the method for determining incremental MOW costs.

Based on the ICC's determination in the Amtrak/Conrail proceeding,¹⁴ Amtrak proposes to pay Guilford an incremental MOW cost of \$0.117 per locomotive- and car-mile (approximately \$2,050 per track-mile in 1996 dollars).¹⁵ While acknowledging that this level of compensation is

¹⁴ National Railroad Passenger Corp. and Consolidated Rail Corp.--Application Under Section 402(a) of the Rail Passenger Service Act for an Order Fixing Just Compensation, Finance Docket No. 32467 (ICC served January 18, 1996).

¹⁵ Amtrak's \$0.117 figure is developed by converting the \$1.445 per 1,000 gross ton-mile
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unrelated to the operation of passenger trains over Guilford's track, Amtrak states that the proposed payment will be more than necessary because, following the \$39.6 million rehabilitation of the Plaistow-Portland line with funds to be supplied by the State of Maine, there will be little need for track maintenance for the first 6 to 8 years. Furthermore, Amtrak argues that, because of the limited amount of freight traffic that traverses the Plaistow-Portland line (less than 10 million gross tons or MGT), most maintenance costs will be weather-related and not related to Amtrak's use of the line. According to Amtrak, only track inspection costs will be higher due to its use of the line and Amtrak will pay these costs directly.

Guilford does not dispute that MOW costs will be significantly reduced in the first few years following rehabilitation; nor does it calculate a specific incremental MOW expense figure. Rather, Guilford proposes that Amtrak pay the difference between Guilford's average MOW cost for the Plaistow-Portland line in the period 1989-1991, and any additional maintenance costs incurred after institution of Amtrak service.

Neither party has presented evidence that allows us to accurately estimate the incremental MOW for Amtrak's operations over Guilford's tracks. Amtrak's adoption of incremental MOW cost from the Amtrak/Conrail proceeding is unrelated to the incremental costs that Amtrak's service will impose on Guilford. There are substantial differences between the Conrail facilities over which Amtrak operates and Guilford's facilities. The majority of Conrail's track is maintained for freight operations at a level that is equivalent to or higher than that which Amtrak needs to provide passenger service and, therefore, no special additional maintenance is necessary to allow Amtrak to operate over the Conrail track. Here, however, to conduct its freight operations Guilford does not need to maintain its track at the level needed by Amtrak for passenger service. Therefore, the incremental maintenance needed to allow Amtrak to operate at 60 mph is likely to differ significantly from the figure developed in Amtrak/Conrail.

On the other hand, Guilford's proposal that Amtrak pay for all MOW expenditures above those historically made during the 1989-1991 period would result in Amtrak paying for far more than the incremental cost associated with passenger service. Currently, Guilford operates many more trains over the Plaistow-Portland line than it did the 1989-1991 period. In addition, it is anticipated that the proposed acquisition of Conrail by two Eastern railroads, if approved, would further increase Guilford's traffic. Under Guilford's approach, the additional MOW costs resulting from the increase in freight traffic on the Plaistow-Portland line would be borne by Amtrak. In addition, any type of maintenance not incurred in the 1989-1991 period would be payable by Amtrak, whether or not these costs were attributable to Amtrak operations.¹⁶ Also, Guilford's

¹⁵(...continued)
(GTM) from Amtrak/Conrail to a unit-mile basis, adjusted for inflation.

¹⁶ For example, Guilford's approach assumes that capital expenditures for bridges on the Plaistow-Portland line average only \$25,000 a year. But Guilford recently spent \$489,000 to
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proposal would make Amtrak responsible for damage from natural causes, such as floods or fires, although none of the costs could be attributable to Amtrak's operations, and the majority of repairs would be necessary even if Amtrak were not operating on the line.

While on this record it is not possible to estimate the incremental MOW expense that will be attributable to Amtrak service, we recognize that the planning for and restoration of passenger service on the Plaistow-Portland line needs to move forward. Therefore, to avoid further delays, we are prescribing, on an interim basis, Amtrak's proposed annual MOW payment¹⁷ plus additional charges agreed to by the parties.¹⁸ This payment is adequate on an interim basis because Guilford will be the immediate beneficiary of \$39.6 million of rehabilitation which the parties agree will reduce MOW expense below the historical MOW.¹⁹ Thus, even without Amtrak's MOW payments, Guilford will be required to spend less to maintain the line following rehabilitation than it would if the rehabilitation work were not performed and Amtrak did not institute passenger service.

After passenger service has begun, and after the parties have experience operating over the rehabilitated line, data on actual maintenance expenditures will become available and it will be possible to develop a better estimate of the MOW expenses on the line. Thus, although the incremental MOW payment we are prescribing may not be sufficient after the first several years of operations following rehabilitation, after operating on the Plaistow-Portland line for a period of time following the rehabilitation work, the parties will be in a better position to negotiate a MOW payment that better reflects the actual maintenance needs of the Plaistow-Portland line. If, following rehabilitation and the resumption of Amtrak service, either party believes that Amtrak's

¹⁶(...continued)

rehabilitate the Main Street Bridge in Saco, ME, because salting of the overhead street caused the bridge to deteriorate. Under Guilford's proposal, if Amtrak were operating over that bridge, the entire cost of repairs would be chargeable to Amtrak, even though damage to the bridge was not caused by rail traffic.

¹⁷ Amtrak's payment of \$2050 should be indexed to the appropriate time period based on the indexation procedures discussed infra.

¹⁸ The parties agree that Amtrak will pay for a weekly track inspection (unless Guilford otherwise has to make the inspection because annual tonnage on the Plaistow-Portland line exceeds 10 MGT), the costs of an annual Sperry Car inspection, and the costs of any non-routine service Guilford performs.

¹⁹ Guilford acknowledges that, in the years immediately following the rehabilitation, the maintenance and capital work needed to maintain the Plaistow-Portland line at Amtrak's desired level of utility would be less than the funds Guilford normally spends to maintain the Plaistow-Portland line. Pease V.S. at 13 n.11; Willbrant V.S. at 10.

MOW payments are inappropriate, they may petition the agency to reopen this proceeding at that time.

III. Rehabilitation of the Line

As noted, Amtrak, Maine Department of Transportation and NNEPRA plan to provide \$39.6 million to rehabilitate the Plaistow-Portland line to meet Amtrak passenger service requirements. With the exception of bridge rehabilitation and construction of a track to bypass Guilford's Rigby Yard in Portland, for which Guilford argues that additional funds are needed, the parties agree on the scope of the rehabilitation work.

A. Bridge Rehabilitation

Amtrak submitted evidence that, in order to operate passenger trains at 60 mph over the line, 11 bridges would need \$2 million of rehabilitation work. Guilford disagrees and argues that, based on a preliminary January 1993 study prepared for Amtrak that \$21 million would be needed to make the bridges on the line safe for passenger operations.

The evidence relied on by Guilford is not relevant. The January 1993 study that Guilford refers to was prepared under the assumption that Amtrak trains would operate at 79 mph.²⁰ Amtrak's \$2 million estimate reflects a lower level of bridge rehabilitation to account for the fact that the maximum speeds have been reduced to 60 mph. Amtrak's evidence is reasonable because the slower, 60 mph speeds will produce less stress on bridges and consequently require less structural improvements. Guilford has presented no evidence to rebut this claim. Indeed, Guilford's own evidence shows that in 1991 it proposed to provide passenger service at 80 mph without any bridge rehabilitation.²¹ Therefore, we find Amtrak's proposal to include \$2 million for bridge rehabilitation reasonable and the best evidence of record.

B. Rigby Yard

The parties agree that a bypass track must be constructed around the Rigby Yard to accommodate the passenger service; they do not agree on the length of the bypass. Amtrak proposes to construct a 2-mile bypass that will intersect Guilford's main line west of Rigby Yard at MP 200.38. Amtrak states this bypass track will allow Amtrak trains to avoid interfering with Guilford's yard operations, which sometimes overflow onto the main line outside the yard.

²⁰ We note that the preliminary January 1993 study was updated in March 1993 and the bridge rehabilitation figure was reduced to \$6.2 million.

²¹ When Guilford was seeking to be the operator of the Boston-to-Portland passenger service, it claimed (to the State of Maine) that rehabilitation of the Plaistow-Portland line to a level that would permit class 4 operating speeds (79 mph) would cost only \$25.5 million, and its proposal did not mention the need for any bridge work.

Guilford asserts that placing the bypass switch at MP 200.38 would seriously impede yard operations. Guilford claims that it uses the main line from the yard to MP 201.00 for yard switching operations, brake testing, and holding inbound and outbound trains temporarily when the yard is congested. Consequently, Guilford proposes to either relocate the proposed bypass switch to MP 201.00²² or construct a new switching track that parallels the main line for approximately 1 mile west of the yard entrance.

To evaluate the need for a longer bypass, Amtrak observed and photographed the yard operations for 3 days (July 21-23, 1997). It found that only one freight train would have been delayed for 10 minutes due to the presence of passenger trains. Guilford claims, however, that Amtrak's observer could not adequately see the yard operations from his vantage point and that the observations were made when yard operations were extremely light. Guilford submits several of its own photographs to show that Amtrak's view of yard operations was blocked by trees.

Guilford's photographs do not support its claim. The track is clearly visible in one of Guilford's photographs. Further, the photographs taken by Amtrak, which clearly show Guilford's train operations, demonstrate that Guilford's photographs were not taken from the same spot as Amtrak's. In addition, Guilford's argument that operations during the observation period were unusually light is contradicted by its own witness who, during depositions, stated that operations during the time Amtrak observed the yard were "typical."²³

Based on the evidence of record, we will allow Amtrak to proceed based on its proposal to locate the bypass switch at MP 200.38.²⁴ Guilford has not submitted probative evidence that Amtrak's operations will materially affect operations at the Rigby Yard or that the main line west of Rigby Yard is used extensively for yard operations when Amtrak trains would be present. Indeed, Amtrak observations indicate that there is little yard activity beyond MP 200.38 with which passenger operations would interfere.

IV. Performance Incentive Payments

As required by 49 U.S.C. 24308(a), Amtrak's proposal includes incentive payments to Guilford for on-time operation of the Amtrak trains and penalties for untimely performance. The performance proposal is similar to Amtrak's agreement with other freight railroads. Guilford would begin to collect monthly performance incentives when Amtrak trains are on-time 80% of the time and

²² Without offering any support, Guilford asserts that the parties have agreed since 1993 to construct a switching lead leaving the main line at MP 201.

²³ Culliford's transcript at 32.

²⁴ Although we will not require Amtrak to construct the longer bypass, if Guilford demonstrates to us that a future extension of the bypass is needed solely as a result of Amtrak operations, Guilford will be allowed to recover the cost of construction from Amtrak.

pay penalties when passenger service is on-time less than 70% of the time. Guilford agrees with Amtrak's performance standards, except that Guilford would set lower incentive payments for timely performance and make the tolerance (the allowable difference between scheduled arrival and actual arrival times) subject to change in the event that insufficient funds are provided to perform adequate maintenance work on the track.

Amtrak's performance proposal is appropriate. These incentive payment terms and conditions have been included in other proceedings and are more beneficial to Guilford than Guilford's proposal. Further, because service will begin on a newly rehabilitated track, and Guilford will receive compensation from Amtrak for MOW, adequate funds should be available to maintain the line to avoid the types of delays envisioned by Guilford.

V. Additional Administrative Costs

Based on an agreement between the parties that was never finalized, Guilford proposes that Amtrak pay \$0.45 per train-mile as compensation for the administrative work that Guilford will perform. This fee allegedly would cover functions such as dispatching Amtrak trains, accounting, billing, and other administrative-type activities which cannot be quantified with precision. Amtrak objects to the \$0.45 per train-mile fee, arguing that it is improper to consider facts presented in failed settlement negotiations.

We agree that Amtrak should be responsible for any incremental administrative expenses that it would cause Guilford to incur. However, on this record, Guilford has offered no evidence to quantify the incremental administrative expenses it will incur, other than anecdotal evidence from a failed settlement negotiation. This is an insufficient basis for us to determine the extent, if any, of additional incremental costs that Amtrak operations would cause. Therefore, we cannot prescribe payments for administrative costs.²⁵

VI. Future Incremental Costs

Guilford proposes that we provide for additional future compensation for incremental costs that Guilford can show that it incurs. Guilford suggests two possible candidates for this category: (1) incremental freight service expenses that are caused by the presence of passenger service, such as the additional crew and per diem expenses that Guilford would incur if a passenger train break-down delayed freight service and (2) costs that Guilford would incur to increase the capacity of its facilities when such an increase would not be necessary in the absence of passenger service.

²⁵ Guilford asked that, if its evidence is rejected, we establish a mechanism to quantify incremental administrative costs. We will not establish any specific procedure. Guilford, of course, is free to petition the Board to reopen this proceeding, following the institution of passenger service, to demonstrate the extent to which it is actually incurring incremental cost associated with administering its relationship with Amtrak.

Amtrak's proposal includes payments for non-routine services provided by Guilford, including the costs associated with passenger train break-downs. Thus, we find that the proposal already takes into account that certain unanticipated future incremental costs caused by the operation of Amtrak trains may arise. If other incremental costs arise, such as those associated with facility capacity, Guilford may petition for reopening of this proceeding to address those matters.

VII. Indexing

Although not expressly addressed by the parties, we note that their evidence provides for different methods of indexing the various incremental costs payable by Amtrak. Amtrak proposes that incremental costs be adjusted annually based on the Railroad Cost Recovery Index (RCRI). Guilford proposes to index costs using the Consumer Price Index (CPI) for all urban consumers.

We find that Amtrak's indexing proposal is more appropriate. The RCRI is more specifically related to the cost of providing rail service, whereas the CPI is a much broader index of costs that includes many items unrelated to rail operations. We generally prefer the index that is most closely related to the type of costs being indexed, and for that reason, we have used the RCRI to index costs in previous Amtrak proceedings.²⁶

VIII. Jurisdictional Issues

A. Rehabilitation, Maintenance, and Initial Operations

Guilford argues that, while we have authority to set the terms and conditions for Amtrak's access to its line, we do not have the authority to require Guilford to upgrade or maintain its line at the level required by Amtrak, or to determine the number of trains Amtrak initially can operate. Guilford argues that our authority under 49 U.S.C. 24308(a) extends only to requiring Guilford to allow Amtrak to use its track and to set the terms and compensation for such use. According to Guilford, 49 U.S.C. 24308(d) and (e) require that any order dealing with the number of passenger trains authorized to operate or the maintenance and rehabilitation of the line must be issued by the Secretary of Transportation.

We disagree. The Secretary's authority pertains to those instances where Amtrak is already operating on the line and wishes to modify its service by either operating at higher speeds or by operating additional trains. Here, we are dealing with a situation where Amtrak wants to establish first-time service and seeks a determination of the terms of such access to the facilities. Guilford's statutory construction could frustrate Amtrak's ability to ever institute service. If we could not impose the initial terms for access, including the condition of the line and number of trains that can operate, and if, as the statute indicates, the Secretary can only order increased trains speeds and number of trains on lines where Amtrak is already operating, Guilford could prevent Amtrak from ever beginning service. Clearly, that is not the statute's intention.

²⁶ See Amtrak/Conrail.

Because commencement of Amtrak service over the Plaistow-Portland line is dependent upon the rehabilitation of the line, we must have the authority, in setting the terms and conditions for access, to require Guilford to provide the services necessary for rehabilitation to bring the line to a condition that will permit Amtrak to inaugurate service with four trains per day. Indeed, as discussed above, the parties agree on the majority of the rehabilitation work that will be needed. Furthermore, Guilford has previously recognized our authority to require rehabilitation when granting Amtrak access to a line over which it did not currently operate. In a case where Amtrak invoked its condemnation authority, now codified at 49 U.S.C. 24311, to acquire a B&M line in order to upgrade the line for Amtrak service, B&M urged our predecessor, the ICC, to use its authority, now codified at 49 U.S.C. 24308(a), to require rehabilitation of the line in lieu of condemning the line and conveying it to Amtrak.²⁷

Thus, we have the authority under the circumstances of this case to require rehabilitation. Moreover, in sanctioning the rehabilitation of the line with public funds, we are requiring that the line be maintained to permit continued passenger service. Indeed, without a maintenance condition, a host carrier could circumvent our prescription of access simply by allowing track to degrade.

B. Right to Convey or Lease

Amtrak requests that Guilford's right to transfer, assign, lease, or otherwise convey an interest in the Plaistow-Portland line be subjected to prior approval of Amtrak or the Board. Amtrak argues that such a limitation is necessary to protect the public's \$39.6 million investment in the line from transfer to an entity that might lack the financial resources to meet its service obligations to Amtrak.

We see no need to explicitly impose such a condition. Amtrak's interest in the line can be otherwise fully protected. Under 49 U.S.C. 24311, Amtrak can institute condemnation proceedings to permit it to acquire the line. Moreover, Amtrak's interest in ensuring that a sale of the line will not affect its ability to provide service can also be protected under our jurisdiction over sale or lease of lines of railroad. For these reasons, our prescription in the case need not include a restriction on alienation by Guilford.

Guilford objects to a proposed term that would allow Amtrak's "successors or assigns" to receive the rights granted to Amtrak, unless those parties are themselves statutorily entitled to access to the track. We agree that the access rights that the Act allows us to grant to Amtrak belong only to Amtrak and may not be transferred to a third party "successor or assign" unless the Act or some other provision of law specifically provides otherwise.²⁸ We see nothing in the access provisions of the Act that allows us to prescribe access terms for a party other than Amtrak,

²⁷ National Railroad Passenger Corp.--Conveyance of Boston & Maine Corp. Interest in Connecticut River Line in Vt. and N.H., 4 I.C.C.2d 761, 770 (1988).

²⁸ For example, under 49 U.S.C. 24305(a)(1), Amtrak has the right to subcontract.

and our decision may not be construed otherwise. If Amtrak seeks to sell or assign its access rights granted under this decision to a third party, its authority to do so may not be supported by this decision.

C. Arbitration Requirement

Amtrak, noting that the agreements it has with other freight railroads require that disputes arising from the agreements be submitted to arbitration, proposes that disputes arising from this decision be submitted to binding arbitration. Guilford opposes this condition. While Amtrak argues that we have the authority to require binding arbitration, it also states that it would not object if the requirement was not imposed. Because Amtrak does not insist upon the arbitration requirement, we will not require that disputes be submitted to arbitration. Rather, we will resolve any future disputes in an appropriate manner.

D. Application of Federal Transit Administration "Boilerplate" Restrictions

Guilford objects to Amtrak's request that we order Guilford to comply with certain requirements that would normally be imposed as a condition to the voluntary receipt of grants from the Federal Transit Administration. While Guilford concedes that it must comply with statutory and regulatory requirements that generally apply to it, the carrier argues that our jurisdiction does not allow us to impose conditions on its use of the funds received as compensation for the property invaded by Amtrak. Specifically, Guilford objects to the following provisions of Amtrak's proposed terms and conditions:²⁹ (1) a statement that the parties "acknowledge" certain matters; (2) a requirement that Guilford agree that the federally appropriated funds that it receives will not be used for lobbying; and (3) a requirement that Guilford comply with a wide variety of otherwise inapplicable statutes, DOT regulations, and state obligations concerning civil rights, employment practices, and environmental statutes.

We agree with Guilford in this respect. Our authority is limited to prescribing the facilities and services that host carriers must provide to Amtrak and the compensation that Amtrak must provide in return. The statute gives us no authority to prescribe the uses to which host carriers put the specific funds that they receive for compensation. Nor does our authority extend to requiring host carriers to observe statutory provisions and regulations to which they would not otherwise be subject. Thus, we will exclude the Federal Transit Administration "boilerplate" restrictions from our prescription.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

²⁹ These provisions appear in Exh. G of Appendix A to Amtrak's proposed terms and conditions.

It is ordered:

Guilford will provide services and facilities to Amtrak pursuant to the terms and conditions proposed by Amtrak, as such terms and conditions are modified herein.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary