

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35743

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

Digest:¹ In this decision, the Board issues interim findings and guidance to the National Railroad Passenger Corporation (Amtrak) and Illinois Central Railroad Company and Grand Trunk Western Railroad Company (subsidiaries of Canadian National Railway Company) and initiates Board-sponsored mediation in an effort to establish reasonable terms and compensation for Amtrak's use of the carriers' facilities (including rail lines) and services.

Decided: August 8, 2019

The National Railroad Passenger Corporation (Amtrak) operates passenger trains over thousands of route miles across the United States. Most of these trains operate over rail lines owned by private freight railroads (referred to as "host railroads") under agreements negotiated between Amtrak and the relevant host railroad. Since the 1970s, Amtrak has operated passenger trains over rail lines now owned by Illinois Central Railroad Company (IC) and Grand Trunk Western Railroad Company (GTW),² pursuant to such agreements. When the most recent agreement (the 2011 Operating Agreement) expired, however, the parties were unable to reach a new operating agreement.

Amtrak asks the Board to set reasonable terms and compensation for Amtrak's use of CN's facilities (including rail lines) and services. The parties dispute numerous issues, including on-time performance (OTP) calculations, Amtrak's penalty and incentive payments to CN, the components of CN's base compensation, and other contract terms such as the term of the agreement.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² IC and GTW are both indirect subsidiaries of Canadian National Railway Company and direct parties to the agreement with Amtrak at issue in this proceeding. For purposes of this proceeding, "CN" refers collectively to IC and GTW, but not their parent company. (See CN Reply 1 n.1, Aug. 1, 2013; Amtrak Reply 1, Aug. 2, 2013.)

In this decision, the Board issues interim findings and guidance on the main disputed issues and directs the parties to engage in Board-sponsored mediation in an effort to reach a final agreement. If, in light of the interim findings and guidance given in this decision, the parties reach an agreement, the Board will dismiss this proceeding; otherwise, the Board will issue a subsequent decision with its final determinations on any remaining unresolved issues.³

I. BACKGROUND AND PRELIMINARY MATTERS⁴

A. Historical Background

Historically, railroads had a common carrier obligation to carry both freight and passenger traffic on their lines. See Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry., 470 U.S. 451, 453-54 (1985). Beginning in 1920, railroads could not abandon their lines without permission from the Board's predecessor, the Interstate Commerce Commission (ICC). See Transportation Act of 1920, ch. 91, § 402, 41 Stat. 456, 477-78. In the ensuing decades, the rise of alternative modes of transportation—automobiles, buses, and airplanes—cut into the railroads' revenues. See Atchison, Topeka & Santa Fe Ry., 470 U.S. at 454. By the 1960s, major railroads were in serious financial trouble, passenger rail services were incurring operating losses, and railroads were seeking to abandon lines at an increased rate. See id.

Finding that modern, efficient intercity rail passenger service is a necessary part of a balanced transportation system, Congress enacted the Rail Passenger Service Act of 1970 (RPSA), Pub. L. No. 91-518, 84 Stat. 1327 (current version at 49 U.S.C. §§ 24301-24322). RPSA created Amtrak, RPSA § 301, and allowed the railroads to enter into agreements with Amtrak, relieving the railroads of their common carrier obligation to carry passengers, in exchange for a statutorily prescribed payment, RPSA, § 401(a). RPSA also required the railroads to allow Amtrak to use their rail lines to provide passenger rail service on negotiated terms, or, absent an agreement, for ICC-imposed "just and reasonable" terms and compensation, id. § 402, which Congress later changed to "reasonable terms and compensation," Act of Jan. 25, 1994, Pub. L. No. 103-272, § 1(e), 108 Stat. 745, 862 (codified at 49 U.S.C. § 24308(a)(2)(A)(ii)).

In 1973, Congress enacted the Amtrak Improvement Act of 1973, Pub. L. No. 93-146, 87 Stat. 548 (current version at 49 U.S.C. §§ 24301-24322). As relevant here, the Amtrak Improvement Act does two things. First, it requires that, when setting reasonable compensation,

³ The Board has considered every argument made by the parties but need not address each argument in this decision. Arguments not addressed herein will be addressed by the Board in a subsequent decision, if necessary.

⁴ The parties designated certain information contained in this decision as confidential or highly confidential in their pleadings. While attempting to avoid references to confidential or highly confidential information in Board decisions, the Board reserves the right to rely upon and disclose such information in decisions when necessary. In this case, the Board determined that it could not present its interim findings and guidance with respect to particular issues without disclosing certain information.

the Board is to consider “quality of service” as “a major factor when determining whether, and the extent to which, the amount of compensation shall be greater than . . . incremental costs.” Id. § 24308(a)(2)(B). Second, it establishes in statute a preference for transportation provided by Amtrak over freight transportation with respect to the use of rail lines, and it allows any railroad affected by that preference to seek relief from the Board from the preference requirement. Id. § 24308(c). In 1981, Congress amended section 402(a) of RPSA by inserting language requiring that any agreement between Amtrak and a host railroad for use of that host’s facilities and its provision of services must “include a penalty for untimely performance.” See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1181, 95 Stat. 357, 693.

B. Amtrak Service on CN Lines

As noted earlier, Amtrak has been using CN’s facilities (including rail lines) and services under agreements negotiated by the parties since the early 1970s. (CN Opening Br. 9-10, Jan. 19, 2018.) In 1995, Amtrak and IC entered into an operating agreement for Amtrak’s use of IC’s facilities and services, which was extended by the parties until May 1, 2011. (CN Opening Evid., V.S. Ladue & Kuxmann, Ex. 1 at 1, Dec. 6, 2018.⁵) Effective May 1, 2011, the 1995 agreement was replaced with the 2011 Operating Agreement, which restated the 1995 agreement and extended its application to GTW’s facilities and services as well.⁶ (Id., V.S. Ladue & Kuxmann, Ex. 1 at 1.) The 2011 Operating Agreement was for a term of two years and was extended twice for short periods through August 11, 2013. (Amtrak Appl. 2 n.2, July 30, 2013.) Both parties propose that their next operating agreement cover Amtrak’s operations over both the IC and GTW⁷ facilities and services. (CN Opening Evid. 50, Dec. 6, 2018; Amtrak Opening Statement V.S. Vilter 5 n.9, Sept. 8, 2015.)

⁵ On December 6, 2018, pursuant to a request from the Board, CN filed revised versions of its September 5, 2015 opening evidence, correcting pagination and footnote numbering errors and incorporating its September 23, 2015 errata into both the confidential and public versions of this filing. Also, on December 6, 2018, Amtrak filed a revised public version of its October 30, 2017 surrebuttal submission, correcting pagination errors.

⁶ Both parties submitted a copy of their 2011 Operating Agreement as part of their opening evidence. (See CN Opening Evid., V.S. Ladue & Kuxmann, Ex. 1, Dec. 6, 2018; Amtrak Opening Statement, V.S. Vilter, Attach. 2, Sept. 8, 2015.) These copies of the 2011 Operating Agreement appear to contain the same information, but Amtrak appears to have submitted the attachments to the 2011 Operating Agreement out of order. The Board will therefore reference CN’s submission of the 2011 Operating Agreement in this decision, for ease of reference for the reader. In addition, both parties designated the 2011 Operating Agreement confidential in their submissions. The Board is not making the parties’ 2011 Operating Agreement public, but, as noted supra note 4, finds it necessary to disclose certain information in order to present the Board’s interim findings and guidance here.

⁷ The parties agree that the IC and GTW lines should be subject to the same contract terms going forward. (See Amtrak Opening Br. 15-16, Jan. 19, 2018; CN Opening Evid. 13, Dec. 6, 2018.)

Six of Amtrak's routes include service over CN lines: the Wolverine, Texas Eagle, Lincoln, Blue Water, Illini/Saluki, and City of New Orleans routes. (Amtrak Opening Statement, V.S. Sacks 2-3, Sept. 8, 2015; CN Opening Evid., V.S. Ladue & Kuxmann 3-4, Dec. 6, 2018.)

Wolverine Service. Amtrak's Wolverine service operates six trains daily over a total of 304.1 route miles between Chicago, Ill., and Pontiac, Mich. On that route, 26.5 route miles are over CN lines in two segments: one between Pontiac and Vinewood, Mich., and one between Gord and Baron in Battle Creek, Mich. (CN Opening Evid., V.S. Ladue & Kuxmann 5, Table 1, Dec. 6, 2018; see also id., V.S. Ladue & Kuxmann, Ex. 2 at 3.)

Texas Eagle Service. Amtrak's Texas Eagle service operates two trains daily over 1,305.4 route miles between Chicago and San Antonio, Tex. The Texas Eagle service operates over CN lines for a segment of 35.7 route miles between Chicago and Joliet, Ill. (Id., V.S. Ladue & Kuxmann 5, Table 1, Dec. 6, 2018; see also id., V.S. Ladue & Kuxmann, Ex. 2 at 2.)

Lincoln Service. Amtrak's Lincoln service operates eight trains daily over 284.1 route miles between Chicago and St. Louis, Mo., of which 35.7 route miles are on CN lines between downtown Chicago and Joliet. (Id., V.S. Ladue & Kuxmann 5, Table 1, Dec. 6, 2018; see also id., V.S. Ladue & Kuxmann, Ex. 2 at 2.)

Blue Water Service. Amtrak's Blue Water service operates two trains daily over a total of 318.5 route miles between Chicago and Port Huron, Mich., with 158.7 route miles over CN lines between Gord, in Battle Creek, and Port Huron. (Id., V.S. Ladue & Kuxmann 5, Table 1, Dec. 6, 2018; see also id., V.S. Ladue & Kuxmann, Ex. 2 at 3.)

Illini/Saluki Service. Amtrak's Illini/Saluki service operates four trains daily over a total of 308.9 route miles between Chicago and Carbondale, Ill. On that route, 306.7 route miles are over CN lines. (Id., V.S. Ladue & Kuxmann 5, Table 1, Dec. 6, 2018; see also id., V.S. Ladue & Kuxmann, Ex. 2 at 1.)

City of New Orleans Service. Amtrak's City of New Orleans service operates two trains daily over a total of 933.8 route miles between Chicago and New Orleans, La., of which 927.9 route miles are over CN lines between Chicago and Southport Junction in suburban New Orleans. (Id., V.S. Ladue & Kuxmann 5, Table 1, Dec. 6, 2018; see also id., V.S. Ladue & Kuxmann, Ex. 2 at 1.)

C. Procedural History

On July 30, 2013, Amtrak filed an application under 49 U.S.C. § 24308(a)(2), requesting that the Board institute a proceeding to establish reasonable terms and compensation for Amtrak's use of the facilities and services of CN and to make those terms retroactive to August 12, 2013. In its application, Amtrak also requested that the Board order CN to continue to make its facilities and services available to Amtrak on an interim basis under the terms of the 2011 Operating Agreement between the parties that was scheduled to expire on August 11, 2013. At the same time, Amtrak also proposed a procedural schedule. On August 1, 2013, CN filed a

letter replying to Amtrak's request for interim relief, stating it did not object to continuing to make its facilities and services available to Amtrak under the terms of the 2011 Operating Agreement on an interim basis. On August 9, 2013, the Board instituted a proceeding and ordered CN to continue to provide interim service under the terms of the expiring 2011 Operating Agreement.

The parties engaged in initial discovery over the next two years.⁸ In September 2015, both parties submitted opening arguments,⁹ after which they twice requested, and the Board twice granted, an extension of the procedural schedule to allow for additional discovery. On December 11, 2015, the Board granted a request by CN to require Amtrak to file a revised public version of its opening submission with the confidentiality designation removed from certain portions. Amtrak filed that document on December 17, 2015.

Upon the final completion of discovery, both parties filed rebuttal evidentiary submissions on September 14, 2017.¹⁰ The parties jointly requested the opportunity to file limited surrebuttals, which the Board granted on October 11, 2017. On October 30, 2017, both parties filed their surrebuttal submissions.¹¹

On November 20, 2017, CN filed a motion to strike a portion of Amtrak's surrebuttal evidentiary submission regarding an issue the parties refer to as the "short shunt" issue as exceeding the proper scope of surrebuttal, or, in the alternative, for leave to supplement the record. On December 7, 2017, Amtrak filed a reply to CN's motion to strike, as well as its own supplemental evidence on the issue. CN's motion to strike is addressed infra in this section, and the substantive issue subject to the motion to strike is discussed infra in the Performance Measurement and Delays section of this decision.

On January 19, 2018, after an additional extension of the procedural schedule at the request of the parties, both parties filed their opening briefs. On March 5, 2018, after an extension of time granted by the Board on February 13, 2018, both parties filed their reply briefs. The Board also received three comments from outside parties: Norfolk Southern Railway Company (NSR), CSX Transportation, Inc. (CSXT), and the National Industrial Transportation League (NITL).¹² Broadly, NSR and CSXT support CN's proposals and raise objections to

⁸ On December 16, 2013, the Board granted a joint motion for protective order. The Board amended the protective order on November 5, 2015, pursuant to a joint motion from the parties.

⁹ On September 23, 2015, CN filed errata to its opening evidence. On December 6, 2018, CN filed a revised version of its opening evidence, discussed supra note 5, in this section.

¹⁰ On September 21, 2017, Amtrak filed corrections to its rebuttal submission.

¹¹ On December 6, 2018, Amtrak filed a revised version of its surrebuttal submission, discussed supra note 5, in this section.

¹² Both NSR and CSXT submitted their comments along with motions for leave to file those comments as amicus curiae. Those motions will be granted and NSR's and CSXT's

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Amtrak's arguments, and NITL asks the Board to take into account the interests of the freight rail shipping community in considering this proceeding. On March 22, 2018, Amtrak replied to the comments from NSR, CSXT, and NITL. Also, on that date, CN replied to Amtrak's reply brief responding to what CN argues are "incorrect and misleading" arguments contained in Amtrak's pleading with regard to the short shunt issue. (CN Reply 1, Mar. 22, 2018.) On March 23, 2018, the Rail Passengers Association (RPA), also known as the National Association of Railroad Passengers, filed a comment in response to NITL's comment and in support of Amtrak. And, on March 28, 2018, the States for Passenger Rail Coalition (SPRC) commented asking the Board to "ensure due regard for the interests of [SPRC's] members, their communities, and their passengers." (SPRC Comment 2, Mar. 28, 2018.)¹³

On March 22, 2019, CN filed a petition for leave to file supplemental arguments regarding the Illini/Saluki schedule and the short shunt issue and included those arguments within its filing. Amtrak filed a reply on April 11, 2019, stating that it does not oppose CN's petition for leave to file provided that the Board accept Amtrak's attached "clarifying reply." In the interest of a full and complete record, the Board will grant CN's request and accept CN's supplemental arguments and Amtrak's reply into the record.

D. Motion to Strike¹⁴

As noted above, CN has filed a motion to strike. CN argues that Amtrak, in its October 30, 2017 surrebuttal, exceeded the scope of arguments permitted by the Board's October 11, 2017 modified scheduling order, (CN Mot. to Strike 1-5, Nov. 20, 2017), which allowed Amtrak to submit "additional evidence responsive to the Train Performance Calculator [(TPC)] runs and the schedule adjustment proposal discussed in section I of the rebuttal verified statement of Harald Krueger," Appl. of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(a)—Canadian Nat'l Ry., FD 35743, slip op. at 1 (STB served Oct. 11, 2017). As a result, CN contends, section I.C.1 of Amtrak's surrebuttal verified statement of Jason Maga concerning the short shunt issue should be stricken. (CN Mot. to Strike 1, Nov. 20, 2017.)

In section I of the Rebuttal verified statement of Harald Krueger, Mr. Krueger states that he used "CN's TPC to calculate the schedule adjustment necessary to account for the speed restriction on [the Horizon/Amfleet] equipment," and that "the nature of the equipment is limiting the train's maximum authorized speed." (CN Rebuttal, V.S. Krueger 12, Sept. 14, 2017; see also id., V.S. Krueger 5 ("[D]ue to safety issues with the Horizon/Amfleet cars used by

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comments accepted into the record. Likewise, notwithstanding the absence of a request for leave to file, the Board will accept NITL's comment into the record.

¹³ In the interest of a full and complete record, the Board will accept SPRC's and the RPA's response comments.

¹⁴ A description of the short shunt issue and the parties' substantive arguments on the issue are addressed in the Short Shunt subsection of the Performance Measurement and Delays section, infra.

Amtrak for [the City of New Orleans] service, Amtrak is required to use an additional car.”); *id.*, V.S. Krueger 6 (“[T]he Illini/Saluki schedules do not account for the slower operating speeds required for safety reasons due to Amtrak’s use of Amfleet/Horizon equipment (the so-called ‘short shunt’ issue).”); *id.*, V.S. Krueger 12 (“The Illini/Saluki Schedule should be adjusted to account for speed restrictions required to address the unsafe short shunting of certain Amtrak equipment.”).)

The Board may strike “any redundant, irrelevant, immaterial, impertinent, or scandalous matter.” 49 C.F.R. § 1104.8; see also Total Petrochems. & Ref. USA, Inc. v. CSX Transp., Inc., NOR 42121, slip op. at 9 (STB served May 31, 2013). However, section I.C.1 of Amtrak’s surrebuttal verified statement of Jason Maga that CN seeks to strike is focused on rebutting CN’s claims via Mr. Krueger that the short shunting is Amtrak’s fault. (Amtrak Surrebuttal, V.S. Maga 8-13, Dec. 6, 2018.) Amtrak states that, contrary to Mr. Krueger’s claims, CN is the party responsible for the delays caused by the short shunting. (*Id.*, V.S. Maga 10.) Specifically, Amtrak argues that the short shunting may be caused by grade crossing warning devices or CN’s infrastructure, both of which Amtrak states CN is responsible for maintaining. (*Id.*) Given Mr. Krueger’s discussion of the cause of the short shunt issue and his attributing the cause to Amtrak’s equipment, the Board finds that section I.C.1 of Mr. Maga’s surrebuttal verified statement is not improper and does not exceed the scope of the scheduling order. Therefore, CN’s request to strike that portion of the verified statement will be denied.

In the alternative, CN seeks leave to supplement the record regarding this issue and simultaneously filed its supplemental arguments. (CN Mot. to Strike 6, Ex. 1, V.S. Hilliard, Nov. 20, 2017.) Amtrak agrees to supplementing the record and includes its own supplement with its reply. (Amtrak Reply 2, 6-10, Dec. 7, 2017.) In the interest of building a full record, the Board will grant the “in the alternative” element of CN’s motion and will accept into the record the supplemental evidence already provided by both parties. See, e.g., Hartwell First United Methodist Church—Adverse Aban. & Discontinuance—Great Walton R.R., in Hart Cty., Ga., AB 1242, slip op. at 2 n.4 (STB served Jan. 31, 2018).

II. DISCUSSION

A. On-Time Performance and Schedules

The contract schedules in the 2011 Operating Agreement are tied to the public schedules published by Amtrak.¹⁵ (CN Opening Evid., V.S. Ladue & Kuxmann, Ex. 1 at 9, Dec. 6, 2018.) CN’s performance under the 2011 Operating Agreement for the purpose of assessing incentives

¹⁵ CN notes that, “for various historical reasons,” there are instances where the current public schedules (i.e., published timetables) and contract schedules differ. (CN Surrebuttal 42, Oct. 30, 2017.) The 2011 Operating Agreement establishes that, should any difference arise between the published timetables and the corresponding contract schedule, Amtrak will “amend its published timetable to bring it into conformance” with that contract schedule. (CN Opening Evid. V.S. Ladue & Kuxmann, Ex. 1 at 9, Dec. 6, 2018.)

and penalties is measured by a contract-based on-time performance metric (KOTP).¹⁶ KOTP, in a given month, is measured by dividing the number of trips of a train that arrived at a checkpoint within tolerance of the agreed-to contract schedule¹⁷ by the number of trips operated by the train to that checkpoint. (Amtrak Opening Br. 15-16, Jan. 19, 2018; CN Opening Evid., V.S. Dubin 7, Dec. 6, 2018.) With one exception,¹⁸ the checkpoints on all of the lines are the endpoints, i.e., the final stations on the line. (Amtrak Opening Br. 18, Jan. 19, 2018.)

Amtrak argues that KOTP ignores the quality of service experienced by the vast majority of passengers traveling on CN's lines because those passengers ride to and/or from intermediate stations that are not currently checkpoints. (*Id.*) According to Amtrak, there are 19 intermediate stations on the routes at issue that are not currently checkpoints. (*Id.* at 18-19.) Amtrak argues that, under the current system, CN has no incentive to minimize these delays at non-checkpoint stations and, therefore, Amtrak suggests a new framework¹⁹ for assessing OTP. (*Id.* at 21-25.) Under this framework, Amtrak would make a quality (also known as incentive) payment to CN based upon defined thresholds derived from a regression analysis correlating seven distinct categories of "Host-Responsible Delays" (HRDs)²⁰ to "All Stations On-Time Performance" (ASOTP) on existing Amtrak schedules. (Amtrak Opening Statement V.S. Vilter 3, n.5, Sept. 8, 2015.)

Specifically, Amtrak proposes correlating, by route, HRDs per month per 10,000 train miles to 80% OTP at "all station stops." (Amtrak Opening Br. 11-12, 21, Jan. 19, 2018.) ASOTP measures the percentage of station arrivals (or departures, in the case of the origin station) of an Amtrak train that occur within fifteen minutes of the time established in the public timetables plus allowances.²¹ (Amtrak Opening Statement 3, 7-8, Sept. 8, 2015.) Amtrak states

¹⁶ The target arrival times, against which CN's performance is measured, are in many cases later than the arrival times set forth in the public schedules. (Amtrak Opening Br. 38, Jan. 19, 2018; CN Open Evid., V.S. Ladue & Kuxmann, Ex. 1 at App II-2, Dec. 6, 2018.)

¹⁷ A tolerance at each checkpoint is articulated in the 2011 Operating Agreement at Appendix V, Table 1. (CN Opening Evid., V.S. Ladue & Kuxmann, Ex. 1 at App. V-12, Dec. 6, 2018.)

¹⁸ The City of New Orleans line has one intermediate checkpoint. (Amtrak Opening Br. 18, Jan. 19, 2018.)

¹⁹ This framework is discussed in the Incentives and Penalties section, *infra*.

²⁰ HRDs would include delays reported under seven different codes (commuter train interference, signal delays, maintenance of way, slow order delays, freight train interference, passenger train interference, and routing delays). (Amtrak Opening Statement, V.S. Vilter 2 n.2, Sept. 8, 2015.) A delay would be considered an HRD when an Amtrak train is delayed while on a line or delayed from entering a line due to an issue reported under one of these codes. (*Id.*, Amtrak Proposed Operating Agreement 4.)

²¹ Recovery time, dwell time, and miscellaneous time are types of delays considered "allowances" within the schedules and are used to calculate whether a train has arrived within tolerance. Recovery time is "time added into the schedule to compensate for certain delays

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that ASOTP reflects quality of service to all its passengers, including those who board or disembark at intermediate stations that are not checkpoints in KOTP. (Amtrak Opening Br. 23, Jan. 19, 2018.) In its rebuttal, Amtrak argues in the alternative that, if the Board retains the checkpoint-based system (as opposed to adopting Amtrak's regression-based proposal), every station should become a checkpoint. (Amtrak Rebuttal 39-40, Sept. 14, 2017.)

CN argues that the current KOTP system remains the best way to measure CN's performance. (CN Opening Evid. 24-27, Dec. 6, 2018.) CN opposes ASOTP, arguing that Amtrak's OTP can vary widely between routes, based on factors unrelated to CN's performance. (CN Opening Br. 27, Jan. 19, 2018.) As to Amtrak's alternative all stations checkpoint-based system, CN states that Amtrak adds checkpoints indiscriminately without substantiating its claim that checkpoints at all stations would motivate CN to provide better service. (*Id.* at 118.) CN argues that any new checkpoints should be based on reasonable segment spacing and whether a meaningful number of passengers either board or disembark at the station. (*Id.*) To that end, CN proposes adding checkpoints at Carbondale and Jackson on the City of New Orleans route and at Champaign on the Illini/Saluki route. (*Id.*)

In addition, CN maintains that any checkpoint additions must be combined with appropriate adjustments to Amtrak's public schedules. (*Id.* at 111-18.) If changes are made to KOTP, CN argues that the pure run time²² in Amtrak's schedules must be lengthened. (CN Opening Evid. 32-33, Dec. 6, 2018; CN Rebuttal, V.S. Kreuger 8, Sept. 14, 2017.) According to CN, inaccurately short pure run time in a schedule can artificially inflate the minutes of delay reported by Amtrak. (CN Opening Evid. 33, Dec. 6, 2018.) Amtrak opposes lengthening its public schedules in any way. (Amtrak Opening Br. 40-41, Jan. 19, 2018.) Amtrak argues that CN's attempt to lengthen the schedules is neither necessary nor appropriate in light of what it claims is "the public interest in fast, convenient and competitive Amtrak service,"²³ and Amtrak maintains that the best way to overcome the "significant deficiencies" with the current KOTP

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encountered en route." (CN Opening Evid., V.S. Ladue & Kuxmann, Ex. 1 at 5, Dec. 6, 2018.) Dwell time is "the amount of time required to perform work while a train is stopped at a station, including loading and unloading passengers and bags, changing crews, and/or servicing the locomotive or cabin cars." (*Id.*, V.S. Ladue & Kuxmann at 32 n.40.) Miscellaneous time is "time that Amtrak may add or remove from a schedule for operational convenience." (*Id.*, V.S. Ladue & Kuxmann, Ex. 1 at 5.)

²² According to CN, pure run time "is the theoretically shortest time, given established track speeds, in which a given Amtrak train can traverse its assigned route if there is no other traffic on the rail line and all operating conditions are perfect." (CN Opening Evid. 32, Dec. 6, 2018.)

²³ Amtrak interprets the statute as creating three primary statutory guideposts for an incentives and penalties system: (1) operating Amtrak service to all stations within 15 minutes of scheduled arrival times, 49 U.S.C. § 24101(c)(4); (2) measuring the quality of service provided by CN to Amtrak, *id.* § 24308(a)(2)(B); and (3) including a penalty for untimely performance, *id.* § 24308(a)(1). (Amtrak Reply Br. 72, Mar. 5, 2018.)

system is its proposed regression-based model. (Amtrak Reply Br. 72, Mar. 5, 2018; see id. at 74, 87.)

As noted above, the 2011 Operating Agreement uses the OTP metric primarily to establish a threshold for the calculation of incentives and penalties.²⁴ The statute requires that terms of an agreement between the parties “include a penalty for untimely performance.” 49 U.S.C. § 24308(a). In considering the ways an agreement ought to measure performance, the Board recognizes that Amtrak’s core business is intercity passenger rail transportation, and, when passengers purchase that transportation, they select origin and destination points from a list of available stations along a route. Here, a significant portion of Amtrak’s passengers travel to or from stations that are not endpoints and also not OTP checkpoints under the 2011 Operating Agreement. (See Amtrak Opening Br. 18, Table 2, Jan. 19, 2018 (showing that, on the six Amtrak routes that travel over CN lines, only between 2.6% and 25.5% of passengers travel endpoint to endpoint, whereas between 74.5% and 97.6% travel between intermediate stations).) In general, if an OTP metric only includes checkpoints at the final station and two to three select intermediate points, as CN proposes for some routes, the metric does not measure performance in a way that captures whether a significant portion of Amtrak’s passengers actually arrived at their selected destinations on time. Such a metric would be an unrepresentative measure of performance. A metric measuring OTP at each station would measure whether all passengers arrived on time, not just those who travel to the final station or two to three select intermediate stations along a route.

At the same time, the incentives and penalties system has effects on both Amtrak and CN. For example, as the record indicates, because network and other constraints sometimes result in Amtrak trains impacting CN freight train operations, a change to the OTP metric that makes it more difficult for CN to receive net incentive payments from Amtrak may cause CN to change its freight operations to receive those payments. In other words, Amtrak’s passenger service may benefit from additional changes by CN that improve its OTP, which, in turn, could have impacts on CN’s freight operations.

While the Board recognizes these potential impacts, the Board finds, based on the record presented here, CN’s rationale unconvincing. It is not reasonable for an incentives and penalties system to have at its foundation a performance metric that fails to account for the OTP at stations central to the passenger experience for a significant portion of Amtrak passengers. CN has not provided adequate justification for an OTP metric that would disregard the punctuality, hence the quality, of a passenger’s trip simply because of a passenger’s destination.

²⁴ For a given route, CN earns an incentive payment if 80% or more of Amtrak trains in a month arrive on time at the designated checkpoints, (Amtrak Opening Statement 7-8, Sept. 8, 2015), and incurs a penalty if 70% or fewer of Amtrak trains in a month arrive on time, (see Amtrak Opening Br. 15, Jan. 19, 2018).

Accordingly, the Board finds that the OTP metric would ideally include checkpoints at all stations along a route,²⁵ and the Board encourages the parties to negotiate with this interim finding in mind.²⁶

With respect to the issue of Amtrak's schedules, the Board encourages the parties to work together to develop new contract schedules. The current schedules generally allocate most of the recovery time to the end of the routes. Appendix II of the 2011 Operating Agreement contains "schedule skeletons," which are used to set Amtrak's public schedules. Those schedule skeletons lay out how much pure run time, recovery time, and dwell time are allotted for each segment and station. On many segments, especially towards the beginning of routes, there is no recovery time built into the schedule. Conversely, at later stations, recovery time occasionally accounts for the majority of the schedule duration, more than even the pure run time of that segment. The record does not establish valid operational reasons for such large variances in recovery time on a station-by-station basis.

Currently, the distribution of recovery time between stations is inconsequential to CN's performance under KOTP as, under the 2011 Operating Agreement, there are not checkpoints at each station used to measure OTP. However, if all stations were checkpoints, recovery time would have to be redistributed to give CN a meaningful opportunity to meet its performance obligations.

Further, the Board notes that there are large variances in the amount of dwell time—almost an hour difference—at different stations in the current schedule skeletons. The record does not discuss whether there are valid operational reasons for such large variances in dwell time on a station-by-station basis. Unless there are such reasons, the parties should readjust that distribution as well. The parties may agree to specific terms regarding schedule lengths;

²⁵ The Board recognizes that an OTP metric with checkpoints at all stations could be designed in ways that were not proposed or addressed by either party so far in this proceeding. For example, an OTP metric could measure the percentage of passengers that arrive at their destination stations on time, rather than the percentage of trains that arrive at each station on time. An OTP metric that measures the percentage of passengers that arrive at their destination stations on time could—in some circumstances—allow for greater host railroad operational flexibility and create an incentive structure more closely tied to the service delivery to the end consumer, the passenger. While such a metric would involve certain trade-offs, such as administrative complexity, such a metric could be consistent with the interim findings and guidance here.

²⁶ For the reasons discussed in the Incentives and Penalties section below, the Board will not adopt the delay-based ASOTP system proposed by Amtrak at this time. However, on the record presented here, the Board views as reasonable the addition of checkpoints at each station along a relevant route (generally consistent with the alternative proposed by Amtrak), subject to the other interim findings and guidance in this decision.

however, the record before the Board does not establish that the total time between a route's origin and its endpoint, i.e., final station, should be lengthened.²⁷

B. Incentives and Penalties

Under the 2011 Operating Agreement's incentives and penalties system, a train is considered to be "within tolerance"—or, in other words, on time—if it arrives at a designated checkpoint at or before a prescribed arrival time plus additional allowances. (Amtrak Opening Statement 8, Sept. 8, 2015.) As noted above, for a given route, CN earns an incentive payment if 80% or more of Amtrak trains in a month arrive on time at the designated checkpoints. (Id. at 7-8.) CN incurs a penalty if 70% or fewer of Amtrak trains on a route in a month arrive on time. (See Amtrak Opening Br. 15, Jan. 19, 2018.) When CN's monthly OTP on a route is above 70% but below 80%, no incentive or penalty is assessed. (Id., App. A-10.) The parties and the 2011 Operating Agreement refer to this as the "neutral performance zone" or the "neutral zone." (See, e.g., id.; CN Opening Br. 125, Jan. 19, 2018.)

Arguing that the current incentives and penalties system is ineffective, Amtrak proposes discarding the checkpoint-based system entirely and replacing it with its own incentives and penalties system based on the regression analysis discussed further below. (See Amtrak Opening Br. 21, 23, Jan. 19, 2018.) Amtrak proposes to replace the current approach of considering only whether a train is late or on time with one that bases incentives and penalties on the degree of lateness caused by the host railroad, measured in HRD minutes calculated using its regression model. (See id. at 23.) Amtrak argues that high levels of HRD minutes on CN's lines are the primary cause of Amtrak's poor OTP. (Id.)

Amtrak contends that under the 2011 Operating Agreement, Amtrak has paid CN substantial incentive payments while OTP at all stations is generally poor. (Amtrak Opening Statement 4, 7, Sept. 8, 2015.) Amtrak argues that this anomaly occurs, in part, because the current system is not based on the overall degree of lateness. Rather, it rewards CN for arriving at a checkpoint within tolerance but does not otherwise encourage CN to minimize delays and the adverse effect delays have on arrival times at stations that are not checkpoints. (Id. at 8-11.)

Furthermore, under the current system, the train's status is binary: it is either late (outside of tolerance) or on time for the purposes of the OTP calculation. Amtrak contends that once a train is sufficiently delayed so as not to count favorably for CN for incentive purposes, whether it is late by one minute or several hours, there are no negative consequences to CN for additional delays. (Id. at 10.) Amtrak argues this is further support for its shift towards an HRD system that considers the degree of lateness. (Id. at 8-10.) Amtrak maintains that while the degree of lateness of already-late Amtrak trains does not have negative consequences for CN, it has a significant negative impact on Amtrak and its passengers. (Id. at 10.)

²⁷ The Board notes, however, that at least one government entity, the Illinois Department of Transportation, is open to the lengthening of a route's schedule duration within its state. (See CN Pet. 1-2, Mar. 22, 2019.)

Accordingly, Amtrak proposes an incentives and penalties system based on the number of minutes of HRD to Amtrak trains. (Id. at 4.) Amtrak uses a regression model to correlate, by route, the HRD minutes per month per 10,000 train miles to 80% ASOTP. (Id. at 12.) Under Amtrak's proposed system, CN would accrue an incentive payment or penalty based on this correlation. (Id. at 12-13.) When monthly HRD minutes fall below the number of minutes that correlates to the 80% OTP threshold, CN would receive an incentive payment from Amtrak, and that incentive payment would increase as HRD minutes decrease below that threshold number. (Id. at 12.) When monthly HRD minutes exceed the number of minutes that correlates to the 80% OTP threshold, CN would pay Amtrak a penalty, and that penalty would increase (to a point) as HRD minutes increase above that threshold number. (Id. at 12, 14.)

Amtrak contends that the purpose of its HRD minutes, regression-based system is to motivate CN to minimize overall delay to Amtrak trains. (Id. at 15.) Amtrak, therefore, also proposes eliminating the neutral performance zone, where no incentive or penalty is assessed if CN's monthly OTP on a route is above 70% but below 80%. (Amtrak Opening Br., App. A-10, Jan. 19, 2018.) Under Amtrak's proposed system, penalties would be assessed based on performance level when CN's monthly performance falls to below 80% OTP. (Id., App. A-10.) However, according to Amtrak, the proposed system would not continue to increase penalties indefinitely on a particular Amtrak route. (Amtrak Opening Statement 16, Sept. 8, 2015.) In Amtrak's proposal, at a certain point on each Amtrak route, the HRD minutes per 10,000 train miles are so high—in other words, the service is so poor—that CN would incur no additional costs on the route attributable to operating Amtrak trains. (Id.) Beyond that point in Amtrak's proposed system, the penalties assessed to CN would be the same, regardless of service level.

CN argues that the methodology for determining incentives and penalties in the 2011 Operating Agreement is sound. CN states that it has performed well as an Amtrak host and it is motivated by operational and reputational concerns to avoid additional delays to delayed trains. (CN Opening Evid. 24, Dec. 6, 2018; CN Opening Br. 30, Jan. 19, 2018.) CN states that it consistently averages OTP above 80% across all six routes. (CN Opening Evid. 25, Dec. 6, 2018.)

CN argues that Amtrak's proposed changes would profoundly modify the agreement in Amtrak's favor and to CN's detriment, (CN Surrebuttal 2, Oct. 30, 2017), and disagrees with Amtrak's underlying argument that the 2011 Operating Agreement's incentives and penalties provisions reward poor performance, (CN Opening Br. 30, Jan. 19, 2018). CN also argues that Amtrak's proposed delay-based framework premised on a regression model involving HRD and ASOTP is a radical change to the incentives and penalties system because it is based upon Amtrak's unrealistic schedules, is unreasonably punitive, and is inferior to the current system. (See CN Reply Br. 36-61, Mar. 5, 2018.) According to CN, Amtrak's reliance on its proposed HRD minutes, regression-based framework to determine an appropriate incentives and penalties system is misplaced because ASOTP levels reflect issues specific to individual lines, including how realistic Amtrak's schedules are given the infrastructure, congestion, and other operating conditions present. (Id. at 37-42.) CN argues that realistic schedules reflecting the operational and on-the-ground challenges on particular lines are critical to achieving desired performance goals. (Id. at 93-102.)

CN also contends that Amtrak's proposal to limit the neutral performance zone should be rejected. (CN Surrebuttal 35, Oct. 30, 2017.) CN argues that a "key fallacy" in Amtrak's proposal is its assumption that performance that falls within the neutral zone under the current incentives and penalties system should be penalized, and that Amtrak provides no basis for this assumption. (*Id.*) CN acknowledges that 80% may be an appropriate goal for Amtrak's OTP metrics, assuming reasonable schedules and Amtrak's willingness to pay the costs to achieve that goal. (*See id.*) CN also states that the neutral performance zone recognizes the agreed-to service standards between the parties and argues that any change to the neutral performance zone should be discussed between the parties. (*Id.*)

Based on the record, the Board finds that a reasonable incentives and penalties system is one that incentivizes both OTP and a reduction in the duration of train delays when OTP is not achieved. There is merit to Amtrak's argument that, while the increasing lateness of already-late Amtrak trains may not have negative consequences for CN, it negatively affects Amtrak and its passengers. (*See* Amtrak Opening Statement 10, Sept. 8, 2015.)

Currently, the incentives and penalties system is based on the percentage of trains that are on time, but it does not include a mechanism to incorporate a degree of lateness. Unlike the proposal from CN, Amtrak's HRD minutes, regression-based proposal incorporates a degree of lateness into calculations for incentives and penalties. However, the Board notes that Amtrak's proposed system is complicated in that it uses a regression model to infer a readily observable occurrence—whether, and to what degree, a train is late. The regression model also assumes that the influence of Amtrak- and third party-caused delays on OTP will remain constant. However, these sources of delay are not constant and affect the likelihood that a CN delay will cause a train to fall outside of tolerance. Therefore, in this decision, the Board does not adopt either party's proposed approach but reiterates that, overall, there is merit to Amtrak's argument regarding impacts of the current system not incorporating a degree of lateness factor.

Accordingly, the parties should incorporate the degree of lateness into their penalty calculation in some manner, perhaps through a degree-of-lateness multiplier in the penalty provision, or in another manner to which the parties agree. By incorporating the degree of lateness, CN would have an incentive to help deliver a late train more expeditiously and not allow the duration of the delay to increase.

Additionally, the parties should eliminate the current neutral performance zone where no incentive or penalty is assessed. The Board finds there is merit to an 80% OTP standard to receive incentive payments. Although Congress has not mandated 80% OTP as the dividing line between incentives and penalties for contractual purposes between Amtrak and its host railroads, Congress has established that two consecutive quarters of OTP below 80% (with OTP to be defined by the Federal Railroad Administration (FRA) and Amtrak) is sufficiently problematic to trigger a Board investigation. *See* 49 U.S.C. § 24308(f)(1); Passenger Rail Inv. & Improvement Act of 2008 (PRIIA), Pub. L. No. 110-432, 122 Stat. 4848.²⁸ Because 80% OTP otherwise

²⁸ Section 24308(f)(1) provides that if the OTP of any intercity passenger train averages less than 80% for any two consecutive calendar quarters, the Board may initiate an investigation, (continued . . .)

appears to be reasonable, the parties should negotiate how to best address those occasions when 80% OTP is not achieved.²⁹

C. Lookback Provision

Another dispute between the parties is whether the compensation CN receives from Amtrak, after accounting for incentives and penalties, can fall below CN's incremental costs associated with Amtrak's use of CN's facilities and services. The starting point of this debate is the language in 49 U.S.C. § 24308(a). Amtrak relies on subsection (a)(1), added in 1981, which provides that agreements between Amtrak and host carriers "shall include a penalty for untimely performance," which Amtrak interprets as barring a lookback provision. (Amtrak Reply Br. 41-42, Mar. 5, 2018.) CN relies on subsection (a)(2)(B), which provides that, when the Board sets terms and compensation, "the Board shall consider quality of service as a major factor when determining whether, and the extent to which, the amount of compensation shall be greater than the incremental costs of using the facilities and providing the services." (CN Opening Br. 45-46, Jan. 19, 2018.) CN interprets this language as permitting host railroad compensation to exceed the incremental cost level, but, by negative implication, not to fall below that level. (*Id.* at 46.)

Previously, Amtrak and CN agreed to include a "lookback" provision that, for a specified time period over which the incentives and penalties are calculated, offsets penalties incurred by CN against any incentives earned by CN up to the point that those penalties exceed incentives. (See CN Opening Evid. 19-21, Dec. 6, 2018; *id.*, V.S. Ladue & Kuxmann, Ex. 1, App. V § D at V-10.) According to CN, the provision is referred to as the "lookback" provision because if penalties are incurred in a month, one "looks back" over the prior 12 months for any net incentives which those penalties may offset. (*Id.* at 19.)

Amtrak proposes to eliminate the lookback provision so that the incremental costs and incentives and penalties payments are independent, in which case CN could possibly receive total net compensation that is lower than incremental costs. Amtrak argues that this is necessary pursuant to § 24308(a)(1) because retaining the lookback provision "would contravene the statutory requirement to have a penalty for untimely performance." (Amtrak Reply Br. 39, Mar. 5, 2018; see also *id.* at 39-46; Amtrak Opening Br. 31-33, App. A-2, Jan. 19, 2018.) Amtrak contends that eliminating the lookback provision would ensure a properly functioning penalty system and motivate CN to avoid untimely service. (Amtrak Opening Br., App. A-2,

(. . . continued)

or upon the filing of a complaint by Amtrak, the Board shall initiate an investigation "to determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or reasonably addressed by Amtrak or other intercity passenger rail operators."

²⁹ Under the 2011 Operating Agreement, the parties agreed that CN will earn an incentive payment when 80% OTP or more is achieved, so the elimination of the neutral zone would not change the threshold for incentive payments. (CN Opening Evid., V.S. Ladue & Kuxmann, Ex. 1 at App. V-8, Dec. 6, 2018.)

Jan. 19, 2018.) According to Amtrak, a penalty that CN does not have to pay because of the application of the lookback provision does not motivate CN to improve OTP. (Id.)

CN argues that the lookback provision should remain because CN is statutorily entitled to recover at least its incremental costs under § 24308(a)(2)(B). (CN Opening Br. 53, Jan. 19, 2018; CN Reply Br. 10-18, Mar. 5, 2018.) CN argues that allowing its overall compensation to fall below incremental costs would result in CN and its customers further subsidizing Amtrak's operations. (CN Opening Evid. 19-20, Dec. 6, 2018.) According to CN, the lookback provision does not negate the fact that, under the 2011 Operating Agreement, penalties are real and can be substantial. (CN Opening Br. 54, Jan. 19, 2018.) CN adds that the lookback provision has rarely been invoked. (CN Opening Evid., V.S. Willig at 7, Dec. 6, 2018.) CN states that the lookback provision appears to have been a key feature of Amtrak's operating agreements with other Class I carriers for decades. (CN Reply Br. 13-14, 35, Mar. 5, 2018.)

To address Amtrak's concerns about the lookback provision, CN proposes a "reopener" provision that would provide that, if CN's performance falls below a certain level, the parties will confer to determine how to improve service. (CN Opening Br. 87-88, Jan. 19, 2018; see also Amtrak Opening Br. 32, Jan. 19, 2018.) Under the proposal, if CN's performance results in penalties for six consecutive months for a service, the parties will "use their best efforts to work together in good faith" to determine why the performance is resulting in penalties, to verify that the incentives and penalties payment system is being properly determined, to verify that only delays within CN's control are being attributed to CN, and to develop remedial measures including, if appropriate, changes to the operating agreement. (CN Opening Br. 88, Jan. 19, 2018.) According to CN, this provision will help ensure that if penalties exceed incentives over a sustained period, the parties will investigate and take action. (Id.)

Amtrak argues that CN's proposed reopener provision would be ineffective. (Amtrak Opening Br. 33, Jan. 19, 2018.) According to Amtrak, the six consecutive months of poor CN performance required to initiate the reopener is too long, and CN would not actually be obligated to implement any remedial measures that may be discussed by the parties unless the measures are acceptable to CN in its sole discretion. (Id. at 32.)

The Board recognizes that CN has obligations, not only to Amtrak, but also to its freight customers. The interim findings and guidance in this decision address substantial changes in the new operating agreement, including the addition of OTP checkpoints, the incorporation of a degree of lateness within the OTP penalties framework, and the elimination of the neutral zone for OTP penalties. Each of these changes relates to other important issues in the operating agreement, such as Amtrak's public schedules, and, therefore, must be considered in light of the agreement as a whole. Given CN's freight obligations and the overall uncertainty with the final framework for OTP, the Board is concerned that any agreement without a lookback provision might place CN in a situation where it may be required to, effectively, pay Amtrak to host Amtrak passenger trains on CN's own network.³⁰

³⁰ The Board acknowledges that the parties will negotiate an incentives and penalties system consistent with the interim findings and guidance in this decision and that the parties may
(continued . . .)

Nevertheless, periods of sustained poor performance must be acknowledged and addressed, as appropriate. The Board, therefore, encourages the parties to include an effective reopener provision in the new operating agreement that will result in concrete action in order to resolve potential future performance disputes and to prevent sustained poor performance. For example, the parties could consider including in the provision mandatory actions by CN to improve service. The parties are also reminded that the Board's Rail Customer and Public Assistance (RCPA) office is available to assist with the informal resolution of disputes. The parties could agree, as part of a reopener provision, to take performance disputes under the provision to RCPA for informal assistance.

Additionally, the Board notes the potential for a completely separate mechanism under PRIIA by which Amtrak could seek relief for sustained periods of poor performance. As noted above, section 207 of PRIIA directs the FRA and Amtrak to jointly establish minimum standards for an Amtrak route's OTP. 49 U.S.C. § 24101 note. As also noted above, section 213 of PRIIA provides that if, for any two consecutive quarters, the OTP of any Amtrak train averages less than 80%, or its service quality fails to meet the minimum standards established under section 207 of PRIIA, then the Board may, or, upon proper request, shall, investigate to determine if the delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a host carrier or by Amtrak. 49 U.S.C. § 24308(f)(1). If the Board finds that the delays are attributable to a host carrier's failure to provide preference to Amtrak trains, as required under 49 U.S.C. § 24308(c), then the Board may award damages against the host, including prescribing such other reasonable and appropriate relief to Amtrak. 49 U.S.C. § 24308(f)(2), (f)(3).

These provisions of PRIIA have not been enforced due to challenges to the constitutionality of section 207. See, e.g., Ass'n. of Am. R.Rs. v. Dep't of Transp., 865 F. Supp. 2d 22 (D.D.C. 2012), rev'd 721 F.3d 666 (D.C. Cir. 2013), vacated 135 S. Ct. 1225 (2015). Those challenges have recently been resolved, with the courts upholding section 207 after severing a provision that would have allowed, if the development of the metrics and standards were not completed within the 180-day period provided in law, any party involved in development of the metrics and standards to petition the Board to appoint an arbitrator to assist in resolution. Ass'n of Am. R.Rs. v. Dep't of Transp., 896 F.3d 539 (D.C. Cir. 2018), cert. denied, No. 18-976 (U.S. June 3, 2019). Once those metrics and standards are in place, the Board will be empowered to investigate the causes of sustained periods of poor performance in accordance with 49 U.S.C. § 24308(f), thus providing a separate mechanism (outside the operating agreement between Amtrak and CN) for addressing any excessive delays to Amtrak trains caused by CN.

(. . . continued)

choose to negotiate a system that removes, keeps, or modifies the lookback provision in those negotiations. If those negotiations fail, the Board will more fully address other arguments, including statutory arguments, in a subsequent decision.

D. Incremental Costs

The parties disagree on which costs incurred by CN for Amtrak's use of CN's facilities (including rail lines) and services constitute the incremental costs for which CN must be reimbursed from Amtrak.

As noted earlier, § 24308 provides that, when setting reasonable compensation when parties cannot agree, "the Board shall consider quality of service as a major factor when determining whether, and the extent to which," a host railroad's "compensation shall be greater than the incremental costs of using the facilities and providing the services." The statute does not define incremental costs.

The 2011 Operating Agreement defines incremental costs as "all costs that CN would not incur but for: (a) the operations of Amtrak on the [r]ail [l]ines or (b) the provision of associated services to Amtrak pursuant to the [a]greement and/or the Act." (CN Opening Evid., V.S. Ladue & Kuxmann, Ex. 1 at 3, Dec. 6, 2018 (emphasis added).) The 2011 Operating Agreement also states that Amtrak shall reimburse CN for incremental costs resulting from Amtrak's operation of trains over CN's lines and for the related services and activities provided by CN, (id., V.S. Ladue & Kuxmann, Ex. 1 at 19), and identifies specific items that the parties have agreed constitute incremental costs for which Amtrak will reimburse CN, (id., V.S. Ladue & Kuxmann, Ex. 1 at App. IV-1 to IV-3, Table 1).

CN argues that the new operating agreement should include three additional categories of incremental costs. First, CN argues incremental costs should be defined to include all avoidable costs, that is, "all costs which would not be incurred if no passenger service were performed for Amtrak." (CN Opening Br. 47, Jan. 19, 2018 (citing H.R. Rep. No. 93-415, at 11 (1973)); see also id. at 59.) CN's proposal for how to define these costs focuses on what it categorizes as "freight delay costs," that is, costs incurred by CN for the delays to CN trains that would not have been incurred but for Amtrak's presence on CN's lines. (Id. at 89, 93-107.) According to CN, these delay costs consist of three elements: train crew costs due to additional delay time, including wages, constructive allowances, and fringe benefits; additional fuel consumption costs due to additional stops, starts, and idling; and additional equipment costs.³¹ (Id., Ex. 1, App. IV-7 to IV-8;³² see also id. at 101.)

Second, CN argues that incremental costs should also include costs caused by freight rate suppression, capacity costs, and lost opportunity costs. (Id. at 91-92; see also id. at 67-72.) CN argues that, while these costs are not easily quantified for purposes of compensation, CN should nevertheless "be relieved of them by other means." (Id. at 92.) CN proposes that Amtrak should

³¹ CN also argues its compensation for these freight delay costs should be retroactive. (CN Opening Br. 110, Jan. 19, 2018.) As discussed later in this decision the Board is not deciding the issue of retroactivity here and will instead allow the parties to further negotiate this aspect of their new operating agreement.

³² Exhibit 1 to CN's opening brief is CN's markup of the 2011 Operating Agreement between the parties reflecting its proposed changes.

reduce these costs by (a) making scheduling or performance standard adjustments to reduce the strain CN argues Amtrak places on CN's capacity, (b) by paying for infrastructure investments on CN lines to restore some of the capacity CN argues it has lost due to Amtrak, or (c) by a combination of the two. (Id. (citing CN Opening Evid., V.S. Willig 3, Dec. 6, 2018).)

Third, CN proposes that, because some costs CN incurs as a result of Amtrak are not currently readily quantifiable, CN should "be allowed to reserve the right to seek any incremental costs that become quantifiable" in the future. (CN Opening Br. 90, Jan. 19, 2018.) The proposed agreement submitted by CN with its opening brief adds a provision in the appendix that purports to allow CN a method to recoup these unknown future costs. (See id., Ex. 1, App. IV-19.)

In support of its proposals, CN cites both the legislative history of § 24308 and agency precedent. (Id. at 43-49.) CN argues that Congress did not intend the term incremental costs to have any technical meaning, as Amtrak contends, but rather intended the phrase to include "all costs which would not be incurred if passenger service were not performed for Amtrak."³³ Further, CN states that "ICC and Board decisions have consistently rejected limitations on the kinds of costs that are compensable, so long as they are costs that would not have occurred but for Amtrak."³⁴ CN also argues that in promulgating the regulations to implement host railroads' statutory right to seek relief from preference,³⁵ FRA, which formerly administered § 24308(c), provided a reduction in host compensation as a condition when such relief was provided. (CN Reply Br. 81, Mar. 5, 2018 (citing 49 C.F.R. § 200.5(c)(3)).) CN argues that this provision shows that normal compensation for incremental costs includes compensation for preference. (Id. at 80-82.)

³³ (CN Opening Br. 59-62, Jan. 19, 2018 (citing H.R. Rep. No. 93-587 (1973) (Conf. Rep.), as reprinted in 1973 U.S.C.C.A.N. 2330, 2336).)

³⁴ Id. (citing Baker—Comp. for Passenger Serv. (Penn Central), 342 I.C.C. 820, 831-33 (1973) (where the ICC declined to adopt "avoidable costs in the short run"); Appl. of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. 24308(a)—Union Pac. R.R. (UP/SP), 3 S.T.B. 143, 145 (1998) (stating that nothing in the statutory incremental cost standard precludes a host carrier's recovery of new types of costs so long as the costs are directly traceable to Amtrak operations); Nat'l R.R. Passenger Corp.—Appl. Under Section 402(a) of the Rail Passenger Serv. Act for an Order Fixing Just Comp., 10 I.C.C.2d 863, 888 (1995) (ICC accepted agreement among the parties that a seven-year time period was appropriate to determine annual maintenance of way costs and that both capital and expense items should be included); Appl. of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. 24308(a)—Springfield Terminal Ry., 3 S.T.B. 157, 157, 169 (1998) ("[i]f other incremental costs arise, such as those associated with facility capacity, [the host] may petition for reopening . . . to address those matters.")).

³⁵ Section 24308(c) provides that, after an opportunity for a hearing, if the Board decides that granting Amtrak preference "materially will lessen the quality of freight transportation provided to shippers," the Board will establish reasonable terms for Amtrak and the host railroad.

CN also contends that limiting incremental costs to “short run avoidable costs,” as Amtrak argues,³⁶ would be unsound as a matter of economics and public policy. CN maintains that long-run avoidable expenditures often provide a more efficient solution to issues of Amtrak/host railroad operations. (CN Opening Br. 62, Jan. 19, 2018; CN Reply Br. 74, Mar. 5, 2018.) CN further argues that allowing it to recover freight delay costs would “better align Amtrak’s incentives with the public interest and motivate Amtrak to seek more reasonable and realistic schedules and performance standards.” (CN Reply Br. 64 n.254, Mar. 5, 2018.)

Finally, CN contends that a Board rejection of its proposed changes to incremental costs would constitute an unconstitutional taking. (CN Opening Br. 49-53, Jan. 19, 2018; CN Reply Br. 13, Mar. 5, 2018.) According to CN, Amtrak’s proposed limitations on incremental costs result in Amtrak effectively requesting “a Board order that would give Amtrak a usage right that is akin to an easement over CN’s property,” which, CN argues, would be a per se taking of its private property. (CN Opening Br. 50, Jan. 19, 2018.)

Amtrak argues the Board should reject all three broad categories of CN’s proposed additions to incremental costs, and that no new categories should be included because incremental costs should be narrowly construed. (Amtrak Opening Br. 76-82, 87-88, Jan. 19, 2018.) Amtrak states the term incremental costs is intended to include only “short run avoidable costs.” (*Id.* at 73-74 (citing Penn Central, 342 I.C.C. 820; Nat’l R.R. Passenger Corp. v. ICC, 610 F.2d 865, 872 (D.C. Cir. 1979)).) Amtrak argues that, in 1973, the ICC defined incremental costs to mean “avoidable costs in the short run.” (*Id.* at 71-72 (citing Penn Central, 342 I.C.C. at 832).) Soon thereafter, Congress enacted the Amtrak Improvement Act of 1973, which, Amtrak argues, used the same terminology—incremental costs—indicating that Congress intended the term to have the same meaning as used by the ICC. (Amtrak Opening Br. 72-74, Jan. 19, 2018.)

In addition, Amtrak asserts that § 24308(c), which guarantees Amtrak preference over freight transportation, implies that incremental costs do not include those costs associated with providing such preference. (*Id.* at 86-87.) Amtrak maintains that, if CN were entitled to recover freight delay costs from Amtrak as part of its base compensation, the preference relief provision of § 24308(c) would be a nullity, as there would be no reason for CN to ever seek relief from preference. (*Id.* at 86-87.)

With regard to CN’s proposal to include freight delay costs as incremental costs, Amtrak argues that neither the parties nor the Board have previously considered these costs to be incremental costs, and that the data CN provides to support its proposal are flawed and should be rejected as a matter of law. (*Id.* at 55, 57-71.) Amtrak further argues that CN would have to establish three distinct elements before such costs could properly be included. First, CN would have to show that it has actually incurred delays; second, that such delays were caused by

³⁶ Amtrak argues that short-run avoidable costs consist of “that amount of maintenance of way, maintenance of equipment, and transportation expenses which could be saved if a particular service were eliminated.” (Amtrak Opening Br. 72, Jan. 19, 2018 (citing Penn Central, 342 I.C.C. at 832).)

Amtrak; and third, that it incurred actual costs as a result of the delays caused by Amtrak. (Id. at 56.)³⁷

Amtrak also argues that freight delay costs are not appropriately reimbursed as incremental costs because they are actually avoidable costs to CN, but not to Amtrak. (Id. at 83-86.) Amtrak states that CN controls the factors affecting the performance of and delays to CN trains, including growth in the level of freight traffic, CN's decisions to single-track its main line, and CN's freight scheduling and operating decisions. (Id. at 84-85.) Amtrak further argues that CN is inappropriately conflating base compensation with quality (incentive) payment compensation. Amtrak states that if CN incurs freight delay costs from providing better service to Amtrak (i.e. better OTP), CN is already being properly reimbursed through the quality (incentive) payments CN receives. (Id. at 87-88.)

With regard to CN's argument that anything less than CN's proposal on incremental costs would constitute an unconstitutional taking, Amtrak contends it is well-settled that a Board order under § 24308(a) does not constitute a taking. (Amtrak Reply Br. 31-39, 32 n.81, Mar. 5, 2018 (citing Metro. Transp. Auth. v. Interstate Commerce Comm'n (MTA v. ICC), 792 F.2d 287, 296 (2d Cir. 1986); Nat'l Rail Passenger Corp. Appl. Under Section 402(a) of the Rail Passenger Serv. Act, 1 I.C.C.2d 243, 247 (1984); UP/SP, 3 S.T.B. at 156.)

With respect to incremental costs, the Board's interim findings and guidance here cover: (1) the definition of incremental costs, and (2) the criteria for establishing that those costs are reasonable and, therefore, reimbursable to CN. Section 24308 does not define the term incremental costs. While the parties agree that incremental costs must be those that result from Amtrak's presence on the line,³⁸ they present conflicting interpretations of the statute.

On the one hand, Amtrak claims that 49 U.S.C. § 24308 adopted Penn Central's definition of incremental costs and requires that such costs be temporally limited. (Amtrak Opening Br. 72-74, Jan. 19, 2018). Amtrak cites National Railroad Passenger Corp. v. ICC, 610 F.2d at 872-73, in which the court stated, in passing, that Congress' use of the term incremental cost "appears to coincide" with the definition of incremental cost applied by the ICC in Penn Central, i.e., "avoidable cost in the short run."

On the other hand, CN contends that incremental costs should not be temporally limited to the "short-run." CN points out that the central issue in Penn Central was the use of fully

³⁷ Amtrak also raises specific issues with how CN has estimated certain costs. For instance, regarding fuel consumption costs as a result of Amtrak delays, Amtrak argues that CN improperly includes events that would occur in the absence of Amtrak trains, fails to account for fuel-saving technologies in CN's locomotive fleet, and relies on a proprietary simulation model when real-world data is likely available. (Amtrak Rebuttal, V.S. Crowley & Mulholland 24. Sept. 14, 2017.)

³⁸ As discussed above, Amtrak's definition of incremental costs includes expenses that could be saved if a particular service were eliminated, while CN argues that incremental costs are those that would not be incurred if Amtrak service were not performed.

allocated costs versus avoidable costs and argues that the ICC did not address whether compensation should be limited to short-run costs. (CN Opening Br. 59-60, Jan. 19, 2018.) Finally, as noted above, CN cites to several cases regarding Amtrak's use of host carriers' facilities and services, none of which place a temporal limitation on incremental costs.³⁹

As to the definition, the Board finds that incremental costs are those costs that CN has actually incurred, and that CN would not have incurred "but for" the presence of Amtrak. Further, the Board rejects Amtrak's contention that incremental costs are limited to "avoidable costs in the short run" because § 24308 contains no such temporal limitation. The Board will not construe such a limitation into the statute.⁴⁰ As to the second point, the Board finds that incremental costs do not include costs that CN cannot specifically and verifiably quantify.⁴¹ The Board therefore rejects the non-quantified or otherwise amorphous costs CN proposes to include as incremental costs, such as freight rate suppression, capacity costs, foregone volume, lost opportunity costs, and other currently non-quantified costs CN might later identify.

With the interim findings and guidance here, the Board is not accepting or rejecting the specific additional three elements of freight delay costs CN proposes. As discussed above, the "but for" definition of incremental costs means that the new operating agreement could include

³⁹ See supra note 35.

⁴⁰ While Amtrak argues for a temporal limit to incremental costs, it does not lay out a discernable test that the Board or the parties could use to determine whether a cost category could be included as an incremental cost under the "short-run avoidable" standard it proposes. Furthermore, as CN notes, Amtrak appears to concede that certain freight delay costs could be incremental costs, even under the method Amtrak proposes. (CN Reply Br. 75, Mar. 5, 2018 (citing Amtrak Rebuttal, V.S. Crowley & Mulholland 24, Sept. 14, 2017).) In other words, even under Amtrak's own analysis, regardless of whether incremental costs were defined as short-run avoidable costs only, certain freight delay costs could be considered incremental costs.

⁴¹ If costs are not specific, verifiable, and quantifiable, it would be speculation to permit CN to collect such amounts, for there would be an insufficient basis on which the amount of the costs could reasonably be determined. The Board has previously found in multiple contexts that speculation is not an appropriate basis for decision making. See, e.g., CSX Transp., Inc.—Discontinuance of Serv. Exemption—in Vermilion Cty., Ill., AB 55 (Sub-No. 785X), slip op. at 3 (STB served Feb. 15, 2019) (finding that "mere speculation about future traffic is not a sufficient basis upon which to deny or revoke an abandonment or discontinuance exemption") (quoting CSX Transp., Inc.—Aban. Exemption—in Bell Cty., Ky., & Claiborne Cty., Tenn., AB 55 (Sub-No. 478X), slip op. at 2 (ICC served Aug. 5, 1994)); Ballard Terminal R.R.—Acquis. & Operation Exemption—Woodinville Subdivision, FD 35731 et al., slip op. at 6 (STB served Aug. 1, 2013) (denying motion for preliminary injunction because alleged irreparable harm in the absence of an injunction was "remote, speculative, and uncertain") (citation omitted).

such costs. However, as a practical matter, whether any proposed costs are included or excluded would depend on whether those costs are specific, verifiable, and quantifiable.⁴²

Further, the Board agrees with Amtrak that CN would have to show that it has actually incurred delays, that those delays were caused by Amtrak, and that it incurred actual costs as a result of the delays caused by Amtrak. The Board also finds that freight delay costs need not be treated as a monolithic category. Rather, each cost proposed by CN should be separately evaluated in accordance with the interim findings and guidance stated above. The parties should use the interim findings and guidance provided here to negotiate the specific incremental costs that will be included in their new operating agreement. If the parties cannot agree, and the issue comes back before Board, the burden would be on CN to show that those specific costs could be included in a reasonable manner, consistent with the “but for” standard and the need for specificity, verifiability, and quantifiability as described above.

With regard to the data CN presents in support of its proposals, the Board disagrees with Amtrak that these data are so devoid of value that they should be rejected as a matter of law. In addition, while the Board provides interim findings and guidance here and is therefore not imposing terms including or excluding any of the cost categories proposed by CN, precedent is clear that such findings would not constitute a taking. See MTA v. ICC, 792 F.2d at 296 (“[P]roceeding by way of section 402(a) [now § 24308(a)] is not a taking.”); UP/SP, 3 S.T.B. at 156 (“‘[I]ncremental cost’ compensation, pursuant to [RPSA], does not effect a compensable taking under the Fifth Amendment.”).

E. Performance Measurement and Delays

1. Root Cause

The cause of a delay, whether it originates from CN, Amtrak, or a third-party, is a critical component in determining whether a host railroad has met its OTP obligations. Amtrak utilizes a system called Electronic Delay Reporting, which—based primarily on a GPS-based system that automatically logs arrival, departure, and passing times at stations and other locations—calculates the number of minutes of delay above the pure run time within each segment of an Amtrak route. (Amtrak Opening Statement, V.S. Vilter 15-16, Sept. 8, 2015.) The Amtrak train’s conductor then records the cause and location of each delay based on the conductor’s direct observations and information from train bulletins, radio communications, Amtrak engineers, freight train crews, dispatchers, maintenance-of-way crews, and other personnel. (Id.,

⁴² CN utilizes a two-part methodology to quantify Amtrak-caused freight delay costs: (1) a determination of Amtrak-caused delays, relying primarily on CN’s Service Reliability Strategy system (SRS); and (2) a quantification of costs resulting from such delays. (CN Opening Br. 89, Jan. 19, 2018.) CN maintains that SRS is reliable, conservative, and transparent. (Id. at 93-97.) Amtrak counters that SRS is unreliable in attributing the amount and cause of delay, and that the record does not support a finding that CN actually incurred additional costs as a result of freight delays attributed to Amtrak. (Amtrak Opening Br. 61-65, Jan. 19, 2018.)

V.S. Vilter 16.) Each delay is categorized by a code that classifies the delay into one of three categories: HRDs (e.g., freight train interference); Amtrak-responsible delays (e.g., crew and system delays); or third-party-responsible delays (e.g., weather delays). (*Id.*; Amtrak Surrebuttal, V.S. Maga, Ex. 3 at 12, Dec. 6, 2018.) Amtrak makes the delay data available to CN, and the parties address disagreements regarding the delay coding. (Amtrak Opening Statement, V.S. Vilter 16, Sept. 8, 2015.) Either may propose corrections within five days after the origin date of the Amtrak train, and Amtrak is responsible for implementing any agreed-upon changes. (*Id.*, V.S. Vilter 16-17.)

CN argues that this approach to recording delays is akin to a motorist blaming the delay caused by a traffic jam on the automobile directly in front of the motorist instead of considering the underlying reason for the traffic jam. (CN Opening Br. 82, Jan. 19, 2018.) Accordingly, CN proposes to amend the relevant section of the operating agreement to state that “evidence of root cause, as opposed to proximate cause, shall be taken as the best evidence of the cause of a delay.” (*Id.*) CN also seeks a more expeditious, equitable, and efficient process to resolve differing positions as to the reported cause of delays. (CN Opening Evid. 62-63, Dec. 6, 2018.)

Amtrak opposes CN’s “root cause” proposal. Amtrak argues that CN has failed to define the term, and that, in practice, determinations of root cause made under the proposal would be entirely subjective. (Amtrak Opening Br. 48-51, Jan. 19, 2018.) Amtrak contends that one would have to arbitrarily decide how far back in time and how far away in distance to look for contributing factors. (*Id.* at 50 n.154.) Amtrak proposes to continue the same delay recording and review process that Amtrak and CN use today, (*id.* at 48), and proposes adding procedures for dispute resolution, (Amtrak Opening Statement, V.S. Vilter 17, Sept. 8, 2015).

The Board finds that, on the record presented here, CN has neither adequately explained how a “root cause” approach would work in practice nor shown that such an approach would not be too burdensome and time-consuming to apply. For example, CN does not offer an adequate description of how far back in time or distance to look for contributing factors. It also does not explain the standard or mechanism for judging the evidence provided by the parties. However, the Board encourages the parties to review Amtrak’s existing delay codes and consider incorporating an analysis of which party is in the position to avoid or control the delay. Because the Board understands that the conductor delay reports may not provide definitive proof of the cause of Amtrak delays, the Board further encourages the parties to review their dispute resolution process regarding delay coding and to streamline that process.

2. Recovery Time Base

Under the 2011 Operating Agreement, the schedule for each route includes recovery time, the purpose of which is to compensate for certain specific types of delays encountered en route. (CN Opening Evid., V.S. Ladue & Kuxmann, Ex. 1 at 5, Dec. 6, 2018.) Recovery time varies from checkpoint to checkpoint and is applied separately within each segment. (Amtrak Rebuttal 40, Sept. 14, 2017.) A portion of this recovery time is designed to compensate for specific, Amtrak-caused delays; this portion is known as Recovery Time Base (RTB). (Amtrak Opening Br., App. A-6 to A-7, Jan. 19, 2018.) The 2011 Operating Agreement also allows CN

to offset its delays with RTB that the designated Amtrak delays do not exhaust. (Amtrak Rebuttal, V.S. Sacks 7, Sept. 14, 2017.)

Amtrak points out that when the designated Amtrak delays exceed the allotted RTB for a train, CN suffers no negative consequences for the train being late (i.e., the train is not considered late for purposes of calculating CN's level of OTP), assuming CN-responsible delays have not otherwise exceeded the recovery time allotted in the 2011 Operating Agreement. (Id. at 41; id., V.S. Sacks 6-10.) Furthermore, Amtrak states that there are delays not eligible for offset with RTB, such as station dwell delays and delayed delivery from other host railroads. (Id. at 40-41; id., V.S. Sacks 6-10.) According to Amtrak, when these delays occur, CN again suffers no negative consequences for the train being late, assuming CN-caused delays have not otherwise exceeded recovery time allotted in the 2011 Operating Agreement (including any RTB not exhausted by designated Amtrak-caused delays). (Id. at 41.)

Amtrak seeks several changes to the current RTB approach. Amtrak argues that RTB should be calculated and applied cumulatively from the CN origin point instead of on a "segment-by-segment" basis. (Id. at 40-41.) Amtrak also argues that the total recovery time defined in the new operating agreement should remain unchanged but be redistributed and apportioned at a higher percentage to RTB. (Id.) Furthermore, Amtrak proposes to expand the category of delays eligible for offset through RTB to include all non-CN-caused delays. (Id.) Amtrak also argues that CN should no longer be able to utilize unused RTB as recovery time. (Id. at 41.)

CN responds that under the proposal to make all non-CN delays eligible for relief under RTB, CN could suffer negative consequences for delays occurring before an Amtrak train ever reaches CN's lines or resulting from Amtrak's own operational choices. (CN Opening Br. 122, Jan. 19, 2018.) CN further notes that Amtrak's proposal would substantially raise the RTB threshold (that is, increase the portion of total recovery time allotted in the new operating agreement that would be considered RTB), which would necessarily reduce the relief available for delays attributed to CN, as the overall pool of recovery time would not increase. (Id. at 121-23.) CN argues that Amtrak has provided no basis for modifying the current split based on either historic operations or the parties' prior agreements. (Id. at 122-23.) CN argues that Amtrak's proposed changes would make it more difficult for CN to earn incentive payments or avoid penalties. (Id. at 122.)

Regarding Amtrak's proposed redistribution of the split of recovery time between RTB and the portion specifically designated for CN for recovery time, the Board will not impose a specific split at this time. The Board notes that any split should reflect the real-world operating conditions on a segment and each party's susceptibility to events resulting in a delay to Amtrak trains. Additionally, based on the record presented here, the Board does not find it objectionable that CN can utilize unused portions of Amtrak's RTB, provided that an Amtrak train otherwise arrives on time.

With regard to Amtrak's proposals that it be allowed to include in RTB additional categories of delays and that RTB be calculated cumulatively from the route's origin, the Board encourages the parties to negotiate these aspects of their new operating agreement as well. The

Board expects that the parties would identify and modify aspects of the new operating agreement to establish a system where both parties are incentivized to move trains that are running behind schedule toward being on time. Accordingly, the Board will not make any specific findings on these matters at this time, as the parties should be able to use their experience to negotiate the most efficient agreement for operation of the network in accordance with these stated goals.

3. Short Shunt

A “short shunt” occurs when a train fails to timely and properly close (or shunt) an electric circuit that activates automated crossing warning devices (ACWDs). (CN Mot. to Strike 2, Nov. 20, 2017.) Short shunts have become an issue with Amtrak trains on the Illini/Saluki route where Amtrak is operating some of its trains with single-level Horizon/Amfleet equipment. (CN Opening Evid., V.S. Ladue & Kuxmann 43, Dec. 6, 2018; see also CN Mot. to Strike 2, Nov. 20, 2017; id., V.S. Hilliard 2 & n.2; Amtrak Reply to Mot. to Strike 4, Dec. 7, 2017.) As a result of these short shunts, the crossing signals are not activated in a timely manner. (CN Opening Evid., V.S. Ladue & Kuxmann 43, Dec. 6, 2018.) This, CN argues, creates a safety issue. (CN Mot. to Strike 2, Nov. 20, 2017.) Based on its concern over safety, CN has imposed speed restrictions on the Horizon/Amfleet equipment operating on portions of the Illini/Saluki route. (Id.)

The parties are asking the Board to decide whether it is more appropriate to treat this issue as a rail car and safety issue, as CN argues it is, or as a track issue, as Amtrak argues it is. CN argues that the short shunts occur because of the weight, speed, and/or design of Horizon/Amfleet cars used by Amtrak and are, thus, Amtrak’s responsibility. (Id. at 2 n.1 & V.S. Hilliard 2 n.1.) In particular, CN alleges that there were 48 unexplained short shunt incidents between 2002 and 2010 involving Amtrak’s Illini/Saluki route. (Id., V.S. Hilliard 1-2.) Amtrak counters that the problem is rail contamination, a track issue that is the responsibility of the railroad, not Amtrak. (Amtrak Reply to Mot. to Strike 7 & V.S. Maga 2, Dec. 7, 2017.)

The parties are currently working with the FRA to determine the cause of the ACWDs activation failures. (Amtrak Surrebuttal, V.S. Maga 11, Dec. 6, 2018.) The FRA is the agency responsible for determining issues of railroad safety. See 49 C.F.R. §§ 200-272. Thus, the determination of the short shunt question is properly within the FRA’s jurisdiction, and the Board will defer to the FRA on the issue.⁴³

F. Other Contract Terms

As discussed throughout this decision, the Board is making findings and giving guidance on many important topics in dispute between the parties. The Board believes this decision will inform further negotiations between the parties on their new operating agreement as a whole. At

⁴³ In its March 22, 2019 petition, CN states that further testing supports its assertion that the short shunting is a result of Amtrak’s equipment. (CN Pet. 2, Mar. 22, 2019.) Amtrak’s April 11, 2019 reply disputes those facts and arguments. The question, however, is still properly before the FRA, which has not yet issued a determination.

the same time, a number of the additional discrete contract implementation terms raised by the parties will not be addressed here.⁴⁴ Instead, the Board is directing the parties to negotiate those items given the other guidance contained in this decision. However, the Board will address arguments related to the term and confidentiality of the new operating agreement below.

1. Term of the Agreement

The 2011 Operating Agreement between the parties was for a term of two years, from May 1, 2011, to April 30, 2013. (CN Opening Evid., V.S. Ladue & Kuxmann, Ex. 1 at 1-2, Dec. 6, 2018.) Upon expiration, the 2011 Operating Agreement was extended by mutual agreement twice, and then this proceeding was brought before the Board.

Amtrak proposes the new operating agreement between the parties have a term of 10 years. Amtrak argues this is an appropriate length, given the time and resources it has taken to develop new terms. (Amtrak Opening Br. 100, Jan. 19, 2018.) CN proposes a term of three years, with an evergreen renewal provision that would allow the new operating agreement to remain in place indefinitely until cancelled by either party. (CN Opening Br. 112, Jan. 19, 2018.) CN argues this gives the parties a reasonable time frame in which to work together without further litigation, but also gives them a reasonable opportunity to renegotiate elements of the agreement, if necessary. CN further argues that Amtrak's proposed 10-year term is too long, and, given the scope and complexity of the issues before the Board here, it is likely that many issues will need to be renegotiated. (*Id.* at 112-13.) In response to CN's proposal, Amtrak argues that a three-year term "would be extremely impractical and inefficient . . ." (Amtrak Opening Br. 100, Jan. 19, 2018.)

The Board agrees with Amtrak that CN's proposal for a term of three years may be too short, considering the amount of time and resources the parties will have spent to reach a new operating agreement. However, the Board also shares CN's concern that Amtrak's proposal for a term of 10 years may be too long, considering the breadth of the issues the parties have raised in this proceeding. The Board finds that a seven-year operating agreement term would be reasonable and would balance the concerns of both parties. However, the parties are free to negotiate a different term of their agreement given the findings and other guidance contained in this decision.

The Board also encourages the parties to include an evergreen renewal clause in their operating agreement, as CN proposes. Such a clause would allow the operating agreement to

⁴⁴ (*E.g.*, CN Reply Br. 103-04, Mar. 5, 2018 (presenting arguments regarding retroactivity of elements of the operating agreement); Amtrak Opening Br. 101, Jan. 19, 2018 (responding to CN's proposal); *id.* at 102-03 (proposing the elimination of unnecessary references to the term incremental costs); CN Reply Br. 106, Mar. 5, 2018 (responding to Amtrak's proposal); CN Opening Br. 113, Jan. 19, 2018; CN Reply Br. 107, Mar. 5, 2018 (proposing to incorporate into the new operating agreement two side-letter agreements between the parties, one relating to positive train control and one related to safety appliance costs); Amtrak Opening Br. 103-04, Jan. 19, 2018 (responding to CN's proposal).)

continue in force after it expires until either party cancels it. Such a clause would not require the continuation of the operating agreement beyond the initial term but would provide the parties with predictability by which they could continue to have an operating agreement in force while negotiating any future changes.

2. Confidentiality

The 2011 Operating Agreement does not itself contain a confidentiality clause, though the Board acknowledges that it may be subject to an external confidentiality agreement between the parties that was not provided to the Board in this proceeding. With regard to the new operating agreement, Amtrak proposes a confidentiality term requiring the parties to maintain the confidentiality of all of the agreement's terms and conditions and not disclose them to third parties without the consent of the other party to the agreement. Amtrak argues that this term is necessary to avoid prejudicing Amtrak in future negotiations with other railroads. (Amtrak Opening Br. 102, Jan. 19, 2018.) In response, CN objects to such a confidentiality term, arguing that Amtrak is seeking to impose terms on CN by Board order, not by means of a confidential commercial negotiation, and thus that "the outcome of that effort is a matter of public interest" (CN Reply Br. 105, Mar. 5, 2018.) CN argues that, while the Board should permit CN to keep confidential terms that implicate CN's costs and trade secrets, the Board should not issue "secret precedents" in these proceedings. (*Id.* at 104-05.)

The parties are free to negotiate the confidentiality of the terms of their new operating agreement pursuant to the interim findings and guidance provided in this decision. However, the Board would make public any specific terms it would need to set in a later decision, as the Board disfavors confidential decision making unless absolutely necessary.

III. BOARD-SPONSORED MEDIATION

As a general matter, the Board encourages the resolution of disputes through privately negotiated agreements. The parties are best equipped to determine what changes to their operating agreement are necessary and to work out the details to implement those changes in an effective and efficient manner. Accordingly, the Board finds it is appropriate here to initiate Board-sponsored mediation pursuant to 49 C.F.R. § 1109.2(a)(2) to facilitate further negotiation between the parties. The Board acknowledges the significant work and negotiation that the parties have already engaged in regarding this matter. The purpose of this decision is to provide the Board's interim findings and guidance to help the parties narrow the scope of their negotiations on the major disputes regarding Amtrak's use of CN's network.

The Board encourages and expects the parties to reach agreement on as many outstanding issues as possible. Within 10 days of the service date of this decision, the Chairman will appoint one or more mediators pursuant to 49 C.F.R. § 1109.3(a). Once appointed, the mediator or mediators will contact the parties to discuss ground rules and the time and location of any mediation sessions. At least one principal from each party, who has authority to commit that party, shall participate in the mediation and be present at any session at which the mediator or mediators request(s) that the principal be present. The mediation period shall be 30 days, beginning on the date of the first mediation session. *Id.* § 1109.3(b). The parties may request to

extend mediation by mutual written requests of all parties to the mediation proceeding. Id. The mediator or mediators are instructed to inform the Board when mediation has ended, with or without a resolution.

If the parties come to a full agreement, they shall so notify the Board and request that the Board terminate this proceeding. 49 C.F.R. § 1109.3(f). If the parties are unable to reach a full agreement, they shall notify the Board, pursuant to 49 C.F.R. § 1109.3(g), of all of the issues that have been resolved in mediation and seek a new procedural schedule to present focused arguments on any residual issues. The Board expects that the residual issues, if any, would be limited in number and scope, as the mediation will have proceeded with the knowledge of the Board's interim findings and guidance concerning this case. The Board would then issue a final decision on any residual issues in this proceeding.

It is ordered:

1. CN's request for leave to file supplemental arguments on the Illini/Saluki schedule and the short shunt issue is granted, and the responsive arguments filed by CN and Amtrak are accepted into the record.

2. CN's motion to strike is denied. CN's motion in the alternative for leave to supplement the record is granted, and the responsive arguments filed by CN and Amtrak are accepted into the record.

3. NSR's and CSXT's motions for leave to file comments as amicus curiae are granted, and their comments are accepted into the record. NITL's, SPRC's, and RPA's comments are, likewise, accepted into the record.

4. Mediation will be initiated as discussed above.

5. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.